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INTERNATIONAL CRIMINALTRIBUNAL FOR RWANDA

Reports of Orders, Decisions and Judgements

2006

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TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA

Recueil des ordonnances, décisions, jugements et arrêts

2006

Volume II

The Prosecutor v. Edouard KAREMERA, Mathieu NGIRUMPATSE and Joseph NZIRORERA

Case N° ICTR-98-44

Case History: Edouard Karemera

• Name: KAREMERA

• First name: Edouard

• Date of birth: unknown

• Sex: male

• Nationality: Rwandan

• Former Official Function: Minister of Interior of interim Government and Vice-President of MRND

• Date of Indictment's Confirmation: 29 August 1998

• Counts: genocide, conspiracy to commit genocide and complicity in 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: 5 June 1998, in Togo

• Date of Transfer: 10 July 1998

• Date of Initial Appearance: 21 March 2005

• Date Trial Began: 19 September 2005 (joint trial, *Karemera and al*., 3 accused, in progress)

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Case History: Mathieu Ngirumpatse

• Name: NGIRUMPATSE

• First Name: Mathieu

• Date of Birth: unknown

• Sex: male

• Nationality: Rwandan

• Former Official Function: Director General of the Ministry for Foreign Affairs and President of MRND

• Date of Indictment's Confirmation: 6 April 1999

• Counts: genocide, conspiracy to commit genocide and 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: 11 June 1998, in Mali

• Date of Transfer: 10 July 1998

• Date of Initial Appearance: 21 March 2005

• Date Trial Began: 19 September 2005 (joint trial *Karemera and al*., 3 accused, in progress)

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Case History: Joseph Nzirorera

• Name: NZIRORERA

• First Name: Joseph

• Date of Birth: 1950

• Sex: male

• Nationality: Rwandan

• Former Official Function: President of the National Assembly and Secretary-General of the MRND

• Date of Indictment's Confirmation: 6 April 1999

• 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 July 1998

• Date of Initial Appearance: 21 March 2005

• Pleading: not guilty

• Date Trial Began: 19 September 2005 (joint trial *Karemera and al*., 3 accused, in progress)

Augustin Bizimana, Félicien Kabuga and Callixte Nzabomina were severed from the original Indictment in 2003. Since 8 October 2003, Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba were the remaining co-Accused in the case number ICTR-98-44. On the 14th February 2005, André Rwamakuba was severed from the file. On the 9th June 2005, a new indictment was emitted for André Rwamakuba who was consequently severed with the new ICTR number ICTR-98-44C.

Order for the Transfer of Detained Witnesses From Rwanda Rule 90 bis of the Rules of Procedure and Evidence 19 January 2006 (ICTR-98-44-R90bis)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Transfer of detained witness – Transfer ordered

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A), 90 bis, 90 bis (A) and 90 bis (B)

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

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Emile Francis Short, and Gberdao Gustave Kam ("Chamber");

BEING SEIZED of the "*Requête du Procureur pour l'émission d'une ordonnance de transfert de certains témoins détenus*" ("Motion"), pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence ("Rules") filed on 13 December 2005;

CONSIDERING the "Production d'une lettre de la Ministère de la Justice de la République du Rwanda", filed on 17 January 2006 ;

NOTING the resumption of the present trial scheduled on 13 February 2006;

NOW DECIDES the Motion pursuant to Rule 73 (A) of the Rules as follows:

Introduction

1. The Prosecution requests the Chamber, pursuant to Rule 90 *bis* of the Rules, to order the temporary transfer of Witnesses with the pseudonyms HH, UB and AWB from Rwanda, where they are currently detained, to the United Nations Detention Unit (UNDF) in Arusha, Tanzania, so that they can testify in the present case.

Deliberations

2. Rule 90 *bis* (A) of the Rules gives the Chamber power to make an order to transfer a detained person to the Detention Unit of the Tribunal if his or her presence has been requested. Rule 90 *bis* (B) lays out the conditions to be met, as shown by the applicant, before such an order can be made:

(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;

3. The Prosecution has exhibited a letter from the Minister of Justice in Rwanda dated 12 January 2006 confirming the availability of Witnesses HH, UB, AWB, to testify during the indicated period of the upcoming trial session, which is from 13 February 2006 to 17 March 2006. The Chamber is

therefore satisfied that these witnesses are not required for criminal proceedings in Rwanda during that time and that the witnesses' presence at the Tribunal does not extend the period of their detention in Rwanda.

FOR THE ABOVE REASONS, THE CHAMBER

I. ORDERS the Registar, pursuant to Rule 90 *bis* of the Rules, to temporarily transfer Detained Witnesses known by the pseudonyms HH, UB and AWB to the UNDF facility in Arusha, at an appropriate time prior to their scheduled dates to testify. Their return travel to Rwanda should be facilitated as soon as practically possible for each witness after the individual's testimony has ended.

II. REQUESTS the Governments of Rwanda and Tanzania to cooperate with the Registrar in the implementation of this Order.

III. REQUESTS the Registrar to cooperate with the authorities of the Governments of Rwanda and Tanzania; Ensure proper conduct during transfer and during detention of the witnesses at the UNDF; Inform the Chamber of any changes in the conditions of detention determined by the Rwanda authorities and which may affect the length of stay in Arusha.

Arusha, 19 January 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Second Order for the Transfer of Detained Witnesses from Rwanda Rule 90 bis of the Rules of Procedure and Evidence 20 January 2006 (ICTR-98-44-R90bis)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Transfer of detained witness, Letter from the Minister of Justice of Rwanda confirming the availability of requested Witnesses – Transfer ordered

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A), 90 bis (A) and 90 bis (B)

International Case cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera, Order for the Transfer of Detained Witnesses from Rwanda, 19 January 2006 (ICTR-98-44)

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

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Emile Francis Short, and Gberdao Gustave Kam ("Chamber");

BEING SEIZED of the "*Requête du Procureur pour l'émission d'une ordonnance de transfert de certains témoins détenus*" ("Motion"), pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence ("Rules"), filed on 13 December 2005;

CONSIDERING the "Production d'une lettre de la Ministère de la Justice de la République du Rwanda", filed on 17 January 2006 ;

CONSIDERING the "Dépôt d'information supplémentaire re : Requête du Procureur en vertu de l'article 90 bis du Règlement de procédure et de preuve", filed on 19 January 2006.

NOTING the resumption of the present trial scheduled on 13 February 2006;

NOW DECIDES the Motion pursuant to Rule 73 (A) of the Rules as follows:

Introduction

1. The Prosecution requests the Chamber, pursuant to Rule 90 *bis* of the Rules, to order the temporary transfer of Witnesses with the pseudonyms ALG, GFA and GBU from Rwanda, where they are currently detained witnesses on provisional release, to the United Nations Detention Unit (UNDF) in Arusha, Tanzania, so that they can testify in the present case.

Deliberations

2. Rule 90 *bis* (A) of the Rules gives the Chamber power to make an order to transfer a detained person to the Detention Unit of the Tribunal if his or her presence has been requested. Rule 90 *bis* (B) lays out the conditions to be met, as shown by the applicant, before such an order can be made:

(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;

3. The Prosecution has exhibited a letter from the Minister of Justice in Rwanda dated 12 January 2006 confirming the availability of Witnesses ALG, GFA and GBU, to testify during the indicated period of the upcoming trial session, which is from 13 February 2006 to 17 March 2006. The Chamber is therefore satisfied that these witnesses are not required for criminal proceedings in Rwanda during that time and that the witnesses' presence at the Tribunal does not extend the period of their detention in Rwanda.

4. With regards to the Prosecution's information that Witness UB is already in Arusha to testify in another case, the Chamber notes its prior decision in this case which already allowed for the transfer of Witness UB to Arusha.[1] As a result, the Chamber grants the extension requested for Witness UB's to remain in Arusha until the end of the individual's testimony in the present case.

FOR THE ABOVE REASONS, THE CHAMBER

I. ORDERS the Registar, pursuant to Rule 90 *bis* of the Rules, to temporarily transfer detained witnesses on provisional release in Rwanda known by the pseudonyms ALG, GFA and GBU to the UNDF facility in Arusha, at an appropriate time prior to their scheduled dates to testify. Their return travel to Rwanda should be facilitated as soon as practically possible for each witness after the individual's testimony has ended.

[1] *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-R90*bis*, Order for the Transfer of Detained Witnesses from Rwanda (TC), 19 January 2006.

II. REQUESTS the Governments of Rwanda and Tanzania to cooperate with the Registrar in the implementation of this Order.

III. REQUESTS the Registrar to cooperate with the authorities of the Governments of Rwanda and Tanzania; Ensure proper conduct during transfer and during detention of the witnesses at the UNDF; Inform the Chamber of any changes in the conditions of detention determined by the Rwanda authorities and which may affect the length of stay in Arusha.

IV. GRANTS the extension requested for Witness UB to remain in Arusha until the end of the individual's testimony in the present case.

Arusha, 20 January 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Decision on Request for Extension of Time
27 January 2006 (ICTR-98-44-A)

(Original : English)

Appeals Chamber

Judges : Mohamed Shahabuddeen, Presiding Judge ; Mehmet Güney ; Liu Daqun ; Theodor Meron ; Wolfgang Schomburg

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Extension of time, Showing of good cause : Missing of French translations – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 116 (B)

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 "International Tribunal", respectively) is seized of the "Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (Rule 73 (C))", filed by the Prosecution on 9 December 2005 ("Prosecution's Interlocutory Appeal"). The Appeals Chamber is also presently seized of the "*Requête de M. Ngirumpatse aux fins d'extension du délai de réponse sur le* 'Prosecutor's Interlocutory Appeal of Decision on Judicial Notice'", filed on 16 December 2005 by the accused Mathieu Ngirumpatse ("Request" and "Accused", respectively).

2. In the Request, the Accused explains that he has not yet received French translations of several documents initially filed in English: the Prosecution's request for judicial notice filed before the Trial Chamber;[1] the responses of his co-accused to the judicial notice request and the Prosecution's reply; the Trial Chamber's Decision on Prosecution Motion for Judicial Notice ("Impugned Decision", filed on 9 November 2005); the Prosecution's request for certification of that decision for interlocutory appeal; the responses of his co-accused to the certification request and the Prosecution's reply; the Prosecution's Interlocutory Appeal; and the response of his co-accused to the Prosecution's

[1] Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts, 30 June 2005.

Interlocutory Appeal. He requests those translations and asks for an extension in the deadline for filing his response to the Prosecution's Interlocutory Appeal.[2]

3. Rule 116 of the Rules of Procedure and Evidence of the International Tribunal allows for extensions of time upon a showing of good cause, and paragraph (B) of that Rule specifically provides that 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".

4. Counsel to the Accused operates in French and not in English. It is clear that, in order to be able to make a full answer to the Prosecution's Interlocutory Appeal, he needs access to French translations both of that Appeal itself and of the Impugned Decision from which the Prosecution is appealing. His present lack of access to these translations constitutes good cause for a reasonable delay in filing his response to the Prosecution's Interlocutory Appeal.

5. The Accused has not demonstrated that access to translations of the other documents he requests – namely, the filings of the various parties before the Trial Chamber on the judicial notice and certification issues, as well as his co-accused's filing before the Appeals Chamber – is necessary to enable him to prepare his response to the Prosecution's Interlocutory Appeal, or that lack of access to them otherwise constitutes good cause for a delay in filing his response. The Impugned Decision, as well the Trial Chamber's Certification of Appeal Concerning Judicial Notice ("Certification Decision", filed on 2 December 2005), summarize and decide upon the arguments set forth by the parties in their filings before the Trial Chamber, and provide all the necessary information to enable the Accused to complete his response. For this reason, and because there may be some dispute as to the scope of the certification for interlocutory appeal,[3] the Appeals Chamber will direct the Registry to ensure that the Certification Decision is translated, even though it was not specifically requested by the Accused. As to the filing of his co-accused Mr. Nzirorera on appeal, at least under the present circumstances, in order to prepare his own response it is not necessary for the Accused to review the responses of his co-accused. Ordinarily, those responses would have been due on the same day, and so it cannot be said that either co-accused is entitled to read the response of the other before preparing his own.

6. Although a reasonable extension of time is merited, the Accused has not justified his request for 17 days beyond the filing of the requested translations. Responses to interlocutory appeals are ordinarily due within 10 days of the appeal's filing,[4] so 10 days should be adequate time to enable the Accused to prepare his response after he has the necessary translations. The Appellant argues that he is entitled to a longer delay as compensation for delays to which he should have been entitled in the proceedings before the Trial Chamber, in light of the fact that he did not have the translations he needed at that stage.[5] This argument does not amount to good cause. It is a moot point at this stage whether the Accused should have had access to the translations during the briefing process before the Trial Chamber, and/or whether he should have received extensions of time at that stage. Even if the Trial Chamber had erred in those respects, its error could not be corrected by an extension of time being granted now.

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[2] Request, para. 14.

[3] One of the co-accused has requested that some of the Prosecution's arguments on appeal be dismissed for exceeding the scope of the certification. See Joseph Nzirorera's Motion to Dismiss Issues of Interlocutory Appeal for Which Certification Was Not Granted, 13 December 2005.

[4] Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, part II (2) (applying this time limit in appeals as of right); *ibid* part III (2) (applying the same time limit in appeals granted by leave of the Appeals Chamber); *ibid* part I (applying the rules set forth by parts II and III *mutatis mutandis* in other interlocutory appeals).

[5] Request, para. 14.

7. Counsel to co-accused Édouard Karemera also operate in French, and Mr. Karemera's failure to file a timely response to the Prosecution's Interlocutory Appeal may also be excused on the basis that the defence lacked access to necessary translations. Although Mr. Karemera has not filed a request for an extension of time, it is in the interests of justice to permit him to benefit from the extension being granted to Mr. Ngirumpatse, if he should choose to file a response.

8. For the foregoing reasons, the Request of the Accused is GRANTED in part. The Registry is DIRECTED to provide to the Accused and his co-accused, on an urgent basis, French translations of the Impugned Decision, the Certification Decision, the Prosecution's Interlocutory Appeal including its annexes, and the present decision. Starting from the date at which the last of these four translated documents is transmitted to the Accused as well as his co-accused Mr. Karemera, they will be permitted 10 days to file their responses to the Prosecution's Interlocutory Appeal.

Done 27 January 2006, At The Hague, The Netherlands.

[Signed] : Mohamed Shahabuddeen

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Order on Filing of Expert Report of Charles Ntampaka Rule 54 of the Rules of Procedure and Evidence 31 January 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Extension of time, Expert report no completed – Prosecution ordered to provide the Chamber and the Defence of each of the Accused with a formal statement from Expert Witness

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

SITTING as Trial Chamber III, composed of Judges Dennis C M. Byron, Presiding, Emile Francis Short and Gberdao Gustave Kam (the "Chamber") pursuant to Rule 54 of the Rules of Procedure and Evidence (the "Rules");

NOTING the "Prosecutor's Notice of Delay in Filing Expert Report of Charles Ntampaka," filed on 19 December 2005 (the "Prosecutor's Notice") and Joseph Nzirorera's "Second Motion to Exclude Testimony of Charles Ntampaka," filed on 20 December 2005 ("Nzirorera's Motion");

NOTING the previous Decisions of this Chamber concerning the disclosure of the Report of Expert Witness Charles Ntampaka, dated 16 May 2005, 9 September 2005 and 12 December 2005, respectively, as well as this Chamber's "Order on Filing of Expert Report of André Guichaoua," dated 15 December 2005.

Introduction

1. On 16 May 2005, the Chamber ordered the Prosecution to disclose the statements of all expert witnesses the Prosecution intended to call to testify to the Chamber, and to the Defence of each of the

Accused, by 15 August 2005.[1] In case of default of disclosure, the Prosecutor was ordered to provide the Chamber and the Defence with reasons and to indicate the revised date by which the disclosure would occur.

2. On 9 September 2005, being satisfied with the explanations provided by the Prosecution in its request for more time to fulfill its disclosure obligation; under Rule 94 *bis* (A) of the Rules, the Chamber granted the Prosecution's application For an extension of time to disclose the Expert Report of Mr. Charles Ntampaka.[2] The revised date – which date was proposed by the Prosecution – was 25 November 2005.

3. In its Decision of 12 December 2005, concerning a Motion by the Prosecution seeking a further extension of time for the disclosure of Mr. Ntampaka's Report, this Chamber extended the deadline for disclosure once more to 19 December 2005.[3] In that Decision, the Chamber also rejected an application, brought by the Defence for Nzirorera, to exclude Mr. Ntampaka's testimony in its entirety as a result of the delay.

4. On 19 December 2005, the Prosecution filed a further Notice of Delay concerning the disclosure of the Expert Report of Charles Ntampaka, seeking an extension of time to 28 February 2005. In its Notice, the reasons given by the Prosecution for Mr. Ntampaka's inability to complete his report within the timeframe stipulated relate to the Witness' competing professional commitments, administrative delays relating to the Witness' negotiation of a contract with the Tribunal, as well as difficulties in communication between the trial team and the Witness. The Prosecutor submits that "a further extension of time is requested until the end of February by which time the Prosecutor has been assured the report will be ready."[4] The Notice does not exhibit any correspondence between the Prosecution and the Witness concerning this issue.

5. As a result of the Prosecution's Notice of Delay, the Defence for Nzirorera filed a Motion to exclude the testimony of Professor Ntampaka in its entirety.

Deliberations

6. The Chamber notes that a significant period of time has lapsed since the date of this Chamber's first order for disclosure of the statement in question – 15 August 2005 – and the disclosure date now proposed by the Prosecutor – 28 February 2006. Further, this is the third request by the Prosecution for an extension of time in relation to the disclosure of the Expert Report of this Witness. Additionally, the Prosecution has made several requests for extensions of time in the deadlines for disclosure of expert witness report; set down by this Chamber. Notably, an application by the Prosecution for an extension of time in the deadline for the disclosure of the report of Expert Witness André Guicahoua is currently pending before this Chamber.

7. The Chamber is not satisfied, in the absence of a statement from the Expert Witness himself, that an extension of time is warranted, or that, if granted, the Witness would be in a position to comply with the order made by the Chamber. The Chamber recalls its Order of 15 December 2005 concerning the Prosecution's request for an extension of time in the deadline for the disclosure of the report of Expert Witness André Guicahoua which required a statement to be provided by the Witness himself, proposing a new deadline. The Chamber considers that a similar course of action is appropriate with respect to the delay in the disclosure of the report of Expert Witness Charles Ntampaka, following which the Chamber will be in a better position to rule on both the Prosecution and Defence Motions.

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[1] *Prosecutor v. Edouard Karemera et al,* Decision on Joseph Nzirorera's Motion for Deadline for Filing of Reports of Experts (TC), 16 May 2005.
[2] *Prosecutor v. Edouard Karemera et al.,* Decision on Prosecutor's Notice of Delay in Filing Expert Reports and Request for Additional Time to Comply with the Chamber Decision of 16 May 2005 (TC), 9 September 2005.
[3] *Prosecutor v. Edouard Karemera et al.,* Decision on Prosecution Request for Additional Time to File Expert Report and Joseph Nzirorera's Motion to Exclude Testimony of Charles Ntampaka, 12 December 2005.
[4] At paragraph 11 of the Prosecutor's Notice.

FOR THOSE REASONS

THE CHAMBER

ORDERS the Prosecution to provide, by Monday 6 February 2006, the Chamber and the Defence of each of the Accused with a formal statement from Expert Witness Charles Ntampaka outlining the reasons for the further delay in the disclosure of his report and indicating the exact date by which he will be able to furnish the Prosecution with his report.

Arusha, 31 January 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Order for the Registrar's Submission on the Defence Motion for Order Concerning Unlawful Disclosure of Confidential Ex Parte Defence Filing and for Stay of Proceedings
Rules 33 (B) and 54 of the Rules of Procedure and Evidence
1 February 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Registrar's responsibility to transmit documents to the appropriate parties – Request to the Registrar to make a submission relating to the disclosure as well as future steps it will take to prevent its recurrence

International Instrument cited :

Rules of Procedure and Evidence, rules 33 (B) and 54

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

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Emile Francis Short, and Gberdao Gustave Kam ("Chamber");

BEING SEIZED of the "Motion for Order Concerning Unlawful Disclosure of Confidential *Ex Parte* Defence Filing and for Stay of Proceedings" ("Motion"), filed by the Defence for Joseph Nzirorera ("Defence") on 30 January 2006;

NOTING "Joseph Nzirorera's *Ex Parte* Motion for Order for Interview of Defence Witness NZ1" and "*Ex Parte* Annex to Joseph Nzirorera's *Ex Parte* Motion for Order for Interview of Defence Witness NZ1" ("*Ex Parte* Annex"), filed on 23 January 2006 and the Prosecution's Response thereto filed on 26 January 2006;

NOTING that in its Motion, the Defence alleges that the Registrar improperly disclosed the *Ex Parte* Annex to the Prosecution;

CONSIDERING that the Registrar has the responsibility to transmit documents to the appropriate parties;

RECALLING Rule 33 (B) of the Rules of Procedure and Evidence ("Rules") providing for the Registrar,

> "in the execution of his functions, […] [to] 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";

and Rule 54 of the Rules giving power to a Judge or a Trial Chamber to "issue such orders […] as may be necessary […] for the preparation or conduct of the trial";

FOR THE ABOVE REASONS, THE CHAMBER

HEREBY REQUESTS the Registrar pursuant to Rule 33 (B) of the Rules to make a submission including the circumstances surrounding the disclosure, as well as future steps it will take to prevent its recurrence, no later than 3 February 2006.

Arusha, 1 February 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guichaoua ; Defence Motion to Exclude the Witness' Testimony ; and Trial Chamber's Order to Show Cause
Article 20 of the Statute and Rules 46 (A) and 94 bis (A) of the Rules of Procedure and Evidence
1 February 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Extension of Time, Competing professional obligations of the witness, Health problems of the Accused, Delay caused by the Prosecutor's office dispatching documents, Request granted – Exclusion of Evidence, Failure of the Prosecutor to comply with the Trial Chamber's order for disclosure, Exclusion of evidence is at the extreme end of a scale of measures available to the Chamber in addressing delay in disclosure, Request denied – Power of the Trial Chamber to impose sanctions against a Counsel if his conduct remains offensive or abusive despite warnings or obstructs the proceedings or is otherwise contrary to the interests of justice – Motion partially granted

International Instruments cited :

Rules of Procedure and Evidence, rules 46 (A), 73 (A), 94 bis (A) and 115 ; Statute, art. 20

International Case cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. André Ntagerura et al., Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004 (ICTR-99-46)

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

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Emile Francis Short and Gberdao Gustave Kam (the "Chamber");

BEING SEIZED of the "Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guichaoua and Request for Additional Time to Comply with the Trial Chamber Decision of 8 November 2005," filed on 8 December 2005 (the "Notice of Delay").

CONSIDERING Joseph Nzirorera's "Motion to Exclude Testimony of André Guichaoua," filed on 13 December 2005 ("Nzirorera's Motion") and the Prosecutor's Response thereto, filed on 14 December 2005 (the "Prosecutor's Response");

NOTING this Chamber's "Order on Filing of Expert Report of André Guichaoua," dated 15 December 2005 (the "Order to Show Cause");

CONSIDERING ALSO the Prosecutor's Responsive and Supplementary Filings, annexing correspondence from Professor André Guichaoua, filed on 3, 4 and 19 January 2006, respectively, as well as the Prosecutor's Responsive Filing to the Trial Chamber's Order to Show Cause, filed on 9 January 2006;

HEREBY DECIDES the Motion pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the "Rules").

Introduction

1. On 16 May 2005, the Chamber ordered the Prosecution to disclose the statements of all expert witnesses the Prosecution intended to call to testify to the Chamber, and to the Defence of each of the Accused, by 15 August 2005.[1] In case of default of disclosure, the Prosecutor was ordered to provide the Chamber and the Defence with reasons and to indicate the revised date by which the disclosure would occur.

2. On 9 September 2005, being satisfied with the explanations provided by the Prosecution in its request for more time to fulfill its disclosure obligations under Rule 94 *bis* (A) of the Rules, the Chamber granted the Prosecution's application for an extension of time to disclose the Expert Report of Mr. André Guichaoua.[2] The revised date – which date was proposed by the Prosecution – was 25 November 2005.

3. On 8 November 2005, the Chamber granted the Prosecution's application for an extension of time to disclose the Expert Report of Mr. André Guichaoua, in part.[3] On this occasion, the extension of time had been sought on medical grounds. The Chamber, however, noted that the available materials did not disclose the need for an extension of time of the length sought by the Prosecution.[4] Accordingly, the new deadline for disclosure ordered was 12 December 2005.

[1] *Prosecutor v. Edouard Karemera et. al,* Decision on Joseph Nzirorera's Motion for Deadline for Filing of Reports of Experts (TC), 16 May 2005.
[2] *Prosecutor v. Edouard Karemera et. al,* Decision on Prosecutor's Notice of Delay in Filing Expert Reports and Request for Additional Time to Comply with the Chamber Decision of 16 May 2005 (TC), 9 September 2005.
[3] *Prosecutor v. Edouard Karemera et. al,* Decision Granting Extension of Time to File Prosecution Expert Report (TC), 8 November 2005.
[4] The Prosecution sought an extension of time to 6 January 2006.

4. On 8 December 2005, the Prosecutor filed a further Notice of Delay in relation to the Expert Report of Professor Guichaoua, requesting additional time to comply with the Chamber's Decision of 8 November 2005.

5. As a result of this application, the Defence for Nzirorera filed a Motion seeking the exclusion of Mr. Guichaoua's testimony on the basis of the further delay.

6. The Chamber was not satisfied, on the basis of the Prosecution's submissions, that a further extension of time should be granted. In that regard, on 15 December 2005, and as a result of the Prosecution's repeated requests for extensions of time in the filing of its expert witness statements under Rule 94 *bis* (A), the Chamber ordered that further information be provided directly by Expert Witness André Guichaoua in order for the Chamber to rule on both the Prosecution and Defence Motions. The deadline for compliance with the Order was 2 January 2006 (the "first Order"). Further, and in light of the Prosecution's repetitive failures to comply with the Chamber's deadlines, the Chamber ordered that the Prosecution should explain why a warning under Rule 46 of the Rules was not warranted (the "second Order").

7. This Decision, therefore, will address three questions flowing from the Prosecution's Notice of Delay, Nzirorera's Motion and the Chamber's first and second Orders of 15 December 2005. Firstly, should the Chamber now grant the extension of time requested by the Prosecution? If not, then should the Defence Motion to exclude the Witness' testimony in its entirety be granted? Lastly, has the Prosecution succeeded in showing why a warning under Rule 46 of the Rules is not warranted?

Discussion

Extension of Time and Exclusion of Evidence

8. With respect to the Chamber's first Order, the Prosecutor filed three documents dated 3, 4 and 19 January 2006, respectively, annexing email correspondence between the Prosecution and Mr. Guichaoua. Those emails outlined the competing professional obligations the Witness had faced at the end of the 2005 calendar year, as well as health problems he had had, and his obligations to attend a research mission in Africa in late 2005. Mr. Guichaoua also said that there had been some delay caused by the Prosecutor's office dispatching documents to him later than anticipated. Further, the Witness advised of the death of his father in late December 2005 and the impact that it had had on his work schedule. The Witness advised that he would not be able to submit his report until 20 February 2006 and that he expected to be in Arusha from 15 February 2006 for the purposes of testifying in another case before the Tribunal.

9. The Chamber is now satisfied, on the basis of all of the available material, that a further extension of time – to 20 February 2006 – should be granted. The Chamber notes that the Witness has not been able to comply with the deadline previously set forth by the Chamber for a number of reasons, both personal and professional. The Chamber also notes that, but for the Witness' reference to the Prosecution's late dispatch of certain documents, it does not appear that this further delay is attributable to the Prosecution's conduct. Despite this fact, however, the Chamber directs the Prosecution to take all necessary measures to ensure that the Witness is able to complete his Report in enough time for the Prosecution to comply with the Chamber's new order for disclosure.

10. In his separate Motion for the exclusion of Professor Guichaoua's testimony, Nzirorera submitted that, when a party fails to disclose by a date set by the Trial Chamber, the evidence should be excluded unless the Prosecution can show due diligence for its failure to comply with the Trial Chamber's order. This, the Defence submitted, is the standard set by the Appeals Chamber when deciding whether to consider evidence not produced on time pursuant to Rule 115.[5] In the Defence's submission, the Prosecution had failed to meet the standard for reconsideration of the Trial Chamber's

[5] *Prosecutor v. Ntagerura et. al.*, Decision on Prosecution Motion for Admission of Additional Evidence, para. 9.

Decision of 8 November 2005, the only new consideration being that Professor Guichaoua had unilaterally decided not to complete his report on time.

11. It must follow, in light of the Chamber granting the Prosecution's request for a further extension of time, that the application for exclusion of evidence should be rejected. The Chamber also considers that, at this stage in the proceedings, it cannot be said that granting this further extension of time will offend the rights of the Accused guaranteed under Article 20 of the Statute. It must also be noted that the Chamber has the ability to manage the trial to ensure that a delay in disclosure will not manifest in unfairness to the Accused. If, when the Witness is called to testify, the Chamber is of the view that the Accused has still not had enough time to prepare or investigate and that this has resulted in unfairness to the Accused, it will then be open to the Chamber to consider exclusion of the Witness' evidence. It is clear that the exclusion of evidence is at the extreme end of a scale of measures available to the Chamber in addressing delay in disclosure. Consequently, the application for exclusion, at this stage in the proceedings, must be rejected.

Order to Show Cause

12. In response to the Chamber's second Order, the Prosecutor submits that no warning should be issued under Rule 46 (A). The Prosecutor contends that delays in filing expert reports are not wholly within his control and that his past submissions concerning deadlines and delays were made on the basis of the best available information at the time, and in good faith. He further submits that the delays were not deliberate or negligent and do not reflect a lack of respect for the authority of the Trial Chamber.

13. Rule 46 (A) of the Rules provides that a Chamber may, after a warning, impose sanctions against a Counsel if, in its opinion, his conduct remains offensive or abusive or obstructs the proceedings, or is otherwise contrary to the interests of justice. The Chamber is satisfied on the basis of the Prosecution's submissions and the available material that sufficient cause has been shown as to why a warning should not, at this stage, be administered under Rule 46 (A). In particular, the Chamber has had regard to the Prosecutor's submission that previous deadlines sought by the Prosecutor have been sought on the basis of the material available to him at the time and that his previous applications for extensions of time have been made in good faith. Whilst the Chamber also notes the reasons advanced by the Witness for the delay in finalising his report, the Chamber wishes to make clear to both the Prosecution and the Witness that any further request for an extension of time will be met with the utmost disapproval. In this regard, the Chamber directs the Prosecutor to take concrete steps to ensure that the Witness complies with his undertaking to submit the report by 28 February 2006. To this end, the Chamber is also of the view that a copy of this Decision should be served upon the Witness.

FOR THOSE REASONS

THE CHAMBER

I. GRANTS the Prosecution's Motion for an extension of time in relation to the disclosure of the statement of Expert Witness André Guichaoua;

II. ORDERS:

a. That the said statement be disclosed to the Defence of each of the Accused and to the Chamber by 28 February 2006; and

b. That the Registry serve a copy of this Decision upon Expert Witness André Guichaoua as soon as practicable; and

III. DENIES Joseph Nzirorera's "Motion to Exclude Testimony of André Guichaoua" in its entirety.

Arusha, 1 February 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Decision on Defence Motion for Issuance of Subpoena to Witness T Rule 54 of the Rules of Procedure and Evidence 2 February 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Issuance of subpoena, Witnesses to a crime are neither the property of the Prosecution or the Defence, Requirements to be met for a subpoena to be issued : demonstration of the service to the overall interests of the criminal process not satisfying, Subpoena is a tool which carries serious repercussions – Motion denied

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. Aloys Simba, Decision on the Defence Request for a Subpoena for Witness SHB, 7 February 2005 (ICTR-2001-765

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. Mile Mrkšić, Appeal Chamber Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party, 30 July 2003 (IT-95-13/1) ; Appeals Chamber, The Prosecutor v. Sejér Halilović, Decision on Issuance of Subpoenas, 21 June 2004 (IT-01-48)

Introduction

1. The trial in this case started on 19 September 2005. The second trial session is scheduled to begin on 13 February 2006 with the continuation of the Prosecution's case. Trial Chamber III is seized of Joseph Nzirorera's Motion for Issuance of *Subpoena* to Witness T[1], the Prosecutor's Response[2] and Nzirorera's Reply brief[3]. Witness T is listed as a Prosecution witness who has been granted special protective measures by the Chamber.[4] Counsel for Joseph Nzirorera wishes to have an interview with Witness T prior to his appearance for testimony, but Witness T has refused to meet him. As a result, Joseph Nzirorera filed this Motion requesting the Chamber to issue a subpoena to Witness T for such an interview.

[1] Motion for Issuance of Subpoena to Witness «T', filed by Joseph Nzirorera on 30 November 2005.
[2] Filed on 5 December 2005.
[3] Filed on 7 December 2005.
[4] *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera,* Case N°ICTR-98-44-PT, Decision on the Prosecutor's Motion for Special Protective Measures for Witnesses G and T (TC) (Confidential), 14 September 2005.

Discussion

2. Nzirorera claims that the requested interview with Witness T will allow him to properly prepare his case because he expects to elicit testimony from Witness T concerning a large number of speeches and interviews broadcast on the radio during the events in Rwanda in April-July 1994. Nzirorera argues that the meeting will allow him to sufficiently prepare for an effective cross-examination, which facilitates the equality of arms, and will alleviate unnecessary consumption of trial time. He also wishes to go beyond the scope of cross-examination to learn of information that Witness T may have regarding additional speeches and public statements not already on the record or in Witness T's statements. As such, he believes that a subpoena should be granted. To support his Motion, Nzirorera relies on the Appeals Chamber decision in the *Halilovic* case.[5] The Prosecution opposes the Motion.

3. The Appeals Chamber has stated that witnesses to a crime are neither the property of the Prosecution or the Defence, such that both sides have an equal opportunity to interview them. If the witness refuses to grant a request for an interview, either party may apply to the Chamber for appropriate relief pursuant to Rule 54 of the Rules of Procedure and Evidence;[6] which provides a Judge or a Trial Chamber with the power to issue a *subpoena* "for the purposes of an investigation or for the preparation or conduct of the trial." This includes the authority 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"[7]

so that ultimately the trial is informed and fair.[8]

4. *Subpoenas* are not to be issued lightly and must therefore satisfy, several requirements.[9] The requesting party must first demonstrate that it has made reasonable attempts to obtain the voluntary cooperation of the witness and of other third parties who may be involved; that the witness' expected testimony is necessary and appropriate for the conduct of the proceedings; and that the prospective witness can materially assist its case.[10] Further considerations for the issuance of a *subpoena* include the reasonable likelihood that an order would produce the degree of cooperation needed for the Defence to interview the witness, and that the purpose of the interview goes beyond the scope of cross-examination.[11] Finally, as the Appeals Chamber stated in the *Halilovic* case, the use of subpoenas as a judicial power to compel must be balanced with the need to serve the overall interests of the criminal process.[12]

5. The Chamber notes that Nzirorera has attempted to obtain Witness T's cooperation through the appropriate channels, and that both parties agree on the importance of Witness T's testimony in this case. However, the Chamber is of the view that Nzirorera has not adequately demonstrated that such a meeting will materially assist this case, and the Chamber does not find that such a meeting is necessary and appropriate for the conduct of the proceedings. The Chamber observes that Witness T met voluntarily with Counsel for Nzirorera on two occasions before he agreed to testify for the Prosecution. The Chamber expects that such meetings would have provided sufficient opportunity to gather any information necessary to materially assist his case. Furthermore, lengthy witness statements and documents concerning Witness T have already been disclosed and the witness has already testified in other trials before this Tribunal.

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[5] *Prosecutor v. Sefer Halilovic,* Case N°IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004.
[6] *Prosecutor v. Mile Mrksic,* Case N°IT-95-1311-AR73, Decision on Defense Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party (AC), 30 July 2003, Section III (b).
[7] *Prosecutor v. Radislav Krstic,* Case N°IT-98-33-A, Decision on Application for Subpoenas (AC), 1 July 2003, para. 10.
[8] *Halilovic* Decision, para. 7.
[9] See, for example, *Prosecutor v. Aloys Simba,* Case N°ICTR-01-76-T, Decision on the Defence Request for a Subpoena for Witness SHB (TC), 7 February 2005, para. 3; *Prosecutor v. Theoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva,* Case N°98-41-T, Decision on Request for Subpoena ofMajor General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, para. 4; *Krstic* Decision, para. 17.
[10] *Id.*
[11] *Krstic* Decision, para. 17, *Halilovic* Decision, para. 14.
[12] *Halilovic* Decision, para. 10.

6. Although the Chamber appreciates that Nzirorera has suggested ways to improve the efficiency of trial time, the Chamber does not agree that a *subpoena*, a tool which carries serious repercussions,[13] is required to achieve such efficiency.

7. Consequently, having evaluated the particular circumstances of the case, the Chamber is of the view that the overall interests of the criminal process would not be served by an order issuing a *subpoena* for Nzirorera to meet with Witness T.

FOR THOSE REASONS THE CHAMBER

DENIES the Defence Motion in its entirety.

Arusha, 8 February 2006, done in English.

[Signed]: Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[13] *Mrksic* Decision, Section III (b); *Halilovic* Decision, paras. 6 and 10.

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Decision Granting Extension of Time to Reply to the Prosecution's Response to Nzirorera's Ex Parte Motion for Order for Interview of Defence Witness NZ1 2 February 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Extension of time

International Case cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Edouard Karemera et al., Order for the Registrar's Submission on the Defence Motion for Order Concerning Unlawful Disclosure of Confidential Ex Parte Defence Filing and for Stay of Proceedings, 1 February 2006 (ICTR-98-44)

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

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Emile Francis Short, and Gberdao Gustave Kam ("Chamber");

BEING SEIZED of "Joseph Nzirorera's Motion for Extension of time to File Reply to Prosecutor's Response to Nzirorera's *Ex Parte* Motion for Order for Interview of Defence Witness NZ1" ("Motion for Extension"), filed on 1 February 2006;

RECALLING "Joseph Nzirorera's *EX Parte* Motion for Order for Interview of Defence Witness NZ1" ("Original Motion") and *"Ex Parte* Annex to Joseph Nzirorera's *Ex Parte* Motion for Order for Interview of Defence Witness NZ1" ("*Ex Parte* Annex"), filed on 23 January 2006 and the Prosecution's Response thereto filed on 26 January 2006;

RECALLING the "Motion for Order Concerning Unlawful Disclosure of Confidential *Ex Parte* Defence Filing and for Stay of Proceedings" ("Motion for Order and Stay of Proceedings"), filed by the Defence for Joseph Nzirorera ("Defence") on 30 January 2006, which alleges that the Registrar improperly disclosed the *Ex Parte* Annex to the Prosecution;

CONSIDERING the Chamber's Order concerning the Motion the Order and Stay of Proceedings requesting submissions from the Registrar including an explanation of the circumstances of the disclosure by 3 February 2006; [1]

CONSIDERING Joseph Nzirorera's argument that he wishes the matter regarding the Registrar and confidentiality be addressed and remedied before he submits newly acquired information to the Chamber regarding his Original Motion;

CONSIDERING that an extension of time allowing the Defence to Reply will not affect the scheduling in this matter and, in the particular circumstances of the case, is warranted;

THE CHAMBER HEREBY

[1] *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-T, Order for the Registrar's Submission on the Defence Motion for Order Concerning Unlawful Disclosure of Confidential Ex Parte Defence Filing and for Stay of Proceedings (TC), 1 February 2006.

I. GRANTS the Defence Motion for Extension; and

II. ORDERS the Defence to file its Reply to the Prosecutor's Response to Nzirorera's *Ex Parte* Motion for Order for Interview of Defence Witness NZ1 no later than *5* days after a decision is filed on the Motion for Order and Stay of Proceedings,

Arusha, 2 February 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Decision on Defence Motion for Issuance of Subpoena to Witness T Rule 54 of the Rules of Procedure and Evidence 8 February 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Issuance of subpoena, Subpoenas are not to be issued lightly, Attempts of the Defence to obtain Witness' cooperation through the appropriate channels, No demonstration of the relevancy of the meeting for the material advance of the case – Motion denied

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. Aloys Simba, Decision on the Defence Request for a Subpoena for Witness SHB, 7 February 2005 (ICTR-2001-76)

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. Mile Mrkšić, Appeal Chamber Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party, 30 July 2003 (IT-95-13/1) ; Appeals Chamber, The Prosecutor v. Sejér Halilović, Decision on Issuance of Subpoenas, 21 June 2004 (IT-01-48)

Introduction

1. The trial in this case started on 19 September 2005. The second trial session is scheduled to begin on 13 February 2006 with the continuation of the Prosecution's case. Trial Chamber III is seized of Joseph Nzirorera's Motion for Issuance of *Subpoena* to Witness T[1], the Prosecutor's Response[2] and the Nzirorera's Reply brief[3]. Witness T is listed as a Prosecution witness who has been granted special

[1] Motion for Issuance of Subpoena to Witness "T", filed by Joseph Nzirorera on 30 November 2005.
[2] Filed on 5 December 2005.
[3] Filed on 7 December 2005.

protective measures by the Chamber[4]. Counsel for Joseph Nzirorera wishes to have an interview with Witness T prior to his appearance for testimony, but Witness T has refused to meet him. As a result, Joseph Nzirorera filed this Motion requesting the Chamber to issue a *subpoena* to Witness T for such an interview.

Discussion

2. Nzirorera claims that the requested interview with Witness T will allow him to properly prepare his case because he expects to elicit testimony from Witness T concerning a large number of speeches and interviews broadcast on the radio during the events in Rwanda in April-July 1994. Nzirorera argues that the meeting will allow him to sufficiently prepare for an effective cross-examination, which facilitates the equality of arms, and will alleviate unnecessary consumption of trial time. He also wishes to go beyond the scope of cross-examination to learn of information that Witness T may have regarding additional speeches and public statements not already on the record or in Witness T's statements. As such, he believes that a subpoena should be granted. To support his Motion, Nzirorera relies on the Appeals Chamber decision in the *Halilović* case.[5] The Prosecution opposes the Motion.

3. The Appeals Chamber has stated that witnesses to a crime are neither the property of the Prosecution or the Defence, such that both sides have an equal opportunity to interview them. If the witness refuses to grant a request for an interview, either party may apply to the Chamber for appropriate relief pursuant to Rule 54 of the Rules of Procedure and evidence[6]; which provides a Judge or a Trial Chamber with the power to issue a *subpoena* "for the purposes of an investigation or for the preparation or conduct of the trial." This includes the authority 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"[7]

so that ultimately the trial is informed and fair.[8]

4. *Subpoenas* are not to be issued lightly and must therefore satisfy several requirements[9]. The requesting party must first demonstrate that it has made reasonable attempts to obtain the voluntary cooperation of the witness and of other third parties who may be involved; that the witness' expected testimony is necessary and appropriate for the conduct of the proceedings; and that the prospective witness can materially assist its case.[10] Further considerations for the issuance of a *subpoena* include the reasonable likelihood that an order would produce the degree of cooperation needed for the Defence to interview the witness, and that the purpose of the interview goes beyond the scope of cross-examination.[11] Finally, as the Appeals Chamber stated in the *Halilović* case, the use of subpoenas as a judicial power to compel must be balanced with the need to serve the overall interests of the criminal process.[12]

5. The Chamber notes that Nzirorera has attempted to obtain Witness T's cooperation through the appropriate channels, and that both parties agree on the importance of Witness T's testimony in this case. However, the Chamber is of the view that Nzirorera has not adequately demonstrated that such a

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[4] *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera,* Case N°ICTR-98-44-PT, Decision on the Prosecutor's Motion for Special Protective Measures for Witnesses G and T (TC) (Confidential), 14 September 2005.
[5] *Prosecutor v. Sefer Halilović,* Case N°IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004.
[6] *Prosecutor v. Mile Mrksic,* Case N°IT-95-1311-AR73, Decision on Defense Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party (AC), 30 July 2003, Section III (b).
[7] *Prosecutor v. Radislav Krstic,* Case No. IT-98-33-A, Decision on Application for Subpoenas (AC), 1 July 2003, para. 10.
[8] *Halilovic* Decision, para. 7.
[9] See, for example, *Prosecutor v. Aloys Simba,* Case N°ICTR-01-76-T, Decision on the Defence Request for a Subpoena for Witness SHB (TC), 7 February 2005, para. 3; *Prosecutor v. Theoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva,* Case No. 98-41-T, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, para. 4; *Krstic* Decision, par. 17.
[10] Id.
[11] *Krstic* Decision, para. 17, *Halilovic* Decision, para. *14*.
[12] *Halilovic* Decision, para. 10.

meeting will materially assist this case, and the Chamber does not find that such a meeting is necessary and appropriate for the conduct of the proceedings. The Chamber observes that Witness T met voluntarily with Counsel for Nzirorera on two occasions before he agreed to testify for the Prosecution. The Chamber expects that such meetings would have provided sufficient opportunity to gather any information necessary to materially assist his case. Furthermore, lengthy witness statements and documents concerning Witness T have already been disclosed and the witness has already testified in other trials before this Tribunal.

6. Although the Chamber appreciates that Nzirorera has suggested ways to improve the efficiency of trial time, the Chamber does not agree that a subpoena, a tool which carries serious repercussions,[13] is required to achieve such efficiency.

7. Consequently, having evaluated the particular circumstances of the case, the Chamber is of the view that the overall interests of the criminal process would not be served by an order issuing a subpoena for Nzirorera to meet with Witness T.

FOR THOSE REASONS THE CHAMBER

DENIES the Defence Motion in its entirety.

Arusha, 8 February 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[13] *Mrksic* Decision, Section III (b); *Halilovic* Decision, paras. 6 and 10.

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Decision on Prosecution Motion Seeking Extension of Time to File Applications Under Rule 92 bis
Rule 92 bis of the Rules of Procedure and Evidence
10 February 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Extension of time requested by the Prosecutor to file its application for admission of written statements in lieu of oral testimony, Potential effect of the Prosecutor' applications on the number of witnesses to be heard orally by the Chamber, Fact that the applications for admission of rape evidence in the form of written statements should have been filed does not banned the Prosecutor from requesting the admission of rape victim evidence in written form, Interests of justice – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 92 bis

Introduction

1. The trial in this case started on 19 September 2005. At an earlier stage, the Prosecution submitted a list of 216 witnesses and informed the Chamber that it will apply to have the testimonies of some of its witnesses supporting the rape charge admitted into evidence by sworn statements in lieu of oral testimony.[1] On 13 December 2005, the Chamber granted the Prosecution leave to remove 51 witnesses and to add Witness ADE to its witness list. In the same Decision, the Prosecution was ordered to file, no later than 10 January 2006, its arguments regarding the admission of the evidence of the rape witnesses in the form of a written statement in lieu of oral testimony, and to indicate which Prosecution witnesses could be removed as a result of the addition of Witness ADE's testimony.

2. The Prosecution now seeks an extension of time of the Chamber's deadline of 10 January 2006 for filing arguments concerning the admission of evidence of rape in written form, until there has been substantial evidence of rapes received by oral testimony.[2] The Defence for Nzirorera and for Ngirumpatse oppose the application.[3] Further, in an Interoffice-Memorandum dated 20 December 2005, the Prosecution states that it cannot indicate which Prosecution witnesses could be removed from the list as a result of the addition of Witness ADE and that it will only be in a position to do so after the witness has testified. The Chamber will now address these two issues.

Discussion

The Filing of Submissions under Rule 92 bis of the Rules

3. The Prosecution contends that it cannot rely on witness statements to anticipate the quality and reliability of the evidence to be given by the witnesses supporting the rape charge. Consequently, the selection process to determine which witness statements will be offered in written form can only be

[1] See Prosecution Pre-Trial Brief filed on 27 June 2005
[2] Prosecution Motion to Extend Time to File the Rule 92 *bis* Application Regarding Receipt of Rape Evidence before the Chamber, filed on 10 January 2006
[3] Defence for Nzirorera filed a Reply on 12 January 2006, and Defence for Ngimmpatse field a Reply on17 January 2006 (dated 16 January 06).

done after assessing the quantity and quality of evidence adduced orally before the Chamber. The Prosecution claims that the preparation of the defence will not be affected by the extension of time sought because the rape witnesses or victims are not anticipated to testify orally until late 2006. In its reply: the Prosecution presents a list of 21 out of 93 rape witnesses that it intends to call to testify.

4. The Defence for Nzirorera claims that since the Prosecution disobeyed the Chamber's Order by not making the required submission in time, it has waived its right to seek admission of the rape witness evidence pursuant to Rule 92 *bis* of the Rules.

5. When denying the Defence Motion seeking reduction of the number of Prosecution witnesses, the Chamber explicitly took into consideration the Prosecution's submission that the evidence of 86 of the 93 proposed witnesses to be heard on the charge of rape might be admitted in the form of a written statement in lieu of oral testimony in accordance with Rule 92 *bis* of the Rules.[4] Whereas the Chamber concluded that the Defence motion seeking reduction of the number of Prosecution witnesses was therefore premature, it considered that the Prosecution should file its motions under Rule 92 *bis* as soon as possible within a reasonable time-limit. In that ruling, the Chamber had already rejected the idea that such a date should follow a substantial record of evidence given orally in court. At this stage of the proceedings, the Prosecution must know its case and therefore he able to file its application for admission of written statements pursuant to Rule 92 *bis* of the Rules.

6. In addition, it must he noted that the Chamber has not prejudged the outcome of the Prosecution application for admission in the form of written statements in lieu of oral testimony. Since the witnesses in respect of whom the Prosecution seeks to file an application under Rule 92 *bis* must be listed on the Prosecution witness list: the filing of these applications could have an effect on the number of witnesses to be heard orally by the Chamber.

7. Due to these particular circumstances of the case, the Chamber reiterates that the applications for admission of rape evidence in the form of written statements should have been filed by 10 January 2006, as ordered. The Chamber nevertheless does not consider that the Prosecution is now barred from seeking the admission of rape victim evidence in written form. Such a conclusion would be contrary to the interests of justice.

8. While there is no doubt that the Prosecution should comply forthwith with the Decision of 13 December 2006, the Chamber is aware that the preparation and filing of these motions will require few days. For these reasons, the Chamber will exceptionally grant a brief extension of time to allow the Prosecution to comply with the Chamber's Order.

The Indication of Witnesses that Could Be Removed From the Prosecution Witness List

9. In its Decision of 13 December 2005, the Chamber concluded that the rights of the Accused will not be prejudiced by the addition of Witness ADE and that it was is in the interests of justice to add this witness to the witness list. As suggested by the Prosecution, the Chamber ordered that the Prosecution should notify the Chamber and the Defence which Prosecution witnesses could be removed from its witness list as a result of Witness ADE's testimony.

10. The Chamber is of the view that an indication by the Prosecution of the witnesses that could be removed from the witness list is not premature at this stage of the proceedings. Again, the Prosecution is expected to know its case before it goes to trial and therefore should now be in a position to comply with the Chamber's Order of 16 December 2005.

FOR THOSE REASONS THE CHAMBER

[4] Prosecution filed a Reply on 17 January 2006.

DENIES the Prosecution Motion and ORDERS the Prosecution no later than 20 February 2006 :

(i) to file its submissions under Rule 92 *bis* of the Rules;

(ii) to notify the Chamber and the Defence of all of the Accused which Prosecution witnesses could be removed as a result of Witness ADE's testimony.

Arusha, 10 February 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders
Article 28 of the Statute of the Tribunal and Rule 54 (B) of the Rules of Procedure and Evidence
13 February 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Cooperation of the Rwandan Authorities, Documents requested : witnesses' statements taken or received by the Rwandan authorities and judgments, Necessary and relevant documents for a fair determination of the credibility of the witnesses concerned – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rules 54 (B) and 90 (G) ; Statute, art. 28 and 28 (2) (c)

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 the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana, 25 May 2004 (ICTR-98-41) ; Appeals Chamber, The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Reasons for the Decision on Request for Admission of Additional Evidence, 8 September 2004 (ICTR-96-10 and ICTR-96-17) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Assistance Pursuant to Article 28 of the Statute, 27 May 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Motions to Compel Inspection and Disclosure and to direct Witnesses to Bring Judicial and Immigration Records, 14 September 2005 (ICTR-98-44)

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)

Introduction

1. The trial in this case commenced on 19 September 2005. During the testimony of Prosecution Witness Ahmed Mbonyunkiza at the first trial session, the Accused Joseph Nzirorera sought to obtain a statement of this witness made to the Rwandan judicial authorities. During the same session, the Prosecution was requested to submit proof of its best efforts made to obtain the Rwandan judicial records of another Prosecution witness, Witness HH, scheduled to be heard during the second trial session starting on 13 February 2006. Despite the efforts made by the Prosecution,[1] these documents were not obtained from the Rwandan authorities. As a result, the Chamber is now seized of "Joseph Nzirorera's Motion for Order for Production of Documents by the Governments of Rwanda and for Cooperation and for Consequential Orders",[2] the Prosecutor's Response[3] and Joseph Nzirorera's Reply Brief.[4] In his Motion, Joseph Nzirorera seeks the Chamber to order the Government of Rwanda to produce documents relating not only to Prosecution Witnesses Ahmed Mbonyunkiza and HH but also to other Prosecution witnesses. In addition, he moves the Chamber to postpone the testimony of all the witnesses listed in Annex 1 of his Motion until the reception of the documents sought.

2. The Defence Counsel for Mathieu Ngirumpatse has also seized the Chamber with a Motion entitled "*Requête aux fins de communication des procédures rwandaises contre les témoins HH, ALG, UB et AWB*".[5] It has requested the postponement of the testimony of Witnesses HH, ALG, UB, and AWB until the disclosure of their Rwandan judicial records, judgements and other pertinent documents.

Discussion

Request for Cooperation of the Rwandan Authorities

3. Joseph Nzirorera seeks the Chamber to issue, pursuant to Article 28 of the Statute of the Tribunal ("Statute") and Rule 54 of the Rules of Procedure and Evidence ("Rules"), an Order directing the Government of Rwanda to provide copies of the following documents pertaining to each of the Prosecution witnesses listed in Annex 1 to the Motion:

(A) All statements taken or received by the Rwandan authorities from the listed persons

(B) All documents containing any charges filed against the listed persons and judgement rendered

(C) All information from witnesses or victims which accuse the listed persons of crimes relating to events in 1994.

4. The Defence has attached a confidential Annex 1 to its Reply Brief, listing thirty seven Prosecution witnesses' names and pseudonyms in the current case believed to have been prosecuted in Rwanda and for whom judicial documents are missing. On the list, the names of six witnesses are not indicated. The Defence moves the Chamber to order the Prosecution to provide the identity of the six witnesses to the Rwandan authorities to enable them comply with the Chamber's Order.

5. Joseph Nzirorera submits that the Chamber should make an Order under Article 28 of the Statute to oblige the Rwandan authorities to disclose the required material encompassing for all of the Prosecution witnesses who lived in Rwanda after 1994 in order to avoid multiple Article 28 Orders and the disruption of trial sessions.

6. The Prosecution states that it is not in possession of a list of witnesses who made statements before the Rwandan authorities. It claims that all of its witnesses who have been prosecuted in Rwanda are known and it has requested their judicial records from the Rwanda authorities. The

[1] See the Interoffice Memorandum filed by the Prosecution on 13 December 2005.
[2] Motion for Order for Production for Documents by the Governments of Rwanda and for Cooperation and for Consequential Orders, filed by Joseph Nzirorera on 9 January 2006 ("Motion").
[3] Filed on 16 January 2006.
[4] Filed on 18 January 2006. A Confidential Annex 1 to the Motion was also filed on 18 January 2006.
[5] Filed on 8 February 2006.

Prosecution contends that Joseph Nzirorera failed to first seek the assistance of the Rwandan Government through cooperative means.[6] In addition, the Prosecution asserts that the Defence Motion lacks specificity.

7. Article 28 (2) (c) of the Statute prescribes that States shall comply without undue delay with any request for cooperation issued by a Trial Chamber for the service of documents. Any request for production of documents, under Article 28 of the Statute, must (i) identify as far as possible the documents or information to which the application relates; (ii) set out succinctly the reasons why such documents are deemed relevant to the trial; and (iii) explain the steps taken by the applicant to secure the State's assistance.[7] Further, it must be noted that the Trial Chambers of this Tribunal have concluded that disclosure of judicial records is not merely for the benefit of the preparation of the Defence but it is also required to assist the Chambers in their assessments of witnesses' credibility pursuant to Rule 90 (G) of the Rules.[8]

8. In the present case, the Chamber is of the view, that among all of the documents requested by the Defence, only the statements taken or received by the Rwandan authorities from the listed Prosecution witnesses and judgements rendered against them have been sufficiently defined. The Chamber is of the view that the list of Prosecution witnesses attached to Joseph Nzirorera's Motion sufficiently identifies those witnesses whose material is sought. However, the Prosecution should provide to the Rwanda authorities the names of the six witnesses, for whom only pseudonyms were given. The Chamber is of the view that the statements taken or received by the Rwandan authorities from the listed persons and the judgments sought are necessary and relevant for a fair determination of the credibility of the witnesses concerned. The Chamber also finds that Joseph Nzirorera, by the letters addressed to Office of the Prosecution and the Special Representative of Rwandan Government, and the meetings held with the latter, has demonstrated that he has taken all reasonable efforts to obtain the judicial records requested. However, with regard to the documents containing charges filed against the listed persons and information from witnesses or victims which accuse the listed Prosecution witnesses of crimes relating to events in 1994, the Chamber finds that the material requested is not adequately precise for a request of cooperation of the Rwandan authorities.

9. Consequently, the Chamber finds that the Defence has met the requirements of Article 28 of the Statute regarding all statements taken or received by the Rwandan authorities and the judgements rendered against the listed persons.

10.The names of the six protected witnesses whose pseudonyms are AWE, BDW, BDX, BGD, BIS, and BIT should be provided to the Rwandan authorities. In addition, since the Witnesses HH, UB, ALG, AWB, GFA, and GBU are going to be called during the next trial session, the cooperation of the said authorities is necessary in the earliest possible time.

Consequential orders

11. Joseph Nzirorera requests the Chamber to delay the testimony of Witness HH who is scheduled to testify in the next trial session. Joseph Nzirorera recalls that Witness HH acknowledged making

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[6] *Prosecutor v. Blaskic*, Case N°IT-95-14, 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, par. 31.

[7] *Prosecutor v. Théoneste Bagosora et al.*, Case N°ICTR-98-41-T, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 10 March 2004, para. 4; *The Prosecutor v. Théoneste Bagosora et al.*, Case N°ICTR-98-41-T, Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana (TC), 25 May 2004, para. 6; *The Prosecutor v. Théoneste Bagosora et al.*, Case N°ICTR-98-41-T, Decision on Request for Assistance Pursuant to Article 28 of the Statute (TC), 27 May 2005, para. 2; see also *Prosecutor v. Blaskic*, Case No. IT-95-14, 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, par. 32.

[8] *Prosecutor v. Edouard Karemera et al.*, Case N°ICTR-98-44-T, Decision on Motions to Compel Insoection and Disclosure and to direct Witnesses to Bring Judicial and Immigration Records (TC), 14 September 2005, para. 8; *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case N°ICTR-96-10-A, ICTR-96-17-A, Reasons for the Decision on Request for Admission of Additional Evidence (AC), 8 September 2004, paras. 47-52.

false statements by lying to the Prosecution investigators in 1998. He affirms that Witness HH judicial records should contain false statements. The Prosecution acknowledges that Witness HH's prior statements were either incomplete or untruthful but opposes any request for postponement.

12. Joseph Nzirorera is also asking the Chamber to postpone the testimony of the witnesses listed on Annex 1 until the disclosure of all the required Rwandan judicial records to enable him to prepare his defence adequately. Mathieu Ngirumpatse also requests the Chamber to postpone the testimony of Witnesses HH, ALG, UB, and AWB to enable him to prepare the cross-examination of the witnesses.

13. The Chamber is of the view that the overall interest of the proceedings in this case would not be served by an order delaying the testimonies of some Prosecution witnesses scheduled to testify during the next trial session before the Chamber, even if their judicial records are not disclosed before they testify. They can be recalled at a later stage of the proceedings, if necessary.

FOR THE ABOVE REASONS THE CHAMBER

I. GRANTS in part "Joseph Nzirorera's Motion for Order for Production of Documents by the Government of Rwanda and for Consequential Orders" and Mathieu Ngirumpatse "*Requête aux fins de communication des procédures rwandaises contre les témoins HH, ALG, UB et AWB*";

II. ORDERS the Prosecution to provide the names of its witnesses omitted in the list provided by Joseph Nzirorera, and to transmit them only to the Rwandan authorities to enable them to comply with the present Order;

III. REQUESTS the cooperation of the Government of Rwanda to provide the Registry with:

(A) All statements taken or received by the Rwandan authorities from the persons whose names are specified in the confidential Annex to the present Decision and the six names specified by the Prosecution; and

(B) All judgements rendered against the listed persons.

IV. ORDERS the Registry to redact the names, addresses, locations and other identifying information as may appear in Witnesses AWE, BDW, BDX, BGD, BIS, and BIT statements or other material disclosed in accordance with Paragraph 11 of the Chamber's Order on Protective Measures for Prosecution witnesses of 10 December 2004;

V. REQUESTS the Government of Rwanda to provide the Registry with all statements taken or received by the Rwandan authorities from Witnesses HH, UB, ALG, AWB, GFA, and GBU no later than 6 March 2006;

VI. ORDERS the Registry to disclose to all the parties in the present case the documents specified in paragraph III (A) and (B) above;

VII. DIRECTS the Registrar to serve this request for cooperation, including the Confidential Annex, on the relevant authorities of the Government of Rwanda;

VIII. DENIES the remainder of the Motions in their entirety.

Arusha, 13 February 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Decision on Delay in Filing of Expert Report of Charles Ntampaka Article 20 of the Statute of the Tribunal and Rule 94 bis of the Rules of Procedure and Evidence 13 February 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Expert witness report, Disclosure of the report to the opposing party as early as possible, Previous order determined earliest possible date for disclosure, Ongoing ability of the trial Chamber to manage the trial to ensure that a delay in disclosure will not manifest in unfairness to the Accused – Extension of time granted

International Instruments cited :

Rules of Procedure and Evidence, rule 94 bis ; Statute, art. 20

Introduction

1. On 16 May 2005, this Chamber ordered the Prosecution to disclose the statement of Prosecution Witness Charles Ntampaka to the Defence of each of the Accused by 15 August 2005.[1] In response to requests for extensions of that deadline by the Prosecution on two occasions, the Chamber extended the deadline twice: the first extension being to 25 November 2005,[2] and the further extension being to 19 December 2005.[3]

2. On 19 December 2005, the Prosecution filed a Motion[4] seeking a further extension of time concerning the disclosure of Mr. Ntampaka's Report, as a result of which the Defence for Nzirorera filed a Motion[5] seeking the exclusion of the witness' evidence in its entirety. The Prosecution advanced reasons for the further request in its Motion, but the Chamber was not satisfied on the basis of the material before it that an extension of time should be granted or that the witness would be in a position to comply with any order made by the Chamber, if it was granted. Accordingly, it ordered Mr. Ntampaka himself to provide a statement, advancing reasons for the further delay and proposing a deadline by which he would be able to submit his Report.[6] The Chamber stated that it would rule on both the Prosecution and Defence Motions once its Order had been complied with.

3. On 7 February 2006, the Prosecutor filed a document in compliance with the Chamber's Order of 31 January 2006,[7] annexing correspondence between the Prosecutor and Mr. Ntampaka, which proposed a filing deadline of 20 March 2006 for the filing of the Report. The Prosecutor had also filed

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[1] *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-T,*("Karemera et al")* Decision on Joseph Nzirorera's Motion for Deadline for Filing of Reports of Experts (TC), 16 May 2005.
[2] *Prosecutor v. Edouard Karemera et. al,* Decision on Prosecutor's Notice of Delay in Filing Expert Reports and Request for Additional Time to Comply with the Chamber Decision of 16 May 2005 (TC), 9 September 2005.
[3] *Prosecutor v. Edouard Karemera et. al,* Decision on Prosecution Request for Additional Time to File Expert Report and Joseph Nzirorera's Motion to Exclude Testimony of Charles Ntampaka (TC), 12 December 2005.
[4] "Prosecutor's Notice of Delay in Filing Expert Report of Charles Ntampaka," ("Prosecution's Motion") filed on 19 December 2005.
[5] "Second Motion to Exclude Testimony of Charles Ntampaka," ("Defence Motion") filed by the Defence for Joseph Nzirorera, on 20 December 2005.
[6] *Karemera et. al,* Order on Filing of Expert Report of Charles Ntampaka, 31 January 2006.
[7] "Prosecutor's Filing Pursuant to Trial Chamber III Decision of 31 January 2006 Concerning Expert Report of Prof. Charles Ntampaka," filed on 7 February 2006.

a document concerning Mr. Ntampaka's Report on 31 January 2006,[8] simultaneously with the filing of the Chamber's Order of that same date. As a result of these filings, the Defence for Ngirumpatse filed a *Mémoire*[9] agreeing to the ordering of a new deadline of 20 March 2006, but seeking certain other declarations from the Chamber.

Discussion

4. Pursuant to Rule 94 *bis* of the Rules, "the full statement of any expert witness called by a party shall be disclosed to the opposing party *as early as possible*".[10] Previously, on the basis of material placed before it, this Chamber has made determinations as to what was the earliest possible date by which the Prosecution could disclose Mr. Ntampaka's Report, and has then ordered accordingly. The Prosecution has not been able to comply with the previous Orders made by the Chamber. The Chamber now considers whether, on the basis of the new material before it, a new deadline should be ordered as to the earliest date possible by which Mr. Ntampaka's Report can now be disclosed.

5. The Chamber has carefully reviewed the correspondence from the expert witness submitted by the Prosecutor. In general, the filings disclose the fact that the witness must consult the Prosecution's archives in Arusha prior to being able to finalise his report. To that end, travel dates on which Mr. Ntampaka will come to Arusha have been proposed, as have been the dates on which the witness and the Prosecutor will meet to discuss the final form the Report should take. Most importantly, the witness himself proposes the dates during which he will be able to consult the Prosecution's archives – between 28 February 2006 and 12 March 2006 – following which, he advises, he will be able to file the Report on 20 March 2006.

6. The Chamber is now satisfied, on the basis of the constraints communicated by the witness and the Prosecution and the deadline self-imposed by Mr. Ntampaka, that a further extension of time – to 20 March 2006 – is warranted.

7. In the light of the Chamber granting the application for a further extension of time, the Chamber considers that Nzirorera's application to exclude Mr. Ntampaka's testimony in its entirety should be rejected. Ngirupmpatse did not join Nzirorera in making such an application. The Chamber notes that, at this stage in the proceedings, it cannot be said that granting this further extension of time will infringe the rights of the Accused guaranteed under Article 20 of the Statute. Furthermore, the Chamber has the ongoing ability to manage the trial to ensure that a delay in disclosure will not manifest in unfairness to the Accused. If, when the witness is called to testify, the Chamber is of the view that the Accused has still not had enough time to prepare for the cross-examination of Mr. Ntampaka, or to investigate in order to challenge the matters contained in his Report, and that this has resulted in unfairness to the Accused, it will then be open to the Chamber to consider exclusion of the witness' evidence. It is clear that the exclusion of evidence is at the extreme end of a scale of measures available to the Chamber in addressing delay in disclosure.

8. Finally, the Chamber wishes to make clear to both the Prosecution and the witness that any further request for extension of time will be met with the Chamber's utmost disapproval. It also directs the Prosecution to take concrete steps to ensure that Mr. Ntampaka complies with his own undertaking to submit his Report by 20 March 2006. To this end, the Chamber is of the view that a copy of this Decision should be served upon the witness.

FOR THOSE REASONS

THE CHAMBER

[8] "Prosecutor's Notice of Delay in Filing Expert Report of Prof. Charles Ntmapaka and Request for Additional Time to Comply with the Trial Chamber Scheduling Order," filed on 31 January 2006.
[9] "Mémoire en Réponse à la Demande de Prorogation de Délai au Dépôt du Rapport de Monsieur Ntampaka," filed by the Defence for Mathieu Ngirumpatse on 8 February 2006.
[10] Emphasis added.

I. GRANTS the Prosecution's Motion for an extension of time for the disclosure of the statement of Expert Witness Charles Ntampaka on the basis outlined by Mr. Ntampaka; and

II. ORDERS:

(a) That the said statement be disclosed to the Defence of each of the Accused and to the Chamber by 20 March 2006; and

(b) That the Registry serve a copy of this Decision upon Expert Witness Charles Ntampaka as soon as practicable; and

III. GRANTS that part of Mathieu Ngirumpatse's "*Mémoire en Réponse à la Demande de Prorogation de Délai au Dépôt du Rapport de Monsieur Ntampaka*," which seeks an Order from the Chamber that the report of Ntampaka be disclosed by 20 March 2006 and DENIES the remainder of the said *Mémoire*; and

IV. DENIES Joseph Nzirorera's "Second Motion to Exclude Testimony of Charles Ntampaka" in its entirety.

Arusha, 13 February 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Decision on Defence Motion to Report Government of a Certain State to United Nations Security Council and on Prosecution Motions Under Rule 66 (C) of the Rules
Article 28 of the Statute of the Tribunal and Rule 66 (C) of the Rules of Procedure and Evidence
15 February 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Report of the Government of State to United Nations Security Council for non cooperation with the Tribunal, Exceptional circumstances relieving the State of its cooperation obligation : security concerns and fact that the information relate to a witness currently prosecuted – Partial disclosure to the Defence of the material disclosed by the State, Exception to the Prosecution disclosure obligations : contrary to the public interests or affect the security interests of any State, Balance between the rights to a fair trial of the Accused and of Witness T – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rules 7 bis, 66 (A), 66 (B), 66 (C), 68 (A), 68 (D) and 70 (B) ; Statute, art. 28

International Cases cited :

I.C.T.R. : 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. Edouard

Karemera et al., Ordonnance visant au dépôt des soumissions d'un Etat, 13 February 2006 (ICTR-98-41)

Introduction

1. The first trial session in this case was held from 19 September to 28 October 2005, with the Prosecution calling Witnesses G and GFJ. Prosecution Witness T was initially scheduled to be called during that first trial session but was not actually heard.

2. On 23 February 2005, the Chamber requested a State[1] to provide its assistance so that all the parties in the current proceedings could be served, as soon as possible, with the following documents pertaining to Witness T:[2]

> (i) copies of all documents on the investigation and prosecution of this Witness which contain a description of the charges being investigated or lodged against this Witness or any facts upon which those charges are based ; and
>
> (ii) copies of any statement made by this Witness before the judicial or law enforcement authorities of the State.

3. In early September 2005, the Prosecutor made an independent request for the abovementioned documents under his power to seek assistance of State authorities in the collection of evidence.[3] Having obtained these documents, the Prosecution made two applications, one filed *inter partes* and the other one filed ex parte, moving the Chamber to allow partial disclosure of the documents under Rule 66 (C) of the Rules of Procedure and Evidence ("Rules").[4] Both the Defence for Nzirorera and Ngirumpatse opposed the applications and requested immediate disclosure of all the material received from the State.[5]

4. On 12 October 2005, as a result of an additional communication made by the authorities of the State, the Prosecution requested the Chamber to permit redacted disclosure of a statement of Witness T taken on 29 September 2005, but served in edited form on the Defence on 7 October 2005.[6] The Defence for each Accused opposed the Motion and requested to obtain an un-redacted version of that statement.[7]

5. In a separate Motion, the Defence for Nzirorera moved the Chamber, pursuant to Rule 7 *bis* of the Rules, to request the President of the Tribunal to report the failure of the State to cooperate with the Tribunal following the Decision of 23 February 2005 to the United Nations Security Council.[8] The Prosecution responded that this Motion was moot since the requested file was disclosed by the State to the Prosecution and an application was made for disclosure in part under Rule 66 (C) of the Rules.[9]

6. On 14 October 2005, the Chamber considered that the Prosecution Motions under Rule 66 (C) of the Rules concerned the authorities of the State and that these authorities may also be able to provide

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[1] In accordance with specific protective measures applicable in the instant case, the name of the State is specified in the Confidential Annex to the present Decision placed under seal.
[2] Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera, Case N°ICTR-98-44-PT (« Karemera et al. »), Décision relative à la requête de Joseph Nzirorera aux fins d'obtenir la coopération du gouvernement d'un certain Etat (TC), 23 February 2005.
[3] Prosecution Motions under Rule 66 C for material within the Dossier of a certain State to be reviewed in camera by the Trial Chamber and ruled not disciosable, filed inter partes and exparfe on 26 September 2005.
[4] Ibidem.
[5] The Defence for Joseph Nzirorera filed a Preliminary Response on 30 September 2005 and a Supplemental Response on 20 October 2005, the Defence for Mathieu Ngirumpatse filed a Response on 3 October 2005, and the Prosecution filed Replies to these Responses on 6 and 10 October 2005.
[6] Prosecution Motion to Permit the Redacted Disclosure of the Statement of Witness T taken by the authorities of a State on 29 September 2005, and served in edited form on the Defence on 7 October 2005, filed ex parte on 12 October 2005.
[7] The issue has been first raised in open court by the Defence for Nzirorera, see T. 10 October 2005, p. 7.
[8] Motion to Report Government of a certain State to United Nations Security Council, filed on 20 September 2005.
[9] The Prosecution files a Response on 26 September 2005 and the Defence replied thereto on 30 September 2005.

important assistance to the chamber.[10] These authorities were therefore invited to make submissions on the Prosecution Motions under Rule 66 (C)[11] and on the Defence application to report the State to the Security Council.[12] These submissions were filed on 3 December 2005.

7. The Chamber is now in a position to deal with the Defence Motion to report to the United Nations Security Council, and the submissions regarding disclosure in part of documents related to Witness T.

Deliberations

Request to Report the State to the United Nations Security Council

8. In its Motion, the Defence for Nzirorera claims that the State has failed to comply with the Decision of 23 February 2005 requesting its cooperation to provide certain documents relating to Witness T to the parties in this case. It is submitted that the authorities provided the requested material to the Prosecution but not to the Defence which the Prosecution now applies to be only partially disclosed pursuant to Rule 66 (C). Accordingly, the Defence requests the President of the Tribunal to report this failure to the United Nations Security Council.

9. The Prosecution explains that, during the course of a mission in Europe, it found out that the authorities of the State had serious concerns regarding the disclosure of the material sought, including the fact that Witness T's Counsel strongly objected to any disclosure in a letter dated 15 September 2005. Consequently, the Prosecution offered the authorities of the State the opportunity to deliver Witness T's judicial record in its entirety to the Chamber and to request the Chamber to make a fair determination regarding its disclosure pursuant to Rule 66 (C) of the Rules. The Prosecution was of the view that such action would expedite the proceedings and address concerns expressed by the State regarding public disclosure of the material.

10. In their submissions, the authorities of the State emphasize its obligation and willingness to cooperate with the Tribunal. The State, however, explained that full disclosure of Witness T's judicial records would be contrary to the applicable domestic law and would also infringe on Witness T's right to a fair trial as he is currently in judicial proceeding before the State. Full disclosure of the material to the Defence could prejudice the security of certain witnesses specifically identified in the documents. The authorities of the State express the view that the suggestion made by the Prosecution in its applications under Rule 66 (C) for partial disclosure of Witness T's judicial records will satisfy both its obligation to cooperate with the Tribunal and to protect its own security interests. They conclude that due to, among other things, security reasons, the documents contained in Witness T's judicial record can only be partially disclosed to the Defence.

11. Rule 7 *bis* of the Rules provides that

> "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".

A State is, however; permitted to rely on exceptional circumstances, including security interests, to be relieved of its obligation to cooperate with the Tribunal.[13]

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[10] *Karemera et al*., Decision on Defence Motion for Disclosure of Prosecution *Ex Parte* Motion under Rule 66 (C) and Request for Cooperation of a Certain State (TC), 14 October 2005; and *Karemera et al*., *Ordonnance portant extension de délai pour le dépôt de soumissions* (TC), 11 November 2005.

[11] Prosecution Motions under Rule 66 (C) for material within the Dossier of a certain State to be reviewed in camera by the Trial Chamber and ruled not diselosable, filed inter partes and *ex parte* an 26 September 2005; and Prosecution Motion to Permit the Redacted Disclosure of the Statement of Witness T taken by the authorities of a State on 29 September 2005, and served in edited form on the Defence on 7 October 2005, filed ex parte on 12 October 2005.

[12] Motion to Report Government of a certain State to United Nations Security Council filed on 20 September 2005.

12. In the present case, it is clear that the authorities of the State had difficulties, including security reasons, to comply with the Decision of 23 February 2005 and was of the view that their position could be represented to the Chamber via another organ of the Tribunal, the Prosecutor's Office. The Chamber also finds that, in its applications, the Prosecution fairly represented the State's concerns and did not intend to frustrate the disclosure of the material. This procedure is not the most appropriate one to comply with an Order to cooperate with the Tribunal. However, the Chamber is of the view that, in these particular circumstances, the authorities have not failed to comply with their obligations under Article 28 of the Statute. The Defence Motion to report the State to the United Nations Security Council falls therefore to be rejected.

13. The Chamber has now to determine whether the disclosure in part, as proposed by the Prosecution and supported by the State, can be granted.

Request for Partial Disclosure

14. The Prosecution has divided the material into three sets of CDS : (1) (CD 1) Material that can be disclosed and was effectively disclosed in redacted form to the Defence on 26 September 2005, containing contents of statements of Witness T to judicial police officers of the State; (2) (CD 2) Material to be reviewed under Rule 66 (C); and (3) (CD 3) Interna1 legal correspondence and bills for the investigation. The Prosecution moves the Chamber to order that the material contained in CD2, which is divided into 4 sub-sets of CDS (CD2A, 2B, 2C and 2D), is not subject to disclosure until the trial of Witness T is completed. It is submitted that full disclosure of the material contained in CD2 could violate Witness T's right to fair trial. The Prosecution contends that the material contained in CD3 is classified as internal documents falling within the ambit of Rule 70 of the Rules, and is not subject to disclosure.

15. In a third Motion, the Prosecution moves the Chamber to permit redacted disclosure of Witness T's statement taken by the authorities of the State on 29 September 2005, and served in edited form on the Defence on 7 October 2005. It claims that un-redacted disclosure of this statement may prejudice the fair trial of Witness T,

16. The Defence for Nzirorera argues that all the material in the Prosecution's possession should be disclosed forthwith to allow it to complete its investigation before Witness T testifies. Should the Chamber determine the need for an in camera inspection, the Defence submits that the Chamber could nevertheless order the disclosure of exculpatory material under Rule 68 (A) of the Rules. Alternatively, if the Chamber concludes that any of the material should be withheld until after the trial of Witness T is completed, the Defence requests that the testimony of Witness T be delayed until his tria1 in the State is concluded and the objection to disclosure has become moot.

17. The Defence for Ngirumpatse claims that the Prosecution abusively intercepted the documents and has withheld them, prejudicing its ability to cross-examine Prosecution witnesses. It requests that the Chamber deny the Motion, order the Prosecution to disclose all of the documents and adjourn the hearing of the Prosecution witnesses for 60 days, allowing the Defence to examine the documents. In the alternative, the Defence requests the Chamber to postpone the testimony of Witness T and of other Prosecution witnesses, in particular Witnesses G, ALG, UB and GFJ until after the trial of Witness T and complete disclosure by the Prosecution, or exclude their testimony altogether,

18. Rules 66 (C) and 68 (D) of the Rules provide for an exception to the Prosecution disclosure obligations under Sub-Rules 66 (A), (B) and 68 (A) if the disclosure "may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interests or affect the security interests of any State", Rule 70 (B) of the Rules provides that

[13] *Karemera et al*., 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 (TC), 9 March 2004, para. 18.

"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".

19. After reviewing the documents sought for non-disclosure, the Chamber is particularly concerned that Witness T receives a fair trial. The Chamber is persuaded that it must balance the rights of the Accused with those of Witness T to receive fair trials in their respective criminal proceedings.

20. The Chamber finds that there is likelihood that some of the documents contained in CD2 A, B, C and D if disclosed to the Defence before Witness T's trial, may violate that right and therefore be contrary to the public interests. In the present case, the Accused has already received substantial disclosure regarding Witness T's testimony and has access to other relief with regard to the documents contained in CD2 at a later stage in these proceedings. The Chamber is therefore of the view that the documents contained in CD2 should not be subject to disclosure at this stage.

21. The Chamber however adopts the Prosecution's suggestion, agreed to by the authorities of the State that some statements made by Witness T contained in CD2B may be disclosed now in a redacted form and will not affect the public interests. Under these circumstances, disclosure of these statements, in a redacted form, should be made

22. In addition, the Chamber needs further information before deciding whether disclosure of Witness T's immigration files contained in CD2D could be ordered. In that regard, the Chamber has already requested the cooperation of the State in a separate Order and will reserve its ruling on that matter.[14]

23. The Chamber notes that all of the documents contained in CD3, except for one report, concern Witness T's criminal proceedings in the State The report is also contained in CD2A, which may be disclosed at a later stage. The other documents in CD3 were provided to the Prosecution by the authorities of the State on a confidential basis and therefore should not be disclosed without the consent of the State in accordance with Rule 70 (B) of the Rules. It must be further noted that these documents are not likely relevant to the preparation of the Defence in this case.

24. In order to preserve the right of Witness T to a fair trial and the public interests, the Chamber is also of the view that the Prosecution is permitted to maintain the redaction of Witness T's statement taken on 29 September 2005, served on the Defence on 7 October 2005.

Delay or Exclusion of Witness Testimony

25. The Chamber notes that following the latest information provided by the Prosecution,[15] Witness T will not be called to testify during the second trial session which started on 13 February 2006 as originally planned. The testimony bas not yet been rescheduled. In light of these particular circumstances, neither the exclusion nor the postponement of Witness T's testimony is warranted. The Chamber extends this reason to the request to exclude the testimony of certain Prosecution witnesses, in particular Witnesses G, ALG, UB and GFJ. Exclusion of evidence is at the extreme end of a scale of measures available to the Chamber in addressing any prejudice to the rights of the Accused. The Defence has not show, at this stage, the existence of any prejudice that would justify such an extreme remedy.

26. In response to Ngirumpatse's request to postpone the testimony of certain witnesses, the Chamber reminds the Defence that it has already denied the postponement of Witness G and Witness GFJ's testimony who were heard during the first trial session in September 2005. The Chamber is of

[14] Karemera et al., Ordonnance visant au dépôt des soumissions d'un Etat (TC), 13 February 2006.
[15] Order of appearance of witnesses for the trial session starting on 13 February 2006, filed on 15 December 2005.

the view that the right of the Defence to cross-examine the Prosecution witnesses will not be impaired if material is withheld from the Defence pursuant to this Decision. In addition, the Chamber has already specified that, if the need arises, witnesses could be recalled to testify on significant matters that arise in the course of the proceedings. At this stage, the interests of the justice would not be served by an order delaying the testimonies of some Prosecution witnesses.

27. Finally, it must be noted that in their submissions of 3 December 2005, the authorities of the State note that Witness T's Counsel agreed that his letter dated 15 September 2005 explaining his opposition to the full disclosure of Witness T's judicial records, could be disclosed to the parties in the instant case.

FOR THE ABOVE REASONS, THE CHAMBER

I. DENIES Joseph Nzirorera's Motion to Report the Government of a certain State to the United Nations Security Council;

II. DENIES the Defence requests for exclusion or postponement of the testimony of Witness T or of any other Prosecution witnesses;

III. GRANTS in part the Prosecution Motions;

IV. ORDERS that the documents pertaining to Witness T, contained in CD 2 annexed to the Second Prosecution Motion, should not be disclosed at this stage;

V. ORDERS that the documents pertaining to Witness T's judicial records, contained in CD 3, should not be disclosed without the consent of the State, except the report, which is also contained in CD2A, which could be disclosed after Witness T's trial;

VI. RESERVES its ruling with respect to the Witness T's immigration files;

VII. AUTHORIZES the Prosecution to maintain the redaction of Witness T's statement taken on 29 September 2005, served in edited form on the Defence on 7 October 2005;

VIII. REQUESTS the Registry to disclose to the Defence the letter dated 15 September 2005 written by Counsel for Witness T,[16] annexed to the Prosecution Motion under Rule 66 (C) for material within the Dossier of a certain State to be reviewed in camera by the Trial Chamber and ruled not disclosable, filed ex parte on 26 September 2005. [17]

Arusha, 15 February 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[16] The name of the Counsel is specified in the confidential Annex to the Present Decision placed under seal.
[17] The name of the State is specified in the confidential Annex to the present Decision placed under seal.

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Decision on Requests for Certification to Appeal Decision on Defence Motion to Report Government of a Certain State to United Nations Security Council and Prosecution Motions Under Rule 66 (C) Rule 73 (B) of the Rules of Procedure and Evidence 14 March 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Certification to appeal a decision granting partial disclosure of material communicated by a State to the Prosecution, Defence did not prove that an immediate resolution by the Appeals Chamber of the issue will materially advance the proceedings, Allegations of errors of law irrelevant – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rules 66 (A) (ii) and 73 (B) ; Statute, art. 28

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. Théoneste Bagosora et al., Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses, 21 July 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Defence Motion to Report Government of a Certain State to United Nations Security Council and on Prosecution Motions under Rule 66 (C) of the Rules), 15 February 2006 (ICTR-98-44) ; 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)

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)

Introduction

1. On 15 February 2006, the Chamber denied the Defence's request to report the Government of a certain State to United Nations Security Council[1] and granted in part the related Prosecution Motions Under Rule 66 (C).

2. On 20 February 2006, Joseph Nzirorera and Mathieu Ngirumpatse filed motions for certification to appeal the Decision.[2] The Prosecution opposes both motions.[3]

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[1] *Karemera et al.*, Decision on Defence Motion to Report Government of a Certain State to United Nations Security Council and Prosecution Motions Under Rule 66 (C) (TC), 15 February 2006.

[2] "Application for Certification to appeal decision on Defence Motion to report Government of a certain State to united nations Security Council and Prosecution Motions Under Rule 66 (C)", filed by the Joseph Nzirorera on 20 February 2006. "Requête de M. Ngirumpatse en certification d'appel contre les décisions suivantes: (...) Decision on Defence Motion to report Government of a Certain state to UNSC and on prosecution Motions Under Rule 66 (C) of the Rules)", filed on 20 February 2006 (...).

Discussion

3. Relying on a *Bagosora* Decision, Joseph Nzirorera contends that Trial Chamber I granted the certification to appeal its Decision on whether the Prosecution could have access to immigration records of Defence witnesses for impeachment purposes.[4] He submits that the same situation applies in the present case and the resolution of this issue by the Appeals Chamber will allow him to obtain the material in time for his use in cross-examining Witness T.

4. Joseph Nzirorera is of the view that the Chamber should also verify whether the requesting party has shown that the appeal could succeed, in addition to the clear standard required for certification.[5] According to him, the Chamber made some errors of law in the impugned Decision. The Chamber held that security concerns are a valid ground for a State not to comply with Article 28 of the Statute. Referring to the *Blaskic* case, he submits that the State must comply and could request protective measures to protect its national security interests.[6]

5. Joseph Nzirorera stresses that the Government of the State never filed any objection to the disclosure of the material requested. The Chamber erred in relying on an unofficial letter from a Prosecutor as the position of the Government of the State.

6. Moreover, Joseph Nzirorera submits that in the Chamber's ruling of 23 February 2005 following a Defence motion pursuant to Article 28 of the Statute, it was affirmed that the Prosecutor's request to use Rule 66 (C) was of no interest to him and inadmissible.[7] The Prosecutor got the same material from the State Prosecutor and applied the same Rule 66 (C) to withhold some documents. The Chamber erred in allowing an unlawful interference by the Prosecutor with the Article 28 procedure.

7. In addition, he claims that the Chamber valued the fair trial rights of Witness T over the rights of Joseph Nzirorera and those of his Co-accused.

8. According to Joseph Nzirorera, the Chamber could have ordered the disclosure of the documents with some protective measures, including an order forbidding the Defence to contact the witnesses revealed by the disclosure. Alternatively, the Chamber could have postponed the testimony of Witness T until the completion of his trial.

9. Mathieu Ngirumpatse argues that while the Chamber found that the Prosecution did not comply with its obligation, it refused to apply the consequence of its analysis but rather dismissed the Defence motions. The Prosecution's non-compliance with its obligations under Rule 66 (A) (ii) is systematic and tends to be strategic. Mathieu Ngirumpatse contends that the Chamber is creating a culture of impunity in favour of the Prosecution while penalizing the Defence. The Defence rights cannot be freely and fully exercised if the material is not disclosed in its entirety 60 days before the testimony of a witness, thereby affecting the fair and expeditions conduct of the proceedings. Moreover, the immediate resolution of this issue will allow the Chamber and the parties to hear the Prosecution witnesses in accordance with the rights of the Defence to cross-examine them with full knowledge of the case.

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[3] "Prosecutor's Response to Joseph Nzirorera and Mathieu Ngirumpatse application for Certification to Appeal Decision on Defence Motion to Report Government of a Certain State to United Nations Security council and Prosecution Motions Under Rule 66 (C)", filed on 27 February 2006.

[4] *The Prosecutor v. Théoneste Bagosora et al.,* Case N°ICTR-98-41-T *(Bagosora et al.),* Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses (TC), 21 July 2005.

[5] *Bagosora et al,* Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC), 16 February 2006, para. 4.

[6] *Prosecutor v. Tihomir Blaskic,* Case N°IT-95-14-A, 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. 64.

[7] Karemera et al., Décision relative à la requête de Joseph Nzirorera aux fins d'obtenir la coopération du Gouvernement d'un certain Etat (TC), 23 février 2005, para. 6.

10. The Prosecution is of the view that that both applications do not meet al1 the requirements of Rule 73 (B) and therefore have to be dismissed.

11. Rule 73 (B) provides that Decisions rendered under Rule 73 motions are without interlocutory appeal, except on the Chamber's discretion for very limited circumstances provided for in that Rule. Certification to appeal may be granted if both conditions stipulated by Rule 73 (B) are satisfied: the applicant must show (i) how the impugned Decision involves an issue that would significantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial, and (ii) that an "immediate resolution by the Appeals Chamber may materially advance the proceedings".

12. Having reviewed the applicants' Motions, the Chamber considers that the Defence has failed to show how the Decision involves an issue that would significantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial. The Chamber recalls that the respect of the rights of the Defence to cross-examine the Prosecution witnesses and the rights of the Accused to a fair and expeditious conduct of the proceedings were considered in the impugned Decision of 15 February 2006. In this regard, it was specified that Prosecution witnesses could be recalled to testify at a later stage of the proceedings, if necessary.[8]

13. The Chamber also takes the view that the Defence did not prove that an immediate resolution by the Appeals Chamber of the issue will materially advance the proceedings.

14. Moreover, Joseph Nzirorera referred to some errors of law as a ground for certification to appeal a Chamber's Decision without showing how such an argument meets the conditions set out by Rule 73 (B) of the Rules. The Chamber notes that allegations of errors of law are not relevant in considering a motion on certification to appeal.[9]

15. The Chamber concludes that the conditions under Rule 73 (B) have not been satisfied and is therefore unable to grant certification to appeal the Impugned Decision.

FOR THE ABOVE MENTIONED REASONS, THE CHAMBER

DENIES the Defence Motions on certification to appeal.

Arusha, 14 March 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[8] *Karemera et al.,* Decision on Defence Motion to Report Government of a Certain State to United Nations Security Council and Prosecution Motions Under Rule 66 (C) (TC), 15 February 2006, para. 26.

[9] *The Prosecutor v. Théoneste Bagosora et al.,* Case N°ICTR-98-41-T, Decision on the Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC), 16 February 2006, para. 4; *The Prosecutor v. Casimir Bizimungu et al.,* Case N°ICTR-99-50-T, 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.

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Order Assigning Judges to a Case Before the Appeals Chamber
16 March 2006 (ICTR-98-44-AR73.6)

(Original : English)

Appeals Chamber

Judge : Fausto Pocar, Presiding Judge

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Assignment of Judges

International Instruments cited :

Rules of Procedure and Evidence, rule 73 ; 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 "Joseph Nzirorera's Interlocutory Appeal from Decision Denying Motion for Stay of Proceedings and Request for Stay Pending Appeal" filed on 7 March 2006 against the Oral Decision rendered by the Trial Chamber on 16 February 2006 denying his Motion for Stay of Proceedings filed on 6 February 2006;

CONSIDERING Articles 11 (3) and 13 (4) of the Statute of the International Tribunal and Rule 73 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. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-AR73.6, shall be composed as follows:

Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Done in English and French, the English version being authoritative.

Done this 16th day of March 2006, At The Hague, The Netherlands.

[Signed] : Fausto Pocar

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Decision on Requests for Disclosure of Witness T's Immigration Records
Rule 54 of the Rules of Procedure and Evidence
17 March 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Prosecutor seeking to be relieved of its disclosure obligation, No objection of the judicial authorities of the relevant States to disclose Witness' immigration records – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rules 54 and 66 (C)

Introduction

1. Following a Defence application for orders to compel the Prosecution to disclose material relating to the testimony of Witness T, the Chamber requested a certain State[1] ("First State") to assist by providing documentation in its possession concerning the witness. In September 2005, the Prosecution received information from the First State, which included material from the witness' immigration files in another State[2] (the "Second State"). On 13 February 2006, the Chamber made an Order requesting the authorities of the First State to provide additional information specifically related to Witness T's immigration file.

2. On 15 February 2006, in its "Decision on Defence Motion to Report Government of a Certain State to United Nations Security Council and on Prosecution Motions under Rule 66 (C) of the Rules", the Chamber reserved its ruling on the question of whether the Prosecution must disclose Witness T's immigration records to the Defence, until it had received a response to its Decision of 13 February 2006 from the First State. The Chamber received the said Response on 13 March 2006.[3]

Discussion

3. The basis for the Prosecution seeking to be relieved of its obligation to disclose the records entirely or in redacted form under Rule 66 (C) of the Rules was that it would prejudice ongoing investigations or that it was contrary to the public interest of the First and Second States.

4. The Chamber notes from the Response of 13 March 2006 that the judicial authorities of the relevant States do not have any objection to the disclosure of Witness T's immigration records to the Parties, on the condition that the names of the witnesses mentioned in statement number 20041224 be redacted. Further, the Chamber has reviewed the immigration documents in question and does not find that the information contained in these documents would prejudice any ongoing investigation. Therefore, the Prosecution's argument is no longer applicable.

5. Finally, the Chamber notes that Joseph Nzirorera sought the same relief in his Confidential Motion to obtain the material from the Second State.[4] That Motion is now moot and is dismissed.

For the above mentioned reasons, the Chamber

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[1] In accordance with specific protective measures applicable in the instant case, the name of the State is specified in the Confidential Annex to the present Decision.
[2] In accordance with specific protective measures applicable in the instant case, the name of the Other State is specified in the Confidential Annex to the present Decision.
[3] The State's response is also attached as a Confidential Annex to this decision.
[4] Filed by Nzirorera on 29 November 2005.

I. ORDERS the Prosecutor to disclose Witness T's immigration records to the Defence in accordance with the redaction below;

II. ORDERS that the names of witnesses appearing in statement number 20041224 be redacted;

III. DENIES the remainder of the Prosecutor's Motion with respect to Witness T's immigration file;

IV. DENIES Joseph Nzirorera's Motion for Request for Cooperation to Government of the Second State in its entirety.

Arusha, 17 March 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Decision on Defence Requests for Certification to Appeal Decision on Motions for order for Production of Documents by the Government of Rwanda and for Consequential Orders
Rule 73 (B) of the Rules of Procedure and Evidence
17 March 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Request for a certification to appeal, Rule 73 motions are in principle without interlocutory appeal, Conditions for granting a certification to appeal are cumulative, Right of the accused to a fair and expeditious conduct of the proceedings, Benefit of the disclosure of judicial records to the preparation of the Defence and to the Trial Chamber in its assessment of witnesses' credibility – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 66 (A) (ii), 73 (B) and 90 (G)

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Reasons for the Decision on Request for Admission of Additional Evidence, 8 September 2004 (ICTR-96-10 and ICTR-96-17) ; 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. Edouard Karemera et al., Decision on Motions to Compel Inspection and Disclosure and to direct Witnesses to Bring Judicial and Immigration Records, 14 September 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders, 13 February 2006 (ICTR-98-44) ; 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)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Dario Kordić and Mario Čerkez, Decision on Request of the Republic of Croatia for Review of a Binding Order, 9 September 1999 (IT-95-14/1)

Introduction

1. The Defence has complained that, despite repeated efforts, certain documents have not yet been obtained from the Rwandan government pertaining to Prosecution witnesses. On 13 February 2006, the Chamber rendered its "Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders" in which it granted in part the Defence Motions for the material requested which was sufficiently defined.

2. On 20 February 2006, Joseph Nzirorera and Mathieu Ngirumpatse filed motions for certification to appeal the said Decision on the issue of the material that the Chamber decided was not sufficiently defined.[1] The Prosecution opposes both motions.[2]

Discussion

3. Joseph Nzirorera seeks a certification to appeal the issue discussed in paragraph 8 of the impugned Decision which held that:

> "with regard to the documents containing charges filed against the listed persons and information from witnesses or victims which accuse the listed Prosecution witnesses of crimes relating to events in 1994, the Chamber finds that the material requested is not adequately precise for a request of cooperation of the Rwandan authorities".

4. Joseph Nzirorera argues that this denial of disclosure of charges will deprive the Defence of important information which can be used in its cross-examination of Prosecution witnesses to challenge their credibility.

5. Moreover, Joseph Nzirorera submits that the Chamber should also verify whether or not the requesting party has shown that the appeal could succeed.[3] He also argues that the Chamber made an error of law in determining that the documents sought did not meet the specificity required by the Appeals Chamber for Article 28, being whether the requested State can sufficiently identify the documents to disclose them to the requesting party.[4] He claims that the charging documents and statements of witnesses and victims are part of the dossier of the Prosecution witness whose prior statements were ordered to be disclosed by the Chamber and can be easily identified by the Rwandan authorities.

6. Mathieu Ngirumpatse argues that while the Chamber found that the Prosecution did not comply with its obligation, it refused to apply the consequence of its analysis but rather dismissed the Defence motions. The Prosecution's non-compliance with its obligations under Rule 66 (A) (ii) is systematic and tends to be strategic. Mathieu Ngirumpatse contends that the Chamber is creating a culture of impunity in favour of the Prosecution while penalizing the Defence. The Defence rights cannot be freely and fully exercised if the material is not disclosed in its entirety 60 days before the testimony of a witness, thereby affecting the fair and expeditions conduct of the proceedings. It claims that the immediate resolution of this issue will allow the Chamber and the parties to hear the Prosecution

[1] "Motion for Certification to Appeal Decision on Motions for Order for Production of Documents by the Government of Rwanda"; and "*Requête de M. Ngirumpatse en certification d'appel contre les decisions suivantes*: (...) Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders", filed both on 20 February 2006.
[2] "Prosecutor's Response to Joseph Nzirorera and Mathieu Ngirumpatse Motions for Certification to Appeal Decisions on Motion for Order for Production of Documents by the Government or Rwanda", filed on 27 February 2006.
[3] *The Prosecutor v. Théoneste Bagosora et al.,* Case N°ICTR-98-41-T (*Bagosora et al.*), Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC), 16 February 2006, para. 4.
[4] *Prosecutor v. Kordic and Cerkez,* Case N°IT-95-14/1-A, Decision on Request of the Republic of Croatia for Review of a Binding Order (AC), 9 September 1999, para. 38.

witnesses in accordance with the rights of the Defence to cross-examine them with full knowledge of the case.

7. The Prosecution contends that both applications do not meet all the requirements of Rule 73 (B).

8. Rule 73 (B) provides that Decisions rendered under Rule 73 motions are without interlocutory appeal, except on the Chamber's discretion for very limited circumstances provided for in that Rule. Certification to appeal may be granted if both conditions stipulated by Rule 73 (B) are satisfied: the applicant must show (i) how the impugned Decision involves an issue that would significantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial, and (ii) that an "immediate resolution by the Appeals Chamber may materially advance the proceedings". The Chamber considers that the two conditions set out above are cumulative and an applicant needs to satisfy both of them in order for the Chamber to exercise its discretion in favour of certification.

9. The Chamber recalls that the right of the accused to a fair and expeditious conduct of the proceedings have been taken into account in the Impugned Decision of 13 February 2006. It was specified that, if need arises, Prosecution witnesses could be recalled to testify at a later stage of the proceedings.[5] The Chamber notes that the Defence counsels have failed to show how the Decision involves an issue that would significantly affect a fair and expeditious conduct of the proceedings. In addition, it considers that the first requirement of the disjunctive first condition for certification to appeal having not been satisfied, there is no need to consider the alternative requirement i.e. whether the issue will affect the outcome of the trial.

10. Mathieu Ngirumpatse contends that the immediate resolution of this issue will prevent all disclosure problems and the renewal of Defence motions due to the violations of its rights without obtaining any sanction. It will also allow sanctioning efficiently these violations to prevent their repetition. In addition, the Chamber and the parties will hear the Prosecution witnesses in accordance with the rights of the Defence and the Accused to cross-examine them with a full knowledge of the case. Mathieu Ngirumpatse also argues that the remedy the Chamber always proposes consists in giving the opportunity to recall a witness for further cross-examination, if it becomes necessary. The immediate resolution of this issue may clarify such interpretation of the Rules.

11. The Chamber endorses the Tribunal's finding that disclosure of judicial records is not merely for the benefit of the preparation of the Defence but it is also required to assist the Trial Chambers in their assessments of witnesses' credibility pursuant to Rule 90 (G) of the Rules.[6] The Chamber has found in the Impugned Decision that

> "the overall interest of the proceedings in this case would not be served by an order delaying the testimonies of some Prosecution witnesses scheduled to testify during the next trial session before the Chamber, even if their judicial records are not disclosed before they testify. They can be recalled at a later stage of the proceedings, if necessary".[7]

Consequently, Mathieu Ngirumpatse did show how an immediate resolution by the Appeals Chamber of the issue will materially advance the proceedings.

12. Moreover, Joseph Nzirorera refers to an error of law as a ground for certification to appeal the impugned Decision without showing how such an argumentation meets the requirements set out by

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[5] *Karemera et al.,* Decision on Motions for Order for Production of Documents and Consequential Orders (TC), 13 February 2006, para. 13.

[6] *Karemera et al.,* Decision on Motion for Order for Production of Documents by the Governments of Rwanda and for Consequential Orders, 13 February 2006, para. 7; *Karemera et al.,* Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records (TC), 14 September 2005, para. 8; *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana,* Case N°ICTR-96-10-A, ICTR-96-17-A, Reasons for the Decision on Request for Admission of Additional Evidence (AC), 8 September 2004, paras. 47-52.

[7] *Karemera et al.,* Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders (TC), 13 February 2006, para. 13

Rule 73 (B) of the Rules. The Chamber finds that the allegation relating to an error of law is irrelevant in considering this motion on certification to appeal.[8]

FOR THE ABOVE MENTIONED REASONS, THE CHAMBER,

DENIES the Defence Motions on certification to appeal.

Arusha, 17 March 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[8] *Bagosora et al.,* Decision on the Motion for Reconsideration Concerning Standarjs for Granting Certification of Interlocutory Appeal (TC), 16 February 2006, para. 4; *The Prosecutor v. Casimir Bizimungu et al.,* Case N°ICTR-99-50-T, 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 Dis:losure of Relevant Material (TC)", 4 February 2005, para. 28.

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Decision on Request for Extension of Time
24 March 2006 (ICTR-98-44-AR73.7)

(Original: English)

Appeals Chamber

Judges : Liu Daqun, Presiding Judge ; Mohamed Shahabuddeen ; Mehmet Güney ; Theodor Meron ; Wolfgang Schomburg

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Extension of time, Showing of good cause : Missing of French translations, Joint nature of the trial and the breadth of the Appeal necessitate the granting of a reasonable delay to allow for translation – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 11

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 the "Prosecutor's Interlocutory Appeal of the Trial Chamber's Decision Given Orally on 16 February 2006 Regarding the Role of the Electronic Disclosure Suite in Discharging the Prosecution's Disclosure Obligations", filed on 6 March 2006 ("Appeal"). The Appeals Chamber is also presently seized of a request for an extension of time to reply to the Appeal pending the translation of the Prosecution's submissions into French, filed by Mathieu Ngirumpatse ("Motion for Extension of Time").[1]

2. Rule 116 of the Rules of Procedure and Evidence of the Tribunal allows for extensions of time upon a showing of good cause. As the Appeals Chamber has observed, counsel for Mr. Ngirumpatse work in French and not in English.[2] It is clear that, in order to be able to make a full answer to the Appeal, he needs access to French translations of the Appeal itself. The Appeals Chamber has recently determined in similar circumstances in this case that this constitutes good cause.[3] Although the Prosecution objects to Mr. Ngirumpatse's request,[4] the joint nature of the trial and the breadth of the Appeal necessitate the granting of a reasonable delay to allow for translation for his benefit.

3. For the foregoing reasons, the Motion for Extension of Time is GRANTED. The Registry is DIRECTED to provide to Mr. Ngirumpatse and his counsel, on an urgent basis, French translations of the Appeal and the present decision. Starting from the date on which the last of these translated documents is transmitted, Mr. Ngirumpatse will be permitted 10 days to file his response, if any, to the Appeal.

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[1] Requête de M. Ngirumpatse aux fins d'extension du délai de réponse sur le Prosecutor's Interlocutory Appeal of the Trial Chamber's Decision Given Orally on 16 February regarding the Role of the Electronic Disclosure Suite in Discharging the Prosecution's Disclosure Obligations, filed 10 March 2006.

[2] *The Prosecutor v. Édouard Karemera et al.,* Case N°ICTR-98-44-AR116, Decision on Request for Extension of Time, 27 January 2006, para. 4.

[3] *Karemera et al.,* Decision on Request for Extension of Time, para. 4.

[4] In response, the Prosecution argues that translation is unnecessary because counsel for Mr. Ngirumpatse did not specify in his motion that he could not work in English, Mr. Ngirumpatse did not file the original motion underlying the impugned decision, and he has a related request for certification pending. See *Réponse du Procureur à la Requête de M. Ngirumpatse aux fins d'extension du délai de réponse sur la Prosecutor's Interlocutory Appeal of the Trial Chamber's Decision Given Orally on 16 February regarding the Role of the Electronic Disclosure Suite in Discharging the Prosecution's Disclosure Obligations*, filed 14 March 2006, paras. 3-5.

Done in English and French, the English version being authoritative.

Done this 24th day of March 2006, At The Hague, The Netherlands.

[Signed] : Liu Daqun

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Decision on Motions to Exclude Testimony of Prosecution Witness ADE Rule 73 bis of the Rules of Procedure and Evidence 30 March 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Exclusion of witness' testimony, Applications must be filed inter partes in principle, General principle of audi alteram partem, Ex parte applications not necessarily contrary to the fairness of the proceedings when necessary in the interests of justice, Inappropriate reasons for filing ex parte, No prejudice to the Defence – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 54 and 73

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Edouard Karemera et al., 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)

Introduction

1 The trial in this case started on 19 September 2005. On 13 December 2005, the Chamber granted leave to add Witness ADE to the Prosecution witness list, but ordered the Prosecution to notify, no later than 10 January 2006, the Chamber and all the Accused which witnesses could be removed as a result of Witness ADE's testimony.

2. After that, the Prosecution submitted that it could not indicate which Prosecution witnesses could be removed from the list as a result of the addition of Witness ADE and that it would only be in a position to do so after the witness has testified.[1] On 12 January 2005, the Defence for Nzirorera filed a motion seeking the exclusion of the testimony of Witness ADE.

3. On 10 February 2006, considering the Prosecution's argument that it was premature to provide such information, the Chamber ruled that the Prosecution is expected to know its case before it goes to trial and should therefore be in a position to comply with the Chamber's Order of 16 December 2005.[2]

[1] See Prosecutor's Inter-Office Memorandum, dated 20 December 2005.

[2] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-T ("*Karemera et al.")*, Decision on Prosecution Motion Seeking Extension of Time to File Applications under Rule 92 *bis* (TC), 10 February 2006.

4. On 20 February 2006, the Prosecution filed confidential and to the attention of the Chamber only, a list of the witnesses which could be removed from the Prosecution's witness list as a result of Witness ADE's testimony.[3] As a result, the Defence for Ngirumpatse claims that the Prosecution has not complied with the Chamber's order and therefore that Witness ADE's testimony should be excluded.[4] Since Joseph Nzirorera, Mathieu Ngirumpatse and the Prosecution's filing are interrelated, the Chamber will now consider them altogether.

Discussion

5. As a preliminary matter, the Chamber notes that it will consider Mathieu Ngirumpatse's Motion dated 27 February 2005, but filed on 28 February 2005.

6. The Defence for Nzirorera submits that the Chamber's order of 13 December 2005 was a condition precedent for Witness ADE to testify and since that condition was not fulfilled on 10 January 2006, Witness ADE's testimony should be excluded. The Defence for Ngirumpatse submits that the Prosecution's *ex parte* filing of 20 February 2006 is contrary to the Chamber's prior Orders of 13 December 2005 and 10 February 2006 and to Rule 73 of the Rules of Procedure and Evidence. It further argues that the Prosecution's witness list is an essential document and that the *ex parte* communication is tantamount to refusing to give a final witness list after over six months after the trial has started. The Defence for Ngirumpatse requests the Chamber to (1) find that the Prosecution has not complied with its requirement to inform the Chamber and the Defence which witnesses could be removed as a result of adding Witness ADE to the list; (2) find that the Prosecution did not comply with the Chamber's order of 10 February 2006; (3) retract, pursuant to Rule 54, its authorization to add Witness ADE to the witness list as a consequence.

7. To its filing of 20 February 2006, the Prosecution attached *ex parte* a list of seven witnesses that could be removed as a result of Witness ADE testimony. It claims three reasons for this filing only with the Chamber. First, in the Prosecution's view, the Defence may not prepare for evidence of these witnesses prior to ADE's testimony. There could be therefore delays in receiving their evidence if the Prosecution should decide to call them. Second, the Prosecution claims that the disclosure to the Defence of the witnesses that could be removed forces the Prosecution to reveal its strategy of which witnesses will be heard as a result of lack of confidence in ADE's testimony. Finally, in the Prosecution's view, if these witnesses find out that they may not be called for this reason, they might refuse to cooperate because of the characterization of their testimony. The Prosecution feels that despite court orders, this information travels quickly to witnesses and their reaction to these circumstances may have strong negative implications.

8. As a general rule, applications must be filed *inter partes*.[5] Such a rule finds its expression in the general principle of *audi alteram partem*. *Ex parte* applications are not necessarily contrary to the fairness of the proceedings where it is thought to be necessary in the interests of justice to do so: where the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact the application itself, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application.

9. In the present case, the Prosecution's arguments are not persuasive. It is clear that the purpose, for which the Chamber requested the Prosecution to disclose the names of the witnesses which may be removed following the testimony of ADE, was to assist the preparation of the Defence. The

[3] Prosecutor's Filing Pursuant to Trial Chamber III Decision of 10 February 2006 and 13 December 2005 concerning Prosecutor's List of Witnesses for the Trial.
[4] Mathieu Ngirumpatse's *Mémoire* is dated 27 February 2006, but has been filed on 28 February 2006. On the same date, he filed a request for extension of time for the Chamber to take into consideration his *Mémoire*. In addition, he filed another *Mémoire* requesting the Chamber to reconsider its Decision of 13 December 2005 and submitting the same arguments as the arguments developed in its first *Mémoire*.
[5] See: *Karemera et al*., Decision on Motion To Unseal *Ex Parte* Submissions and To Strike Paragraphs 32.4 and 49 from the Amended Indictment (TC), 3 May 2005.

Prosecution stated that it would be able to remove some of these witnesses, and the Chamber simply ordered it to notify the Chamber and the Defence, not to actually remove the witnesses as seen by its Order of 13 December 2005. At this stage, the Defence is still expected to prepare the evidence of all the witnesses listed on the Prosecution list. In addition, the Chamber decided that these witnesses who could be removed should not be called during the same session during which Witness ADE will testify. All the necessary steps have therefore been taken to avoid any delay in the proceedings.

10. The Chamber does not consider that the Prosecution's strategy can be jeopardized by such a disclosure to the Defence. In its reply to Joseph Nzirorera's Motion, the Prosecution clearly explains its intention and the possibility of abandoning some portions of the Indictment as pleaded, and therefore the evidence to be given by other witnesses, because ADE's evidence would be so compelling on other aspects of the Indictment.

11. The Chamber has sympathy for the Prosecutor's concern that some witnesses may decline to cooperate if they were informed that they could not be called. This argument should not prevent disclosure to the Defence but would facilitate better preparation of the defence.

12. For the foregoing reasons, the Chamber finds that the *ex parte* nature of the Prosecution's filing is inappropriate. The concern raised by the Prosecution as to dissemination of the information can be addressed by the filing being done confidentially.

13. The Chamber does not find however that the Accused suffered any prejudice in the present circumstances. The final Prosecution witness list, as set out in Rule 73 *bis* of the Rules, is the one filed by the Prosecution in accordance with the Chamber's Decision of 13 December 2005, which includes the seven witnesses that could be removed as a result of Witness ADE's testimony. The indication of which witnesses could be removed is only warranted to facilitate the Accused to better manage the preparation of their defence.

FOR THE ABOVE MENTIONED REASONS, THE CHAMBER

I. DENIES Joseph Nzirorera's and Mathieu Ngirumpatse's Motions;

II. DENIES the Prosecution's application to file *ex parte* the list of witnesses that could be removed as a result of Witness ADE's testimony;

III. ORDERS that the confidential annex to the Prosecution filing of 20 February 2006 be disclosed forthwith and confidentially to the Defence of each Accused persons.

Arusha, 30 March 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Scheduling Order
Rule 54 of the Rules of Procedure and Evidence
30 March 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Order of Appearance of Witnesses for the Next Trial Session, Discussion on the date of appearance of a witness having to testify by video-link, Ethical obligation as lawyers not to disseminate protected information, Duty of the Prosecution to present the best available evidence to prove its case – Length of Examination, Cross-examination limited to three times as long as the examination-in-chief

International Instruments cited :

Rules of Procedure and Evidence, rules 39, 68, 69 and 75 ; Statute, art. 19 and 20

International Cases cited :

I.C.T.R. : 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. 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. Augustin Bizimungu, Decision on the Prosecution's Motion dated 9 August 2005 to Vary its List of Witnesses Pursuant to Rule 73 bis (E), 21 September 2005 (ICTR-2000-56) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Variance of the Prosecution Witness List, 13 December 2005 (ICTR-98-44)

1. The trial in this case started on 19 September 2005. The second trial session was completed on 17 March 2006 after hearing the third Prosecution witness. At the Status Conference held the same day, the parties agreed that the next trial session will take place from 15 May until 14 July 2006. The order of witnesses to be heard, including disclosure concerns, and the length of time for the examination of witnesses were discussed. Furthermore, the Chamber granted the parties leave to file further submissions and that the Prosecution did so on 22 March 2006.

Order of Appearance of Witnesses for the Next Trial Session

2. In its submissions,[1] the Prosecution provides a list of witnesses to be called for the next session. The Defence teams only discuss the date Witness T should start testifying and the scheduling of Witness ADE.

3. All parties agree that Witness T be called at the commencement of the next session. The Accused Mathieu Ngirumpatse however requests that Witness T should start his testimony on 22 May 2006 so that both his Counsel and Co-Counsel, who has other duties the week before, may be present to assist him. While the Prosecution expresses its preference to call this witness on 15 May 2006 for technical reasons, it does not actually object calling him a week later. After consultation with the Registry, the Chamber has been informed that video-link facilities will be available from 22 May until 9 June 2006. The authorities of the State where the witness will reside during his testimony also confirmed their availability to support the organization of the video-link during that period. In order to preserve the fairness of the trial and the rights of the Accused to examine the witness against him in accordance with Articles 19 and 20 of the Statute of the Tribunal, the Chamber is therefore of the view that Witness T should start testifying from 22 May 2006.

4. Each Accused submits disclosure issues regarding Witness ADE which would impair the preparation of his defence. The postponement of his testimony to the fourth session is therefore requested. The Prosecution acknowledges its possession of several witness statements concerning Witness ADE, which may be considered as exculpatory material to be disclosed in accordance with Rule 68 of the Rules of Procedure and Evidence, but maintains its intention to call ADE at the next trial session. The Prosecution had stated its intention to disclose the statements on the 14 of May 2006,[2] but finally refrained from doing so and moved, at the Status Conference, the Chamber to order,

[1] See T. (closed session), 17 March 2006, p. 34 and Prosecutor's Submission on Scheduling for Trial Session #3.
[2] See Statement made by Prosecution Lead Counsel, T., 15 March 2006.

prior to any disclosure, the Defence not to reveal the identifying information contained in the statements. The Prosecution relied on its obligation under Rule 39 of the Rules to protect the security of informants and potential witnesses. The Defence Counsel considered that, in accordance with their ethical obligations as lawyers, they were already obliged not to disseminate protected information.

5. Whereas the Prosecution has the duty to present the best available evidence to prove its case, the Chamber must ensure a fair trial and conduct the proceedings with full respect for the rights of the Accused.[3] In the present case, Witness ADE is likely to be one of the most important prosecution witnesses. It is only recently that he has been added to the Prosecution witness list. Witness ADE statements have been disclosed.[4] It is not disputed that a redacted version of materials which may suggest the innocence or mitigate the guilt of the Accused or affect the credibility of Prosecution evidence have been disclosed only recently to the Defence although the next session is scheduled to commence on 15 May 2006. In those particular circumstances, the Chamber is of the view that scheduling this Witness for the next session could impair the fairness of trial and the rights of the Accused to have time and facilities to prepare their defence. The Prosecution is therefore requested to postpone the testimony of this witness and make the necessary arrangements to ensure the attendance of Witnesses T, ALG, XBM, ZF, GHK, GFA, HH and AWB as proposed in its submissions.

6. Rule 39 of the Rules provides that the Prosecutor may 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".

This Rule must be read in conjunction with Articles 19 and 20 of the Statute and Rules 69 and 75 of the Rules which vest Chambers with exclusive authority to order protective measures. The application of Rule 39 of the Rules by the Prosecution could not constitute, as such, an impediment to disclosure of identifying information with respect to Prosecution witnesses.[5] Moreover, it has been found that redacted portions of the statement of a former witness, including identity of the witness, have to be disclosed under Rule 68 when it is inextricably connected with the substance of the statements.[6]

7. In the present case, the Chamber is of the view that the Prosecution should disclose forthwith an un-redacted version of any Rule 68 material in its possession regarding Witness ADE. Since the witness statements regarding ADE may contain sensitive information that could affect the security of these witnesses, the Defence and the Accused should be requested not to disseminate to the public and media any identifying information included in.

Length of Examination

8. The Prosecution submits that cross-examination should be limited and last no more than three times as long as the examination-in-chief. The Defence for Nzirorera objects to a strict mathematical application to the length of cross-examination since witnesses can be unpredictable. Both Defence for Ngirumpatse and Karemera express serious concerns about the duration of the examination until now and agree that time standards for both parties may facilitate and expedite the proceedings.

9. In the Chamber's view, there is value in fixing time standards for the witness examination, including in-chief, cross and re-direct examination. This will not preclude the Chamber from adopting

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[3] Art. 19 and 20 of the Statute; see also *Muvunyi* Decision, par. 21; *Prosecutor v. Bizimungu, Ndindiliyamana, Nzuwonemeya, Saguhutu,* Case N°ICTR-2000-56-T, Decision on the Prosecution's Motion dated 9 August 2005 to Vary its List of Witnesses Pursuant to Rule 73 *bis* (E) (TC), 21 September 2005, par. 32.

[4] See *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-94-44-T ("*Karemera et al.*"), Decision on Variance of the Prosecution Witness List (TC), 13 December 2005.

[5] *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure (TC), 5 July 2005, par. 18.

[6] *Prosecutor v. Bagosora et al.*, Case N°ICTR-98-41-T, Decision on Motion for Disclosure under Rule 68 (TC), 1 March 2004, par. 6.

a flexible approach and grant extensions of time where appropriate. In addition, the experience in the present case has shown that both parties are willing and able to comply with time-standards when decided by the Chamber without jeopardizing the presentation of their case or the rights of the Accused.

10. The Prosecution has provided an estimated length of examination-in-chief for each witness to be called during the next session. The Chamber will address these estimates in details and discuss them as well as other practice directives before the beginning of the next session.

11. However, the duration of Witness T's testimony could be addressed now. The parties requests between three to four weeks for the examination of this witness. It must be noted that, in the *Bagosora* case, a complex case concerning four co-Accused, the same witness testified for only six days. The Chamber is of the view that the parties may be able to better focus their examination of this witness, so that the examination-in-chief could be done within two days (considering five hours in court per day), seven days being devoted to cross-examination and a half day for the re-direct.

ACCORDINGLY, the Chamber

I. ORDERS that the third trial session shall start on 15 May 2006 until 14 July 2006;

II. ORDERS that the testimony of Witness T take place by video-link from 22 May 2006 for a period of approximately ten days, which could be reviewed as the evidence unfolds;

III. ORDERS that Witness ADE testimony be not called during the third trial session;

IV. ORDERS the Prosecution to make the necessary arrangements to ensure the attendance of Witness T, ALG, XBM, ZF, GHK, GFA, HH and AWB as proposed in its submissions

V. ORDERS the Prosecution to disclose forthwith an un-redacted version of exculpatory material in its possession regarding Witness ADE;

VI. ORDERS that the Defence and the Accused persons shall not share, reveal or discuss, 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 witness whose statement shall be disclosed as ordered above, to any person or entity other than the Accused, assigned Counsel or other persons working on the Defence team.

Arusha, 30 March 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Order for the Prosecutor for Filing Information and Material Ex Parte and Under Seal Regarding Witness ADE
Rules 66 (C) and 68 (D) of the Rules of Procedure and Evidence
31 March 2006 (ICTR-98-44-T)

(Original : English)

Judge : Emile Francis Short, sitting pursuant to Rule 73 (A) of the Rules of Procedure and Evidence

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Request for permission for disclosure of limited information regarding payments and benefits provided to Prosecution Witness and his family, Willingness of the Prosecutor to submit only to the Chamber in camera the specifics not disclosed – Information and material sought to be kept confidential

International Instrument cited :

Rules of Procedure and Evidence, rules 66 (C), 68 (D) and 73 (A)

1. The trial in this case started on 19 September 2005. The Chamber is now seized of a Prosecutor's motion seeking, under Rules 66 (C) and 68 (D) of the Rules of Procedure and Evidence, permission for limited disclosure of information regarding payments and benefits provided to Prosecution Witness ADE and his family.[1] However, the Prosecutor did not provide the Chamber with the information and material sought to be kept confidential. He declares his willingness to submit to the Chamber *in camera*, and only to the Chamber, all the specifics not included in the disclosure already made to the Defence. The Accused Joseph Nzirorera contends that the Prosecutor's Motion should be denied on a technical ground because the Prosecution did not submit the material sought to be kept confidential as mandated by the Rules.[2]

2. When deciding whether the Prosecutor may be relieved from disclosure of material which may prejudice further or ongoing investigations, or may be contrary to the public interests or affect the security interests of any State, the Chamber must have access to the information and material that are sought to be kept confidential.[3] The fact that the Prosecutor did not directly make available to the Chamber the material does not as such prevent the Chamber from considering the merits of the application. In the present case, the Prosecutor offered to provide the information and material to be reviewed. At this stage, they should be therefore provided now to the Chamber only, in accordance with Rules 66 (C) and 68 (D) of the Rules.

FOR THE ABOVE REASONS, THE CHAMBER

HEREBY ORDERS the Prosecutor to file by Monday 3 April 2006, with the Registry, confidentially, under seal and only to the attention of the Chamber, the information and material that are sought to be kept confidential.

Arusha, 31 March 2006, done in English.

[Signed] : Emile Francis Short

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[1] Prosecutor's Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and His Family, filed on 15 December 2005.

[2] Joseph Nzirorera's Response to Prosecution's Motion to Permit Limited Disclosure of Information: Witness ADE, filed on 19 December 2005.

[3] Rule 66 (C) of the Rules provides:
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 which 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-Rules (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 68 (D) of the Rules 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 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.

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Decision on Édouard Karemera's Request for Extension of Time to Respond to Joseph Nzirorera's Interlocutory Appeal 4 April 2006 (ICTR-98-44-AR73.6)

(Original: English)

Appeals Chamber

Judges : Liu Daqun, Presiding Judge ; Mohamed Shahabuddeen ; Mehmet Güney ; Theodor Meron ; Wolfgang Schomburg

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Extension of time, No showing of good cause – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 116

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 the "Joseph Nzirorera's Interlocutory Appeal from Decision Denying Motion for Stay of Proceedings and Request for Stay Pending Appeal", filed on 7 March 2006 ("Appeal"). The Appeals Chamber is also presently seized of a request for an extension of time to respond to the Appeal pending the translation of the submissions of both Mr. Nzirorera and the Prosecution into French, filed by Édouard Karemera on 24 March 2006 ("Motion for Extension of Time").[1]

2. Rule 116 of the Rules of Procedure and Evidence of the Tribunal allows for extensions of time upon a showing of good cause. A request must normally be filed within the prescribed time limits, which Mr. Karemera did not do. He also provides no explanation for this failure.

Disposition

For the foregoing reasons, the Motion for Extension of Time is DENIED.

Done in English and French, the English version being authoritative.

Done this 4th day of April 2006, At The Hague, The Netherlands.

[Signed] : Liu Daqun

[1] *The Prosecutor v. Édouard Karemera et al.*, Case N°ICTR-98-44-AR73.6, *Requête de Édouard Karemera en extension de délai sur la* Joseph Nzirorera's Interlocutory Appeal from Decision Denying Motion for Stay of Proceedings and Request for Stay Pending Appeal, filed 24 March 2006.

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Decision on Édouard Karemera's Request for Extension of Time to Respond to the Prosecution's Interlocutory Appeal
4 April 2006 (ICTR-98-44-AR73.6)

(Original: English)

Appeals Chamber

Judges : Liu Daqun, Presiding Judge ; Mohamed Shahabuddeen ; Mehmet Güney ; Theodor Meron ; Wolfgang Schomburg

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Extension of time, Previous request of extension of time granted to another accused, Language work of the Defence Counsel, No demonstration of the need to access to the documents – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 116

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Édouard Karemera et al., Decision on Request for Extension of Time, 27 January 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Édouard Karemera et al., Decision on Request for Extension of Time, 24 March 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 Serious Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of the "Prosecutor's Interlocutory Appeal of the Trial Chamber's Decision Given Orally on 16 February 2006 Regarding the Role of the Electronic Disclosure Suite in Discharging the Prosecution's Disclosure Obligations", filed on 6 March 2006 ("Appeal"). The Appeals Chamber is also presently seized of a request for an extension of time to respond to the Appeal pending the translation of the submissions of the Prosecution and Joseph Nzirorera into French, filed by Édouard Karemera on 24 March 2006 ("Motion for Extension of Time").[1]

2. Rule 116 of the Rules of Procedure and Evidence of the Tribunal allows for extensions of time upon a showing of good cause. A request must normally be filed within the prescribed time limits, which Mr. Karemera did not do. However, the Appeals Chamber has already granted Mr. Ngirumpatse's timely request for an extension of time to respond to the Prosecution's Appeal pending its translation into French.[2] The Appeals Chamber has on occasion permitted a co-accused to benefit from an extension of time granted to another based on a timely filed motion when it is in the interests of justice to do so.[3] Given the joint nature of the trial and the breadth of the Prosecution's Appeal, the Appeals Chamber finds it in the interests of justice to excuse Mr. Karemera's late filing in this matter and to benefit from the relief accorded to Mr. Ngirumpatse.

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[1] *The Prosecutor v. Édouard Karemera et al.*, Case N°ICTR-98-44-AR73.7, Requête de Édouard Karemera en extension de délai sur la Prosecutor's Interlocutory Appeal of the Trial Chamber's Decision Given Orally on 16 February regarding the Role of the Electronic Disclosure Suite in Discharging the Prosecution's Disclosure Obligations, filed 24 March 2006.

[2] *The Prosecutor v. Édouard Karemera et al.*, Case N°ICTR-98-44-AR73.7, Decision on Request for Extension of Time, 24 March 2006 ("Decision of 24 March 2006").

[3] See, *e.g., The Prosecutor v. Édouard Karemera et al.,* Case N°ICTR-98-44-AR116, Decision on Request for Extension of Time, 27 January 2006, para. 7 ("Decision of 27 January 2006").

3. The Prosecution objects to Mr. Karemera's request by adopting the same arguments advanced and rejected in connection with Mr. Ngirumpatse's motion.[4] However, as the Appeals Chamber has recently observed, counsel for Mr. Karemera work in French, and not in English.[5] It is clear that, in order to be able to present a full answer to the Appeal, he needs access to French translations of the Appeal itself. The Appeals Chamber has already determined that this constitutes good cause for a reasonable extension of time in this case.[6] Mr. Karemera has not demonstrated, however, that access to the translation of the submissions of his co-accused Mr. Nzirorera is necessary to enable him to prepare his response to the Prosecution's Appeal, and the Appeals Chamber has refused such relief in the past.[7]

Disposition

For the foregoing reasons, the Motion for Extension of Time is GRANTED in part. The Registry is DIRECTED to provide to Mr. Karemera and his counsel, on an urgent basis, French translations of the Appeal and the present decision. Starting from the date on which the last of these translated documents is transmitted, Mr. Karemera will be permitted 10 days to file his response, if any, to the Appeal. The Registry is also DIRECTED to inform the Appeals Chamber of the date on which the translations documents are transmitted.

Done in English and French, the English version being authoritative.

Done this 4th day of April 2006, At The Hague, The Netherlands.

[Signed] : Liu Daqun

[4] *The Prosecutor v. Édouard Karemera et al.*, Case N°ICTR-98-44-AR73.6, ICTR-98-44-AR73.7, *Réponse du Procureur à la requête d'Édouard Karemera en extension de délai sur la* Joseph Nzirorera's Interlocutory Appeal from Decision Denying Motion for Stay Proceedings and Request for Stay Pending Appeal et *à la requête en extension de délai sur la* Prosecutor's Interlocutory Appeal of the Trial Chamber's Decision Given Orally on 16 February 2006 Regarding the Role of the Electronic Disclosure Suite in Discharging the Prosecution's Disclosure Obligations, filed 24 March 2006, para. 3; Decision of 24 March 2006, para. 3.
[5] Decision of 27 January 2006, para. 7.
[6] Decision of 24 March 2006, para. 2; Decision of 27 January 2006, para. 4.
[7] Decision of 27 January 2006, para. 5.

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Decision Granting Extension of Time for filing Information and Material Ex Parte and Under Seal Regarding Witness ADE
Rules 66 (C) and 68 (D) of the Rules of Procedure and Evidence
5 April 2006 (ICTR-98-44-AR73.6)

(Original: English)

Trial Chamber III

Judge : Emile Francis Short, sitting pursuant to Rule 73 (A) of the Rules of Procedure and Evidence

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Extension of time requested for the prosecutor to have time to fulfil his disclosure obligation – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 66 (C), 68 (D) and 73 (A)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera, Order for the Prosecutor for Filing Information and Material Ex Parte and Under Seal Regarding Witness ADE, 31 March 2006 (ICTR-98-44)

1. The trial in this case started on 19 September 2005. The Chamber is now seized of a Prosecutor's motion seeking, under Rules 66 (C) and 68 (D) of the Rules of Procedure and Evidence, permission for limited disclosure of information regarding payments and benefits provided to Prosecution Witness ADE and his family.[1] However, the Prosecutor did not provide the Chamber with the information and material sought to be kept confidential.

2. On 31 March 2006, the Chamber ordered the Prosecutor to file these documents by Monday 3 April 2006.[2] On that date, the Prosecutor filed a request seeking extension of time for filing the said documents until 28 April 2006. It explains that the Chief of Prosecutions, who handles this matter personally, is away from the seat of the Tribunal until24 April2006. The Defence for Nzirorera does not oppose the application.

3. The Chamber notes that Witness ADE is not going to be called to testify before the end of this year.[3] Considering the particular circumstances of the case and in the interests of justice, the Chamber is of the view that an extension of time is warranted to assure that the Prosecutor's filing will be completed.

FOR THE ABOVE REASONS, THE CHAMBER

I. GRANTS the Prosecutor's request for extension of time, and

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[1] Prosecutor's Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and His Family, filed on 15 December 2005.

[2] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera,* Case N°ICTR-98-44-T *(Karemera et al.),* Order for the Prosecutor for Filing Information and Material *Ex Parte* and Under Seal Regarding Witness ADE (TC), 3 1 March 2006.

[3] See: *Karemera et al.*, Scheduling Order (TC), 30 March 2006.

II. HEREBY ORDERS the Prosecutor to file no later than 28 April 2006, with the Registry, confidentially, under seal and only to the attention of the Chamber, the information and material that are sought to be kept confidential.

Arusha, 5 April 2006, done in English.

[Signed] : Emile Francis Short

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Decision on Jurisdictional Appeals : Joint Criminal Enterprise 12 April 2006 (ICTR-98-44-AR72.5 and ICTR-98-44-AR72.6)

(Original: English)

Appeals Chamber

Judges: Theodor Meron, Presiding Judge ; Mohamed Shahabuddeen ; Mehmet Güney ; Liu Daqun ; Wolfgang Schomburg

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Extended form of joint criminal enterprise liability, No geographical limitation on third-category JCE liability, Jurisdiction of the Tribunal to consider offences and modes of liability contemplated by its Statute and that existed in customary international law at the time of the alleged actions, Joint criminal enterprise grounded in customary international law rather than in any treaty, Role of customary international law in determining the jurisdiction of the Tribunal – Trial Chamber ordered to render a decision on the issue whether it's possible for an accused to be sentenced for complicity in genocide under an extended joint criminal enterprise theory – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rule 72 (A)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Jean-Paul Akayesu, Judgement, 2 September 1998 (ICTR-96-4) ; Appeals Chamber, The Prosecutor v. Jean Bosco Barayagwiza, Judgement, 3 November 1999 (ICTR-97-19) ; 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 ICTR-96-17) ; Appeals Chamber, The Prosecutor v. Juvénal Kajelijeli, Judgement, 23 May 2005 (ICTR-98-44A)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Duško Tadić, Judgement, 15 July 1999 (IT-94-1) ; Appeals Chamber, The Prosecutor v. Anto Furundžija, Judgement, 21 July 2000 (IT-95-17/1) ; Appeals Chamber, The Prosecutor v. Zdravko Mucić et al., Judgment, 20 February 2001 (IT-96-21) ; Appeals Chamber, The Prosecutor v. Milan Milutinović et al., Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003 (IT-99-37) ; ***Appeals Chamber,*** The Prosecutor v. Milorad Krnojelac, Judgment, 17 September 2003 (IT-97-25) ; Appeals Chamber, The Prosecutor v. Mitar Vasiljević, Judgement, 25 February 2004 (IT-98-32) ; Appeals Chamber, The Prosecutor v. Radoslav Brđanin, Decision on Interlocutory Appeal, 19 March 2004 (IT-99-36)

United States Military Tribunal, Nuremberg : United States of America v. Josef Altstoetter et al. *(*Justice *Case), 4 December 1947 ;* United States of America v. Ulrich Greifelt et al. *(*Rasse und Siedlungshauptamt/ RuSHA *case), 10 March 1948*

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 ("Tribunal")[1] in this decision resolves appeals filed by Joseph Nzirorera ("Appellant") against two decisions of Trial Chamber III ("Trial Chamber") of the Tribunal. Both decisions by the Trial Chamber address issues raised in "Joseph Nzirorera's Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise" ("Jurisdictional Motion"), which was filed on 4 May 2005.

2. In the Jurisdictional Motion, the Appellant asserted that the Tribunal lacks jurisdiction over

> "the charges relating to the extended form of joint criminal enterprise liability in the Amended Indictment".[2]

In support of this assertion, the Appellant first argued that the Tribunal lacks jurisdiction to convict an accused pursuant to the third category of joint criminal enterprise ("JCE") for crimes committed by fellow participants in a JCE of "vast scope".[3] Second, he argued that the Tribunal lacks jurisdiction to consider third category JCE liability when there is no "direct relationship" alleged between the accused and the physical perpetrators of the crime.[4] Third, he argued that the Tribunal lacks jurisdiction to impose liability for rape as a foreseeable consequence of a joint criminal enterprise to commit genocide.[5] Fourth, he argued that that the Tribunal lacks jurisdiction to impose liability for complicity in genocide as a foreseeable consequence of a JCE.[6]

3. On 5 August 2005, the Trial Chamber issued the "Decision on Defence Motion Challenging the Jurisdiction of the Tribunal – *Joint Criminal Enterprise* Rules 72 and 73 of the Rules of Procedure and Evidence" ("First Impugned Decision"). That decision found no jurisdictional impediment to the imposition of third category JCE liability for crimes committed by participants in a vast JCE in which an accused has taken part.[7] The Trial Chamber did not explicitly address the Appellant's second assertion: that the Tribunal lacks jurisdiction to impose third category JCE liability when the Prosecution does not allege a "direct relationship" between the accused and the physical perpetrators of the crime. Rejecting the Appellant's argument about JCEs of "vast scope", however, the Trial Chamber characterized it as an argument that third category JCE liability can be imposed only when the JCE is "limited to a specific operation and a restricted geographical area, and where the Accused was not structurally remote from the actual perpetrators of the crimes."[8]

4. In the First Impugned Decision, the Trial Chamber deferred consideration of the final two arguments put forward in the Jurisdictional Motion.[9] On 14 September 2005, after hearing oral argument on these two issues, the Trial Chamber issued the "Decision on Defence Motions Challenging the Indictment as Regards the Joint Criminal Enterprise Liability" ("Second Impugned Decision").

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[1] In this decision, the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 will be referred to as the "ICTY".
[2] Jurisdictional Motion, para. 66.
[3] *Ibid*., paras 15-32.
[4] *Ibid*., paras 33-39.
[5] *Ibid*., paras 40-56.
[6] *Ibid*., paras 57-65.
[7] First Impugned Decision, para. 7.
[8] *Ibid*., para. 4 (internal footnotes omitted).
[9] *Ibid*., paras 9-12.

5. In the Second Impugned Decision, the Trial Chamber held that there is no jurisdictional impediment to the imposition of liability for rape if it is a foreseeable consequence of a joint criminal enterprise.[10] The Trial Chamber, however, again declined to decide whether the Tribunal has jurisdiction to impose third category joint criminal enterprise liability for complicity in genocide.[11] As the indictment's charge of complicity in genocide is simply an alternative to its genocide charge, the Trial Chamber explained, there might, in the end, be no need to resolve that question in this case.[12]

6. After the Trial Chamber issued the First Impugned Decision, the Appellant filed a document asking the Appeals Chamber to determine that the question resolved by that decision – whether the Tribunal can impose third category JCE liability on an accused for crimes committed by fellow participants in a JCE of "vast scope" – was jurisdictional, and that therefore the Appellant could bring an interlocutory appeal against the Trial Chamber's resolution of the question.[13] In the same document, the Appellant also argued on the merits that the Trial Chamber had resolved the question incorrectly.[14]

7. The Prosecution filed a response[15] and the Appellant filed a reply.[16] Then, a three-judge Bench of the Appeals Chamber decided that the appeal was validly filed.[17] The three-judge Bench of the Appeals Chamber, however, decided that the Appellant would not be allowed to submit a new appellant's brief – as would normally be allowed when three judges of the Appeals Chamber determine that an issue satisfies the requirements for immediate appeal – because the First Defence Appeal argued the merits and greatly exceeded the permissible length for motions merely seeking a determination that an issue satisfies the requirements for immediate appeal.[18]

8. After the Trial Chamber issued the Second Impugned Decision, the Appellant filed a document asking the Appeals Chamber to determine that the question deferred by that decision – whether the extended form of joint criminal enterprise liability can attach to complicity in genocide – was jurisdictional, and that therefore the Appellant could bring an interlocutory appeal against the Trial Chamber's failure to resolve the question.[19] In the same document, the Appellant also argued that the Trial Chamber was obliged to resolve the question.[20] The Appellant added that, should it choose to address the question itself, the Appeals Chamber should determine that the Tribunal cannot impose liability for complicity in genocide as a foreseeable consequence of an extended JCE.[21] The Appellant

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[10] Second Impugned Decision, paras 4-7.
[11] *Ibid*., para. 10.
[12] Ibid.
[13] *Prosecutor v. Karemera et al*., ICTR-98-44-AR72.5, Appeal of Decision Denying Preliminary Motion on Joint Criminal Enterprise, 19 August 2005 ("First Defence Appeal"), paras 9-19. Rule 72 (B) (i) of the Rules of Procedure and Evidence ("Rules") provides the right to file an interlocutory appeal against decisions on jurisdictional motions. Decisions on many other types of motions are not subject to interlocutory appeal.
[14] First Defence Appeal, paras 20-87. Inferring that the Trial Chamber had decided to defer, until the end of the case, a decision on the whether a direct relationship between the accused and the physical perpetrator is necessary for third category joint criminal enterprise liability, the Appellant "decided not to take an interlocutory appeal on the second issue raised in the" Jurisdictional Motion. *Ibid*., fn. 7.
[15] *Prosecutor v. Karemera et al*., ICTR-98-44-AR72.5, Prosecutor's Response to Joseph Nzirorera's "Appeal of Decision Denying Preliminary Motion on Joint Criminal Enterprise" ("First Prosecution Response"), 29 August 2005.
[16] *Prosecutor v. Karemera et al*., ICTR-98-44-AR72.5, Reply Brief: Appeal of Decision Denying Preliminary Motion on Joint Criminal Enterprise, 1 September 2005.
[17] *Prosecutor v. Karemera et al*., ICTR-98-44-AR72.5, Decision on the Validity of Joseph Nzirorera's Appeal of the Decision on Defence Motion Challenging the Jurisdiction of the Tribunal – Joint Criminal Enterprise, 14 October 2005, paras 8-9.
[18] *Ibid*., para. 7. The Prosecution subsequently filed the "Prosecutor's Brief Addressing the *Merits* in Relation to Joseph Nzirorera's 'Appeal of Decision Denying Preliminary Motion on Joint Criminal Enterprise'", 24 October 2005, in which it stated that it would rely on the First Prosecution Response's submissions on the merits of the Appellant's arguments about JCEs of vast scope. On 26 October 2005, the Appellant notified the Appeals Chamber that he would not file a reply brief. See "Statement in Lieu of Reply Brief: Appeal of Decision Denying Preliminary Motion on Joint Criminal Enterprise".
[19] *Prosecutor v. Karemera et al*., ICTR-98-44-AR72.6, Joseph Nzirorera's Interlocutory Appeal of Decision 'Reserving' Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise and Complicity, 19 September 2005 ("Second Defence Appeal'), paras 13-22.
[20] *Ibid*., paras 23-30.
[21] *Ibid*., paras 31-40.

decided not to appeal the Second Impugned Decision's conclusion about third category joint criminal enterprise liability for rape.[22]

9. Again, the Prosecution filed a response,[23] and the Appellant filed a reply.[24] Then, a three-judge Bench of the Appeals Chamber decided that the Appellant could appeal the Trial Chamber's failure to determine whether the Prosecution could charge him with third category JCE liability for complicity in genocide.[25] This appeal was assigned to the same five-judge Bench of the Appeals Chamber assigned to hear the merits of the First Defence Appeal.[26]

10. The present decision therefore addresses two issues: (a) Whether the Tribunal has jurisdiction to impose third category JCE liability on an accused for crimes committed by fellow participants in a JCE of "vast scope"; and (b) Whether the Trial Chamber needed to decide if third category JCE liability can be imposed for complicity in genocide.

The First Defence Appeal

11. The Appellant submits that, in concluding that third category JCE liability can be imposed on an accused for crimes committed by fellow participants in a vast JCE, the Trial Chamber committed "three errors of law".[27] According to the Appellant, the Trial Chamber "erred when it relied upon the *Milošević* case as authority for a vast 'extended' joint criminal enterprise".[28] The Appellant also asserts that the Trial Chamber "erred in concluding that 'the scale of a joint criminal enterprise has [no] impact on such form of liability'".[29] Moreover, the Appellant submits, the Trial Chamber

> "erred by failing to consider whether the 'extended' form of joint criminal enterprise liability applied to vast enterprises in customary international law".[30]

The Appeals Chamber reviews *de novo* whether the Trial Chamber applied the correct law.[31]

12. The Tribunal has jurisdiction to consider only offences and modes of liability which both (a) are contemplated by its Statute, and (b) existed in customary international law at the time of the alleged actions under consideration or were proscribed by treaties forming part of the law to which the accused was subject at the time of the alleged actions under consideration.[32] Because the Appellant

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[22] *Ibid*., para. 11.
[23] *Prosecutor v. Karemera et al*., ICTR-98-44-AR72.6, Prosecutor's Response to Interlocutory Appeal of Decision "Reserving" Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise Complicity, 29 September 2005 ("Second Prosecution Response").
[24] *Prosecutor v. Karemera et al*., ICTR-98-44-AR72.6, Reply Brief: Joseph Nzirorera's Interlocutory Appeal of Decision "Reserving" Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise and Complicity, 3 October 2005.
[25] *Prosecutor v. Karemera et al*., ICTR-98-44-AR72.6, Decision on Validity of Joseph Nzirorera's Appeal of Decision "Reserving" Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise and Complicity, 14 November 2005 ("Second Rule 72 Decision"), paras 8-9. Following the Second Rule 72 Decision, on 15 November 2005, the Appellant filed "Joseph Nzirorera's Statement in Lieu of Brief: Appeal of Decision 'Reserving' Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise and Complicity", in which he informed the Appeals Chamber that he would stand on the Second Defence Appeal's discussion of the merits, see *ibid*., para. 2. The Prosecution did not file a response to "Joseph Nzirorera's Statement in Lieu of Brief: Appeal of Decision 'Reserving' Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise and Complicity".
[26] *Prosecutor v. Karemera et al*., ICTR-98-44-AR72.6, Order replacing a Judge in a Case Before the Appeals Chamber, 18 November 2005; see also *Prosecutor v. Karemera et al*., ICTR-98-44-AR72.5, Order replacing a Judge in a Case Before the Appeals Chamber, 18 November 2005.
[27] First Defence Appeal, para. 21.
[28] *Ibid*. (quoting First Impugned Decision, para. 7). The Appellant refers to the discussion of *Prosecutor v. Slobodon Milošević*, Case N°IT-02-54, in paragraph 7 of the First Impugned Decision.
[29] Ibid.
[30] Ibid.
[31] *Prosecutor v. Krnolejac*, Case N°IT-97-25-A, Judgement, 17 September 2003 ("*Krnolejac* Appeal Judgement"),, para. 10.
[32] See *Prosecutor v. Kajelijeli*, Case N°ICTR-98-44A-A, Judgement, 23 May 2005, para. 209; *Prosecutor v. Barayagwiza*, Case N°ICTR-97-19-AR72, Decision, 3 November 1999, para. 40; *Prosecutor v. Delalić et al*., Case N°IT-96-21-A, Judgement, 20 February 2001, para. 158; *Prosecutor v. Akayesu*, Case N°ICTR-96-4-T, Judgement, 2 September 1998, paras. 604-60, 611; Secretary General's Report on Practical Arrangements for the Effective Functioning of the International

offers no cogent explanation for how the language of the Tribunal's Statute limits consideration of third category JCE liability to cases in which the JCE at issue is small, because the Appeals Chamber itself sees no such limitation in the Statute, and because the JCE mode of liability is grounded in customary international law rather than in any treaty, the crucial question raised by the First Defence Appeal is whether customary international law permits imposition of third category JCE liability on an accused for crimes committed by fellow participants in a JCE of "vast scope". On this question, the Appeals Chamber sees no merit in the Appellant's position.

13. In *Prosecutor v. Tadić*, the ICTY's Appeals Chamber concluded that customary international law recognizes the joint criminal enterprise mode of liability.[33] In so doing, the Appeals Chamber recognized three categories of JCE liability.[34] Under the first – or "basic"[35] – category, the accused can be held responsible for crimes that are intended consequences of the JCE, but which are physically committed by persons besides the accused.[36] The second category of JCE liability, which is not at issue in this appeal, is sometimes called "systemic" JCE liability, and is a variant of the first category.[37] Crucially, under the third – or "extended"[38] – category of JCE liability, the accused can be held responsible for crimes physically committed by other participants in the JCE when these crimes are foreseeable consequences of the JCE, even if the accused did not agree with other participants that these crimes would be committed.[39] In light of *Tadić*, then, there can be no question that third-category JCE liability is firmly accepted in customary international law.

14. Here, the Appellant does not suggest a lack of support in customary international law for imposition of first-category JCE liability for (agreed-upon) crimes committed by any participant in a vast JCE. Indeed, he concedes that the *Justice* and *RuSHA* cases, two major Nuremberg cases, involved vast criminal enterprises.[40] Nonetheless, the Appellant suggests that the Tribunal lacks jurisdiction to impose third category JCE liability for crimes committed by participants in a vast JCE – particularly those structurally or geographically remote from the accused – because the Appellant sees no evidence specifically showing that customary international law permits imposition of third category JCE liability for their crimes.[41]

15. The Appellant's argument reflects a misunderstanding of customary international law and its role in determining the jurisdiction of the Tribunal. For the Tribunal to convict an accused based on a particular mode of liability, there must be clear evidence that the mode of liability exists in customary international law[42] – in addition to being contemplated by the Statute, as discussed above.[43] Yet, "where a principle can be shown to be … established" in customary international law, "it is not an objection to the application of the principle to a particular situation to say that the situation is new if it

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Tribunal for Rwanda, Recommending Arusha as the Seat of the Tribunal, UN Doc. S/1995/134, 13 February 1995, paras 11-12.

[33] *Prosecutor v. Tadić*, Case N°IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Judgement"), para. 220.

[34] See *ibid*., paras 195-220.

[35] See *Prosecutor v. Vasiljević*, Case N°IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Judgement"), para. 97.

[36] *Tadić* Judgement, para. 220.

[37] See *Vasiljević* Judgement, para. 98.

[38] See, *e.g*., *Vasiljević* Judgement, para. 99.

[39] *Tadić* Judgement, para. 220.

[40] First Defence Appeal, paras 81-86.

[41] *Ibid*., paras 58, 60, 75, 77. The Appellant's position rests in part on his belief that post-WWII cases provide no support for the application of third category JCE liability to the crimes of structurally remote JCE participants. In *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 ("*Rwamakuba* Decision"), para. 24, the Appeals Chamber observed that it would be a mistake to find with certainty that post-WWII cases, including the *Justice* and *RuSHA* cases, dealt only with the basic, and not the extended, form of joint criminal enterprise liability. Hence, the Appellant's assertion that post-WWII cases provide no support for the application of third category JCE liability to the crimes of structurally remote JCE participants is not necessarily consistent with the caselaw of the Tribunal.

[42] *Prosecutor v. Milutinović et al*., Case N°IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003, paras 10-11.

[43] See para. 12, *supra*.

reasonably falls within the application of the principle."[44] Hence, once the Tribunal has found that a mode of liability exists in customary international law, and once the Tribunal has identified the elements that need to be proven to establish that mode of liability under customary international law, the Tribunal can, consistently with customary international law, convict someone pursuant to the mode of liability whenever the facts demonstrate that its elements have been met.[45]

16. Here, as already mentioned, it is clear that there is a basis in customary international law for both JCE liability in general, and for the third category of JCE liability in particular. Moreover, though the Tribunal's Appeals Chamber and that of the ICTY have, in several cases dealing with different factual situations, explained the requirements for establishing different types of JCE liability,[46] not once has either Appeals Chamber suggested that JCE liability can arise only from participation in enterprises of limited size or geographical scope. Confirming that there is no geographical limitation on third-category JCE liability, the *Tadić* Judgement cited, as an example of when this type of liability may be imposed, a situation in which murders are committed as a foreseeable but unintended consequence of a JCE that seeks "to forcibly remove members of one ethnicity from their […] *region*".[47] Thus, the ICTY's Appeals Chamber has explicitly contemplated third category JCE liability for crimes stemming from region-wide JCEs.

17. The import of the section of the First Defence Appeal addressing the "impact" of the enterprise's "scale" is far from clear – in particular, it is unclear whether this section seeks to advance an argument based on the Tribunal's Statute or customary international law. In any event, this section appears to argue that it would be bad policy to permit third category JCE liability for crimes committed by participants in vast JCEs; according to the Appellant, permitting third category JCE liability for these crimes would turn JCE into a form of strict liability and produce unfair convictions.[48] The Appeals Chamber, however, considers fears about establishing strict liability to be unfounded. Third category JCE liability can be imposed only for crimes that were foreseeable to an accused.[49] In certain circumstances, crimes committed by other participants in a large-scale enterprise will not be foreseeable to an accused. Thus, to the extent that structural or geographic distance affects foreseeability, scale will matter, as the Appellant suggests it should.

18. Finally, the Appeals Chamber notes that, for purposes of this decision, it is irrelevant whether the Trial Chamber properly cited the *Milošević* case, or whether doing so was improper, as the Appellant alleges.[50] For the reasons explained in this decision, the Trial Chamber gave the correct answer to the question of law raised by the Appellant. The Appeals Chamber therefore dismisses the First Defence Appeal.

The Second Defence Appeal

19. In the Second Defence Appeal, the Appellant contends that the Trial Chamber erred in failing to reach a decision on whether the Tribunal has jurisdiction to convict an accused for complicity in genocide pursuant to an extended JCE theory. The Appellant observes that Rule 72 (A) of the Rules provides that motions which challenge jurisdiction must be "disposed of not later than sixty days after they were filed, and before the commencement of the opening statements". Though the Trial Chamber found that the Appellant's motion challenged the Tribunal's jurisdiction, the Appellant points out, the

[44] See *Prosecutor v. Hadzihasanović et al.*, Case N°IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 12.
[45] See ibid.
[46] See, *e.g.*, *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case N°ICTR-96-10-A and ICTR-96-17-A, Judgement, paras 463-468; *Prosecutor v. Brdanin*, Case N°IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004, paras 5-8; *Vasiljević* Judgement, paras 94-111; *Krnolejac* Appeal Judgement, paras 28-32, 67-98; *Prosecutor v. Delalić et al.*, Case N°IT-96-21-A, Judgement, 20 February 2001, paras 343, 365-366; *Prosecutor v. Furundzija*, Case N°IT-95-17/1-A, Judgement, 21 July 2000, paras 118-119.
[47] *Tadić* Judgement, para. 204 (emphasis added).
[48] First Defence Appeal, paras 52-56.
[49] See, *e.g.*, *Tadić* Decision, para. 220.
[50] First Defence Appeal, paras 42-47.

Trial Chamber failed to "dispose of the motion before the commencement of the opening statements".[51] According to the Appellant, the Trial Chamber's failure to decide on his motion "deprived [him] of his right not to be tried on a crime for which the Tribunal lacks jurisdiction".[52]

20. In response, the Prosecution first argues that the Trial Chamber, in ruling that extended JCE liability can be imposed for the crime of rape, and that JCE liability is not limited in "its application to any particular crime", implicitly rendered a decision on whether third category JCE liability can be imposed for complicity in genocide.[53] The Appeals Chamber disagrees. The Trial Chamber explicitly reserved its decision on complicity in genocide,[54] and the Trial Chamber cannot be held to have implicitly decided a question that it explicitly reserved.

21. The Prosecution's other arguments in response to the Second Defence Appeal are far from clear. In seeming contradiction to its argument that the Trial Chamber rejected the Defence's point about complicity in genocide, the Prosecution states that "unless the Trial Chamber can organise its work in such a way as to defer such a decision on a count" – like the complicity in genocide count – "that is only an alternative count, the Trial Chamber may have committed … error in this instance".[55] The Prosecution also suggests that in light of Rule 72 (A)'s text, "the question is whether the Appeals Chamber should return the matter to the Trial Chamber for a decision, or dispose of the issue itself".[56] Later, however, the Prosecution asserts that neither the Appeals Chamber nor the Trial Chamber has any reason to promptly decide the Appellant's challenge to the allegation of third category JCE liability for complicity in genocide; according to the Prosecution, a decision is unnecessary because the Appellant has been charged with complicity in genocide pursuant to other modes of liability as well, and because complicity in genocide is an alternative charge.[57]

22. To the extent that it suggests that the Trial Chamber can avoid deciding the Appellant's challenge now, the Prosecution is mistaken. Under Rule 72 (A) all motions challenging jurisdiction must be "disposed of" within 60 days and before the commencement of opening statements. Here, both the Trial Chamber[58] and the Appeals Chamber[59] have ruled that the Appellant's motion was jurisdictional. And while it is certainly possible that a jurisdictional motion might raise within it certain non-jurisdictional questions that the Trial Chamber could legitimately defer, this is not such a case: the question that the Appellant faults the Trial Chamber for deferring is a pure question of law concerning the limits of the Tribunal's jurisdiction to employ a mode of liability.

23. The Trial Chamber cannot avoid deciding the Appellant's motion simply because it pertains to an alternative charge, or because the count at issue alleges that the Appellant can be found guilty pursuant to several modes of liability. As already mentioned, the text of Rule 72 (A) makes clear that its time limits apply to all jurisdictional motions – including those challenging alternative counts and those challenging one of many modes of liability alleged in connection with an offence. This reflects each accused's right not to be tried on, and not to have to defend against, an allegation that falls outside the Tribunal's jurisdiction.

24. The Second Defence Appeal is therefore upheld.

Disposition

25. For the foregoing reasons, the Appeals Chamber:

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[51] Second Defence Appeal, para. 25.
[52] *Ibid*., para. 29.
[53] Second Prosecution Response, para. 6 (quoting Second Impugned Decision, para. 4).
[54] See Second Impugned Decision, para. 10.
[55] Second Prosecution Response, para. 8.
[56] *Ibid*., para. 9.
[57] *Ibid*., paras 11, 14.
[58] First Impugned Decision, para. 2.
[59] Second Rule 72 Decision, para. 9.

a. DISMISSES the First Defence Appeal;
b. ALLOWS the Second Defence Appeal; and
c. ORDERS the Trial Chamber to render a decision on whether the Appellant can be tried for complicity in genocide under an extended joint criminal enterprise theory.

Done in both English and French, the English text being authoritative.

Dated this 12th day of April, 2006, At The Hague, The Netherlands.

[Signed] : Theodor Meron

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Decision on Reconsideration of the Scheduling Order for the Next Trial Session Article 20 of the Statute of the Tribunal, Rule 73 of the Rules of Procedure and Evidence 18 April 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Reconsideration of the Scheduling Order, Availability of the residing country of the witness to support the organization of the video-link, Right of the Accused to be tried without undue delay – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 73 ; Statute, art. 20

1. The second trial session in this case was completed on 17 March 2006 after hearing the third Prosecution witness. At the Status Conference held the same day, the parties agreed that the next trial session will take place from 15 May until 14 July 2006. On the basis of these discussions, the order of witnesses to be heard at the third trial session was addressed by the Chamber.[1] While the next session is scheduled to start on 15 May 2006, the Chamber decided that the testimony of Witness T should take place by video-link from 22 May 2006 in order to preserve the fairness of the trial and the rights of the Accused Ngirumpatse to examine the witness.

2. The Prosecutor now moves the Chamber to reconsider its prior Scheduling Order of 30 March 2006 and order that the testimony of Witness T take place by video-link starting on 15 May 2006.[2] He submits that it would be quite impracticable to have Witness T begin his testimony on 22 May 2006 for three reasons. First, the authorities of the State where the Witness will give his evidence agreed with the Prosecutor before the Chamber gave its Order that the video-link will commence on 15 May 2006. Second, since the Prosecutor's Trial team is working with limited manpower, he submits that the trial preparation will have to be re-arranged so that two attorneys will have to meet with Witness T the week before his testimony. As a result, those trial attorneys will not be available in Arusha to examine the other witnesses that are assigned to them and that are mentioned in the Scheduling Order. Finally, in the Prosecutor's view, it is highly improbable that Witness ALG could complete his testimony in

[1] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-94-44-T, Scheduling Order (TC), 30 March 2006 (Scheduling Order).
[2] Motion for Reconsideration of Scheduling Order Dated 30 March 2006, filed on 3 April 2006.

five days, if it started on 15 May 2006, which means that Witness ALG's testimony will have to be suspended for the beginning of Witness T's testimony on 22 May 2006.

3. In his Response, Joseph Nzirorera suggests that the trial session be scheduled to commence on 22 May 2006.[3] In his view, this will solve the Prosecutor's problem as well as that of the Ngirumpatse team. He also suggests that a Status Conference or Working session be held during the week of 15 May 2006 to deal with disclosure issues, as well as any practice direction and time scheduling for witnesses. The Prosecutor replies that Joseph Nzirorera's suggestion is reasonable under the circumstances and that it seems to be a reasonable compromise to deal with logistical challenges faced by the parties.[4] Mathieu Ngirumpatse also supports Nzirorera's suggestion.[5] Conversely, he firmly opposes the Prosecutor's application to begin on the 15 May 2006 with Witness T since it could affect his rights.

4. As the Chamber already stated, the authorities of the State where Witness T will reside during his testimony already confirmed their availability to support the organization of the video-link from 22 May 2006.[6] Further, in his Reply, the Prosecutor acknowledges that this witness could start his evidence from that date. This issue is therefore solved and does not need to be reconsidered.

5. The trial in this case started *de novo* in September 2005 and, so far, the Chamber has heard only three Prosecution witnesses. While the Chamber has sympathy for the Prosecutor's current situation amongst his trial team, it also must guarantee the rights of the Accused to a fair trial, including the right to be tried without undue delay. The trial should therefore start on 15 May 2006 and the Prosecution should be ready to call his first witness from that date.

6. In addition, the Chamber is of the view that all disclosure issues should be dealt with now. The parties are expected to cooperate in good faith in that matter and are strongly encouraged to find a prompt solution to all issues that might delay the continuation of the trial.

ACCORDINGLY, the Chamber

DENIES the Prosecutor's motion in its entirety.

Arusha, 18 April 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[3] Filed on 4 April 2006.
[4] Filed on 4 April 2006.
[5] Response file on 7 April 2006.
[6] Scheduling Order, par. 3.

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Order for the Transfer of Prosecution Witnesses from Rwanda Article 28 of the Statute of the Tribunal and Rule 54 of the Rules of Procedure and Evidence 19 April 2006 (ICTR-98-44-A28)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Transfer of detained witness

International Instrument cited :

Rules of Procedure and Evidence, rules 54 and 90 bis ; Statute, art. 28

1. The trial in this case started on 19 September 2005. The third trial session is scheduled to start on 15 May 2006. In a Motion filed on 4 April2006, the Prosecutor requests the Chamber, pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence, to order the temporary transfer of Witnesses with the pseudonyms ALG, XBM and AWB from Rwanda, where they are currently on provisional release, to the United Nations Detention Unit (UNDF) in Arusha (United-Republic of Tanzania), so that they can testify in the present case during the next trial session. The Prosecutor contends that the requirements set out by Rule 90 *bis* of the Rules are met. He is awaiting a letter from the Rwandan Ministry of Justice confirming this affirmation. The Prosecutor further submits that none of these witnesses will be released by the Rwandan authorities during the period they will be detained at the UNDF.

2. Rule 90 *bis* (A) of the Rules gives the Chamber power to make an order to transfer a Detained person to the Detention Unit of the Tribunal if his or her presence has been requested. In the present case, the witnesses whom transfer is requested to Arusha are not detained in Rwanda but rather on provisional release, which implies that they remain free subject to restrictions to their freedom of movement. While Rule 90bis cannot therefore apply to those witnesses, their presence is requested to allow them to give evidence during the next trial session.

3. The Chamber is of the view that Witnesses ALG, XBM and AWB should temporarily be transferred to Arusha with the cooperation of the Rwandan authorities in accordance with Article 28 of the Statute of the Tribunal. In addition, since these witnesses are on provisional release in Rwanda, they will remain under the Tribunal's control and custody so that they can be returned back to Rwanda, as soon as each witness completes his or her testimony.

FOR THE ABOVE REASONS, THE CHAMBER

I. REQUESTS, pursuant to Article 28 of the Statute, the Government of Rwanda to cooperate with the Tribunal to ensure the temporary transfer of witnesses known by the pseudonyms ALG, XBM and AWB to the UNDF facility in Arusha;

II. REQUESTS the Government of Tanzania to cooperate with the Registrar in the implementation of this Order;

II. ORDERS the Registrar, pursuant to Rule 54 of the Rules, to temporarily transfer these witnesses to the UNDF facility in Arusha, at an appropriate time prior to their scheduled dates to testify. Their return travel to Rwanda should be facilitated as soon as practically possible for each witness after each witness completes his or her testimony;

IV. REQUESTS the Registrar to cooperate with the authorities of the Governments of Rwanda and United-Republic of Tanzania; to ensure proper conduct during the transfer and during the detention of the witnesses at the UNDF; to inform the Chamber of any changes in the conditions which may affect the length of stay in Arusha.

Arusha, 19 April 2006, done in English.

[Signed]: Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Decision on Defence Motions to Exclude Testimony of Professor André Guichaoua Article 20 of the Statute and Rule 94 bis (A) of the Rules of Procedure and Evidence 20 April 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Exclusion of expert witness testimony, Delay of the Prosecutor in disclosure of the reports of expert witnesses, Good reasons : international courier services and part time required by the Registry to process the material for filing purposes – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rules 54, 94 bis (A) and 115 ; Statute, art. 19 and 20

International Case cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. André Ntagerura et al., Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004 (ICTR-99-46)

Introduction

1. On 16 May 2005, this Chamber ordered the Prosecution to disclose the statement of Expert Witness André Guichaoua to the Defence of each of the Accused by 15 August 2005.[1] As a result of Prosecution requests for extensions of that deadline on three occasions, the Chamber extended the deadline: firstly to 25 November 2005;[2] secondly to 12 December 2005;[3] and, most recently, to 28 February 2006.[4]

2. During the trial proceedings in this case of 27 February 2006, the Prosecution drew to the attention of the Chamber, and the Defence, the fact that Professor Guichaoua's Report had been completed and would be dispatched that day by international courier, but that the filing of the Report

[1] *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-T,*("Karemera et al")* Decision on Joseph Nzirorera's Motion for Deadline for Filing of Reports of Experts (TC), 16 May 2005.
[2] *Karemera et al,* Decision on Prosecutor's Notice of Delay in Filing Expert Reports and Request for Additional Time to Comply with the Chamber Decision of 16 May 2005 (TC), 9 September 2005.
[3] *Karemera et al,* Decision on Prosecution Request for Additional Time to File Expert Report and Joseph Nzirorera's Motion to Exclude Testimony of Charles Ntampaka (TC), 12 December 2005.
[4] *Karemera et al,* Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guichaoua; Defence Motion to Exclude the Witness' Testimony; and Trial Chamber's Order to Show Cause (TC), 1 February 2006.

would be delayed by a short time.[5] The Report was subsequently filed with the Registry, after which it was disclosed to the Defence between 7 and 9 March 2006.

3. On 10 March 2006, the Defence for Nzirorera and the Defence for Ngirumpatse filed Motions[6] seeking the exclusion of Professor Guichaoua's Report on the basis of the further delay occasioned. By Response dated 15 March 2006,[7] the Prosecution opposes both Motions.

Discussion

4. The Defence for Ngirumpatse relies upon Articles 19 and 20 of the Tribunal's Statute, as well as on Rule 54 of the Rules of Procedure and Evidence, as a foundation for its Motion.

5. In support of its application, the Defence for Nzirorera outlines the history of this matter before the Chamber, submitting that the Prosecution's "chronic non-compliance" with the Trial Chamber's orders should be remedied by exclusion of the witness' testimony. Relying upon Appeals Chamber authority in the case of *Ntagerura,*[8] Nzirorera submits that, when a party fails to disclose by a date set by the Trial Chamber, the evidence should be excluded unless the Prosecution can show due diligence for its failure to comply with the Trial Chamber's order. Nzirorera further submits that the exclusion of the Report in its entirety is in the interests of a fair trial due to the length of the Report and the matters therein which must be investigated by the Defence.

6. The Prosecution opposes both Motions for exclusion of evidence, noting that such exclusion would be contrary to the interests of justice and judicial economy. It notes that neither Nzirorera nor Ngirumpatse raised any objections to the further delay when the matter was ventilated in open court. The Prosecution also notes that international courier delay resulted in the Report being received in Arusha on 5 March 2006, despite its dispatch on 27 and 28 February 2006, and that the additional delay was occasioned as a result of the Registry processing the Report for filing purposes.

7. As Annexures to its Response, the Prosecutor attaches relevant email correspondence between Mr. Guichaoua and the Registry. The first email from Mr. Guichaoua to the Registry notes that the first part of his Report had been dispatched by international courier to Arusha on 27 February 2006 and indicates that the supporting exhibits will be dispatched by international courier in the next 48 hours. The second email from Mr. Guichaoua to the Registry, dated 1 March 2006, advises the Registry that the supporting exhibits were dispatched by international courier the previous day. The reason for the delay advanced by Mr. Guichaoua in his email is difficulties he experienced in arranging his return ticket to France after his time spent in consultation with the Prosecutor in Arusha. He says that he needed to have access to the facilities available to him in France, prior to finalising the Report for dispatch. The delay in his return to France impacted upon his ability to finalise the Report within the timeframe stipulated.

8. The Chamber is of the view that the applications of Ngirumpatse and Nzirorera for exclusion of Mr. Guichaoua's testimony should be rejected. In reaching this conclusion, the Chamber has firstly taken into account the reasons advanced for the delay. In this respect, it is noteworthy that although the Report was served upon the Defence some seven to nine days after the deadline set in the Chamber's Order of 1 February 2006, part of the delay occasioned was due to the use of international courier services, and part of it was due to the time required by the Registry to process the material for

[5] T 27 February 2006, p. 53.
[6] See "Requête de M. Ngirumpatse aux Fins de Rejet du Rapport de M. Guichaoua (Art. 54) et Subsidiairement aux Fins de l'Article 94 bis," filed on 10 March 2006. See also "Second Motion to Exclude Testimony of André Guichaoua," filed by the Defence for Joseph Nzirorera on 10 March 2006.
[7] See "Prosecutor's Response to Joseph Nzirorera's Second Motion to Exclude Testimony of André Guichaoua and Mathieu Ngirumpatse's *Requête aux Fins de Rejet du Rapport de M. Guichaoua*," filed on 15 March 2006.
[8] *Prosecutor v. Ntagerura et. al.,* Case N°ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence (AC), 10 December 2004, para. 9. Note that this Decision concerned failure to comply with disclosure deadlines set under Rule 115 of the Rules.

filing purposes – both matters which were outside the Prosecutor's control. The Chamber further accepts that difficulties encountered by Mr. Guichaoua in arranging his return trip to France had some impact upon his ability to finalise his Report for its timely dispatch. Secondly, the Chamber has taken into account the extent to which the Accused's rights under Articles 19 and 20 of the Statute would be offended by the further delay of between seven and nine days, if indeed at all. As the Chamber has noted in its prior Decisions concerning the delay in disclosure of the reports of expert witnesses, the Chamber considers that it cannot be said that this delay will offend the rights of the Accused. The Chamber has an ability to manage the trial to ensure that the delay will not manifest in unfairness to the Accused – this includes being able to deal with the concerns raised by Nzirorera relating to the length of the Report and the matters requiring investigation, on an ongoing basis. In this sense, the Chamber wishes to make clear that the exclusion of evidence is a remedy which is at the extreme end of a scale of remedies at its disposition. Thirdly, the Appeals Chamber Decision relied upon by Nzirorera is factually distinguishable from the case before this Chamber. The Appeals Chamber Decision concerns the timeframe for the presentation of additional evidence before the Appeals Chamber under Rule 115 of the Rules, whereas the question before this Chamber relates to how it should deal with a party's non-compliance with an order made by it under Rule 94 *bis* of the Rules.

FOR THOSE REASONS

THE CHAMBER

DENIES Mathieu Ngirumpatse's and Joseph Nzirorera's Motions to Exclude Testimony of André Guichaoua.

Arusha, 20 April 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Decision on Defence Motion for Disclosure or Inspection of Hand-Written Notes from OTP Investigator
Rules 66 and 89 of the Rules of Procedure and Evidence
26 April 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Disclosure or Inspection of Hand-Written Notes of the interview of a witness from OTP Investigator, Opportunity of the Defence to cross-examine the witness, Discretionary power of the Trial Chamber to admit any relevant evidence which it deems to have probative value, Distinction between the admissibility of evidence and the assessment of its weight – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 66 (B) and 89 (C)

1. The trial in this case started on 19 September 2005. The second trial session was completed on 17 March 2006 after hearing the third Prosecution witness, Witness UB. During Witness UB's cross-examination, the Defence for Nzirorera referred to the report of his interviews of 26, 27, 28 and 29

April 2004 drafted by a Prosecution investigator.[1] The Defence for Nzirorera contended that there is a contradiction between this report and his testimony given in court.[2] As a result, it moved the Chamber to order the disclosure of the hand-written notes of the investigator for those statements, if they exist, which contradict this witness or at least, that they be produced for inspection, under Rule 66 (B) of the Rules of Procedure and Evidence. The Defence for Nzirorera submitted that the investigator's handwritten contemporaneous notes of his conversations with Witness UB are the best physical evidence of those meetings which make them necessary and material to the preparation of the defence.

2. The Prosecution opposed the Motion and argued that the investigator's report is a reflection of the investigator's recollection of his conversation with the witness. It submitted that beyond that, the Defence can speak to the investigator and even, call him as a Defence witness.[3]

3. Pursuant to Rule 89 (C) of the Rules and the jurisprudence of this Tribunal,[4] the Chamber has the discretionary power to admit any relevant evidence which it deems to have probative value, to the extent that it may be relevant to the proof of allegations pleaded in the Indictment. It must be noted that the admissibility of evidence is not to be confused with the assessment of the weight to be accorded to the evidence.

4. In the present case, it is not disputed that the Accused was provided with a copy of the report of interviews with Witness UB on 26, 27, 28 and 29 April 2004 and that he had full opportunity to cross-examine the witness on their content.[5] It can be admitted that the investigator's report is a reflection of the investigator's recollection of his conversation with the witness. There is no need to order further disclosure of the investigator's hand-written notes, if they still exist. Finally, the Chamber observes that the weight to be attached to evidence given by Witness UB is an issue to be addressed by the Chamber at a later stage.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Nzirorera's Motion in its entirety.

Arusha, 26 April 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[1] T. 6 March 2006, p. 46.
[2] T. 6 March 2006, p. 46-52.
[3] T. 6 March 2006, p. 52.
[4] See for e.g.: *Prosecutor v. Pauline Nyiramasuhuko*, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, par. 12; *Prosecutor v. Ntahobali and Nyiramasuhuko*, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible" (AC), 2 July 2004, par. 15; *Prosecutor v. Alfred Musema*, Judgment (AC), 16 November 2001, par. 46-50.
[5] See: T. 6 March 2006.

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Decision on Defence Motions for Disclosure of Information Obtained from Juvénal Uwilingiyimana
Rules 66 (B) and 68 (A) of the Rules of Procedure and Evidence
27 April 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Omar Serushago, Juvénal Uwilingiyimana – Disclosure obligation of the Prosecutor of exculpatory and other relevant material as soon as practicable, Motion for disclosure of Information Obtained from Juvénal Uwilingiyimana, Prosecution's offer to review a statement taken from Uwilingiyimana in camera in order for the Chamber to decide or not the disclosure, Proposition rejected : Defence has to demonstrate that the Prosecution has made an erroneous determination with respect to the material to disclose – Definition of the material to disclose, Interpretation of the Rule 66 of the Rules of Procedure and Evidence, Investigator's reports and/or notes not subject to disclosure, Preparation of the cross-examination of Omar Serushago, Joint criminal enterprise – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 66 (B), 68 (A), 70 (A) and 73

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali, Decision on Defence Motion for Disclosure of Evidence, 1 November 2000 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Emmanuel Bagambiki, Decision on Bagambiki's Motion for the Disclosure of the Guilty Pleas of Detained Witnesses and the Statements of Jean Kambanda, 1 December 2000 (ICTR-98-46) ; Trial Chamber, The Prosecutor v. Juvénal Kajelijeli, Decision on Kajelijeli's Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials Pursuant to Rule 66(B) and Rule 68 of the Rules of Procedure and Evidence, 5 July 2001 (ICTR-98-44A) ; 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 2001 (ICTR-99-50) ; Trial Chamber, The Prosecutor v. Elie Ndayambaje, Decision on the Defence Motion for Disclosure, 25 September 2001 (ICTR-96-8 and ICTR-98-42) ; Trial Chamber, The Prosecutor v. Sylvestre Gacumbitsi, 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, 1 August 2003 (ICTR-2001-64) ; 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. André Rwamakuba et al., Decision on Defence Motion for Disclosure, 15 January 2004 (ICTR-98-44) ; 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 Defence Request for Additional Disclosure of Investigative Reports and Statements, 25 August 2004 (ICTR-98-41) ; Prosecutor v. Juvénal Uwilingiyimana, Indictment (Confidential), 10 June 2005 (ICTR-2005-83) ; Trial Chamber, The Prosecutor v. Juvénal Uwilingiyimana, Confirmation of Indictment and other Related Orders, 13 June 2005 (ICTR-2005-83) ; 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. Edouard Karemera et al., Decision on Motions to Compel Inspection and Disclosure and to direct Witnesses to Bring Judicial and Immigration Records,

14 September 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Juvénal Uwilingiyimana, Decision on Prosecutor's Motion to Unseal the Indictment and Warrant of Arrest, 29 November 2005 (ICTR-2005-83)

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)

Introduction

1. Referring to the Prosecution's disclosure obligations under Rules 66 (B) and 68 (A) of the Rules, the Defence for Nzirorera[1] seeks an order obligating the Prosecution to disclose "information obtained from Juvénal Uwilingiyimana", including any statements taken from him, any reports of interviews conducted with him, and any investigator's notes containing information about him. Nzirorera contends that the information is material to the preparation of his defence under Rule 66 (B), in particular for the preparation of his cross-examination of Prosecution Witness Omar Serushago. Nzirorera also claims that the material constitutes exculpatory material which affects the credibility of Prosecution evidence under Rule 68 (A), in particular the proposed testimony of Serushago. The Defence for Ngirumpatse moves the Chamber for the same relief as Nzirorera.[2] The Prosecution opposes the Defence Motions, but proposes to offer Uwilingiyimana's statement *in camera* for review by the Chamber and for it to determine whether or not it ought to be disclosed,[3] an alternative supported by the Defence.

2. Omar Serushago may testify during the next trial session in this case, which is scheduled to begin on 15 May 2006, and to run until 14 July 2006. The Defence for Nzirorera expects, on the basis of material already disclosed to it,[4] that part of Serushago's testimony will relate to the allegation that former Rwandan Government Minister Juvénal Uwilingiyimana, and the Accused Joseph Nzirorera, jointly participated in the planning and execution of genocide in Rwanda in 1994.[5]

3. Uwilingiyimana, who is now deceased, was indicted by this Tribunal in June 2005.[6] The Defence for Nzirorera claims that it interviewed Uwilingiyimana on two occasions, during which interviews Uwilingiyimana provided information which directly contradicts the evidence to be given by

[1] "Joseph Nzirorera's Motion for Disclosure of Information Obtained from Juvénal Uwilingiyimana," filed on 27 January 2006, by the Defence for Nzirorera.

[2] "Requête aux fins de communication de tous documents relatifs aux entretiens intervenus entre le Procureur et Juvénal Uwilingiyimana," filed by the Defence for Ngirumpatse on 7 February 2006.

[3] See "Prosecutor's Response to Nzirorera's Request of 27 January 2006 for Disclosure of the Statements of the Deceased Juvénal Uwilingiyimana," filed on 1 February 2006, as well as "*Réponse du Procureur à la Requête de Mathieu Ngirumpatse aux fins de communication de de tous documents relatifs aux entretiens intervuenus entre le Procureur et Juvénal Uwilingiyimana*," filed on 9 February 2006.

[4] Nzirorera makes specific reference to specific allegations contained in Omar Serushago's Statements of 16 February 2005, 3 February 1998 and 12 February 1998, taken by the OTP, and his testimony in the *Nahimana* trial.

[5] The allegations contained in the statements, quoted by Nzirorera, are as follows:
In 1993, at an MRND meeting in Gisenyi stadium, Juvénal Uwilingiyimana took the floor and said that it was important to know that the Inyenzis were the enemies (OTP statement of 16 February 2005, p. 322).
In December 1993, Nzirorera and Uwilingiyimana led a meeting of the *Interahamwe* at the Meridien Hotel in Gisenyi at which Major Anatole Nsengiyumva was introduced as the new Army commander in Gisenyi. They promised the *Interahamwe* that arms would be distributed to them (OTP statement of 16 February 2005, p. 322).
In April 1994, Nzirorera and Uwilingiyimana harbored Serushago and Thomas Mugiraneza in their rooms at the Meridien Hotel after Serushago killed the sister of Colonel Ngungize. They later intervened with Ngungize so that the army and the *Interahamwe* could continue to work together to kill Tutsis (OTP statements of 3 February 1998; 12 February 1998, p. 562).
In April 1994, Uwilingiyimana called Serushago and instructed him to kill the wife of football coach Longin Rudaswinga. Serushago arrived at the residenc where she was staying, took her and showed her to Nzirorera and Colonel Nsengiyumva, and then took her to the cemetery to be killed (OTP statements of 3 February 1998; 12 February 1998, p. 569).
In June 1994, Uwilingiyimana and Nzirorera attended a meeting for raising funds to purchase arms to be used to kill Tutsis (Testimony in *Nahimana* trial, 16 November 2001, p. 41; statement of 16 February 2005, p. 322).

[6] *Prosecutor v. Juvénal Uwilingiyimana*, Case N°ICTR-2005-83-I, Indictment (Confidential), 10 June 2005, confirmed on 13 June 2005, see *Prosecutor v. Juvénal Uwilingiyimana*, Case N°ICTR-2005-83-I, Confirmation of Indictment and other Related Orders, 13 June 2005; Confidential Status of Indictment lifted by *Prosecutor v. Juvénal Uwilingiyimana*, Case N°ICTR-2005-83-I, Decision on Prosecutor's Motion to Unseal the Indictment and Warrant of Arrest, 29 November 2005.

Serushago. Nzirorera claims that Uwilingiyimana must have provided information to the Prosecution consistent with that which he provided to the Defence. As Uwilingiyimana is now deceased, the Defence is unable to obtain a written statement from him, or to call him to testify. Therefore, one of the reasons for which the Defence seeks disclosure of the material is to decide whether to have any statement made by the deceased admitted under Rule 92 *bis* of the Rules.[7]

4. Whilst the Prosecution acknowledges its possession of at least one witness statement from Uwilingiyimana, which it offers for *in camera* review by the Chamber, it has rejected all previous written requests by the Defence to obtain any material concerning Uwilingiyimana.[8]

Discussion

In Camera Inspection

5. As a preliminary matter in the determination of the Defence Motions, the Chamber has considered whether to accept the Prosecution's offer to review a statement taken from Uwilingiyimana, *in camera,* for the purposes of determining whether or not it ought to be disclosed under Rule 68 of the Rules. The Chamber notes that this course of action is supported by the Defence in the absence of a determination by the Chamber that the material ought to have been disclosed, though Nzirorera seeks to widen the category of material to be inspected by the Trial Chamber to include "all information obtained from Mr. Uwilingiyimana not limited to formal statements taken from him".

6. Rules 66 and 68 impose an obligation upon the Prosecution to disclose materials falling within the ambit of those provisions. As the jurisprudence of this Tribunal indicates, the Prosecutor is responsible for making an initial determination about whether or not material ought to be disclosed under those provisions,[9] yet that determination can be interfered with by a Chamber if it is found that the Prosecution has erred in making such a determination. Once the Prosecution has made a determination that it is not under an obligation to disclose the material, and has communicated this view to the Defence, it is then for the Defence to demonstrate, by satisfying the criteria outlined in the jurisprudence, that the Prosecution has made an erroneous determination under either, or both, of the aforementioned provisions.

7. In the particular circumstances of this case, the Chamber considers it inappropriate to review the material *in camera*. The Chamber prefers to consider whether or not the Defence has demonstrated that the Prosecution has made an erroneous determination with respect to the material in question, through the satisfaction of the criteria outlined in the relevant jurisprudence. To that end, the Chamber must consider the merits of the application, based solely on the briefs of the Parties, as governed by Rule 73 of the Rules.

Whether Disclosure should be ordered under Rule 68 of the Rules

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[7] Rule 92 *bis*, entitled "Proof of Facts Other Than by Oral Evidence" provides for circumstances under which a Trial Chamber may admit the evidence of a witness in the form of a written statement in lieu of oral testimony.

[8] By letter dated 23 December 2005, Nzirorera requested disclosure of "all reports, statements, or recordings of all interviews" with Juvénal Uwilingiyimana to the OTP. Nzirorera stated in his letter that he had "reason to believe that the material is exculpatory, relevant and necessary for the preparation of the defence… In addition, Mr. Nzirorera's defence team had interviewed Mr. Uwilingiyimana in the past and considered him a potential defence witness. Disclosure of the statements made to OTP is necessary to determine whether to seek to admit his evidence pursuant to Rule 92 *bis*." This request was rejected by the Prosecutor by letter dated 25 January 2006. The Prosecutor said, "Based on those conversations [with the Prosecutor's colleagues], and in light of my familiarity with the indictment against your client and the lines of defence that you have articulated, I have made the determination that the Prosecutor is not in possession of information from this witness that is exculpatory, relevant or necessary for the preparation of the defence… since his file does not contain exculpatory material, the Prosecutor will decline to disclose any portion of his file at this time."

[9] See, for example, *Prosecutor v. Bagosora et al*, ICTR Case N°98-41-T, Decision on Defence Request for Additional Disclosure of Investigative Reports and Statements, 25 August 2004, para. 6, concerning Rule 68.

8. Rule 68 of the Rules sets out the Prosecution's disclosure obligations in relation to exculpatory and other relevant material. Sub-Rule (A) places a duty upon the Prosecutor to disclose to the Defence any material which, in his actual knowledge, may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence. The timeframe stipulated is "as soon as practicable."

9. In order for the Defence to establish that the Prosecution has breached its disclosure obligations under Rule 68, and invoke an order from the Chamber that the material be disclosed, the Defence must: firstly, identify the material sought with the requisite specificity;[10] secondly, make a prima facie showing of the exculpatory or potentially exculpatory character of the materials requested;[11] and, thirdly, make a prima facie showing of the Prosecution's custody or control of the materials requested.[12] It has been held that information which contradicts that provided by a Prosecution witness is exculpatory within the meaning of Rule 68.[13]

10. The Chamber considers that the Defence has failed to satisfy the criteria invoking an interference with the Prosecution's determination under Rule 68 (A). In particular, the Chamber is not convinced that the Defence has presented *prima facie* evidence that the material sought is exculpatory within the meaning of the Rule. Nzirorera claims that Uwilingiyimana told him that the allegations of Omar Serushago were untrue. Other than his own assertions, Nzirorera relies upon a letter, purportedly from Juvénal Uwilingiyimana to the Prosecutor, the provenance of which has not been established, containing general allegations about misconduct of Prosecution investigators. It also contains an allegation, purportedly by Uwilingiyimana, that the testimony to be given by Omar Serushago is "rote". The Chamber is of the view that an allegation, purportedly by Uwilingiyimana, that Serushago's testimony before this Tribunal is "rote" is not sufficient to establish that the Prosecution has material which contradicts the testimony to be given by Serushago.

11. Nzirorera also claims that information from Uwilingiyimana is material to his cross-examination of Witnesses ADE and T and will raise issues concerning their credibility, though he does not provide any basis for such an assertion other than claiming that the material sought will expose Prosecution misconduct.[14] The Chamber is, therefore, presently unprepared to go behind the Prosecutor's assertion that his review of the material "presently suggests it is not exculpatory or undermining of other witnesses within the meaning of Rule 68."[15]

Whether Disclosure should be ordered under Rule 66 of the Rules

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[10] *Prosecutor v. Karemera et al.,* Case N°ICTR-98-44-I, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, para. 11 ("the purpose of Rule 68 is not to facilitate the conduct of a fishing expedition."); *Prosecutor v. Karemera et al.,* Case N°ICTR-98-44-PT, Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure, 5 July 2005, para. 14; *Prosecutor v. Bagosora et al.,* Case N°ICTR-98-41-T, Decision on Motion for Disclosure Under Rule 68, 1 March 2004, para. 5; *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, 14 September 2001, para. 11.

[11] *Prosecutor v. Kajelijeli*, Case N°ICTR-98-44A-T, Decision on Kajelijeli's Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials Pursuant to Rule 66 (B) and Rule 68 of the Rules of Procedure and Evidence, 5 July 2001, paras. 13-14.

[12] *Prosecutor v. Karemera et al.,* Case N°ICTR-98-44-I, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, para. 11.

[13] *Prosecutor v. Karemera et al*, Case N°ICTR-98-44-T, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, paras. 12-13; *Prosecutor v. Bagosora et al.,* Case N°ICTR-98-41-T, Decision on Motion for Disclosure Under Rule 68, 1 March 2004, fn. 5;

[14] With respect to Witness ADE, Nzirorera asserts that he was used as a 'tool' to encourage Uwilingiyimana to co-operate with the prosecution. No further basis or material is advanced to support this assertion. In relation to Witness T, Nzirorera asserts that Uwilingiyimana's information will expose the "Gestapo" tactics of the Prosecution in encouraging witnesses to turn against Nzirorera. Again no further basis or material is advanced to support this assertion.

[15] See letter from Prosecutor to Peter Robinson, dated 25 January 2006 (appearing as Annexure C to Nzirorera's Motion), as well as Prosecutor's Response, dated 1 February 2006, para. 5. See also "Prosecution Response to Nzirorera's Supplemental Motion for Stay of 13 February 2006 (Confidential), filed on 14 February 2006, para. 5.

12. Rule 66 of the Rules places an obligation upon the Prosecution to disclose certain materials falling within the ambit of that provision. Rule 66 (B) places an obligation upon the Prosecution, after receiving a request from the Defence,[16] to permit the Defence to "inspect any books, documents, photographs and tangible objects in his custody or control," which:

(1) are material to the preparation of the defence; or

(2) are intended for use by the Prosecutor as evidence at trial; or

(3) were obtained from or belonged to the accused.

13. The Defence submits that the "information provided by Mr. Uwilingiyimana" is material to the preparation of Nzirorera's defence. The Prosecution submits that sub-Rule (B) does not apply to material concerning a witness whom the Prosecution does not intend to call. In support of its position, the Prosecution submits that, as sub-Rule (A) refers to disclosure of witness statements of intended prosecution witnesses, Rule 66 (B) ought to be read in that context. Since the Prosecution has no intention of calling Juvénal Uwilingiyimana (as he is deceased), Rule 66 (B) does not apply to the material in question. The Defence argues that this is an incorrect interpretation of Rule 66 (B) and cites a number of decisions of the Tribunal wherein the Prosecution has been ordered to allow inspection of material under sub-Rule (B) which related to witnesses whom the Prosecution did not intend to call to testify.[17]

14. A simple reading of Rule 66 as a whole, as well as sub-Rule (B) in isolation, indicates that the Defence argument is the correct interpretation of sub-Rule (B). Rule 66 is entitled "Disclosure of Materials by the Prosecutor".[18] The Chamber considers that sub-Rules (A) and (B) are intended to cover separate categories of material; sub-Rule (A) referring to *disclosure* of statements of the accused and statements of witnesses, and sub-Rule (B) referring to *inspection* of other material not falling within the ambit of sub-Rule (A).

15. In order for the Defence to establish that the Prosecution has breached its disclosure obligations under Rule 66 and invoke an order from the Chamber that the material be made available for inspection, the Defence must, firstly, identify the material sought with the requisite specificity, and secondly, make a *prima facie* showing of the material's "materiality for the preparation of the Defence."[19] The materiality of the documents sought to be inspected may be determined by assessing whether they are necessary for the preparation of the cross-examination of a witness,[20] or by reference to the Indictment.[21] Furthermore, Rule 66 must be read in the context of Rule 70 which outlines materials exempt from Rule 66 disclosure. Pursuant to Rule 70 (A), reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of a case are not subject to disclosure under Rule 66.

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[16] See fn 9, above, concerning the satisfaction of this element by the Defence.

[17] *Prosecutor v. Nyiramasuhuko et al.,* Case N°ICTR-97-21-I, Decision on Defence Motion for Disclosure of Evidence, 1 November 2000, para. 47; *Prosecutor v. Ndayambaje,* Case N°ICTR-96-8-T, Decision on Defence Motion for Disclosure, 25 September 2001, para. 12; *Prosecutor v. Ntagerura et al.,* Case N°ICTR-98-46-T, Decision on Bagambiki's Motion for the Disclosure of the Guilty Pleas of Detained Witnesses and the Statements of Jean Kambanda, 1 December 2000, para. 18; *Prosecutor v. Karemera et al.,* Case N°ICTR-98-44-PT, Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records, 14 September 2005, para. 15.

[18] Emphasis added.

[19] *Prosecutor v. Zejnil Delalic,* Case N°IT-96-21-T, Decision on the Motion by the Accused Zenjil Delalic for the Disclosure of Evidence, 26 September 1996, para. 10; *Prosecutor v. Ndayambaje,* Case N°ICTR-96-8-T, Decision on the Defence Motion for Disclosure, 25 September 2001, para. 11; *Prosecutor v. Rwamakuba et al.,* Case N°ICTR-98-44-T, Decision on Defence Motion for Disclosure, 15 January 2004, para. 11.

[20] *Prosecutor v. Gacumbitsi,* Case N°ICTR-2001-64-T, 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, 1 August 2003.

[21] *Prosecutor v. Ndayambaje,* Case N°ICTR-96-8-T, Decision on the Defence Motion for Disclosure, 25 September 2001, para. 11.

16. In this case, the Chamber is of the view that the investigator's reports and/or notes sought by the Defence constitute "matters not subject to disclosure" pursuant to Rule 70 (A). Secondly, with respect to the specificity of the materials sought, the Chamber has noted, and has accepted, the Prosecution's assertion in open court that it is not in possession of any tape recordings and/or transcripts of interviews conducted between Uwilingiyimana and Prosecution investigators.[22] The Chamber is of the view that Nzirorera's references, throughout his Motion, to any or all "information obtained from Uwilingiyimana" lacks the specificity required under Rule 66. However, Nzirorera also seeks inspection of any statements taken from Uwilingiyimana, which request does have the requisite specificity. The Chamber notes that the Prosecution has admitted that it has in its possession at least one statement from Uwilingiyimana. The Chamber will therefore consider whether that statement is material to the preparation of the Defence.

17. In terms of materiality, Nzirorera submits that his inspection of the material is necessary for the preparation of his cross-examination of Serushago. The Prosecution does not actually respond to the merits of the Defence's application under Rule 66 (B) since the Prosecution says that, as a matter of law, Rule 66 (B) only applies to statements from witnesses whom it intends to call at trial. The Prosecution does, however, submit that Uwilingiyimana's statement is not material to any issue that the Defence has indicated that it wishes to put forth affirmatively, and that Nzirorera is "fishing" for material.

18. Whilst the Indictment against the Accused in this case does not specifically refer to Juvénal Uwilingiyimana as being part of the joint criminal enterprise of which the co-Accused were allegedly part, it states that the co-Accused were participants in the joint criminal enterprise with the following individuals and classes of persons:

> … (ii) political authorities at the national and regional level, including… (iii) influential businessmen, Akazu, and political party leaders affiliated with 'Hutu Power', including… (iv) leaders of the *Interahamwe* and *Impuzaumpagambi* political party 'youth wing' militias and the 'civil defense' program, including… The Prosecutor is unable to specifically identify each and every participant in the joint criminal enterprise."[23]

The allegations in the Indictment against Juvénal Uwilingiyimana put him within the aforementioned classes of persons. The Chamber also notes that the Indictment against Juvénal Uwilingiyimana specifically alleges that all three co-Accused in this case were the co-conspirators of Uwilingiyimana.[24]

19. The Chamber is of the view that Nzirorera has succeeded in establishing the *prima facie* materiality of the statement in the possession of the Prosecution from Uwilingiyimana. It is apparent from the passages in Serushago's statements, relied upon by the Defence for Nzirorera in its Motion, that Serushago will testify to specific allegations concerning Uwilingiyimana and Nzirorera which are relevant to specific paragraphs and counts in the Indictment against the co-Accused in this case.

20. The Chamber finds, therefore, that the criteria under Rule 66 (B) have been met by the Defence with respect to Uwilingiymana's statement. The Chamber also considers that any other material in the Prosecution's possession concerning Uwilingiyimana which does not fall within the ambit of the Rule 70 exception, and which relates to any allegations against the Accused linked with any paragraph or count in the Indictment, is material to the preparation of the Defence and should be disclosed.

FOR THOSE REASONS

THE CHAMBER

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[22] T. 22 February 2006, p. 48.
[23] *Prosecutor v. Karemera et al,* Case N°ICTR-98-44-I, Amended Indictment of 24 August 2006, para. 6.
[24] The relevant passages of the Indictment against Uwilingiyimana are attached as an Annexure to this Note.

I. GRANTS the Defence Motions for disclosure of information obtained from Juvénal Uwilingiyimana, in part; and

II. ORDERS that, pursuant to Rule 66 (B), the statement of Juvénal Uwilingiyimana be made available for inspection by the Defence of each of the Accused in this case; and

III. ORDERS that, pursuant to Rule 66 (B), the Prosecution make available for inspection by the Defence of each of the Accused in this case any other material in its possession from Juvénal Uwilingiyimana which does not fall within the ambit of Rule 70 (A) of the Rules and which relates to any allegations against the Accused linked with any paragraph or count in the Indictment against them.

Arusha, 27 April 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Decision on Reconsideration of the Scheduling Order for the Next Trial Session Article 20 of the Statute of the Tribunal, Rule 73 of the Rules of Procedure and Evidence 28 April 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Modification a schedule decision, Video-conference testimony – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rule 73 ; Statute, art. 20

1. The second trial session in this case was completed on 17 March 2006 after hearing the third Prosecution witness. At the Status Conference held the same day, the parties agreed that the next trial session will take place from 15 May until 14 July 2006. On the basis of these discussions, the order of witnesses to be heard at the third trial session was addressed by the Chamber.[1] While the next session is scheduled to start on 15 May 2006, the Chamber decided that the testimony of Witness T should take place by video-link from 22 May 2006 in order to preserve the fairness of the trial and the rights of the Accused Ngirumpatse to examine the witness.

2. The Prosecutor now moves the Chamber to reconsider its prior Scheduling Order of 30 March 2006 and order that the testimony of Witness T take place by video-link starting on 15 May 2006.[2] He submits that it would be quite impracticable to have Witness T begin his testimony on 22 May 2006 for three reasons. First, the authorities of the State where the Witness will give his evidence agreed with the Prosecutor before the Chamber gave its Order that the video-link will commence on 15 May 2006. Second, since the Prosecutor's Trial team is working with limited manpower, he submits that the trial preparation will have to be re-arranged so that two attorneys will have to meet with Witness T the week before his testimony. As a result, those trial attorneys will not be available in Arusha to examine

[1] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-94-44-T, Scheduling Order (TC), 30 March 2006 (Scheduling Order).
[2] Motion for Reconsideration of Scheduling Order Dated 30 March 2006, filed on 3 April 2006.

the other witnesses that are assigned to them and that are mentioned in the Scheduling Order. Finally, in the Prosecutor's view, it is highly improbable that Witness ALG could complete his testimony in five days, if it started on 15 May 2006, which means that Witness ALG's testimony will have to be suspended for the beginning of Witness T's testimony on 22 May 2006.

3. In his Response, Joseph Nzirorera suggests that the trial session be scheduled to commence on 22 May 2006.[3] In his view, this will solve the Prosecutor's problem as well as that of the Ngirumpatse team. He also suggests that a Status Conference or Working session be held during the week of 15 May 2006 to deal with disclosure issues, as well as any practice direction and time scheduling for witnesses. The Prosecutor replies that Joseph Nzirorera's suggestion is reasonable under the circumstances and that it seems to be a reasonable compromise to deal with logistical challenges faced by the parties.[4] Mathieu Ngirumpatse also supports Nzirorera's suggestion.[5] Conversely, he firmly opposes the Prosecutor's application to begin on the 15 May 2006 with Witness T since it could affect his rights.

4. As the Chamber already stated, the authorities of the State where Witness T will reside during his testimony already confirmed their availability to support the organization of the video-link from 22 May 2006.[6] Further, in his Reply, the Prosecutor acknowledges that this witness could start his evidence from that date. This issue is therefore solved and does not need to be reconsidered.

5. The trial in this case started *de novo* in September 2005 and, so far, the Chamber has heard only three Prosecution witnesses. While the Chamber has sympathy for the Prosecutor's current situation amongst his trial team, it also must guarantee the rights of the Accused to a fair trial, including the right to be tried without undue delay. The trial should therefore start on 15 May 2006 and the Prosecution should be ready to call his first witness from that date.

6. In addition, the Chamber is of the view that all disclosure issues should be dealt with now. The parties are expected to cooperate in good faith in that matter and are strongly encouraged to find a prompt solution to all issues that might delay the continuation of the trial.

ACCORDINGLY, the Chamber

DENIES the Prosecutor's motion in its entirety.

Arusha, 18 April 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[3] Filed on 4 April 2006.
[4] Filed on 4 April 2006.
[5] Response file on 7 April 2006.
[6] Scheduling Order, par. 3.

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Decision on Joseph Nzirorera's Interlocutory Appeal 28 April 2006 (ICTR-98-44-AR73.6)

(Original : English)

Appeals Chamber

Judges : Liu Daqun, Presiding Judge ; Mohamed Shahabuddeen ; Mehmet Güney ; Theodor Meron ; Wolfgang Schomburg

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Disclosure of material relevant to the testimony of the witnesses, Not every violation of this important obligation implicates a violation of an accused's fair trial rights warranting a remedy, Trial Chamber best placed to determine what time is sufficient for an accused to prepare his defence – Criteria of a violation of the Rule 68 disclosure obligation, Responsibility for disclosing exculpatory material rests on the Prosecution, No demonstration of error in the facts-based judgement of what material to disclose, Inspection in camera of materials only for relied of disclosure obligation or of public interest or the security interests of a state – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rules 66 (A) (ii), 68 and 68 (D) ; Statute, art. 20 (4) (b)

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Juvénal Kajelijeli, Judgement, 23 May 2005 (ICTR-98-44A) ; 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. François Karera, Oral Decision, 18 January 2006 (ICTR-2001-74)

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. 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, Judgement, 17 December 2004 (IT-95-14/2)

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 with an interlocutory appeal filed by Joseph Nzirorera[1] against the Trial Chamber's oral decision of 16 February 2006.[2] This

[1] *The Prosecutor v. Édouard Karemera et al.*, Case N°ICTR-98-44AR73.6, Joseph Nzirorera's Interlocutory Appeal from Decision Denying Motion for Stay of Proceedings and Request for Stay Pending Appeal, filed 7 March 2006 ("Nzirorera Appeal"). Mathieu Ngirumpatse filed a brief in support of the Nzirorera Appeal. See *The Prosecutor v. Édouard Karemera et al.*, Case N°ICTR-98-44AR73.6, *Mémoire de M. Ngirumpatse au soutien du* Nzirorera's Interlocutory Appeal from Decision Denying Motion for Stay of Proceedings and Request for Stay Pending Appeal, filed 10 March 2006 ("Ngirumpatse Submissions"). The Prosecution responded in *The Prosecutor v. Édouard Karemera et al.*, Case N°ICTR-98-44AR73.6, Prosecutor's Response to "Joseph Nzirorera's Interlocutory Appeal from Decision Denying Motion for Stay of Proceedings and Request for Stay Pending Appeal", filed 17 March 2006 ("Prosecution Response"). Mr. Nzirorera filed a reply on 21 March 2006.

appeal raises issues of whether the Trial Chamber provided Mr. Nzirorera with adequate time to prepare for cross-examination of a witness following the Prosecution's late disclosure of potentially exculpatory material that was relevant to that cross-examination as well as whether it applied the correct standard and followed proper procedures in declining to order additional disclosure.

Background

2. The trial in which this appeal arises is in the initial stages of the Prosecution case. The trial originally commenced on 27 November 2003 before a section of Trial Chamber III.[3] The Defence successfully challenged the composition of the Bench, and the Appeals Chamber ordered the trial to commence *de novo*.[4] The trial restarted on 19 September 2005,[5] and the Trial Chamber heard two witnesses during the first session, which lasted until 28 October 2005.

3. On 6 February 2006, before the commencement of the second trial session, Mr. Nzirorera requested the immediate disclosure of material relevant to the testimony of each of the witnesses scheduled to be heard during the upcoming session.[6] He claimed that the Prosecution had failed to provide these materials in violation of its obligations under Rules 66 (A) (ii) and 68 of the Rules of Procedure and Evidence of the Tribunal ("Rules").[7] As a remedy, he sought a sixty day stay of proceedings.[8]

4. In the Impugned Decision, the Trial Chamber agreed that the Prosecution had failed to comply with its disclosure obligations in respect of some of the material sought by Mr. Nzirorera.[9] However, it declined to stay the proceedings.[10] In addition, the Trial Chamber refused to order the production of other material, based on the Prosecution's undertaking that it either did not possess the documents or that they were not exculpatory.[11] Over Mr. Nzirorera's objection, the Trial Chamber commenced the testimony of Witness UB.[12] The testimony of Witness UB covered the entire second trial session, running from 16 February until 15 March 2006. The third trial session is scheduled to commence on 15 May 2006.

Discussion

A. Ground 1: Allegation that the Trial Chamber Erred in Failing to Provide a Remedy for Rule 66 and Rule 68 Violations It Found to Have Been Established

5. Under his first ground of appeal, Mr. Nzirorera focuses his submission on Rule 68 violations bearing on the testimony of Witness UB,[13] the only witness ultimately heard during the second trial session. These violations include the late disclosure of a judgement of a Rwandan court implicating

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[2] *The Prosecutor v. Édouard Karemera et al.*, Case N°ICTR-98-44-T, Oral Decision, T. 16 February 2006 pp. 2-10 ("Impugned Decision").
[3] Impugned Decision, p. 8.
[4] *The Prosecutor v. Édouard Karemera et al.*, Case N°ICTR-98-44AR15*bis*.2, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 22 October 2004.
[5] Impugned Decision, p. 8.
[6] Impugned Decision, p. 2; Nzirorera Appeal, para. 1.
[7] Impugned Decision, p. 2; Nzirorera Appeal, para. 1.
[8] Impugned Decision, p. 2; Nzirorera Appeal, para. 1.
[9] Impugned Decision, pp. 3, 4, 6-8. The Trial Chamber found disclosure violations in respect of Witnesses UB, GFA, GBU, AWB, ALG, HH, Omar Serushago, and Ahmed Mbonyunkiza. Impugned Decision pp. 3, 4, 6-8.
[10] Impugned Decision, pp. 8-10. The Appeals Chamber observes that, given the trial schedule, Mr. Nzirorera received the sixty day delay that he sought with respect to all witnesses other than Witnesses Mbonynkiza and UB, who have already testified.
[11] Impugned Decision, pp. 5-7.
[12] Impugned Decision, pp. 8, 9.
[13] Nzirorera Appeal, paras. 73-92.

Witness UB in killings[14] as well as statements of two individuals further incriminating the witness.[15] Mr. Nzirorera argues that, having found serious violations of the Prosecution's disclosure obligations, the Trial Chamber erred as a matter of law by failing to provide him with adequate time and facilities to prepare his defence in violation of his rights under Article 20 (4) (b) of the Statute.[16]

6. The Trial Chamber determined that, in the circumstances of the case, no prejudice resulted from the late disclosures because Mr. Nzirorera had some knowledge of the material, and the Prosecution provided the documents at the outset of the witness's testimony.[17] Mr. Nzirorera disagrees with this assessment and submits that he suffered prejudice because, in order to properly challenge Witness UB's credibility based on the material, he needed time to "digest" the material and to interview the individuals whose allegations underlie it.[18] In response, the Prosecution argues that Mr. Nzirorera had no right to a stay of proceedings in the circumstances of the case.[19]

7. The Prosecution's obligation to disclose potentially exculpatory material is essential to a fair trial.[20] However, not every violation of this important obligation implicates a violation of an accused's fair trial rights, warranting a remedy.[21] If a Rule 68 disclosure is extensive, parties are entitled to request an adjournment in order to properly prepare themselves.[22] The authority best placed to determine what time is sufficient for an accused to prepare his defence is the Trial Chamber conducting the case.[23]

8. Mr. Nzirorera raised the issue of his need for investigations arising from the late disclosure before the Trial Chamber.[24] In the Impugned Decision, the Trial Chamber expressly considered the impact of the late disclosure on Mr. Nzirorera's ability to prepare for Witness UB's testimony and determined that the late disclosure would not interfere with an effective cross-examination.[25] Furthermore, the Trial Chamber noted that it would provide appropriate additional relief on a case-by-case basis and indicated that it might be appropriate to recall the witness if further investigations warranted additional cross-examination.[26] In the present circumstances, the Appeals Chamber cannot say that the Trial Chamber abused its discretion in declining to stay the proceedings. The Appeals Chamber considers that in long and complicated cases, it is necessary for a Trial Chamber to exercise

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[14] Nzirorera Appeal, para. 77. The Prosecution disclosed this judgement in Kinyarwanda on 13 February 2006. It was translated informally for the parties into French and English on 16 February 2006 on an expedited basis at the request of the Trial Chamber. The judgement contains allegations of fourteen individuals implicating Witness UB in various killings. *See* Nzirorera Appeal, para. 78; Impugned Decision, p. 9. The Appeals Chamber observes that the Prosecution obtained the Rwandan judgement on 10 February 2006. T. 13 February 2006 pp. 12, 13.
[15] Nzirorera Appeal, para. 80.
[16] Nzirorera Appeal, paras. 75-82.
[17] Impugned Decision, p. 8.
[18] Nzirorera Appeal, paras. 75-82.
[19] Prosecution Response, paras. 3-28.
[20] *The Prosecutor v. Théoneste Bagosora et al*., ICTR Case N°98-41-AR73, 98-41-AR73(B), Decision on Interlocutory Appeals on Witness Protection Orders, 6 October 2005, para. 44; *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case N°IT-95-14/2-A, Appeal Judgement, 17 December 2004, paras. 183, 242 ("*Kordić and Čerkez* Appeal Judgement"); *The Prosecutor v. Tihomir Blaškić* Case N°IT-95-14-A, Judgement, 20 July 2004, para. 264 ("*Blaškić* Appeal Judgement"); *The Prosecutor v. Radislav Krstić*, Case N°IT-98-33-A, Judgement, 19 April 2004, para. 180 ("*Krstić* Appeal Judgement"); *The 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, p. 3 ("*Brđanin* Decision").
[21] *Kordić and Čerkez* Appeal Judgement, para. 179 ("Once the Defence has satisfied a Chamber that the Prosecution has failed to comply with Rule 68, the Chamber, in addressing what is the appropriate remedy (if any) must examine whether or not the Defence has been prejudiced by a breach of Rule 68 […].")(emphasis added). See also *The Prosecutor v. Juvénal Kajelijeli*, ICTR Case N°98-44A-A, Judgement, 23 May 2005, para. 262 (*Kajelijeli* Appeal Judgement"); *Blaškić* Appeal Judgement, paras. 295, 303; *Krstić* Appeal Judgement, para. 153.
[22] *Krstić* Appeal Judgement, para. 206.
[23] *The Prosecutor v. Slobodan Milošević*, 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, 20 January 2004, para. 18.
[24] T. 13 February 2006 p. 16.
[25] Impugned Decision, p. 8.
[26] Impugned Decision, pp. 3, 8, 10.

its discretion to control the progress of the proceedings as appropriate, provided that it does not encroach on fair trial rights.[27]

9. Mr. Nzirorera contends that the Trial Chamber rejected his request for a stay of proceedings solely based on an erroneous reading of an oral decision in the *Karera* case.[28] Mr. Nzirorera notes that, in the *Karera* case, the Trial Chamber postponed the cross-examination of Witness UB, who also appeared in that trial, based on late disclosure.[29] However, he submits that in the Impugned Decision, the Trial Chamber erroneously described the holding in *Karera* as providing for the recall of the witness.[30] The Appeals Chamber does not accept Mr. Nzirorera's contention that the Trial Chamber reached the Impugned Decision on the basis of such a reading of the *Karera* decision. In refusing to stay the proceedings, the Trial Chamber engaged in a case-specific analysis of the impact of the late disclosure on Mr. Nzirorera's ability to cross-examine Witness UB.[31] The Trial Chamber also noted that it had a range of other possible remedies at its disposal, including postponing or excluding the witness's testimony.[32] Only then, did the Trial Chamber proceed to make its observations about the *Karera* decision.[33]

10. Mr. Nzirorera also contends that recall, as an exceptional measure, is an insufficient remedy.[34] The Appeals Chamber notes, however, that the adequacy of this remedy in this instance has not been tested given that Mr. Nzirorera has not yet sought to recall the witness. In addition, at this stage, it is also entirely unclear what evidentiary value, if any, the Trial Chamber will place on Witness UB's testimony in light of the existing cross-examination or further evidence and submissions provided during the proceedings.

11. Accordingly, this ground of appeal is dismissed.

B. Ground II: Allegation that the Trial Chamber Erred in Setting an Unreasonable Threshold for Proof of Rule 68 Violations It Did Not Find Had Been Established

12. Under his second ground of appeal, Mr. Nzirorera submits that the Trial Chamber erred in refusing to order the disclosure of additional material in the Prosecution's possession pertaining to Witnesses Mbonyunkiza, UB, GFA, and GBU.[35] He claims that members of his Defence team interviewed a number of individuals who acknowledged providing statements to the Prosecution which, in the Defence's view, contradicted the anticipated testimony of Prosecution witnesses about specific events.[36] In refusing to order disclosure of this material, Mr. Nzirorera argues that the Trial Chamber set an unreasonably high threshold for proof of a Rule 68 violation by requiring the Defence to have actual knowledge of the contents of the material in question before ordering disclosure.[37]

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.[38]

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[27] See *Kordić and Čerkez* Appeal Judgement, para. 196.
[28] Nzirorera Appeal, paras. 83-86, referring to *The Prosecutor v. François Karera,* ICTR Case N°01-74-T, Oral Decision, T. 18 January 2006 p. 86.
[29] Nzirorera Appeal, paras. 85, 86.
[30] Nzirorera Appeal, para. 84.
[31] See Impugned Decision, pp. 8, 9.
[32] See Impugned Decision, p. 4.
[33] See Impugned Decision, pp. 9, 10.
[34] Nzirorera Appeal, paras. 87, 88.
[35] Nzirorera Appeal, paras. 93-102.
[36] Nzirorera Appeal, paras. 96-98; T. 13 February 2006 pp. 4, 6, 7, 30.
[37] Nzirorera Appeal, para. 93.
[38] *Kajelijeli* Appeal Judgement, para. 262; *Kordić and Čerkez* Appeal Judgement, para. 179; *Brđanin* Decision, p. 3.

14. The Prosecution admitted taking statements from some of the individuals, as alleged by the Defence, but did not consider the material to be exculpatory.[39] The Trial Chamber accepted a representation to this effect from the Prosecution, noting that the Defence did not refute it.[40]

15. Mr. Nzirorera claims that, in accepting this representation, the Trial Chamber failed to consider the history of the Prosecution's Rule 68 violations in this case, the Prosecution's "misguided view" of its Rule 68 obligations, as well as the likelihood that a witness to an important event who was not being called by the Prosecution would possess information which affected the credibility of its witness, describing the same event.[41] The Prosecution responds that it was open to the Trial Chamber to accept its representations.[42]

16. The Appeals Chamber can identify no error on the part of the Trial Chamber in declining to order the disclosure of the material in question. The responsibility for disclosing exculpatory material rests on the Prosecution, and the determination of what material meets Rule 68 disclosure requirements is primarily a facts-based judgement, falling within the Prosecution's responsibility.[43]

17. The Appeals Chamber cannot fault the Trial Chamber for requesting Mr. Nzirorera to provide an "evidentiary basis" for his claims that the material fell within the scope of Rule 68, contrary to the assertions of the Prosecution.[44] The Trial Chamber is entitled to assume that the Prosecution is acting in good faith.[45] The Appeals Chamber observes that Mr. Nzirorera supported his assertion that the Prosecution possessed exculpatory material based on the representations of his counsel recounting interviews with individuals who claimed that they provided the Prosecution with contradictory accounts of certain events.[46] Although the Trial Chamber would have been within its discretion to order the Prosecution to disclose the material in question on the basis of such representations, the Appeals Chamber cannot conclude that it abused its discretion in declining to do so.

18. The Appeals Chamber also does not agree that, in reaching its decision, the Trial Chamber failed to adequately consider the history of disclosure violations in this case.[47] The Trial Chamber expressly stated that it had been requested to draw various inferences from prior disclosure disputes, which Mr. Nzirorera raised during oral argument.[48] Moreover, in accepting the Prosecution's representations, the Trial Chamber emphasized that the administration of justice depended on the integrity of the Prosecution and indicated its willingness to consider sanctions if the Prosecution declarations were inaccurate.[49]

19. Accordingly, this ground of appeal is dismissed.

C. Ground III: Allegations that the Trial Chamber Erred in Refusing to Inspect the Disputed Material In Camera

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[39] Impugned Decision, pp. 6, 7.
[40] Impugned Decision, pp. 6, 7.
[41] Nzirorera Appeal, para. 99.
[42] Prosecution's Response, para. 29.
[43] *Kordić and Čerkez* Appeal Judgement, para. 183; *Brđanin* Decision, p. 3. See also *Kajelijeli* Appeal Judgement, para. 262.
[44] See Impugned Decision, pp. 7, 8; T. 13 February 2006 p. 6 ("If you're saying the Prosecutor has not honoured a commitment and you're asking us to provide a remedy for doing so, we would need some evidence that would enable us to say that.").
[45] *Kordić and Čerkez* Appeal Judgement, para. 183; *Brđanin* Decision, p. 3.
[46] See, *e.g.*, Nzirorera Appeal, paras. 96-98; T. 13 February 2006 pp. 4, 6, 7, 30.
[47] Mr. Nzirorera and Mr. Ngirumpatse outline the Prosecution's disclosure practices throughout the case in detail. Nzirorera Appeal, paras. 12-64, 94. See also Ngirumpatse Submissions, paras. 10-13. The Prosecution notes that past problems have been cured and that the Trial Chamber has never found that the Prosecution acted in bad faith. Prosecution Response, para. 17.
[48] Impugned Decision, p. 5.
[49] Impugned Decision, pp. 6, 8, 9.

20. Finally, under his third ground of appeal, Mr. Nzirorera submits that the Trial Chamber erred by refusing to inspect the disputed material *in camera*.[50] The Appeals Chamber observes, however, that Rule 68 (D) requires inspection *in camera* of materials only where the Prosecution seeks to be relieved of its disclosure obligation as a result of possible prejudice to ongoing investigations, or because disclosure may be contrary to the public interest or the security interests of a state. Given that the Prosecution has the primary responsibility to make disclosure determinations under Rule 68,[51] the Appeals Chamber does not find any error on the Trial Chamber's part in declining to inspect the documents *in camera*.

21. Accordingly, this ground of appeal is dismissed.

Disposition

22. For the foregoing reasons, the Appeals Chamber DISMISSES the Nzirorera Appeal in all respects and DISMISSES his motion for a stay of proceedings pending the disposition of the appeal as moot.

Done in English and French, the English version being authoritative.

Done this 28th day of April 2006, At The Hague, The Netherlands.

[Signed] : Liu Daqun

[50] Nzirorera Appeal, paras. 103-106.
[51] *Kordić and Čerkez* Appeal Judgement, para. 183.

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Decision on Prosecutor's Confidential Motion for Special Protective Measures for Witness ADE
Article 20 of the Statute, Rule 75 of the Rules of Procedure and Evidence
3 May 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Protective measures for a witness, Testimony by video-link where it is in the interests of justice, Possibility to assess of witness' credibility, Witness insider of the "AKAZU" – Closed Session ordered – Restricted disclosures already displayed – Motion partially granted

International Instruments cited :

Rules of Procedure and Evidence, rules 54, 75 and 90 (A) ; Statute, art. 20 (4) (e)

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. Edouard Karemera, Order on Protective Measures for Prosecution Witnesses, 10 December 2004 (ICTR-98-44) ; 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 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Tharcisse Muvunyi, Decision on Decision on Prosecutor's extremely urgent Motion Pursuant to TC II Directive of 23 May 2005 for Preliminary measures to Facilitate the use of Closed Video-link Facilities, 20 June 2005 (ICTR-2000-55A) ; 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 Defence and Prosecution Motions Related to Witness ADE, 31 January 2006 (ICTR-2001-73) ; Trial Chamber, The Prosecutor v. Protais Zigiranyirazo, Decision on the Prosecution Motion for Witness BPP to Testify by Video-link, 27 March 2006 (ICTR-2001-73)

Introduction

1. The Prosecutor moves the Chamber to order special protective measures for Witness ADE[1], by hearing his testimony via video-link, in closed session, and restricting disclosure of documents and information relating to the said witness. The motion was supported by additional oral arguments on the alleged security problems of Witness ADE, in response to a request from the Chamber.[2]

[1] "Requête Confidentielle du Procureur pour une Ordonnance de Mesures Spéciales de Protection à l'égard du témoin ADE", filed on 6 February 2006.
[2] T. 17 March 2006, Status Conference (Closed session).

2. The Prosecutor contends that Witness ADE is unwilling to travel to Arusha due to fears for his safety stemming from his position as an AKAZU insider; that his expected testimony is important as he will be adducing evidence on the alleged functioning of the "AKAZU", one of the groups alleged in the indictment to have been included in the joint criminal enterprise with the three Accused; and that hearing the testimony via video-link is in the interests of justice and will not compromise the Accused's right to a fair trial.

Discussion

Video-Link Testimony

3. The Defence for Nzirorera and for Ngirumpatse oppose the Motion.[3] They agree that the testimony of Witness ADE is important but contend that this should be a reason for ensuring the witness' attendance in Arusha to facilitate cross-examination and proper assessment of the witness' credibility. They stress that there is no factual justification regarding any fear for the safety of Witness ADE and the Tribunal should be able to provide the same security guarantees in Arusha as in The Hague. They argue that the Prosecutor is confusing the personal interest of Witness ADE with the interests of justice and that any agreement made between Witness ADE and the Prosecutor assuring the witness that his testimony will take place via video-link usurps the function of the Chamber and should not be considered.

4. The Chamber's preference is that Witness ADE should be heard at the Tribunal's seat in Arusha, a principle enshrined in Rule 90 (A) of the Rules. However, this principle does not preclude a witness from testifying by video-link where it is in the interests of justice, as established by this Tribunal's jurisprudence. Although the Rules do not expressly provide for the taking of direct trial testimony via video-link, Trial Chambers of this Tribunal have held that such testimony may be ordered under either Rules 54 or 75.[4] In making such a determination, the Chamber will consider the importance of the testimony; the inability or unwillingness of the witness to attend; and whether a good reason has been adduced for the inability or unwillingness to attend.[5]

5. The Chamber notes that the Prosecutor and the Defence are in agreement that the evidence of Witness ADE is important. Since Witness ADE is alleged to be an insider of the "AKAZU" with information about its operation and functioning, the Chamber accepts that his evidence is undoubtedly important to the Prosecutor's case. On the basis of the submissions made by the Prosecutor, the Chamber accepts that Witness ADE's concerns about his security in Arusha are well founded and genuine. The Chamber recalls that in its Decision relating to special protective measures for Witnesses G and T, it rejected the contention raised by the Defence, that the use of a video-link could impair its ability to assess the credibility of a witness' testimony, and restates that with respect to the Defence arguments concerning limitations on its ability to observe the demeanour of Witness ADE and to

[3] "Joseph Nzirorera's Response to Requête Confidentielle du Procureur pour une Ordonnance de Mesures Spéciales de Protection à l'égard du témoin ADE", filed on 8 February 2006 ; "Réplique du Procureur à la Réponse de Joseph Nzirorera à la Requête Confidentielle du Procureur pour une Ordonnance de Mesures Spéciales de Protection à l'égard du témoin ADE", filed on 9 February 2006 ; "Mémoire en réponse à la requête confidentielle du procureur pour une ordonnance de mesures spéciales de protection à l'égard du témoin ADE", filed by Mathieu Ngirumpatse on 13 February 2006 ; "Réplique de la défense de Edouard Karemera à la requête confidentielle du procureur pour une ordonnance de mesures spéciales de protection à l'égard du témoin ADE", filed on 13 February 2006.

[4] *Prosecutor v. Théoneste Bagosora et al.,* Case N°ICTR-98-41-T (*Bagosora et al.*), Decision on Ntabakuze Motion to Allow Witness DK52 to Give Testimony by Video-Conference, 22 February 2005, para. 4; *Prosecutor v. Aloys Simba,* Decision Authorising the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link, 4 February 2005; *Prosecutor v. Aloys Simba*, Decision on the Defence Request for Taking the Evidence of Witness FMP1 by Deposition, 9 February 2005.

[5] *The Prosecutor v. Édouard Karemera et al.*, Case N°ICTR-98-44-T (*Karemera et al.*), Decision on the Prosecutor's Motion for Special Protective Measures for Witnesses G and T (TC), 14 September 2005; *Prosecutor v. Aloys Simba*, Decision on the Defence Request for Taking the Evidence of Witness FMP1 by Deposition (TC), 9 February 2005; 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.

challenge his credibility, the Chamber is of the view that these matters are not affected by his testimony by video-link.[6]

6 The Defence refers to the *Zigiranyirazo* case in which the Trial Chamber was concerned by the ability to accurately assess the testimony and demeanour of a witness who is testifying by video-link and finally expressed the wish to hear Witness ADE uninterrupted and in person at the location where the witness resides.[7] The Chamber notes that the same Trial Chamber has rendered a Decision allowing a Prosecutor Witness to testify via video-link.[8] Previously, this Chamber had taken Witnesses G and T testimonies by video-link.[9] In the present case, this Chamber is of the view that the taking of Witness ADE's testimony by video-link will neither impair the Chamber's assessment of his credibility nor infringe the Accused's rights under Article 20 (4) (e) of the Statute of the Tribunal.[10] It is satisfied that it is in the interests of justice to order the taking of the testimony by video-link.

7. Accordingly the alternative defence request that the Chamber hear Witness ADE's testimony by sitting in The Hague, in the presence of the Accused and their Counsel is rejected.

Closed Session

8 The Chamber considers that due to the protective orders presently in place for Witness ADE, discussions of these particular requests should take place in closed session. The Chamber is of the view that all hearings concerning the planning and scheduling of the video-link testimony and/or concerning the details of the special protective measures already in place for Witness ADE, including his movements, are excluded from the public and the press and remain confidential. However, depending on the circumstances, and on a case-by-case basis, the Chamber will consider whether parts of Witness ADE's testimony should be heard in closed session.

Restrictions on disclosures

9 The Prosecutor also asks the Chamber to order that the Defence Counsel and the Accused shall not disclose any documents or information relating to Witness ADE to anybody, including other Defence teams, except the persons working in the Defence teams in the present case, and that no identifying information regarding ADE be disclosed to the public. The Chamber recalls that this measure is already covered by Order Number 5 of the Chamber's Decision of 10 December 2004 granting protective measures for all witnesses.[11] There is no need to make a new determination on this point as the said Decision is still in force.

FOR THOSE REASONS, THE CHAMBER

I. GRANTS in part the Prosecutor's Motion, and

II. ORDERS as follows:

a) That the testimony of Witness ADE shall be taken via a secure audiovideo transmission link, and be broadcast live to the seat of the Tribunal in Arusha, in the presence of all the parties;

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[6] *Karemera et al*., Decision on the Prosecutor's Motion for Special Protective Measures for Witnesses G and T (TC), 14 September 2005, para 13.
[7] *The Prosecutor v. Protais Zigiranyirazo*, Case N°ICTR-2001-73-T, Decision on Defence and Prosecution Motions Related to Witness ADE (TC), 31 January 2006, para. 32.
[8] *The Prosecutor v. Protais Zigiranyirazo*, Case N°ICTR-2001-73-T, Decision on the Prosecution Motion for Witness BPP to Testify by Video-Link (TC), 27 March 2006.
[9] *Karemera et al*., Decision on the Prosecutor's Motion for Special Protective Measures for Witnesses G and T (TC), 14 September 2005.
[10] See, for example, *Prosecutor v. Muvunyi*, Decision on Prosecutor's Extremely Urgent Motion Pursuant to Trial Chamber II Directive of 23 May 2005 for Preliminary Measures to Facilitate the Use of Closed Video-Link Facilities, 20 June 2005, para. 17; *Bagosora et al*., Decision on Prosecution Request for Testimony of Witness BT via Video-Link, 8 October 2004, para. 7.
[11] *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera, André Rwamakuba,* Case N°ICTR-98-44-R75, Order on Protective Measures for Prosecution Witnesses (TC), 10 December 2004.

b) That the Registry makes the necessary logistical arrangements for Witness ADE to give his testimony by way of secure audio-video transmission link, and that it does so in a confidential manner;

c) That all questioning of Witness ADE take place from the seat of the Tribunal in Arusha, including cross-examination by the Defence;

d) That a representative of each of the Parties be permitted to be present at the place from which Witness ADE will testify, for the duration of his testimony, and that the Registry, in confidence, makes all necessary logistical arrangements for those persons' attendance;

e) That the planning and scheduling of the said video-link testimony shall take place only in closed session; and

f) That the details of the special protective measures already in place for Witness ADE, including his movements, shall not be disclosed to the public or be discussed in open session.

Arusha, 3 May 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment Articles 2 and 6 (1) of the Statute 18 May 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Applicability of joint criminal enterprise liability to complicity in genocide, Interpretation of the ICTY and ICTR statute, Complicity is one of the forms of criminal responsibility applicable to the crime of genocide and not a crime itself following the jurisprudence of both ad hoc Tribunals, Impossible to plead that complicity in genocide has been committed by means of a joint criminal enterprise – Motion partially granted

International Instrument cited :

Statute, art. 2, 2 (3) and 6 (1)

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. Ignace Bagilishema, Judgement, 7 June 2001 (ICTR-95-1A) ; Trial Chamber, The Prosecutor v. Laurent Semanza, Judgement and Sentence, 15 May 2003 (ICTR-97-20) ; Trial Chamber, The Prosecutor v. Sylvestre Gacumbitsi, Judgement, 17 June 2004 (ICTR-2001-64) ; 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)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Radislav Krstić, Judgment, 2 August 2001 (IT-98-33) ; Trial Chamber, The Prosecutor v. Milomir Stakić, Judgement, 31 July 2003 (IT-97-24) ; Appeals

Chamber, The Prosecutor v. Radislav Krstić, Judgement, 19 April 2004 (IT-98-33) ; Trial Chamber, The Prosecutor v. Radoslav Brđanin, Judgment, 1 September 2004 (IT-99-36) ; Trial Chamber, The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Judgment, 17 January 2005 (IT-02-60)

Introduction

1. The trial in this case started on 19 September 2005. The Amended Indictment charges Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera with genocide committed by means of a joint criminal enterprise. In the alternative, it charges the Accused persons with complicity in genocide also committed by means of a joint criminal enterprise.[1]

2. On 5 September 2005, the parties were heard on a preliminary motion challenging the applicability of joint criminal enterprise liability to complicity in genocide.[2] The Chamber found that this challenge was premature, because the count of complicity in genocide was pleaded as an alternative to the count of genocide. In the Chamber's view, in the event that the count of genocide was proved, the issue would become moot. The Chamber's deliberations on the matter were therefore reserved.[3] Following Joseph Nzirorera's successful interlocutory appeal of this Decision, the Appeals Chamber ordered the Trial Chamber to render a decision on whether the Appellant could be tried for complicity in genocide under an extended joint criminal enterprise theory.[4]

Discussion

3. Joseph Nzirorera, joined by Ngirumpatse and Karemera, argues that complicity in genocide is a form of liability and, as such, cannot be committed through a joint criminal enterprise since the latter is also a form of accomplice liability.[5] They therefore contend that there is no jurisdiction to prosecute complicity through the extended form of joint criminal enterprise.

4. The Prosecution denies that complicity in genocide is a mode of liability and it submits that complicity in genocide must be considered as a separate crime.[6] In its view, a person can therefore be found guilty of complicity in genocide through the extended form of joint criminal enterprise if the other member of the joint criminal enterprise is an accomplice in genocide, if that was a natural and foreseeable consequence of the enterprise, and if the accused was both aware of this, and with that awareness, participated in the enterprise.[7]

5. Joint criminal enterprise does not appear expressly in the Statute nor in the Rules of Procedure and Evidence. This legal concept appeared for the first time in the *Tadić* Appeals Judgment of 15 July 1999.[8] According to established jurisprudence, joint criminal enterprise is considered as a form of participation in a crime coming from the word *committing* contained in Article 7(1) of the Statute of the International Criminal Tribunal for former Yugoslavia and Article 6 (1) of this Tribunal's Statute.

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[1] See Counts 3, 4 and para. 7. On 23 February 2005, the Prosecutor filed an Amended Indictment. A new Amended Indictment dated 24 August 2005 was filed on 25 August 2005 pursuant to the Chamber's Decision on Defects in the Form of the Indictment of 5 August 2005.
[2] T. 5 September 2005.
[3] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-R72 ("*Karemera et al.* Case"), Decision on Defence Motions Challenging the Indictment as Regards the Joint Criminal Enterprise Liability (TC), 14 September 2005.
[4] *Prosecutor v. Karemera et al.*, Case N°ICTR-98-44AR72.5 and ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise (AC), 12 April 2006.
[5] See: Joseph Nzirorera's Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise, filed on 4 May 2005; "*Mémoire pour M. Ngirumpatse*", adopting Joseph Nzirorera's submissions, filed on 11 May 2005; "*Requête d'Édouard Karemera en exception préjudicielle pour vices de forme de l'acte d'accusation*" and "*Requête relative à l'exception préjudicielle pour incompétence ratione materiae, ratione personae, ratione temporis et nullum crimen, nuella poena sine lege*", filed on 17 May 2005; and oral arguments made by the parties, T. 5 September 2005.
[6] T. 5 September 2005, p. 29.
[7] Prosecutor's Response to Nzirorera's Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise, filed on 9 May 2005; and oral arguments, T. 5 September 2005, p. 29.
[8] *Prosecutor v. Dusko Tadic*, Case N°IT-94-1-A, Judgement (AC), 15 July 1999, paras. 185-229.

As the Appeals Chamber recently reiterated, it is clear that there is a basis in customary international law for joint criminal enterprise liability.[9] It is also well established that joint criminal enterprise can apply to the crime of genocide.[10]

6. Conversely, complicity in genocide is explicitly provided for Article 2 (3) of the Statute.[11] Chambers have defined complicity as referring to

> "all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide".[12]

7. Contrary to the Prosecution's assertion, jurisprudence of both *ad hoc* Tribunals has determined that complicity is one of the forms of criminal responsibility that is applicable to the crime of genocide, and not a crime itself.[13] There is no need for this Chamber to reiterate this explicit finding of the Appeals Chamber, which has been constantly applied by Trial Chambers of both *ad hoc* Tribunals on this matter.[14]

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[9] *Karemera et al*., Decision on Jurisdictional Appeals: Joint Criminal Enterprise (AC), 12 April 2006, para. 16.

[10] See in particular: *Prosecutor v. André Rwamakuba*, Case N°ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide (AC), 22 October 2004; see also: *Prosecutor v. Mitar Vasiljevic,* Case N°IT-98-32-A, Judgment (AC), 25 February 2004, para. 102; *Prosecutor v. Radislav Krstic,* Case N°IT-98-33-A, Judgment (AC), 19 April 2004, paras. 134 and 144.

[11] Articles 2 (2) and (3) of the Statute read as follows:
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 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.
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.(emphasis added)

[12] *Prosecutor v. Laurent Semanza,* Case N°ICTR-97-20-T, Judgment (TC), 15 May 2003, para. 395. Prior jurisprudence (See: *Prosecutor v. Jean-Paul Akayesu,* Case N°ICTR-96-4-T, Judgment (TC), 2 September 1998, paras. 533, 535, 537 ("*Akayesu* Judgment (TC)"); *Prosecutor v. Ignace Bagilishema,* Case N°ICTR-95-1A-T, Judgment (TC), 7 June 2001, paras. 69-70 ("*Bagilishema* Judgment (TC)"); *Prosecutor v. Alfred Musema,* Case N°ICTR-96-13-A, Judgement (TC), 27 January 2000, paras. 177 and 179 ("*Musema,* Judgment (TC)") has taken into consideration the general meaning of complicity in the common and civil law, as well as the domestic law of Rwanda, has defined the term complicity as aiding and abetting, instigating, and procuring. The Trial Chamber in *Semanza* case emphasized rightly that there is no compelling reason for explicitly defining a legal term in its Statute, which is drawn *verbatim* from an international instrument, by reference to a particular national code.

[13] Reference can also be made to the Statute of the International Criminal Court ("ICC"), 17 July 1998, art. 6, UN Doc. A/Conf.183/9. All forms of criminal responsibility, even those uniquely applicable to genocide, are listed in Article 25 of the ICC Statute while Article 6 provides the definition of the crime of genocide as follows:
For the purpose of this Statute, « 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 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.

[14] *Prosecutor v.Elizaphan Ntakirutimana and Gerard Ntakirutimana,* Case N°ICTR-96-10-A and ICTR-96-17-A, Judgment (AC), 13 December 2004, para. 500; *Prosecutor v. Laurent Semanza,* Case N°ICTR-97-20-A, Judgment (AC), 20 May 2005, para. 316; *Prosecutor v. Radislav Krstic,* Case N°IT-98-33-A, Judgment (AC), 19 April 2004, para. 139; *Bagilishema* Judgment (TC), para. 67: "In the Chamber's view, genocide and complicity in genocide are two different forms of participation in the same offence"; *Prosecutor v. Laurent Semanza,* Case N°ICTR-97-20-T, Judgment (TC), 15 May 2003, para. 390; *Prosecutor v. Radislav Krstic,* Case N°IT-98-33-T, Judgment (TC), 2 August 2001, para. 640; *Prosecutor v. Milomir Stakic*, Case N°IT-97-24-T, Judgment (TC), 31 July 2003, para. 531; *Prosecutor v. Radoslav Brdjanin,* Case N°IT-99-36-T, Judgment (TC), 1 September 2004, para. 724-725, 727 and 729: the Trial Chamber adds that "complicity is one of the forms of criminal responsibility recognized by the general principles of criminal law, and in respect of genocide, it is also recognized in customary international law" (references omitted); *Prosecutor v. Vidoje Blagojevic and Dragan Jokic,* Case

8. Whereas the genocide is the crime, joint criminal enterprise and complicity in genocide are two modes of liability, two methods by which the crime of genocide can be committed and individuals held responsible for this crime. It is therefore impossible to plead that complicity in genocide has been committed by means of a joint criminal enterprise. Complicity can only be pleaded as a form of liability for the crime of genocide.

9. Furthermore, since an individual cannot be both the principal perpetrator of a particular act and the accomplice thereto, it is well recognized that complicity must be pleaded as an alternative form of responsibility.[15]

10. In the present case, the Chamber will therefore consider the count of complicity as a pleading of a specific form of participation in the crime of genocide alternatively to the forms pleaded under the count of genocide. In that regard, there is no need to file a new Amended Indictment.

FOR THE ABOVE REASONS, THE CHAMBER

I. GRANTS the Defence Motions in part;

II. DECIDES that there is no jurisdiction to prosecute complicity through the form of a joint criminal enterprise; and

III. DECIDES that the Amended Indictment against the Accused must be understood as pleading complicity in genocide as an alternative form of participation in the crime of genocide.

While Judge Short agrees with the outcome of the decision, he will be filing a Separate Opinion.

Arusha, 18 May 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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N°IT-02-60-T, Judgment (TC), 17 January 2005, para. 684. The Trial Chamber further noted that "in this case, the Prosecution, when submitting the elements of complicity in genocide, explicitly referred to it as a form of liability and not as a crime".

[15] *Bagilishema* Judgment (TC), para. 67: In the Chamber's view, genocide and complicity in genocide are two different forms of participation in the same offence. The Chamber thus concurs with the opinion expressed in Akayesu that "an act with which an Accused is being charged cannot, therefore, be characterized both as an act of genocide and an act of complicity in genocide as pertains to this accused. Consequently, since the two are mutually exclusive, the same individual cannot be convicted of both crimes for the same act". Therefore, the Chamber finds that an accused cannot be convicted of both genocide and complicity in genocide on the basis of the same acts.
See also: *Musema*, Judgment (TC), para. 175; *Prosecutor v. Sylvestre Gacumbitsi*, Case N°ICTR-2001-64-T, Judgment, (TC), 17 June 2004, para. 246 ("*Gacumbitsi* Judgment (TC)").

Separate Opinion of Judge Short on Complicity in Genocide and Joint Criminal Enterprise Theory
Articles 2 and 6 (1) of the Statute and Rule 72 of the Rules of Procedure of Evidence
23 May 2006 (ICTR-98-44-T)

Separate Opinion of Judge Short

1. I support the conclusion reached in the Decision of 18 May 2006 to the extent that it upheld the Defence submission that the Accused in this case cannot be tried for complicity in genocide under an extended form of joint criminal enterprise ('JCE'). However, I am unable to agree with part of the reasoning in that Decision. I also disagree with the scope of the ruling.

2. First, I am of the view that the Chamber's Decision should have been limited to a consideration of the question which the Appeals Chamber directed it to answer, and which was the subject of the Defence preliminary motions which ultimately became the subject of Nzirorera's appeal. That narrow question relates to whether or not the Accused in this case can be tried for complicity in genocide under an extended joint criminal enterprise theory.[1] Findings with respect to the pleading of complicity and JCE in general were not necessary for the Decision.

3. In the course of their preliminary motions concerning this question, as well as during the oral hearing of 5 September 2005, the Accused argued against pleading complicity in genocide pursuant to a theory of extended JCE on two different grounds. The first ground was a theoretical one, namely, that since both complicity in genocide and JCE are modes of liability, they cannot be pleaded together, since it would amount to pleading that a mode of liability (complicity in genocide) had been committed by means of a JCE. The second ground was a factual one relating specifically to the Count of complicity in genocide in the Indictment against the co-Accused (Count four). With respect to this leg of the Defence argument, the Accused argued that it is factually impossible for the Prosecution to prove the allegations concerning complicity in genocide and extended JCE together, as pleaded in the Indictment.

4. The Decision of 18 May 2006 was based upon findings made with respect to the first of the aforementioned arguments – that since complicity in genocide is a mode of liability, another mode of liability (JCE) cannot be pleaded with respect to it.

5. I have reviewed the relevant provisions of the Statute, as well as the jurisprudence relied upon in the Decision, and I am unable to reach the same conclusion with respect to the status of complicity in genocide. Articles 2, 3 and 4 of the Statute of the Tribunal outline the subject matter jurisdiction of this Tribunal – genocide, crimes against humanity, and violations of common Article 3 of the Geneva Conventions and Additional Protocol II thereto, respectively. Article 2 (1) vests jurisdiction in the Tribunal with respect to the crime of genocide, as defined in paragraph 2, *or* any of the *other acts* outlined in paragraph 3 of that Article. Paragraph 3 provides:

> 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;

[1] *Karemera et al. v. Prosecutor,* Case N°ICTR-98-44AR72.5 and ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise (AC), 12 April 2006, para. 25 (c).

(e) Complicity in genocide.[2]

It is clear that the so-called "acts" referred to in Articles 2 (3) (a) and (b) – genocide and conspiracy to commit genocide – are individual crimes. So are "attempt to commit genocide" and "direct and public incitement to commit genocide", which are inchoate offences. However, the contention with respect to the status of complicity in genocide, mentioned in paragraph 3 (e), arises as a result of an overlap between "complicity" in Article 2 (3) (e) of the Statute and forms of accomplice liability in Article 6 (1) of the Statute.[3]

6. The Decision of 18 May 2006 found that "complicity is one of the forms of criminal responsibility that is applicable to the crime of genocide, and not a crime itself", and that this was an "explicit finding" of the Appeals Chamber.[4] In reaching such a finding, the Decision relied upon a number of decisions of the *ad hoc* Tribunals which, it said, made such a determination.

7. I do not agree with that interpretation of the jurisprudence. In my view, none of the Appeals Chamber jurisprudence relied upon in the Decision as authority for the proposition that complicity is one of the forms of criminal responsibility that is applicable to the crime of genocide, and not a crime itself, makes such an explicit finding. However, it is conceded that such an explicit statement of law was made concerning the status of complicity in genocide in the *Blagojevic and Jokic* case:

> Since complicity in genocide, as recently reiterated by the *Krstic* Appeal Chamber, is a form of liability of the crime of genocide and not a crime itself, Article 7 (3) cannot but refer to the crime of genocide.[5]

This statement was made by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, and, in my view, relied upon passages of the *Krstic* Appeals Chamber Decision[6] which did not make such a categorical finding. The remaining Trial Chamber jurisprudence touching upon this issue is inconsistent and in no way categorical in its treatment of complicity in genocide.[7]

8. In my view, complicity in genocide has the indicia of a criminal offence, whilst encompassing a particular mode of liability. It is often charged as an alternative count to the count of genocide, as in the Indictment in this case, and can result in a finding of guilt for "complicity in genocide". In the case of *Semanza,* for example, the Accused, who was charged with Counts of genocide and complicity in genocide in the alternative, was found not guilty of genocide and convicted of complicity in genocide.[8] It certainly cannot be said that the Accused in that case was convicted of a mode of liability. I am therefore of the view that the term "complicity in genocide" referred to under Article 2 (3) (e) is a crime (genocide) to which a particular mode of criminal responsibility is attached (complicity, or accomplice liability).

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[2] Emphasis added.

[3] See, for example, *Prosecutor v.Elizaphan Ntakirutimana and Gerard Ntakirutimana,* Case N°ICTR-96-10-A and ICTR-96-17-A, Judgment (AC), 13 December 2004, para. 500; *Prosecutor v. Laurent Semanza,* Case N°ICTR-97-20-A, Judgment (AC), 20 May 2005, para. 316; *Prosecutor v. Radislav Krstic,* Case N°IT-98-33-A, Judgment (AC), 19 April 2004, para. 139 ("*Krstic* Judgment (AC)"); *Prosecutor v. Radislav Krstic,* Case N°IT-98-33-T, Judgment (TC), 2 August 2001, para. 640 ("*Krstic* Judgment (TC)").

[4] *Prosecutor v. Karemera et al.,* Case N°ICTR-98-44-T, 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.

[5] *Prosecutor v. Vidoje Blagojevic and Dragan Jokic,* Case N°IT-02-60-T, Judgment (TC), 17 January 2005, para. 684.

[6] *Prosecutor v. Radislav Krstic,* Case N°IT-98-33-A, Judgment (AC), 19 April 2004, para. 139 ("*Krstic* Judgment (AC)");

[7] For example, in the *Bagilishema* Judgment the Trial Chamber said: "In the Chamber's view, genocide and complicity in genocide are two different forms of participation in the same offence", para. 67; In *Prosecutor v. Laurent Semanza,* Case N°ICTR-97-20-T, Judgment (TC), 15 May 2003, para. 390, the Trial Chamber said that "Article 2 (3) lists the forms of criminal responsibility that are applicable to the crime of genocide under the Statute, namely genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide."; See also *Prosecutor v. Radislav Krstic,* Case N°IT-98-33-T, Judgment (TC), 2 August 2001, para. 640.

[8] *Prosecutor v. Laurent Semanza,* Case N°ICTR-97-20-T, Judgement and Sentence (TC), 15 May 2003, paras. 433 and 553. This conviction was affirmed on appeal, see *Laurent Semanza v. The Prosecutor,* Case N°ICTR-97-20-A, Judgement, 20 May 2005, p. 128.

9. In my view, however, the question of whether or not the Accused in this case can be tried on a Count of complicity in genocide under an extended joint criminal enterprise theory cannot be resolved by attempting to place complicity in genocide within a 'crime' or 'mode of liability' category. It is clear from the jurisprudence of both Tribunals that a count of "complicity in genocide" has come to refer to accomplice liability for the crime of genocide – that is, aiding, abetting, or otherwise assisting a principal offender in the commission of one or more of the acts proscribed by Article 2 (2).[9] Furthermore, stating that the term "complicity in genocide" under Article 2 (3) (e) refers to a mode of liability does not resolve the issue concerning whether or not an extended form of JCE can be pleaded with it.

10. Instead, I am of the view that it is preferable to resolve this question by reference to the Indictment in this case – that is, by addressing the second leg of the Defence argument that it is factually impossible for the Prosecution to prove the allegations of complicity in genocide committed by means of extended form JCE liability, as outlined in the Indictment. In order to do so, it is necessary to set out the relevant provisions of the Amended Indictment.

11. Paragraph four of the Amended Indictment in this case, whilst attributing Article 6 (1) responsibility to the Accused for the crimes referred to in Articles 2, 3 and 4 of the Statute, states that the term "committing" in the Indictment also refers to participation in a JCE a co-perpetrator. Paragraph five of the Indictment then goes on to set out the allegation concerning the Accused's participation in a JCE. It also states that the purpose of the JCE was "the destruction of the Tutsi population in Rwanda through the commission of crimes in violation of Articles 2, 3 and 4 of the Statute…" Paragraph six outlines the alleged participants in the JCE, including the Accused, certain named individuals, and classes of persons.

12. Paragraph seven of the Indictment states that the crime[10] of complicity in genocide (Count four), amongst others, was within the object of the JCE. It goes on to state that the crime of complicity in genocide was the natural and foreseeable consequence of the execution of the object of the JCE and that the accused were aware that this crime was the possible outcome of the execution of the JCE. This is therefore the main statement of the allegation that the co-Accused committed complicity in genocide by virtue of the fact that the commission of that crime, by others, was a natural and foreseeable consequence of their participation in a JCE.

13. Count four, complicity in genocide, is charged as an alternative crime to Count three, genocide. Under Count four, the Accused (the accomplices) are alleged to have instigated or provided the means to other persons (the principal offenders) to commit genocidal acts. Paragraphs 34 to 66 of the Indictment contain the substance of the allegations against the Accused with respect to their Article 6 (1) or 6 (3) responsibility for the crime of genocide, or alternatively, form the basis of the case against them with respect to their Article 6 (1) liability for complicity in genocide. The anomaly in this pleading is that, rather than outlining the acts of the Accused's co-perpetrators, which result in criminal responsibility attaching to the Accused by virtue of the extended form of JCE, paragraphs 34-66 contain, for the most part, allegations concerning the acts of one or more of the co-Accused in this case. This pleading with respect to complicity in genocide is entirely inconsistent with the way in which extended form JCE liability is pleaded in the Indictment.

14. Furthermore, a problem arises in terms of the underlying offence in both cases – the purpose of the joint criminal enterprise, and the unintended but foreseeable crime giving rise to extended form

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[9] Those are:
(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.
with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

[10] The Indictment contemplates 'complicity in genocide' as a 'crime', and makes several references to it being as such.

joint criminal enterprise liability – being genocide. The Indictment establishes that the purpose of the JCE entered into by the Accused was the destruction of the Tutsi population through the commission of genocidal acts outlined in Article 2 (2), amongst other things.[11] The third or "extended" category of joint criminal enterprise liability allows conviction of a participant in a joint criminal enterprise for certain crimes committed by other participants in the joint criminal enterprise, even though those crimes were outside the common purpose of the enterprise, if he or she intended to further the common purpose of the joint criminal enterprise and the crime was a natural and foreseeable consequence of that common purpose.[12] The third form of JCE liability is therefore intended to cover the commission of a crime or crimes which were outside the common purpose of the enterprise. The inconsistency, in this case, is that both the purpose of the JCE, and Count four, contemplate the offence of genocide, even though Count four contemplates the commission of that offence through a particular mode of liability. In my view, the extended form of JCE was not intended to cover this type of scenario. Rather, it was meant to attach liability to the Accused for offences not contemplated by the agreement, but nonetheless foreseeable.

Arusha, 23 May 2006, done in English.

[Signed] : Emile Francis Short

[11] Amended Indictment, paragraph 5.
[12] *Prosecutor v. Milomir Stakic,* Case N°IT-97-24-A, Judgement (AC), 22 March 2006, paras. 58 and seq.; *Prosecutor v. Radoslav Brdjanin,* Case N°IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004, paras. 5 and 6.

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Decision on Nzirorera Request for Access to Protected Material 19 May 2006 (ICTR-98-41-T)

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge ; Jai Ram Reddy ; Sergei Alekseevich Egorov

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Disclosure of the closed session transcripts and exhibits filed under seal in respect of seven Defence witnesses in the Bagosora Case, Standard for disclosure of confidential inter partes material to a party in another case : factual nexus between the two cases, Good chance that this information would materially assist the Defence, Supplementary conditions for disclosure regarding the fact that witnesses have not revealed their identity themselves – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 75 (G) (i)

International Cases cited :

I.C.T.R. : 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 Motion by Nzirorera for Disclosure of Closed Session Testimony of Witness ZF, 11 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 Motion to Harmonize and Amend Witness Protection Orders, 1 June 2005 (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 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)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Decision on Motions for Access to Confidential Materials, 16 November 2005 (IT-02-60) ; 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)

SITTING as Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED of the "Motion for Disclosure of Closed Session Transcripts and Exhibits Under Seal for Certain Defence Witnesses", filed by the Defence for Nzirorera on 2 May 2006;

HEREBY DECIDES the motion.

1. Joseph Nzirorera, an Accused in the trial of *The Prosecutor v. Karemera et al.*, requests disclosure pursuant to Rule 75 (G) (i) of the closed session transcripts and exhibits filed under seal in respect of seven Defence witnesses heard in the present case: BDR-1, LIG-1, NR-1, LM-1, BZ-1, LK-2 and YD-1. These witnesses are said to have been called to rebut the testimony of Prosecution Witnesses ZF and XBM, both of whom are also about to testify for the Prosecution in the *Karemera et al.* trial.[1]

2. 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.[2]

3. Nzirorera submits that he wishes to confront Witnesses ZF and XBM with contradictory testimony offered by the seven Defence witnesses in this case, and that he needs to know their identities and the content of their closed session testimony for this purpose. The Chamber accepts that there is a good chance that this information would materially assist the Defence. Moreover, disclosure would place the Defence on an even footing with the Prosecution, which under an Appeals Chamber decision of October last year, has access to this material for the purpose of discharging its obligation to identify and disclose exculpatory information which might be heard in other trials.[3]

4. 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.[4] The Chamber is concerned, however, that those conditions may not be sufficient in the present circumstances. The record does not show whether any particular sensitivities or witness protection interests might be engaged by broader disclosure of these witnesses' identities. The present case is distinguishable in that respect from two recent disclosure decisions, in which it was apparent that the witnesses in question had already revealed their participation as protected witnesses in the first proceedings to Defence counsel in the second proceedings.[5]

5. In similar circumstances, the Appeals Chamber has additionally required that the party in receipt of the confidential material:

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[1] The first four are said to be relevant to the testimony of Witness ZF, whereas the last three are germane to Witness XBM.

[2] *Blagojević and Jokić*, Decision on Momčilo Perišić's Motion Seeking Access to Confidential Material in the Blagojević and Jokić Case (AC), 18 January 2006, para. 4; *Prosecutor v. Galić*, Decision on Momčilo Perišić's Motion Seeking Access to Confidential Material in the Galić Case (AC), 16 February 2006, para. 3 (with further references).

[3] *Bagosora et al*,. Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005, paras. 44-46. Parity of access is an argument for disclosure: *Prosecutor v. Blagojević and Jokić*, Decision on Motions for Access to Confidential Materials (AC), 16 November 2005, para. 11 ("The Prosecution has access to those filings, and given Mr. Nikolić's demonstration of the nexus between the two cases, the principle of equality of arms supports giving Mr. Nikolic a similar chance to understand the proceedings and evidence in the Blagojević and Jokić case and evaluate their relevance to his own case"); *Bagosora et al.*, Decision on Zigiranyirazo Motion for Disclosure of Closed Session Testimony of Witness DM-190 (TC), 16 May 2006, para. 5. The applicant has not here argued that the requested testimony is exculpatory. If that were the case, as suggested by the Appeals Chamber, the information would be automatically disclosable under Rule 75 (F). *Bagosora et al*, Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005, paras. 44-45. In fact, access by the Prosecution team in *Karemera et al.* to protected Defence witness information in the *Bagosora et al.* case enables it to comply with its obligations under Rule 68 to disclose exculpatory material. This is not to suggest that the material actually is exculpatory, but simply that the record does not show whether this more direct avenue of disclosure has been pursued.

[4] See e.g. *Bagosora et al.*, Decision on Motion By Nzirorera for Disclosure of Closed Session Testimony of Witness ZF (TC), 11 November 2003, p. 3.

[5] *Rwamakuba*, Decision on Bagosora Motion for Disclosure of Closed Session Testimony of Witness 3/13 (TC), para. 5 (witness already scheduled to appear as a protected witness in the second proceedings); *Bagosora et al.*, Decision on Zigiranyirazo Motion for Disclosure of Closed Session Testimony of Witness DM-190 (TC), 16 May 2006, para. 5 (witness had met with Defence counsel in second proceedings and expressed willingness to testify as a protected witness).

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:

(a) disclose to any third party, the names of witnesses, their whereabouts, transcripts of witness testimonies, exhibits, or any information which would enable them to be identified and would breach the confidentiality of the protective measures already in place;

(b) disclose to any third party, any documentary evidence or other evidence, or any written statement of a witness or the contents, in whole or in part, of any non-public evidence, statement or prior testimony; or

(c) contact any witness whose identity was subject to protective measures.[6]

Counsel may use the closed session testimony of the seven Defence witnesses in order to elicit responses to the substantive propositions therein, but may not disclose their identity, or information which likely would do so, to the Prosecution witnesses. The contrary would mean that the identity of a protected witness could be revealed to any other protected witness, a practice which would seriously undermine witness protection.

6. The Chamber authorizes the other Accused in the *Karemera et al*. trial to have the same access to this material, on the same conditions.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

DECLARES that the Nzirorera 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;[7]

ORDERS that in addition to the existing witness protection measures, the party 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:

(a) disclose to any third party, the names of witnesses, their whereabouts, transcripts of witness testimonies, exhibits, or any information which would enable them to be identified and would breach the confidentiality of the protective measures already in place;
(b) disclose to any third party, any documentary evidence or other evidence, or any written statement of a witness or the contents, in whole or in part, of any non-public evidence, statement or prior testimony; or
(c) contact any witness whose identity was subject to protective measures.

Arusha, 19 May 2006.

[Signed] : Erik Møse ; Jai Ram Reddy ; Sergei Alekseevich Egorov

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[6] *Blagojević and Jokić*, Decision on Momčilo Perišić's Motion Seeking Access to Confidential Material in the Blagojević and Jokić Case (AC), 18 January 2006, para. 9.

[7] Three of the Defence witness protection orders are, in substance, identical: *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. The Ntabakuze order was declared applicable to all Nsengiyumva witnesses by virtue of: *Bagosora et al*., Decision on Motion to Harmonize and Amend Witness Protection Orders (TC), 1 June 2005. The orders were modified again, but not in any manner relevant to the present application, by *Bagosora et al*., Decision Amending Defence Witness Protection Orders (TC), 2 December 2005.

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Decision on Defence Motion for an Order Requiring Notice of Ex Parte Filings and to Unseal a Prosecution Confidential Motion
Article 20 of the Statute
30 May 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Request for an order that no confidential ex parte motion can be filed by one party without notice to the other party at the time the filing, Ex parte applications not necessarily contrary to the fairness of the proceedings, Principle of audi alteram partem, Chamber will continue to decide any ex parte filing on a case-by-case basis – Motion denied

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. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera, Decision on Defence Motion for Disclosure of Prosecution Ex Parte Motion under Rule 66 (C) and Request for Cooperation of a Certain State, 14 October 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera, Decision on Prosecution's Motion to Renew and Extend Transfer Order of Detained Prosecution Witness Omar Serushago, 15 December 2005 (ICTR-98-44)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Blagoje Simić et al., Decision on (1) Application by Stevan Todorovic to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 February 2000 (IT-95-9)

Introduction

1. The trial in this case started on 19 September 2005. On 15 December 2005, at the Prosecution's request filed *ex parte*,[1] the Chamber granted the renewal and extension of the transfer of the detained witness Omar Serushago temporarily to the UNDF in Arusha until the completion of his testimony in the current trial.[2]

2. Following that Order, the Defence for Nzirorera moved the Chamber to unseal the Prosecution Motion to renew and extend transfer Order of Omar Serushago, filed *ex parte* on 8 December 2005.[3] It further moved the Chamber for an Order that no confidential *ex parte* motion can be filed by one party without notice of the fact of such filing to the other party at the time the filing is made. The Prosecution requested this motion to be denied in its entirety.[4]

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[1] Motion to Renew and Extend Transfer Order of Detained Prosecution Witness Omar Serushago, filed by *ex parte* by the Prosecutor on 8 December 2005.
[2] Prosecutor v. *Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-PT ("*Karemera et al.*"), Decision on Prosecution's Motion to Renew and Extend Transfer Order of Detained Prosecution Witness Omar Serushago (TC), 15 December 2005.
[3] Motion For Order Requiring Notice of *Ex Parte* Filings and to Unseal, filed on 19 December 2005.
[4] Prosecutor's Response, filed 22 December 2005.

Discussion

3. As this Chamber has stated several times in the present case,[5] as a general rule, applications must be filed *inter partes*. *Ex parte* applications are nevertheless appropriate, and even required, in certain circumstances. They are not necessarily contrary to the fairness of the proceedings. The fundamental principle is that

> "*ex parte* proceedings should be entertained only where it is thought to be necessary in the interests of justice to do so – that is, justice to *everyone* concerned – in the circumstances already stated: where the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact the application itself, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application."[6]

This Chamber has also held that the principle of *audi alteram partem* requires that filings be disclosed to the opposing party, absent a compelling reason not to do so.[7]

4. The Chamber is of the view that the law on the admission of *ex parte* filings is clear and guarantees the right of each party. The Chamber has decided and will continue to decide any *ex parte* filing on a case-by-case basis in accordance with that law. The Defence motion seeking a general declaration of law is not warranted.

5. In particular, in the Decision of 15 December 2005, the Chamber explicitly addressed the issue of the *ex parte* filing made by the Prosecution and accepted it to be in the interests of justice.[8]

6. The Defence has not submitted any argument to reconsider this Chamber's finding. The Chamber does not find any merit for reconsideration of this finding. The application to unseal the Prosecution Motion to Renew and Extend Transfer Order of Detained Prosecution Witness Omar Serushago, filed on 8 December 2005, falls therefore to be rejected.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion in its entirety.

Arusha, 30 May 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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[5] See: *Karemera et al*., Decision on Motion to Unseal *Ex Parte* Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment (TC), 3 May 2005, paras. 11 and 13; *Karemera et al*., Decision on Defence Motion for Disclosure of Prosecution *Ex Parte* Motion under Rule 66 (C) and Request for Cooperation of a Certain State (TC), 14 October 2005.

[6] *Prosecutor v*. *Simic et al*., Case N°IT-95-9, Decision on (1) Application by Stevan Todorovic to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material (TC), 28 February 2000, para. 40.

[7] *Karemera et al*., Decision on Motion to Unseal *Ex Parte* Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment (TC), 3 May 2005, paras. 11 and 13.

[8] *Karemera et al*., Decision on Prosecution's Motion to Renew and Extend Transfer Order of Detained Prosecution Witness Omar Serushago (TC), 15 December 2005, para. 4.

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Interim Order on Defence Motion for Subpoena to Meet with Defence Witness NZ1 31 May 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Subpoena issued only when the witness is uncooperative, Choose for alternative method to make the determination of the witness' willingness to participate in this case

International Instruments cited :

Rules of Procedure and Evidence, rules 33 and 54 ; Statute, art. 28

International Cases cited :

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Radislav Krstić, Decision on Application for subpoenas, 1 July 2003 (IT-98-33)

1. On 23 January 2006, Nzirorera moved, pursuant to Article 28 of the Statute of the Tribunal and Rule 54 of the Rules of Procedure and Evidence, for the Chamber to issue a *subpoena* to Defence Witness NZ1[1] to meet with Counsel for the Accused and to the State[2] where he is located to cooperate in facilitating such a meeting. Nzirorera stated that the witness refuses to meet with him and that the witness had been contacted by the Prosecution in the past.

2. The Appeals Chamber in *Krstic* stated that where a prospective witness had been previously uncooperative with the defence, issuing a *subpoena* would only occur if the Chamber considered that it was reasonably likely that there will be cooperation if such an order were made.[3] However that Chamber also stated that such a determination may not be safely made by the Defence alone, and proposed some alternative suggestions such as requesting the assistance of the Prosecution or ordering a *subpoena* for the witness to appear before the Trial Chamber to discuss the importance of his cooperation to assist in producing a just result in the trial and that he will be afforded protection by the Tribunal if required.[4]

3. Due to the particular circumstances of this case, and the alleged position of the witness during the events in Rwanda in 1994, the Chamber finds it necessary to have an alternative method to make the determination of the witness' willingness to participate in this case before it decides the Motion. In accordance with Rule 33 of the Rules, the Chamber is of the view that the Registry may assist in that order.

FOR THOSE REASONS, THE CHAMBER

I. REQUESTS the Registry to make its best efforts to contact the witness and convey to him the Chamber's desire for his cooperation in this case and that if required, protective measures can be afforded to him. A report on these efforts should be made to the Chamber as soon as possible, but no later than 15 June 2006.

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[1] See the attached Confidential Annex for the details concerning Witness DNZ1.
[2] See the attached Confidential Annex for the name of the State.
[3] *Prosecutor v. Radislav Krstic*, Case N°IT-98-33, Decision on Application for Subpoenas (AC), 1 July 2003, para. 12
[4] Id.

II. REQUESTS the Government of a certain State to cooperate in facilitating this contact.

Arusha, 31 May 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Order of the Presiding Judge Assigning a Bench of three Judges Pursuant to Rule 72 (E) of the Rules of Procedure and Evidence 1 June 2006 (ICTR-98-44-AR72.7)

(Original: English)

Appeals Chamber

Judge : Fausto Pocar, Presiding Judge

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Assignment of judges

International Instruments cited :

Rules of Procedure and Evidence, rules 72 (B) (i), 72 (D) and 72 (E) ; Statute, art. 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 "Prosecutor's Motion for Determination that the Interlocutory Appeal as of Right May Proceed Immediately, for Leave to File a Written Brief on the Merits of the Appeal, and for a Scheduling Order", filed on 30 May 2006;

CONSIDERING that the Prosecution seeks to proceed with this appeal as of right as an appeal challenging jurisdiction under Rule 72 (B) (i) of the Rules of Procedure and Evidence of the International Tribunal ("Rules");

CONSIDERING that Rule 72 (E) of the Rules provides that an appeal brought under Rule 72 (B) (i) may not be proceeded with if a bench of three judges of the Appeals Chamber decides that the appeal is not capable of satisfying the requirements of Rule 72 (D), in which case the appeal shall be dismissed;

CONSIDERING the composition of the Appeals Chamber of the International Tribunal as set out in document IT/245 of the International Criminal Tribunal for the former Yugoslavia issued on 12 May 2006;

NOTING Article 13 (4) of the Statute of the International Tribunal;

HEREBY ORDER that, in *Prosecutor v. Karemera, et al.*, Case N°ICTR-98-44-AR72.7, for the purpose of determining whether the appeal may proceed pursuant to Rule 72 (E) the bench be composed as follows:

Done in English and French, the English text being authoritative.

Done this 1st day of June 2006, At The Hague, The Netherlands.

Judge Mehmet Güney

Judge Liu Daqun

Judge Wolfgang Schomburg

[Signed] : Fausto Pocar

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Decision on Defence Motions for Certification to Appeal Decision Granting Special Protective Measures for Witness ADE
Rule 73 (B) of the Rules of Procedure and Evidence
7 June 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Certification to appeal, Rule 73 motions are without interlocutory appeal in principle, Discretionary power of the Chamber to grant certification to appeal, Conditions of Rule 73 (B) are cumulative, Absolute exception of the interlocutory appeal when deciding on the admissibility of the evidence, Right of the Accused to confront the witness, No demonstration that the issue of the Appeal would significantly affect the fair and expeditious conduct of the proceedings or the outcome 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. 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) ; Appeals Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004 (ICTR-98-42) ; 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. Protais Zigiranyirazo, Decision on the Prosecution Motion for Witness BPP to Testify by Video-link, 27 March 2006 (ICTR-2001-73)

Introduction

1. The third trial session in this case started on 15 May 2006. Prosecution Witness ADE will most likely be heard during the next trial session. On 3 May 2006, at the Prosecution's request, the Chamber granted this witness special protective measures, including hearing the witness' testimony by video-

link.[1] Each co-Accused seeks now certification to appeal that Decision.[2] The Prosecution opposes these applications.[3]

Discussion

2. Rule 73 (B) of the Rules provides that Decisions rendered under Rule 73 motions are without interlocutory appeal. However, the Rule confers a discretion on the Chamber to grant certification to appeal when certain clearly delimited conditions are fulfilled: the applicant must show (i) how the impugned Decision involves an issue that would significantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial, and (ii) that an "immediate resolution by the Appeals Chamber may materially advance the proceedings".

3*. Each co-Accused claims that the requirements for a certification to appeal, as set out by Rule 73(B) of the Rules of Procedure and Evidence, are met. Mathieu Ngirumpatse and Edouard Karemera submit that a systematic authorization to hear the most important Prosecution witness via video-link affects the right of the co-Accused to cross-examine the witness. According to Mathieu Ngirumpatse, it would be as if the Chamber was ratifying the Prosecution's deal with its witness. Edouard Karemera claims that taking testimony via video-link diminishes the ability of the opposing party, to assess the witness' credibility. He also claims that the Trial Chamber did not take into account his arguments in the Decision of 3 May 2006. In Joseph Nzirorera's view, because of the importance of Witness ADE's testimony, taking the witness' testimony by video-link deprives him of the right to personally confront the witness, violates his right to adequate cross-examination and therefore his right to a fair trial. Each co-Accused further contends that a resolution by the Appeals Chamber will also materially advance the proceedings because if the Appeals Chamber ruled in their favor, they would be able to hear the witness live, while respecting the rights the Accused. In Joseph Nzirorera's view, a finding at a later stage that the Chamber erred will require taking the testimony anew, either before the Appeals Chamber or at a new trial. Joseph Nzirorera finally argues that a resolution by the Appeals Chamber may resolve an issue in which there are two directly contradictory decisions. The Accused makes reference to the Trial Chamber's Decision in the *Zigiranyirazo* case, where the Chamber denied the video-link motion to hear Witness ADE and found that it will benefit from the physical presence of the Accused.[4]

5. The two conditions set out in Rule 73 (B) are cumulative and are not determined on the merits of the appeal against the impugned Decision. The Appeals Chamber further stated that the certification to appeal must remain exceptional,[5] and even the absolute exception when deciding on the admissibility of the evidence.[6]

6. In the present case, the Chamber did not grant a blanket authorization that important Prosecution witnesses shall always be heard by video-link. On the contrary, it has considered each application to hear testimony by video-link on a case-by-case basis. The Accused will not be deprived of their right to confront the witness, nor to assess his demeanor and credibility, since they will cross-examine him

[1] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-PT ("*Karemera et al.*"), Decision on Prosecutor's Confidential Motion for Special Protective Measures for Witness ADE (TC), 3 May 2006.
[2] The Defence for Nzirorera and the Defence for Ngirumpatse filed respectively their Motions on 5 and 8 May 2006; the Defence for Karemera filed a Motion on 9 May 2006.
[3] See: Prosecution's Responses filed on 9 and 11 May 2006.
* The error in the numbering of the paragraphs is due to an error of the Tribunal.
[4] *Prosecutor v. Zigiranyirazo*, Case N°ICTR-01-73-T, Decision on Defence and Prosecution Motions Related to Witness ADE (TC), 31 January 2006.
[5] See: *Prosecutor v. Arsène Shalom Ntahobali and Pauline 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' (TC), 18 March 2004, para. 15; *Prosecutor v. Nyiramasuhuko et al.*, Case N°ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 10.
[6] *Prosecutor v. Pauline Nyiramasuhuko*, Case No ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 10 : "[…] 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."

from the seat of the Tribunal. Moreover, the Chamber was satisfied that it will be able to assess the witness' demeanor and credibility. The Chamber is not satisfied that the co-Accused have shown that the Impugned Decision involves an issue that would significantly affect a fair and expeditious conduct of the proceedings or the outcome of the trial.

7. Moreover, like the Trial Chamber in the *Zigiranyirazo* case, this Chamber made its own findings on its own assessment of the facts. There is no difference in the interpretation of the law made by the two Chambers but it is the application to each specific case which resulted in a different conclusion.[7] An Appeals Chamber ruling is therefore not warranted.

8. Finally, contrary to Karemera's assertion, the Chamber has not failed to take into consideration his arguments when dealing it decided the Prosecution's Motion for special protective measures for Witness ADE. As indicated by the reference at footnote 3 of the Impugned Decision, the Chamber considered each Defence argument, but since they were similar, there was no reason to repeat each of them in the text of the Decision. In any event, such argument would not satisfy the requirements to grant a certification to appeal.

FOR THOSE REASONS, THE CHAMBER

DENIES the Defence Motions.

Arusha, 7 June 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[7] It can be noted that the same Trial Chamber in the *Zigiranyirazo* case granted an application for video-link in respect to another witness (see: *Prosecutor v. Zigiranyirazo*, Case N°ICTR-2001-73-T, Decision on the Prosecution Motion for Witness BPP to Testify by Video-link (TC), 27 March 2006).

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Decision on Oral Motion for a Bill of Particulars 8 June 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Obligation of the Prosecutor to state the material facts underpinning the charges in the Indictment, Rights of the Accused to be entitled to a fair hearing and to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence – Motion partially granted

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Motions Challenging the Indictment as Regards the Joint Criminal Enterprise Liability, 14 September 2005 (ICTR-98-44)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Zoran Kupreškić, Judgement, 23 October 2001 (IT-95-16)

Introduction

1. Count Five of the Amended Indictment charges Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera with being part of a joint criminal enterprise of which rape as a crime against humanity was a natural and foreseeable consequence of its object.[1]

2. On 28 February 2006, Witness UB testified about the commission of sexual crimes against a particular individual. Joseph Nzirorera objected to the admission of this evidence in support of Count five since no prior notice of these facts had been given in the Indictment. Instead, he submitted, the evidence should be admitted for the limited purpose of proving that rapes were committed in Rwanda, during the relevant period.

3. After the Chamber deferred ruling on this issue because it was premature at this stage, and should be dealt with at the end of the Prosecution case, Nzirorera made a Motion for a Bill of Particulars, for the Prosecution to provide a list of the names of individuals, whose identity is known, on which evidence will be led and that the Prosecution intends to hold his client responsible for their rape or sexual assault.

4. The Prosecution responded that the Chamber had already found Count Five to be properly pleaded in the Indictment. It submitted that to prove Count Five, the Prosecution only has to lead evidence on whether rape and sexual assault was widespread and systematic in Rwanda during 1994 and that the Accused have responsibility for those acts as part of the joint criminal enterprise. It claimed that there could be a similar request for all of the murders charged in the Indictment, which is not possible.

Discussion

[1] On 23 February 2005, the Prosecutor filed an Amended Indictment. A new Amended Indictment dated 24 August 2005 was filed on 25 August 2005 pursuant to the Chamber's Decision on Defects in the Form of the Indictment of 5 August 2005. See also para. 7 of the Amended Indictment.

5. In the *Kupreskic* Appeals Chamber Judgment, the Court held that the rights of the Accused to be entitled to a fair hearing and to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence, require the Prosecution to state the material facts underpinning the charges in the Indictment.[2] The amount of detail required, depends on the nature of the Prosecution's case:

> "there may be instances where 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". [3]

6. In its Decision on Joint Criminal Enterprise of 14 September 2005, the Chamber ruled in accordance with the established case-law, and in particular, with the above-mentioned principles set out in the *Kupreskic* case, finding that the particulars of the acts of rape encompassed by Count Five were not material facts which had to be pleaded in the Indictment.[4] However, the Chamber also found that such particulars were important for the preparation of the Defence, and noted that the details of the acts of rape had been disclosed through 143 witness statements in the Prosecution Pre-Trial Brief.

7. In relation to the present Motion, the Chamber finds that, pursuant to the aforementioned jurisprudence, and in light of this Chamber's Decision of 14 September 2005, the Indictment in this case contains sufficient information to inform the Accused of the nature of the charges against them.

8. The Chamber further notes that the details of the sexual violence to which Witness UB testified, and which formed the substance of this application, are found in his statement of interview dated 10 February 2004. This included details concerning the identity of the victim. Although the Prosecution is not required to identify each individual who has been the victim of rape or sexual violence in order to meet it obligations under the jurisprudence, the Prosecution must give notice of details to the extent that those details are within its knowledge. In this instance, timely notice was given concerning the identity of the victim in question which was sufficient for the Defence to be adequately prepared for its cross-examination of Witness UB.

9. Consequently, if the Prosecution has information regarding the names and details of witnesses and victims of rape or sexual violence upon which evidence will be led at trial and which is not contained in the witness statements that have already been disclosed to the Defence, then that information must be disclosed. In addition, for the fairness of the trial, it is in the best interests of the Prosecution to assist with the preparation of the Defence, as it has done here, through timely disclosure of details in a witness statement.

FOR THOSE REASONS, THE CHAMBER

GRANTS the Defence Motion in part;

ORDERS the Prosecution to disclose the known details of the witnesses and victims of rape and sexual violence upon which evidence will be lead at trial which have not already been disclosed in witness statements;

DENIES the remainder of the Motion.

Arusha, 8 June 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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[2] *Prosecutor v. Kupreskic et. al.*, Case N°IT-95-16, Judgement (A), 23 October 2001, para. 88
[3] *Id.* at para. 89.
[4] *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-T, Decision on Defence Motions Challenging the Indictment as Regards the Joint Criminal Enterprise Liability, 14 September 2005, para. 7.

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Decision on Request for Extension of Time 9 June 2006 (ICTR-98-44-AR72.7)

(Original : English)

Appeals Chamber

Judges : Mehmet Güney, Presiding Judge ; Liu Daqun ; Wolfgang Schomburg

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Extension of time, Work language of the Defence Counsel, Translation of the decisions – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 116

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Édouard Karemera et al., Decision on Request for Extension of Time, 27 January 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Édouard Karemera et al., 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 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Édouard Karemera et al., Separate Opinion of Judge Short on Complicity in Genocide and Joint Criminal Enterprise Theory, 23 May 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 Serious Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of the "Prosecutor's Motion for Determination that the Interlocutory Appeal as of Right May Proceed Immediately, For Leave to File a Written Brief on the Merits of the Appeal, and for a Scheduling Order", filed on 30 May 2006 ("Prosecution Motion"). The Prosecution Motion relates to a Trial Chamber decision and a separate opinion of Judge Short, issued in English, addressing the question of whether complicity in genocide is a form of criminal liability or a separate crime.[1]

2. The Appeals Chamber is also presently seized of two requests, filed respectively by Mathieu Ngirumpatse and Édouard Karemera, seeking an extension of time to respond to the Prosecution Motion pending the translation of the Prosecution Motion as well as Judge Short's separate opinion into French.[2]

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[1] *The Prosecutor v. Édouard Karemera et al.*, Case N°ICTR-98-44-T, 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; *The Prosecutor v. Édouard Karemera et al.*, Case N°ICTR-98-44-T, Separate Opinion of Judge Short on Complicity in Genocide and Joint Criminal Enterprise Theory, 23 May 2006.

[2] *Requête de M. Ngirumpatse aux fins d'extension du délai de réponse sur le* "Prosecutor's Motion for Determination that the Interlocutory Appeal as of Right May Proceed Immediately, For Leave to File a Written Brief on the Merits of the Appeal, and for a Scheduling Order", 5 June 2006; *Requête aux fins de prorogation de délai*, 6 June 2006. The Prosecution has not yet responded to this motion. However, in accord with paragraph 18 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal, 16 December 2002, the Appeals Chamber does not find that the Prosecution would be prejudiced by taking this decision prior to the expiration of the period normally allowed for a response.

3. Rule 116 of the Rules of Procedure and Evidence of the Tribunal allows for extensions of time upon a showing of good cause. The Appeals Chamber has previously observed that counsel for Mr. Karemera and Mr. Ngirumpatse work in French, and not in English.[3] The Appeals Chamber considers that, in order to be able to present a full answer to the Prosecution Motion, they need access to French translations of the Prosecution Motion as well as Judge Short's separate opinion.[4] The Appeals Chamber has already determined that this constitutes good cause for a reasonable extension of time in this case.[5]

Disposition

4. For the foregoing reasons, the requests of Mr. Karemera and Mr. Ngirumpatse for an extension of time are GRANTED. The Registry is DIRECTED to provide to Mr. Karemera and Mr. Ngirumpatse and their counsel, on an urgent basis, French translations of the Prosecution Motion, Judge Short's separate opinion, and the present decision. Starting from the date on which the last of these translated documents is transmitted, Mr. Karemera and Mr. Ngirumpatse will be permitted 10 days to file their responses, if any, to the Prosecution Motion. The Prosecution may then file its reply within four days of the filing of the responses. The Registry is also DIRECTED to inform the Appeals Chamber of the date on which the translated documents are transmitted.

Done in English and French, the English version being authoritative.

Done this 9th day of June 2006, At The Hague, The Netherlands.

[Signed] : Mehmet Güney ; Liu Daqun ; Wolfgang Schomburg

[3] *The Prosecutor v. Édouard Karemera et al.,* Case N°ICTR-98-44-A, Decision on Request for Extension of Time, 27 January 2006, para. 4 ("*Karemera et al*. Decision on Request for Extension of Time").
[4] The Trial Chamber's decision at issue has already been communicated to the parties in French, but the separate opinion of Judge Short has only been provided in English.
[5] *Karemera et al*. Decision on Request for Extension of Time, para. 4.

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Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice 16 June 2006 (ICTR-98-44- AR73(C))

(Original: English)

Appeals Chamber

Judges: Mohamed Shahabuddeen, Presiding Judge ; Mehmet Güney ; Liu Daqun ; Theodor Meron ; Wolfgang Schomburg

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – No provision for interlocutory appeal as of right, Power of the Trial Chamber to grant certification of appeal, Power of the Trial Chamber to limit the scope of the certification of appeal to certain questions, Interpretation of the rationale of the Trial Chamber by the Appeals Chamber, Certification to appeal an entire decision on the basis of one issue – Judicial Notice, Conditions to met to be admitted as a fact of common knowledge : question as whether the proposition can reasonably be disputed, Power of the Appeals Chamber to de novo review on appeal the decision of whether to take judicial notice of a relevant fact, Power to take judicial notice of facts relating directly or indirectly to the defendant's guilt – Judicial Notice of Adjudicated Facts in another cases, Res judicata Principle, Distinction between the judicial notices taken on the basis of article 94 (B) and 94 (A) of the Rules of Procedure and Evidence, Judical Notice taken on the basis of article 94 (B) is discretionary and is establishing presumptions rather than facts, Reversal of the initial burden to produce evidence and not of the ultimate burden of persuasion, Analogy with the administration of alibi evidence – Not judicial notice of facts sufficient to establish the Accused's responsibility, Respect of the presumption of innocence and of the rights of the Accused – Judicial Notice of the existence of a genocide in 1994 in Rwanda, Inconceivable proof of the contrary, Origin of the création of the Tribunal, Relevant to the thesis of the Prosecutor, No lessening of the Prosecution's burden of proof, Relevant context for other charges against the Accused – Facts of common knowledge admitted: Status of Hutu, Tutsi and Twa as Ethnic Groups, Existence of Widespread or Systematic Attacks, Genocide – Case to be retried by the Trial Chamber

International Instruments cited :

Practice Direction on the Length of Briefs and Motions on Appeal, sections (C) (2) (a) (1) et (C) (2) (d) ; Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, paras. 2 et 3 ; Rules of Procedure and Evidence, rules 7 ter (B), 73 (B), 73 (C), 89, 92 bis, 94, 94 (A) et 94 (B) ; Rules of Procedure and Evidence of the ICTY, rule 94 (A) ; Statute, art. 24 (1) ; Statute of Rome of the International Criminal Court, art. 69 (6) ; Statute of the International Military Tribunal for Germany, art. 21

International and National Cases cited :

European Court of Human Rights, Klass et al. v. Germany, 6 September 1978, n° 5029/71.

T.P.I.R. : Appeals Chamber, The Prosecutor v. Jean-Paul Akayesu, Judgement, 1st June 2001 (ICTR-96-4) ; Trial Chamber, The Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts – Rule 94 (B) of the Rules of Procedure and Evidence, 22 November 2001 (ICTR-96-10 and ICTR-96-17) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecutor's Motion for Judicial Notice, 11 April 2003 (ICTR-98-41) ; 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) ; 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) ; Appeals Chamber, The Prosecutor v. Juvénal Kajelijeli, Judgement, 23 May 2005 (ICTR-98-44A) ; Appeals Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Prosecution Appeal of Witness Protection Measures, 16 November 2005 (ICTR-99-50) ; Trial Chamber, The Prosecutor v. Édouard Karemera et al., Decision on Request for Extension of Time, 27 January 2006 (ICTR-98-44)

T.P.I.Y. : Trial Chamber, The Prosecutor v. Duško Sikirica, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 September 2000 (IT-95-8) ; Appeals Chamber, The Prosecutor v. Stanislav Galić, Decision on Interlocutory Appeal Concerning Rule 92 bis (C), 7 June 2002 (IT-98-29) ; Trial Chamber, The Prosecutor v. Momčilo Krajišnik, Decision on Prosecution Motions for Judicial Notice and Adjudicated Facts and for Admission of Written Statements of Witnesses pursuant to Rule 92bis, 28 February 2003 (IT-00-39) ; Appeals Chamber, The Prosecutor v. Slobodan Milošević, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003 (IT-02-54) ; Trial Chamber, The Prosecutor v. Vidoje Blagojević, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence, 19 December 2003 (IT-02-60) ; Trial Chamber, The Prosecutor v. Željko Mejakić, Decision on Prosecution Motion for Judicial Notice Pursuant to Rule 94 (B), 1 April 2004 (IT-02-65) ; 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. Momčilo Krajišnik, Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts, 24 March 2005 (IT-00-39) ; Appeals Chamber, The Prosecutor v. Momir Nikolić, Decision on Appellant's Motion for Judicial Notice, 1 April 2005 (IT-02-60/1) ; Appeals Chamber, The Prosecutor v. Naser Orić, Interlocutory Decision on Length of Defence Case, 20 July 2005 (IT-03-68) ; Appeals Chamber, The Prosecutor v. Ramush Haradinaj et al., Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying His Provisional Release, 9 March 2006 (IT-04-84)

Australie : High Court d'Australie, Woods v. MultiSport Holdings (2002), 186 ALR 145, 7 March 2002.

Canada : Ontario County Court, R. v. Potts (1990), 26 C.R. (3d) 25 ; Supreme Court of Canada, R. v. Zundel (1992), 2 S.C.R. 731, 27 August 1992.

South Africa : Minister of Land Affairs et al. v. Stamdien et al.*, 4 BCLR 413 (1999)*

United Kingdom : Kings Bench, Dorman Long and Co., Ltd. v. Carroll and Others, 2 All ER 567 (1945) ; Court of Appeal, Mullen v. Hackney L.B.C. (1997) 1 W.L.R. 1103

United States of America : 9th Circuit Court of Appeal, Mead v. United States, 257 F. 639, 642 (1919)

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 Interlocutory Appeal of Decision on Judicial Notice (Rule 73 (C))", filed by the Prosecution on 12 December 2005 ("Prosecution's Interlocutory Appeal").

I. Procedural History and Filings of the Parties

2. On 30 June 2005, the Prosecution filed before Trial Chamber III its "Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts" ("Prosecution's Motion"). In the Motion, the Prosecution requested, pursuant to Rule 94 of the Tribunal's Rules of Procedure and Evidence ("Rules"), that the Trial Chamber take judicial notice of six purported "facts of common knowledge",

as well as a further 153 purported "adjudicated facts" extracted from the Judgements in the *Akayesu, Kayishema and Ruzindana, Rutaganda, Kajelijeli, Musema, Nahimana et al., Ndindabahizi, Niyitegeka, Ntakirutimana* and *Semanza* cases.

3. In its "Decision on Prosecution Motion for Judicial Notice" ("Impugned Decision"), filed on 9 November 2005, the Trial Chamber took judicial notice of two of the six "facts of common knowledge, took judicial notice of another "fact of common knowledge" in modified form, and denied the remainder of the Prosecution's Motion. The Prosecution sought certification to appeal the Decision in accordance with Rule 73 (C) of the Rules. The Trial Chamber granted certification in its "Certification of Appeal concerning Judicial Notice", filed on 2 December 2005 ("Certification"). The Prosecution's Interlocutory Appeal was filed accordingly on 12 December.[1]

4. One of the Accused, Joseph Nzirorera, filed "Joseph's Nzirorera's Motion to Dismiss Issues of Interlocutory Appeal for Which Certification Was Not Granted" on 13 December 2005 ("Nzirorera's Motion"), seeking to confine the scope of the interlocutory appeal to the single issue on which, Mr. Nzirorera argued, the Trial Chamber had granted certification to appeal. The Prosecution filed a response to this motion on 15 December 2005,[2] and Mr. Nzirorera filed a reply to this response on 16 December 2005.[3] In addition, on 16 December 2005, Mr. Nzirorera filed his "Respondent's Brief" ("Nzirorera's Response") responding to the interlocutory appeal on its merits. The Prosecution filed its reply to this response on 20 December 2005.[4]

5. In both its Response to Nzirorera's Motion and its Reply to Nzirorera's Response, the Prosecution argues that it was improper for Mr. Nzirorera to file both a motion to dismiss the interlocutory appeal and a separate response to that interlocutory appeal. It contends that a respondent to an interlocutory appeal is entitled to only one response, into which should be incorporated any arguments for the dismissal of the appeal. The Prosecution asks the Appeals Chamber to treat Nzirorera's Motion, being the first filed, as his response, and thus to disregard Nzirorera's Response.[5] Mr. Nzirorera has given no answer to these arguments.

6. The Appeals Chamber agrees with the Prosecution that Mr. Nzirorera was only entitled to file a single response. According to paragraph 2 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal,[6] the response to an interlocutory appeal filed as of right shall both "state whether or not the appeal is opposed and the grounds therefore" and "set out any objection to the applicability of the provision of the Rules relied upon by the Appellant as the basis for the appeal". That is, the response should both address the merits of the appeal and include any procedural arguments for its dismissal. Nzirorera's Motion set forth an objection to the applicability of Rule 73 (B) of the Rules as a basis for the appeal, by contending that the appeal exceeds the scope of the certification granted under that Rule. It should have been included as part of the response.

7. However, the Appeals Chamber nonetheless finds that it is in the interests of justice in the exceptional circumstances of this case to consider the arguments raised in both Nzirorera's Motion and Nzirorera's Response. This is for two reasons. First, there may arguably have been a good faith basis for Mr. Nzirorera's counsel to believe (albeit wrongly) that the above-cited provision of the Practice Direction did not apply to interlocutory appeals certified by a Trial Chamber, an issue the Appeals

[1] Rule 73 (C) requires a party to file its interlocutory appeal within seven days of the filing of a decision certifying the appeal. Because Friday, 9 December 2005 was an official holiday at the Tribunal in Arusha, where the appeal was filed, the deadline was the following Monday, 12 December 2005.
[2] Prosecutor's Reply to Nzirorera's Response, 13 December 2005 ("Response to Nzirorera's Motion").
[3] Reply Brief: Joseph Nzirorera's Motion to Dismiss Issues of Interlocutory Appeal for Which Certification Was Not Granted, 16 December 2005 ("Reply Supporting Nzirorera's Motion").
[4] Prosecutor's Reply to "Respondent's Brief of Joseph Nzirorera" Dated 16 December 2005, 20 December 2005 ("Reply to Nzirorera's Response").
[5] See Response to Nzirorera's Motion, paras 1-2; Prosecution's Reply to Nzirorera's Reponse, paras 2-3.
[6] 16 September 2002 ("Practice Direction on Written Submissions").

Chamber had not previously decided.[7] In light of that fact, to set aside Nzirorera's Response entirely – and thus consider the merits of the issues raised on appeal without any argument from Mr. Nzirorera – would be a disproportionate remedy for the violation of the Rules.

8. Second, the Prosecution's own appeal filing has violated the Practice Direction on the Length of Briefs and Motions on Appeal,[8] which provides in paragraph I (C) (2) (a) (i) that the "motion of a party wishing to appeal where appeal lies as of right will not exceed 15 pages or 4500 words, whichever is greater." In submitting a 28-page filing (plus appendices), the Prosecution relies instead on paragraph I (C) (2) (d).[9] But that paragraph applies to cases in which the Appeals Chamber has either ordered or expressly permitted the parties to file "briefs" on the merits of an interlocutory appeal – that is to say, where the Appeals Chamber has determined that the issues are sufficiently complex to justify submissions longer than those allowed by the ordinary provisions of subparagraphs (a) and (c). No such order or leave has been granted in this case. None of the Accused has objected to the Prosecution's appeal on this basis, which means that the Appeals Chamber is not obligated to grant relief.[10] In light of the fact that the Accused have now all responded to the Prosecution's appeal, the important issues raised by the appeal, and the fact that – like Mr. Nzirorera – the Prosecution might conceivably have been confused by the applicability of the various provisions of the practice direction, the Appeals Chamber determines that the fairest approach is to accept the Prosecution's Interlocutory Appeal as validly filed. Doing so provides another reason that, in fairness to Mr. Nzirorera, the arguments in Nzirorera's Response should not be disregarded.

9. For the foregoing reasons, the Appeals Chamber permits Mr. Nzirorera to separate the response authorized by paragraph 2 of the Practice Direction on Written Submissions into two separate filings (Nzirorera's Motion and Nzirorera's Response), and will thus consider the arguments included in both filings. The Prosecution's replies to these two separate filings are thus also permissible as they are, in essence, a two-part version of the reply authorized by paragraph 3 of that Practice Direction. The Appeals Chamber will not, however, consider the submissions contained in Mr. Nzirorera's Reply Supporting Nzirorera's Motion. There is no provision in the Practice Direction for further submissions by an appellee in response to the appellant's reply, and the above-discussed reasons do not provide a basis for permitting Mr. Nzirorera to file one.

10. The Appeals Chamber delayed its consideration of this appeal because it was awaiting the responses of the other Accused, Édouard Karemera and Mathieu Ngirumpatse, both of which were filed on 22 May 2006.[11] These filings were made several months after the above-described filings were completed because of lengthy delays in the completion and transmission of several translations ordered by the Appeals Chamber.[12] Both of the Responses complied with the deadline set by the

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[7] The Practice Direction on Written Submissions distinguishes between appeals that lie "as of right" and those that lie "only with the leave of a bench of three judges of the Appeals Chamber". Appeals that have been certified by a Trial Chamber – pursuant to a procedure established by amendment to the Rules after the Practice Direction's issuance – are not specifically mentioned, but the Appeals Chamber considers that, after the required certification has been issued, they lie "as of right", in that they are authorized by Rule 73 (B) of the Rules and the appellant need not apply to the Appeals Chamber for further leave to file them. In any event, the provisions of the Practice Direction governing the content of a response are the same for all categories of interlocutory appeal. See *ibid*. paras 2, 5.

[8] 16 September 2002.

[9] Prosecution's Interlocutory Appeal, footnote 1.

[10] See Rule 5 of the Rules.

[11] Réponse à l'appel interlocutoire interjeté par le Procureur de la Décision relative au constat judiciaire, 20 May 2006 ("Karemera Response") ; Mémoire de M. Ngirumpatse en réponse au mémoire d'appel du Procureur contre la « Décision rélative à la Requête du Procureur intitulée Motion for judicial notice of facts of common knowledge and adjudicated facts », 22 May 2006 ("Ngirumpatse Response").

[12] See Decision on Request for Extension of Time, 27 January 2006 ("Decision on Extension of Time), para. 8 (setting a deadline for the responses of 10 days after the "last of ... four translated documents is transmitted to the Accused as well as his co-accused Mr. Karemera"). French translations of the four documents in question – the Certification, the Decision on Extension of Time, the Prosecution's Interlocutory Appeal, and the Impugned Decision – were filed on 24 January, 7 February, 6 March, and 10 April 2006, respectively. However, the Registry has confirmed that the Impugned Decision was not communicated to counsel for Mr. Karemera and Mr. Ngirumpatse until 11 May 2006; pursuant to the Decision on Extension of Time and Rule 7 *ter* (B), therefore, the deadline for the responses was 22 May 2006, and they were timely filed.

Appeals Chamber's Decision on Extension of Time (ten days after the transmission of the translations in question), and thus were timely. The Prosecution filed a "Consolidated Reply" to these responses on 25 May 2006.

II. Scope of grounds for which certification of appeal has been granted

11. The Prosecution's Interlocutory Appeal alleges that the Trial Chamber erred in law when it refused to take judicial notice, as facts of common knowledge under Rule 94 (A) of the Rules, of four facts, namely, facts 1, 2, 5 and 6 appearing in Annex A to the Prosecution's Interlocutory Appeal. The Prosecution further alleges that the Trial Chamber erred in law and in fact in its refusal to take judicial notice, as adjudicated facts under Rule 94 (B), of 147 facts appearing in Annex B to the Prosecution's Interlocutory Appeal.[13] The Prosecution does not challenge the Trial Chamber's refusal to take judicial notice of six other facts.[14]

12. The Accused Joseph Nzirorera claims that this Appeal exceeds the scope of the Certification. He contends that certification for interlocutory appeal was granted only on the legal question whether judicial notice can be taken of adjudicated facts that go directly or indirectly to the guilt of the accused.[15]

13. Under Rule 73 (B) of the Rules, a Trial Chamber may certify a decision on a motion for interlocutory appeal if, in its view, the decision "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" such that "immediate resolution by the Appeals Chamber may materially advance the proceedings". The certification decision is discretionary: Rule 73 makes no provision for interlocutory appeal as of right.[16] The Appeals Chamber has recognized that, as a corollary of the Trial Chamber's discretion concerning whether to certify an interlocutory appeal in the first place, it also has the discretion to limit the scope of the interlocutory appeal to particular issues.[17] The Trial Chamber's Certification thus dictates the possible scope of the Appeals Chamber's decision. The Appeals Chamber is, therefore, called upon to interpret the scope of the Certification.

14. The text of the Certification is unfortunately less than crystalline on this point. In paragraph 3 the Certification acknowledges that the Prosecution advanced "a number of issues ..., all of which, it submits satisfy both criteria to invoke an exercise of the Chamber's discretion under Rule 73 (B)". It proceeds:

> 4. One of the issues raised by the impugned Decision which the Prosecution submits satisfies the criteria to invoke an exercise of the Chamber's discretion is the Chamber's refusal to take judicial notice of a number of facts, as adjudicated facts, on the basis that they might go directly or indirectly to the guilt of the Accused, notably in relation to the pleading of their participation in a joint criminal enterprise. It submits that, if interpreted widely, no fact could be judicially noticed as, presumably, most facts introduced by the Prosecution will go towards proving, either directly or indirectly, the guilt of the accused.
>
> 5. The Chamber is of the view that this issue satisfies both criteria for certification. …

[13] Prosecution's Interlocutory Appeal, para. 3.
[14] Prosecution's Interlocutory Appeal, para. 5. The relevant facts appear under numbers 31-32 and 75-78 in Annex B to the Prosecution's Interlocutory Appeal.
[15] Nzirorera's Motion, para. 5.
[16] This is in contrast to Rule 72 (B) (i), which provides for a right to interlocutory appeal of decisions on preliminary motions concerning jurisdiction.
[17] See *Nyiramasuhuko v. Prosecutor*, Case N°ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004, para. 7.

FOR THOSE REASONS THE CHAMBER GRANTS certification of an interlocutory appeal under Rule 73 (B) from the Chamber's "Decision on the Prosecutor's Motion for Judicial Notice", dated 9 November 2005.[18]

No further reference is made to the other issues regarding which certification of appeal was requested. Thus, on the one hand, the *rationale* of the Trial Chamber for certifying an interlocutory appeal relies on only one issue; however, on the other hand, the disposition does not purport to limit the certification to that issue.

15. In the Appeals Chamber's view, although it is plausible to read to the Certification as limited only to one issue, it is more likely that the Trial Chamber intended no such limit. First, the Trial Chamber explicitly referred in paragraph 3 of its decision to the "number of issues" on which the Prosecution sought certification. It would be strange for it then to proceed to discuss one of those issues in detail, and then simply to ignore all of the other issues entirely – unless, that is, the Trial Chamber considered that its resolution of the one issue made it unnecessary to resolve the others because the one issue alone was enough to justify certification of the entire appeal sought. Moreover, as the Prosecution observes,[19] the reasoning given by the Trial Chamber for certification concerned, as a general matter, the potential usefulness of judicial notice in making the trial proceedings more expedient; this reasoning applied equally well to the other issues presented by the Prosecution.[20] In these circumstances, had the Trial Chamber intended simply to deny certification on the other issues, for it to do so simply by omitting discussion of those issues, without a word of explanation, might have run afoul of the requirement that it provide a reasoned basis for its decision.[21]

16. It is not illogical or impermissible for a Trial Chamber to grant certification to appeal an entire decision on the basis of one issue which, in its view, satisfies the Rule 73(B) criteria. To the contrary, such an approach is consistent with the text of that Rule, which requires only that the Trial Chamber identify "an issue" satisfying certain criteria in order to certify interlocutory review of a decision, but does not state that the review must be limited to the identified issue. Thus, although the Appeals Chamber has found that the Trial Chamber *can* limit review to the issue(s) that it has found to specifically satisfy the Rule 73 (B) criteria, it is not obligated to do so.

17. This approach is consistent with Rule 73's objective of advancing the fair and expeditious conduct of the proceedings. Interlocutory appeals under Rule 73 interrupt the continuity of trial proceedings and so should only be allowed when there is a significant advantage to doing so – that is, when, in the Trial Chamber's judgement, there is an important issue meriting immediate resolution by the Appeals Chamber. But once one such issue is identified and an interlocutory appeal is certified, allowing the Appeals Chamber to resolve related issues at the same time may cause little additional interruption and may ultimately serve the goals of fairness and expeditiousness.

18. Mr. Nzirorera argues that in a previous interlocutory appeal that he brought in this case, the Appeals Chamber confined the scope of the certification to the issue expressly identified by the Trial Chamber.[22] That situation, however, was different from the one presented here. As here, the Trial Chamber had not specified whether the certification it granted to appeal a decision extended only to the issue it discussed (the competence of *ad litem* judges to confirm indictments) or also to an unmentioned issue (the sanctions it had imposed against Mr. Nzirorera's counsel for bringing the underlying motion).[23] So, as here, the Appeals Chamber was left to infer the Trial Chamber's intent

[18] Certification, paras. 4-5.
[19] Reply to Nzirorera's Motion, para. 7.
[20] See Certification, para. 5.
[21] The Statute of the International Tribunal applies this requirement to judgements on the merits, see Article 22 (2), but the Appeals Chamber has also applied it to decisions on motions. See, *e.g.*, *Prosecutor v. Haradinaj et al.*, Case N°IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying His Provisional Release, 9 March 2006, para. 10.
[22] Nzirorera's Motion, paras 9-13, citing Decision of Interlocutory Appeals Regarding Participation of Ad Litem Judges, 11 June 2004.
[23] T. 7 April 2004, p. 55.

from its context and reasoning. But there, it was clear from context that the Trial Chamber had not meant to certify the issue of sanctions – for just a minute or two later, in the same oral hearing, the Trial Chamber rejected Mr. Nzirorera's attempt to appeal another sanction that had been issued against counsel. It held that "an appeal against financial sanctions is not grounds for an interlocutory appeal, in the sense that the decision to impose financial sanctions does not involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and the resolution by the Appeals Chamber will not materially advance the proceedings."[24] In light of that statement, it was clear that the Trial Chamber did not intend to permit interlocutory appeals of financial sanctions. Moreover, the reasoning that the Trial Chamber gave for permitting interlocutory appeal on the *ad litem* judges issue had no relation to the sanctions issue. This is unlike the position in the present case; here, as noted above, the Trial Chamber's rationale for allowing the Appeals Chamber to resolve the proper scope of judicial notice on an interlocutory basis applied equally to all the parts of the Prosecution's appeal.

19. Nor do the other decisions Mr. Nzirorera cites support his position. In *Nyiramasuhuko v. Prosecutor*,[25] the Trial Chamber had been seized of two separate requests for certification of appeal. It granted both certifications in separate decisions. Erroneously, the Appellant later filed an appeal only with regard to one of the certifications, assuming that the Appeals Chamber would also rule on the related issues certified in the other Trial Chamber decision. The Appeals Chamber, however, held that because no appeal had been filed concerning the second certification, it was not seized of the second issue and could not rule on it. In *Prosecutor v. Bizimungu et al.*,[26] the Prosecutor had submitted several requests for reconsideration of defence witness protection measures with regard to each of the four accused. Three of these requests had been denied by the Trial Chamber and certification for appeal been granted. The fourth request was yet to be decided by the Trial Chamber. The Appeals Chamber, in deciding the Prosecution's interlocutory appeal with regard to the three requests already decided, unsurprisingly held that it would be premature at that stage to decide the issues raised in the fourth request.

20. For the foregoing reasons, the Appeals Chamber holds that the Trial Chamber intended to grant certification to appeal the Impugned Decision with respect to all of the issues raised by the Prosecution's Interlocutory Appeal. Mr. Nzirorera's Motion is therefore denied.

21. Notwithstanding this determination, the Appeals Chamber will not, in considering an interlocutory appeal that extends beyond the issues that the Trial Chamber found to specifically satisfy the Rule 73 (B) standard, address matters in which its consideration will not, in fact, materially advance the proceedings. The Appeals Chamber notes the related argument of Mr. Karemera that the Prosecution has as a general matter failed to demonstrate errors invalidating the Trial Chamber's decision or occasioning a miscarriage of justice within the meaning of Article 24 (1) of the Statute.[27] Although the Article 24 (1) standard applies specifically to post-trial appeals from final Trial Chamber decisions, it is likewise true that in interlocutory appeals, even where certification under Rule 73 (B) has been granted, it is not the Appeals Chamber's practice to pass on purported errors that are inconsequential.[28] The Appeals Chamber will keep this standard in mind in addressing the individual allegations of error raised by the Prosecution.

III. Judicial Notice of Facts of Common Knowledge

[24] *Ibid*. p. 56.
[25] Case N°ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004.
[26] Case N°ICTR-99-50-AR73, Decision on Prosecution Appeal of Witness Protection Measures, 16 November 2005 ("*Bizimungu* Appeal Decision on Witness Protection Measures").
[27] Karemera Response, p. 2.
[28] See *Prosecutor v. Orić*, Case N°IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005, para. 9 and fn. 25.

22. Rule 94 (A) states: "A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof." As the Trial Chamber correctly noted,[29] this standard is not discretionary – if a Trial Chamber determines that a fact is "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.[30]

23. 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. Mr. Nzirorera suggests that the Appeals Chamber should defer to the Trial Chamber's discretion as to "admissibility of evidence" and "the manner in which facts are to be proven at trial".[31] But the general rule that the Trial Chamber has discretion in those areas is superseded by the specific, mandatory language of Rule 94 (A); as noted above, the Trial Chamber has no discretion to determine that a fact, although "of common knowledge", must nonetheless be proven through evidence at trial. For these reasons, a Trial Chamber's decision whether to take judicial notice of a relevant[32] fact under Rule 94 (A) is subject to *de novo* review on appeal.

24. The Prosecution sought judicial notice under Rule 94 (A) with respect to six purported facts of common knowledge. Its request was granted with respect to Facts 3 and 4 (Rwanda's status as a party to various treaties), but denied with respect to the other facts, although the Trial Chamber did take judicial notice of Fact 1 in modified form. The Prosecution's contentions on appeal as to facts 1, 2, 5, and 6 are considered here in turn.

Fact 1 – Status of Hutu, Tutsi and Twa as Ethnic Groups

25. The Prosecution sought judicial notice of the following fact: "Between 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified according to the following ethnic classifications: Tutsi, Hutu and Twa."[33] The Trial Chamber instead took judicial notice of "the existence of the *Twa, Tutsi* and *Hutu* as protected groups falling under the Genocide Convention", noting that such a classification was consistent with the Tribunal's jurisprudence and that the groups were "stable and permanent".[34] The Prosecution argues that the Trial Chamber should have used the designation "ethnic" in order to comport with the Appeal Judgement in *Semanza*. Although the Prosecution correctly states that the *Semanza* Appeal Judgement recognized that the Tutsi were an "ethnic" group, it has not attempted to show that the formulation that was instead chosen by the Trial Chamber has any potential to prejudice the Prosecution or render the proceedings less fair and expeditious. The Appeals Chamber can see no potential for such consequences, as the Trial Chamber's formulation equally (or perhaps even more clearly) relieves the Prosecution's burden to introduce evidence proving protected-group status under the Genocide Convention. The Appeals Chamber thus

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[29] Impugned Decision, para. 5.
[30] *Prosecutor v. Semanza*, Case N°ICTR-97-20-A, Judgement, 20 May 2005, para. 194 (footnotes omitted) ("*Semanza* Appeal Judgement").
[31] Nzirorera's Response, para. 41-42.
[32] As Mr. Nzirorera suggests, see Nzirorera's Response, para. 41, a Trial Chamber is not obligated to take judicial notice of facts that are not relevant to the case, even if they are "facts of common knowledge". Of course, it remains the case that the Trial Chamber "shall not require proof" of such facts, see Rule 94(A), since evidence proving an irrelevant fact would in any event be inadmissible under Rule 89 (C) of the Rules. *Cf. Prosecutor v. Hadzihasanović and Kubura*, Case N°IT-01-47-T, Final Decision on Judicial Notice of Adjudicated Facts, 20 April 2004 (holding that "before taking judicial notice of these four Definitively Proposed Facts the Chamber is obliged to verify their relevance, pursuant to Rule 89 (C) of the Rules"). Relevance determinations are circumscribed by various standards of law, but within the appropriate legal framework the Trial Chamber enjoys a margin of discretion.
[33] See Prosecution's Interlocutory Appeal, Annex A, para.1.
[34] Impugned Decision, para. 8.

need not consider whether the Trial Chamber erred in choosing not to adopt the Prosecution's formulation; nor, given that the Accused have not appealed, need it consider whether it erred in concluding that protected-group status was a fact of common knowledge. The Prosecution's Interlocutory Appeal as to this point is dismissed.

Facts 2 and 5 – The Existence of Widespread or Systematic Attacks

26. As Fact 2, the Prosecution sought judicial notice of the following:

> 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.[35]

The Trial Chamber declined the Prosecution's request, stating that the notice sought concerned

> "a legal finding which constitutes an element of a crime against humanity. The Prosecutor has an obligation to prove the existence of such an attack whenever he alleges that a crime against humanity occurred. The Chamber considers that judicial notice therefore cannot be taken of it."[36]

For essentially the same reasons, the Trial Chamber also refused to take judicial notice of Fact 5, namely: "Between 1 January 1994 and 17 July 1994 in Rwanda there was an armed conflict not of an international character."[37]

27. The Prosecution argues on appeal that the Trial Chamber should have followed the *Semanza* Appeal Judgement in recognizing these facts as being "of common knowledge". In response, Mr. Nzirorera argues that these facts were reasonably disputable and should be proved with evidence, citing various pre-*Semanza* Trial Chamber decisions declining to take judicial notice of them.[38] He notes that in *Semanza*, unlike in this case, the "widespread or systematic" nature of the attacks had not been disputed by the accused.[39] Mr. Ngirumpatse advances similar arguments and adds that it is disputable whether the attacks were committed solely against Tutsis and on the basis of ethnicity[40] and whether the conflict was in fact non-international.[41] Mr. Nzirorera and Mr. Karemera both argue that the "widespread and systematic" and "non-international" characterizations are legal rather than factual in nature and are thus not subject to judicial notice.[42]

28. The Appeals Chamber in *Semanza* stated:

> As these passages suggest, the Trial Chamber struck an appropriate balance between the Appellant's rights under Article 20 (3) and the doctrine of judicial notice by ensuring that the facts judicially noticed were not the basis for proving the Appellant's criminal responsibility. Instead, the Chamber took notice only of general notorious facts not subject to reasonable dispute, including, *inter alia*: that Rwandan citizens were classified by ethnic group between April and July 1994; that widespread or systematic attacks against a civilian population based on Tutsi ethnic identification occurred during that time; that there was an armed conflict not of an international character in Rwanda between 1 January 1994 and 17 July 1994; that Rwanda became a state party to the Convention on the Prevention and Punishment of the Crime of Genocide (1948) on 16 April 1975; and that, at the time at issue, Rwanda was a state party to the Geneva Conventions of 12 August 1949 and their additional Additional Protocol II of 8 June

[35] Prosecution's Interlocutory Appeal, Annex A, para. 2.
[36] Impugned Decision, para. 9.
[37] Prosecution's Interlocutory Appeal, Annex A, para. 5; see Impugned Decision, para. 11.
[38] See Nzirorera Response paras 58, 61, 62.
[39] Nzirorera Response, paras 66-68.
[40] Ngirumpatse Response, para. 7.
[41] Ngirumpatse Reponse, para. 8.
[42] Karemera Reponse, p. 4; Nzirorera Response paras 50, 52-53.

> 1977. The Appeals Chamber finds that these judicially noted facts did not relieve the Prosecution of its burden of proof; they went only to the manner in which the Prosecution could discharge that burden in respect of the production of certain evidence which did not concern the acts done by the Appellant. When determining the Appellant's personal responsibility, the Trial Chamber relied on the facts it found on the basis of the evidence adduced at trial.[43]

29. Thus, the Appeals Chamber has already held that the existence of widespread or systematic attacks against a civilian population based on Tutsi ethnic identification, as well as the existence of a non-international armed conflict, are notorious facts not subject to reasonable dispute. Therefore, the Trial Chamber was obliged to take judicial notice of them, since judicial notice under Rule 94 (A) is not discretionary. Moreover, the reasons it gave for not doing so were unfounded. It is true that "widespread and systematic attack against a civilian population" and "armed conflict not of an international character" are phrases with legal meanings, but they nonetheless describe factual situations and thus can constitute "facts of common knowledge". The question is not whether a proposition is put in legal or layman's terms (so long as the terms are sufficiently well defined such that the accuracy of their application to the described situation is not reasonably in doubt).[44] The question is whether the proposition can reasonably be disputed. Neither the Trial Chamber nor any of the Accused has demonstrated any reasonable basis for disputing the facts in question.

30. Likewise, it is not relevant that these facts constitute elements of some of the crimes charged and that such elements must ordinarily be proven by the Prosecution.[45] There is no exception to Rule 94 (A) for elements of offences. Of course the Rule 94 (A) mechanism sometimes will alleviate the Prosecution's burden to introduce evidence proving certain aspects of its case. As the Appeals Chamber explained in *Semanza*, however, it does not change the burden of proof, but simply provides another way for that burden to be met. The Appeals Chamber notes that the practice of taking judicial notice of facts of common knowledge is well established in international criminal law[46] and in domestic jurisdictions.[47] Such facts include notorious historical events and phenomena, such as, for instance, the Nazi Holocaust, the South African system of apartheid, wars, and the rise of terrorism.[48]

31. The Appeals Chamber further considers that there is no reasonable basis for disputing the remainder of Fact 2: during the 1994 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." These facts are not only consistent with every judgement so far issued by the Appeals and Trial Chambers of this Tribunal, but also with the essentially universal consensus of historical accounts included in sources such as encyclopaedias and history books.[49] They are facts of common knowledge.

32. For these reasons, the Trial Chamber erred in failing to take judicial notice of Facts 2 and 5 under Rule 94 (A).

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[43] *Semanza* Appeal Judgement, para. 192.

[44] For instance, it is routine for courts to take judicial notice of the existence of a state of war, despite the fact that such a description has a legal meaning. See, *e.g.*, *Mead v. United States*, 257 F. 639, 642 (U.S. 9th Cir. Ct. App. 1919); see also *infra* note 46 (listing other examples of judicial notice incorporating legal concepts).

[45] Impugned Decision, paras 9, 11.

[46] See Charter of the International Military Tribunal for Germany, art. 21; Rome Statute of the International Criminal Court, art. 69 (6); Rules of Procedure and Evidence of the ICTY, Rule 94 (A).

[47] See, *e.g.*, German Criminal Procedural Code (Strafprozessordnung stop) sec. 244(3); *R. v. Potts*, 26 C.R. (3d) 252, para. 15 (stating that in Canada, a "court has a duty to take judicial notice of facts which are known to intelligent persons generally"); *Mullen v. Hackney* L.B.C. (U.K. 1997) 1 W.L.R. 1103, CA (Civ. Div.), Archbold 2004, 10-71; *Woods v. Multi-Sport Holdings* (2002), High Court of Australia, 186 ALR 145, para 64; Fed. R. Evid. Rule 201 (U.S.).

[48] See, *e.g.*, *R. v. Zundel* (Can. 1990) 53 C.C.C. (3d) 161, (sub nom. *R. v. Zundel* (No. 2)) 37 O.A.C. 354, para 21 (Holocaust); *Minister of Land Affairs et al v. Stamdien et al*, 4 BCLR 413 (S.Af. LCC 1999), p. 31 (apartheid); *Dorman Long and Co., Ltd. v. Carroll and Others*, 2 All ER 567 (Kings Bench 1945) (state of war); *Case of Klass and Others v. Germany*, Judgement (Merits), E.C.H.R. 6 Sept. 1978, para. 48 (terrorism). See generally James G. Stewart, *Judicial Notice in International Criminal Law: A Reconciliation of Potential, Peril and Precedent*, 3 Int'l Crim. L. Rev. 245, 265-66 (2003).

[49] Dinah L. Shelton (ed.), *Encyclopedia of Genocide and Crimes Against Humanity* (Thomson Gale, 2005);William A. Schabas, *Genocide in International Law* (Cambridge 2000); Jonathan Glover, *Humanity: A Moral History of the 20th Century* (Yale University Press, 1999). See *also infra* notes 55-62 (listing further sources).

Fact 6 – Genocide

33. The Prosecution sought judicial notice of the following fact: "Between 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group."[50] The Trial Chamber rejected this request. It explained that in order to obtain a genocide conviction, the Prosecution must establish the Accused's individual involvement and mental state, and reasoned:

> As a result, it does not matter whether genocide occurred in Rwanda or not, the Prosecutor must still prove the criminal responsibility of the Accused for the counts he has charged in the Indictment. Taking judicial notice of such a fact as common knowledge does not have any impact on the Prosecution's case against the Accused, because that is not a fact to be proved. In the present case where the Prosecutor alleges that the Accused are responsible for crimes occurring in all parts of Rwanda, taking judicial notice of the fact that genocide has occurred in that country would appear to lessen the Prosecutor's obligation to prove his case.[51]

34. On appeal, the Prosecution argues that the occurrence of genocide in Rwanda in 1994 is a universally known fact – as evidenced by, *inter alia*, United Nations and government reports, books, news accounts, and the Tribunal's jurisprudence – and, although not itself sufficient to support a genocide conviction, is certainly relevant to the context in which individual crimes are charged.[52] It further argues that taking judicial notice of this fact would not be unfair to the Accused or inconsistent with the Prosecution's burden of proof.[53] In response, Mr. Ngirumpatse argues that to take judicial notice of genocide would prejudge the accusations against the Accused and violate their right to confront their accusers.[54] Mr. Karemera argues that the existence of genocide is a legal determination inappropriate for judicial notice, and that to take judicial notice of it would violate the presumption of innocence.[55] Mr. Nzirorera contends that the Trial Chamber correctly found that the existence of genocide was not relevant to the matters to be proven at trial; that it requires a legal conclusion; and that the practice of the Tribunal has established that it is a matter to be proven with evidence.[56]

35. The Appeals Chamber agrees with the Prosecution: the fact that genocide occurred in Rwanda in 1994 should have been recognized by the Trial Chamber as a fact of common knowledge. Genocide consists of certain acts, including killing, undertaken with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.[57] There is no reasonable basis for anyone to dispute that, during 1994, there was a campaign of mass killing intended to destroy, in whole or at least in very large part, Rwanda's Tutsi population, which (as judicially noticed by the Trial Chamber) was a protected group. That campaign was, to a terrible degree, successful; although exact numbers may never be known, the great majority of Tutsis were murdered, and many others were raped or otherwise harmed.[58] These basic facts were broadly known even at the time of the Tribunal's establishment; indeed, reports indicating that genocide occurred in Rwanda were a key impetus for its establishment, as reflected in the Security Council resolution establishing it and even the name of the Tribunal.[59] During its early history, it was valuable for the purpose of the historical record for Trial Chambers to gather evidence documenting the overall course of the genocide and to enter findings of fact on the basis of that evidence. Trial and Appeal Judgements thereby produced (while varying as to the responsibility of particular accused) have unanimously and decisively confirmed the occurrence of

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[50] Prosecution Interlocutory Appeal, Annex A, para. 6.
[51] Impugned Decision, para. 7.
[52] Prosecution's Interlocutory Appeal, paras 14-15, 22-31.
[53] *Ibid*., paras. 32-36.
[54] Ngirumpatse Response, paras 5-6.
[55] Karemera Response, p. 3.
[56] Nzirorera Response, paras 45-49, 50-54, and 56-60, respectively.
[57] Statute of the International Tribunal, art. 4 (2).
[58] See, *e.g*., Human Rights Watch, *Leave None to Tell the Story: Genocide in Rwanda*, Human Rights Watch Report March 1, 1999, Introduction, available at http://www.hrw.org/reports/1999/rwanda/Geno1-3-04.htm htm#P95_39230; see also *infra* notes 58-64 and sources cited therein.
[59] See S/RES/155 (8 November 1994).

genocide in Rwanda,[60] which has also been documented by countless books,[61] scholarly articles,[62] media reports,[63] U.N. reports and resolutions,[64] national court decisions,[65] and government and NGO reports.[66] At this stage, the Tribunal need not demand further documentation. The fact of the Rwandan genocide is a part of world history, a fact as certain as any other, a classic instance of a "fact of common knowledge".

36. Notably, the Trial Chamber's decision does not contest any of this; indeed, even the Accused have not claimed that genocide might *not* have occurred in Rwanda in 1994. Instead the Trial Chamber provides two other, oddly contradictory reasons not to take judicial notice: first, that whether genocide occurred is not relevant to the case that the Prosecution must prove; and second, that recognizing it would improperly lighten the Prosecution's burden of proof.[67] The first can be readily dismissed. Whether genocide occurred in Rwanda is of obvious relevance to the Prosecution's case; it is a necessary, although not sufficient, part of that case. Plainly, in order to convict an individual of genocide a Trial Chamber must collect evidence of that individual's acts and intent. But the fact of the nationwide campaign is relevant; it provides the context for understanding the individual's actions. And, indeed, the existence of the genocide may also provide relevant context for other charges against the Accused, such as crimes against humanity. It bears noting that if the overall existence of genocide were not relevant to the charges against individuals, then Trial Chambers would not be permitted under Rule 89 to admit evidence pertaining to it either. Yet, as Mr. Nzirorera documents in his Response, they have consistently done so, and the Appeals Chamber has held that this is proper.[68]

37. The second part of the Trial Chamber's reasoning has been addressed already in the context of Facts 2 and 5 above. As the *Semanza* Appeal Judgement made clear, allowing 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 that burden can be

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[60] See, *e.g., Akayesu* Trial Judgement, para 126; *Kayishema and Ruzindana* Trial Judgement, para 291; *Muzema* Trial Judgement, para 316; *Kayishema and Ruzindana* Appeal Judgement, para 143; *Semanza* Trial Judgement, para 424.

[61] See, e.g., Gérard Prunier, *The Rwanda Crisis 1959-1994: History of a Genocide* (Hurst and Company 1995); Linda Melvern, Conspiracy to Murder: The Rwandan Genocide (New York: Verso, 2004); Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York: Basic Books, 2002), **Alain Destexhe, *Rwanda and Genocide in the Twentieth Century* (New York University Press, 1995);** Alan J. Kuperman, The Limits of Humanitarian Intervention: Genocide in Rwanda (Brookings Institution Press, 2001); Roméo Dallaire, Shake Hands with the Devil: The Failure of Humanity in Rwanda (Carroll and Graf, 2004); Philip Gourevitch, We Wish to Inform You That Tomorrow We Will Be Killed With Our Families (Picador, 1999).

[62] See, *e.g.*, Peter Uvin, ***Prejudice, Crisis, and Genocide in Rwanda*, *African Studies Review*** Vol. 40, No. 2 (Sep., 1997); Helen M. Hintjens, Explaining the 1994 Genocide in Rwanda, The Journal of Modern African Studies (1999), 37; Rene Lemarchand, ***Genocide in the Great Lakes: Which Genocide? Whose Genocide?,*** *African Studies Review*, Vol. 41, No. 1 (Apr., 1998); Paul J. Magnarella, *The Background and Causes of the Genocide in Rwanda*, 3 J. Int'l Crim. Just. 801 (Special Issue: Genocide in Rwanda: 10 Years On), and numerous others.

[63] See, *e.g.*, William D. Rubinstein, *Genocide and Historical Debate*, History Today, April 2004, Vol. 54 Issue 4, pp. 36-38; Gabriel Packard, *Rwanda: Census Finds 937,000 Died in Genocide*, New York Amsterdam News, 4/8/2004, Vol. 95 Issue 15, p. 2-2; BBC News, *Rwanda: How the Genocide Happened*, Thursday, 1 April 2004, available at http://news.bbc.co.uk/2/hi/africa/1288230.stm.

[64] Report of the Special Representative of the Commission on Human Rights on the Situation of Human Rights in Rwanda. A/52/522, paras 3, 10; General Assembly Resolution on the Situation of Human Rights In Rwanda, A/RES/49/206; General Assembly Resolution on the Situation of Human Rights In Rwanda, A/RES/54/188.

[65] See, e.g., Mugasera v. Canada (Minister of Citizenship and Immigration) [2005] 2 S.C.R. 100; R v. Minani [2005] NSWCCA 226; Government of Rwanda v. Johnson, 366 U.S. App. D.C. 98; Mukamusoni v. Ashcroft, 390 F.3d 110; Ntakirutimana v. Reno, 184 F.3d 419.

[66] See, *e.g.*, United Kingdom Foreign and Commonwealth Office, Country Profiles: Rwanda, available at http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPageandc=Pageandcid=1007029394365anda=KCountryProfileandaid=1020338066458; France Ministère des Affaires Étrangères, Présentation du Rwanda, available at http://www.diplomatie.gouv.fr/fr/pays-zones-geo_833/rwanda_374/presentation-du-rwanda_1270/politique-interieure_5519.html; Human Rights Watch, *Leave None to Tell the Story*, *supra* note 58.

[67] Impugned Decision, para. 7.

[68] See, *e.g.*, *Akayesu* Appeal Judgement, para. 262.

satisfied, obviating the necessity to introduce evidence documenting what is already common knowledge. The Prosecution must, of course, still introduce evidence demonstrating that the specific events alleged in the Indictment constituted genocide and that the conduct and mental state of the Accused specifically make them culpable for genocide. The reasoning under Facts 2 and 5 also dispenses with the objection of the Accused that the genocide characterization is legal in nature; Rule 94 (A) does not provide the Trial Chamber with discretion to refuse judicial notice on this basis. In this respect the term "genocide" is not distinct from other legal terms used to characterize factual situations, such as "widespread or systematic" or "not of an international nature", which the Appeals Chamber in *Semanza* already held to be subject to judicial notice under Rule 94 (A).

38. For these reasons, the Trial Chamber erred in refusing to take judicial notice of Fact 6.

III. Judicial Notice of Adjudicated Facts

39. Rule 94 (B) of the Rules provides:

> "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."

Taking judicial notice of adjudicated facts under Rule 94 (B) is a method of achieving judicial economy and harmonizing judgements of the Tribunal while ensuring the right of the Accused to a fair, public and expeditious trial.[69]

40. Although governed by some of the same principles, judicial notice under Rule 94 (B) is different in nature from judicial notice under Rule 94 (A). Adjudicated facts are different from facts of common knowledge (although there is some overlap in the categories). There is no requirement that adjudicated facts be beyond reasonable dispute. They are facts that have been established in a proceeding between other parties on the basis of the evidence the parties to that proceeding chose to introduce, in the particular context of that proceeding. For this reason, they cannot simply be accepted, by mere virtue of their acceptance in the first proceeding, as conclusive in proceedings involving different parties who have not had the chance to contest them.

41. Thus, there are two crucial differences between the two provisions. One is built into the Rule: whereas judicial notice under Rule 94 (A) is mandatory, judicial notice under Rule 94 (B) is discretionary, allowing the Trial Chamber to determine which adjudicated facts to recognize on the basis of a careful consideration of the accused's right to a fair and expeditious trial. The principles guiding and limiting the exercise of that discretion have been developed through jurisprudence and are discussed below.

42. The second difference is established by the Tribunal's jurisprudence, and concerns the consequences of judicial notice: whereas facts noticed under Rule 94 (A) are established conclusively, those established under Rule 94 (B) are merely presumptions that may be rebutted by the defence with evidence at trial.[70] The Appeals Chamber reiterates that judicial notice does not shift the ultimate

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[69] See *Prosecutor v. Željko Mejakić*, Case N°IT-02-65-PT, Decision on Prosecution Motion for Judicial Notice Pursuant to Rule 94 (B), 1 April 2004 ("*Mejakić* Judicial Notice Decision"), p. 5; *The Prosecutor v. Momčilo Krajišnik*, Case N°IT-00-39-T, Decision on Third and Fourth Prosecution Motion for Judicial Notice of Adjudicated Facts, 24 March 2005 ("*Krajišnik* Judicial Notice Decision of 24 March 2005"), para. 12; *Prosecutor v. Ntakirutimana et al.*, Case N°ICTR-96-10-T and ICTR-96-17-T, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 September 2001 ("*Ntakirutimana* Judicial Notice Decision"), para. 28; *Prosecutor v. Duško Sikirica et al.*, Case N°IT-95-8-PT, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 September 2000, p. 4.

[70] See *Prosecutor v. Slobodan Milošević,* Case N°IT-02-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003 ("*Milošević* Appeal Decision on Judicial Notice"), pp. 3-4; *Prosecutor v. Momir Nikolić*, Case N°IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice, 1 April 2005, paras 10-11; *Prosecutor v. Momčilo Krajišnik,* Case N°IT-00-39-PT, Decision on Prosecution Motions for Judicial Notice and Adjudicated Facts and for Admission of Written Statements of Witnesses pursuant to Rule 92 *bis*, 28 February 2003 ("*Krajišnik* Decision"), para. 16.

burden of persuasion, which remains with the Prosecution. In the case of judicial notice under Rule 94 (B), the effect is only to relieve the Prosecution of its initial burden to produce evidence on the point; the defence may then put the point into question by introducing reliable and credible evidence to the contrary. This approach is consistent with practice in national jurisdictions: whereas judicial notice of facts of common knowledge may be treated as conclusive,[71] the final adjudication of facts in judicial proceedings is treated as conclusively binding only, at most, on the parties to those proceedings (*res judicata*).[72]

43. The Prosecution sought judicial notice under Rule 94 (B) of 153 adjudicated facts. The Trial Chamber rejected this request in full, and the Prosecution appeals with respect to 147 of the facts. The Prosecution, the Accused, and the Trial Chamber have not proceeded in their analysis one by one through these facts, and the Appeals Chamber will not do so either. It will instead address the two major reasons given by the Trial Chamber for refusing to take judicial notice and consider whether each constitutes a legitimate reason to so refuse under Rule 94 (B). In doing so, the Appeals Chamber bears in mind that "a Trial Chamber's exercise of discretion will only 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".[73] The piecemeal analysis of each proposed adjudicated fact is a matter best left to the Trial Chamber on remand.[74]

44. The Appeals Chamber will thus consider the Trial Chamber's conclusions that (a) certain facts implicate the guilt of the accused and therefore were not subject to judicial notice; and (b) certain others were improperly taken out of context or combined to produce facts not actually adjudicated. The other reasons given by the Trial Chamber for declining to take judicial notice of other adjudicated facts need not be considered here, either because they have not been appealed by the Prosecution[75] or because, in the case of Fact 153, the issue is rendered moot by the Appeals Chamber's disposition concerning the sixth "fact of common knowledge" above.[76]

A. Facts Implicating the Guilt of the Accused

45. The Trial Chamber declined to take judicial notice of some facts because they "may go directly or indirectly to the guilt of the Accused, notably in relation with the pleading of their participation in a joint criminal enterprise".[77] The Prosecution claims that the Trial Chamber's refusal to take judicial notice on this basis amounts to an "over-broad interpretation of principle that is at odds with the object and purpose" of Rule 94 (B).[78] It explains that that purpose is precisely to enable the adjudication of an accused's criminal responsibility in a more expeditious way, and that to categorically exclude all findings relating to that responsibility severely impairs the attainment of that objective; every fact relevant to a trial will bear "directly or indirectly" on the accused's responsibility.[79]

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[71] See *R. v. Zundel*, *supra*, para 166; Phipson on Evidence, 16th edition, 3-03; Fed. R. Evid. R. 201 (g).
[72] See, *e.g.*, *Kajelijeli* Appeal Judgement, para. 202.
[73] *Milošević* Appeal Decision on Assignment of Counsel, para. 11; *Bizimungu* Appeal Decision on Witness Protection Measures, para. 3.
[74] See *Milošević* Appeal Decision on Judicial Notice, p. 3.
[75] See Prosecution Interlocutory Appeal, para. 5, declining to appeal the Trial Chamber's determination that facts 31-32 could not be judicially noticed because evidence had already been introduced on them, and that facts 75-78 could not be judicially noticed because they were extracted from cases currently on appeal. See Impugned Decision para. 15.
[76] Fact 153 under "Adjudicated Facts" was proposed as an alternative to Fact 6 (existence of genocide in Rwanda) under "Facts of Common Knowledge". Prosecution's Interlocutory Appeal, para. 4.
[77] Impugned Decision, para. 15 (citing facts 1-30, 33-74, 79-85, and 111-152).
[78] Prosecution's Interlocutory Appeal, para. 48.
[79] Prosecution's Interlocutory Appeal, para. 62. The Appeals Chamber notes that the Prosecution's Interlocutory Appeal is confusing on this point, as in paras 53 and 63 it appears to accept the *Blagojević* formulation. However, the Appeals Chamber understands the Prosecution to be arguing for a narrow interpretation of the *Blagojević* formulation – essentially, excluding only facts that are *sufficient* to establish the accused's criminal responsibility. See *ibid*. para. 63 ("Here, however, proof, either by evidence or judicial notice, of the existence of a joint criminal enterprise is not proof of the criminal responsibility of the Accused, who must still be shown to have participated in it.").

46. Mr. Nzirorera argues in response that the Trial Chamber's reasoning was consistent with that of other ICTR and ICTY Trial Chambers, which have consistently declined to take judicial notice of facts bearing on criminal responsibility.[80] He and Mr. Ngirumpatse each further argue that, in the context of joint criminal enterprise allegations, facts relating to the existence of a joint criminal enterprise or the conduct of its members are directly related to the criminal responsibility of the accused and thus are not subject to judicial notice.[81] Mr. Karemera argues that to adopt the Prosecution's position would undermine the presumption of innocence by allowing criminal responsibility to be established without evidence.[82]

47. As Mr. Nzirorera notes, in *Semanza* the Appeals Chamber made reference to the need to ensure "that the facts judicially noticed were not the basis for proving the Appellant's criminal responsibility". This reference was made in the context of a discussion of Rule 94 (A), and the Appeals Chamber did not discuss the implications for Rule 94 (B). In both contexts, however, it remains the case that the practice of judicial notice must not be allowed to circumvent the presumption of innocence and the defendant's right to a fair trial, including his right to confront his accusers. Thus, it would plainly be improper for facts judicially noticed to be the "basis for proving the Appellant's criminal responsibility" (in the sense of being *sufficient* to establish that responsibility), and it is always necessary for Trial Chambers to take careful consideration of the presumption of innocence and the procedural rights of the accused.

48. The Appeals Chamber, however, has never gone so far as to suggest that judicial notice under Rule 94 (B) cannot extend to facts that "go directly or indirectly" to the criminal responsibility of the accused (or that "bear" or "touch" thereupon). With due respect to the Trial Chambers that have so concluded,[83] the Appeals Chamber cannot agree with this proposition, as its logic, if consistently applied, would render Rule 94 (B) a dead letter. The purpose of a criminal trial is to adjudicate the criminal responsibility of the accused. Facts that are not related, directly or indirectly, to that criminal responsibility are not relevant to the question to be adjudicated at trial, and, as noted above, thus may neither be established by evidence nor through judicial notice.[84] So judicial notice under Rule 94 (B) is in fact available *only* for adjudicated facts that bear, at least in some respect, on the criminal responsibility of the accused.[85]

49. How can this observation be reconciled with the presumption of innocence? First, as noted above, judicial notice under Rule 94 (B) does not shift the ultimate burden of persuasion, but only the initial burden of production (the burden to produce credible and reliable evidence sufficient to bring the matter into dispute). Analogously, in the context of alibi evidence, for instance, the accused bears the burden of production with respect to a matter centrally related to the guilt of the accused; yet this shift does not violate the presumption of innocence because, as the Appeals Chamber has repeatedly recognized, the prosecution retains the burden of proof of guilt beyond a reasonable doubt.[86]

50. Notwithstanding this point, there is nonetheless reason for caution in allowing judicial notice under Rule 94 (B) of facts that are central to the criminal responsibility of the accused – for ordinarily

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[80] Nzirorera Response, paras 13-24, citing *Prosecutor v. Bagosora*, Case N°ICTR-98-41-T, Decision on the Prosecutor's Motion for Judicial Notice Pursuant to Rules 73, 89, and 94 (11 April 2003), paras 61-62; *Prosecutor v. Bizimungu et al.*, Case N°ICTR-99-50-T, Decision on the Prosecutor's Motion and Notice of Adjudicated Facts, 10 December 2004, para. 21; *Prosecutor v. Blagojević et al.*, Case N°IT-02-60-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence, 19 December 2003, paras 16, 23 ("*Blagojević* Decision"); *Krajišnik* Decision.

[81] Nzirorera Response, paras 25-29; Ngirumpatse Reponse paras 10-12.

[82] Karemera Response, p. 5.

[83] See *supra* note 77 (cases cited by Nzirorera Response).

[84] See *supra* note 29.

[85] In theory, there is one exception to this statement: facts bearing on the Tribunal's jurisdiction but not (directly or indirectly) on the accused's criminal responsibility under international law, such as the location of the territorial boundaries of Rwanda, or the Rwandan citizenship of a person accused of committing a serious violation of international humanitarian law in a neighbouring State. This category is quite limited, however, and it has never been suggested that the scope of Rule 94 (B) should be limited to such facts.

[86] See, *e.g.*, *Kajelijeli* Appeal Judgement, paras 40-41; *Niyitegeka* Appeal Judgement, paras 60-61.

in criminal cases the burdens of production *and* persuasion are on the prosecution. Although the latter always remains on the prosecution, even shifting the former has significant implications for the accused's procedural rights, in particular his right to hear and confront the witnesses against him.[87] The Appeals Chamber considers that as a result an exclusion from judicial notice under Rule 94 (B) is appropriate, but one narrower than that adopted by the Trial Chamber: judicial notice should not be taken of adjudicated facts relating to the acts, conduct, and mental state of the accused.

51. There are two reasons that this category of facts warrants complete exclusion, while other facts bearing less directly on the accused's criminal responsibility are left to the Trial Chamber's discretion. First, this interpretation of Rule 94 (B) strikes a balance between the procedural rights of the Accused and the interest of expediency that is consistent with the one expressly struck in Rule 92 *bis*, which governs the proof of facts other than by oral evidence – another procedural mechanism adopted largely for the same purpose as was Rule 94.[88] Second, there is also a reliability concern – namely, there is reason to be particularly skeptical of facts adjudicated in other cases when they bear specifically on the actions, omissions, or mental state of an individual not on trial in those cases. As a general matter, the defendants in those other cases would have had significantly less incentive to contest those facts than they would facts related to their own actions; indeed, in some cases such defendants might affirmatively choose to allow blame to fall on another.

52. As to all other adjudicated facts relating to the criminal responsibility of the accused, it is for the Trial Chambers, in the careful exercise of their discretion, to assess each particular fact in order to determine whether taking judicial notice of it – and thus shifting the burden of producing evidence rebutting it to the accused – is consistent with the accused's rights under the circumstances of the case. This includes facts related to the existence of a joint criminal enterprise and the conduct of its members other than the accused – and, more generally, facts related to the conduct of physical perpetrators of a crime for which the accused is being held criminally responsible through some other mode of liability. Contrary to the contentions of Mr. Nzirorera and Mr. Ngirumpatse, there is a distinction between such facts and those related to the acts and conduct of the accused themselves. In the *Galić* case, in the context of Rule 92 *bis*, the ICTY Appeals Chamber considered and rejected an argument similar to that raised by the Accused here:

> The appellant emphasises that Rule 92 *bis* excludes from the procedure laid down any written statement which goes to proof of the acts and conduct of the accused as charged in the indictment. He says that, as the indictment charges the appellant with individual criminal responsibility -
>
> as having aided and abetted others to commit the crimes charged, and
>
> as the superior of his subordinates who committed those crimes,
>
> the acts and conduct of those others and of his subordinates "represent his own acts". The appellant describes those "others" as "co-perpetrators", and he says that the "acts and conduct of the accused as charged in the indictment" encompasses the acts and conduct of the accused's co-perpetrators and/or subordinates. This argument was rejected by the Trial Chamber.
>
> The appellant's interpretation of Rule 92 *bis* would effectively denude it of any real utility. That interpretation is inconsistent with both the purpose and the terms of the Rule. It confuses the present clear distinction drawn in the jurisprudence of the Tribunal between (a) the acts and conduct of those others who commit the crimes for which the indictment alleges that the accused is individually responsible, and (b) the acts and conduct of the accused as charged in the indictment which establish his responsibility for the acts and conduct of those others. It is

[87] Statute of the International Tribunal, art. 20 (e). For similar reasons, Article 20 (d), referring to the right of the accused to be tried in his or her presence, is also implicated by the practice of resolving facts fundamental to the guilt of the accused in other trials where the accused is not present.

[88] Rule 92 *bis* (in paragraphs (A) and (D) limits admission of witness statements and transcripts from other proceedings to matters "other than the acts and conduct of the accused as charged in the indictment". The Appeals Chamber has interpreted this phrase as extending to the mental state of the accused. See Prosecutor v. Galić, Case N°IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002, paras 10-11 ("*Galić* Decision").

only a written statement which goes to proof of the latter acts and conduct which Rule 92 *bis* (A) excludes from the procedure laid down in that Rule.[89]

The Appeals Chamber considers this analysis equally applicable in the Rule 94 (B) context.

53. Thus, the Trial Chamber erred to the extent that it found that, under Rule 94 (B), it is categorically impermissible to take judicial notice of facts relating directly or indirectly to the defendant's guilt, including facts related to the existence and activity of a joint criminal enterprise.[90] It should instead assess the particular facts of which the Prosecution seeks judicial notice to determine (a) whether they are related to the acts, conduct, or mental state of the Accused; and (b) if not, whether under the circumstances of the case admitting them will advance Rule 94 (B)'s objective of expediency without compromising the rights of the Accused.

B. Facts Taken Out of Context or Improperly Combined

54. The Trial Chamber declined to take judicial notice of adjudicated facts 86 through 110 because they were "taken out of context and put together to build new facts which have not been adjudicated."[91] The Prosecution contends that this was an error in fact and in law, because the facts have been adjudicated and because there is no legal requirement that facts be placed "in context".[92] It observes, stating five examples, that the adjudicated facts as set out in its request for judicial notice were drawn essentially verbatim from other Trial Judgements.[93] Mr. Ngirumpatse responds that the Trial Chamber's approach was correct because the "facts" at issue are not true facts but instead subjective assertions not subject to judicial notice.[94] Mr. Nzirorera and Mr. Karemera do not respond specifically to these arguments.[95]

55. As to the legal error asserted by the Prosecution, the Appeals Chamber finds no error. A Trial Chamber can and indeed must decline to take judicial notice of facts if it considers that the way they are formulated – abstracted from the context in the judgement from whence they came – is misleading or inconsistent with the facts actually adjudicated in the cases in question. A fact taken out of context in this way would not actually be an "adjudicated fact" and thus is not subject to judicial notice under Rule 94 (B). This is the principle that the Appeals Chamber infers that the Trial Chamber meant to follow in its refusal to take judicial notice of facts "taken out of context".

56. However, because of the lack of further explanation for its conclusion in the Trial Chamber's opinion – and given the examples to the contrary provided in paragraph 67 of the Prosecution's Interlocutory Appeal, which need not be reproduced here – the Appeals Chamber is not persuaded that all of the facts in question were taken out of context, or improperly combined, in a way that made them inconsistent with the judgements from which they were drawn. The Trial Chamber should reconsider the matter on remand and provide an explanation for its conclusions.

Disposition

57. For the foregoing reasons, the Appeals Chamber

UPHOLDS the Prosecution's Interlocutory Appeal in part, except as to Fact 1 listed under its Annex A;

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[89] *Galić* Decision, paras 8-9.
[90] The Trial Chamber's statements on this point are in fact somewhat vague; it is not entirely clear whether it intended to embrace such a categorical rule or simply to exercise its discretion as to the particular facts at issue. See Impugned Decision, paras 14-15. However, given the lack of any discussion of the particular facts in the Impugned Decision, the Appeals Chamber understands it to have, in essence, taken the former approach.
[91] Impugned Decision, para. 15.
[92] Prosecution's Interlocutory Appeal, paras 64-65.
[93] Prosecution's Interlocutory Appeal, paras 66-67.
[94] Ngirumpatse Response, para. 13.
[95] See Nzirorera Response, para. 76 (deeming it unnecessary to respond as the facts in question also related directly or indirectly to the guilt of the accused); Karemera Response, pp. 4-5.

DENIES Nzirorera's Motion;

DIRECTS the Trial Chamber to take judicial notice under Rule 94 (A) of the Rules of Facts 2, 5, and 6 listed under Annex A of the Prosecution's Interlocutory Appeal; and

REMANDS this matter to the Trial Chamber for further consideration of Facts 1-30, 33-74, and 79-152 listed under Annex B of the Prosecution's Interlocutory Appeal, in a manner consistent with this Decision.

Done this 16th day of June 2006, at The Hague, The Netherlands.

[Signed] : Mohamed Shahabuddeen

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Order for the Registrar's Submission on Joseph Serugendo's Health Condition and Ability to Testify
Rules 33 (B) and 54 of the Rules of Procedure and Evidence
20 June 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Joseph Serugendo – Health condition of the witness : terminal illness, Video-link testimony requested – Chamber requests information on the physical and psychological ability to testify

International Instrument cited :

Rules of Procedure and Evidence, rules 33 (B) and 54

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Joseph Serugendo, Decision on Urgent Motion for the Deposition of Joseph Serugendo, 8 June 2006 (ICTR 05-81)

1. On 15 March 2006, Joseph Serugendo pleaded guilty before this Tribunal. On 8 June 2006, Trial Chamber I delivered the Judgment and Sentence against him. The same day, that Trial Chamber granted the Prosecution's Urgent Motion for the Deposition of Joseph Serugendo,[1] due to Mr. Serugendo's health condition, which has been described as a terminal illness. Since then Mr. Serugendo has been taken to Nairobi, Kenya for medical treatment.

2. On several occasions, the Prosecution has expressed its intention to call Mr. Serugendo as a witness in this trial and on 20 June 2006, it made an oral motion to add Mr. Serugendo to its witness list.

3. Defence Counsel for Nzirorera, supported by the Defence for Ngirumpatse and Karemera, made an oral application on 19 June 2006 for Mr. Serugendo to testify in front of this Chamber, as soon as

[1] *Prosecutor v. Joseph Serugendo*, Case N°ICTR 05-81-I, Decision on Urgent Motion for the Deposition of Joseph Serugendo (TC), 8 June 2006.

practicable. He requested that a video-link be set up in Nairobi to hear Mr. Serugendo's testimony due to his precarious health position, which may prevent his attendance in Court.

4. The Chamber needs to be apprised of Mr. Serugendo's current state of health. Specifically, the Chamber requests information regarding the physical and psychological ability of Mr. Serugendo to testify or to make a deposition, and which practical arrangements could be made in that order, including the possibility to use video-link facilities from Mr. Serugendo's location. In accordance with Rule 33 of the Rules of Procedure and Evidence, the Chamber is of the view that the Registrar may assist in this matter.

FOR THE ABOVE REASONS, THE CHAMBER

HEREBY REQUESTS the Registrar pursuant to Rule 33 (B) of the Rules to make a submission responding to the requests of the Chamber as described in paragraph 4 above, no later than 26 June 2006.

Arusha, 20 June 2006, done in English.

[Signed : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Decision on Prosecution's Motion to permit limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and his Family Rules 66 (C) and 68 (D) of the Rules of Procedure and Evidence 21 June 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Disclosure of Information Regarding Payments and Benefits Provided to witness, Information material to the preparation of the defence, Limited admission of the Prosecution argument that potential witnesses will use the disclosed information as a bargaining tool to cooperate with the Prosecution, Information already disclosed in another case – Confidential disclosure ordered – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rules 66 (C) and 68 (D)

International Cases cited :

I.C.T.R. : 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. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera, Order for the Prosecutor for Filing Information and Material Ex Parte and Under Seal Regarding Witness ADE, 31 March 2006 (ICTR-98-44)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Slobodan Milosović, Order on Defence Application for Re-Admission of Witness Henning Hensch, 9 May 2005 (IT-02-54)

Introduction

1. On 15 December 2005, the Prosecution submitted a Motion to be relieved from its obligations under Rules 66 and 68 of the Rules of Procedure and Evidence to disclose information in its possession regarding payments and benefits paid to Witness ADE and his family. The document, which the Prosecution wishes to withhold, is an un-redacted budget for the payments and benefits paid to the family of Witness ADE signed by the Prosecutor himself on 27 October 2005. This document was disclosed to the Defence in a redacted form on 15 December 2005.

Discussion

2. As a preliminary matter, the Prosecution requests sanctions to be imposed against Counsel for Nzirorera for not filing his response to the present Motion as confidential. It is the Chamber's view that in the normal course of proceedings, all submissions from the Parties are to be filed publicly unless the content warrants confidential filing.[1] The Chamber finds that the response does not contain any confidential information and denies the request for sanctions.

3. Nzirorera further argues as a preliminary matter that the Motion should be denied on a technical ground because the Prosecution did not submit the material sought to be kept confidential as mandated by the Rules. In its Interim Order of 31 March 2006, the Chamber found that "[t]he fact that the Prosecutor did not directly make available to the Chamber the material does not as such prevent the Chamber from considering the merits of the application".[2] It requested this information from the Prosecution, and it was provided to the Chamber *ex parte* on 4 May 2006. Consequently, this matter is now moot.

4. Regarding the merits of the Motion, the Prosecution acknowledges that it has provided certain payments and benefits for Witness ADE and his family. While the Prosecution claims that this material is not exculpatory, it wishes to withhold from the Defence detailed financial information in a budget form of payments and benefits paid to Witness ADE and his family seeking the application of Rules 66 (C) and 68 (D) of the Rules.

5. The Prosecution's submission is ambiguous. In the Chamber's view, in order for the Prosecutor to apply for relief from its disclosure obligations pursuant to Rules 66 and 68, the material itself must already be determined by the Prosecution as material to the preparation of the defence or exculpatory material. The Chamber, therefore considers that this application is made under Rule 66 (C) or 68 (D) of the Rules as information that is material to the preparation of the defence or exculpatory.

6. As stated in Rules 66 (C) and 68 (D), the Prosecution may be relieved of its obligation to disclose information that is material to the preparation of the defence or is exculpatory if its disclosure would (1) prejudice further or ongoing investigations; (2) be contrary to the public interests; or (3) affect the security interests of any State.

7. The Chamber is not satisfied that the un-redacted budget submitted as a summary of benefits dated 4 May 2006 "may prejudice further or ongoing investigations, or for any other reasons which may be contrary to the public interest or affect the security interests of any State" to warrant limited disclosure pursuant to Rules 66 (C) and 68 (D). Although the Prosecution broadly states that the disclosure of the redacted material would prejudice further investigations and be contrary to the public interest, the Prosecution's only argument in that vein is that potential witnesses will use the disclosed information as a bargaining tool to cooperate with the Prosecution. The Prosecution focuses its submissions on its concerns for the safety of the witness, which is not a reason falling within the ambit

[1] See for example, *Prosecutor v. Slobodan Milosovic*, Case N°IT-02-54-T, Order on Defence Application for Re-Admission of Witness Henning Hensch (TC), 9 May 2005.
[2] *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-T, Order for the Prosecutor for Filing Information and Material *Ex Parte* and Under Seal Regarding Witness ADE (TC), 31 March 2006, para. 2.

of the exception provided by Rules 66 (C) and 68 (D). The Chamber further notes that the total amount paid to Witness ADE was disclosed to the Defence in the Decision of the Trial Chamber in the *Zigiranyirazo* case[3], and in the disclosure to the Defence in this case of 15 December 2005 and 11 May 2006.

8. While the Prosecution's request is denied, the Chamber nevertheless accepts the Prosecution's concern for future witnesses using the information as a bargaining tool and to protect Witness ADE from further public scrutiny, and therefore orders the disclosure of the un-redacted budget of payments and benefits paid to Witness ADE as submitted to the Chamber on 4 May 2006 to be filed confidentially through the Registrar and distributed to the Defence of each Accused in the present case.

9. The Chamber declines to evaluate Nzirorera's proposal that Rule 68 (D) of the Rules in itself contravenes the rights of the Accused, since the present application failed and the Rule is not being applied.

For the above mentioned reasons, the Chamber

DENIES the Prosecution Motion; and

ORDERS the immediate disclosure of the un-redacted submission of 4 May 2006, to be filed confidentially.

Arusha, 21 June 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[3] *Prosecutor v. Protais Zigiranyirazo*, Case N°2001-73-T, Decision on Defence and Prosecution's Motions Related to Witness ADE (TC), 31 January 2006, para. 23.

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Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations 30 June 2006 (ICTR-98-44-AR73.7)

(Original : English)

Appeals Chamber

Judges : Liu Daqun, Presiding Judge ; Mohamed Shahabuddeen ; Mehmet Güney ; Theodor Meron ; Wolfgang Schomburg

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, Prosecution's obligation to disclose exculpatory material is essential to a fair trial, Distinct obligation of the Prosecutor to participate in the process of administering justice by disclosing to the Defence the exculpatory material, A search engine cannot serve as a surrogate for the Prosecution's individualized consideration of the material in its possession, Lack of access to documents through EDS – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 68, 68 (A) and 68 (B)

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Juvénal Kajelijeli, Judgement, 23 May 2005 (ICTR-98-44A) ; 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)

I.C.T.Y. : 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, Judgement, 17 December 2004 (IT-95-14/2) ; Trial Chamber, The Prosecutor v. Fatmir Limaj et al., Decision on the Joint Motion on Prosecution's Late and Incomplete Disclosure, 7 June 2005 (IT-03-66) ; Trial Chamber, The Prosecutor v. Sefer Haliloviæ, Decision on Motion for Enforcement of Court Order Re Electronic Disclosure Suite, 27 July 2005 (IT-01-48)

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 with an interlocutory appeal filed by the Prosecution[1] against an oral decision of Trial Chamber III, rendered on 16 February 2006,[2] resolving a disclosure dispute between the parties.

[1] Prosecutor's Interlocutory Appeal of the Trial Chamber's Decision Given Orally on 16 February 2006 Regarding the Role of the Electronic Disclosure Suite in Discharging the Prosecution's Disclosure Obligations, 6 March 2006 ("Prosecution Appeal"). Mr. Nzirorera responded in Respondent's Brief of Joseph Nzirorera and Motion to Strike, 13 March 2006 ("Nzirorera Response and Motion"). The Prosecution replied in Prosecutor's Reply to "Respondent's Brief of Joseph

2. In this decision, the Appeals Chamber considers whether the Trial Chamber erred as a matter of law in finding that the Prosecution may not rely on its Electronic Disclosure Suite ("EDS") to fulfill its disclosure obligations under Rule 68 of the Rules of Procedure and Evidence of the Tribunal ("Rules"). The EDS contains public or redacted versions of more than thirty-four thousand documents potentially relevant to all accused before the Tribunal.[3] The Prosecution has made this searchable database available to the defence in every case, in which counsel agree to its terms of use, so that it may be searched for exculpatory material.[4] In the view of the Prosecution, this system discharges its obligation under Rule 68, except for material "not, or not yet," included in the system, which material, the Prosecution claims, it will continue to search and disclose itself.[5] The Prosecution made these submissions before the Trial Chamber, when confronted by the Defence with material available in redacted form in the EDS, which it had not formally disclosed.[6] The Trial Chamber, however, found the Prosecution in breach of its Rule 68 disclosure obligations.[7] This interlocutory appeal ensued.

Background

3. On 6 February 2006, Mr. Nzirorera requested the disclosure of a number of statements relevant to several witnesses scheduled to be heard.[8] In support of his motion, he presented several redacted statements, which he had obtained, bearing markings associated with the Prosecution, to demonstrate that the Prosecution was in possession of documents that it had failed to disclose.[9]

4. During oral argument on the motion before the Trial Chamber, the Prosecution explained that many of the statements sought by Mr. Nzirorera were available in the EDS and asserted that Mr. Nzirorera had in fact already obtained them by searching the EDS.[10] The Prosecution further contended that the availability of this material in the EDS fulfilled its disclosure obligations under Rule 68.[11]

5. The Trial Chamber disagreed that availability of material on the EDS discharges the Prosecution's disclosure obligations and found that the Prosecution had failed to comply with its disclosure obligations.[12] It emphasized that:

Nzirorera and Motion to Strike", Responding to, "Prosecutor's Interlocutory Appeal of the Trial Chamber's Decision Given Orally on 16 February 2006 Regarding the Role of the Electronic Disclosure Suite in Discharging the Prosecution's Disclosure Obligations" ("Prosecution Reply and Response"). Mr. Karemera and Mr. Ngirumpatse did not respond to the Prosecution Appeal after requesting and being granted an extension of time pending its translation into French, which was filed on 30 May 2006. See Decision on Édouard Karemera's Request for Extension of Time to Respond to the Prosecution's Interlocutory Appeal, 4 April 2006; Decision on Request for Extension of Time, 24 March 2006.

[2] *The Prosecutor v. Édouard Karemera et al.*, Case N°ICTR-98-44-T, Oral Decision, T. 16 February 2006 pp. 2-10 ("Impugned Decision").

[3] Prosecution Appeal, para. 24.

[4] Prosecution Appeal, paras. 23-26.

[5] Prosecution Appeal, paras. 2, 20, 26 ("The Appellant, however, should be able to rely on the EDS for disclosure of any other material, under Rule 68 … The EDS has been set up to perform the function of disclosing the evidence in the possession of the Prosecutor to the Defence … It is thus unnecessarily repetitive, and wasteful of resources, for the Office of the Prosecutor to have to carry out the same search, and provide the same material again, when the material has already been made available to the Defence through EDS. In effect this would require the Prosecution to discharge its disclosure obligations twice.").

[6] Prosecution Appeal, para. 2.

[7] Impugned Decision, pp. 5, 8.

[8] Impugned Decision, p. 2; Prosecution Appeal, para. 6; Nzirorera Response and Motion, para. 6. The Appeals Chamber has considered other aspects of this particular dispute in *The Prosecutor v. Édouard Karemera et al.*, Case N°98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006 ("*Nzirorera* Appeal Decision").

[9] Prosecution Appeal, paras. 7, 26.

[10] T. 13 February 2006 p. 11.

[11] T. 13 February 2006 p. 11 (Mr. Webster: "Now, if he's finding this information on EDS, then he's finding it, or he's discovering it, in a manner that is intended by the rules because that database was established to afford the Defence an opportunity to look for information that would assist it in preparing its defence. So I don't know if the Court could enquire where Mr. Robinson is pulling this information from, but if it's coming from the EDS, the EDS is functioning in exactly the fashion that it was designed to.").

[12] Impugned Decision, p. 8.

> […] the existence of an electronic database created by the Office of the Prosecutor for storage and retrieval of documents, which allows the Defence to do its own searches for exculpatory material, does not relieve the Prosecution from its positive obligation to disclose all Rule 68 material in the possession of the Prosecution.[13]

The Trial Chamber, however, found that Mr. Nzirorera's possession of redacted forms of the documents mitigated much of the prejudice caused by the failure to disclose.[14]

6. On appeal, the Prosecution does not seek reversal of any of the Trial Chamber's individual findings regarding disclosure.[15] Rather, the Prosecution challenges exclusively the general finding that it may not discharge its Rule 68 disclosure obligations through the EDS, emphasizing the significant implications this conclusion has on its disclosure practices in this and other cases.[16]

7. The Prosecution explains that, upon completion,[17] its EDS will contain its entire evidence collection, except for confidential material.[18] Presently, it has thirty-four thousand documents, with several thousand more to be added, divided into three general categories: redacted witness statements, audio/video, and Prosecution evidence.[19] The database allows a user to perform text searches and then to view and print selected documents.[20] The Prosecution explains that the EDS is also accessible to defence counsel via the internet,[21] which Mr. Nzirorera disputes.[22] In addition, Mr. Nzirorera portrays a vastly different picture of the utility of the EDS, pointing to significant problems in locating relevant material in light of the fact that much of the material in the EDS is redacted.[23]

Discussion

8. The Prosecution argues that the Trial Chamber erred as a matter of law in finding that it cannot discharge its disclosure obligations under Rule 68 by making the Prosecution evidence collection and other relevant materials accessible to the Defence through the EDS.[24] In identifying the Trial Chamber's alleged legal error, the Prosecution contends that the Trial Chamber failed to appreciate the searchable format of the EDS.[25] However, in the very same passage upon which the Prosecution relies in support of this proposition, the Trial Chamber clearly expressed that the EDS, "allows the Defence to do its searches for exculpatory material."[26] Consequently, the Appeals Chamber cannot agree that the Trial Chamber failed to appreciate this aspect of the EDS. Rather, in the view of the Appeals Chamber, the Prosecution appears to take issue with the Trial Chamber's finding that the Prosecution has a "positive obligation" to disclose Rule 68 material "in its possession" to individual accused.[27] The

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[13] Impugned Decision, p. 5.
[14] Impugned Decision, p. 8.
[15] Prosecution Appeal, para. 3.
[16] Prosecution Appeal, para. 2.
[17] The Prosecution does not indicate when the EDS will be complete.
[18] Prosecution Appeal, para. 24. The Prosecution illustrates the functioning of its EDS in paragraphs 20 to 26 of the Prosecution Appeal. Attached to the Prosecution Appeal are several annexes containing materials that illustrate how the EDS works and how it can be used by Defence Counsel. Mr. Nzirorera seeks to strike the annexes and paragraphs 20 to 25 of the Prosecution Appeal, complaining that these paragraphs and annexes present material that was not before the Trial Chamber. *See* Nzirorera Response and Motion, paras. 2-4. With respect to paragraphs 20 to 25 of the Prosecution Appeal, the Appeals Chamber denies Mr. Nzirorera's request. In the circumstances of this case, the Appeals Chamber does not find the submissions in these paragraphs problematic, as the description provided in the Prosecution Appeal is materially the same, for the purposes of this decision, as the much more general one given to the Trial Chamber. See T. 13 February 2006 pp. 10-12, 19. The Appeals Chamber, however, grants Mr. Nzirorera's request with respect to the annexes. These annexes contain additional evidence, which may only be admitted in accordance with the procedure laid out in Rule 115.
[19] Prosecution Appeal, paras. 21, 24.
[20] Prosecution Appeal, para. 21
[21] Prosecution Appeal, para. 21.
[22] Nzirorera Response and Motion, para. 25.
[23] Nzirorera Response and Motion, paras. 14-26.
[24] Prosecution Appeal, paras. 2, 16, 18.
[25] Prosecution Appeal, para. 25.
[26] Impugned Decision, p. 5; Prosecution Appeal, para. 25.
[27] Prosecution Appeal, para. 34 ("The Trial Chamber incorrectly formulated the Prosecutor's obligation, stating that the Prosecution has a 'positive obligation to disclose all Rule 68 material *in the possession* of the Prosecution'") (emphasis in

Appeals Chamber, however, can identify no legal error on the part of the Trial Chamber in holding that the Prosecution has a positive obligation to disclose exculpatory material in its possession.

9. The Prosecution's obligation to disclose exculpatory material is essential to a fair trial.[28] The Appeals Chamber has always interpreted this obligation broadly.[29] The positive nature of this obligation and its significance stem from the Prosecution's duty to investigate, which the Appeals Chamber has explained runs conterminously with its duty to prosecute.[30] In particular, the Appeals Chamber recalls that one of the purposes of the Prosecution's investigative function is

> "to assist the Tribunal to arrive at the truth and to do justice for the international community, victims, and the accused."[31]

The responsibility for disclosing exculpatory material rests on the Prosecution alone, and the determination of what material meets Rule 68 disclosure requirements is primarily a fact-based judgement, falling within the Prosecution's responsibility.[32] In other words, the Prosecution has a distinct obligation to participate in the process of administering justice by disclosing to the Defence, as required by Rule 68 (A), material which it actually knows "may suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecution evidence". This responsibility is crucial to the analysis.

10. Bearing these principles in mind, the Prosecution must actively review the material in its possession for exculpatory material[33] and, at the very least, inform the accused of its existence.[34] In the view of the Appeals Chamber, the Prosecution's Rule 68 obligation to disclose extends beyond simply making available its entire evidence collection in a searchable format. A search engine cannot serve as a surrogate for the Prosecution's individualized consideration of the material in its possession. As

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original); Prosecution Reply and Response, para. 7 ("The objectionable language used by the Trial Chamber in the impugned Decision was that the EDS 'does not relieve the Prosecution from its *positive obligation to disclose all Rule 68 material* in the possession of the Prosecution'") (emphasis in original).

[28] *Nzirorera* Appeal Decision, para. 7. See also *The Prosecutor v. Théoneste Bagosora et al.*, Case N°ICTR-98-41-AR73, ICTR-98-41-AR73(B), Decision on Interlocutory Appeals on Witness Protection Orders, 6 October 2005, para. 44 ("*Bagosora* Appeal Decision"); *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case N°IT-95-14/2-A, Appeal Judgement, 17 December 2004, paras. 183, 242 ("*Kordić and Čerkez* Appeal Judgement"); *The Prosecutor v. Tihomir Blaškić*, Case N°IT-95-14-A, Judgement, 20 July 2004, para. 264 ("*Blaškić* Appeal Judgement"); *The Prosecutor v. Radislav Krstić*, Case N°IT-98-33-A, Judgement, 19 April 2004, para. 180 ("*Krstić* Appeal Judgement"); *The 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, p. 3 ("*Brđanin* Appeal Decision").

[29] *Blaškić* Appeal Judgement, paras. 265, 266; *Krstić* Appeal Judgement, para. 180.

[30] *Bagosora* Appeal Decision, para. 44. See also *Brđanin* Appeal Decision, p. 3; *Kordić and Čerkez* Appeal Judgement, para. 183; *Blaškić* Appeal Judgement, para. 264.

[31] Prosecution Regulation No. 2, para. 2 (h). As a result, the Appeals Chamber finds disconcerting the Prosecution's suggestion before the Trial Chamber that it is somehow not obliged to search for material impacting on the credibility of its own witnesses. See T. 13 February 2006 p. 11 ("we cannot exhaustively search the entire OTP database simply to prosecute witnesses that we're bringing to this Court as part of our Prosecution case … our job here is to prosecute the three men … sitting on the other side of the courtroom. We do not prosecute our other witnesses. When we find material that is relevant to this case and relevant to – and within the parameters of Rule 68, we disclose it, but we can only do the best that we can do, and that's what we've done.").

[32] *Nzirorera* Appeal Decision, paras. 16, 22; *Bagosora* Appeal Decision, para. 43 ("… the [disclosure] obligations rest on the Prosecutor alone …"). See also *Kordić and Čerkez* Appeal Judgement, para. 183; *Brđanin* Appeal Decision, p. 3.

[33] See, *e.g.*, *Blaškić* Appeal Judgement, para. 302; *The Prosecutor v. Juvénal Kajelijeli*, Case N°ICTR-98-44A-A, Judgement, 23 May 2005, para. 262. The Appeals Chamber has recognized that the voluminous nature of materials "in the possession" of Prosecutor may give rise to delays in disclosure. It does not however excuse the Prosecution from reviewing it and assessing it in light of Rule 68. See, *e.g.*, *Blaskić* Appeal Judgement, para. 300 ("… the voluminous nature of the materials in the possession of the Prosecution may result in delayed disclosure, since the material in question may be identified only after the trial proceedings have concluded."); *Krstić* Appeal Judgement, para. 197 ("The Appeals Chamber is sympathetic to the argument of the Prosecution that in most instances material requires processing, translation, analysis and identification as exculpatory material. The Prosecution cannot be expected to disclose material which – despite its best efforts - it has not been able to review and assess. Nevertheless, the Prosecution did take an inordinate amount of time before disclosing material in this case, and has failed to provide a satisfactory explanation for the delay.") (internal citation omitted). Moreover, the Appeals Chamber has explained the unity of the Office of the Prosecutor in discharging disclosure. See *Bagosora* Appeal Decision, paras. 42-46.

[34] See *Krstić* Appeal Judgement paras. 190, 195.

such, the Appeals Chamber can identify no legal error on the part of the Trial Chamber in finding that the EDS, as described by the Prosecution, fails to fulfil these important and expansive obligations.

11. The Prosecution's reasoning includes the following two steps. First, it argues that paragraphs (A) and (B) of Rule 68 establish two distinct disclosure obligations covering different categories of materials: paragraph (A) applies to materials that the Prosecution *actually knows may be exculpatory*, while paragraph (B) applies more broadly to all "collections of relevant material", whether or not the Prosecution knows that they may be exculpatory. Second, it argues that when the Prosecution provides the defence with an electronic collection of relevant materials in satisfaction of its obligation under paragraph (B), that also satisfies its obligations under paragraph (A) with respect to any materials governed by paragraph (A) that may be found somewhere within the collection. The Appeals Chamber notes that while the first step of the Prosecution's argument appears to embrace a rather *broad* interpretation of the Prosecution's disclosure obligations, the second step would have the effect of curtailing them by making it unnecessary for the Prosecution to draw the attention of the Defence to the particular material that it actually knows may be exculpatory.

12. The Appeals Chamber observes several flaws in the Prosecution's reasoning. The Prosecution's obligation to disclose to the defence material that may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence is set forth in Rule 68(A).[35] It is only Rule 68 (A) that articulates which material is subject to disclosure under this rule and which obliges the Prosecution to disclose it. Rule 68 (B) does not establish a distinct disclosure obligation.[36] Rather, it simply provides for a possible modality of conveying exculpatory material to the defence, in an electronic format, after the Prosecution identifies it as "relevant material" which is subject to disclosure under Rule 68. This is supported by the plain language of sub-paragraph B of Rule 68 and by its drafting history, which focused on the technical feasibility of providing to the defence electronic versions of documents subject to Rule 68 disclosure.[37]

13. Thus, disclosure under Rule 68 (B) is merely the digital equivalent of disclosure under Rule 68 (A), consisting of the same material in searchable electronic form. For these reasons, for the Prosecution to seek to satisfy its Rule 68 obligations merely by granting the Defence access to an electronic database containing tens of thousands of documents, only a few of which it knows to be potentially exculpatory, is the equivalent of the Prosecution seeking to satisfy those obligations by giving the Defence a key to a storage closet containing the same tens of thousands of documents in paper form. In both cases, the Prosecution has for all intents and purposes buried the exculpatory materials, at least unless it notifies the Defence of the existence of such materials and provides a means by which the Defence can be reasonably expected to find them. Rule 68 (B) was not intended to facilitate this kind of evasion of the Prosecution's disclosure obligations. Indeed, its text makes clear that it is in no way intended to dilute or circumvent Rule 68 (A)'s requirements: it states that it is "without prejudice to paragraph (A)".[38]

14. The Prosecution's second principal argument on appeal is that, by creating the EDS and by making it searchable, its collection is now "reasonably accessible" to the defence, which is a

[35] Rule 68 (A) provides: "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."

[36] Rule 68 (B) provides: "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."

[37] Minutes of the Fourteenth Plenary Session (confidential), paras. 87-100.

[38] Indeed, this proviso makes it clear that even if the Prosecution were correct that Rule 68 (B) refers to a different category of materials than does Rule 68 (A), it would not follow that granting access to the EDS satisfies all of its disclosure obligations. Instead, it would simply mean that the Prosecution could use electronic disclosure to satisfy its obligation under Rule 68 (B) with respect to one category of materials, but would still be obligated to follow the traditional method of disclosure for the narrower category of materials subject to Rule 68 (A). Thus, the second step of the Prosecution's argument does not follow logically from the first.

recognized exception to its obligation to disclose.[39] By way of illustration, the Prosecution refers to Appeals Chamber jurisprudence indicating that transcripts of open session testimony are not subject to disclosure as they are "reasonably accessible".[40] Mr. Nzirorera disputes this claim, emphasizing the difficulty of identifying exculpatory material given the redacted nature of the documents on the EDS.[41] The Prosecution counters that Mr. Nzirorera's complaints are belied by his possession of material, which it surmises came from the EDS, thereby demonstrating its proper functioning.[42] The Appeals Chamber observes that it is not clear from the record how Mr. Nzirorera obtained the material he used to demonstrate that the Prosecution was in breach of its disclosure obligations.

15. The Appeals Chamber agrees 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.[43] On the basis of the record before it, however, the Appeals Chamber cannot find that the EDS makes documents reasonably accessible as a general matter, nor that the Defence can be assumed to know about all materials included in it. The determination whether given exculpatory information is reasonably accessible, and whether its existence is known to the Defence requires a careful examination of the relevant circumstances.[44] This is true for material on the EDS – especially given that, as Mr. Nzirorera notes, it may be difficult to recognize material as exculpatory if it is only available in redacted form – just as it is true for material not found on this system. The Appeals Chamber has not been asked to decide here whether the Prosecution satisfied its disclosure obligation with respect to any particular piece of information. The Appeals Chamber cautions the Prosecution, however, that just because it has placed a particular piece of material on the EDS, it has not necessarily made that piece of material "reasonably accessible" to any given accused. It might be helpful if the Prosecution either separates a special file for Rule 68 material or draws the attention of the Defence to such material in writing and permanently updates the special file or the written notice.

16. Finally, the Appeals Chamber observes that the Prosecution points to the practice of various Trial Chambers of the International Criminal Tribunal for the Former Yugoslavia concerning electronic disclosure.[45] The Appeals Chamber notes that the practice described in those cases differs from the Prosecution's proposed approach in this Tribunal.[46]

Disposition

17. For the foregoing reasons, the Appeals Chamber DISMISSES the Prosecution Appeal in all respects.

Done in English and French, the English version being authoritative.

Done this 30th day of June 2006, At The Hague, The Netherlands.

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[39] Prosecution Appeal, paras. 2, 43-47. The Prosecution also raises a related argument, submitting that the EDS addresses the underlying rationale for the Prosecution's disclosure obligation by eliminating its superior access to the material. Prosecution Appeal, paras. 38-42.
[40] Prosecution Appeal, para. 46, citing *Blaškić* Appeal Judgement and *Brđanin* Appeal Decision.
[41] Nzirorera Response and Motion, paras. 14-26.
[42] Prosecution Appeal, para. 26.
[43] *Brđanin* Appeal Decision, p. 4; *Blaškić* Appeal Judgement, para. 296.
[44] See*, e.g., Blaškić* Appeal Judgement, paras. 286-303.
[45] Prosecution Appeal, paras. 48-54, citing *The Prosecutor v. Sefer Halilović*, Case N°IT-01-48-T, Decision on Motion for Enforcement of Court Order Re Electronic Disclosure Suite, 27 July 2005 ("*Halilović* Decision"); *Prosecutor v. Fatmir Limaj et al*., Case N°IT-03-66-T, Decision on the Joint Motion on Prosecution's Late and Incomplete Disclosure, 7 June 2005.
[46] For example, in the *Halilović* Decision, the Prosecution's Electronic Disclosure Suite contained a separate folder for material directed at Halilović, the Prosecution informed the accused when new material was placed into the folder, and it also indexed, to some extent, the electronic collection. *Halilović* Decision, pp. 3-5.

[Signed] : Liu Daqun

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Decision on the Prosecutor's Application Pursuant to Rules 39, 68 and 75 of the Rules of Procedure and Evidence for an Order for Conditional Disclosure of Witness Statements and Other Documents Pursuant to Rule 68 (A) Rules 68 (A) and 75 of the Rules of Procedure and Evidence 4 July 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Conditional Disclosure of Witness Statements and Other Documents, Identity of the witnesses inextricably connected with the substance of their statements, Exception to the Prosecutor's disclosure obligation when it might affect the security of the individuals who gave the statements, Exception to the Prosecutor's obligation granted only on a case-by-case basis, No exception needed in this case : protective measures of the witnesses ensure their safety – Motion orders protective measures for witnesses and denies the rest of the motion

International Instrument cited :

Rules of Procedure and Evidence, rules 39, 66 (C), 68, 68 (A), 68 (D), 75 and 75 (F)

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. Pauline Nyiramasuhuko et al., Decision on the Prosecutor's ex-parte and Extremely Urgent Motion to Access Closed Session Transcripts in Case N°ICTR-96-3-A to Disclose to Case N°ICTR-98-42-T, 23 September 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Edouard Karemera, Order on Protective Measures for Prosecution Witnesses, 10 December 2004 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Prosecutor's Motion for an Order of Disclosure of Closed Session Transcripts and Sealed Prosecution Exhibits Pursuant to Rules 69 and 75, 16 December 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on the Prosecutor's Request for an Order of Disclosure of Closed Session Transcripts and Sealed Prosecution Exhibits Pursuant to Rules 69 and 75 of the Rules of Procedure and Evidence, 2 February 2005 (ICTR-99-50) ; 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. 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 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, Scheduling Order, 30 March 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Protais Zigiranyirazo, Decision on Prosecution Motion for Conditional Disclosure of Witness Statements, 7 April 2006 (ICTR-2001-73) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Disclosure of Prosecution Informant, 24 May 2006 (ICTR-98-41)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Slobodan Milosović, Order on Defence Application for Re-Admission of Witness Henning Hensch, 9 May 2005 (IT-02-54)

Introduction

1. The trial in the instant proceedings started on 19 September 2005. The Prosecution makes this motion, following several requests by the Defence, for conditional disclosure of (1) documents and witness statements relating to RPF acts of violence and "infiltration" in Rwanda between 1990 and 1994 ("RPF material"), and (2) other independent witness statements which may affect the credibility of Prosecution witnesses or be exculpatory pursuant to Rule 68 (A) of the Rules of Procedure and Evidence ("Credibility Statements").[1] The Prosecution's condition for disclosing the RPF material is that the disclosure is done in a redacted format by not revealing the identities of the individuals who gave the statements, and for the Credibility Statements that the individuals who gave the statements and who are not presently the beneficiaries of any order for protective measures by a Trial Chamber, be given protective measures by this Chamber.

Discussion

Confidential Character of the Prosecution Motion

2. In his Response, Joseph Nzirorera moves first for an Order that the Prosecutor's Motion be filed publicly.[2] The Chamber notes that submissions from the Parties are to be filed publicly unless the content warrants confidential filing.[3] The Chamber has reviewed the content of the Motion and finds that it does not contain any protected information nor does the Prosecutor submit any argument in support of its confidential filing.[4] The Chamber is therefore of the view that this application is to be filed as public.

Application for Conditional Disclosure

3. The Prosecutor is willing to disclose certain RPF materials if it can be relieved of its obligation to disclose the identities of the individuals who made the statements pursuant to Rules 66 (C) and 68 (D) of the Rules as their disclosure may undermine Prosecution investigations that are still underway. Except for the statements of Witnesses DM80 and DM46 who are covered by an order for protective measures from the *Bagosora* case[5], the Prosecutor states that the witnesses who provided these materials are not subject to protective measures by any Trial Chamber of the Tribunal, even though he claims they are protected through Rule 39 of the Rules. Further, the Prosecutor requests that the Defence should not attempt to investigate the identities of the witnesses or share any of the information in the statements with anyone outside of the Defence team, except for the Accused himself. He also requests that the Chamber maintain the order for protective measures for Witnesses DM80 and DM46.

4. As for the Credibility Statements, although the Prosecutor only wishes to disclose them in a redacted format, if the Chamber orders their full disclosure, he requests that the Chamber protect the identities of the individuals who provided the information by extending its prior orders for protective measures from 10 December 2004 and in the Scheduling Order of 30 March 2006[6], to these witnesses.

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[1] Prosecutor's Application pursuant to Rules 39, 68 and 75 of the Rules of Procedure and Evidence for an Order for Conditional Disclosure of Witnesses Statements and other documents pursuant to Rule 68 (A), filed on 5 April 2006.
[2] Filed on 10 April 2006
[3] See for example, *Prosecutor v. Slobodan Milosovic*, Case N°IT-02-54-T, Order on Defence Application for Re-Admission of Witness Henning Hensch (TC), 9 May 2005.
[4] In his Reply to Joseph Nzirorera's Response, the Prosecutor does not address the issue of the confidentiality of his application.
[5] *The Prosecutor v. Théoneste Bagosora et. al.*, Case N°ICTR-98-41-T ("Bagosora et al."), Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A) (TC), 8 March 2006; these statements will be disclosed automatically pursuant to Rule 75 (F).
[6] *The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera* ("*Karemera et al.*"), Case N°ICTR-98-44-R75 Order on Protective Measures For Prosecution Witnesses (TC), 10 December 2004 ("Order of 10 December 2004"); *Karemera et al.,* Case N°ICTR-98-44-T, Scheduling Order (TC), 30 March 2006. The Prosecutor attached two affidavits to

In particular, the Prosecutor asks that the Defence notify the Prosecutor in writing and on reasonable notice if it wishes to contact one of these witnesses and such contact, if agreed to by the witness, should be facilitated through WVSS.

5. In support of the requests in this Motion, the Prosecutor relies on this Chamber's Scheduling Order of 30 March 2006 where the Chamber ordered the Rule 68 (A) witness statement material concerning Witness ADE to be disclosed in an unredacted format but ordered the Defence and the Accused not to disseminate any of the included identifying information so as to protect the security of the witnesses. In his Reply[7], the Prosecutor further relies on the recent decision in the *Zigiranyirazo* case where the Trial Chamber extended its orders of protective measures to witnesses who were not expected to testify at trial but who made statements to the Prosecutor which may contradict one of the Prosecutor's witnesses, based on the interests of protecting the witnesses in question and in the interests of justice as a whole[8]. The Prosecutor also submitted as Annexes to this Motion, a declaration of one of his investigators from May 2005 detailing the security situation in Rwanda, which remains highly precarious and unpredictable, and an affirmation from another investigator dated March 2006 that the details in the first declaration remain current.

6. Joseph Nzirorera opposes the Motion only to the extent that he believes that the Prosecutor's Rule 68 (A) obligations require the provision of completely unredacted witness statements to the Defence. He also opposes the requirement that he notify the Prosecutor if he wishes to interview any of these witnesses and that WVSS facilitate the interview because as this Chamber has already ruled, they are not property of either party and have not been designated as Prosecution witnesses.[9]

7. Concerning the Prosecutor's request to be relieved of its obligation to disclose the identities of the individuals who provided the RPF material pursuant to Rules 66 (C) and 68 (D) of the Rules, the Chamber notes that these rules provide an exception to the Prosecutor's obligation to disclose information which may affect the credibility of Prosecution witnesses, be exculpatory, or material to the preparation of the Defence when it is might prejudice further or ongoing Prosecution investigations, be contrary to the public interest or affect the security interests of any State. Furthermore, these rules prescribe that when making such an application the Prosecutor shall provide the Trial Chamber with the information or materials sought to be kept confidential. The Chamber is of the view that an exception to the Prosecutor's obligation to disclose information should only be given on a case-by-case basis after consideration of the Prosecutor's submissions in each case. In the instant case, no information or material has been given to the Chamber, nor has any specific argument been made for the Chamber to make this order.

8. The Chamber has already decided that Rule 68 (A) mandates the disclosure of identifying information with respect to Prosecution witnesses,[10] when their identity is inextricably connected with the substance of the statements.[11] The Chamber acknowledges that Rule 39 of the Rules allows the Prosecution to take special measures to provide for the safety of potential witnesses and informants including requesting an order from a Trial Chamber or a Judge. As stated in prior Decisions, the application of this Rule could not constitute, as such, an impediment to disclosure of identifying information with respect to Prosecution witnesses".[12] Accordingly, since the identity of the individuals

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support the allegation of risks faced by the witnesses, and argues that the protective measures order could be extended to persons who were interviewed by him.

[7] Filed on 3 May 2006.

[8] *Prosecutor v. Protais Zigiranyirazo*, Case N°ICTR-2001-73-T, Decision on Prosecution Motion for Conditional Disclosure of Witness Statements (TC), 7 April 2006, para. 6.

[9] *Karemera et al.*, Decision on Defence Motion for Issuance of Subpoena to Witness T (TC), 8 February 2006, para. 3.

[10] *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure (TC), 5 July 2005, para. 18; *Karemera et al.*, Scheduling Order (TC), 30 March 2006, para. 6.

[11] *Bagosora et al.*, Decision on Disclosure of Identity of Prosecution Informant, 24 May 2006, para. 5; *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure (TC), 5 July 2005, para. 18; *Karemera et al.*, Scheduling Order (TC), 30 March 2006, para. 20.

[12] *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure (TC), 5 July 2005, para. 18; Karemera et al., Scheduling Order (TC), 30 March 2006, para. 6.

who gave statements regarding the RPF material and the individuals who gave the Credibility Statements are indeed related to the content of the statements, they should be disclosed to the Defence.[13]

9. The Chamber however agrees that the Credibility Statements and the statements concerning the RPF Material may contain sensitive information, which could affect the security of the individuals who gave the statements. To adequately protect those individuals, the Chamber is of the view that the Defence and the Accused should be requested not to disseminate to the public and media any of their identifying information and that should the individuals agree to an interview with the Defence, after notifying the Prosecution, the Witnesses and Victims Support Section of the Tribunal (WVSS) shall take all necessary arrangements to facilitate the interview.

10. Following the established jurisprudence, Rule 75 (F) of the Rules provides a mechanism for routine disclosure and obviates the need for individualized applications to the Chambers.[14] It also provides that Defence to whom the disclosure is being made must be informed of the nature of the protective measures ordered in the first proceedings. In the present case, there is therefore no need for the Chamber to order the maintenance of protective measures already ordered for Witnesses DM80 and DM46.

For the above mentioned reasons, the Chamber

I. ORDERS that the Prosecutor's Application pursuant to Rules 39, 68 and 75 of the Rules of Procedure and Evidence for an Order for Conditional Disclosure of Witnesses Statements and other documents pursuant to Rule 68 (A) be reclassified as a public document;

II. GRANTS the Prosecutor's Motion in part; and accordingly,

III. ORDERS that the Defence for each Accused and the Accused persons shall not share, reveal or discuss, 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 person whose statement shall be disclosed pursuant to this decision, to any person or entity other than the Accused, assigned Counsel or other persons working on the Defence team;

IV. ORDERS that the Defence for each Accused shall notify the Prosecution in writing, on reasonable notice, and the Witnesses and Victims Support Section of the Tribunal (WVSS) if it wishes to contact any person who submitted a statement to the Prosecution related to the RPF material or a Credibility Statement, who are not subject to a Trial Chamber's protective orders. Should the person concerned agree to the interview, WVSS shall immediately undertake all necessary arrangements to facilitate the interview;

V. DENIES the remainder of the Prosecutor's Motion.

Arusha, 4 July 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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[13] 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.

[14] *The Prosecutor v. Pauline Nyiramasuhuko,et al.,* Joint Case N°ICTR-98-42-T, Decision on the Prosecutor's Ex Parte and Extremely Urgent Motion for Leave to Access Closed Session Transcripts in Case N°ICTR-96-3-A for Disclosure in Case N°ICTR-98-42-T (TC), 23 September 2004. *The Prosecutor v. Pauline Nyiramasuhuko et al.,* Joint Case N°ICTR-98-42-T, Decision on the Prosecutor's Motion for an Order of Disclosure of Closed Session Transcripts and Sealed Prosecution Exhibits Pursuant to Rules 69 and 75 (TC), 16 December 2004; *The Prosecutor v. Casimir Bizimungu et al.,* Case N°ICTR-99-50-T, Decision on the Prosecutor's Request for an Order of Disclosure of Closed Session Transcripts and Sealed Prosecution Exhibits Pursuant to Rules 69 and 75 of the Rules of Procedure and Evidence (TC), 2 February 2005.

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Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3 Rule 54 of the Rules of Procedure and Evidence 12 July 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Request for subpoena to prospective Defence Witnesses : witnesses are protected prosecution witnesses, No demonstration that the Defence could not obtain the information by other means, Issuance of a subpoena must be balanced with the interests of justice – Prosecution request for disclosure of ex parte filings : risk of prejudice to the right of the Accused to prepare his defence – Issuance of subpoena denied, Disclosure of ex parte filings ordered

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. Gratien Kabiligi and Aloys Ntabakuze, Decision on Motion by the Office of the Prosecutor for Orders for Protective Measures for Victims and Witnesses, 19 May 2000 (ICTR-97-34) ; 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. Aloys Simba, Decision on Defence Request for Subpoenas, 4 May 2005 (ICTR-2001-76); Trial Chamber, The Prosecutor v. André Rwamakuba, Decision on Confidential Ex Parte Motion for Subpoenas Directed to Defence Witnesses, 20 January 2006 (ICTR-98-44C) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Order for the Registrar's Submission on the Defence Motion for Order Concerning Unlawful Disclosure of Confidential Ex Parte Defence Filing and for Stay of Proceedings, 1 February 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Defence Motion For Order Requiring Notice of Ex Parte Filings and to Unseal a Prosecution Confidential Motion, 30 May 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Interim Order on Defence Motion for Subpoena to Meet with Defence Witness NZ1, 31 May 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)

Introduction

1. The trial in this case started on 19 September 2005. Seven Prosecution witnesses have been heard so far. Joseph Nzirorera now moves, pursuant to Article 28 of the Statute of the Tribunal and Rule 54 of the Rules of Procedure and Evidence for the Chamber to issue a subpoena to prospective Defence Witnesses NZ1, NZ2 and NZ3 to meet with his Counsel and to the State where they are

located to cooperate in facilitating such meetings because the witnesses have refused to meet with his Counsel on their own volition.[1]

2. The Prosecution objects to Joseph Nzirorera's applications on the basis that all of the relevant information concerning the merits has been filed *ex parte*. It requests that the motions be denied, or in the alternative, that the Chamber order the disclosure of the *ex parte* information and allow the Prosecution five days to further respond to the disclosed information.

3. To support his applications, Joseph Nzirorera filed *ex parte* annexures including the identifying information of the prospective witnesses, an account of the facts to which the witnesses could testify and that could be material to his defence, and documents showing the unwillingness of the witnesses to meet with Nzirorera's Counsel. The *ex parte* filing regarding Witness DNZ1 was however inadvertently disclosed by the Registry to the Prosecution.[2] As a result of an additional Motion filed by Nzirorera, the Chamber decided to deal with the *ex parte* character of the confidential annex and the remedies sought by the Defence when it rules on the merits of the Defence motion regarding Defence Witness NZ1.[3]

4. Furthermore, on 31 May 2006, the Chamber considered that, due to the particular circumstances of the case, the Registrar's assistance was required to determine the willingness of Witness DNZ1 to participate in this trial.[4] As a result, the Registrar submitted that

> "no contact could be made directly with the witness as his Counsel has peremptorily asserted that his client was unwilling to cooperate with the Tribunal".[5]

Discussion

Ex Parte Filings of Defence Annexes

5. The Chamber is now ready to rule on the Prosecution's request for disclosure of *ex parte* filings and the Defence's application for subpoena prospective witnesses.

6. Applications may be filed *ex parte* when they are necessary in the interests of justice, that is, where the disclosure to the other party in the proceedings of the information conveyed by the application would be likely to prejudice unfairly either the applicant or some person involved in or related to that application.[6]

7. Under the specific circumstances of the case, the Chamber considers that the disclosure of the identity of prospective Defence Witness DNZ1 could have prejudiced unfairly Joseph Nzirorera since it could have affected the right of the Accused to prepare his defence. This *ex parte* filing should therefore not have been disclosed to the Prosecution. However, since, as discussed hereinafter, a subpoena directed to prospective Witness DNZ1 is not warranted in the present case, the Chamber does not find that the Accused suffered any prejudice and that any remedy is therefore needed.

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[1] See: Joseph Nzirorera's *Ex Parte* Motion For Order For Interview of Defence Witness NZ1 filed on 23 January 2006, and Joseph Nzirorera's *Ex Parte* Motion for Order for Interview of Defence Witnesses NZ2 and NZ3, filed on 13 March 2006.
[2] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-T ("*Karemera et al.*"), Order for the Registrar's Submission on the Defence Motion for Order Concerning Unlawful Disclosure of Confidential *Ex Parte* Defence Filing and for Stay of Proceedings (TC), 1 February 2006.
[3] T. 22 February 2006, p. 10.
[4] *Karemera et al.*, Interim Order on Defence Motion for Subpoena to Meet with Defence Witness NZ1 (TC), 31 May 2006.
[5] *Karemera et al.*, Registrar's Submission under Rule 33 (B) of the Rules on Chamber's on Chamber's Interim Order on Defence Motion for Subpoena to Meet with Defence Witness NZ1, filed on 23 June 2006.
[6] *Karemera et al.*, Decision on Defence Motion For Order Requiring Notice of *Ex Parte* Filings and to Unseal a Prosecution Confidential Motion (TC), 30 May 2006.

8. The situation regarding prospective witnesses DNZ2 and DNZ3 is different since they are protected Prosecution witnesses in other proceedings before this Tribunal.[7] According to the relevant protective orders which remain applicable even if these witnesses have already testified, the Defence must give reasonable notice to the Prosecution of its intention to contact these witnesses.[8] The Defence filing indicating the identifying information of prospective witnesses DNZ2 and DNZ3 should therefore have been disclosed to the Prosecution. In light of the ruling below, the Chamber does not consider that additional time is required for the Prosecution to file further reply to the Defence Motion.

Applications for Subpoena of Prospective Defence Witnesses

9. Rule 54 of the Rules permits the issuance of

> "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 Rule encompasses the Chamber's power to require a prospective witness to attend at a nominated place and time in order to be interviewed when the requesting party shows that (i) it has made reasonable attempts to obtain the voluntary cooperation of the witness, (ii) the witness' testimony can materially assist its case and (iii) the witness' testimony must be necessary and appropriate for the conduct and the fairness of the trial.[9]

10. According to this Tribunal's jurisprudence, a subpoena order however is not to be issued lightly. When deciding whether the applicant has met the evidentiary threshold, the Chamber may also consider whether the information the applicant seeks to elicit through the use of *subpoena* is obtainable through other means.[10] The Appeals Chamber furthermore held that that a *subpoena* should be issued if "it is at least reasonably likely that an order would produce the degree of cooperation needed for the defence to interview the witness."[11]

11. In the present case, the Chamber is satisfied that the Defence has made reasonable attempts to obtain the voluntary cooperation of prospective Witnesses DNZ1, DNZ2 and DNZ3.

12. The Chamber has carefully reviewed the nature and the scope of the information that could be given by these witnesses. The Chamber is not convinced that the information that Witness DNZ1 could provide according to Joseph Nzirorera could not be obtained through other means and is therefore necessary for the conduct and the fairness of this trial. In addition, in light of the Registrar's

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[7] According to Joseph Nzirorera's application.

[8] See for DNZ2, *Prosecutor v. Kabiligi and Ntabakuze,* Case N°ICTR-97-34-I, Decision on Motion by the Office of the Prosecutor for Orders for Protective Measures for Victims and Witnesses (TC), 19 May 2000:
[…] Written request, on reasonable notice to the Prosecution, to the Trial Chamber of a Judge thereof, to contact the Witness or any relative of such person. At the direction of the Trial Chamber or a Judge thereof, and with the consent of such Protected Person or the parents or guardian of such person if that person under the age of 18 years, to an interview by the Defence, the Prosecution shall undertake the necessary arrangements to facilitate such contact.
For DNZ3, see: *Prosecutor v. Ndindiliyimana et al.*, Order for Protective Measures for Witnesses (TC), 12 July 2001, (f):
[…] for all potential prosecution witnesses residing in Rwanda:
(f) the Accused of Defence Counsel make a written request to the Trial Chamber, on reasonable notice to the Prosecution, to contact any of these witnesses whose identity is known to the Defence or any relative of such person. At the direction of the Trial Chamber and with the consent of such person, or the parents or guardian of such person if that person under the age of 18 years, to an interview by the Defence, the Prosecution shall undertake the necessary arrangements to facilitate such contact.

[9] *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 a Subpoena (AC), 21 June 2004; *Prosecutor v. Bagosora et al.*, Case N°98-41-T, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana.(TC), 23 June 2004; *Prosecutor v. Simba,* Case N°ICTR-01-76-T, Decision on the Defence Request for Subpoenas (TC), 4 May 2005; *Prosecutor v. André Rwamakuba*, Case N°ICTR-98-44C-T, Decision on Confidential *Ex Parte* Motion for Subpoenas Directed to Defence Witnesses (TC), 20 January 2006.

[10] *Prosecutor v. Halilovic*, Case N°IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 6.

[11] *Id.* at para. 17.

submissions that the witness is firmly unwilling to cooperate with the Tribunal,[12] it is unlikely that a subpoena will produce the degree of cooperation needed for the Defence Counsel for Nzirorera to interview this witness. There is therefore no ground for issuing a subpoena with respect to prospective Witness DNZ1.

13. Joseph Nzirorera believes that Defence Witnesses DNZ2 and DNZ3 could provide rebuttal evidence to some Prosecution evidence, because they were said to be present at a certain meeting chaired by Nzirorera but they did not mention it in prior statements. Nzirorera submits that these witnesses could confirm they never attended this meeting as alleged by a Prosecution witness. According to the Accused, when the Defence is not fully aware of the nature and relevance of the testimony of a prospective witness but has a reasonable belief that the witness can materially assist in the preparation of its case, it is in the interests of justice to allow the Defence to meet the witness and assess his testimony.[13]

14. In the Chamber's view, the mere omission of a meeting in a statement does not necessarily imply that these witnesses did not attend it. Furthermore, even if these witnesses confirm that they did not attend this meeting, Nzirorera does not show how such evidence could materially assist in the preparation of his case. At the utmost, it could provide foundation to impeach a Prosecution witness but could not provide evidence that Nzirorera did not attend the meeting. The Chamber also notes that other persons were said to be present at this meeting.[14] Prospective Witnesses DNZ 2 and DNZ 3 are therefore not the only potential source of information. Again, a subpoena should not be issued lightly and must be balanced with the interests of justice. In light of the above-mentioned, the Chamber does not find that a subpoena for prospective Witnesses DNZ 2 and DNZ 3 is warranted.

FOR THE ABOVE REASONS, THE CHAMBER

I. GRANTS in part the Prosecution's application for disclosure of the *ex parte* annex to the Defence Motion to subpoena DNZ2 and DNZ3, and accordingly

II. ORDERS the Defence for Nzirorera to disclose to the Prosecution the identity of prospective Defence Witnesses DNZ2 and DNZ3,

III. DENIES Joseph Nzirorera's Motions in their entirety.

Arusha,12 July 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[12] *Karemera et al*., Registrar's Submission under Rule 33 (B) of the Rules on Chamber's on Chamber's Interim Order on Defence Motion for Subpoena to Meet with Defence Witness NZ1, filed on 23 June 2006.
[13] The Defence relies on *Prosecutor v. Bagosora et al*., Case N°98-41-T, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana.(TC), 23 June 2004.
[14] See Exh. DNZ 86.

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Decision on Joseph Nzirorera's Notice of Violation of Rule 68 and motion for remedial measures
Rules 68 (A) of the Rules of Procedure and Evidence
12 July 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Positive and continuous obligation of disclosure of the Prosecutor, No demonstration of the violation of the disclosure obligation of the Prosecutor – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 68 and 68 (A)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Edouard Karemera et al., Oral Decision on Stay of Proceedings, 16 February 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Oral Decision on the Motion for Inspection of Non-Rule 68 Material, 9 March 2006 (ICTR-98-44) ; Appeals Chamber, Eliézer Niyitegeka v. The Prosecutor, Decision on Request for Review, 30 June 2006 (ICTR-96-14)

Introduction

1. The proceedings in the instant case started on 19 September 2005. On 9 March 2006, the Chamber delivered an Oral Decision on Joseph Nzirorera's Motion for Inspection of Non-Rule 68 Material allowing the Accused to inspect some statements in the Prosecution's possession provided by Célestin Sezibera, Djuma Babizunturo, and Grégoire Niyimanzi.[1] After having reviewed these statements, Joseph Nzirorera contends that they contradict the testimony of Prosecution Witness UB, and consequently the Prosecutor's original representations that the statements were not exculpatory were incorrect. This application is for remedial measures as a result of the Prosecution's breach of its obligations to disclose exculpatory material under Rule 68 of the Rules of Procedure and Evidence.[2] The Prosecutor opposes the Motion.[3]

Discussion

2. The Chamber recalls that the Prosecutor has a positive and continuous obligation under Rule 68 (A) of the Rules to disclose, as soon as practicable, to the Defence any material which, in his actual knowledge, may suggest the innocence or mitigate the guilt of the Accused or affect the credibility of the Prosecutor's evidence. If the Accused wishes to show that the Prosecutor is in breach of these obligations, it must identify specifically the materials sought, present a *prima facie* showing of its probable exculpatory nature, and prove the Prosecutor's actual knowledge of the materials requested.[4]

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[1] *Karemera et al*., Oral Decision on the Motion for Inspection of Non-Rule 68 Material (TC), 9 March 2006.
[2] Notice of Violation of Rule 68 and for Remedial Measures, filed on 13 March 2006; and Reply Brief: Notice of Violation of Rule 68 and for Remedial Measures, filed on 16 March 2006; and Reply Brief: Notice of Violation of Rule 68 and for Remedial Measures, filed on 16 March 2006.
[3] Prosecutor's Response to Nzirorera's Motion for Remedial Measures, filed on 15 March 2006.
[4] *Karemera et al*., Oral Decision on Stay of Proceedings (TC), 16 February 2006, p. 6.

3. In his Motion, Joseph Nzirorera details the differences between the statements of Célestin Sezibera, Grégoire Niyimanzi and the testimony of Witness UB. He mainly contends that in their statements, Sezibera and Niyimanzi did not mention a meeting chaired by Nzirorera in April 1994, while Witness UB testified that both Sezibera and Niyimanzi were present at that meeting.

4. The Chamber has reviewed the statements signed by Grégoire Niyiramanzi on 18 June 2003 and by Célestin Sezibera on 9 November 2005. However, according to the jurisprudence of this Tribunal, the mere omission of a reference to a meeting in a statement does not mean that these witnesses could not have attended it or that this meeting could not have taken place.[5]

5. In the light of the foregoing, the Chamber concludes that Joseph Nzirorera has failed to demonstrate a violation of Rule 68 (A) of the Rules by the Prosecutor in this respect. Consequently, the Chamber finds it unnecessary to consider the remedial measures sought by Joseph Nzirorera.

For the above mentioned reasons, the Chamber

DENIES the Defence Motion in its entirety.

Arusha, 12 July 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[5] *Eliézer Niyitegeka v. The Prosecutor*, Case N°ICTR-96-14-R, Decision on Request for Review (AC), 30 June 2006, para. 70.

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Decision Pursuant to Rule 72 (E) of the Rules of Procedure and Evidence on Validity of the Prosecution Appeal Regarding the Pleading of Joint Criminal Enterprise in a Count of Complicity in Genocide 14 July 2006 (ICTR-98-44-AR72.7)

(Original: English)

Appeals Chamber

Judges: Mehmet Güney, Presiding Judge ; Liu Daqun ; Wolfgang Schomburg

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Pleading of Joint Criminal Enterprise in a Count of Complicity in Genocide – Filing of written submissions ordered

International Instruments cited :

Practice Direction on the Lengths of Briefs and Motions on Appeal, para. (C) (2) (d) (1) ; Rules of Procedure and Evidence, rules 72 (D), 72 (D) (iv) and 72 (E), ; Statute, art. 2, 2 (3) (e) and 6

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Édouard Karemera et al., 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 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Édouard Karemera et al., Separate Opinion of Judge Short on Complicity in Genocide and Joint Criminal Enterprise Theory, 23 May 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Édouard Karemera et al., Order of the Presiding Judge Assigning a Bench of Three Judges Pursuant to Rule 72 (E) of the Rules of Procedure and Evidence, 1 June 2006 (ICTR-98-44)

1. This Bench of three Judges 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 Serious Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Bench" and "Tribunal", respectively) is seized of the "Prosecutor's Motion for Determination that the Interlocutory Appeal as of Right May Proceed Immediately, For Leave to File a Written Brief on the Merits of the Appeal, and for a Scheduling Order", filed on 30 May 2006 ("Prosecution Motion").

Discussion

2. This matter is before the Bench pursuant to Rule 72 (E) of the Rules of Procedure and Evidence of the Tribunal ("Rules")[1] in order to determine whether the appeal is capable of satisfying the criteria under Rule 72 (D) which delimits the types of jurisdictional challenges which may proceed as of right. Rule 72 (D) provides:

> 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;

[1] Order of the Presiding Judge Assigning a Bench of Three Judges Pursuant to Rule 72 (E) of the Rules of Procedure and Evidence, 1 June 2006. Rule 72 (E) presently provides: "An appeal brought under paragraph (B) (i) may not be proceeded with if a bench of three Judges of the Appeals Chamber, assigned by the presiding Judge of the Appeals Chamber, decides that the appeal is not capable of satisfying the requirements of paragraph (D), in which case the appeal shall be dismissed."

(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.

3. The Prosecution Motion challenges a Trial Chamber decision holding that the theory of joint criminal enterprise cannot apply to a charge of complicity in genocide since complicity in genocide is itself a mode of liability and not a crime.[2] The Prosecution submits that in so holding the Trial Chamber erred in law since complicity in genocide, specified in Article 2 (3) (e) of the Statute, is a crime and not just a mode of liability.[3] In addition, the Prosecution requests leave to file written briefs in conformity with the requirements of paragraph C (2) (d) (1) of the Practice Direction on the Lengths of Briefs and Motions on Appeal ("Practice Direction") and for a scheduling order.[4]

4. Mr. Nzirorera does not oppose the Prosecution Motion.[5] He requests that the translation requirements of Mr. Karemera and Mr. Ngirumpatse be taken into account in making the scheduling order.[6] Mr. Karemera and Mr. Ngirumpatse have not filed a response.[7] The Prosecution has not filed a reply.

5. Having considered the parties' submissions, the Bench finds that this appeal involves a question of jurisdiction within the meaning of Rule 72 (D) (iv) of the Rules as it relates to the violations indicated in Articles 2 and 6 of the Statute and that, as such, it satisfies the requirements to proceed as of right. In light of this conclusion, the Bench authorizes the parties to file written submissions pursuant to paragraph C (2) (d) (1) of the Practice Direction. In setting out a scheduling order for this appeal, the Bench is mindful that in order to be able to present a full answer, Mr. Karemera and Mr. Ngirumpatse need French translations of the Prosecution's appeal brief.[8]

Disposition

6. For the foregoing reasons, the Prosecution Motion, Judge Schomburg dissenting, is GRANTED. The Prosecution is DIRECTED to file its brief no later than 28 July 2006. The Registry is DIRECTED to provide to Mr. Karemera and Mr. Ngirumpatse and their counsel, on an urgent basis, French translations of the Prosecution's brief and the present decision. Mr. Karemera, Mr. Ngirumpatse, and Mr. Nzirorera may file their responses within ten days from the date on which the French translation of the last of these documents is served on them respectively. The Prosecution may reply to any response within four days. The Registry is also DIRECTED to inform the Appeals Chamber of the date on which the translated documents are served on the parties.

Judge Shomburg appends his dissenting opinion*.

Done in English and French, the English version being authoritative.

Done this 14th day of July 2006, At The Hague, The Netherlands.

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[2] *The Prosecutor v. Édouard Karemera et al.*, Case N°ICTR-98-44-T, 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; *The Prosecutor v. Édouard Karemera et al.*, Case N°ICTR-98-44-T, Separate Opinion of Judge Short on Complicity in Genocide and Joint Criminal Enterprise Theory, 23 May 2006.

[3] Prosecution Motion, paras. 2, 6, 12-13.

[4] Prosecution Motion, paras. 14-18.

[5] Joseph Nzirorera's Response to Prosecution Request to Appeal as of Right, 31 May 2006, para. 2 ("*Nzirorera* Response").

[6] *Nzirorera* Response, para. 3.

[7] The Appeals Chamber delayed consideration of this decision, based on requests by Mr. Karemera and Mr. Ngirumpatse, to allow for translation of the Prosecution Motion and other related materials. See Decision on Request for Extension of Time, 9 June 2006, paras. 3, 4 ("Decision on Request for Extension of Time").

[8] Mr. Karemera and Mr. Ngirumpatse work in French, and not in English, which the Appeals Chamber has already found to be good cause for a reasonable extension of time. See Decision on Request for Extension of Time, para. 3.

[Signed] : Mehmet Güney

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Scheduling Order
Rule 54 of the Rules of Procedure and Evidence
17 July 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judge : Dennis C. M. Byron, Presiding Judge sitting pursuant to Rule 54 of the Rules of Procedure and Evidence

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Schedule

1. The trial in this case started on 19 September 2005. On 9 November 2005, the Chamber ruled on the Prosecution's motion for judicial notice of facts of common knowledge and adjudicated facts.[1] Following the Prosecutor's successful interlocutory appeal of this Decision, the Appeals Chamber remanded the matter to this Chamber for further consideration of Facts 1-30, 33-74 and 79-152 listed under Annex B of the Prosecution's Interlocutory Appeal, in manner consistent with the Appeals Chamber's Decision.[2]

2. During the third trial session held between 15 May and 10 July 2006, the parties expressed their intention to file further submissions as a result of this Appeals Chamber's ruling.

3. In order to ensure a prompt management of this issue, in the interests of justice and considering the views expressed by the parties, a scheduling order for filing these submissions is necessary.

ACCORDINGLY, THE CHAMBER ORDERS that

I. The Defence for each Accused shall file any submission no later than 28 August 2006 ;

II. The Prosecution shall file any response thereto no later than 11 September 2006 ;

III. The Defence for each Accused shall file any reply to the Prosecution's Response no later than 25 September 2006.

Arusha, 17 July 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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* The dissenting opinion was missing in the original document. See the French translation.

[1] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-R94 ("*Karemera et al.* Case"), Decision on Prosecution Motion for Judicial Notice (TC), 9 November 2005.

[2] *Prosecutor v. Karemera et al.*, Case N°ICTR-98-44AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC), 16 June 2006.

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Order Assigning Judges to a Case Before the Appeals Chamber 14 August 2006 (ICTR-98-44-AR73(C))

(Original: English)

Appeals Chamber

Judge : Fausto Pocar, Presiding Judge

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Assignment of judges

International Instrument cited :

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 Prosecutor's Interlocutory Appeal of Decision on Judicial Notice" rendered by the Appeals Chamber on 16 June 2006;

NOTING the "Demande en reconsidération de la décision de la Chambre d'Appel en date du 16 juin 2006 suite à l'appel interlocutoire du Procureur de la décision relative au constat judiciaire" filed on 7 August 2006 by Counsel for Édouard Karemera;

CONSIDERING Articles 11 (3) and 13 (4) of the Statute 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. Édouard Karemera et al.*, Case N°ICTR-98-44-AR73(C) shall be composed as follows:

Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

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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Order Assigning Judges to a Case Before the Appeals Chamber 24 August 2006 (ICTR-98-44-AR73(C))

(Original: English)

Appeals Chamber

Judge : Fausto Pocar, Presiding Judge

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Assignment of judges

International Instrument cited :

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 Prosecutor's Interlocutory Appeal of Decision on Judicial Notice" rendered by the Appeals Chamber on 16 June 2006;

NOTING "Joseph Nzirorera's Motion for Reconsideration and Modification of Judicial Notice Decision" filed on 17 August 2006 by Counsel for Joseph Nzirorera;

CONSIDERING Articles 11 (3) and 13 (4) of the Statute 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. Édouard Karemera et al.*, Case N°ICTR-98-44-AR73(C), shall be composed as follows:

Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Done in English and French, the English version being authoritative.

Done this 24th day of August 2006, At The Hague, The Netherlands.

[Signed] : Fausto Pocar

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Decision on Prosecution Motion to Withdraw Appeal Regarding the Pleading of Joint Criminal Enterprise in a Count of Complicity in Genocide 25 August 2006 (ICTR-98-44-AR73(C))

(Original: English)

Appeals Chamber

Judges : Mehmet Güney, Presiding Judge ; Mohamed Shahabuddeen ; Liu Daqun ; Theodor Meron ; Wolfgang Schomburg

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Appeals Chamber seized of an interlocutory appeal filed by the Prosecution, against a decision of Trial Chamber III, A party may withdraw an appeal or a particular ground of appeal by giving notice, No further justification required – Appeal moot

International Cases cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Laurent Semanza, Judgement, 20 May 2005 (ICTR-97-20)

I.C.T.Y. : 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 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,[1] filed by the Prosecution, against a decision of Trial Chamber III.[2] In relation to this appeal, the Appeals Chamber is also seized with a motion filed by the Prosecution to withdraw its appeal.[3]

Background

2. On 12 April 2006, the Appeals Chamber ordered the Trial Chamber to consider in the first instance Joseph Nzirorera's jurisdictional challenge to the pleading of joint criminal enterprise in a count of complicity in genocide.[4] As a consequence, the Trial Chamber issued a decision on 18 May 2006 holding that the Prosecution could not pursue a count of complicity in genocide through the theory of joint criminal enterprise because complicity in genocide was a mode of liability and not a separate crime.[5] The Prosecution then sought leave to appeal the Trial Chamber's decision as of right.[6]

3. On 14 July 2006, a Bench of three judges of the Appeals Chamber, Judge Schomburg dissenting, determined that the Prosecution's appeal could proceed as of right and set forth a briefing schedule for the parties.[7] The Prosecution has not yet filed its appeal brief. Instead, it now seeks leave to withdraw the appeal.[8] The Prosecution submits that, "upon careful re-assessment of the situation", it no longer

[1] See generally Decision Pursuant to Rule 72 (E) of the Rules of Procedure and Evidence on Validity of the Prosecution Appeal Regarding the Pleading of Joint Criminal Enterprise in a Count of Complicity in Genocide, 14 July 2006 ("Decision on Validity of Appeal").
[2] *The Prosecutor v. Édouard Karemera et al.*, Case N°ICTR-98-44-T, 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 ("Impugned Decision"). See also *The Prosecutor v. Édouard Karemera et al.*, Case N°ICTR-98-44-T, Separate Opinion of Judge Short on Complicity in Genocide and Joint Criminal Enterprise Theory, 23 May 2006.
[3] Prosecutor's Motion to Withdraw Interlocutory Appeal Regarding the Pleading of Joint Criminal Enterprise in a Count of Complicity in Genocide, 27 July 2006, para. 3 ("Prosecution Motion"). Mr. Nzirorera and Mr. Ngirumpatse do not oppose this motion. See Joseph Nzirorera's Response to Prosecution's Motion to Withdraw Interlocutory Appeal, 28 July 2006; *Réponse de Mathieu Ngirumpatse à la Requête du Procureur "sollicitant le retrait de son appel sur l'entreprise criminelle commune en tant que complicité de génocide"*, 7 August 2006. Mr. Karemera has not filed a response.
[4] *The Prosecutor v. Édouard Karemera et al.*, Case N°ICTR-98-44-AR72.5, ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, 12 April 2006, para. 25 (c).
[5] Impugned Decision, paras. 2, 8.
[6] See Prosecutor's Motion for Determination that the Interlocutory Appeal as of Right May Proceed Immediately, For Leave to File a Written Brief on the Merits of the Appeal, and for a Scheduling Order, filed 30 May 2006.
[7] Decision on Validity of Appeal, paras. 5, 6.
[8] Prosecution Motion, paras. 1, 19.

views this appeal as necessary in the circumstances of this case.[9] Though it still maintains its legal position that complicity in genocide is a separate crime, the Prosecution states that considerations of judicial economy do not justify pursuing the present appeal.[10]

Disposition

4. In the view of the Appeals Chamber, a party may withdraw an appeal or a particular ground of appeal simply by giving notice and need not necessarily provide any further justification.[11] While it would have been preferable for the Prosecution to carefully assess its position prior to filing the appeal, the Appeals Chamber sees no reason to require it to pursue an appeal it no longer finds necessary in the context of this case. For the foregoing reasons, the Appeals Chamber GRANTS the Prosecution's motion to withdraw its appeal and DECLARES the appeal moot.

Done in English and French, the English version being authoritative.

Done this 25th day of August 2006, At The Hague, The Netherlands.

[Signed] : Mehmet Güney

[9] Prosecution Motion, paras. 7-9.
[10] Prosecution Motion, paras. 9, 14.
[11] See, *e.g., Laurent Semanza v. The Prosecutor*, Case N°ICTR-97-20-A, Judgement, 20 May 2005, para. 348; *The 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. 13. See also Practice Direction on Withdrawal of Pleadings of 24 April 2001.

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Order Assigning Judges to a Case Before the Appeals Chamber 31 August 2006 (ICTR-98-44-AR73(C))

(Original: English)

Appeals Chamber

Judge : Fausto Pocar, Presiding Judge

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Assignment of judges

International Instrument cited :

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 Prosecutor's Interlocutory Appeal of Decision on Judicial Notice" rendered by the Appeals Chamber on 16 June 2006;

NOTING the "Demande de Mathieu Ngirumpatse en reconsidération de la Décision de la Chambre d'Appel en date du 16 juin 2006 suite à l'appel interlocutoire du Procureur de la décision relative au constat judiciaire" filed by Counsel for Mathieu Ngirumpatse on 29 August 2006;

CONSIDERING Articles 11 (3) and 13 (4) of the Statute 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. Édouard Karemera et al.*, Case N°ICTR-98-44-AR73(C), shall be composed as follows:

Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Done in English and French, the English version being authoritative.

Done this 31th day of August 2006, At The Hague, The Netherlands.

[Signed] : Fausto Pocar

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Order for the Transfer of Prosecution Witnesses from Rwanda Article 28 of the Statute of the Tribunal and Rule 90 bis of the Rules of Procedure and Evidence 13 September 2006 (ICTR-98-44-T)

(Original: French)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

1. The trial in this case started on 19 September 2005. The fourth trial session is scheduled to start on 23 October 2006. The Prosecutor now requests the Chamber, pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence, to order the temporary transfer of witnesses with the pseudonyms ALG, HH, GK, GGK and GBU, who are currently detained or on provisional release in Rwanda, to the United Nations Detention Facilities (UNDF) in Arusha (United-Republic of Tanzania), so that they can testify in the present case during the next trial session.[1]

2. Rule 90 *bis* (A) of the Rules gives the Chamber power to make an order to transfer a detained person to the Detention Unit of the Tribunal if his or her presence has been requested. Rule 90 *bis* (B) stipulates the conditions that an applicant must satisfy before such an order can be made:

> (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;

3. The Prosecution has exhibited a letter from the Rwandan Prosecutor General addressed to the Rwandan Minister of Justice and a letter from the Rwandan Ministry of Justice confirming the availability of Witnesses ALG, HH, GK and GGK to be transferred temporarily to Arusha during the period 23 September to 21 December 2006.[2] The Chamber is satisfied that these witnesses are not required for criminal proceedings in Rwanda during that time and that the witnesses' presence at the Tribunal will not extend the period of their detention in Rwanda.

4. According to the letter form the Rwandan Prosecutor General, Witness GBU is on provisional release. Rule 90 *bis* cannot apply to him since he remains free in Rwanda subject to restrictions to his freedom of movement. His presence is nonetheless requested to allow him to give evidence during the next trial session. The Chamber is of the view that this witness should temporarily be transferred to Arusha with the cooperation of the Rwandan authorities in accordance with Article 28 of the Statute of the Tribunal.

FOR THE ABOVE REASONS, THE CHAMBER

> I. GRANTS the Prosecution Motion as follows:
>
> II. REQUESTS, pursuant to Rule 90 *bis* of the Rules, the Registrar to temporarily transfer detained witnesses known by the pseudonyms ALG, HH, GK and GGK to the UNDF facility in Arusha, at an appropriate time prior to their scheduled dates to testify during the period 23 October to 15 December 2006.
>
> III. REQUESTS, pursuant to Article 28 of the Statute, the Government of Rwanda to cooperate with the Tribunal to ensure the temporary transfer of witness known by the pseudonym GBU to

[1] Prosecutor's Motion filed on 14 July 2006 and Prosecutor's Supplemental filing filed on 5 September 2006.
[2] Prosecutor's Supplemental filing filed on 5 and 11 September 2006.

Arusha at an appropriate time prior to his scheduled dates to testify during the period *23* October to 15 December 2006;

IV. REQUESTS the Registrar to make all the necessary arrangements to implement this Decision and to ensure that the return travel of Witnesses ALG, HH, GK, GGK and GBU to Rwanda is facilitated as soon as practically possible for each witness after the individual's testimony has ended;

V. REQUESTS the Governments of Rwanda and United-Republic of Tanzania to cooperate with the Registrar in the implementation of this Order;

IV. REQUESTS the Registrar to cooperate with the authorities of the Governments of Rwanda and United-Republic of Tanzania; to ensure proper conduct during the transfer and during the detention of the witnesses at the UNDF; to inform the Chamber of any changes in the conditions which may affect the length of stay in Arusha.

Arusha, 13 September 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Decision on Extension of Time to Respond to the Prosecutor's Two Motions Rule 73 of the Rules of Procedure and Evidence 27 September 2006 (ICTR-98-44-T)

(Original: French)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Extension of Time, Work language of the Defence Counsel, Missing translations, Good cause for reasonable delay, A trial document not available in a language understood by the Accused should not serve as pretext for requesting an extension of time, Right of the Accused to be tried within a reasonable timeframe – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rules 73, 73 (E) and 116 ; Statute, art. 20 (4)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Aloys Simba, Decision on Defence Request for Protection of Witnesses, 25 August 2004 (ICTR-2001-76) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on extension of time, 5 October 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Édouard Karemera et al., Decision on Request for Extension of Time, 27 January 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Édouard Karemera et al., Decision on Request for Extension of Time, 24 March 2006 (ICTR-98-44) ; Appeals Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Édouard Karemera's Request for Extension of Time to Respond to the Prosecution's Interlocutory Appeal, 4 April 2006 (ICTR-98-44)

1. The third session of the trial in the instant case concluded on 14 July 2006. On 11 September 2006 the Prosecutor filed a Motion for a Scheduling Order and for Practice Directives for the Duration of the Trial in order to organise the trial in light of the Tribunal completion strategy.[1] On that same date the Prosecutor filed its Consolidated Response to the Defence Submissions on the Motion for Judicial Notice of Adjudicated Facts.[2]

2. By two motions filed on 18 and 25 September 2006 respectfully, Édouard Karemera requested the Chamber to grant him an extension of time to respond, running from the date of receipt of the translation into French of the said motions.[3] Referring to the Rules of Procedure and Evidence, the Statute of the Tribunal and to "consistent" case law of the Appeal Chamber, the Defence contends that the said translation is crucial to guaranteeing the Accused's right to a just and fair trial.[4]

3. In recent decisions rendered on the basis of Rule 116 of the Rules, which explicitly allows for extension of time limits,[5] the Appeals Chamber granted certain requests by the Accused to extend time. In the instant case, the Appeals Chamber considered that Counsel to Édouard Karemera operates in French and not in English. The Appeals Chamber held that, in order to be able to make a full answer to the Prosecution's Interlocutory Appeal, the Defence Counsel needs access to French translations of these documents. The Appeals Chamber further held that the lack of access to these translations constitutes good cause, within the meaning of Rule 116 of the Rules, for a reasonable delay in responding to the Prosecution's Interlocutory Appeal.[6] In each case, the Appeals Chamber held that the respondent must demonstrate good cause for an extension of time, and in particular, that access to translation of certain documents is necessary to enable him to prepare his response to the initial motion.[7] Where such is not demonstrated, a request to extend time would be denied.[8]

4. Defence Counsel are representing the Accused before this Tribunal. Therefore, trial documents must first be understood by them since otherwise the rights of the Accused as set out in Article 20 (4) of the Statute and interpreted by the Tribunal's case law would be impaired.[9] In this regard, the Chamber notes the Tribunal's practice of assigning defence teams composed of bilingual counsel or legal assistants in order to limit delays in proceedings resulting from the lack of access to translations.[10] Thus, a trial document not available in a language understood by the Accused should not serve as pretext for requesting an extension of time, in particular when Defence Counsel are capable of properly assisting the Accused.

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[1] Prosecutor's Motion for a Scheduling Order and for Practice Directives for the duration of the Trial.
[2] Prosecutor's Consolidated Response to Defence Submissions on the Motion for Judicial Notice of Adjudicated Facts.
[3] Édouard Karemera's Motion for Extension of Time to Respond to Prosecutor's Motion for a Scheduling Order and for Practice Directives for the Duration of the Trial, filed on 18 September 2006; Édouard Karemera's Motion for Extension of Time to Reply to Prosecutor's Consolidated Response to Defence Submissions on the Motion for Judicial Notice of Adjudicated Facts, filed on 25 September 2006. See Prosecutor's responses filed on 19 and 27 September 2006.
[4] Édouard Karemera's Reply to Prosecutor's Response to Karemera's Motion for Extension of Time to Respond to Prosecutor's Motion for a Scheduling Order, filed on 20 September 2006.
[5] Rule 116 of the Rules of Procedure and Evidence:
(A) The Appeals Chamber 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;.
[6] *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-A (*Karemera et al.*), Decision on Request for Extension of Time (AC), 27 January 2006, paras. 4 and 5; *Karemera* et al., Decision on Édouard Karemera's Request for Extension of Time to Respond to the Prosecution's Interlocutory Appeal (AC), 4 April 2006, para. 3.
[7] *Karemera et al.*, Decision on Request for Extension of Time (AC), 27 January 2006, para. 5; *Karemera et al.*, Decision on Request for Extension of Time (AC), 24 March 2006, para. 2; *Karemera et al.*, Decision on Édouard Karemera's Request for Extension of Time to Respond to the Prosecution's Interlocutory Appeal (AC), 4 April 2006, para. 3.
[8] Idem.
[9] *Karemera et al.*, Decision on extension of time (TC), 5 October 2005.
[10] See, for instance, *The Prosecutor v. Aloys Simba*, Case N°ICTR-01-76-I, Decision on Defence Request for Protection of Witnesses (TC), 25 August 2004, para. 1.

5. Therefore, the Chamber is bound to consider the instant requests in light of these practices and, as the Appeals Chamber itself has ruled and directed, any extension of time should take into account the circumstances of the instant case and the grounds pleaded by the moving party.

6. In the instant case, the Chamber has on several occasions noted that Édouard Karemera's Defence team includes a bilingual French-English legal assistant and that both Lead Counsel and Co-Counsel understand English and are capable of working in that language.[11] Moreover, it should be recalled that the date of filing of response to the Prosecutor's motion for judicial notice of facts of common knowledge and adjudicated facts was determined on consent by the parties.[12]

7. In the Chamber's view, the Accused therefore has sufficient assistance to enable him to understand the motions in question. The Chamber also notes that a draft translation of the Prosecutor's motions has just been served on the parties. The fact that the Defence does not have the certified translation of the motions filed by the other party in the instant case in no way relieves it of its obligation to file its reply within the five-day time limit prescribed in Rule 73 (E) of the Rules. No extension of time on this basis could therefore be allowed.

8. The Chamber expresses some concern regarding the repeated requests to extend time, which are filed, without justification, at the expiration of time for filing of Édouard Karemera's response to the pending motions. Such practices affect the effective management of proceedings. Defence Counsel are urgently called upon to ensure that such repeated and last-minute requests do not undermine the administration of justice and the Accused's basic rights, including his right to be tried within a reasonable timeframe.

9. However, since a brief extension of time would not affect the resumption of proceedings on 23 October 2006 and considering the importance of the Prosecutor's two motions, the Chamber is prepared to partially grant Édouard Karemera's requests.

FOR THESE REASONS, THE CHAMBER

I. PARTIALLY GRANTS Édouard Karemera's requests to extend time; and

II. AUTHORISES the Defence Counsel for each of the Accused to file responses to the Prosecutor's Motion for a Scheduling Order and for Practice Directives for the Duration of the Trial and the Prosecutor's Consolidated Response to Defence Submissions on the Motion for Judicial Notice of Adjudicated Facts no later than 2 October 2006; and the Prosecution to file its reply no later than 6 October 2006, with effect from the date of filing of the Defence responses.

Arusha, 27 September 2006.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[11] See, for instance, in this regard, Édouard Karemera's Reply to Prosecutor's Response to Karemera's Motion for Extension of Time to Respond to Prosecutor's Motion for a Scheduling Order, which demonstrated that the Defence Counsel understand the purport of the Prosecutor's Motion for a Scheduling Order and for Practice Directives for the duration of the Trial.

[12] See Scheduling Order, 17 July 2006.

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Decision Amending the Chamber's Prior Order for the Transfer of a Prosecution Witness from Rwanda
Rule 90 bis of the Rules of Procedure and Evidence
28 September 2006 (ICTR-98-44-T)

(Original: French)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Transfer of detained witness, Witness in detention in Rwanda – Transfer ordered

International Instrument cited :

Rules of Procedure and Evidence, rules 90 *bis* and 90 *bis* (B)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Edouard Karemera et al., Order for the Transfer of Prosecution Witnesses From Rwanda, 13 September 2006 (ICTR-98-44)

1. On 13 September 2006, as a result of a Prosecution's Motion, the Chamber requested the Government of Rwanda to cooperate with the Tribunal to ensure the temporary transfer of a Prosecution Witness GBU to Arusha at an appropriate time prior to his scheduled dates to testify during the fourth trial session 23 October to 15 December 2006.[1] At that time, according to the information provided to the Chamber, the witness was on provisional release and Rule 90 *bis* of the Rules of Procedure and Evidence, which gives the Chamber power to make an order to transfer a *detained* person to the Detention Unit of the Tribunal if his or her presence has been requested, could not apply.

2. Since then, the Prosecution was informed that Witness GBU has been re-arrested and is currently in detention in Rwanda. It therefore requests the Chamber to order his temporary transfer, as a detained witness, to the UNDF facility in Arusha.[2]

3. According to a letter from the Rwandan Ministry of Justice exhibited by the Prosecution, Witness GBU is available to be transferred temporarily to Arusha during the relevant period.[3] The Chamber is satisfied that this witness is not required for criminal proceedings in Rwanda during that time and that his presence at the Tribunal will not extend the period of their detention in Rwanda. In conformity with the requirements set out in Rule 90 *bis* (B) of the Rules, the witness can therefore be temporarily transferred to the Tribunal's Detention Facility.

FOR THE ABOVE REASONS, THE CHAMBER

I. GRANTS the Prosecution Motion and

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[1] *Karemera et al*., Case N°ICTR-98-44-T, Order for the Transfer of Prosecution Witnesses From Rwanda (TC), 13 September 2006.
[2] Prosecutor's Further Request for Temporary Transfer of Witness GBU under Rule 90 *bis*, filed on 19 September 2006.
[3] Prosecutor's Supplemental filings filed on 11 September 2006.
* The wrong numbering of the paragraphs is due to an error of the Tribunal.

II. REQUESTS, pursuant to Rule 90 *bis* of the Rules, the Registrar to temporarily transfer the detained witness known by the pseudonyms GBU to the UNDF facility in Arusha, at an appropriate time prior to his scheduled dates to testify during the period 23 October to 15 December 2006.

III. REQUESTS the Registrar to ensure that the return travel of Witness GBU to Rwanda is facilitated as soon as practically possible after his testimony has ended;

V*. REQUESTS the Governments of Rwanda and United-Republic of Tanzania to cooperate with the Registrar in the implementation of this Order;

IV. REQUESTS the Registrar to cooperate with the authorities of the Governments of Rwanda and United-Republic of Tanzania; to ensure proper conduct during the transfer and during the detention of the witness at the UNDF; to inform the Chamber of any changes in the conditions which may affect the length of stay in Arusha.

Arusha, 28 September 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Decision on Defence Motion to Report Government of Rwanda to United Nations Security Council
Rule 7 bis of the Rules of Procedure and Evidence
2 October 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Records of judgements requested from the authorities of Rwanda, Material partially disclosed to the Defence, Missing Material, Failure of the government of Rwanda to comply with its cooperation obligation, Discretionary power of the Trial Chamber to decide to request the President to report State's failure to cooperate with the Tribunal to the Security Council – Motion premature – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rule 7 *bis* ; Statute, art. 19 and 28

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders, 13 February 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Defence Motion to Report Government of a Certain State to United Nations Security Council and on Prosecution Motions under Rule 66 (C) of the Rules), 15 February 2006 (ICTR-98-44)

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. Duško Tadić, Judgement, 15 July 1999 (IT-94-1)

1. The trial in this case started on 19 September 2005. The next trial session is scheduled to start on 23 October 2006. On 13 February 2006, following Joseph Nzirorera's application, the Chamber requested the cooperation of the Government of Rwanda to provide, by 6 March 2006, the Registry with statements taken or received by the Rwandan authorities from and judgements rendered against 37 Prosecution witnesses.[1]

2. On 22 May 2006, noting that none of the requested records had been provided, Defence for Nzirorera moved the Chamber, pursuant to Rule 7 *bis* of the Rules of Procedure and Evidence, to request the Tribunal's President to report the failure of the government of Rwanda to comply with its obligation under Article 28 of the Tribunal's Statute to the United Nations Security Council.[2] It claims that lack of access to prior Prosecution witnesses' statements, while the Government of Rwanda cooperates with the Prosecution, amounts to a denial of equality of arms, guaranteed under Article 19 of the Statute.[3] To support its application, the Defence relies upon an Appeals Chamber Decision in the case of *Prosecutor v. Blaskic* that outlined the procedure to be followed when a State fails to comply with a Trial Chamber's order.[4] The Prosecution took no position on the propriety of referring this matter to the President and relied upon the Chamber's discretionary power on that matter.[5] But in the Prosecution's view, it does not appear that the Rwandan authorities are unwilling to cooperate; rather, from the Prosecution's experience when requesting documents from the Rwandan authorities, it would appear that they often encounter logistical challenges in locating the relevant documents dispersed throughout the country, depending on the prefecture and commune of origin of the witness, reviewing them and keeping track of those already forwarded or remain outstanding.[6]

3. Rule 7 *bis* of the Rules provides that

> "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".

4. This Rule provides a Chamber with discretionary power to decide whether to request the President to report any State's failure to cooperate with the Tribunal to the Security Council.[7]

5. In the present case, the Rwandan authorities have provided some of the documents sought. On 11 July 2006, the *Parquet Général* of Rwanda forwarded a bundle of documents concerning Witnesses ANU, GBU, GFA, GFG and GNK to the Tribunal's Witnesses and Victims Support Section in Kigali. These documents reached the Registrar's Office in Arusha on 17 July 2006, where they were indexed and translation priorities were identified.[8] They were subsequently distributed to the parties on 19 July 2006. This communication by the Rwandan authorities was not accompanied by any letter indicating how they had complied with the Chamber's Decision of 13 February 2006 and, particularly, no information was provided as to the absence of the other material requested.

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[1] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-T, Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders (TC), 13 February 2006.
[2] Motion to Report Government of Rwanda to United Nations Security Council.
[3] To support its assertion, Defence for Nzirorera relies upon an Appeals Chamber Decision in the case *Prosecutor v. Tadic*, Case N°IT-94-1-A, 15 July 1999.
[4] Case N°IT-95-14-A, 29 October 1997.
[5] Prosecutor's Response, filed on 29 May 2006. The Prosecutor relies upon two prior Decisions in *Karemera et al.* case, dated 19 March 2004 and 15 February 2006.
[6] Prosecutor's Response, filed on 29 May 2006.
[7] See: *Karemera et al.*, Decision on Defence Motion to Report Government of a Certain State to United Nations Security Council and on Prosecution Motions under Rule 66 (C) of the Rules (TC), 15 February 2006, para. 12; *Prosecutor v. Tihomir Blaskic*, Case N°IT-95-14-A, 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. 35.
[8] See Registrar's Office filing made on 19 July 2006.

6. The Chamber finds some relevancy in the Prosecutor's representation of the Rwandan context, which is not actually challenged by the Defence, and is satisfied that the circumstances of the case do not show any unwillingness of the Rwandan authorities to cooperate with the Tribunal. It is appropriate at this stage to determine the reasons why the material sought was only disclosed in part and no material was disclosed at all regarding some of the witnesses concerned by the Chamber's Decision. It is noted that the Defence does not object to the Prosecution's suggestion that further efforts be made to convince the Rwandan government to completely comply with the Chamber's Decision of 13 February 2006.[9]

7. The Defence, however, claims that it is reasonable for the Prosecution not to call any of the witnesses who are subjects of the Chamber's request for cooperation until the issue is resolved. In the Chamber's view, there is no need at this stage to rule on the order of appearance of the Prosecution witnesses called to testify during the next trial session, even if some of them are affected by the request made to the Rwandan authorities.

FOR THE ABOVE REASONS, THE CHAMBER

I. DENIES the Defence Motion in its entirety;

II. REQUESTS, pursuant to Article 28 of the Statute, the Rwandan authorities to explain as soon as possible and no later than 13 October 2006, how they complied with the Chamber's Decision of 13 February 2006, and, where appropriate, to provide the reasons why some material sought was not disclosed.

Arusha, 2 October 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[9] Defence's Reply, filed on 31 May 2006.

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Decision on Prosecutor's Motion to vary its Witness List Rule 73 bis of the Rules of Procedure and Evidence 2 October 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Modification of the Prosecution witness list, Removal of witnesses from the list, Interests of justice – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 73 *bis* and 73 *bis* (E)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Alfred Musema, Decision on the Prosecutor's Request for Leave to Call Six New Witnesses, 20 April 1999 (ICTR-96-13) ; 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. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba, Decision on Admission of Transcript of Prior Testimony of Antonius Maria Lucassen, 15 November 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Variance of the Prosecution Witness List, 13 December 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., *Decision on Prosecution Motion Seeking Extension of Time to File Applications under Rule 92 bis,* 10 February 2006 (ICTR-98-44)

1. The trial in this case commenced on 19 September 2005. On 13 December 2005, at the Prosecution's request, the Chamber granted leave to remove 51 witnesses from the Prosecution witness list and to add one witness, Witness ADE, to the same list.[1] Following this Decision, the Prosecution also notified to the Chamber and the Defence the pseudonyms and the name of six witnesses whose evidence would have been rendered unnecessary if ADE testified and could therefore be removed from its list.[2]

2. The Prosecution now moves the Chamber to grant leave to remove 10 other witnesses, including Witness ADE.[3] It further confirms the removal of the six other witnesses, who were to be removed subject to Witness ADE's testimony. The Defence for Nzirorera and for Ngirumpatse do not oppose this request. The Defence for Karemera did not file any response to the Prosecution's motion.

3. Rule 73 *bis* (E) of the Rules states that

> "[a]fter the commencement of Trial, the Prosecutor, 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".

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[1] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-T ("*Karemera et al.*"), Decision on Variance of the Prosecution Witness List (TC), 13 December 2005.

[2] See Prosecution's filing following the Chamber's Decision of 23 December 2005 and Decision on Prosecution Motion Seeking Extension of Time to File Applications under Rule 92 *bis* (TC), 10 February 2006.

[3] Prosecutor's Motion to Vary the Final List of Witnesses under Rule 73 *bis* (B)(iv) (*Removal of certain witnesses*), filed confidential on 11 September 2006.

Pursuant to the established jurisprudence, this Rule provides that a list of witnesses may be varied if the Chamber considers it to be in the interests of justice.[4]

4. The Prosecution witness list is currently composed of more than 160 witnesses, including 72 witnesses whom the Prosecution seeks admission of their evidence in the form of a written statement or transcript of prior testimony in lieu of oral testimony.[5] In the Chamber's view, the removal of 16 witnesses from the Prosecution witness list will contribute to expedite the proceedings and is therefore in the interests of justice.

ACCORDINGLY, THE CHAMBER

I. GRANTS the Prosecution Motion to remove witnesses known by the pseudonyms ADE, AFQ, AHJ, AKX, BIT, BW, CR, GBV, GDG, GFG, GGG, GGK, GJQ, IV and NNZ as well as Marc Nees; and

II. ORDERS that the amended version of the Prosecution Witness List be filed according this Decision by 4 October 2006.

Arusha, 2 October 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[4] *Prosecutor v. Musema,* Case N°ICTR-96-13-T, Decision on the Prosecutor's Request for Leave to Call Six New Witnesses (TC), 20 April 1999, par. 4 and 13; *Prosecutor v. Bagosora, Kabiligi, Ntabakuze, Nsengiyumva,* Case N°ICTR-98-41-T, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E) (TC), 26 June 2003, par. 13.

[5] See the pending motion entitled Prosecution Motion for Proof of Facts Other than by Oral Evidence Pursuant to Rule 92 *bis*, filed on 20 February 2006. The Chamber already admitted the transcripts of the evidence given by Mr. Lucassen in the *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba*, in lieu of his oral testimony (Decision on Admission of Transcript of Prior Testimony of Antonius Maria Lucassen (TC), 15 November 2005).

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Decision on Defence Motion to Reconsider Special Protective Measures Granted to Prosecution Witness ADE
Rule 73 of the Rules of Procedure and Evidence
2 October 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Protective measures for the witness : secure audio-video transmission link, Witness having identified himself – Motion moot

International Instrument cited :

Rules of Procedure and Evidence, rule 73

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Édouard Karemera et al., Decision on Prosecutor's Confidential Motion for Special Protective Measures for Witness ADE, 3 May 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Édouard Karemera et al., Decision on Prosecutor's Motion to Vary its Witness List, 2 October 2006 (ICTR-98-44)

1. The trial in this case started on 19 September 2005. On 3 May 2006, at the Prosecution's request, the Chamber granted special protective measures to Prosecution Witness ADE, including that his testimony be taken via a secure audio-video transmission link.[1] The Defence for Nzirorera now requests the Chamber to reconsider its prior Decision since the witness testified under his true name in another proceeding before this Tribunal.[2]

2. Since this Motion was filed, the Chamber granted the Prosecution's request to remove Witness ADE from its witness list.[3] The Defence Motion has therefore become moot.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion.

Arusha, 2 October 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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[1] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-T ("*Karemera et al.*"), Decision on Prosecutor's Confidential Motion for Special Protective Measures for Witness ADE (TC), 3 May 2006.
[2] Joseph Nzirorera's Motion for Reconsideration of Decision on Prosecutor's Confidential Motion for Special Protective Measures for Witness ADE, filed on 16 August 2006; and see: Prosecutor's Response, filed on 21 August 2006.
[3] *Karemera et al.*, Decision on Prosecutor's Motion to Vary its Witness List (TC), 2 October 2006.

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Decision on Defence Motion to Compel Best Efforts to Obtain and Disclose Statements and Testimony of Witness UB
Rule 98 of the Rules of Procedure and Evidence
10 October 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Discretionary power of the Trial Chamber to order the Prosecutor, Government of Rwanda requested to cooperate with the Tribunal – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 98

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Motions to Compel Inspection and Disclosure and to direct Witnesses to Bring Judicial and Immigration Records, 14 September 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders, 13 February 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Defence Motion for Additional Disclosure, 1 September 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Édouard Karemera et al., Decision on Defence Motion to Report Government of Rwanda to United Nations Security Council, 2 October 2006 (ICTR-98-44)

Introduction

1. The trial in this case started on 19 September 2005. Prosecution Witness UB came to testify during the second trial session, which took place between 16 February and 15 March 2006.

2. In August 2006, the Defence for Nzirorera learnt that Witness UB gave two statements to Rwandan authorities, which allegedly contain information inconsistent with the witness' testimony in this case and were not disclosed to the Defence.[1] It also became aware for the first time that this witness testified in a Rwandan trial.[2] The Defence claims that despite a specific request, the Prosecution has declined to use its best efforts to obtain these documents because the witness has already completed his testimony.[3] The Defence therefore requests the Chamber, pursuant to Rule 98 of the Rules of Procedure and Evidence, to order the Prosecution to use its best efforts to obtain and disclose the above-mentioned statements and Witness UB's testimony in the said case.

Deliberations

[1] Joseph Nzirorera's Motion to Compel Best Efforts to Obtain and Disclose Statements and Testimony of Witness UB, filed on 13 September 2006: statements dated 12 May 1998 and 22 February 2000.
[2] Ibidem.
[3] The Defence refers to correspondence between Counsel for Nzirorera and Prosecutor's Office.

3. Rule 98 provides that a "Trial Chamber may *proprio motu* order either party to produce additional evidence. It may itself summon witnesses and order their attendance." This provision gives the Chamber discretion to make such an order to the Prosecution.[4]

4. The Chamber recalls that on 13 February 2006, following Joseph Nzirorera's application, the Government of Rwanda was requested to cooperate with the Tribunal in order to provide statements taken or received by the Rwandan authorities from and judgements rendered against 37 Prosecution witnesses, including Witness UB.[5]

5. Later, noting that none of the requested records had been provided, the Defence for Nzirorera filed a motion moving the Chamber to request the Tribunal's President to report the government of Rwanda to the United Nations Security Council for its failure to cooperate with the Tribunal.[6] On 11 July 2006, the Rwandan authorities responded to that request and communicated some material to the Chamber, none of which related to Witness UB.[7] In its Decision of 2 October 2006, the Chamber observed that the Rwandan authorities cooperated with the Tribunal by providing some of the documents requested, and denied the Defence's application.[8] The Chamber further requested the Rwandan authorities to explain as soon as possible how they complied with the Chamber's Decision of 13 February 2006, and, where appropriate, to provide the reasons why some material sought was not disclosed.

6. In the light of these circumstances, the Chamber does not see why it should exercise its discretion to order the Prosecution to obtain documents, which it has already requested from the Rwandan authorities in a prior Decision. The Chamber expects the Defence not to file repetitive motions seeking the same relief as has been done in this instance.[9]

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion.

Arusha, 10 October 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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[4] See: *Prosecutor v. Bagosora et al.*, Case N°ICTR-98-41-T, Decision on Defence Motion for Additional Disclosure (TC), 1 September 2006, para. 5; see also: *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-T ("*Karemera et al.*"), Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records (TC), 14 September 2005.

[5] *Karemera et al.*, Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders (TC), 13 February 2006.

[6] Motion to Report Government of Rwanda to United Nations Security Council, filed on 22 May 2006.

[7] See Registrar's filing on 19 July 2006.

[8] *Karemera et al.*, Decision on Defence Motion to Report Government of Rwanda to United Nations Security Council (TC), 2 October 2006, paras. 5 and 6.

[9] See Rule 73 (F) of the Rules of Procedure and Evidence.

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Decision on Motion for Disclosure of Closed Session Transcripts and Exhibits Rule 73 of the Rules of Procedure and Evidence 12 October 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Request for disclosure of material – Material already disclosed – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 73

1. In "extremely urgent confidential" motion filed on 11 september 2006, Anatole Nsengiyumva, an Accused in the *Bagosora et al*. trial, requested the Chamber to order the disclosure of closed sessions transcripts of the testimony of two witnesses who testified in the current case, as well as the disclosure of un-redacted statements of these witnesses and the exhibits accompanying their testimony in the instant case. The Defence for Nzirorera responded that it did not oppose the application but requested that the Motion be filed publicly.[1]

2. The Chamber notes that, on 2 October 2006, the Prosecution did disclose the requested material.[2] The Defence Motion has therefore become moot.

3. The Chamber further does not see any reason, and the Defence did not adduce any, why this motion was filed confidentially.

FOR THE ABOVE REASONS, THE CHAMBER

I. DENIES the Defence Motion;

II. REQUESTS the Registrar to reclassify the "Extremely Urgent Confidential Motion for Disclosure of Witnesses ZF, XBM and Request for the Witnesses' Unredacted Statements and Exhibits in *Prosecutor vs. Edouard Karemera et al*.", filed by the Defence for Nsengiyumva on 11 September 2006 as public.

Arusha, 12 October 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[1] Response filed on 19 September 2006.
[2] Prosecutor's Response filed on 12 October 2006.

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Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions against the Prosecution and for Exclusion of Evidence Outside the Scope of the Indictment

Articles 17 (4) and 20 of the Statute, Rule 47 (C) of the Rules of Procedure and Evidence

19 October 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Exclusion of testimonies, Late disclosure of the testimonies, Disclosure obligation of the Prosecutor, Measures available to address delay in disclosure and violation of the rights of the Accused, No demonstration of a prejudice by the Defense – Charges against an Accused, Obligation of the Prosecutor to state the material facts underpinning the charges in the indictment, Statement of the essential factual elements and not of the proving material, Defect of the Indictment, Testimonies linked to essential facts absent of the indictment : réseau zéro network, link between the réseau zéro network and the akazu, organisation of meetings, distribution of weapons, Identity of participants to a conspiracy to commit genocide and the participation of the Accused with others in a specific group conspiring to commit genocide are material facts which have to be pleaded in the Indictment – Admissibility of evidence, Admissibility of hearsay evidence, Fact admissible for the sole purpose of showing the collaboration between civilians and military officials not concerning the behaviour of the Accused – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rules 46 (A), 47 (C), 66 (A) and 89 (C) ; Statute, art. 17 (4) and 20

International Cases cited :

I.C.T.R. : 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. Gérard and Elizaphan Ntakirutimana, Judgement, 13 December 2004 (ICTR-96-10 and ICTR-96-17) ; Trial Chamber, The Prosecutor v. Aloys Simba, Decision on the Admission of Prosecution Exhibits 27 and 28, 31 January 2005 (ICTR-2001-76) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guicahaoua; Defence Motion to Exclude the Witness' Testimony; and Trial Chamber's Order to Show Cause, 1 February 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Defence Motions to Exclude Testimony of Professor André Guichaoua, 20 April 2006 (ICTR-98-44) ; 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. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe, Arrêt, 7 July 2006 (ICTR-99-46) ; 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 Kabiligi Motion for Exclusion of Evidence, 4 September 2006 (ICTR-98-41) ; Trial Chamber, The

Prosecutor v. Théoneste Bagosora et al., Decision on Nsengiyumva Motion for Exclusion of Evidence Outside the Scope of the Indictment, 15 September 2006 (ICTR-98-41) ; 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)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Zlatko Aleksovski, *Decision on Prosecutor's Appeal on Admissibility of Evidence*, 16 February 1999 (IT-95-14/1) ; Trial Chamber, The Prosecutor v. Naser Orić, http://www.icty.org/x/cases/oric/tord/en/041021.pdf*Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings*, 21 October 2004 (IT-03-68); 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)

Introduction

1. The proceedings in the instant case commenced on 19 September 2005. Prosecution Witnesses ZF and XBM were called to testify during the third trial session which started on 15 May 2006.

2. Throughout their testimony, the Defence for Nzirorera raised objections on the admissibility of some parts of their evidence and requested the exclusion of certain parts of the witnesses' evidence. The Defence for Karemera and Ngirumpatse also expressed concerns about the way in which the Prosecution evidence had been led in the light of the allegations set forth in the Indictment, and they supported Nzirorera's objections. The Prosecutor opposed the Defence objections and submitted that adequate notice of the disputed evidence was given in the Indictment, Pre-Trial Brief, including the summary of the witnesses' evidence, and in the witnesses' statements. Considering that these objections raised similar and significant factual and legal issues relating to the charges against the Accused persons, the Chamber considered it more appropriate to address them together in a written decision.

3. In addition to these specific objections, at the end of the trial session the Defence requested the exclusion of Witness XBM's testimony in its entirety and for sanctions against the Prosecution as a result of the late disclosure of a statement taken from the witness in 2005.

Discussion

4. The present section will firstly discuss the request to exclude Witness XBM's testimony in its entirety, and then address the other objections raised by the Defence.

1. Defence Request for Exclusion of Witness XBM's Testimony and Sanctions against the Prosecution

5. On 5 July 2006, while Witness XBM was still testifying in the current proceedings, the Prosecution disclosed to the Defence a statement taken from the witness by ICTR investigators stationed in Kigali on 6 September 2005. The Defence for Nzirorera, joined by the Defence for Karemera and Ngirumpatse,[1] claimed that such a late disclosure was a clear violation of the Prosecution's obligation to disclose copies of the statements of all witnesses it intends to call to testify at trial no later than 60 days before the date set for trial, as prescribed under Rule 66 (A) of the Rules of Procedure and Evidence. It therefore requested the exclusion of XBM's testimony in its entirety and

[1] T. 5 July 2006, pp. 5-7.

for sanctions to be imposed against the Prosecution under Rule 46 (A) of the Rules.[2] Prosecution Counsel acknowledged the late disclosure but explained that he had only become aware of the existence of the document when the witness had mentioned it for the first time in court the day before. He said that the failure to disclose was a mistake.[3]

6. Exclusion of evidence is at the extreme end of a scale of measures available to the Chamber in addressing delay in disclosure and violation of the rights of the Accused.[4]

7. In the present case, the Defence has not shown that it has suffered any prejudice from the late disclosure of the witness' statement which would justify such an extreme remedy. The Defence had an opportunity to cross-examine the witness on this specific statement and its alleged inconsistencies with his evidence given in court.[5] Consequently, even if the Defence suffered prejudice from the late disclosure, the Chamber is of the view that the appropriate remedy was granted. It must also be noted that witness' statements had already been disclosed to the Defence in a timely manner, such that the Defence had been given information on his anticipated evidence and issues affecting his credibility.[6] Under these specific circumstances, the Chamber is satisfied that the fair trial of the Accused was not compromised by the late disclosure of the witness' statement. The Defence's application seeking the exclusion of Witness XBM's testimony in its entirety therefore falls to be rejected.

8. The Chamber is of the view that no sanction under Rule 46 of the Rules is warranted against the Prosecution. Contrary to the Defence's assertion, the situation at hand is distinguishable from when the Chamber issued a warning against the Prosecution due to its failure to disclose material related to Witness T.[7] At that time, while the Defence was requesting full disclosure of material concerning Prosecution Witness T and complaining about breach in the Prosecution's disclosure obligations, the Prosecution repeatedly claimed that it had complied with its obligations. However, it later acknowledged that, upon further investigation, it realised that the disclosure was not actually complete. The Chamber found that such behaviour showed a lack of diligence in the Prosecution's compliance with its obligations, which obstructed the proceedings and was contrary to the interests of justice.[8] However, in the present situation, as soon as the Prosecution became aware of the document concerning Witness XBM, it endeavoured to find it and then disclosed it forthwith to the Defence. It acknowledged that this failure was due to a mistake and stated that it was ready to be sanctioned if the Chamber found it appropriate.[9] The Prosecution is presumed to have discharged its obligations in good faith.[10] In the light of these circumstances, and in the absence of any showing to the contrary, the Chamber has no reason to believe that the Prosecution acted in bad faith or lacked due diligence in discharging its duties in this instance.

2. Defence Objections to the Admission of Some Parts Witnesses ZF and XBM's Testimonies

[2] T. 5 July 2006, pp. 2-4. Rule 46: "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 Prosecution."
[3] T. 5 July 2006, p. 9.
[4] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera* ("*Karemera et al.*"), Case N°ICTR-98-44-T, Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guicahaoua; Defence Motion to Exclude the Witness' Testimony; and Trial Chamber's Order to Show Cause (TC), 1 February 2006, para. 11; *Karemera et al.*, Decision on Defence Motions to Exclude Testimony of Professor André Guichaoua (TC), 20 April 2006, para. 8.
[5] T. 5 July 2006, pp. 1-2.
[6] See: Statement dated of 26 and 27 February 2003; Record of Confession and Guilty Plea dated 20 January 2003.
[7] T. 24 May 2006, pp. 35-36.
[8] T. 24 May 2006, pp. 35-36.
[9] T. 5 July 2006, p. 9.
[10] *Karemera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 17; *Prosecutor v. Dario Kordic and Mario Cerkez*, Case N°IT-95-14/2-A, Judgement (AC), para. 183.

9. The Chamber deems it necessary to recall the applicable principles of law with respect to the issues at stake; it will then apply these principles to the specific objections raised by the Defence in the present case.

2.1. Applicable Law

10. The oral objections raised by the Defence raised two kinds of legal issues on the applicable law: first, concerning the charges against an accused; second, concerning the admissibility of evidence.

(i) Applicable Law Concerning the Charges against an Accused

11. Article 17 (4) of the Tribunal's Statute and Rule 47 (C) of the Rules of Procedure and Evidence require the Prosecution to set forth in the indictment a concise statement of the facts of the case and of the crime(s) with which the suspect is charged. This obligation must be interpreted in light of the rights of the accused to a fair trial, to be informed of the charges against him, and to have adequate time and facilities for the preparation of his defence.[11] According to the jurisprudence of both *ad hoc* Tribunals, this imposes an obligation upon 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:[12] 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.[13]

12. Whether particular facts are "material" depends upon the nature of the Prosecution case. 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.[14] Where the Prosecution alleges that an accused personally committed the criminal acts in question, it must, so far as possible, plead the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by which they were committed "with the greatest precision."[15] 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."[16] Where it is alleged that the accused planned, instigated, ordered, or aided and abetted the alleged crimes, the Prosecution is required to identify the "particular acts" or "the particular course of conduct" on the part of the accused which forms the basis for the charges in question.[17] 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.[18]

13. Failure to set forth the specific material facts of a crime constitutes a defect in the indictment. On occasion, 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.[19] In this context, it must be emphasised that the Prosecution is expected to know its case before proceeding to trial and may not rely on the weakness of its own investigations in order to mould the case against the accused as the

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[11] Statute, Articles 19, 20 (2), 20 (4) (a) and 20 (4) (b).
[12] *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana,* Case N°ICTR-96-10-A and ICTR-96-17-A, Judgement (AC), 13 December 2004, paras. 25 and 470; *Prosecutor v. Georges Anderson Nderubumwe Rutaganda,* Case N°ICTR-96-3-A, Judgement (AC), 26 May 2003, paras. 301-303; *Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, Case N°ICTR-99-46-A, Judgement (AC), 7 July 2006, para. 21*; Prosecutor v. Mladen Naletilic and Vinko Martinovic*, Case N°IT-98-34-A, Judgement (ICTY AC), 3 May 2006, para. 26.
[13] *Ntakirutimana* Appeal Judgement, paras. 25 and 470; *Ntagerura* Appeal Judgement, para. 22.
[14] *Prosecutor v. Kvocka et al.,* Case N°IT-98-30/1-A, Judgement (AC), 28 February 2005, para. 28.
[15] *Naletilic* Appeal Judgement, para. 24.
[16] Ibidem.
[17] Ibidem.
[18] *Ntagerura* Appeal Judgement, para. 24; *Kvocka* Appeal Judgement, para. 28.
[19] *Naletilic* Appeal Judgement, para. 25.

trial progresses.[20] A defect in the indictment may also arise because the evidence turns out differently than expected. In these circumstances, the 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.[21]

14. In addition, according to the established jurisprudence of this Tribunal, a defect in the indictment may be cured where the accused has received timely, clear, and consistent information from the Prosecution which resolves the ambiguity or clears up the vagueness.[22] As the Appeals Chamber stated, "« curing » is likely to occur only in a limited number of cases."[23] Only material facts which can be reasonably related to existing charges and do not lead to a "radical transformation" of the Prosecution's case may be communicated in such a manner.[24] In making this determination, Chambers have looked at information provided through the Prosecutor's Pre-Trial Brief or its opening statement. As the Appeals Chamber emphasises, these are not the sole methods by which an indictment can be cured.[25] Depending on the circumstances, the list of witnesses the Prosecution intends to call at trial, containing a summary of the facts and charges in the indictment as to which each witness will testify, including specific references to counts and relevant paragraphs in the indictment, may serve to put the accused on notice. The Appeals Chamber also held that "the mere service of witness statements or of potential exhibits by the Prosecution pursuant to the disclosure requirements does not suffice to inform an accused of material facts that the Prosecution intends to prove at trial."[26] 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.[27] The Appeals Chamber, nevertheless, held that a witness statement, when taken together with the unambiguous information contained in the Pre-Trial Brief and its annexes, may be sufficient to cure a defect in an indictment.[28]

15. When deciding whether a defective indictment has been cured, the essential question is therefore whether, depending on the specific circumstances of each case, the accused was in a reasonable position to understand the charges against him or her and to confront the Prosecution's case.[29] In addition, where a 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 prejudices an accused's right to a fair trial by hindering the preparation of a proper defence.[30]

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[20] *Naletilic* Appeal Judgement, para. 25.
[21] *Prosecutor v. 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 (AC), 18 September 2006, para. 18.
[22] *Prosecutor v. Eliézer Niyitegeka*, Case N°ICTR-96-14-A, Judgement (AC), 9 July 2004, para. 195; *Ntagerura* Appeal Judgement, paras. 30; *Prosecutor v. Sylvestre Gacumbitsi*, Case N°ICTR-2001-64-A, Judgement (AC), 7 July 2006, para. 49; *Naletilic* Appeal Judgement, para. 25.
[23] *Prosecutor v. 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 (AC), 18 September 2006, para. 21.
[24] *Prosecutor v. 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 (AC), 18 September 2006, paras. 29 and 30: Omission of a count or charge from the indictment cannot be "cured" by the provision of timely, clear, consistent information.
[25] *Prosecutor v. 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 (AC), 18 September 2006, para. 35.
[26] *Ntakirutimana* Appeal Judgement, para. 27; *Niyitegeka*, Judgement (AC), para. 197; *Naletilic* Appeal Judgement, para. 25.
[27] *Prosecutor v. Bagosora et al.*, Case N°ICTR-98-41-T, Decision on Kabiligi Motion for Exclusion of Evidence (TC), 4 September 2006, para. 3; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Nsengiyumva Motion for Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 September 2006, para. 3.
[28] *Ntakirutimana* Appeal Judgement, para. 48; *Gacumbitsi* Appeal Judgement, para. 57.
[29] *Rutaganda* Appeal Judgement, para. 303; see also: *Ntakirutimana* Appeal Judgement, paras. 27 and 469-472; *Ntagerura* Appeal Judgement, paras. 30 and 67; *Gacumbitsi* Appeal Judgement, para. 49.
[30] *Prosecutor v. 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 (AC), 18 September 2006, para. 26

(ii) Admissibility of Evidence

16. The Rules of Procedure and Evidence govern the proceedings.[31] The Chamber is not bound by national rules of evidence and may, in cases not otherwise provided for in the Rules, 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.[32]

17. Rule 89 (C) of the Rules provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value". The Appeals Chamber has constantly ruled that this Rule provides a Chamber with broad discretion to admit relevant hearsay evidence. The fact that the evidence is hearsay does not necessarily deprive it of probative value, but it is acknowledged that the weight or probative value to be afforded to that evidence will usually be less than given to the testimony of a witness who has testified under oath and who has been cross-examined, although even this will depend upon the infinitely variable circumstances which surround hearsay evidence.[33]

18. As a general rule, the admissibility of evidence should not be confused with the assessment of weight to be accorded to that evidence, an issue to be decided by the Trial Chamber after hearing the totality of the evidence.[34]

19. To be admissible, the "evidence must be in some way relevant to an element of a crime with which the Accused is charged."[35] According to Appeals Chamber, when it has been found that a material fact has not been sufficiently pleaded in the indictment, this alone does not render the evidence inadmissible.[36] The evidence can be admitted to the extent that it may be relevant to the proof of any allegation sufficiently pleaded in the indictment.[37]

20. When deciding on the admissibility of evidence, the Chamber must also guarantee the protection of the rights of the Accused as prescribed by Articles 19 and 20 of the Statute. The Chamber therefore has inherent power to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.[38]

2.2. Application to the Defence Oral Objections in the Present Case

21. Under the following sections, the Chamber will address each of the Defence objections in relation to the testimonies of Witnesses ZF and XBM in the light of the above-mentioned principles.

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[31] Rules of Procedure and Evidence, Rule 89.
[32] Rules of Procedure and Evidence, Rules 89 (A) and (B).
[33] *Prosecutor v. Naser Oric*, Case N°IT-03-68-T, Order concerning Guidelines on Evidence and the Conduct of Parties during Trial Proceedings (TC), 21 October 2004; *Prosecutor v. Zlatko Aleksovski*, Case N°IT-95-14/1-T, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 January 1999, para. 15.
[34] *Prosecution v. Nyiramasuhuko et al.*, Case N°ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible" (AC), 2 July 2004, para. 15; *Prosecutor v. Simba*, Case N°ICTR-01-76-T, Decision on the Admission of Prosecution Exhibits 27 and 28 (TC), 31 January 2005, para. 12; see this Chamber prior oral decisions, T. 22 September 2005, p. 2 and T. 27 February 2006, pp. 7-9.
[35] *Prosecutor v. Bagosora et al.*, Case N°ICTR-98-41-T, Decision on Kabiligi Motion for Exclusion of Evidence (TC), 4 September 2006, para. 3; *Prosecutor v. Bagosora et al.*, Case N°ICTR-98-41-T, Decision on Nsengiyumva Motion for Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 September 2006, para. 3.
[36] *Prosecution v. Nyiramasuhuko et al.*, Case N°ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible" (AC), 2 July 2004, para. 15; *Prosecution v. Nyiramasuhuko et al.*, Case N°ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 12.
[37] *Ibidem*. See also: *Prosecutor v. 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 (AC), 18 September 2006, footonote 40.
[38] See this Chamber prior oral decision, T. 27 February 2006, pp. 7-9. See International Criminal Tribunal for Former Yugoslavia, Rules of Procedure and Evidence, Rule 89(D).

(i) On the Objections raised by the Defence Relating to Witnesses ZF's Testimony

22. The Defence for Joseph Nzirorera argued that some aspects of Witness ZF's testimony are material facts not pleaded in the Indictment. It also contended that in some instances, his evidence was not reliable, had no probative value and that its admission would be prejudicial to Joseph Nzirorera. It therefore requests the Chamber to exclude the portions of Witness ZF's testimony pertaining to:

a. Those who were members of the *réseau zéro* network;[39]

b. Meetings held by Ngirumpatse in Gisenyi from 1992 to late 1993 and meetings of military and civilian authorities at a certain location throughout 1990-1994;[40]

c. Nzirorera's presence at a distribution of weapons after 6 April 1994.[41]

a. Evidence on Members of *Réseau Zéro* Network

23. Witness ZF testified to the existence of a secret telecom network called *réseau zéro* which was used by members of President Habyarimana's inner circle.[42] The witness described those people using different names depending on the considered periods; sometimes they were called "the *Abakozi*, the workers" and sometimes "the dragons." He explained that there was a relationship between the *réseau zéro* and the *Akazu*, the presidential circle which included people who came from the same part of the country as the President, especially Ruhengeri and Gisenyi. Since the President needed additional support, the *Akazu* group progressively included people whom he considered to be trustworthy from other regions in the country. This extended group was then called "the dragons."[43]

24. The Defence for Nzirorera objected to the admission of the evidence on the *réseau zéro* and its members. It argued that this material fact was not pleaded in the Indictment, and its source was not reliable enough or had no sufficient probative value for it to be admitted.[44] The Prosecutor replied that the evidence adduced regarding *réseau zéro* would be used to prove the charge of conspiracy to commit genocide and since being part of a communication network is not criminal, *per se*, it need not to be pleaded in the Indictment. Regardless, the Prosecutor contended that sufficient notice of these facts was given to the Accused through the witness' 1998 statement and "a number of disclosures."[45]

25. The identity of participants to a conspiracy to commit genocide and the participation of the Accused with others in a specific group conspiring to commit genocide are material facts which have to be pleaded in the Indictment. The Chamber notes that there is no reference to the *réseau zéro* and its membership in the Indictment. The Pre-Trial Brief only contains a footnote where it is said that "[s]ociologist André Guichaoua and historian Alison Des Forges, as well as several factual witnesses, will comment that Joseph Nzirorera, whether actually by deed or only by reputation, was associated with the […] "Reseau Zero" that planned and executed political assassinations as a method of social control."[46] Nowhere in Witness ZF's summary of his evidence attached to the Pre-Trial Brief, or in the opening statement is there any reference to this network and its members. Contrary to the Prosecutor's assertion, in the light of the volume of disclosure, a witness statement cannot, without some other indication, adequately signal to the Accused that the allegation is part of the Prosecution case.

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[39] T. 16 May 2006, p. 18.
[40] T. 16 May 2006, p. 24; T. 16 May 2006, p. 55. The name of the location is kept under seal.
[41] T. 16 May 2006, p. 76.
[42] T. 16 May 2006, p. 16.
[43] T. 16 May 2006, p. 17.
[44] T. 16 May 2006, pp. 18-19.
[45] T. 16 May 2006, pp. 18-19.
[46] Footnote 117, p. 45 pertaining to the following sentence in the text: "In contrast to Karemera's litigious disposition, and Ngirumpatse's calm detachment, Nzirorera simply seems to have generated a reputation as brute and a scoundrel."

26. The Chamber concludes that the vagueness of the Indictment in relation to the existence and the participation of the Accused in the "*réseau zero*" has not been cured by timely, clear and consistent notice.

27. However, the Chamber is of the view that Witness ZF's evidence is relevant to the proof of other allegations sufficiently pleaded in the Indictment, and in particular the existence of groups affiliated with the alleged "Hutu Power", including the *Akazu*. Contrary to the Defence's contention, the Chamber considers that this hearsay evidence can be admitted and the extent of its probative value does not substantially outweigh the need to ensure a fair trial. The Chamber recalls that the weight to be attributed to the evidence is a different issue to be assessed at a later stage.

28. Consequently, the Chamber finds that Witness ZF's evidence on *réseau zero* is inadmissible to prove the material fact that the Accused participated in this network since they were not put on notice of this allegation. The witness' testimony on this issue is admissible only to the extent that it is related to the existence of the *Akazu*, as pleaded in the Indictment.[47]

b. Meetings held by Ngirumpatse from 1992 to late 1993 and meetings of military and civilian authorities at a certain location throughout 1990-1994 in Gisenyi

29. Witness ZF testified that Ngirumpatse held two meetings at the MRND palace in the Gisenyi *préfecture* during 1992 and 1993, where the conduct of the *Interahamwe* militia in the Gisenyi *préfecture*, their discipline, their support to the Rwandan armed forces and to the Gisenyi *gendarme* were discussed.[48] The witness also testified to five meetings held at a certain location in the same *préfecture* between 1990 and 1994.[49] According to the witness, Nzirorera attended one of these meetings, in the second half of 1992, and said that "a Tutsi would not succeed in their unimaginable dream, and that he agreed with [Colonel Bagosora] that they should not be left to go on with their plan."[50] Apart from that meeting,[51] the witness did not provide much detail as to the content of the other meetings and only indicated the main participants, which did not include the presence of any of the Accused.

30. The Defence for Nzirorera objected to the admission of these portions of Witness ZF's evidence arguing that these meetings are material facts not contained in the Indictment or Pre-Trial Brief and that sufficient notice had not been given to the Accused.[52] In response, the Prosecutor referred to paragraphs 23 and 24 of the Indictment for the meetings held by Ngirumpatse, but provided no specific references for the meetings at a certain location in Gisenyi between 1990 and 1994.[53] He claimed that the Defence was adequately put on notice since the meetings were mentioned in the Pre-Trial Brief,[54] the summary of the witness' anticipated evidence attached to the Pre-Trial Brief, witness statements and Witness ZF's will-say statement.[55]

31. The Chamber notes that nowhere in the Pre-Trial Brief or opening statement is there a reference to a 1990 meeting in Gisenyi. The Accused were not adequately put on notice that this material fact was part of the case against them. In addition, the Prosecution acknowledged that "the 1990 meeting [was] negligible" and "[was] simply to provide a narrative structure for the evidence."[56] There is

[47] See para. 6 (iii).
[48] T. 16 May 2006, pp. 24, 28 and 29.
[49] T. 16 May 2006, pp. 54 and seq. The name of the location is kept under seal.
[50] T. 16 May 2006, p. 62.
[51] T. 16 May 2006, p. 61.
[52] T. 16 May 2006, pp. 24-25 and pp. 55-56.
[53] T. 16 May 2006, pp. 25 and 38.
[54] The Prosecution referred to paragraphs 37 and 41 of its Pre-Trial Brief.
[55] T. 16 May 2006, p.56.
[56] T. 16 May 2006, p. 58.

therefore no reason to admit the evidence of Witness ZF pertaining to a meeting held at a certain location in Gisenyi in 1990 and it should be excluded.[57]

32. Paragraphs 23 and 24 of the Indictment allege that the Accused persons participated in meetings "over the course of several years leading up to and including 1994".[58] Some specific meetings are also pleaded in the subsequent paragraphs of the Indictment.[59] There is, however, no reference to the meetings held by Ngirumpatse at the MRND palace in the Gisenyi *prefecture* during 1992 and 1993 and to the meetings at a certain location in the same *préfecture* 1990 and 1994. The Pre-Trial Brief contains references to meetings from 1992. At paragraph 37, it is said that "GFA, GBU, ZF, among others, will recount that starting in mid-1992, around the same time that the first legitimate multi-party government of Dismas Nsengiyaremye was introduced, MRND leaders at the national, regional and local levels began to organize meetings in their communities." Paragraph 41 of the Pre-Trial Brief specifically mentions that meetings were held at various locations in Gisenyi from the beginning of 1992 "where notable MRND figures at the regional and national levels gathered to plan their strategies." Paragraph 141 of the Pre-Trial Brief also contains a reference to several meetings held sometime in 1992 in Gisenyi in certain military camps and "that participants included Nzirorera." The summary of Witness ZF's anticipated testimony annexed to the Pre-Trial Brief mentions that the witness will testify to meetings between 1992 and 1994 held in Gisenyi, including in military camps; it enumerates the participants therein, including Nzirorera and Ngirumpatse, and briefly describes the content of these meetings; there are also clear references to specific paragraphs and charges of the Indictment to which those facts correspond. This clear information is consistently confirmed in the witness' statements disclosed prior to the beginning of the trial.[60] In that respect, it must be noted that the Defence acknowledged that the statements describe the meetings in considerable detail.[61]

33. In the Chamber's view, considering the unambiguous information contained in the Pre-Trial Brief, including the summary of Witness ZF's anticipated testimony, the witness statements adequately signalled to the Accused that the allegations on the said meetings were part of the Prosecution case. The Chamber further notes that the Pre-Trial Brief and the numerous witness statements were filed a long time before Witness ZF's testimony.[62]

34. Under these circumstances, the Chamber concludes that the Accused were given timely, clear and consistent notice that the alleged meetings were part of the Prosecution's case against them. The Chamber is also of the view that the Defence has had reasonable opportunity to investigate these allegations. The extent of the defects in the Indictment does not materially prejudice the Accused's right to a fair trial. Accordingly, the Defence objection is dismissed.

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[57] See: T. 16 May 2006, p. 54.

[58] Indictment, paras. 23 and 24:

23. Over the course of several years leading up to and including 1994, particularly after 1992, Édouard KAREMERA, Mathieu NGIRUMPATSE, and Joseph NZIRORERA agreed among themselves, and with the individuals identified in paragraphs 6 (i)-(iv), meeting severally at various locations on disparate occasions in the context of their political party and official government activities, to plan and prepare the destruction of Rwanda's Tutsi population, particularly the killing of persons identified as Tutsi and committed acts in furtherance of this agreement.

Prior to 8 April 1994

Formation of the Interahamwe; meetings and public speeches; financing, military training, stockpiling of firearms and weapons distributions for militias:

24. Over the course of 1993 and 1994 Édouard KAREMERA, Mathieu NGIRUMPATSE, and Joseph NZIRORERA agreed among themselves, and with others, and collectively undertook initiatives that were intended to create and extend their own personal control, and that of the MRND Steering Committee, over an organized, centrally commanded corps of militiamen that would respond to their call to attack, kill and destroy the Tutsi population.

[59] See paras. 24.6, 24.7, 24.8.

[60] Statements of 24 June 1998, 6 and 8 April 2004 and 8 and 10 December 2004, disclosed on 13 April 2005.

[61] T. 16 May 2006, p. 56.

[62] The Prosecution Pre-Trial Brief was filed on 27 June 2005, more than 10 months prior to Witness ZF's testimony.

c. Nzirorera's presence at a distribution of weapons after 6 April 1994

35. The Defence for Nzirorera requested that Witness ZF's evidence pertaining to the presence of the Accused at a distribution of weapons in late 1993 or early 1994 be excluded since this information does not appear in the Indictment.

36. The Indictment does not plead this specific event but refers to Joseph Nzirorera's direct participation in the distribution of weapons.[63] The summary of the anticipated testimony of ZF attached to the Pre-Trial Brief indicates that the witness will testify to distribution of weapons at certain military camps in Gisenyi in 1993 and will recount that "after 6 April 1994 weapons brought in from abroad were distributed to militiamen to reinforce the 42nd battalion, […] and that this distribution took place in Nzirorera's presence." This unambiguous information was consistently mentioned in the witness' statements disclosed well in advance to the commencement of the trial.[64]

37. In the Chamber's view, the Accused had timely, consistent, and clear notice that the alleged distribution of weapons to which ZF gave evidence was part of the Prosecution's case against them. The Chamber notes that, during his testimony in court, the witness could not recall the exact dates of the distribution of weapons. This is an issue to be addressed when assessing the evidence. Since the Defence has had reasonable opportunity to investigate these allegations, the extent of this defect in the Indictment does not materially prejudice the Accused's right to a fair trial. Accordingly, the Defence objection is rejected.

(ii) On the Objections raised by the Defence Relating to Witnesses XBM's Testimony

38. The Defence for Nzirorera, joined by the Defence for Ngirumpatse and Karemera,[65] objected to the admission of the following evidence adduced during Witness XBM's testimony:

a. A ceremony relating to the installation of Radio RTLM antenna and subsequent distribution of weapons;[66]

b. A meeting at the Mutura communal office in January 1994;[67]

c. A meeting held at the Meridien Hotel in May 1994;[68]

d. Nyundo Massacre.[69]

39. With respect to each of these events, XBM's evidence consisted of a description how the military authorities mobilized and requested the collaboration of civilians and how the civilians cooperated in the attacks against Tutsi population.

40. The Defence argued, and the Prosecution did not dispute, that these material facts were not, as such, contained in the Indictment or in the Pre-trial Brief. The Chamber, however, accepts the Prosecution's contention that this evidence is relevant to show the collaboration between military officials and civilians.[70] This allegation is unambiguously part of the Prosecution's case according to the Indictment, the Pre-trial Brief and the summary of the anticipated testimony of several witnesses annexed thereto.[71] Particularly, the summary of the anticipated evidence of Witness XBM indicates

[63] See: Indictment, paras. 14, 36, 39 and 62.7.
[64] See: Statements 6 and 8 April 2004 and 8 and 10 December 2004, disclosed on 13 April 2005.
[65] T. 21 June, pp. 38 and 40.
[66] T. 21 June 2006, pp. 38 and 44.
[67] T. 21 June 2006, p. 48.
[68] T. 21 June 2006, p. 49.
[69] T. 21 June 2006, pp. 50-51.
[70] T. 21 June 2006, pp. 33, 44, 45, 48, 50, 52.
[71] See: Indictment, paras. 24.3, 36, 62.2, 62.12; Prosecution Pre-Trial Brief, paras. 9 ("*Planning* to take advantage of the political impasse brought on by Habyarimana's death entailed meetings, discussion and coordination among military and

that the witness "will testify about cooperation between soldiers and civilians prior [to] and during the massacres". This unambiguous information is confirmed in the statement of Witness XBM which was disclosed as supporting material to the amendment of the Indictment in December 2004, more than a year before the witness testified.

41. The Chamber notes that Witness XBM did not testify that any of the Accused were present at these events. Under these circumstances, the Chamber is satisfied that a restricted admission of this evidence will not infringe upon the rights of the Accused to a fair trial.

42. Witness XBM's evidence concerning the ceremony of installation of Radio RTLM antenna in late 1993 and the subsequent distribution of weapons, Mutura communal office meeting in January 1994, a meeting held at the Meridien Hotel in May 1994 and the Nyundo Massacre is therefore admissible for the sole purpose of showing the collaboration between civilians and military officials.

FOR THE ABOVE REASONS, THE CHAMBER

I. DENIES the Defence Motion for exclusion of Witness XBM's testimony in its entirety and for sanctions against the Prosecution;

II. GRANTS IN PART the Defence oral objections on some parts of the testimonies of Witnesses ZF and XBM and DECIDES as follows:

1. Witness ZF's evidence on *réseau zero* is inadmissible to prove the material fact that the Accused persons participated in this network for absence of notice. The witness' testimony on *réseau zero* is admissible only to the extent that it is related to the existence of the *Akazu*;

2. Witness XBM's evidence concerning the ceremony of installation of Radio RTLM antenna in late 1993 and the subsequent distribution of weapons, Mutura communal office meeting in January 1994, a meeting held at the Meridien Hotel in May 1994 and the Nyundo Massacre is admissible for the sole purpose of showing the collaboration between civilians and military officials.

III. DENIES the remainder of the Defence oral objections.

Arusha, 19 October 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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civilian authorities over the period 6 – 10 April 1994"), 11 ("After settling in Murambi, Gitarama, on 12 April, having fled the RPF assault on Kigali, the accused and civilian and military authorities comprising the Interim Government *planned* the removal of *préfets*, *bourgmestre*s and military leaders that were deemed to be obstacles to the genocidal program", 14, 18 ("Given the massive scale of the genocidal enterprise, *commission* of the crime required coordination between military and civilian authorities nationwide"), 155 ("But, as it appears from the cumulative testimonies of the many witnesses, Nzirorera, Ngirumpatse and Karemera, worked *hand in hand with other civilian and military authorities* of the Interim Government, and relied on their own networks of communication and control in the MRND party and the territorial administration, to ensure the success of a well coordinated government campaign against the Tutsi of Bisesero", emphasis added); see summary of the anticipated testimony of Witness AKX, ANP, AWE, BDW, XBM and XXQ. These summaries contain references to specific paragraphs of the Indictment where the cooperation between military authorities and civilian is alleged.

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Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution
Rule 68 of the Rules of Procedure and Evidence
19 October 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Disclosure of Exculpatory Material, Disclosure obligation of the Prosecutor, Exculpatory character of the material depends on the nature of the charges and evidence against the accused, Exculpatory character of the material retained in another case does not infer exculpatory character in the actual case – Unity of the Office of the Prosecutor regarding disclosure obligations, Prosecution must actively review the material in the possession of the whole Office of the Prosecutor and inform the accused of the existence of exculpatory material – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rules 39, 46 (A), 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. Edouard Karemera et al., Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure, 5 July 2005 (ICTR-98-44) ; 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 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, Scheduling Order, 30 March 2006 (ICTR-98-44) ; 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) ; 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. : 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. 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)

Introduction

1. The proceedings in the instance case commenced on 19 September 2005. In a motion filed on 5 April 2006, the Prosecution indicated its willingness to disclose RPF materials as requested by the Defence for Nzirorera but moved the Chamber to "be relieved of its obligation to disclose the

identities of the individuals who made the statements."[1] On 4 July 2006, the Chamber granted in part this application ruling that the identity of the individuals who gave statements regarding the *Revolutionary Patriotic Front* ("RPF") material should be disclosed to the Defence, but also ordered protective measures in view to protect their security.[2]

2. Subsequently, the Prosecution disclosed, in redacted form, to the Defence for each Accused four witness' statements, including those of Witnesses DM46 and DM80, and a copy of a report pertaining to RPF activities.[3]

3. In the meantime, the Defence for Nzirorera filed a Motion moving the Chamber to order the Prosecution to disclose documents and witness statements relating to RPF acts of violence and infiltration in Rwanda between 1990 and 1994. It also requests the Chamber to sanction the Prosecution for its failure to comply with the Chamber's Decision of 4 July 2006.[4] The Prosecution opposes the Motion.[5]

Deliberations

(1) Defence Request for Disclosure of Exculpatory Material

4. The Defence argues that documents and witness statements relating to RPF acts of violence and infiltration in Rwanda between 1990 and 1994 are exculpatory material falling within the ambit of Rule 68 of the Rules of Procedure and Evidence. In the Defence's view, the material sought is sufficiently identified and its disclosure is vital for its case as such evidence provides justification for the road blocks, civil defence system and tends to prove that the acts of the Accused were legitimate responses to actual infiltration and acts of violence by the RPF. It submits that the exculpatory character of the material has already been accepted by the Trial Chamber in *Bagosora* case and is equally applicable here.[6] It also claims that the Prosecution has acknowledged possession of other witness statements besides those which it has disclosed. The Defence concludes that the requirements set forth by this Chamber's prior decisions for ordering the disclosure of the material under Rule 68 are therefore met in the present case. The Prosecution responds that its trial team periodically reviews its database for RPF material using the criteria offered by the Defence but denies having found other material that should be disclosed.

5. Rule 68 (A) of the Rules provides that the Prosecution has an obligation to disclose, as soon as practicable, 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." The determination as to whether material has to be disclosed under Rule 68 "is primarily a facts-based judgement, failing within the responsibility of the Prosecution,"[7] which is presumed to discharge its obligation in good faith.[8]

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[1] Prosecutor's Application pursuant to Rules 39, 68 and 75 of the Rules of Procedure and Evidence for an Order for Conditional Disclosure of Witnesses Statements and other documents pursuant to Rule 68 (A).
[2] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera* ("*Karemera et al.*"), Case N°ICTR-98-44-T, Decision on the Prosecutor's Application pursuant to Rules 39, 68 and 75 of the Rules of Procedure and Evidence for an Order for Conditional Disclosure of Witnesses Statements and other documents pursuant to Rule 68 (A) (TC), 4 July 2006 ("Decision of 4 July 2006").
[3] See disclosures made on 1 August 2006 and 29 September 2006.
[4] Joseph Nzirorera's Motion to Compel Disclosure of RPF Material and For Sanctions, filed on 25 September 2006.
[5] Prosecutor's Response, filed 29 September 2006.
[6] The Defence refers to *Prosecutor v. Bagosora et al.*, Case N°ICTR-98-41-T, Decision on Disclosure of Defence Witness Statements in the Possession of the Prosecution Pursuant to Rule 68 (A) (TC), 8 March 2006.
[7] *Karemera et al.*, Case N°ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 16 ; *Prosecutor v. Tihomir Blaskic*, Case N°IT-95-14-A, Judgement (AC), 29 July 2004, para. 264.
[8] *Karemera et al.*, Case N°ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 17; *Prosecutor v. Dario Kordic and Mario Cerkez*, Case N°IT-95-14/2-A, Judgement (AC), para. 183.

6. According to the established jurisprudence of this Tribunal, if the Defence claims that the obligation to disclose material under Rule 68 has been violated, it must: (i) identify the material sought with reasonable specificity; (ii) establish that the material is in the custody or control of the Prosecution; and (iii) make a *prima facie* showing of the exculpatory or potentially exculpatory character of the materials requested.[9] Information will be exculpatory if it tends to disprove a material fact alleged against the accused, or if it undermines the credibility of evidence intended to prove to material facts.[10]

7. As the Trial Chamber I in the *Bagosora et al*. noted, the exculpatory character of the material sought "depends on the nature of the charges and evidence heard against the accused".[11] It concluded that some specific information on RPF activities could be exculpatory in the light of the charges against the accused in that specific case. It also held that "evidence of RPF activities which have only a remote connection to the crimes alleged against the Accused is not exculpatory", and found that "evidence of RPF operations at times or places unrelated to the crimes alleged against this Accused is not exculpatory."[12] The Trial Chamber I's rulings were based on a case-by-case basis and did not contain any general statement on the exculpatory character of RPF materials. That same Chamber further held that

> 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. […] Disclosure of an entire category of documents will only be ordered under Rule 68 where the category is accurately tailored to the exculpatory content.[13]

8. In the present case, it cannot be excluded that some information concerning RPF activities may be exculpatory to the extent that it is relevant to the crimes alleged against the Accused or to the evidence adduced during the Prosecution's case. This information may, for instance, assist the Chamber in understanding some of conduct and acts about which testimony was heard. The Defence's request, however, lacks specificity as to the material desired. It generally refers to all evidence in the hands of the Office of the Prosecutor concerning "RPF acts of violence and infiltration in Rwanda between 1990 and 1994." Such a request is too vague and could encompass evidence of RPF activities which have only remote connection or even no connection at all to the crimes alleged against the Accused and which therefore would have no exculpatory character. The Defence's request is not sufficiently tailored to the exculpatory content of the material sought. The Rule cannot be used freely as a means to obtain information from the Prosecution and then subsequently to determine whether it can be used or not.[14] The Defence's motion for disclosure of exculpatory material falls therefore to be rejected.

(2) Defence Request for Disclosure of Statement in Un-Redacted Form and for Sanctions Against the Prosecution

9. The Defence for Nzirorera requests disclosure of statements in un-redacted form arguing that, in order to use the exculpatory information, it needs to know the identity of the persons making the statements.[15] It shares with the Prosecution concerns about the perils faced by the witnesses with information concerning the RPF's crimes who are likely to want to cooperate with the Defence and thus undertakes not to take any action that could jeopardize their security; it has no objection to

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[9] *Karemera et al*., Case N°ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 13; *Prosecutor v. Bagosora et al.,* Case N°ICTR-98-41-T, Decision on the Ntabakuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68 (TC), 6 October 2006, para. 2.
[10] *Prosecutor v. Bagosora et al.,* Case N°ICTR-98-41-T, Decision on Ntabakuze Motion for Disclosure of Prosecution Files (TC), 6 October 2006, para. 4 ("*Bagosora* Decision of 6 October 2006").
[11] Ibidem.
[12] *Ibid*., para. 5.
[13] *Ibid*., para. 6.
[14] *Ibid*., para. 6 quoting *Delalic et al.,* Decision on the Request of the Accused Hazim Delic Pursuant to Rule 68 for Exculpatory Information (TC), 24 June, para. 15.
[15] Defence's Reply, filed on 2 October 2006.

contacting these witnesses under the auspices of the Witnesses and Victims Support Section.[16] The Defence further requests the Chamber to impose sanctions, pursuant to Rule 46 (A), for violating the Chamber's Decision of 4 July 2006. It claims that sanctions are the only measures which can put an end to the impunity with which the Prosecution has violated its disclosure obligations in this case which are delaying and obstructing the trial on a continuous, ongoing basis.[17]

10. The Prosecution submits that "its trial team" has determined the existence of two additional witness statements but has disclosed them to the Defence in redacted form in order to avoid any prejudice to ongoing investigations and protect the security of its informants.[18]

11. As this Chamber and the Appeals Chamber clearly stated, the Prosecution's obligation to disclose exculpatory material is essential to a fair trial.[19] One of the purposes of the Prosecution's investigative function is "to assist the Tribunal to arrive at the truth and to do justice for the international community, victims and the accused."[20] The Appeals Chamber has also explained the unity of the Office of the Prosecutor in discharging disclosure obligations considering that the Prosecution teams are all representatives in the same Office of the Prosecutor.[21]

12. In the light of these principles, the Prosecution's contentions that "[its] *trial team* is not aware of any other materials that should be disclosed pursuant to Rules 66 (B) and 68 (A)" and that "the review did not identify [the two above-mentioned] statements since they were deemed to be *sub judice* in the *Bagosora et al*. trial" are unsatisfactory.[22] The Prosecution must actively review the material in the possession of the Office of the Prosecutor, and not only the documents in possession of this trial team, and, at the very least, inform the accused of the existence of exculpatory material.[23]

13. In its Decision of 4 July 2006, the Chamber also considered that

> "since the identity of the individuals who gave statements regarding the RPF material and the individuals who gave the Credibility Statements are indeed related to the content of the statements, they should be disclosed to the Defence."[24]

The Prosecution acknowledges this prior order but claims that the disclosure of these witnesses' identities would expose them to grave danger and that it must use its power under Rule 39 which allows the Prosecution to take special measures to protect the safety of potential witnesses and informants. It invites the Chamber to balance the Defence's request with the Prosecutor's interest to preserve the integrity of his ongoing investigation.

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[16] Ibidem.
[17] Defence's Motion.
[18] Prosecution's Response.
[19] Oral Decision on Stay of Proceedings, T. 16 February 2006, pp. 5 and seq.; *Karemera et al*., Case N°ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations (AC), 30 June 2006, para. 9
[20] *Karemera et al*., Case N°ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations (AC), 30 June 2006, para. 9; *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 (AC), para. 44.
[21] *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 (AC), 6 October 2005, para. 43:
Nowhere in the Statute or Rules is it stated that the Prosecutor's obligations may be limited to specific teams within the Office of the Prosecutor, which in the practice of the Tribunal, are sometimes referred to as the "Prosecution" in an individual case. The ordinary meaning and context of the text of the Rules suggest that the obligations of the Prosecutor rest 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.
See also: *Karemera et al*., Case N°ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations (AC), 30 June 2006, footnote 33.
[22] Prosecution's Reply, para. 9 (emphasis added).
[23] *Karemera et al*., Case N°ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations (AC), 30 June 2006, para. 10.
[24] Decision of 4 July 2006, quoting *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.

14. As stated in prior decisions, Rule 39 of the Rules could not constitute, as such, an impediment to disclosure of identifying information with respect to Prosecution witnesses.[25] However, when the Prosecution fears that potential witnesses or informants may be in danger or at risk or that disclosure of material may prejudice further or ongoing investigations, it may apply to the Chamber for specific measures in accordance with the Statute and the Rules.[26] Specifically, Rule 68 (D) of the Rules provides for an exception to the Prosecution disclosure obligations of exculpatory material if the disclosure "may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interests or affect the security interests of any State." When applying for such exemption, the Prosecution is expected to provide the Chamber with the information or materials sought to be kept confidential.[27] The Chamber will grant such kind of request only on a case-by-case basis after consideration of the Prosecutor's submissions in each case.

15. In the Prosecution's response, no information or material has been given to the Chamber, nor has any specific argument been made for the Chamber to make an order under the exception provided by Rule 68 (D). In its Decision of 4 July 2006, the Chamber has already issued measures to protect the security of the individuals who gave the statements.[28] If the Prosecution seeks further measures, it must apply forthwith to the Chamber. Apart from the statements of Witnesses DM80 and DM46,[29] disclosure of exculpatory material in redacted form is therefore not permitted at this stage, as acknowledged by the Prosecution.

16. Rule 46 (A) of the Rules provides that

> 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 Prosecution.

17. In its oral Decision of 24 May 2006, the Chamber found a lack of diligence in the Prosecution's compliance with its disclosure obligations.[30] It concluded that this obstructed the proceedings and was contrary to the interests of justice and imposed a warning against the Prosecution. In the situation at hand, the Chamber finds, and the Prosecution does not even dispute, that the Prosecution's conduct in disclosing statements in redacted form is in breach of the prior Chamber's Decision of 4 July 2006. Such misconduct is unacceptable; it remains offensive, obstructs the proceedings and is contrary to the interests of justice. The Chamber therefore finds that a sanction should be imposed against the Prosecution, by formally drawing the attention of the Prosecutor himself, as the disciplinary body, to this misconduct.[31]

FOR THE ABOVE REASONS, THE CHAMBER

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[25] Decision of 4 July 2006, para. 8; see also: *Karemera et al*., Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure (TC), 5 July 2005, para. 18; *Karemera et al.,* Scheduling Order (TC), 30 March 2006, para. 6.
[26] See Statute, Article 21; Rules of Procedure and Evidence, Rules 69, 75, 66 (C) and 68(D).
[27] Decision of 4 July 2006, para. 7.
[28] Decision of 4 July 2006:
[…] the Defence for each Accused and the Accused persons shall not share, reveal or discuss, 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 person whose statement shall be disclosed pursuant to this decision, to any person or entity other than the Accused, assigned Counsel or other persons working on the Defence team;
[…] the Defence for each Accused shall notify the Prosecution in writing, on reasonable notice, and the Witnesses and Victims Support Section of the Tribunal (WVSS) if it wishes to contact any person who submitted a statement to the Prosecution related to the RPF material or a Credibility Statement, who are not subject to a Trial Chamber's protective orders. Should the person concerned agree to the interview, WVSS shall immediately undertake all necessary arrangements to facilitate the interview.
[29] Decision of 4 July 2006.
[30] T 24 May 2006, pp. 35-36.
[31] Compare with Rule 46 (B) which provides that the misconduct of counsel may be communicated "to the professional body regulating the conduct of counsel in his State of admission."

I. DENIES the Defence's application for disclosure of exculpatory material and for sanctions against the Prosecution;

II. GRANTS the Defence's application for disclosure of the statements previously disclosed on 29 September 2006 in un-redacted form;

III. IMPOSES, pursuant to Rule 46 (A) of the Rules, a sanction against the Prosecution, and accordingly

IV. REQUESTS the Registry to serve the present Decision on the Prosecutor in person.

Arusha, 19 October 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Decision on Motions to Disclose a Prosecution Witness Statement and to Unseal Confidential Documents
Rule 66 (C) of the Rules of Procedure and Evidence
25 October 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Motion to Unseal Confidential Annexes, State's correspondence with the Registrar already served to the parties, Annex attached to facilitate the State's cooperation, No fair trial issue at stake, No unsealing – Disclosure of witness statements, Witness domestically prosecuted, Balance of the rights of the Accused with those of Witness to receive fair trials in their respective criminal proceedings – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rules 66, 66 (B) (ii) and 66 (C)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Edouard Karemera, Order on Protective Measures for Prosecution Witnesses, 10 December 2004 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Defence Motion to Report Government of a Certain State to United Nations Security Council and on Prosecution Motions under Rule 66 (C) of the Rules), 15 February 2006 (ICTR-98-44)

Introduction

1. The trial in this case started on 19 September 2005. During the third trial session, the Defence for each Accused requested the disclosure of a statement of Prosecution Witness HH taken by the authorities of a certain State.[1] The Prosecution acknowledged that this statement should be disclosed, as a prior statement of a witness intended to be called during the fourth trial session, and in accordance

[1] T. 2 June 2006. Due to specific protective measures applicable in the instant case, the name of the State is specified in the Confidential Annex to the present Decision placed under seal.

with Rule 66 of the Rules of Procedure and Evidence.[2] The Chamber, however, noted that the document was part of the investigatory file of Witness T communicated by the State and for which it had already been ruled that it could not be disclosed to the Defence due to the public interest.[3] It therefore decided to make a further request of the authorities of the State to file submissions on the specific issue and to inform the Chamber as to whether the statement could be disclosed, in a whole or in part, to the Defence in the present case.[4]

2. On 5 October 2006, the Registrar informed the Chamber that the State had filed a submission in accordance with the Chamber's Decision of 7 June 2006.[5] This submission was filed under seal, confidentially, and exclusively with the Chamber. In a separate Motion, the Defence for Nzirorera requests that this document be unsealed forthwith.[6] The Chamber will begin by addressing this issue and then turn to the application for disclosure of the witness' statement.

Deliberations

Motion to Unseal Confidential Annexes

3. In the Chamber's view, the State's correspondence attached to the Registrar's submissions filed on 5 October 2006 does not contain information the disclosure of which to the Parties in the case would cause any prejudice or be contrary to the interests of justice. The Chamber further notes that the Parties were already served with the State's submission made in December 2005, which is reproduced in the current correspondence. This document, however, contains information concerning a protected witness that should not be disseminated to the public.[7] The Chamber is therefore of the view that the attachment to the Registrar's submission can be disclosed to the Defence but must remain confidential to the public.

4. In addition to requesting to unseal the annex to the Registrar's submission of 5 October 2006, the Defence for Nzirorera claims that the Chamber has yet to rule on its Oral Motion to unseal the confidential annex to the Chamber's Decision of 7 June 2006, requesting the further cooperation of the State.[8]

5. Contrary to the Defence's assertion, the Chamber has already ruled on this application and decided that "the confidentiality was a necessary incident of consistency with [its] previous orders."[9] This annex was attached to facilitate the State's cooperation: it contains the name of the State, the physical description (including the exact title and reference) of the document sought for disclosure, and the Chamber's request to be informed on whether the document can be disclosed in whole or in part in the present case. There is therefore no fair trial issue at stake, and unsealing the document to the Defence should not be entertained since it contains information which is part of the State investigative file which is subject to non-disclosure at this stage.[10]

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[2] T. 2 June 2006.
[3] T. 6 June 2006, p. 18. See also, *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-T ("*Karemera et al.*"), Decision on Defence Motion to Report Government of a Certain State to United Nations Security Council and on Prosecution Motions under Rule 66 (C) of the Rules (TC), 15 February 2006.
[4] T. 6 June 2006, p. 18; see also Karemera et al., Ordonnance complémentaire visant au dépôt de soumissions d'un Etat (TC), 7 June 2006.
[5] Registrar's Submissions, 5 October 2006.
[6] Joseph Nzirorera's Motion to Unseal Attachment to Registrar's Submission of 5 October 2006, filed on 9 October 2006.
[7] See: *Karemera et al.*, Order on Protective Measures for Prosecution Witnesses (TC), 10 December 2004.
[8] T. 14 June 2006, p.1.
[9] T. 14 June 2006, p. 2.
[10] *Karemera et al.*, Decision on Defence Motion to Report Government of a Certain State to United Nations Security Council and on Prosecution Motions under Rule 66 (C) of the Rules (TC), 15 February 2006.

Motion for Disclosure of Witness HH's statement

6. Rule 66 (C) of the Rules provide for an exception to the Prosecution obligation to disclose prior statements of a witness it intends to call at trial under Sub-Rules 66 (B) (ii) if the disclosure

> "may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interests or affect the security interests of any State".

7. In the present case, the State expresses the view that the requested statement cannot be disclosed, at this stage, to the Defence for the Accused persons. It reiterates its prior position expressed in its submission dated 2 December 2005, which was communicated to the Chamber as a result of a request for cooperation concerning the same material.[11] In that prior submission, the State relied upon, among other things, security reasons, and explained that full disclosure of Witness T's judicial records would be contrary to the applicable domestic law and would also infringe on Witness T's right to a fair trial as the witness is currently in judicial proceeding before the State. It also submitted that full disclosure of the material to the Defence could also prejudice the security of certain witnesses specifically identified in the documents.

8. As already stated in its Decision of 15 February 2006, the Chamber is concerned that Witness T receives a fair trial and must balance the rights of the Accused with those of Witness T to receive fair trials in their respective criminal proceedings.[12]

9. The Chamber finds that there is likelihood that the document requested, if disclosed to the Defence before Witness T's trial, may violate his right to a fair trial and therefore be contrary to the public interest. It must be also noted that the document sought for disclosure is only composed of six pages of questions and answers and that the Accused have already received substantial disclosure regarding Witness HH and his anticipated testimony, which provides them with adequate facilities for the preparation of their defence and the cross-examination of the witness.

FOR THE ABOVE REASONS, THE CHAMBER

I. DECIDES, pursuant to Rule 66 (C) of the Rules, that the statement of Witness HH taken by the authorities of a certain State should not be disclosed at this stage;

II. GRANTS in part the Defence Motion to Unseal the Attachment to the Registrar's Submission of 5 October 2006,[13] and accordingly

III. REQUESTS the Registry to reclassify this Attachment confidential to the public and to disclose it only to the parties in the instant case.

Arusha, 25 October 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[11] See: Order for submissions *Karemera et al*., Decision on Defence Motion to Report Government of a Certain State to United Nations Security Council and on Prosecution Motions under Rule 66 (C) of the Rules (TC), 15 February 2006.
[12] *Ibid*., para. 19.
[13] Entitled: "The Registrar's Submissions Regarding the Trial Chamber's Decision on Request for Subpoena Dated 7 June 2006".

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Decision on Reconsideration of Protective Measures for Prosecution Witnesses Articles 19 and 20 of the Statute, Rules 33, 34, 54 and 75 of the Rules of Procedure and Evidence 30 October 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Protective measures for witnesses, Inherent power of a trial Chamber to reconsider its decisions, Material change in circumstances since the Decision granting protective measures : meeting of the Prosecution witnesses and the Defence and intervention of the Prosecutor, Right of the parties to interview a potential witness : possible limitation, Assistance of the Registry (Witnesses and Victims Support Section), Witness is the property of none of the parties – Rights of the accused to a fair and expeditious trial, Right to have adequate time and facilities to prepare his/her defence, Right to examine and have examined a witness against him or her – Motion partially granted

International Instruments cited :

Rules of Procedure and Evidence, rules 33, 34, 54, 66 (B), 68 and 75 ; Statute, art. 19 and 20

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) ; 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. Casimir Bizimungu et al., Decision On Prosper Mugiraneza's Extremely Urgent Motion To Vary Conditions Of Interview With Jean Kambanda, 19 January 2005 (ICTR-99-50) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Joseph Nzirorera's Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting With Defence Witness, 11 October 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Defence Motion for Modification of Protective Order: Timing of Disclosure, 31 October 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Nzuwonemeye Request for Disclosure of Identifying Information of Witness XXO and Authorization to Interview Him, 31 October 2005 (ICTR-98-41)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Mile Mrkšić, Appeal Chamber Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party, 30 July 2003 (IT-95-13/1) ; Appeals Chamber, The Prosecutor v. Sejér Halilović, Decision on Issuance of Subpoenas, 21 June 2004 (IT-01-48)

Introduction

1. The proceedings in the instant case commenced on 19 September 2005. The Defence for Nzirorera contends that throughout the trial, the Prosecution has repeatedly interfered with the right of

the Accused to interview Prosecution witnesses who consent to meet with Counsel for the Accused before they give testimony.[1] To support its motion, the Defence refers to various events where it sought to meet, or met, with a Prosecution witness at a time immediately before the witness was called to testify in court. It therefore requests the Chamber to reconsider and amend its prior Order on Protective Measures for Prosecution Witnesses of 10 December 2004[2] to avoid these problems recurring in the future. In response, the Prosecution also expresses concerns regarding the current method that is employed by the Defence for interviewing of Prosecution witnesses and although it agrees with the Defence that the regime needs revision, it presents alternative suggestions.[3]

Deliberations

2. According to the established jurisprudence, a Chamber has the inherent power to reconsider its decisions when (i) a new fact has been discovered that was not known to the Chamber at the time it made its original Decision, (ii) there has been a material change in circumstances since it made its original Decision, or (ii) 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.[4]

3. In the present case, the Defence Motion was filed in the particular context of the Defence's previous requests to meet with a Prosecution witness just before or during his or her testimony in court. The meetings were requested by the Defence so it could show the witness any documents intended to be used during cross-examination in order to save time in court.[5] The Prosecution does not dispute that it intervened during those meetings but submits that it had no choice in order to avoid any misrepresentation to, or coercion of the witness to obtain the witness' co-operation.

4. The Chamber accepts that these incidents may be considered, to a certain extent, as a material change in circumstances that has occurred since its original Decision on Protective Measures for Prosecution Witnesses and therefore may require reconsideration of that Decision.

5. The Defence suggests eight orders for the Chamber to adopt that would have the effect of helping the witness to understand the reasons for meeting Defence Counsel prior to his or her testimony; eliminate the appearance that the Prosecution is discouraging the witness from meeting and speaking with Defence Counsel; and expedite the proceedings by allowing the witnesses to be shown documents intended to be used during cross-examination in order to save time in court.[6] The

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[1] Joseph Nzirorera's Motion for Reconsideration of Witness Protection Order, filed on 25 September 2006.
[2] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera* ("*Karemera et al.*"), Case N°ICTR-98-44-T, Order on Protective Measures for Prosecution Witnesses (TC), 10 December 2004.
[3] Prosecution's Response filed on 29 September 2006 and Corrigendum filed on 19 October 2006.
[4] *Karemera et al.,* Case N°ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karemera et al.,* Case N°ICTR-98-44-T, Decision on Defence Motion for Modification of Protective Order: Timing of Disclosure, 31 October 2005, para. 3; *Karemera et al.,* Case N°ICTR-98-44-T, Decision on Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting with Defence Witness, 11 October 2005, para. 8 (note also the authorities cited in footnotes contained within that paragraph).
[5] See: Defence Motion.
[6] The Defence suggests the following orders:
1. The defence shall notify the WVSS in writing, upon reasonable notice, of its wish to contact a protected victim or prosecution witness.
2. WVSS shall make arrangements for the witness to meet defence counsel and provide notice to the prosecution of the time and place of the meeting and an opportunity to be present.
3. At the commencement of the meeting, before asking any questions about the substance of the witness' proposed testimony, defence counsel should ask the witness if he or she consents to be interviewed by the defence prior to giving testimony.
4. If the witness does not consent, the meeting shall be terminated.
5. If the witness consents, he or she should be asked by defence counsel whether the witness wishes to meet with defence counsel with or without the presence of a representative from the prosecution.
6. If the witness requests to meet with defence counsel without the presence of a representative of the prosecution, that representative should depart from the meeting.

Prosecution responds that the Chamber must preserve both the rights of the accused to a fair trial and the integrity of the process and therefore suggests that the witness should be informed by an impartial and independent legal officer, that he or she has the right to decide whether to be interviewed by the Defence and is not obliged to explain its refusal to anyone. It opposes the Defence's suggested order that the Defence Counsel make the request of the witness for consent to be interviewed by the Defence prior to giving testimony.[7] In its reply, the Defence does not object in principle to the presence of a legal officer to referee and document pre-trial meetings with the witnesses,[8] but insists that the Defence Counsel should have an opportunity to explain its reasons for the meeting to the witness before the witness decides whether to participate.

6. Article 19 and 20 of the Tribunal's Statute guarantee the rights of the accused to a fair and expeditious trial, including his or her rights of to have adequate time and facilities to prepare his or her defence and to examine and have examined a witness against him or her. The Chamber must further ensure that the proceedings are conducted with full respect for these rights and with due regard for the protection of victims and witnesses.[9] When appropriate, protective measures can be ordered for the protection of the victims and witnesses.[10]

7. According to the Appeals Chamber, each party has the right to interview a potential witness.[11] "Witnesses to a crime are the property of neither the Prosecutor nor the Defence; both sides have an equal right to interview them."[12] In particular, the Appeals Chamber stated that

> Given that during cross-examination the Defence can elicit from the Prosecution witness information which is relevant to its own case and goes beyond the scope of the Prosecution's examination-in-chief, the Defence may have a legitimate need to interview this witness prior to trial in order to properly prepare its case.[13]

It also considered that

> "[t]he Trial Chamber should have examined whether the Defence has presented reasons for the need to interview these witnesses which went beyond the need to prepare a more effective cross-examination."[14]

8. The right to contact and interview a potential witness is, however, not without limitation.[15] The Chamber must ensure that there is no interference with the course of justice and that the witness does not feel coerced or intimidated. To this end, Trial Chambers have required that a witness formally consent to meet with the requesting party.[16] The assistance of the Registry, in particular of the

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7. The prosecution's representative shall make no comments to the witness during the process of determining whether the witness consents to meet with defence counsel and whether he or she wishes to do so in the presence of a representative of the prosecution.
8. A representative of WVSS shall be present at all times during the interview.

[7] Corrigendum filed on 19 October 2006.
[8] Defence Reply filed on 2 October 2006.
[9] Statute, Art. 19.
[10] Statute, Art. 21 and Rules of Procedure and Evidence, Rules 69 and 75.
[11] *Prosecutor v. Mile Mrksic*, Case N°IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party (AC), 30 July 2003; see also, *Prosecutor v. Sefer Halilovic*, Case N°IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 12 to 15.
[12] Ibidem.
[13] *Prosecutor v. Sefer Halilovic*, Case N°IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 14.
[14] *Ibid*., para. 15.
[15] *Prosecutor v. Mile Mrksic*, Case N°IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party (AC), 30 July 2003.
[16] See: *Bizimungu et al*., Case No. ICTR-99-55-T, 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 (TC), 24 August 2004; *Prosecutor v. Ndindiliyimana et al*., Decision on Sagahutu's Motion for Reconsideration of 19 March 2004 Decision on Disclosure of Prosecution Materials, for Leave to Contact a Prosecution Witness, and for Access to Testimony of Protected Witnesses in the Military I Case (TC), 3 November 2004, paras. 21-23; *Bizimungu et al*., Case N°ICTR-99-55-T, Decision on Prosper Mugiraneza's Extremely Urgent Motion To Vary Conditions Of Interview With Jean Kambanda, (TC) 19 January 2005;

Witnesses and Victims Support Section ("WVSS"), has often been requested to help in that determination.[17] If a witness for any reason declines to be interviewed, the requesting party does not have the power to compel the person to attend an interview or to respond to any question.[18] If the requesting party wishes to compel an unwilling person to submit to a pre-trial interview, then it may seek the assistance of the Chamber to issue a subpoena and any other order pursuant to Rule 54 of the Rules.

9. In the Chamber's view, in light of the prior experience in this case and since a witness is the property of neither the Prosecutor nor the Defence, when the Defence seeks to contact a Prosecution witness in the future, WVSS should make the necessary arrangements for this meeting to take place and provide its assistance where necessary. It must be noted that the presence of a representative of the Prosecution to such a meeting should not interfere with the right of the Defence to interview a consenting witness. The Chamber is, however, not persuaded that the presence of a representative of WVSS is necessary for each interview, nor is there any need to rule in detail on how the interview should proceed, including whether the Defence is entitled to ask the witness whether he or she consents to the meeting, as requested by both parties. The particular circumstances referred to in their submissions concern situations where the Defence sought to interview a witness at the outset of his or her testimony in court. There has been no allegation of any difficulty during meetings when the witness was not about to give evidence in court. In any event, the parties are at liberty to file specific requests seeking the assistance of the Chamber in particular circumstances.

10. The Chamber is particularly concerned that allowing either Counsel to meet a witness for the opposite party at the outset of the witness' testimony in court may interfere with the course of the proceedings and the interests of justice. It has the potential of delaying the proceedings and destabilizing the witness immediately prior to his or her testimony. Consequently, while each party has the right to interview a witness, requests for a meeting between the Defence and a Prosecution witness at the outset of his or her testimony should only be made on giving good reason why the application was not made earlier. In that respect, the Chamber notes that the Defence's request to meet the witness at the outset of his or her testimony with the view of showing documents intended to be used in court does not go beyond the need to prepare more effective cross-examination and does not constitute good reason to override the risks of having such a meeting.

11. In its reply, the Defence requests the disclosure of investigatory reports concerning Witness AWB's refusal to testify to show that the Defence did nothing to discourage the witness' participation in the trial.[19] The Chamber does not intend to make any finding on this issue. There is no reason to order the requested disclosure. The Chamber further takes note of the Prosecution's intention to disclose any material falling within the ambit of Rules 66 (B) or 68 if and when continuing investigations reveal information relevant to the case.[20]

FOR THE ABOVE REASONS, THE CHAMBER

I. GRANTS in part the Defence Motion,

II. AMENDS Order 8 of its Decision on Protective Measures for Prosecution Witnesses of 10 December 2004 as follows:

Prosecutor v. Bagosora et al., Decision on Nzuwonemeye Request for Disclosure of Identifying Information of Witness XXO and Authorization to Interview Him (TC), 31 October 2005, para. 6.

[17] *Ibidem*; see also Rules of Procedure and Evidence, Rules 33 and 34.

[18] *Prosecutor v. Mile Mrksic*, Case N°IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party (AC), 30 July 2003.

[19] Defence Reply filed on 2 October 2006; this position is reiterated in a Reply Brief: Motion for Disclosure of Materials Related to Witness AWB, filed on 26 October 2006.

[20] See Prosecutor's Response to Joseph Nzirorera's Motion for Disclosure of Witness AWB Material, filed on 25 October 2006. The Prosecution filed this delayed response because it did not take note of the Nzirorera's motion for disclosure of Witness AWB material which was incorporated in the Defence's Reply related to Joseph Nzirorera's Motion for Reconsideration of Witness Protection Order. The Defence submits that this late filing should not be considered by the Chamber.

ORDERS that the Defence shall notify the Witnesses and Victims Support Section of the Tribunal and the Prosecution in writing, on reasonable notice, of its wish to contact a protected Prosecution witness or potential Prosecution witness or a relative of such person. Should the witness or potential witness concerned agree to the interview, or the parents or guardian of that person, if that person is under the age of 18, WVSS shall immediately make all necessary arrangements for the witness to meet with the Defence and provide sufficient notice to the Prosecution of the time and place of the meeting. Except under exceptional circumstances, such meeting shall not take place at the outset of the witness' testimony in court. Where appropriate, WVSS may facilitate the interview.

III. DENIES the remainder of the Motion.

Arusha, 30 October 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Decision on Defence Motion for Certification to Appeal the Chamber's Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3
Rule 73 (B) of the Rules of Procedure and Evidence
30 October 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Certification of appeal requested against a decision denying a request for subpoenas to meet with potential Defence Witnesses at out-of-court interviews, Merits should not be considered when addressing an application to certification, No obligation to the Trial Chamber to grant all requested facilities by a party because alleging it needs assistance, Standard to met for a certification of appeal to be granted : no demonstration of an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rule 73 (B) ; Statute, art. 20 (4) (e)

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) ; Appeals Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 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. 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) ; 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) ; 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 Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements, 22 May 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko, Decision on Ntabohali's Motion for Certification to Appeal the Chamber's Decision Granting Kanyabashi's Request to Cross-Examine Ntabohali Using 1997 Custodial Interviews, 1 June 2006 (ICTR-97-21) ; Trial Chamber, The Prosecutor v. Édouard Karemera et al., Decision on Defence Motion for Certification to Appeal Decision Granting Special Protective Measures for Witness ADE, 7 June 2006 (ICTR-98-44)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Duško Tadić, Judgement, 15 July 1999 (IT-94-1) ; 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 Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding, 20 June 2005 (IT-02-54)

S.C.S.L. : Trial Chamber, The Prosecution v. Sam Hinga Norman et al., Decision on motions by the First and Second Accused for leave to appeal the Chamber's decision on their motions for the issuance of a subpoena to the President of the Republic of Sierra Leone., 28 June 2006 (SCSL-04-14)

Introduction

1. The trial in this case started on 19 September 2005. On 12 July 2006, the Chamber denied the Defence request for subpoenas to meet with potential Defence Witnesses DN1, DN2, and DNZ3 ("Impugned Decision").[1] The Defence for Nzirorera now applies to the Chamber for certification to appeal that decision. The Prosecution opposes the Motion.

Discussion

2. The Defence submits that, according to the Appeals Chamber Judgement in the *Tadic* case,

> "[a Trial] Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case."[2]

It claims that by denying the Defence's motions to issue *subpoenas* for DNZ1, DNZ2 and DNZ3, the Chamber failed in its duty to provide those facilities, thereby jeopardizing his right to obtain the attendance and examination of witnesses who may be able to rebut the testimony of prosecution witnesses pursuant to Article 20 (4) (e) of the Tribunal's Statute.

3. The Chamber notes that the Appeals Chamber has held that

> "[t]he Chambers are empowered 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."[3]

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[1] *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-T ("*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.
[2] *Prosecutor v. Tadić*, Case N°IT-94-1-A, Judgement (AC), 15 July 1999, para. 52.
[3] *Prosecutor v. Tadić*, Case N°IT-94-1-A, Judgement (AC), 15 July 1999, para. 52 (emphasis added).

This, however, does not mean that a Chamber must grant all requested facilities by a party because it alleges that it needs assistance. The Chamber must exercise its discretionary power in accordance with the Rules and the Statute. As stated in the Impugned Decision, the Appeals Chamber has determined specific criteria following the outline in the Statute and the Rules, for a Chamber to issue a *subpoena* and to require a prospective witness to attend at a nominated place and time in order to be interviewed.[4] When an Accused is seeking this particular facility, the Chamber must determine whether it can be granted in accordance with the Statute and the Rules.

4. The Defence argues that the requirements set out for granting certification are met in the instant situation. It also submits that when deciding to grant certification, the Chamber should consider the merits of the appeal against the Impugned Decision as recognized by the Trial Chamber in the *Bagosora* case.[5]

5. Rule 73 (B) of the Rules of Procedure and Evidence provides that a decision rendered on Rule 73 motions are without interlocutory appeal except on the Chamber's discretion for the very limited circumstances stipulated in Rule 73 (B). The Trial Chamber has discretion to grant certification when:

> (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) an immediate resolution by the Appeals Chamber may materially advance the proceedings.

6. The moving party must demonstrate that both requirements of Rule 73 (B) are satisfied, and even then, certification to appeal must remain exceptional.[6]

7. This Chamber has already decided that the merits should not be considered when addressing an application to certification.[7] Other Trial Chambers have taken the same position.[8] The Chamber is also of the view that the Defence has improperly relied on the *Bagosora* Chamber's view on this issue. In a recent decision not cited by the Defence, the Trial Chamber in the *Bagosora* case has also clarified its position on 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. It considered that:

> 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. On the other

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[4] *Prosecutor v. Krstić*, Case N°IT-98-33-A, Decision on Application for Subpoenas (AC), 1 July 2003, para. 10; *Prosecutor v. Halilović*, Case N°IT-01-48-AR73, Decision on the Issuance of a Subpoena (AC), 21 June 2004.

[5] The Defence relies upon *Bagosora et. al.*, Decision on Kabiligi Application for Certification Concerning Defence Cross-Examination After Prosecution Cross-Examination (TC), 2 December 2005.

[6] *Prosecutor v. Arsène Shalom Ntahobali and Pauline 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' (TC), 18 March 2004, para. 15; *Prosecutor v. Nyiramasuhuko et al.*, Case N°ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 10.

[7] *Karemera et al.*, Decision on Defence Motion for Certification to Appeal Decision Granting Special Protective Measures for Witness ADE (TC), 7 June 2006, para. 5.

[8] See for example, *The Prosecutor v. Casimir Bizimungu et al.*, Case N°ICTR-99-50-T, 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. "The *Bizimungu* Chamber agreed that whether there was an error of law or abuse of discretion is not an issue to be considered by the Trial Chamber in its determination of a certification to appeal. It emphasized, however, that the word "significant" in the first prong of the Rule, intends the exclusion of minor or trivial issues that arise in the course of the trial; *Prosecutor v. Nyiramasuhuko et al.*, Case N°ICTR-98-42-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 (TC), 4 February 2005, para. 11; *Prosecutor v. Miloševic*, Case N°IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding (TC), 20 June 2005, para. 4.

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.[9]

8. In the light of these principles, the Chamber will now determine whether the Defence has shown that both requirements under Rule 73 (B) are met.

9. The Defence submits that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings because the right of the Accused to a fair trial, and in particular his right to obtain the attendance and examination of witnesses pursuant to Article 20 (4) (e) of the Statute, is greatly jeopardized by the Chamber's denial of access to potential witnesses who may be able to rebut the testimony of prosecution witnesses. To support its application, the Defence relies upon prior Decisions rendered by this Tribunal in the *Bagosora et al.* and *Nyiramasuhuko* cases, as well as a Decision from the Special Court in Sierra Leone.[10] It asserts that the issue at hand is similar to the issues faced in those cases. The Defence also cites other cases that have certified issues concerning the admission and exclusion of evidence, also asserted to be much like the issue at hand, and which have the effect of excluding important potential Defence evidence at the trial.

10. The Defence believes that the resolution of the issue of the Defence obtaining access to potential witnesses by the Appeals Chamber will materially advance the proceedings because this issue is likely to recur as the Defence will request access to more potential Defence witnesses and it will obtain certainty on this issue early in the Prosecution's presentation of evidence and before the Defence begins presenting its case. Should certification be denied and the Trial Chamber be found incorrect in an appeal from a final judgement, the Defence asserts that a new trial would be required to hear the Defence witnesses who had not been originally compelled to testify, thereby significantly delaying the proceedings. The Defence also argues that the potential testimonies are so clearly relevant that since the Chamber did not exercise its power to order a subpoena in this case it is unlikely that it will ever exercise it. Therefore review of the decision will materially advance proceedings.

11. In the Impugned Decision, there has been no general denial of the right of the Accused to examine a witness. Neither has there been a blanket refusal to order *subpoenas* for all potential witnesses who may rebut the testimony of Prosecution witnesses. The Chamber recalls that the Impugned Decision was not concerned with the attendance of witnesses at the trial. It related only to a request to compel attendance at out-of-court interviews. The Chamber was seized of specific requests concerning three potential witnesses and made its ruling on the basis of the information provided by the Defence with respect to these witnesses. No general conclusion can be drawn from the Impugned Decision as to how the Chamber will decide a future motion for subpoena. The Accused is free to submit further requests for *subpoenas* for out-of-court interviews or to compel their attendance in court when the need arises in this case, which the Chamber will evaluate on a case-by-case basis.

12. The Chamber also finds that the Defence misplaces reliance on several decisions, which it analogizes to the present case and uses to support the claim that the issue in question affects the Accused's right to a fair trial. What distinguishes those cases to the present case is that they all concern issues with a broad scope and a general statement of law which affect a large category of documents or witnesses. The Impugned Decision cannot affect a large category of witnesses, nor does it involve a general statement of law because the evaluation of each request for *subpoena* was done on a case-by-case basis, and included an exercise of the Chamber's discretion.

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[9] *Bagosora et al.*, Decision on the Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC), 16 February 2006, para. 4.

[10] *Bagasora et al.*, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses (TC), 21 July 2005; *Bagasora et al.*, Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements (TC), 22 May 2006; *Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko,* Case N°ICTR-97-21-T, Decision on Ntabohali's Motion for Certification to Appeal the Chamber's Decision Granting Kanyabashi's Request to Cross-Examine Ntabohali Using 1997 Custodial Interviews (TC), 1 June 2006; *Prosecution v Norman et. al.*, Special Court for Sierra Leone, Case N°SCSL-04-14-T, 28 June 2006.

13. The Chamber rejects Nzirorera's reliance on the decision from the Special Court for Sierra Leone, which certified a decision from the Trial Chamber after it denied the request to issue a *subpoena* to call the President of Sierra Leone to testify. In that case, the Trial Chamber was divided in its opinion, the very first considering the issue of pre-testimony interview *subpoenas* at the Special Court which it claimed would likely arise again, with the majority decision, a concurring opinion, and a dissenting opinion. It was for these reasons that the Trial Chamber certified its decision.[11] This Tribunal has issued other decisions on subpoenas for pre-testimony interviews and the jurisprudence has enunciated that ultimately, the decision to order a *subpoena* remains discretionary, but also promulgated criteria when the issuance of a *subpoena* would be appropriate which the unanimous Chamber in this case took into consideration in the Impugned Decision.

14. Consequently, the Defence failed to show that the Impugned Decision involved an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Without satisfying the first requirement needed to grant certification to appeal, the Chamber need not continue its analysis and denies the Defence Motion on that basis.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion in its entirety.

Arusha, 30 October 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[11] Prosecution v. Norman et al., at para. 12.

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Decision on Admission of UNAMIR Documents Rule 89 of the Rules of Procedure and Evidence 21 November 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Admission of evidence, Broad discretion of the Trial Chamber to admit any evidence on the basis of two criteria only : the relevancy and the probative value of the evidence, Criteria for the admissibility of an evidence : reliability of the beginning of proof, No need of recognition of the documents by a witness in order to have probative value, Admission into evidence does not constitute a binding determination as to the authenticity or trustworthiness of the document – No dispute on the relevancy of the UNAMIR Situation Reports, Sufficient indicia of reliability, Issue of the admission of the UNAMIR Reports by the witness, Witness not the author the reports – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 89, 89 (C) and 89 (D)

International Cases cited :

I.C.T.R. : 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 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 Request to Admit United Nations Documents into Evidence under Rule 89 (C), 25 May 2006 (ICTR-98-41)

I.C.T.Y. : 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) ; 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) ; Trial Chamber, The Prosecutor v. Miroslav Kvočka et al., Decision on Exhibits, 19 July 2001 (IT-***98-30/1)*** ; Trial Chamber, The Prosecutor v. Jadranko Prlić et al., Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings, 28 April 2006 (IT-04-74) ; Trial Chamber, The Prosecutor v. Jadranko Prlić et al., Decision on Admission of Evidence, 13 July 2006 (IT-04-74)

Introduction

1. The proceedings in the instant case commenced on 19 September 2005. The fourth trial session started on 26 October 2006 with the continuation of the Prosecution's case. On 6 November 2006, the Defence sought the admission of 10 UNAMIR Situation Reports issued in April 1994 as Defence exhibits during the cross-examination of Prosecution Witness ALG.[1] The Prosecution objected to the admission through that witness and rather moved the Chamber to admit all the UNAMIR Situation Reports as exhibits so that they can be used as documents sent by the UNAMIR to the United Nations

[1] T. 6 November 2006; see Documents marked for identification ID. NZ 39 to 49.

Head Quarters in New York and when necessary during the examination of a witness.[2] The Chamber decided to reserve its ruling and invited the parties to file their written submissions thereto by the following day.[3] These submissions were filed by each party on 8 November 2006.[4]

2. Before addressing the specific issue of admission into evidence of the 10 UNAMIR documents, the Chamber will generally deal with the rules governing the admission of evidence.

Deliberations

Rules Governing the Admission of Evidence

3. The Defence for Nzirorera submits that authentication is the first hurdle of admissibility; then even if a document is authentic, it must be relevant before being admitted as an exhibit at the trial. In the Defence's view, the admission of exhibits should be done in connection with the testimony of witnesses.[5] The Defence for Nzirorera also contends that "it is up to each party to determine how much evidence to present behind its documentary evidence so as to give it more weight". In its view, the Chamber should not filter the admission of authentic and relevant documents, but should determine the weight to be given to the exhibits during its deliberations after it has heard all of the evidence.

4. According to Rule 89 of the Rules, the Tribunal's Rules of Procedure and Evidence govern the proceedings.[6] The Chamber is not bound by national rules of evidence and may, in cases not otherwise provided for in the Rules, 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.[7] The Chamber has also broad discretion under Rule 89 (C) of the Rules to admit any evidence provided on the basis of two criteria only: the evidence must be *relevant* and have *probative value*. While a Chamber always retains the competence under Rule 89 (D) to request verification of the authenticity of evidence obtained out of court,

> "to require absolute proof of a document's authenticity before it could be admitted would be to require a far more stringent test than the standard envisioned by Sub-rule 89 (C)".[8]

According to the Appeals Chamber, at the stage of admissibility, only the beginning of proof that evidence is reliable, namely, that sufficient indicia of reliability have been established, is required for evidence to be admissible.[9]

5. Trial Chambers of both *ad hoc* Tribunals have held that documents need not be recognized by a witness in order to have probative value.[10] There is no prohibition on the admission of evidence simply

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[2] T. 6 November 2006, p. 28.
[3] T. 6 November, p. 29.
[4] Joseph Nzirorera's Submissions Concerning the Admission of Exhibits; Prosecutor's Submission Concerning Admission of UNAMIR Documents; Soumission d'Edouard Karemera concernant l'admission des documents de la MINUAR; Mémoire de M. Ngirumpatse sur la question du versement en prevue des pièces à conviction dans le cadre des auditions de témoin.
[5] The Defence relies, among other things, upon two decisions delivered by the International Criminal Tribunal for Former Yugoslavia in the *Prlic* (13 July 2006) and *Milutinovic* cases (10 October 2006).
[6] Rule 89 of the Rules reads as follows:
(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.
[7] Rules of Procedure and Evidence, Rules 89 (A) and (B).
[8] *Prosecutor v. 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.
[9] *Prosecutor v. Nyiramasuhuko*, Case N°ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 7; *Prosecutor v. Georges Anderson Rutaganda*, Case N°ICTR-96-3-A, Judgement (AC), para. 33; *Prosecutor v. 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.

on the grounds that the purported author of that evidence has not been called to testify, and Trial Chambers have permitted the admission of documentary evidence even though not submitted by or through a witness. This practice is consistent with Rule 89 (A) of the Rules according to which Trial Chambers are not bound by any national rules of evidence. Furthermore, as the Trial Chamber noted in the *Blaskic* Judgement, the proceedings are conducted by professional Judges who can admit a given piece of evidence and then evaluate it to determine its due weight, having regard to the circumstances in which it was obtained, its actual contents and its credibility in light of all the evidence tendered.[11]

6. If a witness declares that he or she recognises a document, and the Trial Chamber is satisfied that the document is relevant and has probative value, it can be admitted through that witness.[12] However, where a witness states that he or she does not recognise a document that is not presented as a prior inconsistent statement of the witness, it cannot be admitted through the witness.

7. Finally, the admission into evidence does not in any way constitute a binding determination as to the authenticity or trustworthiness of the document. These are to be assessed by the Chamber at a later stage in the case when assessing the probative weight to be attached to the evidence.[13]

Admission of UNAMIR Documents

8. The Defence for Nzirorera moves the Chamber to admit 10 UNAMIR Situation reports[14] through Witness ALG. It contends that these documents are authentic and relevant by some connection with the testimony of the witness. The Prosecution responds that these reports cannot be offered into evidence through Witness ALG and cannot be used to impeach the witness as he knows nothing about them. It submits that these documents, however, are relevant to the Indictment and probative of some historical background and therefore suggests preparing a comprehensive file of all relevant UNAMIR situation reports, properly indexed in chronological order, to cover the period 1 January through 19 July 1994. In the Prosecution's view, the Chamber may then determine their probative value by weighing their contents in relation to the testimony of witnesses who specifically comment on a particular situation report, or who comment on a particular portion of a particular situation report. The Defence for each Accused oppose the Prosecution's suggestion. They submit that each party should only tender the UNAMIR documents that are relevant to their own case and that they will choose in the context of the testimony of the Prosecution and Defence witnesses.

9. In the present case, there is no dispute that the UNAMIR Situation Reports marked for identification[15] are relevant to the case and present sufficient indicia of reliability to be admissible. The Chamber, however, is not satisfied that the Defence has shown that the documents can be admitted through the witness as he did not recognise the documents and did not adopt their contents. The 10 UNAMIR Situation Reports marked for identification cannot therefore be entered through Witness ALG.

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[10] *Prosecutor v. Bagosora et al.*, Case N°ICTR-98-41-T, Decision on Request to Admit United Nations Documents into Evidence under Rule 89 (C) (TC), 25 May 2006, para. 4; *Prosecutor v. Tihomir Blaskic*, Case N°IT-95-14-T, Judgement (TC), 3 March 2000, para. 35; *Prosecutor v. Kvočka et al.*, Decision on Zoran Zigic's Motion For Rescinding Confidentiality of Schedules Attached to the Indictment Decision On Exhibits (TC), 19 July 2001; *Prosecutor v. Prlic et al.,* IT-04-74-PT, Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings (TC), 28 April 2006; *Prosecutor v. Prlic et al.,* IT-04-74-T, Decision on Admission of Evidence (TC), 13 July 2006.

[11] *Prosecutor v. Tihomir Blaskic*, Case N°IT-95-14-T, Judgement (TC), 3 March 2000, para. 35.

[12] *Prosecutor v. Tihomir Blaskic*, Case N°IT-95-14-T, Decision on the Defence Motion For Reconsideration of the Ruling to Exclude From Evidence Authentic And Exculpatory Documentary Evidence (TC), 30 January 1998, paras. 10 and 11.

[13] *Prosecutor v. Nyiramasuhuko*, Case N°ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 7; *Prosecutor v. Georges Anderson Rutaganda*, Case N°ICTR-96-3-A, Judgement (AC), para. 33; *Prosecutor v. 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.

[14] Documents marked for identification ID. NZ 39 to 49, T. 6 November 2006.

[15] Marked ID. NZ 39 to 49.

10. In the Chamber's view, UNAMIR documents could be admitted through the author of the documents, a person who knows of the documents or could speak to their contents. In that respect, the Chamber notes that both Prosecution and Defence for Nzirorera agree that the next Prosecution Witness, Frank Claeys, will be able to speak to their content and therefore to offer them into evidence.

11. The Chamber is also of the view that UNAMIR Documents could be admitted without being tendered during the examination of a witness, provided that the moving party shows, for each document, its relevancy and probative value. In that respect, it is noteworthy that Trial Chamber I in the *Bagosora et al*. case, quoted by the Defence for Nzirorera, granted the admission of official United Nations correspondence arising from the UNAMIR peacekeeping mission in Rwanda in 1994 *without being recognized by a witness*.[16]

12. The Prosecution's suggestion to provide the Chamber with a bundle of UNAMIR documents so that the Chamber determines which document has probative value is not appropriate. For evidence to be admissible, each party must demonstrate its relevance and probative value.

Guidelines for the Admission of Evidence

13. The Chamber refers to the above principles governing the admissibility of documentary evidence and directs the parties are to take them into account when presenting or objecting to the admission of such evidence.

14. The Chamber further notes that the Defence for Nzirorera is not averse to informing the Prosecution in advance of the testimony of an upcoming witness whether it intends to object to a document to be offered through that witness. The Chamber considers that the expeditiousness of the proceedings may be enhanced if such a practice be systematically adopted by the parties.

15. The Defence for Nzirorera also requests that a document which is submitted for admission but rejected by the Chamber should be marked for identification so that it can be referred to by subsequent witnesses and will be available for examination by the Appeals Chamber to determine whether the Trial Chamber erred in refusing to admit such document.

16. In the Chamber's view, there is no need to adopt a general rule that each document which are referred to in court and are not admitted should be marked for identification. The Chamber will continue to decide on a case-by-case basis when marking for identification a document will be warranted, bearing in mind the transparency of the proceedings and the interests of justice. In any event, each document marked for identification will not be admitted until the Chamber makes a ruling on admissibility, either orally or in writing, at which point it will be given an official exhibit number.

FOR THE ABOVE REASONS, THE CHAMBER

I. DENIES the Defence Motion to admit into evidence, through Witness ALG, 10 UNAMIR Situation Reports marked for identification ID. NZ 39 to 49;

II. DENIES the Prosecution's application to enter all the UNAMIR Documents into evidence;

III. REQUESTS the Parties to apply and take into consideration the rules governing the admission of evidence as stated above when seeking or objecting to the admission of evidence; and

IV. REQUESTS each Party to inform the opposite Party in advance of the testimony of an upcoming witness whether it intends to object to a certain exhibit to be offered through that witness.

[16] *Prosecutor v. Bagosora et al*., Case N°ICTR-98-41-T, Decision on Request to Admit United Nations Documents into Evidence under Rule 89 (C) (TC), 25 May 2006, para. 4.

Arusha, 21 November 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Decision on Defence Motion for Exclusion of Witness GK's Testimony or for Request for Cooperation from Government of Rwanda
Articles 20 and 28 of the Statute ; Rules 66 and 98 of the Rules of Procedure and Evidence
27 November 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Exclusion of testimony, Computation of the 60-day deadline to disclose testimonies before the date set for trial, Exclusion of evidence is at the extreme end of a scale of measures available to the Chamber in addressing delay in disclosure, No demonstration that the Defence suffered any prejudice from the late disclosure of the witness' statement, Duty of the Defence of making its own independent efforts to secure evidence it wishes to use at trial other than exculpatory material in the possession of the Prosecution, Development of a practice of requiring the intervention of the Prosecution to obtain and disclose Rwandan judicial records of a Prosecution witness – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rules 54, 66, 66 (A) (ii) and 98 ; Statute, art. 20 and 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 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. Aloys Simba, Decision on the Admissibility of the Evidence of Witness KDD , 1 November 2004 (ICTR-2001-76) ; 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, 17 December 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Request for Assistance Pursuant to Article 28 of the Statute, 27 May 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Motions to Compel Inspection and Disclosure and to direct Witnesses to Bring Judicial and Immigration Records, 14 September 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guicahaoua; Defence Motion to Exclude the Witness' Testimony; and Trial Chamber's Order to Show Cause, 1 February 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Defence Motion to Report Government of a Certain State to United Nations Security Council and on Prosecution Motions under Rule 66 (C) of the Rules), 15 February 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Oral Decision on Stay of Proceedings, 16 February 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Defence Motions to Exclude Testimony of Professor André Guichaoua, 20 April 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. François Karera,

Decision on Defence Motion for Additional Disclosure, 1 September 2006 (ICTR-01-74) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., *Decision on Defence Oral Motions for Exclusion of XBM's Testimony, for Sanctions Against the Prosecution and Exclusion of Evidence* Outside the Scope of the Indictment, 19 October 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Reconsideration of Protective Measures for Prosecution Witnesses, 30 October 2006 (ICTR-98-44)

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. Mile Mrkšić, Appeal Chamber Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party, 30 July 2003 (IT-95-13/1) ; Appeals Chamber, The Prosecutor v. Sejér Halilović, Decision on Issuance of Subpoenas, 21 June 2004 (IT-01-48)

Introduction

1. The proceedings in the instant case commenced on 19 September 2005. Prosecution Witness GK is scheduled to be called to testify during the fourth trial session between 26 October 2006 and 15 December 2006. The Defence for Nzirorera now moves the Chamber to exclude his forthcoming testimony as relief for the Prosecution's alleged serial violations of its disclosure obligations in the present case.[1] Should the Chamber decline to grant this remedy, the Defence requests an order for the cooperation of the Rwandan authorities in order to obtain some documents identified in a confidential annex to the Motion, and for the postponement of the cross-examination of Witness GK until those documents have been disclosed to the Defence. The Prosecution opposes the Motion in its entirety.

Deliberations

2. According to the Defence, since the Prosecution failed to disclose the testimony of Witness GK in the *Ndindabahizi* trial no later than 60 days before the date set for trial, it violated its disclosure obligations as prescribed under Rule 66 (A) (ii) of the Rules of Procedure and Evidence.[2] The Defence therefore contends that the forthcoming testimony of Witness GK should be excluded as an appropriate remedy for this failure.

3. The 60-day deadline prescribed by Rule 66 (A) (ii) of the Rules must be read in connection with the rights of the accused, and in particular with his or her right to have adequate time and facilities to prepare his or her case and to examine, or have examined, the witness against him or her.[3] Late disclosure will not necessarily offend the rights of the accused.[4] When the disclosure of material which could assist the Accused to impeach the testimony of a Prosecution witness is made so late that it has an impact on the fairness of the trial, different types of remedy have been utilized by Trial Chambers. The evidence could be excluded, the trial or the testimony could be postponed, the cross-examination of the witness could be deferred, or the witness could be re-called.[5] Exclusion of evidence is at the

[1] Joseph Nzirorera's Motion to Exclude Testimony of Witness GK or for Request for Cooperation to Government of Rwanda, filed on 13 November 2006.
[2] Rule 66 (A) (ii) reads as follows:
Subject to the provisions of Rules 53 and 69;
The Prosecutor shall disclose to the Defence:
[…] (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.
[3] See Tribunal's Statute, Articles 20 (4) (b) and (e).
[4] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-T ("*Karemera et al.*"), Oral Decision on Stay of Proceedings (TC), T. 16 February 2006, pp.5-15.
[5] *Karemera et al.*, Oral Decision on Stay of Proceedings (TC), T. 16 February 2006, pp.5-15; *Bagosora et al.*,Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 17 December 2004, para. 8.

extreme end of a scale of measures available to the Chamber in addressing delay in disclosure and violation of the rights of the accused.[6]

4. In the present case, the Defence has not shown, or even claimed, that Joseph Nzirorera has suffered any prejudice from the late disclosure of the witness' statement which would justify such an extreme remedy. In that respect, it must be noted that the document was disclosed more than three months before the witness was expected to testify and that other statements had already been disclosed to the Defence in a timely manner, such that the Accused had been given information on the anticipated evidence of the witness and issues affecting his credibility.[7]

5. The Defence also requests the exclusion of the anticipated testimony of Witness GK due to other incomplete disclosures. During a meeting held on 10 November 2006, it learned from Witness GK that he had provided "numerous signed statements and testimony about the 1994 events in Rwanda which have never been disclosed to the Defence".[8] The Defence recalls that following the Chamber's Decision of 14 September 2005, the Prosecution had to use its best efforts to obtain and disclose these materials.[9] In the Defence's view, the minimal best efforts that could have been expected from the Prosecution would have been to have interviewed the witness in advance of his testimony, and to have identified and collected the missing documents from the witness himself, who has them in Rwanda. The Defence concludes that the Prosecution has therefore once again violated a Chamber's order and that exclusion of the testimony of Witness GK is an appropriate remedy for the serial disclosure violations by the Prosecution in this case.

6. As a general rule, the Defence must first make its own independent efforts to secure evidence it wishes to use at trial other than exculpatory material in the possession of the Prosecution.[10] In that respect, it is admitted that the Defence may have a legitimate need to interview a witness prior to trial in order to properly prepare its case and has therefore the right to contact and interview a potential witness.[11]

7. Under Rules 98 or 54 of the Rules, a practice has also developed, subject to considerations of the interests of justice, of requiring the intervention of the Prosecution to obtain and disclose certain records, specifically the Rwandan judicial records of a Prosecution witness.[12] Trial Chambers have resorted to these provisions, for instance, when the information could be considered as material for the preparation of the Defence case or to determine the credibility of Prosecution witnesses.[13]

8. In other situations, Trial Chambers have requested, pursuant to Article 28 of the Tribunal's Statute, the assistance and cooperation of some States in order to obtain documents.[14] According to the

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[6] *Karemera et al*., Decision on Defence Oral Motions for Exclusion of XBM's Testimony, for Sanctions Against the Prosecution and Exclusion of Evidence Outside the Scope of the Indictment (TC), 19 October 2006; *Karemera et al*., Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guicahaoua; Defence Motion to Exclude the Witness' Testimony; and Trial Chamber's Order to Show Cause (TC), 1 February 2006, para. 11; *Karemera et al*., Decision on Defence Motions to Exclude Testimony of Professor André Guichaoua (TC), 20 April 2006, para. 8.

[7] See for e.g.: Statements and other material disclosed on 14 February 2005 and 23 March 2005.

[8] This assertion is not disputed by the Prosecution.

[9] *Karemera et al*., Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to bring Judicial and Immigration Records (TC), 14 September 2005, para. 11.

[10] *Prosecutor v. Aloys Simba*, Case N°ICTR-2001-76-T, Decision on Matters Related to Witness KDD's Judicial Dossier (TC), 1 November 2004, para. 10.

[11] *Prosecutor v. Mile Mrksic*, Case N°IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party (AC), 30 July 2003; *Prosecutor v. Sefer Halilovic*, Case N°IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 12 to 15. The right to interview a potential witness is not unlimited and is generally subject to the witness' consent, see *Karemera et al*., Decision on Reconsideration of Protective Measures for Prosecution Witnesses (TC), 30 October 2006.

[12] *Karemera et al*., Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to bring Judicial and Immigration Records (TC), 14 September 2005, paras. 7-8; *Prosecutor v. François Karera*, Case N°ICTR-01-74-, Decision on Defence Motion for Additional Disclosure (TC), 1 September 2006, paras. 5-7.

[13] Ibidem.

[14] See for instance, *Prosecutor v. Bagosora et al*., Case N°ICTR-98-41-T, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 10 March 2004, para. 4; *Prosecutor v. Bagosora et al*.,

established jurisprudence, a request to a Chamber to make such an order must set forth the nature of the information sought; its relevance to the trial; and the efforts that have been made to obtain it.[15]

9. Due to the particular circumstances of the case, the Chamber has used both its power under Rule 98 and Article 28 of the Statute to assist the Defence in the preparation of its case. On 14 September 2005, the Chamber first requested the Prosecution to use its best efforts to obtain and disclose statements made to Rwandan authorities and records pertaining to the criminal prosecution of Prosecution witnesses for whom such materials have not been fully disclosed.[16] Then, in February 2005, the Chamber requested the assistance of the Rwandan authorities to provide the Registry with all statements taken or received from some Prosecution witnesses, including GK, as well as judgements rendered by the Rwandan authorities against these witnesses.[17]

10. However, these decisions in no way undermined the Defence's obligation to prepare its case.[18] In the present situation, the Defence gives no reason why it did not previously meet with Witness GK while conducting its investigations when it could have obtained the said documents itself, nor does Counsel for Nzirorera allege that the witness refused to meet with him.

11. Moreover, according to various correspondences recently provided at the Chamber's request,[19] it appears that the Office of the Prosecutor, including the Prosecutor himself, made several efforts in order to obtain from the Rwandan authorities material concerning Witness GK. Recently, the Prosecution also undertook a further step to interview the witness concerning his judicial records, statements and testimonies he gave before Rwandan authorities.[20] As a result, three documents were collected from the witness and disclosed to the Defence.[21] It must be noted that it is only recently that the Defence has suggested that the Prosecution should interview some witnesses in order to obtain the information necessary to make a specific request for the documents to the Rwandan Government.[22]

12. The Chamber further notes that the Defence does not allege any prejudice resulting from the current situation. Exclusion of the forthcoming testimony of Witness GK is therefore not warranted.

13. In the alternative, the Defence moves the Chamber to request the cooperation of the Rwandan authorities in order to obtain the documents identified in a confidential annex to the Motion, and to postpone the cross-examination of Witness GK until those documents have been disclosed to the Defence.

14. Although the Defence met with the witness and therefore should have collected preliminary information as to the content of the documents sought, it does not show how they could be relevant to this trial. In addition, the Rwandan authorities have recently indicated that they are "willing to provide

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Case N°ICTR-98-41-T, Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana (TC), 25 May 2004, para. 6; *Prosecutor v. Bagosora et al.*, Case N°ICTR-98-41-T, Decision on Request for Assistance Pursuant to Article 28 of the Statute (TC), 27 May 2005, para. 2; see also *Prosecutor v. Blaskic*, Case N°IT-95-14, 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, par. 32.

[15] Ibidem.

[16] *Karemera et al.*, Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to bring Judicial and Immigration Records (TC), 14 September 2005.

[17] *Karemera et al.*, Decision on Motions for Order for Production of Documents by The Government of Rwanda and For Consequential Orders (TC), 15 February 2006.

[18] *Karemera et al.*, Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to bring Judicial and Immigration Records (TC), 14 September 2005, para. 11.

[19] Prosecutor's Submission Concerning Best Efforts to Obtain Rwanda Judicial Records of Witness HH, filed on 17 November 2006, following the Chamber's Order made orally on 16 November 2006.

[20] Will-Say Statement dated 7 November 2006.

[21] Prosecution's Response; disclosure made on 10 November 2006.

[22] Joseph Nzirorera's Motion for Further Order to Obtain Documents in Possession of Government of Rwanda, filed on 18 October 2006.

to any party, any other documents that can be specified to ease verification of their existence".[23] An Order requesting the assistance of the Rwandan authorities is not therefore warranted at this stage.

15. Since the Defence does not show or allege any prejudice to the rights of the Accused or impact on the fairness of the trial, the Chamber does not find any reason to postpone the cross-examination of Witness GK. In any event, the Defence may draw the Chamber's attention to inconsistencies between the testimony of the witness before this Chamber and any declaration or record obtained subsequently. If prejudice can be shown from its inability to put these inconsistencies to the witness, the Defence may file a motion for him to be recalled.

FOR THE ABOVE REASONS, THE CHAMBER DENIES the Defence Motion in its entirety.

Arusha, 27 November 2006, done in English.

[Signed]: Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[23] Letter dated 13 October 2006, following Chamber's Decision on Defence Motion to Report Government of Rwanda to United Nations Security Council (TC), 2 October 2006.

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Decision on Motions for Reconsideration
1 December 2006 (ICTR-98-44- AR73 (C))

(Original: English)

Appeals Chamber

Judges : Mohamed Shahabuddeen, Presiding Judge ; Mehmet Güney ; Liu Daqun ; Theodor Meron ; Wolfgang Schomburg

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Discretionary power of the Appeals Chamber to reconsider a decision if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice, Allegation of mischaracterization of the facts of common knowledge : rejected, Contestation of the non-international nature of the 1994 conflict in Rwanda : notorious fact not subject to a reasonable dispute, Contestation of the existence of the genocide as a fact of common knowledge : rejected, Difference between the taking of judicial notice of the fact of genocide and the determination that an accused is individually criminally responsible for the crime of genocide, Contestation of the discretionary power of the Chamber to take judicial notice : rejected – Allegation that the taking of judicial notice affects the presumption of innocence, Judicially noticed facts do not relieve the Prosecution of its burden of proof – Motion denied

International Instruments cited :

Rules of Procedure and Evidence, rules 94 (A) and 94 (B) ; Statute, art. 2 and 20

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. Laurent Semanza, Judgement, 20 May 2005 (ICTR-97-20) ; Appeals Chamber, The Prosecutor v. Juvénal Kajelijeli, Judgement, 23 May 2005 (ICTR-98-44A)

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Goran Jelisić, Judgment, 5 July 2001 (IT-95-10) ; Appeals Chamber, The Prosecutor v. Radislav Krstić, Judgement, 19 April 2004 (IT-98-33)

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

(i) "Motion for Review of the Appeals Chamber Decision of 16 June 2006 on the Prosecutor's Interlocutory Appeal of Decision on Judicial Notice" filed by Édouard Karemera on 7 August 2006 ("Karemera Motion");[1]

(ii) "Joseph Nzirorera's Motion for Reconsideration and Modification of Judicial Notice Decision" filed on 17 August 2006 ("Nzirorera Motion"); and

(iii) "Mathieu Ngirumpatse's Motion for Reconsideration of the Appeal Chamber 16 June 2006 Decision Following the Prosecutor's Interlocutory Appeal of Decision on Judicial Notice" filed on 29 August 2006 ("Ngirumpatse Motion") ("Motions" and "Applicants", collectively).

[1] Although the English translation of the motion is designated a motion for «review», Mr. Karemera in fact seeks reconsideration of the Appeals Chamber's decision, as is clear from the original motion, which was entitled "*Demande en reconsidération de la décision de la Chambre d'Appel en date du 16 juin 2006 suite á l' appel interlocutoire du Procureur de la décision relative au constat judiciaire*" 3 August 2006.

2. The Prosecution responded to each of the Motions,[2] and the Applicants replied.[3]

I. Background

3. On 16 June 2006, the Appeals Chamber issued the "Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice" ("Decision on Judicial Notice"),[4] in which it ordered Trial Chamber III to take judicial notice of the following three facts:[5]

> (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;
>
> (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.[6]

The Appeals Chamber also remanded the matter to the Trial Chamber for consideration of certain facts, in a manner consistent with the Decision on Judicial Notice.[7]

4. The Applicants now move the Appeals Chamber to reconsider the Decision on Judicial Notice. Mr. Karemera submits that reconsideration of the Decision on Judicial Notice is required in the interests of justice and to ensure full respect for the rights of the Defence, in keeping with the exigencies of international justice.[8] He requests that the Appeals Chamber rule *de novo* on the Prosecutor's Interlocutory Appeal and uphold the Trial Chamber's Decision of 9 November 2005.[9]

5. Nzirorera contends that taking judicial notice of controversial matters such as the occurrence of genocide, the existence of a widespread or systematic attack, and the nature of the armed conflict is the product of a clear error in reasoning, and accordingly requests the Appeals Chamber to determine that such matters are inappropriate for judicial notice.[10] Should the Appeals Chamber decline to make such a determination, Mr. Nzirorera requests a modification of the Decision on Judicial Notice to clarify that judicial notice of genocide does not include the existence of a plan or campaign of genocide, and to provide a margin of discretion to the Trial Chamber to determine whether the facts of

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[2] "Prosecutor's Response to the 'Demande, Formulée par Edouard Karemera, en Reconsideration de la Décision de la Chambre d'Appel en date du 16 juin 2006, suite à l' Appel Interlocutoire du Procureur de la Décision Relative au Constat Judiciaire'" 15 August 2006 ("Karemera Response"); "Prosecutor's Response to 'Joseph Nzirorera's Motion for Reconsideration and Modification of Judicial Notice Decision'", 28 August 2006 ("Nzirorera Response"); "Prosecutor's Response to 'Mathieu Ngirumpatse's Motion for Reconsideration of the 16 June 2006 Decision of the Prosecutor's Interlocutory Appeal on Judicial Notice'", 4 September 2006 ("Ngirumpatse Response").

[3] "Édouard Karemera's Reply to the 'Response du Procureur à La Demande, Formulée par Edouard Karemera, en Reconsideration de la Décision de la Chambre d'Appel en date du 16 juin 2006, suite á l' Appel Interlocutoire du Procureur de la Décision Relative au Constat Judiciaire'", 31 August 2006 ("Karemera Reply"); "Reply Brief: Joseph Nzirorera's Motion for Reconsideration and Modification of Judicial Notice Decision", 31 August 2006 ("Nzirorera Reply"); "Ngirumpatse's Reply in Respect of the Motion for Reconsideration of the 16 June 2006 Appeals Chamber Decision on the Procesecutor's Interlocutory Appeal of Judicial Notice", 1 September 2006 ("Ngirumpatse Reply").

[4] *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.

[5] Decision on Judicial Notice, para. 57.

[6] *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.

[7] Decision on Judicial Notice, para. 57.

[8] Karemera Motion, p. 11.

[9] Karemera Motion, p. 11.

[10] Nzirorera Motion, para. 24. Mr. Nzirorera endorsed the submissions of Mr. Karemera and requested that they also be considered as part of his appeal.

common knowledge should be admitted at this stage of his trial.[11] Mr. Ngirumpatse endorses the submissions of the other Applicants.[12]

II. Discussion

6. The Appeals Chamber may reconsider a previous interlocutory decision under its inherent discretionary power if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice.[13] Bearing this standard of review in mind, the Appeals Chamber will consider the alleged errors of law and miscarriages of justice advanced by the Applicants.

A. Alleged Errors of Reasoning

1. Facts of Common Knowledge

7. Karemera submits that the facts which the Appeals Chamber characterised as facts of common knowledge in the Decision on Judicial Notice are not irrefutable.[14] He argues that, in principle, judicial notice concerns only manifestly indisputable facts.[15] He states that in his trial, the testimonies of seven Prosecution witnesses do not support the Prosecution's theories on which the Appeals Chamber relied in the Decision on Judicial Notice.[16] He also argues that these facts are the subject of debate and disagreement among reasonable people, including highly renowned experts, some of whom have already testified before the Tribunal, such as Father De Souter, Professor Strizek, Professor Reyntjens, and Bernard Lugan,[17] and therefore judicial notice should not have been taken of them.[18] The Prosecution responds that these facts are a matter of common knowledge, reasonably irrefutable and not controversial.[19]

8. Appeals Chamber recalls that whether a fact qualifies as "a fact of common knowledge" under Rule 94 (A) is a legal question.[20] This determination does not turn on evidence introduced in a particular case.[21] Mr. Karemera's reference to witness testimonies and opinions of persons who, according to him, are renowned experts demonstrates no error of reasoning in the Decision on Judicial Notice.

2. The Nature of the Conflict

9. Mr. Karemera contends that the non-international character of the conflict is disputed in his case and therefore cannot be a fact of common knowledge.[22] In support of this contention, he notes that in other cases before the Tribunal there is evidence of an international conflict involving several countries.[23] He also refers to expert reports and publications which, in his view, establish the international character of the Rwandan conflict.[24]

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[11] Nzirorera Motion, para. 25.
[12] Ngirumpatse Motion, para. 3.
[13] See, e.g., *Juvénal Kajelijeli v. The Prosecutor,* Case N°ICTR-98-44A-A, Judgement, 23 May 2005, para. 203 ("*Kajelijeli* Appeal Judgement").
[14] Karemera Motion, p. 4.
[15] Karemera Motion, p. 4.
[16] Karemera Motion, p. 3.
[17] Karemera Motion, p. 5.
[18] Karemera Motion, p. 5.
[19] Karemera Response, para. 11.
[20] Decision on Judicial Notice, para. 23.
[21] Decision on Judicial Notice, para. 23.
[22] Karemera Motion, p. 4.
[23] Karemera Motion, p. 4
[24] Karemera Motion, p. 5.

10. The Prosecution responds that the publications cited by Mr. Karemera simply reiterate the relationship between the various countries and Rwanda before, during, and after the genocide[25] and that they do not qualify this conflict as international.[26]

11. The Appeals Chamber recalls that in the Decision on Judicial Notice, it relied on its findings in the *Semanza* Appeal Judgment where it held that the existence of a non-international armed conflict is a notorious fact not subject to a reasonable dispute.[27] The fact that there may have been evidence in other cases before the Tribunal which alluded to the conflict being of an international character and that some reports and publications may express a similar view does not demonstrate a clear error in holding that it is a fact of common knowledge that the conflict in Rwanda was of a non-international character. Furthermore, the Appeals Chamber has already indicated above that whether a fact is one of common knowledge is a legal question, the answer to which does not turn on the evidence introduced in a particular case. The Appeals Chamber finds that Mr. Karemera has failed to show any error of reasoning on this point that would warrant reconsideration of the Decision on Judicial Notice.

3. Genocide

12. Mr. Karemera contends that the Appeals Chamber incorrectly interpreted Resolution 955[28] in relation to the taking of judicial notice of genocide in Rwanda.[29] He argues that while Resolution 955 may refer to genocide in Rwanda, it makes no reference to genocide against the Tutsi ethnic group, contrary to the Appeals Chamber's assertion.[30] Mr. Ngirumpatse argues that even if Resolution 955 states that there was genocide in Rwanda, this cannot render moot any debate before the Tribunal, as it would deprive the Tribunal of its jurisdiction to hear and decide cases, and force it to endorse decisions that are essentially political.[31] The Prosecution responds that in referring to Resolution 955, the Appeals Chamber was making reference to basic facts that were widely known and irrefutable, such as the vast campaign of killing intended to destroy in whole or in part Rwanda's Tutsi population.[32]

13. The Appeals Chamber recalls that in the Decision on Judicial Notice it reasoned as follows:

> The Appeals Chamber agrees with the Prosecution: the fact that genocide occurred in Rwanda in 1994 should have been recognized by the Trial Chamber as a fact of common knowledge. Genocide consists of certain acts, including killing, undertaken with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. There is no reasonable basis for anyone to dispute that, during 1994, there was a campaign of mass killing intended to destroy, in whole or at least in very large part, Rwanda's Tutsi population, which (as judicially noticed by the Trial Chamber) was a protected group. That campaign was, to a terrible degree, successful; although exact numbers may never be known, the great majority of Tutsis were murdered, and many others were raped or otherwise harmed. These basic facts were broadly known even at the time of the Tribunal's establishment; indeed, reports indicating that genocide occurred in Rwanda were a key impetus for its establishment, as reflected in the Security Council resolution establishing it and even the name of the Tribunal. During its early history, it was valuable for the purpose of the historical record for Trial Chambers to gather evidence documenting the overall course of the genocide and to enter findings of fact on the basis of that evidence. Trial and Appeal Judgements thereby produced (while varying as to the responsibility of particular accused) have unanimously and decisively confirmed the occurrence of genocide in Rwanda, which has also been documented by countless books, scholarly articles, media

[25] Karemera Response, para. 16.
[26] Karemera Response, para. 16.
[27] Decision on Judicial Notice, para. 29, referring to *Prosecutor v. Semanza*, Case N°ICTR-97-20-A, Judgement, 20 May 2005, para. 192 (footnotes omitted) ("*Semanza* Appeal Judgment").
[28] S/RES/955 (1994), 8 November 1994 ("Resolution 955").
[29] Karemera Motion, p. 7.
[30] Karemera Motion, p. 6.
[31] Ngirumpatse Reply, para. 3.
[32] Karemera Response, para. 21.

> reports, U.N. reports and resolutions, national court decisions, and government and NGO reports. At this stage, the Tribunal need not demand further documentation. The fact of the Rwandan genocide is a part of world history, a fact as certain as any other, a classic instance of a "fact of common knowledge".[33]

14. Mr. Karemera's contention that the Appeals Chamber misinterpreted Resolution 955 is baseless. In the Decision on Judicial Notice, the Appeals Chamber referred to Resolution 955 in finding that "reports indicating that genocide occurred in Rwanda were a key impetus for its establishment" and that therefore the basic facts of the genocide "were broadly known even at the time of the Tribunal's establishment".[34] This resolution was one of the many authorities, which included trial and appeal judgments, that the Appeals Chamber relied upon in determining that the Trial Chamber erred in refusing to take judicial notice of the fact of the Rwandan genocide.

15. Mr. Karemera contends that the Appeals Chamber erred in law when it relied on Article 2 of the Tribunal's Statute to take judicial notice of the crime of genocide.[35] He questions, in light of this contention, whether it is possible to take judicial notice of a crime which requires a determination of the elements of *actus reus* and *mens rea* or whether these elements should be adduced from irrefutable evidence.[36] The Prosecution responds that Article 2 of the Statute was not used in support of the Decision on Judicial Notice but rather to define genocide and to determine its elements.[37]

16. The Appeals Chamber finds no merit in Mr. Karemera's contention on this point. There is a significant difference between the taking of judicial notice of the fact of genocide and the determination that an accused is individually criminally responsible for the crime of genocide. The former gives a factual context to the allegations of the crime of genocide. The latter requires a finding of whether the elements of the crime of genocide, such as *actus reus* and *mens rea*, exist in order to ascertain whether an accused is responsible for the crime. Consequently, the taking of judicial notice of genocide does not, in itself, go to the alleged conduct or acts of the Applicants as charged in the indictment.[38]

17. Mr. Nzirorera submits that the Appeals Chamber expanded the Prosecution's request from one of judicial notice that genocide occurred in Rwanda to judicial notice of a nationwide campaign of genocide.[39] He argues that it is one thing to believe that some people killed in Rwanda with the subjective intention of ridding the country of Tutsis, which would be sufficient for genocide. However, in his view, it is completely another matter, particularly in the trial of the country's leaders, to take judicial notice of a nationwide campaign of genocide.[40]

18. Mr. Nzirorera states that the theory of a nationwide campaign of genocide is being debated in cases before the Tribunal, and that in his case it has been disputed by Prosecution witnesses.[41] According to Mr. Nzirorera, it is incongruous to suggest that a plan or campaign of genocide is a fact of common knowledge when it was unknown to the Prosecution's own highly placed witnesses.[42]

19. The Prosecution responds that its request for judicial notice was clearly confined to the taking of judicial notice of the occurrence of genocide[43] and that the Appeals Chamber directed the Trial Chamber to take judicial notice of the occurrence of genocide in Rwanda in 1994.[44]

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[33] Decision on Judicial Notice, para. 35 (internal citations omitted).
[34] Decision on Judicial Notice, para. 35.
[35] Karemera Motion, p. 7.
[36] Karemera Motion, p. 7.
[37] Karemera Response, para. 20.
[38] Semanza Appeal Judgment, para. 192.
[39] Nzirorera Motion, para. 8.
[40] Nzirorera Motion, para. 9.
[41] Nzirorera Motion, para. 10, referring to the testimonies of Prosecution Witnesses G and T.
[42] Nzirorera Motion, para. 12.
[43] Nzirorera Response, para. 10.
[44] Nzirorera Response, para. 14.

20. Mr. Nzirorera submits in reply that by taking judicial notice of genocide, the Trial Chamber may infer the existence of a plan and this inference will be aided by the language of the Decision on Judicial Notice which repeatedly refers to a nationwide campaign of genocide. He also argues that the Prosecution will now be in a position to assert that the taking of judicial notice of genocide infers the existence of a plan[45] and avers that this will lead to injustice, as the existence of a plan of genocide is not a matter of common knowledge.[46]

21. The Appeals Chamber recalls that in the Decision on Judicial Notice it directed the Trial Chamber to take judicial notice of the fact that between 6 April 1994 and 17 July 1994, there was genocide in Rwanda against the Tutsi ethnic group.[47] The taking of judicial notice of this fact does not imply the existence of a plan to commit genocide. The Appeals Chamber recalls that:

> [T]he existence of a plan or policy is not a legal ingredient of the crime of genocide. While the existence of such a plan may help to establish that the accused possessed the requisite genocidal intent, it remains only evidence supporting the inference of intent, and does not become the legal ingredient of the offence.[48]

It therefore follows that if the existence of a plan to commit genocide is vital to the Prosecution's case, this must be proved by evidence. The Appeals Chamber finds no merit in Mr. Nzirorera's submission that it expanded the Prosecution's request for judicial notice to include the existence of a plan to commit genocide.

4. Alleged Removal of the Trial Chamber's Discretion

22. Mr. Nzirorera submits that the Appeals Chamber erred in the Decision on Judicial Notice when it held that judicial notice under Rule 94 (A) of the Rules of Procedure and Evidence ("Rules") is not discretionary.[49] He further contends that the Appeals Chamber erred in 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, which would be unfair to him and the other Applicants.[50] In support of these contentions, Mr. Nzirorera argues 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.[51] Should the Appeals Chamber maintain the Decision on Judicial Notice on its merits, Mr. Nzirorera requests modification of this Decision so as 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.[52]

23. The Prosecution responds that the taking of judicial notice of facts of common knowledge is not discretionary.[53] It argues that it is incumbent on the Trial Chamber, under Rule 94 (A) of the Rules, to take judicial notice of the occurrence of genocide in Rwanda in 1994, as a fact of common knowledge.[54] It also argues that Mr. Nzirorera has not demonstrated that the Appeals Chamber erred in directing the Trial Chamber to take judicial notice of genocide as a fact of common knowledge.[55]

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[45] Nzirorera Reply, para. 3.
[46] Nzirorera Reply, para. 5.
[47] Decision on Judicial Notice, paras 33 and 57.
[48] *Prosecutor v. Radislav Krstić,* Case N°IT-98-33-A, Judgment, 19 April 2004, para. 225 which refers to *Prosecutor v. Goran Jelisić,* Case N°IT-95-10-A, Judgment, 5 July 2001, para. 48, which referred to *Obed Ruzindana and Clément Kayishema v. The Prosecutor,* Case N°ICTR-95-1-A, Oral Decision by the Appeals Chamber, 1 June 2001.
[49] Nzirorera Motion, para. 17.
[50] Nzirorera Motion, para. 18.
[51] Nzirorera Motion, para. 20.
[52] Nzirorera Motion, para. 23.
[53] Nzirorera Response, para. 22.
[54] Nzirorera Response, para. 27.
[55] Nzirorera Response, para. 27.

24. 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.[56] 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. Consequently, the Appeals Chamber finds that Mr. Nzirorera has failed to demonstrate an error in its interpretation of Rule 94 (A) of the Rules. The Appeals Chamber also finds no merit in his request for modification of the Decision on Judicial Notice.

B. The Alleged Necessity to Prevent an Injustice

25. Mr. Karemera submits that the taking of judicial notice affects the presumption of innocence, as it assumes that in the case of genocide the crime has already been proven before the outcome of the trial[57] and thus constitutes an "admission of guilt",[58] jeopardises his right to a fair hearing in accordance with Article 20 of the Statute of the Tribunal,[59] and significantly lessens the Prosecution's burden of proof.[60]

26. The Appeals Chamber recalls and emphasizes its statement in the Decision on Judicial Notice that

> the practice of judicial notice must not be allowed to circumvent the presumption of innocence and the defendant's right to a fair trial, including his right to confront his accusers. Thus, it would plainly be improper for facts judicially noticed to be the "basis for proving the Appellant's criminal responsibility" (in the sense of being *sufficient* to establish that responsibility), and it is always necessary for Trial Chambers to take careful consideration of the presumption of innocence and the procedural rights of the accused.[61]

The Appeals Chamber also reiterates that judicially noticed facts do not relieve the Prosecution of its burden of proof.[62] The Appeals Chamber consequently finds no merit in the submission advanced by Mr. Karemera.

27. Mr. Karemera further submits that the Decision on Judicial Notice breaches the principle of *inter partes* proceedings and is inconsistent with the *audi alteram partem* doctrine.[63] He argues that the Decision on Judicial Notice affects all cases before the Tribunal without affording the parties in those cases the opportunity to present their submissions on these matters.[64] The Appeals Chamber finds no merit in this submission. Parties 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.[65]

C. Conclusion

28. For the aforementioned reasons, the Appeals Chamber finds that the Applicants have failed to demonstrate a clear error of reasoning in the Decision on Judicial Notice or that reconsideration of this

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[56] Decision on Judicial Notice, para. 23.
[57] Karemera Motion, p. 7.
[58] Karemera Motion, p. 9.
[59] Karemera Motion, p. 9.
[60] Karemera Motion, p. 8.
[61] Decision on Judicial Notice, para. 47.
[62] Decision on Judicial Notice, para. 37.
[63] Karemera Motion, p. 7.
[64] Karemera Motion, p. 7.
[65] *Aloys Ntabakuze v. The Prosecutor*, Case N°ICTR-98-41-AR73, "Decision on Motion for Reconsideration", 4 October 2006, para. 15.

Decision is necessary to prevent an injustice. Moreover, there is no error that would warrant granting Mr. Nzirorera's request for modification of the Decision on Judicial Notice.

III. Disposition

The Appeals Chamber DISMISSES the Applicants' motions in their entirety.

Done in English and French, the English text being authoritative.

1 December 2006, The Hague, The Netherlands.

[Signed] : Mohamed Shahabuddeen

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Decision on Prosecutor's Motion to Admit Prior Sworn Trial Testimony of the Accused Persons
Rule 89 of the Rules of Procedure and Evidence
6 December 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Bagosora et al. Case – Admissibility of evidence, Broad discretion of the Trial Chamber to admit relevant evidence, Right of the Accused to refuse to testify, Prior testimonies of the Accused Sworn in another trial, Admissibility of transcripts and exhibits – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rules 89, 89 (C), 89 (D), 90 (E) and 90 (F)

International Cases cited :

I.C.T.R. : 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. 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 Request to Admit United Nations Documents into Evidence under Rule 89 (C), 25 May 2006 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Décision accordant une prorogation de délai de réponse à deux requêtes du Procureur et ordonnant la communication de documents certifiés conformes, 13 September 2006 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Admission of UNAMIR Documents, 21 November 2006 (ICTR-98-44)

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) ; Trial Chamber,

The Prosecutor v. Miroslav Kvočka et al., Decision on Exhibits, 19 July 2001 (IT-***98-30/1) ;*** Trial Chamber, The Prosecutor v. Jadranko Prlić et al., Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings, 28 April 2006 (IT-04-74) ; Trial Chamber, The Prosecutor v. Jadranko Prlić et al., Decision on Admission of Evidence, 13 July 2006 (IT-04-74)

Introduction

1. The proceedings in the instant case commenced on 19 September 2005. The Prosecution now moves the Chamber to admit, pursuant to Rule 89 of the Rules of Procedure and Evidence, trial transcripts and accompanying exhibits from the sworn testimonies of Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera in the *Bagosora et al*. case.[1] The Prosecution explains that it has sought on several occasions to narrow the issues to be litigated in this trial by requesting admissions from the Accused of facts not in dispute, including admission of authenticity of certain documents that they have authored. It contends that certain admissions by the Accused during their testimony will conclusively address factual matters in this case that would otherwise require the testimony of additional witnesses, for example, obviating the need for evidence from a hand-writing analyst to address matters of authenticity of documents that are apparently non-contentious issues for the Accused in light of their testimony in the *Bagosora* trial.

2. None of the Accused objects to the admission of the transcript of their prior testimony on the *Bagosora et al*. case.[2] However, Mathieu Ngirumpatse requests that the Chamber does not admit the exhibits tendered during the testimony of his co-Accused, and Edouard Karemera opposes the admission of the exhibits entered during his own testimony. They submit that these exhibits were subject to various objections and consequently request the admission of these exhibits to be fully discussed in their trial before this Chamber. These objections are supported by Joseph Nzirorera

3. On 15 September 2006, following the Chamber's order,[3] the Registrar served certified copies of the trial transcripts and accompanying exhibits sought for admission upon the Chamber and the Parties.

Deliberations

4. According to Rule 89 of the Rules, the Chamber is not bound by national rules of evidence and may, in cases not otherwise provided for in the Rules, 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.[4] The Chamber also has a broad discretion under Rule 89 (C) of the Rules to admit any relevant evidence which it deems to have probative value. Trial Chambers of both *ad hoc* Tribunals have held that documents need not be recognized by a witness in order to have probative value.[5] While a Chamber always retains the competence under Rule 89 (D) to request verification of the authenticity of evidence obtained out of court, only the beginning of proof that evidence is reliable,

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[1] See Prosecutor's Motion to Admit Prior Sworn Trial Testimony of the Accused under Rule 89 (C), filed on 5 September 2006. Mathieu Ngirumpatse testified on 5 and 6 July 2005; Joseph Nzirorera on 16 March and 12 June 2006; and Edouard Karemera on 16 June 2006.

[2] Joseph Nzirorera, Edouard Karemera and Mathieu Ngirumpatse respectively filed their Responses on 8 September 2006, 29 September 2006 and 2 October 2006.

[3] Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera, Case N°ICTR-98-44-T ("Karemera et al."), Décision accordant une prorogation de délai de réponse à deux requêtes du Procureur et ordonnant la communication de documents certifiés conformes (TC), 13 September 2006.

[4] Rules of Procedure and Evidence, Rules 89 (A) and (B).

[5] *Karemera et al*., Decision on Admission of UNAMIR Documents (TC), 21 November 2006, para. 5; *Prosecutor v. Bagosora et al*., Case N°ICTR-98-41-T, Decision on Request to Admit United Nations Documents into Evidence under Rule 89 (C) (TC), 25 May 2006, para. 4; *Prosecutor v. Tihomir Blaskic*, Case N°IT-95-14-T, Judgement (TC), 3 March 2000, para. 35; *Prosecutor v. Kvočka et al*., Decision on Zoran Zigic's Motion For Rescinding Confidentiality of Schedules Attached to the Indictment Decision On Exhibits (TC), 19 July 2001; *Prosecutor v. Prlic et al.,* IT-04-74-PT, Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings (TC), 28 April 2006; *Prosecutor v. Prlic et al.,* IT-04-74-T, Decision on Admission of Evidence (TC), 13 July 2006.

namely, that sufficient indicia of reliability have been established, is required for evidence to be admissible.[6] As the Appeals Chamber has also repeatedly emphasized,

> "[a]dmissibility of evidence should not be confused with the assessment of weight to be accorded by the Chamber to that evidence at a later stage".[7]

5. The Chamber notes that at the beginning of the testimony of each Accused, the Presiding Judge in the *Bagosora et al.* case reminded them that, according to Rule 90 (E) of the Rules, "[they] may refuse to make any statement which might tend to incriminate [them]".[8] The Accused persons did rely upon this Rule to refuse to answer certain questions. The Counsel for each of the Accused were also present during the proceedings and allowed to intervene when appropriate.

6. The authenticity and authorship of the exhibits were not disputed by the Accused persons and, except for one of them, were not subject to any objection from the Accused or their Counsel attending the proceedings. Exhibit P. 396, which is a page extracted from handwritten notes taken by Edouard Karemera during a Council of Ministers held on 17 June 1994, was the subject to an objection from Edouard Karemera supported by his Counsel. The Accused did not dispute that he was the author of the notes but submitted that the document touched upon the charges against him.[9] Relying upon his right to remain silent as set forth in Rule 90 (E) of the Rules, he refused to discuss the document in its entirety, but agreed to comment on one page which was the subject of the examination-in-chief by the Defence for Nsengiyumva and was subsequently admitted by the *Bagosora* Trial Chamber.[10]

7. After reviewing the transcripts and exhibits, the Chamber is satisfied that the sworn testimony of each Accused in the *Bagosora et al.* trial and the accompanying exhibits concern matters relevant to the case and which have probative value. Exhibits were an integral part of the testimony of the Accused persons since during their respective testimonies, they commented on some documents which were already admitted as exhibits or were subsequently admitted.

8. The Chamber does not consider that the admission of the transcripts and the accompanying exhibits will infringe upon the rights of the Accused. Each of them has acknowledged the authorship of the documents shown to them. The admission into evidence does not in any way constitute a binding determination as to the authenticity or trustworthiness of the documents and the weight to be attached to the evidence shall be determined at a later stage and after considering the evidence as a whole. Furthermore, as explained by the Prosecution, the admission is sought to prove authorship of the documents which the Prosecution had always intended to offer as part of its case. The Accused will also be able to fully discuss these documents during their trial if necessary.

FOR THE ABOVE REASONS, THE CHAMBER

I. GRANTS the Prosecution Motion; and

II. REQUESTS the Registrar to assign an exhibit number in the instant case to the certified copies of the transcripts of the sworn testimony given by Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera in the *Bagosora et al.* case as well as to the exhibits accompanying these testimonies which are described hereinafter.

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[6] *Prosecutor v. Nyiramasuhuko*, Case N°ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 7; *Prosecutor v. Georges Anderson Rutaganda*, Case N°ICTR-96-3-A, Judgement (AC), para. 33; *Prosecutor v. 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.

[7] *Ntahobali and Nyiramasuhuko*, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible" (AC), 2 July 2004, para. 15.

[8] T. 5 July 2005, p. 49 (Ngirumpatse); T. 16 March 2006, p. 60 (Nzirorera); T. 16 June 2006, p. 2 (Karemera).

[9] T. 16 June 2006, pp. 20-21 and 24.

[10] T. 16 June 2006, p. 29.

Arusha, 6 December 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

Exhibits accompanying Karemera's testimony:

D. NS 186: Personal information sheet of Edouard Karemera.

D. NS 187 (A and B; Document K 0366114): Telegram written by Kayishema on 12 June 1994 on a "ratissage" operation which would last four days from the 15 to the 18 June 1994.

P. 394 (A and B; Document K0285041 and K0286366): Letter dated 20 June 1994 from Edouard Karemera, as Minister of Interior, sent to Clément Kayishema, *Préfet* of Kibuye.

P. 395 (A and B; Document K0195166): Message dated 2 June 1994 from *Préfet* of Kibuye, Clément Kayishema, to Minister of Interior and Communal Development, Edouard Karemera.

P. 396: Handwritten notes taken by Edouard Karemera during council of Ministers held on 17 June 1994 (only page KA010403E).

P. 397(A, B and C; Document K0272220): Letter dated 24 June 1994 written in Kinyarwanda by *Bourgmestre* Ignace Bagilishema to *Préfet* of Kibuye, Clément Kayishema.

P. 50 (A and B): Letter "Subject, mopping up operation in Kibuye", written by Edouard Karemera, as Minister of Interior, sent to Colonel Nsengiyumva.

P. 48 (A and B): Letter written by Edouard Karemera to all *préfets* on the implementation of the Prime Minister's directive on the self organisation of civilian defence.

P. 49 (A and B): Letter from Edouard Karemera directed to the *préfet*s of the different *préfecture* of Rwanda on the implementation of the Prime Minister's directive regarding civilian self defence.

Exhibits accompanying Ngirumpatse's testimony:

D. B 177: Personal details of Mathieu Ngirumpatse.

D. B 178: Protocole d'entente entre les partis politiques appelés à participer au gouvernement de transition, dated 7 April 1992.

D. B 179: Protocole additionnel au protocole d'entente entre les partis politiques qui participent au Gouvernement de transition, dated 13 April 1993.

D. B 180: Protocole additionnel au protocole d'entente entre les partis politiques appelés à participer au Gouvernement de transition, dated 8 April 1994.

P. 352: *Protocole d'entente*, dated 16 July 1993.

P. 353: Map of Kigali.

Exhibits accompanying Nzirorera's testimony:

D. NS 161: Personal details of Joseph Nzirorera.

D. NS 162 (A and B): *Curriculum Vitae* of Joseph Nzirorera.

D. B321: Copies of Nzirorera's passport.

D. B 271: *Affidavit* signed by Nzirorera to the attention of Bagosora.

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Decision on Appeals Chamber Demand of Judicial Notice Rules 94 of the Rules of Procedure and Evidence 11 December 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Judicial notice, Obligation of taking of judicial notice of 'notorious' material, Definition of 'notorious' – Faculty to take judicial notice of adjudicated facts in another trial, Guiding principles when deciding whether or not to take judicial notice of purported adjudicated facts, Consistency between taking judicial notice of adjudicated facts and the admission of written statements in lieu of oral testimony – Request for judicial notice of nine facts adjudicated in the judgements Akayesu, Semanza, Kajelijeli, Rutaganda, Musema, Niyitegeka, Kayishema, Ntakirutimana, Nahimana, Purpose of expediting the proceedings without compromising the rights of the Accused, Corroboration of evidence not required, Admissibility of Hearsay evidence, Words 'Tutsi' "enemy", "accomplices of the enemy", "infiltrators", "accomplices of the RPF", "inyenzi", "inkotanyi" considered as synonymous, Judicial notice of acts and conducts of accused can be taken when not central to the criminal responsibility of Joseph Nzirorera – Judicial notice taken for some of the facts

International Instrument cited :

Rules of Procedure and Evidence, rules 89, 92 bis, 94 (A) and 94 (B)

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. 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. Laurent Semanza, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, 3 November 2000 (ICTR-97-20) ; Trial Chamber, The Prosecutor v. Laurent Semanza, Decision on the Prosecutor's Further Motion for Judicial Notice Pursuant to Rules 94 and 54, 15 March 2001 (ICTR-97-20) ; Appeals Chamber, The Prosecutor v. Jean-Paul Akayesu, Judgement, 1st June 2001 (ICTR-96-4) ; Trial Chamber, The Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts – Rule 94 (B) of the Rules of Procedure and Evidence, 22 November 2001 (ICTR-96-10 and ICTR-96-17) ; Trial Chamber, The Prosecutor v. Juvénal Kajelijeli, Decision on the Prosecutor's Motion for Judicial Notice pursuant to Rule 94 of the Rules, 16 April 2002 (ICTR-98-44A) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on the Prosecutor's Motion or Judicial Notice and Admission of Evidence, 15 May 2002 (ICTR-97-21) ; 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. Laurent Semanza, Judgement and Sentence, 15 May 2003 (ICTR-97-20) ; Trial Chamber, The Prosecutor v. Eliezer Nyitegeka, Judgement, 16 May 2003 (ICTR-96-14) ; Trial Chamber, The Prosecutor v. Juvénal Kajelijeli, Judgment and sentence, 1st December 2003 (ICTR-98-44A) ; Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Judgement and Sentence, 3 December 2003 (ICTR-99-52) ; 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 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) ; Appeals Chamber, The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe, Judgment, 7 July 2006 (ICTR-99-46) ; Appeals Chamber, The Prosecutor v. Sylvestre Gacumbitsi, Judgement, 7 July 2006 (ICTR-2001-64) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Prosecutor's Motion for Judicial Notice, 22 September 2006 (ICTR-99-50) ; Appeals Chamber, Karemera et al. v. The Prosecutor, Decision on Motions for Reconsideration, 1 December 2006 (ICTR-98-44)

I.C.T.Y. : Trial Chamber, The Prosecutor v. Blagoje Simić et al., Decision on the Pre-trial motion by the Prosecution requesting the Trial Chamber to take judicial notice of the international character of the conflict in Bosnia-Herzegovina, 25 March 1999 (IT-95-9) ; Appeals Chamber, The Prosecutor v. Stanislav Galić, Decision on Interlocutory Appeal Concerning Rule 92 bis (C), 7 June 2002 (IT-98-29) ; Trial Chamber, The Prosecutor v. Momčilo Krajišnik, Decision on Prosecution Motions for Judicial Notice and Adjudicated Facts and for Admission of Written Statements of Witnesses pursuant to Rule 92 bis, 28 February 2003 (IT-00-39) ; Trial Chamber, The Prosecutor v. Momčilo Krajišnik, Decision on the Prosecution Motion for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92 bis, 10 March 2003 (IT-00-39) ; Appeals Chamber, The Prosecutor v. Slobodan Milošević, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003 (IT-02-54) ; Trial Chamber, The Prosecutor v. Vidoje Blagojević, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence, 19 December 2003 (IT-02-60) ; Trial Chamber, The Prosecutor v. Momčilo Krajišnik, Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts, 24 March 2005 (IT-00-39) ; Appeals Chamber, The Prosecutor v. Momir Nikolić, Decision on Appellant's Motion for Judicial Notice, 1 April 2005 (IT-02-60/1) ; Trial Chamber, The Prosecutor v. Enver Hadžihasanović and Amir Kubura, Decision on Judicial Notice of Adjudicated Facts Following the Motion Submitted by Counsel for the Accused Hadžihasanović and Kubura on 20 January 2005, 14 April 2005 (IT-01-47) ; Trial Chamber, The Prosecutor v. Jadranko Prlić et al., Décision relative à la requête aux fins de dresser le constat judiciaire de faits admis dans d'autres affaires en application de l'article 94 (B) du Règlement, 14 March 2006 (IT-04-74) ; Trial Chamber, The Prosecutor v. Milutin Popović et al., Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex , 26 September 2006 (IT-05-88)

Introduction

1. On 9 November 2005, this Chamber ruled upon the Prosecution's request for judicial notice to be taken of six purported facts of common knowledge and 153 purported adjudicated facts.[1] It took judicial notice of three facts of common knowledge, pursuant to Rule 94(A) of the Rules of Procedure and Evidence, and denied the remainder of the request.[2]

2. On 16 June 2006, the Appeals Chamber upheld, in part, the Prosecution's interlocutory appeal of that Decision, directing the Chamber to take judicial notice of certain facts of common knowledge, and to review its findings in the impugned Decision concerning certain purported adjudicated facts.[3]

[1] The 153 purported adjudicated facts were taken from the Nahimana et al., Kajelijeli, Kayishema and Ruzindana, Musema, Ntakirutimana, Niyitegeka, Akayesu, Rutaganda and Semanza Judgements.

[2] *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera* (*"Karemera et al."*), Case N°ICTR-98-44-T, Decision on Prosecution Motion for Judicial Notice (TC), 9 November 2005 ("Impugned Decision"). The facts in relation to which judicial notice was taken were Facts 3 and 4, as proposed by the Prosecution, as well as a slightly modified version of Fact 1. The substance of the denial was the denial of Facts 2, 5 and 6 as facts of common knowledge; and denial of the 153 purported adjudicated facts. Of the adjudicated facts, Fact 153 – that genocide was committed in Rwanda in 1994 against the Tutsi as a group – was pleaded alternatively as a fact of common knowledge and as an adjudicated fact. The Trial Chamber declined to take judicial notice of the fact on either basis.

[3] Respectively, Facts two, five and six; and Facts 1-30, 33-74, and 79-152 listed under Annex B of the Prosecution's Interlocutory Appeal. *Karemera et al,* Case N°ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC), 16 June 2005 ("Appeals Chamber Decision").

3. At the Parties' request, the Chamber then issued a Scheduling Order, permitting them to file any further submissions they may have concerning the Trial Chamber's pending review of its findings on judicial notice of adjudicated facts.[4] The Parties duly complied.[5]

4. According to the Defence for Nzirorera, the Defence for each of the Accused agreed to divide their Responses so as each Accused would make submissions with respect to certain Facts only.[6] However, whereas the Defence for Nzirorera adhered to this delineation, the Defence for Ngirumpatse made submissions on almost each and every fact, and the Defence for Karemera made submissions on only some of the facts allocated to it under this division.

5. The Prosecution filed one single Response to all of the Defence submissions. It indicated that it abandoned its application with respect to 10 of the purported adjudicated facts,[7] so that only 137 purported adjudicated facts remain to be considered by the Trial Chamber.[8]

6. While the Chamber had completed its deliberations pertaining to the Appeals Chamber's remand and was in the final drafting process of its decision, the anticipated testimony of two Prosecution witnesses rendered necessary the delivery of two oral rulings indicating the Chamber's findings concerning certain facts. The Chamber specified that its written Decision on this matter would provide reasons for its ruling, and would be the authoritative statement of the Chamber's findings and reasoning concerning this issue. These rulings allowed the Prosecution to drastically shorten its examination-in-chief.

Deliberations

Preliminary Matter

7. The Defence of each of the Accused in this case requested the Appeals Chamber to reconsider, or alternatively, to clarify, its Decision. Pending the Decision of the Appeals Chamber on reconsideration, the Defence for Ngirumpatse asked the Chamber to defer its review of the judicial notice issues, submitting that such a deferral would be in the interests of justice and judicial economy.

8. This request for deferral has been rendered moot since, on 1 December 2006, the Appeals Chamber dismissed the motions for reconsideration in their entirety.[9]

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[4] *Karemera et al,* Case N°ICTR-98-44-T, Scheduling Order, 17 July 2006.

[5] Joseph Nzirorera's "Supplemental Submission on Judicial Notice of Adjudicated Facts", filed by on 8 August 2006; "Requête d' Édouard Karemera relative à la demande de la Chambre d'appel pour la reconsidération de la requête du Procureur à propos du constat judiciaire de faits admis", filed on 25 August 2006; "Mémoire complémentaire pour M. Ngirumpatse sur la requête en constat judiciaire et en admission de faits et demande à la Chambre d'entendre les observations orales des parties au soutien de leurs écritures", filed on 28 August 2006; "Prosecutor's Consolidated Response to Defence Submissions on the Motion for Judicial Notice of Adjudicated Facts", filed on 11 September 2006; Joseph Nzirorera's "Reply Brief on Judicial Notice of Adjudicated Facts", filed on 14 September 2006; "Mémoire en réplique pour M. Ngirumpatse sur la Prosecutor's Motion for Judicial Notice of Adjudicated Facts", filed on 25 September 2006. On 27 September 2006, the Chamber granted the Defence an extension of time to reply to 2 October 2006 (see Karemera et al, Case N°ICTR-98-44-T, Décision Accordant une Prorogation de Délai de Réponse à Deux Requêtes du Procureur (TC), 27 September 2006). Édouard Karemera filed a Reply to the Prosecution Motion was filed on 1 October 2006.

[6] See Nzirorera's Supplemental Submission, para. 10. According to this submission, the Defence for Joseph Nzirorera was to address the facts taken from the *Nahimana et al*. and *Kajelijeli* Judgements; the Defence for Mathieu Ngirumpatse was to address the facts taken from the *Akayesu, Rutaganda,* and *Semanza* Judgements, and the Defence for Édouard Karemera was to address the facts taken from the *Kayishema, Musema, Ntakirutimana,* and *Niyitegeka* Judgements.

[7] Facts 14, 79-83, and 138-141 – see Prosecutor's Consolidated Response, para. 7.

[8] One of which – Fact 153 – is pleaded alternatively as a fact of common knowledge.

[9] *Prosecutor v. Karemera et al*., Case N°ICTR-98-44-AR73(C), Decision on Motions for Reconsideration (AC), 1 December 2006, para. 28 and "Disposition".

9. The Trial Chamber will therefore begin by considering that part of the Appeals Chamber Decision which directed the Chamber to take judicial notice of certain facts of common knowledge. It will then go on to consider the adjudicated facts aspect of the Appeals Chamber Decision.

I. Facts of Common Knowledge – Rule 94 (A)

10. Rule 94 (A) of the Rules states: "A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof." This part of the rule is not discretionary;[10] rather Rule 94 (A) "commands the taking of judicial notice of material that is 'notorious'".[11] 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".

11. The Appeals Chamber Decision found that this Chamber had erred in failing to take judicial notice of the following facts, which the Appeals Chamber said are facts of common knowledge:[12]

> (i) Fact 2 – "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."
>
> (ii) Fact 5 – "Between 1 January 1994 and 17 July 1994 in Rwanda there was an armed conflict not of an international character."
>
> (iii) Fact 6 – "Between 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group."

12. Whilst this Chamber only sought further submissions from the Parties on the question of judicial notice of adjudicated facts, the Defence for Ngirumpatse makes submissions concerning whether or not the Trial Chamber is bound to follow the Appeals Chamber's directive. It submits that there is no requirement in the Rules that the Trial Chamber is bound to follow the Appeals Chamber and that instead of carrying out the Appeals Chamber's directive, it should revisit the impugned Decision on the basis of the Appeals Chamber's findings.

13. This contention is, however, contrary to the established jurisprudence, and particularly the recent Appeals Chamber's Decisions. When a fact is considered as a fact of common knowledge, a Trial Chamber has no discretion and must take judicial notice thereof.[13] In the present case, the Appeals Chamber has determined that Facts 2, 5 and 6 are of common knowledge and accordingly, directed the Trial Chamber to take judicial notice thereof.[14]

14. In the case of *Bizimungu et al.,* Trial Chamber II also considered that "a determination by the Appeals Chamber that any given fact is one of common knowledge and of which judicial notice should be taken under Rule 94 (A) is binding upon all Trial Chambers".[15]

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[10] Appeals Chamber Decision, para. 22; *Prosecutor v. Karemera et al.,* Case N°ICTR-98-44-AR73(C), Decision on Motions for Reconsideration (AC), 1 December 2006, para. 24.
[11] Appeals Chamber Decision, para. 22, citing *Prosecutor v. Semanza,* Case N°ICTR-97-20-A, Judgement, 20 May 2005, para. 194 ("*Semanza* Appeals Judgement").
[12] As to Facts 2 and 5, see Appeals Chamber Decision, paras. 26 to 32, particularly, para. 32. As to Fact 6, see Appeals Chamber Decision, paras. 33 to 38, particularly para. 38.
[13] Appeals Chamber Decision, para. 22; *Prosecutor v. Karemera et al.,* Case N°ICTR-98-44-AR73(C), Decision on Motions for Reconsideration (AC), 1 December 2006, para. 24.
[14] Appeals Chamber Decision, para. 57.
[15] *Prosecutor v. Casimir Bizimungu et al.,* Case N°ICTR-99-50-T, Decision on Prosecutor's Motion for Judicial Notice (TC), 22 September 2006, para. 7.

15. The Chamber therefore takes judicial notice of Facts 2, 5 and 5 as facts of common knowledge, pursuant to Rule 94 (A) of the Rules.

II. Adjudicated Facts – Rule 94 (B)

16. Rule 94(B) of the Rules provides:

> 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.

17. In its Decision of 16 June 2006, the Appeals Chamber remanded the judicial notice matter to the Trial Chamber for further consideration of the majority of the purported adjudicated facts on the basis of two findings.

18. The Appeals Chamber firstly found that

> "the Trial Chamber erred to the extent that it found that, under Rule 94 (B), it is categorically impermissible to take judicial notice of facts relating directly or indirectly to the defendant's guilt, including facts related to the existence and activity of a joint criminal enterprise."[16]

In so doing, the Appeals Chamber also recognised the need for caution in allowing judicial notice of adjudicated facts which were central to the criminal responsibility of the accused. It stated that the Trial Chamber should assess the particular facts of which judicial notice is sought to determine, firstly, whether they are related to the acts, conduct, or mental state of the accused; and, secondly, if not, whether under the circumstances of the case admitting them will advance the objective of expediency without compromising the rights of the accused.[17]

19. The Appeals Chamber secondly considered that a Trial Chamber "can and indeed must decline to take judicial notice of facts if it considers that the way they are formulated – abstracted from the context in the judgement from which they came – is misleading, or inconsistent with the facts actually adjudicated in the cases in question".[18] However, in the present case, the Appeals Chamber was not persuaded that Facts 86 through 110 were actually taken out of context, or improperly combined, in a way which made them inconsistent with the judgements from which they were drawn, as decided by this Chamber. Accordingly, the Appeals Chamber directed the Chamber to reconsider the matter and provide an explanation for its conclusions.[19]

II.1. Applicable Law

20. Under Rule 94 (B) judicial notice of adjudicated facts is *discretionary*. Moreover, in order to invoke an exercise of its discretion, the Chamber must be satisfied that the fact in question relates to a matter at issue in the current proceedings.[20]

21. According to the Appeals Chamber,

> "[t]aking judicial notice of adjudicated facts under Rule 94 (B) is a method of achieving judicial economy and harmonising judgements of the Tribunal while ensuring the right of the Accused to a fair, public and expeditious trial".[21]

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[16] Appeals Chamber Decision, para. 53.
[17] Appeals Chamber Decision, para. 53, emphasis added.
[18] Appeals Chamber Decision, para. 55.
[19] Appeals Chamber Decision, paras. 56 and 57.
[20] *Prosecutor v. Popović et al.*, Case N°IT-05-88-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex (TC), 26 September 2006, para. 5 ("*Popović* Decision"). The Trial Chamber said, "the fact must have some relevance to an issue in the current proceedings."

The Appeals Chamber also noted the consistency between taking judicial notice of adjudicated facts and the admission of written statements in lieu of oral testimony under Rule 92 *bis* of the Rules – both procedural mechanisms adopted "largely for the same purpose".[22]

22. The Appeals Chamber describes adjudicated facts judicially noticed under Rule 94 (B) as "merely presumptions that may be rebutted by the defence with evidence at trial."[23] The Appeals Chamber has clarified how this qualification can be reconciled with the presumption of innocence as follows:

> Judicial notice does not shift the ultimate burden of persuasion, which remains with the Prosecution. In the case of judicial notice under Rule 94 (B), the effect is only to relieve the Prosecution of its initial burden to produce [credible and reliable] evidence on the point; the defence may then put the point into question by introducing reliable and credible evidence to the contrary.[24]
>
> Analogously, in the context of alibi evidence, for instance, the accused bears the burden of production with respect to a matter centrally related to the guilt of the accused; yet this shift does not violate the presumption of innocence because, as the Appeals Chamber has repeatedly recognized, the prosecution retains the burden of proof of guilt beyond a reasonable doubt.[25]

23. Trial Chambers of both this Tribunal and the International Criminal Tribunal for the former Yugoslavia ("ICTY") have laid down some guiding principles when deciding whether or not to take judicial notice of purported adjudicated facts. They are consistent with the recent directives given by the Appeals Chamber's in its Decision of 16 June 2006. These principles, which are not exhaustive, can be summarized as follows:

- When ruling on the matter, the Chamber must examine the purported fact in the context of the original judgement.[26]
- With regard to the meaning of the term "adjudicated facts", the jurisprudence outlines a number of requirements before a fact can be considered to be truly adjudicated:
  - A fact sought to be judicially noticed must be distinct, concrete and identifiable.[27]
  - A fact in relation to which judicial notice is sought must be in the same or a substantially similar form to how it was expressed by the original Chamber.[28] Facts altered in a substantial way by the moving party cannot be considered to have been truly

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[21] Appeals Chamber Decision, para. 39. See also *Prosecutor v. Laurent Semanza,* Case N°ICTR-97-20-I, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, 3 November 2000 (TC), para. 20; *Prosecutor v. Casimir Bizimungu et al*., Case No. ICTR-99-50-I, Decision on Prosper Mugiraneza's First Motion for Judicial Notice Pursuant to Rule 94 (B) (TC), 10 December 2004, paras. 10, 12; *Prosecutor v. Kajelijeli,* Decision on the Prosecutor's Motion for Judicial Notice pursuant to Rule 94 of the Rules (TC), 16 April 2002, para. 18.

[22] Appeals Chamber Decision, para. 51.

[23] Appeals Chamber Decision, para. 42, referring to *Prosecutor v. Slobodan Milosevic,* Case N°IT-02-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts (AC), 28 October 2003, pp. 3-4; *Prosecutor v. Momir Nikolić,* Case N°IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice (AC), 1 April 2005, paras. 10-11; *Prosecutor v. Momčilo Krajišnik,* Case N°IT-00-39-PT, Decision on Prosecutor's Motion for Judicial Notice and Adjudicated Facts and Admission of Written Statements of Witnesses pursuant to Rule 92 *bis* (TC), 28 February 2003, para. 16.

[24] Appeals Chamber Decision, paras. 42 and 49.

[25] Appeals Chamber Decision, para. 49.

[26] *Popović* Decision, para.6, citing *Prosecutor v. Prlić et al.,* Case N°IT-04-74-PT, Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94 (B), 14 March 2006, para. 12; *Prosecutor v. Hadžihasanović and Kubura,* Case N°IT-01-47-T, Decision on Judicial Notice of Adjudicated Facts Following the Motion Submitted by Counsel for the Accused Hadžihasanović and Kubura on 10 January 2005 (TC), 14 April 2005, p. 5; *Prosecutor v. Krajišnik,* Case N°IT-00-39-T, Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts (TC), 24 March 2005, para. 14; *Prosecutor v. Krajišnik,* Case N°IT-00-39-T, Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92 *bis,* 28 February 2003, para. 15; *Prosecutor v. Blagojević and Jokić,* Case N°IT-02-60-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence, 19 December 2003 ("*Blagojevic* Decision"), para. 16.

[27] *Prosecutor v. Krajisnik,* Decision on the Prosecution Motion for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92*bis,* 10 March 2003; *Blagojevic* Decision.

[28] *Blagojević* Decision.

adjudicated.[29] However, as the Trial Chamber recently noted in the *Popović* Decision, a minor inaccuracy or ambiguity can be cured *proprio motu* by the Trial Chamber. This is discretionary, and should introduce no substantive change to the proposed fact. "[T]he purpose of such correction should be to render the formulation consistent with the meaning intended by the original Chamber."[30]

- Facts proposed for judicial notice must constitute factual findings and must not include legal characterisations.[31]
- A fact cannot be considered as adjudicated in circumstances where those facts *are* or *might be* subject to pending appeal.[32]

• Judicial notice under Rule 94(B) cannot be taken of facts which attest to criminal responsibility of the accused.[33] According to the Appeals Chamber, judicial notice should therefore not be taken of facts relating to the acts, conducts and mental state of the accused.[34] This exclusion does not apply to acts and conduct of other persons for which the accused is alleged to be responsible.[35] Such persons may include, for instance, alleged subordinates whose criminal conduct the accused is charged with failing to prevent or punish, persons said to have participated with the accused in a joint criminal enterprise, and persons the accused is alleged to have aided and abetted.[36]

• Once the Chamber is satisfied that the facts sought for admission are truly adjudicated facts and do not relate to the acts, conduct and mental state of the Accused, it is called upon to invoke an exercise of its discretion for the purpose of expediting the proceedings, only in circumstances where admitting such facts will not compromise the rights of the Accused, including his or her right to a fair and expeditious trial, to hear and confront the witnesses against him or her.[37] In that respect, Trial Chambers of this Tribunal and of the ICTY have considered, in the particular context of their case, that facts which are core issues should not be judicially noticed.[38] Where a certain fact concerns a core issue in the

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[29] *Popović* Decision, para. 7.
[30] *Popović* Decision, para. 7.
[31] *Prosecutor v. Krajisnik,* Decision on the Prosecution Motion for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92*bis,* 10 March 2003; *Blagojevic* Decision, para. 16; *Bizimungu et al*., Decision on the Prosecutor's Motion and Notice of Adjudicated Facts, 10 December 2004, para. 16, citing *Nyiramasuhuko et al.,* Decision on the Prosecutor's Motion for Judicial Notice and Admission of Evidence, 15 May 2002, para. 127, which followed the decision in *Ntakirutimana,* Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001, para. 35 and 36.
[32] See *Popović* Decision, para. 14, and fn. 50, "[a] Trial Chamber may only judicially notice a purported adjudicated fact if that fact *itself* is clearly not subject to pending appeal or review proceedings." (Emphasis added)
[33] *Prosecutor v. Krajisnik,* Decision on the Prosecution Motion for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92*bis,* 10 March 2003.
[34] *Karemera* Appeals Chamber Decision, para. 50
[35] Appeals Chamber Decision, para. 52; see also *Popović* Decision para. 13.
[36] Appeals Chamber Decision, para. 48; *Popović* Decision, para. 13. Note that the *Karemera* Appeals Chamber referred to the Decision of the Appeals Chamber in the case of *Galić* concerning the application of Rule 92 *bis* (*Prosecutor v. Galić,* Case N°IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (AC), 7 June 2002, paras. 10-11. In the extract of the Decision quoted, the Appeals Chamber considered whether the exclusion from admission under Rule 92 *bis* of any written statement which "goes to proof of the acts and conduct of the accused as charged in the indictment" also mandated the exclusion of any written statement going to proof of the acts and conduct of other persons for whose conduct the accused was alleged to be liable by reason of a joint criminal enterprise theory, or accomplice liability. The Appeals Chamber considered that such an interpretation would denude Rule 92 *bis* of any real utility, and that it would be inconsistent with the purpose and terms of the Rule. The *Karemera* Appeals Chamber considered that this analysis was equally applicable to Rule 94 (B).
[37] See Articles 19 and 20 of the Statute of the Tribunal. See Appeals Chamber Decision, para. 50. See *Prosecutor v. Semanza*, Case N°ICTR-97-20-I, Decision on the Prosecutor's Further Motion for Judicial Notice Pursuant to Rules 94 and 54, 15 March 2001, para. 10; *Prosecutor v. Ntakirutimana,* Case N°ICTR-96-10-T and ICTR-96-17-T, Decision on Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001, para. 28; *Prosecutor v. Simic et al*., Decision of 25 March 1999 on the Pre-trial motion by the Prosecution requesting the Trial Chamber to take judicial notice of the international character of the conflict in Bosnia-Herzegovina. *Prosecutor v. Krajisnik,* Decision on the Prosecution Motion for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92 *bis,* 10 March 2003; *Blagojevic* Decision, para. 18.
[38] *Prosecutor v. Krajisnik,* Decision on the Prosecution Motion for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92*bis,* 10 March 2003; *Bizimungu et al*., Decision on the Prosecutor's Motion and Notice of Adjudicated Facts, 10 December 2004; *Popović* Decision, para. 19.

case, the taking of judicial notice of that fact may place such a significant burden on the Accused to produce rebuttal evidence that it would jeopardise the Accused's right to fair trial.[39] Considering the interests of justice and the particular circumstances of the case at hand, Trial Chambers have also declined to take judicial notice of adjudicated facts in circumstances where evidence has already been heard on the subject matter of the fact sought to be judicially noticed.[40]

II.2. Facts sought for Judicial Notice

24. Generally the Defence for the Accused dispute the accuracy of the facts sought for admission or their character as adjudicated facts. They also contend that some of the facts relate to the acts, conduct and mental of the Accused or of other persons for which the Accused are alleged to be responsible. In their views, the admission of the purported adjudicated facts will seriously impair the rights of the Accused in various ways and will not contribute to the objective of expediency.

25. The Chamber will now consider whether judicial notice should be taken of the 136 purported adjudicated facts in the light of above-mentioned principles and each party's submissions. In order to facilitate the reading of this Decision, it must be noted that the Chamber will not systematically recall each argument submitted by the Parties with respect to each fact, when it has already been addressed.

1. Facts 1 to 9 (*Akayesu* Judgement)

26. The Prosecution requests the Chamber to take judicial notice of nine facts taken from the *Akayesu* Judgement.[41]

27. These facts are relevant to matters at issue in the current proceedings and do not relate to the acts, conduct and mental state of the Accused persons in this case. After reviewing Facts 1 to 9 in the context of the Judgement, the Chamber is also satisfied that they are truly adjudicated facts. Specifically and contrary to Ngirumpatse's assertions, Facts 1 and 8 are similar to how they were expressed in the original Judgement, and Fact 3 does not contain a characterisation of an essentially legal nature.

28. Furthermore, the Defence for Ngirumpatse and the Defence for Karemera request the Chamber not to take judicial notice where the original Trial Chamber has made the particular finding on the basis of the testimony of only one witness.[42] They contend that this deprives the Accused of the same right which has been afforded to the accused person in the case from which the fact has been taken and an opportunity to raise reasonable doubt in the Prosecution's case.

29. Under Rule 89 of the Rules and according to the established jurisprudence of this Tribunal, corroboration of evidence is not required: a Chamber may rely on a single witness' testimony as proof of a material fact.[43] A Chamber also has a broad discretion to admit hearsay evidence, even when it cannot be examined at its source and when it is not corroborated by direct evidence.[44] The Chamber will therefore not exclude the admission of an adjudicated fact solely because the original Chamber made its finding on the basis of the evidence of only one witness.

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[39] *Popović* Decision, para. 16.
[40] See *Prosecutor v. Bizimungu et al.,* Case N°ICTR-50-T, Decision on the Prosecutor's Motion and Notice of Adjudicated Facts, 10 December 2004, para. 22; *Blagojevic* Decision, paras. 22 and 23.
[41] Facts 1 to 9. *Prosecutor v. Jean-Paul Akayesu,* Case N°ICTR-96-4-T, Judgement (TC), 2 September 1998, *ICTR Report 1998*, pp. 44 and seq.
[42] The Defence for Karemera also raises this point. Facts 1, 2, 3, 7, 10-24, 36, 41-51, 60, 67, 68, 79, 82, 84, 85, 110, 116-123, 125, 126, 132, 134-141, 144, 145, 148 and 150.
[43] See for e.g.: *Prosecutor v. Laurent Semanza,* Case N°ICTR-97-20-A, Judgement (AC), 20 May 2005, para. 153; *Prosecutor v. Sylvestre Gacumbitsi*, Case N°ICTR-2001-64-A, Judgement (AC), 7 July 2006, para. 72.
[44] See for e.g.: *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement (AC), 1 June 2001; *Gacumbitsi* Appeal Judgement.

30. In view of the particular circumstances of the case, the Chamber is satisfied that taking judicial notice of Facts 1 to 9 will contribute to the objective of expediency while not compromising the rights of the Accused. The Chamber, however, deems it necessary to cure certain minor inaccuracies concerning Fact 9.

2. Facts 15, 65 to 68, 144 and 145 (*Semanza* Judgement)

31. The Prosecution seeks judicial notice of facts taken from the *Semanza* Judgement (Facts 15, 65 to 68, 144 and 145).[45]

32. These facts are relevant to matters at issue in the current proceedings and do not relate to the acts, conduct and mental state of the Accused persons in this case. Contrary to Ngirumpatse's assertion, the Chamber is also satisfied that these facts are truly adjudicated facts and are in a substantially similar form to how they were expressed by the original Chamber.

33. The Defence for Ngirumpatse also submits that the Chamber should decline to take judicial notice of Facts 15, 67, 144 and 145 in relation to which the original Chamber did not specify the evidence upon the basis of which the factual finding was made. In its view, where there is lack of transparency, the Accused in this case are unable to bring evidence to rebut those findings.

34. The Chamber has reviewed these facts in the context of the Judgement and does not share the Defence's contention. The *Semanza* Chamber explicitly describes how it assessed and took into consideration the evidence adduced in that trial, including the alibi evidence.

35. Considering the circumstances of the case, the Chamber is of the view that taking judicial notice of Facts 15, 65 to 68 and 144 to 145 will contribute to the objective of expediency without compromising the rights of the Accused.

3. Facts 16 to 24 and 31 to 64 (*Kajelijeli* Judgement)

36. Under Facts 16 to 24 and 31 to 64, the Prosecution moves the Chamber to take judicial notice of facts extracted from the *Kajelijeli* Judgement.[46]

37. Whereas the Defence for Nzirorera concede that none of these facts relates to the acts, conduct and mental state of the Accused, the Defence for Ngirumpatse submits that certain facts must be excluded from admission because they comprise the acts and conduct of the Accused,[47] notably because some of these facts concern the actions of the *Interahamwe* which, according to the Indictment, are imputed to the Accused.[48] Furthermore, it submits that the Chamber should decline to take judicial notice of facts concerning the synonymous use of the words 'Tutsi' "enemy", "accomplices of the enemy", "infiltrators", "accomplices of the RPF", "*inyenzi*", "*inkotanyi*" for similar reasons.[49]

38. The Chamber is of the view that the facts sought for admission are relevant to matters at issue in the current proceedings. Furthermore, none of them can be said to relate to the acts, conduct and mental state of the Accused in this case.

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[45] *Prosecutor v. Laurent Semanza*, Case N°ICTR-97-20-T, Judgement and Sentence (TC), 15 May 2003.
[46] *Prosecutor v. Juvénal Kajelijeli*, Case N°ICTR-98-44A-T, Judgement and Sentence (TC), 1 December 2003.
[47] Facts 33-48, 52-54, 58-60.
[48] Facts 16-24, 35, 36, 38-40, 46, 52, 53, 56, 57, 59-63.
[49] Facts 19, 34, 35, 42, 43, 49, 52, 54, 55, 57, 58, 61, 64.

39. However, some of them directly describe the acts and conducts of Kajelijeli,[50] who according to the Indictment in the present case, is alleged to having directly acted under the instructions of Nzirorera. Paragraph 62 of the Indictment alleges that on 6 or 7 April 1994, or both, Joseph Nzirorera participated in certain decisions taken at a meeting at the residence of Nzirorera's mother in Busogo *secteur* with Juvenal Kajelijeli, amongst others, and ordering the attack and killing of Tutsi population in Mukingo and Nkuli *communes*. It is further alleged that Kajelijeli executed the decisions taken by Joseph Nzirorera.[51]

40. While judicial notice can be taken of acts and conducts of persons for which an accused is alleged to be responsible, the Chamber finds that Facts 19, 40, 50-53, 55-56, 60, 62 and 63 sought for admission are so proximate and central to the criminal responsibility of Joseph Nzirorera following the allegations pleaded in the Indictment that it would compromise the rights of the Accused if judicial notice was taken of these facts.

41. The Chamber finds that Facts 34, which states that killings of the Tutsi in Mukingo *commune* "were not spontaneous reaction of the Hutu populace to the death of the President", touches upon a core issue in the instant case. It has been the consistent Prosecution's theory that the Accused in this case had pre-planned the genocide throughout Rwanda, and the Defence has repeatedly given notice of its intention to rely on the defence that the killings were a spontaneous reaction of the Hutu population. According to the Appeals Chamber, "if the existence of a plan to commit genocide is vital to the Prosecution's case, this must be proved by evidence".[52] Under these circumstances, the Chamber is of the view that it is in the interests of justice to hear oral evidence on this particular issue.

42. With respect to Fact 18,[53] the Prosecution submits that the question of whether there were "widespread attacks" is a question of fact, which having been found proved, can lead to a legal finding. It also submits that, since the Appeals Chamber has found as a fact of common knowledge that there were "throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification" and rape is one such method of attacking a population, it is proper for the Trial Chamber to take judicial notice of this fact. In the Chamber's view, that rapes and sexual assaults were committed *in the course of* a widespread attack upon the Tutsi civilian population may be considered as a characterisation of an essentially legal nature, which should be left to the ultimate determination of the Trial Chamber. The Chamber therefore declines to take judicial notice of Fact 18.

43. Considering the context of the *Kajelijeli* Judgement, the Chamber is not satisfied that Facts 36 to 38 reflect the factual findings of the Trial Chamber in the *Kajelijeli* Judgement.[54] They therefore

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[50] Facts 19, 36-38, 40, 50-53, 55-56, 60, 62 and 63.

[51] Amended Indictment dated 24 August 2005, paras. 62.8 to 62.10.

[52] *Prosecutor v. Karemera et al.,* Case N°ICTR-98-44-AR73(C), Decision on Motions for Reconsideration (AC), 1 December 2006, para. 21.

[53] Fact 18 sought for admission reads as follows: "These rapes and sexual assaults were committed in the course of a widespread attack upon the Tutsi civilian population".

[54] Fact 36 is extracted from para. 404 of *Kajelijeli* Judgement, which reads as follows:
The Chamber notes in particular the detailed and reliable account of Prosecution Witness GBH, who stated that the Accused "was the one who gave instructions to the young people who had to do anything. He supervised them and gave them orders… The young people in question were the *Interahamwe*." Witness GBH also testified that "a man of his position as a *bourgmestre* could [have] had the power to stop or lock the young people wearing uniform, engaged in training, singing and dancing." This testimony was further corroborated by Prosecution Witness GBE, who provided testimony that the Accused never bothered the *Interahamwe* even when they were "molesting or harassing" people, though as *bourgmestre* he was both able and obliged to do so. The Chamber finds that these testimonies present a clear picture of the Accused's close association with, and control over, the *Interahamwe*. The Chamber consequently finds that the Accused was a leader of *Interahamwe* with control over the *Interahamwe* in Mukingo *commune*, and that he also had influence over the *Interahamwe* of Nkuli *commune* from 1 January 1994 to July 1994.
Fact 37 is extracted from para. 426 of *Kajelijeli* Judgement, which reads as follows:
Notwithstanding the fact that the Chamber in its previous findings [Part III, Section H] stated that the Accused was a leader of the *Interahamwe*, the youth wing of the MRND, the Chamber finds, on the basis of the evidence, that there is inconclusive evidence to establish that the Accused was either (a) a registered member of the new MRND, established by the July 1991 Statute; (b) a member of the prefectural committee or a member of the prefectural congress of this party. The aforesaid notwithstanding, the Chamber finds that the Accused was closely associated with the new MRND and its leadership and that,

cannot be considered as adjudicated facts and it is therefore appropriate to decline to take judicial notice of them.

44. The Chamber agrees with the Defence that Facts 35, 47 and 48 are vague and not distinct, concrete and identifiable to be judicially noticed. The Chamber is also of the view that Fact 64 may be ambiguous and does not fairly translate how this finding was expressed by the original Chamber.[55] For this reason, it will not be judicially noticed.

45. Conversely, Facts 16, 17, 20 to 24, 33, 41 to 46, 49, 54, 57, 58, 59, and 61 are truly adjudicated facts. In particular and contrary to the assertions made by the Defence for Nzirorera and the Defence for Ngirumpatse, Facts 17, 33, 43, 59 are distinct, concrete and identifiable, and Fact 44 does not include a legal characterisation.

46. As already mentioned, the Chamber is also satisfied that Facts 16, 17, 20 to 24, 33, 41 to 46, 49, 54, 57, 58, 59, and 61 do not relate to the acts, conduct and mental state of the Accused persons in this case. In that respect, the Chamber notes that Facts 41 to 46 concern a different meeting to the one which the Indictment alleges that Nzirorera attended and do not contain any allegation that Nzirorera was present at that meeting. This was a meeting held by Kajelijeli on the evening of 6 April 1994 at the Canteen next to the Nkuli *bureau communal*. The Chamber is satisfied that these facts are not too proximate to the Accused.

47. The Defence for Nzirorera, however, objects to their admission submitting that in different ways, it will compromise the rights of the accused and that it will not advance the objective of expediency.

48. According to the Defence, Witnesses ANP and GBU, upon the basis of whose testimony certain factual findings were made by the *Kajelijeli* Trial Chamber, have been found to have committed perjury, and therefore taking judicial notice of facts which are based on the testimony of those witnesses would compromise the Accused's rights.

49. The Chamber notes that Witnesses ANP and GBU were two of several witnesses upon whom the Trial Chamber relied in making the findings from which the adjudicated facts are proposed. The Defence's argument in that respect therefore falls to be rejected.

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especially from January 1994 to mid-July 1994, he was actively involved in many activities of this party in Mukingo *commune* and the neighbouring areas. He may as well have been a member of the MRND party.
Fact 38 is extracted from Para. 400 of *Kajelijeli* Judgement, which reads as follows:
The Chamber finds that by 6 April 1994 the Accused was actively involved in the training of the *Interahamwe*. This is evidenced in the eye witness testimony of Prosecution Witness GBH, who stated that the Accused was "seen in the company of the young people while they trained on a football field using the guns, wooden guns." Corroborating evidence is found in the testimonies of Prosecution Witnesses GDD and GAO, both of whom gave similar and largely consistent testimonies of the Accused's involvement in the training of the *Interahamwe*. Witness GDD, a former member of the *Interahamwe*, testified that the Accused and other politicians solicited him to train young *Interahamwe* recruits. Witness GAO, another former member of the *Interahamwe*, also confirmed that when the Accused was *bourgmestre* he [the Accused], together with others, gave *Interahamwe* military training. Witness GAO also testified that the Accused would come to the training grounds every morning, and that the Accused told *Interahamwe* to complete their training quickly so that he [the Accused] could send them to the volcanoes to fight against the "*Inkotanyi*, the *Inyenzi*." The Chamber notes in particular, the testimony of Prosecution Witness GAP who stated that the Accused was the leading instructor "responsible for political ideology". Although there are minor ambiguities among them regarding the timing of various training activities of the militia in Mukingo *commune* and the neighbouring areas, the Chamber finds their testimonies consistent and establish beyond reasonable doubt that the Accused did actively participate in the training of *Interahamwe* in Mukingo *commune*. The Chamber finds, however, that there is insufficient evidence that the Accused organized these trainings.

[55] See *Kajelijeli* Judgement, par. 625:
After careful consideration of all the evidence regarding the massacre at the Ruhengeri Court of Appeal on or around 14 April 1994, the Chamber finds that the Accused played a vital role as an organizer and facilitator of the *Interahamwe* and other attackers. He did this by procuring weapons, rounding up the *Interahamwe* and facilitating their transportation to the Ruhengeri Court of Appeal by supplying them with petrol. The *Interahamwe* were to assist in killing the Tutsis who had been taken from Busengo sub-*prefecture* in Ndusu *Commune* and left at the Ruhengeri Court of Appeal, and who had until that point been successfully resisting attacks by the local militia.

50. The Defence for Nzirorera contends that the testimony already heard by this Chamber of Witness BTH is a bar to the taking judicial notice of certain facts.

51. As previously mentioned, considering the interests of justice and the particular circumstances of the case, some Trial Chambers have declined to take judicial notice of adjudicated facts in circumstances where evidence has already been heard on the subject matter of the fact sought to be judicially noticed.[56] The fact of a Trial Chamber having heard testimony on a particular fact is, however, not an absolute bar to the taking of judicial notice of that fact. The Chamber must determine whether, having already heard testimony on a particular fact, taking judicial notice of that fact will advance the objective of expediency without compromising the rights of the Accused. Relevant considerations to this determination may include, for example, how much evidence has been heard on a particular fact, how much evidence is still to be heard with respect to the particular fact, how directly a witness has testified on a particular fact, and whether the relevant witness testimony corroborates or contradicts the fact proposed for judicial notice.

52. In the present case, the Chamber has considered the facts allegedly precluded from judicial notice by virtue of Witness BTH's testimony, and is of the view that only Fact 39 should be excluded on this basis in the interests of justice. There might be indeed some divergence with the testimony of Witness BTH on the same fact. Contrary to Nzirorera's assertion, the fact that Witness BTH testified that Kajelijeli was acting at the direction of Nzirorera, does not affect the conclusion that Facts 16, 17, 20 to 24, 33, 41 to 46, 49, 54, 57, 58, 59, and 61 do not relate to the acts, conduct and mental state of the Accused.

53. The Defence for Nzirorera also submits, since the Trial Chamber in *Kajelijeli* found that the Prosecution had failed to prove its allegation that Kajelijeli conspired with Nzirorera and others,[57] it would be unfair to take judicial notice of selective findings of the Trial Chamber which help the Prosecution.[58] The Chamber is of the view that this argument, on the contrary, favours the admission of Facts 16, 17, 20 to 24, 33, 41 to 46, 49, 54, 57, 58, 59, and 61 since the *Kajelijeli* Trial Chamber did not find that Nzirorera and Kajeljeli were co-conspirators.

54. The Defence for Nzirorera also makes several individual submissions on why taking judicial notice of certain facts will not advance the objective of expediency. Firstly, he submits, Facts 23 and 24 involve events in Kinigi *commune* which are not included in the Amended Indictment, and are not the subject of testimony from any proposed witness on the Prosecution's Witness List. The Defence for Nzirorera submits that, since it will be required to adduce evidence to refute events in Kinigi and Nkuli *communes,* the purpose of expediency will not be advanced. Secondly, with respect to Facts 41 to 50, the Defence submits that these facts are based on findings from the testimony of Witness GDD, who has since died, and that no other witness on the Prosecution's Witness List will testify to these events. It claims that in these circumstances, to take judicial notice of these facts will deprive Nzirorera of his right to cross-examination on matters which are strongly disputed, and will not promote expediency since there are no witnesses whose testimony would not otherwise be needed or whose testimony would be shortened by the taking of judicial notice. The Prosecution acknowledges that Witness GDD has died since his testimony in the *Kajelijeli* case, but says that the Defence will still be able to rebut the facts by calling other witnesses and that there will be other witnesses who will testify about the events in these *communes* whose evidence can be challenged.

55. The Chamber is satisfied that both the Indictment and the Pre-trial Brief make specific mention of massacres in Ruhengeri *prefecture,* within which Kinigi *commune* is located. Furthermore, in the Pre-trial Brief, specific mention is made of Mukingo *commune* and other *communes* which neighbour

[56] See *Prosecutor v. Bizimungu et al.,* Case N°ICTR-50-T, Decision on the Prosecutor's Motion and Notice of Adjudicated Facts, 10 December 2004, para. 22; *Blagojevic* Decision, paras. 22 and 23.
[57] *Kajelijeli* Judgement, paras. 794-98.
[58] See paras. 47-49 of Nzirorera's first submissions on this (13 July 2005).

Kinigi and Nkuli. Having considered the circumstances of the present case, the Chamber is of the view that taking judicial notice of Facts 16, 17, 20 to 24, 33, 41 to 46, 49, 54, 57, 58, 59, and 61 will advance the objective of expediency without compromising the rights of the Accused. Concerning Facts 33 and 54, the Chamber deems it necessary to cure minor inaccuracies (see Annexure to the present Decision)

56. Finally, Facts 31 and 32 have not been appealed, and therefore were not remanded to the Chamber for further consideration. The findings of the Chamber on those facts in the Decision of 9 November 2005 still stand.

4. Facts 25 to 30 and 146 to 152 (*Rutaganda* Judgement)

57. Under Facts 25 to 30 and 146 to 152, the Prosecution seeks judicial notice of facts taken from the *Rutaganda* Judgement.[59]

58. The Defence for Ngirumpatse submits that Facts 27 to 30, 147, 151 and 152 must be excluded from admission because they comprise the acts and conduct of the Accused, or the acts of the *Interahamwe* that can be imputed to the Accused in this case. Furthermore, it contends that the Chamber should decline to take judicial notice of facts concerning the synonymous use of the words 'Tutsi' "enemy", "accomplices of the enemy", "infiltrators", "accomplices of the RPF", "*inyenzi*", "*inkotanyi*" for similar reasons.[60]

59. The Chamber is satisfied that the purported facts taken from the *Rutaganda* Judgement concern a matter at issue in the current proceedings and none of them relates to the acts, conduct and mental state of the Accused persons in this case. However, Facts 151 and 152 are so central to the allegations against the Accused in this case, that it is preferable to hear *viva voce* evidence on these matters. The Chamber therefore declines to take judicial notice of them.

60. The Chamber also declines to take judicial notice of Fact 150 on the ground of vagueness, and of Facts 148 and 149 because the Chamber is not persuaded that their admission will promote the objective of expediency.

61. Considering the context of the Judgement, Facts 25 to 30 and 146 and 147 are truly adjudicated facts and are in a substantially similar form to how they were expressed in the original Judgement. Considering the rights of the Accused and the interests of justice, their admission will contribute to expediting the proceedings. The Chamber, however, has cured certain minor inaccuracies *proprio motu*, so as to enable the taking of judicial notice of those facts in a form which does not contain any ambiguity (see Annexure to this Decision; Facts 25 and 28).

5. Facts 10 to 12, 88 to 90, 92, 99 to 103, 105 to 107, 124, 127 to 131, 133, 134 to 137 (*Niyitegeka* Judgement); Facts 13, 86, 87, 91, 93, 94, 104, 111, 112, 113 (*Musema* Judgement); Facts 69, 71, 74, 84, 85, 95 to 98, 109, 110, 114, 115 (*Kayishema* Judgement); and Facts 70, 72, 73, 108, 116 to 123, 125, 126, 132 (*Ntakirutimana* Judgement)

62. The Prosecution moves the Chamber to take judicial notice of a series of facts extracted from the *Niyitegeka*, *Musema*, *Kayishema* and *Ntakirutimana* Judgements,[61] which, among other things concerns attacks on Muyira Hill, in the Bisesero area, on 13 and 14 May 1994.

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[59] *Prosecutor v. Georges Rutaganda*, Case N°ICTR-96-3-T, Judgement and Sentence (TC), 6 December 1999.
[60] See Facts 151-152.
[61] *Prosecutor v. Eliezer Niyitegeka*, Case N°ICTR-96-14-T, Judgement and Sentence (TC), 16 May 2003; *Prosecutor v. Alfred Musema*, Case N°ICTR-96-13-T, Judgement and Sentence (TC), 27 January 2000; *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case N°ICTR-95-1-T, Judgement (TC), 21 May 1999; *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case N°ICTR-96-10 and ICTR-96-17-T, Judgement and Sentence (TC), 21 February 2003.

63. The Defence for Ngirumpatse and the Defence for Karemera submit that these Facts extracted from the *Niyitegeka* Judgement must be excluded because they comprise the acts, conduct and mental state of the Accused persons or concern the acts of the *Interahamwe* that could be imputed to the Accused in this case. They also claim that some of them are vague or taken out of context of the original Judgement.

64. The Chamber declines to take judicial notice of Fact 84 on the basis that, absent the meaning provided by the context of Facts 79 to 83, in respect of which the Prosecution abandoned its application, the fact is devoid of meaning.

65. After reviewing the remaining facts in the context of their original Judgement, the Chamber considers that they are accurate reproductions of the original Chamber's findings from which they were extracted and are truly adjudicated facts which are relevant to matters at issue in the current proceedings. Contrary to the Defence's assertions, the Chamber is also satisfied that none of them concerns the acts, conduct or mental state of the Accused in this case.

66. The Defence for Ngirumpatse and the Defence for Karemera request the exclusion of facts where the original Trial Chamber has made the particular finding on the basis of the testimony of only one witness. Furthermore, the Defence for Karemera submits that judicial notice of Facts 86 to110 should be denied on the basis that those facts are the subject of reasonable dispute. In its view, since Appeals Judge Lennart Aspergen did not find certain facts pertaining to this incident proven beyond reasonable doubt in his Separate Opinion to the *Musema* Judgement, these facts are the subject of reasonable dispute. The Defence for Karemera also contends that, since Witness HR's testimony, upon whose testimony factual findings were made in the *Musema* Judgement, was disregarded by another Trial Chamber, judicial notice should not be taken of Facts 86 to 107.

67. The Chamber has already indicated that according to the established jurisprudence, a Chamber may rely on a single witness' testimony as proof of a material fact.

68. The *Niyitegeka* Trial Chamber explicitly stated that Witness HR was a credible witness, and accepted his testimony.[62] The Appeals Chamber found the Trial Chamber's assessment of Witness HR to be "detailed and careful", and found no error in the Trial Chamber having relied on his testimony.[63] Furthermore, in the *Musema* trial, Witness HR was one of the witnesses upon whom the Trial Chamber relied in making the findings underpinning other facts.[64] The Trial Chamber expressly stated that it found the cross-examination of the witness in no way impaired his credibility, and that his evidence was reliable. The Appeals Chamber did not question the evaluation of this witness by the Trial Chamber.[65]

69. While the Chamber considers that issues of witness credibility in an original judgement *may* mitigate against judicial notice of an adjudicated fact, the Chamber is of the view that this depends upon the particular fact in question and the totality of the circumstances surrounding that finding. The question for the Chamber is whether the taking of judicial notice of the fact will compromise the rights of the Accused. The Chamber notes that a witness may be found to be credible by one finder of fact, and not by another. The Chamber also notes that a witness may be found to be telling the truth in a case against one accused, and not in another. The Chamber is not satisfied, with respect to the particular facts proposed for adjudication and said to be tarnished by issues of witness credibility that the rights of the Accused would be compromised. In addition in the present situation, the facts the admission of which is disputed by the Defence were adjudicated by four different Trial Chambers which also heard various witnesses.

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[62] *Niyitegeka* Judgement, para. 108.
[63] *Prosecutor v. Niyitegeka,* Case N°ICTR-96-14-A, Judgement (AC), 9 July 2004, para. 138.
[64] Facts 86, 87, 91, 93, 94, 104, 111-112.
[65] *Musema* Appeals Chamber Judgement, paras. 77-100.

70. In these circumstances, the Chamber is satisfied that taking judicial notice of Facts 10 to 12, 88 to 90, 92, 99 to 103, 105 to 107, 124, 127 to 131, 133, 134 to 137, 13, 86, 87, 91, 93, 94, 104, 111, 112, 113, 69, 71, 74, 85, 95 to 98, 109, 110, 114, 115, 70, 72, 73, 108, 116 to 123, 125, 126, 132 is the interests of justice and will promote expediency in this case, without compromising the rights of the Accused.

6. Facts 142 and 143 (*Nahimana* Judgement)

71. The Prosecution seeks judicial notice of two facts taken from the *Nahimana* Judgement (Facts 142 and 143).[66] It claims that while the case is pending appeal, these two facts are not the subject to the appeal and may be judicially noticed. Relying upon the Separate Opinion of His Honour Judge Shahabuddeen, it submits that judicial notice can be taken of adjudicated facts in cases pending appeal, provided that the particular facts in question do not form part of the appeal.[67]

72. The Chamber notes that one of the Appellants in the *Nahimana* case, Jean-Bosco Barayagwiza, is requesting the annulment of the Judgement on the basis that the proceedings were conducted in his absence. Furthermore, he is alleging a lack of independency of the Tribunal and lack of impartiality of the Judges.[68]

73. In light of these grounds of appeal, the Chamber considers that the Appeals Chamber Judgement has the potential to impact all factual findings of the Trial Chamber Judgement, including the facts sought for judicial notice. Under these circumstances, Facts 142 and 143 cannot be considered to have been finally adjudicated and cannot therefore be judicially noticed.

General Assessment of the Rights of Accused and Expediency of the Proceedings

74. The Defence for each Accused generally submits that taking judicial notice of the facts proposed for notice by the Prosecution compromises the rights of the Accused, including their rights to examine and have examined the witnesses against him. They also claim that the Rule's purpose of expediency will not be advanced, as required by the Appeals Chamber's ruling, since the Accused in this case will be obligated to call evidence to rebut each fact.

75. The Chamber wholly rejects this argument, for if it were to adopt the position, a Chamber could never find that taking judicial notice of any fact would promote expediency.

76. Considering the interests of justice and the entire circumstances of the case, the Chamber is satisfied that taking judicial notice of certain adjudicated facts, as detailed above, will promote expediency without compromising the rights of the Accused. Particularly, the Chamber is of the view that this Decision will not place such a significant burden on the Accused to produce rebuttal evidence that it would jeopardise their right to fair trial.[69] In terms of expediency of the proceedings, the Chamber expects the Prosecution to comply with its stated intention to streamline the presentation of its evidence and to reduce the number of witnesses it intends to call as a result of admission of adjudicated facts.

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[66] Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, ICTR-99-52-T, Judgement (TC), 3 December 2003.
[67] *Prosecutor v. Milosevic,* Case N°IT-02-54-AR73.5, Separate Opinion of Judge Shahabuddeen Appended to the Appeal's Chamber's Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003.
[68] See Notice of Request for Annulment of Judgement rendered on 3 December 2003 in *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, ICTR-99-52-T, filed on 3 February 2004.
[69] *Popović* Decision, para. 16.

77. However, it is necessary to state that judicial notice is neither taken of the specific order in which these facts have been placed by the Prosecution in its Motion, nor of the headings under which those facts have been placed by the Prosecution. The Chamber takes judicial notice of the facts individually, as extracted from the original Judgements in which the findings were made (for details see Annexure A to this Decision).

FOR THOSE REASONS, THE CHAMBER

I. GRANTS the Prosecution Motion in part, and hereby

II. TAKES JUDICIAL NOTICE of the following facts of common knowledge, pursuant to Rule 94 (A) of the Rules:

(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.

(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.

III. TAKES JUDICIAL NOTICE of the following adjudicated facts, pursuant to Rule 94 (B) of the Rules, which content is detailed in Annexure A to this Decision:

Facts 1 to 8, 10 to 13, 15, 16, 17, 20 to 24, 26, 27, 29, 30, 41 to 46, 49, 57 to 59, 61, 65 to 74, 85 to 137, 144 to 147.

III. TAKES judicial notice of the following adjudicated facts, pursuant to Rule 94 (B) of the Rules, subject to minor corrections deemed necessary and appropriate by the Chamber, appearing in Annexure A to this Decision: Facts 9, 33, 54, 25 and 28.

III. DENIES the remainder of the Prosecution's request and therefore DECLINES to take judicial of the following facts, which content is detailed in Annexure B to this Decision:

Facts 18, 19, 34 to 40, 47, 48, 50-53, 55-56, 60, 62, 63, 64, 84, 142, 143, 148 to 152.

Arusha, 11 December 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

Annexure A - Adjudicated Facts Judicial Noticed

As explained in this Decision, in some instances the Chamber took judicial notice of adjudicated facts subject to amendments deemed necessary to cure minor inaccuracies or ambiguities. These amendments are highlighted in bold hereinafter when appropriate.

1	During the events of 1994, Tutsi girls and women were subjected to sexual violence, beaten and killed on or near the *bureau communal* premises, as well as elsewhere in the *commune* of Taba. Hundreds of Tutsi, mostly women and children, sought refuge at the *bureau communal* during this period and many rapes took place on or near the premises of the *bureau communal*.	Akayesu, par. 449.
2	A woman was taken by *Interahamwe* from the refuge site near the *bureau communal* to a nearby forest area and raped there. She was also raped repeatedly on two separate occasions in the cultural center on the premises of the *bureau communal*, once in a group of fifteen girls and women and once in a group of ten girls and women.	Akayesu, par. 449.
3	Women and girls were selected and taken by the *Interahamwe* to the cultural center to be raped. Two *Interahamwes* took a woman and raped her between the *bureau communal* and the cultural center.	Akayesu, par. 449.
4	A woman was taken from the *bureau communal* and raped in a nearby field. Three women were raped at Kinihira, the killing site near the *bureau communal*, and another woman found her younger sister, dying, after she had been raped at the *bureau communal*.	Akayesu, par. 449.
5	Many other instances of rape in Taba took place outside the *bureau communal* – in fields, on the road, and in or just outside houses.	Akayesu, par. 449.
6	Other acts of sexual violence took place on or near the premises of the *bureau communal* – the forced undressing and public humiliation of girls and women.	Akayesu, par. 449.
7	Much of the sexual violence took place in front of large numbers of people, and all of it was directed against Tutsi women.	Akayesu, par. 449.
8	With regard to all rape and sexual violence which took place on or near the premises of the Taba *bureau communal*, the perpetrators were all Interahamwe.	Akayesu, par. 450.
9	*Interahamwe* are also identified as the perpetrators of many rapes which took place outside the *bureau communal*.	Akayesu, par. 450.
10	On 28 June 1994, near the Technical Training College, on a public road between Charroi Naval and Kibuye, Niyitegeka ordered *Interahamwe* to undress the body of a woman who had just been shot dead, to fetch and sharpen a piece of wood, which he then instructed them to insert into her genitalia.	Niyitegeka, paras. 316 and 273.
11	This act was then carried out by the *Interahamwe*, in accordance with his instructions.	Niyitegeka, par. 316.
12	The body of the woman, with the piece of wood protruding from it, was left on the roadside for some three days thereafter. Niyitegeka referred to the woman as "*Inyenzi*" by which he meant to refer to Tutsi.	Niyitegeka, par. 316.
13	Within the area of Gisovu Tea Factory, Twumba *Cellule*, Gisovu *Commune*, Musema ordered the rape of Annunciata Mujawayezu, a Tutsi woman, and the cutting off of her breast to be fed to her son. She was in fact killed.	Musema, paras. 805 and 828.

15	On 13 April 1994 at approximately 10:00 a.m. Semanza directed a group of people to rape Tutsi women before killing them. Victim A was raped by one of the men in the group and that her cousin, Victim B, was taken outside and killed by two other men from the group.	Semanza, par. 261.
16	Ntenzireyerimye and Uyamuremye, members of the Interahamwe, mutilated a Tutsi girl named Nyiramburanga by cutting off her breast and then licking it, on the morning of 7 April 1994 in Rwankeri *cellule*.	Kajelijeli, par. 678.
17	Members of the *Interahamwe*, including *Interahamwe* from Mukingo *commune* and neighbouring areas committed rapes and sexual assaults in the Ruhengeri *Préfecture* between 7 and 10 April 1994.	Kajelijeli, par. 683.
20	The *Interahamwe* pierced Joyce's side and sexual organs with a spear, and then covered her dead body with her skirt.	Kajelijeli, par. 677.
21	A Tutsi woman was raped by members of the *Interahamwe* in Busogo Parish and in Kabyaza *cellule* on 7 April 1994, after having been stopped at a roadblock.	Kajelijeli, par. 679, 918.
22	The handicapped daughter of a Tutsi woman was raped and killed by members of the *Interahamwe* in Rukoma Cellule, Shiringo *Secteur* on 7 April 1994.	Kajelijeli, par. 680, 919.
23	A Tutsi woman was raped and sexually mutilated by members of the *Interahamwe* in Susa *secteur*, Kinigi commune on 7 April 1994.	Kajelijeli, par. 681, 920.
24	A Tutsi woman was raped by members of the *Interahamwe* in Susa *secteur*, Kinigi *Commune* on 10 April 1994.	Kajelijeli, par. 682, 921.
25	Many of the refugees who escaped or survived the attack at ETO (*École Technique Officielle,* in Kicukiro sector, Kicukiro *Commune*) headed in groups towards the Amahoro Stadium.	Rutaganda, paras. 262 and 300.
26	Some women were taken forcibly from the group and subsequently raped.	Rutaganda, par. 300.
27	Flanked on both sides by *Interahamwe*, approximately 4,000 refugees were then forcibly marched to Nyanza.	Rutaganda, par. 300.
28	At Nyanza, an attack took place on 11 April, in the late afternoon and into the evening. Many were killed in this attack.	Rutaganda, par. 301.
29	The *Interahamwe* then began killing people with clubs and other weapons.	Rutaganda, par. 301.
30	Some girls were selected, put aside, and raped before they were killed. Clothing had been removed from many of the women who were killed.	Rutaganda, par. 301.
33	On 7 April 1994 many Tutsi men, women and children were attacked and massacred at a place of shelter within the Mukingo *commune*, in this case the place known as Munyemvano's compound in Rwankeri *cellule*.	Kajelijeli, par. 597.
41	There was a meeting on the evening of 6 April 1994 following the death of the President, at the Canteen next to the Nkuli bureau communal.	Kajelijeli, par. 469.
42	Kajelijeli seized the leading role in the meeting, and addressed those persons present – who were all of Hutu ethnic origin. And he said to them "[Y]ou very well know that it was the Tutsi that killed – that brought down the Presidential plane. What are you waiting for to eliminate the enemy?"	Kajelijeli, par. 469.
43	By "the enemy", a witness present understood Kajelijeli to mean the Tutsi ethnic group.	Kajelijeli, par. 469.

4 4	After receiving information from Sendugu Shadrack that there were no weapons available to attack the population, Kajelijeli left the meeting with Deputy Brigadier Boniface Ntabareshya.	Kajelijeli, par. 469.
4 5	When he returned he informed those present that Major Bizabarumana had agreed to provide them with "equipment" at the *commune* the following morning.	Kajelijeli, par. 469.
4 6	Kajelijeli also promised to bring *Interahamwe* reinforcements from Mukingo *commune* for the attack on Kinyababa cellule.	Kajelijeli, par. 469.
4 9	Augustin Habiyambere and Sendugu Shadrack led an attack on the morning of the 7 April 1994, following the delivery of weapons from Mukamira camp in which approximately 100 young militants, including youth from Nkuli *commune*; recruits from Mukingo led by the CDR President from the Gitwa *secteur*, Iyakaremye; a group from the Rukoma Mountains; forces from Mukamira; and soldiers in civilian attire from IGA, attacked and killed approximately 12 families of Tutsis, numbering approximately 80 people, residing in Kinyababa *cellule* in Nkuli *commune*.	Kajelijeli, par. 487.
5 4	The attack at Busogo Hill, Rwankeri *cellule,* Mukingo *commune,* claimed the lives of many Tutsis.	Kajelijeli, paras. 544 and 549.
5 7	The *Interahamwe* attackers involved in the attack at Munyemvano's compound used traditional weapons, guns and grenades to slaughter their Tutsi victims.	Kajelijeli, par. 597.
5 8	There was a killing of a large number of Tutsis at the Convent at Busogo Parish on the morning of 7 April 1994. The number of bodies buried the following day is an indicator that approximately 300 people died in the attack.	Kajelijeli, par. 604.
5 9	Members of the *Interahamwe* were involved in the attack.	Kajelijeli, par. 604.
6 1	At the Ruhengeri Court of Appeal, *Interahamwe*, who were all Hutus, killed about three hundred Tutsis.	Kajelijeli, par. 622.
6 5	Tutsi civilians were killed at Musha church by soldiers, gendarmes, and *Interahamwe* militiamen on 13 April 1994. Semanza participated in this attack by gathering *Interahamwe* to take part in the attack and by directing the assailants to kill Tutsi refugees.	Semanza, par. 206.
6 6	In April 1994 there were attacks on mostly Tutsi, civilian refugees on Mwulire Hill.	Semanza, par. 224.
6 7	Semanza participated in the killings of Tutsi refugees on Mwulire Hill on 18 April 1994.	Semanza, par. 228.
6 8	Semanza was armed and present on 12 April 1994 during the attack on Mabare mosque and that the attack resulted in the death of around 300 Tutsi refugees.	Semanza, par. 244.
6 9	From about 9 April until 30 June 1994, Tutsis sought refuge in Bisesero from Hutu attacks that had occurred in other parts of Rwanda and, in particularly, other areas of Kibuye *Préfecture*.	Kayishema, par. 409.
7 1	Attacks occurred at approximately twelve sites in the Bisesero area.	Kayishema, par. 411.
7 4	Ruzindana and Kayishema personally attacked Tutsis seeking refuge during the assaults described in Bisesero.	Kayishema, par. 467.
7 0	Regular attacks occurred in the Bisesero region from 9 April 1994 until about 30 June 1994, and thousands of Tutsi were killed, injured and maimed there.	Ntakirutimana, paras. 446, 447 and 448.

72	The attackers consisted of *Interahamwe*, *gendarmes*, soldiers, and civilians.	Ntakirutimana, par. 447.
73	The *Interahamwe*, *gendarmes*, and soldiers were usually armed with guns and wore uniforms. The civilians were usually armed with clubs, machetes, bows, arrows, spears, hoes, knives, sharpened bamboo sticks, and other traditional weapons.	Ntakirutimana, par. 447.
85	The most severe attacks occurred in the Bisesero area on 13 and 14 May 1994, after an apparent two-week lull in the attacks.	Kayishema, par. 406.
95	Kayishema and Ruzindana were present at the massacres in Muyira Hill and its vicinity beginning on about 13 May 1994.	Kayishema, par. 430.
110	Attacks in the vicinity of Muyira Hill continued into June 1994.	Kayishema, par. 452.
96	Kayishema and Ruzindana arrived at the head of the convoy of vehicles which transported soldiers, members of the *Interahamwe*, communal police and armed civilians.	Kayishema, par. 565.
97	Kayishema signalled the start of the attacks by firing a shot into the air, directed the assaults by dividing the assailants into groups, and headed one group of them as it advanced up the Hill and verbally encouraged the attackers through a megaphone.	Kayishema, par. 565.
98	Ruzindana also played a leadership role, distributing traditional weapons, leading a group of attackers up the Hill and shooting at the refugees.	Kayishema, par. 565.
109	Ruzindana orchestrated the massacre at the Hole near Muyira Hill, and the assault commenced upon his instruction.	Kayishema, par. 565.
86	On 13 May 1994, a large scale attack occurred on Muyira Hill against up to 40000 Tutsi refugees.	Musema, par. 747.
87	The attack started in the morning.	Musema, par. 747.
91	The attackers were armed with firearms, grenades, rocket launchers and traditional weapons, and sang anti-Tutsi slogans.	Musema, par. 747.
93	Musema was one of the leaders of the attackers coming from Gisovu and drove his red Pajero to the attack. Musema was armed with a rifle. He used the weapon during the attack.	Musema, par. 748.
94	Thousands of unarmed Tutsi men, women and children were killed during the attack at the hands of the assailants and that many were forced to flee for their survival.	Musema, par. 748.
104	A large scale attack occurred on Muyira Hill 14 May 1994 against Tutsi civilians, and the attackers, numbering as many as 15000, were armed with traditional weapons, firearms and grenades, and sang slogans.	Musema, par. 750.
88	The attackers comprised thousands of *Interahamwe*, soldiers, policemen and Hutu civilians.	Niyitegeka, par. 178.
89	They were transported in ONATRACOM buses, lorries belonging to COLAS, MINITRAP vehicles, buses, pick-ups, vehicles from the Gisovu Tea Factory and vehicles commandeered from Tutsi.	Niyitegeka, par. 178.
90	These vehicles parked at Kucyapa. The attackers were chanting "Tuba Tsemba Tsembe", which means "Let's exterminate them", a reference to the Tutsi.	Niyitegeka, par. 178.
92	The attackers were armed with guns, machetes, spears, sharpened bamboo sticks and clubs.	Niyitegeka, par. 178.
99	On 13 May, sometime between 7.00 a.m. and 10.00 a.m., Niyitegeka was one of the leaders in a large-scale attack by armed attackers against Tutsi refugees at Muyira Hill.	Niyitegeka, par. 178.

100	Niyitegeka was armed with a gun and was shooting at the Tutsi refugees at the hill. In addition, Niyitegeka instructed the attackers during the attack, showing the attackers where to go and how to attack the refugees.	Niyitegeka, par. 178.
101	Niyitegeka was in the front row leading attackers, together with other leaders.	Niyitegeka, par. 178.
106	The attackers comprised civilians, soldiers, *Interahamwe*, gendarmes and communal policemen.	Niyitegeka, par. 205.
107	They were carrying guns, spears, clubs, machetes and sharpened objects, and launched a large-scale attack against the Tutsi refugees at Muyira Hill. Niyitegeka was armed with a gun and shot at Tutsi refugees at Muyira Hill.	Niyitegeka, par. 205.
105	On the morning of 14 May, Niyitegeka and others, together with attackers, arrived at Muyira Hill and parked their vehicles at Kucyapa.	Niyitegeka, par. 205.
102	In the evening of 13 May 1994, Niyitegeka held a meeting at Kucyapa after the 13 May attack against Tutsi refugees at Muyira Hill, for the purpose of deciding on the programme of killings for the next day and to organize these killings against the Tutsi in Bisesero, who numbered approximately 60,000. The meeting was attended by about 5,000 people.	Niyitegeka, par. 257.
103	Using a loudspeaker, Niyitegeka thanked attackers for their participation in attacks and commended them for "a good work", which refers to the killing of Tutsi civilians. Niyitegeka told them to share the people's property and cattle, and eat meat so that they would be strong to return the next day to continue the work, that is, the killing.	Niyitegeka, par. 257.
108	Sometime in mid-May 1994 in Muyira Hill, Gérard Ntakirutimana led armed attackers in an attack on Tutsi refugees, as a result of which many Tutsi were killed.	Ntakirutimana, par. 635.
111	Musema participated in an attack on Mumataba hill in mid-May 1994. The assailants, numbering between 120 and 150, included tea factory employees, armed with traditional weapons, and communal policemen.	Musema, par. 755.
112	In the presence and with the knowledge of Musema, tea factory vehicles transported attackers to the location. The attack was launched on the blowing of whistles, and the target of the attack were 2000 to 3000 Tutsis who had sought refuge in and around a certain Sakufe's house.	Musema, par. 756.
113	Musema participated in the attack on Nyakavumu cave at the end of May 1994. Musema was present at the attack during which assailants closed off the entrance to the cave with wood and leaves, and set fire thereto. Over 300 Tutsi civilians who had sought refuge in the cave died as a result of the fire.	Musema, par. 780.
114	At the cave, Kayishema was directing the siege generally and Ruzindana was commanding the attackers from Ruhengeri; both were giving instructions to the attackers and orchestrating the attack.	Kayishema, par. 566.
115	Gendarmes, members of the *Interahamwe* and various local officials were present and participated.	Kayishema, par. 438.

1 16	Elizaphan Ntakirutimana brought armed attackers in the rear hold of his vehicle to Nyarutovu Hill one day in the middle of May 1994, and the group was searching for Tutsi refugees and chasing them. Elizaphan Ntakirutimana pointed out the fleeing refugees to the attackers who then chased these refugees singing "Exterminate them; look for them everywhere; kill them; and get it over with, in all the forests."	Ntakirutimana, par. 594.
1 17	Elizaphan Ntakirutimana participated in a convoy of vehicles carrying armed attackers to Kabatwa Hill at the end of May 1994, and, later on that day, at neighbouring Gitwa Hill, he pointed out the whereabouts of Tutsi refugees to attackers who attacked the refugees.	Ntakirutimana, par. 607.
1 18	Three meetings convened in Kibuye town in June 1994.	Ntakirutimana, paras. 711 and 720.
1 19	The first took place around 10 June in the conference room of the prefectural office. The meeting started between 10.00 and 11.00 a.m.	Ntakirutimana, paras. 711 and 720.
1 20	It was attended by *Interahamwe* and various officials, including Prefect Kayishema, Ruzindana, Musema, Eliézer Niyitegeka, Gérard Ntakirutimana, and the *bourgmestres* of the *communes* surrounding Bisesero, seated in the front row.	Ntakirutimana, paras. 711 and 720.
1 21	Ruzindana took the floor and explained to the participants that the meeting was aimed at evaluating their progress in killing Tutsi in the Bisesero area and to decide what still needed to be done to finish that task.	Ntakirutimana, paras. 711 and 720.
1 22	Gérard Ntakirutimana also took the floor, saying that the problem they faced in completing the work was that they had insufficient guns and ammunition. Like other speakers at the meeting, Gérard Ntakirutimana spoke through a microphone connected to loudspeakers.	Ntakirutimana, paras. 711 and 720.
1 23	At those meetings Gérard Ntakirutimana also participated in the distribution of weapons, discussed the planning of attacks at Bisesero, was assigned a role in such an attack, and reported back on its success.	Ntakirutimana, par. 720.
1 25	There was a second meeting that took place about a week later at the same venue. It also started between 10.00 and 11.00 a.m. and lasted about four hours.	Ntakirutimana, paras. 712 and 720.
1 26	The same officials who attended the first meeting also attended the second. Many other persons, including *Interahamwe*, were present, inside and outside the room.	Ntakirutimana, paras. 712 and 720.
1 32	Gérard Ntakirutimana was named as a member of the "Ngoma group", which included Enos Kagaba and Mathias Ngirinshuti and was to attack Murambi.	Ntakirutimana, par. 712.
1 24	Niyitegeka promised to provide weapons for the killing of the Tutsi in Bisesero.	Niyitegeka, par. 225.
1 27	The meeting was held to permit Niyitegeka to answer questions posed at the previous meeting, including in relation to the promise of weapons made at the previous meeting.	Niyitegeka, par. 225.
1 28	At that meeting, Niyitegeka distributed the weapons to group representatives for use in killings in Bisesero.	Niyitegeka, par. 225.
1 29	Niyitegeka stated that the attack would take place the next day in Bisesero.	Niyitegeka, par. 225.

1 30	Niyitegeka presented the attack plan on a blackboard: a circle with "Bisesero" written in the circle. Around this circle were written the names of the designated leaders of each group of attackers and the points of departure for the five groups of attackers, which were Karongi, Rushishi, Kiziba, Gisiza and Murambi.	Niyitegeka, par. 225.
1 31	Niyitegeka encouraged people to participate in the attack, and was himself a leader for the Kiziba group.	Niyitegeka, par. 225.
1 33	This plan was carried out in the attack at Kiziba the next day against Tutsi in Bisesero, which attack was led by Niyitegeka and resulted in many victims amongst the Tutsi refugees.	Niyitegeka, par. 225.
1 34	On or about 18 June, Niyitegeka attended a meeting in the canteen of Kibuye Prefectural Office where he promised to supply *gendarmes* for the next day's attack and urged *bourgmestres* and others to do all they could to ensure participation in the attacks so that all the Tutsi in Bisesero could be killed. Another attack took place the next day as planned.	Niyitegeka, par. 229.
1 35	Sometime in June, at approximately 5.00 p.m., Niyitegeka spoke at a meeting at Kibuye Prefectural Office, which was attended by Kayishema, Ruzindana, many *Interahamwe*, and others.	Niyitegeka, par. 232.
1 36	The Interahamwe were chanting: "Exterminate them, flush them out of the forest", meaning the Tutsi.	Niyitegeka, par. 232.
1 37	Niyitegeka told the audience that he had come so they could pool their efforts in overcoming the enemy, that is, the Tutsi, and promised they would get his contribution in due course. He promised that not less than a hundred *Interahamwe* would assist in the attacks against the Tutsi.	Niyitegeka, par. 232.
1 44	On 8 April 1994 in the morning, Semanza met Rugambarara and a group of *Interahamwe* in front of a certain house in Bicumbi *commune*. Semanza told the *Interahamwe* that a certain Tutsi family had not yet been killed, that no Tutsi should survive, and that the Tutsis should be sought out and killed.	Semanza, par. 271.
1 45	Later the same day, the Interahamwe searched a field near the house of the family mentioned by Semanza, found four members of that family, and killed them.	Semanza, par. 271.
1 46	As from an unspecified date in mid-April, a roadblock was erected by *Interahamwe* on the Avenue de la Justice near a traffic light not far from the entrance to the Amgar Garage at the Cyahafi Sector boundary, in Nyarugenge *Commune* of the Kigali-*ville Préfecture*.	Rutaganda, par. 225.
1 47	At the said roadblock, the *Interahamwe* checked the identity cards of those who crossed it and detained those who carried identity cards bearing the "Tutsi" ethnic reference or were otherwise considered as "Tutsi" because they had stated that they were not in possession of an identity card.	Rutaganda, par. 225.

Annexure B - Facts in relation to which judicial notice is denied

1 8	These rapes and sexual assaults were committed in the course of a widespread attack upon the Tutsi civilian population.	Kajelijeli, par. 922.

191	Pursuant to an order of Kajelijeli given at Byangabo Market on 7 April 1994 to "exterminate the Tutsis" the Interahamwe went to Rwankeri cellule, where a Tutsi woman named Joyce was raped and killed by *Interahamwe*.	Kajelijeli, par. 917.
34	In Mukingo commune and neighbouring areas in April 1994, the killings of the Tutsi were not a spontaneous reaction of the Hutu populace to the death of the President.	Kajelijeli, par. 161.
35	The killers were, amongst others, *Interahamwe* who were directed to kill all the Tutsis and received assistance and were supplied with weapons to do so.	Kajelijeli, par. 161.
36	Kajelijeli was a leader of *Interahamwe* with control over the *Interahamwe* in Mukingo *commune*, and he also had influence over the *Interahamwe* of Nkuli *commune* from 1 January 1994 to July 1994.	Kajelijeli, par. 404.
37	Kajelijeli was closely associated with the new MRND and its leadership and especially from January 1994 to mid-July 1994, he was actively involved in many activities of this party in Mukingo *commune* and the neighbouring areas. He may as well have been a member of the MRND party.	Kajelijeli, par. 426.
38	Kajelijeli held and maintained effective control over *Interahamwe* from Mukingo and Nkuli *communes* from 6 April until at least 14 April 1994.	Kajelijeli, par. 626.
39	By 6 April 1994, Kajelijeli was actively involved in the training of the *Interahamwe* in Mukingo *commune*.	Kajelijeli, par. 400.
40	Interahamwe in Mukingo *commune* used distinctive uniforms and Kajelijeli participated in the distribution of these uniforms to the *Interahamwe* in Byangabo Market around 1993	Kajelijeli, par. 402.
47	At the Nkuli bureau communal between 5:00am and 6:00am on the morning of 7 April 1994, a Land Rover arrived from Mukamira military camp.	Kajelijeli, par. 474.
48	The Land Rover had brought Kalashnikovs, grenades and boxes of cartridges.	Kajelijeli, par. 474.
50	The weapons procured by Kajelijeli, which arrived early that morning at the Nkuli bureau communal, were used in the attack.	Kajelijeli, par. 488.
51	Augustin Habiyambere, amongst others, reported back to Kajelijeli at the end of the day on what had been achieved, and assured Kajelijeli that they had "eliminated everything."	Kajelijeli, par. 488.
52	Kajelijeli assembled members of the *Interahamwe* at Byangabo Market on the morning of 7 April 1994, and instructed them to "[k]ill and exterminate all those people in Rwankeri" and to "exterminate the Tutsis". He also ordered them to dress up and "start to work."	Kajelijeli, par. 531.
53	Kajelijeli participated in this attack by directing the *Interahamwe* from Byangabo Market towards Rwankeri cellule, to join that attack, and by acting as a liaison with Mukamira camp for military and weapons assistance.	Kajelijeli, par. 549.
55	Tutsis were attacked and killed at the home of Rudatinya. Kajelijeli ordered and supervised this attack and participated in it.	Kajelijeli, par. 555.
56	Kajelijeli was present during the attack on Munyemvano's compound in Rwankeri *cellule* and, in his position of authority over the *Interahamwe* attackers, commanded and supervised the attack.	Kajelijeli, par. 597.

60	A feast was held at Kajelijeli's bar on the evening of 7 April 1994 where the *Interahamwe* feasted together and sang songs after the day's killings. Kajelijeli was present during this event.	Kajelijeli, par. 708.
62	Kajelijeli played a vital role as an organizer and facilitator of *the Interahamwe* and other attackers in the massacre at the Ruhengeri Court of Appeal on or around 14 April 1994.	Kajelijeli, par. 625.
63	He did this by procuring weapons, rounding up the *Interahamwe* and facilitating their transportation to the Ruhengeri Court of Appeal by supplying them with petrol.	Kajelijeli, par. 625.
64	The Tutsis at the Ruhengeri Court of Appeal had been taken from Busengo sub-prefecture in Ndusu *Commune*.	Kajelijeli, par. 625.
84	Soon after in mid May, the assailants again pursued those seeking refuge from place to place.	Kayishema, par. 406.
142	Radio was the medium of mass communication with the broadest reach in Rwanda. Many people owned radios and listened to RTLM – at home, in bars, on the streets, and at the roadblocks.	Nahimana, par. 488.
143	The *Interahamwe* and other militia listened to RTLM and acted on the information that was broadcast by RTLM.	Nahimana, par. 488.
148	Rutaganda ordered men under his control to take fourteen detainees, including at least four Tutsis, to a deep hole located near Amgar garage and on his orders and in his presence, his men killed ten of the said detainees with machetes. The bodies of the victims were thrown into the hole.	Rutaganda, par. 261.
149	The attack on the Tutsi population occurred in various parts of Rwanda, such as in Nyanza, Nyarugenge *Commune*, Kiemesakara Sector in the Kigali *Préfecture*, Nyamirambo, Cyahafi, Kicukiro, Masango.	Rutaganda, par. 372.
150	Rutaganda was present at the mass grave site near the hole behind the *École Technique de Muhazi* and ordered the burial of bodies. Rutaganda ordered the burial of bodies in order to conceal the dead from foreigners.	Rutaganda, paras. 346, 353, 356.
151	There were meetings held to organise and encourage the targeting and killings of the Tutsi civilian population as such and not as "RPF Infiltrators."	Rutaganda, par. 371.
152	This organisation and encouragement took the form of radio broadcasts calling for the apprehension of Tutsi, the use of mobile announcement units to spread propaganda messages about the *Inkontanyi,* the distribution of weapons to the *Interahamwe* militia, the erection of roadblocks manned by soldiers and members of the *Interahamwe* to facilitate the identification, separation and subsequent killing of Tutsi civilians, and the house to house searches conducted to apprehend Tutsis.	Rutaganda, par. 371.

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Decision Prosecution Motion for admission of evidence of rape and sexual assault pursuant to Rule 92 bis of the Rules ; and Order for Reduction of Prosecution Witness List

Rules 92 bis and 73 bis (D) of the Rules of Procedure and Evidence

11 December 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Discretionary power upon a Trial Chamber to admit evidence of a witness in the form of a written statement, Discretionary power upon a Trial Chamber to admit evidence of a witness previously given in proceedings before this Tribunal in the form of a transcript of that evidence, Formal requirements for the admission of written statements, Satisfaction of general requirements of relevance and probative value applicable to all types of evidence – Meaning of the phrase acts and conduct of the accused, Exclusion of the acts and conduct of the Accused as charged in the Indictment which establish his responsibility for the acts and conduct of others except of his co-perpetrators or subordinates – Cross-examination of the Witness in regard of the proximity to the accused of the acts and conduct which are described in the written statement, Principal consideration for ordering a cross-examination : respect of the right to a fair trial of the Accused – Superior responsibility, Pivotal allegations which can not be established solely by written statements, Necessity of a cross-examination – Reduction of the number of Prosecution witnesses – Motion partially granted

International Instruments cited :

Rules of Procedure and Evidence, rules 73 bis (D), 89 (C), 92 bis, 92 bis (A) (i), 92 bis (A) (ii), 92 bis (A) (ii) (c), 92 bis (B), 92 bis (D) and 92 bis (E) ; Statute, art. 19 and 20

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Order for Reduction of Prosecutor's Witness List, 8 April 2003 (ICTR-98-41) ; *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. Edouard Karemera et al., Decision on Variance of the Prosecution Witness List, 13 December 2005 (ICTR-98-44) ; 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)

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Duško Tadić, Judgement, 15 July 1999 (IT-94-1) ; Trial Chamber, The Prosecutor v. Slobodan Milošević, Decision on Prosecution's Request to have Written Statements Admitted Under Rule 92 bis, 21 March 2002 (IT-02-54) ; Trial Chamber, The Prosecutor v Radoslav Brđanin and Momir Talić, IT-99-36-T, (Confidential) Decision on the Admission of Rule 92bis Statements, 1 May 2002 (IT-99-36) ; Appeals Chamber, The Prosecutor v. Stanislav Galić, Decision on Interlocutory Appeal Concerning Rule 92 bis (C), 7 June 2002 (IT-98-29) ; Trial Chamber, The Prosecutor v. Vidoje Blagojević et al., First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant To Rule, 12 June 2003 (IT-02-60) ; Trial Chamber, The Prosecutor v. Slobodan Milošević, Decision on Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to 92 bis (D) – Foča Transcripts (TC), 30 June 200392 bis, 12 June 2003 (IT-02-54)

Introduction

1. The trial in this case commenced on 19 September 2005, with the Prosecution calling its first witnesses. Pursuant to Count Five of the Indictment, the Accused are charged with the commission of the crime of rape as a crime against humanity.[1] It is not alleged that the Accused personally physically perpetrated the alleged rapes, but rather that they are responsible for the crime of rape by virtue of

[1] Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera ("Karemera et al."), Case N°98-44-I, Amended Indictment, 24 August 2005.

their superior responsibility[2] for those who physically perpetrated the rapes or, alternatively, by virtue of an extended form joint criminal enterprise theory.[3]

2. On 4 July 2005, the Prosecution disclosed the statements of 143 witnesses who, it was proposed, would testify on the issue of rape and sexual assault, as pled in Count Five of the Indictment. On 13 December 2005, the Chamber granted the Prosecution's request to remove fifty of those witnesses from its List, and ordered the Prosecution to file any motion seeking the admission of evidence in written form in lieu of oral testimony, as provided for by Rule 92 *bis* of the Rules of Procedure and Evidence, by 10 January 2006.[4] That deadline was subsequently extended to 20 February 2006.[5]

3. On that date, the Prosecution filed a Motion[6] seeking the following relief:

- The admission into evidence of the written statements of 63 purported rape witnesses, in lieu of them testifying orally, pursuant to Rule 92 *bis* (A) of the Rules.
- The admission into evidence of the transcripts of evidence of eight purported rape witnesses[7] in previous proceedings before this Tribunal, in lieu of them testifying orally, pursuant to Rule 92 *bis* (D) of the Rules.

4. The Prosecution submits that, in the event that the Chamber requires the witnesses in relation to whom it is seeking the admission of their evidence in written form to appear in person for the purposes of cross-examination, the Prosecution prefers to call each witness to give his or her evidence orally, in its entirety. In addition to the aforementioned evidence which it is seeking to have admitted in written form, the Prosecution intends to call 21 witnesses to give evidence on Count Five, orally.

5. The Motion is opposed by the Defence for Joseph Nzirorera,[8] as well as by the Defence for Mathieu Ngirumpatse, which adopts the submissions of the Nzirorera Defence.[9] In addition to opposing the Motion on its merits, the Defence seeks two further forms of relief: firstly, for the Chamber to grant the Defence an extension of time to respond fully to the merits of the Motion, in order for it to be able to investigate the material sought to be admitted with a view to establishing its unreliability; and, secondly, for the Chamber to exclude the evidence of all 72 witnesses and to make an order for the reduction of the Prosecution Witness List, accordingly, on the ground that an excessive number of witnesses is being proposed in relation to Count Five of the Indictment.

Discussion

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[2] Paragraph 70 of the Indictment alleges that the rapes were so widespread and systematic that the Accused knew or had reason to know that the *Interahamwe* and other militiamen were about to commit them or that they had committed them; that they had the material capacity to halt or prevent the rapes, or punish or sanction the perpetrators; but that they failed to do so.

[3] Paragraph 69 (and 7) of the Indictment alleges that the rapes were the natural and foreseeable consequence of the object of the joint criminal enterprise to destroy the Tutsi as a group, and that the Accused were aware that rape was the natural and foreseeable consequence of the joint criminal enterprise in which they knowingly and wilfully participated. See also paragraphs 4, 5, 6, 7, 8, 14, 15 and 16 of the Indictment which also outline the general allegations of the joint criminal enterprise and relate to Count Five.

[4] *Prosecutor v. Karemera et al.,* Case N°98-44-T, Decision on Variance of the Prosecution Witness List, 13 December 2005.

[5] *Prosecutor v. Karemera et al.,* Case N°98-44-T, Decision on Prosecution Motion Seeking Extension of Time to File Applications Under Rule 92 *bis*, 10 February 2006.

[6] See "Prosecution Motion for Proof of Facts Other Than by Oral Evidence Pursuant to Rule 92 *bis* – Admission of 63 witness statements and 9 previous trial testimonies concerning rape and sexual assaults", dated 20 February 2006. See also, "Prosecutor's Reply: Motion for Proof of Facts Other than by Oral Evidence Pursuant to Rule 92 *bis* and Prosecutor's Response to Motion for Extension of Time", dated 2 March 2006.

[7] Note that the Prosecution originally sought the admission of the previous trial testimony of nine witnesses, pursuant to Rule 92 *bis*. However, by Corrigendum dated 3 October 2006, the Prosecution withdrew its application for the admission of the evidence of one of those nine witnesses – Witness FAF (a.k.a. 'TM' and 'RJ') – so that its final application pursuant to Rule 92 *bis* (D) relates to the previous trial testimony of eight witnesses only.

[8] "Response to Prosecution Motion for Proof of Facts Other than by Oral Evidence Pursuant to Rule 92 *bis* and Motion for Extension of Time", filed by the Defence for Joseph Nzirorera, on 27 February 2006.

[9] "*Mémoire de M. Ngirumpatse sur la* Prosecution Motion for Proof of Facts Other Than By Oral Evidence Pursuant to Rule 92 *bis* et Requête aux Fins D'extension de Délai de Réponse (Confidentiel)", filed on 28 February 2006.

Applicable Law

General Requirements

6. Rule 92 *bis* of the Rules, entitled "Proof of Facts Other Than by Oral Evidence", bestows a discretionary power upon a Trial Chamber to admit, in whole or in part, the evidence of a witness in the form of a written statement (Sub-Rule (A)), or, where the witness has previously given evidence in proceedings before this Tribunal, in the form of a transcript of that evidence (Sub-Rule (D)), in lieu of oral testimony, on the condition that it goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.

7. In relation to written statements only, a further threshold requirement is provided for by Rule 92 *bis* (B), which outlines the formal requirements for the admission of written statements under the Rule. Furthermore, and with respect only to written statements, the Chamber is guided in the exercise of its discretion by the criteria for and against admission, set out in Rule 92 *bis* (A) (i) and (ii), respectively, which are non-exhaustive lists. The factors enumerated include "any other factors which make it appropriate for the witness to attend for cross-examination", which is a factor against the admission of evidence in written form.[10]

8. In relation to the admission of written statements, or transcripts of prior trial testimony under Rule 92*bis*, the general requirements of relevance and probative value, applicable to all types of evidence under Rule 89 (C), must also be satisfied.[11] Finally, after making a determination that a written statement or transcript of previous trial testimony is admissible in written form, Sub-Rule 92 *bis* (E) bestows a further discretionary power upon the Chamber to admit the witness' evidence in whole or in part, and/or to require the witness to appear for cross-examination. The exercise of the Chamber's discretion under Rule 92 *bis*, must be governed by the right of the Accused to a fair trial, as provided for in Articles 19 and 20 of the Statute.

The meaning of the phrase "acts and conduct of the accused"

9. The meaning of the term "acts and conduct of the accused as charged in the indictment" has been defined by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), particularly in relation to cases such as the one before the Chamber, in which the accused are charged with criminal responsibility for the physical acts of subordinates and/or co-perpetrators.

10. The jurisprudence states that the term is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused himself and not the acts and conduct of his co-perpetrators and/or subordinates.[12] The Appeals Chamber Decision in *Galić* is the leading Appeals Chamber authority on the interpretation of Rule 92 *bis*.[13] That Decision held that Rule 92 *bis* excludes the acts and conduct of the Accused as charged in the Indictment *which establish his responsibility* for the acts and conduct of others, but does not exclude the acts and conduct of *others* for which the

[10] Sub-Rule 92 *bis* (A) (ii) (c).
[11] *Prosecutor v. Bagosora et al.*, Case N°ICTR-98-41-T, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 *bis* (TC), 9 March 2004, para. 12.
[12] *Prosecutor v. Milošević,* Case N°IT-02-54-T, Decision on Prosecution's Request to have Written Statements Admitted Under Rule 92 bis (TC), 21 March 2002, para. 22, cited in *Prosecutor v. Galić,* Case N°IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (AC), 7 June 2002, fn. 28, in support of the Appeals Chamber's statement of principle, at paragraph 10 of its Decision, that the term "acts and conduct of the accused as charged in the indictment" does not refer to the acts and conduct of others for which the accused is charged in the indictment with responsibility.
[13] *Prosecutor v. Galić,* Case N°IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (AC), 7 June 2002. In fact the authority of the *Galić* Decision in relation to the meaning of the term "acts and conduct of the accused" was recently recalled by the Appeals Chamber in its Decision in this case concerning judicial notice. See *Prosecutor v. Karemera et al.*, Case N°ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, para. 52.

Accused is alleged to be responsible, for example, the acts and conduct of his co-perpetrators or subordinates.[14]

11. According to the jurisprudence, Rule 92 *bis* (A) (and by analogy Rule 92 *bis* (D)) excludes any written statement (or transcript) which goes to the proof of any act or conduct of the accused upon which the prosecution relies to establish: (1) that the accused personally physically perpetrated any of the crimes charged himself or herself; or (2) that he planned, instigated or ordered the crimes charged; or (3) that he otherwise aided and abetted those who actually did commit the crimes in their planning, preparation or execution of those crimes; or (4) that he was a superior to those who actually did commit the crimes; or (5) that he knew or had reason to know that those crimes were about to be or had been committed by his subordinates; or (6) that he failed to take reasonable steps to prevent such acts or to punish those who carried out those acts.[15]

12. The proximity to the accused of the acts and conduct which are described in the written statement or transcript is relevant to the exercise of the Trial Chamber's discretion in deciding whether the evidence should be admitted in written form at all.[16] In cases alleging command responsibility and where the crimes charged involve widespread criminal conduct by the alleged subordinates of the accused, there is often but a short step from a finding that the acts constituting the crimes charged were committed by such subordinates to a finding that the accused knew or had reason to know that those crimes were about to be or had been committed by them.[17] In such cases, it may well be that the alleged subordinates of the accused are so proximate to the accused that

> "the evidence of their acts and conduct which the prosecution seeks to prove by a Rule 92 *bis* statement becomes sufficiently pivotal to the prosecution case that it would not be fair to the accused to permit the evidence to be given in written form".[18]

13. Where the Prosecution case is that an accused participated in a joint criminal enterprise, and is therefore liable for the acts of others in that joint criminal enterprise, Rule 92 *bis* also excludes any written statement or transcript which goes to proof of any act or conduct of the accused upon which the prosecution relies to establish that he had participated in that joint criminal enterprise, or that he shared with the person who actually did commit the crimes charged the requisite intent for those crimes.[19] Again, the proximity to the accused of the acts and conduct which are described in the written statement is relevant to the exercise of the Trial Chamber's discretion in deciding whether the evidence should be admitted in written form at all. Where the individual, whose acts and conduct are described in the statement or transcript is proximate to the accused and where the evidence is pivotal to the Prosecution case, the Trial Chamber may decide not to admit the statement or transcript at all.[20]

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[14] See *Prosecutor v. Galić,* Case N°IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (AC), 7 June 2002, paras. 9-14.

[15] *Prosecutor v. Galić,* Case N°IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (AC), 7 June 2002, para. 10.

[16] *Prosecutor v Brđanin and Talić*, IT-99-36-T, *(Confidential)* Decision on the Admission of Rule 92 *bis* Statements, 1 May 2002, par 14 [A public version of this Decision was filed on 23 May 2002.]

[17] *Prosecutor v. Galić,* Case N°IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (AC), 7 June 2002, para. 14.

[18] *Prosecutor v. Galić,* Case N°IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (AC), 7 June 2002, para. 15; *Prosecutor v. Blagojević et al.,* Case N°IT-02-60-T, First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant To Rule 92 *bis* (TC), 12 June 2003, para. 12.

[19] *Prosecutor v. Galić,* Case N°IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (AC), 7 June 2002, para. 10; *Prosecutor v. Milošević,* Case N°IT-02-54-T, Decision on Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to 92 *bis* (D) – Foča Transcripts (TC), 30 June 2003, para. 12; *Prosecutor v. Blagojević et al.,* Case N°-02-60-T, First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant To Rule 92 *bis* (TC), 12 June 2003, para. 11; *Prosecutor v. Tadić,* Case N°IT-94-1-A, Judgment (AC), 15 July 1999, para. 220.

[20] *Prosecutor v. Galić,* Case N°IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (AC), 7 June 2002, paras. 13-15; *Prosecutor v. Blagojević et al.,* Case N°IT-02-60-T, First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant To Rule 92 *bis* (TC), 12 June 2003, para. 12.

Cross-examination of the Witness

14. According to Rule 92 *bis* (A) (ii) (c), a factor against admitting evidence in the form of a written statement is whether there are any other factors which make it appropriate for the witness to attend for cross-examination. In the *Galić* case, the Appeals Chamber considered that in some instances,

> "the absence of the opportunity to cross-examine the maker of the statement would in fairness preclude the use of the statement in any event".[21]

15. In addition to considering the issue of cross-examination as relevant for the admission of a statement under Rule 92 *bis* (A), the Chamber has a discretionary power to decide whether to require the witness to appear for cross-examination, under Rule 92 *bis* (E). As the *Galić* Appeals Chamber said,

> … the fact that [a] written statement goes to proof of the acts and conduct of a subordinate of the accused or of some other person for whose acts and conduct the accused is charged with responsibility does, however, remain relevant to the Trial Chamber's decision under Rule 92 *bis*. That is because such a decision also involves a further determination as to whether the maker of the statement should appear for cross-examination [under Rule 92 *bis* (E)].

In that regard, the proximity to the accused of the acts and conduct which are described in the written statement sought to be admitted is also relevant to the exercise of the Trial Chamber's discretion in deciding whether to require the witness to appear for cross-examination.

16. The principal consideration for determining whether a witness should appear for cross-examination is the overriding obligation of a Chamber to ensure a fair trial under Articles 19 and 20 of the Statute. In that regard, among the matters for consideration are whether the statement or transcript goes to proof of a critical element of the Prosecution's case against the accused.[22] Cross-examination shall be granted if the statement touches upon a critical element of the Prosecution's case, or goes to a live and important issue between the parties, as opposed to peripheral or marginally relevant issue.[23]

Application of Rule 92 *bis* to the Material Before the Trial Chamber

17. The Chamber will now consider the substance of the materials sought to be admitted in the light of Rule 92 *bis,* the relevant jurisprudence, and the Parties' submissions.

18. As a preliminary matter, the Chamber finds that the formal requirements of Rule 92 *bis* (B) have been met with respect to all 63 statements sought to be admitted under Rule 92 *bis* (A). This finding is supported by the submissions of both Parties.

19. Having reviewed all of the material sought to be admitted, the Chamber notes that none of the rapes and/or sexual assaults alleged are alleged to have been physically perpetrated by any of the Accused in this case. Rather, all of the rapes and/or sexual assaults are alleged to have been physically perpetrated by *Interahamwe* and militiamen, and not by any of the Accused in this case.

20. However, according to the forms of liability pleaded in the Indictment (as outlined in paragraph one of this Decision, and the footnotes thereto) the evidence is to be relied upon to prove that rapes were committed on a widespread and systematic basis by the Accused's subordinates and/or co-perpetrators. These allegations are so pivotal to the Prosecution's case that it would be unfair to the

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[21] *Prosecutor v. Galić,* Case N°IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (AC), 7 June 2002, para. 15.
[22] *Prosecutor v. Milošević,* Case N°IT-02-54-T, Decision on Prosecution's Request to have Written Statements Admitted Under Rule 92 *bis* (TC), 21 March 2002, para. 7.
[23] *Prosecutor v. Milošević,* Case N°IT-02-54-T, Decision on Prosecution's Request to have Written Statements Admitted Under Rule 92 *bis* (TC), 21 March 2002, para. 24.

Accused to permit the evidence to be given in written form without an opportunity to cross-examine the witnesses.

21. The Prosecution Motion falls to be rejected. There is therefore no need for the Chamber to rule upon the Defence's application for extension of time in order to be able to conduct investigations with a view to making a factual demonstration of the unreliability of the material sought to be admitted.

Defence Motion for Order Reducing Prosecution Witness List Pursuant to Rule 73 *bis* (D)

22. The Defence submits that the Trial Chamber should exclude the evidence sought to be admitted under Rule 92 *bis* of the Rules, in its entirety, by means of an order pursuant to Rule 73 *bis* (D) of the Rules.[24] The Prosecutor opposes this application. It finds difficult to conclude that the testimony of 93 witnesses is excessive given the massive scale of the rapes alleged in the Indictment. It submits that, since the Indictment alleges the rape of Tutsi women and girls over the course of three months in five different *préfectures*, the proposed number of 93 witnesses amounts to an average of approximately six witnesses to testify to the rapes, per month, per *préfecture*[25] – a number which the Prosecutor contends is not excessive.

23. According to Rule 73 *bis* (D) of the Rules, 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.[26]

24. In this case, the Trial Chamber has thus far declined the Defence's request for an order that the Prosecution reduce its Witness List.[27] In its Decision of 13 December 2005, the Chamber noted the Prosecution's intention to file a request seeking admission of written statements for 86 witnesses in lieu of their oral testimony, and therefore found that it was "premature for the Chamber to order the Prosecution to reduce the number of witnesses it intends to call."[28]

25. Now, as a result of the Chamber's finding in the present Decision rejecting the Prosecution's application for admission of written statements, the Prosecution Witness List will include 93 witnesses to be called to testify on the rape allegations. Considering the particular circumstances of the case, the Chamber is of the view that this number should be drastically reduced.

26. In order to justify the number of witnesses to be called to prove Count Five, the Prosecution offers a mode of calculation based on average of approximately six witnesses to testify to the rapes, per month, per *préfecture*.[29] Should this formula be strictly applied to the allegations as set forth in the Indictment, the Chamber notes that, contrary to the Prosecution's assertion, no more than some 36 witnesses only should be called to testify. The Indictment alleges the commission of rapes in each *préfecture* for a substantially reduced period than the Prosecutor claims: rapes were allegedly committed in Ruhengeri and Butare *préfectures* over a period of two weeks (respectively, from early to mid April; and from mid to late April); in Kigali-*ville* for one month (April); in Kibuye for two

[24] Rule 73 *bis* (D) provides: "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".
[25] So that the calculation is six witnesses, multiplied by five *préfectures*, multiplied by three months (6 x 5 x 3), which equals a total of ninety witnesses. The Prosecution Witness List currently lists 93 witnesses on the Count of Rape as a Crime Against Humanity – 21 to be called to testify orally, and 72 in respect of whom this application is brought.
[26] See *Bagosora et al*., Case N°ICTR-98-41-T, Order for Reduction of Prosecutor's Witness List (TC), 8 April 2003: the Trial Chamber I ordered *proprio motu* the Prosecution to reduce its witness list from 235 to 100 witnesses.
[27] *Prosecutor v. Karemera et al*., Case N°98-44-T, Decision on Variance of the Prosecution Witness List, 13 December 2005, para. 20.
[28] Ibidem.
[29] So that the calculation is six witnesses, multiplied by five *préfectures*, multiplied by three months (6 x 5 x 3), which equals a total of ninety witnesses. The Prosecution Witness List currently lists 93 witnesses on the Count of Rape as a Crime Against Humanity.

months (May and June) and in Gitarama for two months (April and May), and not over the course of three months in each *préfecture* as the Prosecution submits to justify a number of 93 witnesses.

27. The Chamber recalls that in its Decision of 13 December 2005, it denied the Defence's submission to reduce the witness list because, at that time, it received information from the Prosecution that only *seven* witnesses were supposed to be called to give oral evidence on Count Five of the Indictment, related to the rape allegations.[30] Then, the Prosecution indicated its intention to call 21 witnesses to give oral testimony on this Count and sought the admission of written statements of 72 witnesses on the premise that their evidence would be of a cumulative nature. The Chamber also recalls that the Prosecution has acknowledged on prior occasions that its list is too long and has expressed its intention to reduce the number of witnesses as the trial progresses. In that respect, the Prosecution's Motion for judicial notice was sought to reduce the evidence to be orally heard during this trial and, in its Decision of even date, the Chamber has taken judicial notice of adjudicated facts concerning rapes committed in Gitarama, Kibuye, Kigali-rural, Ruhengeri and Kigali-ville *prefectures*.

28. In view of the particular circumstances of the case, the Chamber finds that the Prosecution Witness List is excessive and should be drastically reduced with respect to the number of witnesses proposed to give evidence on Count Five of the Indictment. In reaching this conclusion, the Chamber has had regard to: (i) the number of witnesses currently proposed to be called on this Count; (ii) the factual elements that the Prosecution has to establish; (iii) the application of the Prosecution's own formula in submitting to the Chamber that the current number of witnesses is not excessive; (iv) that the use of excessive witnesses wastes judicial resources and time and compromises the administration of justice and the rights of the accused, and (v) that by Decision of even date, the Chamber has taken judicial notice of a number of adjudicated facts concerning rape and sexual assault.

FOR THOSE REASONS

THE CHAMBER

DENIES the Prosecution's Motion in its entirety; and hereby

ORDERS the Prosecution, pursuant to Rule 73 *bis* (D) of the Rules, to drastically reduce the number of witnesses being called to give evidence of rape and sexual assault in relation to Count Five of the Indictment and to file, as soon as possible, with the Chamber, and disclose to the Defence of each of the Accused, a revised Witness List.

Arusha, 11 December 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[30] *Karemera et al.*, Case N°98-44-T, Decision on Variance of the Prosecution Witness List, 13 December 2005, para. 20.

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Decision on Defence Motion for Request for Cooperation to Government of Rwanda: MRND Videotape
Article 28 of the Statute of the Tribunal
14 December 2006 (ICTR-98-44-PT)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Cooperation of the Rwanda Government, Relevancy of the requested material, Efforts of the Defence and of the Prosecutor – Cooperation of Rwanda required

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 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., 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. : 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)

Introduction

1. The Defence for Joseph Nzirorera moves the Chamber, pursuant to Article 28 of the Statute of the Tribunal, to request the cooperation of the Government of Rwanda in obtaining "a copy of a videotape of MRND rallies in Gisenyi which was introduced during the trial of MRND President Wellars Banyi in Gisenyi…".[1]

Discussion

[1] *Prosecutor v. Karemera et al.,* Case N°ICTR-98-44-T, "Joseph Nzirorera's Motion for Request for Cooperation to Government of Rwanda: MRND Videotape", 20 November 2006, para. 1. The Defence goes on to state that "[t]he tape is referred to in the judgement of the court delivered on 21 February 2001. Mr Banzi's case number is RP221/R/2000."

2. Article 28 of the Tribunal's Statute provides that States shall cooperate with the Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. It further provides that States shall comply with any request for assistance or order issued by a Trial Chamber, including, *inter alia,* for the taking of testimony and production of evidence, without undue delay.[2]

3. According to the jurisprudence of this Tribunal, the criteria to be satisfied by the party seeking an order for State cooperation under Article 28 of the Statute are: (i) the party seeking the material must specifically identify, to the extent possible, the material sought; (ii) the party must articulate its relevance to the trial; and (iii) the party must show that its efforts to obtain the documents have been unsuccessful.[3]

4. The Chamber considers that the Defence for Nzirorera has identified the material sought with the requisite specificity. Furthermore, the Parties' filings demonstrate that both the Parties, and the Rwandan authorities, have a clear understanding of the material sought, and that it is, or has been, in existence.

5. The Chamber is also satisfied that that the material is relevant to the trial. The MRND meeting at Umuganda Stadium in October 1993 is alleged in paragraph 25.2 of the Indictment and has been the subject of the testimony of two Prosecution witnesses.[4] The Chamber notes that Prosecution Witness XBM referred to the videotape in question, and that he acknowledged having seen it, during his testimony before this Trial Chamber.[5] Therefore the Chamber considers that any recording of what actually transpired at the rally is relevant to the case before it.

6. Finally, the Chamber is satisfied that both the Prosecution and the Defence have made efforts to obtain the material through other avenues and that, to date, those efforts have been unsuccessful in securing a copy of the videotape.[6] The Chamber notes that the first evidence of efforts to secure this material was in May 2006, yet the videotape has not been obtained.

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[2] Statute of the Tribunal, Article 28 (2) (b).

[3] *Prosecutor v. Casimir Bizimungu et al.,* Case N°ICTR-99-50-T, Decision on Casimir Bizimungu's Requests for Disclosure of the Bruguière Report and the Cooperation of France, 25 September 2006, para. 27 and fn. 16; *Prosecutor v. Bagosora,* ICTR-98-41-T, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, 10 March 2004, para. 4; See also *Prosecutor v. Bagosora,* ICTR-98-41-T, Decision on Request to the Republic of Togo for Assistance Pursuant to Article 28 of the Statute, 31 October 2005, para. 2. See also *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; See also *Prosecutor v. Bizimungu et al.,* (Augustin), 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.

[4] Prosecution Witnesses XBM and HH.

[5] T. 4 July 2006, p. 11.

[6] As regards the Defence's efforts, the Chamber notes the correspondence between Nzirorera and the Rwandan authorities annexed to the Defence Motion in which the Defence requests a copy of the videotape: (1) Letter dated 10 August 2006 from Defence Counsel Peter Robinson to Rwandan Prosecutor General Martin Ngoga; and (2) Email dated 7 November 2006 from Defence Counsel Peter Robinson to Mr Ngoga's assistant. The Chamber also notes Mr Robinson's assertion that he met with Rwandan Prosecutor General Martin Ngoga, in Kigali, Rwanda, on 11 October 2006, during which meeting he again requested a copy of the videotape and was advised that a copy of the tape would be made available to him within a week, but that when he returned to collect it, he was told it was not ready.
As regards the Prosecution's efforts, the Chamber accepts the Prosecution's submissions that a request for the tape was first made on 31 May 2006 and again on 14 June 2006; that Prosecution investigators in Kigali reported that they had personally met Mr. Emmanuel Rukangira at the Kigali Prosecutor's Office and that he undertook to make the tape available as soon as it was located; that the same request was also made personally to the Rwandan Prosecutor General, Mr. Martin Ngoga; that the Prosecutor General confirmed that the tape had been sent to the Parquet General's Office in Kigali and that he was undertaking efforts to locate it; and that the Prosecution has since sent reminders to the Rwandan authorities, some of which correspondence is annexed to the Prosecution Response (email dated 24 November 2006). In the email of 24 November, from a Mohammed Ayat to the Prosecutor, the writer states that "the videotape seems to be in Mr. Emmanuel Rukangira's office (Emmanuel Rukangira is a Senior Prosecutor with National Jurisdiction). Unfortunately, Mr. Rukangira is currently on

7. Finding that the Defence has satisfied the criteria for a request to the Government of Rwanda, pursuant to Article 28 of the Statute, the Chamber considers that it is in the interests of justice to make such a request. Finally, with respect to the Prosecution's submission that the Office of the Prosecutor and the Rwandan authorities concerned have made good faith efforts to obtain the tape without success, and that there has been no reluctance or lack of cooperation on the part of the Rwandan authorities, the Chamber notes that no absence of good faith is implied in the Chamber formally seeking the cooperation of Rwandan authorities to secure a copy of the videotape in question. However, the Chamber considers that a formal request for the assistance of the Rwandan authorities may assist in expediting these inquiries.

FOR THOSE REASONS

THE CHAMBER

GRANTS the Defence Motion; and hereby

RESPECTFULLY REQUESTS, pursuant to Article 28 of the Tribunal's Statute, the Government of Rwanda to provide the Registry with a copy of the videotape of MRND rallies in Gisenyi which was purportedly introduced during the trial of MRND President Wellars Banyi in Gisenyi, (in relation to whom judgement was purportedly delivered on 21 February 2001; and the case number of which is RP221/R/2000) as soon as practicable, for disclosure to the Defence. Should the Rwandan authorities be unable to comply with the Chamber's request, they are respectfully requested to inform the Registry of this inability, by 31 January 2007, providing reasons why; and

DIRECTS the Registrar to serve this request for cooperation on the relevant authorities of the Government of Rwanda; and

ORDERS the Registry to disclose to all the parties in the present case, and to file with the Chamber, a copy of the videotape as soon as, and if, it is received.

Arusha, 14 December 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

mission abroad. According to the Deputy General Prosecutor the Rwandan Authorities are willing to keep looking for the document requested to hand it out to Defense if it is located."

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Decision on Defence Motions to Prohibit Witness Proofing Rule 73 of the Rules of Procedure and Evidence 15 December 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Practice of proofing witnesses at the ICC, Analysis of an ICC decision, Definition of the proofing as a form of witness familiarization with the layout of the Court, Analysis of national practice of proofing witnesses, Conclusion of the ICC decision not applicable to the Ad Hoc Tribunals case-law – Practice of proofing witnesses by the Ad Hoc Tribunals, Practice of pre-testimony interviews of witnesses allowed, Usefulness of the practice of witness familiarization, Prosecution practice of disclosing "will-say" or "reconfirmation statements" prior to the testimony of a witness, Existence of clear standards of professional conduct and ethics which apply to Prosecuting Counsel when conducting interviews, Distinction of proofing with a permission to train, coach or tamper a witness before he/she gives evidence, Advantages for the due functioning of the judicial process – Motion denied

International Instruments cited :

ICC Statute, art. 21 ; Rules of Procedure and Evidence, rules 67 (D) and 73

International Cases cited :

ICC : Pre-Trial Chamber, The Prosecutor v. Thomas Lubanga Dyilo, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006 (ICC-01/04-01/06)

I.C.T.R. : 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 Admissibility of Evidence of Witness DP, 18 November 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Aloys Simba, Decision on the Admissibility of the Evidence of Witness KDD, 1 November 2004 (ICTR-2001-76) ; Trial Chamber, The Prosecutor v. André Rwamakuba, Decision on the Defence Motion Regarding Will-Say Statements, 14 July 2005 (ICTR-98-44C) ; Appeals Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006 (ICTR-98-44)

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Mile Mrkšić, Appeal Chamber Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party, 30 July 2003 (IT-95-13/1) ; Trial Chamber, The Prosecutor v. Vidoje Blagojevic and Dragan Jokic, Decision on Prosecution's Unopposed Motion For Two Day Continuance For The Testimony of Momir Nikolic, 16 September 2003 (IT-02-60) ; Appeals Chamber, The Prosecutor v. Sejér Halilović, Decision on Issuance of Subpoenas, 21 June 2004 (IT-01-48) ; Trial Chamber, The Prosecutor v. Fatmir Limaj et al., Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses, 10 December 2004 (IT-03-66) ; Appeals Chamber, The Prosecutor v. Dario Kordić and Mario Čerkez, Judgement, 17 December 2004 (IT-95-14/2) ; Trial Chamber, The Prosecutor v. Momčilo Krajišnik, Order for Transfer of Detained Witness Pursuant to Rule 90 bis, 13 March 2006 (IT-00-39) ; Trial Chamber, The Prosecutor v. Milan Milutinovic et al., Decision on Ojdanic Motion to Prohibit Witness Proofing, 12 December 2006 (IT-05-87)

Introduction

1. The proceedings in the instant case commenced on 19 September 2005. While the fourth trial session of the Prosecution's case was ongoing, the Defence for Nzirorera moved the Chamber to prohibit, with immediate effect, the Prosecution from "proofing" its witnesses before they testify.[1] To support its application, it relied upon a Decision rendered by Pre-Trial Chamber I of the International Criminal Court ("ICC") in the *Dyilo* case and requested the Chamber to apply the same standards.[2] The Defence for Ngirumpatse joins the application and the Prosecution opposes the Motion.[3]

Deliberations

2. In order to address the Defence Motions, the Chamber will first provide an analysis of the ICC Decision (1), then it will address the practice at the *ad hoc* Tribunals (2) and finally the practice of the Prosecution in this case (3).

1. Comments on the Dyilo Decision

3. On 8 November 2006, the Pre-Trial Chamber of the ICC ruled upon whether the practice of proofing witnesses as described by the Prosecution in the *Dyilo* case was admissible in proceedings before the ICC. In reaching its finding, the Pre-Trial Chamber applied the standards of applicable law as set out in Article 21 of its Statute.[4]

4. The Pre-Trial Chamber divided the notion of "witness proofing" as described by the ICC Prosecution in that case into two components of goals and measures. The Pre-Trial Chamber defined the first component, labelled "witness familiarization" by the Pre-Trial Chamber, as

> "a series of arrangements to familiarise the witnesses with the layout of the Court, the sequence of events that is likely to take place when the witness is giving testimony, and the different responsibilities of the various participants at the hearing".[5]

The Pre-Trial Chamber found that this first component, "witness familiarization", was not only admissible but also mandatory under the ICC Statute.[6] Furthermore, in the Pre-Trial Chamber's view,

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[1] Joseph Nzirorera's Motion to Prohibit Witness Proofing, filed on 13 November 2006.
[2] ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case N°ICC-01/04-01/06, Decision on the Practices of Witness Familiarisation and Witness Proofing (Pre-Trial Chamber), 8 November 2006 ("*Dyilo* Decision").
[3] See Ngirumpatse's Motion filed on 17 November 2006; Prosecution Responses filed on 16 and 20 November; Nzirorera's Reply filed on 20 November 2006 and Ngirumpatse's Reply filed on 24 November 2006. The Defence for Nzirorera also orally requested the Chamber to take interim measures prohibiting witness proofing until such a time it will have delivered its decision. The Chamber denied this application for interim measures but reduced the time-limits for the Prosecution to file its response (see T. 14 November 2006).
[4] *Dyilo* Decision, paras. 7-9. ICC Statute, Article 21 (Applicable law):
1. The Court shall apply:
(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.
[5] *Dyilo* Decision, para. 15.
[6] *Dyilo* Decision, paras. 14 and 15. These goals and measures encompass:
Assisting the witness testifying with the full comprehension of the Court proceedings, its participants and their respective roles, freely and without fear, through the following measures:
i. To provide the witness with an opportunity to acquaint him/herself with the Prosecution's Trial Lawyer and other whom may examine the witness in Court;

> "the [Witnesses and Victims Unit], in consultation with the party that proposes the relevant witness, is the organ of the Court competent to carry out the practice of witness familiarisation from the moment the witness arrives at the seat of the Court to give oral testimony".[7]

5. The Pre-Trial Chamber described the second component of the notion of witness proofing advanced by the ICC Prosecution as measures to review the witness' evidence

> "by *inter alia* (i) allowing the witness to read his or her statement, (ii) refreshing his or her memory in respect of evidence that he or she will give at the confirmation hearing, and (iii) putting to the witness the very same questions and in the very same orders as they will be asked during the testimony of the witness".[8]

The Pre-Trial Chamber found that this second component was not covered by any provision of the Statute, the Rules or the Regulations.[9] It also considered that the ICC Prosecution failed to prove that the goals and measures described under the second component of witness proofing were widely accepted as practice in international criminal law.[10] It observed that the Prosecution did not put forward any jurisprudence from the ICTR authorising the practice of witness proofing as defined by the Prosecution, and it considered that the sole ICTY Decision rendered in the *Limaj* case did not regulate in detail the content of the practice of witness proofing.[11] The Pre-Trial Chamber also considered that the Prosecution's submission that the practice of witness proofing as defined in the Prosecution Information is a special feature of proceedings carried out before international adjudicatory bodies due to the particular character of the crimes over which such bodies have jurisdiction is also unsupported.[12]

6. In accordance with Article 21 of its Statute, the Pre-Trial Chamber then sought to determine whether the second component of the definition could be embraced by

> "general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards".[13]

7. The Pre-Trial Chamber observed that this second component would be either unethical or unlawful in jurisdictions as different as Brazil, Spain, France, Belgium, Germany, Scotland, Ghana, England and Wales and Australia, whereas in other national jurisdictions, particularly in the United States of America, the practice of witness proofing along the lines advanced by the Prosecution is well accepted, and at times even considered professional good practice.[14] The Pre-Trial Chamber particularly emphasised that the second component of the practice as described by the ICC Prosecution would be in direct breach of the professional standards of the Code of Conduct of the Bar Council of England and Wales that the ICC Prosecution had expressly undertaken to comply with.[15] In light of these circumstances, the Pre-Trial Chamber concluded that

> the second component of the definition of the practice of witness proofing advanced by the Prosecution is *not embraced by any general principle of law* that can be derived from the

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ii. To familiarise the witness with the Courtroom, the Participants to the Court proceedings and the Court proceedings;
iii. To reassure the witness about his/her role in the Court proceedings;
iv. To discuss matters that are related to the security and safety of the witness, in order to determine the necessity of applications for protective measures before the Court;
v. To reinforce to the witness that he/she is under a strict legal obligation to tell the truth when testifying;
vi. To explain the process of examination-in-chief, cross-examination and reexamination.

[7] *Dyilo* Decision, para. 24.
[8] *Dyilo* Decision, para. 40, see also paras. 16 and 17.
[9] *Dyilo* Decision, para. 28.
[10] *Dyilo* Decision, para. 33.
[11] *Dyilo* Decision, paras. 31 and 32. *Prosecutor v. Limaj et al.*, Case N°IT-03-66-T, Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses (TC), 10 December 2004 ("*Limaj* Decision").
[12] *Dyilo* Decision, para. 34.
[13] ICC Statute, Article 21. See *Dyilo* Decision, paras. 35 and seq.
[14] *Dyilo* Decision, para. 37.
[15] *Dyilo* Decision, paras. 38-41.

national laws of the legal systems of the world.[16] On the contrary, if any general principle of law were to be derived from the national laws of the legal systems of the world on this particular matter, it would be the duty of the Prosecution to refrain from undertaking the [above-mentioned] practice of witness proofing".[17]

8. In this Chamber's view, the process by which the *Dyilo* Chamber came to its decision is not based on a comprehensive knowledge of the established practice of the *ad hoc* Tribunals, which is justified by the particularities of these proceedings that differentiate them from national criminal proceedings, as explained hereinafter. This was also recently reiterated in the *Milutinovic et al*. case, where the Trial Chamber of the International Criminal Tribunal for Former Yugoslavia ("ICTY") denied a Defence application seeking the Chamber to apply the exact same standards set out in the *Dyilo* Decision.[18]

2. Practice of the Ad Hoc Tribunals and the Rights of the Accused

9. Both this Tribunal and the ICTY have consistently allowed the practice of pre-testimony interviews of witnesses for the better administration of justice, in the particular context of their proceedings, and to reduce any element of surprise to the Defence. This practice is in accordance with the Appeals Chamber's finding that each party has the right to interview a potential witness.[19]

10. The practice of witness familiarization not only poses no undue prejudice, but is also a useful and permissible practice.[20] As the *Milutinovic* Trial Chamber recently recalled, there is no reason for limiting witness familiarization to the Witnesses and Victims Support Section of the Tribunal.[21]

11. Although it has not been the subject of specific case-law at the ICTR, witness preparation has been recognized in the jurisprudence in relation to how the content of an interview with a witness is to be disclosed. The Prosecution has developed a practice of disclosing "will-say" or "reconfirmation statements" prior to the testimony of a witness. Contrary to Mathieu Ngirumpatse' assertions, this practice has been sanctioned by the Tribunal's jurisprudence.[22] In the *Simba* case, Trial Chamber I defined a will-say statement as

> "a communication from one party to the other party and the Chamber anticipating that a witness will testify about matters that were not mentioned in previously disclosed witness statements."[23]

Trial Chambers have considered that will-say statements are in conformity with the Prosecution's obligations under Rule 67 (D) of the Rules of the Rules of Procedure and Evidence which require each party to promptly notify the opposing party and the Chamber of the discovery and existence of additional evidence, information and materials that should have been produced earlier pursuant to the Rules.[24] The will-say statement generally supplements or elaborates on information previously disclosed to the Defence, but it may also bring new elements of which the Defence was not put on notice. Although it is not acceptable for the Prosecution to mould its case against the Accused in the

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[16] *Dyilo* Decision, para. 42 (emphasis added).
[17] *Dyilo* Decision, para. 42.
[18] *Prosecutor v. Milan Milutinovic et al.,* Case N°IT-05-87-T, Decision on Ojdanic Motion to Prohibit Witness Proofing (TC), 12 December 2006 ("*Milutinovic* Decision").
[19] *Prosecutor v. Mile Mrksic*, Case N°IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party (AC), 30 July 2003; see also, *Prosecutor v. Sefer Halilovic*, Case N°IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 12 to 15.
[20] *Milutinovic* Decision, para. 10.
[21] Ibidem.
[22] See for e,g., *Prosecutor v. Bagosora et al.,* Case N°ICTR-98-41-T, Decision on Admissibility of Witness DBQ (TC), 18 November 2003; *Prosecutor v. Simba*, Case N°ICTR-01-76-T, Decision on the Admissibility of Evidence of Witness KDD (TC), 1 November 2004, par. 9; *Prosecutor v. André Rwamakuba*, Case N°ICTR-98-44C-T, Decision on the Defence Motion Regarding Will-Say Statements (TC), 14 July 2005, para. 4.
[23] *Prosecutor v. Simba*, Case N°ICTR-01-76-T, Decision on the Admissibility of Evidence of Witness KDD (TC), 1 November 2004, par. 9 ; see also *Prosecutor v. André Rwamakuba*, Case N°ICTR-98-44C-T, Decision on the Defence Motion Regarding Will-Say Statements (TC), 14 July 2005, para. 4.
[24] Ibidem.

course of the trial, it must be admitted that a witness may recall and add details to his or her prior statements. As explained by Trial Chamber I in the *Bagosora et al*. case

> […] witness statements from witnesses who saw and experienced events over many months which may be of interest to this Tribunal, may not be complete. Some witnesses only answered questions put to them by investigators whose focus may have been on persons other than the accused rather than volunteering all the information of which they are aware.[25]

12. While this practice cannot be considered as permission to train, coach or tamper a witness before he or she gives evidence, the content of these statements under Rule 67 (D) encompasses much of the elements described in the second component of witness proofing in the *Dyilo* Decision.

13. The ICTY has also developed a consistent practice of "witness proofing". An overview of recent proceedings before the ICTY shows that preparing witnesses, including the practice of putting questions to the witness concerning contradictions between prior statements, is an entire part of the proceedings.[26] In the *Limaj et al*. case, the Trial Chamber denied a Defence Motion seeking that the Prosecution cease "proofing" witnesses with immediate effect.[27] The Trial Chamber noted that the practice of proofing witnesses, by both parties, has been in place and accepted since the inception of the Tribunal. It also noted that "[i]t is a widespread practice in jurisdictions where there is an adversary procedure". The *Limaj* Chamber considered that this practice has a number of advantages for the due functioning of the judicial process.

14. Recently, in the *Milutinovic et al*. case, the Trial Chamber reaffirmed that

> "discussions between a party and a potential witness regarding his or her evidence can, in fact, enhance the fairness and expeditiousness of the trial, provided that these discussions are a genuine attempt to clarify a witness' evidence".[28]

It considered that "the process by which the *Dyilo* Chamber came to its decisions [was] not applicable to [its] determination of the issue".[29] Considering the situation at the ICTY, which in view of the *Milutinovic* Chamber is radically different than the *Dyilo* case,[30] the *Milutinovic* Chamber found that "reviewing a witness' evidence prior to testimony is a permissible practice under the law of the Tribunal and, moreover, does not *per se* prejudice the rights of the Accused".[31]

15. Under these circumstances, this Chamber is satisfied that a practice of preparing witnesses before they testify has developed and has been sanctioned by both *ad hoc* Tribunals. Provided that it does not amount to the manipulation of a witness' evidence, this practice may encompass preparing and familiarizing a witness with the proceedings before the Tribunal, comparing prior statements made by a witness, detecting differences and inconsistencies in recollection of the witness, allowing a

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[25] *Bagosora et al*., Decision on Admissibility of Witness DBQ (TC), 18 November 2003, para. 29.
[26] See for e.g., *Prosecutor v. Mile Mrksic*, Case N°IT-95-13/1, T. 26 January 2006; *Prosecutor v. Naser Oric*, Case N°IT-03-68, T. 6 April 2006; *Prosecutor v. Prlic et al.,* Case N°IT-04-74, T. 10 July 2006; see also *Prosecutor v. Vidoje Blagojevic Dragan Jokic*, Case N°IT-02-60-T, Decision on Prosecution's Unopposed Motion For Two Day Continuance For The Testimony of Momir Nikolic (TC), 16 September 2003:
FINDING that there was more than sufficient time for the Prosecution to complete all interviews and final proofing sessions with Mr. Nikolić and to inform the Defence of any new information arising out of such proofing sessions in advance of him being called to testify,
CONSIDERING that the Prosecution has only disclosed the final notes from its last proofing sessions to the Defence on 16 September 2003, one day before Mr. Nikolic is to testify, and that this information needs to be translated into B/C/S for Defence review, […]
REMINDING the Prosecution that all such proofing sessions of witnesses – particularly witnesses whom it expects to testify at length – should be completed in sufficient time to allow the Defence to consider any new information gathered through such sessions, […]
See also *Prosecutor v. Momcilo Krajisnik*, Case N°IT-0039-T, Order for Transfer of Detained Witness Pursuant to Rule 90 *bis* (TC), 13 March 2006.
[27] *Limaj* Decision.
[28] *Milutinovic* Decision, para. 16.
[29] *Milutinovic* Decision, para. 13.
[30] *Milutinovic* Decision, para. 15.
[31] *Milutinovic* Decision, para. 22.

witness to refresh his or her memory in respect of the evidence he or she will give, and inquiring and disclosing to the Defence additional information and/or evidence of incriminatory or exculpatory nature in sufficient time prior to the witness' testimony. It is also admitted that "the practice of witness familiarization not only poses no undue prejudice, but is also a useful and permissible practice".[32]

16. In that respect, the Chamber notes that there are clear standards of professional conduct and ethics which apply to Prosecuting Counsel when conducting interviews. According to the Prosecutor's Regulations N°2, the members of the Office of the Prosecutor can be regarded as permanent officers of the court who are "to serve and protect the public interest, including the interests of the international community, victims and witnesses, and to respect the fundamental rights of the suspects and accused" and are "not knowingly to make an incorrect statement of material fact to the Tribunal or offer evidence which Prosecution Counsel knows to be incorrect of false".[33]

17. The practice of reviewing a witness' evidence prior to testimony is consistent with the specificities of the proceedings before the *ad hoc* Tribunals and may contribute to a proper administration of justice in different circumstances: crimes charged in the indictment occurred many years ago and, in many cases, witness interviews took place a long time ago; matters that were relevant during the course of the investigations may need to be reviewed in light of the case the Prosecution intends to present; there might be differences of perception between the Prosecution investigator and Counsel who is going to lead the witness' evidence in court; the duration of the proceedings and the time elapsed between prior testimonies may require further interviews with a witness before he or she testifies and reduce the effect of surprise to the Defence in cases where the witness recollects elements that were not previously disclosed.[34]

18. This positive effect of meeting a witness before he or she testifies was even acknowledged by the Defence in the present case. The Defence for Nzirorera has requested several times to meet with Prosecution witnesses in order to better prepare its cross-examination and expedite the proceedings.[35] A recent example is that it met with Prosecution Witness GK a few weeks before his anticipated testimony, after the witness had arrived at the Tribunal to testify, and questioned the witness about some discrepancies with testimony in another case and a prior statement.[36] The witness was given an opportunity to explain these discrepancies.

19. In its Motion, the Defence contends that the Prosecution's practice of witness proofing in this case has created many problems of late disclosure and admission of evidence outside the scope of the Indictment.

20. The Chamber is not persuaded that reviewing a witness' evidence prior to testimony necessarily contributes to adduce evidence on matters outside the scope of the Indictment. In any event, should a witness recall and add details to his or her prior statements during the review of his or her evidence, several remedies are possible such as providing additional time to the Defence for its preparation or, where appropriate, the exclusion of the evidence.[37] Each time, the Chamber will apply the appropriate remedy on a case-by-case basis in conformity with the rights of the Accused, including the right to be tried without undue delay. The Chamber, however, considers that the Prosecution should give notice at the earliest possible date of any additional information the witness is likely to provide during testimony.[38]

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[32] *Milutinovic*, para. 10. and *Limaj* Decision.
[33] Prosecutor's Regulations N°2 (1999), Standard of Professional Conduct Prosecution Counsel.
[34] See *Limaj* Decision.and *Milutinovic* Decision, para. 20
[35] See Joseph Nzirorera's Motion for Reconsideration of Witness Protection Order, filed on 25 September 2006.
[36] See Will-say Statement of Witness GK, dated 10 November 2006, filed 17 November 2006.
[37] *Prosecutor v. Bagosora et al.*, Case N°ICTR-98-41-T, Decision on Admissibility of Evidence of Witness DP (TC), 18 November 2003; *Prosecutor v. Bagosora et al.*, Case N°ICTR-98-41-T, Decision on Admissibility of Evidence of Witness DBQ (TC), 18 November 2003.
[38] *Prosecutor v. André Rwamakuba*, Case N°ICTR-98-44C-T, Decision on the Defence Motion Regarding Will-Say Statements (TC), 14 July 2005, para. 7; *Milutinovic* Decision, paras. 22 and 23

3. "Witness Proofing" in the Present Case

21. The Defence for Ngirumpatse claims that, in the present case, the witnesses are actually prepared to recite their testimonies in court that they learnt from the Prosecution. In its view, witness proofing amounts to tampering with the witness and moulding the evidence against the Accused. The Prosecution explicitly "rebuts any suggestion or implication that the pre-trial interview is used to train, coach, and tamper with or in any manner whatsoever, to mould its case against the Accused".

22. While the Defence may query and challenge how the Prosecution prepares its witnesses before he or she testifies, the allegations of tampering with witnesses made by the Defence of Ngirumpatse are serious allegations and making them without any evidence to support or justify them is discourteous at the very least. On the contrary, the Chamber notes that several witnesses have been cross-examined on the conduct of the pre-trial interview and there has been no evidential basis to support such allegations. There is, however, no need to expunge Ngirumpatse's submissions from the Tribunal's record as requested by the Prosecution.[39]

23. As the Pre-Trial Chamber of the ICC stated, the expression "witness proofing" may encompass various practices which are not necessarily unlawful.[40] Neither the Defence nor the Prosecution provide detailed information as to how the Prosecution prepares its witnesses in this case before calling them to testify. According to disclosures of will-say statements and notices under Rule 67 (D) in this case, the Chamber finds that there is a consistent practice by the Prosecution which consists of comparing statements made by a witness, detecting differences and inconsistencies in recollection of the witness, allowing a witness to refresh his or her memory in respect of the evidence he or she will give, inquiring and disclosing to the Defence additional information and/or evidence of incriminatory or exculpatory nature in sufficient time prior to the witness' testimony.[41] It is not shown by the Defence, nor does it transpire from the said disclosures that the Prosecution puts to the witness the exact questions to be asked during his or her testimony.

24. The Prosecution is presumed to act in good faith[42] and in accordance with standards of professional conduct and ethics. Failure by the Defence to show the contrary, the Chamber is not satisfied that any meeting held prior to the testimony of the witnesses were not in conformity with the established practice.

FOR THE ABOVE REASONS, THE CHAMBER DENIES the Defence Motions.

Arusha, 15 December 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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[39] See Prosecutor's Response.
[40] *Dyilo* Decision, para. 12.
[41] See for e.g., Prosecutor's Notice for GBU, filed 28 November 2006; Will-say Statement of Witness GK, filed on 17 November 2006.
[42] *Karemera et al*., Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 17; *Prosecutor v. Dario Kordic and Mario Cerkez*, Case N°IT-95-14/2-A, Judgement (AC), para. 183.

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Decision on Prosecutor's Motion to Admit Witness Statement from Joseph Serugendo
Rule 89 (C) and 92 bis of the Rules of Procedure and Evidence
15 December 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Joseph Serugendo – Witness sick from a fatal illness, Addition of the witness on the Prosecution witness list not disputed – Admission of the written statement of the witness, No possibility of cross-examination of the witness, Conditions to met for the Chamber to admit written statement : evidence must go to proof of the matter other than the acts and conduct of the Accused, Condition not fulfilled – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 92 bis

International Cases cited :

I.C.T.R. : *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. Edouard Karemera et al., Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules; and Order for Reduction of Prosecution Witness List, by this Chamber on 11 December 2006 (ICTR-98-44)

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) ; Trial Chamber, The Prosecutor v. Vidoje Blagojević et al., First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant To Rule, 12 June 2003 (IT-02-60) ; Trial Chamber, The Prosecutor v. Slobodan Milošević, Decision on Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to 92 bis (D) – Foča Transcripts (TC), 30 June 2003 (IT-02-54)

Introduction

1. The trial in this case started on 19 September 2005. During the third trial session, the Defence for each Accused and the Prosecution applied to call Joseph Serugendo as a witness for their respective cases.[1] The Chamber made no decision on these applications. At that time, there were serious concerns regarding Mr. Serugendo's health and whether or not it was possible or even feasible for him to testify.[2] The Registrar had already provided a medical report,[3] but the Chamber considered that it needed further information in order to address the parties' applications and it requested the Registrar to inform the Chamber and the parties of Mr. Serugendo's current state of health and physical and psychological ability to testify, including via video-link, or to make a deposition.[4]

[1] T. 16 June 2006, pp. 1-3; T. 20 June 2006, p. 2.
[2] T. 20 June 2006, pp. 1-3 and 16.
[3] The Registrar's Submissions Regarding Joseph Serugendo's Extremely Urgent Motion for Partial Enforcement of Sentence, filed on 19 June 2006, see T. 20 June 2006, p. 16.
[4] *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-T ("*Karemera et al.*"), Order for the Registrar's Submission on Joseph Serugendo's Health Condition and Ability to Testify (TC), 20 June 2006.

2. On 26 June 2006, the Registrar informed the Chamber that the Medical Officer concluded that Mr. Serugendo was not in a condition to undergo an interrogation, either by live testimony or through a deposition.[5] At the last day of the third trial session, after the parties reiterated their requests, the Chamber noted that according to the last updated information provided by the Registrar, there had been no improvement in Serugendo's condition.[6] The Chamber therefore considered that no order could be made at that time.[7] On 22 August 2006, Joseph Serugendo succumbed to his illness and passed away.

3. The Prosecutor now requests the Chamber to admit an abridged statement ("Abridged Statement") from Joseph Serugendo pursuant to Rule 89 (C) or Rule 92 *bis* of the Rules of Procedure and Evidence.[8] On 27 June 2006, Prosecution Counsel accompanied by a judicial officer appointed by the Registry, met Mr. Serugendo who verified the content of his prior statement and also reviewed the Abridged Statement. This document consists of a bi-lingual composite text of 40 pages,[9] composed of extracts from an original statement of Joseph Serugendo which was disclosed to the parties on 12 June 2006.[10]

Discussion

Preliminary Issue- Witness List

4. On 30 May 2006, the Prosecution stated that it intended to make a motion to vary its witness list to include Mr. Serugendo. In an oral decision on the same day, the Chamber ordered that any application to add him to the witness list should be made forthwith.[11] On 13 June 2006, after learning that Mr. Serugendo was suffering from a fatal illness, the Defence for Nzirorera asserted its wish to have Mr. Serugendo testify on its behalf,[12] and made a motion on 19 June 2006 for him to be called as a Defence witness out of order.[13] In response to the Chamber's query, the Prosecution admitted that the decision had not yet been made to call Mr. Serugendo as a Prosecution witness due to the state of his health and potential quality of his testimony.[14] On 20 June 2006, the Prosecution made an oral motion to have Serugendo added to its witness list, and the Chamber deferred its decision until it received more information from the Registrar concerning Mr. Serugendo's health.[15] The Defence for Nzirorera did not oppose the motion and asked that it be granted.[16]

5. Since both parties were in agreement that Mr. Serugendo should testify and the Prosecution's eventual motion to add him to the witness list was not in controversy, the Chamber finds this issue should not prevent the full evaluation of the present Motion.

Admission Pursuant to Rule 92bis

6. The Prosecution claims that its application is motivated by a concern to make Serugendo's evidence available to this Trial Chamber "in whatever form possible". It submits that, in accordance with Rule 92 *bis*, the Abridged Statement excludes direct and indirect references to the acts or conducts of the Accused.

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[5] The Registrar's Submissions Regarding Joseph Serugendo's Health Condition and Ability to Testify, filed on 26 June 2006.
[6] T. 10 July 2006, p. 3.
[7] *Ibidem* at p. 4.
[8] Prosecutor's Motion to Admit Witness Statement from Joseph Serugendo pursuant to Rule 89 (C) and 92 *bis* (B), filed on 5 September 2006.
[9] Annex B to the Motion.
[10] This statement results from several meetings between the Office of the Prosecutor and Joseph Serugendo.
[11] T. 30 May 2006, p.62-64.
[12] T. 13 June 2006 p. 4-5.
[13] T. 19 June 2006 p. 1.
[14] T. 19 June 2006 p.4-5.
[15] T. 20 June 2006 p. 2.
[16] T. 20 June 2006 p. 16.

7. All three Accused oppose the Motion because there will be no cross-examination on matters so proximate to the Accused that its admission would be unfair. Specifically, the Defence points to specific paragraphs in the Abridged Statement that go to the acts and conducts of the Accused, making the statement ineligible for admission pursuant to Rule 92 *bis*.

8. Rule 92 *bis* provides that a witness statement can be admitted in lieu of oral testimony, if it satisfies certain criteria laid out in the Rule.[17] A threshold requirement is that the evidence must go to proof of the matter other than the acts and conduct of the Accused.[18] That is, a written statement upon which the prosecution relies to establish (a) that the accused committed (that is, personally physically perpetrated) any of the crimes charged himself or herself; or (2) that he planned, instigated or ordered the crimes charged; or (3) that he otherwise aided and abetted those who actually did commit the crimes in their planning, preparation or execution of those crimes; or (4) that he was a superior to those who actually did commit the crimes; or (5) that he knew or had reason to know that those crimes were about to be or had been committed by his subordinates; or (6) that he failed to take reasonable steps to prevent such acts or to punish those who carried out those acts.[19]

9. The Prosecution submits that the Abridged Statement deals with four substantive issues: RTLM as a vehicle of the MRND; The Structure of the *Interahamwe za MRND*; the role of the MRND in the Interim government; and the "pacification" tour of 10 April 1994", and that the Accused are not mentioned by name. Although that is accurate, perusal of the Abridged Statement indicates that the acts and conduct of the Accused are often the subject matter of its contents. Throughout the Abridged Statement, the Accused were implicitly referred to in a variety of ways, such as "certain personalities of the government and the MRND party"[20], "MRND Party Leadership"[21], "MRND authorities"[22], "Senior Officials of the MRND Party"[23], and "Interim Government"[24]. An Accused need not be specifically named for statements to be held as going to the acts or conduct of the Accused[25], and in this case, it is the Prosecution's assertions that the Accused committed the crimes charged "by using their power and authority as high level MRND political party leaders and their status as current or former ministers of government to recruit, indoctrinate, arm, train, and mobilize Hutu militiamen and ordinary Hutu citizens, mostly subsistence farmers, to attack, harm and destroy the Tutsi population of Rwanda during the period 1990 – 1994."[26] The Chamber finds that these expressions, found under each of the four substantive headings in Mr. Serugendo's statement, do go to the acts and conduct of the Accused.

10. As the Abridged Statement contains evidence which goes to the acts and conduct of the Accused, a threshold issue for admission pursuant to Rule 92 *bis* has not been met.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Prosecution Motion in its entirety.

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[17] For a full discussion on Rule 92 *bis*, see the recent Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 *bis* of the Rules; and Order for Reduction of Prosecution Witness List, by this Chamber on 11 December 2006.
[18] *See* Rule 92 *bis*(A).
[19] *Prosecutor v. Galić,* Case N°IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (AC), 7 June 2002, para. 10; *Prosecutor v. Milošević*, Case N°IT-02-54-T, Decision on Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to 92 *bis* (D) – Foča Transcripts, 30 June 2003, para. 11; *Prosecutor v. Blagojević et al.,* Case N°IT-02-60-T, First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant To Rule 92 *bis* (TC), 12 June 2003, para. 9.
[20] Abridged Statement para. 17.
[21] Abridged Statement para. 26.
[22] Abridged Statement para. 27, 49, 80.
[23] Abridged Statement para. 39, 48.
[24] Abridged Statement para. 40, According to the Prosecutor's Pre-Trial Brief, Édouard Karemera was Minister of the Interior in the Interim Government of 8 April 1994.
[25] See for example, *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva,* Decision on Prosecutor's Motion for the Admission of Written Statements Under Rule 92 *bis* (TC), 9 March 2004, para. 22.
[26] Prosecutor's Pre-Trial Brief para. 4.

Arusha, 15 December 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Decision on Admission of Defence Exhibits Rule 89 (C) of the Rules of Procedure and Evidence 29 December 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Admission of exhibits into evidence, Relevancy of the exhibits – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 89 (C)

International Cases cited :

I.C.T.R. : 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)

INTRODUCTION

1. The trial in this case started on 19 September 2005. On 30 May 2005, while cross-examining Prosecution Witness T, the Defence for Nzirorera requested the Chamber to admit into evidence four documents described as follows: a speech of Minister Éliezer Niyitegeka on the 9th of April 1994; a communiqué of the Ministry of Interior on the 10th of May 1994; the speech of Minister Éliezer Niyitegeka on the 30th of April 1994; and a speech of the Minister of Justice on the 17th of May 1994.[1] These documents were, however, only available in Kinyarwanda. The Prosecution objected to the admission of the first document on the basis of relevance of the document to the witness' cross-examination.[2] The Chamber was unable to rule on the admission of the speeches tendered by the Defence for Nzirorera at that stage since the documents were only available in Kinyarwanda.[3] It therefore reserved its ruling, ordered the documents to be marked for identification and requested the assistance of the Registrar in order to obtain the translations.[4] The translations of the speeches are now available. The Chamber is therefore now in a position to rule on their admission.

Discussion

[1] T. 30 May 2006, pp. 42 and 47.
[2] T. 30 May 2006, p. 47.
[3] T. 30 May 2006, p. 47.
[4] T. 30 May 2006, p. 47. A speech of Minister Éliezer Niyitegeka on the 9th of April 1994; a *communiqué* of the Ministry of Interior on the 10th of May 1994; the speech of Minister Éliezer Niyitegeka on the 30th of April 1994; and a speech of the Minister of Justice on the 17th of May 1994 were respectively marked for identification as ID. NZ16, 17, 18 and 19.

2. Rule 89 (C) of the Rules of Procedure and Evidence provides the Chamber with the discretion to admit any relevant evidence which it deems to have probative value. As the Appeals Chamber has repeatedly emphasized,

> "[a]dmissibility of evidence should not be confused with the assessment of weight to be accorded by the Chamber to that evidence at a later stage".[5]

3. After reviewing the documents sought for admission as well as the testimony of Witness T, the Chamber is satisfied that these documents are relevant to the issue of efforts to stop the killings to which Witness T testified in the instant case. The Chamber is also satisfied that these documents have probative value.

FOR THE ABOVE REASONS, THE CHAMBER

I. GRANTS the Defence Motion, and accordingly

II. ADMITS into evidence the documents marked for identification as ID. NZ16, ID. NZ17, ID. NZ18 and ID. NZ19, as well as their translations, and described as a speech of Minister Éliezer Niyitegeka on the 9th of April 1994; a *communiqué* of the Ministry of Interior on the 10th of May 1994; the speech of Minister Éliezer Niyitegeka on the 30th of April 1994; and a speech of the Minister of Justice on the 17th of May 1994.

II. REQUESTS the Registrar to assign these documents with an exhibit number in the instant case.

Arusha, 29 December 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[5] *Prosecutor v. Ntahobali and Nyiramasuhuko*, Case N°**ICTR-97-21-AR73,** Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible" (AC), 2 July 2004, para. 15.

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Decision on Defence Motion for Investigation of Prosecution Witness Ahmed Mbonyunkiza for False Testimony Rule 91 (B) of the Rules of Procedure and Evidence 29 December 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – False testimony, Discretionary power upon the Chamber of launching an investigation if that Chamber has strong grounds for believing that a witness has knowingly and wilfully given false testimony, Case-by-case analysis of the "strong grounds for believing", Distinction between mere contradictions or discrepancies between the testimonies and the false testimony, the fact that the Tribunal will close its business and could not be able to prosecute witnesses for false testimony is not a sufficient ground for ordering an investigation – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 91 (B)

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Jean-Paul Akayesu, Decision on the Defence Motions to Direct the Prosecutor to investigate the Matter of False Testimony by Witness "R", 9 March 1998 (ICTR-96-4) ; Trial Chamber, The Prosecutor v. Ignace Bagilishema, Decision on the Request of the Defence for the Chamber to Direct the Prosecution to Investigate a Matter with a View to the Preparation and Submission of an Indictment for False Testimony, 11 July 2000 (ICTR-95-1A) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Defence Request for an Investigation into Alleged False Testimony of Witness DO, 3 October 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Arsène Shalom Ntahobali's Motion to Have Perjury Committed by Prosecution Witness QY Investigated, 23 September 2005 (ICTR-97-21 and ICTR-98-42)

Introduction

1. The trial in this case started on 19 September 2005. The Prosecution called Witness Ahmed Napoléon Mbonyunkiza as its first witness starting 20 September 2005 through 28 October 2005. On 14 October 2005, while the Chamber was also hearing the testimony of Prosecution Witness G who allegedly contradicted Witness Mbonyunkiza's testimony, the Defence for Nzirorera made an oral motion requesting that the Chamber order an investigation for false testimony of Witness Mbonyunkiza.[1] The Chamber denied the Motion stating that it was premature and that it cannot initiate an investigation every time there is a contradiction of testimony.[2] On 1 March 2006, while cross-examining Witness UB, the Defence for Nzirorera reiterated its application.[3] The Chamber reserved its ruling at that time.[4] After hearing all the testimony from the Prosecution witnesses who had testified to

[1] T. 14 October 2005, pp.19-20.
[2] T. 14 October 2005, p.21.
[3] T. 1 March 2006, pp. 36-37.
[4] T. 1 March 2006, p. 37.

the same issues, the Defence for Nzirorera, joined by the Defence for Ngirumpatse, renewed its application for investigation of Witness Mbonyunkiza for false testimony.[5]

Discussion

2. The Defence for Nzirorera requests, pursuant to Rule 91 (B) of the Rules of Procedure and Evidence that an *amicus curiae* be appointed to investigate the false testimony of Prosecution Witness Mbonyunkiza because some of his statements have been contradicted by the testimony of other Prosecution witnesses and will be contradicted by Defence witnesses in the future. It claims that Prosecution Witnesses G, UB and T contradicted Witness Mbonyunkiza's statement that Ngirumpatse spoke at weekly Wednesday meetings in February 1992 and advocated elimination the Tutsi; that Prosecution Witnesses G and T also contradicted Mbonyunkiza's testimony that it was Bikindi who introduced a song about eliminating the Tutsi at the meetings and that Gaspard Uwizigara attended the meetings and that axes were displayed and distributed at the meetings. It also asserts that Prosecution Witness UB denied that axes were used by the *Interahamwe* at the time. The Defence for Ngirumpatse joins in the Motion and alleges that Witness Mbonyunkiza lied about further events such as: that Ngirumpatse was the author of a grammar book; that meetings took place every Wednesday and that lists were generated confirming the presence of individuals at the meetings. On 2 November 2006, during the testimony of Prosecution Witness ALG, the Defence for Nzirorera requested the Chamber to consider the evidence of that witness as supplementary material in support of this Motion.[6]

3. The Defence asserts that the requirements set out under Rule 91 (B) of the Rules for an investigation in case of false testimony are met. To support its application, it relies upon an oral decision from the Appeals Chamber in the *Kamuhanda* case, where it alleges that the Appeals Chamber referred a matter for investigation of false testimony on far less evidence than exists against Witness Mbonyunkiza.

4. The Prosecution opposes the Motion and asserts that apparent contradictions do not automatically mean that a witness has deliberately given false testimony.[7]

5. Rule 91 (B) of the Rules bestows a discretionary power upon the Chamber such that 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;
>
> (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.

6. In the *Akayesu* case, the Trial Chamber outlined the basic considerations for an order to investigate false testimony.[8] It considered that to constitute false testimony (a) the witness must make a solemn declaration; (b) the false statement must be contrary to the solemn declaration; (c) the witness must believe at the time the statement was made that it was false; and (d) there must be a relevant relationship between the statement and a material matter within the case. The statement must also have been made with intent to mislead the judge and to cause harm and the onus is on the pleading party to prove (a) the falsehood of the witness statements; (b) that the statements were made

[5] Motion for Investigation of Witness Ahmed Mbonyunkiza for False Testimony, filed on 29 May 2006; *Mémoire de Ngirumpatse sur la* Joseph Nzirorera's Motion for Investigations of Witness Ahmed Mbonyunkiza for False Testimony, filed on 5 June 2006; see also Joseph Nzirorera's Reply filed on 6 June 2006.
[6] T. 2 November 2006 p. 36.
[7] Prosecution Response filed 5 June 2006.
[8] *Prosecutor v. Jean-Paul Akayesu,* Case N°ICTR-96-4-T, Decision on Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness "R" (TC), 9 March 1998 ("*Akayesu* Decision").

with harmful intent; or at least they were made by a witness who was fully aware that they were false; and (c) the possible bearing of the said statements on the judge's decision.[9]

7. In determining whether "strong grounds" exist that the witness gave false testimony, a Chamber must therefore find, on a case-by-case basis in the particular circumstances of each case, evidence of an intention to commit this offence. Contradictory evidence between witness' testimony is insufficient evidence to demonstrate that a witness intended to mislead the Chamber and to cause harm.[10] Instead, contradictory evidence is used when determining the probative value of the evidence presented by the parties during trial.[11]

8. The Chamber notes that in the *Kamuhanda* case referred to by the Defence, the Appeals Chamber not only "noted significant discrepancies in testimony given by the witnesses, which may amount to false testimony", but also "had been given reason to believe that there may have been attempts to pervert the course of justice with respect to this appeal in the form of the solicitation of false testimony".[12] They were therefore specific circumstances in that case for the Appeals Chamber to order the Prosecution to investigate the matter of alleged false testimony of a witness.[13]

9. In this case, the Defence alleges that Witness Mbonyunkiza made statements contradicted by other Prosecution witnesses and that will be contradicted by witnesses the Defence intends to call to testify. The Defence does not provide any details as to the content of the evidence of these potential Defence witnesses, and mostly does not adduce evidence of any harmful intent of Witness Mbonyunkiza to make a false testimony. As already recalled, mere contradictions or discrepancies between the testimonies of different witnesses do not, as such, constitute sufficient ground for believing that a witness has knowingly and wilfully given false testimony. Also the Defence has not shown that the requirements set forth by the Rule for ordering an investigation for false testimony have been met.

10. Furthermore, the fact that the Tribunal will close its business by a certain date and could not be able to prosecute witnesses for false testimony, as claimed by the Defence, is not a sufficient ground for ordering an investigation when there is no strong reasons for believing that a witness has knowingly and willfully given false testimony. The Chamber also does not accept the Defence contention that the Chamber should order an investigation for false testimony in the present case for the purpose of discouraging future witnesses from giving false testimony, when there are no strong grounds for believing any harmful intent of the witness concerned. In addition, the Appeals Chamber has already made it very clear to potential witnesses that the Tribunal will not tolerate false testimony before the Court, as well as the interference with the testimony of other witnesses who may appear before the Court.[14]

11. In any event, any alleged discrepancy in the testimony of Witness Mbonyunkiza will be addressed by this Chamber at a later stage when assessing the evidence adduced by each party in the present case as a whole. To make a finding now on allegedly contradictory evidence would be pre-judging the issues and is premature.

FOR THE ABOVE REASONS, THE CHAMBER

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[9] Ibidem.
[10] *Prosecutor v. Ignace Bagilishema*, Case N°ICTR-95-1A-T, Decision on the Request of the Defence for the Chamber to Direct the Prosecution to Investigate a Matter with a View to the Preparation and Submission of an Indictment for False Testimony (TC), 11 July 2000, para. 6.
[11] *Id.* at para. 7; *Akayesu* Decision; *Prosecutor v. Bagosora et . al.*, Case N°ICTR-98-41-T, Decision on Defence Request for an Investigation into Alleged False Testimony of Witness DO (TC), 3 October 2003, para. 9; *Prosecutor v. Niyramasuhuko et al.*, Case N°ICTR-97-21-T and ICTR-98-42-T, Decision on Arsène Shalom Ntahobali's Motion to Have Perjury Committed by Prosecution Witness QY Investigated (TC), 23 September 2005.
[12] *Prosecutor v. Jean de Dieu Kamuhanda*, Case N°ICTR-99-54-A, T. 19 May 2005, p. 50.
[13] Ibidem.
[14] *Prosecutor v. Jean de Dieu Kamuhanda*, Case N°ICTR-99-54-A, T. 19 May 2005, p. 50.

DENIES the Defence Motion in its entirety.

Arusha, 29 December 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Decision on Motion for Disclosure of Letter from Prosecution Witness BTH to the Witness and Victim Support Section
Rules 33 (B) and 54 of the Rules of Procedure and Evidence
29 December 2006 (ICTR-98-44-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera – Disclosure of Letter from a Prosecution Witness to the Witness and Victim Support Section, Inherent power to reconsider its decisions in view of new circumstances not known at the time, No disclosure obligation on the Registrar – Assistance of the Registrar requested

International Instrument cited :

Rules of Procedure and Evidence, rules 33 (B) and 54

International Cases cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera, Decision on Joseph Nzirorera's Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting With Defence Witness, 11 October 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Defence Motion for Modification of Protective Order: Timing of Disclosure, 31 October 2005 (ICTR-98-44)

Introduction

1. During the testimony of Prosecution Witness BTH, on 20 June 2006, the witness alleged that he had been intimidated by the Defence for Joseph Nzirorera. He also stated that he was offered a sum of money by a relative of the Accused if he declined to testify for the Prosecution and/or agreed to testify on behalf of the Defence. The witness testified that he subsequently informed an employee of the Witness and Victim Support Section ('WVSS'), Kigali, of this offer, and wrote a letter about the matter which was left in the possession of WVSS, Kigali. Immediately following this testimony, the Defence for Joseph Nzirorera made an Oral Motion before the Chamber for an order for the disclosure of the said letter.[1] As a result, the Presiding Judge asked the witness for the name of the employee who

[1] T. 20 June 2006, p. 45 (closed session)

received the letter and the date that it was written. Being satisfied that the witness gave sufficient information to identify the letter, the Chamber denied the Defence application.[2]

2. In a Further Submission, the Defence for Nzirorera submits that the Chamber has not yet ruled upon its oral motion.[3] It contends that this Motion, however, is now moot because the WVSS employee and his supervisor told Lead Counsel for Nzirorera that they had no recollection of having received such a letter, and that no such letter is in Witness BTH's file. The Defence further advises that he asked each of these persons to sign a statement to this effect, but that they both declined to do so.

3. In a response filed on 26 October 2006, the Prosecution provides a different account of events, and submits that the Motion has not been rendered moot. The Prosecution submits that the Senior Trial Attorney spoke with the WVSS employee concerned and that he found the employee's account of events to be consistent with that of Witness BTH.[4] It requests the Chamber to order WVSS to provide a written memorandum clarifying its position, or alternatively, that the WVSS employees concerned be ordered to appear before the Chamber to provide an explanation of the relevant matters concerning the letter.

Discussion

4. Although the Chamber has already decided to deny the Defence application for an order to disclose a letter given by Witness BTH to a WVSS employee, the Chamber has an inherent power to reconsider its decisions in view of new circumstances that were not known at the time it made its original Decision.[5]

5. In the present case, the Parties' subsequent filings concerning the existence or non-existence of the letter raise new circumstances that might be relevant to the credibility of the witness and show that the Defence may have difficulties in obtaining the document sought. The Chamber is also of the view that this issue could be addressed without calling a WVSS representative to testify orally as suggested by the Defence.[6]

6. Since the Prosecution is not in possession of the letter and the Registrar, through WVSS, indicates to have relevant information and have no objection in complying with any directive of the Trial Chamber concerning this issue,[7] the Chamber finds appropriate to request, pursuant to Rules 33 (B) and 54 of the Rules of Procedure and Evidence,[8] the assistance of the Registrar.

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[2] T. 20 June 2006, p. 45: "Is that sufficient identifying information? I don't think we make the order that you requested at this stage, but the document has been satisfactorily identified."
[3] Further Submission Concerning Motion for Disclosure of Witness BTH Letter to WVSS, filed on 17 October 2006.
[4] See Prosecution Response, para. 1: "a letter was written by BTH providing details of an attempt of the Nzirorera defense team to influence his testimony; BTH gave the letter to the WVSS witness support assistant; that WVSS witness support assistant forwarded the letter to his immediate supervis[or] to be filed in the WVSS archive."
[5] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera* ("*Karemera et al*.") Case N°ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses (TC), 29 August 2005, para. 8; *Karemera et al.,* Case N°ICTR-98-44-T, Decision on Defence Motion for Modification of Protective Order: Timing of Disclosure (TC), 31 October 2005, para. 3; *Karemera et al.,* Case N°ICTR-98-44-T, Decision on Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting with Defence Witness (TC), 11 October 2005, para. 8 (note also the authorities cited in footnotes contained within that paragraph).
[6] Further Submission Concerning Motion for Disclosure of Witness BTH Letter to WVSS, filed on 17 October 2006.
[7] Filings made on 30 October and 2 November 2006.
[8] Rule 33 (B) provides:
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.
Rule 54 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.

7. Moreover, the Chamber is of the view that the correspondence attached to the Prosecutor's Response filed on 26 October 2006 contains information that could identify the witness and should therefore be re-filed as confidential in order to preserve the security of the witness.

FOR THOSE REASONS, THE CHAMBER

I. REQUESTS the Registrar to provide, confidentially and as soon as practicable, the Chamber and the Parties with the letter given by Witness BTH to a WVSS employee named Janvier Bayingana on or about 4 January 2004, as well as any supporting material and statements from the relevant WVSS employees who could be relevant to the issue at stake;

II. ORDERS that Annex to the Prosecutor's Response to Joseph Nzirorera's Further Submission Concerning Motion for Disclosure of BTH Letter to WVSS, filed on 26 October 2006, be re-classified as confidential to the public.

Arusha, 29 December 2006, done in English.

[Signed] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Le Procureur c. Edouard KAREMERA, Mathieu NGIRUMPATSE, et Joseph NZIRORERA

Affaire N° ICTR-98-44

Fiche technique : Edouard Karemera

• Nom: KAREMERA

• Prénom: Edouard

• Date de naissance: inconnue

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: Ministre de l'intérieur du gouvernement intérimaire et vice-président du MRND

• Date de confirmation de l'acte d'accusation: 29 août 1998

• Chefs d'accusation: génocide, entente en vue de commettre le génocide et complicité de 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 Togo

• Date du transfert: 10 juillet 1998

• Date de la comparution initiale : 21 mars 2005

• Date du début du procès : 19 septembre 2005 (procès joint, *Karemera et al*., 3 accusés, procès en cours)

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Fiche technique: Mathieu Ngirumpatse

• Nom: NGIRUMPATSE

• Prénom: Mathieu

• Date de naissance: inconnue

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: directeur général au ministère des affaires étrangères et président du MRND

• Date de confirmation de l'acte d'accusation: 6 avril 1999

• Chefs d'accusation: génocide, entente en vue de commettre le génocide et 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: 11 juin 1998, au Mali

• Date du transfert: 10 juillet 1998

• Date de la comparution initiale: 21 mars 2005

• Date du début du procès: 19 septembre 2005 (procès joint *Karemera et al*., 3 accusés, procès en cours)

***

Fiche technique: Joseph Nzirorera

• Nom: NZIRORERA

• Prénom: Joseph

• Date de naissance: 1950

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: président de l'assemblée nationale et secrétaire général du MRND

• Date de confirmation de l'acte d'accusation: 6 avril 1999

• Chefs d'accusation: génocide, complicité dans le 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 juillet 1998

• Date de la comparution initiale: 21 mars 2005

• Précision sur le plaidoyer: non coupable

• Date du début du procès: 19 septembre 2005 (procès joint *Karemera et al*., 3 accusés, procès en cours)

Augustin Bizimana, Félicien Kabuga et Callixte Nzabomina ont été disjoints au cours de l'année 2003. A partir du 8 octobre 2003, seuls restent poursuivis sous le numéro d'affaire ICTR-98-44, Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba.

Décision sur la requête d'Edouard Karemera en certification d'appel Article 73 (B) du Règlement de procédure et de preuve 20 janvier 2006 (ICTR-98-44-R73B)

(Original : Français)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Certification d'appel, Pas de démonstration que l'appel concerne une question susceptible de compromettre l'équité, la rapidité ou l'issue du procès – Requête rejetée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 73 (B) ; Statut, art. 17 (3) et 20 (4) (a)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision relative à la requête d'Édouard Karemera en prolongation de délai, 18 mai 2005 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Decision Granting Extension of Time to File Defence Pre-Trial Brief, 1 juillet 2005 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Decision Granting Extension of Time to Respond to the Prosecution Motion for Judicial Notice, 12 juillet 2005 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Oral Decision on Karemera Motion for Extension of Time filed on 29 July 2005, 9 septembre 2005 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision relative à la requête de la Défense en extension de délai, 5 octobre 2005 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision sur la requête d'Edouard Karemera aux fins de lui garantir un procès équitable, 28 octobre 2005 (ICTR-98-44)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance III (la « Chambre »), composée des Juges Dennis C. M. Byron, Président, Emile Francis Short et Gberdao Gustave Kam ;

SAISI de la « Requête en certification d'appel » déposée le 14 Décembre 2005 par l'Accusé Édouard Karemera ;

CONSIDÉRANT la « Réponse du Procureur à la Requête d'Edouard Karemera pour certification d'appel de la « *Decision on Variance of the Prosecution Witness List* » rendue par la Chambre le 13 décembre 2005 », déposée le 15 décembre 2005 ;

STATUE comme suit, sur la base des mémoires écrits des parties, et conformément à l'Article 73 du Règlement de procédure et de preuve (le « Règlement »).

Introduction

1. La Chambre a rendu une « *Decision on Variance of Prosecution Witness List* » en date du 13 décembre 2005 (« Décision sur la liste de témoins du Procureur »). Dans cette décision, la Chambre a partiellement fait droit à la requête du Procureur et a rejeté les prétentions de la Défense dans leur

entièreté. La Défense d'Édouard Karemera conteste à présent cette Décision et demande une certification d'appel. Le Procureur s'y oppose.

Discussion

2. La Défense d'Édouard Karemera estime que les droits fondamentaux de l'accusé, tel que prévus par les articles 17 (3) et 20 (4) (a) du Statut du Tribunal, sont systématiquement violés depuis le commencement du présent procès en faisant valoir que le Procureur introduit ses requêtes et s'exprime en anglais, une langue qui n'est pas connue d'Edouard Karemera. De plus, poursuit-elle, aucune des réponses introduites par les autres équipes de la Défense n'a été traduite en français. La Défense d'Édouard Karemera n'a donc pas pu répondre aux différents arguments des parties, faute d'avoir reçu leur traduction. Cette situation est préjudiciable pour l'accusé et remet en cause l'équité du procès. Par conséquent, la Défense d'Édouard Karemera demande que la Chambre accorde une certification d'appel contre la Décision 13 Décembre 2005.

3. Le Procureur soumet qu'Edouard Karemera n'a démontré ni que la question soulevée est susceptible de compromettre l'équité et la rapidité du procès ni que le règlement immédiat de cette question par la Chambre d'appel pourrait concrètement faire progresser la procédure. Elle demande donc à la Chambre de rejeter cette requête.

4. La Chambre note qu'aux termes des dispositions de l'article 73 (B) du Règlement deux conditions doivent être réunies pour qu'une certification d'appel soit accordée : le requérant doit démontrer (i) que la décision contestée touche une question à même de compromettre l'équité, la rapidité ou l'issue du procès, (ii) et que son règlement immédiat par la Chambre d'appel peut faire avancer la procédure.

5. La Chambre rappelle qu'elle a déjà rendu plusieurs décisions portant sur la question du lien entre la traduction des documents et l'équité du procès.[1] Dans lesdites décisions, la Chambre a constamment pris en compte le droit à un procès équitable et rappelé les règles applicables en vue de garantir les droits de l'accusé. Il revient à la Défense d'Edouard Karemera d'en tenir compte dans l'intérêt de l'accusé.

6. En l'espèce, la Chambre estime que la Défense n'a nullement démontré en quoi la décision contestée se rapporte à une question susceptible de compromettre l'équité, la rapidité ou l'issue du procès.

7. En outre, la Chambre est d'avis que la saisine immédiate de la Chambre d'appel ne contribuera pas à faire avancer la procédure.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête de la Défense en certification d'appel.

Arusha, 20 janvier 2006, fait en Français.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[1] Le Procureur c. Édouard Karemera, Affaire N°ICTR-98-44 T (Karemera et al.), Décision relative à la requête d'Édouard Karemera en prolongation de délai (TC), 18 mai 2005 ; Karemera et al, Decision Granting Extension of Time to File Defence Pre-Trial Brief (TC), 1 July 2005 ; Karemera et al, Decision Granting Extension of Time to Respond to the Prosecution Motion for Judicial Notice (TC), 12 July 2005; Karemera et al, Oral Décision on Karemera Motion for Extension of Time filed on 29 July 2005 (TC), 9 September 2005, p. 2; Karemera et al, Décision relative à la requête de la Défense en extension de délai (TC), 5 octobre 2005, para. 5; Karemera et al, Décision sur la requête d'Edouard Karemera aux fins de lui garantir un procès équitable (TC), 28 octobre 2005, paras. 8-11.

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Décision relative à la demande de prorogation 27 janvier 2006 (ICTR-98-44-A)

(Original : Anglais)

Chambre d'appel

Juges : Mohamed Shahabuddeen, Président de Chambre ; Mehmet Güney ; Liu Daqun ; Theodor Meron ; Wolfgang Schomburg

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Demande de prorogation, Démonstration de motifs valables : traductions françaises manquantes – Requête acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 116 (B)

4. La Chambre d'appel du Tribunal pénal international chargé de juger les personnes accusées 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 (respectivement la « Chambre d'appel » et le « Tribunal international ») est saisie du recours du Procureur intitulé « *Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (Rule 73 (C))* », déposé par le Procureur le 9 décembre 2005 (l'« Appel interlocutoire du Procureur »). La Chambre d'appel est également saisie de la « Requête de M. Ngirumpatse aux fins d'extension du délai de réponse au recours du Procureur intitulé "*Prosecutor's Interlocutory Appeal of Decision on Judicial Notice*" » (la « requête »), déposée le 16 décembre 2005 par l'accusé Mathieu Ngirumpatse (l'« accusé »).

2. L'accusé précise dans la requête qu'il n'a pas encore reçu la traduction en français de plusieurs documents originaux rédigés en anglais, à savoir la requête du Procureur en constat judiciaire déposée devant la Chambre de première instance[1], les réponses de ses coaccusés à ladite requête et la réplique du Procureur, la Décision de la Chambre de première instance relative à la requête du Procureur en constat judiciaire (la « décision attaquée », déposée le 9 novembre 2005), la requête du Procureur en certification d'appel de la décision attaquée, les réponses de ses coaccusés à la requête en certification et la réplique du Procureur, l'appel interlocutoire du Procureur et la réponse de ses coaccusés à l'appel interlocutoire du Procureur. Il demande la traduction des documents susmentionnés et demande un report du délai imparti pour déposer sa réponse à l'appel interlocutoire du Procureur[2].

3. L'article 116 du *Règlement de procédure et de preuve* du Tribunal international permet une prorogation de délais justifiée par des motifs valables ; le paragraphe (B) du même article est ainsi libellé :

> « 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 […] ».

4. La langue de travail du conseil de l'accusé est le français, non l'anglais. Il est évident que, pour pouvoir répondre de manière exhaustive à l'appel interlocutoire du Procureur, le Conseil doit pouvoir consulter le texte traduit en français du recours du Procureur et celui de la décision attaquée. Le fait qu'il n'ait pas toujours obtenu la traduction desdits documents constitue un motif valable de proroger le délai imparti pour le dépôt de sa réponse à l'appel interlocutoire du Procureur.

[1] Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts, 30 juin 2005.
[2] Requête, par. 14.

5. L'accusé n'a pas démontré que l'obtention de la traduction en français des autres documents – à savoir les pièces que les diverses parties ont déposées devant la Chambre de première instance en ce qui concerne le constat judiciaire et la certification, ainsi que celles déposées par ses coaccusés devant la Chambre d'appel – est nécessaire pour lui permettre de rédiger sa réponse à l'appel interlocutoire du Procureur ou que le fait de n'avoir pas reçu ladite traduction constitue un motif valable de proroger le délai imparti pour le dépôt de sa réponse. La décision attaquée et la certification d'appel de la décision relative au constat judiciaire (« Décision relative à la certification », déposée le 2 décembre 2005) statuent, après les avoir résumés, sur les arguments avancés par les parties dans les pièces déposées devant la Chambre de première instance et fournissent toutes les informations nécessaires à l'accusé pour préparer sa réponse. Pour cette raison, et du fait qu'il pourrait y avoir un désaccord sur l'étendue de la certification de l'appel interlocutoire[3], la Chambre d'appel chargera demandera au Greffe de faire traduire la décision relative à la certification alors même que l'accusé n'en a pas fait expressément la demande. En ce qui concerne le dépôt des pièces en appel du coaccusé Nzirorera, il n'est pas nécessaire pour l'accusé, tout au moins dans l'état actuel, d'examiner les réponses de ses coaccusés afin de préparer sa propre réponse. Normalement, ces réponses auraient dû être déposées à la même date ; on ne saurait donc affirmer que chaque coaccusé est habilité à prendre connaissance de la réponse des autres avant de préparer la sienne propre.

6. Une prorogation raisonnable du délai se justifie, mais l'accusé n'a pas établi la nécessité de proroger ce délai de 17 jours après le dépôt de la demande de traduction. Les réponses aux appels interlocutoires devant normalement être déposées dans les 10 jours qui suivent le dépôt de l'appel[4], une prorogation de 10 jours devrait donc suffire pour permettre à l'accusé de préparer sa réponse, une fois reçues les traductions requises. L'appelant affirme qu'il a le droit d'obtenir un délai plus long à titre de compensation pour la prorogation qu'il aurait pu obtenir de la Chambre de première instance, compte tenu du fait qu'il ne disposait pas, à ce stade, des traductions nécessaires[5]. Cet argument ne constitue pas un motif valable. Au présent stade, le point de savoir si l'accusé aurait dû disposer des traductions au moment de la préparation des mémoires devant la Chambre de première instance, et/ou s'il aurait dû obtenir une prorogation de délai à ce stade est une question sans objet. À supposer que la Chambre de première instance ait commis une erreur à cet égard, cette erreur n'aurait pas pu être corrigée par une prorogation de délai.

7. Le conseil du coaccusé Édouard Karemera utilise également le français comme langue de travail, et le dépôt tardif de sa réponse à l'appel interlocutoire du Procureur peut aussi s'expliquer par le fait que la Défense ne disposait pas des traductions requises. M. Karemera n'a pas déposé une requête en prorogation de délai, mais l'intérêt de la justice commande qu'il bénéficie de la prorogation consentie à M. Ngirumpatse, au cas où il choisirait de déposer une réponse.

8. Par ces motifs, la Chambre FAIT DROIT en partie à la requête de l'accusé. Elle ENJOINT au Greffe de fournir de toute urgence à l'accusé et à ses coaccusés la traduction en français de la décision attaquée, de la décision relative à la certification, de l'appel interlocutoire du Procureur, y compris ses annexes, et de la présente décision. À compter de la date à laquelle le dernier de ces quatre documents traduits aura été communiqué, l'accusé et son coaccusé M. Karemera disposeront d'un délai de 10 jours pour déposer leurs réponses à l'appel interlocutoire du Procureur.

Fait à La Haye (Pays-Bas), le 27 janvier 2006.

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[3] Un des coaccusés a demandé que certains des arguments du Procureur en appel soient rejetés pour être sortis du cadre de la certification. Voir la requête intitulée *Joseph Nzirorera's Motion to Dismiss Issues of Interlocutory Appeal for Which Certification Was Not Granted*, 13 décembre 2005.

[4] *Directive pratique relative à la procédure de dépôt des écritures en appel devant le Tribunal,* partie II 2) (appliquant ce délai lorsqu'un recours est de droit) ; *ibid*., partie III 2) (appliquant le même délai en appel où le recours est autorisé par la Chambre d'appel) ; *ibid*., partie I (les parties II et III s'appliquent *mutatis mutandis* à d'autres appel interlocutoires).

[5] Requête, par. 14.

[Signé] : Mohamed Shahabuddeen

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Décision sur la notification du Procureur intitulée « Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guichaoua » et la requête de la défense intitulée « Defence Motion to Exclude the Witness' Testimony » et Ordonnance de justification
Article 20 du Statut et articles 46 (A) et 94 bis (A) du Règlement de procédure et de preuve
1er février 2006 (ICTR-98-44-T)

(Original : Français)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Prorogation de délais, Engagements professionnels du témoin, Problème de santé de l'accusé, Retards survenus du fait de la transmission tardive par le Bureau du Procureur, Requête accordée – Exclusion du moyen de preuve, Non-respect de la décision de la Chambre par le Procureur, Exclusion de témoignages est une mesure extrême dans l'éventail des réparations, Requête rejetée – Pourvoir de la Chambre de première de 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 – Requête partiellement acceptée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 46 (A), 73 (A), 94 bis (A) et 115 ; Statut, art. 20

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. André Ntagerura et consorts, "Decision on Prosecution Motion for Admission of Additional Evidence", 10 décembre 2004 (ICTR-99-46)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance III, composée des juges Dennis C. M. Byron, Président, Emile Francis Short et Gberdao Gustave Kam (la «Chambre »),

SAISI de la notification du Procureur intitulée « Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guichaoua and Request for Additional Time to Comply with the Trial Chamber Decision of 8 November 2005 » (la « notification du Procureur »), déposée le 8 décembre 2005,

CONSIDÉRANT la requête de Joseph Nzirorera intitulée « *Motion to Exclude Testimony of André Gichaoua* » (la « requête de Joseph Nzirorera »), déposée le 13 décembre 2005, et la réponse du Procureur à cette requête (la « réponse du Procureur »), déposée le 14 décembre 2005,

RAPPELANT la décision de la Chambre intitulée « *Order on Filing of Expert Report of André Guichaoua* » (« l'ordonnance de justification »), rendue le 15 décembre 2005,

CONSIDÉRANT ÉGALEMENT les réponses et les écritures complémentaires du Procureur annexant des lettres de M. Guichaoua, déposées respectivement les 3, 4 et 19 janvier 2006, ainsi que les écritures du Procureur intitulées « *Prosecutor's Responsive Filing to the Trial Chamber's Order to Show Cause* », déposées le 9 janvier 2006,

STATUE sur ladite requête en vertu de l'article 73 (A) du Règlement de procédure et de preuve (le « Règlement ») comme suit :

Introduction

1. Le 16 mai 2005, la Chambre a enjoint au Procureur de communiquer à la Chambre et à la Défense de chacun des accusés, au plus tard le 15 août 2005, les déclarations de tous les témoins experts qu'il avait l'intention d'appeler à la barre[1]. Au cas où celles-ci ne seraient pas communiquées, le Procureur devait en expliquer la raison à la Chambre et à la Défense des accusés, et indiquer la date à laquelle elles le seraient.

2. Le 9 septembre 2005, estimant que le Procureur avait fourni des explications satisfaisantes pour solliciter un report de délais afin de s'acquitter de l'obligation de communication que lui impose l'article 94 *bis* (A) du Règlement, la Chambre a fait droit à la demande du Procureur aux fins de prorogation des délais de communication du rapport du témoin expert André Guichaoua[2]. La nouvelle date – proposée par le Procureur – a été fixée au 25 novembre 2005.

3. Le 8 novembre 2005, la Chambre a fait droit à une demande du Procureur aux fins de prorogation de délais en vue de la communication partielle du rapport d'expert de M. André Guichaoua[3]. Cette fois, la prorogation des délais a été sollicitée pour raisons médicales. La Chambre a cependant relevé que les pièces disponibles ne justifiaient pas la nécessité de proroger les délais de la durée demandée par le Procureur[4]. En conséquence, la nouvelle date limite a été fixée au 12 décembre 2005.

4. Le 8 décembre 2005, le Procureur a déposé une nouvelle notification de retard au sujet du rapport d'expert de M. Guichaoua et sollicité un délai supplémentaire pour se conformer à la décision rendue par la Chambre le 8 novembre 2005.

5. À la suite de cette demande, le conseil de Nzirorera invoquant ce nouveau retard, a déposé une requête visant à faire exclure le témoignage de M. Guichaoua.

6. La Chambre n'a pas été convaincue par les arguments du Procureur de la nécessité d'un nouveau report des délais. À cet égard, le 15 décembre 2005, à la suite des diverses demandes faites par le Procureur aux fins de prorogation du délai de dépôt de déclarations de témoins experts à charge en vertu de l'article 94 *bis* (A) du Règlement, la Chambre a décidé que le témoin expert André Guichaoua devrait lui fournir directement un complément d'information pour lui permettre de statuer sur les requêtes du Procureur et de la Défense. Le délai d'application de cette décision a été fixé au 2 janvier 2006 (la « première décision »). En outre, étant donné qu'à plusieurs reprises le Procureur n'a pas respecté les délais prescrits, la Chambre lui a enjoint d'en expliquer la raison sous peine de recevoir un avertissement en vertu de l'article 46 du Règlement (la « deuxième décision »).

[1] Le Procureur c. Édouard Karemera et consorts, Decision on Joseph Nzirorera's Motion for Deadline for filing of Reports of Experts (Chambre de première instance), 16 mai 2005.
[2] Le Procureur c. Édouard Karemera et consorts, Decision on Prosecutor's Notice of Delay in Filing Expert Reports and Request for Additional Time to Comply with the Chamber Decision of 16 May 2005 (Chambre de première instance de), 9 septembre 2005.
[3] Le Procureur c. Édouard Karemera et consorts, Decision Granting Extension of Time to File Prosecution Expert Report (Chambre de première instance), 8 novembre 2005.
[4] Le Procureur a sollicité la prorogation des délais jusqu'au 6 janvier 2006.

7. La présente décision portera par conséquent sur trois questions découlant de la notification du Procureur, de la requête de Nzirorera et des première et deuxième décisions rendues par la Chambre le 15 décembre 2005. Premièrement, la Chambre devrait-elle accorder le report de délais sollicité par le Procureur ? Deuxièmement, si ce report n'était pas accordé, la Chambre devrait-elle alors faire droit à la requête de la Défense en exclusion du témoignage dans son intégralité ? Troisièmement, le Procureur a-t-il fourni des raisons valables pour lesquelles un avertissement en vertu de l'article 46 du Règlement serait injustifié ?

Délibération

Report de délais et exclusion du témoignage

8. Suite à la première décision de la Chambre, le Procureur a déposé trois documents datés respectivement des 3, 4 et 19 janvier 2006 et transmettant sous forme d'annexes des courriels échangés entre le Bureau du Procureur et M. Guichaoua. Ces messages relevaient les différents engagements professionnels que le témoin avait dû assumer fin 2005, ainsi que ses problèmes de santé et ses obligations au titre d'une mission de recherche en Afrique durant la même période. M. Guichaoua ajoutait que certains retards étaient survenus du fait que le Bureau du Procureur lui avait envoyé des documents plus tard que prévu. En outre, il mentionnait le décès de son père fin décembre 2005 et l'incidence de cet événement sur son programme de travail. Le témoin signalait qu'il ne serait pas en mesure de soumettre son rapport avant le 20 février 2006 et qu'il comptait être présent à Arusha à partir du 15 février 2006 pour faire une déposition dans le cadre d'un autre procès devant le Tribunal.

9. La Chambre estime maintenant, sur la base de l'ensemble des informations disponibles, qu'elle devrait accorder une nouvelle prorogation jusqu'au 20 février 2006. Elle retient que pour diverses raisons tant personnelles que professionnelles, le témoin n'a pas pu respecter les délais fixés antérieurement par la Chambre. Elle note également qu'en dehors de la mention, par le témoin, de l'envoi tardif de certains documents par le Procureur, le nouveau retard accusé ne semble pas imputable à ce dernier. La Chambre enjoint cependant au Procureur de prendre toutes les dispositions qui s'imposent afin que le témoin puisse achever son rapport à temps pour que le Procureur puisse respecter la nouvelle ordonnance de communication.

10. Dans sa requête tendant à faire exclure le témoignage de M. Guichaoua, Nzirorera fait valoir que la non-communication d'un élément de preuve à la date fixée par la Chambre de première instance devrait entraîner le rejet de cet élément de preuve, à moins que le Procureur ne montre que le non-respect de la décision de la Chambre n'est pas dû à son manque de diligence. La Défense soutient qu'il s'agit-là de la norme établie par la Chambre d'appel lorsqu'elle a eu à déterminer s'il fallait prendre en considération des moyens de preuve produits hors délais, en vertu de l'article 115 du Règlement[5]. Selon les arguments de la Défense, le Procureur n'a pas satisfait à cette exigence pour que la Chambre de première instance puisse revenir sur sa décision du 8 novembre 2005, le seul élément nouveau étant que M. Guichaoua a décidé unilatéralement de ne pas achever son rapport dans les délais prévus.

11. Le fait que la Chambre ait fait droit à la demande de nouveau report de délais soumise par le Procureur devrait entraîner le rejet de la demande tendant à faire exclure le rapport. La Chambre estime par ailleurs qu'on ne saurait affirmer, à ce stade de la procédure, que le fait d'accorder une nouvelle prorogation de délai portera atteinte aux droits de l'accusé prévus à l'article 20 du Statut. Il convient d'indiquer aussi que la Chambre est habilitée à gérer le procès de manière à garantir que le retard de communication ne se traduise pas par une injustice envers les accusés. Si, au moment où le témoin est appelé à la barre, la Chambre est d'avis que l'accusé n'a toujours pas eu suffisamment de temps pour se préparer ou mener des enquêtes et qu'il a subi un quelconque préjudice de ce fait, elle aura alors toute latitude pour envisager de rejeter le témoignage en question. Il est évident que

[5] Le Procureur c. Ntagerura et consorts, Decision on Prosecution Motion for admission of Additional Evidence, par. 9.

l'exclusion de témoignages est une mesure extrême dans l'éventail des réparations dont elle dispose. Par conséquent, la demande faite à cet effet à ce stade de la procédure doit être rejetée.

Ordonnance de justification

12. En réponse à la deuxième décision de la Chambre, le Procureur soutient qu'aucun avertissement ne devrait lui être donné en vertu de l'article 46 (A) du Règlement. Il affirme que les retards accusés dans le dépôt des rapports d'expert ne dépendent pas entièrement de sa volonté et que ses précédentes conclusions en matière de délais et de retards ont été présentées sur la base des informations les plus fiables disponibles à la date considérée, et en toute bonne foi. Il estime par ailleurs que ces retards n'ont pas été causés de propos délibéré ou par négligence et qu'ils ne relèvent pas non plus d'un manque de respect pour l'autorité de la Chambre.

13. Selon l'article 46 (A) du Règlement, 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. La Chambre est convaincue, sur la base des arguments du Procureur et des informations disponibles, que des raisons valables ont été avancées pour expliquer pourquoi elle ne devrait pas, à ce stade de la procédure, adresser d'avertissement en vertu de l'article 46 (A). En particulier, la Chambre a tenu compte de l'argument du Procureur selon lequel les délais qu'il avait sollicités précédemment étaient fondés sur les informations en sa possession à la date considérée et que ces demandes avaient été faites en toute bonne foi. En prenant note également des raisons invoquées par le témoin pour expliquer le retard pris par l'achèvement de son rapport, la Chambre tient à préciser à l'intention tant du Procureur que du témoin que toute nouvelle demande de prorogation de délais se heurtera à sa désapprobation la plus vive. À cet égard, elle enjoint au Procureur de prendre des dispositions concrètes pour veiller à ce que le témoin respecte l'engagement qu'il a pris en vue de soumettre son rapport au plus tard le 28 février 2006. À cette fin, la Chambre estime que copie de la présente décision devrait être notifiée au témoin.

PAR CES MOTIFS, LA CHAMBRE

I. FAIT DROIT à la requête du Procureur en prorogation de délais en vue de la communication du rapport du témoin expert André Guichaoua ;

II. ENJOINT

(a) Que le rapport en question soit communiqué à la Défense de chacun des accusés et à la Chambre au plus tard le 28 février 2006 ;

(b) Que le Greffe notifie copie de la présente décision au témoin expert André Guichaoua le plus tôt possible ;

III. REJETTE la requête de Joseph Nzirorera intitulée « *Motion to Exclude Testimony of André Guichaoua* » dans sa totalité.

Fait à Arusha, le 1er février 2006.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Ordonnance visant au dépôt de soumissions d'un Etat Article 28 du Statut du Tribunal et Article 54 du Règlement de procédure et de preuve 13 février 2006 (ICTR-98-44-T)

(Original : Français)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Ordonnance visant au dépôt de soumissions d'un Etat, Sollicitation d'informations complémentaires de l'Etat concerné

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 54 et 66 (C) ; Statut, art. 28

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera, Decision on Defence Motion for Disclosure of Prosecution Ex Parte Motion under Rule 66 (C) and Request for Cooperation of a Certain State, 14 octobre 2005 (ICTR-98-44)

1. Le 26 septembre 2006, le Procureur demandait à la Chambre d'autoriser la communication partielle de certains documents relatifs au témoin T en vertu de l'article 66 (C) du Règlement de procédure et de preuve (« Règlement »). La Chambre a considéré qu'en vue de statuer sur cette requête, il était approprié de solliciter l'avis des autorités de l'Etat qui avaient communiqués ces documents au Procureur.[1]

2. Conformément à cette décision, les autorités dudit Etat ont déposé, le 3 décembre 2005, leurs soumissions relatives à la requête dont question. La Chambre a revu avec attention ces soumissions ainsi que les documents qui lui ont été soumis sous couvert de l'article 66 (C) du Règlement.

3. Bien que la Chambre soit satisfaite des informations fournies par cet Etat, elle est d'avis que des informations supplémentaires relatives à certains documents particuliers sont requis.

PAR CES MOTIFS, LA CHAMBRE, en vertu de l'article 28 du Statut du Tribunal et de l'article 54 du Règlement, PRIE les autorités de l'Etat dont le nom est précisé en annexe à la présente décision et placé sous scellés, de fournir, dans les meilleurs délais, les informations supplémentaires telles que décrites dans l'annexe confidentielle à la présente décision.

Arusha, 13 février 2006, fait en Français.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[1] Le Procureur c. Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera, Affaire N°ICTR-98-44-T, Decision on Defence Motion for Disclosure of Prosecution Ex Parte Motion under Rule 66 (C) and Request for Cooperation of a Certain State (Ch.), 14 octobre 2005.

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Décision relative à la requête de la défense tendant à rendre compte au Conseil de Sécurité de l'inexécution d'une obligation par le gouvernement d'un Etat, et aux requêtes du Procureur déposées en vertu de l'article 66 (C) du Règlement de procédure et de preuve

Articles 28 du Statut et 66 (C) du Règlement de procédure et de preuve du Tribunal

15 février 2006 (ICTR-98-44-T)

(Original : Français)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Rapport au Conseil de sécurité des Nations Unies de l'absence de coopération du gouvernement d'un Etat avec le Tribunal, Impératifs déliant l'Etat de son obligation de coopération : problèmes de sécurité et le fait que les informations touchent à un témoin actuellement poursuivi – Communication partielle des documents communiqués par l'Etat, Exception à l'obligation de communication du Procureur : communication contraire à l'intérêt public ou risquant de porter atteinte à la sécurité d'un Etat , Equilibre entre le droit des accusés et celui du témoin T à un procès équitable – Requête rejetée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 7 bis, 66 (A), 66 (B), 66 (C), 68 (A), 68 (D) et 70 (B) ; 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 faire injonction au Département des opérations de maintien de la paix des Nations Unies de produire certains documents, 9 March 2004 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Ordonnance visant au dépôt des soumissions d'un Etat, 13 février 2006 (ICTR-98-44)

Note au lecteur : Les paragraphes 1 à 4 ne figuraient pas dans le document disponible original. Nous vous invitons à vous reporter à la version anglaise de la décision.

5. Dans une autre requête, la Défense de Nzirorera a demandé à la Chambre de prier le President du Tribunal, conformément à l'article 7 *bis* du Règlement, de rendre compte au Conseil de sécurité de l'ONU de l'inexécution par l'Etat en question de son obligation de coopérer avec le Tribunal suite à la décision du 23 fevrier 2005[1]. Le Procureur a répondu que cette requête était sans objet puisque l'Etat en question avait effectivement communiqué le dossier au Procureur, lequel avait demandé à la Chambre l'autorisation de le communiquer en partie à la Defense en vertu de l'article 66 (C) du Règlement[2].

6. Le 14 octobre 2005, la Chambre a estimé que les requêtes du Procureur déposées en vertu de l'article 66 (C) du Règlement visaient les autorités de l'Etat et que celles-ci seraient sans doute aussi

[1] Requête tendant à informer le Conseil de sécurité d'une inexécution d'obligation par le Gouvernement d'un certain Etat, déposée le 20 septembre 2005.
[2] Le Procureur a deposé une réponse le 26 septembre 2005, à laquelle la Defense a répliqué le 30 septembre 2005.

en mesure de fournir une assistance importante à la Chambre[3]. Ces autorités ont donc été invitées à faire des observations sur les requêtes du Procureur présentées conformément à l'article 66 (C)[4] du Règlement, ainsi que sur une éventuelle saisine du Conseil de sécurité demandée par la Défense.[5] L'Etat en question a deposé ses observations le 3 décembre 2005.

7. La Chambre est à présent en mesure d'examiner la Requête de la Défense relative à la saisine du Conseil de sécurité de l'ONU, et les observations relatives à la communication partielle des documents afférents au témoin T.

Délibéré

Requête tendant à rendre compte au Conseil de sécurité de l'inexécution d'une obligation par un Etat

8. Dans sa Requête, la Défense de Nzirorera soutient que l'Etat ne s'est pas conformé à la décision du 23 février 2005 sollicitant sa coopération afin que les parties à la présente affaire puissent recevoir certains documents concernant le témoin T. Elle soutient que les autorités dudit Etat ont fourni au Procureur, mais pas à la Défense, les documents demandés, et que le Procureur demande à présent qu'ils soient communiqués partiellement en vertu de l'article 66 (C). C'est pourquoi elle prie le Président du Tribunal de rendre compte au Conseil de sécurité de l'ONU de l'inexécution de cette obligation.

9. Le Procureur indique que lors d'une mission en Europe, il a pu se rendre compte que les autorités de l'Etat en question étaient gravement préoccupées par la divulgation éventuelle des informations demandées du fait, en particulier, que dans une lettre datée du 15 septembre 2005, l'avocat du témoin T s'était vivement opposé à toute divulgation. Le Procureur a donc invité les autorités de l'Etat à remettre l'intégralité du dossier judiciaire du témoin T à la Chambre, qui se prononcerait équitablement sur la question de sa communication, conformément à l'article 66 (C) du Règlement. Selon le Procureur, cette démarche contribuerait à accélérer la procédure tout en répondant aux préoccupations exprimées par l'Etat quant à la divulgation publique des informations contenues dans ledit dossier.

10. Dans leurs observations, les autorités de l'Etat insistent sur l'obligation qui leur incombe de coopérer avec le Tribunal et leur volonté de le faire, en faisant toutefois observer que la communication intégrale du dossier judiciaire du témoin T non seulement serait incompatible avec la législation nationale en vigueur, mais porterait aussi atteinte au droit de l'interessé à un procès équitable, dans la mesure où celui-ci fait actuellement l'objet d'un procédure judiciaire. En outre, la communication intégrale de ces informations à la Défense pourrait nuire à la sécurité de certains témoins nommément mentionnés dans les documents. Les autorités de l'Etat estiment que la proposition du Procureur tendant à une communication partielle du dossier judiciaire du témoin T en vertu de l'article 66 (C) répondra à la fois à l'obligation qui leur incombe de coopérer avec le Tribunal et de protéger leurs propres interêts en matière de sécurité. Elles concluent que pour des raisons, entre autres, de securité, les documents figurant dans le dossier judiciaire du témoin T ne peuvent être que partiellement communiqués à la Défense.

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[3] Affaire *Karemera et consorts,* Décision relative à la requête de la Défense intitulée *« Joseph Nzirorera's Motion for disclosure of Prosecution ex parte Motion Under Rule 66 (C) »* et demande aux fins d'obtenir la coopération d'un certain Etat, 14 octobre 2005 ; et affaire *Karemera et consorts,* Ordonnance portant extension de délai pour le dépôt de soumissions, Chambre de premi§re instance III, 11 novembre 2005.

[4] Requêtes du Procureur en vertu de l'article 66 (C) du Règlement tendant à ce que la Chambre de première instance examine à huis clos les pièces figurant dans le dossier d'un certain Etat et les déclare non connnunicables, déposées *Inter partes* et *ex parte* le 26 septembre 2005 ; et Requête du Procureur en autorisation de communication de la version caviardée de la déclaration du témoin T enregistrée par les autorités d'un certain Etat le 29 septembre 2005 et signifiée à la Défense sous une forme remaniée le 7 octobre 2005, déposée unilatéralement le 12 octobre 2005.

[5] Requête tendant à informer le Conseil de sécurité d'une inexécution d'obligation par le Gouvernement d'un certain Etat, déposée le 20 septembre 2005.

11. Aux termes de l'article 7 *bis* du Règlement,

> « 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 ».

Toutefois, un Etat peut exciper de circonstances exceptionnelles, notamment des impératifs de securité, pour être délié de l'obligation de coopérer avec le Tribunal[6].

12. En l'espèce, il est indéniable que les autorités de l'État éprouvaient des difficultés, tenant notamment à des questions de sécurité, pour se conformer à la décision du 23 février 2005, et elles pensaient qu'un autre organe du Tribunal, en l'occurrence le Bureau du Procureur, pouvait le faire comprendre à la Chambre. La Chambre estime également que le Procureur a fidèlement rendu compte des préoccupations de l'État dans ses requêtes et qu'il n'avait nullement l'intention d'entraver la divulgation des documents. La présente affaire n'est pas la mieux indiquée pour demander à un État de se conformer à une injonction de coopérer avec le Tribunal. Toutefois, la Chambre estime qu'au vu de ces circonstances particulières, les autorités n'ont pas refusé de s'acquitter des obligations qui leur incombent en vertu de l'article 28 du Statut. La Requête de la Défense tendant à ce que l'affaire soit portée devant le Conseil de sécurité de l'ONU doit par conséquent être rejetée.

13. La Chambre doit à présent déterminer s'il y a lieu de faire droit à la proposition du Procureur, appuyée par l'État, de ne communiquer que partiellement les informations demandées.

Demande de communication partielle des informations

14. Le Procureur a divisé les documents en trois jeux de CD :

> 1) Premier jeu (CD1) : pièces susceptibles d'être communiquées, qui ont été effectivement notifiées à la Défense sous une forme caviardée le 26 septembre 2005, qui contiennent des éléments des déclarations que le témoin T a faites aux officiers de police judiciaire de l'État ;
>
> 2) Deuxième jeu (CD2) : piéces à examiner conformément à l'article 66 (C) du Règlement ;
>
> 3) Troisième jeu (CD3) : pièces de correspondance juridique interne et documents relatifs à l'enquête.

Le Procureur prie la Chambre de dire que les informations contenues dans le CD2, lui-même subdivisé en quatre sous-ensembles de CD (CD2A, 2B, 2C et 2D), ne peuvent être communiquées avant la fin du procès du témoin T, dans la mesure où la communication intégrale des informations contenues dans le CD2 pourrait porter atteinte au droit de ce témoin à un procès équitable. Le Procurcur soutient que les informations contenues dans le CD3 sont classifiées comme étant des documents internes rentrant dans le champ d'application de l'article 70 du Règlement et, à ce titre, n'ont pas à être communiquées.

15. Dans une troisième requête, le Procureur prie la Chambre de l'autoriser à communiquer une version caviardée de la déclaration du témoin T enregistrée par les autorités de l'État le 29 septembre 2005 et signifiée à la Défense sous une forme remaniée le 7 octobre 2005 car, fait-il valoir, la communication de cette déclaration sous une forme non caviardée pourrait compromettre l'équité du procès du témoin T.

16. La Defense de Nzirorera soutient que toutes les informations en la possession du Procureur doivent lui être communiquées sans délai afin qu'elle puisse achever son travail d'enquête avant la date prévue pour la déposition du témoin T. Elle affirme que si la Chambre venait à décider que

[6] 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 III), 9 mars 2004, par. 18.

l'examen desdites informations doit se faire à huis clos, la Chambre pourrait néanmoins ordonner la communication des éléments qui sont de nature à disculper l'accusé, en application de l'article 68 (A) du Règlement. Subsidiairement, si la Chambre juge qu'aucune information ne doit être divulguée avant la fin du procès du témoin T, la Défense demande que la déposition de l'interessé soit reportée jusqu'a ce que son procès dans l'Etat en question soit achevé et que l'opposition faite à la communication n'ait plus de raison d'être.

17. La Défense de Ngirumpatse soutient que le Procureur a abusivement intercepté les documents et a omis de les produire, restreignant ainsi sa capacité de contre-interroger les témoins à charge. Elle demande donc à la Chambre de rejeter la Requête, d'enjoindre au Procureur de communiquer la totalité des documents et de reporter de 60 jours l'audition des témoins à charge afin que la Défense ait le temps nécessaire d'étudier lesdits documents. Subsidiairement, elle prie la Chambre de diffèrer la déposition du témoin T et d'autres témoins à charge, en particulier les témoins G, ALG, UB et GFJ, jusqu'à ce que le procès du témoin T soit achevé et que le Procureur ait communiqué la totalité des informations, ou d'exclure purement et simplement la déposition de ces témoins.

18. Les articles 66 (C) et 68 (D) du Règlement prevoient une exception à l'obligation de communication du Procureur visee aux paragraphes (A) et (B) de l'article 66 et au paragraphe (A) de l'article 68 dans le cas où la communication d'informations ou de pièces se trouvant en sa possession « pourrait nuire à de nouvelles enquêtes ou à des enquêtes en cours, ou pour toute autre raison pourrait être contraire à l'interêt public ou porter atteinte à la sécurité d'un Etat ». Aux termes de l'article 70 (B) du Règlement,

> « [s]i 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 foumies. Ces informations et leur source ne seront en aucun cas utilisées comme moyens de preuve avant d'avoir été communiquées l'accusé ».

19. Après avoir examiné les documents à la divulgation desquels le Procureur est opposé, la Chambre doit veiller en particulier à ce que le témoin T bénéficie d'un procès équitable. Elle est persuadée qu'elle doit trouver un juste milieu entre le droit des accusés et celui du témoin T à un procès équitable dans le cadre des poursuites pénales engagées contre eux.

20. La Chambre estime qu'il est probable que la communication à la Défense de certaines informations contenues dans le CD2 A, B, C et D avant le procès du témoin T pourrait violer ce droit et donc être contraire à l'intérêt public. En l'espèce, un grand nombre de documents sur la déposition du témoin T ont déja été communiqués à l'accusé, lequel pourra solliciter d'autres mesures eu égard aux informations contenues dans le CD2 à un stade ultérieur de la procédure. La Chambre estime donc que les informations contenues dans le CD2 ne doivent pas être communiquées à ce stade.

21. Toutefois, la Chambre se range à l'idée du Procureur – acceptée par les autorités de l'Etat – selon laquelle certaines déclarations du témoin T figurant dans le CD2B peuvent d'ores et déjà être communiquées sous une forme caviardée sans nuire pour autant à l'intérêt public. Dans ces conditions, ces déclarations devraient être communiquées sous une forme caviardée.

22. Par ailleurs, la Chambre a besoin d'informations supplémentaires avant de se prononcer sur l'opportunité ou non d'ordonner la communication du dossier d'immigration du témoin T contenu dans le CD2D. A cet égard, elle a déjà demandé, dans une ordonnance distincte, la coopération de l'Etat, et elle réservé sa décision sur cette question.[7]

[7] Affaire *Karemera et consorts*, Ordonnance visant au dépôt des soumissions d'un Etat (Chambre de première instance III), 13 fevrier 2006.

23. Elle relève qu'à l'exception d'un rapport, toutes les informations contenues dans le CD3 ont trait aux poursuites pénales engagées contre le témoin T dans l'Etat en question. Ce rapport figure également dans le CD2A, qui pourra être communiqué à un stade ultérieur. Les autres documents figurant dans le CD3 ont été remis au Procureur par les autorités de l'Etat à titre confidentiel et ne doivent donc pas être divulgués sans le consentement de l'Etat, conformément à l'article 70 (B) du Règlement. Il convient en outre de noter que ces documents ne sont probablement pas pertinents pour la préparation de la Défense en l'espèce.

24. Afin de sauvegarder le droit du témoin T à un procès équitable et l'intérêt public, la Chambre estime également que le Procureur doit être autorisé à maintenir la version caviardée de la déclaration du témoin T recueillie le 29 septembre 2005 et notifiée à la Défense le 7 octobre 2005.

Ajournement ou exclusion de la déposition du témoin

25. La Chambre note que d'après les dernières informations fournies par le Procureur[8], le témoin T ne sera pas appelé à la barre durant la deuxième session du procès qui a debuté le 13 février 2006, comme prévu à l'origine. Aucune date n'a encore été fixée pour sa déposition. Compte tenu de ces circonstances particulières, ni l'exclusion ni l'ajournement de la déposition du témoin T ne se justifie. La Chambre étend ce raisonnement à la demande de la Défense tendant à exclure la déposition de certains témoins à charge, notamment les témoins G, ALG, UB et GFJ. Parmi l'éventail de moyens dont dispose la Chambre pour prévenir toute atteinte aux droits de l'accusé, le recours à l'exclusion d'un témoiguage constitue la mesure extrême. Or, au stade actuel, la Défense n'a pas démontré l'existence d'un quelconque préjudice qui justifierait le recours à une telle extrêmité.

26. En réponse à la demande d'ajournement de la déposition de certains témoins, faite par Ngirumpatse, la Chambre rappelle à la Défense qu'elle a déjà refusé le report de la déposition des témoins G et GFJ, qui ont été entendus durant la première session du procès en septembre 2005. Elle considère que la capacité de la Défense de contre-interroger les témoins à charge ne sera pas compromise si certaines informations ne lui sont pas communiquées en applications de cette décision. Qui plus est, elle a déjà indiqué expressement qu'au besoin les témoins pourraient être rappelés pour témoigner sur des questions importantes qui seraient soulevées au cours de la procédure. A ce stade, il ne serait pas dans l'interêt de la justice d'ordonner le report de la déposition de certains témoins à charge.

27. Il convient enfin de noter que dans leurs observations en date du 3 décembre 2005, les autorités de l'Etat font remarquer que le conseil du témoin T a accepté que sa lettre datée du 15 septembre 2005, dans laquelle il explique son opposition à la divulgation de l'integralité du dossier judiciaire du témoin T, soit communiquée aux parties en l'espèce.

PAR CES MOTIFS. LA CHAMBRE

I. REJETTE la requête de Joseph Nzirorera tendant à rendre compte au Conseil de sécurité de l'ONU de l'inexécution d'une obligation par le gouvernement d'un certain Etat ;

II. REJETTE la requête de la Défense aux fins d'exclusion ou d'ajoumement de la déposition du témoin T ou de tout autre témoin à charge ;

III. FAIT DROIT en partie aux requêtes du Procureur

IV. DECIDE que les informations relatives au témoin T, contenues dans le CD2 annexe à la deuxième requête du Procureur, ne doivent pas être divulguées à ce stade ;

V. DECIDE que les informations relatives au dossier judiciaire du témoin T, contenues dans le CD3, ne doivent pas être divulguées sans le consentement de l'Etat, à l'exception du rapport,

[8] Ordre de comparution des témoins pour la session débutant le 13 février 2006, déposé le 15 décembre 2005.

qui figure également dans le CD2A, et qui pourrait être communiqué après le procès du témoin T ;

VI. RESERVE sa décision quant au dossier d'immigration du témoin T ;

VII. AUTORISE le Procureur à maintenir la déclaration caviardée du témoin T recueillie le 29 septembre 2005 et notifiée à la Défense sous une forme remaniée le 7 octobre 2005 ;

VIII. INVITE le Greffe B communiquer à la Défense la lettre du conseil du témoin T[9] datée du 15 septembre 2005, annexée à la requête du Procureur en vertu de l'article 66 (C) du Règlement tendant à ce que la Chambre de première instance examine à huis clos les pièces figurant dans le dossier d'un certain Etat et les déclare non communicables, déposée *ex parte* le 26 septembre 2005[10].

Fait en anglais, à Arusha, le 15 février 2006.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[9] Le nom du conseil est precise dans l'annexe confidentielle à la présente Décision placé sous scellés.
[10] Le nom de l'Etat est précisé dans l'annexe confidentielle à la présente Décision placée sous scellés.

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Décision relative à la requête aux fins d'inspecter certains documents Articles 66 (B) et 68 (A) du Règlement de procédure et de preuve 24 février 2006 (ICTR-98-44-T)

(Original : Français)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Inspection de documents, Communication des éléments de preuve à décharge, Pas d'identification claire et suffisante par la défense des éléments que le Procureur a en sa possession ou sous son contrôle – Requête rejetée

Instrument international cité :

Règlement de Procédure et de preuve, art. 66 (B) et 68 (A)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Elie Ndayambaje, Decision on the Defence Motion for Disclosure, 25 septembre 2001 (ICTR-96-8 et ICTR-98-42) ; Chambre de première instance, Le Procureur c. Juvénal Kajelijeli, Decision on Kajelijeli's Motion Seeking Disclosure of the Statements of Defence Detained Witnesses, 18 November 2002 (ICTR-98-44A) ; 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. André Rwamakuba et consorts, Decision on Defence Motion for Disclosure, 15 janvier 2004 (ICTR-98-44); Chambre de première instance, Le Procureur c. Casimir Bizimungu et consorts, Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatoty Evidence Related to Witness GKI, 14 septembre 2004 (ICTR-99-50) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision relative à la requête intitulée Joseph Nzirorera's Motion to Compel Inspection and Disclosure, 5 juillet 2005 (ICTR-98-44)

T.P.I.Y. : Chambre de première instance, Le Procureur c. Zejnil Delalić, Décision relative aux exceptions préjudicielles aux fins de disjonction d'instances soulevées par les accusés Zejnil Delalić et Zdravko Mucić, 25 septembre 1996 (IT-96-21)

Introduction

1. La Défense d'Edouard Karemera a saisi la Chambre d'une « Requête aux fins d'inspecter certains documents » sur la base des articles 54, 66, 67, 68 et 73 du Règlement de procédure et de preuve (le « Règlement »)[1].

2. La Défense d'Édouard Karemera demande à inspecter :
(i) l'original du fax envoyé le 11 janvier 1994 par le Général Roméo Dallaire au Général Baril qui en a accusé réception le même jour (Annexe 2) ;
(ii) le manuscrit saisi sur Jean Kambanda lors de son arrestation et intitulé "Rwanda 1994, l'Apocalypse et après", qui contient des éléments de preuve disculpatoires, ainsi que la lettre de Jean Kambanda en date du septembre 1998 remettant en cause la commission d'office de Maître Olivier Michael Ignis pour assurer la défense de ses intérêts ;

[1] Déposée au Greffe le 13 janvier 2006.

(iii) la liste des autorités préfectorales et communales relevées de leurs fonctions ou nommées par Édouard Karemera en sa qualité de Ministre de l'intérieur à partir 25 mai 1994 ;

(iv) les éléments du dossier belge sur la base duquel les bourgmestres Joseph Kanyabashi et Elie Ndayambaje ont été arrêtés en Belgique, ainsi qu'Augustin Ndindilyimana et Protais Zigiranyirazo. Il en est de même des pièces et autres documents obtenus des autorités suisses en relation avec l'affaire *Musema* ainsi que les documents utilisés pour l'arrestation de Alphonse Nteziryayo au Burkina Faso.

3. Elle souhaite également :

(i) écouter les enregistrements des discours prononcés par Léon Mugesera et Banzi Wellars réalisés par Radio Rwanda au cours du meeting du MNRD tenu le 22 Novembre 1993, à Kabaya ;

(ii) écouter les enregistrements des émissions de Radio Muhabura diffusées entre le 6 avril et le 17 juillet 1994 ;

(iii) examiner les éléments de reportage des tournées de pacification effectuées par les délégations gouvernementales entre le 30 avril et le 6 mai 1994 dans les préfectures contrôlées par le Gouvernement.

4. Le Procureur dans sa réponse s'oppose[2] aux demandes formulées par la Défense[3].

Délibérations

5. La Chambre rappelle que lorsqu'une requête en inspection de documents et en communication des éléments de preuve à décharge est soumise aux termes des articles 66 (B) et 68 (A) du Règlement, la Défense doit clairement et suffisamment identifier les éléments que le Procureur a en sa possession ou sous son contrôle et pour lesquels l'inspection et la communication sont requises[4]. De plus, la Défense doit démontrer que les documents pour lesquels l'inspection est demandée serviront à sa préparation[5]. En référence à l'article 68 (A) du Règlement, la Défense doit en outre prouver le caractère disculpatoire ou potentiellement disculpatoire de ces éléments[6].

6. Dans la présente affaire, la Chambre relève que la Défense se contente de se référer aux articles 66 (B) et 68 (A) du Règlement sans que la démonstration de la réunion de leurs conditions d'application n'ait été faite.

7. Par conséquent, la Chambre ne saurait faire droit à la requête de la Défense.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête de la Défense.

Arusha, 24 février 2006, fait en Français.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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[2] Réponse déposée au Greffe le 18 janvier 2006.

[3] La Défense a déposé une réplique au Greffe le 30 janvier 2006.

[4] *The Prosecutor v. Joseph Nzirorera et al.*, Case N°ICTR-98-44-I, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, para. 11; *The Prosecutor v. Casimir Bizimungu and al.*, Case N°ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exclupatory Evidence Related to Witness GKI, 14 September 2004, para. 11; *The Prosecutor v. Édouard Karemera et al.*, Case N°ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure (TC), 5 July 2005, para.9; *The Prosecutor v. Elie Ndayambaje*, Case N°ICTR-96-8-T, Decision on the Defence Motion for Disclosure (TC), 25 September 2001, para. 10; *Prosecutor v. Zejnil Delalic et al.*, Case N°IT-96-21-T, Decision on the Motion by the Accused Zejnil Delalic for the Disclosure of Evidence (TC), September 1996.

[5] See also *The Prosecutor v. André Rwamakuba and others*, Case N°ICTR-98-44-T, Decision on Defence Motion for Disclosure (TC), 15 January 2004, para. 11.

[6] *The Prosecutor v. Juvénal Kajelijeli*, Case N°ICTR-98-44A-T, Decision on Kajelijeli's Motion Seeking Disclosure of the Statements of Defence Detained Witnesses (TC), 18 November 2002, par. 6-8.

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Décision sur la requête d'Edouard Karemera aux fins de certification d'appel Article 73 (B) du Règlement de procédure et de preuve 10 mars 2006 (ICTR-98-44-R73B)

(Original : Français)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Certification d'appel, Conditions à remplir pour que la Chambre puisse octroyer un certification d'appel, Pas de démonstration par la défense que l'appel toucherait à une question susceptible de compromettre l'équité, la rapidité ou l'issue du procès – Requête rejetée

Instrument international cité :

Règlement de Procédure et de preuve, art. 66, 68 et 73 (B)

Introduction

1. Le 24 février 2006, la Chambre a rejeté la requête en inspection[1] de la Défense d'Édouard Karemera au motif qu'elle n'avait pas fait la démonstration de la réunion des conditions d'application des articles 66 (B) et 68 (A) du Règlement de procédure et de preuve (le « Règlement »). Celle-ci souhaite contester la décision, et demande en conséquence d'être autorisée à en interjeter appel[2]. Le Procureur s'oppose à cette requête en certification d'appel[3].

Discussion

2. La Défense d'Édouard Karemera soutient que la Décision de la Chambre ignore les développements faits dans sa requête du 17 décembre 2005. Elle estime avoir démontré que le Procureur détient l'original du fax envoyé de Kigali le 11 janvier 1994 par Roméo Dallaire et qu'il a l'obligation de le communiquer sur la base de l'article 66 du Règlement. En outre, la Défense d'Édouard Karemera affirme qu'elle a prouvé le caractère disculpatoire ou potentiellement disculpatoire des éléments de preuve demandés et notamment du discours de Léon Mugesera.

3. Elle relève que la Chambre s'est contentée de rappeler les critères d'application des articles 66 et 68 du Règlement sans étayer les motifs de son rejet. De plus, la Chambre n'a pas clairement distingué ces deux articles. Cette situation remet en cause l'équité et l'issue du procès et son règlement pourrait faire progresser la procédure. Par conséquent, la Défense d'Édouard Karemera demande que la Chambre accorde une certification d'appel contre la Décision du 24 février 2006.

4. Le Procureur estime que la Défense n'a pas démontré que la décision en cause a trait à des questions susceptibles de compromettre l'équité, la rapidité ou l'issue du procès. Elle ne prouve pas non plus de quelle manière le règlement immédiat de ces questions par la Chambre d'appel est à même de faire progresser la procédure.

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[1] La requête a été déposée le 17 décembre 2005 par la Défense d'Edouard Karemera.

[2] « Requête aux fins de certification contre la décision en date du 24 février 2006 relative à la requête aux fins d'inspecter certains documents déposée par la Défense de Edouard Karemera le 17 Décembre 2005 », déposée au Greffe le *2* mars 2006.

[3] « Réponse du Procureur à la Requête aux Fins de Certification Contre la Décision en Date du 24 Février 2006 Relative à la Requête aux Fins d'Inspecter Certains Documents Déposée par la Défense de Edouard Karemera le 17 Décembre 2005 », déposée au Greffe le 7 mars 2006.

5. La Chambre note qu'aux termes des dispositions de l'article 73 (B) du Règlement deux conditions doivent être réunies pour qu'une certification d'appel soit accordée : le requérant doit démontrer (i) que la décision contestée touche une question à même de compromettre l'équité, la rapidité ou l'issue du procès, (ii) et que son règlement immédiat par la Chambre d'appel peut faire avancer la procédure.

6. Dans la présente requête, la Défense ne démontre nullement en quoi la décision contestée se rapporte à une question susceptible de compromettre l'équité, la rapidité ou l'issue du procès. En outre, la Chambre est d'avis que la saisine immédiate de la Chambre d'appel ne contribuera pas à faire avancer la procédure.

7. Par ailleurs, la Chambre note que la Défense se contente d'arguer une erreur de droit dans la Décision du 24 février 2006, sans démontrer si une telle argumentation répond à l'une ou l'autre des conditions posées à l'article 73 (B) du Règlement. Cependant, la Chambre considère que l'allégation d'une erreur de droit en l'espèce n'est pas recevable au titre des dispositions pertinentes pour la certification d'appel.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête de la Défense en certification d'appel.

Arusha, 10 mars 2006, fait en Français.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Décision relative à la requête d'Edouard Karemera en extension de délai pour répondre à l'appel interlocutoire du Procureur 4 avril 2006 (ICTR-98-44-AR73.7)

(Original : Anglais)

Chambre d'appel

Juges : Liu Daqun, Président de Chambre ; Mohamed Shahabuddeen ; Mehmet Güney ; Theodor Meron ; Wolfgang Schomburg

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Prorogation de délai, Requête en prorogation de délai à autre accusé préalablement acceptée, Langue de travail du Conseil de la défense, Pas de démonstration de la nécessité d'accéder aux documents – Requête acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 116

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Édouard Karemera et consorts, Décision relative à la demande de prorogation, 27 janvier 2006 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Édouard Karemera et consorts, Décision relative à la requête en prorogation de délais, 24 mars 2006 (ICTR-98-44)

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'États voisins entre le 1er janvier et le 31 décembre 1994 (respectivement la « Chambre d'appel » et le « Tribunal ») est saisie de l'appel interlocutoire du Procureur intitulé Prosecutor's Interlocutory Appeal of the Trial Chamber's Decision Given Orally on 16 February 2006 Regarding the Role of the Electronic Disclosure Suite in Discharging the Prosecution's Disclosure Obligations, déposé le 6 mars 2006 (l' « Appel »). Elle est aussi actuellement saisie d'une requête en prorogation de délais pour répondre à l'appel en attendant la traduction en français des écritures du Procureur et de Joseph Nzirorera, déposée par Édouard Karemera le 24 mars 2006 (la « Requête en prorogation de délais[1] »).

2. L'article 116 du Règlement de procédure et de preuve du Tribunal autorise les prorogations de délais si des motifs valables le justifient. La requête doit normalement être déposée dans les délais requis, ce que M. Karemera n'a pas fait. Toutefois, la Chambre d'appel a déjà fait droit à la requête aux fins d'extension du délai imparti pour répondre à l'appel du Procureur en attendant sa traduction en français, que M. Ngirumpatse a déposée dans les délais[2]. Il est arrivé à la Chambre d'autoriser un coaccusé à bénéficier d'une prorogation de délais accordée à un autre coaccusé qui avait déposé une requête dans les délais lorsque l'intérêt de la justice le commandait[3]. Étant donné que le procès est une jonction d'instances et compte tenu de l'ampleur de l'appel, la Chambre d'appel estime qu'il est dans l'intérêt de la justice d'excuser le dépôt tardif de la requête de M. Karemera en l'espèce et de le faire bénéficier de la mesure accordée à M. Ngirumpatse.

3. Le Procureur s'oppose à la requête de M. Karemera en faisant siens les arguments qui ont été avancés et rejetés dans le cadre de la requête de M. Ngirumpatse[4]. Toutefois, comme la Chambre d'appel l'a récemment fait observer, la langue de travail du conseil de M. Karemera est le français, et non l'anglais[5]. Il est évident que pour pouvoir répondre de manière exhaustive à l'Appel, le conseil doit être en mesure d'en consulter la version française. La Chambre d'appel a déjà jugé que cela constitue un motif valable de proroger le délai imparti en l'espèce[6]. M. Karemera n'a toutefois pas démontré que l'obtention de la traduction des écritures de son coaccusé, M. Nzirorera, est nécessaire pour lui permettre de rédiger sa réponse à l'appel interlocutoire du Procureur, et la Chambre d'appel a refusé d'accorder ce type de mesure par le passé[7].

Dispositif

Par ces motifs, la Chambre d'appel FAIT DROIT en partie à la Requête en prorogation de délais. La Chambre d'appel PRESCRIT au Greffe de fournir à M. Karemera et à son conseil, de toute urgence, la traduction française de l'Appel et de la présente décision. À compter de la date à laquelle le dernier de ces documents traduits lui aura été communiqué, M. Karemera disposera de 10 jours pour

[1] Le Procureur c. Édouard Karemera et consorts, affaire n°ICTR-98-44-AR73.7, « Requête de Édouard Karemera en extension de délai sur la Prosecutor's Interlocutory Appeal of the Trial Chamber's Decision Given Orally on 16 February Regarding the Role of the Electronic Disclosure Suite in Discharging the Prosecution's Disclosure Obligations », déposée le 24 mars 2006.
[2] *Le Procureur c. Édouard Karemera et consorts*, affaire n°ICTR-98-44-AR73.7, Décision relative à la requête en prorogation de délais, 24 mars 2006 (« Décision du 24 mars 2006 »).
[3] Voir, par exemple, *Le Procureur c. Édouard Karemera et consorts*, affaire n°ICTR-98-44-AR116, Décision relative à la demande de prorogation, 27 janvier 2006, par. 7 (« Décision du 27 janvier 2006 »).
[4] *Le Procureur c. Édouard Karemera et consorts*, affaires n°ICTR-98-44-AR73.6, ICTR-98-44-AR73.7, « Réponse du Procureur à la requête d'Édouard Karemera en extension de délai sur la *Joseph Nzirorera's Interlocutory Appeal from Decision Denying Motion for Stay Proceedings and Request for Stay Pending Appeal* et à la requête en extension de délai sur la *Prosecutor's Interlocutory Appeal of the Trial Chamber's Decision Given Orally on 16 February 2006 Regarding the Role of the Electronic Disclosure Suite in Discharging the Prosecution's Disclosure Obligations* », déposée le 24 mars 2006, par. 3 ; Décision du 24 mars 2006, par. 3.
[5] Décision du 27 janvier 2006, par. 7.
[6] Décision du 24 mars 2006, par. 2 ; Décision du 27 janvier 2006, par. 4.
[7] Décision du 27 janvier 2006, par. 5.

déposer une réponse éventuelle à l'Appel. Il est également ORDONNÉ au Greffe d'informer la Chambre d'appel de la date à laquelle les documents traduits sont communiqués à l'intéressé.

Fait en anglais et en français, la version anglaise faisant foi.

La Haye (Pays-Bas), le 4 avril 2006.

[Signé] : Liu Daqun

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Décision relative aux appels portant sur des exceptions d'incompétence : Entreprise criminelle commune
12 avril 2006 (ICTR-98-44-AR72.5 et ICTR-98-44-AR72.6)

(Original : Anglais)

Chambre d'appel

Juges : Theodor Meron, Président de Chambre ; Mohamed Shahabuddeen ; Mehmet Güney ; Liu Daqun ; Wolfgang Schomburg

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Forme élargie d'entreprise criminelle commune, Aucune limitation géographique en ce qui concerne la troisième catégorie de responsabilité d'entreprise criminelle commune, Tribunal compétent pour connaître des infractions et formes de responsabilité qui sont prévues dans le Statut et existaient déjà dans le droit international coutumier au moment de la commission des crimes allégués, Fondement de l'entreprise criminelle commune dans le droit international coutumier et non dans un traité, Rôle du droit international coutumier dans la détermination de la compétence du Tribunal – Chambre de première instance priée de rendre une décision précisant si l'accusé peut être jugé pour complicité dans le génocide sur la base de la théorie de la forme élargie de l'entreprise criminelle commune – Requête partiellement acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 72 (A)

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 d'appel, Le Procureur c. Jean Bosco Barayagwiza, Arrêt, 3 novembre 1999 (ICTR-97-19) ; Chambre d'appel, Le Procureur c. André Rwamakuba, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 octobre 2004 (ICTR-98-44) ; Chambre d'appel, Le Procureur c. Gérard et Elizaphan Ntakirutimana, Jugement, 13 décembre 200 (ICTR-96-10 et 96-17) ; 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. Duško Tadić, Arrêt, 15 juillet 1999 (IT-94-1) ; Chambre d'appel, Le Procureur c. Anto Furundzija, Arrêt, 21 juillet 2000 (IT-95-17/1) ; Chambre d'appel, Le Procureur c. Zdravko Mucić et consorts, Arrêt, 20 février 2001 (IT-96-21) ; Chambre d'appel, Le Procureur c. Milan Milutinović et consorts, Arrêt relatif à l'exception préjudicielle d'incompétence soulevée par Dragoljub Ojdanić - entreprise criminelle commune, 21 mai 2003 (IT-99-37) ; ***Chambre d'appel,*** Le Procureur c. Milorad Krnojelac, Jugement, 17 septembre 2003 (IT-97-25) ; Chambre d'appel, Le Procureur c. Mitar Vasiljević, Arrêt, 25 février 2004 (IT-98-32) ; Chambre

d'appel, Le Procureur c. Radoslav Brđanin, Décision relative à l'arrêt interlocutoire, 19 mars 2004 (IT-99-36)

Tribunal Militaire américain, Nuremberg : Etats-Unis d'Amérique c. Josef Altstoetter et consorts *(Aff.* Justice*), 4 décembre 1947 ; Etats-Unis d'Amérique c. Ulrich Greifelt et consorts (Aff.* Rasse und Siedlungshauptamt/ RuSHA*), 10 mars 1948*

Introduction

1. Dans la présente décision, 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 »)[1] statue sur les appels interjetés par Joseph Nzirorera, ci après dénommé (l'« Appelant »), contre deux décisions rendues par la Chambre de première instance III ci après dénommée (la « Chambre de première instance») du Tribunal. Ces deux décisions portent sur des questions relatives à l'exception d'incompétence soulevées dans la requête intitulée *Joseph Nzirorera's Preliminary Motion to Dismiss for Lack of Jurisdiction : Joint Criminal Enterprise* dénommée (« Exception d'incompétence »), déposée le 4 mai 2005.

2. Dans son Exception d'incompétence, l'appelant affirme que le Tribunal n'est pas compétent pour connaître

> « des chefs d'accusation liés à la forme élargie de l'entreprise criminelle commune invoquée dans l'acte d'accusation modifié[2] ». [Traduction]

À l'appui de cette assertion, il affirme en premier lieu que le Tribunal n'est pas compétent pour déclarer un accusé coupable sur la base de la troisième forme de l'entreprise criminelle commune à raison de crimes commis par d'autres participants dans une entreprise criminelle de « grande ampleur »[3] [Traduction]. Deuxièmement, il estime que le Tribunal n'est pas compétent pour connaître de la forme de responsabilité découlant de la troisième catégorie de l'entreprise criminelle commune en l'absence de « lien direct » entre l'accusé et les auteurs effectifs des crimes visés[4]. Troisièmement, il affirme que le Tribunal n'a pas compétence pour retenir la responsabilité pour viol comme étant une conséquence prévisible d'une entreprise criminelle commune en vue de commettre le génocide[5]. Quatrièmement, il soutient que le Tribunal n'a pas compétence pour retenir la responsabilité de complicité dans le génocide comme étant une conséquence prévisible d'une entreprise criminelle commune[6].

3. Le 5 août 2005, la Chambre de première instance a rendu une décision intitulée Decision on Defence Motion Challenging the Jurisdiction of the Tribunal – Joint Criminal Enterprise Rules 72 and 73 of the Rules of Procedure and Evidence, ci-après dénommée « première décision contestée ». Elle a conclu qu'il n'existait aucun obstacle, en matière de compétence, à engager la responsabilité de l'accusé sur la base de la troisième forme de l'entreprise criminelle commune à raison de crimes commis par d'autres participants dans le contexte d'une entreprise criminelle commune de grande ampleur à laquelle il a pris part[7]. Elle ne s'est pas expressément prononcée sur la deuxième affirmation de l'appelant selon laquelle le Tribunal n'est pas compétent pour retenir la responsabilité au regard de la troisième catégorie de l'entreprise criminelle commune quand le Procureur n'allègue pas de « lien direct » entre l'accusé et les auteurs matériels du crime. Cependant, en rejetant l'argument de

[1] Dans la présente décision, le Tribunal pénal international chargé de juger les personnes présumées responsables de violations graves du droit humanitaire commises sur le territoire de l'Ex-Yougoslavie depuis 1991 est dénommé le « TPIY ».
[2] Exception d'incompétence, par. 66.
[3] *Ibid*., par 15 à 32.
[4] *Ibid*., par. 33 à 39.
[5] *Ibid*, par. 40 à 56.
[6] *Ibid*., par. 57 à 65.
[7] Première décision contestée, par. 7.

l'appelant en ce qui concerne l'entreprise criminelle commune de « grande ampleur », elle a estimé que la responsabilité découlant de la troisième catégorie d'entreprise criminelle commune ne pouvait être retenue que quand cette entreprise

> « est limitée à une opération donnée et à un lieu géographique précis où l'accusé n'était pas structurellement éloigné des auteurs matériels des crimes[8] » (traduction).

4. Dans la première décision contestée, la Chambre de première instance a renvoyé à plus tard l'examen des deux derniers arguments avancés dans l'Exception d'incompétence[9]. Le 14 septembre 2005, après avoir entendu les arguments des parties sur ces deux questions, elle a rendu la décision intitulée *Decision on Defence Motions Challenging the Indictment as Regards the Joint Criminal Enterprise Liability,* ci-après dénommée la « deuxième décision contestée ».

5. Dans la deuxième décision contestée, la Chambre de première instance a estimé que, du point de vue de la compétence, rien n'empêchait de retenir la responsabilité pour viol si ce crime est une conséquence prévisible de l'entreprise criminelle commune[10]. Là encore cependant, elle s'est refusée de se prononcer sur la question de savoir si le Tribunal était compétent pour engager la responsabilité de l'appelant pour complicité dans le génocide dans le contexte de la troisième catégorie de l'entreprise criminelle commune[11]. Le chef de complicité dans le génocide ayant été imputé simplement à titre subsidiaire dans l'acte d'accusation, elle a indiqué qu'il ne serait peut-être pas nécessaire, en fin de compte, de statuer sur la question[12].

6. Après que la Chambre de première instance a rendu la première décision contestée, l'appelant a déposé un document demandant à la Chambre d'appel de déterminer si la question tranchée par cette décision, (à savoir si le Tribunal était habilité à retenir la responsabilité d'un accusé pour des crimes commis par d'autres participants dans le contexte d'une entreprise criminelle commune de « grande ampleur »), relevait bien de la compétence de la Chambre de première instance, et que, par conséquent, l'appelant était en droit d'interjeter un appel interlocutoire contre cette décision[13]. Dans le même document, l'appelant a fait valoir, que sur le fond, la décision de la Chambre de première instance était erronée[14].

7. Le Procureur a déposé une réponse[15] et l'appelant une réplique[16]. Par la suite, la Chambre d'appel, siégeant en une formation de trois juges, a déclaré l'appel recevable[17]. Les juges ont toutefois indiqué que l'appelant ne serait pas autorisé à déposer un nouveau mémoire d'appel, comme ce serait normalement le cas quand une formation de trois juges de la Chambre d'appel décide qu'une question remplit les conditions d'un appel immédiat, étant donné que dans le premier appel de la Défense, il a

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[8] *Ibid*., par. 4 (notes de bas de pages à l'intérieur omises).
[9] *Ibid*., par. 9 à 12.
[10] Deuxième décision contestée, par. 4 à 7.
[11] *Ibid*., par. 10.
[12] Ibid.
[13] *Le Procureur c. Karemera et consorts*, affaire n°ICTR-98-44-AR72.5, recours intitulé « *Appeal of Decision Denying Preliminary Motion on Joint Criminal Enterprise* », daté du 19 août 2005 dénommé « premier appel de la Défense », par. 9 à 19. L'article 72 (B) (i) du *Règlement de procédure et de preuve*, le (« Règlement ») prévoit qu'une partie a le droit d'interjeter appel des décisions relatives aux questions d'exception d'incompétence. Les décisions portant sur de nombreux autres types de requêtes ne sont pas susceptibles d'appel.
[14] Premier appel de la Défense, par. 20 à 87. En inférant que la Chambre de première instance avait décidé d'attendre la fin du procès, avant de dire si une décision sur l'existence ou non de lien direct entre l'accusé et les auteurs effectifs des crimes visés était nécessaire pour retenir la responsabilité pénale au titre de la troisième catégorie d'entreprise criminelle commune, l'appelant a « décidé de ne pas interjeter appel de la deuxième question soulevée dans l'exception d'incompétence ». *Ibid*., note de bas de page n°7.
[15] Le Procureur c. Karemera et consorts, affaire n°ICTR-98-44-AR72.5, réponse intitulée « Prosecutor's Response to Joseph Nzirorera's 'Appeal of Decision Denying Preliminary Motion on Joint Criminal Enterprise' » ci-après dénommée « première réponse du Procureur », datée du 29 août 2005.
[16] *Le Procureur c. Karemera et consorts*, affaire n°ICTR-98-44-AR72.5, mémoire en réplique intitulé « Reply Brief: Appeal of Decision Denying Preliminary Motion on Joint Criminal Enterprise », daté du 1er septembre 2005.
[17] *Le Procureur c. Karemera et consorts,* affaire n°ICTR-98-44-AR72.5, décision intitulée « Decision on the Validity of Joseph Nzirorera's Appeal of the Decision on Defence Motion Challenging the Jurisdiction of the Tribunal – Joint Criminal Enterprise », du 14 octobre 2005, par. 8 et 9.

plaidé l'affaire au fond et largement excédé la longueur autorisée pour les requêtes déposées simplement en vue de déterminer si une question satisfait aux critères exigés pour un appel immédiat[18].

8. Après que la Chambre de première instance a rendu la deuxième décision contestée, l'appelant a déposé un document demandant à la Chambre d'appel de déterminer si la question dont l'examen a été reporté par cette décision, – la responsabilité découlant de la forme élargie de l'entreprise criminelle commune peut elle être retenue pour établir la complicité dans le génocide – relevait de la compétence du Tribunal et s'il était en droit de déposer un appel interlocutoire contre le non règlement de cette question par la Chambre[19]. Dans ce même document, il affirmait aussi que la Chambre avait l'obligation de statuer sur la question[20] et a ajouté que si elle choisissait de statuer elle-même sur la question, la Chambre d'appel devrait conclure que le Tribunal ne pouvait pas retenir la responsabilité pour complicité dans le génocide comme une conséquence prévisible de la forme élargie de l'entreprise criminelle commune[21]. Il a décidé de ne pas faire appel de la conclusion dégagée dans la deuxième décision contestée, au sujet de la troisième catégorie de responsabilité pour le crime de viol commis dans le contexte de l'entreprise criminelle commune[22].

9. Une fois encore, le Procureur a déposé une réponse[23] et l'appelant une réplique[24]. Une formation de trois juges de la Chambre d'appel a alors décidé que l'appelant était en droit de faire appel de la décision de la Chambre de première instance reportant l'examen de la question de savoir si le Procureur pouvait le poursuivre pour complicité dans le génocide dans le contexte de la troisième catégorie de l'entreprise criminelle commune[25]. L'examen de cet appel a été confié à la formation de cinq juges qui avait été saisie du premier appel de la Défense sur le fond[26].

10. La présente décision porte donc sur deux questions : (a) Le Tribunal est-t-il compétent pour retenir la responsabilité d'une personne au titre de la troisième catégorie de l'entreprise criminelle commune à raison de crimes commis par d'autres participants dans le contexte d'une entreprise criminelle commune de « grande ampleur » ?, et (b), la Chambre de première instance a-t-elle besoin

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[18] Ibid., par. 7. Par la suite, le 24 octobre 2005, le Procureur a déposé un mémoire intitulé « Prosecutor's Brief Addressing the Merits in Relation to Joseph Nzirorera's 'Appeal of Decision Denying Preliminary Motion on Joint Criminal Enterprise », dans lequel il affirmait qu'il se fonderait sur les arguments présentés dans sa première réponse relativement au bien-fondé des arguments de l'appelant au sujet de l'entreprise criminelle commune de grande ampleur. Le 26 octobre 2005, l'appelant a informé la Chambre d'appel qu'il ne déposerait pas de mémoire en réplique. Voir déclaration intitulée « Statement in Lieu of Reply Brief: Appeal of Decision Denying Preliminary Motion on Joint Criminal Enterprise ».

[19] *Le Procureur c. Karemera et consorts*, affaire n°ICTR-98-44-AR72.6, appel interlocutoire intitulé « Joseph Nzirorera's Interlocutory Appeal of Decision "Reserving" Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise and Complicity » du 19 septembre 2005, dénommé « deuxième appel de la Défense », par. 13 à 22.

[20] *Ibid*., par. 23 à 30.

[21] *Ibid*., par. 31 à 40.

[22] *Ibid*., par. 11.

[23] Le Procureur c. Karemera et consorts, affaire n°ICTR-98-44-AR72.6, Réponse du Procureur à l'appel interlocutoire de la décision de prendre en délibéré la requête pour exception d'incompétence : Entreprise criminelle commune et complicité » datée du 29 septembre 2005 dénommée « deuxième réponse du Procureur ».

[24] *Le Procureur c. Karemera et consorts*, affaire n°ICTR-98-44-AR72.6, Mémoire en réplique intitulé « Reply Brief: Joseph Nzirorera's Interlocutory Appeal of Decision "Reserving" Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise and Complicity » daté du 3 octobre 2005.

[25] Le Procureur c. Karemera et consorts, affaire n°ICTR-98-44-AR72.6, décision intitulée « Decision on Validity of Joseph Nzirorera's Appeal of Decision "Reserving" Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise and Complicity » rendue le 14 novembre 2005, dénommée (« Second Rule 72 Decision »), par. 8 et 9. Après la deuxième décision fondée sur l'article 72 du Règlement, le 15 novembre 2005, l'appelant a déposé une déclaration intitulée « Joseph Nzirorera's Statement in Lieu of Brief: Appeal of Decision "Reserving" Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise and Complicity » par laquelle il informait la Chambre d'appel qu'il maintiendrait les arguments qu'il avait avancés lors de l'examen au fond du deuxième appel interjeté par la Défense, voir ibid., par. 2. Le Procureur n'a pas déposé de réponse à la déclaration intitulée « Joseph Nzirorera's Statement in Lieu of Brief: Appeal of Decision "Reserving" Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise and Complicity ».

[26] Le Procureur c. Karemera et consorts, affaire n°ICTR-98-44-AR72.6, ordonnance intitulée « Order replacing a Judge in a Case Before the Appeals Chamber », du 18 novembre 2005; voir également Le Procureur c. Karemera et consorts, affaire n°ICTR-98-44-AR72.5, ordonnance intitulée « Order replacing a Judge in a Case Before the Appeals Chamber », du 22 novembre 2005.

de déterminer si la responsabilité pour complicité dans le génocide au titre de la troisième catégorie de l'entreprise commune peut être retenue ?

Le premier appel de la Défense

11. L'appelant soutient qu'en concluant que la responsabilité au titre de la troisième catégorie de l'entreprise criminelle commune peut être retenue contre un accusé pour des crimes commis par d'autres participants à une entreprise criminelle commune de « grande ampleur », la Chambre de première instance a commis « trois erreurs de droit[27] ». Il estime que c'est à tort qu'elle s'est fondée sur l'affaire *Milošević* en ce qui concerne l'entreprise criminelle commune de grande ampleur[28]. Il affirme aussi que la Chambre « a commis une erreur en déclarant que l'ampleur de l'entreprise criminelle commune n'a aucun effet sur cette forme de responsabilité[29] » (Traduction). De plus, il soutient que la Chambre « a commis une erreur en omettant de déterminer si, en droit international coutumier, la forme « élargie » de l'entreprise criminelle commune est applicable aux entreprises de grande ampleur[30]. La Chambre d'appel examine à nouveau si la Chambre de première instance a correctement appliqué le droit[31].

12. Le Tribunal est compétent pour connaître uniquement des infractions et formes de responsabilité qui, à la fois, sont (a) prévues dans le Statut et (b) existaient déjà dans le droit international coutumier au moment de la commission des crimes allégués ou qui étaient proscrites par des traités faisant partie intégrante des lois auxquelles était soumis l'accusé au moment où il perpétrait les actes allégués[32]. L'appelant n'ayant pas expliqué de manière convaincante dans quelle mesure le Statut du Tribunal limite l'examen de la responsabilité de la troisième catégorie aux affaires dans lesquelles l'entreprise criminelle commune est de moindre ampleur; étant donné que la Chambre d'appel n'y relève pas une telle restriction, que la forme de responsabilité découlant de l'entreprise criminelle commune trouve son fondement dans le droit international coutumier et non dans un traité, la question essentielle soulevée dans le premier appel de la Défense est celle de savoir si le droit international coutumier autorise à retenir la responsabilité d'un accusé au titre de la troisième catégorie de l'entreprise criminelle commune à raison de crimes commis par d'autres participants à une entreprise criminelle commune de « grande ampleur ». Sur cette question, la Chambre d'appel estime que l'argument de l'appelant est infondé.

13. Dans l'affaire *Le Procureur c. Tadić*, la Chambre d'appel du TPIY a estimé que la forme de responsabilité découlant de l'entreprise criminelle commune était établie en droit international coutumier[33]. Ce faisant, elle a identifié trois catégories de responsabilité découlant de l'entreprise criminelle commune[34]. En ce qui concerne la première catégorie, dite « élémentaire »[35], la responsabilité de l'accusé peut être engagée pour des crimes qui sont la conséquence prévisible de l'entreprise criminelle commune mais dont les auteurs matériels sont des personnes autres que l'accusé[36]. La deuxième catégorie de responsabilité découlant de l'entreprise criminelle commune, dont il n'est pas question en l'espèce, est parfois appelée la forme « systémique » et est une variante de

[27] Premier appel de la Défense, par. 21.
[28] *Ibid*. (citant la première décision contestée, par. 7). L'appelant fait référence à l'affaire n°IT-02-54, *Le Procureur c. Slobodan Milošević*, paragraphe 7 de la première décision contestée.
[29] Ibid.
[30] Ibid.
[31] *Le Procureur c. Krnolejac*, affaire n°IT-97-25-A, l'arrêt du 17 septembre 2003 (« arrêt *Krnolejac* »), par. 10.
[32] Voir *Le Procureur c. Kajelijeli*, affaire n°ICTR-98-44A-A, arrêt rendu le 23 mai 2005, par. 209; *Le Procureur c. Barayagwiza*, affaire n°ICTR-97-19-AR72, arrêt rendu le 3 novembre 1999, par. 40; *Le Procureur c. Delalić et consorts*, affaire n°IT-96-21-A, arrêt rendu le 20 février 2001, par. 158; *Le Procureur c. Akayesu*, affaire n°ICTR-96-4-T, jugement rendu le 2 septembre 1998, par. 604 à 606 et 611; Rapport du Secrétaire général relatif aux dispositions pratiques pour que le Tribunal international pour le Rwanda puisse fonctionner effectivement, recommandant Arusha comme siège du Tribunal, S/1995/134 du 13 février 1995, par 11 et 12.
[33] *Le Procureur c. Tadić*, affaire n°IT-94-1-A, arrêt rendu le 15 juillet 1999 (« Arrêt *Tadić* »), par. 220.
[34] Voir *ibid*., par 195 à 220.
[35] Voir *Le Procureur c. Vasiljević*, affaire n°IT-98-32-A, arrêt rendu le 25 février 2004 (« Arrêt *Vasiljević* »), par. 97.
[36] Arrêt *Tadić*, par. 220.

la première[37]. Fondamentalement, sur la base de la troisième catégorie appelée la forme « élargie »[38] de responsabilité découlant de l'entreprise criminelle commune, l'accusé peut être tenu responsable de crimes dont les auteurs physiques sont d'autres participants quand ces crimes sont la conséquence prévisible de l'entreprise criminelle commune, même si l'accusé n'a pas passé d'accord avec ceux-ci en vue de leur commission[39]. À la lumière de l'affaire *Tadić*, il n'y a aucun doute que la troisième catégorie de responsabilité découlant de l'entreprise criminelle commune est fermement établie en droit international coutumier.

14. En l'espèce, l'appelant ne prétend pas que le droit international coutumier n'était pas l'application de la première catégorie de responsabilité de l'entreprise criminelle commune dans les crimes (convenus) commis par des participants à une entreprise criminelle commune de grande ampleur. En effet, il admet que les affaires *Justice* et *RuSHA*, deux cas notoires portés devant le Tribunal de Nuremberg, portaient sur des entreprises criminelles communes de grande ampleur[40]. Il affirme cependant que le Tribunal n'est pas compétent pour retenir la troisième forme de responsabilité découlant de l'entreprise criminelle commune à raison de crimes commis par des participants à une entreprise de grande ampleur, en particulier ceux qui sont géographiquement et structurellement éloignés de l'accusé, étant donné qu'il ne relève aucun élément établissant que le droit international coutumier permet de retenir la troisième catégorie de responsabilité pour leurs crimes[41].

15. L'argument de l'appelant traduit une méconnaissance du droit international coutumier et du rôle qu'il joue dans la détermination de la compétence du Tribunal. Pour que le Tribunal retienne la responsabilité d'un accusé sur la base d'une forme particulière de responsabilité, il doit être clairement établi que cette forme de responsabilité existe en droit international coutumier[42] – et qu'en outre, elle est prévue par le Statut, comme indiqué plus haut[43]. Toutefois, « lorsqu'on peut démontrer qu'un principe a été ainsi ...établi », en droit international coutumier, « rien ne s'oppose à ce qu'il s'applique à une situation donnée même s'il s'agit d'une situation nouvelle, à condition qu'elle relève raisonnablement du champ d'application de ce principe[44] ». Ainsi, à partir du moment où le Tribunal a conclu à l'existence d'une forme de responsabilité en droit international coutumier et qu'il en a identifié les éléments qui doivent être établis à cette fin au regard dudit droit, il peut, sur cette base, déclarer une personne coupable en invoquant cette forme de responsabilité, chaque fois que les faits de l'espèce établissent que les éléments constitutifs sont réunis[45].

16. Comme indiqué auparavant, il est manifeste que le droit international coutumier sert de base à la responsabilité découlant de l'entreprise criminelle commune, en général, et à la troisième forme de cette responsabilité en particulier. De plus, bien que dans plusieurs affaires concernant des situations

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[37] Voir arrêt *Vasiljević*, par. 98.
[38] Voir par exemple, arrêt *Vasiljević*, par. 99.
[39] Arrêt *Tadić*, par. 220.
[40] Premier appel de la Défense, par. 81 à 86.
[41] *Ibid*., par. 58, 60, 75 et 77. L'appelant fonde partiellement sa thèse sur sa croyance que les affaires postérieures à la Seconde guerre mondiale n'étayent pas l'application de la troisième catégorie de responsabilité dans l'entreprise criminelle commune à des crimes dont les participants appartiennent à des structures éloignées. Dans *Le Procureur c. Rwamakuba*, affaire n°ICTR-98-44-AR72.4, l'arrêt intitulé « Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide », rendu le 22 octobre 2004 (« *Arrêt Rwamakuba* »), par. 24, la Chambre d'appel a fait observer qu'il serait erroné de conclure avec certitude, que les affaires postérieures à la Seconde guerre mondiale y compris les affaires Justice et RuSHA, ne concernaient que la forme élémentaire et non élargie de responsabilité dans l'entreprise criminelle commune. Par conséquent, l'affirmation de l'appelant selon laquelle les affaires postérieures à la Seconde guerre mondiale n'étayent pas l'application de la troisième catégorie de responsabilité dans l'entreprise criminelle commune s'agissant de crimes dont les participants appartiennent à des structures éloignées n'est pas nécessairement conforme à la jurisprudence du Tribunal.
[42] Le Procureur c. Milutinovic et consorts, affaire n°IT-99-37-AR72, Arrêt relatif à l'exception préjudicielle d'incompétence soulevée par Dragoljub Ojdanić - entreprise criminelle commune, rendu le 21 mai 2003, par. 10 et 11.
[43] Voir par. 12, supra.
[44] Voir Le Procureur c. Hadzihasanović et consorts, affaire n°IT-01-47-AR72, Décision relative à l'exception d'incompétence (Responsabilité du supérieur hiérarchique), 16 juillet 2003, par. 12.
[45] Voir *ibid*.

factuelles différentes, la Chambre d'appel du Tribunal de céans et celle du TPIY aient indiqué les conditions requises pour déterminer différentes formes de responsabilité découlant de l'entreprise criminelle[46], ni l'une ni l'autre n'a jamais dit que cette responsabilité ne pouvait être retenue que pour des crimes commis dans le cadre d'entreprises criminelles d'ampleur ou d'étendue géographique réduites. Pour confirmer qu'il n'existe aucune limitation géographique en ce qui concerne la troisième catégorie de responsabilité découlant de l'entreprise criminelle commune, l'arrêt rendu dans l'affaire *Tadić* cite comme exemple de cas où cette responsabilité peut être imposée une situation dans laquelle les meurtres commis sont une conséquence prévisible mais non voulue d'une entreprise criminelle commune visant à « expulser par la force les membres d'un groupe ethnique de leur … région »[47]. La Chambre d'appel du TPIY a donc envisagé, de manière expresse, la troisième catégorie de responsabilité découlant de l'entreprise criminelle commune à raison de crimes commis à l'échelle de toute une région.

17. La partie du premier appel de la Défense portant sur l'« effet » de l'entreprise criminelle, est loin d'être claire – en particulier, on ne sait pas si la Défense fonde son raisonnement sur le Statut du Tribunal ou sur le droit international coutumier. En tout état de cause, l'argument avancé est qu'il serait inopportun d'admettre que la troisième catégorie d'entreprise criminelle commune soit retenue pour des crimes commis par des participants à une entreprise criminelle commune de grande ampleur. L'appelant estime que l'application de la troisième catégorie de la responsabilité découlant de l'entreprise criminelle commune transformerait l'entreprise criminelle commune en une forme de responsabilité absolue et donnerait lieu à des condamnations injustes[48]. La Chambre d'appel considère cependant que ces craintes sont infondées. La troisième catégorie de responsabilité découlant de l'entreprise criminelle commune ne peut être retenue que pour des crimes prévisibles aux yeux de l'accusé[49]. Dans certaines circonstances, l'accusé ne pourra pas prévoir les crimes commis par d'autres participants à l'entreprise de grande ampleur. Par conséquent, dans la mesure où l'éloignement structurel ou géographique influe sur la prévisibilité, l'ampleur de l'entreprise doit être prise en considération comme l'affirme l'appelant.

18. Enfin, la Chambre d'appel relève qu'aux fins de la présente décision, il importe peu que la Chambre de première instance ait invoqué à juste titre ou non l'affaire *Milošević*, ou qu'il ait été inopportun de le faire, comme l'affirme l'appelant[50]. Pour les raisons avancées dans la présente décision, elle estime que la Chambre de première instance a donné les réponses appropriées aux questions de droit soulevées par l'appelant. En conséquence, elle rejette le premier appel de la Défense.

Le deuxième appel de la Défense

19. Dans le deuxième appel de la Défense, l'appelant affirme que la Chambre de première instance a commis une erreur en ne statuant pas sur la question de savoir si le Tribunal est ou non compétent pour déclarer un accusé coupable de complicité dans le génocide au titre de la forme élargie d'entreprise criminelle commune. Il fait observer que l'article 72 (A) du Règlement prévoit que, s'agissant des exceptions d'incompétence, « la Chambre se prononce sur ces exceptions préjudicielles dans les soixante jours suivant leur dépôt et avant le début des déclarations liminaires ». L'appelant fait valoir qu'alors qu'elle a relevé que dans sa requête, il a contesté la compétence du Tribunal, la Chambre de première instance ne s'est pas « prononcée sur la requête avant le début des déclarations

[46] Voir également, *Le Procureur c. Ntakirutimana et Ntakirutimana*, affaires n°ICTR-96-10-A et ICTR-96-17-A, Arrêt, par. 463 à 468 ; *Le Procureur c. Brđanin*, affaire n°IT-99-36-A, décision relative à l'arrêt interlocutoire, rendue le 19 mars 2004, par. 5 à 8 ; arrêt *Vasiljević*, par. 94 à 111 ; arrêt *Krnolejac*, par. 28 à 32, 67 à 98 ; *Le Procureur c. Delalić et consorts*, affaire n° IT-96-21-A, arrêt rendu le 20 février 2001, par. 343, 365 à 366 ; *Le Procureur c. Furundžija*, affaire n°IT-95-17/1-A, arrêt rendu le 21 juillet 2000, par. 118 et 119.
[47] Arrêt *Tadić*, par. 204 (non souligné dans l'original).
[48] Premier appel de la Défense, par. 52 à 56.
[49] Voir, par exemple, Arrêt *Tadić*, par. 220.
[50] Premier appel de la Défense, par. 42 à 47.

liminaires »[51] (traduction). En ne statuant pas sur sa requête, la Chambre « l'a privé de son droit de ne pas être jugé pour un crime qui ne relève pas de la compétence du Tribunal »[52] (traduction).

20. En réponse, le Procureur affirme tout d'abord qu'en déclarant que la responsabilité découlant de la forme élargie de l'entreprise criminelle commune pouvait être retenue pour le crime de viol et qu'elle ne « s'appliquait pas à un crime particulier » (traduction), la Chambre de première instance a implicitement tranché la question de savoir si la troisième catégorie de responsabilité dans l'entreprise criminelle commune pouvait être retenue pour complicité dans le génocide. La Chambre d'appel n'est pas de cet avis[53]. La Chambre de première instance ayant explicitement renvoyé à plus tard sa décision sur la complicité dans le génocide[54], on ne saurait conclure qu'elle a implicitement statué sur une question dont elle a reporté l'examen.

21. Les autres arguments avancés par le Procureur dans sa deuxième réponse sont loin d'être précis. Dans ce qui apparaît comme une contradiction de l'argument selon lequel la Chambre de première instance a rejeté la thèse de la Défense en ce qui concerne la complicité dans le génocide, le Procureur affirme que « à moins qu'une Chambre de première instance ne puisse organiser son travail de façon convenable en reportant à plus tard une telle décision se rapportant à un chef d'accusation »- comme celui de complicité dans le génocide – « qui est purement subsidiaire, la Chambre de première instance en l'occurrence a pu faire l'erreur que lui reproche l'appelant[55] ». Le Procureur affirme également, à la lumière du libellé de l'article 72 (A) du Règlement, que « la question est de savoir si la Chambre d'appel devrait remettre l'affaire à la Chambre de première instance afin qu'elle prenne une décision ou trancher la question elle-même[56] ». Plus loin, cependant, il affirme que ni la Chambre d'appel ni la Chambre de première instance n'ont de raison de statuer promptement sur le grief de l'appelant en ce qui concerne l'allégation relative à la troisième catégorie de responsabilité découlant de l'entreprise criminelle commune s'agissant de la complicité dans le génocide. Il estime qu'une décision n'est pas nécessaire car le chef de complicité dans le génocide a été également retenu contre l'appelant sur la base d'autres formes de responsabilité et que la complicité dans le génocide lui est imputée à titre subsidiaire[57].

22. C'est à tort que le Procureur affirme que la Chambre de première instance peut s'abstenir de statuer sur le grief de l'appelant au stade actuel. L'article 72 (A) du Règlement prévoit que la Chambre « se prononce » sur toutes les exceptions d'incompétence dans les soixante jours suivant leur dépôt et avant le début des déclarations liminaires. En l'espèce, la Chambre de première instance[58] et la Chambre d'appel[59] ont jugé que la requête de l'appelant portait sur la compétence du Tribunal. Certes, il est possible qu'une requête en incompétence du Tribunal soulève des questions qui ne portent pas sur la compétence dont la Chambre de première instance pourrait légitimement renvoyer l'examen à plus tard, mais tel n'est pas le cas : la question que l'appelant reproche à la Chambre de première instance d'avoir renvoyée à plus tard relève purement du droit et porte sur les limites de la compétence du Tribunal en ce qui concerne l'application d'une forme de responsabilité.

23. La Chambre de première instance ne peut s'abstenir de se prononcer sur la requête de l'appelant au simple motif que celle-ci porte sur un chef d'accusation subsidiaire, ou parce que le chef en question allègue que l'appelant peut être déclaré coupable au regard de plusieurs formes de responsabilité. Comme nous l'avons déjà mentionné, le libellé de l'article 72 (A) du Règlement indique clairement que le délai mentionné s'applique à toutes les requêtes d'incompétence– y compris celles mettant en cause des chefs subsidiaires ou contestant l'une des formes de responsabilité

[51] Deuxième appel de la Défense, par. 25.
[52] *Ibid*., par. 29.
[53] Réponse du Procureur, par. 6 (citant la deuxième décision contestée, par. 4).
[54] Deuxième décision contestée, par. 10.
[55] Deuxième réponse du Procureur, par. 8.
[56] *Ibid*., par. 9.
[57] *Ibid*., par. 11 et 14.
[58] Décision intitulée « première décision contestée », par. 2.
[59] Décision intitulée « *Second Rule 72 Decision* », par. 9.

alléguées dans le cadre d'une infraction. Il en va du droit de chaque accusé de ne pas être jugé sur la base d'une allégation qui échappe à la compétence du Tribunal et de ne pas avoir à s'en défendre.

24. Il est donc fait droit au deuxième appel de la Défense.

Dispositif

25. Par ces motifs, la Chambre d'appel,

d. REJETTE le premier appel de la Défense ;
e. FAIT DROIT au deuxième appel de la Défense ; et
f. DEMANDE à la Chambre de première instance de rendre une décision précisant si l'appelant peut être jugé pour complicité dans le génocide sur la base de la théorie de la forme élargie de l'entreprise criminelle commune.

Fait en anglais et en français, la version en anglais faisant foi.

La Haye (Pays-Bas), le 12 avril 2006.

[Signé] : Theodor Meron

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Décision relative à la révision du calendrier de la prochaine session du procès Articles 20 du Statut et 73 du Règlement de procédure et de preuve 18 avril 2006 (ICTR-98-44-T)

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Modification de la décision de calendrier, Déposition d'un témoin par vidéo-conférence – Requête rejetée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 73 ; Statut, art. 20

1. La deuxième session du procès s'est achevée le 17 mars 2006 à l'issue de l'audition du troisième témoin à charge. Le même jour, les parties réunies en conférence de mise en état ont convenu que la prochaine session d'audiences se tiendrait du 15 mai au 14 juillet 2006. En se fondant sur leurs discussions, la Chambre a examiné l'ordre de comparution des témoins qui seraient entendus durant cette troisième session[1]. Celle-ci commencera en principe le 15 mai, mais pour préserver l'équité du procès et le droit de Ngirumpatse d'interroger le témoin T, la Chambre a décidé que la déposition de ce témoin aurait lieu par vidéoconférence à partir du 22 mai 2006.

2. Le Procureur demande à présent à la Chambre de revoir la décision portant calendrier qu'elle a rendue le 30 mars 2006 pour prescrire que la déposition du témoin T ait lieu par vidéo-conférence à partir du 15 mai 2006[2]. Il avance trois raisons pour lesquelles la date du 22 mai 2006 ne conviendrait vraiment pas à cette fin. Premièrement, avant que la Chambre ne rende sa décision portant calendrier,

[1] *Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera*, affaire n°ICTR-94-44-T, Décision portant calendrier, 30 mars 2006 (la « décision portant calendrier »).
[2] Motion for Reconsideration of Scheduling Order Dated 30 March 2006, requête déposée le 3 avril 2006.

le Procureur et les autorités de l'État d'où la déposition serait faite avaient convenu que la vidéoconférence débuterait le 15 mai 2006. Deuxièmement, comme l'équipe du Bureau du Procureur chargée de la présente affaire a peu de membres, il faudrait réorganiser la préparation du procès pour permettre à deux substituts du Procureur d'avoir une entrevue avec le témoin T durant la semaine qui précède son audition. En conséquence, ces avocats généraux ne seront pas disponibles à Arusha pour interroger les autres témoins mentionnés dans la décision portant calendrier qui leur ont été assignés. Troisièmement, il est bien improbable que le témoin ALG puisse achever sa déposition en cinq jours si celle-ci doit commencer le 15 mai 2006. Il s'ensuit qu'elle devra être interrompue pour permettre à celle du témoin T de débuter le 22 mai 2006.

3. Dans sa réponse, Joseph Nzirorera demande de reporter l'ouverture de la troisième session du procès au 22 mai 2006[3], pour régler à la fois le problème du Procureur et celui de l'équipe de défense de Ngirumpatse. Il demande également qu'une conférence de mise en état ou une séance de travail soit tenue au cours de la semaine du 15 mai 2006 pour examiner les problèmes de communication de pièces, les directives pratiques à adopter s'il y a lieu et le calendrier des dépositions. Dans sa réplique, le Procureur juge que la proposition de Joseph Nzirorera est raisonnable, vu les circonstances, et qu'elle constitue un compromis satisfaisant pour résoudre les difficultés logistiques rencontrées par les parties[4]. Mathieu Ngirumpatse souscrit également à la proposition de Joseph Nzirorera[5] et s'oppose fermement à la demande du Procureur tendant à faire commencer le 15 mai 2006 par la déposition du témoin T, cette solution risquant de porter atteinte à ses droits.

4. Comme la Chambre l'a déjà dit, les autorités de l'État d'où le témoin T fera sa déposition ont confirmé qu'elles étaient en mesure de concourir à l'organisation de la vidéoconférence à partir du 22 mai 2006[6]. Au demeurant, le Procureur reconnaît dans sa réplique que le témoin T pourrait commencer à déposer à cette date. La question est donc résolue et ne doit plus être examinée.

5. En l'espèce, le procès s'est ouvert à nouveau en septembre 2005 et à ce jour, la Chambre n'a entendu que trois témoins à charge. Elle comprend la situation difficile que connaît l'équipe du Procureur, mais elle se doit aussi de préserver les divers éléments constitutifs du droit des accusés à un procès équitable, notamment le droit d'être jugés sans retard excessif. Il convient donc que les audiences reprennent le 15 mai 2006 et que le Procureur soit prêt à appeler son premier témoin à la barre à cette date.

6. Par ailleurs, la Chambre estime que tous les problèmes de communication de pièces doivent être réglés maintenant. Les parties sont censées coopérer de bonne foi dans ce domaine et la Chambre les engage fortement à résoudre au plus vite tout problème susceptible de retarder la reprise des débats.

PAR CES MOTIFS, la Chambre

REJETTE la requête du Procureur dans son intégralité.

Fait à Arusha, le 18 avril 2006.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[3] Réponse déposée le 4 avril 2006.
[4] Réplique déposée le 4 avril 2006.
[5] Mémoire en réponse déposé le 7 avril 2006.
[6] Décision portant calendrier, par. 3.

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Décision relative aux requêtes de la défense aux fins de rejet de la déposition du Professeur André Guichaoua
Article 20 du Statut et article 94 bis (A) du Règlement de procédure et de preuve
20 avril 2006 (ICTR-98-44-T)

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Exclusion du témoignage d'un témoin expert, Retard du Procureur dans la communication des rapports du témoin expert, Bonnes raisons : recours aux services de courrier international et temps requis par le Greffe pour traiter les documents en vue de leur dépôt – Requête rejetée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 54, 94 bis (A) et 115 ; Statut, art. 19 et 20

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. André Ntagerura et consorts, Decision on Prosecution Motion for Admission of Additional Evidence, 10 décembre 2004 (ICTR-99-46)

Introduction

1. Le 16 mai 2005, la Chambre a ordonné au Procureur de communiquer à la Défense de chacun des accusés la déclaration du témoin expert André Guichaoua au plus tard le 15 août 2005[1]. À la suite des demandes du Procureur tendant à proroger le délai à trois reprises, la Chambre l'a prorogé comme suit : dans un premier temps jusqu'au 25 novembre 2005[2] ; puis jusqu'au 12 décembre 2005[3] ; et plus récemment jusqu'au 28 février 2006[4].

2. À l'audience en l'espèce du 27 février 2006, le Procureur a appelé l'attention de la Chambre et de la Défense sur le fait que le rapport du professeur Guichaoua était achevé et serait expédié ce jour-là par courrier international, mais que son dépôt serait légèrement retardé[5]. Le rapport a été déposé par la suite au Greffe, après quoi il a été communiqué à la Défense entre le 7 et le 9 mars 2006.

3. Le 10 mars 2006, la Défense de Nzirorera et celle de Ngirumpatse ont déposé des requêtes[6] tendant à l'exclusion du rapport du professeur Guichaoua en raison du retard supplémentaire accusé. Dans sa réponse en date du 15 mars 2006[7], le Procureur s'est opposé aux deux requêtes.

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[1] Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera, affaire n°ICTR-98-44-T, (« Karemera et consorts ») Décision intitulée « Decision on Joseph Nzirorera's Motion for Deadline for Filing of Reports of Experts » (Chambre de première instance), 16 mai 2005.

[2] Karemera et consorts, Decision on Prosecutor's Notice of Delay in Filing Expert Reports and Request for Additional Time to Comply with the Chamber Decision of 16 May 2005 (Chambre de première instance), 9 septembre 2005.

[3] Karemera et consorts, Decision on Prosecution Request for Additional Time to File Expert Report and Joseph Nzirorera's Motion to Exclude Testimony of Charles Ntampaka (Chambre de première instance), 12 décembre 2005.

[4] Karemera et consorts, Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guichaoua; Defence Motion to Exclude the Witness' Testimony; and Trial Chamber's Order to Show Cause (TC), 1er février 2006.

[5] Compte rendu de l'audience du 27 février 2006, p. 58 et 59.

[6] Voir Requête de M. Ngirumpatse aux fins de rejet du rapport de M. Guichaoua (art. 54) et subsidiairement aux fins de l'article 94 *bis,* déposée le 10 mars 2006. Voir également *Second Motion to Exclude Testimony of André Guichaoua,* déposée par la Défense de Joseph Nzirorera le 10 mars 2006.

Délibération

4. À l'appui de sa requête, la Défense de Ngirumpatse invoque les articles 19 et 20 du Statut du Tribunal et l'article 54 du Règlement de procédure et de preuve, (le « Règlement »).

5. Pour fonder sa demande, la Défense de Nzirorera fait l'historique de cette question devant la Chambre, en soutenant que le « non-respect chronique » [traduction] des décisions de la Chambre de première instance par le Procureur doit être réparé par l'exclusion de la déposition du témoin. Se fondant sur les décisions de la Chambre d'appel en l'affaire *Ntagerura*[8], Nzirorera fait valoir que, lorsqu'une partie ne communique pas des éléments de preuve dans le délai imparti par la Chambre de première instance, ceux-ci doivent être exclus à moins que le Procureur ne montre que le non-respect de la décision de la Chambre de première instance n'est pas dû à son manque de diligence. Nzirorera soutient par ailleurs que l'intérêt d'un procès équitable commande que le rapport soit exclu dans son intégralité en raison de sa longueur et des questions qui y sont abordées sur lesquelles la Défense doit enquêter.

6. Le Procureur s'oppose aux deux requêtes tendant à l'exclusion des éléments de preuve, faisant observer qu'une telle exclusion ne servirait pas l'intérêt de la justice et l'économie judiciaire. Il fait remarquer que ni Nzirorera ni Ngirumpatse n'ont soulevé d'objections à la prorogation des délais lorsque la question a été débattue en audience publique. Le Procureur note également que le retard accusé dans la transmission du courrier international s'est soldé par la réception du rapport à Arusha le 5 mars 2006, alors qu'il a été expédié les 27 et 28 février 2006, et qu'un retard additionnel a été occasionné par les démarches entreprises au Greffe pour le dépôt dudit rapport.

7. À titre d'annexes à sa réponse, le Procureur joint la correspondance électronique pertinente entre M. Guichaoua et le Greffe. Il ressort du premier courriel adressé par M. Guichaoua au Greffe que la première partie de son rapport a été expédiée à Arusha par courrier international le 27 février 2006 et que les pièces à conviction l'étayant seraient expédiées par courrier international dans les 48 heures. Le second courriel de M. Guichaoua au Greffe en date du 1er mars 2006 notifie le Greffe de l'expédition la veille par courrier international des pièces à conviction. Pour expliquer le retard accusé, M. Guichaoua évoquait dans son courriel les difficultés qu'il avait rencontrées pour obtenir son billet de retour en France, à l'issue de ses consultations avec le Procureur à Arusha. Il dit qu'il lui fallait avoir accès aux facilités à sa disposition en France pour mettre la dernière main au rapport et l'expédier. Le fait qu'il soit arrivé en retard en France l'a empêché de terminer le rapport dans le délai imparti.

8. La Chambre estime que les demandes de Ngirumpatse et de Nzirorera tendant à l'exclusion de la déposition de M. Guichaoua doivent être rejetées. Pour arriver à cette conclusion, elle a d'abord tenu compte des raisons avancées pour expliquer ce retard. À cet égard, il convient de noter que bien que le rapport ait été communiqué à la Défense sept à neuf jours environ après le délai prescrit dans la décision de la Chambre de première instance du 1er février 2006, le retard a été occasionné, d'une part, par le recours aux services de courrier international et, d'autre part, par le temps requis par le Greffe pour traiter les documents en vue de leur dépôt – dans les deux cas, les circonstances étaient indépendantes de la volonté du Procureur. La Chambre admet également que les difficultés rencontrées par M. Guichaoua dans les démarches pour son voyage de retour en France l'ont quelque peu empêché de mettre la dernière main à la version définitive de son rapport en temps voulu afin qu'il soit expédié dans les délais. Deuxièmement, la Chambre s'est demandée dans quelle mesure, le cas échéant, un retard supplémentaire de sept à neuf jours porterait atteinte au droit des accusés garanti par les articles 19 et 20 du Statut. Comme l'a relevé la Chambre dans ses décisions antérieures relatives au

[7] Voir « Prosecutor's Response to Joseph Nzirorera's Second Motion to Exclude Testimony of André Guichaoua and Mathieu Ngirumpatse's Requête aux Fins de Rejet du Rapport de M. Guichaoua », déposée le 15 mars 2006.

[8] *Le Procureur c. Ntagerura et consorts,* affaire n°ICTR-99-46-A, *Decision on Prosecution Motion for Admission of Additional Evidence* (Chambre d'appel), 10 décembre 2004, par. 9. Prière de noter que cette décision portait sur le non-respect des délais de communication prescrits par l'article 115 du Règlement.

retard accusé dans la communication de rapports de témoins experts, la Chambre estime qu'on ne peut pas dire que ce retard porterait atteinte aux droits des accusés. Elle est habilitée à gérer le procès de manière à garantir que le retard ne se traduise pas par une injustice envers les accusés – à ce titre, elle peut notamment statuer, à tout moment, sur les préoccupations exprimées par Nzirorera à propos de la longueur du rapport et des questions nécessitant des enquêtes. En ce sens, la Chambre tient à indiquer clairement que l'exclusion de témoignages est une mesure extrême dans l'éventail des réparations dont elle dispose. Troisièmement, la question tranchée dans l'arrêt de la Chambre d'appel sur lequel se fonde Nzirorera n'est pas comparable à la présente affaire. L'arrêt de la Chambre d'appel vise en effet le délai de présentation d'éléments de preuve supplémentaires devant la Chambre d'appel en vertu de l'article 115 du Règlement, alors que la question dont est saisie ici la Chambre porte sur la démarche à suivre en cas de non-respect par une partie d'une décision rendue en vertu de l'article 94 *bis* du Règlement.

PAR CES MOTIFS,

LA CHAMBRE

REJETTE les requêtes de Mathieu Ngirumpatse et de Joseph Nzirorera tendant à l'exclusion de la déposition de M. André Guichaoua.

Fait à Arusha, le 20 avril 2006.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Décision relative à l'appel interlocutoire de Joseph Nzirorera 28 avril 2006 (ICTR-98-44-AR73.6)

(Original : Français)

Chambre d'appel

Juges : Liu Daqun, Président de Chambre ; Mohamed Shahabuddeen ; Mehmet Güney ; Theodor Meron ; Wolfgang Schomburg

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Communication de documents relatifs au témoignage d'un témoin, Toute violation de l'important obligation de communication du Procureur n'emporte pas nécessairement une reparation au benefice de la défence, La Chambre de première instance est la mieux place pour determiner le temps nécessaire à la défense pour se préparer – Critère indiquant la violation de l'obligation de communication contenue dans l'art. 68 du Règlement, Le Procureur a la charge principale de déterminer et communiquer les éléments de preuve susceptible de disculper l'accusé, Pas de démonstration par la défense d'une erreur de jugement réalisée par le Procureur quant au matériel à lui communiquer, Inspection du matériel à huis clos que si leur divulgation présente un risque pour des enquêtes en cours, ou pourrait être contraire à l'intérêt public ou porter atteinte à la sécurité d'un Etat – Requête rejetée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 66 (A) (ii), 68 et 68 (D) ; Statut, art. 20 (4) (b)

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 Interlocutory Appeals of Decision on Witness Protection Orders, 6 octobre 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. François Karera, Décision orale, 18 janvier 2006 (ICTR-2001-74)

T.P.I.Y. : Chambre d'appel, Le Procureur c. Slobodan Milošević, Décision relative à l'appel interlocutoire interjeté par les Amici Curiae contre l'ordonnance rendue par la Chambre de Première Instance concernant la préparation et la présentation des moyens à décharge, 20 janvier 2004 (IT-02-54) ; 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, Le Procureur c. Dario Kordić et Mario Čerkez, Arrêt, 17 décembre 2004 (IT-95-14/2)

1. La Chambre d'appel du Tribunal pénal international chargé de juger le spersonnes présumée sresponsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du rwanda et les citoyens rwandais présumés de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994 (la « Chambre d'appel » et le « Tribunal », respectivement) est saisie d'un appel interlocutoire déposé par Joseph Nzirorera[1] contre la décision orale rendue par la Chambre de première instance le 16 février 2006[2] (la « décision contestée »). Cet appel soulève la question de savoir si la Chambre de première instance a donné à M. Nzirorera suffisamment de temps pour préparer le contre-interrogatoire d'un témoin, suite à la communication tardive par le Procureur d'informations susceptibles de le disculper et présentatn un intérêt dans le cadre dudit contre-interrogatoire, d'une part, et, d'autre part, si elle a appliqué le critère idoine et suivi les procédures appropriées en se refusant à ordonner la communication d'autres pièces.

Historique

2. Le procès dont découle cet appel n'en est encore qu'aux premières phases de la présentation des moyens à charge. Il a débuté le 27 novembre 2003 devant une section de la Chambre de première instance III[3]. La Défense a contesté, avec succès, la composition de la Chambre, et la Chambre d'appel a ordonné la reprise du procès *de novo*[4]. Le procès a repris le 19 septembre 2005[5], et durant la première session, qui a duré jusqu'au 28 octobre 2005, la Chambre de première instance a entendu les dépositions de deux témoins.

3. Le 6 février 2006, avant le commencement de la deuxième session du procès, M. Nzirorera a demandé la communication immédiate de documents se rapportant à la déposition de chacun des

[1] Le Procureur c. Edouard Karemera et consorts, affaire n° ICTR-98-44-AR73.6, Joseph Nzirorera's Interlocutory Appeal from Decision Denying Motion for Stay of Proceedings and Request for Stay Pending Appeal, déposée le 7 mars 2006 (« Appel de Nzirorera »). Mathieu Ngirumpatse a déposé un mémoire en appui à l'appel de Nzirorera. Voir Le Procureur c. Edouard Karemera et consorts, affaire n°ICTR-98-44-AR73.6, Mémoire de M. Ngirumpatse au soutien de Nzirorera's Interlocutory Appeal from Decision Denying Motion for Stay Pending Appeal, déposé le 10 mars 2006 (« Observations de Ngirumpatse »). Le Procureur a répondu dans Le Procureur c. Edouard Karemera et consorts, affaire n°ICTR-98-44-AR73.6, « Prosecutor's Response to Joseph Nzirorera's Interlocutory Appeal from Decision Denying Motion for Stay of Proceedings and Request for Stay Pending Appeal », déposée le 17 mars 2006 (« Prosecutor's Response »). M. Nzirorera a déposé une réplique le 21 mars 2006.

[2] *Le Procureur c. Edouard Karemera et consorts*, affaire n°ICTR-98-44-T, Décision orale, Compte rendu de l'audience du 16 février 2006, p. 2 à 11 (« Décision contestée »).

[3] *Ibid*., p. 8 et 9.

[4] Le Procureur c. Edouard Karemera et consorts, affaire n°ICTR-98-44-AR15bis.2, Motifs de la décision de la Chambre d'appel intitulée « Decision on Interlocutory Appeal regarding the Continuation of Proceedings with a Substitue Judge and on Nzirorera's Motion for Leave to consider New Material », 22 octobre 2004.

[5] Décision contestée, p. 9.

témoins qui devait normalement être cité au cours de la sessions à venir[6]. Il affirmait que le Procureur en violation de ses obligations en vertu des articles 66 (A) (ii) et 68 du Règlement de procédure et de preuve du Tribunal (le « Règlement »), ne lui avait pas communiqué ces documents[7]. A titre de réparation, il a demandé une suspension de la procédure de soixante jours[8].

4. Dans la décision contestée, la Chambre de première instance a reconnu que le Procureur avait effectivement manqué à ses obligations de communication s'agissant de certains documents demandés par M. Nzirorera[9]. Elle n'a toutefois pas accepté de suspendre la procédure[10]. En outre, elle a refusé d'ordonner la production d'autres documents, ajoutant ainsi foi à la déclaration du Procureur qui a affirmé soit qu'il ne possédait pas les documents soit que ceux-ci n'étaient pas de nature à disculper l'accusé[11]. Passant outre aux objections soulevées par M. Nzirorera, la Chambre de première instance commença l'audition du témoin UB[12], dont la déposition a duré toute la deuxième session du procès, à savoir du 16 février au 15 mars 2006. Le début de la troisième sessions est prévu le 15 mai 2006.

Examen

A. Motif 1 : Allégation selon laquelle la Chambre de première instance a commis une erreur en refusant d'accorder une réparation pour les violations des articles 66 et 68 du Règlement qu'elle a constatées

5. Dans son argumentation sous ce premier motif d'appel, M. Nzirorera met l'accent sur les violations de l'article 68 en rapport avec la déposition du témoin UB[13], l'unique témoin, finalement, etendu durant la deuxième session du procès. Ces violations comprennent notamment la communication tardive d'un jugement rendu par un tribunal rwandais impliquant le témoin UB dans des massacres[14], et les déclarations de deux individus qui incriminenet davantage le témoin[15]. M. Nzirorera affirme que la Chambre de première instance, ayant conclu à de graves manquements du Procureur à ses obligations de communication, a commis une erreur de droit en refusant de lui accorder suffisamment de temps et de facilités pour préparer sa défense, en violation des droits qui lui sont garantis en vertu de l'article 20 (4) (b) du Statut[16].

6. La Chambre de première instance a déclaré que dans les circonstances de l'espèce, M. Nzirorera n'a subi aucun préjudice du fait de la communication tardive des pièces dans la mesure où il en avait plus ou moins connaissance et où le Procureur lui avait communiqué certaines pièces importantes dès le début de la déposition du témoin[17]. M. Nzirorera ne partage pas cette appréciation de la Chambre et soutient qu'il a subi un prejudice car, pour pouvoir mettre valablement en doute la crédibilité du témoin UB sur la base de ces documents, il avait besoin de temps pour les « assimiler » et interroger les individus sur les allégations desquelles ils reposent[18]. Le Procureur fait valoir que dans les

[6] *Ibid*., p. 2 et 3 ; Appel de Nzirorera, par. 1.
[7] *Ibid*., p. 2 ; Appel de Nzirorera, par. 1.
[8] *Ibid*., p. 2 ; Appel de Nzirorera, par. 1.
[9] *Ibid*., p. 3, 4 et 5 à 9. La Chambre de première instance a conclu à des violations en amtière de communication en ce qui concerne les témoins UB, GFA, GBU, AWB, ALH, HH, Omar Serushago et Ahmed Mbonyunkiza. Décision contestée, p. 3, 4 et 5 à 9.
[10] *Ibid*., p. 8 à 11. La Chambre d'appel fait observer que, compte tenu du calendrier du procès, M. Nzirorera a obtenu le report de soixante jours qu'il a demandé en ce qui concerne tous les témoins sauf Mbonyunkiza et UB qui ont déjà déposé.
[11] *Ibid*., p. 5 à 8.
[12] *Ibid*., p. 8 à 10.
[13] Appel de Nzirorera, par. 73 à 92.
[14] Appel de Nzirorera, par. 77. Le Procureur a communiqué ce jugement en kinyarwanda le 13 février 2006. A la demande de la Chambre de première instance, une traduction non officielle en français et en anglais en a été faite à la hâte pour les parties le 16 février 2006. Le jugement contient les allégations de 14 individus impliquant le témoin UB dans plusieurs massacres. Voir Appel de Nzirorera, par. 78 ; Décision contestée, p. 9 et 10. La Chambre d'appel relève que le Procureur a obtenu le jugement rwandais le 10 février 2006. Compte-rendu de l'audience du 13 février 2006, p. 13 à 15.
[15] Appel de Nzirorera, par. 80.
[16] *Ibid*., par. 75 à 72.
[17] Décision contestée, p. 8 et 9.
[18] Appel de Nzirorera, par. 75 à 82.

circonstances de l'affaire, M. Nzirorera ne pouvait nullement prétendre à une suspension de la procédure[19].

7. L'obligation du Procureur de communiquer les éléments susceptibles de disculper l'accusé est une condition essentielle d'un procès équitable[20]. Toutefois, une violation de cette importante obligation n'est pas nécessairement synonyme de violation des droits de l'accusé à un procès équitable ouvrant droit à réparation[21]. Si les documents dont la communication est sollicitée en vertu de l'article 68 sont nombreux, les parties sont en droit de demander une suspension du procès afin de pouvoir se préparer convenablement[22]. L'autorité la mieux placée pour déterminer le temps nécessaire à l'accusé pour préparer sa défense est la Chambre de première instance chargée de l'affaire[23].

8. M. Nzirorera a soulevé devant la Chambre de première instance la question de la nécessité d'enquêter suite à la communication tardive des documents en question[24]. Dans la Décision contestée, la Chambre a expressément exémibé l'incidence de la communication tardive de ces pièces sur l'aptitude de M. Nzirorera à se préparer pour la déposition du témoin UB, et elle a conclu que ce retard ne nuirait pas à sa capacité de le contre-interroger de façon efficace[25]. En outre elle a fait observer qu'elle accorderait une réparation additionnelle appropriée qui serait appréciée au cas par cas et indiqué qu'il conviendrait peut-être de rappeler le témoin di des enquêtes complémentaires justifiaient un contre-interrogatoire supplémentaire[26]. Dans les circonstances actuelles, la Chambre d'appel ne saurait dire que la Chambre de première instance a abuse de son pouvoir discrétionnaire en se refusant à suspendre la procédure. Elle estime que dans les affaires longues et complexes, la Chambre de première instance doit exercer son contrôle sur la procédure, selon que de besoin, étant entendu qu'elle ne doit pas porter atteinte au droit des parties à un procès équitable[27].

9. M. Nzirorera soutient que la Chambre de première instance a rejeté sa demande de suspension de la procédure uniquement sur la base d'une interprétation erronée d'une décision orale dans l'affaire *Karera*[28]. Il fait observer que dans cette affaire, la Chambre de première instance a reporté le contre-interrogatoire du témoin UB, qui comparaissait également dans le cadre de ce procès, en raison de la communication tardive des pièces[29]. Toutefois, il soutient que dans la décision contestée, la Chambre de première instance a estimé à tort, que la décision rendue dans l'affaire *Karera* prévoyait le rappel du témoin[30]. La Chambre d'appel n'accepte pas l'affirmation de M. Nzirorera selon laquelle la Chambre de première instance est parvenue à une décision contestée sur la base d'une interprétation erronée de la décision rendue dans l'affaire *Karera*. En l'espèce, en refusant de suspendre la procédure, la Chambre de première instance a analyse, dans le contexte de l'affaire, quelle incidence aurait le retard pris à communiquer les pièces sur l'aptitude de M. Nzirorera à contre-interroger le

[19] Prosecutor's Response, par. 3 à 28.
[20] The Prosecutor v. Théoneste Bagosora et al., ICTR affaires n°98-41-AR73 et 98-41AR73 B), Decision on Interlocutory Appeals on Witness Protection Orders, 6 octobre 2005, par. 44 ; Le Procureur c. Dario Kordić et Mario Čerkez, affaire n°IT-95-14/2-A, arrêt, 17 décembre 2004, par. 183 et 242 (« arrêt Kordić et Čerkez ») ; Le Procureur c. Tihomir Blaškić, affaire n°IT-95-14-A, arrêt, 20 juillet 2004, par. 264 (« arrêt Blaškić ») ; 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 communications en application de l'article 68 du Règlement et qu'une ordonnance impose au Greffier de communiquer que certains documents, 7 décembre 2004, p. 2 et 3 (« Décision Brdjanin »).
[21] Arrêt *Kordić et Čerkez*, par. 179 (« Une fois que la Défense l'a convaincue que l'Accusation n'a pas respecté l'article 68, la Chambre examine, pour décider des modalités de réparation (éventuelles), si la violation de l'article 68 a porté préjudice à la Défense… » (non souligné dans l'original). Voir également : *The Prosecutor v. Juvénal Kajelijeli*, ICTR affaire n° 98-44A-A, arrêt, 23 mai 2005, par. 262 (« arrêt *Kajelijelii* ») ; arrêt *Blaškić*, par. 295 et 303 ; arrêt *Krstić*, par. 153.
[22] Arrêt *Krstić*, par. 206.
[23] The Prosecutor v. Slobodan Milošević, affaire n° IT-02-54-AR73.6, Decision on Interlocutory Appeal by the Amici Curiae against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 janvier 2004, par. 18.
[24] Compte-rendu de l'audience du 13 février 2006, p. 16 (version anglaise).
[25] Décision contestée, p. 8 et 9.
[26] *Ibid*., p. 3, 4 et 8 à 11.
[27] Voir arrêt *Kordić et Čerkez*, par. 196.
[28] Appel de Nzirorera, par. 83 à 86, se référant à la Décision orale rendue dans l'affaire *Le Procureur c. François Karera*, affaire ICTR n°01-74-T, Compte-rendu de l'audience du 8 janvier 2006, p. 88 et 89.
[29] Appel de Nzirorera, par. 85 et 86.
[30] *Ibid*., par. 84.

témoin UB[31]. Elle a également fait observer qu'elle avait à sa disposition un éventail d'autres mesures éventuelles, y compris le report ou l'exclusion de la déposition du témoin[32]. Ce n'est qu'ensuite qu'elle a formulé ses observations relativement à la décision *Karera*[33].

10. M. Nzirorera affirme également que le rappel du témoin à titre de mesure exceptionnelle, est une réparation insuffisante[34]. La Chambre d'appel fait toutefois observer que le caractère satisfaisant de cette réparation n'a pas été établi en l'espèce puisque M. Nzirorera n'a pas encore demandé à rappeler le témoin en question. En outre, à ce stade, il est absolument impossible de dire quelle valeur probante, le cas échéant, la Chambre de première instance va accorder à la déposition du témoin UB à la lumière du contre-interrogatoire en cours ou d'autres éléments de preuve et communication fournis durant la procédure.

11. Ce moyen d'appel est par conséquent rejeté.

B. Motif II : Allégation selon laquelle la Chambre de première instance a commis une erreur en fixant un seuil excessif pour rapporter la preuve de violations de l'article 68, violations qui, selon elle, n'ont pas été établies

12. Sous ce deuxième motif d'appel, M. Nzirorera soutient que la Chambre de première instance a commis une erreur en refusant d'ordonner la communication d'éléments additionnels en la possession du Procureur et en se rapportant aux témoins Mnonyunkiza, UB, GFA, et GBU[35]. Il affirme que les membres de son équipe de la défense ont interrogé un certain nombre de personnes qui ont reconnu avoir fourni au Procureur des déclarations qui, de l'avis de la défense, contredisaient la déposition attendue ds témoins à charge sur des faits précis[36]. M. Nzirorera soutient qu'en refusant d'ordonner la communication de ces éléments, la Chambre de première instance a fixé des conditions très rigoureuses pour qu'une violation de l'article 68 soit établie, puisqu'elle demande que la défense connaisse effectivement la teneur des déclarations en question avant d'en ordonner la communication[37].

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[38].

14. Le Procureur a reconnu avoir recueilli des déclarations auprès de certaines personnes, comme l'a allégué la défense, mais il ne considère pas ces informations comme étant susceptibles de disculper l'accusé.[39] La Chambre de première instance a accepté les vues que le Procureur a exposées à cet effet, faisant observer que la défense ne les a pas réfutées[40].

15. M. Nzirorera soutient qu'en acceptant ces vues, la Chambre de première instance a négligé de prendre en considération l'historique des violations de l'article 68 par le Procureur dans la présente affaire, l'opinion « inexacte » que le Procureur se fait de ses obligations en vertu de l'article 68, ainsi que la probabilité qu'un témoin d'un fait important que le Procureur ne cite pas puisse posséder des

[31] Décision contestée, p. 8 à 10.
[32] *Ibid*., p. 4 et 5.
[33] *Ibid*., p. 9 à 11.
[34] Appel de Nzirorera, par. 87 et 88.
[35] *Ibid*., par. 93 à 102.
[36] *Ibid*., par. 96 à 98 ; compte rendu de l'audience du 13 février 2006, p. 4 et 5 ; 6 à 8 ; 33 et 34.
[37] Appel de Nzirorera, par. 93.
[38] Arrêt *Kajelijeli* (version anglaise), par. 262 ; arrêt *Kordić et Čerkez*, par. 179 ; *Brdjanin*, Décision du 7 décembre 2004, p. 3.
[39] Décision contestée, p. 6 et 7.
[40] *Id*.

informations qui entament la crédibilité des témoins à charge décrivant le même fait[41]. Le Procureur répond qu'il était loisible à la Chambre de première instance d'accepter ses observations[42].

16. La Chambre d'appel considère que la Chambre de première instance n'a commis aucune erreur en refusant d'ordonner la communication des éléments en question. Le Procureur a seul la charge de communiquer les éléments de preuve susceptible de disculper l'accusé et il lui appartient de déterminer, essentiellement sur la base des faits, quelles pièces remplissent les conditions posées par l'article 68[43].

17. La Chambre d'appel ne peut pas reprocher à la Chambre de première instance de demander à M. Nzirorera de fournir un « fondement probatoire » à l'appui de son allégation selon laquelle les éléments demandés entrent dans le champ d'application de l'article 68, contrairement aux affirmations du Procureur[44]. La Chambre de première instance est en droit de considérer que le Procureur s'acquitte de ses obligations de bonne foi[45]. La Chambre d'appel fait observer que M. Nzirorera s'est appuyé sur les déclarations de son avocat qui rappelait les entretiens qu'il avait eu avec des personnes qui prétendaient avoir fourni au Procureur des récits contradictoires de certains événements[46] pour affirmer que le Procureur avait en sa possession des éléments susceptibles de le disculper. S'il est vrai que la Chambre de première instance n'aurait pas outrepassé son pouvoir discrétionnaire en ordonannt au procureur de communiquer les informations en question sur la base de telles déclarations, la Chambre d'appel ne saurait conclure pour autant qu'elle a abusé de son pouvoir discrétionnaire en s'y refusant.

18. La Chambre d'appel ne partage pas l'opinion selon laquelle la Chambre de première instance, en prenant sa décision, n'a pas dûment pris en considération l'historique des violations touchant les obligations de communication en l'espèce[47]. La Chambre de première instance a expressément déclaré qu'il lui avait été demandé de tirer plusieurs conclusions des différends antérieurs relatifs à la communication des pièces, que M. Nzirorera a rappelés lors du débat oral[48]. En outre, en acceptant les déclarations du Procureur, la Chambre de première instance a insisté sur le fait que l'administration de la justice dépendait de l'intégrité du Procureur, et elle s'est déclarée prête à envisager des sanctions si les déclarations de celui-ci étaient inexactes[49].

19. Ce moyen d'appel est par conséquent rejeté.

C. Motif III : Allégations selon lesquelles la Chambre de première instance a commis une erreur en refusant d'examiner les éléments litigieux à huis clos

20. Enfin, sous son troisième motif d'appel, M. Nzirorera soutient que la Chambre de première instance a commis une erreur en refusant d'examiner les éléments litigieux à huis clos[50]. La Chambre d'appel fait toutefois observer que, selon l'article 68 (D) du Règlement de procédure et depreuve, des informations ne doivent être examinées à huis clos que lorsque le Procureur demande à être dispensé de l'obligation de les communiquer, étant entendu que leur divulgation pourrait hypothèquer des enquêtes en cours, ou pourrait être contraire à l'intérêt public ou porter atteinte à la sécurité d'un Etat.

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[41] Appel de Nzirorera, par. 99.
[42] Prosecutor's Response, par. 29.
[43] Arrêt *Kordić et Čerkez*, par. 183 ; Décision *Brdjanin*, p. 3. Voir également arrêt *Kajelijeli*, par. 262 (version anglaise).
[44] *Décision contestée*, p. 7 à 9 ; compte rendu de l'audience du 13 février 2006, p. 6 (« Si vous dites que le Procureur n'a pas honoré ses engagements, et si vous nous demandez de remédier à la situation, il nous faudra avoir des éléments de preuve pour pouvoir le faire »).
[45] Arrêt *Kordić et Čerkez*, par. 183 ; Décision *Brdjanin*, p. 4.
[46] Voir, par ex. Appel de Nzirorera, par. 96 à 98 ; compte rendu de l'audience du 13 février 2006, p. 4 à 5 ainsi que 33 et 34.
[47] M. Nzirorera et M. Ngirumpatse exposent en détail les pratiques du Procureur en matière de communication des pièces tout au long du procès. Appel de Nzirorera, par. 12 à 64 ainsi que 94. Voir également le mémoire de Ngirumpatse, par. 10 à 13. Le Procureur fait observer que les problèmes qui s'étaient posés par le passé ont été résolus et que la Chambre de première instance n'a jamais déclaré que le Procureur avait agi de mauvaise foi. *Prosecutor's response*, par. 17.
[48] Décision contestée, p. 5.
[49] *Ibid*., p. 6 à 10.
[50] Appel de Nzirorera, par. 103 à 106.

Etant donné que c'est principalement au Procureur qu'il appartient de déterminer si des informations doivent être communiquées en vertu de l'article 68[51], la Chambre d'appel considère que la Chambre de première instance n'a commis aucune erreur en refusant d'examiner lesdites informations à huis clos.

21. Ce moyen d'appel est par conséquent rejeté.

Dispositif

22. Par ces motifs, la Chambre d'appel rejette l'appel de Nzirorera dans son intégralité et rejette sa requête en suspension de procédure en attendant que l'appel soit déclaré sans objet.

Fait en anglais et en français, le texte anglais faisant foi.

Fait à La Haye (Pays-Bas), le 28 avril 2006.

[Signé] : Liu Daqun

[51] Arrêt *Kordić et Čerkez*, par. 183.

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Décision relative à la requête confidentielle du Procureur pour une ordonannce de mesures spéciales de protection à l'égard du témoin ADE
Article 20 du Statut, Article 75 du Règlement de procédure et de preuve
3 mai 2006 (ICTR-98-44-T)

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Mesure de protection d'un témoin, Témoignage par video-conférence lorsque c'est dans l'intérêt de la justice, Possibilité d'évaluer la crédibilité du témoin, Témoin membre de l'« AKAZU » – Huis Clos ordonné – Mesures de communication réduite préalablement mises en œuvre – Requête partiellement acceptée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 54, 75 et 90 (A) ; Statut, art. 20 (4) (e)

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. Edouard Karemera, Order on Protective Measures for Prosecution Witnesses, 10 décembre 2004 (ICTR-98-44) ; 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. 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 DK52 de déposer par voie de vidéoconférence, 22 février 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Tharcisse Muvunyi, Decision on Decision on Prosecutor's extremely urgent Motion Pursuant to TC II Directive of 23 May 2005 for Preliminary measures to Facilitate the use of Closed Video-link Facilities, 20 juin 2005 (ICTR-2000-55A) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision relative à la requête du Procnreur intitulée Prosecutor's Motion for Special Protective Measures for Witnesses G and T, 14 septembre 2005 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Protais Zigiranyirazo, Decision on Defence and Prosecution Motions Related to Witness ADE, 31 janvier 2006 (ICTR-2001-73) ; Chambre de première instance, Le Procureur c. Protais Zigiranyirazo, Décision relative à la requête du Procureur tendant à ce que le témoin BPP dépose par liaison vidéo, 27 mars 2006 (ICTR-2001-73)

Introduction

1. Le Procureur prie la Chambre d'ordonner des mesures spéciales pour protéger le témoin ADE[1], en recueillant son témoignage à huis clos par voie de vidéoconférence et en imposant des restrictions à la communication des documents et des informations concernant ledit témoin. À l'appui de sa requête,

[1] Requête confidentielle du Procureur pour une ordonnance de mesures spéciales de protection à l'égard du témoin ADE, déposée le 6 février 2006.

il a fourni oralement des arguments supplémentaires sur les problèmes de sécurité qu'aurait ce témoin, en réponse à une question de la chambre[2].

2. Le Procureur fait valoir que le témoin ADE a quelque réticence à se rendre à Arusha parce que, membre de l'AKAZU, il craint pour sa sécurité, que sa déposition attendue est importante parce qu'elle apportera des éléments de preuve sur le mode de fonctionnement présumé de l'« *AKAZU* », l'un des groupes cités dans l'acte d'accusation comme ayant pris part, de concert avec les trois accusés, à une entreprise criminelle commune et que l'audition du témoin par voie de vidéoconférence préserve l'intérêt de la justice et ne porte pas atteinte au droit de l'accusé à un jugement équitable.

Délibération

Témoignage par vidéoconférence

3. Les conseils de Nzirorera et de Ngirumpatse s'opposent à la requête[3]. Ils sont d'avis qu'il est important que le témoin ADE soit entendu, mais estiment que, pour ce faire, celui-ci doit se rendre à Arusha, afin qu'il puisse être contre-interrogé plus facilement et que sa crédibilité puisse être dûment appréciée. Ils relèvent que les craintes relatives à sa sécurité ne se justifient pas au regard des faits et que le Tribunal devrait être capable d'offrir les mêmes garanties de sécurité à Arusha qu'à La Haye. Ils estiment par ailleurs que le Procureur confond l'intérêt personnel du témoin avec l'intérêt de la justice, et que tout accord entre celui-ci et le Procureur, tendant à garantir au témoin que sa déposition se fera par vidéoconférence, empiète sur les attributions de la Chambre et doit être écarté.

4. La Chambre préfèrerait que le témoin soit entendu au siège du Tribunal à Arusha, ce qui constitue un principe consacré à l'article 90 (A) du Règlement de procédure et de preuve (le « Règlement »). Cependant, comme le montre la jurisprudence du Tribunal, ce principe n'empêche pas l'audition d'un témoin par vidéoconférence lorsque l'intérêt de la justice le commande. Même si le Règlement ne prévoit pas expressément l'audition de témoins par vidéoconférence, les Chambres de première instance du Tribunal de céans ont néanmoins déclaré qu'il était possible de recourir à cette solution sur le fondement soit de l'article 54 soit de l'article 75 du Règlement[4]. En rendant sa décision, la Chambre doit prendre en compte l'importance de la déposition, l'incapacité ou le refus du témoin de se présenter à l'audience et la question de savoir si des raisons valables ont été fournies pour justifier cette incapacité ou ce refus[5].

5. La Chambre note que le Procureur et la Défense conviennent de l'importance de la déposition du témoin ADE. Compte tenu du fait que celui-ci serait membre de l'«AKAZU » sur les activités et le mode de fonctionnement duquel il détiendrait des informations, la Chambre est d'avis que sa

[2] Compte rendu de l'audience du 17 mars 2006, Conférence de mise en état (tenue à huis clos).

[3] Réponse de Joseph Nzirorera à la Requête confidentielle du Procureur pour une ordonnance de mesures spéciales de protection à l'égard du témoin ADE, déposée le 8 février 2006 ; Réplique du Procureur à la réponse de Joseph Nzirorera à la requête conîïdeutielle du Procureur pour une ordonnance de mesures spéciales de protection à l'égard du témoin ADE, déposée le 9 février 2006 ; Mémoire en réponse à la requête coufidentieile du Procureur pour une ordonnance de mesures spéciales à l'égard du témoin ADE, déposé par Mathieu Ngirumpatse le 13 février 2006 ; Réplique de la défense d'Edouard Karemera à la requête confidentielle du Procureur pour une ordonnance de mesures spéciales à l'égard du témoin ADE, déposée le 13 février 2006.

[4] Voir *Le Procureur c. Théoneste Bagosora et consorts,* affaire n°ICTR-98-41-T *(Bagosora et consorts),* Décision relative à la requête de Ntabakuze demandant qu'il soit permis au témoin DK52 de déposer par voie de vidéoconférence, 22 février 2005, par. 4 ; *Le Procureur c. Aloys Simba,* Décision autorisant les dépositions des témoins IMG, ISG et BJKl par vidéoconférence, 4 février 2005 ; *Le Procureur c. Aloys Simba,* Décision relative à la requête de la défense tendant à faire recueillir la déposition du témoin FMP1, 9 février 2005.

[5] *Le Procureur c. Édouard Karemera et consorts*, affaire n°ICTR-98-44-T (Karemera et consorts), Décision relative à la requête du Procnreur intitulée Prosecutor's Motion for Special Protective Measures for Witnesses G and T, Chambre de première instance, 14 septembre 2005 ; *Le Procureur c. Aloys Simba*, Décision relative à la requête de la défense tendant à faire recueillir la déposition du témoin FMP1, Chambre de première instance, 9 février 2005 ; Décision autorisant les dépositions des témoins IMG, ISG, and BJKl par vidéoconférence, Chambre de première instance, 4 février 2005, par. 4 ; affaire *Bagosora et consorts*, Decision on Testimony by Video-Conference, Chambre de première instance, 20 décembre 2004.

déposition est indéniablement importante pour la thèse du Procureur. Sur la base des arguments avancés par celui-ci, la Chambre admet que les craintes du témoin ADE quant à sa sécurité à Arusha sont bel et bien fondées et authentiques. Elle rappelle que, dans sa décision relative aux mesures spéciales de protection en faveur des témoins G et T, elle a rejeté l'objection soulevée par la Défense selon laquelle celle-ci ne serait plus en mesure de vérifier la crédibilité des témoins, en cas de recours à la vidéoconférence. Aux craintes de la Défense concernant sa moindre capacité à observer le comportement du témoin ADE afin de contester sa crédibilité, la Chambre répond que le témoignage par vidéoconférence ne lui portera pas préjudice[6].

6 La Défense renvoie à l'affaire *Zigiranyirazo* dans laquelle la Chambre de première instance s'inquiétait des moyens d'évaluer de manière précise les déclarations et le comportement du témoin entendu par vidéoconférence et a finalement exprimé le souhait d'écouter le témoin ADE sans interruption et en personne, dans son lieu de résidence[7]. La Chambre relève que la même Chambre a rendu une décision permettant à un témoin à charge de déposer par vidéoconférence[8]. La Chambre a, par le passé, entendu les témoins G et T par liaison vidéo[9]. Dans la présente affaire, elle estime que l'audition du témoin ADE par ce moyenne l'empêche pas d'évaluer sa crédibilité et ne porte pas atteinte aux droits de l'accusé préws à l'article 20 (4) (e) du statut[10]. Elle est convaincue que l'intérêt de la justice commande que le témoin soit entendu par voie de vidéoconférence.

7. En conséquence, la Chambre rejette la requête subsidiaire de la Défense la priant de siéger à La Haye pour entendre le témoin ADE, en présence des accusés et de leurs conseils.

Huis clos

8. La Chambre estime que, compte tenu des mesures actuellement prises pour assurer la protection du témoin ADE, l'examen de ces demandes particulières doit se faire à huis clos. Il importe que les débats portant sur la planification et le calendrier de la vidéoconférence et/ou sur les modalités des mesures spéciales mises en place pour ce témoin, concernant notamment ses déplacements, ne soient pas portées à la connaissance du public et de la presse et demeurent confidentiels. Toutefois, la Chambre décidera au cas par cas, en fonction des circonstances, si elle doit entendre certaines parties du témoignage à huis clos.

Restrictions imposées a la communication de documents et d'informations

9. Le Procureur prie également la Chambre d'ordonner aux conseils de la Défense et aux accusés de ne communiquer à personne aucun document ni aucune information concernant le témoin ADE, pas même à d'autres équipes de la Défense, sauf si les personnes intéressées assurent la défense dans la présente affaire. Aucune information permettant de l'identifier ne doit être rendue publique. La Chambre rappelle que cette mesure fait déjà l'objet du point n°5 de sa Décision du 10 décembre 2004 accordant des mesures de protection à tous les témoins[11]. Il n'est nul besoin d'y revenir, ladite décision étant toujours en vigueur.

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[6] Affaire *Karemera et consorts,* Décision relative à la requête du Procureur intitulée *Motion for Special Protective Measures for Witnesses G and T,* Chambre de première instance, 14 septembre 2005, par. 13.
[7] *Le Procureur c. Protais Zigiranyirazo*, affaire n°ICTR-2001-73-T, Decision on Defence and Prosecution Motions Related ta Witness ADE, Chambre de première instance, 31 janvier 2006, par. 32.
[8] *Le Procureur c. Protais Zigiranyirazo,* affaire n°ICTR-2001-73-T, Décision relative à la requête du Procureur tendant à ce que le témoin BPP dépose par liaison vidéo, Chambre de première instance, 27 mars 2006.
[9] Affaire *Karemera et consorts,* Décision relative à la requête du Procureur intitulée *Motion for Special Protective Measures for Witnesses G and T,* Chambre de première instance, 14 septembre 2005.
[10] Voir, par exemple, *Le Procureur c. Muvunyi*, Decision on Prosecutor's Extremely Urgent Motion Pursuant to Trial Chamber II Directive of 23 May 2005 for Preliminary Measures to Facilitate the Use of Closed Video-Link Facilities, 20 juin 2005, par. 17 ; affaire *Bagosora et consorts*, Decision on Prosecution Request for Testimony of Wiiness BT via Video-Link, 8 octobre 2004, par. 7.
[11] *Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera, André Rwamakuba*, affaire n°ICTR-98-44-R75, Order on Prorective Measures for Prosecution Witnesses, 10 décembre 2004.

PAR CES MOTIFS. LA CHAMBRE

FAIT DROIT en partie à la requête du Procureur ;

ENJOINT :

a) que le témoin ADE soit entendu par un système sécurisé d'audio et de vidéoconférence, sa déposition étant retransmise en direct au siège du Tribunal à Arusha, en présence de toutes les parties ;

b) que le Greffe prenne toutes les dispositions logistiques nécessaires à l'audition de ce témoin au moyen d'un système d'audio et de vidéoconférence sécurisé, et qu'il le fasse de manière confidentielle ;

c) Que l'interrogatoire complet du témoin, y compris le contre-interrogatoire par la Défense, se déroule à partir du siège du Tribunal à Arusha ;

d) Qu'un représentant de chacune des parties soit autorisé à être présent au lieu à partir duquel le témoin ADE sera entendu, et ceci pour la durée de sa déposition, et que le Greffe prenne, en toute confidentialité, toutes les mesures logistiques nécessaires pour garantir cette présence ;

e) Que les débats concernant la planification et le calendrier de la vidéoconférence se déroulent uniquement a huis clos ;

f) Que les modalités des mesures de protection spéciales déjà adoptées en faveur du témoin ADE, concernant notamment ses déplacements, ne soient pas rendues publiques ni débattues en audience publique.

Fait à Arusha le 3 mai 2006.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Ordonnance complémentaire visant au dépôt de soumissions d'un Etat Article 28 du Statut du Tribunal et Article 54 du Règlement de procédure et de preuve 7 juin 2006 (ICTR-98-44-T

(Original : Français)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Documents supplémentaires requis

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 54 ; Statut, art. 28

1. Le 6 juin 2006, la Chambre a rendu une décision orale sur cinq requêtes orales présentées par la Défense de Joseph Nzirorera et appuyées par les Défenses d'Edouard Karemera et de Mathieu Ngirumpatse.[1] Tout en rejetant ces demandes, la Chambre a néanmoins considéré que des informations supplémentaires relatives à un document émanant des autorités d'un Etat[2] étaient requises. Elle a en

[1] T. 6 juin 2006, pp. 17 et s.
[2] Le nom de cet Etat est mentionné dans l'annexe strictement confidentielle à la présente Décision.

conséquence sollicité la coopération de cet État, conformément à l'article 28 du Statut du Tribunal, en lui demandant de préciser si le procès-verbal d'audition d'un certain individu, pris par l'autorité de l'État peut être communiqué, en tout ou partie, à la Défense des accusés en la présente affaire.

2. Les détails relatifs au document dont question sont précisés dans l'annexe strictement confidentielle à la présente Ordonnance.

Arusha, 7 juin 2006, fait en Français.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Décision relative aux requêtes entrant à obtenir un report de délai 9 juin 2006 (ICTR-98-44-AR73(C))

(Original : Anglais)

Chambre d'appel

Juges : Mehmet Güney, Président de la formation de juges désignée ; Liu Daqun ; Wolfgang Schomburg

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Prorogation de délai, Langue de travail du Conseil de la défense, Traduction des décisions – Requête acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 116

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Édouard Karemera et consorts, Décision relative à la demande de prorogation, 27 janvier 2006 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Édouard Karemera et consorts, Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment, 18 mai 2006 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Édouard Karemera et consorts, Separate Opinion of Judge Short on Complicity in Genocide and Joint Criminal Enterprise Theory, 23 mai 2006 (ICTR-98-44)

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 (respectivement la « Chambre d'appel » et le « Tribunal ») est saisie d'une requête du Procureur intitulée *Prosecutor's Motion for Determination that the Interlocutory Appeal as of Right May proceed Immediately, for Leave to File a Written Brief on the Merits of the Appeal, and for a Scheduling Order*, déposée le 30 mai 2006 (la « Requête du Procureur »). La Requête du Procureur se rapporte à une décision rednue par la Chambre de première instance en anglais et à une opinion individuelle du juge Short exprimée également en anglais qui examinent la question de savoir si la

complicité dans le génocide est une forme de participation à la perpétration du crime ou un crime distinct[1].

2. La Chambre d'appel est également saisie de deux requêtes déposées respectivement par Mathieu Ngirumpatse et Edouard Karemera à l'effet d'obtenir le report du délai imparti pour répondre à la requête du Procureur jusqu'à ce que celle-ci et l'opinion individuelle du juge Short soient traduites en français[2].

3. L'article 116 du Règlement de procédure et de preuve du Tribunal autorise les reports de délai si la Chambre d'appel consièdre que des motifs valables le justifient. La Chambre d'appel a déjà relevé que la langue de travail des conseils de MM. Karemera et Ngirumpatse est le français et non l'anglais[3]. Elle estime dès lors que pour pouvoir répondre exhaustivement à la requête du Procureur, ils doivent disposer de la version française de celle-ci et de l'opinion individuelle du juge Short[4]. La Chambre d'appel a déjà jugé en l'espèce qu'il s'agissait d'un motif valable pour reporter un délai[5].

Dispositif

4. Par ces motifs, la Chambre d'appel ACCUEILLE les requêtes tendant au report de délai formées par MM. Karemera et Ngirumpatse. Elle ORDONNE au Greffe de fournir de toute urgence à MM. Karemera et Ngirumpatse, ainsi qu'à leurs conseils, la traduction française de la requête du Procureur, de l'opinion individuelle du juge Short et de la présente décision. A partir de la date de communication du dernier de ces documents, MM. Karemera et Ngirumpatse disposent d'un délai de 10 jours pour déposer, s'il y a lieu, leurs réponses à la requête du Procureur. Le Procureur est autorisé à présenter sa réplique dans les quatre jours suivant le dépôt de ces réponses. La Chambre d'appel ORDONNE également au greffe de l'informer de la date à laquelle les documents traduits auront été communiqués.

Fait en anglais et en français, le texte anglais faisant foi.

La Haye (Pays-Bas), le 9 juin 2006.

[Signé] : Mehmet Güney

[1] Le Procureur c. Edouard Karemera et consorts, affaire n°ICTR-98-44-T, Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment, 18 mai 2006 ; Le Procureur c. Edouard Karemera et consorts, affaire n°ICTR-98-44-T, Separate Opinion of Judge Short on Complicity in Genocide and Joint Criminal Enterprise Theory, 23 mai 2006.

[2] Requête de Ngirumpatse aux fins d'extension du délai de réponse sur le « Prosecutor's Motion for Determination that the Interlocutory Appeal as a Right May Proceed Immediately, for Leave to File a Written Brief on the Merits of the Appeal, and for a Scheduling Order », 6 juin 2006. Le Procureur n'a pas encore répondu à cette requite. Cela dit, conformément au paragraphe 18 de la Directive pratique relative à la procédure de dépôt des écritures en appel devant le tribunal, datée du 16 décembre 2002, la Chambre d'appel n'estime pas que le Procureur subirait le moindre préjudice du fait que la présente décision a été rendue avant l'expiration du délai normalement imparti pour déposer une réponse.

[3] *Le Procureur c. Edouard Karemera et consorts*, affaire n°ICTR-98-44-T, *Décision relative à la demande de prorogation*, 27 janvier 2006, par. 4 (ci-après dénommée la « Décision Karemera et consorts relative à la prorogation de délai »).

[4] La décision de la Chambre de première instance en question a déjà été communiquée aux parties en français alors que l'opinion individuelle du juge Short n'a été communiquée qu'en anglais.

[5] Décision Karemera et consorts relative à la prorogation de délai, par. 4.

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Décision faisant suite à l'appel interlocutoire interjeté par le Procureur de la décision relative au constat judiciaire
16 juin 2006 (ICTR-98-44-AR73(C))

(Original : Anglais)

Chambre d'appel

Juges : Mohamed Shahabuddeen, Président de la formation de juges désignée ; Mehmet Güney ; Liu Daqun ; Theodor Meron ; Wolfgang Schomburg

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Pas d'appel interlocutoire de droit, Pouvoir souverain d'appréciation de la Chambre de première instance d'autoriser un appel interlocutoire, Pouvoir de la Chambre de première instance de limiter le champ de l'appel interlocutoire à certaines questions, Interprétation de la volonté de la Chambre de première instance par le Chambre d'appel, Appel de l'ensemble d'une décision sur la base d'une seule question – Constat judiciaire, Conditions pour être un fait de notoriété publique : question de savoir si on peut raisonnablement remettre en question le fait, Pouvoir de la Chambre d'appel de ré-examiner l'opportunité de dresser le constat judiciaire d'un fait pertinent, Possibilité de dresser le constat judiciaire de faits ayant directement ou indirectement trait à la culpabilité de l'accusé – Etablissement d'un constat judiciaire de faits admis dans d'autres affaires, Principe de l'autorité de la chose jugée, Distinction entre les constats judiciaires établis sur base de l'article 94 (B) de ceux établis sur base de l'article 94 (A) du Règlement de procédure et de preuve, Constat fondé sur l'article 94 (B) est facultatif et est constitutif de présomptions plutôt que de faits établis, Renversement de la charge initiale de la production de la preuve et non de la charge principale de la persuasion, Analogie avec l'administration de la preuve de l'alibi – Pas de constat judiciaire de faits suffisants pour retenir la responsabilité de l'accusé, Respect de la présomption d'innocence et des droits de l'accusé – Etablissement d'un constat judiciaire sur l'existence d'un génocide en 1994 au Rwanda, Preuve du contraire inconcevable, Origine de la création du Tribunal, Intérêt manifeste pour la thèse du Procureur, Pas d'allègement de la charge de la preuve incombant au Procureur, Circonstance nécessaire pour retenir d'autres chefs d'accusation contre la personne poursuivie – Faits de notoriété publique établis : Le fait que les Hutus, les Tutsis et les Twas constituaient des groupes ethniques, Existence d'attaques généralisées ou systématiques, Génocide – Cause renvoyée à la Chambre de première instance

Instruments internationaux cités :

Directive pratique relative à la longueur des mémoires et des requêtes en appel, sections (C) (2) (a) (1) et (C) (2) (d) ; Directive pratique relative à la procédure de dépôt des écritures en appel devant le Tribunal, para. 2 et 3 ; Règlement de Procédure et de preuve, art. 7 ter (B), 73 (B), 73 (C), 89, 92 bis, 94, 94 (A) et 94 (B) ; Règlement de procédure et de preuve du TPIY, art. 94 (A) ; Statut, art. 24 (1) ; Statut de Rome de la Cour pénale internationale, art. 69 (6) ; Statut du Tribunal militaire international pour l'Allemagne, art. 21

Jurisprudence internationale et nationale citée :

Cour européenne des droits de l'homme : Klass et autres c. Allemagne, 6 septembre 1978, n° 5029/71.

T.P.I.R. : Chambre d'appel, Le Procureur c. Jean-Paul Akayesu, Arrêt, 1er juin 2001 (ICTR-96-4) ; Chambre de première instance, Le Procureur c. Elizaphan Ntakirutimana et Gérard Ntakirutimana, Décision relative à la requête du Procureur en constat judiciaire de faits admis (article 94 (B)) du Règlement de procédure et de preuve, 22 novembre 2001 (ICTR-96-10 et ICTR-96-17) ; Chambre de

première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision sur la requête du Procureur aux fins de constat judiciaire conformément aux articles 73, 89 et 94 du Règlement, 11 avril 2003 (ICTR-98-41) ; Chambre d'appel, Le Procureur c. Eliezer Niyitegeka, Jugement, 9 juillet 2004 (ICTR-96-14) ; Chambre d'appel, Le Procureur c. Pauline Nyiramasuhuko, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 septembre 2004 (ICTR-98-42) ; 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 d'appel, Le Procureur c. Juvénal Kajelijeli, Arrêt, 23 mai 2005 (ICTR-98-44A) ; Chambre d'appel, Le Procureur c. Casimir Bizimungu et consorts, Decision on Prosecution Appeal of Witness Protection Measures, 16 novembre 2005 (ICTR-99-50) ; Chambre de première instance , Le Procureur c. Édouard Karemera et consorts, Décision relative à la demande de prorogation, 27 janvier 2006 (ICTR-98-44)

T.P.I.Y. : Chambre de première instance, Le Procureur c. Duško Sikirica, Décision relative à la requite de l'accusation aux fins de dresser le constat judiciaire de faits admis dans d'autres affaires, 27 septembre 2000 (IT-95-8) ; Chambre d'appel, Le Procureur c. Stanislav Galić, Décision relative à l'appel interlocutoire interjeté en vertu de l'article 92 bis (C) du Règlement, 7 juin 2002 (IT-98-29) ; Chambre de première instance, Le Procureur c. Momčilo Krajišnik, Décision relative aux requêtes de l'Accusation aux fins du constat judiciaire de faits admis et de l'admission de déclarations écrites en application de l'article 92 bis, 28 février 2003 (IT-00-39) ; Chambre d'appel, Le Procureur c. Slobodan Milošević, Décision relative à l'appel interlocutoire interjeté par l'accusation contre la décision relative à la requête visant à faire dresser constat judiciaire de faits admis dans d'autres affaires rendue le 10 avril 2003 par la Chambre de première instance, 28 octobre 2003 (IT-02-54) ; Chambre de première instance, Le Procureur c. Vidoje Blagojević, Décision relative à la requête de l'accusation aux fins de dresser le constat judiciaire de moyens de preuve documentaires et de faits admis dans d'autres affaires, 19 décembre 2003 (IT-02-60) ; Chambre de première instance, Le Procureur c. Željko Mejakić, Décision relative à la requête de l'Accusation aux fins de constat judiciaire en application de l'article 94 (B) du Règlement, 1er avril 2004 (IT-02-65) ; Chambre d'appel, Le Procureur c. Slobodan Milošević, http://www.icty.org/x/cases/slobodan_milosevic/tdec/fr/041101.htm*Décision relative à l'appel interlocutoire formé contre la décision de la chambre de première instance relative à la commission d'office des conseils de la défense*, 1 novembre 2004 (IT-02-54) ; Chambre de première instance, Le Procureur c. Momčilo Krajišnik, Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts, 24 mars 2005 (IT-00-39) ; Chambre d'appel, Le Procureur c. Momir Nikolić, Decision on Appellant's Motion for Judicial Notice, 1er avril 2005 (IT-02-60/1) ; Chambre d'appel, Le Procureur c. Naser Orić, Décision relative à l'appel interlocutoire concernant la durée de la présentation des moyens à décharge, 20 juillet 2005 (IT-03-68) ; Chambre d'appel, Le Procureur c. Ramush Haradinaj et consorts, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying His Provisional Release, 9 mars 2006 (IT-04-84)

Afrique du Sud : Minister of Land Affairs et al. v. Stamdien et al., *4 BCLR 413 (1999)*

Australie : High Court d'Australie, Woods v. MultiSport Holdings (2002), 186 ALR 145, 7 mars 2002.

Canada : Cour de comté de l'Ontario, R. v. Potts (1990), 26 C.R. (3d) 252 ; Cour Suprême du Canada, R. v. Zundel [1992] 2 S.C.R. 731, 27 août 1992

Etats-Unis d'Amérique : 9th Circuit Court of Appeal, Mead v. United States, 257 F. 639, 642 (1919)

Royaume-Uni : Kings Bench, Dorman Long & Co., Ltd. v. Carroll and Others, 2 All ER 567 (1945) ; Court of Appeal, Mullen v. Hackney L.B.C. (1997) 1 W.L.R. 1103

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'États voisins entre le 1er janvier et le 31 décembre 1994 (respectivement la « Chambre d'appel » et le « Tribunal ») est saisie d'un recours intitulé *Appel interlocutoire interjeté par le Procureur de la décision relative au constat judiciaire – Article 73 (C) du Règlement de procédure et de preuve*, formé le 12 décembre 2005 (l'« Appel interlocutoire du Procureur » ou le « Recours interlocutoire du Procureur »).

I. Rappel de la procédure et des écritures des parties

2. Le 30 juin 2005, le Procureur a saisi la Chambre de première instance III (la « Chambre de première instance ») d'une requête intitulée *Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts* (la « Requête du Procureur »). Dans cette requête, il s'est fondé sur l'article 94 du *Règlement de procédure et de preuve* du Tribunal (le « Règlement ») pour demander que soit dressé le constat judiciaire de six faits qu'il considérait comme des « faits de notoriété publique » et de 153 autres qui, selon ses dires, avaient été « admis » par les juges dans d'autres affaires. Il avait extrait les 153 faits admis des jugements *Akayesu*, *Kayishema et Ruzindana*, *Rutaganda*, *Kajelijeli*, *Musema*, *Nahimana et consorts*, *Ndindabahizi*, *Niyitegeka*, *Ntakirutimana* et *Semanza*.

3. Par sa Décision relative à la requête du Procureur intitulée « Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts » (la « Décision contestée »), rendue le 9 novembre 2005, la Chambre de première instance a dressé le constat judiciaire de deux des six « faits de notoriété publique », ainsi que celui d'un troisième dont elle a préalablement modifié la formulation, et rejeté la Requête du Procureur pour le surplus. En vertu de l'article 73 (C) du Règlement, le Procureur a demandé l'autorisation d'interjeter appel de cette décision. La Chambre de première instance a fait droit à sa demande le 2 décembre 2005 par un acte intitulé Certification d'appel de la décision relative au constat judiciaire (la « Certification portant autorisation d'interjeter appel ») et le Procureur a interjeté appel le 12 décembre[1].

4. Joseph Nzirorera, un des accusés, a déposé le 13 décembre 2005 une requête intitulée *Joseph Nzirorera's Motion to Dismiss Issues of Interlocutory Appeal for Which Certification Was Not Granted* (la « Requête de Nzirorera ») pour demander que la Chambre d'appel limite le domaine de l'Appel interlocutoire du Procureur à la seule question sur laquelle porte, selon lui, l'autorisation de faire appel accordée par la Chambre de première instance. Le Procureur a répondu à cette requête le 15 décembre 2005[2] et Nzirorera a produit une réplique le 16 décembre 2005[3]. Le même jour, ce dernier a déposé d'autres écritures intitulées *Respondent's Brief of Joseph Nzirorera* (la « Réponse de Nzirorera ») dans lesquelles il répond à l'appel interlocutoire sur le fond. Le Procureur a présenté une réplique le 20 décembre 2005[4].

5. Le Procureur fait valoir dans sa réponse à la Requête de Nzirorera comme dans sa réplique à la Réponse de Nzirorera que celui-ci n'était pas en droit de déposer séparément une requête tendant à faire rejeter l'appel interlocutoire et une réponse au même appel. D'après lui, toute partie qui entend répondre à un appel interlocutoire n'a droit qu'à une seule réponse et doit y inclure tout argument militant contre l'appel en question. La Requête de Nzirorera étant l'acte que celui-ci a déposé en

[1] L'article 73 (C) du Règlement fait obligation aux parties de former leurs recours interlocutoires dans les sept jours suivant la date à laquelle elles ont obtenu l'autorisation d'interjeter appel. Comme le vendredi 9 décembre 2005 était un jour férié et chômé dans les services du Tribunal sis à Arusha où l'acte d'appel a été déposé, ce délai courait jusqu'au lundi suivant, c'est-à-dire jusqu'au 12 décembre.

[2] *Prosecutor's Reply to Nzirorera's Response*, 15 décembre 2005 (la « Réponse du Procureur à la requête de Nzirorera »).

[3] Reply Brief: Joseph Nzirorera's Motion to Dismiss Issues of Interlocutory Appeal for Which Certification Was Not Granted, 16 décembre 2005 (la « Réplique tendant à étayer la requête de Nzirorera »).

[4] Prosecutor's Reply to "Respondent's Brief of Joseph Nzirorera" Dated 16 December 2005, 20 décembre 2005 (la « Réplique du Procureur à la réponse de Nzirorera »).

premier lieu, le Procureur demande à la Chambre d'appel de la considérer comme sa réponse à l'appel interlocutoire pour écarter la réponse proprement dite qu'il a produite le 16 décembre[5]. Nzirorera n'a pas répondu à ces arguments du Procureur.

6. La Chambre d'appel convient avec le Procureur que Nzirorera n'avait le droit de déposer qu'une seule réponse. Aux termes du paragraphe 2 de la *Directive pratique relative à la procédure de dépôt des écritures en appel devant le Tribunal*[6], lorsqu'un appel interlocutoire est de droit, la partie adverse indique dans sa réponse

> « si elle s'oppose ou non audit appel et expos[e], le cas échéant, les raisons de cette opposition. La réponse énonce, en outre, toute objection à l'applicabilité de la disposition du Règlement sur laquelle l'Appelant a fondé son appel ».

Autrement dit, la réponse doit non seulement porter sur le fond du recours, mais aussi contenir tout argument d'ordre procédural militant pour le rejet dudit recours. Dans sa requête, Nzirorera s'oppose à ce que l'article 73 (B) du Règlement soit considéré comme un des fondements de l'appel interlocutoire, au motif que celui-ci outrepasse les limites de l'autorisation accordée en application de cette disposition. Un tel argument aurait dû faire partie de sa réponse.

7. La Chambre d'appel estime toutefois que, compte tenu des circonstances exceptionnelles caractérisant la cause, l'intérêt de la justice commande d'examiner les arguments présentés dans la Requête et la Réponse de Nzirorera. Deux raisons militent en faveur de ce point de vue. Premièrement, le conseil de Nzirorera a peut-être cru de bonne foi (bien que ce fût à tort) que la disposition de la Directive pratique relative au dépôt des écritures en appel citée plus haut ne s'appliquait pas aux appels interlocutoires autorisés par une Chambre de première instance, la Chambre d'appel n'ayant pas encore statué sur cette question[7]. Cela étant, la sanction serait disproportionnée à la violation des textes qu'il a commise si la Chambre d'appel écartait complètement la Réponse de Nzirorera et examinait donc sur le fond les questions soulevées en appel sans tenir compte d'un seul de ses arguments.

8. Deuxièmement, l'acte d'appel même du Procureur viole la *Directive pratique relative à la longueur des mémoires et des requêtes en appel*[8] dont la section (C) (2) (a) (1) se lit comme suit : « La requête d'une partie qui souhaite interjeter appel d'une décision pour laquelle un recours est de droit n'excède pas 15 pages ou 4 500 mots ». S'appuyant plutôt sur la section (C) (2) (d)[9] de cette directive, le Procureur a déposé un document dont l'original comprend 28 pages [et la traduction 27 pages], sans compter les annexes. Or, la disposition retenue par le Procureur ne s'applique qu'aux cas où la Chambre d'appel a ordonné aux parties ou leur a expressément accordé l'autorisation de déposer des « mémoires » sur le fond d'un appel interlocutoire, c'est-à-dire aux cas où la Chambre d'appel considère que la complexité des questions soulevées justifie le dépôt de conclusions plus volumineuses que celles autorisées par les dispositions de droit commun des alinéas *a* et *c*. La Chambre d'appel n'a ni ordonné ni autorisé cette mesure exceptionnelle en l'espèce. Aucun des accusés ne s'étant opposé à l'appel du Procureur sur cette base, la Chambre d'appel n'est pas obligée

[5] Voir la Réponse du Procureur à la requête de Nzirorera, par. 1 et 2, et la Réplique du Procureur à la réponse de Nzirorera, par. 2 et 3.
[6] 16 septembre 2002 (la « Directive pratique relative au dépôt des écritures en appel »).
[7] La Directive pratique relative au dépôt des écritures en appel distingue entre les recours qui sont « de droit » et ceux qui sont « soumis à l'autorisation d'une formation de trois juges de la Chambre d'appel ». Elle ne fait pas expressément état des recours autorisés par une Chambre de première instance (suivant une procédure qui a été créée dans le cadre d'une modification du Règlement après l'adoption de la directive). La Chambre d'appel estime cependant qu'une fois que la Chambre de première instance a donné le feu vert nécessaire, ces recours deviennent des recours « de droit », puisqu'ils sont autorisés par l'article 73 (B) du Règlement et les appelants n'ont pas besoin de solliciter une autorisation supplémentaire de la Chambre d'appel pour les former. Au demeurant, les dispositions de la directive pratique qui régissent le contenu des réponses sont les mêmes pour toutes les catégories d'appel interlocutoire. Voir la Directive pratique relative au dépôt des écritures en appel, par. 2 et 5.
[8] 16 septembre 2002.
[9] Appel interlocutoire du Procureur, note 1.

de sanctionner la violation des textes qu'il a ainsi commise[10]. Compte tenu du fait que tous les accusés ont déjà déposé leurs réponses à l'appel du Procureur, que cet appel soulève des questions importantes et que le Procureur – à l'instar de Nzirorera – se serait vraisemblablement mépris sur l'applicabilité des diverses dispositions de la directive pratique, la Chambre d'appel estime que la solution la plus équitable consiste à juger que l'Appel interlocutoire du Procureur a été valablement interjeté. Cette démarche offre une autre raison de ne pas faire abstraction des arguments exposés dans la Réponse de Nzirorera, par souci d'équité envers l'accusé.

9. Pour les raisons susmentionnées, la Chambre d'appel approuve le fait que Nzirorera a scindé la réponse autorisée par le paragraphe 2 de la Directive pratique relative au dépôt des écritures en appel en deux documents distincts (à savoir la Requête de Nzirorera et la Réponse de Nzirorera). Elle examinera par conséquent les moyens présentés dans les deux documents. La Réponse du Procureur à la requête de Nzirorera et la Réplique du Procureur à la réponse de Nzirorera sont dès lors aussi recevables en ce qu'elles constituent essentiellement une version en deux parties de la réplique autorisée par le paragraphe 3 de la Directive pratique relative au dépôt des écritures en appel. La Chambre d'appel ne prendra toutefois pas en compte les arguments présentés dans la Réplique tendant à étayer la requête de Nzirorera. En effet, aucune des dispositions de la directive pratique n'autorise un intimé à déposer des conclusions supplémentaires à la suite de la réplique de l'appelant et les raisons évoquées plus haut ne suffisent pas pour autoriser Nzirorera à le faire.

10. La Chambre d'appel a différé l'examen du recours du Procureur parce qu'elle attendait les réponses des autres accusés, à savoir Édouard Karemera et Mathieu Ngirumpatse, qui les ont finalement déposées le 22 mai 2006[11], soit plusieurs mois après les écritures susmentionnées. Cet intervalle s'explique par de longs retards pris dans la réalisation et la communication de plusieurs traductions que la Chambre d'appel avait ordonné de produire[12]. Les deux réponses ont été déposées dans le délai imparti par la Chambre d'appel dans sa Décision relative à la prorogation de délai (10 jours après la communication des traductions en question). Elles ne sont donc pas tardives. Le Procureur a produit une « réplique globale » à ces réponses le 25 mai 2006.

II. Éventail des motifs pour lesquels l'autorisation d'interjeter appel a été accordée

11. Dans son appel interlocutoire, le Procureur allègue que la Chambre de première instance a commis une erreur de droit en ce qu'elle a refusé de considérer quatre faits comme des faits de notoriété publique au sens de l'article 94 (A) du Règlement pour en dresser le constat judiciaire, à savoir les faits n°1, 2, 5 et 6 énoncés à l'annexe A de l'appel interlocutoire. Il allègue en outre qu'elle a commis une erreur de droit et de fait en ce qu'elle a refusé de considérer 147 faits énoncés à l'annexe B de son appel interlocutoire comme des faits admis par les juges dans d'autres affaires au sens de l'article 94 (B) du Règlement pour en dresser le constat judiciaire[13]. En revanche, il ne fait pas grief à la Chambre de première instance d'avoir refusé de dresser le constat judiciaire de six autres faits[14].

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[10] Voir l'article 5 du Règlement.

[11] Réponse à l'appel interlocutoire interjeté par le Procureur de la décision relative au constat judiciaire, 20 mai 2006 (la « Réponse de Karemera ») ; Mémoire de M. Ngirumpatse en réponse au mémoire d'appel du Procureur contre la « Décision relative à la requête du Procureur intitulée "Motion for judicial notice of facts of common knowledge and adjudicated facts" », 22 mai 2006 (la « Réponse de Ngirumpatse »).

[12] Voir la *Décision relative à la demande de prorogation*, 27 janvier 2006 (la « Décision relative à la prorogation de délai »), par. 8 (qui prescrit que les réponses en question soient déposées dans un délai de 10 jours à compter de la date à laquelle « le dernier de […] quatre documents traduits aura été communiqué [à] l'accusé et [à] son coaccusé M. Karemera »). Les versions françaises des quatre documents visés ─ la Certification portant autorisation d'interjeter appel, la Décision relative à la prorogation de délai, l'Appel interlocutoire du Procureur et la Décision contestée ─ ont été déposées respectivement les 24 janvier, 7 février, 6 mars et 10 avril 2006. Toutefois, le Greffe a confirmé que la Décision contestée n'avait été communiquée aux conseils de Karemera et à ceux de Ngirumpatse que le 11 mai 2006. En application de la Décision relative à la prorogation de délai et de l'article 7 *ter* (B) du Règlement, la date butoir des réponses était donc le 22 mai 2006. Elles ont été déposées dans le délai imparti.

[13] Appel interlocutoire du Procureur, par. 3.

[14] *Ibid*., par. 5. Les faits en question sont énoncés aux paragraphes 31, 32 et 75 à 78 de l'annexe B de l'Appel interlocutoire du Procureur.

12. L'accusé Joseph Nzirorera estime que le recours du Procureur déborde le cadre défini dans la Certification portant autorisation d'interjeter appel. Selon lui, cette autorisation n'avait trait qu'à la question juridique de savoir s'il est permis de dresser le constat judiciaire de faits admis dans d'autres affaires qui touchent directement ou indirectement à la culpabilité de l'accusé [15].

13. Aux termes de l'article 73 (B) du Règlement, une Chambre de première instance saisie d'une requête tendant à faire accorder l'autorisation de former un recours interlocutoire contre une décision peut certifier à cet effet la décision en cause si elle estime que celle-ci « touche une question susceptible de compromettre sensiblement l'équité et la rapidité du procès, ou son issue », à tel point que « son règlement immédiat par la Chambre d'appel pourrait concrètement faire progresser la procédure ». L'octroi de la certification est laissé à l'appréciation souveraine de la Chambre : l'article 73 du Règlement ne prévoit aucun appel interlocutoire de droit[16]. La Chambre d'appel a déjà reconnu que le pouvoir souverain d'appréciation de la Chambre de première instance qui lui permet de décider s'il convient d'autoriser un appel interlocutoire a pour corollaire la latitude de limiter le champ de l'appel interlocutoire à certaines questions[17]. En l'espèce, c'est donc la Certification de la Chambre de première instance portant autorisation d'interjeter appel qui dicte les questions que la Chambre d'appel peut trancher dans sa décision. En conséquence, la Chambre d'appel se doit d'interpréter le champ d'application de cette certification.

14. Malheureusement, le libellé de la Certification portant autorisation d'interjeter appel est loin d'être clair à ce sujet. Au paragraphe 3 de ce document, la Chambre de première instance reconnaît que le Procureur a mis en avant

> « un certain nombre de questions […] dont il estime qu'elles remplissent les deux critères requis pour justifier le recours au pouvoir discrétionnaire de la Chambre, en application de l'article 73 (B) du Règlement ».

Elle poursuit en ces termes :

> 4. L'un des points soulevés dans la décision contestée qui, aux dires du Procureur, justifie le recours au pouvoir discrétionnaire de la Chambre est le refus de celle-ci de dresser le constat judiciaire d'un certain nombre de faits, en tant que faits admis, au motif qu'ils porteraient directement ou indirectement sur la culpabilité des accusés, en particulier dans l'optique de leur participation alléguée à une entreprise criminelle commune. Le Procureur fait valoir qu'une interprétation large de cet argument conduirait à la conclusion qu'aucun fait ne devrait donner lieu à un constat judiciaire, étant donné que la majorité des faits présentés par le Procureur sont censés prouver directement ou indirectement la culpabilité des accusés.
>
> 5. De l'avis de la Chambre, ce point satisfait aux deux critères à remplir en vue d'une certification d'appel.
>
> […]
>
> PAR CES MOTIFS, LA CHAMBRE FAIT DROIT, en vertu de l'article 73 (B) du Règlement**,** à la demande de certification d'appel interlocutoire de la décision intitulée « *Decision on Prosecution Motion for Judicial Notice* », rendue le 9 novembre 2005[18].

La Chambre de première instance ne fait nullement mention des autres questions pour lesquelles l'autorisation d'interjeter appel a été demandée. Il s'avère donc d'une part qu'elle s'est fondée sur une seule question pour autoriser l'appel interlocutoire et d'autre part que le dispositif de la Certification portant autorisation d'interjeter appel ne prétend pas limiter le champ d'application de l'autorisation à cette question.

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[15] Requête de Nzirorera, par. 5.
[16] À la différence de l'article 72 (B) (i) qui prévoit le droit de former des recours interlocutoires contre les décisions touchant à l'exception d'incompétence.
[17] Voir Le Procureur c. Nyiramasuhuko, affaire n°ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 septembre 2004, par. 7.
[18] Certification portant autorisation d'interjeter appel, par. 4 et 5.

15. Selon la Chambre d'appel, même si on peut valablement conclure de l'examen de la certification que son champ d'application a été limité à une seule question, il est plus probable que la Chambre de première instance n'avait pas l'intention d'imposer cette limite. Premièrement, au paragraphe 3 de sa décision, elle dit expressément que le Procureur a sollicité l'autorisation d'interjeter appel pour « un certain nombre de questions ». Il serait étrange qu'elle examine par la suite une de ces questions dans le détail et fasse complètement abstraction des autres, à moins qu'elle n'ait jugé inutile de statuer sur celles-ci dès lors qu'elle avait tranché la première, la question réglée étant suffisante à elle seule pour justifier l'autorisation de former tout le recours envisagé. Par ailleurs, comme le fait remarquer le Procureur[19], le raisonnement suivi par la Chambre de première instance pour accorder la certification portait en général sur l'utilité que le constat judiciaire peut avoir dans l'accélération du procès. Ce raisonnement s'applique également bien aux autres questions soulevées par le Procureur[20]. Dans ces circonstances, à supposer que la Chambre de première instance ait voulu refuser purement et simplement d'autoriser l'appel sur les autres questions, sa démarche pourrait constituer un manquement à l'obligation de motiver sa décision si elle se bornait à omettre l'examen de ces questions, sans la moindre explication, pour exprimer son refus[21].

16. Il n'est ni illogique ni interdit qu'une Chambre de première instance accorde l'autorisation de faire appel de l'ensemble d'une décision sur la base d'une seule question qui, à son avis, satisfait aux critères prévus par l'article 73 (B) du Règlement. Bien au contraire, c'est une démarche conforme à la lettre de cet article qui demande uniquement que la Chambre de première instance recherche s'il y a « une question » remplissant certaines conditions déterminées pour accorder l'autorisation de faire réexaminer en cours de procès telle ou telle décision et n'impose pas l'obligation de limiter le réexamen de la décision à la question retenue. Ainsi, bien que la Chambre d'appel ait conclu que la Chambre de première instance *pouvait* limiter la possibilité de faire réexaminer ses décisions à la question ou aux questions qui, d'après elle, remplissent clairement les conditions fixées par l'article 73 (B), elle n'est pas tenue d'agir de la sorte.

17. Cet éclairage cadre avec le souci d'assurer l'équité et la rapidité du procès qui caractérise l'article 73 du Règlement. Les appels interlocutoires prévus par l'article 73 interrompent la procédure et ne doivent dès lors être autorisés que s'ils présentent un grand avantage, c'est-à-dire si la Chambre de première instance estime qu'il y a une question importante qui mérite d'être tranchée immédiatement par la Chambre d'appel. Mais une fois qu'une question de cette nature a été mise en évidence et un appel interlocutoire autorisé, le fait d'admettre que la Chambre d'appel règle par la même occasion certaines questions connexes à celle retenue ne risque guère de prolonger l'interruption de la procédure et peut au bout du compte contribuer à assurer l'équité et la rapidité recherchées.

18. Nzirorera fait valoir que saisie d'un recours interlocutoire qu'il avait formé avant celui du Procureur, la Chambre d'appel avait considéré que le champ d'application de l'autorisation d'interjeter appel était limité à la question expressément retenue par la Chambre de première instance[22]. Or, la situation n'était pas la même qu'en l'espèce. Comme en l'espèce, la Chambre de première instance n'avait pas précisé si l'autorisation qu'elle accordait pour que sa décision soit attaquée portait uniquement sur la question qu'elle avait examinée (celle de savoir si les juges *ad litem* étaient compétents pour confirmer des actes d'accusation) ou également sur une question non mentionnée (celle des sanctions infligées au conseil de Nzirorera à raison de la requête qui avait donné lieu à cette

[19] Réponse du Procureur à la requête de Nzirorera, par. 7.
[20] Voir la Certification portant autorisation d'interjeter appel, par. 5.
[21] Le Statut du Tribunal international ne prévoit cette obligation que pour les jugements rendus sur le fond (voir l'article 22.2), mais la Chambre d'appel la retient aussi pour les décisions relatives à des requêtes. Voir, par exemple, *Le Procureur c. Haradinaj et consorts,* affaire n°IT-04-84-AR65.2, *Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying His Provisional Release*, 9 mars 2006, par. 10.
[22] Requête de Nzirorera, par. 9 à 13, citant la décision intitulée *Decision of Interlocutory Appeals Regarding Participation of Ad Litem Judges*, 11 juin 2004.

décision)[23]. Ainsi, comme en l'espèce, la Chambre d'appel était obligée de déduire l'intention de la Chambre de première instance des circonstances de la cause et du raisonnement de la Chambre. Par contre, il ressortait clairement des circonstances de la cause que la Chambre de première instance n'avait pas eu l'intention de certifier la question des sanctions, car juste une ou deux minutes plus tard, lors de la même audience contradictoire, elle avait rejeté la demande de Nzirorera qui tentait d'obtenir l'autorisation de former un recours contre une autre sanction infligée au conseil. Elle avait déclaré à cet égard qu'

> « un appel contre des sanctions financières ne constitue pas un motif entrant dans le cadre des appels interlocutoires, dans la mesure où la décision sur les sanctions financières ne touche pas une question susceptible de compromettre [sensiblement] l'équité et la rapidité du procès ou son issue, et son règlement par la Chambre ne pourrait pas faire progresser la procédure[24] ».

Compte tenu de cette déclaration, il était évident que la Chambre de première instance n'avait pas eu l'intention d'autoriser des appels interlocutoires portant sur des sanctions financières. En outre, à la différence du cas présent, la raison avancée par la Chambre de première instance pour autoriser un appel interlocutoire sur la question des juges *ad litem* n'avait aucun rapport avec la question des sanctions. En l'espèce, comme il a été relevé plus haut, la raison pour laquelle la Chambre de première instance a accepté que la Chambre d'appel détermine en cours de procès les questions qui peuvent à bon droit faire l'objet d'un constat judiciaire est valable pour tous les points de l'appel du Procureur.

19. Les autres décisions invoquées par Nzirorera ne confortent pas sa thèse non plus. Dans l'affaire *Le Procureur c. Nyiramasuhuko*[25], la Chambre de première instance avait été saisie de deux demandes d'autorisation d'interjeter appel bien distinctes. Elle a fait droit à ces demandes dans deux décisions distinctes. Par erreur, l'appelant a tenu compte d'une seule des deux autorisations obtenues pour former son recours, présumant que la Chambre d'appel statuerait également sur les questions apparentées certifiées dans l'autre décision de la Chambre de première instance. La Chambre d'appel a jugé qu'aucun recours n'ayant été formé en vertu de la seconde autorisation, elle n'était pas saisie de la seconde question et ne pouvait donc pas statuer sur celle-ci. Dans l'affaire *Le Procureur c. Bizimungu et consorts*[26], le Procureur avait présenté plusieurs demandes tendant à faire réviser les mesures de protection des témoins à décharge pour chacun des quatre accusés. La Chambre de première instance a rejeté trois de ces demandes et accordé au Procureur l'autorisation d'interjeter appel. Elle ne s'était pas encore prononcée sur la quatrième demande. Statuant sur l'appel interlocutoire du Procureur en ce qui concerne les trois demandes déjà rejetées, la Chambre d'appel a déclaré, comme on pouvait s'y attendre, qu'il serait prématuré de trancher les questions soulevées dans la quatrième demande.

20. Compte tenu de ce qui précède, la Chambre d'appel juge que la Chambre de première instance entendait autoriser le Procureur à faire appel de la Décision contestée sur toutes les questions soulevées dans son recours interlocutoire. En conséquence, elle rejette la Requête de Nzirorera.

21. Il convient cependant de préciser que lorsqu'elle entreprend d'examiner un recours interlocutoire dont le champ ne se limite pas aux questions qui, d'après la Chambre de première instance, remplissent clairement les conditions prévues par l'article 73 (B) du Règlement, la Chambre d'appel ne s'intéresse pas aux sujets dont l'examen ne fera pas concrètement progresser la procédure. Elle relève à ce propos l'argument de Karemera selon lequel le Procureur n'a, dans l'ensemble, pas établi l'existence d'erreurs invalidant la décision de la Chambre de première instance ou ayant entraîné un déni de justice au sens de l'article 24 (1) du Statut[27]. S'il est vrai que l'article 24 (1) s'applique spécialement aux recours formés après le procès contre la décision finale de la Chambre de première instance, il n'en reste pas moins qu'en cas d'appel interlocutoire, même lorsque l'autorisation prévue

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[23] Compte rendu de l'audience du 7 avril 2004, p. 59 et 60.
[24] *Ibid*., p. 60.
[25] Affaire n°ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 septembre 2004.
[26] Affaire n°ICTR-99-50-AR73, *Decision on Prosecution Appeal of Witness Protection Measures*, 16 novembre 2005 (la « Décision *Bizimungu* de la Chambre d'appel sur les mesures de protection de témoins »).
[27] Réponse de Karemera, p. 2.

par l'article 73 (B) du Règlement a été accordée, la Chambre d'appel n'a pas l'habitude de se prononcer sur des erreurs invoquées qui ne portent pas à conséquence[28]. Elle tiendra compte de ce principe lors de l'examen de chacune des allégations d'erreurs du Procureur.

III. Constat judiciaire de faits de notoriété publique

22. L'article 94 (A) du Règlement dispose que « [l]a Chambre de première instance n'exige pas la preuve de ce qui est de notoriété publique, mais en dresse le constat judiciaire ». Comme l'a relevé à juste titre la Chambre de première instance[29], l'application de cette règle n'est pas facultative : une fois qu'elle a conclu qu'un fait est « de notoriété publique », la Chambre de première instance doit en dresser le constat judiciaire. À ce propos, la Chambre d'appel a déclaré dans l'arrêt *Semanza* ce qui suit :

> 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 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.[30] [traduction]

23. 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 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 lorsqu'elle réexamine les décisions de première instance, cette règle ne s'applique pas aux faits de notoriété publique. Selon Nzirorera, la Chambre d'appel devrait s'en remettre à la liberté d'appréciation de la Chambre de première instance en ce qui concerne l'« admissibilité des moyens de preuve » et « la façon dont les faits doivent être établis au procès[31] » [traduction]. Or, la disposition spéciale et impérative de l'article 94 (A) du Règlement l'emporte sur la règle générale qui confère à la Chambre de première instance un pouvoir souverain d'appréciation sur ces questions. Comme la Chambre d'appel l'a souligné plus haut, il n'est pas loisible à la Chambre de première instance de décider qu'un fait « de notoriété publique » sera obligatoirement établi par des éléments de preuve au procès. Pour ces raisons, toute décision par laquelle une Chambre de première instance statue sur l'opportunité de dresser le constat judiciaire d'un fait pertinent[32] en vertu de l'article 94 (A) du Règlement peut être réexaminée en appel.

24. Le Procureur avait demandé à la Chambre de première instance de dresser en vertu de l'article 94 (A) le constat judiciaire de six faits qui, selon lui, étaient de notoriété publique. Sa demande a été accueillie pour les faits n°3 et 4 (la qualité d'État partie à divers traités acquise par le Rwanda), mais rejetée pour les autres faits, à cette exception que la Chambre de première instance a dressé le constat judiciaire du fait n°1 après en avoir modifié la formulation. À présent, la Chambre d'appel va

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[28] Voir Le Procureur c. Orić, affaire n°IT-03-68-AR73.2, Décision relative à l'appel interlocutoire concernant la durée de la présentation des moyens à décharge, 20 juillet 2005, par. 9 et note de bas de page n° 25.
[29] Décision contestée, par. 5.
[30] *Le Procureur c. Semanza*, affaire n°ICTR-97-20-A, Arrêt, 20 mai 2005, par. 194 (les notes de bas de page n'ont pas été reproduites) (l'« Arrêt *Semanza* »).
[31] Réponse de Nzirorera, par. 41 et 42.
[32] Comme l'indique Nzirorera (voir la Réponse de Nzirorera, par. 41), une Chambre de première instance n'est pas tenue de dresser le constat judiciaire de faits qui ne se rapportent pas à l'affaire dont elle est saisie, même si ce sont des « faits de notoriété publique ». Reste, bien entendu, que la Chambre de première instance « n'exige pas la preuve » de tels faits [voir l'article 94 (A) du Règlement], puisque les éléments de preuve tendant à établir un fait sans intérêt seraient de toute façon inadmissibles au regard de l'article 89 (C) du Règlement. Voir *Le Procureur c. Hadžihasanović et Kubura*, affaire n°IT-01-47-T, *Décision finale relative au constat judiciaire de faits admis dans d'autres affaires*, 20 avril 2004 (qui précise que « la Chambre a pour obligation de vérifier, au regard de l'article 89 (C) du Règlement, la pertinence de ces quatre Faits Définitivement Proposés avant d'en dresser le constat judiciaire »). La vérification de la pertinence d'un fait est circonscrite par diverses règles de droit, mais, dès lors qu'elle s'effectue dans le cadre juridique approprié, la Chambre de première instance jouit d'une certaine marge d'appréciation.

examiner les arguments avancés par le Procureur en appel au sujet des faits portant les numéros 1, 2, 5 et 6.

Fait n° 1: Le fait que les Hutus, les Tutsis et les Twas constituaient des groupes ethniques

25. Le Procureur avait demandé que soit dressé le constat judiciaire du fait suivant : « 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[33] ». Au lieu de cela, la Chambre de première instance a dressé le constat judiciaire de « l'existence des Twas, des Tutsis et des Hutus comme groupes protégés au sens de la Convention sur le génocide », faisant observer que cette classification était conforme à la jurisprudence du Tribunal et que lesdits groupes se caractérisaient par « leur stabilité et leur permanence[34] ». Le Procureur fait valoir que la Chambre de première instance aurait dû employer le terme « ethnique » pour s'aligner sur l'arrêt *Semanza*. Il dit à juste titre que l'arrêt *Semanza* a reconnu que les Tutsis formaient un groupe « ethnique », mais ne tente pas de prouver que la formulation choisie par la Chambre de première instance risque de lui porter préjudice ou de rendre le procès moins équitable et rapide. Selon la Chambre d'appel, cette formulation n'est pas susceptible d'entraîner de telles conséquences, puisqu'elle dégage aussi (ou peut-être plus clairement encore) le Procureur de la charge de produire des éléments de preuve pour établir que le groupe tutsi était protégé au sens de la Convention sur le génocide. La Chambre d'appel n'a donc pas à rechercher si la Chambre de première instance a commis une erreur en ce qu'elle a choisi de ne pas adopter la formulation du Procureur et – comme les accusés n'ont pas interjeté appel – conclu que la qualité de groupe protégé était un fait de notoriété publique. Cela étant, elle rejette l'appel interlocutoire du Procureur sur ce point.

Faits n°2 et 5 : Existence d'attaques généralisées ou systématiques

26. Le deuxième fait dont le Procureur avait sollicité le constat judiciaire est ainsi libellé :

> La situation suivante a existé au Rwanda entre le 6 avril et le 17 juillet 1994 : sur toute l'étendue du Rwanda, des attaques généralisées ou systématiques ont été dirigées contre une population civile en raison de son appartenance au groupe ethnique tutsi. Au cours de ces attaques, des citoyens rwandais ont tué des personnes considérées comme des Tutsis ou porté gravement atteinte à leur intégrité physique ou mentale. Ces attaques ont entraîné la mort d'un grand nombre de personnes appartenant à l'ethnie tutsie.[35]

La Chambre de première instance a rejeté la demande du Procureur, au motif que le constat sollicité avait trait à « une conclusion juridique qui constitue un élément d'un crime contre l'humanité », que « [c]haque fois qu'il allègue la commission d'un crime contre l'humanité, le Procureur doit fournir la preuve de l'existence d'une telle attaque » et qu'elle « estime en conséquence qu'il ne peut en être dressé un constat judiciaire[36] ». S'appuyant essentiellement sur les mêmes raisons, elle a aussi refusé de dresser le constat judiciaire du cinquième fait, à savoir qu' « entre le 1er janvier et le 17 juillet 1994, un conflit armé non international s'est déroulé au Rwanda[37] ».

27. Le Procureur soutient en appel que la Chambre de première instance aurait dû se conformer à l'arrêt *Semanza* qui reconnaît que ces faits sont « de notoriété publique ». Nzirorera répond qu'ils sont raisonnablement contestables et doivent être établis par des éléments de preuve. De plus, il cite diverses décisions antérieures à l'arrêt *Semanza* dans lesquelles les Chambres de première instance ont refusé d'en dresser le constat judiciaire[38] et relève qu'à la différence du cas présent, le caractère « généralisé ou systématique » des attaques n'a pas été contesté par l'accusé dans l'affaire *Semanza*[39].

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[33] Voir l'Appel interlocutoire du Procureur, annexe A, par. 1.
[34] Décision contestée, par. 8.
[35] Appel interlocutoire du Procureur, annexe A, par. 2.
[36] Décision contestée, par. 9.
[37] Appel interlocutoire du Procureur, annexe A, par. 5 ; Décision contestée, par. 11.
[38] Réponse de Nzirorera, par. 58, 61 et 62.
[39] *Ibid*., par. 66 à 68.

Ngirumpatse avance des arguments similaires et ajoute qu'il est contestable non seulement que les attaques visées aient été perpétrées uniquement contre les Tutsis et en raison de leur appartenance ethnique[40], mais encore que le conflit ait vraiment revêtu un caractère non international[41]. Nzirorera et Karemera déclarent que les qualificatifs « généralisées et systématiques » et « non international » sont des éléments juridiques et non pas factuels et qu'ils ne sauraient donc faire l'objet d'un constat judiciaire[42].

28. Dans l'arrêt *Semanza*, la Chambre d'appel a dit ce qui suit :

> Comme l'indiquent ces extraits, la Chambre de première instance a trouvé un juste équilibre entre le droit reconnu à l'appelant par l'article 20 (3) du Statut et l'application de la théorie du constat judiciaire en s'assurant que les faits constatés judiciairement n'étaient pas de ceux qui serviraient à établir la responsabilité pénale de l'appelant. Elle n'a ainsi retenu que des faits notoires à caractère général qui ne sont pas l'objet d'une contestation raisonnable, notamment que les citoyens rwandais étaient classés par groupes ethniques entre le mois d'avril et le mois de juillet 1994, que des attaques généralisées ou systématiques dirigées contre une population civile en raison de son appartenance à l'ethnie tutsie ont été perpétrées dans la pays durant cette période, qu'un conflit armé ne présentant pas un caractère international s'est déroulé au Rwanda entre le 1er janvier et le 17 juillet 1994, que le Rwanda a adhéré à la *Convention pour la prévention et la répression du crime de génocide* de 1948 le 16 avril 1975 et qu'à l'époque visée, le Rwanda était un État partie aux Conventions de Genève du 12 août 1949 et au Protocole additionnel II du 8 juin 1977. La Chambre d'appel estime que le constat judiciaire ainsi dressé ne dégageait pas le Procureur de la charge de la preuve qui lui incombait. Il n'avait d'incidence que sur la manière dont le Procureur pouvait s'acquitter du volet de cette charge qui ne concernait pas les actes de l'appelant. Pour déterminer la responsabilité personnelle de l'appelant, la Chambre de première instance s'est fondée sur des faits qu'elle avait jugé établis à la lumière des éléments de preuve produits au procès.[43] [traduction]

29. Il en ressort que la Chambre d'appel a déjà jugé que l'existence d'attaques généralisées ou systématiques dirigées contre une population civile en raison de son appartenance au groupe ethnique tutsi et celle d'un conflit armé non international sont des faits notoires qui ne font pas l'objet d'une contestation raisonnable. La Chambre de première instance était donc tenue d'en dresser le constat judiciaire, d'autant plus que le constat visé par l'article 94 (A) du Règlement n'est pas laissé à son appréciation souveraine. Qui plus est, les motifs qu'elle a invoqués pour s'abstenir de le faire n'étaient pas valables. Certes, la notion d' « attaque généralisée et systématique dirigée contre une population civile » et celle de « conflit armé ne présentant pas un caractère international » ont une signification juridique, mais elles représentent des situations factuelles et peuvent ainsi constituer des « faits de notoriété publique ». Peu importe qu'une idée soit exprimée par des termes juridiques ou non (à condition que ces termes soient définis d'une manière suffisamment appropriée pour que nul ne puisse raisonnablement douter qu'ils s'appliquent au juste à la situation évoquée)[44]. L'important est de savoir si on peut raisonnablement la remettre en question. Ni la Chambre de première instance ni l'un des accusés n'ont fourni de bonnes raisons de contester l'exactitude des faits susmentionnés.

30. Dans le même ordre d'idées, il importe peu que ces faits caractérisent un des éléments constitutifs de certains des crimes retenus et que l'élément en question soit de ceux dont le Procureur est normalement tenu d'établir l'existence[45]. Les éléments constitutifs des infractions ne sont pas exclus du champ d'application de l'article 94 (A) du Règlement. À n'en pas douter, le mécanisme prévu par l'article 94 (A) allège parfois la charge de la preuve de certains points des accusations

[40] Réponse de Ngirumpatse, par. 7.
[41] *Ibid*., par. 8.
[42] Réponse de Karemera, p. 4 ; Réponse de Nzirorera, par. 50, 52 et 53.
[43] Arrêt *Semanza*, par. 192.
[44] Par exemple, les juridictions ont coutume de dresser le constat judiciaire de l'existence d'un état de guerre alors que cette notion a une signification juridique. Voir, par exemple, l'affaire *Mead v. United States*, 257 F. 639, 642 (U.S. 9th Cir. Ct. App. 1919) ; voir aussi *infra*, note 46 (où sont cités d'autres exemples de constat judiciaire incluant des concepts juridiques).
[45] Décision attaquée, par. 9 et 11.

portées par le Procureur. Toutefois, loin de modifier la charge de la preuve, il fournit tout simplement au Procureur un autre moyen de s'en acquitter, comme l'a précisé la Chambre d'appel dans l'Arrêt *Semanza*. La Chambre d'appel relève que la pratique du constat judiciaire de faits de notoriété publique est bien établie en droit pénal international[46] et dans les juridictions nationales[47]. Parmi ces faits figurent des événements et phénomènes historiques notoires tels que l'holocauste perpétré par les nazis, le régime d'apartheid de l'Afrique du Sud, les guerres et la montée du terrorisme[48].

31. La Chambre d'appel considère également que rien n'autorise à contester l'exactitude du dernier volet du deuxième fait qui est ainsi libellé :

> « Au cours [des] attaques [perpétrées en 1994], des citoyens rwandais ont tué des personnes considérées comme des Tutsis ou porté gravement atteinte à leur intégrité physique ou mentale. Ces attaques ont entraîné la mort d'un grand nombre de personnes appartenant à l'ethnie tutsie ».

Ce volet cadre non seulement avec chacun des jugements et des arrêts rendus par le Tribunal, mais aussi avec les récits historiques presque tous concordants qu'on trouve dans des sources telles que les encyclopédies et les livres d'histoire[49]. Il est de notoriété publique.

32. Il s'ensuit que c'est à tort que la Chambre de première instance n'a pas dressé le constat judiciaire des faits n°2 et 5 en vertu de l'article 94 (A) du Règlement.

Fait n° 6 : Génocide

33. Le Procureur avait demandé à la Chambre de première instance de dresser le constat judiciaire du fait suivant : « Entre le 6 avril et le 17 juillet 1994, un génocide a été perpétré au Rwanda contre le groupe ethnique tutsi[50] ». La Chambre a rejeté cette demande. Ayant précisé que pour réussir à faire déclarer un accusé coupable de génocide, le Procureur doit établir le rôle que l'intéressé a joué dans le génocide et l'état d'esprit qu'il avait, elle a tenu le raisonnement reproduit ci-après :

> Par conséquent, qu'un génocide ait eu lieu ou non au Rwanda, le Procureur doit quand même établir la responsabilité pénale des accusés pour les chefs retenus dans l'acte d'accusation. Dresser le constat judiciaire d'un tel fait comme étant de notoriété publique n'a aucun effet sur les moyens à charge puisqu'il ne s'agit pas d'un fait à prouver. Dans le cas d'espèce, où le Procureur affirme que les accusés sont responsables de crimes commis à travers tout le Rwanda, le fait de dresser le constat judiciaire du fait qu'un génocide a eu lieu dans ce pays donnerait l'impression que la charge de la preuve qui incombe au Procureur est allégée.[51]

34. En appel, le Procureur soutient que le fait qu'un génocide s'est produit au Rwanda en 1994 est universellement connu – comme l'attestent, entre autres, des rapports établis par l'Organisation des

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[46] Voir le Statut du Tribunal militaire international pour l'Allemagne, art. 21, le Statut de Rome de la Cour pénale internationale, art. 69.6), et le Règlement de procédure et de preuve du TPIY, art. 94 (A).

[47] Voir par exemple, le Code de procédure pénale allemand (*Strafprozeßordnung*), art. 244.3) ; l'affaire *R. v. Potts*, 26 C.R. (3d) 252, par. 15 (qui déclare qu'au Canada, « les juridictions ont le devoir de dresser le constat judiciaire de faits que connaissent dans l'ensemble les personnes intelligentes » [traduction]) ; l'affaire *Mullen v. Hackney* L.B.C. (U.K. 1997) 1 W.L.R. 1103, CA (Civ. Div.), Archbold 2004, 10-71 ; l'affaire *Woods v. Multi-Sport Holdings* (2002), *High Court* d'Australie, 186 ALR 145, par. 64 ; et les *Federal Rules of Evidence* des États-Unis d'Amérique, art. 201.

[48] Voir, par exemple, l'affaire *R. v. Zundel* (Can. 1990) 53 C.C.C. (3d) 161, (sub nom. *R. v. Zundel* (No. 2)) 37 O.A.C. 354, par. 21 (holocauste) ; l'affaire *Minister of Land Affairs et al v. Stamdien et al*, 4 BCLR 413 (S.Af. LCC 1999), p. 31 (apartheid) ; l'affaire *Dorman Long & Co., Ltd. v. Carroll and Others*, 2 All ER 567 (Kings Bench 1945) (état de guerre) ; et l'affaire *Klass et autres c. Allemagne,* Cour européenne des droits de l'homme, *Arrêt* (au fond), 6 septembre 1978, par. 48 (terrorisme). Voir à titre général James G. Stewart, « Judicial Notice in International Criminal Law: A Reconciliation of Potential, Peril and Precedent », *International Criminal Law Review*, Volume 3, Number 3 (2003), p. 245 ainsi que 265 et 266.

[49] Dinah L. Shelton (ed.), *Encyclopedia of Genocide and Crimes Against Humanity* (Thomson Gale, 2005) ; William A. Schabas, *Genocide in International Law* (Cambridge 2000) ; Jonathan Glover, *Humanity: A Moral History of the 20th Century* (Yale University Press, 1999). Voir aussi *infra*, notes 55 à 62 (qui énumèrent d'autres sources).

[50] Appel interlocutoire du Procureur, annexe A, par. 6.

[51] Décision contestée, par. 7.

Nations Unies et certains États, des ouvrages portant sur cette question, des comptes rendus publiés dans la presse et la jurisprudence du Tribunal – et que même s'il ne suffit pas en soi pour qu'un accusé soit déclaré coupable de génocide, il se rapporte sans aucun doute au contexte dans lequel le Procureur situe chacun des crimes retenus[52]. En outre, le Procureur estime que le constat judiciaire de ce fait ne constituerait pas une iniquité envers les accusés ni ne serait incompatible avec la charge de la preuve qui incombe au Procureur[53]. En réponse, Ngirumpatse déclare que le fait de dresser le constat judiciaire du génocide reviendrait à rendre un jugement prématuré sur les accusations portées contre les personnes poursuivies et violerait leur droit d'être confrontés avec leurs accusateurs[54]. Karemera fait valoir que l'existence du génocide est une conclusion d'ordre juridique, qu'elle ne se prête dès lors pas au constat judiciaire et que tout constat judiciaire du génocide porterait atteinte au principe de la présomption d'innocence[55]. Selon Nzirorera, c'est à juste titre que la Chambre de première instance a jugé que la question de l'existence du génocide ne présentait aucun intérêt pour les faits à établir lors du procès, elle ne peut être tranchée que par une conclusion juridique et il ressort des usages en vigueur au Tribunal que l'existence du génocide doit être établie par des éléments de preuve[56].

35. La Chambre d'appel partage l'avis du Procureur : la Chambre de première instance aurait dû reconnaître que le génocide perpétré au Rwanda en 1994 est un fait de notoriété publique. Le génocide consiste à commettre certains actes, notamment des meurtres, dans l'intention de détruire, en tout ou en partie, un groupe national, ethnique, racial ou religieux comme tel[57]. Nul ne peut valablement contester qu'il y ait eu en 1994 une campagne de massacres visant à détruire l'ensemble ou au moins une très grande fraction de la population tutsie du Rwanda qui (comme la Chambre de première instance l'a constaté judiciairement) était un groupe protégé. Cette campagne a été couronnée de succès dans une mesure épouvantable : on ne connaîtra peut-être jamais le nombre exact des victimes, mais l'immense majorité des membres du groupe tutsi ont été tués et de nombreux autres ont été violés ou ont de toute autre manière subi des atteintes à leur intégrité physique ou mentale[58]. Ces faits fondamentaux étaient largement connus, même à l'époque de la création du Tribunal. En effet, les rapports indiquant qu'un génocide s'était produit au Rwanda figurent parmi les éléments essentiels qui ont motivé sa création, comme il ressort de la résolution du Conseil de sécurité créant le Tribunal et même du nom de celui-ci[59]. Au cours des premières années d'existence du Tribunal, il était extrêmement utile – pour établir l'historique des événements – que les Chambres de première instance recueillent des éléments de preuve propres à les renseigner sur le déroulement général du génocide et dégagent des conclusions factuelles à la lumière de ces éléments de preuve. Les jugements et arrêts produits dans ces circonstances confirment tous et sans hésitation qu'un génocide s'est produit au Rwanda[60] (même s'ils diffèrent sur la responsabilité des divers accusés). Au demeurant, l'existence du génocide a été également établie par d'innombrables ouvrages[61], articles d'érudition[62], reportages[63],

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[52] Appel interlocutoire du Procureur, par. 14 et 15 ainsi que 22 à 31.
[53] *Ibid*., par. 32 à 36.
[54] Réponse de Ngirumpatse, par. 5 et 6.
[55] Réponse de Karemera, p. 3.
[56] Réponse de Nzirorera, par. 45 à 49, 50 à 54 et 56 à 60 respectivement.
[57] Statut du Tribunal international, art. 2 (2).
[58] Voir, par exemple, Human Rights Watch et Fédération internationale des ligues des droits de l'homme, *Aucun témoin ne doit survivre : le génocide au Rwanda* (Paris, éditions Karthala, 1999) ; voir aussi *infra*, notes 58 à 64 et les sources qui y sont citées.
[59] Voir la résolution S/RES/955 (8 novembre 1994).
[60] Voir, par exemple, le jugement *Akayesu*, par. 126 ; le jugement *Kayishema et Ruzindana*, par. 291 ; le jugement *Musema*, par. 316 ; l'arrêt *Kayishema et Ruzindana*, para 143 ; et le jugement *Semanza*, par 424.
[61] Voir, par exemple, Gérard Prunier, *Rwanda, 1959-1994 : histoire d'un génocide* (Paris, éditions Dagorno, 1997) ; Linda Melvern, *Conspiracy to Murder: The Rwandan Genocide* (New York, Verso, 2004) ; Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York, Basic Books, 2002) ; **Alain Destexhe, *Rwanda :*** *essai sur le génocide* (Bruxelles, éditions Complexe, 1994) ; Alan J. Kuperman, *The Limits of Humanitarian Intervention: Genocide in Rwanda* (Brookings Institution Press, 2001) ; Roméo Dallaire, *J'ai serré la main du diable - La faillite de l'humanité au Rwanda* (Montréal, éditions Libre Expression, 2003) ; Philip Gourevitch, *Nous avons le plaisir de vous informer que, demain, nous serons tués avec nos familles* (Paris, éditions Denoël, 1999).
[62] Voir, par exemple, Peter Uvin, « **Prejudice, Crisis, and Genocide in Rwanda »,** *African Studies Review*, *Volume* 40, *Number* 2 (septembre 1997) ; Helen M. Hintjens, « Explaining the 1994 Genocide in Rwanda », *The Journal of Modern*

rapports et résolutions de l'ONU[64], décisions rendues par des juridictions nationales[65] et rapports produits par des États et des ONG[66]. Au stade actuel, il n'est pas nécessaire que le Tribunal exige des preuves supplémentaires. Le génocide rwandais est un fait qui s'inscrit dans l'histoire du monde, un fait aussi certain que n'importe quel autre. C'est un exemple classique de « faits de notoriété publique ».

36. De toute évidence, la décision de la Chambre de première instance ne conteste aucun des points de ce raisonnement. Les accusés même n'ont nullement dit qu'un génocide *ne* se serait *pas* produit au Rwanda en 1994. En fait, la Chambre de première instance présente deux autres raisons – curieusement contradictoires – de ne pas dresser de constat judiciaire : en premier lieu, l'existence d'un génocide ne présente aucun intérêt pour la thèse que le Procureur doit prouver ; en second lieu, en dresser le constat reviendrait à alléger indûment la charge de la preuve qui incombe au Procureur[67]. La première de ces raisons peut être facilement rejetée. Le fait de savoir si un génocide a eu lieu au Rwanda présente manifestement un intérêt pour la thèse du Procureur. C'est un des éléments nécessaires de cette thèse, même s'il ne suffit pas pour l'établir. De toute évidence, une Chambre de première instance n'est habilitée à déclarer une personne coupable de génocide que si elle a recueilli la preuve de ses actes et de son intention. Toutefois, la réalité de la campagne menée sur l'ensemble du territoire national entre en ligne de compte, car on y trouve des circonstances permettant de comprendre les actes de la personne considérée. Au demeurant, l'existence d'un génocide peut aussi fournir les circonstances nécessaires pour retenir d'autres chefs d'accusation contre la personne poursuivie, par exemple les crimes contre l'humanité. Il convient de relever que si l'existence générale du génocide n'avait aucun rapport avec les accusations portées contre telle ou telle personne, l'article 89 du Règlement n'autoriserait pas les Chambres de première instance à admettre les éléments de preuve tendant à l'établir. Or, comme Nzirorera l'a prouvé par certains documents dans sa réponse, les Chambres de première instance le font invariablement et la Chambre d'appel a déclaré que cette ligne de conduite était conforme aux règles[68].

37. La seconde raison avancée par la Chambre de première instance a déjà été examinée plus haut dans le cadre de l'analyse des faits n°2 et 5. Comme le précise l'arrêt *Semanza*, accepter de dresser le constat judiciaire d'un fait de notoriété publique – quand bien même ce fait serait un des éléments caractérisant une infraction, par exemple l'existence d'une attaque « généralisée ou systématique » – n'emporte pas allègement de la charge de la preuve incombant au Procureur ni ne constitue une violation des droits procéduraux des accusés. En fait, cela crée un autre moyen de s'acquitter de cette charge, en supprimant la nécessité de produire la preuve de ce qui est déjà de notoriété publique. Il va de soi que le Procureur demeure tenu d'établir non seulement que les divers faits énoncés dans l'acte

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African Studies (1999), p. 37 ; René Lemarchand, « **Genocide in the Great Lakes: Which Genocide? Whose Genocide? »,** *African Studies Review*, *Volume* 41, *Number* 1 (avril 1998) ; Paul J. Magnarella, « The Background and Causes of the Genocide in Rwanda », *Journal of International Criminal Justice*, *Volume* 3, *Number* 4, septembre 2005, p. 801 (numéro spécial : « Genocide in Rwanda: 10 Years On »), et de nombreux autres articles.

[63] Voir, par exemple, William D. Rubinstein, « Genocide and Historical Debate », *History Today*, avril 2004, Volume 54, Issue 4, p. 36 à 38 ; Gabriel Packard, « Rwanda: Census Finds 937,000 Died in Genocide », *New York Amsterdam News*, 4 août 2004, *Volume* 95, *Issue* 15, p. 2 ; BBC News, « Rwanda: How the Genocide Happened », jeudi, 1er avril 2004, disponible sur le site suivant : http://news.bbc.co.uk/2/hi/africa/1288230.stm.

[64] Rapport du Représentant spécial de la Commission des droits de l'homme sur la situation des droits de l'homme au Rwanda (A/52/522, par. 3 et 10) ; résolution de l'Assemblée générale sur la situation des droits de l'homme au Rwanda (A/RES/49/206) ; résolution de l'Assemblée générale sur la situation des droits de l'homme au Rwanda (A/RES/54/188).

[65] Voir, par exemple, l'affaire Mugasera c. Canada (Ministre de la citoyenneté et de l'immigration) [2005] 2 S.C.R. 100 ; affaire R v. Minani [2005] NSWCCA 226 ; affaire Government of Rwanda v. Johnson, 366 U.S. App. D.C. 98 ; affaire Mukamusoni v. Ashcroft, 390 F.3d 110 ; affaire Ntakirutimana v. Reno, 184 F.3d 419.

[66] Voir, par exemple, Royaume Uni, Foreign and Commonwealth Office, « Country Profiles: Rwanda », disponible sur le site suivant : : http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029394365&a=KCountryProfile&aid=1020338066458 ;
France, Ministère des affaires étrangères,« Présentation du Rwanda », disponible sur le site suivant : http://www.diplomatie.gouv.fr/fr/pays-zones-geo_833/rwanda_374/presentation-du-rwanda_1270/politique-interieure_5519.html ; Human Rights Watch, *Aucun témoin ne doit survivre* (*supra*, note 58).

[67] Décision contestée, par. 7.

[68] Voir, par exemple, l'arrêt *Akayesu*, par. 262.

d'accusation constituent un génocide, mais aussi que la conduite et l'état mental des accusés les rendent précisément coupables de génocide. Le raisonnement tenu lors de l'analyse des faits n°2 et 5 permet également d'écarter l'objection des accusés selon laquelle la qualification de « génocide » est une conclusion d'ordre juridique : l'article 94 (A) du Règlement ne confère pas à la Chambre de première instance le pouvoir souverain de rejeter une demande de constat judiciaire pour ce motif. Dans ce cadre, le terme « génocide » n'est pas distinct d'autres termes juridiques – par exemple les expressions « généralisé ou systématique » et « ne présentant pas un caractère international » – employés pour qualifier certains faits dont la Chambre d'appel a déjà dit dans l'arrêt *Semanza* qu'ils peuvent faire l'objet d'un constat judiciaire au sens de l'article 94 (A) du Règlement.

38. Il s'ensuit que la Chambre de première instance a refusé à tort de dresser le constat judiciaire du fait 6.

IV. Constat judiciaire de faits admis dans d'autres affaires

39. L'article 94 (B) du Règlement se lit comme suit :

> « 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 ».

Le fait de dresser le constat judiciaire de faits admis dans d'autres affaires en vertu de l'article 94 (B) du Règlement permet d'économiser les ressources du Tribunal et d'uniformiser ses jugements tout en garantissant le droit à un procès équitable, public et rapide dont jouissent les accusés[69].

40. Le constat judiciaire visé au paragraphe B de l'article 94 du Règlement est aussi régi par certains des principes énoncés plus haut, mais il se distingue de celui visé au paragraphe A par sa nature. Les faits admis dans d'autres affaires diffèrent des faits de notoriété publique (bien que ces deux catégories coïncident dans une certaine mesure). Le droit ne prescrit nullement de ne dresser le constat judiciaire de faits admis dans d'autres affaires que s'ils échappent à toute contestation raisonnable. Ce sont des faits qui ont été établis dans une affaire opposant des tiers à l'aide des éléments de preuve que ces tiers ont choisi de verser au dossier, dans les circonstances particulières de l'affaire considérée. Pour cette raison, on ne peut s'autoriser du simple fait qu'ils y ont été admis pour conclure qu'ils sont incontestables dans des procès concernant des parties étrangères à la première affaire qui n'ont pas eu la possibilité de les contester.

41. Il existe dès lors deux différences fondamentales entre les deux dispositions. La première ressort des termes mêmes de l'article 94 du Règlement : le constat judiciaire visé par le paragraphe A est obligatoire, tandis que celui visé par le paragraphe B est laissé à l'appréciation souveraine de la Chambre de première instance, ce qui l'autorise à déterminer les faits admis dans d'autres affaires qu'il convient de reconnaître, en tenant scrupuleusement compte du droit des accusés à un procès équitable et rapide. Élaborés par la jurisprudence, les principes orientant et limitant l'exercice du pouvoir souverain d'appréciation de la Chambre dans ce domaine seront examinés plus loin.

42. La seconde différence a été mise en lumière par la jurisprudence du Tribunal. Elle a trait aux conséquences du constat judiciaire : on considère que les faits constatés en vertu du paragraphe A de

[69] Voir Le Procureur c. Željko Mejakić, affaire n°IT-02-65-PT, Décision relative à la requête de l'Accusation aux fins de constat judiciaire en application de l'article 94 B) du Règlement, 1er avril 2004 (la « Décision Mejakić relative au constat judiciaire »), p. 4 ; Le Procureur c. Momčilo Krajišnik, affaire n°IT-00-39-T, Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts, 24 mars 2005 (la « Décision Krajišnik du 24 mars 2005 relative au constat judiciaire »), par. 12 ; Le Procureur c. Ntakirutimana et consorts, affaire n°ICTR-96-10-T et ICTR-96-17-T, Décision relative à la requête du Procureur en constat judiciaire de faits admis, 22 novembre 2001 (la « Décision Ntakirutimana relative au constat judiciaire »), par. 28 ; Le Procureur c. Duško Sikirica et consorts, affaire n°IT-95-8-PT, Décision relative à la requête de l'Accusation aux fins de dresser le constat judiciaire de faits admis dans d'autres affaires, 27 septembre 2000, p. 4.

l'article 94 du Règlement sont irréfutablement établis, tandis que ceux établis par la mise en application du paragraphe B sont de simples présomptions que la Défense peut combattre par des éléments de preuve lors du procès[70]. La Chambre d'appel souligne à nouveau que le recours au constat judiciaire ne renverse pas la charge principale de la persuasion, cette charge continuant d'incomber au Procureur. Le constat judiciaire visé par le paragraphe B de l'article 94 n'a pour effet que de dégager le Procureur de sa charge initiale consistant à produire des éléments de preuve sur le point considéré : la Défense est habilitée à remettre ce point en question par la suite en versant au dossier des preuves contraires crédibles et fiables. Ce point de vue cadre avec les usages en vigueur dans les juridictions nationales : le constat judiciaire de faits de notoriété publique peut être considéré comme concluant[71], tandis que l'admission définitive de tel ou tel fait dans un procès par les juges saisis n'a, tout au plus, irréfutablement force obligatoire qu'à l'égard des parties à ce procès (principe de l'autorité de la chose jugée)[72].

43. Le Procureur avait demandé à la Chambre de première instance de dresser, en application de l'article 94 (B) du Règlement, le constat judiciaire de 153 faits admis dans d'autres affaires. La Chambre a rejeté cette demande dans son intégralité. Le recours du Procureur porte sur 147 des faits en question. Le Procureur, les accusés et la Chambre de première instance ne les ont pas analysés un par un. La Chambre d'appel ne le fera pas non plus. Elle s'intéressera plutôt aux deux principaux motifs avancés par la Chambre de première instance pour refuser de dresser le constat judiciaire sollicité et recherchera si chacun de ces motifs est valable au regard de l'article 94 (B). Ce faisant, la Chambre d'appel ne perd jamais de vue qu'une décision rendue par la Chambre de première instance dans l'exercice de son pouvoir souverain d'appréciation ne peut être infirmée que si elle « (1) repose sur une interprétation erronée du droit applicable, (2) repose sur une constatation manifestement erronée ou (3) est à ce point injuste ou déraisonnable qu'il y a eu erreur d'appréciation de la part de la Chambre de première instance[73] ». L'analyse de chacun des faits admis proposés est une question qu'il convient de renvoyer devant la Chambre de première instance s'il y a lieu[74].

44. Ainsi, la Chambre d'appel examinera les conclusions de la Chambre de première instance selon lesquelles *(a)* certains des faits visés accréditent la thèse de la culpabilité des accusés et ne pouvaient donc pas faire l'objet d'un constat judiciaire et *(b)* certains autres ont été indûment sortis de leur contexte ou mal réunis pour constituer des faits qui n'avaient nullement été admis dans les affaires considérées. Il n'est pas nécessaire d'examiner les motifs avancés par la Chambre de première instance pour refuser de dresser le constat judicaire des faits restants, soit parce que le Procureur ne les a pas inclus dans son recours[75], soit, s'agissant du fait n°153, parce que la question devient sans intérêt du moment que la Chambre d'appel a statué plus haut sur le sixième « fait de notoriété publique »[76].

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[70] Voir Le Procureur c. Slobodan Milošević, affaire n°IT-02-54-AR73.5, *Décision relative à l'appel interlocutoire interjeté par l'Accusation contre la décision relative à la requête visant à faire dresser constat judiciaire de faits admis dans d'autres affaires rendue le 10 avril 2003 par la Chambre de première instance*, 28 octobre 2003 (la « Décision Milošević de la Chambre d'appel sur le constat judiciaire »), p. 3 et 4 ; Le Procureur c. Momir Nikolić, affaire n°IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice, 1er avril 2005, par. 10 et 11 ; et Le Procureur c. Momčilo Krajišnik, affaire n°IT-00-39-PT, Décision relative aux requêtes de l'Accusation aux fins du constat judiciaire de faits admis et de l'admission de déclarations écrites en application de l'article 92 bis, 28 février 2003 (la « Décision Krajišnik), par. 16.

[71] Voir l'affaire *R. v. Zundel*, *supra*, par. 166 ; *Phipson on Evidence*, 16th edition, 3-03 ; et les *Federal Rules of Evidence*, Rule 201 (g).

[72] Voir, par exemple, l'arrêt *Kajelijeli*, par. 202.

[73] Voir Le Procureur c. Slobodan Milošević, affaire n° IT-02-54-AR73.7, Décision relative à l'appel interlocutoire formé contre la décision de la Chambre de première instance relative à la commission d'office des conseils de la Défense, 1er novembre 2004, (la « Décision Milošević de la Chambre d'appel sur la commission d'office de conseils de la Défense »), par. 10. Voir aussi la Décision Bizimungu de la Chambre d'appel sur les mesures de protection de témoins, par. 3.

[74] Voir la Décision *Milošević* de la Chambre d'appel sur le constat judiciaire, p. 3.

[75] Voir l'Appel interlocutoire du Procureur, par. 5 (où le Procureur refuse d'attaquer la conclusion de la Chambre de première instance selon laquelle le constat judiciaire des faits n°31 et 32 ne pouvait être dressé parce que des éléments de preuve tendant à les établir avaient déjà été versés au dossier et celui des faits n°75 à 78 ne pouvait être dressé non plus, ceux-ci ayant été tirés d'affaires pendantes devant la Chambre d'appel). Voir aussi la Décision contestée, par. 15.

[76] Le fait n°153 énoncé sous la rubrique des « faits admis dans d'autres affaires » est un fait alternatif qui ne devait être pris en considération qu'au cas où la Chambre de première instance refuserait de dresser le constat judiciaire du fait n°6

A. Faits accréditant la thèse de la culpabilité des accusés

45. La Chambre de première instance a refusé de dresser le constat judiciaire de certains faits au motif qu'ils peuvent « directement ou indirectement déterminer la culpabilité des accusés, surtout en ce qui concerne leur participation à une entreprise criminelle commune[77] ». Le Procureur fait valoir que ce raisonnement constitue « une interprétation de principe trop large, qui va à l'encontre de l'objet et du but » de l'article 94 (B) du Règlement[78]. Il souligne que le but de cette disposition est précisément d'aider les juges à se prononcer plus rapidement sur la question de la responsabilité pénale de l'accusé, que le fait d'exclure catégoriquement toutes les conclusions ayant trait à cette responsabilité entrave gravement la réalisation du but en question et que chaque fait présentant un intérêt pour un procès a « directement ou indirectement » une incidence sur la responsabilité de l'accusé[79].

46. Nzirorera répond que le raisonnement de la Chambre de première instance cadre avec celui d'autres Chambres de première instance du TPIR et du TPIY qui refusent systématiquement de dresser le constat judiciaire de faits concernant la responsabilité pénale de l'accusé[80]. Ngirumpatse et lui ajoutent que lorsqu'il est reproché à des accusés d'avoir participé à une entreprise criminelle commune, les faits relatifs à l'existence de cette entreprise ou à la conduite des personnes qui y auraient participé touchent directement à la responsabilité pénale des accusés et ne peuvent dès lors faire l'objet d'un constat judiciaire[81]. Selon Karemera, l'adoption du point de vue du Procureur porterait atteinte au principe de la présomption d'innocence en permettant de retenir sans preuves la responsabilité pénale des accusés[82].

47. Comme le fait remarquer Nzirorera, la Chambre d'appel a évoqué dans l'arrêt *Semanza* la nécessité de s'assurer que « les faits constatés judiciairement [ne sont] pas de ceux qui serviraient à établir la responsabilité pénale de l'appelant ». C'était dans le cadre de l'examen de l'article 94 (A) du Règlement. Elle n'a rien dit à propos de l'article 94 (B). Toutefois, il reste dans les deux cas que la pratique du constat judiciaire ne doit pas être autorisée si elle a pour effet de contourner la présomption d'innocence et le droit de l'accusé à un procès équitable, notamment son droit d'être confronté avec ses accusateurs. Il serait donc manifestement illicite que des faits dont le constat judiciaire a été dressé « [servent] à établir la responsabilité pénale de l'appelant » (c'est-à-dire soient *suffisants* pour retenir cette responsabilité). Les Chambres de première instance doivent toujours tenir dûment compte de la présomption d'innocence et des droits procéduraux de l'accusé.

48. La Chambre d'appel n'est cependant jamais allée jusqu'à affirmer que le constat judiciaire visé par l'article 94 (B) du Règlement ne saurait s'étendre à des faits qui peuvent « directement ou indirectement déterminer » la responsabilité pénale de l'accusé (ou qui « concernent » cette

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(existence du génocide au Rwanda) proposé comme « fait de notoriété publique ». Voir l'Appel interlocutoire du Procureur, par. 4.

[77] Décision contestée, par. 15 (visant les faits 1 à 30, 33 à 74, 79 à 85 et 111 à 152).

[78] Appel interlocutoire du Procureur, par. 48.

[79] Appel interlocutoire du Procureur, par. 62. La Chambre d'appel relève que l'Appel interlocutoire du Procureur prête à confusion sur ce point, car, aux paragraphes 53 et 63, il semble souscrire aux critères énoncés dans l'affaire *Blagojević*. Quoi qu'il en soit, elle croit comprendre que le Procureur plaide en faveur d'une interprétation restrictive de ces critères qui n'exclurait essentiellement que les faits *suffisants* pour établir la responsabilité pénale de l'accusé. Voir *ibid*., par. 63 (« Toutefois, en l'espèce, la preuve de l'existence d'une entreprise criminelle commune, qu'elle soit administrée par présentation d'éléments de preuve ou par voie de constat judiciaire, n'établit pas la responsabilité pénale de l'accusé, dans la mesure où sa participation à ladite entreprise doit encore être prouvée »).

[80] Réponse de Nzirorera, par. 13 à 24, citant Le Procureur c. Bagosora, affaire n°ICTR-98-41-T, Décision sur la requête du Procureur aux fins de constat judiciaire conformément aux articles 73, 89 et 94 du Règlement (11 avril 2003), par. 61 et 62 ; Le Procureur c. Bizimungu et consorts, affaire n°ICTR-99-50-T, Décision relative à la requête du Procureur en constat judiciaire de faits admis, 10 décembre 2004, par. 21 ; Le Procureur c. Blagojević et consorts, affaire n°IT-02-60-T, Décision relative à la requête de l'Accusation aux fins de dresser le constat judiciaire de moyens de preuve documentaires et de faits admis dans d'autres affaires, 19 décembre 2003, par. 16 et 23 (la « Décision Blagojević ») ; et la Décision Krajišnik.

[81] Réponse de Nzirorera, par. 25 à 29 ; Réponse de Ngirumpatse, par. 10 à 12.

[82] Réponse de Karemera, p. 5.

responsabilité ou y « touchent »). Avec tout le respect dû aux Chambres de première instance qui sont arrivées à cette conclusion[83], la Chambre d'appel ne peut souscrire à leur thèse, car l'application systématique du raisonnement qui la sous-tend rendrait l'article 94 (B) du Règlement lettre morte. Le but d'un procès pénal est de déterminer si l'accusé est pénalement responsable ou non. Les faits n'ayant aucun rapport – direct ou indirect – avec sa responsabilité pénale ne présentent pas d'intérêt pour la question qui doit être tranchée au procès et, comme la Chambre d'appel l'a relevé plus haut, ne peuvent donc être établis à l'aide d'éléments de preuve ni par voie de constat judiciaire[84]. Il s'ensuit que le constat judiciaire visé par l'article 94 (B) du Règlement *n'est en réalité prévu que* pour les faits admis dans d'autres affaires qui se rapportent, du moins à certains égards, à la responsabilité pénale de l'accusé[85].

49. Comment peut-on concilier cette conclusion avec la présomption d'innocence ? Comme il a été indiqué plus haut, le constat judiciaire visé par l'article 94 (B) du Règlement ne renverse pas la charge principale de la persuasion, mais uniquement la charge initiale de la production de la preuve (la charge de produire des éléments de preuve crédibles et fiables suffisants pour susciter une contestation). Cette situation présente une certaine analogie avec l'administration de la preuve de l'alibi, par exemple, où la charge de la production incombe à l'accusé alors que la question a fondamentalement trait à sa culpabilité. Or, ce renversement de la charge ne porte pas atteinte au principe de la présomption d'innocence, car, comme la Chambre d'appel l'a reconnu à maintes reprises, il ne dégage pas le Procureur de la charge d'établir la culpabilité de l'accusé au-delà de tout doute raisonnable[86].

50. Néanmoins, il existe des raisons de dresser avec circonspection le constat judiciaire visé par l'article 94 (B) du Règlement lorsque les faits considérés sont indispensables pour établir la responsabilité pénale de l'accusé, puisque la charge de la production de la preuve *et* celle de la persuasion incombent normalement au Procureur en matière pénale. La charge de la persuasion incombe toujours au Procureur, mais le renversement de la charge de la production de la preuve porterait aussi sensiblement atteinte aux droits procéduraux de l'accusé, notamment au droit d'entendre les témoins à charge et d'être confronté avec eux[87]. La Chambre d'appel estime qu'il convient dès lors d'exclure certains faits du champ d'application de l'article 94 (B) du Règlement, mais dans une mesure plus faible que celle adoptée par la Chambre de première instance. Précisément, il est interdit de dresser le constat judiciaire de faits admis qui ont trait aux actes, au comportement et à l'état mental de l'accusé.

51. Pour deux raisons, il est permis d'exclure totalement cette catégorie de faits et d'abandonner à l'appréciation souveraine de la Chambre de première instance les faits concernant moins directement la responsabilité pénale de l'accusé. Premièrement, l'interprétation de l'article 94 (B) adoptée en l'occurrence réalise entre les droits procéduraux de l'accusé et le souci de célérité un juste équilibre concordant avec celui expressément établi par l'article 92 *bis* du Règlement qui régit l'administration de la preuve des faits autrement que par l'audition d'un témoin, autre mécanisme procédural adopté surtout pour les mêmes raisons que dans le cas de l'article 94 du Règlement[88]. Deuxièmement, il se pose un problème de fiabilité, car on a des raisons de bien douter de l'exactitude de faits admis dans

[83] Voir *supra*, note 80 (affaires citées dans la Réponse de Nzirorera).
[84] Voir *supra*, note 29.
[85] En théorie, la règle connaît une exception, à savoir les faits concernant la compétence du Tribunal qui n'ont pas (directement ou indirectement) trait à la responsabilité pénale de l'accusé en droit international, comme l'emplacement des frontières du Rwanda ou la citoyenneté rwandaise d'une personne accusée d'avoir commis une violation grave du droit international humanitaire dans un État voisin. Cette catégorie est toutefois assez restreinte et il n'a jamais été demandé de limiter le champ d'application de l'article 94 (B) à ces faits.
[86] Voir, par exemple, l'arrêt *Kajelijeli*, par. 40 et 41, et l'arrêt *Niyitegeka,* par. 60 et 61.
[87] Statut du Tribunal international, art. 20 (4) (e). Pour les mêmes raisons, on ferait aussi une entorse à l'article 20 (4) (d) qui garantit le droit de l'accusé d'être présent à son procès si on statuait sur des faits indispensables pour établir sa culpabilité dans d'autres procès auxquels il n'assiste pas.
[88] L'article 92 *bis*, en ses paragraphes A et D, limite l'admission des déclarations de témoin et des comptes rendus d'audience d'autres procès aux questions « autre[s] que les actes et le comportement de l'accusé tels qu'allégués dans l'acte d'accusation ». La Chambre d'appel interprète ce membre de phrase comme embrassant aussi l'état mental de l'accusé. Voir *Le Procureur c. Galić*, affaire n°IT-98-29-AR73.2, *Décision relative à l'appel interlocutoire interjeté en vertu de l'article 92 bis (C) du Règlement*, 7 juin 2002, par. 10 et 11 (la « Décision *Galić* »).

d'autres affaires lorsqu'ils concernent précisément les actes, les omissions ou l'état mental d'une personne qui n'était pas en cause dans ces affaires. En général, les personnes poursuivies dans les autres affaires seraient beaucoup moins enclines à contester ces faits que s'ils avaient trait à leurs propres actes. D'ailleurs, dans certains cas, ces accusés pourraient choisir délibérément de laisser incriminer autrui.

52. S'agissant de tous les autres faits admis touchant à la responsabilité pénale de l'accusé, il revient aux Chambres de première instance de les apprécier au cas par cas, en exerçant avec circonspection leur pouvoir d'appréciation, pour décider si le fait d'en dresser le constat judiciaire – et donc de reporter sur l'accusé la charge de produire la preuve contraire – serait compatible avec le respect des droits de l'accusé dans les circonstances de la cause. Il s'agit notamment des faits concernant l'existence d'une entreprise criminelle commune et la conduite des personnes autres que l'accusé qui y ont participé. Plus généralement, ce sont des faits liés à la conduite des auteurs matériels d'un crime imputé à l'accusé par le biais d'un autre mode de responsabilité. Contrairement à la thèse de Nzirorera et Ngirumpatse, il y a une différence entre ces faits et ceux qui se rapportent aux actes et au comportement des accusés mêmes. Statuant dans le cadre de l'article 92 *bis* du Règlement, la Chambre d'appel du TPIY a examiné et rejeté dans l'affaire *Galić* un argument semblable à celui que les accusés ont présenté en l'espèce :

> L'Appelant souligne que l'article 92 *bis* exclut de la procédure prévue toute déclaration écrite tendant à établir les actes et le comportement de l'accusé tels qu'allégués dans l'acte d'accusation. Il déclare qu'étant donné qu'aux termes de l'acte d'accusation, l'accusé voit sa responsabilité pénale individuelle engagée
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> (i) pour avoir aidé et encouragé d'autres à commettre les crimes reprochés, et
>
> (ii) en tant que supérieur hiérarchique de ceux qui ont commis ces crimes,
>
> les actes et le comportement de ces autres et ceux de ses subordonnés « représentent ses propres actes ». L'Appelant qualifie les autres de « coauteurs », et déclare que l'expression « les actes et le comportement de l'accusé tels qu'allégués dans l'acte d'accusation » s'étend aux actes et au comportement des coauteurs et/ou des subordonnés de l'accusé. La Chambre de première instance a rejeté cet argument.
>
> Tel qu'interprété par l'Appelant, l'article 92 *bis* perdrait effectivement toute utilité pratique. Cette interprétation n'est compatible ni avec la finalité ni avec les termes du Règlement. Elle efface la nette distinction actuellement faite par la jurisprudence du Tribunal entre (a) les actes et le comportement d'autres personnes ayant commis les crimes dont l'accusé serait, aux termes de l'acte d'accusation, individuellement responsable et (b) les actes et le comportement de l'accusé tels qu'allégués dans l'acte d'accusation, qui établissent sa responsabilité pour les actes et le comportement des autres. Seuls les éléments relevant du dernier point sont exclus de la procédure prévue à l'article 92 *bis* (A)[89].

La Chambre d'appel estime que cette analyse est aussi valable dans le cadre de l'article 94 (B) du Règlement.

53. La Chambre de première instance a donc commis une erreur en ce qu'elle a conclu qu'il était formellement interdit dans le cadre de l'article 94 (B) du Règlement de dresser le constat judiciaire de faits ayant directement ou indirectement trait à la culpabilité de l'accusé, notamment ceux liés à l'existence et au fonctionnement d'une entreprise criminelle commune[90]. Elle devrait plutôt analyser les faits précis dont le Procureur demande le constat judiciaire pour déterminer *(a)* s'ils se rapportent aux actes, au comportement ou à l'état mental des accusés et *(b)*, dans le cas contraire, si les

[89] Décision *Galić*, par. 8 et 9.

[90] De fait, les propos de la Chambre de première instance sont assez vagues sur ce point. On ne sait pas très bien si elle a voulu adopter cette règle rigoureuse ou se borner à exercer son pouvoir d'appréciation sur les faits précis dont elle avait été saisie. Voir la Décision contestée, par. 14 et 15. Toutefois, comme elle n'a pas du tout examiné ces faits dans la Décision contestée, la Chambre d'appel croit que la Chambre de première instance a essentiellement retenu la première solution.

circonstances de la cause autorisent à penser que leur admission apporterait la rapidité visé par l'article 94 (B) sans compromettre les droits des accusés.

B. Faits sortis de leur contexte ou mal réunis

54. La Chambre de première instance n'a pas voulu dresser le constat judiciaire des faits n°86 à 110 au motif qu'ils « ont été sortis de leur contexte et assemblés pour constituer de nouveaux faits qui n'[avaient] pas été admis[91] ». Selon le Procureur, il s'agit là d'une erreur de fait et de droit non seulement parce que ces faits ont été admis dans d'autres affaires, mais aussi parce que le droit n'exige nullement que les faits soient placés « dans leur contexte »[92]. Citant cinq exemples, le Procureur souligne que les faits admis énoncés dans sa requête en constat judiciaire ont été tirés presque textuellement de certains jugements[93]. Ngirumpatse répond que la Chambre de première instance a bien tranché la question, les « faits » litigieux étant des assertions subjectives qui ne peuvent faire l'objet d'un constat judiciaire et non pas de vrais faits[94]. Nzirorera et Karemera ne répondent pas spécialement aux arguments du Procureur sur ce point[95].

55. S'agissant de l'erreur de droit relevée par le Procureur, la Chambre d'appel juge qu'elle n'existe pas. Une Chambre de première instance peut et même doit refuser de dresser le constat judiciaire des faits dont elle est saisie si elle considère que leur formulation – hors de leur contexte exposé dans le jugement d'où ils ont été tirés – prête à confusion ou ne correspond pas aux faits réellement admis dans les affaires considérées. Un fait ainsi sorti de son contexte n'est pas réellement un « fait admis » et ne peut donc pas faire l'objet d'un constat judiciaire en vertu de l'article 94 (B) du Règlement. Tel est, selon la Chambre d'appel, le principe que la Chambre de première instance a voulu appliquer en refusant de dresser le constat judiciaire de faits « sortis de leur contexte ».

56. Toutefois, comme la Chambre de première instance n'a pas donné de plus amples explications sur sa conclusion, la Chambre d'appel n'est pas convaincue que tous les faits en question ont été sortis de leur contexte ou mal réunis de telle sorte qu'ils ne cadrent plus avec les jugements d'où ils ont été tirés, d'autant plus que des exemples tendant à prouver le contraire ont été fournis au paragraphe 67 de l'appel interlocutoire du Procureur. Il y a dès lors lieu de renvoyer la question devant la Chambre de première instance pour qu'elle l'examine à nouveau et motive ses conclusions.

Dispositif

57. Par ces motifs, LA CHAMBRE D'APPEL

ACCUEILLE l'appel interlocutoire du Procureur, sauf en ce qui concerne le fait n°1 énoncé à l'annexe A ;

REJETTE la requête de Nzirorera ;

ORDONNE à la Chambre de première instance de dresser, en vertu de l'article 94 (A) du Règlement, le constat judiciaire des faits n°2, 5 et 6 énoncés à l'annexe A de l'appel interlocutoire du Procureur ;

RENVOIE la cause devant la Chambre de première instance pour qu'elle examine à nouveau, conformément aux indications articulées dans la présente décision, les faits n°1 à 30, 33 à 74 et 79 à 152 énoncés à l'annexe B de l'appel interlocutoire du Procureur.

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[91] Décision contestée, par. 15.
[92] Appel interlocutoire du Procureur, par. 64 et 65.
[93] *Ibid*, par. 66 et 67.
[94] Réponse de Ngirumpatse, par. 13.
[95] Voir la Réponse de Nzirorera, par. 76 (qui juge inutile de répondre, au motif que les faits en question se rapportent aussi directement ou indirectement à la culpabilité des accusés), et la Réponse de Karemera, p. 4 et 5.

Fait à La Haye (Pays-Bas), le 16 juin 2006.

[Signé] : Mohamed Shahabuddeen

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Décision relative à l'appel interlocutoire concernant le rôle du système de communication électronique du Procureur dans l'exécution de l'obligation de communication
30 juin 2006 (ICTR-98-44-AR73.7)

(Original : Anglais)

Chambre d'appel

Juges : Liu Daqun, siègeant en qualité Président de Chambre ; Mohamed Shahabuddeen ; Mehmet Güney ; Theodor Meron ; Wolfgang Schomburg

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Rôle du système de communication électronique du Procureur dans l'exécution de l'obligation de communication, Obligation de communication des éléments à décharge par le Procureur est essentiel à un procès équitable, Obligation du Procureur de participer au processus d'administration de la justice en communiquant à la Défense le matériel à décharge, Un moteur de recherche ne saurait remplacer l'examen des éléments de preuve en sa possession que le Procureur est tenu de faire au cas par cas, Difficulté d'accès aux documents par le système EDS – Requête rejetée

Instrument international cité :

Règlement de Procédure et de preuve, art. 68, 68 (A) et 68 (B)

Jurisprudence internationale citée :

T.P.I.R. : Chambre d'appel, Le Procureur c. Juvénal Kajelijeli, Arrêt, 23 mai 2005 (ICTR-98-44A) ; Chambre d'appel, Le Procureur c. Théoneste Bagosora et consorts, Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 octobre 2005 (ICTR-98-41) ; 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)

T.P.I.Y.: 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, Le Procureur c. Dario Kordić et Mario Čerkez, Arrêt, 17 décembre 2004 (IT-95-14/2) ; Chambre de première instance, Le Procureur c. Fatmir Limaj et consorts, Decision on the Joint Motion on Prosecution's Late and Incomplete Disclosure, 7 juin 2005 (IT-03-66) ; Chambre de première instance, Le Procureur c. Sefer Haliloviæ, Decision on Motion for Enforcement of Court Order Re Electronic Disclosure Suite, 27 juillet 2005 (IT-01-48)

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'États voisins entre le 1er janvier et le 31 décembre 1994 (respectivement la « Chambre d'appel » et le « Tribunal ») est saisie d'un recours interlocutoire formé

par le Procureur[1] contre une décision que la Chambre de première instance III a rendue oralement le 16 février 2006[2] pour trancher une question opposant les parties dans le domaine de la communication de pièces.

2. Dans la présente décision, la Chambre d'appel recherchera si la Chambre de première instance a commis une erreur de droit lorsqu'elle a conclu que le Procureur n'était pas autorisé à se servir de son système électronique de communication de pièces (« système EDS ») pour s'acquitter de l'obligation de communication mise à sa charge par l'article 68 du *Règlement de procédure et de preuve* du Tribunal (le « Règlement »). Le système EDS contient la version publique ou caviardée de plus de 34.000 documents susceptibles de concerner toutes les personnes traduites devant le Tribunal[3]. Le Procureur met cette base de données interrogeable à la disposition de la Défense dans chaque affaire si les conseils acceptent de se conformer aux conditions d'utilisation qu'il a définies, pour permettre à la Défense d'y rechercher des éléments de preuve à décharge[4]. Selon le Procureur, le système EDS est un moyen suffisant pour s'acquitter de l'obligation mise à sa charge par l'article 68 du Règlement, sauf dans le cas où les informations nécessaires « ne sont pas ou pas encore » dans le système. En ce qui concerne celles-ci, le Procureur souligne qu'il continuera de les rechercher lui-même pour les communiquer[5]. Il a avancé ces arguments devant la Chambre de première instance lorsque la Défense lui a présenté des pièces disponibles en version caviardée dans le système EDS qu'il ne lui avait pas officiellement communiquées[6]. Néanmoins, la Chambre de première instance a conclu qu'il avait manqué à l'obligation de communication prévue par l'article 68 du Règlement[7]. C'est pourquoi il a formé le recours sur lequel la Chambre d'appel statue à présent.

Rappel de la procédure

3. Le 6 février 2006, Nzirorera a demandé que le Procureur lui communique un certain nombre de déclarations faites par plusieurs témoins qui devaient comparaître[8]. À l'appui de sa requête, il a présenté plusieurs déclarations caviardées portant des marques faites par le Procureur pour démontrer que celui-ci possédait des documents qu'il n'avait pas communiqués[9].

4. Lors des débats qui ont eu lieu sur la requête devant la Chambre de première instance, le Procureur a précisé que bon nombre des déclarations demandées par Nzirorera se trouvaient

[1] Appel interlocutoire du Procureur contre la décision rendue oralement par la Chambre de première instance le 16 février 2006 concernant le rôle du système de communication électronique (EDS) dans l'exécution de l'obligation de communication du Procureur, 6 mars 2006 (l'« Appel du Procureur »). Nzirorera y a répondu par des écritures intitulées *Respondent's Brief of Joseph Nzirorera and Motion to* Strike, déposées le 13 mars 2006 (la « Réponse-requête de Nzirorera »). Le Procureur a produit une réplique intitulée *Prosecutor's Reply to "Respondent's Brief of Joseph Nzirorera and Motion to Strike", responding to, "Prosecutor's Interlocutoly Appeal of the Trial Chamber's Decision Given Orally on 16 February 2006 Regarding the Role of the Electronic Disclosure Suite in Discharging the Prosecution's Disclosure Obligations"* (la « Réplique-réponse du Procureur »). Karemera et Ngimmpatse n'ont pas répondu à l'Appel du Procureur, bien qu'ils aient sollicité et obtenu le report du délai imparti jusqu'à la production de sa traduction française qui a été déposée le 30 mai 2006. Voir la Décision relative à la requête d'Édouard Karemera en extension de délai pour répondre à l'appel interlocutoire du Procureur, 4 avril 2006, et la Décision relative à la requête en prorogation de délais, 24 mars 2006.

[2] *Le Procureur c. Édouard Karemera et consorts,* affaire n°ICTR-98-44-T, décision orale, compte rendu de l'audience du 16 février 2006, p. 2 à 10 (la « Décision contestée »).

[3] Appel du Procureur, par. 24.

[4] *Ibid*., par. 23 à 26.

[5] *Ibid*., par. 2, 20 et 26 (« L'appelant devrait toutefois pouvoir compter sur le système EDS pour communiquer tout autre élément, conformément à l'article 68 ... Le système EDS a été créé pour que le Procureur puisse communiquer à la Défense les éléments de preuve qui se trouvent en sa possession... Ce serait un gaspillage de ressources que d'avoir à faire deux fois les mêmes recherches et à fournir à la Défense des éléments qui ont déjà été mis à sa disposition grâce au système EDS. Cela reviendrait pour le Procureur à s'acquitter deux fois de son obligation de communication »)

[6] *Ibid*., par. 2.

[7] Décision contestée, p. 6 et 8.

[8] *Ibid*., p. 2 ; Appel du Procureur, par. 6 ; Réponse-requête de Nzirorera, par. 6. La Chambre d'appel a examiné d'autres volets de cette question litigieuse dans *Le Procureur c. Edouard Karemera et consorts,* affaire n°98-44-AR73.6, Décision relative à l'appel interlocutoire de Joseph Nzirorera, 28 avril 2006 (« la Décision relative à l'appel de Nzirorera »).

[9] Appel du Procureur, par. 7 et 26.

dans le système EDS et fait valoir que Nzirorera les avait en fait déjà obtenues en effectuant des recherches dans le système[10]. Il a ajouté que l'existence de ces pièces dans la base de données suffisait pour conclure qu'il s'était acquitté de l'obligation de communication prévue par l'article 68 du Règlement[11].

5. Rejetant cette thèse, la Chambre de première instance a jugé que le Procureur avait manqué à l'obligation de communication mise à sa charge[12]. À ce propos, elle a souligné ce qui suit :

> [...] l'existence d'une base de données électronique créée par le Bureau du Procureur pour la conservation et la récupération des documents, qui permet à la Défense de mener ses propres recherches pour des pièces disculpatoires, ne relève pas le Procureur de son obligation positive, à savoir communiquer toutes les pièces en sa possession conformément à l'Article 68[13].

Toutefois, la Chambre de première instance a estimé que le fait que Nzirorera ait en sa possession la version caviardée des documents visés atténuait dans une large mesure le préjudice causé par ce manquement à l'obligation de commnication[14].

6. En appel, le Procureur ne demande pas l'annulation des conclusions tirées par la Chambre de première instance de chacune des constatations qu'elle a faites sur la question de la communication de pièces[15]. Il ne conteste que la conclusion générale qui lui dénie le droit de se servir du système EDS pour s'acquitter de l'obligation de communication prévue par l'article 68 du Règlement et souligne les graves incidences que cette conclusion aurait sur ses méthodes de communication de pièces en l'espèce et dans d'autres affaires[16].

7. Le Procureur précise que lorsque l'installation de son système EDS sera achevée[17], cette base de données contiendra toute sa collection d'éléments de preuve, à l'exception des pièces confidentielles[18]. La base de données contient actuellement 34 000 pièces et plusieurs milliers d'autres y seront ajoutées. Ces pièces sont divisées en trois grandes catégories, à savoir les déclarations de témoin caviardées, les pièces audio et vidéo et les éléments de preuve à charge[19]. La base de données offre à l'utilisateur la possibilité de faire de la recherche sur texte

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[10] Compte rendu de l'audience du 13 février 2006, p. 12.
[11] *Id*. (M. Webster : « Et s'il les découvre, c'est conforme à la réglementation, parce que cette base de données a été mise en place pour permettre à la Défense d'accéder aux informations qui pourraient l'aider à préparer sa cause. Je ne sais pas ... La Chambre n'a pas besoin de demander où est-ce que Monsieur ... Maître Robinson a trouvé ces informations. C'est clair ... C'est clair, il les a en accédant à cette base de données. »)
[12] Décision contestée, p. 8.
[13] *Ibid*., p. 6.
[14] *Ibid*., p. 9.
[15] Appel du Procureur, par. 3.
[16] *Ibid*., par. 2.
[17] Le Procureur n'a pas indiqué la date à laquelle l'installation du système EDS sera achevée.
[18] Appel du Procureur, par. 24. Le Procureur illustre le fonctionnement du système EDS aux paragraphes 20 à 26 de son appel. Il a joint à l'appel plusieurs annexes qui contiennent des informations illustrant le fonctionnement du système EDS et indiquant comment les conseils de la Défense peuvent s'en servir. Nzirorera demande que soient supprimés ces annexes et les paragraphes 20 à 25 de l'Appel du Procureur, au motif qu'ils contiennent des informations qui n'avaient pas été présentées devant la Chambre de première instance. Voir la Réponse-requête de Nzirorera, par. 2 à 4. S'agissant des paragraphes 20 à 25 de l'Appel du Procureur, la Chambre d'appel rejette la demande de Nzirorera. Dans les circonstances de l'espèce, elle n'estime pas que les arguments présentés dans ces paragraphes font problème, car elle juge aux fins de la présente décision que les indications fournies dans l'Appel du Procureur sont essentiellement les mêmes que celles beaucoup plus générales données à la Chambre de première instance. Voir le compte rendu de l'audience du 13 février 2006, p. 12 et 13 ainsi que 22. La Chambre d'appel fait cependant droit à la demande de Nzirorera en ce qui concerne les annexes. Celles-ci contiennent des informations supplémentaires qui ne peuvent être admises que suivant la rocédure énoncée à l'article 115 du Règlement
[19] Appel du Procureur, par. 21 et 24.

et d'afficher et imprimer les documents choisis[20]. Au dire du Procureur, les conseils de la Défense peuvent aussi consulter le système EDS par internet[21], mais Nzirorera le dément[22]. De plus, Nzirorera brosse un tableau de l'utilité du système EDS nettement différent de celui présenté par le Procureur et relève que l'utilisateur a d'énormes difficultés à y trouver les pièces nécessaires, nombre de documents figurant dans le système étant caviardés[23].

Délibération

8. Selon le Procureur, la Chambre de première instance a commis une erreur de droit en ce qu'elle a conclu que le fait de mettre la collection de moyens à charge et d'autres pièces pertinentes à la disposition de la Défense par le biais du système EDS ne saurait être un moyen de s'acquitter de l'obligation de communication prévue à l'article 68 du Règlement[24]. Pour établir cette erreur, le Procureur déclare que la Chambre de première instance n'a pas fait grand cas de la forme du système EDS qui permet d'y effectuer des recherches[25]. Or, dans le passage même qu'il invoque à l'appui de son grief, la Chambre de première instance a clairement dit que le système EDS « permet à la Défense de mener ses propres recherches pour [se procurer] des pièces disculpatoires »[26]. En conséquence, la Chambre d'appel ne saurait convenir que la Chambre de première instance n'a pas fait grand cas de cet aspect du système EDS. En fait, d'après la Chambre d'appel, le Procureur semble s'insurger contre la conclusion de la Chambre de première instance selon laquelle il a l'«obligation incontestable » de communiquer à chaque accusé les informations visées par l'article 68 du Règlement qui sont «en sa possession »[27]. La Chambre d'appel ne voit pas en quoi la Chambre de première instance a commis une erreur de droit lorsqu'elle a jugé que le Procureur était incontestablement tenu de communiquer les éléments de preuve à décharge qui sont en sa possession.

9. L'obligation faite au Procureur de communiquer à la Défense les éléments de preuve à décharge est indispensable à l'équité du procès[28]. La Chambre d'appel a toujours donné une interprétation large à cette obligation[29]. Son incontestabilité et son importance découlent de l'obligation d'enquête incombant au Procureur qui, comme l'a précisé la Chambre d'appel, va de pair avec l'obligation d'engager des poursuites[30]. En particulier, la Chambre d'appel rappelle que si le Procureur a mission de mener des enquêtes, c'est, entre autres, pour « [aider] le Tribunal [à découvrir] la vérité et [à] rendre justice à la communauté internationale, aux victimes et aux accusés »[31]. L'obligation de

[20] *Ibid*., par. 21
[21] *Id*.
[22] Réponse-requête de Nzirorera, par. 25.
[23] *Ibid*., par. 14 à 26.
[24] Appel du Procureur, par. 2, 16 et 18.
[25] *Ibid*., par. 25.
[26] Décision contestée, p. 6 ; Appel du Procureur, par. 25.
[27] Appel du Procureur, par. 34 (« La Chambre de première instance a [mal] défini l'obligation du Procureur en concluant [...] que celui-ci avait l'"obligation incontestable de communiquer tous les éléments [visés par] l'article 68 *en sa possession*" ») (souligné dans l'original) ; Réplique-réponse du Procureur, par. 7 (« Dans la Décision contestée, la Chambre de première instance a déclaré à tort que le système EDS "ne relève pas le Procureur de *[l'obligation incontestable qui lui est faite de] communiquer toutes les pièces* en sa possession *[visées par] l'Article 68*" ») [traduction] (souligné dans l'original).
[28] Décision relative à l'appel de Nzirorera, par. 7. Voir également *Le Procureur c. Théoneste Bagosora et consorts,* affaire n°ICTR-98-41-AR73 et ICTR-98-41-AR73(B), *Decision on Interlocutoly Appeals of Decision on Witness Protection Orders,* 6 octobre 2005, par. 44 (la « Décision *Bagosora* de la Chambre d'appel ») ; *Le Procureur c. Dario Kordić et Mario Cerkez,* affaire n°IT-95-1412-A, *Arrêt,* 17 décembre 2004, par. 183 et 242 (l'« Arrêt *Kordié et Cerkez* ») ; *Le Procureur c. Tihomir Blaskić,* affaire n° IT-95-14-A, *Arrêt,* 20 juillet 2004, par. 264 (l'« Arrêt *Blaskić* ») ; *Le Procureur c. Radislav Krstić,* affaire n°IT-98-33-A, *Arrêt,* 19 avril 2004, par. 180 (1'« Arrêt *Krstić »*) ; et *Le Procureur c. Radoslav Brdanin,* 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 Grefier de communiquer certains documents,* 7 décembre 2004, p. 3 (la « Décision *Brdanin* de la Chambre d'appel »).
[29] Arrêt *Blaskić,* par. 265 et 266 ; Arrêt *Krstić* par. 180.
[30] Décision *Bagosora* de la Chambre d'appel, par. 44. Voir également la Décision *Brdanin* de la Chambre d'appel, p. 3, l'Arrêt *Kordić et Cerkez,* par. 183, et l'Arrêt *Blaskić,* par. 264.
[31] *Règlement interne du Procureur n°2,* par. 2 (h). En conséquence, la Chambre d'appel juge déconcertant le fait que le Procureur a dit devant la Chambre de première instance qu'il n'était en quelque sorte pas tenu de rechercher les éléments de preuve de nature à porter atteinte à la crédibilité des témoins à charge. Voir le compte rendu de l'audience du 13 février 2006,

communiquer les éléments de preuve propres à disculper l'accusé n'incombe qu'au Procureur et il lui appartient de déterminer, essentiellement à la lumière des faits de la cause, les éléments qui remplissent les conditions de communication définies par l'article 68 du Règlement[32]. En d'autres termes, le Procureur est incontestablement tenu de participer au processus d'administration de la justice en communiquant à la Défense, conformément à l'article 68 (A) du Règlement, 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 ». Cette responsabilité revêt une importance primordiale pour l'analyse.

10. Compte tenu des principes exposés ci-dessus, le Procureur doit activement examiner les éléments en sa possession pour rechercher si certains sont de nature à disculper les accusés[33] et, à tout le moins, informer ceux-ci de leur existence[34]. De l'avis de la Chambre d'appel, l'obligation de communication imposée au Procureur par l'article 68 du Règlement ne consiste pas seulement à mettre toute sa collection de moyens de preuve à la disposition de la Défense sous une forme permettant d'y faire des recherches. Un moteur de recherche ne saurait remplacer l'examen des éléments de preuve en sa possession que le Procureur est tenu de faire au cas par cas. Cela étant, la Chambre d'appel ne voit pas en quoi la Chambre de première instance a commis une erreur de droit lorsqu'elle a conclu que le système EDS, tel qu'il a été décrit par le Procureur, ne remplit pas les amples conditions importantes rappelées plus haut.

11. L'argumentation du Procureur comprend deux volets. Premièrement, le Procureur soutient que les paragraphes (A) et (B) de l'article 68 du Règlement créent deux obligations de communication bien distinctes portant sur des catégories de pièces différentes : le paragraphe (A) concerne les éléments dont le Procureus sait effectivement qu'ils sont de nature à disculper l'accusé, alors que le paragraphe (B) s'applique de manière plus générale à toutes les « collections de documents pertinents » , y compris celles dont le Procureur ne sait pas s'ils sont de nature à disculper l'accusé. Deuxièmement, il estime que lorsqu'il met à la disposition de la Défense sous forme électronique une collection de documents pertinents pour s'acquitter de l'obligation créée par le paragraphe (B), cela emporte exécution de celle prévue par le paragraphe (A) en ce qui concerne tout élément régi par ledit paragraphe qu'on pourrait trouver dans la collection. La Chambre d'appel relève que le prernier volet de l'argumentation du Procureur semble adopter une interprétation plutôt large de l'obligation de communication qui lui incombe, tandis que le second aurait pour effet de restreindre cette obligation en supprimant la nécessité d'appeler l'attention de la Défense sur tel ou tel élément de preuve dont le Procureus sait effectivement qu 'il est de nature à disculper l'accusé.

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p. 12 et 22 de la version française et 11 et 20 de la version anglaise (« [Nous ne pouvons pas fouiller exhaustivement toute la base de données du Bureau du Procureur tout simplement pour mettre en cause les témoins que nous citons à comparaître devant le Tribunal ... La tâche qui nous incombe ici est de poursuivre les trois hommes qui sont assis de l'autre côté. Nous ne poursuivons pas nos témoins. Lorsque nous trouvons des informations présentant un intérêt en l'espèce qui entrent dans le champ d'application de l'article 68, nous les communiquons, mais nous ne pouvons qu'agir de notre mieux et c'est ce que nous avons fait.] »)

[32] Décision relative à l'appel de Nzirorera, par. 16 et 22 ; Décision *Bagosora* de la Chambre d'appel, par. 43 (« …l'obligation de communication n'incombe qu'au Procureur … ») [traduction]. Voir également l'Arrêt *Kordić et Cerkez,* par. 183, et la Décision *Brdanin* de la Chambre d'appel, p. 3

[33] Voir, par exemple, l'Arrêt *Blaskić*, par. 302, et *Le Procureur c. Juvénal Kajelijeli*, affaire n°ICTR-98-44A-A, Arrêt, 23 mai 2005, par. 262. La Chambre d'appel a reconnu qu'en raison du nombre considérable des pièces qui sont « en la possession » du Procureur, la communication peut prendre du retard. Cela ne relève cependant pas le Procureur de l'obligation de les examiner et de les apprécier à la lumière des critères définis par l'article 68 du Règlement. Voir, par exemple, l'Arrêt *Blaskić*, par. 300 (« Vu le nombre considérable de pièces détenues par le Procureur, la communication d'éléments à décharge peut prendre du retard puisqu'il arrive que ces éléments de preuve ne soient découverts qu'après la clôture du procès en première instance »), et l'Arrêt *Krstić*, par. 197 (« La Chambre d'appel n'est pas insensible à l'argument de l'Accusation selon lequel, dans la plupart des cas, les documents doivent d'abord être traités, traduits, analysés et identifiés comme éléments à décharge. On ne saurati s'attendre à ce que l'Accusation communique des éléments de preuve qu'elle n'a pas été en mesure, malgré toute sa bonne volonté, d'examiner et d'évaluer. Toutefois, la communication de documents en l'espèce a pris un retard excessif et l'Accusation ne s'en est pas expliquée de manière satisfaisante ») (note de bas de page interne non reproduite). En outre, la Chambre d'appel a déjà précisé que le Bureau du Procureur est un et indivisible dans l'exécution de l'obligation de communication. Voir la Décision *Bagosora* de la Chambre d'appel, par. 42 à 46.

[34] Voir l'Arrêt *Krstić*, par. 190 et 195.

12. La Chambre d'appel constate plusieurs failles dans l'argumentation du Procureur. L'obligation de communiquer à la Défense 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 est énoncée au paragraphe (A) de l'article 68 du Règlement[35]. Ce n'est que cette disposition qui précise les éléments que le Procureur doit communiquer dans ce cadre et lui fait obligation de les communiquer. Le paragraphe (B) ne crée pas une obligation de communication distincte[36] : il ne fait que prévoir la possibilité de communiquer à la Défense sous forme électronique les éléments de nature à disculper l'accusé, une fois que le Procureur a jugé qu'ils constituent des « documents pertinents » entrant dans le champ d'application de l'article 68 du Règlement, comme le confirment la lettre même du paragraphe en question et les travaux préparatoires à sa rédaction qui ont consisté essentiellement à rechercher s'il était techniquement possible de communiquer à la Défense les versions électroniques des documents entrant dans le champ d'application de l'article 68[37].

13. Il s'ensuit que la communication de pièces visée par le paragraphe (B) de l'article 68 n'est que l'équivalent numérique de celle visée par le paragraphe (A), les pièces en question étant les mêmes présentées sous une forme électronique permettant d'y faire des recherches. Ainsi, lorsque le Procureur cherche à s'acquitter de l'obligation mise à sa charge par l'article 68 en se bornant à offrir à la Défense la possibilité de consulter une base de données électronique contenant des dizaines de milliers de documents alors que ceux dont il sait qu'ils sont de nature à disculper l'accusé ne sont pas nombreux, cela revient à vouloir assumer cette obligation en donnant à la Défense la clé d'une armoire contenant la version papier de ces dizaines de milliers de documents. Dans les deux cas, le Procureur aurait en pratique enterré les éléments de preuve à décharge figurant dans la base de données, à moins qu'il n'informe la Défense de leur existence et ne lui fournisse un moyen de recherche autorisant à penser qu'elle les trouvera. Le paragraphe (B) de l'article 68 n'a pas été adopté pour aider le Procureur à se dérober ainsi à l'obligation de communication qui lui incombe. En effet, il ressort clairement de son libellé que cette disposition n'est nullement destinée à alléger ou à tourner l'obligation énoncée au paragraphe (A), puisqu'il y est précisé qu'elle s'applique « sous réserve du paragraphe (A) »[38].

14. Comme second moyen d'appel principal, le Procureur fait valoir que grâce à la création du système EDS et à sa présentation sous une forme permettant d'y effectuer des recherches, la Défense peut désormais « aisément avoir accès » à sa collection, ce qui est une exception reconnue à l'obligation de communication mise à sa charge[39]. A titre d'exemple, il cite la jurisprudence de la Chambre d'appel qui considère que les comptes rendus des dépositions faites en audience publique ne doivent pas être communiqués, puisqu'on peut « aisément [y] avoir accès »[40]. Nzirorera conteste cette affirmation et souligne que les documents figurant dans le système EDS étant caviardés, il est difficile de déterminer ceux qui sont de nature à disculper l'accusé[41]. Le Procureur réplique que le fait que Nzirorera possède des pièces qui, selon le Procureur, proviendraient du système EDS dément ses

[35] Le paragraphe A de l'article 68 du Règlement est ainsi libellé : «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 de ses éléments de preuve à charge ».

[36] Le paragraphe (B) de l'article 68 est ainsi libellé : «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 fome électronique, les collections de documents pertinents qu'il détient et les logiciels qui permettent à la défense de les passer au crible électroniquement ».

[37] Procès-verbal de la quatorzième session plénière du Tribunal (confidentiel), par. 87 à 100

[38] De fait, il ressort clairement de cette réserve que quand bien même le Procureur serait fondé à soutenir que le paragraphe (B) de l'article 68 vise une catégorie d'éléments de preuve différente de celle régie par le paragraphe A, il n'en résulterait pas que le fait d'offrir à la Défense la possibilité de consulter le système EDS suffit pour satisfaire à toute l'obligation de communication prévue. Cela signifierait simplement que le Procureur peut communiquer des pièces par voie électronique pour s'acquitter de l'obligation mise à sa charge par le paragraphe (B) de l'article 68 en ce qui concerne une catégorie d'éléments de preuve, mais est toujours tenu de suivre la méthode traditionnelle de communication pour la faible catégorie d'éléments de preuve régie par le paragraphe (A). Il s'ensuit que le second volet de l'argumentation du Procureur ne s'inscrit pas dans le droit fil du premier.

[39] Appel du Procureur, par. 2 et 43 à 47. Dans le même ordre d'idées, le Procureur soutient que le système EDS répond à la raison d'être de l'obligation de communication mise à sa charge en supprimant l'avantage que lui donne son accès privilégié aux éléments de preuve. Voir l'Appel du Procureur, par. 38 à 42.

[40] Appel du Procureur, par. 46, citant l'Arrêt *Blaskić* et la Décision *Brdanin* de la Chambre d'appel.

[41] Réponse-requête de Nzirorera, par. 14 à 26.

griefs et démontre que la base de données-fonctionne bien[42]. La Chambre d'appel relève que le dossier de l'affaire ne permet pas de savoir comment Nzirorera a obtenu les pièces qu'il a produites pour prouver que le Procureur avait manqué à l'obligation de communication mise à sa charge.

15. La Chambre d'appel convient que le Procureur peut être dégagé de l'obligation que lui impose l'article 68 du Règlement si la Défense est informée de l'existence des éléments de preuve à décharge considérés et si elle peut aisément y avoir accès pour peu qu'elle fasse preuve de toute la diligence voulue[43]. Le dossier dont la Chambre d'appel est saisie ne l'autorise cependant pas à conclure que le système EDS permet en général d'avoir aisément accès aux documents ni qu'il est permis de présumer que la Défense est au courant de toutes les pièces qui s'y trouvent. Pour déterminer si on peut aisément avoir accès à telle ou telle information de nature à disculper l'accusé et si la Défense est informée de son existence, il faut examiner minutieusement les circonstances de la cause[44]. Ce principe est valable non seulement pour les pièces qui ne se trouvent pas dans le système EDS, mais également pour celles qui y figurent, d'autant plus qu'il est sans doute difficile – comme l'a relevé Nzirorera – de reconnaître les éléments de preuve à décharge s'ils n'existent qu'en version caviardée. Il n'a pas été demandé à la Chambre d'appel de dire en l'occurrence si le Procureur avait satisfait à l'obligation de communication mise à sa charge en ce qui concerne tel ou tel élément d'information. La Chambre d'appel rappelle cependant au Procureur que le simple fait d'introduire une pièce dans le système EDS ne revient pas nécessairement à donner à tel ou tel accusé la possibilité d'y « avoir aisément accès ». Il serait utile que le Procureur crée un dossier spécial pour les pièces visées par l'article 68 du Règlement ou appelle par écrit l'attention de la Défense sur ces pièces et actualise régulièrement le dossier spécial ou la notification écrite.

16. Enfin, la Chambre d'appel constate que le Procureur me1 en avant la pratique suivie par diverses Chambres de première instance du Tribunal pénal international pour l'ex-Yougoslavie en matière de communication de pièces par voie électronique[45]. La Chambre d'appel relève que cette pratique diffère de la ligne de conduite qu'il propose au TPIR[46].

Dispositif

17. Par ces motifs, la Chambre d'appel REJETTE l'Appel du Procureur dans son intégralité.

Fait en anglais et français, le texte anglais faisant foi.

La Haye (Pays-Bas)**,** le 30 juin 2006.

[Signé] : Liu Daqun

[42] Appel du Procureur, par. 26.
[43] Décision *Brdanin* de la Chambre d'appel, p. 4 ; Arrêt *Blaskić,* par. 296.
[44] Voir, par exemple, l'Arrêt *Blaskić,* par. 286 à 303.
[45] Appel du Procureur, par. 48 à 54, citant *Le Procureur c. Sefer Haliloviæ*, affaire N°IT-01-48-T, Decision on Motion for Enforcement of Court Order Re Electronic Disclosure Suite, 27 juillet 2005 (la «Décision Halilović »), et *Le Procureur c. Fatmir Limaj et consorts*, affaire n°IT-03-66-T, Decision on the Joint Motion on Prosecution's Late and Incomplete Disclosure, 7 juin 2005.
[46] Par exemple, dans l'affaire *Halilović,* le système électronique de communication de pièces du Procureur contenait un dossier distinct réservé aux éléments de preuve destinés à Halilović. Chaque fois que de nouveaux éléments étaient introduits dans le dossier, le Procureur en informait l'accusé. En outre, il indexait dans une certaine mesure les pièces figurant dans la collection électronique. Voir la Décision *H alilović,* p. 3 à 5

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Décision rendue en vertu de l'article 72 (E) du Règlement de procédure et de preuve relative à la validité de l'appel du Procureur concernant la thèse de l'entreprise criminelle commune appliquée à un chef de complicité dans le génocide 14 juillet 2006 (ICTR-98-44-AR72.7)

(Original : Français)

Chambre d'appel

Juges : Mehmet Güney, siègeant en qualité de président ; Liu Daqun ; Wolfgang Schomburg

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Plaidoyer pour que l'entreprise criminelle commune soit appliquée à un chef de complicité dans le génocide – Dépôt de soumissions écrites ordonné

Instruments internationaux cités :

Directive pratique relative à la longueur des mémoires et des requêtes en appel, para. (C) (2) (d) (1) ; Règlement de Procédure et de preuve, art. 72 (D), 72 (D) (iv) et 72 (E) ; Statut, art. 2, 2 (3) (e) et 6

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Édouard Karemera et consorts, Décision relative aux exceptions de la Défense en rejet de l'entreprise criminelle commune retenue dans l'acte d'accusation modifié au titre du chef de complicité dans le génocide, 18 mai 2006 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Édouard Karemera et consorts, Opinion individuelle du juge Short relative à l'applicabilité de la théorie de l'entreprise criminelle commune à l'accusation de complicité dans le génocide, 23 mai 2006 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Order of the Presiding Judge Assigning a Bench of Three Judges Pursuant to Rule 72 (E) of the Rules of Procedure and Evidence, 1er juin 2006 (ICTR-98-44)

1. La présente formation de trois juges de la Chambre d'appel du tribunal pénal international chargé de poursuivre 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 (respectivement la « Formation » et le « Tribunal ») est saisie de la Requête du Procureur tendant à ce que la Chambre d'appel dise que l'appel interlocutoire est de droit et peut être acceptée immédiatement, l'autorise à déposer un mémoire écrit sur le fond de l'appel et rende une ordonnance portant calendrier déposée le 30 mai 2006 (la « Requête du Procureur »).

Délibération

2. La présente requête est portée devant les juges en vertu de l'article 72 (E) du Règlement de procédure et de preuve (le « Règlement ») du Tribunal[1] en vue de déterminer si l'appel satisfait aux exigences de l'article 72 (D) qui définit la catégorie d'objections qui peuvent être acceptées en droit. L'article 72 (D) est libellé comme suit :

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 :

[1] *Order of the Presiding Judge Assigning a Bench of Three Judge Pursuant to Rule 72 (E) of the Rules of Procedure and Evidence*, 1er juin 2006. L'article 72 (E) est actuellement libellé comme suit : « L'appel interjeté en application du paragraphe (B) (i) est rejeté si une formation de 3 juges de la Chambre d'appel, nommée par le Président du Tribunal, decide que le recours n'est pas susceptible de remplir l'une des conditions mentionnées au paragraphe (D) ».

(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.

3. La Requête du Procureur tend à contester une décision rendue par la Chambre de première instance selon laquelle la thèse de l'entreprise criminelle commune ne peut pas s'appliquer à une accusation de complicité dans le génocide, étant donné que la complicité dans le génocide constitue, en tant que telle, une forme de responsabilité et non un crime[2]. Le Procureur soutient que la Chambre a commis une erreur de droit, vu que la complicité dans le génocide, prévue à l'article 2 (3) (e) du Statut constitue un crime et pas simplement un mode de responsabilité[3]. Le Procureur demande également l'autorisation de dépser des mémoires écrits, conformément au paragraphe C (2) (d) (1) de la Directive pratique relative à la longueur des mémoires et des requêtes en appel (la « Directive pratique »), ainsi qu'une ordonnance portant calendrier[4].

4. Nzirorera ne s'oppose pas à la Requête du Procureur[5]. Il demande que l'ordonnance portant calendrier tienne compte des besoins de Karemera et Ngirumpatse[6] en matière de traduction[7]. Ceux-ci n'ont pas déposé de réponse, ni le Procureur en réplique.

5. Après avoir examiné les arguments de sparties, les juges considèrent que le présent appel concerne une question de compétence au sens de l'article 72 (D) (iv) du Règlement, puisqu'il vise les infractions énumérées aux articles 2 et 6 du Statut et que, de ce fait, il remplit les conditions pour être examiné en droit. En conséquence, les juge sautorisent les parties à déposer des conclusions écrites, conformément au paragraphe C (2) (d) (1) de la Directive pratique. En ce qui concerne l'ordonnance portant calendrier, les juges n'ignorent pas que pour pouvoir apporter une réponse exhaustive, Karemera et Ngirumpatse doivent disposer de la version française du mémoire d'appel du Procureur[8].

Dispositif

6. Pour les motifs qui précèdent, il est FAIT DROIT à la requête, le juge Schomburg ayant émis une opinion dissidente. Le Procureur est INVITE à déposer son mémoire au plus tard le 28 juillet 2006. Le Greffe est INVITE à fournir d'urgence à Karemera et Ngriumpatse, ainsi qu'à leurs conseils, la traduction en français du mémoire du Procureur et de la présente décision. Karemera, Ngirumpatse et Nzirorera pourront déposer leur réponse dans un délai de 10 jours à compter de la date à laquelle ils recevront respectivement la version française du dernier de ces documents. Le Procureur pourra déposer sa réplique à chacune des réponses dans un délai de quatre jours. Le Greffe est également CHARGE d'informer la Chambre d'appel de la date à laquelle les documents traduits auront été transmis aux parties.

Le juge Schomburg joint son opinion dissidente.

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[2] *Le Procureur c. Edouard Karemera et consorts*, affaire n°ICTR-98-44-T, Décision relative aux exceptions de la Défense en rejet de l'entreprise criminelle commune retenue dans l'acte d'accusation modifié au titre du chef de complicité dans le génocide, 18 mai 2006 ; *Le Procureur c. Edouard Karemera et consorts*, affaire n°ICTR-98-44-T, Opinion individuelle du juge Short relative à l'applicabilité de la théorie de l'entreprise criminelle commune à l'accusation de complicité dans le génocide, 23 mai 2006.
[3] Requête du Procureur, par. 2, 6, 12 et 13.
[4] *Ibid*., par. 14 à 18.
[5] Joseph Nzirorera's Response to Prosecution Request to Appeal as of Right, 31 mai 2006, par. 2 (« Nzirorera's Response »).
[6] Nzirorera's Response, par. 3.
[7] La Chambre d'appel a retardé l'examen de cette decision suite à la demande de Karemera et Ngirumpatse en vue de permettre la traduction de la Requête du Procureur et des autres documents connexes. Voir : Décision relative aux requêtes tendant à obtenir un report de délai, 9 juin 2006, par. 3 et 4.
[8] Karemera et Ngirumpatse s'exprimant en français et non en anglais, la Chambre d'appel a déjà estimé que cela constitutait un motif valable pour qu'un délai raisonnable leur soit accordé. Voir : Décision relative aux requêtes tendant à obtenir un report de délai, par. 3.

Fait en anglais et en français, la version anglaise faisant foi.

La Haye (Pays-Bas), le 14 juillet 2006.

[Signé] : Mehmet Güney

Opinion dissidente du Juge Schomburg au sujet de la Décision rendue en vertu de l'article 72 (E) du Règlement de procédure et de preuve relative à la validité de l'appel du Procureur concernant la thèse de l'entreprise criminelle commune appliquée à un chef de complicité dans le génocide 14 juillet 2006 (ICTR-98-44-AR72.7)

(Original : Anglais)

1. Je ne partage pas l'avis de la majorité des juges au sujet de la décision rendue ce jour faisant droit à la requête du Procureur. En effet, l'appel du Procureur ne satisfait pas aux exigences de l'article 72 (D) (iv) du Règlement. Le Tribunal est compétent pour statuer en l'espèce, indépendamment de la question de savoir si la théorie de l'entreprise criminelle commune s'applique ou pas et si l'accusation de complicité dans le génocide est qualifiée de crime ou de forme de responsabilité. L'appel n'est donc pas de droit.

2. Il n'appartient pas à la Chambre d'appel de statuer dès à présent sur des questions de droit qui doivent d'abord être tranchées par la Chambre de première instance compétente. C'est uniquement dans l'hypothèse où un appel serait formé sur cette qustion à l'issue du procès en première instance que la Chambre d'appel pourrait être appelée à se prononcer de manière définitive sur la question, en se fondant sur les conclusions et les considérations de la Chambre de première instance.

3. Trancher la question à ce stade reviendrait à accepter que l'examen d'une question de droit soit délégué de la juridiction de première instance compétente à la juridiction d'appel, ce qui pourrait *de facto* porter atteinte au droit fondamental d'interjeter appel d'un jugement en première instance. En outre, cela se traduirait par un abus de l'appel interlocutoire.

Fait en anglais et en français, le texte anglais faisant foi.

La Haye (Pays-Bas), le 14 juillet 2006.

[Signé] : Wolfgang Schomburg

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Décision accordant une prorogation de délai de réponse à deux requêtes du Procureur et ordonnant la communication de documents certifiés conformes Articles 33 (B), 54 et 73 du Règlement de procédure et de preuve 13 septembre 2006 (ICTR-98-44-T

(Original : Français)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Prorogation de délai, Rôle du greffier dans la traduction des documents – Requête partiellement acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 3, 33 (B), 54 et 73

1. La troisième session du procès en la présente affaire s'est clôturée le 14 juillet 2006. Le 5 septembre 2006, le Procureur a déposé deux requêtes distinctes aux fins de faire admettre (1) une déclaration écrite en version abrégée de Joseph Serugendo, (2) des transcrits d'audience dans l'affaire *Bagosora et consorts* ainsi que des pièces à conviction y afférentes[1]. Il sollicite en outre que, dans l'hypothèse où il serait fait droit à sa seconde demande, la Chambre ordonne au Greffe de produire la version certifiée conforme des transcrits et pièces à conviction susmentionnés.

2. Par deux requêtes déposées le 8 septembre 2006, Mathieu Ngirumpatse demande à la Chambre une extension de délai de réponse aux requêtes précitées du Procureur, extension « adaptée à l'espèce et à la prochaine reprise du procès » et qui courrait jusqu'au 2 novembre 2006[2]. Il soutient qu'il doit disposer du temps nécessaire pour analyser ces requêtes et surtout leurs importantes annexes, et qu'il n'y pas d'urgence particulière à ce que la Chambre statue. Edouard Karemera, pour sa part, demande à ce que la Chambre fasse le nécessaire pour que les traductions en français des requêtes du Procureur soient disponibles et que, dans l'attente de leur réception, il lui soit accordé une extension de délai pour y répondre[3].

3. En vertu de l'article 3 du Règlement de procédure et preuve, le Greffier « prend les dispositions voulues pour assurer la traduction et l'interprétation dans les langues de travail ». La Chambre et le Greffe travaillent en étroite collaboration en vue de fournir la traduction des documents requis dans les meilleurs délais. Il n'est pas nécessaire d'ordonner au Greffe de prendre des mesures qu'il applique déjà. En outre, la Chambre note qu'en l'espèce, la traduction provisoire de l'une des deux requêtes du Procureur est déjà à la disposition des parties, et que la traduction de la seconde requête devrait être disponible dans les prochains jours.

4. En l'espèce, la déclaration écrite en version abrégée de Joseph Serugendo qui fait l'objet de la première demande du Procureur comporte 40 pages présentées sous forme de tableau présentant un texte en version bilingue (français-anglais).[4] Ce texte est tiré d'extraits de déclarations écrites antérieures du témoin faites à différentes dates, lesquelles ont été communiquées par le Procureur aux Conseils de la Défense et aux accusés le 12 juillet 2006.

5. Les documents qui font l'objet de la seconde demande du Procureur contiennent les témoignages sous serment d'Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera dans l'affaire *Bagosora et consorts* ainsi que les pièces à conviction y afférentes. Le Procureur n'a pas déposé les versions papiers de ces documents mais les a communiquées aux Conseils de la Défense via courrier électronique. De l'opinion de la Chambre, il serait cependant plus approprié que la version certifiée conforme de ces documents soit dès à présent communiquée par le Greffe aux parties et à la Chambre.

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[1] Prosecutor's Motion to Admit Witness Statement from Joseph Serugendo pursuant to Rule 89 (C) and 92 bis (B), and Prosecutor's Motion to Admit Prior Sworn Trial Testimony of the Accused under Rule 89 (C).

[2] Requête de M. Ngirumpatse aux fins d'extension du délai de réponse sur le *Prosecutor's Motion to Admit Witness Statement from Joseph Serugendo pursuant to Rules 89 (C) and 92 bis (B)m* Requête de M. Ngirumpatse aux fins d'extension du délai de réponse sur le *Prosecutor's Motion to Admit Witness Statement from Joseph Serugendo pursuant to Rules 89 (C) and 92* bis *(B)*.

[3] Requête d'Edouard Karemera pour extension de délai de réponse suite aux requêts du Procureur "Prosecutor's Motion to Admit Prior Sworn Trial Testimony of the Accused under Rule 89 (C)" et "Prosecutor's Motion to Admit Witness Statement from Joseph Serugendo pursuant to Rules 89 (C) and 92 bis (B)", déposée le 13 septembre 2006.

[4] Annexe B à la requête.

6. La Chambre est d'avis qu'il est dans l'intérêt de la justice et d'un procès équitable d'accorder une prorogation de délai raisonnable aux accusés afin de leur permettre d'apprécier le contenu des documents faisant l'objet des deux requêtes du Procureur et d'être en mesure d'y répondre. Au vu des circonstances de l'espèce et principalement du fait que les Conseils de la Défense et les accusés ont déjà une très large connaissance de ces document, la demande d'extension de délai jusqu'au 2 novembre 2006 ne semble pas appropriée. La Chambre doit tenir compte de la reprise de la procédure fixée au 23 octobre 2006 et veiller à ce qu'aucune circonstance ne puisse affecter cette reprise.

PAR CES MOTIFS, LA CHAMBRE

I. FAIT PARTIELLEMENT DROIT aux demandes de Mathieu Ngirumpatse et Edouard Karemera en prorogation de délai; et

II. AUTORISE les Conseils de la Défense de chaque accusés à déposer toute réponse à la requête du Procureur intitulée *Prosecutor's Motion to Admit Witness Statement from Joseph Serugendo pursuant to Rule 89 (C) and 92* bis *(B),* au plus tard le 16 octobre 2006 ; et le Procureur à déposer toute réplique au plus tard le 20 octobre 2006 à dater du dépôt des réponses de la défense ;

III. PRIE le Greffier, en vertu des Articles 33 (B) et 54 du Règlement, de bien vouloir communiquer aux parties en l'espèce et à la Chambre, dans les meilleurs délais, les copies certifiées conformes, et dans les deux langues de travail, des transcrits du témoignage d'Edouard Karemera du 16 juin 2006, de Mathieu Ngirumpatse des 5 et 6 juillet 2005 et de Joseph Nzirorera des 16 mars et 12 juin 2006 dans l'affaire *Bagosora et consorts* ainsi que les pièces à conviction y afférentes.

IV. AUTORISE les Conseils de la Défense de chaque accusés à déposer toute réponse à la requête du Procureur intitulée *Prosecutor's Motion to Admit Prior Sworn Trial Testimony of the Accused under Rule 89 (C)*, au plus tard 15 jours après la réception des copies certifiées conformes des documents susmentionnés ; et le Procureur à déposer toute réplique au plus tard 5 jours à dater du dépôt des réponses de la défense.

Arusha, le 13 septembre 2006, fait en Français.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Décision accordant une prorogation de délai de réponse à deux requêtes du Procureur
Article 73 du Règlement de procédure et de preuve
27 septembre 2006 (ICTR-98-44-T)

(Original : Français)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Prorogation de délai, Langue de travail du Conseil de la Défense, Traductions manquantes, Bonne raison pour l'octroi d'un délai raisonnable, Pas de prétexte valable de l'indisponibilité d'un acte de procédure dans la langue de l'accusé pour proroger les délais de la procédure si des conseils peuvent comprendre le document, Droit de l'accusé à être jugé dans un délai raisonnable – Requête partiellement acceptée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 73, 73 (E) et 116 ; Statut, art. 20 (4)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Aloys Simba, Decision on Defence Request for Protection of Witnesses, 25 août 2004 (ICTR-2001-76) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision relative à la requête de la Défense en extension de délai, 5 octobre 2005 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Édouard Karemera et consorts, Décision relative à la demande de prorogation, 27 janvier 2006 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Édouard Karemera et consorts, Décision relative à la requête en prorogation de délais, 24 mars 2006 (ICTR-98-44) ; Chambre d'appel, Le Procureur c. Edouard Karemera et consorts, Decision on Édouard Karemera's Request for Extension of Time to Respond to the Prosecution's Interlocutory Appeal, 4 avril 2006 (ICTR-98-44)

1. La troisième session du procès en la présente affaire s'est clôturée le 14 juillet 2006. Le 11 septembre 2006, le Procureur a déposé une requête proposant un calendrier relatif à la présentation de la preuve dans la présente affaire ainsi que des directives pratiques en vue de l'organisation du procès compte tenu de stratégie de fin des travaux du Tribunal[1]. A la même date, le Procureur a déposé sa réponse unique aux soumissions des défenses quant à la demande de constat judiciaire[2].

2. Par deux requêtes respectivement des 18 et 25 septembre 2006, Edouard Karemera demande à la Chambre de lui accorder un délai de réponse à courir à compter de la réception de la traduction en français desdites requêtes[3]. Se référant aux Règlement de procédure et de preuve, au Statut du Tribunal et à la jurisprudence « constante » de la Chambre d'appel, il prétend que cette traduction est indispensable à la garantie de son droit à un procès juste et équitable[4].

3. Dans de récentes décisions prises sur la base de l'article 116 du Règlement qui prévoit explicitement cette possibilité[5], la Chambre d'appel a, en effet, fait droit à certaines demandes de l'Accusé en extension de délai. Elle a considéré qu'en l'espèce, le Conseil de la Défense d'Edouard Karemera travaille en français et non pas en anglais. Elle a conclut qu'en vue de pouvoir répondre aux appels interlocutoires, il était approprié que le Conseil de la Défense ait accès à la traduction française de ces documents. Elle a également estimé que l'absence de ces traductions constituait des motifs valables, au sens de l'article 116 dudit Règlement, pour accorder un délai raisonnable en vue de répondre à l'appel interlocutoire du Procureur[6]. Dans chaque cas, la Chambre d'appel exige la démonstration par le requérant de motifs valables à sa demande de prorogation et notamment que

[1] Requête du Procureur intitulée: "Prosecutor's Motion for a Scheduling Order and for Practice Directives for the duration of the Trial".
[2] Requête du Procureur intitulée: "Prosecutor's consolidated Response to Defence Submissions on the Motion for Judicial Notice of Adjudicated Facts".
[3] Requête d'Edouard Karemera pour extension de délai de réponse suite à la requête du Procureur *Prosecutor's Motion for a Scheduling Order and for Practice Directives for the duration of the Trial*, déposée le 18 septembre 2006 ; Requête d'Edouard Karemera pour extension de délai de réponse suite à la "*Prosecutor's consolidated Response to Defence Submissions on the Motion for Judicial Notice of Adjudicated Facts*", déposée le 25 septembre 2006. Voir les réponses du Procureur déposées les 19 et 27 septembre 2006.
[4] Réponse d'Edouard Karemera à la requête du Procureur intitulée "Prosecutor's Response to Karemera's Motion for Extension of Time to Respond to Prosecutor's Motion for a Scheduling Order", déposée le 20 septembre 2006.
[5] Règlement, article 116:
(A) La Chambre d'appel 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.
[6] Le Procureur c. Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera, Case N°ICTR-98-44-A (Karemera et al.), Decision on Request for Extension of Time (AC), 27 janvier 2006, par. 4 et 5; Karemera et al., Decision on Edouard Karemera's Request for Extension of Time to Respond to the Prosecution's Interlocutory Appeal (AC), 4 avril 2006, par. 3.

l'accès à la traduction dans sa langue de certains documents lui est nécessaire afin de lui permettre de répondre à la requête initiale[7]. A défaut de le faire, la prorogation de délai lui est refusée[8].

4. Les Conseils de la Défense représentent l'accusé dans la procédure devant ce Tribunal. Les actes de procédure doivent être compris d'abord par eux, sans aller à l'encontre des droits de l'accusé tels qu'inscrits à l'Article 20 (4) du Statut et interprétés par la jurisprudence de ce Tribunal[9]. A cet égard, la Chambre note la pratique du Tribunal consistant à recourir à des équipes de défense composée de conseils ou assistants juridiques bilingues en vue de limiter les ralentissements de la procédure liés à l'obtention de traductions[10]. Il ne saurait donc être pris prétexte de l'indisponibilité d'un acte de procédure dans la langue de l'accusé pour proroger les délais de la procédure, notamment lorsque les conseils sont aptes à assister adéquatement l'accusé.

5. La Chambre se doit donc d'examiner les présentes demandes à la lumière de ces principes et, comme la Chambre d'appel l'a elle-même déterminé et appliqué, toute extension de délai doit se faire tenant compte des circonstances de l'espèce et des motifs avancés par la partie requérante.

6. En l'espèce, la Chambre a déjà eu l'occasion de constater à plusieurs reprises que l'équipe de la Défense d'Edouard Karemera est composée d'une assistante juridique bi-lingue, français-anglais, et que tant le Conseil principal que le Co-conseil comprennent l'anglais et sont aptes à travailler dans cette langue[11]. En outre, il faut rappeler que la date de dépôt de réponse à la soumission du Procureur relative au constat judiciaire avait été fixée de commun accord avec les parties[12].

7. De l'avis de la Chambre, l'Accusé dispose par conséquent d'une assistance suffisante pour lui permettre de comprendre les requêtes dont question. La Chambre note également que la traduction provisoire des requêtes du Procureur vient d'être communiquée aux parties. Le fait que la Défense ne dispose pas de la version traduite de requêtes déposées par une autre partie en la présente affaire n'affecte en rien son obligation de déposer ses soumissions endéans un délai de cinq jours conformément à l'article 73 (E) du Règlement. Aucune prolongation de ce délai sur cette base ne pourrait dès lors être accordée.

8. La Chambre exprime une certaine préoccupation quant à des demandes répétitives d'extension de délai et présentées, sans aucune justification, à la date limite d'expiration pour le dépôt de réponse d'Edouard Karemera à des requêtes pendantes. Un tel comportement affecte une gestion efficace de la procédure. Les Conseils de la Défense sont vivement appelés à veiller à ce que de telles demandes répétitives et de dernière minute ne portent pas atteinte à une bonne administration de la justice et aux droits fondamentaux de l'Accusé, en ce compris à être jugé dans un délai raisonnable.

9. Cependant, dans la mesure où une brève prorogation de délai ne devrait pas affecter la reprise de la procédure fixée au 23 octobre 2006 et vu l'importance des deux requêtes du Procureur, la Chambre se déclare prête à faire partiellement droit aux demandes d'Edouard Karemera.

PAR CES MOTIFS, LA CHAMBRE

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[7] Karemera et al., Decision on Request for Extension of Time (AC), 27 janvier 2006, par. 5 ; Karemera et al., Decision on Request for Extension of Time (AC), 24 mars 2006, par. ; Karemera et al., Decision on Edouard Karemera's Request for Extension of Time to Respond to the Prosecution's Interlocutory Appeal (AC), 4 avril 2006, par. 3.
[8] Ibidem.
[9] *Karemera et al*., Décision relative à la requête de la Défense en extension de délai (TC), 5 octobre 2005.
[10] Voir, par exemple, Le Procureur c. Aloys Simba, Case N°ICTR-01-76-I, Decision on Defence Request for Protection of Witnesses (TC), 25 August 2004, para. 1.
[11] Voir, par exemple, à cet égard, la réponse d'Edouard Karemera à la requête du Procureur intitulée "*Prosecutor's Response to Karemera's Motion for Extension of Time to Respond to Prosecutor's Motion for a Scheduling Order*", dont le contenu démontre que les Conseils de la défense saisissent la teneur de la requête du Procureur intitulée "*Prosecutor's Motion for a Scheduling Order and for Practice Directives for the duration of the Trial*".
[12] Voir l'Ordonnance portant calendrier du 17 juillet 2006.

I. FAIT PARTIELLEMENT DROIT aux demandes d'Edouard Karemera en prorogation de délai; et

II. AUTORISE les Conseils de la Défense de chaque accusés à déposer toute réponse aux requêtes du Procureur intitulées Prosecutor's Motion for a Scheduling Order and for Practice Directives for the duration of the Trial et Prosecutor's consolidated Response to Defence Submissions on the Motion for Judicial Notice of Adjudicated Facts au plus tard le 2 octobre 2006 ; et le Procureur à déposer toute réplique au plus tard le 6 octobre 2006 à dater du dépôt des réponses de la défense.

Arusha, le 27 septembre 2006, fait en Français.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Décision modifiant l'ordre de la Chambre aux fins du transfert d'un témoin à charge du Rwanda
Article 90 bis du Règlement de procédure et de preuve
28 septembre 2006 (ICTR-98-44-T)

(Original : Français)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Transfert de témoins détenus, Témoins en détention au Rwanda – Transfert ordonné

Instrument international cité :

Règlement de Procédure et de preuve, art. 90 bis et 90 bis (B)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Order for the Transfer of Prosecution Witnesses From Rwanda, 13 septembre 2006 (ICTR-98-44)

1. 13 septembre 2006, à la suite d'une requête introduite par le Procureur, la Chambre a invité le Gouvernement rwandais à coopérer avec le Tribunal en vue du transfert temporaire du témoin à charge GBU qui devra être à Arusha en temps utile pour pouvoir déposer comme prévu pendant la quatrième session du procès allant du 23 octobre au 15 décembre 2006[1]. Selon les informations reçues par la Chambre, le témoin était alors en liberté provisoire ; l'article 90 *bis* du Règlement de procédure et de preuve, qui habilite la Chambre à ordonner le transfert d'une personne détenue au centre de détention du Tribunal quand sa présence est sollicitée, n'était donc pas applicable.

[1] Karemera et consorts, affaire n°ICTR-98-44-T, Order for the Transfer of Prosecution Witnesses From Rwanda, 13 septembre 2006.

2. Depuis lors, le Procureur a reçu des informations selon lesquelles le témoin GBU a de nouveau été arrêté et est actuellement détenu au Rwanda. Il prie par conséquent la Chambre d'ordonner son transfert temporaire, comme témoin détenu, au centre de détention des Nations Unies à Arusha[2].

3. Selon une lettre du Ministère rwandais de la justice présentée par le Procureur, le transfert temporaire de GBU à Arusha pourra se faire pendant la période sus-indiquée[3]. La Chambre s'est assurée que ce témoin n'était pas requis pour un procès pénal au Rwanda pendant cette période et que sa présence au Tribunal ne prolongerait pas la durée de sa détention dans ce pays. En vertu des dispositions de l'article 90 *bis* (B) du Règlement, le témoin peut donc être temporairement transféré au centre de détention du Tribunal.

PAR CES MOTIFS, LA CHAMBRE

I. FAIT DROIT à la requête du Procureur ;

II. PRIE le Greffier, en vertu de l'article 90 *bis* du Règlement, de transférer temporairement le témoin détenu, connu sous le pseudonyme de GBU, au centre de détention des Nations Unies à Arusha, en temps utile pour pouvoir déposer comme prévu pendant la période allant du 23 octobre au 15 décembre 2006 ;

III. PRIE le Greffier de prendre les dispositions voulues pour faciliter le retour du témoin GBU au Rwanda dès que possible, une fois qu'il aura terminé sa déposition ;

IV. [*sic*] INVITE les Gouvernements rwandais et tanzanien à prêter leur collaboration au Greffe en vue de l'application de la présente décision ;

V. [*sic*] PRIE le Greffier de coopérer avec les autorités rwandaises et tanzaniennes pour veiller au bon déroulement du transfert et de la détention du témoin au centre de détention des Nations Unies et de porter à la connaissance de la Chambre tout changement de circonstances qui pourrait affecter la durée du séjour de l'intéressé à Arusha.

Fait à Arusha, 28 septembre 2006.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[2] Prosecutor's Further Request for Temporary Transfer of Witness GBU under Rule 90 bis, déposée le 19 septembre 2006.
[3] Prosecutor's Supplemental filings, déposée le 11 septembre 2006.

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Décision relative aux requêtes orales de la défense aux fins d'exclure la déposition du témoin XBM, de sanctionner le Procureur et d'exclure les éléments de preuve qui sortent du cadre de l'acte d'accusation
Articles 17 (4) et 20 du Statut et article 47 (C) du Règlement de procédure et de preuve
19 octobre 2006 (ICTR-98-44-T)

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Exclusion de témoignages, Communication tardive des témoignages, Obligation de communication du Procureur, Moyens pour remédier à la communication tardive de pièces et à la violation des droits de l'accusé, Pas de démonstration par la défense d'un préjudice – Accusations portées contre un accusé, Obligation du procureur d'exposer succinctement dans l'acte d'accusation les faits en cause et le crime allégué, Exposer des éléments de faits essentiels et non des moyens de preuve, Vice de l'acte d'accusation, Témoignages touchant à des faits essentiels ne figurant pas dans l'acte d'accusation : réseau zéro, lien entre le réseau zéro et l'akazu, organisation de réunions, distribution d'armes, Identité des parties à l'entente en vue de commettre le génocide et l'appartenance de l'accusé et d'autres personnes à un groupe précis dans le but de commettre le génocide constituent des faits essentiels qui doivent être traités dans l'acte d'accusation – Admissibilité des moyens de preuve, Preuve par ouï-dire admissible, Fait admis car ne touchant pas au comportement des accusés mais admissible dans le seul but de montrer qu'il existait une collaboration entre civils et autorités militaires – Requête partiellement acceptée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 46 (A), 47 (C), 66 (A) et 89 (C) ; Statut, art. 17 (4) et 20

Jurisprudence internationale citée :

T.P.I.R. : Chambre d'appel, Le Procureur c. Georges Rutaganda, Arrêt, 26 mai 2003 (ICTR-96-3) ; Chambre d'appel, Le Procureur c. Pauline Nyiramasuhuko et consorts, 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 juillet 2004 (ICTR-97-21) ; Chambre d'appel, Le Procureur c. Eliezer Niyitegeka, Jugement, 9 juillet 2004 (ICTR-96-14) ; Chambre d'appel, Le Procureur c. Pauline Nyiramasuhuko, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 septembre 2004 (ICTR-98-42) ; Chambre d'appel, Le Procureur c. Gérard et Elizaphan Ntakirutimana, Jugement, 13 décembre 2004 (ICTR-96-10 et 96-17) ; Chambre de première instance, Le Procureur c. Aloys Simba, Décision relative à l'admissibilité des pièces à conviction 27 et 28, 31 janvier 2005 (ICTR-2001-76) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guicahaoua; Defence Motion to Exclude the Witness' Testimony; and Trial Chamber's Order to Show Cause, 1er février 2006 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision relative aux requêtes de la Défense aux fins de rejet de la déposition du Professeur André Guichaoua, Chambre de première instance, 20 avril 2006 (ICTR-98-44) ; 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 d'appel, Le Procureur c. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe, Arrêt, 7 juillet 2006 (ICTR-99-46); Chambre d'appel, Le Procureur c. Sylvestre Gacumbitsi, Judgement, 7 juillet 2006

(ICTR-2001-64) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Kabiligi Motion for Exclusion of Evidence, 4 septembre 2006 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Nsengiyumva Motion for Exclusion of Evidence Outside the Scope of the Indictment, 15 septembre 2006 (ICTR-98-41) ; Chambre d'appel, Le Procureur c. Théoneste Bagosora et consorts, 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)

T.P.I.Y. : 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. Naser Orić, Ordonnance énonçant les principes directeurs qui régiront l'admission des éléments de preuve et le comportement des parties durant le procès, 21 octobre 2004 (IT-03-68) ; 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. Mladen Naletilić et Vinko Martinović, Arrêt, 3 mai 2006 (IT-98-34)

Introduction

1. Le procès en l'espèce s'est ouvert le 19 septembre 2005. Les témoins à charge ZF et XBM ont été appelés à la barre au cours de la troisième session du procès qui a débuté le 15 mai 2006.

2. Pendant les dépositions, la Défense de Nzirorera a soulevé des objections quant à l'admissibilité de certaines parties des témoignages et demandé l'exclusion de telle ou telle partie. La Défense de Karemera et celle de Ngirumpatse ont également exprimé leurs préoccupations sur les modalités de présentation des moyens à charge à la lumière des allégations formulées dans l'acte d'accusation et ont fait leurs les objections de la Défense de Nzirorera. Le Procureur s'est opposé à ces objections et a fait valoir que la Défense avait été dûment informée des moyens de preuve contestés à travers l'acte d'accusation, le mémoire préalable au procès, notamment le résumé des dépositions des témoins, et les déclarations de témoin. Estimant que les objections portaient sur des questions juridiques et factuelles importantes et similaires, se rapportant aux charges retenues contre les accusés, la Chambre a jugé qu'il valait mieux qu'elle statue par écrit.

3. En plus de ces objections particulières, la Défense a demandé, à la fin de la session, que la déposition du témoin XBM soit exclue dans sa totalité et que des sanctions soient prises contre le Procureur pour communication tardive d'une déclaration du témoin recueillie en 2005.

Délibération

4. Dans la présente section, la Chambre examine tout d'abord la demande tendant à faire exclure dans sa totalité la déposition du témoin XBM, avant de se pencher sur les autres objections soulevées par la Défense.

1. Demande de la Défense tendant à exclure la déposition du témoin XBM et à imposer des sanctions au Procureur

5. Le 5 juillet 2006, lors de la déposition du témoin XBM en l'espèce, le Procureur a communiqué à la Défense une déclaration de ce témoin recueillie le 6 septembre 2005 par les enquêteurs du TPIR basés à Kigali. La Défense de Nzirorera, appuyée par celles de Karemera et de Ngirumpatse[1], a fait valoir qu'une communication aussi tardive constituait la preuve que le Procureur avait manifestement manqué à l'obligation que lui imposait l'article 66 (A) du Règlement de procédure et de preuve (le « Règlement ») de communiquer, au plus tard 60 jours avant la date fixée pour le début du procès, copie des dépositions de tous les témoins qu'il entend appeler à la barre. Elle a par conséquent

[1] Compte rendu de l'audience du 5 juillet 2006, p. 5 à 8.

demandé l'exclusion de la déposition du témoin XBM dans sa totalité et l'imposition de sanctions au Procureur conformément à l'article 46 (A) du Règlement[2]. Le Procureur a reconnu que la pièce avait été communiquée tardivement, mais a expliqué qu'il n'avait été informé de l'existence de ce document que la veille, après que le témoin l'eut mentionné pour la première fois. Il a déclaré que le défaut de communication était une erreur[3].

6. Parmi l'éventail de moyens dont dispose la Chambre pour remédier à la communication tardive de pièces et à la violation des droits de l'accusé, le recours à l'exclusion d'un témoignage est une mesure extrême[4].

7. En l'espèce, la Défense n'a pas montré que la communication tardive de la déclaration du témoin lui avait causé un préjudice qui justifierait le recours à cette mesure extrême. Elle a eu l'occasion de contre-interroger le témoin sur cette déclaration particulière et les incohérences qui existeraient entre la déclaration et la déposition à l'audience[5]. Par conséquent, même si la Défense avait subi un préjudice du fait de la communication tardive de cette pièce, la Chambre estime qu'il y a été remédié. Elle relève par ailleurs que les déclarations du témoin avaient déjà été communiquées à la Défense dans les délais, de sorte que la Défense a été informée de la déposition envisagée et des questions touchant la crédibilité de ce témoin[6]. Dans ces conditions, la Chambre est convaincue que la communication tardive de la déclaration du témoin n'a pas compromis l'équité du procès des accusés. La demande de la Défense tendant à exclure dans sa totalité la déposition du témoin XBM doit donc être rejetée.

8. La Chambre estime que rien ne justifie une sanction contre le Procureur sur le fondement de l'article 46 du Règlement. Contrairement aux affirmations de la Défense, le cas d'espèce diffère de celui qui a amené la Chambre à prononcer un avertissement contre le Procureur pour défaut de communication des pièces relatives au témoin T[7]. À l'époque, la Défense demandait que lui soient communiquées toutes les pièces concernant le témoin T et se plaignait de ce que le Procureur manquait à ses obligations de communication. Le Procureur quant à lui ne cessait de répéter qu'il s'était acquitté de ses obligations. Il reconnaîtra toutefois plus tard, après complément d'enquête, n'avoir effectivement pas communiqué toutes les pièces. La Chambre a jugé qu'un tel comportement dénotait un manque de diligence du Procureur face à ses obligations, ce qui entravait la procédure et allait à l'encontre des intérêts de la justice[8]. Dans le cas d'espèce par contre, dès qu'il a été informé de l'existence de la pièce concernant le témoin XBM, le Procureur s'est employé à la retrouver pour la communiquer immédiatement à la Défense. Il a reconnu que ce défaut de communication était une erreur et s'est déclaré prêt à en assumer les conséquences si la Chambre jugeait nécessaire de le sanctionner[9]. La Chambre présume que le Procureur s'est acquitté de ses obligations de bonne foi[10]. À la lumière de ce qui précède, et en l'absence de toute preuve du contraire, la Chambre n'a aucune raison de croire que le Procureur a fait preuve de mauvaise foi ou qu'il n'a pas exercé toute la diligence voulue pour s'acquitter de ses obligations en l'espèce.

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[2] *Ibid*., p. 2 à 5. Article 46 (A) du Règlement: « 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 ».

[3] Compte rendu de l'audience du 5 juillet 2006, p. 9 et 10.

[4] Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera (« Karemera et consorts »), affaire n°ICTR-98-44-T, Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guicahaoua; Defence Motion to Exclude the Witness' Testimony; and Trial Chamber's Order to Show Cause, Chambre de première instance, 1er février 2006, par. 11 ; Le Procureur c. Karemera et consorts, Décision relative aux requêtes de la Défense aux fins de rejet de la déposition du Professeur André Guichaoua, Chambre de première instance, 20 avril 2006, par. 8.

[5] Compte rendu de l'audience du 5 juillet 2006, p. 1 à 3.

[6] Voir la déclaration des 26 et 27 février 2003 ; *Record of Confession and Guilty Plea,* du 20 janvier 2003.

[7] Compte rendu de l'audience du 24 mai 2006, p. 39 à 42.

[8] *Id*.

[9] Compte rendu de l'audience du 5 juillet 2006, p. 9 et 10.

[10] Le Procureur c. Karemera et consorts, Décision relative à l'appel interlocutoire de Joseph Nzirorera, Chambre d'appel, 28 avril 2006, par. 17 ; Le Procureur c. Dario Kordic et Mario Cerkez, affaire n°IT-95-14/2-A, arrêt, par. 183.

2. Objections de la Défense à l'admission de certaines parties des dépositions des témoins ZF et XBM

9. La Chambre estime qu'il convient de rappeler les principes de droit applicables aux questions soulevées, principes qu'elle appliquera aux objections particulières soulevées par la Défense dans le cas d'espèce.

2.1. Droit applicable

10. Les objections orales de la Défense soulèvent deux questions relatives au droit applicable, la première concerne les accusations portées contre un accusé et la seconde l'admissibilité des éléments de preuve.

(i) Droit applicable aux accusations portées contre un accusé

11. Selon l'article 17 (4) du Statut et l'article 47 (C) du Règlement, le Procureur doit exposer succinctement dans l'acte d'accusation les faits en cause et le crime (ou les crimes) qui sont reprochés à l'accusé. Cette obligation doit être interprétée à la lumière du droit de l'accusé à un procès équitable, à être informé des accusations portées contre lui et à disposer du temps et des moyens nécessaires à la préparation de sa défense[11]. Selon la jurisprudence des deux Tribunaux *ad hoc*, le Procureur est tenu de présenter les faits essentiels qui fondent les accusations formulées dans l'acte d'accusation, et non les éléments de preuve qui doivent établir ces faits[12] : l'acte d'accusation doit remplir son objectif fondamental qui est d'informer l'accusé, avec suffisamment de précision, de la nature des accusations portées contre lui pour qu'il puisse préparer sa défense[13].

12. C'est la nature des moyens à charge qui détermine le caractère « essentiel » des faits. La qualification donnée par le Procureur au comportement criminel allégué et l'étroitesse du lien qui existerait entre l'accusé et les faits incriminés constituent des éléments décisifs pour déterminer le degré de précision avec lequel le Procureur doit exposer les faits essentiels de sa cause dans l'acte d'accusation afin d'informer suffisamment l'accusé[14]. Lorsque le Procureur reproche à l'accusé d'avoir personnellement commis des crimes, il doit, autant que possible, indiquer l'identité de la victime, le lieu et la date approximative des crimes allégués ainsi que leur mode d'exécution « avec la plus grande précision »[15] [traduction]. Une présentation moins détaillée peut être acceptée si,

> « au vu de l'ampleur des crimes allégués, il serait difficile d'exiger un degré élevé de précision concernant, par exemple, l'identité des victimes et les dates auxquelles les crimes ont été commis[16] » [traduction].

Lorsqu'il reproche à l'accusé d'avoir planifié, incité à commettre, ordonné ou aidé et encouragé les crimes allégués, le Procureur doit préciser les « agissements » ou « la ligne de conduite » de l'accusé qui fondent les accusations portées contre lui[17]. S'il invoque la théorie de l'entreprise criminelle commune, il doit préciser le but de l'entreprise, l'identité des parties et la nature de la participation de l'accusé[18].

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[11] Statut, articles 19, 20 (2), 20 (4) (a) et 20 (4) (b).
[12] *Le Procureur c. Elizaphan Ntakirutimana et Gérard Ntakirutimana*, affaires n°ICTR-96-10-A et n°ICTR-96-17-A, arrêt, 13 décembre 2004, par. 25 et 470 ; *Le Procureur c. Georges Anderson Nderubumwe Rutaganda*, affaire n°ICTR-96-3-A, arrêt, 26 mai 2003, par. 301 à 303 ; *Le Procureur c. André Ntagerura, Emmanuel Bagambiki et Samuel Imanishimwe*, affaire n° ICTR-99-46-A, arrêt, 7 juillet 2006, par. 21 ; *Le Procureur c. Mladen Naletilić et Vinko Martinović*, affaire n°IT-98-34-A, arrêt (TPIY), 3 mai 2006, par. 26.
[13] Le Procureur c. Ntakirutimana, arrêt, par. 25 et 470 ; Le Procureur c. Ntagerura, arrêt, par. 22.
[14] *Le Procureur c. Kvocka et consorts*, affaire n° IT-98-30/1-A, arrêt, 28 février 2005, par. 28.
[15] Arrêt *Naletilić*, par. 24.
[16] Id.
[17] Id.
[18] Arrêt *Ntagerura*, par. 24 ; arrêt *Kvocka*, par. 28.

13. L'acte d'accusation est entaché de vice s'il ne précise pas les faits essentiels du crime. Il peut arriver que l'acte d'accusation ne présente pas les faits essentiels avec le degré de précision requis parce que le Procureur n'était pas en possession des informations nécessaires[19]. Dans ce contexte, il convient de souligner que le Procureur doit connaître son dossier avant d'aller au procès et ne devrait pas invoquer les lacunes de ses propres enquêtes pour justifier la modification des charges retenues contre l'accusé au fur et à mesure que le procès avance[20]. L'acte d'accusation peut également se trouver entaché de vice lorsque les dépositions prennent une tournure inattendue. Dans ce cas, la Chambre doit juger s'il convient, pour l'équité du procès, de faire modifier l'acte d'accusation, d'ajourner le procès ou d'exclure les éléments de preuve qui sortent du cadre de l'acte d'accusation[21].

14. De plus, selon la jurisprudence constante du Tribunal, l'acte d'accusation peut être purgé de ses vices si l'accusé a reçu du Procureur, en temps voulu, des informations claires et cohérentes qui lèvent toute ambiguïté et éliminent toute imprécision qui l'entacherait[22]. Comme la Chambre d'appel l'a relevé, « le nombre de fois qu'un acte d'accusation peut être "purgé" n'est pas illimité[23] » [traduction]. Seuls les faits essentiels pouvant raisonnablement se rapporter aux accusations retenues et n'entraînant pas une « transformation radicale » de la thèse du Procureur peuvent être communiqués de cette manière[24]. Avant d'adopter cette position, les Chambres ont examiné les informations fournies par le mémoire préalable au procès ou la déclaration liminaire du Procureur. Comme le souligne la Chambre d'appel, ces méthodes ne sont pas les seuls moyens de purger un acte d'accusation[25]. Selon les circonstances, l'accusé peut être informé par la liste des témoins que le Procureur entend appeler à la barre, accompagnée du résumé des faits et accusations énoncés dans l'acte d'accusation et sur lesquels porteront les dépositions des témoins, avec notamment des références précises aux chefs d'accusation et aux paragraphes pertinents de l'acte d'accusation. La Chambre d'appel a également déclaré que « les seules déclarations de témoin ou pièces à conviction potentielles fournies par le Procureur pour s'acquitter de ses obligations de communication ne peuvent suffisamment informer l'accusé des faits essentiels que le Procureur entend prouver au procès[26] » [traduction]. Elle reconnaît que, vu le volume des pièces communiquées par le Procureur dans certaines affaires, une déclaration de témoin ne peut, sans indication complémentaire, informer suffisamment l'accusé que l'allégation fait partie des moyens à charge[27]. La Chambre d'appel a néanmoins relevé qu'une déclaration de témoin lue à la lumière des informations claires contenues dans le mémoire préalable au procès du Procureur et ses annexes, peut suffire à purger un acte d'accusation vicié[28].

15. Pour déterminer si un acte d'accusation vicié a été purgé, la Chambre doit se demander si, au regard des circonstances particulières de l'espèce, l'accusé a raisonnablement été en mesure de comprendre la nature des accusations portées contre lui et de préparer sa défense[29]. De plus, lorsqu'elle estime qu'un acte d'accusation vicié a été purgé ultérieurement, elle devrait déterminer malgré tout si

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[19] Arrêt *Naletilić*, par. 25.
[20] Id.
[21] Le Procureur c. Bagosora et consorts, 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, Chambre d'appel, 18 septembre 2006, par. 18.
[22] *Le Procureur c. Eliézer Niyitegeka*, affaire n°ICTR-96-14-A, arrêt, 9 juillet 2004, par. 195 ; arrêt *Ntagerura*, par. 30 ; *Le Procureur c. Sylvestre Gacumbitsi*, affaire n°ICTR-2001-64-A, arrêt, 7 juillet 2006, par. 49 ; arrêt *Naletilić,* par. 25.
[23] Le Procureur c. Bagosora et consorts, 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, Chambre d'appel, 18 septembre 2006, par. 21.
[24] *Ibid*., par. 29 et 30 : le Procureur ne peut « remédier » à l'omission d'un chef ou d'une allégation dans l'acte d'accusation par la communication, en temps utile, d'informations claires et cohérentes.
[25] *Ibid*., par. 35.
[26] Arrêt *Ntakirutimana*, par. 27 ; arrêt *Niyitegeka*, par. 197 ; arrêt *Naletilić,* par. 25.
[27] Le Procureur c. Bagosora et consorts, affaire n°ICTR-98-41-T, Decision on Kabiligi Motion for Exclusion of Evidence, Chambre de première instance, 4 septembre 2006, par. 3 ; Le Procureur c. Bagosora et consorts ; affaire n°ICTR-98-41-T, Decision on Nsengiyumva Motion for Exclusion of Evidence Outside the Scope of the Indictment, Chambre de première instance, 15 septembre 2006, par. 3.
[28] Arrêt *Ntakirutimana*, par. 48 ; arrêt *Gacumbitsi*, par. 57.
[29] Arrêt *Rutaganda*, par. 303 ; voir également, arrêt *Ntakirutimana*, par. 27 et 469 à 472 ; arrêt *Ntagerura*, par. 30 et 67 ; arrêt *Gacumbitsi*, par. 49.

ces vices ont porté un préjudice substantiel au droit de l'accusé à un procès équitable en l'empêchant de préparer convenablement sa défense[30].

(ii) Admissibilité des moyens de preuve

16. L'admissibilité des moyens de preuve est régie par le Règlement de procédure et de preuve[31]. La Chambre n'est pas liée par les règles de droit interne régissant l'administration de la preuve et, dans les cas où le Règlement est muet, elle peut appliquer les règles propres à permettre, dans l'esprit du Statut et des principes généraux du droit, un règlement équitable de la cause[32].

17. Selon l'article 89 (C) du Règlement, « la Chambre peut recevoir tout élément de preuve pertinent dont elle estime qu'il a valeur probante ». La Chambre d'appel a constamment déclaré que cet article conférait à la Chambre de première instance toute latitude pour admettre une preuve indirecte pertinente. Le fait que la preuve est indirecte ne la prive pas nécessairement de sa force probante mais on admet que l'importance ou la valeur probante qui s'y attache sera habituellement moindre que celle accordée à la déposition sous serment d'un témoin qui peut être contre-interrogé, encore que même cela dépend des circonstances extrêmement variables qui entourent ce témoignage[33].

18. En règle générale, il ne faut pas confondre l'admissibilité d'un élément de preuve et l'évaluation de sa valeur probante, question qui doit être tranchée par la Chambre de première instance après audition de l'ensemble de la déposition[34].

19. Pour être admissible, l'élément de preuve doit, d'une manière ou d'une autre, se rapporter à un élément constitutif du crime imputé à l'accusé [35][traduction]. Selon la Chambre d'appel, le fait qu'un fait essentiel n'a pas été suffisamment précisé dans l'acte d'accusation ne suffit pas à rendre l'élément de preuve inadmissible[36]. Celui-ci peut être admis dès lors qu'il est susceptible d'étayer une allégation suffisamment précise de l'acte d'accusation[37].

20. Lorsqu'elle se prononce sur l'admissibilité d'un élément de preuve, la Chambre doit également s'assurer que les droits de l'accusé sont protégés conformément aux articles 19 et 20 du Statut. Elle

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[30] Le Procureur c. Bagosora et consorts, 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, Chambre d'appel, 18 septembre 2006, par. 26

[31] Règlement de procédure et de preuve, article 89.

[32] *Ibid*., article 89 (A) et (B).

[33] *Le Procureur c. Naser Orić*, affaire n°IT-03-68-T, Ordonnance énonçant les principes directeurs qui régiront l'admission des éléments de preuve et le comportement des parties durant le procès, Chambre de première instance, 21 octobre 2004 ; *Le Procureur c. Zlatko Aleksovski*, affaire n°IT-95-14/1-T, arrêt (*sic*) relatif à l'appel du Procureur concernant l'admissibilité d'éléments de preuve, 16 février 1999, par. 15.

[34] Le Procureur c. Nyiramasuhuko et consorts, affaire n° ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible", Chambre d'appel, 2 juillet 2004, par. 15 ; Le Procureur c. Simba, affaire n°ICTR-01-76-T, Décision relative à l'admissibilité des pièces à conviction 27 et 28, (Chambre de première instance) 31 janvier 2005, par. 12 ; voir les décisions orales antérieures de la Chambre, compte rendu de l'audience du 22 septembre 2005, p. 2 et 3, puis compte rendu de l'audience du 27 février 2006, p. 7 à 11.

[35] Le Procureur c. Bagosora et consorts, affaire n°ICTR-98-41-T, Decision on Kabiligi Motion for Exclusion of Evidence, Chambre de première instance, 4 septembre 2006, par. 3 ; Le Procureur c. Bagosora et consorts, affaire n°ICTR-98-41-T, Decision on Nsengiyumva Motion for Exclusion of Evidence Outside the Scope of the Indictment, Chambre de première instance, 15 septembre 2006, par. 3.

[36] Le Procureur c. Nyiramasuhuko et consorts, affaire n°ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible", Chambre d'appel, 2 juillet 2004, par. 15 ; Le Procureur c. Nyiramasuhuko et consorts, affaire n°ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, Chambre d'appel, 27 septembre 2004, par. 12.

[37] Voir également, Le Procureur c. Bagosora et consorts, 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, Chambre d'appel, 18 septembre 2006, note en bas de page 40.

dispose donc du pouvoir légitime d'exclure tout élément de preuve dont la valeur probante est largement inférieure à l'exigence d'un procès équitable[38].

2.2. Application des principes de droit susmentionnés aux objections orales soulevées par la Défense en l'espèce

21. Dans les paragraphes qui suivent, la Chambre examinera chacune des objections soulevées par la Défense au sujet des dépositions des témoins ZF et XBM à la lumière des principes de droit susmentionnés.

(i) Objections de la Défense à la déposition du témoin ZF

22. La Défense de Joseph Nzirorera soutient que certains aspects de la déposition du témoin ZF visent des faits essentiels dont il n'était pas question dans l'acte d'accusation. Pour elle, certaines parties de la déposition manquent de fiabilité et de valeur probante et leur admission causerait un préjudice à son client. Elle demande par conséquent à la Chambre d'exclure les parties de la déposition du témoin ZF portant sur :

a. Les membres du *réseau zéro*[39],

b. Les réunions organisées par Ngirumpatse à Gisenyi de 1992 à fin 1993 et les réunions tenues entre autorités civiles et militaires en un certain lieu entre 1990 et 1994[40],

c. La présence de Nzirorera à une distribution d'armes qui aurait eu lieu après le 6 avril 1994[41].

a. Éléments de preuve portant sur les membres du *réseau zéro*

23. Le témoin ZF a déclaré qu'il existait un réseau de télécommunications secret appelé *réseau zéro* qu'exploitaient les membres du cercle restreint du Président Habyarimana[42]. Selon lui, ces personnes changeaient d'appellation au gré des circonstances, elles pouvaient un jour s'appeler « *Abakozi*, les travailleurs » et un autre « les dragons ». Le témoin a déclaré qu'il existait des liens entre le *réseau zéro* et l'*Akazu*, le cercle présidentiel qui regroupait des personnes originaires de la même région que le Président, particulièrement de Ruhengeri et de Gisenyi. Le Président ayant eu besoin d'un soutien plus large, le groupe *Akazu* s'est progressivement étendu aux personnes originaires d'autres localités du pays et que le Président considérait comme étant dignes de confiance. Le groupe ainsi élargi s'appelait « les dragons »[43].

24. La Défense de Nzirorera s'oppose à l'admission des éléments de preuve portant sur le *réseau zéro* et ses membres. Elle soutient que ce fait essentiel n'est pas traité dans l'acte d'accusation et que sa source n'est pas assez fiable ou suffisamment pourvue de valeur probante pour qu'il soit admis[44]. Le Procureur réplique que les éléments de preuve présentés sur le *réseau zéro* pourraient servir à établir l'accusation d'entente en vue de commettre le génocide, et étant donné que l'appartenance à un réseau de télécommunications ne constitue pas en soi un crime, ce fait n'avait pas besoin d'être traité dans l'acte d'accusation. Toutefois, le Procureur fait valoir que l'accusé en a suffisamment été informé par la déclaration faite par le témoin en 1998 et les « nombreuses pièces qui lui avaient été communiquées »[45] [traduction].

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[38] Voir décision orale antérieure de la Chambre, compte rendu de l'audience du 27 février 2006, p. 7 à 11. Voir article 89 (D) du Règlement de procédure et de preuve du Tribunal pénal international pour l'ex-Yougoslavie.
[39] Compte rendu de l'audience du 16 mai 2006, p. 19 et 20.
[40] *Ibid*., p. 26 et 27 ; ibid., p. 56 et 57. Le nom du lieu est gardé sous scellés.
[41] *Ibid*., p. 77.
[42] *Ibid*., p. 17 et 18.
[43] *Ibid*., p. 18 et 19.
[44] *Ibid*., p. 19 et 20.
[45] *Id*.

25. L'identité des parties à l'entente en vue de commettre le génocide et l'appartenance de l'accusé et d'autres personnes à un groupe précis dans le but de commettre le génocide constituent des faits essentiels qui doivent être traités dans l'acte d'accusation. La Chambre relève que l'acte d'accusation ne mentionne nulle part le *réseau zéro* et ses membres. Le mémoire préalable au procès ne contient qu'une note en bas de page dans laquelle on peut lire :

> « [l]e sociologue André Guichaoua et l'historienne Alison Des Forges, ainsi que plusieurs autres témoins de fait observeront que Joseph Nzirorera, par action ou uniquement par réputation, était lié […] au « Réseau Zéro » qui planifiai[en]t et exécutai[en]t les assassinats politiques comme méthode de contrôle social [46]».

Ni le résumé de la déposition du témoin ZF joint au mémoire préalable au procès, ni la déclaration liminaire ne font référence à ce réseau et à ses membres. Contrairement aux affirmations du Procureur, une déclaration de témoin ne peut, vu le volume de pièces communiquées, suffisamment informer l'accusé qu'une allégation fait partie des moyens à charge si elle n'est pas accompagnée d'indications complémentaires.

26. La Chambre conclut qu'il n'a pas été remédié aux imprécisions de l'acte d'accusation sur l'existence du *réseau zero* et l'appartenance de l'accusé à ce réseau par des informations claires, cohérentes et communiquées en temps utile.

27. Elle estime toutefois que la déposition du témoin ZF est pertinente en ce qu'elle étaie d'autres allégations suffisamment précises de l'acte d'accusation, en particulier l'existence de groupes affiliés au mouvement dit « *Hutu Power* », notamment l'*Akazu*. Contrairement aux arguments de la Défense, la Chambre considère que cette preuve par ouï-dire est admissible et que sa valeur probante ne l'emporte pas nettement sur la nécessité d'assurer un procès équitable. Elle rappelle que le poids à accorder à un élément de preuve est une question différente qui sera tranchée à un stade ultérieur de la procédure.

28. En conséquence, la Chambre conclut que la déposition du témoin ZF portant sur le *réseau zéro* ne peut être admise pour établir le fait essentiel que les accusés appartenaient à ce réseau, dans la mesure où ceux-ci n'ont pas été informés d'une telle allégation. Cette déposition ne peut être admise que dans la mesure où elle établit l'existence de l'*Akazu*, comme le soutient l'acte d'accusation[47].

b. Réunions organisées par Ngirumpatse à Gisenyi de 1992 à fin 1993 et réunions tenues entre autorités civiles et militaires en un certain endroit de Gisenyi de 1990 à 1994

29. À en croire le témoin ZF, Ngirumpatse a tenu deux réunions au palais du MRND dans la préfecture de Gisenyi en 1992 et 1993, où il était question du comportement des milices *Interahamwe* dans la préfecture de Gisenyi, de la discipline en leur sein et du soutien qu'elles devaient apporter aux forces armées rwandaises et à la gendarmerie de Gisenyi[48]. Le témoin a également déclaré que cinq réunions s'étaient tenues en un certain endroit de la même préfecture entre 1990 et 1994[49]. Selon lui, Nzirorera avait pris part à une de ces réunions dans le second semestre de 1992 et avait déclaré que « les Tutsis ne réussir[aient] pas leur rêve inimaginable, et qu'il [était] d'accord avec lui [le colonel Bagosora] pour ne pas les laisser [poursuivre leur plan][50] ». À part cette réunion[51], le témoin n'a pas

[46] Note en bas de page 117, p. 46, se rapportant à cette phrase du mémoire : « Contrairement à l'humeur orageuse de Karemera et à la calme indifférence de Ngirumpatse, Nzirorera semble simplement s'être bâti une réputation de brute et de fripouille ».
[47] Voir par. 6 (iii).
[48] Compte rendu de l'audience du 16 mai 2006, p. 26 et 27, 30 à 32.
[49] *Ibid*., p. 55 et suivantes. Le nom du lieu est gardé sous scellés.
[50] *Ibid*., p. 64.
[51] *Ibid*., p. 62 et 63.

fourni beaucoup de détails sur les réunions en question et s'est contenté de donner la liste des principaux participants où ne figurait aucun des accusés.

30. La Défense de Nzirorera s'est opposée à l'admission de ces parties de la déposition du témoin ZF au motif que les réunions qui y étaient évoquées constituaient des faits essentiels qui n'étaient visés ni dans l'acte d'accusation ni dans le mémoire préalable au procès, et que les accusés n'en avaient pas été suffisamment informés[52]. En réponse, le Procureur a invoqué les paragraphes 23 et 24 de l'acte d'accusation en ce qui concerne les réunions tenues par Ngirumpatse, mais n'a donné aucune référence précise s'agissant des réunions tenues en un certain endroit de Gisenyi entre 1990 et 1994[53]. Il a fait valoir que la Défense avait été suffisamment informée dans la mesure où les réunions étaient évoquées dans le mémoire préalable au procès[54], le résumé de la déposition envisagée joint au mémoire, les déclarations de témoin et le résumé de la déposition attendue du témoin ZF[55].

31. La Chambre relève que ni le mémoire préalable au procès ni la déclaration liminaire ne font état d'une réunion tenue à Gisenyi en 1990. Elle estime que les accusés n'ont pas été suffisamment informés que ce fait essentiel faisait partie des accusations portées contre eux. De plus, le Procureur a reconnu que « c'[étaient] des réunions négligeables [, et qu'i]l s'agissait en fait d'éclairer la preuve[56]». Rien ne justifie par conséquent l'admission de la déposition du témoin ZF portant sur une réunion qui se serait tenue en un certain endroit de Gisenyi en 1990. Cette déposition devrait être exclue[57].

32. Selon les paragraphes 23 et 24 de l'acte d'accusation, les accusés auraient participé à des réunions « [p]endant une période de plusieurs années qui va jusqu'en 1994 inclusivement »[58]. Les paragraphes suivants font également état de la tenue de réunions particulières[59]. Aucune mention n'est toutefois faite des réunions tenues par Ngirumpatse au palais du MRND dans la préfecture de Gisenyi en 1992 et 1993, ni de celles qui ont été organisées en un certain lieu de cette même préfecture entre 1990 et 1994. Le mémoire préalable au procès évoque des réunions tenues à partir de 1992, le paragraphe 37 indique que

> « GFA, GBU, ZF, entre autres, raconteront qu'à partir du milieu de l'année 1992, autour de la même époque où le premier gouvernement multipartite légitime de Dismas Nsengiyaremye a été présenté, les responsables du MRND au niveau national, régional et local ont commencé à organiser des meetings dans leurs communautés ».

Le paragraphe 41 fait particulièrement état des réunions organisées en divers lieux de Gisenyi dès le début de 1992, réunions « au cours desquelles des personnalités éminentes du MRND aux niveaux régional et national se sont retrouvées pour accorder leurs stratégies ». Le paragraphe 141 fait également référence à plusieurs réunions tenues en 1992 dans certains camps militaires à Gisenyi et dont « les participants comprenaient Nzirorera […] ». Le résumé de la déposition attendue de ZF joint

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[52] *Ibid*., p. 26 à 28, 56 à 58.
[53] *Ibid*., p. 27 et 28, 40 et 41.
[54] Le Procureur invoque les paragraphes 37 et 41 de son mémoire préalable au procès.
[55] Compte rendu de l'audience du 16 mai 2006, p. 57 et 58.
[56] *Ibid*., p. 58.
[57] *Ibid*., p. 55 et 56.
[58] Acte d'accusation, par. 23 et 24 :
23. Pendant une période de plusieurs années qui va jusqu'en 1994 inclusivement, notamment après 1992, Édouard KAREMERA, Mathieu NGIRUMPATSE et Joseph NZIRORERA se sont entendus entre eux et avec les personnes mentionnées aux alinéas i à iv du paragraphe 6, se réunissant séparément en divers lieux et à différentes occasions dans le cadre de leurs activités au sein du parti et de leurs activités officielles au sein du Gouvernement, pour planifier et préparer la destruction de la population tutsie du Rwanda, en particulier le massacre des personnes considérées comme tutsies. En outre, ils ont commis des actes tendant à l'exécution de cette entente.
Avant le 8 avril 1994 Création du mouvement Interahamwe ; réunions et discours publics ; financement et formation militaire des milices ; stockage d'armes à feu et distribution d'armes aux dites milices: 24. En 1993 et 1994, Édouard KAREMERA, Mathieu NGIRUMPATSE et Joseph NZIRORERA se sont entendus entre eux et avec d'autres personnes pour prendre collectivement des initiatives visant à établir et étendre leur contrôle personnel et celui du Comité directeur du MRND sur un corps de miliciens organisé et centralisé qui répondrait à leur appel lorsqu'ils demanderaient d'attaquer, de tuer et de détruire la population tutsie.
[59] Voir par. 24.6, 24.7 et 24.8.

au mémoire préalable au procès indique que le témoin parlerait des réunions tenues entre 1992 et 1994 à Gisenyi, notamment dans des camps militaires, il cite les participants à ces réunions, dont Nzirorera et Ngirumpatse, et présente brièvement les sujets qui y ont été débattus. Le résumé indique aussi de manière claire les paragraphes et allégations spécifiques de l'acte d'accusation auxquels se rapportent ces faits. Ces informations claires ont été constamment confirmées dans les déclarations de témoin communiquées à la Défense avant le début du procès[60]. Il convient de relever à cet égard que la Défense a reconnu que ces déclarations de témoin décrivaient les réunions avec beaucoup de détails[61].

33. La Chambre estime qu'au vu des informations claires contenues dans le mémoire préalable au procès, notamment du résumé de la déposition attendue du témoin ZF, les accusés ont été suffisamment informés à travers les déclarations de témoin que les allégations fondées sur ces réunions faisaient partie de la thèse du Procureur. Elle relève en outre que le mémoire préalable au procès et les nombreuses déclarations de témoin ont été déposés bien avant que le témoin ZF ne fasse sa déposition[62].

34. Dans ces circonstances, la Chambre conclut que les accusés ont reçu, en temps utile, des informations claires et cohérentes indiquant que les réunions alléguées faisaient partie des accusations portées contre eux. Elle estime également que la Défense a eu l'occasion raisonnable d'enquêter sur ces allégations. L'ampleur du vice de l'acte d'accusation ne porte pas de préjudice substantiel au droit de l'accusé à un procès équitable. L'objection de la Défense est par conséquent rejetée.

c. Présence de Nzirorera à une distribution d'armes qui aurait eu lieu après le 6 avril 1994

35. La Défense de Nzirorera a demandé à la Chambre d'exclure la partie de la déposition du témoin ZF relative à la présence de l'accusé à une distribution d'armes qui aurait eu lieu fin 1993 – début 1994, au motif que cette information ne figurait pas dans l'acte d'accusation.

36. L'acte d'accusation ne vise pas ce fait précis, mais évoque la participation directe de Joseph Nzirorera à la distribution d'armes[63]. Le résumé de la déposition attendue du témoin ZF joint au mémoire préalable au procès indique que le témoin parlerait de la distribution d'armes qui a eu lieu dans certains camps militaires de Gisenyi en 1993 et dirait

> « qu'après le 6 avril 1994, des armes importées de l'étranger ont été distribuées aux miliciens dans le but de renforcer le 42ème bataillon[…] et que cette distribution d'armes a eu lieu en présence de Nzirorera ».

Ces informations claires ont été constamment confirmées dans les déclarations de témoin communiquées à la Défense bien avant le début du procès[64].

37. Selon la Chambre, les accusés ont reçu, en temps utile, des informations claires et cohérentes indiquant que la distribution d'armes sur laquelle portait la déposition du témoin ZF faisait partie des accusations portées contre eux. Elle note qu'au cours de la déposition le témoin n'a pas pu se rappeler les dates exactes auxquelles la distribution d'armes avait eu lieu. Cette question sera examinée lors de l'évaluation de la déposition. La Défense ayant eu la possibilité raisonnable d'enquêter sur ces allégations, l'ampleur du vice de l'acte d'accusation ne porte pas de préjudice substantiel au droit des accusés à un procès équitable. L'objection de la Défense est par conséquent rejetée.

[60] Déclarations des 24 juin 1998, 6 et 8 avril 2004, et 8 et 10 décembre 2004, communiquées le 13 avril 2005.
[61] Compte rendu de l'audience du 16 mai 2006, p. 57 et 58.
[62] Le Procureur a déposé son mémoire préalable au procès le 27 juin 2005, soit plus de 10 mois avant que le témoin ZF ne fasse sa déposition.
[63] Voir acte d'accusation, par. 14, 36, 39 et 62.7.
[64] Voir Déclarations des 6 et 8 avril 2004, et 8 et 10 décembre 2004, communiquées le 13 avril 2005.

(ii) Objections de la Défense à la déposition du témoin XBM

38. La Défense de Nzirorera, appuyée par celles de Ngirumpatse et de Karemera[65], s'est opposée à l'admission des éléments de preuve ci-après invoqués lors de la déposition du témoin XBM :

a. La cérémonie d'installation de l'antenne de la RTLM et la distribution d'armes qui a suivi[66],

b. Une réunion tenue au bureau communal de Mutura en janvier 1994[67],

c. Une réunion tenue à l' Hôtel Méridien en mai 1994[68],

d. Les massacres perpétrés à Nyundo[69].

39. À propos des faits susmentionnés, le témoin XBM a expliqué comment les autorités militaires avaient mobilisé la population civile, sollicité sa collaboration, et comment celle-ci avait participé aux attaques lancées contre les Tutsis.

40. La Défense soutient, et le Procureur convient avec elle, que ces faits essentiels ne sont visés ni dans l'acte d'accusation, ni dans le mémoire préalable au procès. La Chambre retient toutefois l'argument du Procureur selon lequel ces éléments de preuve servent à établir qu'il existait une collaboration entre les autorités militaires et la population civile[70]. Cette allégation fait clairement partie de la thèse du Procureur si l'on considère l'acte d'accusation, le mémoire préalable au procès et le résumé des dépositions attendues de différents témoins joint en annexe[71]. Le résumé de la déposition attendue du témoin XBM indique particulièrement que « [l]e témoin fera un témoignage sur la coopération existant entre militaires et civils avant et pendant les massacres ». Cette information claire est confirmée dans la déclaration du témoin XBM communiquée en décembre 2004 comme pièce justificative à la modification de l'acte d'accusation, soit plus d'un an avant la déposition du témoin.

41. La Chambre note que le témoin XBM n'a pas déclaré que les accusés étaient présents lors de la commission de ces faits. Dans ces circonstances, elle est convaincue qu'une admission restreinte de ces éléments de preuve ne portera pas atteinte aux droits des accusés à un procès équitable.

42. La déposition du témoin XBM portant sur la cérémonie d'installation d'une antenne de la RTLM fin 1993 et la distribution d'armes qui a suivi, la réunion tenue au bureau communal de Mutura en janvier 1994, une réunion tenue à l'Hôtel Méridien en mai 1994 et les massacres perpétrés à Nyundo est par conséquent admissible dans le seul but de montrer qu'il existait une collaboration entre civils et autorités militaires.

PAR CES MOTIFS, LE TRIBUNAL

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[65] Compte rendu de l'audience du 21 juin, p. 42 et 43, 45 et 46.
[66] *Ibid*., p. 42 et 43, 49 et 50.
[67] *Ibid*., p. 54 et 55.
[68] *Ibid*., p. 55 et 56.
[69] *Ibid*., p. 56 à 58.
[70] *Ibid*., p. 37 et 38, 49 et 50, 50 et 51, 54 et 55, 56 et 57, 58 et 59.
[71] Voir acte d'accusation, par. 24.3, 36, 62.2 et 62.12 ; Mémoire préalable au procès, par. 9 (« *Le plan* visant à tirer profit de l'impasse politique provoquée par la mort de Habyarimana comportait des réunions, des discussions et la coordination des militaires et des autorités civiles pendant la période allant du 6 au 10 avril 1994 »), par. 11 (« Après avoir fui l'assaut du FPR à Kigali et s'être installés à Murambi (Gitarama) le 12 avril, les accusés et les autorités civiles et militaires, dont le Gouvernement intérimaire, *ont préparé* la destitution des préfets, bourgmestres et chefs militaires considérés comme des obstacles au programme de génocide », par. 18 (« En raison de la massivité de l'entreprise génocide, la *commission* des crimes impliquait une coordination entre les militaires et les autorités civiles dans l'ensemble du pays »), par. 155 (« Mais, comme il apparaît des déclarations cumulées de nombreux témoins, Nzirorera, Ngirumpatse et Karemera travaillaient *main dans la main avec d'autres autorités civiles et militaires* du Gouvernement intérimaire et s'appuyaient sur leurs propres réseaux de communication et de contrôle au sein du parti MRND et de l'administration territoriale pour assurer le succès d'une campagne gouvernementale habilement coordonnée contre les Tutsis de Bisesero », (non souligné dans l'original) ; voir le résumé des dépositions attendues des témoins AKX, ANP, AWE, BDW, XBM et XXQ, qui renvoie à des paragraphes précis de l'acte d'accusation faisant état de la coopération qui existait entre civils et autorités militaires.

I. REJETTE la requête de la Défense tendant à exclure dans sa totalité la déposition du témoin XBM et à imposer des sanctions au Procureur,

II. ACCUEILLE EN PARTIE les objections soulevées oralement par la Défense à certaines parties de la déposition des témoins ZF et XBM et DÉCIDE comme suit :

1. La déposition du témoin ZF relative au *réseau zéro* ne peut être admise pour établir le fait essentiel que les accusés appartenaient à ce réseau, ceux-ci n'ayant pas été informés du fait. Cette déposition n'est admissible que dans la mesure où elle établit l'existence des liens entre le réseau et l'*Akazu,*

2. La déposition du témoin XBM portant sur la cérémonie d'installation d'une antenne de la RTLM fin 1993 et la distribution d'armes qui a suivi, la réunion tenue au bureau communal de Mutura en janvier 1994, une réunion tenue à l'Hôtel Méridien en mai 1994 et les massacres perpétrés à Nyundo est admissible dans le seul but de montrer qu'il existait une collaboration entre civils et autorités militaires.

III. REJETTE les objections orales de la Défense en leurs autres aspects.

Fait à Arusha, le 19 octobre 2006.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Décision relative à la requête de Joseph Nzirorera aux fins d'une ordonnance enjoignant au Procureur de communiquer les pièces relatives au FPR et lui imposant des sanctions
Article 68 du Règlement de procédure et de preuve
19 octobre 2006 (ICTR-98-44-T)

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Communication de matériel disculpatoire, Obligation de communication du Procureur, Caractère disculpatoire du matériel dépend de la nature des charges retenues et des éléments de preuve obtenus à sa charge, Le caractère disculpatoire retenu dans un autre dossier ne s'impose pas dans le présen dossier – Indivisibilité du Bureau du Procureur en ce qui concerne l'obligation de communication, Le Procureur doit activement examiner tous les éléments en possession de l'ensemble de son Bureau et informer les accusés de l'existence d'éléments de nature à les disculper– Requête partiellement acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 39, 46 (A), 68, 68 (A) et 68 (D)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Casimir Bizimungu et consorts, Decision on Prosper Mugiraneza's Motion to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68, 10 décembre 2003 (ICTR-99-50) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision relative à la requête intitulée Joseph Nzirorera's Motion to Compel Inspection

and Disclosure,, 5 juillet 2005 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 octobre 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 de première instance, Le Procureur c. Edouard Karemera, Scheduling Order, 30 mars 2006 (ICTR-98-44) ; 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 d'appel, Le Procureur c. Edouard Karemera et consorts, Décision relative à l'appel interlocutoire concernant le rôle du système de communication électronique du Procureur dans l'exécution de l'obligation de communication, 30 juin 2006 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on the Ntabakuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68, 6 October 2006 (ICTR-98-41)

T.P.I.Y.: Chambre de première instance, Le Procureur c. Zejnil Delalić et consorts, Décision relative à la requête de l'accusé Hazim Delić aux fins de la communication d'informations à décharge en application de l'article 68 du Règlement, 24 juin 1997 (IT-96-21) ; 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)

Introduction

1. L'ouverture du procès en l'espèce a eu lieu le 19 septembre 2005. Dans une requête déposée le 5 avril 2006, le Procureur a indiqué qu'il était disposé à communiquer des pièces relatives au FPR comme l'avait demandé la Défense de Joseph Nzirorera, tout en priant la Chambre d'« être dispensé de l'obligation de révéler l'identité des auteurs des déclarations[1] » (traduction). Le 4 juillet 2006, la Chambre a fait droit en partie à la requête mais a ordonné que l'identité des auteurs des déclarations concernant le *Front patriotique rwandais* (« FPR ») soit communiquée à la Défense. Elle a en même temps prescrit des mesures de protection en faveur des témoins en vue d'assurer leur sécurité[2].

2. Par la suite, le Procureur a communiqué à la Défense de chacun des accusés une version caviardée de quatre déclarations de témoin, dont celles de DM46 et DM80, ainsi que copie d'un rapport portant sur les activités du FPR[3].

3. Entre-temps, la Défense de Nzirorera avait déposé une requête demandant à la Chambre d'ordonner au Procureur de communiquer les documents et les déclarations de témoin susceptibles d'établir que le FPR avait commis des actes de violence et qu'il avait infiltré la population rwandaise entre 1990 et 1994. Elle a également demandé des sanctions à l'encontre du Procureur qui ne s'était pas conformé à la décision rendue par la Chambre le 4 juillet 2006[4]. Le Procureur s'oppose à cette requête[5].

Délibération

(1) Demande de la Défense en vue de la communication de pièces à décharge

[1] Prosecutor's Application Pursuant to Rules 39, 68 and 75 of the Rules of Procedure and Evidence for an Order for Conditional Disclosure of Witness Statements and other Documents Pursuant to Rule 68 (A).
[2] *Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera* (« *Karemera et consorts* »), affaire n°ICTR-98-44-T, Décision relative à la Requête du Procureur, fondement tiré des articles 39, 68 et 75 du Règlement de procédure et de preuve aux fins de communication conditionnelle de déclarations de témoin et d'autres pièces en application de l'article 68 (A) (Chambre de première instance), 4 juillet 2006 (« Décision du 4 juillet 2006 »).
[3] Voir pièces communiquées les 1er août et 29 septembre 2006.
[4] Requête de Joseph Nzirorera aux fins d'une ordonnance enjoignant au Procureur de communiquer les pièces relatives au FPR et lui imposant des sanctions, déposée le 25 septembre 2006.
[5] Réponse du Procureur, déposée le 29 septembre 2006.

4. La Défense fait valoir que les documents et les déclarations de témoin alléguant d'actes de violence et d'infiltration commis par le FPR entre 1990 et 1994 constituent des éléments de preuve à décharge au sens de l'article 68 du Règlement de procédure et de preuve (le « Règlement »). Ces pièces sont suffisamment identifiées et leur communication est essentielle à la thèse de la Défense, dans la mesure où elles fournissent la justification des barrages et du système de défense civile et qu'elles tendent à prouver que les actes reprochés à l'accusé relevaient d'une réponse légitime à l'infiltration avérée du FPR et aux actes de violence commis par celui-ci. La Défense ajoute que, dans l'affaire *Bagosora*, la Chambre a déjà établi que ces pièces étaient de nature à disculper l'accusé, conclusion qui s'applique à l'espèce[6]. Toujours selon la Défense, le Procureur a admis être en possession de déclarations de témoin autres que celles qu'il a déjà communiquées. Elle en conclut que les critères que la Chambre a formulés dans ses précédentes décisions pour ordonner la communication de pièces en vertu de l'article 68 du Règlement sont donc réunis en l'espèce. En réponse, le Procureur indique que son équipe consulte régulièrement sa base de données à la recherche de documents sur le FPR en suivant les critères avancés par la Défense mais qu'il n'a en sa possession aucune pièce susceptible d'être communiquée.

5. L'article 68 (A) du Règlement prescrit que 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 de ses éléments de preuve à charge ».

« C'est au Procureur qu'il revient de déterminer, sur la base des faits », quelles sont les pièces qui remplissent les conditions fixées dans l'article 68[7], et celui-ci est présumé s'acquitter de ses obligations de bonne foi[8].

6. Selon la jurisprudence du Tribunal, pour établir une violation de l'obligation de communication en vertu de l'article 68, la Défense doit : (i) déterminer de manière précise les pièces dont elle souhaite la communication, (ii) établir que le Procureur a ces éléments en sa possession ou sous son contrôle, (iii) présenter un commencement de preuve accréditant l'idée que les éléments recherchés seraient susceptibles de disculper l'accusé[9]. Des éléments de preuve sont considérés comme étant de nature à disculper l'accusé si ceux-ci tendent à réfuter un fait matériel qui lui est reproché ou s'ils portent atteinte à la crédibilité des éléments censés étayer des faits essentiels[10].

7. Comme l'a relevé la Chambre de première instance I dans l'affaire *Bagosora et consorts,* la question de savoir si les éléments recherchés sont de nature à disculper l'accusé dépend « de la nature des charges retenues et des éléments de preuve obtenus à sa charge[11] » (traduction). Elle avait conclu que certaines informations spécifiques concernant les activités du FPR pourraient être susceptibles de disculper l'accusé, au vu des charges portées contre lui en l'espèce. Elle a ajouté que « les éléments de preuve relatifs aux activités du FPR mais qui n'ont qu'un rapport lointain avec les crimes allégués ne sont pas de nature à disculper l'accusé » (traduction). Elle a également estimé que « les éléments de preuve concernant les activités du FPR à des moments et à des lieux sans rapport avec les crimes

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[6] La Défense se réfère à l'affaire Le Procureur c. Bagosora et consorts, n°ICTR-98-41-T, Decision on Disclosure of Defence Witness Statements in the Possession of the Prosecution Pursuant to Rule 68(A) (Chambre de première instance), 8 mars 2006.

[7] Affaire *Karemera et consorts,* n°ICTR-98-44-AR73.6, Décision relative à l'appel interlocutoire de Joseph Nzirorera (Chambre d'appel), 28 avril 2006, par. 16 ; *Le Procureur c. Tihomir Blaskić*, affaire n°IT-95-14-A, arrêt, 29 juillet 2004, par. 264.

[8] Affaire *Karemera et consorts,* n°ICTR-98-44-AR73.6, Décision relative à l'appel interlocutoire de Joseph Nzirorera (Chambre d'appel), 28 avril 2006, par. 17 ; *Le Procureur c. Dario Kordić et Mario Čerkez*, affaire n°IT-95-14/2-A, arrêt, par. 183.

[9] Affaire *Karemera et consorts,* n°ICTR-98-44-AR73.6, Décision relative à l'appel interlocutoire de Joseph Nzirorera (Chambre d'appel), 28 avril 2006, par. 13 ; *Le Procureur c. Bagosora et consorts,* affaire n° ICTR-98-41-T, *Decision on the Ntabakuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68* (Chambre de première instance), 6 octobre 2006, par. 2.

[10] *Le Procureur c. Bagosora et consorts,* affaire n°ICTR-98-41-T, *Decision on Ntabakuze Motion for Disclosure of Prosecution Files* (Chambre de première instance), 6 octobre 2006, par. 4 (« Décision *Bagosora* du 6 octobre 2006 »).

[11] *Id.*

allégués ne sont pas susceptibles de disculper l'accusé[12] ». Les décisions rendues par la Chambre de première instance I sont basées sur un examen au cas par cas et ne contiennent pas de déclaration d'ordre général pouvant laisser croire que les éléments concernant le FPR sont de nature à innocenter l'accusé. Cette même Chambre a encore estimé que

> Même si certains éléments de la catégorie indiquée par la Défense pourraient être de nature à disculper l'accusé, cela ne suffit pas à justifier que la Chambre ordonne la communication de toute la catégorie en question [...] La communication de toute la catégorie de documents ne sera ordonnée qu'en vertu de l'article 68 lorsque ladite catégorie est définie avec précision au regard des éléments à décharge qu'elle contient[13] (traduction).

8. En l'espèce, il n'est pas exclu que certaines informations concernant les activités du FPR soient de nature à disculper l'accusé, dans la mesure où elles ont un rapport avec les crimes qui sont imputés à celui-ci ou avec des éléments de preuve présentés par le Procureur. Ces informations permettraient à la Chambre de comprendre le contexte ou les circonstances dans lesquels ont été commis certains actes qui ont fait l'objet des dépositions entendues lors de la présentation des moyens à charge. Or, la Défense n'a pas défini avec suffisamment de précision les éléments recherchés. Elle se réfère, de manière générale, à toutes les informations que détient le Procureur au sujet « d'actes de violence et d'infiltration du FPR au Rwanda entre 1990 et 1994 » (traduction). La requête est trop imprécise et pourrait englober des éléments n'ayant qu'un lien éloigné ou même aucun rapport avec les crimes reprochés à l'accusé et qui ne sauraient donc être de nature à disculper celui-ci. La demande de la Défense n'a pas suffisamment circonscrit ce qui, dans les éléments recherchés, pourrait être de nature à innocenter l'accusé. Les articles du Règlement ne peuvent pas être utilisés librement comme moyen d'obtenir des informations du Procureur, puis de déterminer, *a posteriori*, si elles peuvent être utilisées ou non[14]. La demande de la Défense en vue de la communication d'éléments à décharge est donc à rejeter.

(2) Demande de la Défense tendant à obtenir la communication de déclarations de témoin non caviardées et des sanctions à l'encontre du Procureur

9. La Défense de Nzirorera demande que lui soient communiquées des déclarations de témoin en version non caviardée, arguant du fait qu'elle doit en identifier les auteurs pour pouvoir utiliser les éléments susceptibles de disculper l'accusé[15]. Elle partage cependant les craintes du Procureur au sujet des dangers que pourraient courir les témoins détenant des informations sur les crimes imputés au FPR et qui sont disposés à coopérer avec la Défense. C'est pourquoi elle s'engage à n'entreprendre aucune action susceptible de compromettre leur sécurité et ne voit aucun inconvénient à entrer en contact avec eux par le biais de la Section d'aide aux témoins et aux victimes[16]. La Défense demande par ailleurs que des sanctions soient imposées à l'encontre du Procureur en vertu de l'article 46 (A) du Règlement au motif qu'il a violé la Décision du 4 juillet 2006. Elle soutient que ce sont les seules mesures appropriées pouvant mettre fin à l'impunité avec laquelle le Procureur manque à ses obligations en matière de communication de pièces en l'espèce, provoquant des retards répétés et une obstruction continuelle au bon déroulement du procès[17].

10. Le Procureur fait valoir que l'équipe chargée du procès a confirmé l'existence de deux autres déclarations de témoin mais que celles-ci n'ont été communiquées à la Défense qu'en version caviardée, afin de ne pas compromettre les enquêtes en cours et pour garantir la sécurité de ses informateurs[18].

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[12] *Ibid*., par. 5.
[13] *Ibid*., par. 6.
[14] *Id*., citant l'affaire *Delalić et consorts,* Décision relative à la requête de l'accusé Hazim Delić aux fins de la communication d'informations à décharge en application de l'article 68 du Règlement, Chambre de première instance, 24 juin 1997, par. 15.
[15] Réponse de la Défense, déposée le 2 octobre 2006.
[16] *Id*.
[17] Requête de la Défense.
[18] Réponse du Procureur.

11. La Chambre de céans et la Chambre d'appel ont clairement rappelé que le respect par le Procureur de l'obligation qui lui est faite de communiquer à la Défense les éléments de preuve à décharge était indispensable à l'équité du procès[19]. Si le Procureur a mission de mener des enquêtes, c'est notamment pour « [aider] le Tribunal [à découvrir] la vérité et [à] rendre justice à la communauté internationale, aux victimes et aux accusés »[20]. Par ailleurs, la Chambre d'appel a également précisé que le Bureau du Procureur était un et indivisible dans l'exécution de l'obligation de communication, attendu que les équipes du Bureau du Procureur étaient toutes représentatives de ce service[21].

12. Compte tenu des principes exposés ci-dessus, la Chambre trouve non convaincant l'argument du Procureur selon lequel « l'équipe chargée du dossier n'a pas connaissance d'autres éléments devant être communiqués en vertu des articles 66 (B) et 68 (A) » et que « les recherches n'ont pas permis d'identifier lesdites déclarations du fait qu'elles font partie d'un dossier en cours, à savoir *Bagosora et consorts* » (traduction)[22]. Le Procureur doit activement examiner tous les éléments en sa possession et non pas seulement ceux dont s'occupe l'équipe chargée du procès et, à tout le moins, informer les accusés de l'existence d'éléments de nature à les disculper[23].

13. Dans la Décision du 4 juillet 2006, la Chambre a également estimé que « puisque l'identité des auteurs des déclarations relatives aux documents du FPR et celle des auteurs des déclarations intéressant la crédibilité sont effectivement liées à la teneur des déclarations, ces informations doivent être communiquées à la Défense »[24]. Le Procureur reconnaît cette décision mais fait valoir que révéler l'identité de ses témoins exposerait ceux-ci à de graves dangers et qu'il est donc amené à invoquer l'article 39 du Règlement, qui autorise le Procureur à prendre les mesures spéciales nécessaires à la sécurité d'éventuels témoins et informateurs. Il invite la Chambre à trouver le juste milieu entre la demande de la Défense et la nécessité pour lui de ne pas compromettre l'intégrité des enquêtes en cours.

14. Comme cela a été précisé dans des décisions antérieures, l'application de l'article 39 du Règlement ne constitue pas en soi un obstacle à la communication d'informations permettant d'identifier les témoins à charge[25]. Toutefois, lorsque le Procureur craint que des témoins potentiels ou des informateurs ne soient mis en danger ou n'encourent des risques éventuels ou que la communication de certains éléments pourrait compromettre des enquêtes en cours ou à venir, il peut

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[19] Décision orale relative à une requête en ajournement de procédure, compte rendu de l'audience du 16 février 2006, p. 5 et suivantes ; affaire *Karemera et consorts*, n°ICTR-98-44-AR73.7, Décision relative à l'appel interlocutoire concernant le rôle du système de communication électronique du Procureur dans l'exécution de l'obligation de communication, Chambre d'appel, 30 juin 2006, par. 9.

[20] Affaire *Karemera et consorts*, n°ICTR-98-44-AR73.7, Décision relative à l'appel interlocutoire concernant le rôle du système de communication électronique du Procureur dans l'exécution de l'obligation de communication, Chambre d'appel, 30 juin 2006, par. 9 ; affaire *Bagosora et consorts*, n°ICTR-98-41-AR73 et ICTR-98-41-AR73(B), *Decision on Interlocutory Appeals of Decision on Witness Protection Orders*, Chambre d'appel, par. 44.

[21] Affaire *Bagosora et consorts*, n°ICTR-98-41-AR73 et ICTR-98-41-AR73(B), *Decision on Interlocutory Appeals of Decision on Witness Protection Orders*, Chambre d'appel, 6 octobre 2005, par. 43 :
Il n'est indiqué nulle part dans le Statut ou dans le Règlement que les obligations du Procureur pourraient être limitées à des équipes particulières au sein du Bureau du Procureur, qui, dans la pratique du Tribunal, sont parfois appelées le « Procureur » dans une affaire donnée. Selon l'interprétation habituelle du texte et du contexte du Règlement, les obligations du Procureur lui incombent à lui seul en tant qu'individu qui peut ensuite déléguer au Bureau du Procureur, en tant qu'entité indivisible, le devoir de remplir ces obligations (Traduction).
Voir également : Affaire *Karemera et consorts*, nº ICTR-98-44-AR73.7, Décision relative à l'appel interlocutoire concernant le rôle du système de communication électronique du Procureur dans l'exécution de l'obligation de communication, Chambre d'appel , 30 juin 2006, note de bas de page 33.

[22] Réponse du Procureur, par. 9 (non souligné dans l'original).

[23] Affaire *Karemera et consorts*, n°ICTR-98-44-AR73.7, Décision relative à l'appel interlocutoire concernant le rôle du système de communication électronique du Procureur dans l'exécution de l'obligation de communication (Chambre d'appel), 30 juin 2006, par. 10.

[24] Décision rendue le 4 juillet 2006, citant l'affaire Bizimungu et consorts ; Decision on Prosper Mugiraneza's Motion to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68 (Chambre de première instance), 10 décembre 2003, par. 21.

[25] Décision rendue le 4 juillet 2006, par. 8 ; voir également : affaire *Karemera et consorts,* Décision relative à la requête intitulée *Joseph Nzirorera's Motion to Compel Inspection and Disclosure* (Chambre de première instance), 5 juillet 2005, par. 18 ; affaire *Karemera et consorts,* Décision portant calendrier (Chambre de première instance), 30 mars 2006, par. 6.

demander à la Chambre d'ordonner les mesures spécifiques prévues par le Statut du Tribunal et par le Règlement[26]. Plus précisément, l'article 68 (D) du Règlement prévoit une exception à l'obligation de communication d'éléments susceptibles de disculper l'accusé dans le cas où une telle 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 ». Lorsqu'il forme une requête en ce sens, le Procureur est tenu de fournir à la Chambre les informations ou pièces dont la confidentialité est demandée[27]. La Chambre n'accordera une telle dérogation qu'au cas par cas après examen des arguments présentés par le Procureur.

15. Dans la réponse du Procureur, la Chambre n'a été saisie d'aucune information ou pièce ni d'aucun argument précis de nature à l'amener à rendre une ordonnance allant dans le sens de l'exception prévue par l'article 68 (D) du Règlement. Le 4 juillet 2006, la Chambre avait déjà prescrit des mesures de protection en faveur des auteurs des déclarations dont il est question[28]. Si le Procureur estime que d'autres mesures sont nécessaires, il doit en saisir la Chambre sur-le-champ. À l'exception des déclarations des témoins DM80 et DM46[29], la communication d'éléments à décharge sous forme caviardée n'est donc pas autorisée à ce stade, comme le reconnaît le Procureur.

16. L'article 46 (A) du Règlement est libellé comme suit :

> 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.

17. Dans sa décision orale rendue le 24 mai 2006, la Chambre a estimé que le Procureur n'avait pas fait preuve de diligence dans l'exécution de ses obligations en matière de communication[30], ce qui entravait le bon déroulement du procès et était contraire à l'intérêt de la justice, et a de ce fait adressé un avertissement au Procureur. La Chambre considère en l'espèce qu'en communicant les déclarations de témoin dans leur version caviardée, le Procureur a violé la décision qu'elle avait rendue le 4 juillet 2006, ce que celui-ci ne conteste même pas. Ce comportement est inacceptable, il reste offensant, entrave la procédure et va à l'encontre des intérêts de la justice. La Chambre estime donc devoir imposer une sanction au Bureau du Procureur, en appelant formellement l'attention personnelle du Procureur, en tant qu'organe de régulation, sur ce cas d'indiscipline[31].

PAR CES MOTIFS, LA CHAMBRE

I. REJETTE la demande de la Défense en vue de la communication d'éléments à décharge et de l'imposition de sanctions au Procureur ;

II. DROIT à la demande de la Défense tendant à obtenir la version non caviardée des déclarations qui ont été déjà communiquées le 29 septembre 2006 ;

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[26] Voir article 21 du Statut ; articles 69, 75, 66 (C) et 68 (D) du Règlement.
[27] Décision du 4 juillet 2006, par. 7.
[28] *Ibid*. La Chambre a ordonné que :
[…] les conseils de chaque accusé et les accusés ne communiquent, ni ne révèlent ni ne commentent, directement ou indirectement, … pièce ni information contenues dans tous documents, ni toute autre information de nature à révéler ou à permettre d'identifier toute personne dont la déclaration est communiquée en exécution de la présente décision, à toute personne ou entité autre que les accusés, leurs conseils commis d'office ou les autres personnes concourant à leur Défense ;
[…] les conseils de chaque accusé informent le Procureur par écrit, dans un délai raisonnable, et la Section d'aide aux témoins et aux victimes toutes les fois qu'ils souhaiteraient s'entretenir avec une personne qui a soumis au Procureur une déclaration relative aux documents du FPR ou une déclaration intéressant la crédibilité et qui ne serait pas l'objet de quelque mesure de protection prescrites. Si la personne concernée consentait à l'entretien, la Section d'aide aux témoins et aux victimes prendrait immédiatement toutes mesures nécessaires en vue de l'organiser ; ».
[29] Décision du 4 juillet 2006.
[30] Compte rendu de l'audience du 24 mai 2006, p. 35 et 36.
[31] À lire en parallèle avec l'article 46 (B) du Règlement qui prévoit que tout manquement d'un conseil peut être signalé à l'« Ordre des avocats dans le pays où il est admis à l'exercice de sa profession… ».

III. IMPOSE, en application de l'article 46 (A) du Règlement, une sanction au Bureau du Procureur ;

IV. INVITE en conséquence le Greffe à notifier la présente décision au Procureur en personne.

Fait à Arusha, le 19 octobre 2006.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Décision sur la requête de la défense en certification d'appel de la décision relative à la requête intitulée « Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2 and NZ3 » Article 73 (B) du Règlement de procédure et de preuve 30 octobre 2006 (ICTR-98-44-T)

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Certification d'appel demandée contre une decision rejetant une demande d'injonction à comparaître en vue d'interrogatoires de témoins hors audience, Examen d'une demande de certification ne devrait pas tenir compte du fond de l'affaire, Pas d'obligation pour la Chambre de première instance d'accorder toutes les mesures demandées par une partie parce qu'elle prétend avoir besoin d'aide, Critères à remplir pour qu'une certification d'appel soit accordé : pas de démonstration que la décision contestée touche une question susceptible de compromettre sensiblement l'équité et la rapidité du procès ou son issue – Requête rejetée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 73 (B) ; Statut, art. 20 (4) (e)

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 d'appel, Le Procureur c. Pauline Nyiramasuhuko, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 septembre 2004 (ICTR-98-42) ; Chambre de première instance, Le Procureur c. Casimir Bizimungu et consorts, 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 février 2005 (ICTR-99-50) ; 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) ; 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, Decision on Kabiligi Application for Certification Concerning Defence Cross-Examination After Prosecution Cross-Examination, 2 décembre 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 al., Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements, 22 mai 2006 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Arsène Shalom Ntahobali et Pauline Nyiramasuhuko, Decision on Ntabohali's Motion for Certification to Appeal the Chamber's Decision Granting Kanyabashi's Request to Cross-Examine Ntabohali Using 1997 Custodial Interviews, 1 June 2006 (ICTR-97-21) ; Chambre de première instance, Le Procureur c. Édouard Karemera et consorts, Decision on Defence Motion for Certification to Appeal Decision Granting Special Protective Measures for Witness ADE, 7 juin 2006 (ICTR-98-44)

T.P.I.Y.: Chambre d'appel, Le Procureur c. Duško Tadić, Arrêt, 15 juillet 1999 (IT-94-1) ; 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, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding, 20 juin 2005 (IT-02-54)

T.S.S.L. : Chambre de première instance, Le Procureur c. Sam Hinga Norman et consorts, Decision on motions by the First and Second Accused for leave to appeal the Chamber's decision on their motions for the issuance of a subpoena to the President of the Republic of Sierra Leone., 28 juin 2006 (SCSL-04-14)

Introduction

1. Le procès en l'espèce s'est ouvert le 19 septembre 2005. Le 12 juillet 2006, la Chambre a rejeté la requête de la Défense demandant que des injonctions à comparaître soient délivrées aux témoins à décharge potentiels DN1, DN2 et DNZ3 pour qu'elle puisse les rencontrer (la « Décision contestée »)[1]. La Défense de Nzirorera demande à la Chambre de l'autoriser à interjeter appel de cette décision. Le Procureur s'y oppose.

Discussion

2. La Défense fait valoir que, selon l'arrêt *Tadiæ*,

> « une Chambre [de première instance] est tenue, lorsqu'une Partie lui demande de l'aider à présenter sa cause, d'accorder toutes les mesures qu'elle est à même de fournir aux termes du Règlement et du Statut[2]. »

Elle soutient qu'en rejetant sa requête demandant que DNZ1, DNZ2 et DNZ3 soient enjoints à comparaître, la Chambre a failli à son obligation d'accorder de telles mesures, portant ainsi atteinte à son droit d'obtenir la comparution et l'interrogatoire de témoins susceptibles de réfuter les témoignages à charge, conformément à l'article 20 (4) (e) du Statut du Tribunal.

3. La Chambre de première instance relève que selon la Chambre d'appel,

> « [l]es Chambres sont investies du pouvoir de délivrer des ordonnances, assignations, citations, mandats et ordres de transferts nécessaires à l'enquête, à la préparation du procès ou à sa conduite[3]. »

[1] Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera, affaire n°ICTR-98-44-T («Karemera et consorts»), « Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2, and NZ3», 12 juillet 2006.
[2] *Le Procureur c. Tadić*, affaire n°IT-94-1-A, jugement, 15 juillet 1999, par. 52.
[3] *Id.*

Cela ne veut pas dire, cependant, qu'une Chambre doive accorder toutes les mesures demandées par une partie simplement parce qu'elle prétend avoir besoin d'aide. Elle doit exercer le pouvoir discrétionnaire que lui confèrent le Règlement et le Statut. Comme exposé dans la décision contestée, la Chambre d'appel a fixé, conformément aux dispositions du Statut et du Règlement, les conditions qui doivent être remplies pour enjoindre à un témoin potentiel de venir déposer à une date et en un lieu donnés[4]. Lorsque pareille mesure est demandée par un accusé, la Chambre doit apprécier si le Statut et le Règlement l'autorisent à l'accorder.

4. La Défense soutient qu'en l'espèce, les conditions requises pour la certification sont réunies. Elle ajoute que si elle décidait d'accorder la certification, la Chambre devrait examiner le fond de l'appel de la décision contestée, comme l'a conclu la Chambre de première instance en l'affaire *Bagosora*[5].

5. Le paragraphe (B) de l'article 73 du Règlement prévoit que [les décisions] concernant les requêtes présentées en application de l'article 73 ne sont pas susceptibles d'appel interlocutoire sauf décision contraire de la Chambre dans un nombre de cas très limité qu'il prévoit. La Chambre de première instance est investie du pouvoir discrétionnaire d'accorder la certification si :

> 1) la décision contestée touche une question susceptible de compromettre sensiblement l'équité et la rapidité du procès, ou son issue ; et
>
> 2) un règlement immédiat de la question par la Chambre d'appel pourrait concrètement faire progresser la procédure.

6. Il incombe à la partie requérante de démontrer que les deux conditions posées par l'article 73 (B) sont réunies, et même si elle le fait, la certification doit demeurer exceptionnelle[6].

7. La présente Chambre a déjà conclu que l'examen d'une demande de certification ne devrait pas tenir compte du fond de l'affaire[7]. D'autres Chambres de première instance ont adopté la même position[8]. La Chambre estime également que la Défense a mal interprété la position que la Chambre compétente a adoptée sur la question en l'affaire *Bagosora*. Dans une décision récente rendue en cette affaire, que la Défense n'a pas citée, la Chambre a précisé sa position quant à la question de savoir si, lorsqu'elle examine une demande d'autorisation d'interjeter appel, une Chambre de première instance doit ou non tenir compte du fond de l'affaire. Elle a conclu que :

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[4] *Le Procureur c. Krstić,* affaire n°IT-98-33-A, arrêt relatif à la demande d'injonctions, 1er juillet 2003, par. 10 ; *Le Procureur c. Halilović*, affaire n°IT-01-48-AR73, Décision relative à la délivrance d'injonctions, 21 juin 2004.

[5] *Le Procureur c. Bagosora et consorts,* affaire n°ICTR-98-41-T, Décision sur la demande de certification d'appel formée par Kabiligi relativement à la faculté pour la Défense de contre-interroger un témoin après son contre-interrogatoire par le Procureur, 2 décembre 2005.

[6] *Le Procureur c. Arsène Shalom Ntahobali et Pauline 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, par. 15 ; *Le Procureur c. Nyiramasuhuko et consorts*, affaire n°ICTR-98-42-AR73, « *Decision on Pauline Nyiramasuhuko's Request for Reconsideration* », 27 septembre 2004, par. 10.

[7] Le Procureur c. Karemera et consorts, « Decision on Defence Motion for Certification to Appeal Decision Granting Special Protective Measures for Witness ADE » (Chambre de première instance), 7 juin 2006, par. 5.

[8] Voir, par exemple, *Le Procureur c. Casimir Bizimungu et consorts*, affaire n°ICTR-99-50-T, Décision relative à la demande de Bicamumpaka en certification d'appel intitulée « *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 février 2005, par. 28. Dans l'affaire *Bizimungu*, la Chambre a convenu que la question de savoir si la Chambre a commis une erreur de droit ou si elle a abusé de sa discrétion ne doit pas être examinée au moment d'autoriser ou non l'appel. Elle a souligné, cependant, qu'en employant le terme « sensiblement » dans la première condition, les rédacteurs de cet article entendaient exclure des questions sans intérêt particulier ou d'ordre secondaire qui pourraient être soulevées au cours du procès ; *Le Procureur c. Nyiramasuhuko et consorts*, affaire n°ICTR-98-42-T, Décision relative à la Requête du Procureur en certification d'appel de la Décision de la Chambre de première instance du 30 novembre 2004 relative à la Requête en communication des moyens à charge, 4 février 2005, par. 11 ; *Le Procureur c. Slobodan Milošević*, Affaire n°IT-02-54-T, Décision portant sur la Requête de l'Accusation aux fins de certifier l'appel de la Décision relative à la demande de l'Accusation concernant une procédure de voir dire », rendue par la Chambre de première instance, 20 juin 2005, par. 4.

> Lorsqu'il est fait droit à la demande de certification, c'est à la Chambre d'appel qu'il appartient de déterminer la validité de la décision. De ce point de vue, il ne fait aucun doute que ce n'est pas à la Chambre de première instance d'évaluer la validité de sa propre décision lorsqu'elle détermine s'il y a lieu de faire droit à une demande d'autorisation d'interjeter appel. Par ailleurs, les Chambres de première instance ont l'obligation d'écarter les demandes de certification qui n'ont aucune chance d'aboutir et qui, par conséquent, « ne pourrai[en]t pas concrètement faire avancer la procédure en l'espèce[9] » [traduction].

8. Sur la base des arguments exposés ci-dessus, la Chambre doit maintenant déterminer si la Défense a démontré que les deux conditions posées par l'article 73 (B) étaient satisfaites.

9. La Défense fait valoir que la décision contestée touche une question susceptible de compromettre sensiblement l'équité et la rapidité du procès, parce que le droit de l'accusé à un procès équitable, et particulièrement son droit d'obtenir la comparution et l'interrogatoire de témoins conformément à l'article 20 (4) (e) du Statut est gravement compromis par le refus de la Chambre de lui donner accès à des témoins qui pourraient réfuter les dépositions à charge. Pour appuyer sa requête, la Défense se réfère à des décisions antérieures rendues par le Tribunal de céans dans les affaires *Bagosora et consorts* et *Nyiramasuhuko et consorts*, ainsi qu'à une décision rendue par le Tribunal spécial pour la Sierra Leone[10], affirmant que les questions qui y étaient posées étaient semblables à celle que la Chambre doit examiner en l'espèce. Elle cite également d'autres affaires où la Chambre compétente a statué sur l'admission ou l'exclusion de moyens de preuve, qui, affirme-t-elle, présentent beaucoup de ressemblances avec l'espèce et qui excluaient d'importants éléments de preuve à décharge au cours du procès.

10. Selon la Défense, en tranchant la question soulevée par la Défense concernant l'accès à des témoins potentiels, la Chambre d'appel pourrait concrètement faire avancer la procédure en l'espèce car il s'agit d'une question qui ne manquera pas de resurgir pour d'autres témoins à décharge potentiels. Il vaudrait donc mieux la clarifier au stade de la présentation des moyens de preuve à charge et avant que la Défense ne présente ses moyens. Si la demande de certification était rejetée et qu'à l'occasion d'un recours introduit contre le jugement final de la Chambre de première instance, la Chambre d'appel concluait qu'une erreur a été commise, un nouveau procès devrait s'ouvrir pour entendre les témoins à décharge qui n'auraient pas été appelés à témoigner, ce qui aurait pour effet de retarder la procédure. La Défense soutient en outre que les témoignages qu'elle demande sont si pertinents que si la Chambre n'a pas usé de son pouvoir discrétionnaire pour délivrer des injonctions en l'espèce, il est fort probable qu'elle ne le fera jamais. La révision de la décision permettrait donc de faire avancer concrètement la procédure.

11. Dans la décision contestée, la Chambre n'a pas catégoriquement privé l'accusé de son droit d'interroger un témoin, ni refusé absolument de délivrer des injonctions à comparaître pour tous les témoins potentiels susceptibles de réfuter les affirmations des témoins à charge. Cette décision ne portait d'ailleurs pas sur la comparution de témoins au procès, mais sur une demande d'injonction à comparaître en vue d'interrogatoires hors audience. La Chambre étant saisie de demandes relatives à trois témoins potentiels bien précis, elle a statué sur la base des informations que la Défense lui a fournies concernant ces témoins. Aucune conclusion générale ne peut être tirée de la décision contestée quant à la manière dont la Chambre statuerait sur une future requête portant sur des injonctions à comparaître. Il est loisible à l'accusé de demander la délivrance d'injonctions permettant

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[9] Le Procureur c. Bagosora et consorts, « Decision on the Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal », 16 février 2006, par. 4.

[10] Le Procureur c. Bagosora et consorts, « Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses », 21 juillet 2005 ; Le Procureur c. Bagosora et consorts, « Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements », 22 mai 2006 ; Le Procureur c. Arsène Shalom Ntahobali et Pauline Nyiramasuhuko, Affaire n°ICTR-97-21-T,
« Decision on Ntabohali's Motion for Certification to Appeal the Chamber's Decision Granting Kanyabashi's Request to Cross-Examine Ntabohali Using 1997 Custodial Interviews », 1er juin 2006 ; The Prosecutor v. Norman et al., Tribunal spécial pour la Sierra Leone, affaire n°SCSL-04-14-T, 28 juin 2006.

d'interroger des témoins hors audience ou, le cas échéant, de les obliger à comparaître à l'audience, et la Chambre statuera au cas par cas.

12. La Chambre estime aussi que la Défense a tort d'invoquer plusieurs décisions rendues dans des cas qu'elle rapproche du sien pour soutenir que la question soulevée touche au droit de l'accusé à un procès équitable. La différence entre le cas présent et les autres c'est que ceux-ci portent tous sur des questions d'ordre général, ont donné lieu à un exposé du droit applicable, et concernent une vaste catégorie de déclarations et de témoins. Or, la décision contestée ne concerne pas une vaste catégorie de témoins et n'a pas donné lieu à un exposé du droit, parce que la Chambre a examiné chaque demande d'injonction au cas par cas en usant de son pouvoir discrétionnaire.

13. La Chambre rejette la référence de Nzirorera à la décision du Tribunal spécial pour la Sierra Leone, qui a certifié l'appel d'une décision rejetant une requête demandant qu'une injonction de comparaître soit délivrée au Président de la République. C'était la première fois que le Tribunal spécial avait à se prononcer sur la question des injonctions à comparaître pour interrogatoire préalable à la déposition et la Chambre a considéré qu'il était probable que la question se pose à nouveau. Son avis était partagé puisqu'elle a tranché à la majorité, sa décision ayant suscité une opinion concurrente et une opinion dissidente. C'est pour ces raisons que la Chambre de première instance a certifié l'appel de sa décision[11]. Le Tribunal spécial a délivré par la suite d'autres injonctions à comparaître pour interrogatoire préalable à la déposition et la jurisprudence a établi qu'en fin de compte, la décision de délivrer une injonction à comparaître relevait du pouvoir discrétionnaire ; elle a néanmoins fixé les conditions qui devraient être remplies pour qu'une injonction puisse être délivrée, ce que la Chambre a unanimement pris en compte lors de l'examen de la décision contestée.

14. En conclusion, la Chambre estime que la Défense n'a pas démontré que la décision contestée soulevait une question susceptible de compromettre sensiblement l'équité et la rapidité du procès, ou son issue. Comme la première condition exigée pour faire droit à une requête en certification d'appel n'est pas satisfaite, la Chambre estime qu'il n'y a pas lieu de continuer son analyse et rejette la requête en conséquence.

PAR CES MOTIFS,

LA CHAMBRE rejette la requête dans son intégralité.

Fait à Arusha, le 30 octobre 2006.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[11] The Prosecutor v. Norman et al., par. 12.

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Décision relative à l'admission en preuve des documents de la MINUAR Article 89 du Règlement de procédure et de preuve 21 novembre 2006 (ICTR-98-44-T)

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Admission de preuves, Large pouvoir d'appréciation de la Chambre de première instance d'admettre un élément de preuve si deux conditions sont remplies : la preuve doit être pertinente et avoir une valeur probante., Critère pour l'admission preuve : commencement de preuve de sa fiabilité, Pas nécessaire qu'un témoin reconnaisse les documents présentés pour qu'ils aient une valeur probante, Admission en preuve d'un document ne constitue en aucune façon une décision définitive sur son authenticité ou sa fiabilité – Pas de débats sur la pertinence des rapports de situation de la MINUAR, Indice suffisant de fiabilité, Question de l'admission des rapports par l'intermédiaire du témoin, Témoin non auteur des rapports – Requête rejetée

Instrument international cité :

Règlement de Procédure et de preuve, art. 89, 89 (C) et 89 (D)

Jurisprudence internationale citée :

T.P.I.R. : Chambre d'appel, Le Procureur c. Georges Rutaganda, Arrêt, 26 mai 2003 (ICTR-96-3) ; 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 de première instance, Le Procureur c. Théoneste Bagosora et consorts, 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.P.I.Y. : Chambre de première instance, Le Procureur c. Tihomir Blaškić, Decision on the Defence Motion for Reconsideration of the Ruling to Exclude from Evidence Authentic and Exculpatory Documentary Evidence, 30 janvier 1998 (IT-95-14) ; 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 de première instance, Le Procureur c. Miroslav Kvočka et consorts, Décision relative à des pièces à conviction, 19 juillet 2001 (IT-***98-30/1)*** ; Chambre de première instance, Le Procureur c. Jadranko Prlić et consorts, Version révisée de la décision portant adoption de lignes directrices relatives à la conduite du procès, 28 avril 2006 (IT-04-74) ; Chambre de première instance, Le Procureur c. Jadranko Prlić et consorts, Décision portant sur l'admission d'éléments de preuve, 13 juillet 2006 (IT-04-74)

Introduction

1. En l'espèce, le procès a débuté le 19 septembre 2005. Le 26 octobre 2006, la quatrième session du procès s'est ouverte avec la suite de la présentation des moyens à charge. Le 6 novembre 2006, pendant le contre-interrogatoire du témoin à charge ALG, la Défense a demandé que 10 rapports de situation de la MINUAR dressés en avril 1994 soient admis en tant que pièces à conviction à

décharge[1]. Le Procureur s'est opposé à ce que ces rapports soient admis à l'occasion de la déposition de ce témoin, demandant plutôt à la Chambre de verser au dossier tous les rapports de situation de la MINUAR [les rapports que celle-ci envoyait au Siège de l'Organisation des Nations Unies à New York] pour qu'ils puissent au besoin, être utilisés lors de l'interrogatoire de tout témoin[2]. La Chambre a décidé de réserver sa décision et a invité les parties à déposer leurs écritures à ce sujet le lendemain[3], ce qu'elles ont fait le 8 novembre 2006[4].

2. Avant d'aborder la question du versement au dossier des 10 documents de la MINUAR, la Chambre examinera, de façon générale, les règles régissant l'admission de la preuve.

Délibération

Règles régissant l'admission de la preuve

3. La Défense de Nzirorera fait valoir que la première condition de l'admissibilité c'est l'authenticité ; mais même si un document est authentique, il faut encore qu'il soit pertinent pour pouvoir être versé au dossier. Elle estime que l'admission des pièces devrait se faire dans le cadre des dépositions des témoins[5] et « qu'il revient à chaque partie de décider du nombre de témoins qu'elle présentera pour étayer sa preuve documentaire » [traduction]. À son avis, la Chambre ne devrait exclure aucune pièce authentique et pertinente mais déterminer le poids qu'il convient de lui accorder au moment où elle délibère, après avoir entendu tous les témoignages.

4. L'article 89 du Règlement s'applique à toutes les procédures engagées devant le Tribunal[6]. Les Chambres ne sont pas liées par les règles de droit interne et 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, à un règlement équitable de la cause[7]. Le paragraphe (C) de cet article confère à la Chambre un large pouvoir d'appréciation lui permettant d'admettre un élément de preuve si seulement deux des conditions sont remplies : la preuve doit être pertinente et elle doit avoir une valeur probante. Même si le paragraphe (D) habilite la Chambre à vérifier l'authenticité de tout élément de preuve obtenu hors audience,

> «[d]emander des preuves irréfutables de l'authenticité d'un document avant de l'admettre au dossier reviendrait à imposer des critères beaucoup plus stricts que ceux envisagés par l'article 89 (C) »[8].

D'après la Chambre d'appel, pour qu'un élément de preuve soit admis, il suffit qu'il y ait un commencement de preuve de sa fiabilité, autrement dit que des indices de fiabilité suffisants aient été établis[9].

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[1] Compte rendu de l'audience du 6 novembre 2006 ; voir documents cotés ID. NZ 39 à 49 pour identification.
[2] Compte rendu de l'audience du 6 novembre 2006, p. 31 et 32.
[3] *Ibid*., p. 33 et 34.
[4] Joseph Nzirorera's Submissions Concerning the Admission of Exhibits ; Prosecutor's Submission Concerning Admission of UNAMIR Documents ; Soumission d'Édouard Karemera concernant l'admission des documents de la MINUAR ; Mémoire de M. Ngirumpatse sur la question du versement en preuve des pièces à conviction dans le cadre des auditions de témoin.
[5] La Défense s'appuie notamment sur deux décisions du Tribunal pénal international pour l'ex-Yougoslavie dans les affaires *Prlić* (13 juillet 2006) et *Milutinović* (10 octobre 2006).
[6] L'article 89 du Règlement se lit comme suit :
(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.
[7] Règlement de procédure et de preuve, article 89 (A) et (B).
[8] *Le Procureur c. Delalić et Delić*, Arrêt relatif à la requête de l'accusé Zejnil Delalić 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 (Chambre d'appel), 4 mars 1998.

5. Selon les Chambres de première instance des deux Tribunaux spéciaux, il n'était pas nécessaire qu'un témoin reconnaisse les documents présentés pour qu'ils aient une valeur probante[10]. Un élément de preuve ne peut pas être jugé inadmissible au seul motif que son auteur présumé n'a pas été appelé à la barre et il est arrivé aux Chambres de première instance d'admettre des preuves documentaires qui n'avaient pas été présentées par un témoin ou par l'intermédiaire d'un témoin. Une telle pratique va dans le sens de l'article 89 (A) du Règlement, aux termes duquel les Chambres de première instance ne sont pas liées par les règles de droit interne. En outre, comme l'a relevé la Chambre de première instance dans le jugement *Blaskiæ*, la procédure est menée par des juges professionnels, ayant les compétences requises pour admettre tel ou tel élément de preuve aux fins de se prononcer sur le poids à lui accorder, à la lumière des circonstances dans lesquelles il a été obtenu, d'en déterminer la teneur réelle et d'en apprécier la crédibilité au vu de l'ensemble des éléments de preuve présentés[11].

6. Lorsqu'un témoin déclare reconnaître un document dont la Chambre de première instance est convaincue qu'il est pertinent et qu'il a force probante, elle peut l'admettre par l'intermédiaire de ce témoin[12]. Toutefois, quand un témoin déclare ne pas reconnaître un document qui n'est pas présenté comme une déclaration antérieure contradictoire de ce témoin, le document en question ne peut être admis dans le cadre de la déposition en question.

7. Enfin, l'admission en preuve d'un document ne constitue en aucune façon une décision définitive sur son authenticité ou sa fiabilité. C'est à un stade ultérieur de la procédure que la Chambre doit en décider lorsqu'elle détermine le poids qu'il convient de lui accorder[13].

Admission des documents de la MINUAR

8. La Défense de Nzirorera prie la Chambre d'admettre 10 rapports de situation de la MINUAR[14] dans le cadre de la déposition d'ALG. Elle fait valoir que ces documents sont authentiques et que, comme ils ont un rapport avec la déposition du témoin, ils sont aussi pertinents. Selon le Procureur, ces rapports ne peuvent être admis en preuve par l'intermédiaire d'ALG et ne peuvent être utilisés pour saper sa crédibilité puisque ce témoin ne sait rien de ces documents. En revanche, il reconnaît que ces documents sont pertinents au regard de l'acte d'accusation et qu'ils peuvent avoir valeur probante quant au contexte historique. Il propose donc de constituer un jeu complet des rapports de situation de la MINUAR sur la période allant du 1er janvier au 19 juillet 1994 et de les classer par ordre chronologique. Ainsi, argumente-t-il, la Chambre pourra-t-elle déterminer leur valeur probante en comparant leur contenu aux dépositions qui évoquent tel ou tel rapport de situation ou tel ou tel passage d'un rapport de situation. La Défense de chacun des accusés s'oppose à la proposition du

[9] Le Procureur c. Nyiramasuhuko, affaire n°ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (Chambre d'appel), 4 octobre 2004, par. 7 ; Le Procureur c. Georges Anderson Rutaganda, affaire n°ICTR-96-3-A, arrêt, par. 33 ; Le Procureur c. Delalić et Delić, Arrêt relatif à la requête de l'accusé Zejnil Delalić 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 (Chambre d'appel), 4 mars 1998.

[10] Le Procureur c. Bagosora et consorts, affaire n°ICTR-98-41-T, Decision on Request to Admit United Nations Documents into Evidence under Rule 89 (C) (Chambre de première instance), 25 mai 2006, par. 4 ; Le Procureur c. Tihomir Blaskić, affaire nº IT-95-14-T, jugement, 3 mars 2000, par. 35 ; Le Procureur c. Kvočka et consorts, Décision relative à des pièces à conviction (Chambre de première instance), 19 juillet 2001; Le Procureur c. Prlić et consorts, IT-04-74-PT, Version révisée de la Décision portant adoption de lignes directrices relatives à la conduite du procès (Chambre de première instance), 28 avril 2006 ; Le Procureur c. Prlić et consorts, IT-04-74-T, Décision portant sur l'admission d'éléments de preuve (Chambre de première instance), 13 juillet 2006.

[11] *Le Procureur c. Tihomir Blaskić*, affaire n°IT-95-14-T, jugement, 3 mars 2000, par. 35.

[12] *Le Procureur c. Tihomir Blaskić*, affaire n°IT-95-14-T, Décision sur la requête de la Défense aux fins de réexamen de la Décision visant à déclarer irrecevables des éléments de preuves documentaires authentiques à décharge (Chambre de première instance), 30 janvier 1998, par. 10 et 11.

[13] Le Procureur c. Nyiramasuhuko, affaire n°ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (Chambre d'appel), 4 octobre 2004, par. 7 ; Le Procureur c. Georges Anderson Rutaganda, affaire n°ICTR-96-3-A, arrêt, par. 33 ; Le Procureur c. Delalić et Delić, Arrêt relatif à la requête de l'accusé Zejnil Delalić 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.

[14] Documents cotés ID. NZ 39 à 49 pour identification, compte rendu de l'audience du 6 novembre 2006.

Procureur, affirmant que chaque partie ne devrait produire que les documents de la MINUAR qui sont pertinents au regard de sa cause, et les présenter dans le cadre des dépositions à charge ou à décharge.

9. Il ne fait aucun doute que les rapports de situation de la MINUAR cotés pour identification[15] sont pertinents en l'espèce et qu'ils présentent suffisamment d'indices de fiabilité pour être admissibles. Toutefois, la Chambre n'est pas convaincue que la Défense ait démontré que ces documents pouvaient être admis par l'intermédiaire du témoin puisque celui-ci ne les a pas reconnus et n'a pas souscrit à leur contenu. Les 10 rapports de situation de la MINUAR cotés pour identification ne peuvent être produits par l'intermédiaire du témoin ALG.

10. La Chambre estime que les documents de la MINUAR pourraient être produits par leur auteur, une personne qui en a connaissance ou qui pourrait parler de leur contenu. À ce propos, elle relève que le Procureur et la Défense de Nzirorera sont d'acccord pour dire que le prochain témoin à charge, Frank Claeys, sera en mesure de parler de leur contenu et qu'ils peuvent donc être proposés en preuve.

11. La Chambre estime aussi que les documents de la MINUAR pourraient être admis sans être produits pendant l'interrogatoire d'un témoin à condition que le requérant démontre la pertinence et la valeur probante de chaque document. Elle note à cet égard que la Chambre de première instance I dans l'affaire Bagosora et consorts, invoquée par la Défense de Nzirorera, a admis la correspondance officielle de l'Organisation des Nations Unies concernant la MINUAR pendant l'année 1994, sans qu'elle ne soit reconnue par un témoin[16].

12. La proposition du Procureur tendant à remettre à la Chambre un paquet de rapports de la MINUAR pour qu'elle détermine quel document a une valeur probante n'est pas acceptable. Pour qu'une preuve soit admise, c'est à la partie qui en demande l'admission qu'il appartient de démontrer sa pertinence et sa valeur probante.

Directives concernant l'admission de la preuve

13. La Chambre renvoie aux directives ci-dessus régissant l'admissibilité de la preuve documentaire et enjoint aux parties de s'y conformer lorsqu'elles demandent l'admission d'un tel élément de preuve ou qu'elles s'y opposent.

14. La Chambre relève en outre que la Défense de Nzirorera n'a pas d'objection à ce que le Procureur sache à l'avance son intention de s'opposer à un document qui sera produit par l'intermédiaire d'un futur témoin. Elle estime que la rapidité de la procédure y gagnerait si toutes les parties adoptaient une telle pratique.

15. La Défense de Nzirorera demande aussi qu'un document dont l'admission a été refusée par la Chambre soit coté pour identification, afin que les futurs témoins puissent s'y référer et que la Chambre d'appel puisse l'examiner afin de décider si la Chambre de première instance a commis une erreur en refusant de l'admettre.

16. La Chambre estime qu'il n'est pas nécessaire d'adopter une règle générale prescrivant l'attribution d'une cote à tous les documents qui, bien que mentionnés à l'audience, n'ont pas été admis. Elle continuera de décider au cas par cas s'il convient d'attribuer une cote d'identification, en gardant à l'esprit à la fois la transparence de la procédure et l'intérêt de la justice. En tout état de cause, un document coté pour identification ne sera pas admis avant que la Chambre n'en décide ainsi oralement ou par écrit, auquel cas une cote officielle lui sera attribuée.

PAR CES MOTIFS, LA CHAMBRE

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[15] Cotés ID. NZ 39 à 49.

[16] Le Procureur c. Bagosora et consorts, affaire n°ICTR-98-41-T, Decision on Request to Admit United Nations Documents into Evidence under Rule 89 (C) (Chambre de première instance), 25 mai 2006, par. 4.

I. REJETTE la Requête demandant l'admission de 10 rapports de situation de la MINUAR cotés ID. NZ 39 à 49 pour identification par l'intermédiaire du témoin ALG ;

II. REJETTE la demande du Procureur aux fins de l'admission de tous les documents de la MINUAR ;

III. DEMANDE aux parties d'appliquer et de respecter les règles régissant l'admission de la preuve énoncées plus haut chaque fois qu'elles demandent l'admission d'une preuve ou qu'elles s'y opposent ;

IV. DEMANDE à chaque partie de faire savoir à la partie adverse, avant la déposition du prochain témoin, si elle a ou non l'intention de s'opposer à une pièce qui sera produite par l'intermédiaire dudit témoin.

Fait à Arusha, le 21 novembre 2006.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Décision relative à la requête de la défense tendant à faire exclure la déposition du témoin GK ou solliciter la coopération du gouvernement rwandais
Articles 20 et 28 du Statut ; articles 66 et 98 du Règlement de procédure et de preuve
27 novembre 2006 (ICTR-98-44-T)

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Exclusion de témoignage, Computation du délai de 60 jours pour communiquer les témoignages avant la date fixée pour l'ouverture du procès, Exclusion d'un témoignage comme dernière des mesures que la Chambre peut prendre pour sanctionner un retard dans la communication de pièces, Pas de demonstration par la defence d'un préjudice du au retard de communication, Devoir de la défense de s'employer seule à obtenir les éléments de preuve qu'elle souhaite utiliser au procès à l'exception des pièces à décharge se trouvant en la possession du Procureur, Développement d'une pratique qui consiste à demander au Procureur d'user de ses bons offices pour obtenir et communiquer certains documents, notamment les dossiers judiciaires rwandais des témoins à charge – Requête rejetée

Instruments internationaux cités :

Règlement de Procédure et de preuve, art. 54, 66, 66 (A) (ii) et 98 ; Statut, art. 20 et 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, 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. Aloys Simba, Décision de la Chambre de première instance relative à des points se rapportant au dossier judiciaire du témoin KDD, 1er novembre 2004 (ICTR-2001-76) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses, 17 décembre 2004 (ICTR-98-41) ;

Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Request for Assistance Pursuant to Article 28 of the Statute, 27 mai 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision relative aux requêtes de la Défense tendant à contraindre le Procureur à permettre l'examen de pièces et à s'acquitter de son obligation de communication et à demander aux témoins de fournir leurs dossiers judiciaires et d'immigration, 14 septembre 2005 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Order for the Registrar's Submission on the Defence Motion for Order Concerning Unlawful Disclosure of Confidential Ex Parte Defence Filing and for Stay of Proceedings, 1 février 2006 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Decision on Defence Motion to Report Government of a Certain State to United Nations Security Council and on Prosecution Motions under Rule 66 (C) of the Rules), 15 février 2006 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision orale relative à la suspension des débats, 16 février 2006 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision relative aux requêtes de la Défense aux fins de rejet de la déposition du Professeur André Guichaoua, 20 avril 2006 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. François Karera, Décision relative à la requête de la Défense intitulée Motion of the Defence for Additional Disclosure, 1 septembre 2006 (ICTR-01-74) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision relative aux requêtes orales de la Défense aux fins d'exclure la déposition du témoin XBM, de sanctionner le Procureur et d'exclure les éléments de preuve qui sortent du cadre de l'acte d'accusation, 19 octobre 2006 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision relative à la requête de Joseph Nzirorera intitulée Motion for Reconsideration of Witness Protection Order, 30 octobre 2006 (ICTR-98-44)

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. Mile Mrkšić, Décision relative à l'appel interlocutoire de la Défense concernant la communication avec des témoins potentiels de la partie adverse, 30 juillet 2003 (IT-95-13/1) ; Chambre d'appel, Le Procureur c. Sejér Halilović, Décision de la relative aux citations à comparaître, 21 Juin 2004 (IT-01-48)

Introduction

1. En l'espèce, le procès a commencé le 19 septembre 2005. Le témoin à charge GK doit en principe comparaître à la quatrième session d'audiences, entre le 26 octobre et le 15 décembre 2006. La Défense de Nzirorera prie la Chambre d'exclure la déposition que ce témoin envisage de faire pour sanctionner le Procureur qui aurait manqué à maintes reprises à l'obligation de communication mise à sa charge en l'espèce[1]. Au cas où la Chambre refuserait d'accorder cette mesure, la Défense lui demande d'ordonner que les autorités rwandaises lui apportent leur coopération pour permettre d'obtenir certaines pièces indiquées dans un document confidentiel joint en annexe à la requête et que le contre-interrogatoire du témoin GK soit reporté jusqu'à ce que ces pièces aient été communiquées à la Défense. Le Procureur s'oppose à la requête dans son intégralité.

Délibération

2. Selon la Défense, du moment que le Procureur n'a pas communiqué au plus tard 60 jours avant la date fixée pour l'ouverture du procès en l'espèce la déposition faite par le témoin GK dans l'affaire *Ndindabahizi*, il s'est dérobé à l'obligation de communication mise à sa charge par l'article 66 (A) (ii) du Règlement de procédure et de preuve[2]. Dans ces circonstances, la Défense estime qu'il convient d'exclure la déposition que le témoin a l'intention de faire pour sanctionner ce manquement.

[1] Requête tendant à faire exclure la déposition du témoin GK ou solliciter la coopération du Gouvernement rwandais, déposée par Joseph Nzirorera le 13 novembre 2006.

[2] L'article 66 (A) (ii) se lit comme suit :
Sous réserve des dispositions des Articles 53 et 69:
Le Procureur communique à la défense :

3. Le respect du délai de 60 jours prescrit par l'article 66 (A) (ii) du Règlement doit être apprécié en tenant compte des droits de l'accusé et en particulier du droit de disposer du temps et des facilités nécessaires à la préparation de sa défense et d'interroger ou de faire interroger les témoins à charge[3]. Les retards dans la communication de pièces ne portent pas forcément atteinte aux droits de l'accusé[4]. Lorsque la communication de pièces pouvant aider l'accusé à discréditer la déposition d'un témoin à charge est faite si tardivement que l'équité du procès s'en ressent, les Chambres de première instance adoptent différents types de solutions. Elles peuvent écarter le témoignage, ajourner les débats ou la déposition, différer le contre-interrogatoire du témoin ou ordonner le rappel de celui-ci à la barre[5]. L'exclusion d'un témoignage est la dernière des mesures que la Chambre peut prendre pour sanctionner un retard dans la communication de pièces ou une violation des droits de l'accusé[6].

4. En l'espèce, la Défense n'a ni prouvé ni même prétendu que la communication tardive de la déclaration du témoin avait causé à Joseph Nzirorera un préjudice qui justifierait cette mesure extrême. À cet égard, il faut souligner que le document en question a été communiqué plus de trois mois avant la date prévue pour la comparution du témoin et que le Procureur avait déjà communiqué à la Défense d'autres déclarations en temps voulu, de sorte que l'accusé était informé de la déposition que le témoin avait l'intention de faire et des problèmes relatifs à sa crédibilité[7].

5. La Défense demande aussi à la Chambre d'exclure la déposition que le témoin GK entend faire parce que d'autres communications de pièces faites seraient incomplètes. Lors d'une entrevue qui a eu lieu le 10 novembre 2006, elle a appris de ce témoin qu'il avait fourni de « nombreuses dépositions et déclarations signées concernant les événements survenus en 1994 au Rwanda qui n'ont jamais été communiquée à la Défense[8] » [traduction]. Elle rappelle que la décision rendue par la Chambre le 14 septembre 2005, ordonnait au Procureur de tout mettre en œuvre pour obtenir et communiquer ces pièces[9]. Selon la Défense, le minimum auquel on aurait pu s'attendre de la part du Procureur aurait été d'interroger le témoin avant sa déposition, de déterminer les documents manquants et de les obtenir du témoin lui-même qui les a au Rwanda. La Défense en conclut que le Procureur a violé à nouveau une décision de la Chambre et que l'exclusion de la déposition du témoin GK est une mesure appropriée pour sanctionner la série de manquements à l'obligation de communication commise par le Procureur en l'espèce.

[…]
(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.

[3] Voir le Statut du Tribunal, alinéas (b) et (e) du paragraphe (4) de l'article 20.

[4] *Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera*, affaire n°ICTR-98-44-T (l'« affaire *Karemera et consorts* »), Décision orale relative à la suspension des débats (Chambre de première instance), compte rendu de l'audience du 16 février 2006, p. 5 à 15.

[5] Affaire *Karemera et consorts*, décision orale relative à la suspension des débats (Chambre de première instance), compte rendu de l'audience 16 février 2006, p. 5 à 15 ; affaire *Bagosora et consorts, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses* (Chambre de première instance), 17 décembre 2004, par. 8.

[6] Affaire *Karemera et consorts*, Décision relative aux requêtes orales de la Défense aux fins d'exclure la déposition du témoin XBM, de sanctionner le Procureur et d'exclure les éléments de preuve qui sortent du cadre de l'acte d'accusation, (Chambre de première instance), 19 octobre 2006 ; affaire *Karemera et consorts*, Décision sur la notification du Procureur intitulée « *Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guicahaoua* », la requête de la Défense intitulée « *Defence Motion to Exclude the Witness' Testimony* » et Ordonnance de justification (Chambre de première instance), 1er février 2006, par. 11 ; affaire *Karemera et consorts*, Décision relative aux requêtes de la Défense aux fins de rejet de la déposition du professeur André Guichaoua (Chambre de première instance), 20 avril 2006, par. 8.

[7] Voir, par exemple, les déclarations et les autres pièces communiquées les 14 février et 23 mars 2005.

[8] Cette affirmation n'est pas contestée par le Procureur.

[9] Affaire *Karemera et consorts,* Décision relative aux requêtes de la Défense tendant à contraindre le Procureur à permettre l'examen de pièces et à s'acquitter de son obligation de communication et à demander aux témoins de fournir leurs dossiers judiciaires et d'immigration (Chambre de première instance), 14 septembre 2005, par. 11.

6. En général, la Défense doit d'abord s'employer seule à obtenir les éléments de preuve qu'elle souhaite utiliser au procès, à l'exception des pièces à décharge se trouvant en la possession du Procureur[10]. À cet égard, il est admis qu'elle peut légitimement avoir besoin d'interroger un témoin avant le procès pour bien préparer son dossier et qu'elle a donc le droit de prendre contact avec un témoin potentiel pour l'interroger[11].

7. En vertu des articles 98 et 54 du Règlement, s'est aussi créée une pratique qui consiste à demander au Procureur, sous réserve de l'intérêt de la justice, d'user de ses bons offices pour obtenir et communiquer certains documents, notamment les dossiers judiciaires rwandais des témoins à charge[12]. Des Chambres de première instance ont eu recours à ces dispositions dans les cas où, par exemple, les informations recherchées pouvaient être considérées comme nécessaires pour préparer la présentation des moyens à décharge ou pour apprécier la crédibilité des témoins à charge[13].

8. Dans d'autres situations, les Chambres de première instance ont sollicité, en vertu de l'article 28 du Statut du Tribunal, l'assistance et la coopération de certains États pour obtenir des documents[14]. Selon la jurisprudence constante, toute partie qui demande à la Chambre de prendre cette mesure doit préciser la nature des informations recherchées, l'intérêt qu'elles présentent pour le procès et les initiatives prises pour les obtenir[15].

9. En raison des circonstances particulières de l'espèce, la Chambre a fait usage des pouvoirs que lui confèrent l'article 98 du Règlement et l'article 28 du Statut pour aider la Défense à préparer les moyens à décharge. Le 14 septembre 2005, elle a d'abord demandé au Procureur de tout mettre en œuvre pour obtenir et communiquer les déclarations faites aux autorités rwandaises par les témoins à charge et les dossiers concernant les poursuites judiciaires engagées contre eux dans les cas où ces pièces n'avaient pas été intégralement communiquées[16]. Par la suite, en février 200[6], elle a sollicité l'assistance des autorités rwandaises en leur demandant de communiquer au Greffe toutes les déclarations de certains témoins à charge, y compris GK, qu'elles avaient recueillies ou reçues de ces témoins, ainsi que les jugements prononcés contre eux par les autorités rwandaises[17].

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[10] *Le Procureur c. Aloys Simba*, affaire n°ICTR-2001-76-T, Décision relative à des points se rapportant au dossier judiciaire du témoin KDD (Chambre de première instance), 1er novembre 2004, par. 10.

[11] *Le Procureur c. Mile Mrkšić,* affaire n°IT-95-13/1-AR73, Décision relative à l'appel interlocutoire de la Défense concernant la communication avec des témoins potentiels de la partie adverse (Chambre d'appel), 30 juillet 2003 ; *Le Procureur c. Sefer Halilović*, affaire n°IT-01-48-AR73, Décision relative à la délivrance d'injonctions (Chambre d'appel), 21 juin 2004, par. 12 à 15. Le droit d'interroger un témoin potentiel n'est pas illimité et est généralement tributaire du consentement de celui-ci ; voir l'affaire *Karemera et consorts*, Décision relative à la requête de Joseph Nzirorera intitulée *Motion for Reconsideration of Witness Protection Order* (Chambre de première instance), 30 octobre 2006.

[12] Affaire *Karemera et consorts*, Décision relative aux requêtes de la Défense tendant à contraindre le Procureur à permettre l'examen de pièces et à s'acquitter de son obligation de communication et à demander aux témoins de fournir leurs dossiers judiciaires et d'immigration (Chambre de première instance), 14 septembre 2005, par. 7 et 8 ; *Le Procureur c. François Karera*, affaire n°ICTR-01-74-T, Décision relative à la requête de la Défense intitulée *Motion of the Defence for Additional Disclosure* (Chambre de première instance), 1er septembre 2006, par. 5 à 7.

[13] *Id*.

[14] Voir par exemple, Le Procureur c. Bagosora et consorts, affaire n°ICTR-98-41-T, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (Chambre de première instance), 10 mars 2004, par. 4 ; Le Procureur c. Bagosora et consorts, affaire n°ICTR-98-41-T, Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana (Chambre de première instance), 25 mai 2004, par. 6 ; Le Procureur c. Bagosora et consorts, affaire n°ICTR-98-41-T, Decision on Request for Assistance Pursuant to Article 28 of the Statute (Chambre de première instance), 27 mai 2005, par. 2 ; voir aussi Le Procureur c. Blaškić, affaire n°IT-95-14, 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.

[15] *Id*.

[16] Affaire *Karemera et consorts*, Décision relative aux requêtes de la Défense tendant à contraindre le Procureur à permettre l'examen de pièces et à s'acquitter de son obligation de communication et à demander aux témoins de fournir leurs dossiers judiciaires et d'immigration (Chambre de première instance), 14 septembre 2005.

[17] Affaire *Karemera et consorts*, Décision relative aux requêtes de la Défense tendant à faire demander au Gouvernement rwandais de communiquer des documents et à obtenir certaines mesures en conséquence (Chambre de première instance), 13 février 2006.

10. Toutefois, ces décisions ne relevaient nullement la Défense de l'obligation de préparer les moyens à décharge[18]. Dans le cas présent, la Défense ne dit pas pourquoi elle n'a pas eu d'entrevue avec le témoin GK lors de ses enquêtes, alors qu'elle aurait pu obtenir elle-même les documents recherchés à cette occasion. Le conseil de Nzirorera ne dit pas non plus que le témoin a refusé de s'entretenir avec lui.

11. Par ailleurs, selon diverses correspondances récemment communiquées à la demande de la Chambre[19], il s'avère que le Bureau du Procureur, y compris le Procureur lui-même, s'est employé à maintes reprises à obtenir des autorités rwandaises les pièces concernant le témoin GK. Ces derniers temps, le Procureur a pris une nouvelle initiative en interrogeant le témoin sur son dossier judiciaire ainsi que sur les déclarations et les dépositions qu'il avait faites devant les autorités rwandaises[20]. Par suite, trois documents ont été obtenus du témoin et communiqués à la Défense[21]. Il faut souligner que c'est tout récemment que la Défense a émis l'idée que le Procureur interroge des témoins afin d'obtenir les informations nécessaires pour adresser une demande précise de documents au Gouvernement rwandais[22].

12. La Chambre relève en outre que la Défense n'invoque aucun préjudice subi du fait de la situation actuelle. L'exclusion de la déposition envisagée par le témoin GK n'est donc pas justifiée.

13. Au cas où la déposition ne serait pas écartée, la Défense prie la Chambre de solliciter la coopération des autorités rwandaises pour permettre d'obtenir les pièces indiquées dans un document confidentiel joint en annexe à la requête et de reporter le contre-interrogatoire du témoin GK jusqu'à ce que ces pièces aient été communiquées à la Défense.

14. La Défense s'est entretenue avec le témoin et aurait donc dû recueillir des informations préliminaires sur la teneur des documents recherchés, mais elle n'indique pas en quoi ceux-ci pourraient présenter un intérêt pour le procès en l'espèce. De plus, les autorités rwandaises ont récemment fait savoir qu'elles étaient disposées « à fournir à toute partie tous autres documents sur lesquels des précisions peuvent être apportées pour faciliter la vérification de leur existence[23] » [traduction]. Il n'y a donc pas lieu de rendre une décision tendant à solliciter l'assistance des autorités rwandaises à ce stade.

15. La Défense n'ayant ni prouvé ni allégué que les droits de l'accusé avaient été violés ni que l'équité du procès était compromise, la Chambre ne voit aucune raison de reporter le contre-interrogatoire du témoin GK. De toute façon, il est loisible à la Défense d'appeler l'attention de la Chambre sur les éventuelles contradictions existant entre la déposition du témoin devant la Chambre et toute déclaration ou tout dossier obtenus par la suite. Si la Défense peut établir qu'elle a subi un préjudice pour avoir été dans l'impossibilité d'interroger le témoin sur ces contradictions, il lui est permis de former une requête pour obtenir le rappel du témoin.

PAR CES MOTIFS, LA CHAMBRE REJETTE la requête de la Défense dans son intégralité

Arusha, le 27 novembre 2006.

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[18] Affaire *Karemera et consorts*, Décision relative aux requêtes de la Défense tendant à contraindre le Procureur à permettre l'examen de pièces et à s'acquitter de son obligation de communication et à demander aux témoins de fournir leurs dossiers judiciaires et d'immigration (Chambre de première instance), 14 septembre 2005, par. 11.

[19] Écritures du Procureur intitulées *Prosecutor's Submission Concerning Best Efforts to Obtain Rwandan Judicial Records of Witness HH*, déposées le 17 novembre 2006 à la suite de l'ordonnance rendue oralement par la Chambre le 16 novembre 2006.

[20] Résumé de la déposition attendue, daté du 7 novembre 2006.

[21] Réponse du Procureur. Les documents en question ont été communiqués le 10 novembre 2006.

[22] Joseph Nzirorera's Motion for Further Order to Obtain Documents in Possession of Government of Rwanda, déposée le 18 octobre 2006.

[23] Lettre datée du 13 octobre 2006, faisant suite à la Décision relative à la requête de la Défense intitulée *Motion to Report Government of Rwanda to United Nations Security Council*, rendue par la Chambre le 2 octobre 2006.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Décision relative à la requête du Procureur aux fins d'admission de dépositions antérieures faites sous serment au procès par les accusés en vertu de l'article 89 (C) du règlement de procédure et de preuve
6 décembre 2006 (ICTR-98-44-T)

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Affaire Bagosora et consorts – Admission de preuves, Large pouvoir d'appréciation de la Chambre en matière d'administration de la preuve, Droit des accusés de refuser de témoigner, Dépositions faites sous serment par les accusés dans une autre affaire, Admission des comptes rendus des audiences et des pièces y afférentes – Requête acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 89, 89 (C), 89 (D), 90 (E) et 90 (F)

Jurisprudence internationale citée :

T.P.I.R. : Chambre d'appel, Le Procureur c. Georges Rutaganda, Arrêt, 26 mai 2003 (ICTR-96-3) ; Chambre d'appel, Le Procureur c. Pauline Nyiramasuhuko et consorts, 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 juillet 2004 (ICTR-97-21) ; 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 de première instance, Le Procureur c. Théoneste Bagosora et consorts, 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) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision accordant une prorogation de délai de réponse à deux requêtes du Procureur et ordonnant la communication de documents certifiés conformes, 13 septembre 2006 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision relative à l'admission en preuve des documents de la MINUAR, 21 novembre 2006 (ICTR-98-44)

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 de première instance, Le Procureur c. Miroslav Kvočka et consorts, Decision on Exhibits, 19 juillet 2001 (IT-***98-30/1) ;*** Chambre de première instance, Le Procureur c. Jadranko Prlić et consorts, Version révisée de la décision portant adoption de lignes directrices relatives à la conduite du procès, 28 avril 2006 (IT-04-74) ; Chambre de première instance, Le Procureur c. Jadranko Prlić et consorts, Décision portant sur l'admission d'éléments de preuve, 13 juillet 2006 (IT-04-74)

Introduction

1. Le procès en l'espèce a commencé le 19 septembre 2005. Le Procureur demande maintenant à la Chambre d'admettre, conformément à l'article 89 du Règlement de procédure et de preuve (le « Règlement »), les comptes rendus d'audience des dépositions faites sous serment par Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera en l'affaire *Bagosora et consorts* ainsi que les pièces y afférentes[1]. Le Procureur explique qu'il a essayé à plusieurs occasions de réduire le nombre de questions devant être plaidées en l'espèce en demandant aux accusés d'admettre les faits qui ne sont pas contestés, notamment l'authenticité de certains documents qui portent leur signature. Il affirme que certains aveux faits par les accusés au cours de dépositions antérieures permettront de trancher des questions factuelles soulevées en l'espèce, sans que l'on doive citer d'autres témoins, notamment un expert en écriture qui témoignerait pour confirmer l'authenticité des documents que, manifestement, les accusés ne contestent pas vu leurs dépositions à cet égard en l'affaire *Bagosora*.

2. Aucun des accusés ne s'oppose à l'admission des comptes rendus d'audience de leurs dépositions en l'affaire *Bagosora et consorts*[2]. Toutefois, Mathieu Ngirumpatse demande à la Chambre de ne pas admettre les pièces produites pendant la déposition de ses coaccusés et Édouard Karemera s'oppose à l'admission des pièces produites pendant sa propre déposition, faisant valoir que ces pièces ont suscité de nombreuses objections. Ils demandent donc que leur admission fasse l'objet d'une discussion détaillée au cours de leur procès devant la présente Chambre. Joseph Nzirorera appuie ces objections.

3. Le 15 septembre 2006, sur ordre de la Chambre[3], le Greffier a communiqué à la Chambre et aux parties les copies certifiées conformes des comptes rendus des audiences et les pièces à conviction y afférentes.

Délibération

4. Aux termes de l'article 89 du Règlement, la Chambre n'est pas liée par les règles de droit interne régissant l'administration de la preuve et peut lorsque le Règlement est muet, appliquer 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[4]. En vertu de l'article 89 (C) du Règlement, la Chambre jouit aussi d'un large pouvoir d'appréciation lui permettant de recevoir tout élément de preuve pertinent dont elle estime qu'il a valeur probante. Les Chambres de première instance des deux Tribunaux spéciaux ont déclaré qu'il n'était pas nécessaire qu'un témoin reconnaisse les documents présentés pour qu'ils aient une valeur probante[5]. Même si en vertu de l'article 89 (D) du Règlement, une Chambre peut toujours demander à vérifier l'authenticité de tout élément de preuve obtenu hors audience, seul un commencement de preuve sur sa fiabilité, à savoir l'existence d'indices de sa

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[1] Voir requête du Procureur aux fins d'admission de dépositions antérieures faites sous serment au procès par les accusés en vertu de l'article 89 (C) du Règlement de procédure et de preuve, déposée le 5 septembre 2006. Mathieu Ngirumpatse a déposé les 5 et 6 juillet 2005 ; Joseph Nzirorera, les 16 mars et 12 juin 2006 et Édouard Karemera, le 16 juin 2006.

[2] Joseph Nzirorera, Édouard Karemera et Mathieu Ngirumpatse ont déposé leurs réponses respectivement les 8 septembre 2006, 29 septembre 2006 et 2 octobre 2006.

[3] *Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera*, affaire n°ICTR-98-44-T (*Karemera et consorts*), Décision accordant une prorogation de délai de réponse à deux requêtes du Procureur et ordonnant la communication de documents certifiés conformes (Chambre de première instance), 13 septembre 2006.

[4] Article 89 (A) et (B) du Règlement de procédure et de preuve.

[5] *Karemera et consorts*, Décision relative à l'admission en preuve des documents de la MINUAR (Chambre de première instance), 21 novembre 2006, par. 5 ; *Le Procureur c. Bagosora et consorts*, affaire n°ICTR-98-41-T, 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) (Chambre de première instance), 25 mai 2006, par. 4 ; *Le Procureur c. Tihomir Blaškić*, affaire n°IT-95-14-T, Jugement, 3 mars 2000, par. 35 ; *Le Procureur c. Kvočka et consorts*, Décision relative à des pièces à conviction (Chambre de première instance), 19 juillet 2001 ; *Le Procureur c. Prlic et consorts,* IT-04-74-PT, Version révisée de la Décision portant adoption de lignes directrices relatives à la conduite du procès (Chambre de première instance), 28 avril 2006 ; *Le Procureur c. Prlić et consorts,* IT-04-74-T, Décision portant sur l'admission d'éléments de preuve (Chambre de première instance), 13 juillet 2006.

fiabilité, est nécessaire pour qu'il soit admissible[6]. Comme l'a souligné la Chambre d'appel à plusieurs reprises,

> « il ne faut pas confondre la question de l'admissibilité d'un élément de preuve avec celle de l'appréciation du poids à lui accorder par la suite »[7].

5. La Chambre relève que le Président de la Chambre en l'affaire *Bagosora et consorts* a rappelé aux accusés, au début de leur déposition, conformément à l'article 90 (E) du Règlement, « qu'[ils] peuvent refuser de faire toute déclaration qui risquerait de [les] incriminer »[8]. Les accusés se sont effectivement appuyés sur cet article pour refuser de répondre à certaines questions. Les conseils de tous les accusés étaient également présents pendant le procès et ont pu intervenir au besoin.

6. L'authenticité des pièces à conviction et l'identité de leurs auteurs n'ont pas été contestées par les accusés et, à une exception près, n'ont suscité aucune objection de la part des accusés ou de leurs conseils qui assistaient aux audiences. Édouard Karemera, avec l'appui de son conseil, s'est opposé à l'admission de la pièce P. 396, une page extraite de notes qu'il a prises à la main pendant le Conseil des ministres du 17 juin 1994. L'accusé n'a pas nié qu'il en était l'auteur mais a fait valoir que le document avait trait aux charges retenues contre lui[9]. Invoquant son droit de garder le silence prévu à l'article 90 (E) du Règlement, il a refusé de discuter de l'ensemble du document, mais a accepté de commenter le contenu d'une page qui avait fait l'objet de l'interrogatoire principal de la défense de Nsengiyumva et qui, par la suite, a été admise par la Chambre de première instance en l'affaire *Bagosora*[10].

7. Après examen des comptes rendus des audiences et des pièces y afférentes, la Chambre est convaincue que les dépositions faites sous serment par chacun des accusés en l'affaire *Bagosora et consorts* et les pièces y afférentes concernent des questions pertinentes en l'espèce et ayant une valeur probante. Les pièces faisaient partie intégrante des dépositions des accusés puisqu'au cours de leurs dépositions respectives, ils ont évoqué certains documents qui avaient déjà été admis comme pièces ou qui l'ont été par la suite.

8. La Chambre est d'avis que l'admission des comptes rendus des audiences et des pièces y afférentes ne portera pas atteinte aux droits des accusés. Chacun d'eux a reconnu être l'auteur des documents qui lui étaient montrés. L'admission en preuve ne constitue nullement une décision définitive sur l'authenticité et la fiabilité des documents et le poids qu'il convient d'accorder à chaque élément de preuve sera déterminé plus tard, après examen de l'ensemble de la preuve. Par ailleurs, comme il l'a expliqué, le Procureur demande l'admission de ces documents, qu'il a toujours eu l'intention de produire dans le cadre de ses moyens, pour établir l'identité de leurs auteurs. Au besoin, les accusés auront l'occasion de commenter ces documents au cours du procès.

PAR CES MOTIFS, LA CHAMBRE

I. FAIT DROIT à la requête du Procureur ;

II. INVITE le Greffier à attribuer une cote aux copies certifiées des comptes rendus d'audiences des dépositions sous serment d'Édouard Karemera, Mathieu Ngirumpates et Joseph Nzirorera

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[6] Le Procureur c. Nyiramasuhuko, affaire n°ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (Chambre d'appel), 4 octobre 2004, par. 7 ; Le Procureur c. Georges Anderson Rutaganda, affaire n°ICTR-96-3-A, Arrêt, par. 33 ; Le Procureur c. Delalić, Arrêt relatif à la requête de l'accusé Zejnil Delalić 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 (Chambre d'appel), 4 mars 1998.

[7] Le Procureur c. Nyiramasuhuko, 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" (Chambre d'appel), 2 juillet 2004, par. 15.

[8] Comptes rendus des audiences du 5 juillet 2005, p. 49 de la version anglaise (Ngirumptatse), du 16 mars 2006, p. 60 de la version anglaise (Nzirorera) et du 16 juin 2006, p. 2 de la version anglaise (Karemera).

[9] Compte rendu de l'audience du 16 juin 2006, p. 20, 21 et 24 de la version anglaise.

[10] *Ibid*., p. 29 de la version anglaise.

dans l'affaire *Bagosora et consorts* et aux pièces à conviction y afférentes, qui sont décrites en annexe.

Fait à Arusha, le 6 décembre 2006.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

Pièces afférentes à la déposition de Karemera :

D. NS 186 : fiche biographique d'Édouard Karemera.

D. NS 187 (A et B ; Document K 0366114) : télégramme rédigé par Kayishema le 12 juin 1994 au sujet d'une opération de « ratissage » qui devait durer quatre jours du 15 au 18 juin 1994.

P. 394 (A et B ; document K0285041 et K0286366) : lettre datée du 20 juin 1994 adressée par Édouard Karemera, en sa qualité de Ministre de l'intérieur, à Clément Kayishema, préfet de Kibuye.

P. 395 (A et B ; document K0195166) : message daté du 2 juin 1994 du préfet de Kibuye, Clément Kayishema, au Ministre de l'intérieur et du développement communal, Édouard Karemera.

P. 396 : notes écrites à la main prises par Édouard Karemera pendant le Conseil des ministres du 17 juin 1994 (seulement la page KA010403E).

P. 397 (A, B et C ; document K0272220) : lettre datée du 24 juin 1994, adressée par le bourgmestre Ignace Bagilishema au préfet de Kibuye, Clément Kayishema (en kinyarwanda).

P. 50 (A et B) : lettre intitulée « Sujet, opération de ratissage à Kibuye », adressée par Édouard Karemera, en sa qualité de Ministre de l'intérieur, au colonel Nsengiyumva.

P. 48 (A et B) : lettre adressée par Édouard Karemera à tous les préfets au sujet de la mise en œuvre des directives du Premier Ministre relatives à l'organisation de l'auto-défense civile.

P. 49 (A et B) : lettre adressée par Édouard Karemera aux préfets de chaque préfecture du Rwanda au sujet de la mise en œuvre des directives du Premier Ministre relatives à l'organisation de l'auto-défense civile.

Pièces afférentes à la déposition de Ngirumpatse :

D. B 177 : fiche biographique de Mathieu Ngirumpatse.

D. B 178 : Protocole d'entente entre les partis politiques appelés à participer au Gouvernement de transition, daté du 7 avril 1992.

D. B 179 : Protocole additionnel au protocole d'entente entre les partis politiques qui participent au Gouvernement de transition, daté du 13 avril 1993.

D. B 180 : Protocole additionnel au protocole d'entente entre les partis politiques appelés à participer au Gouvernement de transition, daté du 8 avril 1994.

P. 352 : Protocole d'entente, daté du 16 juillet 1993.

P. 353 : plan de Kigali.

Pièces afférentes à la déposition de Nzirorera :

D. NS 161 : fiche biographique de Joseph Nzirorera.

D. NS 162 (A et B) : *curriculum vitæ* de Joseph Nzirorera.

D. B321 : copies du passeport de Nzirorera.

D. B 271 : *affidavit* signé par Nzirorera à l'attention de Bagosora.

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Décision relative à la question du constat judiciaire renvoyée par la Chambre d'appel
Article 94 du Règlement de procédure et de preuve
11 décembre 2006 (ICTR-98-44-T)

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Constat judiciaire, Obligation de dresser le constat judiciaire d'informations "notoires", Définition de la notoriété publique – Faculté de dresser le constat judiciaire de faits admis dans d'autres affaires, Principes directeurs établis par la jurisprudence pour décider s'il y avait lieu de dresser le constat judiciaire de faits présentés comme des fais admis, Analogie entre le constat judiciaire de faits admis dans d'autres affaires et l'admission de déclarations écrites en lieu et place d'un témoignage oral – Demande de constat judiciaire pour neuf faits repris des jugements Akayesu, Semanza, Kajelijeli, Rutaganda, Musema, Niyitegeka, Kayishema, Ntakirutimana, Nahimana, Accélération du procès sans compromettre les droits des accusés, Corroboration des témoignages pas indispensable, Preuve par ouï-dire admissible, Désignations des termes « tutsi », « ennemis », « complices de l'ennemi », « infiltrés », « complices du FPR », « inyenzi », « inkotanyi » comme synonymes, Possibilité de dresser le constat judiciaire d'actes et de comportement d'autrui dont un accusé serait responsable mais sans que cela touche à la responsabilité pénale l'accusé – Constat judiciaire dressé pour une partie des faits

Instrument international cité :

Règlement de Procédure et de preuve, art. 89, 92 bis, 94 (A) and 94 (B)

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. 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. Laurent Semanza, Décision relative à la requête du Procureur aux fins de constat judiciaire et d'admission de présomptions factuelles conformément aux articles 94 et 54, 3 novembre 2000 (ICTR-97-20) ; Chambre de première instance, Le Procureur c. Laurent Semanza, Decision on the Prosecutor's Further Motion for Judicial Notice Pursuant to Rules 91 and 54, 15 mars 2001 (ICTR-97-20); Chambre d'appel, Le Procureur c. Jean-Paul Akayesu, Arrêt, 1er juin 2001 (ICTR-96-4) ; Chambre de première instance, Le Procureur c. Elizaphan Ntakirutimana et Gérard Ntakirutimana, Décision relative à la requête du Procureur en constat judiciaire de faits admis (article 94 (B)) du Règlement de procédure et de preuve, 22 novembre 2001 (ICTR-96-10 et ICTR-96-17) ; Chambre de première instance, Le Procureur c. Juvénal Kajelijeli, Décision relative à la requête du Procureur en constat judiciaire sur le fondement de l'article 94 du Règlement de procédure et de preuve, 16 avril 2002 (ICTR-98-44A) ; Chambre de première instance,

Le Procureur c. Pauline Nyiramasuhuko et consorts, Décision relative à la requête du procureur aux fins de constat judiciaire et d'admission de présomptions factuelles, 15 mai 2002 (ICTR-98-42) ; 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. Laurent Semanza, Jugement et sentence, 15 mai 2003 (ICTR-97-20) ; Chambre de première instance, Le Procureur c. Eliezer Nyitegeka, Jugement, 16 mai 2003 (ICTR-96-14) ; 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. Ferdinand Nahimana et consorts, Jugement et sentence, 3 décembre 2003 (ICTR-99-52) ; Chambre d'appel, Le Procureur c. Eliezer Niyitegeka, Jugement, 9 juillet 2004 (ICTR-96-14) ; Chambre de première instance, Le Procureur c. Casimir Bizimungu et consorts, Décision relative à 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 d'appel, Le Procureur c. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe, Arrêt, 7 juillet 2006 (ICTR-99-46) ; Chambre d'appel, Le Procureur c. Sylvestre Gacumbitsi, Judgement, 7 juillet 2006 (ICTR-2001-64) ; Chambre de première instance, Le rocureur c. Casimir Bizimungu et consorts, Décision relative à la requête du Procureur en constat judiciaire, 22 septembre 2006 (ICTR-99-50) ; Chambre d'appel, Edouard Karemera et consorts c. Le Procureur, Decision on Motions for Reconsideration, 1 décembre 2006 (ICTR-98-44)

T.P.I.Y. : Chambre de première instance, Le Procureur c. Blagoje Simić et consorts, Décision relative à la requête de l'Accusation préalable au procès demandant que la Chambre de première instance dresse le constat judiciaire du caractère international du conflit en Bosnie-Herzégovine, 25 mars 1999 (IT-95-9) ; Chambre d'appel, Le Procureur c. Stanislav Galić, Décision relative à l'appel interlocutoire interjeté en vertu de l'article 92 bis (C) du Règlement, 7 juin 2002 (IT-98-29) ; Chambre de première instance, Le Procureur c. Momčilo Krajišnik, Décision relative aux requêtes de l'Accusation aux fins du constat judiciaire de faits admis et de l'admission de déclarations écrites en application de l'article 92 bis, 28 février 2003 (IT-00-39) ; Chambre de première instance, Le Procureur c. Momčilo Krajišnik, Decision on the Prosecution Motion for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92 bis, 10 mars 2003 (IT-00-39) ; Chambre d'appel, Le Procureur c. Slobodan Milošević, Décision relative à l'appel interlocutoire interjeté par l'accusation contre la décision relative à la requête visant à faire dresser constat judiciaire de faits admis dans d'autres affaires rendue le 10 avril 2003 par la Chambre de première instance, 28 octobre 2003 (IT-02-54) ; Chambre de première instance, Le Procureur c. Vidoje Blagojević, Décision relative à la requête de l'accusation aux fins de dresser le constat judiciaire de moyens de preuve documentaires et de faits admis dans d'autres affaires, 19 décembre 2003 (IT-02-60) ; Chambre de première instance, Le Procureur c. Momčilo Krajišnik, Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts, 24 mars 2005 (IT-00-39) ; Chambre d'appel, Le Procureur c. Momir Nikolić, Decision on Appellant's Motion for Judicial Notice, 1er avril 2005 (IT-02-60/1) ; Chambre de première instance, Le Procureur c. Enver Hadžihasanović et Amir Kubura, Decision on Judicial Notice of Adjudicated Facts Following the Motion Submitted by Counsel for the Accused Hadžihasanović and Kubura on 20 January 2005, 14 avril 2005 (IT-01-47) ; Chambre de première instance, Le Procureur c. Jadranko Prlić et consorts, Décision relative à la requête aux fins de dresser le constat judiciaire de faits admis dans d'autres affaires en application de l'article 94 (B) du Règlement, 14 mars 2006 (IT-04-74) ; Chambre de première instance, Le Procureur c. Milutin Popović et consorts, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex , 26 septembre 2006 (IT-05-88)

Introduction

1. Le 9 novembre 2005, la Chambre a statué sur une demande du Procureur tendant à faire dresser le constat judiciaire de six faits qualifiés par le Procureur de faits de notoriété publique et de 153 faits

qui auraient été admis dans d'autres affaires[1]. Elle a dressé le constat judiciaire de trois faits de notoriété publique, en application de l'article 94 (A) du Règlement de procédure et de preuve, et rejeté le reste de la demande[2].

2. Le 16 juin 2006, la Chambre d'appel a accueilli en partie le recours interlocutoire formé par le Procureur contre la décision du 9 novembre 2005 et ordonné à la Chambre de première instance de dresser le constat judiciaire de certains faits de notoriété publique et de revoir les conclusions qu'elle avait tirées dans la décision contestée au sujet de certains faits présentés comme des faits admis[3].

3. À la demande des parties, la Chambre a ensuite rendu une ordonnance portant calendrier et les a autorisées à déposer, le cas échéant, toutes écritures supplémentaires concernant le projet de réexamen de ses conclusions sur la question du constat judiciaire des faits admis[4]. Les parties s'y sont scrupuleusement conformées[5].

4. Selon la Défense de Nzirorera, les conseils de tous les accusés avaient décidé d'un commun accord de diviser leurs écritures de sorte que les observations de chaque accusé ne portent que sur certains faits[6]. Or, si la Défense de Nzirorera s'est conformée à cette répartition des tâches, celle de Ngirumpatse a présenté des observations sur presque tous les faits et celle de Karemera n'a traité que de certains des faits qui lui étaient dévolus.

5. Le Procureur a déposé un seul mémoire pour répondre à toutes les observations de la Défense. Il a dit qu'il retirait 10 des faits présentés dans sa demande comme des faits admis[7]. En conséquence, la Chambre n'a plus à examiner que 137 de ces faits[8].

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[1] Les 153 faits présentés comme des faits admis avaient été tirés des jugements Nahimana et consorts, Kajelijeli, Kayishema et Ruzindana, Musema, Ntakirutimana, Niyitegeka, Akayesu, Rutaganda et Semanza.

[2] Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera (l'« affaire Karemera et consorts »), affaire n°ICTR-98-44-T, Décision relative à la requête du Procureur intitulée Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts (Chambre de première instance), 9 novembre 2005 (la « décision contestée »). Les faits dont le constat judiciaire a été dressé sont les faits n°3 et 4, tels que proposés par le Procureur, ainsi que le fait nº 1 qui a été au préalable légèrement modifié. Les faits rejetés sont essentiellement les faits n°2, 5 et 6 figurant sur la liste des faits de notoriété publique et les 153 faits qualifiés de faits admis. Des faits admis, le fait n°153 – selon lequel un génocide a été commis contre les Tutsis en tant que groupe au Rwanda en 1994 – avait été présenté à la fois comme un fait de notoriété publique et un fait admis, à charge pour la Chambre de retenir l'une des deux qualifications. La Chambre a refusé d'en dresser le constat judiciaire sous l'une ou l'autre de ces qualifications.

[3] Il s'agit des faits n°2, 5 et 6 dans le premier cas et des faits n°1 à 30, 33 à 74 et 79 à 152 repris à l'annexe B de l'appel interlocutoire du Procureur dans le second. Voir l'affaire *Karemera et consorts,* 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 (la « décision de la Chambre d'appel »).

[4] Affaire *Karemera et consorts*, n°ICTR-98-44-T, Ordonnance portant calendrier, 17 juillet 2006.

[5] *Joseph Nzirorera's Supplemental Submission on Judicial Notice of Adjudicated Facts* , écritures déposées par Joseph Nzirorera le 8 août 2006 ; Requête d'Édouard Karemera relative [à] la demande de la Chambre d'appel pour la reconsidération de la requête du Procureur à propos du constat judiciaire de faits admis, déposée le 25 août 2006 ; Mémoire complémentaire pour M. Ngirumpatse sur la requête en constat judiciaire et en admission de faits et demande à la Chambre d'entendre les observations orales des parties au soutien de leurs écritures, déposé le 28 août 2006 ; *Prosecutor's Consolidated Response to Defense Submissions on the Motion for Judicial Notice of Adjudicated Facts*, déposée le 11 septembre 2006 (la « réponse globale du Procureur ») ; Mémoire en réplique de Joseph Nzirorera relatif au constat judiciaire , déposé le 14 septembre 2006 ; Mémoire en réplique pour M. Ngirumpatse sur la *Prosecutor's Motion for Judicial Notice of Adjudicated Facts*, déposé le 25 septembre 2006. Le 27 septembre 2006, la Chambre a prorogé jusqu'au 2 octobre 2006 le délai imparti à la Défense pour répondre à des écritures du Procureur. Voir l'affaire *Karemera et consorts*, n°ICTR-98-44-T, Décision accordant une prorogation de délai de réponse à deux requêtes du Procureur (Chambre de première instance), 27 septembre 2006. Le 1er octobre 2006, Édouard Karemera a déposé sa réplique à la réponse globale du Procureur.

[6] Voir les conclusions de Nzirorera intitulées *Joseph Nzirorera's Supplemental Submission on Judicial Notice of Adjudicated Facts,* par. 10. Selon ces écritures, la Défense de Joseph Nzirorera devait traiter des faits tirés du jugement *Nahimana et consorts* et du jugement *Kajelijeli,* la Défense de Mathieu Ngirumpatse devait traiter des faits tirés des jugements *Akayesu, Rutaganda* et *Semanza*, tandis que la Défense d'Édouard Karemera devait traiter des faits tirés des jugements *Kayishema, Musema, Ntakirutimana* et *Niyitegeka*.

[7] Faits n°14, 79 à 83 et 138 à 141. Voir la réponse globale du Procureur, par. 7.

[8] L'un d'eux, à savoir le fait nº 153, a été présenté aussi comme un fait de notoriété publique.

6. Lorsque la Chambre a achevé ses délibérations sur le renvoi fait par la Chambre d'appel et mettait la dernière main à la présente décision, la teneur des dépositions prévues par deux témoins à charge l'a obligée à rendre deux décisions orales pour se prononcer sur certains faits. Elle a précisé que la décision écrite qu'elle rendrait sur la question renvoyée fournirait les motifs de ces décisions orales et constituerai l'exposé officiel de ses conclusions et de son raisonnement sur cette question. Les décisions orales susvisées ont permis au Procureur d'abréger considérablement l'interrogatoire principal de ses témoins.

Délibération

Question préliminaire

7. La Défense de chacune des personnes accusées en l'espèce a demandé à la Chambre d'appel de revoir ou, à défaut, de préciser sa décision. En attendant que la Chambre d'appel statue sur cette demande, la Défense de Ngirumpatse a invité Chambre à surseoir au réexamen des questions relatives au constat judiciaire, faisant valoir que ce sursis servirait l'intérêt de la justice et favoriserait l'économie des ressources du Tribunal.

8. La demande de sursis est devenue sans objet, la Chambre d'appel ayant rejeté les requêtes en réexamen dans leur intégralité le 1er décembre 2006[9].

9. La Chambre de première instance commencera par examiner la partie de la Décision de la Chambre d'appel qui lui demande de dresser le constat judiciaire de certains faits de notoriété publique. Elle examinera ensuite le volet de cette décision relatif aux faits admis dans d'autres affaires.

I. Faits de notoriété publique – Article 94 (A) du Règlement

10. L'article 94 (A) du Règlement dispose que

> « [l]a Chambre de première instance n'exige pas la preuve de ce qui est de notoriété publique, mais en dresse le constat judiciaire ».

L'application de cette disposition n'est pas facultative[10]. Bien au contraire, l'article 94 (A) « fait "obligation" de dresser le constat judiciaire d'informations "notoires"[11] ». L'expression « de notoriété publique »

> « s'applique aux faits qui ne sont pas 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. »

11. Dans sa décision, la Chambre d'appel a estimé que la présente Chambre avait eu tort de ne pas dresser le constat judiciaire des faits suivants qui, de l'avis de la Chambre d'appel, sont des faits de notoriété publique[12] :

> i) Fait n°2 : « La situation suivante a existé au Rwanda entre le 6 avril et le 17 juillet 1994 : sur toute l'étendue du Rwanda, des attaques généralisées ou systématiques ont été dirigées contre une population civile en raison de son appartenance au groupe ethnique tutsie. Au cours de ces

[9] *Le Procureur c. Karemera et consorts,* affaire n°ICTR-98-44-AR73(C), *Decision on Motions for Reconsideration* (Chambre d'appel), 1er décembre 2006, par. 28 et dispositif.
[10] Décision de la Chambre d'appel, par. 22 ; *Le Procureur c. Karemera et consorts,* affaire n°ICTR-98-44-AR73(C), *Decision on Motions for Reconsideration* (Chambre d'appel), 1er décembre 2006, par. 24.
[11] Décision de la Chambre d'appel, par. 22, citant *Le Procureur c. Semanza,* affaire n°ICTR-97-20-A, Arrêt, 20 mai 2005, par. 194 (l'« arrêt *Semanza* »).
[12] En ce qui concerne les faits n°2 et 5, voir la décision de la Chambre d'appel, par. 26 à 32, en particulier le paragraphe 32. Pour ce qui est du fait n°6, voir la même décision, par. 33 à 38, en particulier le paragraphe 38.

attaques, des citoyens rwandais ont tué des personnes considérées comme des Tutsis ou porté gravement atteinte à leur intégrité physique ou mentale. Ces attaques ont entraîné la mort d'un grand nombre de personnes appartenant à l'ethnie tutsie. »

ii) Fait n°5 : « Entre le 1er janvier et le 17 juillet 1994, un conflit armé non international s'est déroulé au Rwanda. »

iii) Fait n°6 : « Entre le 6 avril et le 17 juillet 1994, un génocide a été perpétré au Rwanda contre le groupe ethnique tutsi. »

12. La Chambre n'avait demandé aux parties de faire des observations supplémentaires que sur la question du constat judiciaire des faits admis, mais la Défense de Ngirumpatse s'est employée à déterminer si la Chambre de première instance était tenue de suivre les indications de la Chambre d'appel. À ce propos, elle soutient que le Règlement ne fait pas obligation à la Chambre de première instance de se conformer à l'avis de la Chambre d'appel et qu'au lieu de respecter les indications de celle-ci, la Chambre de première instance devrait revoir la décision contestée à la lumière des conclusions de Chambre d'appel.

13. Cet argument va à rebours de la jurisprudence constante, en particulier des récentes décisions de la Chambre d'appel. Dès lors qu'un fait est jugé de notoriété publique, la Chambre de première instance n'a aucun pouvoir d'appréciation à cet égard et doit en dresser le constat judiciaire[13]. En l'espèce, la Chambre d'appel a jugé que les faits n°2, 5 et 6 étaient des faits de notoriété publique et a demandé en conséquence à la Chambre de première instance d'en dresser le constat judiciaire[14].

14. Dans l'affaire *Bizimungu et consorts,* la Chambre de première instance II a, elle aussi, estimé 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[15] ».

15. De ce chef, la Chambre dresse le constat judiciaire des faits n°2, 5 et 6 considérés comme des faits de notoriété publique, en application de l'article 94 (A) du Règlement.

II. Faits admis – Article 94 (B) du Règlement

16. L'article 94 (B) du Règlement se lit comme suit :

> 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.

17. Dans sa décision du 16 juin 2006, la Chambre d'appel a renvoyé la question du constat judiciaire à la Chambre de première instance pour qu'elle examine à nouveau, à la lumière de deux conclusions dégagées par la Chambre d'appel, la majorité des faits présentés comme des faits admis.

18. En premier lieu, la Chambre d'appel a conclu que

> « la Chambre de première instance [avait] […] commis une erreur en ce qu'elle [avait] conclu qu'il est formellement interdit dans le cadre de l'article 94 (B) du Règlement de dresser le constat judiciaire de faits ayant directement ou indirectement trait à la culpabilité de l'accusé,

[13] Décision de la Chambre d'appel, par. 22 ; *Le Procureur c. Karemera et consorts,* affaire n°ICTR-98-44-AR73 (C), *Decision on Motions for Reconsideration* (Chambre d'appel), 1er décembre 2006, par. 24.
[14] Décision de la Chambre d'appel, par. 57.
[15] *Le Procureur c. Casimir Bizimungu et consorts,* affaire n°ICTR-99-50-T, Décision relative à la requête du Procureur en constat judiciaire, 22 septembre 2006, par. 7.

notamment ceux liés à l'existence et au fonctionnement d'une entreprise criminelle commune[16] ».

Ce faisant, la Chambre d'appel a également reconnu la nécessité d'accueillir avec circonspection les requêtes en constat judiciaire de faits admis lorsque ces faits sont indispensables pour établir la responsabilité pénale de l'accusé. Elle a souligné que la Chambre de première instance doit analyser les faits précis dont le constat judiciaire est sollicité pour déterminer s'ils se rapportent aux actes, au comportement ou à l'état d'esprit des accusés et, dans le cas contraire si les circonstances de la cause autorisent à penser que leur admission apporterait la rapidité recherchée sans compromettre les droits des accusés[17].

19. En second lieu, la Chambre d'appel a estimé qu'une Chambre de première instance

> « peut et même doit refuser de dresser le constat judiciaire des faits dont elle est saisie si elle considère que leur formulation – hors de leur contexte exposé dans le jugement d'où ils ont été tirés – prête à confusion ou ne correspond pas aux faits réellement admis dans les affaires considérées[18] ».

Toutefois, contrairement à la Chambre de première instance, elle n'était pas convaincue dans le cas présent, que les faits n°86 à 110 avaient été réellement sortis de leur contexte ou mal réunis de telle sorte qu'ils ne cadraient plus avec les jugements d'où ils avaient été tirés. Cela étant, elle a demandé à la Chambre de première instance d'examiner à nouveau la question et de motiver ses conclusions[19].

II.1. Droit applicable

20. Dans le cadre de l'article 94 (B) du Règlement, le constat judiciaire de faits admis est facultatif. En outre, la Chambre ne peut procéder à l'exercice de son pouvoir d'appréciation que si elle est convaincue que le fait considéré se rapporte à l'instance dont elle est saisie[20].

21. D'après la Chambre d'appel,

> « le fait de dresser le constat judiciaire de faits admis dans d'autres affaires en vertu de l'article 94 (B) du Règlement permet d'économiser les ressources du Tribunal et d'uniformiser ses jugements tout en garantissant le droit à un procès équitable, public et rapide dont jouissent les accusés[21] ».

La Chambre d'appel a également relevé l'analogie qu'il y a entre le constat judiciaire de faits admis dans d'autres affaires et l'admission de déclarations écrites en lieu et place d'un témoignage oral en vertu de l'article 92 *bis* du Règlement, deux mécanismes d'ordre procédural adoptés « surtout pour les mêmes raisons[22] ».

22. La Chambre d'appel considère les faits admis constatés judiciairement en vertu de l'article 94 (B) comme de « simples présomptions que la Défense peut combattre par des éléments de preuve lors

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[16] Décision de la Chambre d'appel, par. 53.
[17] *Id*.
[18] Décision de la Chambre d'appel, par. 55.
[19] *Ibid*., par. 56 et 57.
[20] *Le Procureur c. Popović et consorts*, affaire n°IT-05-88-T, *Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex* (Chambre de première instance), 26 septembre 2006, par. 5 (la « Décision *Popović* »). La Chambre de première instance y a déclaré que « le fait considéré doit avoir un rapport avec une des questions à trancher dans l'instance dont la Chambre est saisie » [traduction].
[21] Décision de la Chambre d'appel, par. 39. Voir également *Le Procureur c. Laurent Semanza,* affaire n°ICTR-97-20-I, Décision relative à la requête du Procureur aux fins de constat judiciaire et d'admission de présomptions factuelles conformément aux articles 94 et 54, 3 novembre 2000 (Chambre de première instance), par. 20 ; *Le Procureur c. Casimir Bizimungu et consorts,* affaire n°ICTR-99-50-I, Décision relative à la requête intitulée *Prosper Mugiraneza's First Motion for Judicial Notice Pursuant to Rule 94 (B)*, 10 décembre 2004, par. 10 et 12 ; *Le Procureur c. Kajelijeli,* Décision relative à la requête du Procureur en constat judiciaire sur le fondement de l'article 94 du Règlement de procédure et de preuve, 16 avril 2002, par. 18.
[22] Décision de la Chambre d'appel, par. 51.

du procès »[23]. Elle a précisé comment cette exception qu'est le constat judiciaire pouvait se concilier avec la présomption d'innocence :

> [L]e recours au constat judiciaire ne renverse pas la charge principale de la persuasion, cette charge continuant d'incomber au Procureur. Le constat judiciaire visé par le paragraphe B de l'article 94 n'a pour effet que de dégager le Procureur de sa charge initiale consistant à produire des éléments de preuve [crédibles et fiables] sur le point considéré : la Défense est habilitée à remettre ce point en question par la suite en versant au dossier des preuves contraires, crédibles et fiables[24].
>
> Cette situation présente une certaine analogie avec l'administration de la preuve de l'alibi, par exemple, où la charge de la production incombe à l'accusé alors que la question a fondamentalement trait à sa culpabilité. Or, ce renversement de la charge ne porte pas atteinte au principe de la présomption d'innocence, car, comme la Chambre d'appel l'a reconnu à maintes reprises, il ne dégage pas le Procureur de la charge d'établir la culpabilité de l'accusé au-delà de tout doute raisonnable[25].

23. Des Chambres de première instance du Tribunal de céans et du Tribunal pénal international pour l'ex-Yougoslavie (« TPIY ») ont établi certains principes directeurs lorsqu'elles ont eu à décider s'il y avait lieu de dresser le constat judiciaire de faits présentés comme des fais admis. Ces principes cadrent avec les indications que la Chambre d'appel a données récemment dans sa décision du 16 juin 2006. Leur liste n'est pas exhaustive et ils peuvent se résumer comme suit :

- Lorsqu'elle statue sur la question, la Chambre doit examiner le fait visé dans le contexte du jugement d'où il a été tiré[26].
- En ce qui concerne le sens de l'expression « faits admis », la jurisprudence définit un certain nombre de conditions qu'un fait doit remplir pour être considéré comme ayant été réellement admis.
- Tout fait dont le constat judiciaire est sollicité doit être distinct, concret et identifiable[27].
- Il doit revêtir la même forme que celle sous laquelle la Chambre qui l'a admis l'a présenté ou une forme sensiblement approchante[28]. Des faits qui ont été sensiblement modifiés par la partie requérante ne sauraient être considérés comme des faits réellement admis[29]. Toutefois, comme la Chambre de première instance l'a relevé récemment dans la décision *Popović*, une Chambre de première instance peut, de sa propre initiative, corriger une inexactitude ou une ambiguïté mineure. La Chambre apprécie souverainement l'opportunité de la rectification et celle-ci ne doit apporter aucune modification

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[23] *Ibid*., par. 42, citant les affaires suivantes : *Le Procureur c. Slobodan Milosević,* affaire n°IT-02-54-AR73.5, Décision relative à l'appel interlocutoire interjeté par l'Accusation contre la décision relative à la requête visant à faire dresser constat judiciaire de faits admis dans d'autres affaires rendue le 10 avril 2003 par la Chambre de première instance (Chambre d'appel), 28 octobre 2003, p. 3 et 4 ; *Le Procureur c. Momir Nikolić,* affaire n°IT-02-60/1-A, *Decision on Appellant's Motion for Judicial Notice* (Chambre d'appel), 1er avril 2005, par. 10 et 11 ; *Le Procureur c. Momčilo Krajišnik*, affaire nº IT-00-39-PT, Décision relative aux requêtes de l'Accusation aux fins du constat judiciaire de faits admis et de l'admission de déclarations écrites en application de l'article 92 *bis* (Chambre de première instance), 28 février 2003, par. 16.

[24] Décision de la Chambre d'appel, par. 42 et 49.

[25] *Ibid*., par. 49.

[26] Décision *Popović,* par. 6, citant les affaires suivantes : *Le Procureur c. Prlić et consorts*, affaire n°IT-04-74-PT, Décision relative à la requête aux fins de dresser le constat judiciaire de faits admis dans d'autres affaires en application de l'article 94 (B) du Règlement, 14 mars 2006, par. 12 ; *Le Procureur c. Hadžihasanović et Kubura,* affaire n°IT-01-47-T, *Decision on Judicial Notice of Adjudicated Facts Following the Motion Submitted by Counsel for the Accused Hadžihasanović and Kubura on 20 January 2005* (Chambre de première instance), 14 avril 2005, p. 5 ; *Le Procureur c. Krajišnik,* affaire n°IT-00-39-T, *Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts* (Chambre de première instance), 24 mars 2005, par. 14 ; *Le Procureur c. Krajišnik,* affaire n°IT-00-39-T, Décision relative aux requêtes de l'Accusation aux fins du constat judiciaire de faits admis et de l'admission de déclarations écrites en application de l'article 92 *bis,* 28 février 2003, par. 15 ; *Le Procureur c. Blagojević et Jokić,* affaire n°IT-02-60-T, Décision relative à la requête de l'Accusation aux fins de dresser le constat judiciaire de moyens de preuve documentaires et de faits admis dans d'autres affaires, 19 décembre 2003 (la « Décision *Blagojević* »), par. 16.

[27] Le Procureur c. Krajisnik, Decision on the Prosecution Motion for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92 bis, 10 mars 2003 ; décision Blagojević.

[28] Décision *Blagojević*.

[29] Décision *Popović*, par. 7.

substantielle au fait considéré. « Cette rectification doit avoir pour but de faire concorder la formulation du fait en question avec le sens qu'a voulu lui donner la Chambre qui l'a admis[30] » [traduction].

- Les faits dont le constat judiciaire est sollicité doivent être des conclusions factuelles et ne doivent contenir aucune qualification juridique[31].
- Un fait ne peut être considéré comme admis dans une autre affaire s'il *est* ou *est susceptible* d'être l'objet d'un appel[32].

• Le constat judiciaire prévu par l'article 94 (B) du Règlement ne peut être dressé si les faits visés attestent la responsabilité pénale de l'accusé[33]. D'après la Chambre d'appel, on ne doit dès lors pas dresser le constat judiciaire de faits qui se rapportent aux actes, au comportement et à l'état d'esprit de l'accusé[34]. Toutefois, cette exclusion ne s'applique pas aux actes et au comportement d'autrui dont l'accusé serait responsable[35]. Les personnes visées en l'occurrence sont, par exemple, les subordonnés de l'accusé dont la conduite criminelle lui est imputée parce qu'il ne l'a ni empêchée ni punie, les personnes qui auraient participé avec lui à une entreprise criminelle commune et celles qu'il aurait aidées et encouragées[36].

• Dès lors qu'elle est convaincue que les faits dont l'admission est sollicitée sont des faits réellement admis dans d'autres affaires et ne se rapportent pas aux actes, au comportement et à l'état d'esprit de l'accusé, la Chambre doit exercer son pouvoir d'appréciation pour accélérer la procédure, à condition que l'admission de ces faits ne soit pas de nature à porter atteinte aux droits de l'accusé, notamment à son droit à un procès équitable et rapide ainsi qu'à celui d'entendre et d'interroger les témoins à charge[37]. À cet égard, des Chambres de première instance du Tribunal de céans et du TPIY ont estimé, à la lumière des circonstances particulières des affaires dont elles étaient saisies, qu'il ne faut pas

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[30] Id.

[31] Le Procureur c. Krajišnik, Decision on the Prosecution Motion for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92 bis, 10 mars 2003 ; décision Blagojević, par. 16 ; affaire Bizimungu et consorts, Décision relative à la requête du Procureur en constat judiciaire de faits admis, 10 décembre 2004, par. 16, citant l'affaire Nyiramasuhuko et consorts, Décision relative à la requête du Procureur aux fins de constat judiciaire et d'admission de présomptions factuelles, 15 mai 2002, par. 127, qui a suivi une autre décision rendue dans l'affaire Ntakirutimana, à savoir la Décision relative à la requête du Procureur en constat judiciaire de faits admis, 22 novembre 2001, par. 35 et 36.

[32] Voir la décision *Popović*, par. 14 et note de bas de page n°50 : « Une Chambre de première instance ne peut dresser le constat judiciaire d'un fait qui aurait été admis dans une autre affaire que si ce fait <u>*en soi*</u> n'est manifestement pas l'objet d'un appel ou d'un recours en révision ». [traduction] (non souligné dans l'original).

[33] Affaire Le Procureur c. Krajisnik, Decision on the Prosecution Motion for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92 bis, 10 mars 2003.

[34] Décision de la Chambre d'appel, par. 50.

[35] *Ibid*., par. 52 ; voir également la décision *Popović,* par. 13.

[36] Décision de la Chambre d'appel, par. 48 ; décision *Popović,* par. 13. Dans l'affaire *Karemera,* la Chambre d'appel a rappelé la décision rendue en appel dans l'affaire *Galić* au sujet de l'application de l'article 92 *bis* du Règlement. Voir *Le Procureur c. Galić*, affaire n°IT-98-29-AR73.2, Décision relative à l'appel interlocutoire interjeté en vertu de l'article 92 *bis* (C) du Règlement (Chambre d'appel), 7 juin 2002, par. 10 et 11. Dans ces paragraphes, la Chambre d'appel avait examiné la question de savoir si le fait que l'article 92 *bis* prohibe l'admission de déclarations écrites « permettant de démontrer […] les actes et le comportement de l'accusé tels qu'allégués dans l'acte d'accusation » emportait l'obligation d'exclure aussi toute déclaration écrite tendant à prouver les actes et le comportement d'autres personnes dont l'accusé serait responsable du comportement par application de la théorie de l'entreprise criminelle commune ou de celle de la responsabilité du complice. Elle avait estimé qu'une interprétation allant dans ce sens ferait perdre toute utilité pratique à l'article 92 *bis* et serait incompatible avec la finalité et les termes de cet article. Dans l'affaire *Karemera,* la Chambre d'appel a considéré que cette analyse s'appliquait également à l'article 94 (B) du Règlement.

[37] Voir les articles 19 et 20 du Statut du Tribunal ainsi que la décision de la Chambre d'appel, par. 50. Voir aussi *Le Procureur c. Semanza*, affaire n°ICTR-97-20-I, *Decision on the Prosecutor's Further Motion for Judicial Notice Pursuant to Rules 94 and 54*, 15 mars 2001, par. 10 ; *Le Procureur c. Ntakirutimana,* affaires n°ICTR-96-10-T et ICTR-96-17-T, Décision relative à la requête du Procureur en constat judiciaire de faits admis, 22 novembre 2001, par. 28 ; *Le Procureur c. Simić et consorts,* Décision relative à la requête de l'Accusation préalable au procès demandant que la Chambre de première instance dresse le constat judiciaire du caractère international du conflit en Bosnie-Herzégovine, 25 mars 1999, *Le Procureur c. Krajisnik, Decision on the Prosecution Motion for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92 bis,* 10 mars 2003 ; décision *Blagojević*, par. 18.

dresser le constat judiciaire de faits qui constituent des points fondamentaux de la cause[38]. Lorsqu'un fait se rapporte à un des points fondamentaux de la cause, en dresser le constat judiciaire risque d'imposer à l'accusé une charge de la preuve contraire si lourde que son droit à un procès équitable serait compromis[39]. S'autorisant de l'intérêt de la justice et des circonstances particulières de l'espèce, des Chambres de première instance refusent également de dresser le constat judiciaire de faits admis lors d'autres affaires dans les cas où des témoignages ont déjà été entendus sur l'objet du fait dont le constat judiciaire est sollicité[40].

II.2. Faits dont le constat judiciaire est sollicité

24. Dans l'ensemble, les avocats des accusés contestent l'exactitude des faits dont l'admission est sollicitée ou la qualification de faits admis lors d'autres affaires qui leur a été attribuée. Ils soutiennent aussi que certains de ces faits se rapportent aux actes, au comportement et à l'état d'esprit des accusés ou à ceux d'autrui dont le Procureur juge les accusés responsables. Pour eux, l'admission des faits qualifiés par le Procureur de faits admis lors d'autres affaires portera gravement atteinte aux droits des accusés de plusieurs manières et ne favorisera pas la rapidité recherchée.

25. La Chambre va maintenant rechercher, à la lumière des principes rappelés ci-dessus et des arguments de chacune des parties, s'il y a lieu de dresser le constat judiciaire des 136 faits qualifiés de faits admis. Pour la commodité du lecteur, il convient de préciser que la Chambre ne rappellera pas systématiquement tous les arguments avancés par les parties sur chaque fait si celui-ci a déjà été examiné.

1. Faits n°1 à 9 (jugement *Akayesu*)

26. Le Procureur invite la Chambre à dresser le constat judiciaire de neuf faits repris du jugement *Akayesu*[41].

27. Ces faits présentent un intérêt pour l'instance et ne se rapportent pas aux actes, au comportement et à l'état d'esprit des personnes accusées en l'espèce. Ayant examiné les faits n°1 à 9 dans le contexte du jugement, la Chambre est également convaincue qu'ils constituent des faits réellement admis. Plus précisément, et contrairement à la thèse de Ngirumpatse, les faits n°1 et 8 ont été libellés de la même manière que dans le jugement d'où ils ont été tirés, et le fait n°3 ne contient aucune qualification essentiellement juridique.

28. La Défense de Ngirumpatse et celle de Karemera demandent à la Chambre de ne pas dresser de constat judiciaire dans les cas où la Chambre de première instance saisie à l'origine a tiré la conclusion considérée sur la foi d'un seul témoin[42]. Selon elles, dresser un constat judiciaire dans ces circonstances revient à priver l'accusé du droit dont avait bénéficié la personne poursuivie dans l'affaire d'où le fait en question a été tiré et de la possibilité de faire naître un doute raisonnable sur la thèse du Procureur.

29. Il ressort de l'article 89 du Règlement et de la jurisprudence constante du Tribunal de céans que la corroboration des témoignages n'est pas indispensable : une Chambre peut s'appuyer sur la

[38] Le Procureur c. Krajisnik, Decision on the Prosecution Motion for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92 bis, 10 mars 2003 ; affaire Bizimungu et consorts, Décision relative à la requête du Procureur en constat judiciaire de faits admis, 10 décembre 2004 ; décision Popović, par. 19.
[39] Décision *Popović*, par. 16.
[40] Voir *Le Procureur c. Bizimungu et consorts,* affaire n°ICTR-50-T, Décision relative à la requête du Procureur en constat judiciaire de faits admis, 10 décembre 2004, par. 22 ; décision *Blagojević*, par. 22 et 23.
[41] Il s'agit des faits n°1 à 9. Voir *Le Procureur c. Jean-Paul Akayesu*, affaire n°ICTR-96-4-T, Jugement, 2 septembre 1998, Recueil des ordonnances, décisions, jugements et arrêts du TPIR, 1998.
[42] La Défense de Karemera aussi soulève ce point. Il s'agit des faits n°1, 2, 3, 7, 10 à 24, 36, 41 à 51, 60, 67, 68, 79, 82, 84, 85, 110, 116 à 123, 125, 126, 132, 134 à 141, 144, 145, 148 et 150.

déposition d'un seul témoin pour conclure qu'un fait essentiel a été établi[43]. Elle dispose également d'une grande latitude pour admettre des preuves par ouï-dire, même lorsque ces preuves ne peuvent être examinées à la source ni n'ont été corroborées par des témoignages directs[44]. En conséquence, la Chambre ne refusera pas d'admettre un fait admis dans une autre affaire tout simplement parce que la Chambre saisie à l'origine a tiré sa conclusion sur la foi d'un seul témoin.

30. Compte tenu des circonstances particulières de l'espèce, la Chambre est convaincue que dresser le constat judiciaire des faits n°1 à 9 favorisera la rapidité recherchée sans pour autant compromettre les droits des accusés. Toutefois, elle juge nécessaire de corriger certaines inexactitudes mineures concernant le fait n°9.

2. Faits n°15, 65 à 68, 144 et 145 (jugement *Semanza*)

31. Le Procureur sollicite le constat judiciaire de certains faits tirés du jugement *Semanza*, en l'occurrence les faits n°15, 65 à 68, 144 et 145[45].

32. Ces faits présentent un intérêt pour l'instance et ne se rapportent pas aux actes, au comportement et à l'état d'esprit des personnes accusées en l'espèce. Contrairement à la thèse de Ngirumpatse, la Chambre est également convaincue que ces faits ont été réellement admis et qu'ils revêtent une forme sensiblement proche de celle sous laquelle ils ont été présentés par la Chambre saisie à l'origine.

33. La Défense de Ngirumpatse demande aussi à la Chambre de refuser de dresser le constat judiciaire des faits n°15, 67, 144 et 145, la Chambre saisie à l'origine n'ayant pas précisé les éléments de preuve sur lesquels elle s'est fondée pour tirer ses conclusions factuelles. À son avis, dans les cas où la transparence fait défaut, les personnes accusées en l'espèce ne peuvent pas produire les éléments de preuve nécessaires pour réfuter ces conclusions.

34. Ayant examiné ces faits dans le contexte du jugement, la Chambre ne souscrit pas à la thèse de la Défense. La Chambre saisie de l'affaire *Semanza* dit explicitement comment elle a évalué et pris en considération les éléments de preuve produits au procès, y compris ceux portant sur l'alibi.

35. Compte tenu des circonstances de l'espèce, la Chambre estime que dresser le constat judiciaire des faits n°15, 65 à 68, 144 et 145 favorisera la rapidité recherchée sans pour autant compromettre les droits des accusés.

3. Faits n°16 à 24 et 31 à 64 (jugement *Kajelijeli*)

36. Les faits n°16 à 24 et 31 à 64 dont le Procureur demande à la Chambre de dresser le constat judiciaire ont été tirés du jugement *Kajelijeli*[46].

37. La Défense de Nzirorera reconnaît qu'aucun de ces faits ne se rapporte aux actes, au comportement et à l'état d'esprit des accusés, mais celle de Ngirumpatse soutient que la Chambre doit en écarter certains parce que ceux-ci comprennent les actes et le comportement des accusés[47] et en particulier parce qu'il y en a qui concernent les actes des *Interahamwe* que l'acte d'accusation impute aux accusés[48]. Elle soutient en outre, que pour les mêmes raisons, la Chambre doit refuser de dresser le

[43] Voir, par exemple, *Le Procureur c. Laurent Semanza*, affaire n°ICTR-97-20-A, Arrêt, 20 mai 2005, par. 153 ; *Le Procureur c. Sylvestre Gacumbitsi*, affaire n°ICTR-2001-64-A, Arrêt, 7 juillet 2006, par.72.
[44] Voir, par exemple, *Le Procureur c. Jean-Paul Akayesu*, affaire n°ICTR-96-4-A, Arrêt, 1er juin 2001 ; arrêt *Gacumbitsi*.
[45] *Le Procureur c. Laurent Semanza*, affaire n°ICTR-97-20-T, Jugement et Sentence, 15 mai 2003.
[46] *Le Procureur c. Juvénal Kajelijeli*, affaire n°ICTR-98-44A-T, Jugement et Sentence, 1er décembre 2003.
[47] Faits n°33 à 48, 52 à 54 et 58 à 60.
[48] Faits n°16 à 24, 35, 36, 38 à 40, 46, 52, 53, 56, 57, 59 à 63.

constat judiciaire des faits concernant l'emploi des désignations « tutsi », « ennemis », « complices de l'ennemi », « infiltrés », « complices du FPR », « *inyenzi* », « *inkotanyi* », etc. comme synonymes[49].

38. La Chambre estime que les faits dont l'admission est sollicitée présentent un intérêt pour l'instance et qu'on ne saurait dire que l'un d'entre eux se rapporte aux actes, au comportement et à l'état d'esprit des personnes accusées en l'espèce.

39. Toutefois, certains de ces faits donnent directement des détails sur les actes et le comportement de Kajelijeli[50] qui, d'après l'acte d'accusation établi en l'espèce, aurait directement agi sur les instructions de Nzirorera. En effet, il est allégué au paragraphe 62 de l'acte d'accusation que le 6 ou le 7 avril 1994, ou à ces deux dates, Joseph Nzirorera a participé avec Juvénal Kajelijeli, entre autres, aux décisions prises lors d'une réunion tenue chez sa mère dans le secteur de Busogo et que Joseph Nzirorera a ordonné d'attaquer et de tuer les membres de la population tutsie dans les communes de Mukingo et de Nkuli. Il est allégué en outre que Kajelijeli a mis à exécution les décisions prises par Joseph Nzirorera[51].

40. Il est permis de dresser le constat judiciaire d'actes et du comportement d'autrui dont un accusé serait responsable, mais la Chambre estime que les faits n°19, 40, 50 à 53, 55, 56, 60, 62 et 63 dont l'admission est sollicitée touchent tellement à la responsabilité pénale de Joseph Nzirorera et jouent un rôle si fondamental dans cette responsabilité – vu les allégations faites dans l'acte d'accusation – que les droits de l'accusé seraient compromis si le constat judiciaire en était dressé.

41. La Chambre juge que le fait n°34, selon lequel les massacres de Tutsis commis dans la commune de Mukingo « ne procédaient pas d'une réaction spontanée de la population hutue à la mort du Président », touche à une question clé en l'espèce. Le Procureur a toujours dit que les personnes accusées en l'espèce avaient planifié à l'avance le génocide dans l'ensemble du Rwanda et la Défense a fait savoir à maintes reprises qu'elle avait l'intention d'invoquer le fait que les massacres perpétrés étaient une réaction spontanée de la population hutue. D'après la Chambre d'appel,

> « si l'existence d'un plan visant à commettre le génocide est indispensable pour que la thèse du Procureur prospère, elle doit être établi par des éléments de preuve[52] » [traduction].

Dans ces conditions, la Chambre estime que l'intérêt de la justice commande d'entendre des témoins en personne sur cette question particulière.

42. Concernant le fait n°18[53], le Procureur soutient que la question de savoir s'il y a eu des « attaques généralisées » est une question de fait et que dès lors que l'existence de ces attaques a été jugée établie, on peut en tirer une conclusion juridique. Il soutient également que la Chambre d'appel ayant considéré que le fait que

> « sur toute l'étendue du Rwanda, des attaques généralisées ou systématiques ont été dirigées contre une population civile en raison de son appartenance au groupe ethnique tutsie »

est un fait de notoriété publique et le viol étant une des méthodes employées pour attaquer une population, il convient que la Chambre de première instance dresse le constat judiciaire de ce fait. De l'avis de la Chambre, le fait que des viols et des violences sexuelles aient été commis *dans le cadre* d'une attaque généralisée dirigée contre la population civile tutsie peut être considéré comme une qualification essentiellement juridique, laquelle doit être laissée à l'appréciation souveraine de la Chambre de première instance. En conséquence, la Chambre refuse de dresser le constat judiciaire du fait n°18.

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[49] Faits n°19, 34, 35, 42, 43, 49, 52, 54, 55, 57, 58, 61 et 64.
[50] Faits n°19, 36 à 38, 40, 50 à 53, 55, 56, 60, 62 et 63.
[51] Acte d'accusation modifié du 24 août 2005, alinéas 8 à 10 du paragraphe 62.
[52] *Le Procureur c. Karemera et consorts,* affaire n°ICTR-98-44-AR73 (C), *Decision on Motions for Reconsideration* (Chambre d'appel), 1er décembre 2006, par. 21.
[53] Le fait n°18 dont l'admission est sollicitée se lit comme suit : « Les viols [et les violences sexuelles] en question ont été commis dans le cadre d'une attaque généralisée dirigée contre la population civile tutsie ».

43. Compte tenu du contexte du jugement *Kajelijeli*, la Chambre n'est pas convaincue que les faits n°36 à 38 correspondent aux conclusions factuelles dégagées par la Chambre de première instance dans ledit jugement[54]. Ces faits ne peuvent donc pas être considérés comme des faits admis dans une autre affaire. En conséquence, il y a lieu de refuser d'en dresser le constat judiciaire.

44. La Chambre partage l'avis de la Défense selon lequel les faits n°35, 47 et 48 sont vagues, qu'ils ne sont pas distincts, concrets et identifiables et qu'il n'y a donc pas lieu d'en dresser le constat judiciaire. En outre, elle estime que le fait n°64 est sans doute ambigu et que sa formulation ne rejoint pas celle adoptée par la Chambre saisie à l'origine[55]. Pour cette raison, elle n'en dressera pas le constat judiciaire.

45. À l'inverse, les faits n°16, 17, 20 à 24, 33, 41 à 46, 49, 54, 57, 58, 59 et 61 sont des faits réellement admis. Qui plus est, et contrairement aux assertions de la Défense de Nzirorera et de celle de Ngirumpatse, les faits n°17, 33, 43 et 59 sont distincts, concrets et identifiables et le fait n°44 ne contient aucune qualification juridique.

46. Comme indiqué plus haut, la Chambre est également convaincue que les faits n°16, 17, 20 à 24, 33, 41 à 46, 49, 54, 57, 58, 59 et 61 ne se rapportent pas aux actes, au comportement et à l'état d'esprit des personnes accusées en l'espèce. À cet égard, elle relève que les faits n°41 à 46 concernent une

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[54] Le fait n°36 est tiré du paragraphe 404 du jugement *Kajelijeli* qui se lit comme suit :
La Chambre relève en particulier la déposition précise et fiable du témoin à charge GBH selon laquelle l'accusé était celui qui « donnait des instructions » aux « jeunes gens […] qui devaient faire quelque chose, […] les supervisait [et] leur donnait des ordres » et « les jeunes gens en question [étaient] des *Interahamwe* ». Selon le témoin GBH, tout homme jouissant de sa qualité de bourgmestre aurait pu faire cesser les agissements de ces jeunes gens en uniforme qui s'entraînaient, chantaient et dansaient ou mettre ceux-ci en prison. Cette déposition a été corroborée par le témoin à charge GBE qui a dit de l'accusé qu'il n'avait jamais inquiété les *Interahamwe*, même quand ils « molestaient ou harcelaient » les gens, alors qu'en tant que bourgmestre il avait à la fois le pouvoir et l'obligation de le faire. La Chambre estime que ces témoignages rendent clairement compte des liens étroits que l'accusé entretenait avec les *Interahamwe* et du contrôle qu'il exerçait sur ces derniers. Cela étant, la Chambre conclut que l'accusé était un des dirigeants des *Interahamwe* sur lesquels il exerçait un contrôle dans la commune de Mukingo et qu'il a également exercé une influence sur les *Interahamwe* de la commune de Nkuli du 1er janvier au mois de juillet 1994.
Le fait n°37 est tiré du paragraphe 426 du jugement *Kajelijeli* qui se lit comme suit :
Encore qu'elle ait conclu plus haut [chapitre III, section H] que l'accusé était dirigeant du mouvement *Interahamwe*, jeunesses du MRND, la Chambre considère que la preuve n'a pas été suffisamment rapportée que l'accusé était (a) militant inscrit sur les listes du MRND rénové issu des Statuts de juillet 1991; (b) membre du comité préfectoral ou du congrès préfectoral de ce parti. Ce nonobstant, elle considère que l'accusé entretenait des liens étroits avec le MRND rénové et ses dirigeants et qu'en particulier de janvier à la mi-juillet 1994, il a participé activement à de nombreuses activités de ce parti dans la commune de Mukingo et ses environs. Autant dire qu'il était militant du MRND.
Le fait n°38 est tiré du paragraphe 400 du jugement *Kajelijeli* qui se lit comme suit :
La Chambre conclut qu'au 6 avril 1994, l'accusé participait activement à l'entraînement des *Interahamwe*, comme il ressort de la déposition du témoin oculaire à charge GBH qui a dit l'avoir vu en compagnie de ces jeunes gens qui s'entraînaient sur un terrain de football avec des fusils en bois, déposition qui rejoint celles des témoins à charge GDD et GAO dont les récits similaires et largement concordants évoquent la participation de l'accusé à l'entraînement des *Interahamwe*. Le témoin GDD, ancien élément *Interahamwe*, a dit que l'accusé et d'autres hommes politiques l'avaient sollicité pour entraîner de jeunes recrues *Interahamwe*. Le témoin GAO, autre ancien élément *Interahamwe*, a également confirmé qu'alors qu'il était bourgmestre, l'accusé assurait la formation militaire des *Interahamwe* avec d'autres personnes, que l'accusé venait au terrain d'entraînement chaque matin, et qu'il avait dit aux *Interahamwe* de parachever rapidement leur formation pour qu'il [l'accusé] puisse les envoyer dans les volcans combattre les « *Inkotanyi,* les *Inyenzi* ». La Chambre relève en particulier la déposition du témoin à charge GAP selon laquelle l'accusé était le principal encadreur « chargé de l'idéologie politique ». Si elle relève des ambiguïtés mineures entre ces dépositions quant à l'époque des diverses séances d'entraînement de la milice dans la commune de Mukingo et ses environs, la Chambre estime que lesdites dépositions se recoupent et établissent, au-delà de tout doute raisonnable, que l'accusé a bel et bien participé activement à la formation des *Interahamwe* dans la commune de Mukingo. Toutefois, la Chambre conclut qu'il n'a pas été suffisamment établi que l'accusé a organisé ces entraînements.
[55] Voir le jugement *Kajelijeli*, par. 625 :
Ayant minutieusement examiné l'ensemble des éléments de preuve ayant trait au massacre perpétré à la Cour d'appel de Ruhengeri le 14 avril 1994 ou vers cette date, la Chambre conclut que l'accusé a joué un rôle primordial en ce sens qu'il a aidé et organisé les *Interahamwe* et les autres assaillants, et ce en leur procurant des armes, en rassemblant les *Interahamwe* et en leur donnant de l'essence pour faciliter leur transport à la Cour d'appel de Ruhengeri. Les *Interahamwe* devaient aider à tuer les Tutsis qui avaient été conduits de la sous-préfecture de Busengo, dans la commune de Ndusu, à la Cour d'appel de Ruhengeri et avaient jusque-là repoussé les assauts des milices locales.

réunion différente de celle à laquelle l'acte d'accusation reproche à Nzirorera d'avoir participé et qu'il n'y est pas dit que Nzirorera était présent à cette réunion. Il s'agit d'une réunion tenue par Kajelijeli dans la soirée du 6 avril 1994 à la cantine jouxtant le bureau communal de Nkuli. La Chambre est convaincue que ces faits ne touchent pas trop aux accusés.

47. La Défense de Nzirorera s'oppose cependant à leur admission, au motif que celle-ci compromettrait les droits des accusés à maints égards et ne favoriserait pas la rapidité recherchée.

48. Selon la Défense, il s'avère que les témoins ANP et GBU sur la foi desquels la Chambre de première instance saisie de l'affaire *Kajelijeli* a dégagé certaines conclusions factuelles ont fait de faux témoignages et le constat judiciaire de faits qui reposent sur la déposition de ces témoins compromettrait dès lors les droits des accusés.

49. La Chambre fait observer que les témoins ANP et GBU sont deux des nombreux témoins sur la foi desquels la Chambre de première instance concernée a dégagé les conclusions contenant les faits admis présentés. L'argument avancé par la Défense à cet égard doit donc être rejeté.

50. La Défense de Nzirorera soutient que vu la déposition faite par le témoin BTH devant la présente Chambre, il n'est pas permis de dresser le constat judiciaire de certains faits.

51. Comme il a été dit plus haut, s'autorisant de l'intérêt de la justice et des circonstances particulières de l'espèce, certaines Chambres de première instance refusent de dresser le constat judiciaire de faits admis lors d'autres affaires dans les cas où des témoignages ont déjà été entendus sur l'objet du fait dont le constat judiciaire est sollicité[56]. Cependant, le fait qu'une Chambre de première instance a entendu des témoignages sur tel ou tel fait n'interdit pas formellement d'en dresser le constat judiciaire. La Chambre doit déterminer si, du moment qu'elle a déjà entendu ces témoignages, le constat judiciaire du fait considéré favorisera la rapidité recherchée sans pour autant compromettre les droits de l'accusé. Au nombre des éléments d'appréciation dont elle dispose peuvent figurer, par exemple, l'ampleur des témoignages entendus sur le fait dont le constat judiciaire est sollicité, l'ampleur des témoignages qu'elle doit encore entendre sur ce fait, l'ampleur des informations de première main fournies par les témoins à ce propos et les éléments permettant de savoir si les dépositions de ces témoins corroborent ou contredisent le fait en question.

52. En l'espèce, la Chambre a examiné les faits qui, selon la Défense, ne sauraient faire l'objet d'un constat judiciaire en raison de la déposition du témoin BTH et elle estime que l'intérêt de la justice ne commande d'écarter que le fait n°39 sur cette base. Il pourrait effectivement y avoir des divergences avec la déposition du témoin BTH sur le même fait. Contrairement à ce qu'affirme Nzirorera, le fait que le témoin BTH a dit que Kajelijeli agissait sur les instructions de Nzirorera n'interdit pas de conclure que les faits n°16, 17, 20 à 24, 33, 41 à 46, 49, 54, 57, 58, 59 et 61 n'ont pas trait aux actes, au comportement et à l'état d'esprit des accusés.

53. La Défense de Nzirorera soutient aussi que la Chambre de première instance ayant conclu dans l'affaire *Kajelijeli* que le Procureur n'avait pas établi que Kajelijeli s'était entendu avec Nzirorera et d'autres personnes[57], il serait injuste de dresser le constat judiciaire de conclusions de cette Chambre triées sur le volet qui sont favorables au Procureur[58]. La Chambre estime que bien au contraire, cet argument milite en faveur de l'admission des faits n°16, 17, 20 à 24, 33, 41 à 46, 49, 54, 57, 58, 59 et 61, puisque la Chambre de première instance saisie de l'affaire *Kajelijeli* n'a pas jugé que Nzirorera et Kajelijeli étaient parties à une entente criminelle.

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[56] Voir *Le Procureur c. Bizimungu et consorts,* affaire n°ICTR-50-T, Décision relative à la requête du Procureur en constat judiciaire de faits admis, 10 décembre 2004, par. 22 ; décision *Blagojević*, par. 22 et 23.
[57] Jugement *Kajelijeli*, par. 794 à 798.
[58] Voir les paragraphes 47 à 49 des premières écritures de Nzirorera sur ce point, intitulées *Joseph Nzirorera's First Supplemental Response to Motion for Judicial Notice* (13 juillet 2005).

54. Par ailleurs la Défense de Nzirorera présente plusieurs arguments spécifiques pour expliquer pourquoi le constat judiciaire de certains faits ne favoriserait pas la rapidité recherchée. Premièrement, elle soutient que les faits n°23 et 24 concernent des épisodes survenus dans la commune de Kinigi qui n'ont pas été inclus dans l'acte d'accusation modifié et ne seront évoqués par aucun des témoins inscrits sur la liste des témoins à charge. Puisqu'elle devra produire des éléments de preuve pour réfuter les allégations portant sur les faits survenus dans les communes de Kinigi et de Nkuli, précise-t-elle, le constat judiciaire ne favoriserait pas la rapidité recherchée. Deuxièmement, elle souligne que les faits n°41 à 50 sont des conclusions tirées de la déposition du témoin GDD qui est mort depuis lors et qu'aucun autre témoin figurant sur la liste des témoins à charge ne parlera des épisodes en question. Dans ces circonstances, estime-t-elle, dresser le constat judiciaire des faits considérés reviendrait à priver Nzirorera de son droit au contre-interrogatoire sur des points très litigieux et ne favoriserait pas la rapidité du procès, puisqu'il n'y a aucun témoin dont la déposition deviendrait inutile ou serait abrégée du fait qu'un constat judiciaire aurait été dressé. Le Procureur reconnaît que le témoin GDD est mort depuis sa déposition dans l'affaire *Kajelijeli*, mais souligne que la Défense pourra toujours contester l'exactitude des faits en citant des témoins, que d'autres témoins viendront parler des épisodes qui se sont produits dans les communes susvisées et que la Défense pourra remettre en question leurs dépositions.

55. La Chambre est convaincue que l'acte d'accusation et le mémoire préalable au procès mentionnent expressément les massacres perpétrés dans la préfecture de Ruhengeri où se trouve la commune de Kinigi. En outre, le mémoire préalable au procès fait explicitement état de la commune de Mukingo et d'autres communes avoisinant celles de Kinigi et de Nkuli. Ayant examiné les circonstances de l'espèce, la Chambre estime que le constat judiciaire des faits n°16, 17, 20 à 24, 33, 41 à 46, 49, 54, 57, 58, 59 et 61 favoriserait la rapidité recherchée sans porter atteinte aux droits des accusés. Concernant les faits n°33 et 54, elle juge nécessaire de corriger certaines inexactitudes mineures qui les entachent (voir l'annexe jointe à la présente décision).

56. S'agissant enfin des faits n°31 et 32, la Chambre d'appel n'en avait pas été saisie et ne les a donc pas renvoyés à la Chambre de première instance pour qu'elle les examine à nouveau. Cela étant, les conclusions que la Chambre a tirées au sujet des faits dans la décision du 9 novembre 2005 restent valables.

4. Faits n°25 à 30 et 146 à 152 (jugement *Rutaganda*)

57. Les faits n[os] 25 à 30 et 146 à 152 dont le Procureur sollicite le constat judiciaire ont été tirés du jugement Rutaganda[59].

58. La Défense de Ngirumpatse soutient que les faits n°27 à 30, 147, 151 et 152 doivent être écartés, car ils comprennent les actes et le comportement des accusés ou les actes des *Interahamwe* qui peuvent être imputés aux accusés en l'espèce. Elle soutient en outre que pour les mêmes raisons, la Chambre doit refuser de dresser le constat judiciaire des faits concernant l'emploi des désignations « tutsi », « ennemis », « complices de l'ennemi », « infiltrés », « complices du FPR », « *inyenzi* », « *inkotanyi* » etc. comme synonymes[60].

59. La Chambre est convaincue que les faits qui auraient été tirés du jugement Rutaganda ont un rapport avec la présente instance et qu'aucun de ces faits ne se rapporte aux actes, au comportement et à l'état d'esprit des personnes accusées en l'espèce. Toutefois, les faits n°151 et 152 sont d'une importance si cruciale pour les allégations faites contre les personnes accusées en l'espèce qu'il est préférable d'entendre des témoins en personne sur ces points. En conséquence, la Chambre refuse d'en dresser le constat judiciaire.

[59] *Le Procureur c Georges Rutaganda*, affaire n°ICTR-96-3-T, Jugement et Sentence, 6 décembre 1999.
[60] Faits n°151 et 152.

60. Elle refuse également de dresser le constat judiciaire du fait n°150 parce qu'elle le juge vague et celui des faits n°148 et 149 parce qu'elle n'est pas convaincue que leur admission favoriserait la rapidité recherchée.

61. Vu le contexte du jugement d'où ils ont été tirés, les faits n°25 à 30, 146 et 147 sont des faits réellement admis et ils revêtent une forme sensiblement proche de celle sous laquelle ils avaient été présentés dans ledit jugement. En outre, tenant compte des droits des accusés et de l'intérêt de la justice, leur admission contribuera à accélérer le procès. Toutefois, la Chambre a rectifié de sa propre initiative, certaines inexactitudes mineures qui y figuraient, de manière à pouvoir dresser le constat judiciaire de ces faits sous une forme exempte de toute ambiguïté (Voir à l'annexe jointe à la présente décision les faits n°25 et 28).

5. Faits n°10 à 12, 88 à 90, 92, 99 à 103, 105 à 107, 124, 127 à 131, 133 et 134 à 137 (jugement *Niyitegeka*) ; faits n°13, 86, 87, 91, 93, 94, 104, 111, 112 et 113 (jugement *Musema*) ; faits n°69, 71, 74, 84, 85, 95 à 98, 109, 110, 114 et 115 (jugement *Kayishema*) ; et faits n°70, 72, 73, 108, 116 à 123, 125, 126 et 132 (jugement *Ntakirutimana*).

62. Le Procureur demande à la Chambre de dresser le constat judiciaire d'une série de faits extraits des jugements Niyitegeka, Musema, Kayishema et Ntakirutimana[61] qui concernent, entre autres, les attaques menées sur la colline de Muyira, dans la région de Bisesero, les 13 et 14 mai 1994.

63. Selon la Défense de Ngirumpatse et celle de Karemera, les faits extraits du jugement Niyitegeka doivent être exclus parce qu'ils comprennent les actes, le comportement et l'état d'esprit des accusés ou concernent les actes des *Interahamwe* qui pourraient être imputés aux personnes accusées en l'espèce. Au demeurant, estiment-elles, certains de ces faits sont vagues ou ont été isolés du contexte du jugement d'où ils ont été tirés.

64. La Chambre refuse de dresser le constat judiciaire du fait n°84, car ce fait n'a de sens que si on le rapproche des faits n°79 à 83 que le Procureur a finalement écartés de sa requête.

65. Ayant examiné les faits restants dans le contexte du jugement d'où ils ont été tirés, la Chambre estime qu'ils reflètent fidèlement les conclusions de la Chambre saisie à l'origine d'où ils ont été tirés et qu'ils sont des faits réellement admis qui présentent un intérêt pour l'instance. Contrairement à la thèse de la Défense, la Chambre est également convaincue qu'aucun de ces faits ne concerne les actes, le comportement ou l'état d'esprit des personnes accusées en l'espèce.

66. La Défense de Ngirumpatse et celle de Karemera demandent d'exclure les faits considérés dans les cas où la Chambre de première instance saisie à l'origine a tiré sa conclusion sur la foi d'un seul témoin. Par ailleurs, la Défense de Karemera dit qu'il y a lieu de refuser de dresser le constat judiciaire des faits n°86 à 110, car ceux-ci sont l'objet d'une contestation raisonnable. À son avis, puisque le juge Lennart Aspergen de la Chambre d'appel a estimé dans son opinion individuelle jointe au jugement Musema, que certains faits relatifs à l'épisode considéré n'avaient pas été prouvés au-delà de tout doute raisonnable, les faits en question sont l'objet d'une contestation raisonnable. La Défense de Karemera soutient également que la déposition du témoin HR sur la base de laquelle la Chambre saisie avait tiré ses conclusions factuelles dans le jugement Musema n'ayant pas été prise en considération par une autre Chambre de première instance, il convient de ne pas dresser le constat judiciaire des fait n°86 à 107.

[61] *Le Procureur c. Eliezer Niyitegeka*, affaire n°ICTR-96-14-T, Jugement et Sentence, 16 mai 2003 ; *Le Procureur c. Alfred Musema*, affaire n°ICTR-96-13-T, Jugement et Sentence, 27 janvier 2000 ; *Le Procureur c. Clément Kayishema et Obed Ruzindana*, affaire n°ICTR-95-1-T, Jugement, 21 mai 1999 ; *Le Procureur c. Élizaphan et Gérard Ntakirutimana*, affaire n°ICTR-96-10 et ICTR-96-17-T, Jugement portant condamnation, 21 février 2003.

67. La Chambre a déjà rappelé qu'il est de jurisprudence constante qu'une Chambre peut s'appuyer sur la déposition d'un seul témoin pour conclure qu'un fait essentiel a été établi.

68. La Chambre de première instance saisie de l'affaire Niyitegeka a explicitement déclaré que le témoin HR était crédible et a admis sa déposition[62]. Par la suite, la Chambre d'appel a jugé que l'appréciation de la crédibilité du témoin HR faite par la Chambre de première instance était « minutieuse et empreinte de prudence » et que celle-ci n'avait commis aucune erreur en s'appuyant sur sa déposition[63]. En outre, dans l'affaire Musema, le témoin HR était l'un de ceux sur la déposition desquels la Chambre de première instance s'était appuyée pour dégager les conclusions d'où ont été tirés d'autres faits[64]. La Chambre de première instance a expressément déclaré qu'à son avis, le contre-interrogatoire de ce témoin n'avait nullement entamé la crédibilité de l'intéressé et que son témoignage était fiable. La Chambre d'appel n'a pas remis en cause l'appréciation de la crédibilité du témoin HR faite par la Chambre de première instance[65].

69. L'appréciation de la crédibilité d'un témoin dans un jugement peut empêcher de dresser le constat judiciaire d'un fait admis tiré de ce jugement, mais la Chambre estime que cela dépend du fait considéré et de l'ensemble des circonstances entourant la conclusion de la Chambre concernée. La question qui se pose à la Chambre est de savoir si le constat judiciaire des faits considérés compromettrait ou pas les droits des personnes accusées. La Chambre relève qu'un juge des faits peut conclure à la crédibilité d'un témoin là où un autre ne le trouverait pas crédible. Elle relève également que les juges peuvent conclure dans telle affaire qu'un témoin à charge dit la vérité et pas dans telle autre. La Chambre n'est pas convaincue qu'en ce qui concerne les faits présentés aux fins d'admission dont la Défense dit qu'ils sont viciés parce que le témoin n'est pas crédible, leur constat judiciaire compromettrait les droits des accusés. Qui plus est, les faits dont la Défense s'oppose à l'admission ont été admis par quatre Chambres de première instance différentes qui avaient aussi entendu divers témoins.

70. Dans ces conditions, la Chambre est convaincue que l'intérêt de la justice commande de dresser le constat judiciaire des faits n°10 à 12, 88 à 90, 92, 99 à 103, 105 à 107, 124, 127 à 131, 133, 134 à 137, 13, 86, 87, 91, 93, 94, 104, 111, 112, 113, 69, 71, 74, 85, 95 à 98, 109, 110, 114, 115, 70, 72, 73, 108, 116 à 123, 125, 126 et 132 et que ce constat judiciaire contribuerait à accélérer le procès en l'espèce sans compromettre les droits des accusés.

6. Faits n°142 et 143 (jugement *Nahimana*)

71. Le Procureur sollicite le constat judiciaire de deux faits tirés du jugement Nahimana, à savoir les faits n°142 et 143[66]. Il précise que l'affaire est pendante devant la Chambre d'appel, mais ces deux faits ne s'inscrivent pas dans l'objet du recours et la Chambre peut donc en dresser le constat judiciaire. Se fondant sur l'opinion individuelle du juge Shahabuddeen, il soutient que la Chambre de première instance peut dresser le constat judiciaire de faits admis dans des affaires pendantes devant la Chambre d'appel, à condition que ces faits n'entrent pas dans le champ de l'appel[67].

72. La Chambre relève que dans l'affaire Nahimana, l'un des appelants, en l'occurrence Jean-Bosco Barayagwiza, demande l'annulation du jugement au motif que le procès s'est déroulé en son

[62] Jugement *Niyitegeka*, par. 108.
[63] *Le Procureur c. Niyitegeka,* affaire n°ICTR-96-14-A, Arrêt, 9 juillet 2004, par. 138.
[64] Faits n°86, 87, 91, 93, 94, 104, 111 et 112.
[65] Arrêt *Musema*, par. 77 à 100.
[66] Le Procureur c. Ferdinand Nahimana, Jean-Bosco Barayagwiza et Hassan Ngeze, affaire n°ICTR-99-52-T, Jugement et Sentence, 3 décembre 2003.
[67] *Le Procureur c. Milosević,* affaire n°IT-02-54-AR73.5, Chambre d'appel, Opinion dissidente du juge Shahabuddeen jointe à la Décision relative à l'appel interlocutoire interjeté par l'Accusation contre la décision relative à la requête visant à faire dresser constat judiciaire de faits admis dans d'autres affaires rendue le 10 avril 2003 par la Chambre de première instance, 28 octobre 2003.

absence. Il allègue en outre que le Tribunal n'est pas indépendant et que les juges ne sont pas impartiaux[68].

73. Vu ces moyens d'appel, la Chambre considère que l'arrêt de la Chambre d'appel pourrait avoir une incidence sur toutes les conclusions factuelles dégagées par la Chambre de première instance dans son jugement, y compris les faits dont le constat judiciaire est sollicité. Dans ces circonstances, les faits n°142 et 143 ne peuvent être considérés comme des faits définitivement admis et ne sauraient donc faire l'objet d'un constat judiciaire.

Appréciation générale des droits des accusés et rapidité du procès

74. La Défense de chacune des accusés soutient, d'une manière générale, que le constat judiciaire des faits présentés par le Procureur compromettrait les droits des accusés, notamment leurs droits d'interroger et de faire interroger les témoins à charge. Elle soutient également qu'il ne permettrait pas d'atteindre le but assigné à l'article 94 (B) du Règlement, à savoir l'accélération du procès, et irait donc à rebours de la décision de la Chambre d'appel, puisque les personnes accusées en l'espèce seraient obligées de produire des éléments de preuve pour établir l'inexactitude de chaque fait.

75. La Chambre rejette totalement cet argument, car toute Chambre qui y souscrirait ne pourrait jamais considérer que le constat judiciaire d'un fait, quel qu'il soit, contribuerait à accélérer le procès.

76. Prenant en considération l'intérêt de la justice et l'ensemble des circonstances de l'espèce, la Chambre est convaincue que le constat judiciaire de certains faits admis, indiqués plus haut, contribuerait à accélérer le procès sans compromettre les droits des accusés. En particulier, elle estime que la présente décision n'imposera pas aux accusés une charge de la preuve contraire si lourde que leur droit à un procès équitable sera compromis[69]. S'agissant de l'accélération du procès, la Chambre escompte que le Procureur abrégera la présentation des moyens à charge comme il a dit vouloir le faire et réduira le nombre des témoins qu'il a l'intention d'appeler à la barre en conséquence de l'admission en l'espèce des faits admis dans d'autres affaires.

77. Toutefois, il importe de préciser que la Chambre n'entend pas dresser le constat judiciaire de l'ordre dans lequel le Procureur a énoncé les faits considérés dans sa requête ni celui des sections dans lesquelles ces faits ont été classés. La Chambre dressera le constat judiciaire des faits retenus l'un après l'autre tels qu'ils ont été tirés des jugements dans lesquels les conclusions en question avaient été dégagées (pour plus de détails, voir l'annexe A jointe à la présente décision).

PAR CES MOTIFS, LA CHAMBRE

I. FAIT DROIT en partie à la requête du Procureur ;

II. DRESSE LE CONSTAT JUDICIAIRE des faits de notoriété publique suivants, en application de l'article 94 (A) du Règlement :

(i) La situation suivante a existé au Rwanda entre le 6 avril et le 17 juillet 1994 : sur toute l'étendue du Rwanda, des attaques généralisées ou systématiques ont été dirigées contre une population civile en raison de son appartenance au groupe ethnique tutsi. Au cours de ces attaques, des citoyens rwandais ont tué des personnes considérées comme des Tutsis ou porté gravement atteinte à leur intégrité physique ou mentale. Ces attaques ont entraîné la mort d'un grand nombre de personnes appartenant à l'ethnie tutsie ;

[68] Voir la notification de la demande 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 » déposée le 3 février 2004.
[69] Décision *Popović*, par. 16.

(ii) Entre le 1er janvier et le 17 juillet 1994, un conflit armé non international s'est déroulé au Rwanda ;

(iii) Entre le 6 avril et le 17 juillet 1994, un génocide a été perpétré au Rwanda, contre le groupe ethnique tutsi ;

III. DRESSE LE CONSTAT JUDICIAIRE des faits admis suivants, dont la teneur est exposée à l'annexe A de la présente décision, en application de l'article 94 (B) du Règlement :

Faits n°1 à 8, 10 à 13, 15, 16, 17, 20 à 24, 26, 27, 29, 30, 41 à 46, 49, 57 à 59, 61, 65 à 74, 85 à 137 et 144 à 147 ;

III. DRESSE LE CONSTAT JUDICIAIRE des faits admis suivants figurant à l'annexe A de la présente décision, en application de l'article 94 (B) du Règlement, sous réserve de quelques corrections mineures jugées nécessaires et appropriées par la Chambre :

Faits n°9, 33, 54, 25 et 28 ;

III. REJETTE la demande du Procureur pour le surplus et REFUSE en conséquence de dresser le constat judiciaire des faits suivants, dont la teneur est exposée à l'annexe B de la présente décision :

Faits n°18, 19, 34 à 40, 47, 48, 50 à 53, 55, 56, 60, 62, 63, 64, 84, 142, 143 et 148 à 152.

FAIT à Arusha, le 11 décembre 2006.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

ANNEXE A : Faits admis dansd'autres affaires dont la Chambre a dressé le constat judiciaire

Comme elle l'a expliqué dans la présente décision, la Chambre a dressé le constat judiciaire de certains faits admis dans d'autres affaires sous réserve de modifications qu'elle a jugées nécessaires pour corriger certaines inexactitudes ou ambiguïtés mineures. Ces modifications sont indiquées ci-après en caractères gras s'il y a lieu.

1	Au cours des évènements de 1994, des filles et des femmes tutsies ont été soumises à des sévices sexuels, battues et tuées à l'intérieur ou près des locaux du bureau communal ainsi qu'ailleurs dans la commune de Taba. Des centaines de Tutsis, en majorité des femmes et des enfants, ont trouvé refuge au bureau communal au cours de cette période et de nombreux viols ont eu lieu à l'intérieur ou près des locaux du bureau communal.	Jugement *Akayesu*, par. 449.
2	Une femme a été emmenée par des *Interahamwe* du lieu où elle s'était réfugiée près du bureau communal dans une forêt avoisinante pour y être violée. Elle a également été violée à plusieurs reprises en deux occasions distinctes au centre culturel dans l'enceinte du bureau communal, une fois parmi un groupe de quinze filles et femmes et une autre fois parmi un groupe de dix filles et femmes.	Jugement *Akayesu*, par. 449.

3	Des femmes et des filles ont été sélectionnées et emmenées par des *Interahamwe* au centre culturel pour y être violées. Deux *Interahamwe* ont pris une femme et l'ont violée entre le bureau communal et le centre culturel.	Jugement *Akayesu*, par. 449.
4	Une femme a été emmenée du bureau communal et violée dans un champ voisin. Trois femmes ont été violées à Kinihira, lieu de massacres situé près du bureau communal, et une autre a retrouvé sa jeune sœur mourante après qu'elle eut été violée au bureau communal.	Jugement *Akayesu*, par. 449.
5	Plusieurs autres viols commis à Taba se sont produits à l'extérieur du bureau communal, à savoir dans les champs, sur la route et à l'intérieur ou à l'extérieur de maisons.	Jugement *Akayesu*, par. 449.
6	D'autres actes de violence sexuelle se sont déroulés à l'intérieur ou près du bureau communal, à savoir le déshabillement forcé et l'humiliation publique de filles et de femmes.	Jugement *Akayesu*, par. 449.
7	L'essentiel des actes de violence sexuelle se sont déroulés devant un grand nombre de gens et tous ces actes étaient dirigés contre les femmes tutsies.	Jugement *Akayesu*, par. 449.
8	En ce qui concerne l'ensemble des viols et des actes de violence sexuelle commis à l'intérieur ou près du bureau communal de Taba, les auteurs étaient tous des *Interahamwe*.	Jugement *Akayesu*, par. 450.
9	Les *Interahamwe s*ont également considérés comme les auteurs de nombreux cas de viols qui ont eu lieu à l'extérieur du bureau communal.	Jugement *Akayesu*, par. 450.
10	Le 28 juin 1994, près de l'École normale technique, sur une voie publique menant de Charroi Naval à Kibuye, Niyitegeka a ordonné à des *Interahamwe* de dévêtir le corps d'une femme qui venait d'être tuée par balles, d'aller chercher un morceau de bois, de le tailler en pointe et de l'enfoncer dans son sexe.	Jugement *Niyitegeka*, par. 316 et 273.
11	Cet acte a ensuite été exécuté par les *Interahamwe*, conformément aux instructions de l'accusé.	Jugement *Niyitegeka*, par. 316.
12	Le corps de la femme, avec le morceau de bois faisant saillie, a par la suite été laissé au bord de la route pendant environ trois jours. Niyitegeka a utilisé le terme « *Inyenzi* » pour parler de la femme, faisant ainsi référence aux Tutsis.	Jugement *Niyitegeka*, par. 316.
13	Dans la zone de l'usine à thé de Gisovu sise dans la cellule de Twumba (commune de Gisovu), Musema a ordonné qu'Annunciata Mujawayezu, une femme tutsie soit violée et que son sein soit coupé et donné à manger à son fils. Elle a en fait été tuée.	Jugement *Musema*, par. 805 et 828.

15	Le 13 avril 1994, vers 10 heures, Semanza a donné à un groupe de personnes l'ordre de violer des femmes tutsies avant de les tuer. La victime A a été violée par l'un des éléments de ce groupe d'hommes et sa cousine, la victime B, a été emmenée à l'extérieur et tuée par deux autres hommes appartenant à ce groupe.	Jugement *Semanza*, par. 261.
16	Ntenzireyerimye et Uyamuremye, éléments *Interahamwe*, ont mutilé une fille tutsie du nom de Nyiramburanga en lui coupant le sein pour le lécher ensuite, le matin du 7 avril 1994 dans la cellule de Rwankeri.	Jugement *Kajelijeli*, par. 678.
17	Des éléments *Interahamwe* venus notamment de la commune de Mukingo et des régions avoisinantes ont perpétré des viols et des violences sexuelles dans la préfecture de Ruhengeri entre les 7 et 10 avril 1994.	Jugement *Kajelijeli*, par. 683.
20	Les *Interahamwe* ont transpercé le côté et les organes génitaux de Joyce à l'aide d'une lance et l'ont couverte de sa jupe.	Jugement *Kajelijeli*, par. 677.
21	Une femme tutsie arrêtée à un barrage routier a été violée par des éléments *Interahamwe* à la paroisse de Busogo et dans la cellule de Kabyaza le 7 avril 1994.	Jugement *Kajelijeli*, par. 679 et 918.
22	La fille handicapée d'une Tutsie a été violée et tuée par des éléments *Interahamwe* dans la cellule de Rukoma (secteur de Shiringo) le 7 avril 1994.	Jugement *Kajelijeli*, par. 680 et 919.
23	Une femme tutsie a été violée et sexuellement mutilée par des éléments *Interahamwe* dans le secteur de Susa (commune de Kinigi) le 7 avril 1994.	Jugement *Kajelijeli*, par. 681 et 920.
24	Une femme tutsie a été violée par des éléments *Interahamwe* dans le secteur de Susa (commune de Kinigi) le 10 avril 1994.	Jugement *Kajelijeli*, par. 682 et 921.
25	Une bonne partie des réfugiés qui ont réussi à s'échapper ou ont survécu à l'attaque de l'ETO (*École technique officielle,* sise dans le secteur de Kicukiro, commune de Kicukiro) se sont ensuite dirigés par groupes vers le stade Amahoro	Jugement *Rutaganda*, par. 262 et 30[1].
26	Certaines femmes ont été arrachées au groupe, puis violées.	Jugement *Rutaganda*, par. 30[1].
27	Flanqués de part et d'autres par des *Interahamwe*, quelque 4 000 réfugiés ont été obligés de marcher jusqu'à Nyanza.	Jugement *Rutaganda*, par. 30[1].
28	Une attaque a eu lieu à Nyanza le 11 avril. Elle a commencé en fin d'après-midi et s'est poursuivie jusque dans la soirée. De nombreuses personnes ont été tuées lors de l'attaque.	Jugement *Rutaganda*, par. 30[2].

29	Les *Interahamwe* se sont alors mis à tuer les gens à l'aide de gourdins et d'autres armes.	Jugement *Rutaganda*, par. 30[2].
30	Certaines jeunes filles ont été choisies, mises de côté et violées avant d'être tuées. Bon nombre des femmes qui ont été tuées avaient été dépouillées de leurs vêtements.	Jugement *Rutaganda*, par. 30[2].
33	Nombre d'hommes, de femmes et d'enfants tutsis ont été attaqués et massacrés le 7 avril 1994 en un lieu de refuge dans la commune de Mukingo, en l'occurrence la concession de Munyemvano sise dans la cellule de Rwankeri.	Jugement *Kajelijeli,* par. 597.
41	Une réunion s'est tenue dans la soirée du 6 avril 1994 à la cantine située près du bureau communal de Nkuli à la suite du décès du Président.	Jugement *Kajelijeli,* par. 469.
42	Kajelijeli a présidé la réunion et s'est adressé aux individus présents – tous d'origine ethnique hutue – en ces termes : « [V]ous savez très bien que ce sont les Tutsis qui ont abattu l'avion présidentiel. Et qu'est-ce que vous attendez pour éliminer l'ennemi? »	Jugement *Kajelijeli,* par. 469.
43	Par le terme « ennemi », un témoin qui était présent a compris que Kajelijeli parlait du groupe ethnique tutsi.	Jugement *Kajelijeli,* par. 469.
44	Ayant été informé par Sendugu Shadrack qu'il n'y avait pas d'armes disponibles pour attaquer la population, Kajelijeli est parti de la réunion en compagnie du brigadier adjoint Boniface Ntabareshya.	Jugement *Kajelijeli,* par. 469.
45	À son retour, il a informé les personnes présentes que le major Bizabarumana avait accepté de leur fournir du « matériel » à la commune le lendemain matin.	Jugement *Kajelijeli,* par. 469.
46	Kajelijeli a également promis d'amener des *Interahamwe* en renfort de la commune de Mukingo en vue de lancer une attaque contre la cellule de Kinyababa.	Jugement *Kajelijeli,* par. 469.
49	Augustin Habiyambere et Sendugu Shadrack ont dirigé dans la matinée du 7 avril 1994, à la suite de la livraison d'armes en provenance du camp de Mukamira, une attaque au cours de laquelle une centaine de jeunes militants, notamment des jeunes originaires de la commune de Nkuli, des recrues de Mukingo ayant à leur tête Iyakaremye, président de la CDR du secteur de Gitwa, un groupe originaire des montagnes de Rukoma, des forces venues de Mukamira et des soldats de l'IGA en tenue civile ont agressé et tué les membres d'une douzaine de familles tutsies, soit environ 80 personnes, qui résidaient dans la cellule de Kinyababa (commune de Nkuli).	Jugement *Kajelijeli,* par. 487.
54	L'attaque lancée sur la colline de Busogo sise dans la cellule de Rwankeri (commune de Mukingo), a coûté la vie à nombre de Tutsis.	Jugement *Kajelijeli*, par. 544 et 549.

57	Les assaillants *Interahamwe* qui ont participé à l'attaque perpétrée contre la concession de Munyemvano ont fait usage d'armes traditionnelles, d'armes à feu et de grenades pour massacrer leurs victimes tutsies.	Jugement *Kajelijeli,* par. 597.
58	Un grand nombre de Tutsis ont été massacrés au couvent de la paroisse de Busogo le matin du 7 avril 1994. À en juger par le nombre de cadavres enterrés le lendemain, quelque 300 personnes ont trouvé la mort au cours de cette attaque.	Jugement Kajelijeli, par. 604.
59	Des éléments *Interahamwe* ont participé à cette attaque.	Jugement *Kajelijeli,* par. 604.
61	À la Cour d'appel de Ruhengeri, les *Interahamwe*, tous Hutus, ont tué environ 300 Tutsis.	Jugement *Kajelijeli,* par. 622.
65	Des civils tutsis ont été tués à l'église de Musha le 13 avril 1994 par des militaires, des gendarmes et des miliciens *Interahamwe*. Semanza a participé à l'attaque incriminée pour avoir rassemblé les *Interahamwe* dans le but de les voir y prendre part, et pour avoir ordonné aux assaillants de tuer les réfugiés tutsis.	Jugement *Semanza*, par. 206.
66	En avril 1994, la colline de Mwulire a été le théâtre d'attaques dirigées contre des réfugiés civils composés en majorité de Tutsis.	Jugement *Semanza*, par. 224.
67	Semanza a participé au meurtre des réfugiés tutsis présents sur la colline de Mwulire le 18 avril 1994.	Jugement *Semanza*, par. 228.
68	Semanza était armé et présent le 12 avril 1994 lors de l'attaque lancée contre la mosquée de Mabare et environ 300 réfugiés tutsis ont trouvé la mort dans ladite attaque.	Jugement *Semanza*, par. 244.
69	Du 9 avril au 30 juin 1994, les Tutsis se sont réfugiés dans la région de Bisesero, pour se mettre à l'abri des attaques qui se perpétraient dans d'autres régions du Rwanda et, en particulier, dans d'autres parties de la préfecture de Kibuye.	Jugement *Kayishema*, par. 409.
71	Des attaques ont été lancées sur environ 12 sites de la région de Bisesero.	Jugement *Kayishema*, par. 411.
74	Ruzindana et Kayishema s'en sont pris à des réfugiés tutsis durant les attaques survenues à Bisesero.	Jugement *Kayishema*, par. 467.
70	Des attaques régulières ont eu lieu dans la région de Bisesero du 9 avril au 30 juin 1994 environ et des milliers de Tutsis y ont été tués, blessés et mutilés.	Jugement *Ntakirutimana*, par. 446, 447 et 448.
72	Les assaillants étaient des *Interahamwe*, des gendarmes, des militaires et des civils.	Jugement *Ntakirutimana*, par. 447.

73	Les *Interahamwe*, les gendarmes et les militaires portaient généralement des armes à feu et étaient en uniforme. Les civils étaient généralement munis de gourdins, de machettes, d'arcs, de flèches, de lances, de houes, de couteaux, de tiges de bambou taillées en pointe et d'autres armes traditionnelles.	Jugement *Ntakirutimana*, par. 447.
85	Les attaques les plus meurtrières lancées dans la région de Bisesero ont eu lieu les 13 et 14 mai 1994, après une accalmie apparente de deux semaines.	Jugement *Kayishema*, par. 406.
95	Kayishema et Ruzindana étaient présents lors des massacres perpétrés sur la colline de Muyira et ses environs, lesquels ont commencé le ou vers le 13 mai 1994.	Jugement *Kayishema*, par. 430.
110	Les attaques lancées dans les environs de la colline de Muyira se sont poursuivies jusqu'en juin 1994.	Jugement *Kayishema*, par. 452.
96	Kayishema et Ruzindana sont arrivés sur les lieux à la tête d'un convoi de véhicules qui transportaient des soldats, des *Interahamwe* et des agents de la police communale, ainsi que des civils armés.	Jugement *Kayishema*, par. 565.
97	Kayishema a donné le signal marquant le début des attaques en tirant un coup de feu en l'air. Il a ensuite dirigé les assauts en scindant les assaillants en plusieurs groupes et en prenant la tête de l'un de ces groupes. Pendant la montée de la colline par son groupe, il a prodigué des encouragements aux assaillants en se servant d'un mégaphone.	Jugement *Kayishema*, par. 565.
98	Ruzindana a également joué un rôle de dirigeant dans l'attaque, notamment en distribuant aux assaillants des armes traditionnelles, en prenant la tête de l'un de leurs groupes lors de l'assaut lancé vers le sommet de la colline et en ouvrant le feu sur les réfugiés.	Jugement *Kayishema*, par. 565.
109	C'est Ruzindana qui a orchestré le massacre perpétré à la fosse située à proximité de la colline de Muyira et il est constant que l'assaut a été donné sur ses instructions.	Jugement *Kayishema*, par. 56[6].
86	Le 13 mai 1994, une attaque de grande envergure a été perpétrée sur la colline de Muyira contre 40 000 réfugiés tutsis.	Jugement *Musema*, par. 747.
87	L'attaque en question a commencé le matin.	Jugement *Musema*, par. 747.
91	Les assaillants avaient des armes à feu, des grenades, des lance-roquettes et des armes traditionnelles et scandaient des slogans anti-tutsis.	Jugement *Musema*, par. 747.

93	Musema se trouvait parmi les meneurs qui étaient à la tête des assaillants en provenance de Gisovu et s'est rendu sur les lieux de l'attaque au volant de sa Pajero de couleur rouge. Musema était armé d'un fusil. Il a utilisé cette arme durant l'attaque.	Jugement *Musema*, par. 748.
94	Au cours de l'attaque, des milliers d'hommes, de femmes et d'enfants tutsis non armés ont péri sous les coups des assaillants et bon nombre des réfugiés se sont vus obligés de prendre la fuite pour échapper à la mort.	Jugement *Musema*, par. 748.
104	Une attaque de grande envergure a été lancée le 14 mai 1994 contre des civils tutsis réfugiés sur la colline de Muyira et les assaillants, dont le nombre atteignait 15 000, portaient des armes traditionnelles, des armes à feu et des grenades et scandaient des slogans.	Jugement *Musema*, par. 750.
88	Les assaillants comptaient dans leurs rangs des milliers d'*Interahamwe*, de militaires, de policiers et de civils hutus.	Jugement *Niyitegeka*, par. 178.
89	Leur transport avait été assuré par des bus de l'ONATRACOM, des camions appartenant à COLAS, des véhicules du MINITRAP, des bus, des camionnettes, des véhicules de l'usine à thé de Gisovu et d'autres saisis sur des Tutsis.	Jugement *Niyitegeka*, par. 178.
90	Ces véhicules étaient garés à Kucyapa. Les assaillants chantaient : « Tuba Tsemba Tsembe », ce qui signifie « Exterminons-les », « les » désignant les Tutsis.	Jugement *Niyitegeka*, par. 178.
92	Les assaillants portaient des armes à feu, des machettes, des lances, de tiges de bambou taillées en biseau et des gourdins.	Jugement *Niyitegeka*, par. 178.
99	Le 13 mai, entre 7 heures et 10 heures du matin, Niyitegeka a orchestré avec d'autres meneurs une attaque de grande envergure perpétrée par des assaillants armés contre des réfugiés tutsis qui se trouvaient sur la colline de Muyira.	Jugement *Niyitegeka*, par. 178.
100	Niyitegeka portait une arme à feu dont il a fait usage pour tirer sur les réfugiés tutsis qui étaient sur la colline. De plus, il donnait des instructions aux assaillants, leur montrant où aller et comment attaquer les réfugiés.	Jugement *Niyitegeka*, par. 178.
101	Niyitegeka était en première ligne, conduisant les assaillants, en companie d'autres dirigeants.	Jugement *Niyitegeka*, par. 178.
106	Dans les rangs des assaillants se retrouvaient des civils, des militaires, des *Interahamwe*, des gendarmes et des agents de la police communale.	Jugement *Niyitegeka*, par. 205.

10 7	Ils portaient des armes à feu, des lances, des gourdins, des machettes et des objets pointus et ont lancé une attaque de grande envergure contre les réfugiés tutsis sur la colline de Muyira. Niyitegeka portait une arme à feu dont il a fait usage pour tirer sur des réfugiés tutsis sur la colline de Muyira.	Jugement *Niyitegeka*, par. 205.
10 5	Dans la matinée du 14 mai, Niyitegeka et d'autres personnes, en compagnie d'assaillants, sont arrivés à la colline de Muyira et ont garé leurs véhicules à Kucyapa.	Jugement *Niyitegeka*, par. 205.
10 2	Le 13 mai 1994 au soir, Niyitegeka a tenu une réunion à Kucyapa, à la suite de l'attaque du 13 mai dirigée contre des Tutsis réfugiés sur la colline de Muyira, dans le but d'arrêter le programme des tueries prévues pour le lendemain et de les organiser contre les Tutsis de Bisesero, dont le nombre s'élevait à près de 60 000. Près de 5 000 personnes ont assisté à la réunion.	Jugement *Niyitegeka*, par. 257.
10 3	Se servant d'un mégaphone, Niyitegeka a remercié les assaillants de leur participation aux attaques et les a félicités pour leur « bon travail », expression qui désigne les tueries de civils tutsis. Il leur a dit de se partager les biens et le bétail des gens et de manger de la viande afin de revenir revigorés le lendemain pour continuer le travail, c'est-à-dire les tueries.	Jugement *Niyitegeka*, par. 257.
10 8	Vers la mi-mai 1994, sur la colline de Muyira, Gérard Ntakirutimana a mené des assaillants armés lors d'une attaque dirigée contre des réfugiés tutsis et de nombreux Tutsis ont ainsi été tués.	Jugement *Ntakirutimana*, par. 635.
11 1	Musema a participé à une attaque perpétrée sur la colline de Mumataba à la mi-mai 1994. Les assaillants, dont le nombre allait de 120 à 150, comptaient dans leurs rangs des employés de l'usine à thé qui portaient des armes traditionnelles, ainsi que des agents de la police communale.	Jugement *Musema*, par. 755.
11 2	En présence et à la connaissance de Musema, les véhicules de l'usine à thé ont transporté des assaillants sur les lieux de l'attaque. L'attaque a été lancée après que des coups de sifflet eurent été donnés et elle avait pour cible 2 000 à 3 000 Tutsis qui s'étaient réfugiés à l'intérieur comme à l'extérieur de la maison d'un certain Sakufe.	Jugement *Musema*, par. 756.
11 3	Musema a participé à l'attaque de la grotte de Nyakavumu à la fin du mois de mai 1994. Musema était présent au moment de l'attaque durant laquelle les assaillants ont condamné l'entrée de la grotte avec du bois et des feuilles, et y ont mis le feu. Plus de 300 civils tutsis qui s'étaient réfugiés dans la grotte y ont trouvé la mort des suites du feu ainsi allumé.	Jugement *Musema*, par. 780.

114	À la grotte, Kayishema a assuré la direction du siège alors que les assaillants venus de Ruhengeri étaient sous les ordres de Ruzindana, sans préjudice du fait que chacun d'eux donnait des instructions aux assaillants et qu'ils avaient conjointement orchestré les attaques.	Jugement *Kayishema*, par. 566.
115	Les gendarmes, les *Interahamwe* et diverses autorités locales étaient présents lors de l'attaque et ont participé à sa perpétration.	Jugement *Kayishema*, par. 438.
116	À la mi-mai 1994, Élizaphan Ntakirutimana a transporté, à l'arrière de son véhicule, des assaillants armés qu'il a conduits à la colline de Nyarutovu vers la mi-mai 1994 et ces personnes ont recherché et pourchassé les réfugiés tutsis. À cette occasion, Élizaphan Ntakirutimana a montré du doigt les réfugiés en fuite aux assaillants qui se sont mis à les pourchasser en chantant « Exterminez-les, recherchez-les partout. Tuez-les et finissez-en avec [eux], dans toutes les forêts ».	Jugement *Ntakirutimana*, par. 594.
117	Élizaphan Ntakirutimana a participé à un convoi de véhicules conduisant des assaillants armés à la colline de Kabatwa à la fin de mai 1994 et dans le courant de la journée, sur la colline voisine de Gitwa, il a indiqué l'endroit où se trouvaient les réfugiés tutsis aux assaillants qui ont attaqué ceux-ci.	Jugement *Ntakirutimana*, par. 607.
118	Trois réunions se sont tenues dans la ville de Kibuye en juin 1994.	Jugement *Ntakirutimana*, par. 711 et 720.
119	La première a eu lieu vers le 10 juin dans la salle de réunion du bureau préfectoral. Elle a commencé entre 10 heures et 11 heures.	Jugement *Ntakirutimana*, par. 711 et 720.
120	Y assistaient des *Interahamwe* et divers responsables, dont le préfet Kayishema, Ruzindana, Musema, Éliézer Niyitegeka, Gérard Ntakirutimana et les bourgmestres des communes avoisinantes de la région de Bisesero, qui avaient pris place à la première rangée.	Jugement *Ntakirutimana*, par. 711 et 720.
121	Prenant la parole, Ruzindana a expliqué aux participants que la réunion avait pour objet de faire le point du massacre des Tutsis dans la région de Bisesero et de décider ce qu'il fallait encore faire pour en finir avec eux.	Jugement *Ntakirutimana*, par. 711 et 720.
122	Gérard Ntakirutimana est lui aussi intervenu pour dire que la difficulté qu'ils éprouvaient à finir le travail tenait au fait qu'ils n'avaient pas assez d'armes à feu et de munitions. Comme les autres intervenants, Gérard Ntakirutimana s'est servi d'un microphone branché à des haut-parleurs.	Jugement *Ntakirutimana*, par. 711 et 720.

123	Au cours de ces réunions, Gérard Ntakirutimana a aussi participé à la distribution d'armes, a discuté de la planification des attaques dans la région de Bisesero, s'est vu assigner un rôle dans les attaques et a rendu compte de leur réussite.	Jugement *Ntakirutimana*, par. 720.
125	Une deuxième réunion s'est tenue au même lieu environ une semaine plus tard. Ouverte également entre 10 heures et 11 heures, elle a duré environ quatre heures.	Jugement *Ntakirutimana*, par. 712 et 720.
126	Y ont assisté les mêmes responsables présents à la première réunion. Beaucoup d'autres personnes, dont des *Interahamwe*, étaient présentes dans la salle ou à l'extérieur.	Jugement *Ntakirutimana*, par. 712 et 720.
132	Gérard Ntakirutimana a été affecté au « groupe de Ngoma » dont faisaient aussi partie Enos Kagaba et Mathias Ngirinshuti. Ce groupe devait attaquer Murambi.	Jugement *Ntakirutimana*, par. 712.
124	Niyitegeka a promis de fournir des armes pour tuer les Tutsis à Bisesero.	Jugement *Niyitegeka*, par. 225.
127	La réunion avait pour objet de permettre à Niyitegeka de répondre aux questions posées à la réunion précédente, notamment sur sa promesse de mettre à disposition des armes.	Jugement *Niyitegeka*, par. 225.
128	À cette réunion, Niyitegeka a distribué à des représentants de groupes d'assaillants des armes à utiliser dans les tueries prévues à Bisesero.	Jugement *Niyitegeka*, par. 225.
129	Niyitegeka a indiqué que l'attaque aurait lieu le lendemain à Bisesero.	Jugement *Niyitegeka*, par. 225.
130	Niyitegeka a exposé le plan de l'attaque en traçant sur un tableau noir un cercle à l'intérieur duquel il a écrit « Bisesero ». Autour du cercle étaient inscrits les noms des personnes désignées comme meneurs de chaque groupe d'assaillants et les points d'où devaient partir les cinq groupes d'assaillants, à savoir Karongi, Rushishi, Kiziba, Gisiza et Murambi.	Jugement *Niyitegeka*, par. 225.
131	Niyitegeka a encouragé les gens à participer à l'attaque, et a lui-même pris la tête du groupe de Kiziba.	Jugement *Niyitegeka*, par. 225.
133	Ce plan a été mis à exécution dès le lendemain, lors de l'attaque perpétrée à Kiziba contre des Tutsis à Bisesero, attaque qui a été dirigée par Niyitegeka et qui a fait de nombreuses victimes parmi les réfugiés tutsis.	Jugement *Niyitegeka*, par. 225.

13 4	Le 18 juin, ou vers cette date, Niyitegeka a assisté à la cantine du bureau préfectoral de Kibuye à une réunion au cours de laquelle il a promis de mettre à disposition des gendarmes aux fins de l'attaque prévue pour le lendemain et a exhorté les bourgmestres et d'autres personnes à faire tout leur possible pour assurer la participation de la population aux attaques afin que tous les Tutsis à Bisesero puissent être tués. Une autre attaque a été perpétrée le lendemain, tel que prévu.	Jugement *Niyitegeka*, par. 229.
13 5	Un jour en juin, vers 17 heures, Niyitegeka a pris la parole à une réunion organisée au bureau préfectoral de Kibuye, en présence de Kayishema, de Ruzindana, de nombreux *Interahamwe* et d'autres personnes.	Jugement *Niyitegeka*, par. 232.
13 6	Les *Interahamwe* chantaient : « Exterminons-les, chassons-les de la forêt ! », faisant ainsi référence aux Tutsis.	Jugement *Niyitegeka*, par. 232.
13 7	Niyitegeka a dit à l'auditoire qu'il était venu afin qu'ils conjuguent leurs efforts pour vaincre l'ennemi, c'est-à-dire le Tutsi, et a promis qu'ils recevraient sa contribution en temps opportun. Il a dit que pas moins de 100 *Interahamwe* leur prêteraient main-forte dans les attaques contre les Tutsis.	Jugement *Niyitegeka*, par. 232.
14 4	Le 8 avril au matin, Semanza a rencontré Rugambarara et un groupe d'*Interahamwe* devant une certaine maison sise dans la commune de Bicumbi. Il a dit aux *Interahamwe* qu'une certaine famille tutsie n'avait pas encore été tuée, qu'aucun Tutsi ne devait survivre et que les Tutsis devaient être recherchés et tués.	Jugement *Semanza*, par. 271.
14 5	Plus tard le même jour, les *Interahamwe* ont fouillé un champ situé près de la maison de la famille mentionnée par Semanza. Ils y ont trouvé quatre membres de ladite famille et les ont tués.	Jugement *Semanza*, par. 271.
14 6	À partir d'une date indéterminée à la mi-avril, un barrage routier a été établi par des *Interahamwe* sur l'avenue de la Justice, près d'un feu de signalisation, à proximité de l'entrée du garage Amgar, à la limite du secteur de Cyahafi, dans la commune de Nyarugenge, préfecture de Kigali-ville.	Jugement *Rutaganda*, par. 22[6].
14 7	Audit barrage, les *Interahamwe* ont vérifié les cartes d'identité des personnes qui y passaient, et ont procédé à l'arrestation des détenteurs de cartes d'identité portant la mention ethnique « Tutsi » ou des personnes qu'ils considéraient comme des Tutsis parce qu'elles déclaraient ne pas être en possession d'une carte d'identité.	Jugement *Rutaganda*, par. 22[6].

ANNEXE B : Faits dont la Chambre refuse de dresser le constat judiciaire

18. Les viols [et les violences sexuelles] en question ont été commis dans le cadre d'une attaque généralisée dirigée contre la population civile tutsie.	Jugement *Kajelijeli*, par. 922.
19. En exécution de l'ordre d'« exterminer les Tutsis » que	Jugement *Kajelijeli*,

Kajelijeli avait donné au marché de Byangabo le 7 avril 1994, les *Interahamwe* se sont rendus à la cellule de Rwankeri où une femme tutsie nommée Joyce a été violée et tuée par des *Interahamwe*. — par. 917.

34. En avril 1994, les massacres de Tutsis survenus dans la commune de Mukingo et les régions avoisinantes ne procédaient pas d'une réaction spontanée de la population hutue à la mort du Président. — Jugement *Kajelijeli*, par. 161.

35. Au nombre des tueurs figuraient des *Interahamwe* qui avaient reçu l'ordre de tuer tous les Tutsis, bénéficié d'une assistance et reçu des armes pour ce faire. — Jugement *Kajelijeli*, par. 161.

36. Kajelijeli était un des dirigeants des *Interahamwe* sur lesquels il exerçait un contrôle dans la commune de Mukingo et il a également exercé une influence sur les *Interahamwe* de la commune de Nkuli du 1er janvier au mois de juillet 1994. — Jugement *Kajelijeli*, par. 404.

37. Kajelijeli entretenait des liens étroits avec le MRND rénové et ses dirigeants et en particulier de janvier à la mi-juillet 1994, il a participé activement à de nombreuses activités de ce parti dans la commune de Mukingo et ses environs. Autant dire qu'il était militant du MRND. — Jugement *Kajelijeli*, par. 426.

38. Kajelijeli n'a cessé d'exercer un contrôle effectif sur les *Interahamwe* des communes de Mukingo et de Nkuli du 6 au 14 avril 1994 au moins. — Jugement *Kajelijeli*, par. 626.

39. Au 6 avril 1994, Kajelijeli participait activement à l'entraînement des *Interahamwe* dans la commune de Mukingo.

40. Les *Interahamwe* de la commune de Mukingo portaient des uniformes distinctifs et Kajelijeli a participé à la distribution de ces uniformes aux *Interahamwe* au marché de Byangabo vers 1993. — Jugement *Kajelijeli*, par. 400.

47. Une jeep Land Rover du camp militaire de Mukamira est arrivée au bureau communal de Nkuli le 7 avril 1994, entre 5 heures et 6 heures. — Jugement *Kajelijeli*, par. 402.

48. La jeep transportait des kalachnikovs, des grenades et des caisses de cartouches. — Jugement *Kajelijeli*, par. 474.

50. Les armes fournies par Kajelijeli, qui étaient arrivées tôt ce matin-là au bureau communal de Nkuli, ont été utilisées durant l'attaque. — Jugement *Kajelijeli*, par. 474.

51. Augustin Habiyambere, entre autres personnes, a rendu compte à Kajelijeli en fin de journée de ce qui avait été fait et lui a donné l'assurance qu'ils avaient « tout éliminé ». — Jugement *Kajelijeli*, par. 488.

52. Kajelijeli a rassemblé des éléments *Interahamwe* au marché de Byangabo dans la matinée du 7 avril 1994 et leur a donné l'ordre de « tue[r] et [d']extermine[r] tous ces gens qui se trouvent à Rwankeri » et d'« exterminer les Tutsis ». Il leur a également demandé de « s'habiller et de commencer le travail ». — Jugement *Kajelijeli*, par. 488.

53. Kajelijeli a participé à cette attaque en ordonnant aux *Interahamwe* de se rendre du marché de Byangabo à la cellule de Rwankeri pour y prendre part et en assurant la liaison avec le camp de Mukamira en quête d'assistance en hommes et en armes.

Jugement *Kajelijeli*, par. 531.

55. Des Tutsis ont été attaqués et tués chez Rudatinya. Kajelijeli a ordonné et supervisé cette attaque à laquelle il a également participé.

Jugement *Kajelijeli*, par. 549.

56. Kajelijeli a assisté à l'attaque lancée contre la concession de Munyemvano sise dans la cellule de Rwankeri et, de par l'autorité qu'il exerçait sur les assaillants *Interahamwe*, il a commandé et supervisé cette attaque.

Jugement *Kajelijeli*, par. 555.

60. Une fête a eu lieu dans la soirée du 7 avril 1994 au bar de Kajelijeli où les *Interahamwe* se sont divertis et ont chanté après les tueries de la journée. Kajelijeli était présent lors de ces réjouissances.

Jugement *Kajelijeli*, par. 597.

62. Kajelijeli a joué un rôle essentiel en ce qu'il a organisé et facilité les opérations des *Interahamwe* et des autres assaillants à l'occasion du massacre perpétré à la cour d'appel de Ruhengeri le 14 avril 1994 ou vers cette date.

Jugement *Kajelijeli*, par. 708.

63. Il a fait cela en leur procurant des armes, en rassemblant les *Interahamwe* et en leur donnant de l'essence pour faciliter leur transport à la cour d'appel de Ruhengeri.

Jugement *Kajelijeli*, par. 625.

64. Les Tutsis présents à la cour d'appel du Ruhengeri avaient été amenés de la sous-préfecture de Busengo, dans la commune de Ndusu.

Jugement *Kajelijeli*, par. 625.

84. Peu après, à la mi-mai, les assaillants pourchassent de nouveau les Tutsis qui cherchent refuge ça et là.

142. La radio constituait le moyen de communication de masse disposant du plus vaste auditoire au Rwanda. De nombreuses personnes possédaient une radio et écoutaient la RTLM, chez eux, dans les bars, dans les rues et aux barrages routiers.

Jugement *Kajelijeli*, par. 625.

143. Les *Interahamwe* et les autres miliciens écoutaient la RTLM et agissaient en fonction des informations qu'elle diffusait.

Jugement *Kayishema*, par. 406.

148. Rutaganda a ordonné à des hommes qui étaient sous son contrôle d'emmener quatorze détenus, dont quatre au moins étaient tutsis, à un trou profond, situé près du garage Amgar. Sur son ordre et en sa présence, ses hommes ont tué dix de ces détenus à coups de machettes. Les corps des victimes ont été jetés dans le trou.

Jugement *Nahimana*, par. 488.

149. Les attaques dirigées contre la population tutsie se sont perpétrées dans diverses régions du Rwanda, comme celles de Nyanza, commune de Nyarugenge, secteur de Kiemesakara, préfecture de Kigali, de Nyamirambo, Cyahafi, Kicukiro, Masango.

Jugement *Nahimana*, par. 488.

Jugement *Rutaganda*, par. 261.

150. Rutaganda était présent à la fosse commune située près du

trou derrière l'École technique de Muhazi et a ordonné que les corps soient enterrés. Il a donné cet ordre pour dissimuler les cadavres aux étrangers.

151. Des réunions ont été tenues en vue d'organiser et d'encourager la prise pour cible et la mise à mort de la population civile tutsie comme telle et non en tant qu'agents du FPR.

Jugement *Rutaganda*, par. 372.

152. Ces actes ont été accomplis par le biais d'émissions radiodiffusées appelant à l'arrestation des Tutsis, de même que par l'utilisation d'unités mobiles de vulgarisation mises en place pour dénoncer les *Inkotanyi*, la distribution d'armes aux milices *Interahamwe*, la mise en place de barrages routiers tenus par des soldats et des membres du mouvement *Interahamwe* pour faciliter l'identification et la séparation des civils tutsis des autres composantes de la population aux fins de leur mise à mort, et par les fouilles systématiques des maisons entreprises dans le but de capturer les Tutsis.

Jugement *Rutaganda*, par. 346, 353 et 356.

Jugement *Rutaganda*, par. 371.

Jugement *Rutaganda*, par. 371.

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Décision relative à la requête du Procureur intitulée « Prosecution Motion for admission of evidence of rape and sexual assault pursuant to Rule 92 bis of the Rules ; and Order for Reduction of Prosecution Witness List »
Articles 92 bis et 73 bis (D) du Règlement de procédure et de preuve
11 décembre 2006 (ICTR-98-44-T)

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Pouvoir de la Chambre de première instance d'admettre des éléments de preuve présentés par un témoin sous la forme d'une déclaration écrite, Pouvoir de la Chambre de première instance d'admettre des éléments de preuve présentés par un témoin dans le cadre de procédures menées devant le Tribunal sous forme de compte rendu du témoignage entendu, Critères formels d'admission des déclarations écrites, Satisfaction des conditions générales de pertinence et de valeur probante applicables à tous les types de preuve – Définition des actes et comportement des accusés figurant dans l'acte d'accusation, Exclut des actes et du comportement de l'accusé figurant dans l'acte d'accusation qui établissent sa responsabilité pour les actes et le comportement d'autres personnes sauf les actes et le comportement de coauteurs ou de subordonnés – Contre-interrogatoire du témoin en tenant compte de la proximité entre l'accusé et l'auteur des actes et du comportement décrits dans la déclaration écrite, Critère essentiel pour ordonner un contre-interrogatoire : garantie à l'accusé d'un procès équitable – Responsabilité

comme supérieur hiérarchique, Allégations cruciales ne pouvant être établies seulement par des dépositions écrites, Contre-interrogatoire nécessaire – Réduction du nombre de témoins à charge – Requête partiellement acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 73 bis (D), 89 (C), 92 bis, 92 bis (A) (i), 92 bis (A) (ii), 92 bis (A) (ii) (c), 92 bis (B), 92 bis (D) et 92 bis (E) ; Statut, art. 19 et 20

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Order for Reduction of Prosecutor's Witness List, 8 avril 2003 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 *bis*, 9 mars 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Decision on Variance of the Prosecution Witness List, 13 décembre 2005 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision faisant suite à l'appel interlocutoire interjeté par le Procureur de la décision relative au constat judiciaire, 16 juin 2006 (ICTR-98-44)

T.P.I.Y. : Chambre d'appel, Le Procureur c. Duško Tadić, Arrêt, 15 juillet 1999 (IT-94-1) ; Chambre de première instance, Le Procureur c. Slobodan Milošević, Décision relative à la requête de l'Accusation aux fins d'admettre des déclarations écrites en vertu de l'article 92 bis du Règlement, 21 mars 2002 (IT-02-54) ; Chambre de première instance, Le Procureur c. Radoslav Brđanin et Momir Talić, Décision confidentielle relative à l'admission de déclarations recueillies en application de l'article 92 bis du Règlement, 1er mai 2002 (IT-99-36) ; Chambre d'appel, Le Procureur c. Stanislav Galić, Décision relative à l'appel interlocutoire interjeté en vertu de l'article 92 bis (C) du Règlement, 7 juin 2002 (IT-98-29) ; Chambre de première instance, Le Procureur c. Vidoje Blagojević et consorts, Première décision relative à la requête de l'Accusation aux fins d'admission de déclarations de témoins et de témoignages antérieurs présentés en application de l'article 92 bis du Règlement, 12 juin 2003 (IT-02-60) ; Chambre de première instance, Le Procureur c. Slobodan Milošević, Decision on Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to 92 bis (D) – Foča Transcripts, 30 juin 2003 (IT-02-54)

Introduction

1. Le procès en l'espèce s'est ouvert le 19 septembre 2005 par la présentation des premiers témoins à charge. Selon le chef n°5 de l'acte d'accusation, les accusés sont poursuivis pour viol constitutif de crime contre l'humanité[1]. Il ne leur est pas reproché d'avoir commis personnellement les viols qui leur sont imputés, mais d'en être responsables en leur qualité de supérieurs hiérarchiques[2] des auteurs matériels des viols en question ou, subsidiairement, d'avoir participé à une entreprise criminelle commune de forme élargie[3].

[1] Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera («Karemera et consorts»), affaire nº98-44-I, acte d'accusation modifié du 24 août 2005.

[2] Au paragraphe 70 de l'acte d'accusation, il est allégué que les viols commis sur les femmes tutsies étaient si généralisés et systématiques que les accusés savaient ou avaient des raisons de savoir que les *Interahamwe* et d'autres miliciens étaient sur le point d'en perpétrer ou en avaient perpétrés ; que les accusés avaient le pouvoir matériel d'y mettre fin, de les prévenir ou d'en punir les auteurs ; mais qu'ils n'en ont rien fait.

[3] Au paragraphe 69 (ainsi qu'au paragraphe 7) de l'acte d'accusation, il est allégué que les viols étaient la conséquence naturelle et prévisible de l'objet de l'entreprise criminelle commune visant à détruire les Tutsis en tant que groupe, et que les accusés savaient que le viol était la conséquence naturelle et prévisible de l'exécution de l'entreprise criminelle commune à laquelle ils avaient sciemment et délibérément participé. Voir également les paragraphes 4, 5, 6, 7, 8, 14, 15 et 16 de l'acte d'accusation qui décrivent les grands traits des allégations relatives à l'entreprise criminelle commune et se rapportent au cinquième chef d'accusation.

2. Le 4 juillet 2005, le Procureur a communiqué les déclarations de 143 témoins et informé la Chambre que leurs dépositions porteraient sur le viol et les violences sexuelles alléguées au chef n°5 de l'acte d'accusation. Le 13 décembre 2005, la Chambre de première instance a autorisé le Procureur à retirer 50 témoins de sa liste et lui a donné jusqu'au 10 janvier 2006[4] pour déposer une requête fondée sur l'article 92 *bis* du Règlement aux fins d'admission en preuve de déclarations de témoin écrites, en lieu et place de témoignages oraux. Ce délai a été par la suite prorogé jusqu'au 20 février 2006[5].

3. À cette date, le Procureur a déposé une requête[6] pour solliciter :

- L'admission des déclarations écrites de 63 témoins de viol, en lieu et place de leurs témoignages oraux, en vertu de l'article 92 *bis* (A) du Règlement.
- L'admission des comptes rendus des dépositions de huit témoins de viol[7] entendues dans le cadre d'autres procédures devant le Tribunal, en lieu et place de leurs témoignages oraux, en vertu de l'article 92 *bis* (A) du Règlement.

4. Le Procureur signale qu'au cas où la Chambre exigerait la comparution pour contre-interrogatoire des témoins dont l'admission des déclarations est demandée, il préférerait que chacun d'eux dépose directement au prétoire. En plus des déclarations écrites susvisées qu'il demande à faire verser au dossier, le Procureur compte appeler 21 témoins qui déposeront devant la Chambre au sujet du chef n°5 de l'acte d'accusation.

5. La Défense de Joseph Nzirorera s'oppose à la requête du Procureur[8], tout comme la Défense de Mathieu Ngirumpatse qui fait siens les arguments de Nzirorera[9]. En plus de s'opposer à la requête du Procureur quant au fond, celle-ci demande à la Chambre : premièrement, de proroger le délai imparti à la Défense pour répondre aux arguments du Procureur, afin de lui permettre de mener des enquêtes sur les pièces dont le versement au dossier est demandé en vue de démontrer qu'elles ne sont pas fiables, et deuxièmement, d'exclure les dépositions des 72 témoins et d'ordonner en conséquence que le Procureur raccourcisse la liste des témoins à charge, le nombre de témoins qu'il entend appeler pour étayer le chef n°5 étant excessif.

Délibération

Droit applicable

Dispositions générales

6. L'article 92 *bis* du Règlement (Faits prouvés autrement que par l'audition d'un témoin) donne à la Chambre de première instance le pouvoir d'admettre, en tout ou en partie, les éléments de preuve

[4] Le Procureur c. Karemera et consorts, affaire n°ICTR-98-44-T, Decision on Variance of the Prosecution Witness List, 13 décembre 2005.
[5] Le Procureur c. Karemera et consorts, affaire n°ICTR-98-44-T, Decision on Prosecution Motion Seeking Extension of Time to File Applications Under Rule 92 bis, 10 février 2006.
[6] Voir la requête du Procureur intitulée « Prosecution Motion for Proof of Facts Other Than by Oral Evidence Pursuant to Rule 92bis – Admission of 63 witness statements and 9 previous trial testimonies concerning rape and sexual assaults », datée du 20 février 2006. Voir aussi la réplique du Procureur intitulée « Prosecutor's Reply: Motion for Proof of Facts Other than by Oral Evidence Pursuant to Rule 92bis and Prosecutor's Response to Motion for Extension of Time » datée du 2 mars 2006.
[7] Il convient de noter qu'à l'origine le Procureur avait sollicité l'admission en preuve des dépositions antérieures de neuf témoins, en vertu de l'article 92 *bis* du Règlement. Toutefois, dans un rectificatif daté du 3 octobre 2006, il a retiré sa demande concernant l'un des neufs témoins – à savoir le témoin FAF (alias « TM » et « RJ ») – sa demande ne concerne donc plus que huit témoins.
[8] Requête intitulée « Response to Prosecution Motion for Proof of Facts Other than by Oral Evidence Pursuant to Rule 92bis and Motion for Extension of Time », déposée par la Défense de Joseph Nzirorera, le 27 février 2006.
[9] « Mémoire (confidentiel) de M. Ngirumpatse sur la "*Prosecution Motion for Proof of Facts Other Than By Oral Evidence Pursuant to Rule 92 bis"* et requête aux fins d'extension de délai de réponse », déposé le 28 février 2006.

présentés par un témoin sous la forme d'une déclaration écrite (paragraphe (A)) ou, lorsque le témoin a déjà déposé dans le cadre de procédures menées devant le Tribunal, sous forme de compte rendu du témoignage entendu (paragraphe (D)), en lieu et place d'un témoignage oral, à condition que cela permette de démontrer un point autre que les actes et le comportement de l'accusé tels qu'allégués dans l'acte d'accusation.

7. Le paragraphe (B) du même article, qui énonce les critères formels d'admission des déclarations écrites, ajoute une condition supplémentaire. Par ailleurs, et toujours dans le cadre des déclarations écrites, la Chambre est guidée dans l'exercice de son pouvoir d'appréciation par les critères justifiant l'admission ou s'y opposant prévus respectivement par les alinéas *(A) (i)* et *(A) (ii)* de l'article 92 *bis* du Règlement et dont la liste n'est pas exhaustive. Parmi les facteurs cités figure « tout autre facteur qui justifie la comparution du témoin pour contre-interrogatoire », qui est un élément s'opposant à l'admission en preuve de déclarations écrites[10].

8. Les déclarations écrites ou les comptes rendus de témoignages antérieurs dont l'admission est sollicitée en vertu de l'article 92 *bis* du Règlement doivent aussi satisfaire aux conditions générales de pertinence et de valeur probante applicables à tous les types de preuve qui sont prescrites par l'article 89 (C) du Règlement[11]. De plus, l'article 92 *bis* (E) du Règlement habilite la Chambre de première instance, une fois qu'elle s'est prononcée en faveur de l'admission de la déclaration écrite ou du compte rendu d'une déposition antérieure d'un témoin, à verser cette pièce au dossier, en tout ou en partie, et/ou à ordonner la comparution du témoin aux fins de contre-interrogatoire. Dans l'exercice du pouvoir d'appréciation que lui confère l'article 92 *bis* du Règlement, la Chambre de première instance doit veiller au respect du droit des accusés à un procès équitable consacré par les articles 19 et 20 du Statut.

Le sens de l'expression « actes et comportement des accusés »

9. L'expression « actes et comportement des accusés figurant dans l'acte d'accusation » a été définie par la Chambre d'appel du Tribunal pénal international pour l'ex-Yougoslavie (TPIY), notamment pour les cas où, comme en l'espèce, la responsabilité pénale des accusés est engagée à raison d'actes perpétrés par des subordonnés ou des coauteurs.

10. Selon la jurisprudence, c'est une expression claire qu'il faut comprendre dans son sens ordinaire, à savoir, qu'il s'agit des actes et du comportement de l'accusé lui-même et non des actes et du comportement de coauteurs et/ou de subordonnés[12]. La décision rendue par la Chambre d'appel dans l'affaire *Galić* fait autorité en matière d'interprétation de l'article 92 *bis* du Règlement[13]. Selon cette décision, l'article 92 *bis* du Règlement exclut les actes et le comportement de l'accusé figurant dans l'acte d'accusation *qui établissent sa responsabilité* pour les actes et le comportement d'autres

[10] Alinéa *(A) (ii) (c)* de l'article 92 *bis* du Règlement de procédure et de preuve.
[11] Le Procureur c. Bagosora et consorts, affaire nºICTR-98-41-T, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 bis (Chambre de première instance), 9 mars 2004, par. 12.
[12] *Le Procureur c. Milošević,* affaire nºIT-02-54-T, Décision relative à la requête de l'Accusation aux fins d'admettre des déclarations écrites en vertu de l'article 92 *bis* du Règlement (Chambre de première instance), 21 mars 2002, par. 22, repris dans *Le Procureur c. Galić,* affaire nºIT-98-29-AR73.2, Décision relative à l'appel interlocutoire interjeté en vertu de l'article 92 *bis* (C) du Règlement (Chambre d'appel), 7 juin 2002, note en bas de page 28, pour étayer le principe énoncé par la Chambre d'appel au paragraphe 10 de sa décision, selon lequel l'expression « les actes et le comportement de l'accusé tels qu'allégués dans l'acte d'accusation » ne parle pas des actes et du comportement d'autres personnes qui engagent la responsabilité pénale de l'accusé selon l'acte d'accusation.
[13] *Le Procureur c. Galić,* affaire nºIT-98-29-AR73.2, Décision relative à l'appel interlocutoire interjeté en vertu de l'article 92 *bis* (C) du Règlement (Chambre d'appel), 7 juin 2002. En fait, la Chambre d'appel a rappelé récemment dans la décision relative au constat judiciaire rendue en l'espèce, le fait que la Décision *Galić* est la référence en matière d'interprétation de l'expression « actes et comportement de l'accusé ». Voir *Le Procureur c. Karemera et consorts,* affaire nºICTR-98-44-AR73C), Décision faisant suite à l'appel interlocutoire interjeté par le Procureur de la décision relative au constat judiciaire, 16 juin 2006, par. 52.

personnes, mais n'exclut pas les actes et le comportement d'*autres personnes* pour lesquels l'accusé est présumé responsable, à savoir les actes et le comportement de coauteurs ou de subordonnés[14].

11. Selon la jurisprudence, l'article 92 *bis* (A) du Règlement (et, par analogie, l'article 92 *bis* (D)) exclut toute déclaration écrite (ou tout compte rendu de témoignage) tendant à prouver les actes ou le comportement de l'accusé sur lesquels le Procureur se fonde pour établir : (1) que l'accusé a matériellement perpétré l'un quelconque des crimes qui lui sont reprochés ; ou (2) qu'il a planifié, incité à commettre ou ordonné lesdits crimes ; ou (3) qu'il a de toute autre manière aidé et encouragé leurs auteurs effectifs à les planifier, à les préparer ou à les exécuter ; ou (4) qu'il était le supérieur hiérarchique des auteurs effectifs de ces crimes ; ou (5) qu'il savait ou avait des raisons de savoir que ses subordonnés s'apprêtaient à les commettre ou l'avaient fait ; ou (6) qu'il n'a pas pris les mesures raisonnables pour empêcher que lesdits actes ne soient commis ou en punir les auteurs[15].

12. Pour se prononcer sur l'admission d'éléments de preuve sous forme écrite en usant de son pouvoir discrétionnaire, la Chambre doit tenir compte de la proximité entre l'accusé et l'auteur des actes et du comportement décrits dans la déclaration écrite ou le compte rendu de témoignage[16]. Dans les cas où c'est la responsabilité de supérieur hiérarchique de l'accusé qui est engagée, et où les crimes reprochés impliquent un comportement criminel généralisé de la part de ses subordonnés (ou de personnes présumées telles), il n'y a souvent qu'un pas entre le fait de conclure que les actes constitutifs de ces crimes ont été commis par ces subordonnés et celui de dire que l'accusé savait ou avait des raisons de savoir que lesdits subordonnés s'apprêtaient à commettre ces crimes ou les avaient commis[17]. Il est alors possible que les subordonnés de 1'accusé (ou les personnes présumées telles) soient si proches de lui que

> « la preuve de leurs actes et de leur comportement à l'aide d'une déclaration relevant de l'article 92 *bis* devient [si] cruciale pour la cause de l'Accusation qu'il ne serait pas équitable envers 1'accusé de permettre que ces éléments de preuve soient produits par écrit[18] ».

13. Dans la mesure où 1e Procureur affirme que l'accusé a participé à une entreprise criminelle commune et qu'il est donc responsable des actes commis par d'autres dans le cadre de celle-ci, l'article 92 *bis* (A) exclut également les déclarations écrites tendant à prouver tout acte ou comportement de l'accusé sur lequel 1e Procureur se fonde pour établir que 1'accusé a participé à l'entreprise criminelle commune, ou qu'il a partagé avec l'auteur effectif des crimes reprochés l'intention requise pour ces actes[19]. Là encore, pour se prononcer sur l'admission d'éléments de preuve sous forme écrite en usant de son pouvoir discrétionnaire, la Chambre doit tenir compte de la proximité entre l'accusé et l'auteur des actes et du comportement décrits dans la déclaration écrite. Lorsque la personne dont les actes et le comportement sont décrits dans la déclaration écrite ou le compte rendu est très proche de l'accusé et lorsque les éléments de preuve sont d'une importance

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[14] Voir *Le Procureur c. Galić,* affaire n° IT-98-29-AR73.2, Décision relative à l'appel interlocutoire interjeté en vertu de l'article 92 *bis* C) du Règlement (Chambre d'appel), 7 juin 2002, par. 9 à 14.

[15] *Ibid*., par. 10.

[16] *Le Procureur c. Brđanin et Talić*, affaire n°IT-99-36-T, Décision confidentielle relative à l'admission de déclarations recueillies en application de l'article 92 *bis* du Règlement, 1er mai 2002, par. 14 [La version publique de cette décision a été déposée le 23 mai 2002.]

[17] *Le Procureur c. Galić,* affaire n°IT-98-29-AR73.2, Décision relative à l'appel interlocutoire interjeté en vertu de l'article 92 *bis* (C) du Règlement (Chambre d'appel), 7 juin 2002, par. 14.

[18] *Ibid*., par. 15 ; *Le Procureur c. Blagojević et consorts,* affaire n°IT-02-60-T, Première décision relative à la requête de l'Accusation aux fins d'admission de déclarations de témoins et de témoignages antérieurs présentés en application de l'article 92 *bis* du Règlement (Chambre de première instance), 12 juin 2003, par. 12.

[19] *Le Procureur c. Galić,* affaire n°IT-98-29-AR73.2, Décision relative à l'appel interlocutoire interjeté en vertu de l'article 92 *bis* (C) du Règlement (Chambre d'appel), 7 juin 2002, par. 10 ; *Le Procureur c. Milošević,* affaire n°IT-02-54-T, *Decision on Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to 92 bis (D) – Foča Transcripts* (Chambre de première instance), 30 juin 2003, par. 12 ; *Le Procureur c. Blagojević et consorts,* affaire n°IT-02-60-T, Première décision relative à la requête de l'Accusation aux fins d'admission de déclarations de témoins et de témoignages antérieurs présentés en application de l'article 92 *bis* du Règlement (Chambre de première instance), 12 juin 2003, par. 11 ; *Le Procureur c. Tadić,* affaire n°IT-94-1-A, Arrêt, 15 juillet 1999, par. 220.

cruciale pour la cause [du Procureur], la Chambre de première instance peut décider de ne pas admettre du tout la déclaration ou le compte rendu[20].

Contre-interrogatoire du témoin

14. Selon l'article 92 *bis* (A) (ii) (c) du Règlement, l'existence de tout autre facteur qui justifie la comparution du témoin pour contre-interrogatoire est un élément défavorable à l'admission d'éléments de preuve sous forme écrite. Dans l'affaire *Galić*, la Chambre d'appel a conclu que, dans certains cas,

> « vu l'impossibilité de contre-interroger l'auteur de la déclaration, il serait de toute façon contraire à l'équité d'[utiliser celle-ci][21] ».

15. Outre le fait qu'il lui appartient, lorsqu'elle se prononce sur l'admission d'une déclaration écrite en vertu de l'article 92 *bis* (A) du Règlement, de déterminer l'opportunité d'un contre-interrogatoire, c'est la Chambre de première instance qui apprécie s'il convient d'ordonner au témoin de comparaître aux fins de contre-interrogatoire, en vertu de l'article 92 *bis* (E) du Règlement. Comme l'a déclaré la Chambre d'appel en l'affaire *Galić* :

> … Quoiqu'il en soit, c'est à la Chambre de première instance qu'il revient de décider, dans le cadre de l'article 92 *bis*, si une déclaration écrite permet de démontrer les actes et le comportement d'un subordonné de 1'accusé ou de toute autre personne dont les actes et le comportement sont mis à la charge de 1'accusé. Elle devra en effet déterminer si l'auteur de la déclaration doit être contre-interrogé [en vertu de l'article 92 *bis* (E)].

Dans l'exercice de son pouvoir discrétionnaire, la Chambre doit décider s'il convient d'ordonner que le témoin comparaisse pour être contre-interrogé, en tenant compte de la proximité entre l'accusé et l'auteur des actes et du comportement décrits dans la déclaration écrite.

16. Le critère essentiel à appliquer pour déterminer s'il convient de faire comparaître un témoin pour le contre-interroger en vertu de l'article 92 *bis* du Règlement est de garantir à l'accusé un procès équitable conformément aux articles 20 et 21 du Statut. Pour cela, il faut rechercher, entre autres, si la déclaration écrite ou le compte rendu tend à prouver un élément crucial à charge[22]. Le droit de procéder au contre-interrogatoire des témoins sera accordé, si la déclaration porte sur un élément clé de la cause du Procureur ou sur une question controversée et primordiale entre les parties, et non sur une question secondaire ou peu pertinente[23].

Application de l'article 92 *bis* du Règlement aux éléments de preuve présentés à la Chambre de première instance

17. La Chambre examine la teneur des pièces dont l'admission est demandée à la lumière de l'article 92 *bis* du Règlement, des principes de droit applicables et des arguments des parties.

18. À titre préliminaire, elle conclut que les 63 déclarations dont l'admission est demandée en vertu de l'article 92 *bis* (A) du Règlement sont conformes aux normes formelles prescrites par l'article 92 *bis* (B) du Règlement. Cette conclusion est étayée par les arguments des deux parties.

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[20] *Le Procureur c. Galić,* affaire n° IT-98-29-AR73.2, Décision relative à l'appel interlocutoire interjeté en vertu de l'article 92 *bis* (C) du Règlement (Chambre d'appel), 7 juin 2002, par. 13 à 15 ; *Le Procureur c. Blagojević et consorts,* affaire n°IT-02-60-T, Première décision relative à la requête de l'Accusation aux fins d'admission de déclarations de témoins et de témoignages antérieurs présentés en application de l'article 92 *bis* du Règlement (Chambre de première instance), 12 juin 2003, par. 12.

[21] *Le Procureur c. Galić,* affaire n°IT-98-29-AR73.2, Décision relative à l'appel interlocutoire interjeté en vertu de l'article 92 *bis* (C) du Règlement (Chambre d'appel), 7 juin 2002, par. 15.

[22] *Le Procureur c. Milošević,* affaire n°IT-02-54-T, Décision relative à la requête de l'Accusation aux fins d'admettre des déclarations écrites en vertu de l'article 92 *bis* du Règlement (Chambre de première instance), 21 mars 2002, par. 7.

[23] *Ibid*., par. 24.

19. Après examen de toutes les pièces dont l'admission est demandée, la Chambre relève qu'aucun des viols ni aucune des violences sexuelles reprochés aux accusés en l'espèce ne sont présumés avoir été commis personnellement par ceux-ci, mais matériellement perpétrés par des *Interahamwe* et des miliciens.

20. Toutefois, selon les formes de responsabilité figurant dans l'acte d'accusation, (comme on l'a exposé au premier paragraphe de la présente décision et dans les notes en bas de page y afférentes), le Procureur s'appuiera sur ces pièces pour établir que les viols ont été commis de façon généralisée et systématique par les subordonnés des accusés et/ou les coauteurs. Ces allégations sont si cruciales pour la cause du Procureur qu'il ne serait pas équitable envers les accusés de permettre que ces éléments de preuve soient produits par écrit sans qu'ils aient la possibilité de contre-interroger les témoins.

21. La requête du Procureur doit être rejetée. Il est donc inutile que la Chambre statue sur la requête de la Défense tendant à faire proroger le délai de réponse qui lui est imparti pour répondre au Procureur en vue de prouver que les pièces dont l'admission est demandée ne sont pas fiables.

Requête de la Défense tendant à ordonner au Procureur de réduire le nombre de témoins à charge en vertu de l'article 73 *bis* (D)

22. La Défense affirme que la Chambre de première instance devrait exclure tous les éléments de preuve dont l'admission est demandée en vertu de l'article 92 *bis* du Règlement, en rendant une décision en vertu de l'article 73 *bis* (D) du Règlement[24]. Le Procureur s'oppose à cette requête. Il estime qu'on ne saurait qualifier d'excessif le nombre de témoins proposé, à savoir 93, les viols allégués dans l'acte d'accusation ayant été commis sur une grande échelle. Les viols de filles et de femmes tutsies imputés aux *Interahamwe* ont été commis sur une période de trois mois dans cinq préfectures différentes. On obtient donc une moyenne de six témoins par préfecture[25] et par mois, ce qui n'a rien d'excessif.

23. Selon l'article 73 *bis* (D) du Règlement, la Chambre de première instance, ou le juge désigné, peut inviter le Procureur à réduire le nombre de témoins appelés à la barre pour établir les mêmes faits[26], si ce nombre est tenu pour excessif.

24. En l'espèce, la Chambre de première instance a rejeté jusqu'à présent la requête de la Défense aux fins d'une ordonnance enjoignant au Procureur de réduire sa liste de témoins[27]. Dans sa décision du 13 décembre 2005, relevant l'intention du Procureur de déposer une demande en admission des déclarations écrites de 86 témoins en lieu et place de leurs dépositions, la Chambre a estimé qu'il était « prématuré de demander au Procureur de réduire le nombre de témoins qu'il entendait appeler à la barre[28] ».

25. La Chambre ayant jugé dans la présente décision qu'il y avait lieu de rejeter la requête du Procureur tendant à faire admettre les déclarations écrites, la liste des témoins à charge comprendrait

[24] L'article 73 *bis* (D) du Règlement est ainsi libellé : « 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 ».
[25] Ainsi, si on multiplie le nombre de témoins (6) par le nombre de préfectures (5) et par le nombre de mois (3) – (6 x 5 x 3), on obtient un total de 90 témoins. La liste des témoins à charge comporte actuellement 93 noms pour le chef de viol constitutif de crime contre l'humanité, dont 21 appelés à déposer à la barre et 72 qui font l'objet de la présente décision.
[26] Voir *Le Procureur c. Bagosora et consorts*, affaire nºICTR-98-41-T, *Order for Reduction of Prosecutor's Witness List*, 8 avril 2003 : la Chambre de première instance I a ordonné, de sa propre initiative, au Procureur de réduire sa liste de témoins, en en faisant passer le nombre de 235 à 100.
[27] Le Procureur c. Karemera et consorts, affaire nºICTR-98-44-T, Decision on Variance of the Prosecution Witness List, 13 décembre 2005, par. 20.
[28] *Id*.

93 personnes appelées à déposer au sujet des allégations de viol. Vu les circonstances de l'espèce, elle considère que ce nombre doit être considérablement réduit.

26. Pour justifier le nombre de témoins appelés pour établir le chef cinq, le Procureur propose une méthode de calcul basée sur une moyenne de six témoins de viols, par préfecture et par mois[29]. En appliquant strictement cette méthode aux allégations figurant dans l'acte d'accusation, la Chambre constate que, contrairement aux affirmations du Procureur, il ne faudrait appeler à la barre que quelque 36 témoins. L'acte d'accusation allègue la commission de viols dans chaque préfecture pendant des périodes substantiellement plus courtes que celles qu'indique le Procureur : des viols auraient été commis dans les préfectures de Ruhengeri et de Butare pendant deux semaines (respectivement, du début d'avril à la mi-avril et de la mi-avril à la fin d'avril) ; dans celle de Kigali-ville pendant un mois (avril); dans celle de Kibuye, pendant deux mois (mai et juin) et dans celle de Gitarama, pendant deux mois (avril et mai), et non pendant trois mois dans chaque préfecture comme le prétend le Procureur pour justifier le nombre de 93 témoins.

27. La Chambre rappelle que, dans sa décision du 13 décembre 2005, elle avait rejeté la requête de la Défense aux fins de réduction de la liste des témoins à charge car le Procureur l'avait alors informée de son intention de n'appeler que sept témoins à la barre pour déposer au sujet du chef n° 5 de l'acte d'accusation relatif aux allégations de viol[30]. Ensuite, le Procureur a dit qu'il entendait appeler 21 témoins à la barre pour déposer sur ce chef et a sollicité l'admission des déclarations écrites de 72 témoins, partant du principe que leurs témoignages seraient cumulatifs. La Chambre rappelle également que le Procureur a reconnu par le passé que sa liste de témoins était trop longue et qu'il a exprimé son intention d'en réduire le nombre au cours du procès. La requête aux fins de constat judiciaire du Procureur visait d'ailleurs à réduire le nombre de témoins appelés à déposer au procès et, dans la décision rendue à ce sujet, la Chambre a dressé le constat judiciaire de faits non contestés relatifs aux viols commis dans les préfectures de Gitarama, de Kibuye, de Kigali-rural, de Ruhengeri et de Kigali-ville.

28. Vu les circonstances de l'espèce, la Chambre conclut que la liste des témoins à charge est trop longue et devrait être considérablement réduite en ce qui concerne les témoins appelés à déposer au sujet du chef n°5 de l'acte d'accusation. Pour arriver à cette conclusion, elle a tenu compte : (i) du nombre de témoins que le Procureur se propose d'appeler à la barre relativement au chef n°5, (ii) des éléments factuels que le Procureur compte établir, (iii) de la formule que le Procureur lui-même a retenue pour démontrer à la Chambre que le nombre actuel de témoins n'était pas trop élevé ; (iv) du fait que le recours à un nombre excessif de témoins gaspille le temps et les ressources judiciaires, compromet la bonne administration de la justice et viole les droits de l'accusé et (v) du fait qu'elle a décidé de dresser le constat judiciaire d'un certain nombre de faits relatifs au viol et aux violences sexuelles.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête du Procureur dans son intégralité,

ORDONNE au Procureur, en vertu de l'article 73 *bis* (D) du Règlement, de réduire considérablement le nombre de témoins à charge appelés à témoigner à la barre sur le viol et les violences sexuelles au titre du chef n°5 de l'acte d'accusation et de déposer, dans les plus brefs délais, une liste révisée des témoins à charge qu'il communiquera aux conseils des accusés.

Fait à Arusha, le 11 décembre 2006.

[29] Ainsi, si on multiplie le nombre de témoins (6) par le nombre de préfectures (5) et par le nombre de mois (3) – (6 x 5 x 3), on obtient un total de 90 témoins. La liste des témoins à charge comporte actuellement 93 témoins pour le chef de viol constitutif de crime contre l'humanité.

[30] Le Procureur c. Karemera et consorts, affaire nºICTR-98-44-T, Decision on Variance of the Prosecution Witness List, 13 décembre 2005, par. 20.

[Signé]: Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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Décision relative à la requête de la défense intitulée Defence Motion for Request for Cooperation to Government of Rwanda : MRND Videotape
Article 28 du Statut du Tribunal
14 décembre 2006 (ICTR-98-44-PT)

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Coopération du Gouvernement rwandais, Pertinence des pièces requises, Efforts de la défense et du Procureur – Coopération du Rwanda requise

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 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. 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) ; 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. Casimir Bizimungu et consorts, Decision on Casimir Bizimungu's Requests for Disclosure of the Bruguière Report and the Cooperation of France, 25 September 2006 (ICTR-99-50)

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)

Introduction

1. La Défense de Joseph Nzirorera prie la Chambre de solliciter la coopération du Gouvernement rwandais, en vertu de l'article 28 du Statut du Tribunal, en vue d'obtenir une « copie d'une

vidéocassette des réunions du MRND à Gisenyi dont il a été fait état au procès de Wellars Banzi, président du MRND à Gisenyi … »[1] [traduction].

Discussion

2. Aux termes de l'article 28 (1) du Statut,

> « [l]es États collaborent avec le Tribunal … à la recherche et au jugement des personnes accusées d'avoir commis des violations graves du droit international humanitaire ».

Conformément à l'article 28 (2),

> « [l]es États 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, […] la réunion des témoignages et la production des preuves[2] […] ».

3. Selon la jurisprudence du Tribunal de céans, la partie qui demande à une Chambre de délivrer une ordonnance pour obtenir la coopération d'un État en vertu de l'article 28 du Statut doit remplir les conditions suivantes : (i) définir avec précision les pièces demandées ; (ii) indiquer la pertinence desdites pièces par rapport à l'espèce ; (iii) établir que les efforts déployés pour obtenir celles-ci ont été infructueux[3].

4. La Chambre estime que la Défense de Nzirorera a dûment précisé la nature de la pièce visée. Par ailleurs, il ressort des écritures que les parties et les autorités rwandaises connaissent la pièce recherchée et que celle-ci existe ou a existé.

5. La Chambre est également convaincue que la pièce demandée est pertinente par rapport à l'espèce. Il est fait état, au paragraphe 25 (2) de l'acte d'accusation, du meeting organisé par le MRND au stade Umuganda en octobre 1993, et ce meeting a été au centre de deux dépositions à charge[4]. La Chambre relève que le témoin à charge XBM s'est référé à la vidéocassette en question dans sa déposition devant la présente Chambre[5] et a reconnu l'avoir vue. La Chambre conclut donc que tout enregistrement de ce qui s'est réellement passé durant ce meeting est pertinent par rapport à l'espèce.

6. Enfin, la Chambre est convaincue que le Procureur et la Défense ont déployé des efforts pour obtenir cette vidéocassette par d'autres moyens, mais sans résultat à ce jour[6]. La Chambre fait observer

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[1] Le Procureur c. Karemera et consorts, affaire n°ICTR-98-44-T, Joseph Nzirorera's Motion for Request for Cooperation to Government of Rwanda: MRND Videotape, 20 novembre 2006, par. 1. La Défense ajoute qu'« [il est fait état de cette vidéocassette dans le jugement rendu le 21 février 2001 en l'affaire Banzi Wellars (RP221/R/2000) » [traduction].

[2] Statut, article 28 (2) (b).

[3] Le Procureur c. Casimir Bizimungu et consorts, affaire n°ICTR-99-50-T, Decision on Casimir Bizimungu's Requests for Disclosure of the Bruguière Report and the Cooperation of France, 25 septembre 2006, par. 27 et note de bas de page 16 ; Le Procureur c. Bagosora et consorts, affaire n°ICTR-98-41-T, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, Chambre de première instance, 10 mars 2004, par. 4 ; voir aussi Le Procureur c. Bagosora, affaire n°ICTR-98-41-T, 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 ; Le Procureur c. Blaskić affaire n°IT-95-14, 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 ; Le Procureur c. Augustin Bizimungu 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, 13 février 2006, par. 6 ; Décision relative à 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, 13 février 2006, par. 6 ; 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, par. 6.

[4] Témoins à charge XBM et HH.

[5] Compte rendu de l'audience du 4 juillet 2006, p. 11.

[6] En ce qui concerne les efforts déployés par la Défense, la Chambre prend acte de la correspondance suivante échangée entre Nzirorera et les autorités rwandaises et annexée à la requête de la Défense tendant à obtenir une copie de la vidéocassette : (1) Lettre datée du 10 août 2006 adressée par M[e] Peter Robinson au Procureur général de la République rwandaise, Martin Ngoga ; (2) Courriel daté du 7 novembre 2006 adressé par M[e] Peter Robinson à l'adjoint de M. Ngoga. Elle note également que M[e] Robinson affirme avoir rencontré le Procureur général de la République rwandaise, Martin Ngoga, à Kigali le 11

que les premiers efforts déployés pour obtenir cette pièce remontent à mai 2006, mais qu'à ce jour, celle-ci n'a pas été obtenue.

7. La Chambre estime que la Défense a rempli toutes les conditions requises pour solliciter la coopération du Gouvernement rwandais en application de l'article 28 du Statut, et qu'il est dans l'intérêt de la justice de faire une telle demande. Enfin, le Procureur ayant fait valoir que des efforts avaient été déployés de bonne foi tant par le Bureau du Procureur que par les autorités rwandaises pour obtenir la vidéocassette visée mais qu'ils étaient demeurés vains, sans que les autorités rwandaises aient fait preuve de réticence ou refusé de coopérer, la Chambre relève qu'une demande officielle de la Chambre sollicitant la coopération du Gouvernement rwandais à l'effet d'obtenir une copie de ladite vidéocassette n'implique pas que celui-ci ait fait montre de mauvaise foi. La Chambre considère simplement qu'une telle demande officielle pourrait accélérer le cours des choses.

PAR CES MOTIFS, LA CHAMBRE

ACCUEILLE la Requête de la Défense ;

PRIE le Gouvernement rwandais, en application de l'article 28 du Statut du Tribunal, de déposer dans les meilleurs délais auprès du Greffe, pour communication à la Défense, une copie de la vidéocassette des meetings organisés par le MRND à Gisenyi, vidéocassette dont il aurait été fait état au procès du Président du MRND, Wellars Banyi, à Gisenyi (le jugement de cette affaire portant le n°RP221/R/2000 aurait été prononcé le 21 février 2001). Au cas où les autorités rwandaises ne seraient pas en mesure de donner suite à la demande de la Chambre, elles sont priées d'en informer le Greffe de manière circonstanciée d'ici au 31 janvier 2007 ;

CHARGE le Greffe de transmettre la présente demande de coopération aux autorités compétentes du Gouvernement rwandais ;

INVITE le Greffier à communiquer à toutes les parties à l'instance et à déposer auprès de la Chambre une copie de la vidéocassette aussitôt qu'elle aura été reçue.

Fait à Arusha, le 14 décembre 2006.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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octobre 2006 et lui avoir à nouveau demandé une copie de la vidéocassette en question, à quoi il lui avait été répondu qu'elle lui serait remise une semaine plus tard. Mais lorsqu'il était passé pour la prendre, on lui avait dit qu'elle n'était pas prête.
En ce qui concerne les efforts déployés par le Procureur, la Chambre accepte les arguments du Procureur. Selon celui-ci, une première demande en vue d'obtenir la vidéocassette susvisée avait été déposée le 31 mai 2006, une autre le 14 juin 2006 ; les enquêteurs du Procureur à Kigali avaient rapporté qu'ils avaient rencontré M. Emmanuel Rukangira en personne au Bureau du Procureur de Kigali et que celui-ci s'était engagé à mettre la vidéocassette à leur disposition dès qu'elle aurait été trouvée ; la même demande avait été faite directement au Procureur général de la République, Martin Ngoga, lequel avait confirmé que ladite vidéocassette avait été adressée au Parquet général de Kigali et qu'il s'employait à la retrouver ; le Procureur avait depuis lors envoyé des rappels aux autorités rwandaises, dont certains étaient annexés à la réponse du Procureur (courriel daté du 24 novembre 2006). Dans le courriel qu'il a envoyé au Procureur le 24 novembre, un certain Mohammed Ayat écrit ce qui suit : « Il semblerait que la vidéocassette se trouve au cabinet de M. Emmanuel Rukangira (Emmanuel Rukangira est Procureur à compétence nationale). Malheureusement, M. Rukangira est actuellement en mission à l'étranger. Selon le Procureur général de la République adjoint, les autorités rwandaises acceptent de continuer à chercher la pièce requise pour la remettre à la Défense, au cas où elles la trouveraient » [traduction].

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Décision relative aux requêtes de la défense tendant à faire interdire de préparer les témoins à la déposition
Article 73 du Règlement de procédure et de preuve
15 décembre 2006 (ICTR-98-44-T)

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Pratique de la CPI en matière de préparation des témoins, Analyse d'une decision de la CPI, Définition de la préparation des témoins comme une familiarisation du témoin avec les usages de la Cour, Analyse des pratiques nationales en matière de préparation des témoins, Conclusions de la CPI non applicable à la jurisprudence des tribunaux ad hoc – Pratique des tribunaux ad hoc en matière de préparation des témoins, Pratique des entretiens avec les témoins avant leurs dépositions autorisée, Utilité de la pratique de familiarisation du témoin, Pratique du Procureur de communiquer à la Défense le résumé de la déposition que le témoin ferait ou ses « déclarations de confirmation » avant sa comparution, Existence de règles déontologiques claires s'imposant aux substituts du Procureur lors des interrogatoires, Distinction de la pratique de préparation du témoin de celle de consistant pour les parties à entraîner les témoins, leur faire répéter ce qu'ils auront à dire à la barre ou à les suborner avant leur déposition, Avantages pour le bon fonctionnement de l'administration judiciaire – Requête rejetée

Instrument international cité :

Règlement de Procédure et de preuve, art. 67 (D) et 73 ; Statut de la CPI, art. 21

Jurisprudence internationale citée :

C.P.I. : Chambre préliminaire, Le Procureur c. Thomas Lubanga Dyilo, Décision relative à la préparation des témoins avant qu'ils ne déposent devant la Cour (witness familiarisation and proofing), 8 novembre 2006 (ICC-01/04-01/06)

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. Thénoneste Bagosora et consorts, Decision on Admissibility of Evidence of Witness DP, 18 novembre 2003 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Aloys Simba, Décision de la Chambre de première instance relative à des points se rapportant au dossier judiciaire du témoin KDD, 1er novembre 2004 (ICTR-2001-76) ; Chambre de première instance, Le Procureur c. André Rwamakuba, Décision sur la requête de la Défense relative aux résumés des dépositions de témoin attendues, 14 juillet 2005 (ICTR-98-44C) ; 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)

T.P.I.Y. : Chambre de première instance, Le Procureur c. Mile Mrkšić, Décision relative à l'appel interlocutoire de la Défense concernant la communication avec des témoins potentiels de la partie adverse, 30 juillet 2003 (IT-95-13/1) ; Chambre de première instance, Le Procureur c. Vidoje Blagojević et Dragan Jokić, affaire n°IT-02-60-T, Décision relative à la requête non contestée de l'Accusation aux fins d'un report de deux jours du témoignage de Nomir Nikolić, 16 septembre 2003 (IT-02-60) ; 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. Fatmir Limaj et consorts, Décision relative à la requête de la Défense concernant le « récolement » des témoins par

l'Accusation, 10 décembre 2004 (IT-03-66) ; Chambre d'appel, Le Procureur c. Dario Kordić et Mario Čerkez, Arrêt, 17 décembre 2004 (IT-95-14/2) ; Chambre de première instance, Le Procureur c. Momčilo Krajišnik, Order for Transfer of Detained Witness Pursuant to Rule 90 bis, 13 mars 2006 (IT-00-39) ; Chambre de première instance, Le Procureur c. Milan Milutinoviæ et consorts, Decision on Ojdanic Motion to Prohibit Witness Proofing, 12 décembre 2006 (IT-05-87)

Introduction

1. Dans la présente affaire, le procès a commencé le 19 septembre 2005. Au cours de la quatrième session de la présentation des moyens à charge, la Défense de Nzirorera a demandé à la Chambre d'interdire, avec effet immédiat, que le Procureur procède à la préparation de ses témoins avant qu'ils ne déposent[1]. Elle a invoqué à l'appui de sa requête une décision rendue par la Chambre préliminaire I de la Cour pénale internationale (la « CPI ») dans l'affaire *Dyilo* et a invité la Chambre à appliquer les mêmes règles que celles qui sont en vigueur à la CPI[2]. La Défense de Ngirumpatse s'associe à cette requête tandis que le Procureur s'y oppose[3].

Délibération

2. Pour statuer sur les requêtes de la Défense, la Chambre commencera par analyser la décision de la CPI (1), puis elle abordera les usages en vigueur dans les Tribunaux ad hoc (2) et enfin elle examinera la pratique adoptée par le Procureur en l'espèce (3).

1. Analyse de la décision Dyilo

3. Le 8 novembre 2006, la Chambre préliminaire de la CPI susvisée s'est prononcée sur la question de savoir si la préparation de témoins à la déposition, telle que le Procureur de la Cour l'avait décrite dans l'affaire *Dyilo*, était une pratique admissible dans les procès intentés devant la CPI. Pour ce faire, elle s'est appuyée sur le droit applicable énoncé à l'article 21 du Statut de la CPI[4].

4. La Chambre préliminaire a scindé la notion de préparation de témoins, telle que le Procureur de la CPI l'avait décrite, en deux volets caractérisés par un certain nombre de buts et de mesures. Elle a défini le premier volet, dénommé « familiarisation du témoin », comme

[1] Requête de Nzirorera intitulée « *Joseph Nzirorera's Motion to Prohibit Witness Proofing* », déposée le 13 novembre 2006.
[2] Cour pénale internationale, *Le Procureur c. Thomas Lubanga Dyilo*, affaire n°ICC-01/04-01/06, Décision relative à la préparation des témoins avant qu'ils ne déposent devant la Cour (*witness familiarisation and proofing*) (Chambre préliminaire), 8 novembre 2006, (la « décision *Dyilo* »).
[3] Voir la requête de Ngirumpatse déposée le 17 novembre 2006, les réponses du Procureur déposées les 16 et 20 novembre 2006, la réplique de Nzirorera déposée le 20 novembre 2006 et la réplique de Ngirumpatse déposée le 24 novembre 2006. La Défense de Nzirorera a aussi demandé oralement à la Chambre de prendre des mesures conservatoires tendant à interdire le récolement des témoins jusqu'à ce qu'elle rende sa décision. La Chambre a rejeté cette demande, mais elle a réduit le délai imparti au Procureur pour déposer sa réponse (voir le compte rendu de l'audience du 14 novembre 2006).
[4] Décision *Dyilo*, par. 7 à 9, et Statut de la CPI, article 21 (Droit applicable) :
1. La Cour applique :
a) En premier lieu, le présent Statut et le Règlement de procédure et de preuve;
b) En second lieu, selon qu'il convient, les traités applicables et les principes et règles du droit international, y compris les principes établis du droit international des conflits armés;
c) À défaut, les principes généraux du droit dégagés par la Cour à partir des lois nationales représentant les différents systèmes juridiques du monde, y compris, selon qu'il convient, les lois nationales des États sous la juridiction desquels tomberait normalement le crime, si ces principes ne sont pas incompatibles avec le présent Statut ni avec le droit international et les règles et normes internationales reconnues.
2. La Cour peut appliquer les principes et règles de droit tels qu'elle les a interprétés dans ses décisions antérieures.
3. L'application et l'interprétation du droit prévues au présent article doivent être compatibles avec les droits de l'homme internationalement reconnus et exemptes de toute discrimination fondée sur des considérations telles que l'appartenance à l'un ou l'autre sexe tel que défini à l'article 7, paragraphe 3, l'âge, la race, la couleur, la langue, la religion ou la conviction, les opinions politiques ou autres, l'origine nationale, ethnique ou sociale, la fortune, la naissance ou toute autre qualité.

> « une série de mesures visant à familiariser le témoin avec l'aménagement du prétoire, l'enchaînement probable des événements au cours de sa déposition à l'audience et les attributions des différents participants à l'audience[5] ».

Elle a estimé que le Statut de la CPI[6] non seulement autorisait ce premier volet, mais aussi l'imposait. De plus, selon elle, « l'Unité d'aide aux victimes et aux témoins est l'organe de la Cour compétent pour procéder, en consultation avec la partie se proposant de citer le témoin concerné, à la familiarisation des témoins à leur arrivée au siège de la Cour pour déposer[7]».

5. La Chambre préliminaire a défini le second volet de la notion de préparation de témoins à la déposition présentée par le Procureur de la CPI comme des mesures visant à passer en revue le récit du témoin,

> « notamment : (i) en permettant au témoin de lire sa déclaration, (ii) en rafraîchissant sa mémoire concernant les éléments de preuve qu'il entend présenter à l'audience de confirmation des charges, et (iii) en posant au témoin exactement les mêmes questions que celles qui lui seront posées au cours de sa déposition, et ce, dans l'ordre dans lequel elles lui seront posées[8] ».

Elle a jugé que ce second volet n'était prévu par aucune disposition du Statut, du Règlement de procédure et de preuve ou du Règlement de la Cour[9]. Elle a également considéré que le Procureur de la CPI n'avait pas établi que les buts et les mesures caractérisant le second volet de la préparation de témoins à la déposition étaient largement reconnus en droit pénal international[10]. En outre, elle a relevé que le Procureur n'avait invoqué aucun précédent jurisprudentiel du Tribunal pénal international pour le Rwanda (TPIR) autorisant la pratique de la préparation de témoins à la déposition telle qu'il l'avait décrite, et a estimé que la seule décision du Tribunal pénal international pour l'ex-Yougoslavie (TPIY) rendue dans l'affaire *Limaj* ne réglait pas en détail la question des composantes de la notion de préparation de témoins à la déposition[11]. Enfin, elle a estimé que le Procureur n'avait pas étayé son argument selon lequel la préparation de témoins à la déposition telle qu'il l'avait définie dans ses Observations, était est une particularité des procès intentés devant les organes judiciaires internationaux en raison de la nature particulière des crimes relevant de la compétence de ceux-ci[12].

6. En application de l'article 21 du Statut de la CPI, la Chambre préliminaire s'est ensuite employée à déterminer si le second volet de la définition pourrait s'inscrire dans le champ d'application des

> « principes généraux du droit dégagés par la Cour à partir des lois nationales représentant les différents systèmes juridiques du monde, y compris, selon qu'il convient, les lois nationales des États sous la juridiction desquels tomberait normalement le crime, si ces principes ne sont pas

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[5] Décision *Dyilo*, par. 15.
[6] Décision *Dyilo*, par. 14 et 15. Le but et les mesures caractérisant ce premier volet sont énoncés comme suit :
Aider le témoin qui va déposer à bien comprendre comment fonctionne la Cour, qui sont les participants et quel est leur rôle, et ce, librement et sans crainte par l'adoption des mesures suivantes :
i. Offrir au témoin la possibilité de rencontrer le premier substitut du Procureur et tout membre de l'équipe de l'Accusation susceptible de l'interroger pendant l'audience;
ii. Familiariser le témoin avec la salle d'audience, les participants à la procédure portée devant la Cour et la procédure en question ;
iii. Rassurer le témoin s'agissant de son rôle dans la procédure ;
iv. Discuter avec le témoin des questions se rapportant à sa sécurité afin de déterminer s'il est nécessaire de demander la mise en œuvre de mesures de protection devant la Cour ;
v. Rappeler au témoin qu'il est légalement tenu de dire la vérité lors de sa déposition ;
vi. Expliquer la procédure régissant l'interrogatoire principal, le contre interrogatoire et l'interrogatoire supplémentaire.
[7] Décision *Dyilo*, par. 24.
[8] *Ibid*., par. 40. Voir également les paragraphes 16 et 17.
[9] *Ibid*., par. 28.
[10] *Ibid*., par. 33.
[11] Décision *Dyilo*, par. 31 et 32 ; *Le Procureur c. Limaj et consorts*, affaire n°IT-03-66-T, Décision relative à la requête de la Défense concernant le « récolement » des témoins par l'Accusation, (Chambre de première instance), 10 décembre 2004 (la « décision *Limaj* »).
[12] Décision *Dyilo*, par. 34.

incompatibles avec le […] Statut ni avec le droit international et les règles et normes internationales reconnues[13] ».

7. La Chambre préliminaire a fait observer que ce second volet serait contraire à la déontologie ou à la loi dans des pays aussi différents que le Brésil, l'Espagne, la France, la Belgique, l'Allemagne, l'Écosse, le Ghana, l'Angleterre, le pays de Galles et l'Australie, alors que dans d'autres pays, notamment aux États-Unis d'Amérique, la préparation de témoins à la déposition telle que la concevait le Procureur est bien acceptée, voire parfois considérée comme une bonne pratique professionnelle[14]. Elle a tout particulièrement souligné que le second volet de la notion, tel que le Procureur de la CPI l'avait décrit constituerait une violation flagrante des dispositions du code de déontologie du Conseil de l'ordre des avocats d'Angleterre et du pays de Galles que le Procureur s'était expressément engagé à respecter[15]. De ces circonstances, elle a tiré la conclusion suivante :

> « Le second volet de la définition du récolement de témoins avancée par l'Accusation *n'est reconnu par aucun principe général du droit* pouvant être dégagé à partir des lois nationales représentant les différents systèmes juridiques du monde[16]. Bien au contraire, si un principe général de droit venait à être dégagé en la matière à partir des lois nationales représentant les différents systèmes juridiques du monde, il insisterait sur l'obligation faite à l'Accusation de s'abstenir de récoler les témoins[17]».

8. Selon la présente Chambre, le raisonnement par lequel la Chambre saisie de l'affaire *Dyilo* est parvenue à sa décision ne repose pas sur une connaissance approfondie des usages constants des Tribunaux ad hoc, lesquels se justifient par les particularités des affaires portées devant ces tribunaux qui les distinguent des affaires pénales nationales, comme la Chambre l'expliquera ci-après. Cette précision a été également apportée récemment dans l'affaire *Milutinović et consorts* où une Chambre de première instance du TPIY a rejeté une demande de la Défense tendant à la voir appliquer exactement les mêmes règles que celles qui avaient été énoncées dans la décision *Dyilo*[18].

2. Usages des Tribunaux ad hoc et droits de l'accusé

9. Le Tribunal de céans et le TPIY autorisent régulièrement les parties à s'entretenir avec les témoins avant leurs dépositions dans le cadre bien précis des affaires qui intéressent ces témoins pour assurer une meilleure administration de la justice, et veiller à ce que la Défense soit moins prise au dépourvu. Cette pratique cadre bien avec la conclusion de la Chambre d'appel qui a estimé que chaque partie avait le droit de s'entretenir avec un témoin potentiel[19].

10. Non seulement la familiarisation de témoins ne cause aucun préjudice injustifié, mais elle est utile et acceptable[20]. Comme l'a rappelé récemment la Chambre de première instance saisie de l'affaire *Milutinoviæ*, il n'y a aucune raison de réserver la familiarisation de témoins à la Section d'aide aux victimes et aux témoins du Tribunal[21].

11. Certes, la question n'a pas encore fait l'objet d'une décision spécifique au TPIR, mais la jurisprudence reconnaît la préparation de témoins lorsqu'elle traite des modalités de communication de

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[13] Statut de la CPI, article 21. Voir la décision *Dyilo*, par. 35 et suiv.
[14] Décision *Dyilo*, par. 37.
[15] *Ibid*., par. 38 à 41.
[16] *Ibid*., par. 42 (non souligné dans l'original).
[17] *Ibid*., par. 42.
[18] Le Procureur c. Milan Milutinović et consorts, affaire n°IT-05-87-T, décision intitulée Decision on Ojdanić Motion to Prohibit Witness Proofing, Chambre de première instance, 12 décembre 2006 (la « Décision Milutinović »).
[19] *Le Procureur c. Mile Mrksić* affaire n°IT-95-13/1-AR73, Décision relative à l'appel interlocutoire de la Défense concernant la communication avec des témoins potentiels de la partie adverse, Chambre d'appel, 30 juillet 2003. Voir également, *Le Procureur c. Sefer Halilović*, affaire n°IT-01-48-AR73, Décision relative à la délivrance d'injonctions, la Chambre d'appel, 21 juin 2004, par. 12 à 15.
[20] Décision *Milutinovic*, par. 10.
[21] *Id*.

la teneur d'un entretien accordé par un témoin. Le Procureur a pris l'habitude de communiquer à la Défense le résumé de la déposition que le témoin ferait ou ses « déclarations de confirmation » avant sa comparution. Contrairement aux affirmations de Mathieu Ngirumpatse, cette pratique est approuvée par la jurisprudence du Tribunal[22]. Dans l'affaire *Simba*, la Chambre de première instance I a défini le résumé préalable de la déposition du témoin comme

> « une communication faite par une partie à l'autre et à la Chambre indiquant d'avance qu'un témoin déposera sur des questions qui n'étaient pas mentionnées dans les déclarations antérieures qui avaient été communiquées[23] ».

Les Chambres de première instance estiment que les résumés préalables des dépositions de témoin cadrent avec l'obligation mise à la charge du Procureur par l'article 67 (D) du Règlement de procédure et de preuve (le « Règlement ») qui dispose que 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[24]. En général, le résumé préalable de la déposition complète ou développe les informations déjà communiquées à la Défense, mais il peut également apporter des éléments nouveaux dont celle-ci n'avait pas connaissance. On ne peut accepter que le Procureur forge sa thèse au cours du procès, mais on doit reconnaître à tout témoin le droit de se remémorer des détails pour les ajouter à ses déclarations antérieures. Comme la Chambre de première instance I l'a précisé dans l'affaire *Bagosora et consorts*,

> « […] des déclarations de témoins, qui ont vu et vécu des événements qui se sont déroulés sur de nombreux mois et sont susceptibles d'intéresser le Tribunal de céans, peuvent ne pas être complètes. En effet, certains témoins se sont bornés à répondre aux questions posées par les enquêteurs, qui s'intéressaient à d'autres personnes et non aux accusés ; ils ne leur ont donc pas donné spontanément tous les renseignements qu'ils détenaient[25] ».

12. L'approbation de cette pratique ne peut être considérée comme un moyen d'autoriser les parties à entraîner les témoins, à leur faire répéter ce qu'ils auront à dire à la barre ou à les suborner avant leur déposition, mais le contenu des résumés préalables de dépositions qui entrent dans le champ d'application de l'article 67 (D) englobe une grande partie des éléments indiqués dans le second volet de la notion de préparation de témoins à la déposition dans la décision *Dyilo*.

13. La préparation de témoins à la déposition se fait aussi régulièrement au TPIY. Il ressort d'un panorama de certains procès qui se sont déroulés récemment devant le TPIY que la préparation de témoins, y compris le fait de les interroger sur des contradictions existant entre leurs déclarations antérieures, fait partie intégrante du procès[26]. Dans l'affaire *Limaj et consorts*, la Chambre de première

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[22] Voir, par exemple, *Le Procureur c. Bagosora et consorts*, affaire n°ICTR-98-41-T, Décision relative à l'admissibilité de la déposition du témoin DBQ, (Chambre de première instance), 18 novembre 2003 ; *Le Procureur c. Simba*, affaire n°ICTR-01-76-T, « *Decision on the Admissibility of Evidence of Witness KDD* », (Chambre de première instance), 1er novembre 2004, par. 9 ; *Le Procureur c. André Rwamakuba*, affaire n°ICTR-98-44C-T, Décision sur la requête de la Défense relative aux résumés des dépositions de témoin attendues, (Chambre de première instance), 14 juillet 2005, par. 4.

[23] *Le Procureur c. Simba*, affaire n°ICTR-01-76-T, « *Decision on the Admissibility of Evidence of Witness KDD* », (Chambre de première instance), 1er novembre 2004, par. 9. Voir également *Le Procureur c. André Rwamakuba*, affaire n°ICTR-98-44C-T, Décision sur la requête de la Défense relative aux résumés des dépositions de témoin attendues, (Chambre de première instance), 14 juillet 2005, par. 4.

[24] *Id*.

[25] *Le Procureur c. Bagosora et consorts*, Décision relative à l'admissibilité de la déposition du témoin DBQ, (Chambre de première instance), 18 novembre 2003, par. 29.

[26] Voir, par exemple, *Le Procureur c. Mile Mrksić*, affaire n°IT-95-13/1, compte rendu de l'audience du 26 janvier 2006 ; *Le Procureur c. Naser Orić*, affaire n°IT-03-68, compte rendu de l'audience du 6 avril 2006 ; *Le Procureur c. Prlić et consorts,* affaire n°IT-04-74, compte rendu de l'audience du 10 juillet 2006 ; voir également *Le Procureur c. Vidoje Blagojević et Dragan Jokić*, affaire n°IT-02-60-T, Décision relative à la requête non contestée de l'Accusation aux fins d'un report de deux jours du témoignage de Nomir Nikolić, (Chambre de première instance), 16 septembre 2003 :
ATTENDU que l'Accusation a disposé d'un délai plus que suffisant pour effectuer tous les interrogatoires et procéder au récolement final de M. Nilolić, ainsi que pour communiquer à la Défense toute information nouvelle résultant de tels récolements avant sa citation à comparaître ;

instance a rejeté une requête de la Défense tendant à faire ordonner au Procureur de cesser immédiatement de procéder au « récolement » des témoins[27]. Elle a relevé que les deux parties procédaient au récolement de témoins et que cette pratique était admise depuis la création du Tribunal. Elle a également relevé qu'il s'agissait « d'une pratique largement répandue dans les systèmes de droit où la procédure est accusatoire ». Enfin, elle a estimé que le récolement de témoins présentait un certain nombre d'avantages permettant d'assurer le bon fonctionnement de la justice.

14. Récemment, la Chambre de première instance saisie de l'affaire *Milutinoviæ et consorts* a réaffirmé que

> « les entretiens qu'une partie a avec un témoin potentiel au sujet du récit de celui-ci, peuvent en fait renforcer l'équité et la rapidité du procès, à condition qu'ils visent réellement à éclaircir le récit du témoin[28] ». [traduction.]

Elle a estimé que la

> « voie suivie par la Chambre saisie de l'affaire *Dyilo* pour parvenir à sa décision ne pouvait être adoptée pour statuer sur la question[29] portée devant elle » [traduction].

Vu la situation du TPIY, qui à son avis est radicalement différente des circonstances de l'affaire *Dyilo*[30], elle a conclu que

> « le fait de passer en revue le récit d'un témoin avant que celui-ci ne comparaisse est une pratique non seulement autorisée par le droit applicable au Tribunal, mais aussi qui ne porte pas en soi atteinte aux droits de l'accusé[31] » [traduction].

15. Dans ces circonstances, la présente Chambre est convaincue que la préparation de témoins à la déposition est une pratique qui existe déjà et est approuvée par les deux Tribunaux ad hoc. Cette pratique peut consister à préparer le témoin et à le familiariser avec le déroulement du procès devant le Tribunal, à comparer ses déclarations antérieures, à relever les divergences et les incohérences existant dans ses souvenirs, à lui rafraîchir la mémoire au sujet du récit qu'il fera et à rechercher des informations et /ou des éléments de preuve à charge ou à décharge supplémentaires pour les communiquer à la Défense en temps utile avant la comparution du témoin, à condition de ne pas donner lieu à la manipulation du récit du témoin. Il est également admis que « non seulement la familiarisation du témoin ne cause aucun préjudice injustifié mais elle est utile et acceptable[32] » [traduction].

16. À cet égard, la Chambre relève que lorsqu'ils procèdent à des interrogatoires, les substituts du Procureur sont astreints à des règles déontologiques claires. Il ressort du Règlement interne du Procureur n°2 que les membres du Bureau du Procureur peuvent être considérés comme des auxiliaires de justice permanents tenus de

> « servir et protéger l'intérêt public, notamment les intérêts de la communauté internationale, des victimes et des témoins, et de respecter les droits fondamentaux des suspects et des accusés »

et de

ATTENDU que l'Accusation n'a communiqué à la Défense les constatations finales résultant de ses derniers récolements que le 16 septembre 2003, un jour avant la comparution de M. Nikolić, et que ces informations doivent être traduites en BCS pour être examinées par la Défense ; […]
RAPPELANT à l'Accusation que l'ensemble de ces récolements de témoins – notamment de ceux dont elle prévoit que le témoignage sera long - devrait être achevé suffisamment à l'avance pour permettre à la Défense d'examiner toute nouvelle information résultant de tels récolements ; […]
Voir également Le Procureur c. Momcilo Krajisnik, affaire n°IT-0039-T, « Order for Transfer of Detained Witness Pursuant to Rule 90 bis, (Chambre de première instance), 13 mars 2006.

[27] Décision *Limaj*.
[28] Décision *Milutinović*, par. 16.
[29] *Ibid*., par. 13.
[30] *Ibid*., par. 15.
[31] *Ibid*., par. 22.
[32] *Ibid*., par. 10, et décision *Limaj*.

« ne pas donner sciemment au Tribunal une version inexacte des faits pertinents ni présenter des moyens de preuve dont ils savent qu'ils sont fallacieux[33] ».

17. Le fait de passer en revue le récit d'un témoin avant sa comparution cadre avec les particularités des procès intentés devant les Tribunaux *ad hoc* et peut contribuer à une bonne administration de la justice dans différentes circonstances : les crimes retenus dans l'acte d'accusation ont été commis il y a des années et, dans de nombreux cas, les entrevues accordées par les témoins ont eu lieu il y a longtemps ; il est peut-être nécessaire de revoir, à la lumière des moyens de preuve que le Procureur entend produire, certains points qui présentaient un intérêt lors des enquêtes ; l'enquêteur du Bureau du Procureur et le substitut du Procureur qui interrogera le témoin à l'audience ne voient peut-être pas les choses de la même façon ; la durée de la procédure et le temps qui s'est écoulé entre les témoignages antérieurs imposent peut-être l'obligation d'avoir de nouveaux entretiens avec le témoin avant que celui-ci ne comparaisse, pour faire en sorte que la Défense soit moins prise au dépourvu dans les cas où le témoin se souvient de certains éléments d'information qui n'ont pas été communiqués[34].

18. Cet effet positif de l'entretien qu'une partie peut avoir avec un témoin avant sa déposition a été même reconnu par la Défense en l'espèce. La Défense de Nzirorera a demandé à plusieurs reprises l'autorisation de s'entretenir avec des témoins à charge pour mieux préparer le contre-interrogatoire de ceux-ci et accélérer la procédure[35]. Comme exemple récent, elle s'est entretenue avec le témoin à charge GK quelques semaines avant sa comparution, lorsque celui-ci est arrivé au Tribunal pour y déposer et l'a interrogé sur certaines divergences existant entre sa dernière version des faits et sa déposition dans une autre affaire ainsi qu'une déclaration antérieure[36]. Le témoin a eu l'occasion de faire la lumière sur ces divergences.

19. Dans sa requête, la Défense affirme que le récolement de témoins pratiqué par le Procureur en l'espèce a engendré de nombreux problèmes en ce qu'il a entraîné des communications tardives de pièces et l'admission d'éléments de preuve tendant à établir des faits qui n'avaient pas été annoncés dans l'acte d'accusation.

20. La Chambre n'est pas convaincue que le fait de passer en revue un témoignage avant la comparution du témoin contribue nécessairement à présenter des éléments de preuve sur des points absents de l'acte d'accusation. De toute façon, si un témoin se souvient de certains détails et les ajoute à ses déclarations antérieures lors de l'examen de son récit, plusieurs mesures de réparation peuvent être prises. Par exemple, on peut accorder à la Défense un temps de préparation supplémentaire, ou, s'il y a lieu, exclure l'élément de preuve concerné[37]. La Chambre déterminera, au cas par cas, la mesure appropriée en tenant compte des droits des accusés, notamment du droit d'être jugé sans retard excessif. Cependant, elle estime que le Procureur devrait, dès que possible, porter à la connaissance de la Défense toute information supplémentaire que le témoin pourrait fournir pendant sa déposition[38].

3. Préparation de témoins dans la présente affaire

21. La Défense de Ngirumpatse soutient qu'en l'espèce, les témoins sont en fait préparés pour venir réciter devant la Chambre la leçon qu'ils ont apprise du Procureur en guise de déposition. À son avis,

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[33] Règlement interne du Procureur n°2 (1999), Règle de déontologie pour les représentants de l'accusation.
[34] Voir la décision *Limaj* et la décision *Milutinović*, par. 20.
[35] Voir la requête intitulée « Joseph Nzirorera's Motion for Reconsideration of Witness Protection Order », déposée le 25 septembre 2006.
[36] Voir le résumé préalable de la déposition du témoin GK, daté du 10 novembre 2006 et déposé le 17 novembre 2006.
[37] *Le Procureur c. Bagosora et consorts*, affaire n°ICTR-98-41-T, décision intitulée « *Decision on Admissibility of Evidence of Witness DP* », (Chambre de première instance), 18 novembre 2003 ; *Le Procureur c. Bagosora et consorts*, affaire n°ICTR-98-41-T, Décision relative à l'admissibilité de la déposition du témoin DBQ, (Chambre de première instance), 18 novembre 2003.
[38] *Le Procureur c. André Rwamakuba*, affaire n°ICTR-98-44C-T, Décision sur la requête de la Défense relative aux résumés des dépositions de témoin attendues, (Chambre de première instance), 14 juillet 2005, par. 7 ; décision *Milutinović*, par. 22 et 23.

la préparation de témoins est une forme de subornation de témoins et un moyen de forger des éléments de preuve à charge. Le Procureur

> « réfute formellement tout argument tendant à soutenir ou à insinuer que l'entretien préalable au procès sert à entraîner, instruire et suborner le témoin ou de toute autre manière à forger les éléments de preuve à charge » [traduction].

22. La Défense peut mettre en doute et attaquer la manière dont le Procureur prépare ses témoins avant leurs dépositions, mais les allégations de subornation de témoins portées par la Défense de Ngirumpatse sont graves et il est à tout le moins discourtois de les avancer sans présenter le moindre élément de preuve pour les étayer ou les justifier. En fait, la Chambre relève que plusieurs témoins ont été contre-interrogés sur la façon dont s'était déroulé leur entretien préalable au procès avec le Procureur, et il n'existe aucun élément de preuve permettant d'étayer ces allégations. Il n'est cependant pas nécessaire de supprimer les conclusions de Ngirumpatse des dossiers du Tribunal comme le demande le Procureur[39].

23. Comme l'a déclaré la Chambre préliminaire de la CPI, l'expression « préparation de témoins » peut recouvrir diverses pratiques qui ne sont pas nécessairement contraires au droit[40]. Ni la Défense ni le Procureur n'ont expliqué d'une manière circonstanciée comment le Procureur prépare les témoins à charge avant de les appeler à la barre dans la présente affaire. Il ressort des résumés préalables de dépositions de témoins communiqués et des notifications faites en application de l'article 67 (D) du Règlement dans la présente affaire que le Procureur a coutume de comparer les déclarations faites par le témoin, de relever les divergences et les incohérences existant dans ses souvenirs, de lui rafraîchir la mémoire au sujet du récit qu'il fera et de rechercher des informations et/ou des éléments de preuve à charge ou à décharge supplémentaires pour les communiquer à la Défense en temps utile avant la comparution du témoin[41]. La Défense n'a pas établi que le Procureur posait au témoin exactement les mêmes questions qui lui seront posées lors de sa comparution. Les pièces communiquées ne portent pas non plus à le croire.

24. Le Procureur est présumé s'acquitter de ses obligations de bonne foi[42] et dans le respect des règles déontologiques. La Défense n'ayant pas prouvé le contraire, la Chambre n'est pas convaincue qu'une quelconque des entrevues qui ont eu lieu avant la déposition des témoins ne s'était pas déroulée conformément à la pratique constante.

PAR CES MOTIFS, LA CHAMBRE REJETTE les requêtes de la Défense.

Fait à Arusha, le 15 décembre 2006.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

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[39] Voir la réponse du Procureur.
[40] Décision *Dyilo*, par. 12.
[41] Voir, par exemple, le document intitulé « *Prosecutor's Notice Pursuant to Rule 67 (D) and Rule 68 (A) Concerning Witness GBU* », déposé le 28 novembre 2006, et le résumé préalable de la déposition du témoin GK, déposé le 17 novembre 2006.
[42] *Le Procureur c. Karemera et consorts*, Décision relative à l'appel interlocutoire de Joseph Nzirorera, (Chambre d'appel), 28 avril 2006, par. 17 ; *Le Procureur c. Dario Kordić et Mario Cerkez*, affaire n°IT-95-14/2-A, arrêt, par. 183.

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Décision relative à la requête du Procureur tendant à faire admettre une déclaration du témoin Joseph Serugendo
Articles 89 (C) et 92 bis du Règlement de procédure et de preuve
15 décembre 2006 (ICTR-98-44-T)

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Joseph Serugendo – Témoin touché par une maladie incurable, Ajout du témoin sur la liste des témoins à charge pas contesté – Admission de la déposition du témoin, Pas de possibilité de contre-interroger le témoin, Conditions pour l'admission de déclarations écrites : élément de preuve portant sur autre chose que les actes et le comportement de l'accusé, Condition non remplie – Requête rejetée

Instrument international cité :

Règlement de Procédure et de preuve, art. 92 bis

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 *bis*, 9 mars 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision relative à la requite du Procureur intitulée « Prosecution Motion for admission of evidence of rape and sexual assault pursuant to Rule 92 bis of the Rules ; and Order for Reduction of Prosecution Witness List », Articles 92 bis et 73 bis (D) du Règlement de procédure et de prevue, 11 décembre 2006 (ICTR-98-44)

T.P.I.Y. : Chambre d'appel, Le Procureur c. Stanislav Galić, Décision relative à l'appel interlocutoire interjeté en vertu de l'article 92 bis C) du Règlement, 7 juin 2002 (IT-98-29) ; Chambre de première instance, Le Procureur c. Vidoje Blagojević et consorts, Première décision relative à la requête de l'Accusation aux fins d'admission de déclarations de témoins et de témoignages antérieurs présentés en application de l'article 92 bis du Règlement, 12 juin 2003 (IT-02-60) ; Chambre de première instance, Le Procureur c. Slobodan Milošević, Décision relative à la requête de l'Accusation aux fins de l'admission de comptes rendus d'audience au lieu et place de dépositions au procès en application de l'article 92 bis (D) du Règlement (comptes rendus relatifs à Foca), 30 juin 2003 (IT-02-54)

Introduction

1. En l'espèce, le procès s'est ouvert le 19 septembre 2005. Pendant la troisième session d'audiences, la Défense de chacun des accusés et le Procureur ont demandé l'autorisation de citer Joseph Serugendo comme témoin à l'appui de leurs thèses respectives[1]. La Chambre ne s'est pas prononcée sur ces requêtes. À l'époque, l'état de santé de Serugendo était très préoccupant et on se demandait sérieusement s'il était en mesure de déposer et même s'il était réaliste d'envisager sa comparution[2]. Le Greffier avait déjà produit un rapport médical[3], mais estimant qu'elle avait besoin de

[1] Comptes rendus des audiences du 1[9] juin 2006, p. 1 à 4 et du 20 juin 2006, p. 2.
[2] Compte rendu de l'audience du 20 juin 2006, p. 1 à 3 et 16.
[3] Observations du Greffier intitulées *The Registrar's Submissions Regarding Joseph Serugendo's Extremely Urgent Motion for Partial Enforcement of Sentence*, déposées le 19 juin 2006. Voir le compte rendu de l'audience du 20 juin 2006, p. 16.

plus amples informations pour statuer sur les requêtes des parties, la Chambre a demandé au Greffier d'informer les parties et elles-mêmes de l'état de santé le plus récent de M. Serugendo et de leur dire si celui-ci était physiquement et psychologiquement en mesure de comparaître, y compris par vidéoconférence, ou de faire une déposition hors audience[4].

2. Le 26 juin 2006, le Greffier a informé la Chambre que le médecin du Tribunal avait conclu que M. Serugendo n'était pas en mesure de subir un interrogatoire, que ce soit au prétoire ou dans le cadre d'une déposition hors audience[5]. Au dernier jour de la troisième session du procès, après que les parties eurent réitéré leurs demandes, la Chambre a fait observer qu'à en croire les plus récentes informations actualisées fournies par le Greffier, l'état de santé de M. Serugendo ne s'était pas amélioré[6]. Dans ces circonstances, elle a estimé qu'elle ne pouvait prescrire aucune mesure à ce moment[7]. Le 22 août 2006, Joseph Serugendo a succombé à sa maladie.

3. Le Procureur demande maintenant à la Chambre d'admettre une « déclaration abrégée » (la « déclaration abrégée ») de Joseph Serugendo en application de l'article 89 (C) ou de l'article 92 *bis* du Règlement de procédure et de preuve (le « Règlement »)[8]. Le 27 juin 2006, le représentant du Procureur, accompagné d'un officier instrumentaire nommé par le Greffier, s'est entretenu avec M. Serugendo qui a vérifié à cette occasion la teneur de sa première déclaration et passé en revue la déclaration abrégée. Celle-ci est un texte bilingue de 40 pages[9], composé de passages de la déclaration initiale de Joseph Serugendo communiquée aux parties le 12 juin 2006[10].

Délibération

Question préliminaire : la liste de témoins

4. Le 30 mai 2006, le Procureur a déclaré qu'il avait l'intention de former une requête aux fins de modification de sa liste de témoins pour y inclure M. Serugendo. Dans une décision rendue oralement le même jour, la Chambre a ordonné que toute requête visant à l'ajouter à la liste de témoins soit formée immédiatement[11]. Le 13 juin 2006, ayant appris que M. Serugendo était atteint d'une maladie incurable, la Défense de Nzirorera a exprimé le souhait de le citer comme témoin[12]. Le 19 juin 2006, elle a demandé par requête l'autorisation de l'appeler à la barre comme témoin à décharge sans respecter l'ordre réglementaire de présentation des moyens de preuve[13]. Interrogé par la Chambre, à ce sujet, le Procureur a admis qu'à cause de son état de santé et de la qualité que pourrait présenter sa déposition, la décision de citer M. Serugendo comme témoin à charge n'avait pas encore été prise[14]. Le 20 juin 2006, le Procureur a demandé oralement l'autorisation d'ajouter M. Serugendo à sa liste de témoins. La Chambre a décidé de surseoir à statuer jusqu'à ce que le Greffier lui fournisse de plus amples informations sur l'état de santé de M. Serugendo[15]. La Défense de Nzirorera ne s'est pas opposée à la requête et a demandé qu'elle soit accueillie[16].

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[4] Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera, affaire n°ICTR-98-44-T (l'« affaire Karemera et consorts »), Order for the Registrar's Submission on Joseph Serugendo's Health Condition and Ability to Testify (Chambre de première instance), 20 juin 2006.
[5] Observations du Greffier intitulées The Registrar's Submissions Regarding Joseph Serugendo's Health Condition and Ability to Testify, déposées le 26 juin 2006.
[6] Compte rendu de l'audience du 10 juillet 2006, p. 8.
[7] *Ibid*. p. 8.
[8] Requête du Procureur en vue de faire admettre, en vertu des articles 89 (C) et 92 *bis* (B), la déclaration écrite du témoin Joseph Serugendo, déposée le 5 septembre 2006.
[9] Annexe B de la requête.
[10] Cette déclaration est le résultat de plusieurs entretiens entre le Bureau du Procureur et Joseph Serugendo.
[11] Compte rendu de l'audience du 30 mai 2006, p. 66 à 69.
[12] Compte rendu de l'audience du 13 juin 2006, p. 4 et 5.
[13] Compte rendu de l'audience du 19 juin 2006 p. 1.
[14] *Ibid*., p. 4 et 5.
[15] Compte rendu de l'audience du 20 juin 2006 p. 2 et 3.
[16] *Ibid*., p. 17.

5. Puisque les deux parties s'accordaient à dire que M. Serugendo devait déposer et que la requête finalement formée par le Procureur aux fins d'obtenir l'autorisation de l'ajouter à sa liste de témoins n'était pas contestée, la Chambre estime que cette question ne doit pas l'empêcher d'apprécier intégralement la requête sur laquelle elle statue à présent.

Admission en application de l'article 92 bis du Règlement

6. Au dire du Procureur, sa requête procède du souci de mettre le témoignage de Serugendo à la disposition de la Chambre, « sous quelque forme que ce soit ». Au demeurant, comme l'exige l'article 92 *bis* du Règlement, la déclaration abrégée ne fait état, ni directement ni indirectement, des actes et du comportement des accusés.

7. Les trois accusés s'opposent à la requête, au motif qu'ils ne pourront pas contre-interroger le témoin sur des questions qui les touchent de très près et que l'admission de la déclaration serait dès lors injuste. Plus précisément, la Défense relève des paragraphes précis de la déclaration abrégée qui portent sur les actes et le comportement des accusés, rendant ainsi la déclaration inadmissible en application de l'article 92 *bis* du Règlement.

8. L'article 92 *bis* du Règlement dispose qu'une déclaration de témoin peut être admise en lieu et place d'un témoignage oral si les conditions prévues par l'article sont réunies[17]. La première condition est que cet élément de preuve permette de démontrer un point autre que les actes et le comportement de l'accusé[18]. Autrement dit, il ne doit pas s'agir d'une déclaration écrite sur laquelle le Procureur se fonde pour établir (a) que l'accusé a personnellement commis l'un quelconque des crimes qui lui sont reprochés (c'est-à-dire qu'il en est l'auteur matériel), (b) qu'il a planifié, incité à commettre ou ordonné les crimes en question, (c) qu'il a de toute autre manière aidé et encouragé les auteurs matériels de ces crimes à les planifier, les préparer ou les exécuter, (d) qu'il était le supérieur hiérarchique des auteurs matériels de ces crimes, (e) qu'il savait ou avait des raisons de savoir que ses subordonnés s'apprêtaient à commettre ces crimes ou l'avaient fait, ou (f) qu'il n'a pas pris de mesures raisonnables pour empêcher que les actes incriminés ne soient commis ou en punir les auteurs[19].

9. Le Procureur souligne que la déclaration abrégée traite de quatre questions fondamentales, à savoir la RTLM en tant qu'organe de communication du MRND, la structure du mouvement *Interahamwe za MRND*, le rôle du MRND dans le Gouvernement intérimaire et la tournée de « pacification » du 10 avril 1994, et que les accusés n'y sont pas mentionnés nommément. Ces précisions sont exactes, mais il ressort d'une lecture attentive de la déclaration abrégée que les actes et le comportement des accusés y sont souvent évoqués. Du début à la fin de la déclaration abrégée, les accusés sont implicitement désignés par différentes expressions telles que « certaines personnalités du gouvernement et du parti MRND[20] », « la hiérarchie [du MRND][21] », « les autorités du parti MRND[22] », « les hautes autorités du parti MRND[23] » et « le Gouvernement Intérimaire[24] ». Il n'est pas nécessaire qu'un accusé soit explicitement nommé pour qu'on considère qu'une déclaration se

[17] Pour une analyse complète de l'article 92 bis du Règlement, voir la décison récente intitulée Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules; and Order for Reduction of Prosecution Witness List, rendue par la Chambre le 11 décembre 2006.
[18] Voir l'article 92 *bis* (A).
[19] *Le Procureur c. Galić,* affaire n°IT-98-29-AR73.2, Décision relative à l'appel interlocutoire interjeté en vertu de l'article 92 *bis* C) du Règlement (Chambre d'appel), 7 juin 2002, par. 10 ; *Le Procureur c. Milošević*, affaire n°IT-02-54-T, Décision relative à la requête de l'Accusation aux fins de l'admission de comptes rendus d'audience au lieu et place de dépositions au procès en application de l'article 92 *bis* (D) du Règlement (comptes rendus relatifs à Foca), 30 juin 2003, par. 11 ; *Le Procureur c. Blagojević et consort,* affaire n°IT-02-60-T, Première Décision relative à la requête de l'Accusation aux fins d'admission de déclarations de témoins et de témoignages antérieurs présentés en application de l'article 92 *bis* du Règlement (Chambre de première instance), 12 juin 2003, par. 9.
[20] Déclaration abrégée, par. 17.
[21] *Ibid*., para. 26.
[22] *Ibid*., par. 27, 49 et 80.
[23] *Ibid*., par. 39 et 48.
[24] *Ibid*., par. 40 ; d'après le mémoire préalable au procès intitulé *Prosecutor's Pre-Trial Brief*, Édouard Karemera était Ministre de l'intérieur dans le Gouvernement intérimaire du 8 avril 1994.

rapporte à ses actes et son comportement[25]. En l'espèce, le Procureur dit que les accusés ont commis les crimes qui leur sont imputés

> « pour avoir usé de leur pouvoir et de leur autorité en tant que hauts responsables du MRND et de leur qualité de membres ou d'anciens membres du Gouvernement pour recruter, endoctriner, armer, entraîner et mobiliser les miliciens hutus et les citoyens hutus ordinaires qui vivaient d'une agriculture de subsistance pour la plupart, en vue d'attaquer la population tutsie du Rwanda, de porter atteinte à l'intégrité de ses membres et de la détruire, durant la période allant de 1990 à 1994 »[26] [traduction].

La Chambre juge que ces expressions, qui se retrouvent dans chacune des quatre sections fondamentales de la déclaration de M. Serugendo, se rapportent effectivement aux actes et au comportement des accusés.

10. Puisque la déclaration abrégée contient des éléments de preuve qui se rapportent aux actes et au comportement des accusés, l'une des conditions essentielles d'admission prévues par l'article 92 *bis* du Règlement n'a pas été remplie.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête du Procureur dans son intégralité.

Fait à Arusha, le 15 décembre 2006.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[25] Voir, par exemple, Le Procureur c. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva, Decision on Prosecutor's Motion for the Admission of Written Statements Under Rule 92 bis (Chambre de première instance), 9 mars 2004, par. 22.
[26] Mémoire préalable au procès, par. 4.

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Décision relative à l'admission ne pruve des pieces à conviction de la défense Article 89 (C) du Règlement de procédure et de preuve 29 décembre 2006 (ICTR-98-44-T)

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Admission de documents comme pieces à conviction, Pertinence des documents – Requête acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 89 (C)

Jurisprudence internationale citée :

T.P.I.R. : Chambre d'appel, Le Procureur c. Pauline Nyiramasuhuko et consorts, 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 juillet 2004 (ICTR-97-21)

Introduction

1. Le procès en l'espèce s'est ouvert le 19 septembre 2005. Le 30 mai 2005, durant le contre-interrogatoire du témoin à charge T, la Défense de Nzirorera ademandé à la Chambre d'admettre en preuve les quatre documents suivants : discours du Ministre Eliezer Niyitegeka du 9 avril 1994 ; communiqué du Ministère de l'intérieur daté du 10 mai 1994 ; discours du ministre Eliezer Niyitegeka du 30 avril 1994 ; et, discours du Ministre de la Justice du 17 mai 1994[1]. Ces documents n'étaient disponibles qu'en kinyarwanda. Le Procureur s'est opposé à l'admission du premier document dont il contestait la pertinence pour le contre-interrogatoire du témoin[2]. A ce stade, la Chambre n'a pas pu se prononcer sur l'admission des discours proposés par la Défense de Nzirorera, parce qu'ils n'étaient disponibles qu'en kinyarwanda[3]. Elle a donc sursis à statuer, ordonné que des cotes de référence leur soient attribuées pour identification et demandé au Greffier de faire en sorte qu'ils soient traduits. Les discours sont maintenant traduits. La Chambre est en mesure de statuer sur leur admission[4].

Discussion

2. Selon l'article 89 (C) du Règlement de procédure et de preuve, la Chambre de première instance peut recevoir tout élément de preuve pertinent dont elle estime qu'il a valeur probante. Comme la Chambre d'appel l'a souligné à maintes reprises « il ne faut pas confondre admissibilité d'un élément de preuve et appréciation de la valeur qu'il convient de lui accorder »[5]. [traduction]

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[1] Compte-rendu du 30 mai 2006, p. 47 et 52.
[2] *Ibid*., p. 52.
[3] *Ibid*., p. 52.
[4] *Ibid*., p. 52. Le discours du Ministre Eliezer Niyitegeka du 9 avril 1994 ; communiqué du Ministère de l'intérieur daté du 10 mai 1994 ; discours du ministre Eliezer Niyitegeka du 30 avril 1994 ; et, discours du Ministre de la Justice du 17 mai 1994 ont été enregistrés sous les cotes de référence ID.NZ16, 17, 18 et 19 respectivement.
[5] Le Procureur c. Arsène Shalom Ntahobali et Pauline Nyiramasuhuko, affaire n°ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible", (Chambre d'appel), 2 juillet 2004, par. 15.

3. Après examen des documents dont l'admission est sollicitée et de la déposition du témoin T, la Chambre est convaincue de la pertinence de ces documents s'agissant de la question des efforts fournis pour arrêter les massacres, au sujet de laquelle le témoin T a déposé. La Chambre est également convaincue de leur valeur probante.

PAR CES MOTIFS, LA CHAMBRE

I. FAIT DROIT à la requête de la Défense et, en conséquence,

II. ADMET en preuve les documents suivants enregistrés sous les cotes de référence ID.NZ16, ID.NZ17, ID.NZ18 et ID.NZ19 : discours du Ministre Eliezer Niyitegeka du 9 avril 1994, communiqué du Ministère de l'intérieur daté du 10 mai 1994, discours du ministre Eliezer Niyitegeka du 30 avril 1994 et, discours du Ministre de la Justice du 17 mai 1994, ainsi que leur traduction.

III. DEMANDE au Greffe d'attribuer à ces documents un numéro de pièce à conviction dans cette affaire.

Fait à Arusha, 29 décembre 2006.

[Signé] : Dennis C. M. Byron ; Emile Francis Short (absent au moment de la signature) ; Gberdao Gustave Kam (absent au moment de la signature)

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Décision relative à la requête de la défense intitulée «Motion for Investigation of Prosecution Witness Ahmed Mbonyunkiza for False Testimony » En vertu de l'article 91 (B) du Règlement de procédure et de preuve 29 décembre 2006 (ICTR-98-44-T)

(Original : Anglais)

Chambre de première instance III

Juges : Dennis C. M. Byron, Président de Chambre ; Emile Francis Short ; Gberdao Gustave Kam

Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera – Affaire Kamuhanda – Faux témoignage, Pouvoir d'appréciation de la Chambre de déclencher une enquête si elle a de bonnes raisons de croire qu'un témoin a sciemment et volontairement fait un faux témoignage, Détermination au cas par cas des « bonnes raisons », Distinction des simples contradictions ou divergences entre les dépositions du faux témoignage, le fait que le Tribunal clôture ses activités et risque de ne pas être en mesure de poursuivre des témoins pour faux témoignage ne constitue pas un motif valable pour ordonner une enquête – Requête rejetée

Instrument international cité :

Règlement de Procédure et de preuve, art. 91 (B)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Jean-Paul Akayesu, Le Procureur c. Jean-Paul Akayesu, Décision faisant suite à la requête de la Défense aux fins de demander au Procureur d'entreprendre une enquête pour faux témoignage relative au témoin « R », 9 mars 1998 (ICTR-96-4) ; Chambre de première instance, Le Procureur c. Ignace Bagilishema, Décision relative à la requête de la Défense aux fins que la Chambre de première instance donne instruction au Procureur

d'entreprendre une enquête visant à établir et à présenter un acte d'accusation pour faux témoignage, 11 juillet 2000 (ICTR-95-1A) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Defence Request for an Investigation into Alleged False Testimony of Witness DO, 3 octobre 2003 (ICTR-96-41) ; Chambre de première instance, Le Procureur c. Pauline Nyiramasuhuko et consorts, Decision on Arsène Shalom Ntahobali's Motion to Have Perjury Committed by Prosecution Witness QY Investigated, 23 septembre 2005 (ICTR-97-21 et ICTR-98-42)

Introduction

1. Le procès en l'espèce s'est ouvert le 19 septembre 2005. Le Procureur a cité, comme premier témoin, Ahmed Napoléon Mbonyunkiza, qui a déposé du 20 septembre 2005 au 28 octobre 2005. Le 14 octobre 2005, alors que la Chambre entendait le témoin à charge G, censé contredire le témoignage de Mbonyunkiza, la Défense de Nzirorera a oralement formé une requête priant la Chambre d'ordonner l'ouverture d'une enquête contre le témoin Mbonyunkiza pour faux témoignage[1]. La Chambre a rejeté cette requête au motif qu'elle était prématurée et qu'il était impossible d'ouvrir une enquête chaque fois qu'il y avait des dépositions contradictoires[2]. Le 1er mars 2006, durant le contre-interrogatoire du témoin UB, la Défense de Nzirorera a réitéré sa demande[3]. La Chambre a réservé sa décision[4]. Après avoir entendu tous les témoins à charge qui ont déposé sur les mêmes questions, la Défense de Nzirorera, appuyée par celle de Ngirumpatse, a de nouveau demandé qu'une enquête soit ouverte contre le témoin Mbonyunkiza pour faux témoignage[5].

Délibération

2. En vertu de l'article 91 (B) du Règlement de procédure et de preuve (le « Règlement »), la Défense de Nzirorera demande qu'un *amicus curiae* soit désigné pour instruire l'allégation de faux témoignage de Mbonyunkiza, dont certaines déclarations ont été contredites par d'autres témoins à charge et le seront par des témoins à décharge. Elle fait valoir que les témoins à charge G, UB et T ont contredit la déclaration du témoin Mbonyunkiza, dans laquelle il affirme que Ngirumpatse a pris la parole au cours des réunions qui se tenaient tous les mercredis en février 1992 et qu'il a prôné l'élimination des Tutsis ; que les témoins G et T ont aussi contredit l'allégation de Mbonyunkiza selon laquelle c'était Bikindi qui, pendant ces réunions, entonnait une chanson sur l'élimination des Tutsis, que Gaspard Uwizigara participait à ces réunions et que des haches auraient été exhibées et distribuées au cours de ces mêmes réunions. La Défense affirme aussi que le témoin à charge UB a nié que les *Interahamwe* aient utilisé des haches à ce moment. Se joignant à la requête, la Défense de Ngirumpatse allègue que le témoin Mbonyunkiza a menti sur d'autres faits, dont ceux disant notamment que Ngirumpatse serait l'auteur d'un livre de grammaire ; que des réunions se seraient tenues tous les mercredis et que des listes de présence auraient été dressées. Le 2 novembre 2006, pendant que le témoin à charge ALG déposait, la Défense de Nzirorera a demandé à la Chambre de considérer sa déposition comme un élément supplémentaire à l'appui de sa requête demandant l'ouverture d'une enquête[6].

3. La Défense affirme que les conditions prévues à l'article 91 (B) du Règlement pour qu'une enquête soit menée pour faux témoignage sont réunies. À l'appui de sa requête, elle invoque une décision rendue oralement par la Chambre d'appel en l'affaire *Kamuhanda* et ordonnant une enquête

[1] Compte rendu de l'audience du 14 octobre 2005, p.19 à 21.
[2] *Ibid*., p. 21 à 23.
[3] Compte rendu de l'audience du 1er mars 2006, p. 40 à 42.
[4] *Ibid*., p. 41 et 42.
[5] Le Procureur c. Karemera et consorts, affaire n°ICTR-98-44-T, Motion for Investigation of Witness Ahmed Mbonyunkiza for False Testimony (Chambre de première instance), 29 mai 2006 ; Le Procureur c. Mathieu Ngirumpatse, affaire n°ICTR-98-44-PT, Mémoire de Ngirumpatse sur la Joseph Nzirorera's Motion for Investigations of Witness Ahmed Mbonyunkiza for False Testimony (Chambre de première instance), 5 juin 2006 ; voir aussi Le Procureur c. Joseph Nzirorera, affaire n°ICTR-98-44-T, Reply Brief: Motion for Investigation of Witness Ahmed Mbonyunkiza for False Testimony (Chambre de première instance), 6 juin 2006.
[6] Compte rendu de l'audience du 2 novembre 2006, p. 41.

pour faux témoignage, alors qu'il y avait bien moins d'éléments de preuve que contre le témoin Mbonyunkiza.

4. S'opposant à la requête, le Procureur affirme que des contradictions apparentes ne signifient pas automatiquement qu'un témoin a délibérément fait un faux témoignage[7].

5. Aux termes de l'article 91 (B) du Règlement, la Chambre dispose d'un pouvoir d'appréciation lui permettant, si elle a de bonnes raisons de croire qu'un témoin a sciemment et volontairement fait un faux témoignage,

> (i) de demander au Procureur d'examiner l'affaire en vue de préparer et de soumettre un acte d'accusation pour faux témoignage ;
>
> (ii) si elle estime que le Procureur a un conflit d'intérêts pour ce qui est du comportement en cause, d'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.

6. Selon la Chambre de première instance en l'affaire *Akayesu*, les éléments constitutifs du faux témoignage[8] sont les suivants : (a) le témoin doit avoir fait une déclaration solennelle ; (b) le faux témoignage doit être contraire à la déclaration solennelle ; (c) le témoin doit croire, au moment où il fait sa déclaration, qu'elle est fausse ; (d) il doit exister une relation significative entre la déclaration et un élément matériel de la cause. La déclaration mensongère doit aussi avoir été faite dans l'intention de tromper le juge et de nuire ; il appartient à la partie requérante de prouver (a) que la déclaration du témoin était mensongère ; (b) que celle-ci a été faite dans l'intention de nuire ou tout au moins que le témoin avait pleinement conscience de sa fausseté ; (c) que celle-ci pouvait influer sur la décision du juge[9].

7. Pour déterminer s'il y a de « bonnes raisons » de croire qu'un témoin a fait un faux témoignage, une Chambre doit donc examiner, au cas par cas, compte tenu des circonstances particulières de chaque affaire, les éléments de preuve établissant l'intention de commettre cette infraction. La contradiction entre les dépositions de témoins ne suffit pas pour prouver qu'un témoin avait l'intention d'induire la Chambre en erreur et de nuire[10]. Elle est plutôt prise en compte au moment de l'appréciation de la valeur probante des éléments de preuve présentés par les parties au cours du procès[11].

8. La Chambre relève qu'en l'affaire *Kamuhanda* citée par la Défense, la Chambre d'appel a non seulement « noté des différences notables dans les dépositions […] faites par les témoins qui, en fait, doivent être considérées comme de faux témoignages, » mais elle a aussi « eu des raisons de croire qu'il se pourrait qu'il y ait eu des tentatives […] d'entraver le cours de la justice en raison de sollicitations de faux témoignage[12] ». Il existait donc, dans cette affaire, des circonstances particulières

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[7] Le Procureur c. Édouard Karemera et consorts, n°ICTR-98-44-T, Prosecutor's Response to Nzirorera's Motion for investigation of Witness Ahmed Mbonyunkiza for False Testimony (Chambre de première instance), 5 juin 2006.

[8] *Le Procureur c. Jean-Paul Akayesu,* affaire n°ICTR-96-4-T, Décision faisant suite à la requête de la Défense aux fins de demander au Procureur d'entreprendre une enquête pour faux témoignage relative au témoin « R » (Chambre de première instance), 9 mars 1998.

[9] *Id.*

[10] *Le Procureur c. Ignace Bagilishema*, affaire n°ICTR-95-1A-T, Décision relative à la requête de la Défense aux fins que la Chambre de première instance donne instruction au Procureur d'entreprendre une enquête visant à établir et à présenter un acte d'accusation pour faux témoignage (Chambre de première instance), 11 juillet 2000, par. 6.

[11] *Id.*, par. 7 ; *Le Procureur c. Jean-Paul Akayesu*, affaire n°ICTR-96-4-T, Décision faisant suite à la requête de la Défense aux fins de demander au Procureur d'entreprendre une enquête pour faux témoignage relative au témoin « R » (Chambre de première instance), 9 mars 1998 ; *Le Procureur c. Bagosora et consorts,* affaire n°ICTR-96-41-T, *Decision on Defence Request for an Investigation into Alleged False Testimony of Witness DO* (Chambre de première instance), 3 octobre 2003, par. 9 ; *Le Procureur c. Nyiramasuhuko et consorts*, affaires n°ICTR-97-21-T et ICTR-98-42-T, *Decision on Arsène Shalom Ntahobali's Motion to Have Perjury Committed by Prosecution Witness QY Investigated* (Chambre de première instance), 23 septembre 2005.

[12] *Le Procureur c. Jean de Dieu Kamuhanda*, affaire n°ICTR-99-54-A, compte rendu de l'audience du 19 mai 2005, p. 51 et 52.

autorisant la Chambre d'appel à ordonner au Procureur d'ouvrir des poursuites pour faux témoignage contre un témoin[13].

9. La Défense allègue en l'espèce que les déclarations du témoin Mbonyunkiza ont été contredites par d'autres témoins à charge et qu'elles seront aussi contredites par des témoins à décharge. Elle ne fournit aucun détail sur le contenu des éléments de preuve qui seront apportés par ces témoins à décharge potentiels, ni ne rapporte la preuve qu'en faisant ce faux témoignage, le témoin Mbonyunkiza avait l'intention de nuire. Comme nous l'avons déjà souligné, de simples contradictions ou divergences entre les dépositions des différents témoins ne constituent pas, en soi, une raison suffisante pour conclure qu'un témoin a sciemment et délibérément fait un faux témoignage. La Défense n'a pas non plus démontré que les conditions fixées par le Règlement pour ordonner une enquête pour faux témoignage étaient réunies.

10. Par ailleurs, le fait que le Tribunal clôturera ses activités à une certaine date et risque de ne pas être en mesure de poursuivre des témoins pour faux témoignage, comme le prétend la Défense, ne constitue pas un motif valable pour ordonner une enquête s'il n'y a pas de raisons suffisantes de croire qu'un témoin a sciemment et délibérément fait un faux témoignage. La Chambre n'accepte pas non plus l'argument de la Défense selon lequel elle devrait ordonner une enquête pour faux témoignage en l'espèce dans le but de décourager les faux témoignages en général, alors qu'aucune raison valable ne permet de croire à l'existence d'une quelconque intention de nuire de la part du témoin visé. En outre, la Chambre d'appel a déjà indiqué très clairement aux témoins potentiels que le Tribunal ne tolérerait pas de faux témoignages à l'audience ni de tentatives d'influencer d'autres témoins qui pourraient comparaître devant lui[14].

11. En tout état de cause, toutes les incohérences alléguées dans le témoignage de Mbonyunkiza seront examinées ultérieurement par la Chambre au moment de l'appréciation de tous les éléments de preuve présentés par chaque partie en l'espèce. Statuer sur l'allégation de témoignages contradictoires à ce stade de la procédure reviendrait à préjuger du fond de la question à l'examen et serait donc prématuré.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête de la Défense dans son intégralité.

Fait à Arusha, 29 décembre 2006.

[Signé] : Dennis C. M. Byron ; Emile Francis Short ; Gberdao Gustave Kam

[13] Id.
[14] *Le Procureur c. Jean de Dieu Kamuhanda*, affaire n°ICTR-99-54-A, Compte rendu de l'audience du 19 mai 2005, p. 51 et 52.

The Prosecutor v. François KARERA

Case N° ICTR-2001-74

Case History

• Name: KARERA

• First Name: François

• Date of Birth: 1939

• Sex: male

• Nationality: Rwandan

• Former Official Function: *préfet* of Kigali-rural *préfecture*

• Date of Indictment's Confirmation: 8 June 2001

• Date of Indictment's Amendment: 19 December 2005

• Counts: genocide or, in the alternative, complicity in genocide and crimes against humanity (extermination and murder)

• Date and Place of Arrest: 20 October 2001, in Nairobi, Kenya

• Date of Transfer: 21 October 2001

• Date of Initial Appearance: 26 October 2001

• Date Trial Began: 9 January 2006

• Date and content of the Sentence: 7 December 2007, sentenced to imprisonment for the remainder of his life

• Appeal: 2 February 2009, dismissed

Decision on Defence Motion for Protection of Witnesses 9 February 2006 (ICTR-2001-74-T)

(Original : English)

Trial Chamber I

Judge : Erik Møse

François Karera – Protection of Defence witnesses – Real and objective fears – Trial fairness – Motion granted – Measures: Confidentiality, Possibility for the Prosecution to contact the witnesses, Disclosure of a witness's identity

International Instruments Cited :

Rules of Procedure and Evidence, Rules 69, 69 (C), 73 and 75 ; Statute, Art. 19 and 21

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Ferdinand Nahimana, Decision on the Defendant's Motion for Witness Protection, 25 February 2000 (ICTR-96-11) ; Trial Chamber, The Prosecutor v. Georges Ruggiu, Decision on the Defence's Motion for Witness Protection, 9 May 2000 (ICTR-97-32) ; Trial Chamber, The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Decision on Witness Protection, 22 August 2000 (ICTR-96-17) ; Trial Chamber, The Prosecutor v. Laurent Semanza, Decision on the Defence Motion for Protection of Witnesses (Rule 75), 24 May 2001 (ICTR-97-20) ; Trial Chamber, The Prosecutor v. Eliezer Niyitegeka, Decision (Defence Motion for Protective Measures for Defence Witnesses), 14 August 2002 (ICTR-96-14) ; 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) ; 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. Francois Karera, Decision on Motion for Protective Measures for Prosecution Witnesses, 1 December 2005 (ICTR-2001-74) ; Trial Chamber, The Prosecutor v. Théoneste Bagasora et al., Decision Amending Defence Witness Protection Orders, 2 December 2005 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Judge Erik Møse, designated by the Trial Chamber, pursuant to Rule 73 of the Rules of Procedure and Evidence ("the Rules");

BEING SEIZED OF the Defence "Requête de la Défense aux fins d'une ordonnance de mesures de protection des témoins à décharge", filed on 1 February 2006;

NOTING that the Prosecution has made no submissions;

HEREBY DECIDES the motion.

1. This motion for special measures protecting the identity of witnesses to be called on behalf of the Defence for Karera is brought under Articles 19 and 21 of the Statute and Rules 69 and 75 of the Rules. Pursuant to Article 19 of the Statute, the Tribunal must conduct the proceedings with due regard for the protection of victims and witnesses. Article 21 obliges the Tribunal to provide in its Rules 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 victim's identity. Rule 75 of the Rules elaborates several specific witness protection measures that may be ordered, including sealing or expunging names and other identifying information that may otherwise appear in the Tribunal's public records, assignment of a pseudonym to a witness, and permitting witness testimony in closed session. Subject to these measures, Rule 69 (C) requires the identity of witnesses to be disclosed to the Prosecution in adequate time for preparation.

2. Measures for the protection of witnesses are granted on a case by case basis. The jurisprudence of this Tribunal and of the International Criminal Tribunal for the Former Yugoslavia requires that the witnesses for whom protective measures are sought must have a real fear for the safety of the witness or her or his family, and there must be an objective justification for this fear. These fears may be expressed by persons other than the witnesses themselves. A further consideration is trial fairness, which favours similar or identical protection measures for Defence and Prosecution witnesses.[1]

3. The Defence for Karera has submitted that Defence witnesses do fear for their safety and that these fears are justified by the dangers and insecurities described in the reports attached as annexes to the Prosecution's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment", filed on 24 November 2005. The Chamber follows previous decisions regarding protection for Defence witnesses and accepts the existence of these fears amongst Defence witnesses, and their objective justification.[2] Accordingly, the Trial Chamber finds that the conditions for ordering witness protection measures are satisfied.

4. The measures sought by the Defence for Karera are substantially identical to those previously ordered in respect of Prosecution witnesses in the present case. The interests of trial fairness and administrative simplicity strongly favour the adoption of identical measures, which are enumerated below in language customarily adopted in such orders.[3]

5. In particular, the Defence for Karera has requested that the Chamber order measures to protect the identity of Defence Witnesses KBA, BBM, YMK, YCK, BBA, KBG, wherever they reside and who have not affirmatively waived their right to protective measures. In conformity with established practice, the Chamber makes a general order. The Defence shall disclose unredacted information to the Prosecution thirty-five days prior to the commencement of the Defence case.

6. The request that the Prosecution provide the Defence with a list of all persons within the Office of the Prosecutor who shall have access to the protected information is denied. The Prosecutor is, of course, bound to ensure that confidential information is not disclosed by his Office to other persons; but the mechanism to prevent such disclosure, and the range of persons within his Office who have such access, rests within his sole discretion.[4]

FOR THE ABOVE REASONS, THE CHAMBER

HEREBY ORDERS that:

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[1] *Bagosora et al.*, Decision on Bagosora Motion for Protection of Witnesses, 1 September 2003, p. 2; *Bagosora et al.*, Decision on Kabiligi Motion for Protection of Witnesses, 1 September 2003, p. 2; *Niyitegeka*, Decision (Defence Motion for Protective Measures for Defence Witnesses), 14 August 2002, p. 4; *Elizaphan and Gerard Ntakirutimana*, Decision on Witness Protection, 22 August 2000, pp. 2-4.

[2] See the decisions referred to in footnote 1. See also *Semanza*, Decision on the Defence Motion for Protection of Witnesses (Rule 75), 24 May 2001, p. 3; *Nahimana*, Decision on the Defendant's Motion for Witness Protection, 25 February 2000, p. 3; *Ruggiu*, Decision on the Defence's Motion for Witness Protection, 9 May 2000, p. 3.

[3] The witness protection orders governing Prosecution witnesses are contained in *Karera*, Decision on Motion for Protective Measures for Prosecution Witnesses, 1 December 2005.

[4] *Bagosora et al.*, Decision Amending Defence Witness Protective Orders (TC), 2 December 2005, para. 5 (applying *Bagosora et al.*, Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005).

1. The Defence for Karera shall designate pseudonyms for each of the witnesses for whom it claims the benefits of this Order, for use in trial proceedings, communications and during discussions between the Parties and with the public.

2. The names, addresses, whereabouts, and other identifying information concerning the protected witnesses shall be sealed by the Registry and not included in any public or non-confidential Tribunal records, or otherwise disclosed to the public.

3. In cases where the names, addresses, relations, whereabouts and other identifying information of the protected witnesses appear in the Tribunal's public records, this information shall be expunged from the said records and placed under seal.

4. The names and identities of the protected witnesses shall be forwarded by the Defence for Karera to the Registry in confidence, and they shall not be disclosed to the Prosecution unless otherwise ordered.

5. No person shall make audio or video recordings or broadcastings and shall not take photographs or make sketches of the protected witnesses, without leave of the Chamber or the witness.

6. The Prosecution and any representative acting on its behalf, shall notify the Defence for Karera in writing prior to any contact with any of its witnesses and, if the witness consents, the Defence for Karera shall facilitate such contact.

7. The Prosecution shall keep confidential to itself all information identifying any witness subject to this order, and shall not, directly or indirectly, disclose, discuss or reveal any such information.

8. The Defence for Karera may withhold disclosure to the Prosecution of the identity of the protected witnesses and temporarily redact their names, addresses, locations and other identifying information from material disclosed to the Prosecution. However, such information shall be disclosed by the Defence to the Prosecution thirty-five days prior to commencement of the Defence case, in order to allow adequate time for the preparation of the Prosecution pursuant to Rule 69 (C) of the Rules.

Arusha, 9 February 2006.

[Signed] : Erik Møse

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Decision on Motion for Further Alibi Particulars
7 March 2006 (ICTR-2001-74-T)

(Original : not specified)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Sergei Alekseevich Egorov; Florence Rita Arrey

François Karera – Alibi, Further alibi particulars – Notion of address of a witness – Sufficient information – Motion denied

International Instrument Cited :

Rules of Procedure and Evidence, Rules 67 (A) (ii) (a) and 73 ter (B) (iii) (a)

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) ; Trial Chamber, The Prosecutor v. Laurent Semanza, Decision on the Prosecutor's Motion to Call Rebuttal Evidence, 27 March 2002 (ICTR-97-20) ; Appeals Chamber, The Prosecutor v. Georges Rutaganda, Judgement, 26 May 2003 (ICTR-96-3) ; 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. François Karera, Decision on Defence Motion for Protection of Witnesses, 9 February 2006 (ICTR-2001-74)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Florence Rita Arrey;

BEING SEIZED OF the Prosecution "Motion for Further and Better Alibi Particulars", filed on 23 January 2006; and the *Corrigendum* thereto, filed on 24 January 2006;

CONSIDERING the Defence Response, filed on 30 January 2006;

HEREBY DECIDES the motion.

Introduction

1. The Defence has notified the Prosecution of its intent to enter an alibi defence, describing the whereabouts of the Accused that contradict allegations in the Indictment, and disclosing the names of the witnesses who will provide the alibi testimony. The Prosecution complains that the notice of alibi is deficient in that the present physical addresses of the alibi witnesses have not been specifically identified.

Deliberations

2. Rule 67 (A) (ii) (a) requires the Defence to 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". The Appeals Chamber has ruled that Rule 67 (A) (ii) (a) does not require the Defence to produce all the evidence supporting the alibi, but that sufficient details must be given to "[allow] the Prosecution to organize its evidence and to prepare its case prior to the commencement of the trial on the merits".[1]

3. Rule 67 (A) (ii) (a) does not expressly require the Defence to provide the present physical address of each witness. The reference to "addresses" might, for example, refer to the witness's physical address at the time of the events; alternatively, it might require disclosure of a general address, such as the city or country of current residence. The Defence is not required to provide the

[1] *Rutaganda*, Judgement (AC), 26 May 2003, para. 241. See also *Kayishema and Ruzindana*, Judgement (AC), 1 June 2001, para. 111 ("the purpose of entering a defence of alibi … is only to enable the Prosecution to consolidate evidence of the accused's criminal responsibility with respect to the crimes charged"). Contrary to the Prosecution's suggestion, the Defence is not obligated at this stage to disclose a full, complete and accurate account of the alibi defence. The Prosecution has referred to *Semanza*, Decision on the Prosecutor's Motion for Leave to Call Rebuttal Evidence and the Prosecutor's supplementary Motion for Leave to Call Rebuttal Evidence (TC), 27 March 2002, para. 12. However, this passage concerned the significance of advance notification of an alibi defence, rather than the content of such notification.

present physical address of non-alibi witnesses under Rule 73 *ter* (B) (iii) (a). Adopting the position of a Prosecution team in another case, this Chamber has held that "the witness's activities in 1994, parentage and birthplace, and country of present residence" provide sufficient identifying information to allow the Prosecution to conduct its investigations.[2] It would seem anomalous to require the Defence to provide more detailed particulars about alibi witnesses than regular witnesses. Furthermore, the Defence witness protection order applicable in this case requires the Prosecution to contact Defence witnesses with the assistance of Defence counsel.[3] Under these circumstances, it is difficult to understand how the present physical address of these alibi witnesses would assist the Prosecution in making its investigations. In light of the witness protection concerns manifested by the Defence, the Chamber considers that "addresses of witnesses" must be considered as referring either to their address during the events to which they will testify, or requires only their present address in general terms, such as their city or country of residence. In the present case, the Defence has provided the addresses of the witnesses in 1994. Absent further argumentation from the Prosecution this is considered sufficient.

4. The Defence claims that the Prosecution, by attaching the notice of alibi, breached an agreement between the parties to keep the witness identifying information confidential. The motion, and its *corrigendum*, are filed as "strictly confidential". Only a limited number of ICTR staff have access to such documents, and witness identifying information is routinely filed with the Tribunal in this manner. Under these circumstances, no breach of confidentiality has occurred.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 7 March 2006.

[Signed] : Erik Møse; Sergei Alekseevich Egorov; Florence Rita Arrey

[2] *Bagosora et al*., Decision on Sufficiency of Defence Witness Summaries (TC), 5 July 2005, para. 8; *Bagosora et al*., T. 21 April 2005 p. 2 ([Prosecution Counsel]: "So the key information that potentially disrupts the cross-examinations, leads to the identification, is with respect to parentage, location, and the location specifically with respect to birth and location in Rwanda in 1994. We are not so concerned about location at the present time; merely a country of origin is satisfactory with respect to that. We don't need addresses or postal codes or phone numbers or anything of that sort. But with respect to 1994 and birth, what we really need is to get information down to at least the *secteur* level, the *préfecture*, *commune*, and *secteur*. And the purpose of that is simply to make sure that we're dealing with the same person. You heard me say this morning that when it came to this other fellow on the spelling list, there were some seven different persons that we know of that that could potentially have been. And this is common. There's a lot of similarity in names, and we need to have that kind of information to determine it. MR. PRESIDENT: Yes. Any problem with this? Should be no problem. So we just decide now that there is a need to provide this to the Prosecution. T. May 2005 p. 30 ([The Presiding Judge reading Prosecution requests]: "Roman II: 'Provide comprehensive witness personal information for all of these witnesses by following the standard for attached'. You have the Chamber's support there as well").

[3] *Karera*, Decision on Defence Motion for Protection of Witnesses (TC), 9 February 2006, p. 3 ("The Prosecution and any representative acting on its behalf, shall notify the Defence for Karera in writing prior to any contact with any of its witnesses and, if the witness consents, the Defence for Karera shall facilitate such contact").

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Decision on Motion for Further Particulars of Defence Witnesses and for Continuance of Trial
25 April 2006 (ICTR-2001-74-T)

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Sergei Alekseevich Egorov; Florence Rita Arrey

François Karera – Further particulars of witnesses – Continuance of trial – Absence of some relevant information, Identification of witnesses – Motion granted in part

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Florence Rita Arrey;

BEING SEIZED OF the Prosecution "Motion for Continuance of Trial Session, Pursuant to Rule 73 (A)", filed on 24 April 2006;

HEREBY DECIDES the motion.

Introduction

1. On 18 April 2006, the Prosecution filed a motion for disclosure of further and better particulars of Defence witnesses. The Chamber was informed that the Defence would follow up this motion. The Prosecution has now filed a new motion indicating that although on 21 April 2006 it received from the Defence further particulars of 18 witnesses, the information does not contain all the identifying details of the witnesses. In particular, the Prosecution requests the parentage and precise information concerning the birthplace and residence in 1994 of each witness.

Deliberations

2. The Chamber has examined the information provided by the Defence. It is correct, as argued by the Prosecution, that some relevant information is missing. The parentage of all 18 witnesses in Annexure A to the motion is missing. In addition, with respect to some witnesses, information is lacking concerning the sector, *cellule*, *commune*, and *préfecture* of their birthplace and/or whereabouts in 1994.

3. Previously, in its Decision on Motion for Further Alibi Particulars, dated 7 March 2006, the Chamber stated clearly which identifying details the Defence must provide in order to comply with the Rules of Procedure and Evidence. Consequently, the Chamber orders the Defence to provide these details with relation to all its witnesses.

4. The Chamber cannot see the basis for granting a continuance of the proceedings.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Prosecution motion insofar as it requests further particulars of Defence witnesses.

ORDERS the Defence to provide all the identifying information of Defence witnesses in accordance with the guidance in its decision of 7 March 2006.

REJECTS the Prosecution request for continuance of the trial session.

Arusha, 25 April 2006.

[Signed] : Erik Møse; Sergei Alekseevich Egorov; Florence Rita Arrey

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Decision on Testimony by Video-Link
29 June 2006 (ICTR-2001-74-T)

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Sergei Alekseevich Egorov; Florence Rita Arrey

François Karera – Testimony by video-link, Brussels or The Hague – Interest of justice – Importance of the testimony, Evidence going directly to prove the alibi of the Accused – Inability or unwillingness of witnesses to attend, Fear for their personal safety, Fear for the loss of the source of income – Motion granted in part

International Instrument Cited :

Rules of Procedure and Evidence, Rules 54, 71 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 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 Ntabakuze Motion to Allow Witness DK52 to Give Testimony by Video-Conference, 22 February 2005 (ICTR-98-41

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Florence Rita Arrey;

BEING SEIZED OF the "Extremely Urgent Defence Application for Testimony to be taken by Video-Conference", and the supplement thereto, filed on 5 and 12 May 2006, respectively;

HEREBY DECIDES the motion.

Introduction

1. Defence Witnesses YMK, BBM, BBA and KMS reside in Europe and refuse to travel to Arusha. The Defence asks that they be allowed to testify via video-link from Brussels or The Hague. It bases its request on Rules 54 and 71 of the Rules of Procedure and Evidence ("the Rules"), arguing that the interest of justice and the rights of the Accused justify hearing their testimonies in this manner. The Prosecution does not object to the motion.[1]

Deliberations

2. Testifying through video-conference is an exception to the general principle, articulated in Rule 90 (A) of the Rules, that witnesses "shall, in principle, be heard directly by the Chambers".[2] The Chamber may authorize testimonies by video-conference where it is in the interest of justice, based on a consideration of the importance of the testimony; the inability or unwillingness of the witness to attend; and when a good reason has been adduced for the inability or unwillingness to attend. 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-conference is authorized.[3]

Importance of the Testimony

3. Witnesses YMK, BBA and BBM are alibi witnesses. The Defence submits that their evidence is important to its case. Witnesses YMK and BBA are expected to testify about the presence of the Accused in Ruhengeri in April 1994. Witness BBM will give evidence about the absence of the Accused from Cyivugiva cellule after 6 April 1994. The Chamber does not find that the evidence of these three witnesses is merely cumulative to the testimonies of other alibi witnesses called by the Defence so far. Consistent with the rights of the Accused under Article 20 of the Statute, the Chamber regards evidence which goes directly to prove the alibi of the Accused as important to the Defence case.

4. As for Witness KMS, the Defence has not shown that his evidence is essential to its case. Furthermore, the Defence indicated orally before the Chamber that Witness KMS may eventually be persuaded to travel to Arusha.[4]

Inability or Unwillingness to Attend

5. The Defence asserts that Witnesses YMK and BBA refuse to travel to Arusha out of fear for their personal safety. It claims the witnesses are mindful of "the recent apparent execution" in Brussels (Belgium) of a potential witness. Witness YMK initially agreed to testify in person, despite his fears, but retracted his consent due to two recent events which enhanced his apprehension: the Prosecutor's absence from an allegedly pre-arranged meeting with the witness; and a request from the Witnesses and Victims Support Section (WVSS) to advance his arrival. The Defence avers to have made repeated efforts to convince the witness to travel to Arusha, but in vain. The Chamber is aware of similar attempts by the WVSS. Accordingly, the Chamber finds that Witness YMK's fear is genuine and amounts to an unwillingness to attend.[5]

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[1] T. 18 May 2006 pp. 33-34.

[2] *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, para. 35; *Bagosora et al.*, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC), 8 October 2004 ("*Bagosora*, Decision of 8 October 2004"), para. 15; *Bagosora et al.*, Decision on Testimony by Video-Conference (TC), 20 December 2004 ("*Bagosora*, Decision of 20 December 2004"), para. 4.

[3] *Bagosora*, Decision of 8 October 2004, paras. 6-7; *Bagosora*, Decision of 20 December 2004, para. 4; *Bagosora*, Decision on Ntabakuze Motion to Allow Witness DK 52 to give Testimony by Video-Conference, 22 February 2005 (*Bagosora*, Decision of 22 February 2005"), para. 4.

[4] T. 12 May 2006 p. 7.

[5] In another case, this Chamber allowed a witness who refused to travel to Arusha due to fear for reprisals against her family, to testify via video-link. The Chamber was unable to assess whether the fear was objectively justified, but held that "the

6. Witness BBA's concerns for his personal safety are supplemented by his fear of loosing his livelihood. He claims that subsequently to testifying in Arusha in another ICTR trial, he nearly lost his job. The Chamber considers that practical inconveniences related to family or work, do not in themselves justify testimonies through video-link.[6] However, a loss of the source of income of a refugee who supports a family is more than a "practical inconvenience". Furthermore, the concerns of the witness are based on his own past experience. The Chamber accepts his reasons for refusing to travel to Arusha.

7. Witness BBM refuses to travel to Arusha as she suffers from fear of flying. Such fear may render a witness unable to attend proceedings in Arusha. The Defence undertook to provide, by 8 June 2006, a medical attestation confirming Witness BBM's condition but has not done so.[7] Consequently, the Chamber does not have a sufficient basis to conclude that the witness is unable to travel to Arusha and hence for allowing her to testify via video-link.[8]

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion with respect to Witnesses YMK and BBA;

DENIES the remainder of the motion.

ORDERS the Registry, in consultation with the parties, to make all necessary arrangements to facilitate the testimonies of Witnesses YMK and BBA via video-conference, from either Brussels or The Hague, and to videotape the testimonies for possible future reference by the Chamber.

Arusha, 29 June 2006.

[Signed] : Erik Møse; Sergei Alekseevich Egorov; Florence Rita Arrey

witness's continued refusal to come to Arusha in spite of the service of a subpoena indicates that these fears are genuinely and deeply held". *Bagosora*, Decision of 8 October 2004, para. 13. In the present case, a subpoena was not requested. However, various persuasion efforts by both the Defence and the WVSS have failed.

[6] *Bagosora*, Decision of 22 February 2005, para. 5.

[7] T. 1 June 2006 pp. 5-6.

[8] In another case, this Chamber allowed a witness whose medical condition prevented his arrival in Arusha, to testify through video-link. In that case, however, a doctor's letter confirming the witness's fragile medical condition was appended to the motion. *Bagosora*, Decision of 20 December 2004, para. 1.

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Decision on Variation of Defence Witness List 13 July 2006 (ICTR-2001-74-T)

(Original : not specified)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Sergei Alekseevich Egorov; Florence Rita Arrey

François Karera – Variation of the witness list – Good cause, Materiality and probative value of testimonies in relation to existing witnesses and allegations in the Indictment – Absence of delay in the trial – Absence of any prejudice to the Prosecution – Motion granted in part

International Instrument Cited :

Rules of Procedure and Evidence, Rule 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. 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 Kabiligi's Request for Particulars of the Amended Indictment, 27 September 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. François Karera, Decision on Defence Motion for Protection of Witnesses, 9 February 2006 (ICTR-2001-74) ; Trial Chamber, The Prosecutor v. 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 Sergei Alekseevich Egorov, and Judge Florence Rita Arrey;

BEING SEIZED OF the Karera "Requête de la Défense aux fins d'être autorisée à revoir la composition de sa liste de témoins", filed on 15 June 2006, the "Requête amendée de la Défense aux fins d'être autorisée à revoir la composition de sa liste de témoins", filed on 30 June 2006, the "Requête réamendée de la Défense aux fins d'être autorisée à revoir la composition de sa liste de témoins" as well as the "Réplique à la réponse du procureur à la requête amendée de la Défense aux fins d'être autorisée à revoir la composition de sa liste de témoins", both filed on 10 July 2006;[1]

CONSIDERING the Prosecution Responses, filed on 23 June and 6 July 2006;

[1] The Defence's initial motion of 15 June requested leave to add Witnesses NKZ, ZIH and YNZ to its witness list; the second Defence motion of 30 June added to those three Witnesses François-Xavier Bangamwabo, RUB, ZAD, ZAE, NVA and NVE; the third motion of 10 July revised its first two requests by removing Witnesses NVE, NVA, ZAD, ZAE and RUB, and adding Witness NSN, MVF and YAN.

HEREBY DECIDES the motion.

Introduction

1. The Defence requests to add to its witness list Witnesses NKZ, ZIH, YNZ, NSN, François-Xavier Bangamwabo, MVF and YAN, all of whom were only recently discovered as a result of investigations conducted following the close of the Prosecution case. According to the Defence, the proposed witnesses' evidence is material to its case and adding them at this stage would not prejudice the Prosecution.

2. The Prosecution contests the proposed additions.[2] Their testimony would be needlessly duplicative of testimony already given, and the Defence has not shown why adding these witnesses is required in the interests of justice or why they were not included earlier. The Prosecution accepts, however, that it is in the interest of justice to allow the Defence to include Witness YNZ in its witness list.

Deliberations

3. On 4 May 2006, the Defence began presenting its case. Rule 73 *ter* (E) of the Rules of Procedure and Evidence allows the Defence to request to amend its witness list after the start of its case, "if it considers it to be in the interests of justice". In deciding such requests, the Chamber has been guided by considerations of the interests of justice and the existence of good cause.[3] Relevant factors considered were the materiality and probative value of the testimony in relation to existing witnesses and allegations in the Indictment; the complexity of the case; prejudice to the opposing party; justifications for the late addition of witnesses; and delays in the proceedings.[4]

4. According to the Defence, Witnesses NKZ and ZIH were present during the attacks on Ntarama church and school, and are able to provide direct testimony about the perpetrators. In particular, they will testify that the Accused neither participated in nor ordered the attacks. Witness YNZ will provide a first-hand account of utterances made by the Accused in Rushashi, rebutting allegations in the Indictment. The Chamber finds that the evidence of these three witnesses is material to the Defence case as it relates to charges in the Indictment. It constitutes direct evidence which appears to be probative concerning the Ntarama and Rushashi events, on which there is limited direct testimony for the Defence.

5. The Defence avers that Witness François-Xavier Bangamwabo observed the Accused on the campus of the National University of Rwanda in Ruhengeri (Nyakinama) in April 1994, that Witnesses YAN and MVF were also on the campus of Nyakinama in April 1994, and that their testimony is essential to the alibi defence that the Accused will present. The Chamber considers that Witness Bangamwabo's eyewitness testimony as to the Accused's alibi is material to the Defence case, as it is direct evidence tending to refute the charges in the Indictment. As to Witness YAN and MVF, however, the Defence has not explained how his testimony will refute the allegations in the Indictment. Their mere presence on the campus during the period in question is not sufficient to show its materiality or probative value.

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[2] The Prosecution has informed the Chamber that it does not intend to file a third Response.

[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 Nsengiyumva Motion for Leave to Amend Its Witness List (TC), 6 June 2006 ("*Bagosora* Decision of 6 June 2006"), para. 3; *Bagosora et al.*, Decision on Defence Motions to Amend the Defence Witness List (TC), 17 February 2006, para. 4; *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; *Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E) (TC), 26 June 2003, para. 13.

[4] *Bagosora* Decision of 6 June 2006, para. 3; *Mpambara*, Decision on the Prosecution's Request to Add Witness AHY (TC), 27 September 2005, para. 4.

6. Witness NSN will present testimony intended to refute the evidence and arguments of the Prosecution regarding the role of the Accused as *sous-préfet* in Kigali-Rural *préfecture*, particularly through testimony about the neutrality of the administration in Rwanda. The Chamber accepts that the evidence of this witness is material to the Defence case as it relates to an important basis of the allegations against the Accused.[5]

7. With the exception of one witness, all the Prosecution witnesses had completed their testimonies by 2 February 2006. The Chamber accepts that ongoing Defence investigations in April through July 2006 led to the discovery of these proposed new witnesses.

8. Six Defence witnesses did not testify during the May 2006 session. Accordingly, the Chamber authorised an additional session.[6] Adding five new Defence witnesses will not delay the trial, as these witnesses can testify during the forthcoming session.[7]

9. The Chamber recalls that, on 10 July 2006, the Defence disclosed all information pertaining to its new witnesses. Consequently, in conformity with the Chamber's order to disclose such material thirty-five days before the next trial session, the Prosecution has sufficient time to prepare its cross-examination and will not suffer any prejudice if the motion is granted.[8]

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Defence leave to vary its witness list adding Witnesses NKZ, ZIH, YNZ, François-Xavier Bangamwabo and NSN;

DENIES the Defence motions as to Witnesses YAN and MVF.

Arusha, 13 July 2006.

[Signed] : Erik Møse; Sergei Alekseevich Egorov; Florence Rita Arrey

[5] Amended Indictment, paras. 12, 21, and 29. The Prosecution's 6 July 2006 Response states that the "allegation that the accused acted as a *sous-préfet* … is the thrust of the Prosecutor's case against the accused" (para. 58).
[6] T. 12 May 2006 p. 9.
[7] *Bagosora* Decision of 6 June 2006, para. 7 (finding that adding witnesses would not prolong the proceedings when they could be accommodated within an existing session).
[8] *Karera*, Decision on Defence Motion for Protection of Witnesses (TC), 9 February 2006 para. 5.

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Decision on Defence Motion for Additional Disclosure (Rule 98) 1 September 2006 (ICTR-2001-74-T)

(Original : not specified)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Sergei Alekseevich Egorov; Florence Rita Arrey

François Karera – Disclosure of testimonies made by witnesses to Rwandan authorities – Absence of information supplied by the Defence – Relevance of the testimonies – Motion denied

International Instruments Cited :

Rules of Procedure and Evidence, Rule 98 ; 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 Prosecutor of the Admissions of Guilt of Witness Y, Z, and AA, 8 June 2000 (ICTR-95-1A) ; Trial Chamber, The Prosecutor v. Laurent Semanza, Decision on the Defence Motion for Orders Calling Prosecution Witness VZ Listed in Prosecution Witness List of November 2000, Prosecution Witness VL, VH and VK Listed in Supporting Material to the Third Amended Indictment to Testify; in the Alternative Admit the Statement of the Said witnesses in Unredactged form in the Evidence in the Interest of Justice Pursuant to Rules 54, 68 and 98 of the Rules and Evidence, 6 September 2001 (ICTR-97-20) ; 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. 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. Aloys Simba, Decision on Matters Related to Witness KDD's Judicial Dossier, 1 November 2004 (ICTR-2001-76)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Florence Rita Arrey;

BEING SEIZED OF the "Motion of Defence for Additional Disclosure", filed on 24 August 2006;

CONSIDERING the Prosecution Response, filed on 25 August 2006;

HEREBY DECIDES the motion.

Introduction

1. The Defence requests the Chamber to order the Prosecution, pursuant to Rule 98 of the Rules of Procedure and Evidence, to use its best efforts to obtain and disclose certain confessions made by

Defence Witnesses NKZ and ZIH to Rwandan authorities. The Defence also requests to re-call the witnesses in order to tender the sought confessions.

2. The two witnesses testified from 14 to 16 August 2006. During its cross-examination, the Prosecution tried to impeach them by using statements they had given to Rwandan authorities. In response, both witnesses referred to confessions they had made in Rwanda and stated that these documents were consistent with their testimony before the Chamber.[1] The Defence requested disclosure of these confessions. The Prosecution stated that it was under no such obligation and denied having the confessions.[2] With respect to Witness NKZ, the Defence requested that the Chamber order the Prosecution to produce the witness's confession, pursuant to Rule 98 of the Rules of Procedure and Evidence.[3] The Chamber denied the request.[4] It also recalled that each party is expected to investigate the judicial records of its own witnesses who have been subject to criminal proceeding, prior to calling them to testify.[5]

Submissions

3. The Defence argues that once the Prosecution accessed the witnesses' criminal files in Rwanda it should have produced all the statements therein in order to provide a "complete and accurate picture". According to the Defence, fairness requires the Chamber to ensure that the Defence obtains the confessions. The Defence had no obligation to request the confessions from Rwanda, and could not have imagined that their existence would become relevant to the proceedings. The Defence refrained from requesting materials out of fear that the witnesses might refuse to testify if the Rwandan authorities suspected that they were Defence witnesses before the ICTR.

4. The Prosecution argues that the motion is moot with regard to Witness NKZ, as the Chamber has already made an oral ruling in respect of this witness. The Defence was under an obligation to obtain the criminal files of its witnesses. Rule 98 does not provide a legal basis for the motion, as it is reserved for orders made pursuant to the Chamber's own initiative.

Deliberations

5. Rule 98 provides that a "Trial Chamber may *proprio motu* order either party to produce additional evidence. It may itself summon witnesses and order their attendance". The provision leaves it to the discretion of the Chamber whether to make such an order. Trial Chambers have resorted to this provision, for instance, when the information could be considered as material for the preparation of the Defence case or to determine the credibility of Prosecution witnesses.[6]

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[1] *Karera*, T. 14 August 2006 pp. 36-59; T. 16 August 2006 pp. 11-16.
[2] *Karera*, T. 14 August 2006 pp. 50, 60, 68; T. 16 August 2006 pp. 20, 23-24.
[3] *Karera*, T. 14 August 2006 p. 68.
[4] *Karera*, T. 15 August 2006 p. 1.
[5] *Karera*, T. 16 August 2006 pp. 26-27 ("The Chamber recalls that before any party presents a witness for trial, that party will have to consider whether the witness is useful to the presentation of its case. This goes for Prosecution witnesses as well as for Defence witnesses. When any of the witnesses presented is an accused or a convict, or is suspected of having been engaged in criminal proceedings or behaviour, then that party has to investigate any criminal antecedents of that witness. Again, this is the same for both parties. If that party is not successful in its investigation, it may, before calling that witness, seize the Chamber and argue that in spite of its best efforts it has not been able to obtain the documents, and the Chamber will then assist the party if there is a basis for that based on submissions. In such a motion, that party must show that it has made efforts to succeed. During the examination of the witness, the other party cross-examining the witness has the right to impeach that witness. It may use any document without any prior disclosure to the party that is presenting that witness. This is part of the general credibility exercise which any party would wish to perform; there is no disclosure obligation there. Then to the issue whether there is, according to the Defence - and that is their argument - that there should not be any selective submission of documents to the Court. The situation in this case is as follows: The OTP has explained that the 1998 confession, which has been referred to by the witness, is not in its possession. The Prosecution doesn't have it, and the Prosecution disputes that such a document exists. The Prosecutor is an officer of the court. The Chamber considers both parties as officers of the court. Based on this assessment, we cannot take this any further.")
[6] In *Bagilishema*, the Chamber ordered the Prosecution, pursuant to Rule 98, to produce written confessions of its witnesses, because "[t]he Chamber is of the view that the said written confessions could be material in evaluating the credibility of the said Prosecution witnesses". *Bagilishema,* Decision on the Request of the Defence for an Order for Disclosure by the

6. On 15 August 2006, this Chamber made an oral ruling to the effect that it would not exercise its discretion under Rule 98 in relation to Witness NKZ's confession.[7] The Chamber sees no reason to amend its decision.

7. Rule 98 does not give the parties any right to request additional evidence. It is for the Chamber to exercise its discretion.[8] The Chamber did not make any ruling with respect to Witness ZIH during the trial. The present motion was filed on 24 August 2006, one day after the close of the Defence case. Under these circumstances, the Chamber has decided to consider, in light of the motion, whether it shall make any decision *proprio motu* under Rule 98 in respect of this witness.

8. Witness ZIH has been accused of criminal activity in Rwanda. As mentioned in the Chamber's oral ruling of 16 August 2006, it was to be expected that the Defence should have investigated his criminal files prior to calling him to testify.[9] If encountering problems, the Defence could have requested the Chamber to order Rwanda, under Article 28 of the Statute, to provide documents pertinent to the witness's criminal file, including confessions, if any. But such an order requires that the party demonstrates first, that it has made reasonable attempts to obtain the requested documents without being successful, and second, describes with particularity the nature and relevance of the information.[10] However, it follows from the Defence submissions that it made a deliberate decision not to make inquiries into the files of these witnesses, based on its experience with fearful and reluctant witnesses. Under these circumstances, the Chamber will not exercise its discretion *proprio motu*. In making its decision, the Chamber has taken into consideration the purported contents of the confession, viewed in the context of the witness's testimony. It is also noted that the alleged confession does not have a direct bearing on the alleged role of the Accused during the events.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 1 September 2006.

[Signed] : Erik Møse; Sergei Alekseevich Egorov; Florence Rita Arrey

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Prosecutor of the Admissions of Guilt of Witness Y, Z, and AA (TC), 8 June 2000, para 10. In *Bagosora*, the Chamber ordered the Prosecution, under Rule 98, to obtain judicial records of Prosecution witnesses from Rwanda, and to disclose them to the Defence, as the documents were considered "important for the preparation of the defence". *Bagosora et al.,* Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003, para. 7. Similarly, in *Simba*, the Chamber ordered the Prosecution, pursuant to Rule 98, to obtain and disclose files of its own witness "given the importance of these records to the preparation of the parties and given the familiarity of the Prosecution with its witnesses". *Simba*, Decision on Matters related to Witness KDD's Judicial Dossier (TC), 1 November 2004, para 11. However, in another decision in *Simba*, the Chamber denied a similar motion by the Defence, requesting the judicial records of two other Prosecution witnesses because "from the testimony of these witnesses, the materials requested by the Defence do not appear to directly relate to the credibility of any allegations against the Accused". *Simba*, Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68 (TC), 4 October 2004, para. 9.

[7] Above, note 4.

[8] *Semanza*, Decision on the Defence Motion for Orders Calling Prosecution Witness VZ Listed in Prosecution Witness List of November 2000 (TC), 6 September 2001, para. 6 ("Rule 98 is therefore solely at the disposal of the Chamber, acting in its own deliberative discretion. It is not a Rule upon which parties may rely in seeking to bring evidence before the Tribunal").

[9] Above, note 5.

[10] *Simba*, Decision on Matters related to Witness KDD's Judicial Dossier (TC), 1 November 2004, para 9.

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Decision on Site Visit to Rwanda
1 September 2006 (ICTR-2001-74-T)

(Original : not specified)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Sergei Alekseevich Egorov; Florence Rita Arrey

François Karera – Site visit – Rwanda – Chamber's exercise of its function away from the Seat of the Tribunal – Particular circumstances, Ability of some witnesses to observe the events about which they testified, Locations of observation – Authorization of the President requested by the Chamber

International Instrument Cited :

Rules of Procedure and Evidence, Rule 4

International Cases Cited :

I.C.T.R.: 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. Aloys Simba, Decision on Defence Visits in Rwanda, 4 May 2005 (ICTR-2001-76) ; Trial Chamber, The Prosecutor v. André Rwamakuba, Decision on Defense Motion for a View Locus in Quo, 16 December 2005 (ICTR-98-44C) ; 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 Sergei Alekseevich Egorov, and Judge Florence Rita Arrey;

BEING SEIZED OF the "Prosecutor's Motion for a View *Locus in Quo*", filed on 27 March 2006;

CONSIDERING the Defence Response, filed on 12 May 2006;

HEREBY DECIDES the motion.

Introduction

1. The Prosecution requests that the Chamber visit locations in Rwanda that are relevant to this trial, in particular, Nyamirambo sector in Nyarugenge *commune*; Ntarama *secteur* in Kanzenze *commune*; and Rushashi *commune*. Many of the disputed issues at trial relate to physical attributes of sites where the offences are alleged to have been committed. A site visit will therefore assist the Chamber in its assessment of issues of visibility, layout of buildings, distances between locations and correlative proximity of places. A first hand familiarization with the relevant locations will assist in the fair and expeditious determination of the case. The Defence concurs with the Prosecution motion,

and requests to add another location to the visited sites, the Ruhengeri campus of the National University of Rwanda, which is relevant to its defence of alibi.

2. The motion was filed in March 2006, during the Prosecution case. This decision is rendered at the end of the presentation of the cases of both parties. In the present circumstances, this will best contribute to the discovery of the truth and determination of the case.[1]

Deliberations

3. 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". In accordance with the jurisprudence of the Tribunal, the Chamber must assess a request for a site visit on the basis of the particular circumstances in each case.[2] The Chamber recalls that the ability of some witnesses to observe the events about which they testified was disputed. These witnesses implicated the Accused in activities in Nyamirambo *secteur*, Ntarama *secteur*, and Rushashi *commune*. A visit to the locations from where these witnesses allegedly observed the events they described, could contribute to the discovery of the truth and determination of the case. It seems unlikely, however, that a visit to the Ruhengeri campus will advance the Chamber's evaluation of the evidence, especially since no criminal events were alleged to have taken place there.

4. The Chamber considers that a visit to Nyamirambo, Ntarama and Rushashi could be conducted within a period of three days. It should take place from 1 to 3 November 2006.

FOR THE ABOVE REASONS, THE CHAMBER

REQUESTS the President to authorize the Chamber's exercise of its function away from the Seat of the Tribunal, pursuant to Rule 4 of the Rules; and if such authorization is granted,

REQUESTS the Registry to make all the necessary arrangements, in liaison with the Chamber and the parties, to facilitate the implementation of this decision.

Arusha, 1 September 2006

[Signed] : Erik Møse; Sergei Alekseevich Egorov; Florence Rita Arrey

[1] *Ndayambaje*, 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 (TC), 23 September 2004, para. 14; *Bagosora*, Decision on Prosecutor's Motion for Site Visits in the Republic of Rwanda (TC), 29 September 2004, para. 4; *Simba*, Decision on the Defence Request for Site Visits in Rwanda (TC), 31 January 2005, para. 2; *Mpambara*, Decision on the Prosecution Motion for a Site Visit, 10 February 2006, para. 4.

[2] *Bagosora et al*., Decision on Prosecutor's Motion for Site Visits in the Republic of Rwanda (TC), 29 September 2004, para. 4; *Simba*, Decision on the Defence Request for Site Visits in Rwanda (TC), 31 January 2005, para. 2; *Simba*, Decision on Defence Visits in Rwanda (TC), 4 May 2005, para. 2; *Rwamakuba*, Decision on Defence Motion for a *View Locus in Quo* (TC), 16 December 2005, para. 6; *Mpambara*, Decision on the Prosecution Motion for a Site Visit, 10 February 2006, para. 4.

Le Procureur c. François KARERA

Affaire N° ICTR-2001-74

Fiche technique

• Nom: KARERA

• Prénom: François

• Date de naissance: 1939

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: Préfet de Kigali-*rural* préfecture

• Date de confirmation de l'acte d'accusation: 8 juin 2001

• Date de modification de l'acte d'accusation: 19 décembre 2005

• Chefs d'accusation: génocide ou, subsidiairement, complicité dans le génocide, crimes contre l'humanité (extermination et assassinat)

• Date et lieu de l'arrestation: 20 octobre 2001, à Nairobi, Kenya

• Date du transfert: 21 octobre 2001

• Date de la comparution initiale: 26 octobre 2001

• Date du début du procès: 9 janvier 2006

• Date et contenu du prononcé de la peine: 7 décembre 2007, condamné à la prison à vie pour le restant de ses jours

• Appel: 2 février 2009, décision confirmée

Décision relative à la requête de la Défense aux fins d'une ordonnance de mesures de protection des témoins à décharge
9 février 2006 (ICTR-2001-74-T)

(Original : Anglais)

Chambre de première instance I

Juge : Erik Møse

François Karera – Protection des témoins à décharge – Craintes réelles et objectives – Equité du procès – Requête acceptée – Mesures: Confidentialité, Possibilité pour le Procureur de contacter les témoins, Communication de l'identité des témoins

Instruments internationaux cités :

Règlement de procédure et de preuve, art. 69, 69 (C), 73 et 75 ; Statut, art. 19 et 21

Jurisprudence internationale citée :

T.P.I.R.: Chambre de première instance, Le Procureur c. Ferdinand Nahimana, Decision on the Defendant's Motion for Witness Protection, 25 février 2000 (ICTR-96-11) ; Chambre de première instance, Le Procureur c. Georges Ruggiu, Décision relative à la requête de la defense en prescription de mesures de protection en faveur d'un témoin, 9 mai 2000 (ICTR-97-32) ; Chambre de première instance, Le Procureur c. Elizaphan Ntakirutimana et Gérard Ntakirutimana, Décision relative à la requête du Procureur en prescription de mesures de témoins à charge, 22 août 2000 (ICTR-96-17) ; Chambre de première instance, Le Procureur c. Laurent Semanza, Décision sur la requête de la défense aux fins de mesure de protection en faveur des témoins (article 75), 24 mai 2001 (ICTR-97-20) ; Chambre de première instance, Le Procureur c. Eliezer Niyitegeka, Décision (Requête de la Défense aux fins de mesures de protection des témoins à décharge), 14 août 2002 (ICTR-96-14) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision sur la requête de Bagosora en prescription de mesures de protection des témoins, 1 septembre 2003 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Décision relative à la requête de Kabiligi aux fins de protection des témoins, 1 septembre 2003 (ICTR-98-41) ; Chambre d'appel, Le Procureur c. Théoneste Bagosora et consorts, Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 octobre 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Francois Karera, Decision on Motion for Protective Measures for Prosecution Witnesses, 1 décembre 2005 (ICTR-2001-74) ; Chambre de première instance, Le Procureur c. Théoneste Bagasora et consorts, Decision Amending Defence Witness Protection Orders, 2 décembre 2005 (ICTR-98-41)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la personne du juge Erik Møse, désigné par la Chambre de première instance conformément à l'article 73 du Règlement de procédure et de preuve (le « Règlement »),

SAISI de la Requête aux fins d'une ordonnance de mesures de protection des témoins à décharge, déposée par la Défense le 1er février 2006,

CONSTATANT que le Procureur n'a pas soumis d'observations,

STATUE CI-APRÈS sur la requête

1. La requête en prescription de mesures spéciales de protection de l'identité des témoins qui seront appelés par la Défense de Karera a été présentée en vertu des articles 19 et 21 du Statut et 69 et 75 du Règlement. Aux termes de l'article 19 du Statut, le Tribunal veille à ce que la protection des victimes et des témoins soit dûment assurée au cours du procès. L'article 21 du Statut fait obligation au Tribunal de prévoir dans son Règlement des mesures de protection des victimes et des témoins. Ces mesures comprennent, sans y être limitées, la tenue d'audiences à huis clos et la protection de l'identité des victimes. L'article 75 du Règlement énumère plusieurs mesures concrètes de protection qui peuvent être prescrites, notamment la mise sous scellés ou la suppression, dans les dossiers du Tribunal, du nom de l'intéressé et autres indications permettant de l'identifier, l'emploi d'un pseudonyme pour désigner un témoin et la tenue d'audiences à huis clos. Sous réserve de ces mesures, l'article 69 (C) du Règlement prévoit que l'identité des témoins doit être divulguée au Procureur dans un délai lui accordant le temps nécessaire à sa préparation.

2. Les mesures de protection des témoins sont accordées au cas par cas. Selon la jurisprudence du Tribunal de céans et du Tribunal pénal international pour l'ex-Yougoslavie, les témoins en faveur desquels des mesures de protection sont demandées doivent éprouver une crainte réelle pour leur sécurité ou celle de leur famille, et cette crainte doit reposer sur des raisons objectives. Cette crainte peut être exprimée par des personnes autres que les témoins eux-mêmes. Un autre principe qui doit être pris en compte est celui de l'équité du procès, d'après lequel les témoins à décharge et à charge doivent bénéficier de mesures similaires ou identiques[3].

3. La Défense de Karera affirme que les témoins à décharge craignent pour leur sécurité et que leur crainte est justifiée par les dangers et l'insécurité dont font état les rapports joints à la requête intitulée « *The Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment (Pursuant to Article 21, Rules 54, 69, 73 and 75)* » déposée le 24 novembre 2005. La Chambre se conforme aux décisions antérieures relatives à la protection des témoins à décharge et admet que les témoins à décharge éprouvent de telles craintes et que celles-ci reposent sur des raisons objectives[4]. Elle conclut donc que les conditions requises pour la prescription de mesures de protection des témoins sont réunies.

4. Les mesures demandées par la Défense de Karera sont dans une large mesure identiques à celles déjà accordées aux témoins à charge en l'espèce. Le souci de l'équité du procès et de la simplicité administrative milite fortement en faveur de l'adoption de mesures identiques, qui sont énoncées ci-dessous dans les termes utilisés habituellement pour ce genre de mesures[5].

5. La Défense de Karera demande en particulier que la Chambre prescrive des mesures de protection de l'identité des témoins à décharge KBA, BBM, YMK, YCK, BBA et KBG où qu'ils résident et qui n'ont pas expressément renoncé à leur droit de bénéficier des mesures de protection. Conformément à la pratique établie, la Chambre rend une ordonnance générale. La Défense communiquera au Procureur des informations non caviardées 35 jours avant le début de la présentation des moyens à décharge.

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[3] Affaire *Bagosora et consorts,* Décision sur la Requête de Bagosora en mesures de protection des témoins, 1er septembre 2003, p. 2 ; affaire *Bagosora et consorts,* Décision relative à la requête de Kabiligi aux fins de protection de témoins, 1er septembre 2003, p. 2 ; affaire *Niyitegeka*, Décision (Requête de la Défense aux fins de mesures de protection des témoins à décharge), 14 août 2002, p. 4 ; affaire *Elizaphan et Gérard Ntakirutimana*, Décision relative à la requête du Procureur en prescription de mesures de protection des témoins à charge, 22 août 2000, p. 2 à 4.

[4] Voir les décisions mentionnées à la note de bas de page 1. Voir aussi affaire *Semanza*, Décision sur la requête de la Défense aux fins de mesures de protection en faveur des témoins (article 75), 24 mai 2001, p. 3 ; affaire *Nahimana*, Décision relative à la requête de la Défense aux fins d'obtenir des mesures de protection de témoins à décharge, 25 février 2000, p. 3 ; affaire *Ruggiu,* Décision relative à la requête de la Défense en prescription de mesures de protection en faveur d'un témoin, 9 mai 2000, p. 3.

[5] Dans l'affaire *Karera,* les mesures de protection en faveur des témoins à charge sont prescrites dans la Décision relative à la requête du Procureur en prescription de mesures de protection des témoins, 1er décembre 2005.

6. La demande de la Défense visant à ce que le Procureur lui remette une liste de toutes les personnes au Bureau du Procureur qui auront accès à l'information protégée est rejetée. Le Procureur doit bien sûr veiller à ce que son personnel ne divulgue pas les informations confidentielles à d'autres personnes, mais la façon dont le Procureur s'assure de la non-divulgation de ces informations relève exclusivement de son pouvoir d'appréciation[6].

PAR CES MOTIFS, LA CHAMBRE

PRESCRIT LES MESURES SUIVANTES :

1. La Défense de Karera attribuera à chaque témoin pour lequel elle réclame le bénéfice de l'application de la présente ordonnance un pseudonyme par lequel celui-ci sera désigné dans les procédures devant le Tribunal, dans les communications ainsi que dans les discussions entre les parties et les relations avec le public.

2. Les noms, adresses et lieux de résidence des témoins protégés ainsi que tous autres renseignements permettant de les identifier seront placés sous scellés par le Greffe et ne figureront dans aucun dossier non confidentiel du Tribunal ou autrement accessible au public.

3. Au cas où les noms, adresses et lieux de résidence des témoins protégés ainsi que tous autres renseignements permettant de les identifier apparaîtraient dans les dossiers publics du Tribunal, ils devront être expurgés desdits dossiers et mis sous scellés.

4. La Défense de Karera communiquera au Greffe sous le sceau de la confidentialité l'identité des témoins protégés, ces renseignements n'étant pas communiqués au Procureur, sauf s'il en est décidé autrement.

5. Il est interdit de faire ou de diffuser des enregistrements sonores ou vidéo des témoins protégés ou de faire des photos ou des croquis de ceux-ci, sauf autorisation de la Chambre ou du témoin concerné.

6. Avant toute prise de contact avec un témoin à décharge, le Procureur ou un membre de son Bureau agissant en son nom devra aviser par écrit la Défense de Karera ; si le témoin y consent, la Défense prendra les dispositions nécessaires pour faciliter ce contact.

7. Le Procureur gardera confidentiellement en sa possession tous les renseignements permettant d'identifier un témoin visé par la présente décision et ne communiquera, ne discutera ni ne divulguera ces renseignements, directement ou indirectement.

8. La Défense de Karera pourra ne pas communiquer au Procureur l'identité de tous les témoins protégés et caviarder temporairement dans les documents qu'elle communiquera au Procureur leurs noms, adresses et lieux de résidence ainsi que tous autres renseignements permettant de les identifier. Elle devra toutefois communiquer ces renseignements au Procureur 35 jours avant le début de la présentation des moyens à décharge, afin d'accorder à celui-ci le temps nécessaire à sa préparation comme le prévoit l'article 69 (C) du Règlement.

Arusha, le 9 février 2006.

[Signé] : Erik Møse

[6] *Bagosora et consorts*, *Decision Amending Defence Witness Protective Orders*, Chambre de première instance, 2 décembre 2005, par. 5 (appliquant la décision rendue dans cette même affaire et intitulée « *Decision on Interlocutory Appeals of Decision on Witness Protection Orders* », Chambre d'appel, 6 octobre 2005).

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Décision relative à la demande de précisions au sujet des témoins à décharge et report du procès
25 avril 2006 (ICTR-2001-74-T)

(Original : Anglais)

Chambre de première instance I

Juges : Erik Møse, Président; Sergei Alekseevich Egorov; Florence Rita Arrey

François Karera – Précisions au sujet de témoins – Report de procès – Absence de certains éléments pertinents, Identification des témoins – Requête acceptée en partie

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIEGEANT en la Chambre de première instance I (la « Chambre »), composée des juges Erik Møse, Sergei Alekseevich Egorov et Florence Rita Arrey,

SAISI de la requête du Procureur intitulée *Motion for Continuance of Trial Session, Pursuant to Rule 73 (A)*, déposée le 24 avril 2006,

STATUANT CI-APRES SUR LA REQUETE

Introduction

1. Le 18 avril 2006, le Procureur a déposé une requête sollicitant la communication de renseignements complémentaires et plus précis au sujet des témoins à décharge. La Chambre a été informée que la Défense donnerait suite à ladite requête. Le Procureur a ensuite déposé une nouvelle requête dans laquelle il indique que, le 21 avril 2006, il a reçu de la Défense des informations supplémentaires au sujet de 18 témoins à décharge, mais que celles-ci ne précisent pas tous les éléments d'identification des témoins. Le Procureur veut en particulier savoir qui sont les parents des témoins et obtenir des informations précises concernant le lieu de naissance et le lieu de résidence de chaque témoin en 1994.

Délibération

2. La Chambre a examiné les informations fournies par la Défense. Il est vrai, comme l'affirme le Procureur, que certains éléments pertinents font défaut. Aucun renseignement n'est fourni au sujet des parents des dix-huit témoins énumérés à l'annexe A à la Requête. En outre, on ne dispose pas d'informations sur le secteur, la cellule, la commune et la préfecture de naissance de certains témoins et/ou leur lieu de séjour en 1994.

3. Antérieurement, dans sa décision intitulée *Décision on Motion for Further Alibi Particulars* datée du 7 mars 2006, la Chambre a clairement indiqué quels éléments d'identification du témoin la Défense devait fournir pour se conformer au *Règlement de procédure et de preuve*. En conséquence, la Chambre ordonne à la Défense d'apporter ces précisions relativement à tous ses témoins.

4. La Chambre ne voit pas sur quelle base elle accorderait un report de la procédure.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT à la requête du Procureur pour ce qui est d'obtenir des précisions supplémentaires au sujet des témoins à décharge ;

ORDONNE à la Défense de fournir tous les éléments d'identification des témoins à décharge conformément aux indications données dans sa décision du 7 mars 2006 ;

REJETTE la demande de report de la session du procès.

Arusha, le 25 avril 2006.

[Signé] : Erik Møse; Sergei Alekseevich Egorov; Florence Rita Arrey

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Décision relative à la requête tendant à faire entendre des dépositions par voie de vidéoconférence
29 juin 2006 (ICTR-2001-74-T)

(Original : Anglais)

Chambre de première instance I

Juges : Erik Møse, Président; Sergei Alekseevich Egorov; Florence Rita Arrey

François Karera – Dépositions par voie de vidéoconférence, Bruxelles ou La Haye – Intérêt de la justice – Importance de la déposition, Déposition tendant directement à prouver l'alibi de l'accusé – Incapacité ou réticence des témoins à comparaître, Crainte pour leur sécurité, Crainte de perdre la source de revenu – Requête acceptée en partie

Instrument international cité :

Règlement de procédure et de preuve, art. 54, 71 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. 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. Théoneste Bagosora et consorts, Decision on Ntabakuze Motion to Allow Witness DK52 to Give Testimony by Video-Conference, 22 février 2005 (ICTR-98-41)

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA,

SIEGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président de Chambre, Sergei Alekseevich Egorov et Florence Rita Arrey,

SAISI d'une requête de la Défense intitulée *Extremely Urgent Defence Application for Testimony to be taken by Video-Conference* et du Supplément à cette requête déposés respectivement le 5 et le 12 mai 2006,

STATUE sur la requête de la Défense.

Introduction

1. Les témoins à décharge YMK, BBM, BBA et KMS résident en Europe et refusent de se rendre à Arusha. La Défense demande qu'ils soient autorisés à déposer par voie de vidéoconférence de Bruxelles ou de La Haye. Invoquant à ce propos les articles 54 et 71 du *Règlement de procédure et de preuve* (le « Règlement »), elle fait valoir que l'intérêt de la justice et les droits de l'accusé justifient l'audition de ces témoins par vidéoconférence. Le Procureur ne s'oppose pas à sa requête[1].

Délibération

2. La déposition par voie de vidéoconférence est une exception à la règle générale énoncée à l'article 90 (A) du Règlement qui dispose qu'« en principe les Chambres entendent les témoins en personne[2] ». La Chambre peut autoriser un témoin à déposer par voie de vidéoconférence lorsqu'il s'avère, à la lumière des éléments indiqués ci-après, que l'intérêt de la justice le commande : la déposition du témoin est importante, celui-ci ne peut pas ou ne veut pas comparaître au prétoire et des raisons valables ont été avancées pour justifier son incapacité ou sa réticence à comparaître au prétoire. Lorsque le témoin rechigne à comparaître au prétoire, son refus doit être réel et bien fondé, donnant ainsi à la Chambre des raisons de croire qu'il ne déposera pas si elle n'autorise pas la vidéoconférence[3].

Importance de la déposition

3. Les témoins YMK, BBA et BBM ont été cités à l'appui de l'alibi invoqué par la Défense qui fait valoir que leurs dépositions sont importantes pour son dossier. Les témoins YMK et BBA parleront en principe de la présence de l'accusé à Ruhengeri en avril 1994. Quant au témoin BBM, il établira que l'accusé ne se trouvait pas dans la cellule de Cyivugiza après le 6 avril 1994. La Chambre ne considère pas que les récits de ces personnes viennent simplement s'ajouter à ceux d'autres témoins déjà appelés par la Défense à l'appui de son alibi. Soucieuse du respect des droits de l'accusé consacrés par l'article 20 du Statut, la Chambre estime que toute déposition tendant directement à prouver l'alibi de l'accusé joue un rôle dans la présentation des moyens à décharge.

4. En ce qui concerne le témoin KMS, la Défense n'a pas démontré en quoi sa déposition est indispensable dans la présentation des moyens à décharge. En outre, la Défense a indiqué oralement à la Chambre que ce témoin pourrait finalement se laisser convaincre de se rendre à Arusha[4].

[1] Compte rendu de l'audience du 18 mai 2006, p. 32.
[2] 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, 14 septembre 2001; par. 35 ; affaire *Bagosora et consorts*, *Decision on Prosecution Request for Testimony of Witness BT Via Video-Link* (Chambre de première instance), 8 octobre 2004 (Décision *Bagosora* du 8 octobre 2004), par. 15 ; affaire *Bagosora et consorts*, *Decision on Testimony by Video-Conference* (Chambre de première instance) 20 décembre 2004 (Décision *Bagosora* du 20 décembre 2004), par. 4.
[3] Décision *Bagosora* du 8 octobre 2004, par. 6 et 7 ; Décision *Bagosora* du 20 décembre 2004, par. 4 ; affaire *Bagosora,* 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 (Décision *Bagosora* du 22 février 2005), par. 4.
[4] Compte rendu de l'audience du 12 mai 2006, p. 8.

Incapacité ou réticence à comparaître

5. Selon la Défense, les témoins YMK et BBA refusent de se rendre à Arusha par crainte pour leur sécurité, d'autant plus qu'ils se rappellent l'« apparente exécution » d'un témoin potentiel perpétrée dernièrement à Bruxelles (Belgique). Au début, YMK avait accepté de témoigner en personne en dépit de ses appréhensions, mais il a changé d'avis à cause de deux événements récents qui ont aggravé ses craintes, à savoir l'absence du Procureur à un rendez-vous qu'il aurait donné au témoin et le fait que la Section d'aide aux victimes et aux témoins lui a demandé d'avancer son arrivée. La Défense affirme avoir essayé à plusieurs reprises de convaincre le témoin de se rendre à Arusha, mais en vain. La Chambre est informée de plusieurs tentatives similaires faites par la Section d'aide aux victimes et aux témoins. Elle en conclut que les craintes du témoin YMK sont réelles et qu'à cause de celles-ci, il est réticent à comparaître au prétoire[5].

6. S'agissant du témoin BBA, la crainte de perdre ses moyens de subsistance vient s'ajouter au fait qu'il a peur pour sa sécurité. En effet, il affirme qu'après avoir témoigné devant le TPIR à Arusha dans un autre procès, il a failli perdre son emploi. La Chambre considère que l'existence de difficultés pratiques d'ordre familial ou professionnel n'autorise pas en soi à faire une déposition par voie de vidéoconférence[6]. Cependant, la perte de la source de revenu d'un refugié ayant charge de famille est plus grave qu'une « difficulté pratique ». Au demeurant, les craintes du témoin BBA sont fondées sur sa propre expérience. Cela étant, la Chambre accepte les raisons qu'il a avancées pour refuser de se rendre à Arusha.

7. BBM refuse de se rendre à Arusha parce qu'elle a peur de prendre l'avion. Une peur de cette nature peut empêcher un témoin de participer au procès à Arusha. La Défense s'était engagée à fournir, au plus tard le 8 juin 2006, une attestation médicale confirmant l'état du témoin BBM, mais elle ne l'a pas fait[7]. En conséquence, la Chambre ne dispose pas d'éléments suffisants pour conclure que le témoin se trouve dans l'incapacité de se rendre à Arusha et l'autoriser de ce fait à déposer par voie de vidéoconférence[8].

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT à la requête de la Défense en ce qui concerne les témoins YMK et BBA ;

REJETTE la requête pour le surplus ;

ORDONNE au Greffe de prendre toutes les dispositions nécessaires, en consultation avec les parties, pour faciliter les dépositions des témoins YMK et BBA par voie de vidéoconférence de Bruxelles ou de La Haye et d'enregistrer ces dépositions sur vidéocassette pour permettre à la Chambre de s'y reporter par la suite s'il y a lieu.

Arusha, le 29 juin 2006.

[Signé] : Erik Møse; Sergei Alekseevich Egorov; Florence Rita Arrey

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[5] Dans une autre affaire, la Chambre a autorisé la déposition par vidéoconférence pour un témoin qui avait refusé de se rendre à Arusha par peur de représailles contre sa famille. La Chambre n'a pas pu déterminer si cette crainte reposait sur des éléments objectifs, mais a jugé que « le fait que le témoin continue de refuser de se rendre à Arusha malgré la convocation qui lui a été signifiée indique que ses craintes sont véritablement et profondément ressenties » [traduction]. Voir la Décision *Bagosora* du 8 octobre 2004, par. 13. Dans la présente affaire, aucune convocation n'a été requise. Cependant, la Défense et la Section d'aide aux victimes et aux témoins ont tenté en vain de persuader le témoin.

[6] Décision *Bagosora* du 22 février 2005, par. 5.

[7] Compte rendu de l'audience du 1er juin 2006, p. 5 et 6.

[8] Dans une autre affaire, la Chambre a autorisé la déposition par voie de vidéoconférence pour un témoin qui se trouvait dans l'impossibilité de se rendre à Arusha à cause de son état de santé. Toutefois, la lettre d'un médecin confirmant la fragilité de l'état de santé du témoin avait été jointe à la requête. Voir la Décision *Bagosora* du 20 décembre 2004, par. 1.

The Prosecutor v. Jean MPAMBARA

Case N° ICTR-2001-65

Case History

- Name: MPAMBARA
- First Name: Jean
- Date of Birth: 1954
- Sex: male
- Nationality: Rwandan
- Former Official Function: *Bourgmestre* of Rukara
- Counts: genocide or, alternatively, complicity in genocide and crime against humanity (extermination)
- Date of Indictment's Confirmation: 23 July 2001
- Date of Indictment's Amendment: 27 November 2004
- Date and Place of Arrest: 21 July 2001, in Kigoma, Tanzania
- Date of Transfer: 23 June 2001
- Date of Initial Appearance: 8 August 2001
- Date Trial Began: 19 September 2005
- Pleading: not guilty
- Date and content of the Sentence: 12 September 2006, Acquittal and release

Order for Transfer of Defence Witnesses RU2 and RU8
4 January 2006 (ICTR-2001-65-T)

(Original : English)

Trial Chamber I

Judge : Sergei Alekseevich Egorov

Jean Mpambara – Transfer of detained witnesses – Rwanda – Conditions satisfied – Motion granted

International Instruments Cited :

Rules of Procedure and Evidence, Rules 73 (A), 90 bis and 90 bis (B)

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Emmanuel Ndindabahizi, Order for Transfer of Defence Witnesses DC, DM, DN, DO and DR, Pursuant to Rule 90 bis, 2 October 2003 (ICTR-2001-71) ; Trial Chamber, The Prosecutor v. Bagosora et al., Order for the Transfer of Prosecution Witness DO, 15 September 2005 (ICTR-98-41)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Sergei Alekseevich Egorov, designated by the Chamber in accordance with Rule 73 (A) of the Rules of Procedure and Evidence ("the Rules");

BEING SEIZED of the Defence Requête Urgente Aux Fins de Transfert de Témoins Detenus Conformément à l'Article 90 bis du Reglement de Procedure et de Preuve, filed on 3 January 2006;

HEREBY DECIDES the motion.

1. The Mpambara Defence requests the Chamber to order the transfer of two of its witnesses, who are detained in Rwanda, under Rule 90 *bis* of the Rules. Rule 90 *bis* (B) sets two conditions for such an order: first, that "the 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 "transfer … does not extend the period of his detention as foreseen by the requested State". Annexed to the motion is a letter, dated 28 December 2005, from the Rwandan Ministry of Justice indicating that the witnesses are available to be transferred, which implies that the two conditions set out in Rule 90 *bis* (B) are satisfied.[9] Accordingly, the Chamber finds that the requirements for the transfer of Witness RU2 and Witness RU8 under Rule 90 *bis* are met.

FOR THE ABOVE REASONS, THE CHAMBER

ORDERS, conditional upon the agreement of the Government Rwanda, that the individuals designated by the pseudonyms RU2 and RU8 shall be temporarily transferred pursuant to Rule 90 *bis* of the Rules to the Detention Unit in Arusha;

REQUESTS the Government of Rwanda to facilitate the transfer in cooperation with the Registrar and the Tanzanian Government;

[9] *Bagosora et al*., Order for the Transfer of Prosecution Witness DO (TC), 15 September 2005, para. 1; *Ndindabahizi*, Order for Transfer of Defence Witnesses DC, DM, DN, DO and DR, Pursuant to Rule 90 *bis* (TC), 2 October 2003, para. 2.

INSTRUCTS the Registrar to:

(A) transmit this decision to the Governments of Rwanda 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 length of the temporary detention, and as soon as possible, inform the Trial Chamber of any such change.

Arusha, 4 January 2006.

[Signed] : Sergei Alekseevich Egorov

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Decision on the Prosecution Motion for a Site Visit
10 February 2006 (ICTR-2001-65-T)

(Original : not specified)

Trial Chamber I

Judges : Jai Ram Reddy, Presiding Judge; Sergei Alekseevich Egorov; Flavia Lattanzi

Jean Mpambara – Site visit – Rwanda – Chamber's exercise of its function away from the Seat of the Tribunal – Particular circumstances, Many of the disputed issues concerning the physical attributes of various sites of the commune – Grant of the motion subject to approval by the President – Authorization of the President requested by the Chamber

International Instrument Cited :

Rules of Procedure and Evidence, Rules 73 (A), 90 bis and 90 bis (B)

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Ignace Bagilishema, Judgement, 7 June 2001 (ICTR-95-1A) ; Trial Chamber, The Prosecutor v. Elie Ndayambaje et al., Decision on Prosecution'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. Aloys Simba, Decision on Defence Renewed Request for Site Visits in Rwanda, 4 May 2005 (ICTR-2001-76) ; Trial Chamber, The Prosecutor v. André Rwamakuba, Decision on Defense Motion for a View Locus in Quo, 16 December 2005 (ICTR-98-44C)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber I, composed of Judge Jai Ram Reddy, presiding, Judge Sergei Alekseevich Egorov, and Judge Flavia Lattanzi;

BEING SEIZED OF the "Prosecution Motion for a View *Locus in Quo*", filed on 30 January 2006;

CONSIDERING the parties' oral submissions at the Status Conference on 9 February 2006;

CONSIDERING the "Réplique de la Défense à la Requête du Procureur en vue du Déplacement du Tribunal sur les Lieux", filed on 9 February 2006;

HEREBY DECIDES the motion.

Introduction

1. The Prosecution seeks to have the Judges of Trial Chamber I visit Rukara *commune* in order to familiarize themselves with the locations that are relevant to this case. In support of its request, the Prosecution submits that many of the disputed issues at trial turn on physical aspects of specific sites where offences are alleged to have been committed and argues that a site visit will allow the Chamber to more accurately assess the evidence adduced at trial. It further argues that a site visit can be accomplished with relative ease because the events occurred at a limited number of sites and can be accessed without any real difficulty from Kigali.

2. The Defence concurs that a site visit would assist the Chamber in more fairly assessing the evidence in this case in light of the topography of the area over which the Accused was responsible as *bourgmestre* of Rukara *commune* and the structure and location of the various sites at issue.

Deliberations

3. 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".

4. In accordance with the jurisprudence of the Tribunal, the Chamber must assess the request for a site visit on the basis of the particular circumstances in each case.[1] A decision to carry out a site visit should preferably be made when the visit will be instrumental in the discovery of the truth and determination of the matter before the Chamber.[2] At least one Trial Chamber has expressed the view that such visits should ideally take place at the close of presentation of the Prosecution and Defence cases.[3]

5. The Chamber agrees with the parties' submissions that many of the disputed issues at trial relate to physical attributes of various sites in Rukara *commune* and therefore finds that the particular circumstances in this case warrant a site visit. The Chamber has reviewed the itinerary suggested by the Prosecution, which the Defence does not appear to oppose, and the Chamber is satisfied that the proposed sites are relevant to the charges against the Accused and the evidence adduced at trial. Moreover, the Chamber notes that the proposed itinerary only requires two days and does not involve

[1] *Bagosora et al*., Decision on Prosecutor's Motion for Site Visits in the Republic of Rwanda (TC), 29 September 2004, para. 4; *Simba*, Decision on the Defence Request for Site Visits in Rwanda (TC), 31 January 2005, para. 2; *Simba*, Decision on Defence Visits in Rwanda (TC), 4 May 2005, para. 2; *Bagilishema*, Judgement (TC), 7 June 2001, para. 10; *Rwamakuba*, Decision on Defence Motion for a *View Locus in Quo* (TC), 16 December 2005, para. 6.
[2] *Bagosora*, Decision on Prosecutor's Motion for Site Visits in the Republic of Rwanda (TC), 29 September 2004, para. 4.
[3] *Ndayambaje*, 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 (TC), 23 September 2004, para. 15. See also *Bagosora*, Decision on Prosecutor's Motion for Site Visits in the Republic of Rwanda (TC), 29 September 2004, para. 4.

difficult logistical planning or significant costs to the Tribunal. The Chamber notes, however, that its grant of the Prosecution motion is subject to approval by the President in accordance with Rule 4.

6. In order to facilitate scheduling for the parties, particularly the Defence, the Chamber finds that the site visit should occur in conjunction with closing arguments, which are set for 2-3 May 2006. The Chamber therefore orders the site visit to take place between Wednesday, 26 April 2006 and Friday, 28 April 2006.

FOR THE ABOVE REASONS, THE CHAMBER

REQUESTS the President to authorize the Chamber's exercise of its function away from the Seat of the Tribunal, pursuant to Rule 4 of the Rules; and if such authorization is granted,

REQUESTS the Registry to make all the necessary arrangements, in liaison with the Chamber and the parties, to facilitate the implementation of this decision.

Arusha, 10 February 2006.

[Signed] : Jai Ram Reddy; Sergei Alekseevich Egorov; Flavia Lattanzi

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Judgement
11 September 2006 (ICTR-2001-65-T)

(Original : English)

Trial Chamber I

Judges : Jai Ram Reddy, Presiding Judge; Sergei Alekseevich Egorov; Flavia Lattanzi

Jean Mpambara – Genocide and extermination as a crime against humanity – Liability for omissions – Clarification of the charges, Accused charged with co-perpetrating, ordering, instigating, and aiding and abetting – Evidence, Standard of reasonable doubt, Credibility of witnesses – Rights of the Accused, Understanding of the charges against him, Material facts falling outside the scope of the indictment – Verdict – Acquittal – Immediate release

International Instruments Cited :

Rules of Procedure and Evidence, Rule 99 (A); Statute, Art. 2 (2), 3, 6 (1), 6 (3) and 20 (4) (a)

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. 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) ; Appeals Chamber, The Prosecutor v. Clément Kayishema and Obed Ruzindana, Judgement (Reasons), 1 June 2001 (ICTR-95-1) ; Trial Chamber, The Prosecutor v. Ignace Bagilishema, Judgement, 7 June 2001 (ICTR-95-1A) ; Appeals Chamber, The Prosecutor v. Alfred Musema, Judgement, 16 November 2001 (ICTR-96-13) ; 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. Laurent Semanza, Judgement and Sentence, 15 May 2003 (ICTR-97-20) ; Trial Chamber, The Prosecutor v. Eliezer Niyitegeka, Judgement, 16 May 2003 (ICTR-96-14) ; Appeals Chamber, The Prosecutor v. Georges Rutaganda, Judgement, 26 May 2003 (ICTR-96-3) ; Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Judgement and Sentence, 3 December 2003 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. André Ntagerura et al., Judgement and Sentence, 25 February 2004 (ICTR-99-46) ; 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) ; 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. Vincent Rutaganira, Judgment, 14 March 2005 (ICTR-95-1C) ; Appeals Chamber, The Prosecutor v. Laurent Semanza, Judgement, 20 May 2005 (ICTR-97-20) ; Trial Chamber, The Prosecutor v. Aloys Simba, Judgement, 13 December 2005 (ICTR-2001-76) ; Trial Chamber, The Prosecutor v. Paul Bisengimana, Judgment, 13 April 2006 (ICTR-2000-60)

I.C.T.Y.: Trial Chamber, The Prosecutor v. Zlatko Aleksovski, Judgement, 25 June 1999 (IT-95-14/1) ; Appeals Chamber, The Prosecutor v. Duško Tadić, Judgement, 15 July 1999 (IT-94-1) ; Trial Chamber, The Prosecutor v. Goran Jelisić, Judgement, 14 December 1999 (IT-95-10) ; Trial Chamber, The Prosecutor v. Tihomir Blaškić, Judgement, 3 March 2000 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Zdravko Mucić et al., Judgment, 20 February 2001 (IT-96-21) ; Appeals Chamber, The Prosecutor v. Goran Jelisić, Judgment, 5 July 2001 (IT-95-10) ; Trial Chamber, The Prosecutor v. Radislav Krstić, Judgment, 2 August 2001 (IT-98-33) ; Trial Chamber, The Prosecutor v. Milorad Krnojelac, Judgement, 15 March 2002 (IT-97-25) ; Appeals Chamber, The Prosecutor v. Dragoljub Kunarac et al., Judgement, 12 June 2002 (IT-96-23 and 23/1) ; Trial Chamber, The Prosecutor v. Mitar Vasiljević, Judgement, 29 Novembre 2002 (IT-98-32) ; Appeals Chamber, The Prosecutor v. Milan Milutinović et al., Decision on Dragoljub Ojdanić's Motions Challenging Jurisdiction-Joint Criminal Enterprise, 21 May 2003 (IT-05-87) ; Appeals Chamber, The Prosecutor v. Milorad Krnojelac, Judgment, 17 September 2003 (IT-97-25) ; 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) ; Trial Chamber, The Prosecutor v. Sylvestre Gacumbitsi, Judgement, 17 June 2004 (ICTR-2001-64) ; 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) ; Trial Chamber, The Prosecutor v. Fatmir Limaj et al., Judgement, 30 November 2005 (IT-03-66) ; Appeals Chamber, The Prosecutor v. Milomir Stakić, Judgement, 22 March 2006 (IT-97-24) ; Appeals Chamber, The Prosecutor v. Mladen Naletilić and Vinko Martinović, Appeal Judgement, 3 May 2006 (IT-98-34)

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Chapter I: Introduction

1. The Accused, Jean Mpambara, was formerly the *bourgmestre* of Rukara *Commune* in eastern Rwanda. Before April 1994, the *Commune* enjoyed a reputation as a relatively peaceful place, where moderation generally prevailed over ethnic extremism. In that fateful month, however, Rukara was

engulfed by ethnic violence which culminated in a massacre of between one and two thousand Tutsi men, women and children who had sought refuge at the Rukara Parish church.

2. The Indictment charges the Accused with the crimes of genocide and extermination. Mpambara is not accused of having physically killed anyone; rather, he is alleged to have instigated, materially supported and facilitated attacks on Tutsi civilians. As the case proceeded, the Prosecution also made clear that it wished to hold the Accused criminally responsible for his failure to prevent the attacks.

3. Mpambara denies these allegations, protesting that he attempted to maintain security and to protect the Tutsi refugees. The Defence also contests whether the failure to prevent the attacks was properly pleaded in the Indictment.

4. The case against the Accused revolves around three sets of events in Rukara *Commune* over a six-day period: looting and killing in Gahini *Secteur* on 7 and 8 April 1994; an attack on Gahini Hospital on 9 April; and two attacks at the Parish Church of Rukara where, on 12 April 1994 attackers using guns, grenades, machetes and spears killed up to two thousand Tutsi civilians in a single night.

5. Chapter II of this judgement sets out the legal requirements of the crimes and forms of participation with which the Accused is charged. In Chapter III, the Chamber reviews the evidence heard during the trial, and will reach factual and legal findings in respect of each of the allegations against the Accused.

Chapter II: Applicable Law

1. Introduction

6. The Indictment charges the Accused with genocide or, in the alternative, complicity in genocide; and extermination as a crime against humanity.[1] The Indictment alleges that the Accused committed or participated in these crimes by: (i) participating in a joint criminal enterprise; (ii) ordering the commission of the crimes; and (iii) instigating and otherwise aiding and abetting those who actually did commit the crimes.[2] In its Closing Brief, the Prosecution withdrew the alternative count of complicity, noting that aiding and abetting was a more appropriate description of the conduct of the Accused.[3] Accordingly, section two below will discuss the elements of genocide and extermination, and section three will describe the forms of participation in these crimes attributed to the Accused.

7. During the course of the trial, and in its Closing Brief, the Prosecution argued that the Accused was criminally liable under Article 6 (1) of the Statute for having failed to prevent crimes committed by others, and that this allegation is encompassed by the charges in the Indictment.[4] The Defence argues that the Indictment contains no such charge and that the Accused was not otherwise informed

[1] Counts 1, 2 and 3, respectively.
[2] Indictment, paras. 6, 21. As will be discussed, *infra*, Prosecution submissions subsequent to the Indictment are ambiguous as to the relationship between joint criminal enterprise liability and the other forms of criminal responsibility provided in Article 6 (1). The Prosecution appears to consider aiding and abetting as a form of joint criminal enterprise. The Indictment itself, however, is clear that joint criminal enterprise and aiding and abetting are distinct and separate modes of participation in a crime: "*In addition* [to ordering, instigating, and aiding and abetting], the accused wilfully and knowingly participated in a joint criminal enterprise…." Few, if any references, to "ordering" or "planning" are to be found in the Prosecution Closing Brief and final arguments, but the Chamber cannot say that these have been dropped. The Chamber has accordingly considered any evidence which may be relevant to those modes of individual criminal responsibility.
[3] Prosecution Closing Brief, para. 272: "Given the divergent views on the distinction between Complicity under Art. 2 (3) (e) and aiding and abetting Genocide under Art (6) (1) the Prosecutor subscribes to the *Krstic* approach and submits that where 'knowledge' is proved the accused should be convicted of aiding and abetting Genocide on the basis that it is a better characterization of the culpability of the accused. In those circumstances, the Prosecutor submits that Complicity as an alternative count need not be considered by the Chamber".
[4] The Indictment contains no allegation of superior responsibility under Article 6 (3) of the Statute, and the Prosecution has not argued that this form of liability was pleaded in this case.

that such a charge was made against him. Section four of this chapter will examine the ways in which an accused may be criminally liable for omissions. Section five and six discuss whether the Accused was given adequate notice that he was charged with criminal responsibility for failing to prevent criminal acts.

2. Crimes

(i) Genocide

8. Genocide, as defined in Article 2 (2) of the Statute, is

> …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….

The victims must be targeted because of their membership in the protected group, and the perpetrator must intend to destroy at least a substantial part of that group.[5] Intent may be proven by overt statements of the perpetrator or by drawing inferences from circumstantial evidence, such as any connection to a wide-scale attack against the targeted group.[6] The *actus reus* of genocide does not require the actual destruction of a substantial part of the group; the commission of even a single instance of one of the prohibited acts is sufficient, provided that the accused genuinely intends by that act to destroy at least a substantial part of the group.[7]

(ii) Extermination

9. Extermination is a crime against humanity which, as defined by Article 3, must be "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds". The crime itself has been described as the widespread or systematic killing of a group of persons, or systematically subjecting a large number of persons to conditions of living that would inevitably lead to death on a large scale.[8] The *actus reus* of the offence is that the perpetrator participates with others in a collective or ongoing mass killing event.[9] The act

[5] *Krstic*, Judgement (AC), para. 12 ("The intent requirement of genocide under Article 4 of the [ICTY] Statute is therefore satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group"); *Akayesu*, Judgement (TC), para. 521 ("Thus, the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group"); *Bagilishema*, Judgement (TC), para. 65 ("[I]f a victim was perceived by a perpetrator as belonging to a protected group, the victim could be considered by the Chamber as a member of the protected group, for the purposes of genocide"); *Semanza*, Judgement (TC), para. 312 (membership in group determined by subjective intentions of perpetrator, not objective criteria); *Jelisic*, Judgement (TC), para. 70 (membership in group determined by subjective intentions of perpetrator, not objective criteria); *Rutaganda*, Judgement (TC), para. 55 (membership in group determined by subjective intentions of perpetrator, not objective criteria).

[6] *Rutaganda*, Judgement (AC), para. 528; *Semanza*, Judgement (AC), para. 262; *Jelisic*, Judgement (AC), para. 47 ("As to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as 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"); *Simba*, Judgement (TC), para. 415; *Ndindabahizi*, Judgement (TC), para. 454.

[7] *Ndindabahizi*, Judgement (TC), para. 471. The perpetrator of a single, isolated act of violence could not possess the requisite intent based on a delusion that, by his action, the destruction of the group, in whole or in part, could be effected.

[8] Statute, Article 3 (b). *Ntakirutimana*, Judgement (AC), para. 522; *Simba*, Judgement (TC), para. 422; *Ndindabahizi*, Judgement (TC), para. 479. No numeric threshold of deaths need be reached for the killings to be deemed "large-scale". *Ntakirutimana*, Judgement (AC), para. 516.

[9] *Ntakirutimana*, Judgement (AC), para. 516 ("the crime of extermination is the act of killing on a large scale"); *Ndindabahizi*, Judgement (TC), para. 479 (the acts must be "directed at a group of individuals collectively, and whose effect is to bring about a mass killing"). *Bagosora et al*., Judgement on Motions for Acquittal (TC), 2 February 2005, para. 28 ("The essential distinction between murder and extermination is that the latter is directed at a group collectively resulting in a mass killing, and that the forms of commission ('participation') are broader than what is required for murder"); *Vasiljevic*, Judgement (TC), para. 227 ("the act of extermination must be collective in nature rather than directed towards singled out individuals").

need not directly cause any single victim's death, but must contribute to a mass killing event.[10] As to the nature of the contribution required, a standard of "sufficient contribution" has been adopted in some cases, assessed according to "the actions of the perpetrator, their impact on a defined [victim] group, and awareness [by the accused] of the impact on the defined group".[11]

10. The *mens rea* of extermination is that the accused must intend by his actions to bring about the deaths on a large-scale.[12]

11. In addition to these specific elements of extermination, the chapeau requirements for a crime against humanity must also be satisfied. First, the crime must have been committed as part of a widespread or systematic attack. "Widespread" is defined as massive or large-scale, involving many victims; "systematic" refers to an organized pattern of conduct, as distinguished from random or unrelated acts.[13] Second, the attack must be carried out against a civilian population on "national, political, ethnic, racial or religious grounds".[14] The perpetrator must know that his acts form part of this discriminatory attack but need not possess the discriminatory intent.[15]

3. Modes of Commission and Participation

12. The Indictment recites all of the modes of participation prescribed by Article 6 (1) of the Statute, namely that a "person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime … shall be individually responsible for the

[10] *Ndindabahizi*, Judgement (TC), para. 479 ("may be committed less directly than murder, as by participation in measures intended to bring about the deaths of a large number of individuals"); *Krstic*, Judgement (TC), para. 498 ("…we surmise that the crime of extermination may be applied to acts committed with the intention of bringing about the death of a large number of victims either directly, such as by killing the victim with a firearm, or less directly, by creating conditions provoking the victim's death"); *Rutaganda*, Judgement (TC), para. 83 ("includes, but is not limited to the direct act of killing. It can be any act or omission, or cumulative acts or omissions, that cause the death of the targeted group of individuals"); *Vasiljevic*, Judgement (TC), para. 227; *Kayishema and Ruzindana*, Judgement (TC), paras. 143, 146. The Appeals Chamber has held that it is unnecessary to name the victims of an extermination. *Ntakirutimana*, Judgement (AC), para. 521. This would not be the case for murder, if the accused participated, and if the Prosecution had this information in its possession. This reflects a fundamental distinction between the nature of murder and extermination.

[11] *Ndindabahizi*, Judgement (TC), para. 479 (the issue is whether an accused "contributed sufficiently to the mass killing"); *Bagosora et al*., Judgement on Motions for Acquittal (TC), 2 February 2005, para. 28 ("Whether the participation is sufficient to constitute extermination depends on a concrete assessment of the facts, including the actions of the perpetrator, their impact on a defined group, and awareness of the impact on the defined group"). The definition of the minimum level of participation has not been addressed by the Appeals Chamber: *Vasiljevic*, Judgement (TC), para. 227 ("'extermination' only attaches to those individuals responsible for a large number of deaths, even if their part therein was remote or indirect"); *Kayishema and Ruzindana*, Judgement (TC), para. 146 (planning alone may be sufficient for commission, provided that the "nexus between the planning and the actual killing" is shown); G. Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford UP, 2005), p. 176 (commission may occur where perpetrator's role "remote or indirect"); Simon Chesterman, "An Altogether Different Order: Defining the Elements of Crimes Against Humanity", 10 Duke J. Comp. & Int'l L. 307, 338 (2000) (advocating the standard of "'contributed directly' in the definition of extermination's *actus reus*); *Ntakurutimana*, Judgement (AC), para. 522 ("participation").

[12] *Stakic*, Judgement (AC), para. 260 ("The *mens rea* of extermination clearly requires the intention to kill on a large scale or to systematically subject a large number of people to conditions of living that would lead to their deaths"); *Simba*, Judgement (TC), para. 422; *Ndindabahizi*, Judgement (TC), para. 480 ("The *mens rea* for the offence of extermination is that the Accused participated in the imposition of measures against many individuals intending that their deaths should be brought about on a large-scale"). There is no need in the present case to decide whether recklessness would also satisfy the *mens rea* of extermination. *Kayishema and Ruzindana*, Judgement (TC), para. 144 (finding that recklessness is sufficient); cf. *Semanza*, Judgement (TC), para. 341 (requiring intent to perpetrate or participate in a mass killing); *Vasiljevic*, Judgement (TC), para. 229 (requiring actual intention to kill, or to cause grievous bodily harm or injury with the knowledge that such actions are likely to cause death).

[13] *Niyitigeka*, Judgement (TC), para. 439; *Ntakirutimana*, Judgement (TC), para. 804; *Semanza*, Judgement (TC) paras. 328-29. See also *Kunarac et al*., Judgement (AC), paras. 93-97 (interpreting the same words as part of a judicially-created condition for crimes against humanity).

[14] *Ntakirutimana*, Judgement (TC), para. 803; *Semanza*, Judgement (TC), para. 331.

[15] *Kunarac et al*., Judgement (AC) paras. 99-100; *Simba*, Judgement (TC), para. 421; *Ndindabahizi*, Judgement (TC), para. 478; *Semanza*, Judgement (TC), para. 332. See also *Semanza*, Judgement (AC), paras. 268-269. It is hard to imagine, however, that an accused could possess the *mens rea* for extermination, and yet not share the intent of the widespread or systematic attack of which it formed a part.

crime".[16] More particularly, the Indictment alleges that the Accused (i) "ordered those over whom he had command responsibility and control" to attack the Tutsi population; (ii) "instigated and aided and abetted those over whom he did not have command responsibility or control to attack the Tutsi population"; and (iii) "participated in a joint criminal enterprise whose object, purpose and foreseeable outcome was the destruction of the Tutsi racial or ethnic group throughout Rwanda".[17]

(i) Joint Criminal Enterprise

13. A joint criminal enterprise arises when two or more persons join in a common and shared purpose to commit a crime under the Statute.[18] Unlike conspiracy, no specific agreement to commit the crime need be shown: the common purpose may arise spontaneously and informally, and the persons involved need not be associated through a formal organization.[19] Any act or omission which assists or contributes to the criminal purpose may attract liability: there is no minimum threshold of significance or importance, and the act need not independently be a crime.[20]

14. A co-perpetrator (a term used to refer to a participant in a joint criminal enterprise) must intend by his acts to effect the common criminal purpose.[21] Mere knowledge of the criminal purpose of others is not enough: the accused must intend that his or her acts will lead to the criminal result. The *mens rea* is, in this sense, no different than if the accused committed the crime alone. As the Appeals Chamber has aptly remarked, a "joint criminal enterprise is simply a means of committing a crime; it is not a crime in itself".[22] Determining whether a co-perpetrator possessed the necessary intent may be more difficult than in the case of a single perpetrator who, of necessity, must physically commit the crime. Although the *actus reus* may be satisfied by any participation, no matter how insignificant, "the

[16] Article 6 (1).
[17] Indictment, para. 6. Although no express reference to joint criminal enterprise is to be found in Article 6 (1), it is well-established that a person may "commit" a crime in that manner, as discussed below in more detail. *Tadic*, Judgement (AC), para. 190 ("Whoever contributed to the commission of crimes by a group of persons or some members of the group, in execution of a common criminal purpose, may be held criminally liable, subject to certain conditions, which are specified below").
[18] It is also often said that the requisite common purpose exists where it "involves the commission" of such a crime. *Stakic*, Judgement (AC), para. 64 ("the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute is required"); *Kvocka et al*., Judgement (AC), para. 81 ("A joint criminal enterprise requires a plurality of co-perpetrators who act pursuant to a common purpose involving the commission of a crime in the Statute"); *Limaj*, Judgement (TC), para. 510 ("When a number of persons are involved in a common plan aimed at the commission of a crime, they can be convicted of participation in a joint criminal enterprise ("JCE") in relation to that crime"); *Simba*, Judgement (TC), para. 387 ("the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute is required").
[19] *Stakic*, Judgement (AC), para. 64 (the persons involved "need not be organized in a military, political or administrative structure"); *Kvocka et al*., Judgement (AC), para. 117 ("The common purpose need not be previously arranged or formulated; it may materialize extemporaneously"); *Vasiljevic*, Judgement (AC), para. 100; *Milutinović et al*., Decision on Dragoljub Ojdanić's Motions Challenging Jurisdiction-Joint Criminal Enterprise (AC), 21 May 2003, para. 23 ("while mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that agreement").
[20] *Stakic*, Judgement (AC), para. 64 ("the participation of the accused in the common purpose is required. This participation need not involve the commission of a specific crime under one of the provisions [of the Statute] (for example, murder, extermination, torture or rape), but may take the form of assistance in, or contribution to, the execution of the common purpose"); *Kvocka et al*., Judgement (AC), para. 97 ("there is no specific legal requirement that the accused make a substantial contribution to the joint criminal enterprise. However, there may be specific cases which require, as an exception to the general rule, a substantial contribution of the accused to determine whether he participated in the joint criminal enterprise"); *Kvocka et al*., Judgement, (AC), para. 187 ("…the accused's participation in carrying out the joint criminal enterprise is likely to engage his responsibility as a co-perpetrator, without it being necessary in general to prove the substantial or significant nature of his contribution: it is sufficient for the accused to have committed an act or an omission which contributes to the common criminal purpose").
[21] *Stakic*, Judgement (AC), para. 65 ("it must be shown that the accused and the other participants in the joint criminal enterprise intended that the crime at issue be committed"); *Kvocka et al*., Judgement (AC), para. 82 ("In the first form of joint criminal enterprise, all of the co-perpetrators possess the same intent to effect the common purpose"); *Vasiljevic*, Judgement (AC), para. 101 ("…what is required is the intent to perpetrate a certain crime (this being the shared intent of the part of all co-perpetrators)"); *Tadic*, Judgement (AC), para. 196 ("the accused, even if not personally effecting the killing, must nevertheless intend this result"); *Limaj*, Judgement (TC), para. 511 ("In the first type of joint criminal enterprise, the accused intends to perpetrate a crime and this intent is shared by all co-perpetrators").
[22] *Kvocka et al*., Judgement (AC), para. 91.

significance and scope of the material participation of an individual in a joint criminal enterprise may be relevant in determining whether that individual had the requisite *mens rea*".[23]

15. There are three forms of joint criminal enterprise: "basic", described above; "systemic"; and "extended". Neither the systemic nor the extended forms of joint criminal enterprise are alleged in the present case, and need not be considered further.[24]

(ii) Aiding and Abetting

16. Aiding and abetting, though distinct concepts, are frequently combined to refer to any form of assistance or encouragement given to another person to commit a crime under the Statute.[25] The assistance or encouragement must have had a "substantial effect upon the perpetration of the crime" to attract liability.[26] The aider and abettor need not (although he or she may) share the principal's criminal intent, but must at least know that his or her acts are assisting the principal to commit the crime.[27]

17. Joint criminal enterprise may be distinguished from aiding and abetting in two respects. Aiding and abetting requires a "substantial effect upon the perpetration of the crime"; by contrast, no minimum threshold of participation is required in a joint criminal enterprise. The extent or significance of the contribution may, however, be important in showing that the perpetrator possessed the requisite criminal intent. The aider and abettor, on the other hand, need only be aware of the criminal intent of the principal whom he assists or encourages.[28] A person who contributes substantially to the commission of a crime by another person, and who shares the intent of that other person, is criminally liable both as a co-perpetrator and as an aider and abettor.[29]

(iii) Instigation

18. Instigation is urging or encouraging, verbally or by other means of communication, another person to commit a crime, with the intent that the crime will be committed.[30] In accordance with

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[23] *Id*., para. 97 ("In practice, the significance of the accused's contribution will be relevant to demonstrating that the accused shared the intent to pursue the common criminal purpose").

[24] Prosecution Closing Brief, para. 25 "The Prosecutor relies on the theory of JCE (JCE I) to establish the individual criminal responsibility of the accused….). The Chamber notes that the intent required for the systemic form of liability, in which there is an organized criminal system such as a prison camp whose purpose is to persecute the inmates, is very similar to that of the basic form. It "requires personal knowledge of the organized system and intent to further the criminal purpose of that system". *Kvocka et al*., Judgement (AC), para. 82. Although this formulation is slightly different from the intent required in the basic form of liability, the similarity is sufficient to permit this Chamber to rely on the pronouncements in the *Kvocka et al*. Appeal Judgement, which was concerned primarily with the systemic form of joint criminal enterprise liability.

[25] *Vasiljevic*, Judgement (AC), para. 102 (defining the *actus reus* of aiding and abetting as "acts specifically directed to assist, encourage or lend moral support to the perpetration of a specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect on the perpetration of the crime"); *Semanza*, Judgement (TC), paras. 384-385; *Limaj*, Judgement (TC), para. 516 ("'Aiding and abetting' has been defined as the act of rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a certain crime"); *Gacumbitsi*, Judgement (TC), para. 286 ("Aiding means assisting or helping another to commit a crime. Abetting means facilitating, advising or instigating the commission of a crime").

[26] *Blaskic*, Judgement (AC), para. 48; *Vasiljevic*, Judgement (AC), para. 102; *Kayishema and Ruzindana*, Judgement (AC), para. 198; *Krstic*, Judgement (AC), para. 137.

[27] *Blaskic*, Judgement (AC), para. 49; *Krnojelac*, Judgement (AC), para. 51; *Vasiljevic*, Judgement (AC), para. 102; *Semanza*, Judgement (TC), para. 388 ("The Accused need not necessarily share the *mens rea* of the principal perpetrator; the accused must be aware, however, of the essential elements of the principal's crime including the *mens rea*"). The Appeals Chamber has ruled that this principle – that only knowledge of the intent of the perpetrator is sufficient for liability – applies even in respect of the specific intent required for genocide: *Ntakirutimana*, Judgement (AC), paras. 499-501; *Krstic*, Judgement (AC), paras. 140-141. Certain authors have criticized imposition of liability based on mere knowledge of the principal's intent: G. Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford UP, 2005), p. 212.

[28] *Vasiljevic*, Judgement (AC), para. 102.

[29] The Appeals Chamber has offered a further distinction: a co-perpetrator is guilty of all the crimes committed by his co-perpetrators, whereas an aidor and abettor is only liable for the specific crime which he or she assists or encourages. *Kvocka et al*., Judgement (AC), para. 90.

[30] *Semanza*, Judgement (TC), para. 381; *Akayesu*, Judgement (TC), para. 482.

general principles of accomplice liability, instigation does not arise unless it has directly and substantially contributed to the perpetration of the crime by another person.[31] Unlike the crime of direct and public incitement, instigation does not give rise to liability unless the crime is ultimately committed.[32]

(iv) Ordering

19. The *actus reus* of ordering is that a person in a position of authority instructs 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 the part of the accused that would compel another to commit a crime in following the accused's order.[33]

(v) Planning

20. Planning is the formulation of a design by which individuals will execute a crime. Participation in such planning must be substantial, such as actually formulating the criminal plan or endorsing a plan proposed by another, for individual liability to arise.[34]

4. Liability for Omissions

21. Evidence was heard during the trial which the Prosecution characterizes as showing the Accused's failure to do certain things at certain times. The permissible legal significance of this evidence (or, more accurately, of this characterization) is disputed. In this section, the Chamber will consider the various ways in which omissions may be relevant to the crimes and forms of participation with which the Accused is charged.

(i) Omission as Evidence of Aiding and Abetting

22. Evidence which is characterized as an omission can be used to show that an accused aided and abetted a crime. A well-established example is the mere presence of a person in authority at the scene of a crime. Such presence could "bestow[] legitimacy on, or provide[] encouragement to, the actual perpetrator", particularly when the accused is in a position of some authority over the attacker.[35] Liability is not automatic, even for a person of high office, and must be proven by showing that the accused's inaction had an encouraging or approving effect on the perpetrators; that the effect was substantial; and that the accused knew of this effect and of the perpetrator's criminal intention, albeit without necessarily sharing the perpetrators' criminal intent.[36] Of course, by choosing to be present, the accused is taking a positive step which may contribute to the crime. Properly understood, criminal responsibility is derived not from the omission alone, but from the omission combined with the choice to be present.

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[31] *Kayishema and Ruzindana*, Judgement (AC), para. 198; *Bagilishema*, Judgement (TC), para. 30.
[32] *Nahimana et al*., Judgement (TC), paras. 1015, 1029; *Musema*, Judgement (TC), para. 115.
[33] *Semanza*, Judgement (AC), para. 361.
[34] *Semanza*, Judgement (TC), para. 380; *Bagilishema*, Judgement (TC), para. 30; *Aleksovski*, Judgement (TC), para. 61.
[35] *Limaj*, Judgement (TC), para. 517; *Bisengimana*, Judgement (TC), para. 34; *Blaskic*, Judgement (TC) para. 284 ("In this respect, the mere presence at the crime scene of a person with superior authority, such as a military commandant, is a probative indication for determining whether that person encouraged or supported the perpetrators of the crime").
[36] *Kayishema and Ruzindana*, Judgement (AC), para. 201 (approving that an accused may "incur individual responsibility provided he is aware of the possible effect of his presence (albeit passive) on the commission of the crime. In the case at bar, the Trial Chamber held that the Accused's failure to oppose the killing constituted a form of tacit encouragement in light of his position of authority"); *Ndindabahizi*, Judgement (TC), para. 457 ("It is not the position of authority itself that is important, but rather the encouraging effect that a person holding the office may lend to events"); *Semanza*, Judgement (TC), para. 386 ("Responsibility, however, is not automatic, and the nature of the accused's presence must be considered against the background of the factual circumstances"); *Blaskic*, Judgement (TC), para. 284; *Krnojelac*, Judgement (TC), para. 89 ("Presence alone at the scene of the crime is not conclusive of aiding and abetting unless it is demonstrated to have a significant legitimising or encouraging effect on the principal offender").

23. Other examples of aiding and abetting through failure to act are not to be easily found in the annals of the *ad hoc* Tribunals. The Appeals Chamber has left the category open, observing that "in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting".[37] On the other hand, inaction without being present at the scene of a crime has been excluded as a basis for proving these elements:

> Criminal responsibility as an "approving spectator" does require actual presence during the commission of the crime or at least presence in the immediate vicinity of the scene of the crime, which is perceived by the actual perpetrator as approval of his conduct.[38]

This would not, of course, preclude aiding and abetting liability for a person who had previously committed positive acts of assistance or encouragement which contributed substantially to the commission of a crime in his absence.[39]

(ii) Omission as Evidence of Participation in a Joint Criminal Enterprise

24. Involvement in a joint criminal enterprise may also be proven by evidence characterized as an omission. The objective element of participation is satisfied as long as the accused has "committed an act or an omission which contributes to the common criminal purpose".[40] Although it is hard to imagine that total passivity could demonstrate the requisite intent for co-perpetratorship, an omission in combination with positive acts might have great significance. The Appeals Chamber upheld an inference of guilt where an omission was combined with a series of other findings concerning the position and conduct of the accused, namely:

> that he held a high-ranking position in the camp and had some degree of authority over the guards; that he had sufficient influence to prevent or halt some of the abuses but that he made use of that influence only very rarely; that he carried out his tasks diligently, participating actively in the running of the camp; that through his own participation, in the eyes of other participants, he endorsed what was happening in the camp.[41]

The failure of the accused to intervene more frequently was an omission; but its significance in proving the criminal mental state of the accused, and its consequence for the victims, depended on a series of positive acts preceding the omission.

(iii) Omission as Failure of Duty to Prevent or Punish

25. Liability for an omission may arise in a third, fundamentally different context: where the accused is charged with a duty to prevent or punish others from committing a crime. The culpability arises not by participating in the commission of a crime, but by allowing another person to commit a crime which the Accused has a duty to prevent or punish.

26. The circumstances in which such a duty has been recognized in international criminal law are limited indeed. As stated by the Appeals Chamber in *Tadic*:

> The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be

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[37] *Blaskic*, Judgement (AC), para. 47 ("The Appeals Chamber leaves open the possibility that in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting").
[38] *Semanza*, Judgement (TC), para. 386; *Bagilishema*, Judgement (TC), paras. 34, 36. The Chamber is aware that this comment may refer only to a particular type of aiding and abetting by omission, and that it was not necessarily intended to be a comprehensive statement about aiding and abetting.
[39] One recent exception is *Bisengimana*, Judgement (TC). Although the Chamber formally found the accused to have been guilty of aiding and abetting on the basis of an omission, no findings were made that the accused's inaction had substantially contributed to the commission of the crime. On the contrary, the Chamber made a finding, conceded by the accused, that he owed a "a duty to protect" the victims. This represents a basis for liability different from aiding and abetting.
[40] *Kvocka et al.*, Judgement (AC), para. 187.
[41] *Id.*, para. 195.

held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).[42]

Article 6 (3) of the Statute creates an exception to this principle in relation to a crime about to be, or which has been, committed by a subordinate. Where the superior knew or had reason to know of the crime, he or she must "take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof".[43] In *Blaskic*, the Appeals Chamber extended this liability by finding that a superior could also be liable under 6 (1) for the mistreatment by his subordinates of prisoners used as human shields, not because he had given an order to do so, but because, as commandant, he was under a direct "legal duty … to care for the persons under the control of [his] subordinates. Wilful failure to discharge such a duty may incur criminal responsibility pursuant to Article [6 (1)] of the Statute in the absence of a positive act".[44] The Geneva Conventions were relied upon as imposing specific positive obligations on the accused.[45]

27. Some Trial Chambers have discovered duties to prevent the criminal acts of others in situations other than the superior-subordinate relationship.[46] In light of the findings below concerning notice, this Chamber need not consider the correctness of those judgements. The important point, for present purposes, is that liability for failing to discharge a duty to prevent or punish is a species of criminal liability distinct from omissions which prove aiding and abetting or joint criminal enterprise. On any view, liability for failing to discharge a duty to prevent or punish requires proof that: (i) the Accused was bound by a specific legal duty to prevent a crime; (ii) the accused was aware of, and wilfully refused to discharge, his legal duty; and (iii) the crime took place.[47] Although the Prosecution need not use any magic formulation of words, the pleadings must at least, in substance, articulate these three elements.

5. Notice

(i) Failure to Plead Duty to Prevent or Punish Criminal Acts

28. In its Closing Brief, the Prosecution purports to characterize the Accused's criminal responsibility as "Aiding and Abetting By Omission". Four conditions of this form of criminal liability are then set forth:

> For an accused to incur criminal liability for an omission in furtherance of the objectives of a JCE, the following elements must be proved: That the accused had a duty to act; That the accused had the ability to act; That the accused failed to act, intending or with knowledge that a crime or crimes would be committed; and That the failure to act resulted in the commission of a crime.[48]

The Closing Brief then discusses at length the evidence which purports to show that the Accused had a legal duty to act under Rwandan law; that he had a variety of legal powers and resources at his disposal as *bourgmestre* to prevent or punish criminal acts; that he failed to exercise such authority

[42] *Tadic*, Judgement (AC), para. 186.
[43] See *Blaskic*, Judgement (AC), paras. 53-85, discussing the conditions for such liability.
[44] *Id*., para. 663.
[45] *Id*., para. 663, fn. 1384 and fn. 1385. The possibility of positive duties being created by international criminal law also appears to have been recognized in *Tadic*, Judgement (AC), para. 188 ("[Article 6 (1)] covers first and foremost 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").
[46] *Rutaganira*, Judgement (TC), paras. 67-91; *Ntagerura et al*., Judgement (TC), paras. 659-60.
[47] *Blaskic*, Judgement (AC), para. 663; *Rutaganira*, Judgement (TC), paras. 67-91; *Ntagerura et al*., Judgement (TC), paras. 659-60.
[48] Prosecution Closing Brief, para. 200. On another occasion, the Prosecution argues that the failure of the duty to act proves aiding and abetting: T. 3 May 2006 p. 42 ("our submission is that the evidence led before you has passed the test of culpable omission we set out in our brief – in our closing brief, and can therefore form the basis for a conviction for aiding and abetting through, *inter alia*, the omissions proved"). These four conditions appear to have been adapted from the *Rutaganira* Judgement, para. 67.

knowing that crimes would result; and that such crimes did, in fact, take place.[49] In substance, this form of liability is the type described in the previous section: a failure of a duty to prevent or punish. The Defence argues that it had no notice of this form of criminal liability and that, accordingly, the Accused cannot be convicted on this basis.

29. Article 20 (4) (a) of the Statute requires that an accused "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". An accused can be convicted of only those crimes with which he or she is charged in the Indictment.[50] The level of specificity required to describe the accused's mode of participation in a crime has been explained as follows:

> If an indictment merely quotes the provisions of Article [6 (1)] without specifying which mode or modes of responsibility are being pleaded, then the charges against the accused may be ambiguous. When the Prosecution is intending to rely on all modes of responsibility in Article [6 (1)], then the material facts relevant to each of those modes must be pleaded in the indictment. Otherwise, the indictment will be defective either because it pleads modes of responsibility which do not form part of the Prosecution's case, or because the Prosecution has failed to plead material facts for the modes of responsibility it is alleging.[51]

A vague indictment may be remedied by giving the accused timely, clear and consistent information concerning the nature of the charges or material facts so as to remedy the ambiguity.[52] Where such clarifying information has been communicated, if a party raises an objection during trial, the Chamber must still consider whether fairness requires amendment of the indictment, an adjournment, or the exclusion of evidence.[53] Even in the absence of any objection, no conviction can be entered against an accused if he or she was not in a reasonable position to understand the charges against him or her.[54]

30. The types of communication which can remedy an unclear indictment were recently canvassed by the Appeals Chamber:

> [T]he Appeals Chamber has in some cases looked at information provided through the Prosecution'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.[55]

31. Neither the Indictment nor the Pre-Trial Brief make any allegation reasonably recognizable as a duty to prevent or punish the crimes of other persons, whether because of a superior-subordinate relationship or otherwise. The Indictment comes closest to doing so in paragraph 19:

> At all times material to this indictment Jean Mpambara failed to maintain public order, or deliberately undermined the public order, in districts over which he exercised administrative authority, in agreement with or in furtherance of the policies and objectives of the MRND, the Interim Government or the joint criminal enterprise referred to in paragraph 6, knowing that those policies and objectives intended the destruction, in whole or in part, of the Tutsi population.

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[49] Prosecution Closing Brief, paras. 200-37.
[50] *Naletilic*, Judgement (AC), para. 26; *Kvocka et al*., Judgement (AC), para. 33.
[51] *Kvocka et al*., Judgement (AC), para. 29; *Kordic and Cerkez*, Judgement (AC), para. 129 ("the alleged mode of liability of the accused in a crime pursuant to Article [6 (1)] of the Statute should be clearly laid out in an indictment …. The nature of the alleged responsibility of an accused should be unambiguous in an indictment").
[52] *Ntakirutimana*, Judgement (AC), para. 27.
[53] *Kvocka et al*., Judgement (AC), para. 31.
[54] *Naletilic*, Judgement (AC), para. 27.
[55] *Naletilic*, Judgement (AC), para. 27 (citations omitted).

This pleading fails to give reasonable notice of a failure to discharge a duty to prevent or punish in several respects. First, the paragraph is ambiguous as to whether the failure to maintain public order is intended to prove participation in a joint criminal enterprise or aiding and abetting, on the one hand; or whether it constitutes a breach of a duty to prevent or punish criminal acts, on the other. This ambiguity is not resolved by any subsequent communications. Paragraph 7 of the Pre-Trial Brief charges that the Accused "used his office and position of authority as Bourgmaster to *actively* undermine public order in furtherance of the criminal enterprise". Paragraph 22 does use the language of failure to prevent or punish the attacks, but in an ambiguous manner.[56] Paragraph 26 of the Pre-Trial Brief states that the Accused's failure to prevent attacks "not only encouraged and lent moral support to the perpetrators but showed that he shared the same intent with the perpetrators in the commission of the crimes charged". A reasonable reader would infer that the Accused's omissions were part of an overall picture which proved his participation in a joint criminal enterprise, or that he aided and abetted a crime.

32. Neither the Indictment nor the Pre-Trial Brief identify the source of the legal duty on the accused, nor is the scope of the legal duty described in any way. This is an essential element for charging an accused with a failure to prevent or punish. An accused must at least know the scope of his obligations to be in a position to dispute his alleged default. No material facts are presented in the Indictment or elsewhere as distinctly supportive of the failure to discharge a duty to prevent or punish criminal acts. Although the summaries of the testimony of witnesses contain information which could be characterized as omissions, there is no specification that those omissions are related to a duty to prevent or punish crimes, rather than being probative of participation in a joint criminal enterprise or aiding and abetting. Indeed, all indications in the Indictment and the Pre-Trial Brief suggest otherwise.

33. The Prosecution could have pleaded that the accused's omissions demonstrated both that he was a co-perpetrator or aider and abettor, on the one hand; and, on the other, that the omissions constituted a failure to prevent or punish crimes. The problem is not that the claims are incompatible, but that the failure to prevent is never distinctly pleaded.

34. The nature of the case against the accused was concisely, fairly, and eloquently summarized by the Prosecutor on the opening day of trial:

> What is the case against the Accused? In a nutshell, it is this: That within hours of the death of President Habyarimana on the 6th of April 1994, Jean Mpambara, the Accused, who was then *bourgmestre* of Rukara *commune*, acting in concert with others and in furtherance of a common criminal enterprise, knowingly and willfully embarked on a deliberate path of destruction whose singular objective was the annihilation of the Tutsi ethnic group in his *commune*. As a result, thousands of Tutsi civilians were killed.… The Prosecution alleges, and will establish, that Jean Mpambara is criminally responsible for having planned, ordered, instigated, committed, or otherwise aided and abetted in the commission of the crimes alleged as a key participant in the joint criminal enterprise. Evidence we will lead will further show that, in the course of the killings, Jean Mpambara was at all times aware that they were a part of a broader, widespread, or systematic attack on the Tutsi civilian population and that he used his office and position of authority as *bourgmestre* to actively undermine public order in furtherance of the criminal enterprise.[57]

This was the Prosecution theory of liability as of the first day of trial. There is no mention of any duty to prevent or punish crimes. It bears repeating that the Prosecution is permitted to bring potentially incompatible charges against the Accused. The defect here is not the incompatibility, but

[56] Paragraph 22 of the Pre-Trial Brief, cited by the Prosecution during closing arguments, similarly gives the impression that the omissions are only relevant to proof that the accused is guilty of aiding and abetting or joint criminal enterprise: "From the facts outlined above, Jean Mpambara prompted, enabled and facilitated the actions of the attackers. His presence during the attacks, and his failure to prevent the attacks or punish the attackers, not only encouraged and lent moral support to the perpetrators but also shows that he shared the same intent with the perpetrators and was not merely an aider and abettor, but a principal perpetrator in the commission of the crimes charged". T. 3 May 2006 p. 42.
[57] T. 19 September 2005 p. 4.

the failure to distinctly explain that the omissions alleged against the Accused constituted a breach of his duty to prevent or punish the crimes of others.

35. The Accused was not in a reasonable position to understand that the Prosecution was charging him with a duty to prevent or punish crimes. Accordingly, no conviction can fairly be entered against the accused for any alleged default in discharging that duty. The Chamber will, however, consider the evidence of omissions adduced at trial to the extent that they may be probative of the accused's participation in a joint criminal enterprise or having aided and abetted another in the commission of a crime.

6. Confusion of Legal Categories in Prosecution Submissions

36. As previously discussed, the Indictment itself delineates distinct modes of commission and participation by the Accused, under Article 6 (1): commission (by participating in a joint criminal enterprise); instigating; planning; ordering; and aiding and abetting.[58] In some of its submissions, however, the Prosecution has blurred the distinction between joint criminal enterprise and aiding and abetting. More seriously, it has failed to observe the important distinction between, on the one hand, a failure to prevent criminal conduct by others; and on the other hand, participation in a joint criminal enterprise to commit a crime.

37. The Prosecution argues that it seeks to prove "criminal responsibility for commission by aiding and abetting the physical perpetrators in furtherance of a JCE".[59] This statement is legally incoherent: aiding and abetting is a form of accomplice liability, whereas participation in a joint criminal enterprise is a form of direct commission, albeit with other persons.[60] There are important differences in the mental and objective elements for each of these forms of participation which have been discussed above. As the Appeals Chamber has stated, "it would be inaccurate to refer to aiding and abetting a joint criminal enterprise".[61] The fact that the same material facts may prove both aiding and abetting and participation in a joint criminal enterprise does not diminish the importance of distinguishing between the two. To the extent that the Prosecution has, on some occasions in its submissions, suggested that the joint criminal enterprise is proven by aiding and abetting, the Chamber will ignore this legal characterization and consider whether the material facts show either that the Accused participated in a joint criminal enterprise, or that he aided and abetted others in the commission of crimes.

38. As discussed above, joint criminal enterprise is a way of committing a crime. The *mens rea* which must be possessed by a co-perpetrator is no different from the *mens rea* which must be possessed by a person committing a crime on his or her own. Thus, a person is not guilty of participating in a joint criminal enterprise merely because he knows that others are about to commit a crime, and yet does nothing to prevent the crime from being committed. The proper inquiry in such a case is whether, by doing nothing, the person (i) intended to commit, or to contribute to the commission of, the crime; and (ii) actually did contribute to the crime. Any evidence which tends to prove these elements of the crime are relevant.

39. The four-part test suggested by the Prosecution does not correspond to the requirements for commission of a crime through a joint criminal enterprise. The four-part test purports to describe

[58] Indictment, paras. 6, 21.
[59] Examples of this include: T. 3 May 2006 p. 41 (referring to "the culpability of the Accused for his participation in a joint criminal enterprise by aiding and abetting"); Prosecution Closing Brief, para 37 ("In order to establish Art. 6 (1) criminal responsibility for commission by aiding and abetting the physical perpetrators in furtherance of a JCE, the Prosecutor must prove that the acts and/or omissions of the accused were committed with the same criminal intent as that of the physical perpetrators of the alleged crimes").
[60] *Milutinović et al.*, Decision on Dragoljub Ojdanić's Motions Challenging Jurisdiction-Joint Criminal Enterprise (AC), 21 May 2003, para. 20.
[61] *Kvocka et al.*, Judgement (AC), para. 91.

something quite different: the conditions in which a duty to prevent others from committing a crime will be imposed on an accused. By conflating these two tests, the Prosecution comes perilously close to equating the failure to prevent or punish a crime with the commission of that same crime through a joint criminal enterprise. The Chamber emphatically rejects this approach. Failure to prevent or punish a crime cannot be characterized as a form of commission of that same crime.

7. Conclusion

40. The Accused is charged with co-perpetrating, ordering, instigating, and aiding and abetting genocide and extermination. The facts as discussed in the next section will be considered in accordance with the mental and objective elements of these crimes and forms of participation. Due to lack of notice, the Chamber will not consider whether the Accused failed to discharge a duty under international criminal law to prevent others from committing a crime. Nonetheless, the Chamber may consider any evidence which the Prosecution characterizes as an omission in relation to the charges which have been properly pleaded. As more fully elaborated above, the Chamber will examine whether:

- the Accused, by his acts or omissions, joined with others in a common purpose: to kill or cause serious bodily or mental harm to Tutsis, with the intention to destroy at least a substantial part of the group (genocide); or to kill civilians on a broad scale (extermination);
- the Accused, by his acts or omissions, contributed substantially to others doing so, with at least knowledge that this was the others' intention (aiding and abetting);
- the Accused planned, ordered or instigated these crimes.

Chapter III: Factual and Legal Findings

1. Introduction

41. The case against the Accused revolves around three sets of events over a six-day period: looting and killing of Tutsi residents of Gahini *Secteur* on 7 and 8 April 1994; an attack on Gahini Hospital on 9 April, in which Tutsi civilians were chased from their hiding places and killed; and attacks on 9 and 12 April at the Parish Church of Rukara where, on the latter date, between one and two thousand Tutsi men, women and children were massacred in a single night.[62] The Accused is not alleged to have physically participated in the killing; rather, he is said to have verbally instigated the attacks; distributed weapons on various occasions; and omitted to do things which shows that he aided and abetted the crimes.

42. The Prosecution theory is that these attacks were the product of an ongoing joint criminal enterprise. To the extent that direct evidence of the Accused's involvement in that joint criminal enterprise may be lacking, the Prosecution has invited the Chamber to infer his involvement based on the inferences from the totality of the evidence. The Chamber has accordingly been mindful of the totality of the evidence and, where necessary, has explicitly analyzed the cumulative effect of relevant evidence. The Chamber has also in some respects been presented with a circumstantial case, which "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".[63] In assessing whether circumstantial evidence proves a conclusion beyond reasonable doubt, the Chamber has applied the following standard:

[62] Other events are pleaded in the Indictment, but were withdrawn by the Prosecution at the close of its case: The Prosecutor's Response to the Defence Motion for Judgement of Acquittal Under Rule 98 *bis* of the Rules of Procedure and Evidence, 10 October 2005, para. 11 (withdrawing paras. 9 (iii), 9 (iv), 9 (v), 14, 16, and 20).
[63] *Mucic et al.*, Judgement (AC), para. 458.

> 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.[64]

43. This Chapter is structured around each of the material facts posited in the Prosecution Closing Brief. The relevant evidence is weighed to determine whether the material fact has been proven beyond a reasonable doubt. In so doing, the testimony of individual witnesses, including the Accused, will be summarized to the extent necessary to understand the totality of relevant evidence heard by the Chamber. This does not mean, unless otherwise indicated, that the evidence is accepted. The Chamber has made factual findings only in relation to matters which, in its view, are necessary for the determination of the material facts. Where necessary, the overall credibility of a witness is discussed. The Chamber has not considered it necessary to explicitly address each and every argument presented by the parties: some arguments are discussed only generally or indirectly, or not at all where the Chamber did not consider it necessary to do so.[65]

2. Position of the Accused

44. Jean Mpambara was appointed *bourgmestre* of Rukara *Commune* in July 1989. Although Rukara was his native *commune*, he had not lived there for more than a decade, having attended university in Butare and worked in Kigali as a civil servant. Immediately before his appointment, Mpambara worked in the Office of the President, where he was in charge of publication of the official gazette.[66]

45. As *bourgmestre*, Mpambara was the chief executive authority of the *Commune*. He reported to the *préfet* and *sous-préfet* of Kibungo, who were, in turn, answerable to the Minister of the Interior and the President of Rwanda.[67] The *bourgmestre* acted in consultation with a council of eight *conseillers*, each elected to five-year terms by their respective *secteurs*.[68] Mpambara lived in an official residence located about one hundred metres from the *commune* offices and several hundred metres from the Rukara Parish Church complex.[69] The nearest town of significance was a place called Rwamagana, about 30 minutes away by car, where there were a *gendarmerie* camp, the residence of the *sous-préfet*, and a telephone line to the outside world.[70]

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[64] *Id*., para. 458; *Stakic*, Judgement (AC), para. 219 ("Where the challenge on appeal is to an inference drawn to establish a fact on which the conviction relies, the standard [of reasonable doubt] is only satisfied if the inference drawn was the only reasonable one that could be drawn from the evidence presented. In such circumstances, the question for the Appeals Chamber is whether it was reasonable for the Trial Chamber to exclude or ignore other inferences that lead to the conclusion that an element of the crime was not proven".). The Prosecution recognizes throughout its Closing Brief that evidence concerning one discrete event is often only indirectly and circumstantially relevant to another event: "on the basis of the direct and circumstantial evidence … the Chamber can safely infer that Rukara Parish was deliberately left undefended … consistent with Mpambara's prior planning and preparation for the attack on the Tutsi refugees at the parish through instigating and facilitating the attackers with grenades, in furtherance of the JCE" (para. 142); "the only inference to be drawn from the foregoing analysis of the evidence is that the accused, consistent with his conduct and statements in Paris that morning, convened the Ruyenzi meeting to issue instructions for the attack on the Tutsi refugees" (para. 156).

[65] *Kunarac et al*., Judgement (AC), paras. 47-48 ("Consonant with the settled practice, the Appeals Chamber exercises its inherent discretion in selecting which submission of the parties merit a 'reasoned opinion' in writing. The Appeals Chamber cannot be expected to provide comprehensive reasoned opinions on evidently unfounded submissions. Only this approach allows the Appeals Chamber to concentrate on the core issues of an appeal"); *Musema*, Judgement (AC), paras. 118-123.

[66] T. 6 February 2006 pp. 2-4 (Mpambara).

[67] *Id*. pp. 18-19; T. 8 February 2006 p. 12 (Mpambara).

[68] T. 6 February 2006 pp. 12-13 (Mpambara).

[69] *Id*. pp. 8-9 (Mpambara).

[70] *Id*. pp. 18-19 (Mpambara); T. 9 January 2006 p. 18 (Santos); T. 13 January 2006 p. 44 (Hardinge); T. 19 September 2005 p. 26 (Wilson).

46. The communal police force normally consisted of seven officers, although one was on annual leave in April 1994, and another never reported for duty after 7 April.[71] The *commune* armoury contained four Kalashnikov rifles, two Enfield rifles, and six other spare rifles.[72] Neither the police nor the *commune* had telephones or two-way radios, and the police travelled on bicycles unless transported in one of the *commune*'s two vehicles, one of which was a white pick-up truck.[73] After the RPF invasion of northern Rwanda in 1990, a squad of *gendarmes* was posted near the *commune* office, but frequently departed on missions for days at a time, as it did on the morning of 7 April.[74] The Defence presented evidence, which the Prosecution did not seriously contest, that the *bourgmestre* had no legal authority over the *gendarmes*, who remained under the direction of their commanding officer even when posted in a commune at the *bourgmestre*'s request.[75]

3. Attacks in Gahini *Secteur* on 7 and 8 April

3.1. Introduction

47. On the evening of 7 April and the morning of 8 April 1994, attacks occurred in Gahini *Secteur*, Rukara *Commune*, resulting in the deaths of Tutsi residents and in the looting and burning of many homes.[76] The attacks originated at a small marketplace called Akabeza Centre and were said to have been organized and led by the *Conseiller* of Gahini *Secteur*, Jean Bosco Butera. Three meetings were purportedly held at Akabeza Centre to plan and instigate the attacks: one on the morning of 7 April, and one preceding each of the two attacks on 7 and 8 April. The Accused is alleged to have participated in these meetings with *Conseiller* Butera and to have publicly instigated the attacks. Mpambara is also alleged to have given Butera weapons on the morning of 7 April, which were later used in the attacks. The Accused testified that he went to Akabeza Centre on several occasions over the course of these two days but asserted that, rather than fomenting the violence as claimed by the Prosecution, he tried to discourage the attacks.

3.2. Indictment

48. The Indictment reads:

> 7. Jean Mpambara participated in the preparation and execution of the campaign against the Tutsi civilian population in Rukara *commune*, Kibungo *préfecture*. The campaign consisted of … (iii) distributing arms to *Interahamwe* and Hutu civilians for purposes of attacks against the Tutsi population.[77]

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[71] T. 6 February 2006 pp. 15-16, 43; T. 7 February 2006 p. 13 (Mpambara); T. 23 January 2006 pp. 9, 12-13 (Murwanashyaka). The Prosecution did not contest this evidence.
[72] T. 6 February 2006 p. 17 (Mpambara). Mpambara denied that the communal police possessed any grenades.
[73] T. 23 September 2005 p. 27 (Witness AOI); T. 26 September 2005 p. 6 (Witness LED); T. 27 January 2006 p. 14 (Habineza); T. 6 February 2006 p. 15 (Mpambara).
[74] T. 6 February 2006 pp. 33-34; T. 8 February 2006 p. 47 (Mpambara); T. 23 January 2006 p. 13 (Murwanashyaka).
[75] T. 6 February 2006 pp. 14, 24; T. 8 February 2006 pp. 18-19 (Mpambara); T. 23 January 2006 pp. 13-14 (Murwanashyaka); Prosecution Closing Brief, paras. 14-17. Although the Prosecution argued generally that the acts and omissions of the Accused must be considered in the context of his "office and position of authority as *Bourgmestre*" (Prosecution Closing Brief, para. 10) the legal authority associated with his office was not a matter on which the Chamber heard extensive testimony. Most of the evidence on this question was adduced through the Accused himself. The present discussion of the legal authority of *bourgmestre* under Rwandan law in 1994 is, accordingly, more limited than in some other judgements of this Tribunal. See, e.g., *Bagilishema*, Judgement (TC), paras. 147-225. In the absence of more comprehensive evidence, or any need to make more detailed findings, the Chamber's description here must be understood as based on the limited evidence placed before it.
[76] The Accused does not, however, contest that killings took place in Umwiga and Ibiza *Cellules* on 7 and 8 April 1994. *Déclarations des Admissions de la Défense*, 30 May 2005, paras. 9-10.
[77] The Prosecution's Pre-Trial Brief considerably narrowed the scope of these allegations and asserted that "[o]n or about 7th April between 9.00 and 11.00 a.m. at Rukara *Commune* office Samson Gacumbitsi, Jean Bosco Butera, Samuel Gasana and Manasse Kanyamurerea received ten guns from Jean Mpambara, with orders that all Tutsis should be killed. The said guns

…

9. Jean Mpambara organized or participated in meetings, as follows:

(i) on or about 7 April 1994, at Samson Gacumbitsi's place in Akabeza Trading Center, with other *commune* authorities and influential persons including *conseiller de secteur* Jean Bosco BUTERA, *Police Brigadier* Ruhiguri, Samson Gacumbitsi and Samuel Gasana.

(ii) on or about 8 April 1994, at Samson Gacumbitsi's place in Akabeza Trading Center, with other *commune* authorities and influential persons.[78]

…

11. On the evening of 7 April 1994, after the meetings in Akabeza Trading Center, Jean Mpambara ordered the gathered Hutu militia to attack the Tutsi population. Other members of the joint criminal enterprise including Jean Bosco Butera, Samson Gacumbitsi and Samuel Gasana led groups of armed Hutu civilians and *Interahamwe* to attack Tutsis in Umwiga Cellule. They attacked and killed a number of Tutsi civilians including Kayitesi and her two children, Anatalie and Gatsinzi.

12. On the morning of 8 April 1994, members of the joint criminal enterprise including Jean Bosco Butera led groups of armed Hutu civilians and *Interahamwe*, who gathered in Akabeza Trading Center, to attack Tutsis in Ibiza Cellule. They attacked and killed a number of Tutsi civilians including a man named David.

The legal characterization of the Accused's participation is expressed in paragraph 6 of the Indictment:

Jean Mpambara ordered those over whom he had command responsibility and control as a result of his position and authority described in paragraph 2. He instigated and aided and abetted those over whom he did not have command responsibility and control to attack the Tutsi population. In addition, the accused willfully and knowingly participated in a joint criminal enterprise whose object, purpose, and foreseeable outcome was the destruction of the Tutsi racial or ethnic group throughout Rwanda. To fulfill this criminal purpose, the accused acted with military and community leaders and members of the *Interahamwe* in Rukara *Commune* such as … *conseiller de secteur* Jean Bosco Butera, *Police Brigadier* Ruhiguri, Businessman Samson Gacumbitsi, Samuel Gasana … and other unknown participants.[79]

3.3. Evidence

3.3.1. Overview of Submissions

49. The Prosecution argues that the evidence shows that the Accused:

- distributed weapons at the Rukara Commune office on the morning of 7 April 1994, which were later used in attacks in Gahini *Secteur*;
- met with other influential persons at Akabeza Centre on the morning of 7 April 1994 to discuss plans for killing Tutsis, and publicly encouraged such attacks;

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were later that day distributed to attackers by Jean Bosco Butera and used to kill Tutsi civilians".[77] Prosecution Pre-Trial Brief, para. 21. See also paras. 25, 28.

[78] The meetings on 7 and 8 April at Gacumbitsi's place are alleged as part of a joint criminal enterprise, through which the Accused knowingly and willfully acted with military and community leaders as well as members of the *Interahamwe* in a scheme to eliminate the Tutsi population throughout Rwanda (and specifically in Rukara *Commune* between 7 and 16 April 1994). Indictment, paras. 6-7, 10.

[79] This paragraph supports the charges of genocide and complicity in genocide. Similar allegations appear in paragraph 21 for the charge of extermination as a crime against humanity.

- publicly encouraged attacks at Akabeza Centre again on the evening of 7 April 1994, which led to attacks that evening in the Umwiga and Ibiza *Cellules*;
- patrolled Umwiga and Ibiza *Cellules* on 8 April 1994 with two *gendarmes* and actively encouraged killings of Tutsis; and
- purposefully failed to arrest those responsible or otherwise prevent the killings or take stronger action to stop the violence on 8 April 1994 as killings were taking place.[80]

3.3.2. Distribution of Weapons at Commune Office, 7 April

50. The Prosecution relies principally on the testimony of Witness AVK to establish that the Accused distributed rifles and grenades to Butera, Gasana, Gacumbitsi and others at the Rukara *Commune* office on the morning of 7 April 1994, which were later stored at Gacumbitsi's place in Akabeza Centre and used in attacks on Tutsis.[81] Witness AVK, who served a prison sentence in Rwanda for his role in attacks against Tutsis in Gahini *Secteur*, testified that on the morning of 7 April at approximately 9.30 or 10.00 a.m., he saw Butera, Gasana, Gacumbitsi, Kanyamurera and Semana leave Akabeza Centre in Gasana's vehicle, heading toward the *commune* office.[82] Butera said that they wanted the *bourgmestre*'s advice.[83] At approximately 10.30 or 11.00 a.m., they returned and carried 10 Kalashnikov rifles and a box into Gacumbitsi's shop.[84] Witness AVK later learned that the box contained grenades, but was never told where the weapons had come from.[85]

51. The Accused acknowledged that Butera, Gasana, and Gacumbitsi came to the *commune* office that morning but denied that he distributed any weapons to them.[86] He testified that they arrived around 7.30 a.m. and asked how they should conduct themselves in light of the President's death.[87] The Accused testified that he told them to return to their *secteurs* and tell people to remain in their homes and avoid trouble.[88] Butera asked for a rifle to maintain security, but the Accused refused, saying that Butera was a civilian and was not authorized to carry a gun.[89] Butera became angry, and the three individuals left the *commune* office without any weapons, returning in the direction of Gahini.[90]

52. The Prosecution also relies on Witness LEV, who testified that he saw the Accused at the *commune* office with three communal policemen at approximately 6.30 a.m.[91] Later that morning, he

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[80] Prosecution Closing Brief, paras. 52-90; T. 2 May 2006 pp. 2-4, 9-21 (closing arguments). No evidence or submissions were offered in support of paragraph 9 (ii) of the Indictment, to the effect that the Accused participated in a second meeting at Gacumbitsi's place on 8 April 1994.
[81] Prosecution Closing Brief, paras. 55-58, 198. T. 2 May 2006 pp. 9-12 (closing arguments).
[82] T. 20 September 2005 pp. 62-63 (Witness AVK); T. 21 September 2005 pp. 7-9 (Witness AVK). See also T. 13 January 2006 pp. 35-36 (Hardinge) (testifying that the commune office was approximately ten kilometres away from Gahini Hospital).
[83] T. 21 September 2005 p. 8 (Witness AVK).
[84] *Id*. pp. 8-9, 25 (Witness AVK).
[85] *Id*. pp. 9, 25 (Witness AVK). Witness AVK testified that he was told by an ex-soldier named Shyaka that the box contained grenades.
[86] *Mémoire Final Aux Fins d'Acquittement*, pp. 64-65; T. 2 May 2006 pp. 58-60 (closing arguments).
[87] T. 6 February 2006 p. 40 (Mpambara). The Accused denied that Kanyamurera and Semana were present at the meeting. T. 8 February 2006 p. 45.
[88] T. 6 February 2006 p. 40 (Mpambara).
[89] *Id*. p. 40 (Mpambara). The Accused testified that an arsenal of weapons was kept in a store room at the *commune* office for use by the communal police and that the head of the communal police, *Brigadier* Ruhiguri, had the key to the room. *Id*. pp. 16, 21 (Mpambara). It is unclear from the record whether the Accused also had means to gain access to the store room.
[90] *Id*. p. 40 (Mpambara).
[91] T. 27 September 2005 pp. 13-14 (Witness LEV). The Prosecution also points to the testimony of Witness LEF, but his testimony has no probative value other than that it fails to corroborate the account given by Witness AVK. Witness LEF, who rented a room from Gacumbitsi in Akabeza Centre, testified that he did not see Butera, Gacumbitsi, and Gasana leave Akabeza Centre that morning nor did he see them return in Gasana's vehicle. T. 21 September 2005 p. 64. Witness LEF also stated that he saw weapons stockpiled at Gacumbitsi's place. T. 22 September 2005 pp. 3-5. However, Witness LEF only saw the weapons there around 17 April 1994, after the Rwandan Patriotic Front arrived in Rukara *commune* and broke the door open on Gacumbitsi's shop, leaving it exposed to looters. T. 21 September 2005 p. 57; T. 22 September 2005 p. 7. This

saw two cars heading from the *commune* office toward Gahini *Secteur*: the first carrying Butera, Gatambara, Musirikare and others; and the second, approximately twenty minutes later, carrying Mpambara, a driver and two communal police.[92] Witness LEV did not, however, witness the meeting at the *commune* office, nor did he see Butera or the other men in possession of any weapons.

53. There is no direct evidence that the Accused distributed weapons to Butera or the other men. No witness saw any such distribution or heard that it had taken place. The Chamber will only infer criminal conduct on the basis of circumstantial evidence where, as previously mentioned, it is "the *only* reasonable conclusion available".[93] The evidence presented, assuming that it is credible, does not foreclose the reasonable possibility that the weapons were obtained elsewhere.[94] No evidence was heard, for example, suggesting that the communal armoury was the only possible source of the weapons in Butera's possession. The Chamber does not find beyond a reasonable doubt that Mpambara distributed weapons to Butera on the morning of 7 April.

3.3.3. First Gathering at Akabeza Centre, 7 April

54. Witnesses AVK and LEF alleged that the Accused came to Akabeza Centre on the morning of 7 April 1994; that he met with the leaders of the subsequent attacks; and that he verbally encouraged killing of Tutsis.

55. According to Witness AVK, the Accused arrived in the white communal pick-up truck around 11.00 a.m., accompanied by a driver and an armed communal policeman.[95] Mpambara entered Gacumbitsi's shop and met with Gacumbitsi, Gasana and Butera.[96] After approximately twenty minutes, the group reemerged onto the veranda, where Gacumbitsi told the crowd that the President's death was the work of the Tutsis and that his death needed to be avenged by killing them.[97] While Gacumbitsi was still speaking, but after these remarks instigating the killings, Mpambara boarded his vehicle and drove away.[98]

56. Witness LEF, a Tutsi who ran a small shop behind Gacumbitsi's bar, testified that he saw the Accused arrive between 9.00 and 10.00 a.m. at Akabeza Centre with two communal police named Ngarambe and Ruhiguri as well as a driver.[99] Upon exiting his truck, the Accused said, "in a very loud voice": "I used to think that the people from Gahini were strong, courageous, and how can there be no – any Tutsi corpses around when the head of state has been killed?".[100] Mpambara entered Gacumbitsi's place for a meeting, while Butera stayed outside and told the crowd that they needed to avenge the President's death.[101] Mpambara came out of Gacumbitsi's shop and left after speaking briefly with Butera.[102] Butera and Gacumbitsi then discussed how to carry out the attacks.[103]

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testimony is insufficient to link the stockpiling of weapons at Gacumbitsi's place in Akabeza to the events of the morning of 7 April 1994 and does not connect the weapons to the Accused in any way.

[92] T. 27 September 2005 pp. 15-17. While Witness LEV mentioned that others were travelling with Butera when he passed by the witness's place of employment, the Chamber notes that Witness LEV failed to mention Gacumbitsi and Gasana, two prominent figures in the community, who were alleged to have been with Butera that morning.

[93] *Mucic et al.*, Judgement (AC), para. 458; *Stakic*, Judgement (AC), para. 219.

[94] The Prosecution conceded during closing arguments that "it's circumstantial evidence, but looking back on the train of events as they unfolded, it's our submission that you can be sure that you can make that inferential finding that there is a direct causation. MR. PRESIDENT: Is that – is that finding the only finding that is open, that it was, indeed, the Accused who is the source of those weapons? MS. MOBBERLEY: Obviously, it's not, Your Honours…". T. 2 May 2006 pp. 11-12 (closing arguments).

[95] T. 21 September 2005 p. 2. Witness AVK did not recognize the communal policeman.

[96] *Id.* pp. 2-3 (Witness AVK). The witness stated that they may have been others who went into Gacumbitsi's shop with the Accused but that he could not recall.

[97] *Id.* p. 3 (Witness AVK).

[98] *Id.* p. 4 (Witness AVK).

[99] *Id.* pp. 54, 65; T. 22 September p. 2 (Witness LEF).

[100] T. 21 September 2005 pp. 54, 67 (Witness LEF).

[101] *Id.* p. 55; T. 22 September 2005 pp. 12-13 (Witness LEF).

[102] T. 21 September 2005 pp. 55-56 (Witness LEF). Witness LEF stated that he was hiding beside Gacumbitsi's shop by that time because he had become frightened by the events that were transpiring. Consequently, he did not actually see the

57. The Accused testified that he visited Akabeza Centre around 10.30 a.m. as part of a tour of the *commune*, following reports of violence.[104] Mpambara told the population to close their shops and return to their homes.[105] Although it is not entirely clear from the record, he appears to have been driving himself in the communal vehicle, accompanied by Ngarambe, a communal policeman.[106] The Accused testified that he did not stay long at Akabeza Centre and continued on toward Kawangire and Rwimishinya *Secteurs*, where he crossed paths with Father Ganuza Lasa Santos, the Spanish priest of Rukara Parish.[107] Mpambara and Father Santos returned to the Parish church together, where they arrived at approximately 11.00 a.m.[108]

58. The testimony of Witnesses AVK and LEF diverge in several significant respects.[109] First, Witness AVK did not hear the Accused ask why there were no Tutsi corpses, even though he testified that he saw the Accused arrive.[110] Second, the witnesses differ as to whether Butera entered Gacumbitsi's place to participate in the meeting or rather remained outside on the veranda. Witness AVK specifically recalled seeing Butera enter Gacumbitsi's shop and remain there for twenty minutes, whereas Witness LEF was adamant that Butera stayed outside to hector the crowd.[111] Third, Witness LEF recalls no speech being made by Gacumbitsi after the meeting, whereas Witness AVK testified that Gacumbitsi addressed the crowd in the presence of the Accused, instigating them to kill Tutsis.[112]

59. These discrepancies cannot be explained by the witnesses' different vantage points, as argued by the Prosecution. Each witness gave specific eyewitness testimony describing the Accused's arrival, entry into Gacumbitsi's shop, emergence from the shop, and then departure from Akabeza. The discrepancies are significant enough to raise a reasonable doubt as to the reliability of both witnesses in respect of this event. The overall credibility of Witness AVK is also undermined by his testimony concerning the Accused's presence at Gahini Hospital on 9 April, discussed by the Chamber in

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Accused leave Gacumbitsi's shop or drive away. He also could not hear what was said between Butera and the Accused just before the Accused's departure.

[103] *Id*. p. 56 (Witness LEF).

[104] T. 6 February 2006 pp. 42-43; T. 8 February 2006 p. 46 (Mpambara).

[105] T. 6 February 2006 pp. 42-43 (Mpambara).

[106] T. 6 February 2006 pp. 16-17, 42-43; T. 7 February 2006 p. 41 (Mpambara).

[107] T. 6 February 2006 p. 44 (Mpambara). Father Santos provided a similar account before the Tribunal. T. 9 January 2006 pp. 12-13 (Santos).

[108] T. 6 February 2006 p. 44 (Mpambara); T. 9 January 2006 p. 13 (Santos).

[109] In addition to the discrepancies to be discussed in detail by the Chamber, other minor discrepancies exist which further diminish the weight to be given their testimonies. For example, Witnesses AVK and LEF differ in their accounts as to the number of communal police that accompanied the Accused that morning and the identity of these policemen. At trial, Witness AVK testified that the Accused arrived with one communal policeman whom the witness did not recognize and a driver. T. 21 September 2005 p. 2. The witness specified that the policeman was not the *Brigadier* Gervais Ruhiguri. T. 21 September 2005 p. 3. However, in his statement to OTP investigators dated 11 October 2004, he expressly stated that the Accused was accompanied by *Brigadier* Ruhiguri and a driver. Exhibit D-11 p. 3. Witness LEF, on the other hand, testified before the Tribunal in this case and in the *Bizimungu et al*. case that the Accused arrived with two communal policemen named Ruhiguri and Ngarambe and a driver. T. 21 September 2005 p. 65; *Prosecutor v. Bizimungu et al*., T. 15 March 2004 p. 35. In his 17 July 2001 statement to OTP investigators, Witness LEF stated that the Accused arrived with only one communal policeman named Ngarambe and a driver. Exhibit D-8A p. 3. He made no mention of the *Brigadier* Ruhiguri. The Chamber notes that, in addition to the witnesses' internal inconsistencies, their accounts may be inconsistent with each other on these issues. Witness LEF also failed to discuss the meeting at Gacumbitsi's place and Butera's address to the crowd during this meeting in his 2001 statement to OTP investigators. Exhibit D-8A. In addition, the Defence argues that LEF's testimony that a man named Alphonse Mugiraneza was present at Akabeka Centre that morning is contradicted by Witness LET's testimony that the man was at Gahini market, approximately two kilometres away, at the same time. *Mémoire Final Aux Fins d'Acquittement* p. 10. Finally, the Defence takes issue with the witnesses' assertions that the Accused had a driver, as the Accused and several other witnesses testified that the Accused did not have a driver during the events of April 1994. *Mémoire Final Aux Fins d'Acquittement* p. 9; T. 6 February 2006 pp. 16-17 (Mpambara); T. 7 February 2006 p. 41 (Mpambara); T. 27 January 2006 pp. 14-16 (Habineza). T. 26 September 2005 p. 7 (Witness LED); T. 31 January 2006 p. 12 (Serukwavu).

[110] T. 21 September 2005 p. 2 (Witness AVK) ("He didn't say anything in particular other than greeting those people that were present").

[111] T. 21 September 2005 pp. 2-3 (Witness AVK); T. 21 September 2005 p. 55 (Witness LEF); T. 22 September 2005 pp. 12-13 (Witness LEF).

[112] T. 21 September 2005 pp. 55-56 (Witness LEF); T. 21 September 2005 p. 3 (Witness AVK).

Section 4.3.7 below. Accordingly, in light of the irreconcilable discrepancies in the testimony of the only Prosecution witnesses to this event, and overall unreliability of Witness AVK's testimony concerning the Accused, the Chamber entertains a reasonable doubt that the Accused verbally instigated attacks on the Tutsi population, or that he stood by while others did so.

3.3.4. Second Gathering at Akabeza Centre and Ensuing Attacks, 7 April

60. The Prosecution relies solely on the testimony of Witness AVK to establish that Mpambara met Gacumbitsi and others at Akabeza Centre on the evening of 7 April 1994 and that he instigated a crowd to kill Tutsis. Witness AVK testified that people began to reassemble at Akabeza Centre around 6.00 p.m. that evening.[113] Mpambara arrived shortly thereafter and entered Gacumbitsi's place.[114] When the Accused reemerged, he and Butera stood on Gacumbitsi's veranda as they had earlier that day.[115] Butera blew a whistle, drawing people to gather around.[116] Witness AVK heard Mpambara tell the crowd that they needed to avenge the death of their father by killing Tutsis and to prevent themselves from becoming slaves.[117] After the Accused's departure, Butera blew the whistle again, and the group moved about ten metres down the road.[118] Witness AVK testified that Butera gave instructions for carrying out the killings and identified the houses to be targeted.[119] Butera blew his whistle a third time, leading attacks on the homes of five Tutsis that evening.[120] The attackers surrounded each house, broke down doors, killed anyone inside, and looted whatever could be found.[121] After the attack, the mob returned to Akabeza Centre where they were given beer and soda by Gacumbitsi and Gasana and told to return the following morning to continue the attacks.[122]

61. The Accused denied these allegations, testifying that he passed through Akabeza Centre in the afternoon, told people gathered there to return to their homes immediately, and that he returned to the *commune* office shortly before 6.00 p.m.[123]

62. Defence witness Félicien Serukwavu, a local carpenter of Tutsi origin, found a group of twenty to twenty-five people with machetes and clubs at Akabeza Centre in the late afternoon that day.[124]

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[113] T. 21 September 2005 pp. 4, 25-26 (Witness AVK).
[114] *Id*. pp. 4-5 (Witness AVK).
[115] *Id*. p. 5 (Witness AVK).
[116] *Id*. pp. 5-6 (Witness AVK). Witness AVK estimated that two hundred armed Hutu were present by that time. The Chamber notes, however, that Witness AVK estimated the crowd at Akabeza Centre in the morning to be one hundred persons whereas Witness LEF attested to twenty to thirty persons. Compare *id*. p. 2 (Witness AVK) with *id*. p. 54 (Witness LEF). The crowd consisted of Hutu civilians and former soldiers in civilian clothes. *Id*. pp. 6-7 (Witness AVK). The head of the communal police, *Brigadier* Ruhiguri, and another communal policeman were also present and carried rifles. *Id*. pp. 9-10 (Witness AVK).
[117] *Id*. p. 5 (Witness AVK). Witness AVK testified that he was standing five metres away from Mpambara at the time. He testified that the crowd reacted favorably to Mpambara's speech. *Id*. p. 9.
[118] *Id*. pp. 10, 25-26 (Witness AVK). It is not clear from the record exactly how long after the address the Accused left.
[119] *Id*. pp. 10-11 (Witness AVK).
[120] *Id*. pp. 10-12 (Witness AVK). The homes of Rugomwa, Shabayiro, and Cassien were located in Umwiga *Cellule*, and the homes of Janvier and Higiro were situated in Ibiza *Cellule*. During the course of the attacks, several people were killed, including Rugomwa's wife, Shabiyiro and his sister Dina. Defence witness Innocent Bagabo corroborated that the attacks took place that evening. T. 26 January 2006 p. 39; Exhibit P-21A p. 3.
[121] T. 21 September 2005 p. 11-12 (Witness AVK).
[122] *Id*. p. 12 (Witness AVK).
[123] T. 7 February 2006 p. 2 (Mpambara) ("The night of the 7th saw nothing extraordinary, so nothing special in Rukara *Commune*. I went round and I found everything was normal. There was no problem of security anywhere I went, except that I was telling the population whenever I went round to go to their homes and take care of themselves and ensure their security, and that is all"). Father Santos testified that the Accused returned to Rukara Parish that afternoon to assess the refugee situation, but he provides no indication of time. T. 9 January 2006 pp. 13-14 (Santos).
[124] T. 31 January 2006 pp. 6-7 (Serukwavu). The witness, who was on his way to drop off wood at his workshop, could not recall exactly what time he reached Akabeza Centre. *Id*. pp. 32-33. He testified that it was still daylight but that it was beginning to be twilight by the time he left Akabeza Centre. *Id*. pp. 6-7.

Butera was telling the crowd that they had to avenge their parent's death.[125] Serukwavu continued home and did not leave his home again until the following day.[126]

63. For reasons discussed more fully in Section 4.3.7, the Chamber entertains a reasonable doubt concerning Witness AVK's uncorroborated testimony incriminating the Accused. Moreover, Serukwavu's credible testimony contradicts that of Witness AVK, although it does not exclude the possibility that the Accused may have been present at Akabeza at some moment that evening. Nevertheless, the Chamber finds that the testimony of Witness AVK does not establish beyond a reasonable doubt that the Accused instigated the killing of Tutsis on the evening of 7 April at Akabeza Centre, or that he attended a meeting at Gacumbitsi's place as part of a joint criminal enterprise to kill the Tutsi population.

3.3.5. Third Gathering at Akabeza Centre and Ensuing Attacks, 8 April

64. The Prosecution again relies on the uncorroborated testimony of Witness AVK to prove that the Accused encouraged killings in Ibiza *Cellule* on 8 April 1994.[127] Witness AVK testified that he and other attackers reconvened at Akabeza Centre that morning.[128] Butera gave instructions for carrying out more killings and divided the attackers into four groups, which proceeded to ravage Ibiza *Cellule* for the remainder of the day.[129] The attackers chased a Tutsi man named David Twamugabo into his house, where they tried to kill him with a grenade.[130] According to Witness AVK, the Accused arrived on the scene in the communal vehicle, accompanied by two *gendarmes*. Mpambara beckoned to Witness AVK and asked him where the grenade had exploded. When Witness AVK responded that it was Twamugabo's house, the Accused asked, "What are you doing? Are you failing to carry out your operations? What is it?".[131] The *gendarmes* accompanying the Accused then said, "Maybe you are short of firearms. Should we give you more weapons?".[132] Witness AVK gave no response, and the Accused and the *gendarmes* drove away.[133]

65. Defence Witness Félicien Serukwavu also saw the attacks that day, including the one on Twamugabo's house. After hearing shouts from that direction, Serukwavu went to Ibiza *Cellule* around 11.00 a.m. and stood a short distance away from Twamugabo's house.[134] Attackers using clubs, machetes and sticks removed the roof, door and windows of the house, but Serukwavu neither heard nor saw any explosions.[135] A short time later, Serukwavu saw Mpambara arrive accompanied by two communal policemen carrying rifles.[136] Mpambara looked angry as he exited his vehicle and said, "Anybody who loots the property of Tutsis or hunts down Tutsis trying to kill them should know that he should be – he will be tried in courts for it … I ask everybody to leave this premises and return

[125] *Id*. p. 7 (Serukwavu).
[126] *Id*.
[127] Prosecution Closing Brief, para. 82; T. 2 May 2006 p. 17 (closing arguments).
[128] T. 21 September 2005 pp. 12-13 (Witness AVK).
[129] *Id*. p. 13 (Witness AVK) ("Butera told us that it was not a matter of getting into homes but, rather, going to the bushes to flush out people"). The attackers were divided into four groups led by Ruvugo, Nyagutungwa, Mugiraneza, and Butera. Although the witness's testimony was ambiguous as to which group he joined, it is at least clear that he was not in the group led by Butera.
[130] *Id*. p. 14. Twamugabo was not injured by the grenade. However, all of the attackers came to his house when they heard the grenade and began throwing arrows and stones at the house. Finally, Butera and Munyemana entered the house and killed Twamugabo, according to the witness.
[131] *Id*.
[132] *Id*.
[133] *Id*.
[134] T. 31 January 2006 pp. 7-8. Serukwavu testified that he had gone back to Rwinkuba forest that morning to recover his carpentry tools and put them in a safe place. The Prosecution tried to establish that Serukwavu had participated in the attacks that day, including on Twamugabo's house, but Serukwavu denied the allegation. T. 31 January 2006 p. 31.
[135] T. 31 January 2006 pp. 8, 27 (Serukwavu).
[136] *Id*. pp. 8-9 (Serukwavu). Witnesses AVK and Serukwavu differ as to whether the two persons travelling with the Accused were *gendarmes* or communal police, but the Chamber does not find this discrepancy to be significant insofar as both witnesses establish that the Accused was travelling with two law enforcement officers. The Chamber notes, however, that Mpambara recalled only having one communal policeman with him on that day. T. 8 February 2006 p. 56.

home".[137] Many attackers fled when they saw Mpambara arrive, and others dispersed at his instruction.[138]

66. Witness NK5, a peasant farmer living in the area who had come to buy food at Gacumbitsi's shop, confirmed the Accused's presence at Akabeza Centre that morning.[139] She testified that the Accused addressed a group outside Gacumbitsi's shop and told them not to turn against each other.[140] Witness NK5 described the Accused as "very sad" and "almost crying".[141] After his departure, a number of people gathered around Butera and began calling the Accused an accomplice of the Tutsi.[142]

67. Another Defence witness, Marie Rose Niwemugeni, testified that Mpambara came to Gahini market, which is not far from Akabeza Centre, around noon that day, accompanied by communal police.[143] According to Niwemugeni, the Accused told people gathered there to go back to their homes and not to engage in the same type of violence that was occurring in the neighbouring *commune* of Murambi.[144] As the Accused drove off in the direction of Gahini Hospital, the witness saw many residents begin to return to their homes and heard people call Mpambara a Tutsi accomplice.[145]

68. The Accused acknowledges that killings took place in Ibiza *Cellule* that day but denies that he encouraged the attacks in any way. He testified that he was informed of killings in Gahini *Secteur* by *Brigadier* Ruhiguri on the morning of 8 April at around 7.00 a.m.[146] The two immediately went to Akabeza Centre, where residents told them of the events of the previous evening.[147] After touring the *secteur* to assess the damage, they returned to Akabeza Centre, where Mpambara reprimanded the crowd for the attacks and told them that the killings had to stop.[148] He also spoke directly with Butera, reiterating the need to quell the violence and instructing him to prepare a report identifying those responsible.[149] The Accused told Butera that he would go to Rwamagana to call on the *gendarmerie* to investigate the killings.[150] Prosecution Witness Dr. Robert Wilson, a British physician who worked at Gahini Hospital in April 1994, generally corroborated this testimony, saying that when he arrived at Akabeza, Mpambara was meeting with approximately seventy to eighty people.[151] Dr. Wilson testified that he did not have the impression that the Accused was inciting violence and only heard him giving instructions about civil defence and emphasizing the need for calm.[152] Both Dr. Wilson and the Accused testified that they spoke to each other after this meeting.[153] Dr. Wilson told the Accused that a

[137] T. 31 January 2006 pp. 8-9 (Serukwavu).
[138] *Id*. p. 9 (Serukwavu).
[139] T. 30 January 2006 pp. 2-6. The witness initially placed the encounter with the Accused near 11.00 a.m. However, in response to suggestive questioning by the Defence to which the Prosecution objected, she stated that she was not sure of the exact time. Her sighting of Butera suggests that she may be referring to Mpambara's earlier visit to Akabeza Centre that day because the Accused testified that he did not find Butera at Akabeza Centre when he returned there around 11.30 a.m. after his trip to Rwamagana. T. 7 February 2006 p. 4.
[140] *Id*. pp. 6, 13 (Witness NK5) ("People, I'm telling you once again, if you hear my message, go and tell other residents of this message. Tell your neighbours, tell any passenger. I'm giving you a message, you are all kith and kin, don't turn against each other, don't say, 'This is a Hutu,' 'This is a Tutsi.' The war is a bad thing").
[141] *Id*. p. 6 (Witness NK5).
[142] *Id*. p. 7 (Witness NK5). The Accused drove off in the direction of Gahini market. *Id*. pp. 7, 13.
[143] T. 27 January 2006 pp. 22-23 (Niweumugeni). The Accused did not testify to passing through Gahini market that morning or addressing residents there.
[144] *Id*.
[145] *Id*. p. 23 (Niweumugeni).
[146] T. 7 February 2006 p. 3 (Mpambara).
[147] *Id*.
[148] *Id*. ("I was extremely disturbed and I went back to Akabeza centre and I called people from that area and told them that what they had done the previous night is very, very bad that they had started the killings that cannot be explained, cannot be justified, and that I wanted those things to stop"). The Accused estimated their return to Akabeza Centre to be between 9.00 and 9.30 a.m. *Id*. p. 4.
[149] *Id*. p. 3.
[150] *Id*.
[151] T. 19 September 2005 p. 18 (Wilson).
[152] *Id*. Dr. Wilson testified that, although his knowledge of Kinyarwanda was not good, he could understand some of what was being said and that he recalled the Accused telling people to be vigilant for the enemy and to remain calm. T. 19 September 2005 p. 38.
[153] T. 7 February 2006 p. 3 (Mpambara); T. 19 September 2005 p. 18 (Wilson).

Tutsi man had taken refuge at his house and sought advice.[154] Mpambara told Dr. Wilson to keep the man in hiding until he returned from Rwamagana with *gendarmes* and could transport him to a more secure place.[155]

69. The Accused testified that after his unsuccessful attempt to obtain *gendarmes* from Rwamagana, he returned to Akabeza Centre around 11.30 a.m.[156] Mpambara was told that Butera and others were carrying out attacks in Umwiga *Cellule*.[157] The Accused took Ruhiguri and headed to Umwiga and Ibiza *Cellules*, where he found houses on fire.[158] The Accused testified that he ran around trying to stop the disturbances but that he could not control the situation because people scattered as soon as he approached.[159] The Accused did not mention having seen Butera.

70. Although the differences between Witness AVK and Serukwavu may be attributable to different perspectives or periods of time, they nevertheless reflect a fundamentally contradictory picture of Mpambara's general behaviour.[160] It seems unlikely that the Accused would have been actively encouraging the killings in Ibiza *Cellule* and, at the same time, scolding participants of the very same attack. Moreover, the Chamber views Witness AVK's uncorroborated testimony with caution in light of his testimony about the Accused at Gahini Hospital, discussed in section 4.3.7. Consequently, the Chamber finds that the evidence does not establish beyond a reasonable doubt that the Accused instigated or encouraged the killings occurring in Ibiza *Cellule* on 8 April 1994.

3.3.6. Failure to Arrest Butera and Others, or to Take Stronger Action to Prevent Attacks on 8 April

71. The Prosecution argues that the Accused's failure to arrest those responsible for the attacks, particularly Butera, and his failure to take additional steps to end the violence on 8 April 1994 were intended to allow other members of a joint criminal enterprise to carry out killings in Umwiga and Ibiza *Cellules*.[161] In addition to the testimony of Witness AVK, the Prosecution relies on Defence Witness Félicien Serukwavu, who stated that he did not hear the Accused give any orders to the armed communal police who were travelling with him to take any action whatsoever.[162]

72. The Accused testified that he did not realize that the situation had become critical until 8 April 1994 when he found people dead in Umwiga and Ibiza *Cellules*, and that he immediately tried to take the necessary measures to restore order to the commune.[163] Upon learning of the killings of the

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[154] T. 7 February 2006 p. 3 (Mpambara); T. 19 September 2005 p. 18 (Wilson).
[155] T. 7 February 2006 p. 3 (Mpambara); T. 19 September 2005 p. 18 (Wilson). Later that day, a group of German volunteers passed by Dr. Wilson's house with *gendarmes* to ask if Dr. Wilson and his family wanted to leave Rukara with them. Dr. Wilson decided to stay, but the group evacuated the Tutsi man to the commune office. Dr. Wilson heard that the man was later seen at the *commune* office but had no idea of what ultimately happened to him. T. 19 September 2005 p. 20 (Wilson).
[156] T. 7 February 2006 pp. 4-5 (Mpambara). Mpambara left Akabeza Centre and headed to Rwamagana between 9.30 and 10.00 a.m. where he met with the *sous-préfet* and the *gendarmerie* commandant to explain the situation and to request that *gendarmes* be deployed to Rukara. The *gendarmerie* commandant told the Accused that he could not send *gendarmes* immediately because many *gendarmes* had been sent to the front lines to fight, leaving very few behind, and because he needed to obtain the approval of his own superior prior to deploying them. The commandant agreed to contact his superiors and to send *gendarmes* to Rukara that afternoon.
[157] T. 7 February 2006 p. 4 (Mpambara).
[158] *Id*. pp. 4-5.
[159] *Id*. pp. 4, 6. ("I went round the *cellule* in that kind of confusion and I didn't know what to do").
[160] The witnesses appear to have been situated at slightly different locations near Twamugabo's house, and consequently they appear to have had separate encounters with Mpambara. They may also have arrived at the scene at slightly different times, which would account for why they did not both hear grenade explosions or witness the looting of Twamugabo's house.
[161] Prosecution Closing Brief paras. 27, 79; T. 2 May 2006 pp. 20-21 (closing arguments).
[162] T. 31 January 2006 pp. 9-10 (Serukwavu) ("They did not do anything. I didn't see them do anything. They were carrying rifles, but they didn't shoot at anyone …. I didn't see any action like that [referring to whether Mpambara gave them any orders]").
[163] T. 8 February 2006 pp. 50-52 (Mpambara) ("I realized that we were living an emergency period … on the 8th of April, when I found people dead at Gahini, that's when I realized that we were in critical times, and I decided to take the necessary measures").

previous evening, he went immediately to Akabeza Centre to gather information and to assess the situation first-hand:

> I went with Ruhiguri, the policeman. We went straight to Umwiga cellule and when I reached there, I found that some homes of the Tutsis had already been torched. When I reached there, I asked him what was happening and – there were doing it – was that whenever I reached a home, a home that was being torched, people would flee running in every direction and I wouldn't see anyone. The only people I would see would be some women and children who would come around to see and I ask people, 'What are you doing here?' And people would scatter into the banana growth, into the bushes and I wouldn't see anyone – anyone to arrest and every time I reached every home, it would happen like that. I could not control anything. I ran all over the place through the bushes, through the banana growth and I said that this is serious, I have to find a way of stopping all these disturbances.[164]

73. According to the Accused, his attempts to stop the violence were futile because he was unable to determine who was responsible.[165] The Prosecution suggested that Mpambara knew at the time that Butera was leading the attacks because Ruhiguri and others had told him so that morning.[166] Mpambara gave somewhat inconsistent responses as to his state of knowledge concerning Butera's culpability, but ultimately testified that, despite certain suspicions of Butera's involvement, he had no concrete reason to believe Butera was involved in the killings at that time.[167] More generally, the Accused testified that he did not have sufficient means to effectuate arrests or prevent the violence.[168]

74. The Accused also points to efforts he made that day to restore order in the *commune*. He made several trips to Akabeza Centre to speak with residents, urging them to remain calm and to return to their homes.[169] He patrolled Umwiga and Ibiza *Cellules* to see what was happening and to stop the violence.[170] He made two trips to Rwamagana to plead for *gendarmes*, once in the morning when he met with the *sous-préfet* and *gendarmerie* commandant, and again in the afternoon with Father Santos.[171]

75. In the Chamber's view, the evidence does not establish that the Accused's alleged omissions demonstrate a criminal intent. The evidence leaves open the reasonable possibility that Mpambara was overwhelmed by the situation, did not know with any degree of certainty who was leading the attacks in Ibiza and Umwiga *Cellules* on 7 and 8 April, and was incapable of restoring order with the law enforcement resources at his disposal. Moreover, the Defence presented evidence that the Accused made attempts to restore order to the *commune*. Although Mpambara may, arguably, have been able to do more than he did, the Prosecution has not established beyond a reasonable doubt that the Accused's failure to arrest Butera and others, or to take stronger measures to quell the violence, shows that he was involved in a joint criminal enterprise, or that his omissions had a substantial effect on the commission of crimes by others so as to make him liable for aiding and abetting.

3.4. Conclusion

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[164] T. 7 February 2006 pp. 3-4 (Mpambara).
[165] *Id*. pp. 4, 6 (Mpambara).
[166] T. 8 February 2006 pp. 54-57.
[167] Mpambara first testified that, upon his third passing at Akabeza Centre on the morning of 8 April, he was told that Butera and several youths had gone to Ibiza *Cellule* to torch houses and kill people. T. 7 February 2006 p. 5. Mpambara then stated that he did not know at the time that Butera was taking part in the killings but that he merely had suspicions without any tangible evidence. T. 7 February 2006 p. 8; T. 8 February 2006 pp. 56-57. Mpambara claimed that he did not learn of Butera's true involvement in the killings across Rukara Commune until he reached Tanzania as a refugee. T. 7 February 2006 p. 8.
[168] T. 9 February 2006 pp. 2-3 (Mpambara).
[169] T. 7 February 2006 pp. 3-4 (Mpambara).
[170] *Id*. pp. 3-5 (Mpambara).
[171] *Id*. pp. 4, 9-10 (Mpambara). Father Santos corroborated Mpambara's testimony about the trip to Rwamagana. T. 9 January 2006 p. 17.

76. The evidence of the events in Gahini *Secteur* on 7 and 8 April 1994 does not show beyond a reasonable doubt that the Accused's alleged acts and omissions amounted to planning, instigating, ordering or aiding and abetting the killings, or that he was a participant in a joint criminal enterprise.

4. Attack on Gahini Hospital, 9 April

4.1. Introduction

77. Gahini Hospital is perched atop a ridge overlooking Lake Muhazi, about 10 kilometres by road from Rukara Parish. A wire-mesh fence encloses several buildings in a compound; the main gate gives access to the road to Rukara Parish, and a back gate leads to a small collection of shops called Akabeza Centre.[172] The evidence shows, and it is not disputed, that on the morning of 9 April 1994, a mob armed with clubs, spears, machetes, and other traditional weapons, surrounded the hospital compound, prevented the evacuation of Tutsi civilians who had taken refuge there, and then invaded the compound and violently killed the Tutsis who were trapped there. Mpambara came to the compound at some stage during the morning, assessed the situation, and then went to the Rwamagana *gendarmerie* camp. Another attack on the hospital then took place, before the Accused returned in the early afternoon with the *gendarmerie* commandant and the *sous-préfet*.[173]

4.2. Indictment

78. The Indictment reads:

> 13. On the morning of 9 April 1994, members of the joint criminal enterprise including *conseiller de secteur* Jean Bosco Butera and *Communal Police Brigadier* Ruhiguri led groups of armed Hutu civilians and *Interahamwe* to attack Tutsis who took refuge in Gahini Hospital. They attacked and killed a number of Tutsis who took refuge in Gahini Hospital. They attacked and killed a number of Tutsi civilians including Kalenzi Muzungu from Umwiga *Cellule*, Mwizerwa a.k.a. Bebe and his father Higiro, Ruhagaza from Kawangire, Mukarugwiza, Karasira Israel from Kawangire, Hhajabakiga Simeon from Bicumbi in Kigali, Muhikira a.k.a. Toto, Murenzi from Kawangire, Bushorishori from Kawangire and a child. During the attack, Jean Mpambara arrived at the Hospital and Jean Bosco Butera reported to him the names of the Tutsis they killed.

The legal characterization of the Accused's participation is that he:

> ordered those over whom he had command responsibility and control as a result of his position and authority described in paragraph 2. He instigated and aided and abetted those over whom he did not have command responsibility and control to attack the Tutsi population. In addition, the accused willfully and knowingly participated in a joint criminal enterprise whose object, purpose, and foreseeable outcome was the destruction of the Tutsi racial or ethnic group throughout Rwanda. To fulfil this criminal purpose, the accused acted with military and community leaders and members of the *Interahamwe* in Rukara *Commune*, such as … *conseiller de secteur* Jean Bosco Butera, Police Brigadier Ruhiguri … and other unknown participants. [174]

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[172] T. 19 September 2005 p. 12 (Wilson).

[173] Witnesses LET, AVK and LEK were not in a position to confirm whether the Accused visited Gahini Hospital on two distinct occasions. However, their testimony is not inconsistent with that of Witnesses Wilson and Hardinge, who gave detailed eyewitness testimony concerning the Accused's first visit, his departure, and his return. Witnesses LET and LEK both confirm that the Accused was present at the compound at some stage, and then appeared to have left the scene. T. 26 September 2005 p. 71; T. 26 September 2005 p. 73 (French) (Witness LEK could not confirm whether Mpambara actually left the compound, although he saw him walking towards the main gate); T. 20 September 2005 pp. 20, 30 (Witness LET saw the Accused drive out of the main gate).

[174] Indictment, para. 6.

79. Even more broadly, paragraph 10 alleges that the Accused "planned, ordered, instigated, facilitated or otherwise aided and abetted the attack on the Tutsi civilian population"; and paragraph 19, that he "failed to maintain public order, or deliberately undermined the public order".

4.3. Evidence

4.3.1. Overview of Submissions

80. The Prosecution argues that the evidence shows that the Accused:

- commanded attackers to withdraw on his first visit to the hospital, thus showing that he was behind the attacks;
- conducted an "audit" of those killed, and of those remaining, with the assistance of Butera;
- exposed the refugees to attack by calling them out of their hiding places, and then leaving the hospital;
- instigated attackers to kill the refugees as he was departing the hospital;
- instructed one of the policemen under his command, Ruhiguri, to protect hospital supplies, but not the Tutsi refugees.[175]

The Accused admits that he visited the hospital twice that day, first in the morning, and then in the early afternoon, but he denies that he participated in, or encouraged, the attack in any manner whatsoever. He concedes that the attackers fled upon his arrival, but rejects that they were under his command. On the contrary, he maintains that he investigated what had happened; attempted to re-establish and maintain security there; and, upon his return with reinforcements in the early afternoon, evacuated the refugees to Rukara Parish where he thought they could be more effectively protected.

4.3.2. Background to the Attacks

81. The arrival of the Accused on the morning of 9 April was preceded by a number of events which shaped the actions and perspectives of the witnesses that day. Prosecution Witness Dr. Robert Wilson testified that on the afternoon of 7 April, he intervened to save a young man who was being beaten by a gang of youths in the hospital compound. When he returned to castigate the group, he found that they had dispersed or withdrawn out of the Akabeza Gate. Just outside the gate, he found Mpambara standing beside his vehicle with other community elders.[176] Wilson asked what could be done to protect the patients and others seeking refuge at the hospital. Mpambara responded that the hospital should be for patients only, and that it should not be used as a refuge, particularly by able-

[175] Prosecution Closing Brief, paras. 93-114. The Prosecution lists a sixth assertion, concerning the presence of a man named Toto (also known as Jean-Claude Muhikira) during one of the Accused's visit. The Chamber will consider the significance of this evidence in the course of its analysis. Witness LET made two additional incriminating allegations against the Accused: that he led the attackers into the compound at the beginning of the first attack, and was present throughout its duration; and that he was present during, and acquiesced in, the killing of a certain Jean-Claude Muhikira. Neither of these allegations are contained in the Indictment, nor were they retained as part of the Prosecution case in its Closing Brief.

[176] T. 19 September 2005 pp. 13-14 (Wilson) ("I think I wanted to try to remonstrate with them, to ask them what they were doing, and to try to keep them out of the hospital compound. I think that they had withdrawn out of the gate, and so I went out of the gate. And it was there that I – I met the *bourgmestre*"). Two boys had been attacked; Wilson believed that the other had been able to escape without his assistance. He recalled the time as between 3:00 and 3:30 p.m. Witness LET gives a different account of this event, alleging that the Accused was inside the compound watching as the young men were beaten. T. 20 September 2005 pp. 10-13. The Accused denied that he saw the beating, but acknowledged that he saw Dr. Wilson taking an injured youth into the hospital, and that he spoke to a group of youth from Gahini who seemed to acknowledge that they had beaten the young man because they "didn't know him in that area". The Accused claims to have told them that "even if you don't know the person, you don't have the right to beat anybody". T. 7 February 2006 p. 2. The Chamber need not make any factual finding on this allegation, which is not part of the Indictment.

bodied young men who might be RPF spies.[177] He did not want the hospital to become either a base for the insurgency, or a target. Wilson testified that he had "no problem with those instructions at that point".[178]

82. Tutsi refugees did start to take shelter at the hospital, however. Prosecution Witness LET was a nurse at Gahini Hospital, who was married to a Tutsi man.[179] On 7 April, a family friend came to her house and warned her that killings were about to begin in the *cellule* and that she should take refuge somewhere.[180] She went to the hospital with her children, staying first in the paediatric ward and then in the maternity ward.[181] Witness LEK, a former school-teacher of Tutsi ethnicity, also took refuge in the paediatric ward on 8 April 1994, hiding in the ceiling.[182]

83. Defence Witness Elizabeth Hardinge, a British physiotherapist who had worked at Gahini Hospital since 1969, testified that late in the afternoon of 8 April, she went to Rukara Parish to ask Mpambara for police protection for the hospital, as there had been disturbances at Gahini.[183] He answered that he had only seven or eight *gendarmes* available and that they were all needed to protect the refugees at Rukara Parish; he promised, however, to send a patrol during the evening.[184] Mpambara testified that a squad of five *gendarmes* arrived at Rukara Parish soon after Hardinge had left. Mpambara proposed splitting them up, so that some of them could be stationed at Rukara Parish, while others would go to Gahini Hospital. The sergeant in command insisted on keeping his unit together, and said that they would maintain security at both locations by patrolling in their vehicle.[185] After showing them around Rukara Parish, Mpambara led the *gendarmes* to the hospital, where he left them in their vehicle.[186]

84. Early on the morning of 9 April, rumours spread amongst the refugees at the hospital of an impending attack.[187] A nurse told them that Dr. Wilson had agreed to assist with their evacuation. Between 20 and 50 refugees gathered on the steps of the main building, opposite the front gate, waiting for the hospital's double-cabin pick-up to arrive.[188] As they were waiting, the communal ambulance arrived, carrying two wounded, as well as two or three *gendarmes* and a driver.[189] After the

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[177] T. 19 September 2005 pp. 14-16, 37 (Wilson). Mpambara generally confirmed the testimony. T. 7 February 2006 p. 2 (Mpambara) ("And I said that if people fleeing from Murambi had come to the hospital and taken refuge there, people would react and say that these people are going to disturb their security. So I told the people to go back home and I also told the doctor that he shouldn't take in anybody who is not sick").
[178] T. 19 September 2005 p. 37 (Wilson).
[179] T. 20 September 2005 pp. 6, 30 (Witness LET).
[180] *Id*. pp. 36-37 (Witness LET).
[181] *Id*. pp. 10, 13-14, 37, 41 (Witness LET).
[182] T. 26 September 2005 pp. 65, 75 (Witness LEK), Exhibit P-13.
[183] T. 13 January 2006 pp. 35, 36 (Hardinge). Hardinge also mentioned that "threats were being made" and that the situation was "very tense".
[184] *Id*. p. 36. Mpambara generally confirmed this account. T. 7 February 2006 p. 10 (Mpambara) ("Hardinge told me that at Gahini Hospital there were refugees who had sought refuge … she was asking for either policemen or *gendarmes* to come and stop any possible attacks at the hospital. I explained to her that there, I had a few policeman, they were just five and they were there, she could see them [in front of the Rukara Parish church]. I said I was waiting for some gendarme[s]. When the gendarme[s] c[a]me, they could work with the police and I could send some to Gahini to restore order").
[185] T. 7 February 2006 pp. 11, 16-18 (Mpambara). Mpambara deferred to their opinion, as they were "the experts in security".
[186] *Id*. pp. 11-12 (Mpambara).
[187] T. 19 September 2005 p. 20 (Wilson) ("It was about 7 o'clock that somebody sent a note down from maternity to say that there was a collection of *Interahamwe* around the hospital perimeter somewhere and that they were – the rumour was that they were going to attack and try to kill the people hiding in the hospital"); T. 20 September 2005 p. 14 (Witness LET) ("[W]e knew that we'd be attacked that morning").
[188] T. 20 September 2005 pp. 14, 41 (Witness LET); T. 19 September 2005 pp. 21-23 (Wilson). Dr. Wilson does not say that he had authorized the evacuation of the refugees before the arrival of the ambulance. On the contrary, he suggests that he asked for the hospital's own vehicle (as distinct from the communal ambulance) to be brought around only once it had become apparent that there was not enough room in the ambulance. T. 19 September 2005 pp. 21-22. Hardinge identifies the hospital vehicle as a "pick-up", T. 13 January 2006 p. 39 Hardinge); Wilson specifies that it was a double-cabin Toyota Hilux, T. 19 September 2005 p. 23 (Wilson).
[189] Hardinge testified that there were two *gendarmes* and a driver. T. 13 January 2006 p. 37. Witness LET said there were three *gendarmes* and a driver. T. 20 September 2005 pp. 14, 41.

patients were unloaded, the *gendarmes* agreed to transport the refugees to Rukara Parish in the ambulance.[190]

85. As these arrangements were being made, a small but menacing group of *Interahamwe* assembled outside the main gate armed with "bows and arrows and machetes nonchalantly swung".[191] Witness LET testified that they had encircled the entire hospital compound, blowing whistles and making threatening noises.[192] The *Interahamwe* blocked the main gate with a tree trunk and let it be known that they would not let the refugees pass. The *gendarmes* refused to attempt to break the blockade, and the refugees ran back towards the hospital buildings.[193] The *gendarmes* also refused to split up so that some of them could remain behind while others returned to Rukara Parish to report on the situation.[194]

4.3.3. Commanding the Attackers to Withdraw

86. The witnesses gave different versions of events in respect of the remainder of the events at Gahini Hospital that day. Witness LET asserted that before any of the vehicles had left, the Accused arrived in his car and led the attackers into the compound.[195] Witness LEK testified that at the commencement of the attack, he saw the *commune*'s white pick-up truck approaching the hospital, although he did not see the Accused himself.[196]

87. This testimony is contradicted by Ms. Hardinge. She testified that she left the hospital before the start of any attack in order to seek Mpambara's help, and found him at the *commune* office, 20 to 25 minutes away by car.[197] He was "obviously concerned about the situation" and agreed immediately to accompany her back to the hospital. Escorted by at least one gendarme and one policeman, they arrived at the hospital at around 10 a.m.[198]

88. The Prosecution does not maintain that the Accused was present at the commencement of the attack, and accepts that Mpambara arrived at Gahini Hospital with Ms. Hardinge at the end of the first attack.[199] However, the Prosecution, relying on the testimony of Dr. Wilson, alleges that the withdrawal of the attackers at the very moment of his arrival shows that he commanded their retreat.[200]

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[190] T. 20 September 2005 pp. 14-15, 41-42 (Witness LET). Witness LET testified that the request for evacuation was made to the *gendarmes* by the same nurse who had requested the evacuation of the refugees in the first place, Jeanne de Dieu. Wilson recalled that it was he who "thought it was a prudent time, since there was an empty vehicle there, to ask the *gendarmes* to take these refugees to the commune office"). The refugees boarded the ambulance and Dr. Wilson's car, which had, in the meantime, also arrived to assist with the evacuation.

[191] T. 19 September 2005 p. 23 (Wilson). Witness LET explained that "they had machetes; they had spears; they had clubs – and they also had bows"). T. 20 September 2005 pp. 16-17, 43 (Witness LET). In addition to these weapons, Witness LEK testified that the *Interahamwe* also possessed grenades, although he is the only witness to make that observation. T. 26 September 2005 pp. 65-66, T. 27 September 2005 p. 2 (Witness LEK).

[192] T. 20 September 2005 pp. 16-17, 43.

[193] *Id*. pp. 16, 18 (Witness LET); T. 13 January 2006 pp. 36-37, 38, 39 (Haringe). Witness LEK explains that the *gendarmes* went to speak with the *Interahamwe* after the gate had been blocked and returned and told the refugees to get out of the vehicles. T. 26 September 2005 pp. 65-66, T. 27 September 2005 p. 2.

[194] T. 19 September 2005 p. 22 (Wilson); T. 13 January 2006 p. 38 (Hardinge).

[195] T. 20 September 2005 pp. 18-19, 20, 44. Witness LET estimated that this was about twenty minutes after the refugees had fled back into the Hospital.

[196] T. 26 September 2005 pp. 67-68; T. 27 September 2005 p. 3. The witness explains that he was not running when he spotted the commune vehicle: "I was not running, I was simply starting to move away from the rest of the group. I was looking in all directions and then I saw the vehicle. Then when the alarm was raised, I ran into hiding").

[197] Dr. Wilson corroborates this account. He remembered that Ms. Hardinge was chosen to go and find the *bourgmestre*, and that he heard the vehicles leaving the compound before any attack had started. T. 19 September 2005 p. 22 (Wilson).

[198] T. 13 January 2006 pp. 38-39, 40-41 (Hardinge).

[199] Prosecution Closing Brief, para. 113 ("When the accused arrived at Gahini Hospital at between 10.30 and 11 a.m. the attackers withdrew at his command…."); 2 May 2006 pp. 22-23 (closing arguments).

[200] Prosecution Closing Brief, paras. 94, 96; T. 2 May 2006 pp. 22-23 (closing arguments).

89. The Prosecution's reliance on Dr. Wilson is misplaced. He testified that "the mob dispersed" when Mpambara arrived and that, once inside the compound, "the *bourgmestre* was trying to be clear – he wanted people to just go away, and just try and get some order in the hospital ground".[201] The fact that Mpambara ordered the attackers to disperse upon his arrival does not support the Prosecution's inference that he commanded the attack. Indeed, Dr. Wilson's impression was that Mpambara was genuinely attempting to restore order. Furthermore, Dr. Wilson's opinion was that Mpambara – far from giving commands to obedient followers – was in a state of "almost despair".[202] In the Chamber's view, this testimony does not show that the attackers were his subordinates, much less that they had carried out the attack as a result of some earlier order to do so.

4.3.4. "Auditing" the Victims And Failure to Arrest Butera

90. The Accused acknowledges, and the evidence shows beyond a reasonable doubt, that he spoke with a number of people at the hospital, including Jean-Baptiste Nkurayija, the hospital administrator; Jean-Bosco Butera, the *Conseiller* of Gahini *Secteur*; and Dr. Wilson.[203] The Prosecution alleges that the Accused "knew Butera had committed the killings at the Hospital, and that [he] was conducting an audit of how many refugees had been killed and how many were remaining".[204] Furthermore, the failure to arrest Butera is cited as evidence that the Accused must have been involved with him in a joint criminal enterprise.[205] The Prosecution relies on the testimony of Dr. Wilson to this end, but not of two of its other witnesses to the Accused's visit, Witnesses LET and LEK.[206]

91. No direct evidence, apart from that given by the Accused, was heard concerning the nature of Mpambara's conversation with Butera. Dr. Wilson believed that Mpambara was evaluating what had happened and, with Butera and Nkurayija's input, writing the names of those who had been killed.[207] There is no direct evidence that this list was being prepared as part of a plan to kill the refugees at the hospital, nor is it the only reasonably possible explanation of their actions.

92. Mpambara testified that after he spoke with Dr. Wilson, Nkurayija showed him three corpses just outside the Akabeza gate.[208] While there, Butera approached from Akabeza Centre, claiming that he had just heard news of the attack.[209] Mpambara testified that he did not believe Butera, but that since no one identified him as having participated in the attack, he had no firm basis to make an arrest.[210] Mpambara walked around the hospital with Butera and Nkurayija, noting the names of the

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[201] T. 19 September 2005 pp. 24-25 (Wilson).
[202] T. 26 September 2005 p. 26 (Wilson). This "despair" arose in respect of Dr. Wilson's request, made shortly thereafter, to Mpambara to leave some *gendarmes* behind to protect the hospital. His response was "almost despair in that he had so few armed *gendarmes* at his disposal".
[203] T. 7 February 2005 p. 20, T. 8 February 2006 p. 61 (Mpambara); T. 19 September 2005 pp. 24-25, 42-43 (Wilson). The group was standing outside the side-door of the operating theatre.
[204] Prosecution Closing Brief, para. 101; T. 2 May 2006 p. 22 (closing arguments).
[205] T. 2 May 2006 p. 4 (closing arguments) ("Now, the culpable omissions, Your Honours, for which we hold him criminally responsible and which we submit are complementary to the positive acts just outlined, generally relate to his deliberate refusal to intervene, despite his duty and material ability to prevent, punish or otherwise impede the efficient execution of the JCE by his co-perpetrators. We list these acts of culpable omissions as follows: … his deliberate refusal to arrest *Conseiller* Butera and other members of the JCE on 9th April at Gahini Hospital").
[206] Prosecution Closing Brief, paras. 98-101; T. 2 May 2006 pp. 21-27 (closing arguments). Their testimony is relied upon in respect of other matters, but not the colloquy between Butera and Mpambara.
[207] T. 19 September 2005 p. 25 (Wilson) ("I believe he was trying to evaluate what had happened, and he was writing down the names of people who had been killed, which those two people were telling him").
[208] T. 7 February 2005 pp. 19, 20, 23 (Mpambara) ("I left through the smaller gate that leads to the Akabeza centre where I found three corpses of dead people"). Mpambara's testimony gives the impression that he spoke first with Dr. Wilson, and certainly before he had met Butera. Dr. Wilson, on the other hand, remembers that the *bourgmestre* was already speaking with Butera when he first saw them. T. 19 September 2005 pp. 24-25 (Wilson).
[209] T. 7 February 2005 p. 20, T. 8 February 2006 p. 61 (Mpambara). Mpambara testified that Butera claimed that he did not know who had participated.
[210] T. 7 February 2005 p. 20, 22-23 (Mpambara) ("They mentioned the names of other people, but they never mentioned the name of the *conseiller* … The *conseiller* had a role in this. That's what I think. But he did it in secrecy. He did not – he must have just been sending people to attack, but he did not show himself"); T. 8 February 2006 pp. 63-64 (Mpambara).

dead.[211] He made no arrests because the attackers who were named by the refugees had all fled the scene. In any event, they were all former soldiers, and attempting to arrest them, given the resources at his disposal, would have been "committing suicide".[212] Indeed, Mpambara doubted the loyalty of the *gendarmes*, whom he suspected of being partial to the attackers, thus undermining his ability to search for and arrest the attackers.[213]

93. The Chamber entertains a reasonable doubt that the failure to arrest Butera was for the purpose of facilitating the latter's criminal conduct. There is no evidence on record that anyone told Mpambara at the time that Butera had been part of this attack.[214] Even if there had been such an indication, the Chamber could not safely infer that the failure to arrest demonstrates participation in a criminal enterprise with Butera. Other plausible explanations for the failure to arrest have been raised, such as: lack of sufficient evidence against Butera; scarce law enforcement resources which were needed for other priorities; and the concern that failure would have led to a total breakdown of civil authority. The factual issue for the Chamber's determination here is not whether these reasons were correct; rather, the sole question is whether they are reasonably possible explanations for the Accused's failure to arrest Butera. The Chamber is not convinced that the only reasonable explanation for the failure to arrest Butera is that the Accused wished to assist him in the commission of crimes.

4.3.5. Exposing the Refugees to a Second Attack

94. The Prosecution alleges that the Accused instructed that the refugees be ordered to come out of their hiding places and that he then left Gahini Hospital, thus exposing them to a second murderous attack. Mpambara is specifically alleged to have failed to assist a refugee, Jean-Claude Muhikira, alias Toto, who was bleeding and in obvious distress and fear.[215]

95. Three Prosecution witnesses make reference to the possible involvement of the Accused in bringing refugees out of their hiding places and, in particular, the killing of Muhikira. Witness LET testified that between noon and 1 p.m., she saw the Accused talking with Nkurayija in the hospital compound when a group of eight to ten people, led by Butera, approached from the Akabeza Gate.[216] After speaking with Mpambara, they went to the physiotherapy ward, where Witness LET thought she heard the attackers trying to force open the door. About twenty minutes later, Butera came back to speak to Mpambara, and then returned to the physiotherapy ward again, now accompanied by a *gendarme* armed with a gun who had been escorting Mpambara. Shortly after hearing a gunshot, Witness LET saw Muhikira coming out of the ward with his hands up. An attacker fired an arrow at Muhikira, piercing his hand.[217] Muhikira, now bleeding profusely, ran up to Mpambara, who said, "'Get away. Go there and get treated, and then we'll take you to Karubamba with the others'".[218] But when Muhikira asked one of the nurses for treatment, she responded "'I would be wasting my time if I

[211] T. 8 February 2005 p. 61 (Mpambara).
[212] T. 7 February 2005 pp. 22-23 (Mpambara).
[213] T. 7 February 2005 pp. 19-22 (Mpambara) (the *gendarmes* "were not sad about what had happened"); T. 7 February 2006 p. 26 (French) ("*Mais après, je me suis rendu compte que les* gendarmes*, au lieu de m'aider, aidaient les assaillants*"). The Chamber is mindful, however, that Witness Hardinge testified that she thought that, in general, the *gendarmes* who had arrived in the communal ambulance had tried to be helpful, as they had agreed to the original plan to evacuate the refugees. T. 13 January 2006 p. 38. Dr. Wilson also had the impression that the *gendarmes* had genuinely attempted to suppress the attacks. T. 19 September 2005 p. 27 (Wilson). Witness LEK, on the other hand, disagreed. T. 26 September 2005 pp. 66-67 (Witness LEK). The Chamber need not reach any finding on the attitude of the *gendarmes*. It is sufficient to say that the evidence does not show that Mpambara's perception of the *gendarmes* was unreasonable or implausible.
[214] The Prosecution assertion that Mpambara admitted that survivors had named Butera (T. 2 May 2006 p. 22) is not supported by the record. T. 7 February 2006 p. 22 (Mpambara) ("And when I asked them who attacked them, they said … 'We saw Kanifu, who had been a solider. We all saw Buringo (phonetic), we saw Bekehan (phonetic), we saw so-and-so.' And they never mentioned the name of the *conseiller*").
[215] Prosecution Closing Brief, paras. 102-107; T. 2 May 2006 p. 23 (closing arguments).
[216] T. 20 September 2005 pp. 23-25, 45 (Witness LET).
[217] *Id*. pp. 24-26, 45-46 (Witness LET).
[218] *Id*. p. 26 (Witness LET).

treat you because in a short while you are going to be killed'".[219] Muhikira slumped down on the veranda in front of the pharmacy. Witness LET had the impression that the young attackers wanted to kill Muhikira immediately, but hesitated. After Butera and others had conferred with Mpambara, one of the young attackers grabbed Muhikira and took him over to a group which started beating him with clubs and slashing him with their machetes.[220] The two *gendarmes* escorting Mpambara went over and searched Muhikira's pockets, taking his money. Mpambara did nothing.[221]

96. Witness LEK gives a different account. He testified that he emerged from his hiding place after Butera told him that the killings were over and that he would be evacuated to Karubamba.[222] He found Butera, Nkurayija, a gendarme, a policeman, and others.[223] Butera told everyone to leave the room, but indicated that Witness LEK should remain behind. The policeman or gendarme nevertheless signalled to the witness to leave and, once outside, he saw the Accused. The witness explained that Butera wanted to kill him in that room, and that he "did not want to show me to the *bourgmestre* Mpambara … He felt that I might get away from him".[224] Butera ordered Witness LEK to put his hands up, and he did so.[225] Mpambara told Witness LEK to join other Tutsi refugees who were sitting on the steps near the operating theatre.[226] Muhikira, who was amongst the group and had been shot in the palm of his hand with an arrow, entreated Mpambara to take him away from there. Mpambara responded angrily, asking why they should be taken away, and shortly thereafter, left on foot towards the main gate.[227] At that moment, Witness LEK saw about eight *Interahamwe* approaching from the left.[228] Witness LEK and Muhikira leapt over a white doctor who was giving stitches to a patient, and locked themselves in an adjacent room. The white doctor subsequently advised them that the *gendarmes* had chased the *Interahamwe* away, and asked them to come out. They did and joined other refugees in the women's ward.[229] Fifteen to thirty minutes later, a gendarme came and said that Witness LEK, Muhikira, and a woman named Mukaragwiza, had been targeted, but that the others would be spared.[230] The witness locked himself in a room and hid, but heard Muhikira and Mukaragwiza screaming as they were taken away and hacked to death.[231]

97. Witness AVK testified that he arrived at the hospital after the first attack had taken place, and that he noticed several corpses along the path that skirts the hospital compound. Before the second attack started, at around 10 a.m., Mpambara drove through the main gate and immediately summoned Butera and a certain Thadée Ruvugo.[232] After some discussion, Butera and Ruvugo returned to where the attackers were. Mpambara then called to Nkurayija, the hospital administrator, saying: "'Tell all

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[219] *Id*. pp. 26, 45-46 (Witness LET).
[220] *Id*. pp. 26-27; T. 20 September 2005 pp. 26-27 (French) (Witness LET).
[221] T 20 September 2005 pp. 26-27 (Witness LET).
[222] T. 26 September 2005 pp. 68 (Witness LEK). Nkurajiya, the hospital administrator, was also present and may also have made statements to this effect. The witness was apparently also told that if he did not come down he would be shot.
[223] *Id*. pp. 68-69; T. 27 September 2005 p. 1, 3 (Witness LEK).
[224] T. 27 September 2005 pp. 69-70; T. 27 September 2005 pp. 4-5 (Witness LEK). The witness was unsure why the policeman would have assisted him, but commented that: "He knew me well. He knew my place of birth … I believe that this policeman was a good person. Later on I learnt that he had become a criminal as well".
[225] T. 26 September 2005 p. 70 (Witness LEK).
[226] T. 26 September 2005 pp. 70, 71 (Witness LEK). The witness estimated that there were "not more than ten people" on the steps. T. 27 September 2005 p. 5. The *gendarme* appeared to be the leader of the *gendarmes* who were accompanying Mpambara that morning.
[227] T. 26 September 2005 p. 71; T. 26 September 2005 p. 73 (French) (Witness LEK) ("*…il a dit, pourquoi est-ce qu'il devait nous emmener*"). The witness testified that the refugees were frightened by Mpambara's demeanour.
[228] T. 26 September 2005 p. 71; T. 26 September 2005 p. 73 (French) (Witness LEK). He could not confirm whether Mpambara actually left the compound. T. 27 September 2005 p. 6 ["the left" may possibly refer to the direction of the Akabeza gate].
[229] T. 26 September 2005 p. 72; T. 27 September 2005 p. 7 (Witness LEK). The witness estimated that there were a total of 6 to 8 refugees there.
[230] T. 26 September 2005 p. 72 (Witness LEK).
[231] *Id*. pp. 72-73. The witness said that he heard Mukaragwiza asking to be spared because she was Hutu. The witness speculated that she was targeted because he was married to a Tutsi. *Id*. p. 74. He also heard Butera insisting that they be apprehended and asking how to get into the rooms. *Id*. p. 73.
[232] T. 21 September 2005 pp. 15, 28-30, 31 (Witness AVK).

the people who are hiding in the halls to come out so that we can provide refuge for them'".[233] People came out of the wards, were told to sit down near the flagpole, and then instructed to board Mpambara's vehicle.[234] Three of the refugees – Mukaragwiza, Toto, and a third person – were left behind and told to return to where they had been.[235] Mpambara then left for Karubamba with the refugees in his vehicle; the refugees who had been left behind were subsequently killed.[236] Witness AVK saw Muhikira being led away by the police chief Ruhiguri, and Witness AVK later saw his corpse.[237]

98. Dr. Wilson also probably saw Muhikira at the hospital that morning. He had a vivid recollection of a young man who had been wounded in the arm, standing near the group which had been discussing the attack with the *bourgmestre*. The man had "been defending his own life and he was obviously wondering what was happening next". Wilson did not recall that he spoke to Mpambara, or that anything was said about him. The young man evinced "intense fear", as he "had just escaped death and yet was going to still be having to face death in a little while".[238] Wilson was unaware of any killings while the *bourgmestre* was present, but as soon as he left, *Interahamwe* entered the hospital compound through the Akabeza gate.[239] Wilson later found the corpse of the young man outside the operating theatre.[240]

99. Ms. Hardinge heard no gunfire or screams indicating an attack or killings during the thirty to forty-five minutes that she and Mpambara were present at the hospital before they departed for Rwamagana *gendarmerie* camp. Just before their departure, Hardinge did leave the hospital compound to obtain documents from her house; she testified, however, that she lived close to the hospital.[241]

100. The differences in the testimony of Witnesses LET, LEK, and AVK are substantial.[242] Witness LET sees Muhikira taken directly from the front of the pharmacy and killed, in Mpambara's presence. Witness LEK testified that, at the sight of approaching attackers, which was after Mpambara had left, he and Muhikira fled from where they were waiting and barricaded themselves in a room adjacent to the operating theatre. Muhikira was killed some significant time later, after he had gone to the women's ward. Witness AVK, who is the only witness to testify that he heard the Accused direct that the refugees be brought out of the hospital, also testified that all but three of the refugees left with him in his vehicle. Ms. Hardinge contradicts this testimony, recalling that she and Mpambara went to Rwamagana *gendarmerie* camp without any refugees.[243]

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[233] *Id*. p. 15, 31 (Witness AVK).
[234] T. 21 September 2005 p. 15 (French) (Witness AVK) ("*On les a fait asseoir près du mât du drapeau; ils ont dit: « Vous, vous, et vous, entrez dans le véhicule»*"); T. 21 September 2005 p. 31 (Witness AVK) ("They left in Mpambara's vehicle, the vehicle which Mpambara had come with").
[235] T. 21 September 2005 p. 15 (French), T. 21 September 2005 p. 31 (Witness AVK).
[236] T. 21 September 2005 p. 28 ("We started the second attack after his departure"); 29, 31 (Witness AVK).
[237] T. 21 September 2005 pp. 16-17 (Witness AVK).
[238] T. 19 September 2005 p. 25 (Wilson) ("it's a very intense image that I have in my mind of his eyes and his presence there").
[239] T. 19 September 2005 p. 42 (Wilson).
[240] T. 19 September 2005 pp. 26-27 (Wilson).
[241] T. 13 January 2006 p. 36 (Hardinge) ("Q. Was that night of the 8th of April a quiet one at the Gahini hospital? Were there attacks? A. As far as I know, no, but I was in my house, and that was not a long distance from the hospital, but I was certainly in my own house, and we stayed there all night"); T 13 January 2006 p. 43 (time of departure).
[242] The Prosecution postulates that all three witnesses are describing the same events during the Accused's first visit to Gahini Hospital. Prosecution Closing Brief, para. 107 ("the Prosecutor has produced the evidence of a survivor independently corroborated by a perpetrator that the accused ordered the refugees to be captured and exposed to their attackers before he left for Rwamagana with Elizabeth Hardinge"); T. 2 May 2006 pp. 23-24 (closing arguments). The Chamber accepts Ms. Hardinge's uncontradicted testimony that the time period involved is about thirty to forty-five minutes.
[243] The Prosecution did not challenge Hardinge's testimony in this respect, either on the witness's cross-examination, or in its closing submissions. T. 13 January 2006 pp. 40-41, 43 (Hardinge). A different problem arises is Witness AVK's testimony is treated as referring to the second visit of the Accused: by that time, according to Witness LET, Dr. Wilson, and probably Witness LEK, Muhikira had already been killed, whereas Witness AVK testified that he saw Muhikira being led away by Ruhiguri, the police brigadier.

101. The result is that the testimony of these three witnesses does not establish beyond a reasonable doubt that the Accused was present when Muhikira or any other refugees were brought out of their hiding places, much less that he ordered this to happen or was present when any of them were killed. Further reasonable doubt is raised by the testimonies of Dr. Wilson and Ms. Hardinge, neither of whom perceived any indication of killings at the hospital during the Accused's presence.

102. The Prosecution also asserts that the Accused failed to assist Muhikira, whom he must have realized was in distress and danger.[244] Mpambara denies having seen anyone fitting Muhikira's description during his first visit to the hospital, but he acknowledges that he knew that there were still refugees in hiding at the hospital. He nevertheless decided to go to Rwamagana *gendarmerie* camp to obtain reinforcements and to complain about the ineffectiveness of those which had been previously assigned to him. He left the chief of communal police there, along with two *gendarmes*, "plead[ing] with them that they should do everything they can to make sure that no one else is killed in that place".[245] Hardinge and the Accused, without any police or *gendarmes*, then left for Rwamagana some time around 10:30 or 11 a.m. that morning.[246]

103. The evidence shows beyond a reasonable doubt that after Mpambara's departure, *Interahamwe* invaded the hospital compound a second time and killed Tutsi refugees, including Jean-Claude Muhikira.[247]

104. The question for determination is whether the alleged failure to immediately evacuate or otherwise assist the refugees shows that the Accused was part of a joint criminal enterprise to kill the refugees at the hospital, or that he aided and abetted the attacks, which would require that he substantially contributed to them. The uncontradicted evidence of Dr. Wilson and Ms. Hardinge was that the Accused did leave law enforcement officers – indeed, that he left all his escorts – at the hospital while he returned to Rwamagana to request additional *gendarmes*. The Chamber is aware that some witnesses suggested that the *gendarmes* and police colluded with the attackers; indeed, Mpambara shared that suspicion.[248] Nevertheless, the Accused explained that he had no better option than to deploy the forces at his disposal. The Prosecution failed to adduce any direct evidence that the Accused was colluding with the police or *gendarmes* to have the refugees killed. Indeed, Dr. Wilson's testimony was that when the *Interahamwe* invaded the compound a second time, one of the *gendarmes* shot into the air a couple of times, but that the *Interahamwe* "were just jeering, really, at the gendarme" and "I had a feeling that they just carried on and did what they wanted to do".[249] These are the impressions of a witness for the Prosecution, not the Defence.

105. The Chamber finds that the Prosecution has not shown beyond a reasonable doubt that the Accused's alleged inaction was for the purpose of assisting the attackers in killing the Tutsi refugees at the hospital. This is not to say that more effective solutions might not have been available such as, for example, immediately collecting and evacuating the refugees with the escorts available. But the

[244] Prosecution Closing Brief, para. 104; T. 2 May 2006 p. 23 (closing arguments).
[245] T. 7 February 2005 p. 24 (Mpambara). Hardinge believed, but could not definitely recall, that Mpambara left *gendarmes* or policemen at the hospital. T. 13 January 2006 p. 43 (Hardinge). Dr. Wilson recalled specifically that Mpambara left a couple of *gendarmes* stationed at the hospital. T. 19 September 2005 p. 27 (Wilson).
[246] T. 13 January 2006 pp. 40-41, 43 (Hardinge). Mpambara indicates that either they arrived at, or left for, Rwamgana at 11 a.m., which would be consistent with Ms. Hardinge, who estimated that it took about half an hour to go from Gahini Hospital to Rwamagana. T. 13 January 2006 p. 44 (Hardinge); T. 7 February 2005 p. 24 (Mpambara). As to the absence of escorts, Hardinge testified "I'm sure it was just us". T. 13 January 2006 p. 44 (Hardinge).
[247] Although the Chamber does not rely on the Witnesses LET, LEK, and AVK as to the manner of Muhikira's death, they all agree that he was killed. That fact is also corroborated by Dr. Wilson, assuming that the young man he saw was, in fact, Muhikira. Dr. Wilson also saw boys with machetes leading people out of the back gate, whom he suspected were later killed. T. 19 September 2005 pp. 26-27 (Wilson).
[248] Mpambara explained that he believed that the *gendarmes* appeared to be partial to the attackers. Only one *gendarme* had been on duty at the hospital when it was attacked, and he claimed that he had been overwhelmed, but without giving a clear account of what had happened. Mpambara did not believe this explanation and perceived that the *gendarmes* "were not sad about what had happened". T. 7 February 2005 pp. 19-22; T. 7 February 2006 p. 26 (French) ("Mais après, je me suis rendu compte que les gendarmes, au lieu de m'aider, aidaient les assaillants").
[249] T. 19 September 2005 pp. 26-27 (Wilson).

Prosecution did not establish, for example, that there was sufficient room in the vehicles to immediately evacuate all the refugees or that it was safe to do so under the circumstances. In the face of doubts such as these and plausible explanations for the conduct of the Accused other than collusion with the attackers, the Chamber entertains a reasonable doubt that the Accused's conduct had a substantial effect on the commission of the crimes, so as to make him liable as an aider and abettor, or that he intended thereby to commit crimes by participating in a joint criminal enterprise.

4.3.6. Instigating the Attackers to Kill the Refugees

106. Witness AVK testified that the Accused verbally instigated the killing of the Tutsi refugees as he was leaving Gahini Hospital after his first visit there, telling the witness and other attackers:

> 'Je ne comprends pas. Est-ce tout ce que vous pouvez faire? Ne pouvez-vous pas faire les choses plus rapidement?' Nous avons compris qu'on ne nous appréciait pas à notre juste valeur. Nous sommes repartis nous réorganiser et nous sommes revenus, donc, pour tuer ceux qui restaient.[250]

These words are said to have been uttered in front of the main hospital building, just as the Accused was preparing to leave with most of the refugees in his vehicle.

107. The credibility of this description is questionable for a number of reasons. First, Witness AVK makes no mention of any words of instigation in his prior statement to the Prosecutor.[251] Even in the absence of specific questions on cross-examination concerning this omission, the Chamber has difficulty understanding how this striking and highly incriminating utterance would not have been previously mentioned.[252] Second, Witness AVK testified that after these words were spoken, Mpambara transported most of the refugees away from the hospital in his vehicle. This is contradicted by Ms. Hardinge's credible account, which was implicitly accepted by the Prosecution, that she and Mpambara left together for Rwamagana in his vehicle, without any refugees.[253] Indeed, no witness other than Witness AVK suggested that the Accused evacuated the refugees after his first visit. This is not a minor detail on which Witness AVK could simply have been mistaken, or which would have been overlooked by other witnesses at the Hospital. Third, Witness AVK testified that the only white person present at the hospital at that time was Dr. Wilson, even though Elizabeth Hardinge was nearby and, indeed, left with Mpambara in the very same vehicle which Witness AVK said was full of

[250] T. 21 September 2005 p. 21 (French), T. 21 September 2005 p. 16 (Witness AVK). The Chamber prefers to cite the French directly, which was the first language of translation from Kinyarwanda, as the English includes some extraneous elements, including the use of the word "we", which do not appear in the French.

[251] Exhibit D-9. In fact, the statement says that there were people who thought that the Accused was there to protect the refugees. In this context, it is even harder to understand why the witness would not have mentioned the act of instigation, which would directly have contradicted this impression: "Some people said that he had brought the *gendarmes* to protected the people who had taken refuge[] at the hospital. When he came, the *gendarmes* started locating the survivors. The survivors who were about eight (8) in number were put on his pick-up and he left with them … All the survivors were of Tutsi ethnic group". Exhibit D-9, p. K0507844.

[252] Counsel did, however, ask questions during his cross-examination about the circumstances in which the statement was given. T. 22 September 2005 pp. 39-40 (Witness AVK).

[253] Prosecution Closing Brief, para. 113 ("When the Accused arrived at Gahini Hospital at between 10.30 and 11 a.m. the attackers withdrew at his command…"). The Prosecution asked Ms. Hardinge only three questions on cross-examination, none of which touched on the substance of her testimony. The Prosecution implicitly accepts that no refugees were evacuated on this occasion, as it argues that the whole group of refugees were exposed and left behind at Gahini Hospital. T. 2 May 2006 p. 22 (closing arguments) ("Still, [Mpambara] left [the *gendarmes*] at the hospital subsequently when he went to Rwamgana with Elizabeth Hardinge with instructions to guard the refugees"). Prosecution Closing Brief, para. 107 ("the Prosecutor has adduced the evidence of a survivor independently corroborated by a perpetrator, that the accused order the refugees to be captured and exposed to their attackers before he left for Rwamagana"). The same position was adopted in closing arguments: "…the Accused left [the Tutsi refugees who had come out of their hiding places], walked to his car before he joined Elizabeth Hardinge, and incited the attackers directly to hurry up and finish killing the Tutsi civilians". T. 2 May 2006 p. 23. The Chamber is mindful that Witness AVK's testimony could refer not to the first visit of the Accused to Gahini Hospital, but the second. However, as mentioned above, that would contradict the testimony of Witnesses LET, LEK, and Dr. Wilson, who testified that Muhikira had already been killed by that time.

refugees.[254] Taken together, these discrepancies with the testimony of other credible witnesses cannot be reasonably attributed to a mere error of memory. The Chamber, accordingly, entertains significant doubts about Witness AVK's veracity.

108. For these reasons, the Chamber finds that the Prosecution has not shown beyond a reasonable doubt that the Accused uttered words of instigation or encouragement to the attackers as he left Gahini Hospital.

4.3.7. Instructing Policeman to Protect the Hospital Premises, Not the Refugees

109. The Prosecution asserts that the Accused instructed the brigadier of communal police, Ruhiguri, to prevent looting of hospital property, but not to protect the Tutsi refugees.[255] The basis for this allegation is the testimony of Witness AVK during cross-examination, who was attempting to explain a prior written statement in which he had said that during the second attack, "[t]here was some kind of scuffle. The chief of police was protect[ing the hospital], and people wanted to enter. Ruhiguri shot in the air, but people managed to enter".[256] This appeared to contradict the witness's testimony that the police and *gendarmes* assisted the attackers. Witness AVK insisted that there was no fighting between Ruhiguri and the attackers and that, indeed, the gunshot had been a signal to invade the premises. The witness explained his prior statement saying that Ruhiguri had only been protecting the hospital premises.

110. As previously mentioned, the Prosecution has failed to adduce any direct evidence that the Accused instructed the police or *gendarmes* to allow or assist in the killing of the refugees.[257] The Accused concedes that he suspected that the *gendarmes* were partial to the attackers. Indeed, it has been proven beyond a reasonable doubt that at least one refugee and probably more were killed during the second wave of attacks, despite the presence of Ruhiguri and two *gendarmes*, who were armed with guns. Notwithstanding Dr. Wilson's testimony that shots were fired into the air by one of the *gendarmes*, the Chamber considers that these killings lead to the inevitable inference that the *gendarmes* or policeman, at the very least, turned a blind eye to the attackers.

111. It does not follow, however, that the Accused was similarly involved. He testified that, despite his suspicions, he pleaded with Ruhiguri and the *gendarmes* to "do everything they can to make sure that no one else is killed in that place".[258] Dr. Wilson seemed to confirm this purpose. When Dr. Wilson asked Mpambara to leave *gendarmes* at the hospital, his response "was almost despair in that he had so few armed *gendarmes* at his disposal, but he said he would try and leave us a few while he went to Rwamagana to get more help from the local *gendarmerie*".[259] The Chamber is alive to the possibility that Mpambara was merely attempting to impress an outside observer of his good intentions. Nevertheless, the Prosecution has not presented any evidence which contradicts the testimony of the Accused concerning what he did at Gahini Hospital or shows that it is implausible. In the absence of such evidence, a reasonable doubt arises as to whether the Accused instructed Ruhiguri or the *gendarmes* not to protect the refugees.

4.4. Conclusion

[254] T. 21 September 2005 p. 31 (Witness AVK) ("Q. Did you see Mpambara talk with any white people during that incident? A. There was one white man present, but one could not follow everything that was happening from every moment. I saw one white man called Robert. He was standing there in front of the meeting room").
[255] Prosecution Closing Brief, paras. 110-112; T. 2 May 2006 p. 25 (closing arguments).
[256] Exhibit P-5; Exhibit P-4; T. 21 September 2005 p. 37 (Witness AVK).
[257] The testimony of Witness LET – that the Accused allowed *gendarmes* to participate in killing Muhikira – was found not credible by the Chamber. *Supra*, paras. 100-101.
[258] T. 7 February 2005 p. 24 (Mpambara).
[259] T. 19 September 2005 p. 26 (Wilson).

112. The attacks on Gahini Hospital on 9 April 1994 were brutal, violent and ethnically motivated. Unarmed Tutsi civilians, men and women alike, were murdered under the blows of clubs and the blades of machetes. One witness heard the mortal cries of family members at close range. The hospital, which had been a place for treating the sick, became a genocide site.

113. The issue before the Chamber, however, is whether the evidence shows that Jean Mpambara is criminally responsible for this attack. The evidence does not show beyond a reasonable doubt that the Accused actively participated in, or was present during, any stage of this attack. Nor has it been shown beyond a reasonable doubt that he ordered or encouraged anyone to participate in the attack. Furthermore, his alleged failures to act have not been shown beyond a reasonable doubt to be proof that he possessed the intent to be part of a joint criminal enterprise or that he substantially contributed to the crimes committed by other persons so as to be guilty of aiding and abetting.

5. Attacks at Rukara Parish, 9 and 12 April

5.1. Introduction

114. Early on the morning of 7 April, refugees from Murambi *Commune* began to arrive at the Rukara Parish Church, in Karubamba *Secteur*, saying that their homes had been attacked and burned.[260] Their stories were confirmed by the smoke rising in the distance from the Murambi hills.[261] Tutsi residents of Rukara *Commune* also started to gather at the church as the day progressed, as groups of thugs roamed on the streets, and people boarded up their homes.[262] Defence Witness Father Santos, testified that "nature itself had gone silent".[263] By 9 April, the number of refugees had risen to about 3,000, including some 900 children, concentrated mostly at the church and its surrounding buildings, which included separate residences for priests, nuns, and novices, and a cinema hall. Others hid in the parish school, health centre, and maternity building, clustered about a hundred metres away from the church.[264] The refugees had also brought five hundred head of cattle, which grazed on parish land near the church.[265] The parish priests and others provided the refugees with food, water, and other assistance.[266]

115. In the late afternoon of 9 April, groups of civilians armed with machetes and a few grenades, allegedly distributed by *gendarmes*, attacked the church.[267] Tutsis who were outside tending their cattle

[260] T. 9 January 2006 pp. 7-8, 15 (Santos); T. 23 September 2005 p. 25 (Witness AOI) ("Many of them were there because their homes had been burnt or had been destroyed"); T. 25 January 2006 p. 11 (Witness RU-18) (the witness heard on 8 April that "people from Murambi fled into Rukara. And people said that things had become serious, and it had become an ethnic problem and people had started killing others and torching houses. And the people who were coming saw smoke all over the place, and houses were burning").

[261] T. 30 January 2006 p. 24 (Kalisa); T. 9 January 2006 p. 9 (Santos); T. 30 January 2006 p. 15 (Murwanshayaka).

[262] T. 9 January 2006 p. 9 (Santos) ("we could see people on the streets and those youths were to be feared"); T. 30 January 2006 p. 23 (Kalisa) ("we found an angry crowd of people" at Gahini market); T. 29 September 2005 p. 14 (Witness AHY) ("In [Paris Centre], no Tutsi had been attacked at his home, but we only saw people fleeing to the church … when we sat around, people would tell stories about people who had come from Murambi and Ryamanyoni, gathering at the church after fleeing their homes").

[263] T. 9 January 2006 p. 9 (Santos).

[264] T. 9 January 2006 pp. 13-14, 16, 21, 24, 33, 34 (Santos) (he had a specific recollection of 300 infants and 600 children under 12, as he assisted in distributing food rations and calculating the amount of food available); T. 27 September 2005 p. 19 (Witness LEV) ("In my estimate, it would be between 2,500 and 4,000 and people were still coming [on the morning of 9 April]"); T. 26 September 2006 p. 3 (Witness LED) (4,000 to 5,000 people). The exact number at the church, as opposed to the whole Parish complex, is not clear, although Father Santos testified that there were 2,000 at the church immediately before the attack on 12 April. T. 10 January 2006 p. 17.

[265] T. 9 January 2006 p. 23 (Santos).

[266] T. 9 January 2006 pp. 21, 24, 37 (Santos); T. 10 January 2006 pp. 9-10 (Santos); T. 13 January 2006 p. 16 (Witness R-01); T. 23 September 2005 p. 39 (Witness AOI); T. 26 September 2005 p. 26 (Witness LED) ("Father Santos used to give us … rations of beans, using glasses … that are normally used to drink water. Yes, Father Santos helped us, gave us some assistance").

[267] Whether and where the two groups coalesced is not expressly agreed upon by the two witnesses to these events. Defence Witness KU-2 testified that a group from Ruyenzi met up with other attackers at Kabuga Centre, not Buyonza. T. 24 January

were targeted with grenades and several were killed as they tried to retreat into the church.[268] The attack lasted between thirty minutes and an hour, during which time about twelve people were killed by grenades and machetes, and many cattle were stolen.[269]

116. No attacks occurred on 10 and 11 April, leading some of the refugees to feel secure enough to circulate outside near the parish buildings.[270]

117. In the late afternoon of 12 April, however, the refugees barricaded themselves into the church in the face of looting and sporadic attacks.[271] Fearing an imminent attack, Father Santos and his captive congregants recited the rosary and sang.[272] The first grenade exploded as darkness fell, beginning a massive attack on the Parish complex that continued until dawn.[273] The Church was attacked with grenades and gunfire; the crowded cinema hall was set afire; and any refugees who tried to flee were hacked or beaten to death with machetes or clubs.[274] By dawn, between one and two thousand Tutsi

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2006 pp. 4-10. Prosecution Witness AHY insisted that the Buyonza group was joined by the Ruyenzi group. T. 29 September 2005 pp. 10-11. Both witnesses name some of the same attackers (Gahirwa, Kavutse, and Nyirahuku) suggesting that, whatever the precise itinerary, different groups did join forces before the attack. T. 24 January 2006 p. 8 (Witness KU-2); T. 29 September 2005 pp. 11, 15 (Witness AHY). Witness AHY also testified that one of the attackers, a former *gendarme* named Rupaca, was armed with a rifle. T. 29 September 2005 p. 12. Gahirwa is also identified as a lead attacker by other witnesses. T. 26 September 2005 p. 5 (Witness LED); T. 27 September 2005 p. 22 (Witness LEV).

[268] T. 29 September 2005 p. 12 (Witness AHY) ("it was approximately 6 p.m. … we found some Tutsis who were guarding cattle behind the church); T. 24 January 2006 pp. 23-24 (Witness KU-2); T. 26 September 2005 pp. 3-5 (Witness LED) (placing the attack at any time between 3.30 and 4.40 p.m.).

[269] T. 26 September 2005 p. 5 (Witness LED) ("twelve people were killed instantly"); T. 24 January 2006 p. 14 (Witness KU-2) ("the refugees went up near the church"); T. 29 September 2005 p. 12 (Witness AHY) ("So Gahirwa threw a grenade at [the Tutsis], so they scattered and they ran away …. [The Tutsis] met the other group [of attackers] that had passed in front of the church, and [the Tutsis] entered the church. And, as they were entering the church, grenades were being thrown at them"); T. 9 January 2006 p. 41 (Santos) ("I got to the front courtyard of the parish and I saw dead bodies at the door, two dead bodies, and the others were dying in front of the door"); T. 12 January 2006 p. 28 (Santos) ("Four of them were killed by grenades, the other eight died of machete wounds"); T. 27 September 2005 p. 22 (Witness LEV) ("After the smoke dissipated, we found that 12 Tutsis had been killed").

[270] T. 10 January 2006 p. 20 (Santos) ("the courtyard was the territory of the refugees"); T. 25 January 2006 p. 18 (Witness RU-18) ([when the attacks started on 12 April] "people started rushing inside the buildings"); T. 13 January 2006 p. 17 (Witness R-01) ("And in the yard of the parish in front of the church there were a lot of refugees, and in the novitiate there were also a lot of them". Although this testimony is said to refer to 7 and 8 April, the witness also seems to believe that the refugees remained outside even after the first attack: "the refugees were not passive. They counter-attacked").

[271] T. 25 January 2006 p. 19 (Witness RU-18) ("When the attack by the looters took place that just wanted bicycles and cattle, that was early, and that's why we [ran] inside the church to hide. That took place early, when you could see them. Then they took … the cattle, they moved around, around the primary school, around the football field").

[272] T. 10 January 2006 pp. 16, 21-22 (Santos).

[273] T. 25 January 2006 pp. 19-20 (Witness RU-18) (attack commenced "around 7.30 p.m."); T. 26 September 2005 pp. 8-9 (Witness LED) (main attack started "around 7 p.m."); T. 10 January 2006 pp. 22-25, 28, T. 12 January 2006 p. 30 (Santos) (attack commenced at "almost nightfall", continues until 5 a.m.); T. 23 September 2005 pp. 30-31 (Witness AOI) (testifying that the attacks commenced between 6 and 7 p.m.). As to the time of the end of attacks: T. 25 January 2006 p. 22 (Witness RU-18) (attacks end "around 4.30 or 5 in the morning"); T. 10 January 2006 pp. 22-25, 28 (Santos) (attack continues until 5 a.m.); T. 7 February 2006 p. 67 (Mpambara) ("…in the morning, at eight in the morning, I went to the Parish to see how the situation was. I passed by the maternity ward, found lots of dead bodies in that area"). For reasons discussed below, the Chamber finds this testimony more credible than that of Witness AOI and Witness LED that the attack continued until mid-morning: T. 25 September 2005 pp. 8-9 (Witness LED); T. 23 September 2005 pp. 30-31 (Witness AOI). T. 25 January 2006 pp. 19-20 (Witness RU-18) (attacks on "people at the health centre; they were targeting people at the nutritional centre, at the church"); T. 10 January 2006 p. 23 (Santos) ("At certain junctures the attackers would go towards the maternity, then they would come back towards us").

[274] T. 10 January 2006 p. 23 (Santos) ("And then we would also hear the attackers shouting while pursuing refugees who were fleeing into the wild"); T. 25 January 2006 pp. 19-20 (Witness RU-18) ("The assailants threw grenades through some openings … I remember there was one grenade that was thrown at the altar, but did not explode … Grenade attacks did not take a long time … Later on, they started using stones, pelting stones, and then people soon managed to see through the window – through the small openings in the church that some soldiers had come, and these soldiers started using rifles").

men, women and children had been massacred.[275] Both soldiers and civilians participated in the killing.[276]

5.2. Indictment

118. The Indictment reads:

> 18. Between 8 and 15 April 1994, Jean Mpambara ordered, planned, facilitated, or aided and abetted these attacks at Rukara Parish by:
>
> (i)* disarming civilians who had gathered, forcibly or by choice, at Rukara Parish, and luring them to exit the building enclosures and to gather in a central location on the Parish compound, allegedly for a security meeting or with promises of protection, as occurred on and between 8 and 13 April 1994;
>
> (ii) transporting and directing attackers including *Interahamwe* to the Parish compound as occurred on 9, 10 and 12 April 1994;
>
> - providing firearms and traditional weapons for the attackers as occurred on and between 8 and 13 April 1994;
> - providing and transporting stones to Rukara Parish complex, which were used by the attackers to attack the civilians sheltered at the Parish compound as occurred repeatedly between 9 and 12 April 1994;
> - providing petrol which was used by the attackers to attack the civilians sheltered at Rukara Parish compound as occurred on or about 11, 12 and 13 April 1994;
> - ordering or inciting *Interahamwe* and soldiers to attack and kill the civilians sheltered at Rukara Parish compound as occurred on or about 13 April 1994.

The legal characterization of the Accused's participation is that the he aided and abetted others to engage in attacks, and that he:

> participated in a joint criminal enterprise … with military and community leaders and members of the *Interahamwe* in Rukara *Commune*, such as … Police Brigadier Ruhiguri … Member of Parliament Innocent Kalibwende … former *bourgmestre* of Murambi *commune* Jean Baptiste Gatete … and other unknown participants. [277]

Paragraph 19 of the Indictment alleges that he "failed to maintain public order, or deliberately undermined the public order, in districts over which he exercised administrative authority, in agreement with or in furtherance of the policies and objectives of the MRND, the Interim Government or the joint criminal enterprise referred to in paragraph 6, knowing that those policies and objectives intended the destruction, in whole or in part, of the Tutsi population".

5.3. Evidence

5.3.1. Overview of Submissions

[275] T. 26 September 2005 pp. 9-10 (Witness LED) ("But an estimate would base the number at about 2,000 dead – 2,000 people killed during that night or more than 2,000, possibly); T. 10 January 2006 p. 11 (Santos) ("And if we calculate that 1,000 people were killed, they were more than 3,000 people there, and that means that 2,000 persons were saved because of protection").

[276] T. 25 January 2006 p. 20 (Witness RU-18) ("these soldiers started using rifles"); T. 16 January 2006 pp. 27-31 (Witness RU-62) ("some soldiers came on bicycles in a line, they were carrying grenades on their belts, and they were carrying also rifles"); T. 29 September 2005 p. 18 (Witness AHY) ("they told me that they were planning to attack in the evening; and they said there were soldiers who would be coming from Murambi to give them a hand").

* The wrong numeration is the fact of the Tribunal.

[277] Indictment, para. 6. Paragraph 10 largely repeats this allegation, that the Accused "planned, ordered, instigated, facilitated or otherwise aided and abetted the attack on the Tutsi civilian population".

119. The Prosecution submits that the evidence shows that the Accused:

- presided over the distribution of grenades at a place called Paris Centre on the morning of 9 April and verbally instigated an attack on the Tutsi refugees;
- left Rukara Parish undefended with the intent to facilitate attacks on the Tutsi refugees on 9 April and instigated the first attack on the church at a place called Ruyenzi;
- met with Gatete, the former *bourgmestre* of Murambi, after the attack on 9 April to discuss the killing of Tutsi refugees;
- delivered stones on 12 April to be used in the attack on the Parish Church that evening; and
- left Rukara Parish undefended and permitted looting with the intent to facilitate attacks on the Tutsi refugees on 12 April.[278]

The Prosecution presented no arguments in support of the allegations in the Indictment that the Accused distributed petrol or that he ordered and incited attacks on 13 April.[279]

120. The Accused asserts that he did not co-operate with or encourage the attacks in any way. He maintains, on the contrary, that he did everything within his limited means as *bourgmestre* to protect the refugees. Testimony was heard purporting to show that he made good faith efforts to protect the refugees; that he opposed the attackers; and that he did not have legal or actual control over *gendarmes* who, rather than protecting the refugees, may have colluded with the attackers.

121. The Prosecution argues that the evidence concerning the Accused's involvement in a joint criminal enterprise must be considered as a whole. The Chamber accepts that where a single crime is constituted by diverse events, it is appropriate to consider whether the evidence of the various events is mutually supportive.[280] The Chamber must also consider whether a sequence of events, "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".[281] As previously mentioned, the criminal conduct of the accused must be "the *only* reasonable conclusion" consistent with such evidence. Where "there is another conclusion which is also reasonably open from that evidence" then the accused must be acquitted.[282] In light of the range of factors which the parties have cited to prove or negate the involvement of the Accused in these attacks, the Chamber will make provisional findings in respect of each allegation on which the Prosecution relies, followed by a concluding section assessing the cumulative weight of the evidence.

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[278] Prosecution Closing Brief, paras. 115-172.

[279] Paragraph 18 (v) of the Indictment alleges that the Accused provided petrol for use during the attacks on the church. Prosecution Witness LEV testified that the Accused obtained jerry-cans of petrol from him on 12 April 1994, which may have been intended to prove this allegation. T. 27 September 2005 pp. 22-23 (Witness LEV). However, the Chamber heard no further evidence connecting this event to the use of petrol during the attacks, and the Prosecution presented no arguments on this evidence in its Closing Brief or closing arguments.

[280] *Stakic*, Judgement (AC), para. 55 ("the Trial Chamber's compartmentalized mode of analysis obscured the proper inquiry. Rather than considering separately whether the Accused intended to destroy the group through each of the genocidal acts … the Trial Chamber should expressly have considered whether all the evidence, taken together, demonstrated a genocidal mental state".).

[281] *Mucic et al*., Judgement (AC), para. 458.

[282] *Id*., para. 458; *Stakic*, Judgement (AC), para. 219 ("Where the challenge on appeal is to an inference drawn to establish a fact on which the conviction relies, the standard [of reasonable doubt] is only satisfied if the inference drawn was the only reasonable one that could be drawn from the evidence presented. In such circumstances, the question for the Appeals Chamber is whether it was reasonable for the Trial Chamber to exclude or ignore other inferences that lead to the conclusion that an element of the crime was not proven".). The Prosecution recognizes throughout its Closing Brief that evidence concerning one discrete event is often only indirectly and circumstantially relevant to another event: "on the basis of the direct and circumstantial evidence … the Chamber can safely infer that Rukara Parish was deliberately left undefended … consistent with Mpambara's prior planning and preparation for the attack on the Tutsi refugees at the parish through instigating and facilitating the attackers with grenades, in furtherance of the JCE" (para. 142); "the only inference to be drawn from the foregoing analysis of the evidence is that the accused, consistent with his conduct and statements in Paris that morning, convened the Ruyenzi meeting to issue instructions for the attack on the Tutsi refugees" (para. 156).

5.3.2. Distribution of Grenades and Instigation at Paris Centre, 9 April

122. The Prosecution relies on the sole testimony of Witness AHY to prove that some time between 9 and 10 a.m. on 9 April, the Accused arrived at Paris Centre, driving the communal pick-up truck, accompanied by two *gendarmes* in the back. A crowd of twenty to thirty villagers gathered, and the *gendarmes* asked if anyone knew how to use grenades. They distributed four grenades, two to a certain Gahirwa and two to Ntaganda, while Mpambara remained silent inside the truck. As he started to drive away, he stopped the car, reversed, and announced: "'The Tutsis who [have] taken refuge in the church have got out of church and are coming to attack you … All of you should get ready to defend yourselves'".[283] He is also alleged to have said, "'People are ready to attack the Tutsis who are at the Karubamba church, so protect yourselves. I am going to tell the people of Ru[y]enzi'".[284] The evidence shows that Gahirwa, amongst others from Paris Centre, participated in the attack on the Parish church later that afternoon.[285]

123. Mpambara denied being at Paris Centre that morning and testified that he was at the communal offices with Elizabeth Hardinge at that time.[286] Ms. Hardinge, whose recollection of the timing of events the Chamber has found to be reliable, testified that:

> I can't remember the exact times, but it has to have been around half past nine that I was talking with him at Karubamba [behind the *commune* offices], and about ten o'clock when we were back at Gahini, but it could be some minutes either way because I never wrote down any timing or anything like that.[287]

Although Ms. Hardinge conceded a margin of error, the Chamber accepts her estimation that it would have been only a matter of "some minutes either way", as she put it, given her relatively precise recollection of the time of her departure from, and return to, Gahini Hospital. Given that Witness AHY testified that Mpambara's visit lasted between ten and fifteen minutes, the earliest he could have left Paris Centre would have been 9.10 a.m., which would have allowed him just enough time to travel the muddy three kilometres back to the communal offices at around 9.30 a.m.[288] On the other hand, after numerous fluctuations, Witness AHY seemed to settle on 9.30 a.m. as the time of Mpambara's arrival, which conflicts with Hardinge's testimony.[289] The likelihood of a conflict increases in light of a statement given by Witness AHY less than two weeks before his testimony that Mpambara arrived at 11 a.m., by which time Mpambara was on his way to Rwamagana with Hardinge.[290] The witness's

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[283] T. 29 September 2005 p. 7, T. 15 December 2005 p. 10 (Witness AHY). Other variations of these words were given by the witness. Whether the Accused spoke before or after the distribution of grenades is unclear. The witness said the former during the examination-in-chief, but then gave the detailed description of the Accused reversing the car and speaking to the crowd. The witness did not suggest that Mpambara had spoken twice, which is implicitly excluded by the witness's testimony that "[t]hose are the only words that he said". T. 29 September 2005 p. 7.
[284] T. 15 December 2005 p. 10 (Witness AHY).
[285] *Supra*, fn. 270. The involvement of Gahirwa and others from Paris Centre is corroborated: T. 24 January 2006 pp. 8, 10, 13-14 (Witness KU-2) (although the spelling in the transcript is not always consistent, it is clear that the witness is referring to Gahirwa).
[286] T. 7 February 2006 p. 18; T. 8 February 2006 p. 60 (Mpambara).
[287] T. 13 January 2006 pp. 39-40 (Hardinge).
[288] T. 29 September 2005 p. 8; T. 15 December 2005 p. 9 (Witness AHY).
[289] T. 29 September 2005 p. 5 ("between 9:30 and 10 a.m."), p. 5 ("between 9.00 and 9.30 a.m."), 6 ("between 9.00 and 9.30"); T. 15 December 2005 p. 46 ("I am testifying as someone who was there between 9 and 10 o'clock; I saw Mpambara"), 46 ("It was at about 9.30, or between 9.30 and 10 o'clock"), 47 ("I am sure that between 9.30 and 10 o'clock in the morning, I saw Mpambara at the Paris centre"), 47 ("And that is why I'm telling you that it was between 9.30 and – rather, between 9 and 9.30"), 50-51 ("Q. And about how long after this second sighting [of Nyirahuku at 9:00 a.m.] did the *bourgmestre*, Mpambara, arrive at Paris Centre? A. It was just a few moments after Nyirahuku left. Maybe thirty minutes after Mpambara arrived"). The Prosecution accepts the timeframe of 9.30 to 10.00 a.m. in its Closing Brief, but argues that both Ms. Hardinge and Witness AHY were giving only estimates. Prosecution Closing Brief, paras. 118-121; T. 2 May 2006 pp. 29-30. If ten minutes is the minimum amount of time that he spent at Paris Centre, then he would not have left for Karubamba, some three kilometres away along a dirt track, until 9:40 a.m.
[290] T. 14 December 2005 pp. 39-40 (Witness AHY); Exhibit D-18.

explanation that the time must have been recorded incorrectly due to a translation error does not seem plausible.

124. Witness AHY testified that twenty to thirty people gathered around Mpambara's vehicle after he arrived at Paris Centre.[291] None of them appeared before the Chamber to testify. The present situation is not one in which the lack of corroboration may be readily discounted because of the lack of potential witnesses. Accordingly, the witness's testimony must be treated with caution in light of the lack of corroboration, combined with its highly incriminating content.[292]

125. The Chamber entertains a reasonable doubt concerning the reliability of Witness AHY's testimony that Mpambara came to Paris Centre on the morning of 9 April and encouraged the killing of Tutsi refugees, and assisted *gendarmes* in distributing grenades.[293] Whether the totality of the evidence dispels that reasonable doubt shall be considered at the end of this section.

5.3.3. Instigating Attackers at Ruyenzi and Facilitating the Attack on Rukara Parish Church Complex on 9 April

126. The Prosecution interpretation of the evidence is that the apparent ease with which the Parish was attacked on 9 April shows that Mpambara made no effort to protect the refugees, despite the availability of *gendarmes* and police. Either no police or gendarmes were deployed to protect the Parish, or if they were, the Accused knew that they were complicit with the attackers. The Prosecution argues that "the Chamber can safely infer that Rukara Parish was deliberately left undefended … consistent with Mpambara's prior planning and preparation for the attack on Tutsi refugees at the parish through instigating and facilitating the attackers with grenades, in furtherance of the JCE".[294]

127. The Accused's role at Rukara Church began at 8 or 9 a.m. on 7 April 1994, when Mpambara met with the first wave of refugees to gather there.[295] As a result of their stories, he decided to tour Rukara to assess the situation and asked Father Santos and the *Inspecteur de Police Judiciaire*, Théophile Karasira, a Tutsi, to visit parts of the *commune* as well. Mpambara testified that neither he nor Santos saw any indications of unrest, although Santos testified that he saw threatening gangs of youths and refugees on the move.[296] By the time they returned to the Church at 11 a.m., the number of refugees had increased significantly.

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[291] T. 29 September 2005 p. 7 (Witness AHY).

[292] *Kordic and Cerkez*, Judgement (AC), ("The Appeals Chamber has consistently held that the corroboration of evidence is not a legal requirement, but rather concerns the weight to be attached to evidence. In *Kupreskic et al*., the Appeals Chamber emphasized that a Trial Chamber is required to provide a fully reasoned opinion, and that where a finding of guilt was made in a case on the basis of identification evidence given by a single witness under difficult circumstances, the Trial Chamber must be especially rigorous in the discharge of that obligation. A Trial Chamber may thus convict an accused on the basis 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. Any appeal based on the absence of corroboration must therefore necessarily be against the weight attached by a Trial Chamber to the evidence in question".). Although identification is not at issue here, the general principle is equally relevant.

[293] The Prosecution attempted to rely on a summary prepared by the Defence of the testimony of a witness who did not appear before the Chamber as corroboration for Witness AHY's testimony. Prosecution Closing Brief, para. 122; T. 2 May 2006 p. 30 (closing arguments). This information was not evidence, could not have been entered into evidence, and is of no evidential value. It is disregarded. Nor does Witness RU-62's testimony that he saw Gahirwa later in the day with grenades, reportedly given to him by *gendarmes*, provide any corroboration whatsoever that Mpambara was involved. Prosecution Closing Brief, para. 125; T. 2 May 2006 pp. 30-31 (closing arguments). Contrary to the Prosecution's suggestion, the evidence is made no stronger by the fact that the Defence put a proposition to the witness (that Mpambara was at a place called Ruyenzi) which conflicted with subsequent Defence evidence (that the Accused was on his way to Gahini Hospital). Prosecution Closing Brief, para. 128; T. 2 May 2006 p. 31 (closing arguments). The Defence may put a proposition to a witness during cross-examination without being thereby bound to that suggestion.

[294] Prosecution Closing Brief, para. 142.

[295] T. 9 January 2006 pp. 8-9, 10 (Santos); T. 6 February 2006 p. 41 (Mpambara).

[296] T. 6 February 2006 p. 44 (Mpambara); T. 9 January 2006 p. 9 (Santos).

128. Mpambara testified that during this trip, he went to the homes of three of the seven communal police officers, including *Brigadier* Ruhiguri, and asked them either to return to the communal office directly or to join him on the tour. Two other policemen, who had been on duty throughout the night, were already accompanying Mpambara and Santos. Of the remaining two policemen, one was on annual leave, and another never reported for work again.[297]

129. Mpambara recalled that he left the Parish Church for the second time on 7 April around noon, in the company of Karasira, to assess the situation in a *secteur* which they had not visited earlier.[298] Defence Witness RU-18, a Tutsi who was inside the Church when it was attacked on 12 April, provides general corroboration of this account:

> [W]hat I recall most is that Mpambara and Karasira started moving around, telling people to stay calm. I remember that at [Karubamba] market people had started forming groups, and Karasira and Mpambara went and told them to disperse and go back to their homes.[299]

Santos testified that Mpambara returned to the Church several times that day to interview the refugees, and that he was "particularly interested in knowing what the situation was".[300] Mpambara testified that he directed the communal police to protect the Rukara Parish complex as of 6 p.m. that evening, but that their strength at that location over the next several days depended on how many policemen were on duty and not otherwise engaged, for example, with escorting him around the *commune*.[301]

130. Mpambara said that he first learned of killings in the *commune* from Brigadier Ruhiguri, on the morning of 8 April at his office.[302] After immediately going to Gahini *Secteur* to try to calm the situation, Mpambara testified that he left for Rwamagana around 9.30 a.m. in an unsuccessful effort to obtain additional reinforcements from the *gendarmerie* commandant and *sous-préfet*. Mpambara returned to Gahini *Secteur* between 11 and 11.30 a.m., where he saw further evidence of violence, before arriving back at the Church just after midday.[303] By that stage, Santos had apparently become alarmed at the possibility of an attack on the growing number of refugees, and told Mpambara:

> "If you cannot protect the refugees at the parish, and if the refugees are attacked by the population and if the refugees are massacred by the population, you[r] cause – the cause of the Hutu would be lost for good. Those images will be aired the world over, and your cause will be lost". So he stopped and looked at me in a pensive mood. And a few seconds afterwards he asked me, "Would you dare to make such a statement before the *sous-préfet*?".[304]

Santos testified that he accompanied Mpambara to Rwamagana where, having been unable to find the *sous-préfet*, they spoke to the *gendarmerie* commandant about the refugees at Rukara church. After Santos repeated his warning, he left the room while Mpambara spoke with the commandant alone. Santos could not recall whether Mpambara subsequently told him that *gendarmes* would be sent, but he testified that some time on that day or the next, four *gendarmes* armed with sub-machineguns were indeed stationed near Karubamba market, about 200 to 300 metres from the Church.[305]

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[297] T. 6 February 2006 pp. 42-43 (Mpambara).
[298] *Id*. p. 44 (Mpambara). Several witnesses identified Karasira as a Tutsi: T. T. 25 January 2006 p. 9 (Witness RU-37); T. 13 January 2006 p. 20 (Witness R-01).
[299] T. 25 January 2006 p. 10 (Witness RU-18). The witness may have received this information from his wife. *Id*. pp. 41-43.
[300] T. 9 January 2006 p. 14 (Santos).
[301] T. 7 February 2006 pp. 12-14 (Mpambara).
[302] *Id*. p. 3 (Mpambara).
[303] *Id*. pp. 3-6.
[304] T. 9 January 2006 p. 17 (Santos). Santos' recollection of times is different than Mpambara's. Santos recalled this meeting happening at 10 or 11 a.m., rather than between 12 and 12:30 p.m. T. 9 January 2006 pp. 16-17 (Santos). Mpambara told Santos immediately before this exchange that "I told [Santos] that I had a lot of problems and that I was on the way to Rwamagana because I cannot manage the situation with only five policemen, and so I needed reinforcements from Rwamagana".). T. 7 February 2006 p. 6 (Mpambara).
[305] T. 9 January 2006 pp. 17-19, 42 (Santos).

131. Early in the afternoon of 9 April, the Accused arrived at the Parish church with twelve refugees who had been evacuated from Gahini Hospital, along with the *gendarme* commandant and several *gendarmes* and communal police.[306] Mpambara testified that he was told that a mob was forming near Gitarama with the intention of attacking the refugees at the church.[307] He left immediately, picking up Karasira, the *Inspecteur de Police Judiciaire*, and Innocent Kalibwende, a Member of Parliament, along the way.

132. Some four kilometres from the Parish church, a group of two or three hundred civilians armed with machetes, spears and sticks had gathered at a place called Ruyenzi.[308] According to Defence Witness RU-62, who was one of the would-be attackers, three of his companions, including Gahirwa, were armed with grenades, reportedly given to them that morning by a *gendarme* from Karubamba.[309] Mpambara urged people to return to their homes; said that he wanted peace and security in the *commune*; and ordered that the refugees be left alone.[310] Karasira reiterated Mpambara's instructions and said that they should instead fight people from Murambi who were invading the *commune*.[311] The crowd was displeased and some of them stood up and started to whistle and shout; some were insulting Karasira.[312] Mpambara, the *gendarmerie* commandant and the others were frightened by this reaction and quickly returned to their cars and left.[313] Some *gendarmes* signalled surreptitiously from the back of the pick-up in which they were riding for the crowd to follow them and an indeterminate number did so.[314] Witness RU-62 testified that one of the *gendarmes* told the attackers, apparently referring to Mpambara, that "if he stops you – keeps stopping you from going to the church, you should kill him first before you proceed to the church".[315] Mpambara testified that although the mob was displeased by what had been said, they started to return to their homes.[316]

133. The Prosecution insists that Mpambara's purpose at Ruyenzi was to instigate the population to attack the refugees at the Church.[317] The Defence testimony should be disregarded in its entirety because of "discrepancies between the various versions of the same event".[318] Furthermore, the

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[306] T. 7 February 2006 p. 29 (Mpambara); T. 26 September 2005 p. 75 (Witness LEK) ("And we were lying on our back while the vehicle was moving to Karubamba, until we reached the destination, which was Karubamba church").
[307] T. 7 February 2006 p. 30 (Mpambara).
[308] T. 16 January 2006 pp. 11-12 (Witness RU-62) ("200 people, or slightly more"; the witness estimate of 2 kilometres is inconsistent with the estimate of Santos and Mpambara that the distance was about 4 kilometres; spears and machetes); T. 9 January 2006 pp. 26-27, 29 (Santos) (estimating the distance to the church as being 4 kilometres, and that the crowd consisted of 300 people); T. 7 February 2006 pp. 30-31 (Mpambara).
[309] T. 16 January 2006 pp. 11-13, 18 (RU-62).
[310] T. 16 January 2006 p. 15 (RU-62); T. 24 January 2006 p. 2 (KU-2); T. 9 January 2006 (Santos) p. 27.
[311] T. 24 January 2006 p. 2 (KU-2). Karasira's presence was corroborated by Witness RU-62 (T. 16 January 2006 p. 13) and Witness R-01 (T. 13 January 2006 p. 20).
[312] T. 13 January 2006 p. 21 (Witness R-01); T. 16 January 2006 p. 16 (Witness RU-62) ("They stood up, blew whistles, and they left"); T. 24 January 2006 p. 2 (Witness KU-2) ("They started shouting – talking, shouting at the same time. Maybe about 20 percent of those were present, but they were talking in unison, and they looked as though they wanted to get away from there, because they didn't welcome what he had said").
[313] T. 9 January 2006 p. 27 (Santos) ("The crowd stood up and picked up their machetes and sticks, so the military authorities became afraid. Then the commandant turned towards me and told me, 'There's nothing for us to do here. Let us leave this place. They threatened me and even the *bourgmestre* …. These people are revolting against us, so there is nothing for us to do"); T. 16 January 2006 pp. 16 (Witness RU-62) ("Mpambara was afraid and entered into the vehicle, and the vehicle left"), 19 ("[t]hey rushed to the vehicle"); T. 17 January 2006 p. 25 (Witness RU-62) ("When they went into the vehicle there was commotion, and people seemed to be … agitated, and everybody was very excited. It's like stepping on a group of ants. Those people were many, and when they started moving, it was – looked very dangerous").
[314] T. 16 January 2006 pp. 16, 19-20 (Witness RU-62); T. 17 January 2006 p. 25 (Witness RU-62); T. 24 January 2006 p. 4 (Witness KU-2) ("the people asked the gendarme if they could follow them. And what I noticed is that the *gendarmes* were signalling them to follow them, but they didn't do anything to the population"). Mpambara seemed to think that none of the attackers followed (T. 7 February 2006 p. 33); Witness RU-62 recalled that more than one hundred followed (T. 16 January 2006 p. 20; T. 17 January 2006 p. 27); Santos only observed a few (T. 9 January 2006 pp. 30-31 ("a small group started walking towards the parish … [s]ix or eight, no more")). Similar behaviour by *gendarmes* on a different occasion was described by Witness Serukwavu. T. 31 January 2006 pp. 12-13, 37.
[315] T. 16 January 2006 p. 16 (Witness RU-62).
[316] T. 7 February 2006 pp. 32-33 (Mpambara).
[317] Prosecution Closing Brief, para. 156.
[318] Prosecution Closing Brief, paras. 149-154. The Prosecution also suggests that the testimony of Witnesses RU-62 and KU-2 was discredited by contradictions with prior statements.

Prosecution suggests that if the *gendarmes* did beckon the crowd to follow, then those in the cars following Mpambara, including Father Santos, were "complicit[] in the planning and preparation of the attack".[319]

134. The evidence of the four Defence witnesses to this event – Santos, R-01, RU-62 and KU-2 – is consistent in the following essential elements: the meeting occurred in the early afternoon at Ruyenzi; leading military and civilian authorities, including Karasira, were present; Mpambara exhorted the attackers to return to their homes; and the crowd reacted to his words with hostility. In comparison with these factors, the discrepancies are of rather minor significance. Witness RU-62's hearsay evidence that Mpambara had some role in convening the meeting was explained by Mpambara who testified that the involvement of the *bourgmestre* would often be falsely invoked to encourage attendance. The Prosecution argues that the explanation is implausible if, as Mpambara claimed, he was widely known to be discouraging the violence.[320] Nevertheless, the Chamber cannot exclude the reasonable possibility that the organizers may still have believed that using Mpambara's name could attract people to the meeting.[321]

135. Defence Witness KU-2, who was one of the prospective attackers, had denied being at the meeting in a previous statement. The Prosecution construes this denial as an effort to dissociate himself from a meeting with a malign purpose and in which the Accused was involved as an organizer.[322] This speculation is outweighed by the consistent testimony of the three other witnesses concerning the words and attitude of the Accused on this occasion. At least two of them, Witness R-01 and Santos, were bystanders and have no need to dissociate themselves from the meeting or to concoct a version of events which would explain their presence there.[323]

136. The discrepancies concerning the number of people who headed to Rukara Parish is plausibly attributable to the witnesses' different perspectives.[324] As Witness RU-62 explained, the *gendarmes* gave their signals furtively, so as not to be observed by Mpambara or the others inside the pick-up truck. This suggests that there would likely have been some delay before most of the attackers followed the convoy. The accusation that the "occupants of the two other cars" in the convoy must have been able to observe the signalling and were, therefore, complicit in the attack which followed is presumably an oblique attack on the credibility of Father Santos.[325] The Prosecution failed to present any credible basis to believe that Father Santos would have lied about this incident. Indeed, the evidence shows that Father Santos declined to be evacuated with other Europeans on 10 April, remaining behind to provide assistance to his parishioners besieged at the Church.[326] A more plausible explanation for Father Santos's testimony, and one which is not reasonably excluded by the evidence, is that he simply did not see the gestures described by Witness RU-62.

137. Further doubt is cast on the proposition that Mpambara's true intention was to instigate the attackers by the fact that Mpambara brought Karasira to the scene, which was corroborated by Witnesses R-01, RU-62 and KU-2. If the Accused had wished to instigate an attack on the church, he would not likely have done so in front of a Tutsi judicial officer, whom he later assisted to flee the *commune*.

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[319] Prosecution Closing Brief, para. 155.
[320] T. 2 May 2006 p. 36 (closing arguments).
[321] The Chamber heard significant evidence that the Accused did engage in such efforts publicly. See Section 5.3.7.
[322] Prosecution Closing Brief, paras. 152-53.
[323] The Chamber is also aware of the substantial contradictions between Witness KU-2's testimony and that of Witnesses AHY and LEV concerning KU-2's role in the first attack on the Parish. Witness KU-2 minimizes his participation (T. 24 January 2006 p. 12), whereas both Witness AHY (T. 29 September 2005 p. 11) and Witness LEV (T. 27 September 2006 p. 22) suggest that KU-2 had a leading role. Witness KU-2 has an obvious interest to be untruthful in respect of his own role in the attacks, but this does not necessarily undermine the credibility of his testimony concerning the Ruyenzi meeting.
[324] Prosecution Closing Brief, para. 154.
[325] Prosecution Closing Brief, para. 155; T. 2 May 2006 p. 38 (closing arguments) ("Father Santos … [is] deemed to have acquiesced in what the *gendarmes* were doing").
[326] See, e.g., T. 26 September 2005 p. 26 (Witness LED); T. 23 September 2005 p. 39 (Witness AOI).

138. When the convoy arrived back at the church, Mpambara spoke to the gathered refugees. Witnesses LED and LEV both testified that he said words to the effect: "'Isn't it your relatives who have killed the head of state?'"[327] Witness LEV described Mpambara as angry, derisive and mocking. Despite this hostility, both Mpambara and the *gendarmerie* commandant assured the refugees that they would be protected.[328] When the refugees complained about lack of water for their livestock, Mpambara promised to find a solution.[329] Prosecution Witness AOI saw Mpambara arrive but did not hear him speak; she was later told that he had said that there was no security at the church and that they should go back to their homes.[330] Father Santos arrived almost immediately after the others, but by that time the commandant was already speaking, having been introduced by the *bourgmestre*. The refugees were distrustful of the commandant's assurances of security, and one of them whispered to Santos: "'What is he talking about? Is he not making a mockery? He is the one who brought the grenades.'"[331] Santos denied that Mpambara had blamed the refugees for the death of the president or that he was mocking the refugees but accepted that the refugees were critical of the *gendarmerie* commandant who, when told of their views, responded: "'There is nothing I can do. I am sorry that what I said has been misinterpreted. There is nothing that I can do'".[332]

139. The Chamber entertains reasonable doubts about the reliability of the observation that Mpambara had a hostile or mocking attitude towards the refugees. Witness LEV admitted that he formed that only later, when the refugees were subsequently attacked. Father Santos testified that Mpambara's genuine goal throughout this period was "the protection of the refugees" and that "I could see at all times the commitment to defend the refugees", but that "[Mpambara] felt powerless because of the situation".[333] Under these circumstances, the Chamber has reasonable grounds to believe that Witness LEV's impressions of Mpambara's attitude are mistaken.

140. Mpambara testified that after the meeting with the refugees, the commandant ordered five *gendarmes* to take up a position at a kiosk near the Parish nutritional centre towards Karubamba Market and instructed them to work with the communal police to ensure security. Communal policemen were stationed near the convent, controlling the road approaching the church from the other direction.[334] Soon thereafter, Mpambara and Santos went together to fix the pump which supplied the Parish with water, some three or four kilometres away.[335]

141. When Mpambara and Santos were on their way back to the Parish, they saw cattle being stolen from the Parish. Santos went to the church while Mpambara started pursuing the thieves and firing his pistol to frighten them.[336] The attack on the church had started 40 minutes to an hour after Mpambara had been there with the *gendarmerie* commandant.[337] Witness AHY asserted that he saw no *gendarmes* or communal policemen at the Parish while he and others attacked the church.[338]

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[327] T. 26 September 2006 p. 4 (Witness LED); T. 27 September 2005 p. 20 (Witness LEV) ("'What are they running from since Tutsi had killed President Habyarimana'").
[328] T. 26 September 2006 p. 4 (Witness LED); T. 27 September 2005 pp. 20-21, 39, 49 (Witness LEV).
[329] T. 27 September 2006 pp. 20, 38, 49 (Witness LEV) ("the kind of tone [in] which he was uttering such words showed a lot of anger. And the words he used before telling us that he was going to ensure our security, the words such as 'what have you come to do here' when he knew very well what had brought us there, show that he wasn't sincere. And when he said 'You are responsible for the death of the president,' that really wouldn't augur for any protection from such a person, and really, eventually that's what happened, our security was never ensured"). At one stage, the witness suggested that he was not aware of Mpambara's mocking tone until subsequent events had shown that his promises of security had not been fulfilled. T. 27 September 2005 p. 39. Later, however, the witness confirmed that, at the time, he perceived Mpambara to be, at the least, angry. T. 27 September 2005 p. 49.
[330] T. 23 September 2005 pp. 25-26 (Witness AOI).
[331] T. 9 January 2006 pp. 34-35 (Santos).
[332] *Id*.
[333] *Id*. pp. 17, 19-20.
[334] T. 7 February 2006 pp. 36-37 (Mpambara).
[335] T. 9 January 2005 pp. 37-39 (Santos).
[336] *Id*. p. 41 (Santos).
[337] T. 26 September 2005 p. 5 (Witness LED) (estimating that the attack took place thirty to forty minutes later); T. 27 September 2005 p. 21 (Witness LEV) (estimating one hour later).
[338] T. 29 September 2005 p. 17; T. 15 December 2005 p. 42 (Witness AHY).

Gendarmes and policemen were not only present, according to Witness LED, but actively participated in the attack.[339] Witness KU-2 also testified that *gendarmes* were present at the Parish during the attack. As he was fleeing, they stopped and frisked him; Mpambara, who was nearby, shouted at him angrily.[340] Mpambara said that he heard *gendarmes* shooting in the air, chasing the people who had attacked the Parish, but did not recall having seen or shouted at Witness KU-2.[341]

142. Mpambara testified that when he found dead bodies at the church entrance, he was "amazed, flabbergasted [and] lost [his] head".[342] He and Santos went to the *gendarmes* and excoriated them for having failed to prevent the attack and asked them how it had happened.[343] Santos testified that the gendarmes responded that they had received orders not to shoot to kill anyone. The *gendarmes* also said, according to the Accused, that the attack had happened too quickly to be prevented.[344] The two communal police who had been stationed near the convent also denied having seen anything until the first grenades exploded because the attackers came through the bushes. Mpambara testified that he "did not accept that explanation" and that he entreated the *gendarmes* to shoot to kill to repel any further attacks.[345]

143. The Prosecution submits that the attack of 9 April could lead the Chamber to "safely infer that Rukara Parish was deliberately left undefended".[346] The Accused concedes that *gendarmes* and communal police acquiesced or cooperated with the attackers, but he insists that this cooperation was contrary to his own wishes and efforts. The vital question, therefore, is whether the lack of effective defence of the Church is attributable to the intentional conduct of the Accused, and whether this shows that he was colluding with the attackers.

144. The Defence has led credible evidence that the Accused took some, albeit ineffective, measures to dissuade or prevent attacks against the refugees and that the *gendarmes* were colluding with the attackers against his wishes. In the absence of any direct evidence (other than the testimony of Witness AHY, which the Chamber has found unreliable) that the Accused ordered, encouraged, or urged the *gendarmes* to facilitate attacks against the refugees, the Chamber cannot safely infer, on the basis of the evidence of events leading up to the 9 April attack, that the Accused facilitated the attack on the Parish complex by deliberately leaving it undefended.

5.3.4. Colluding to Kill Tutsi With Gatete, 9 April

145. The uncorroborated testimony of Prosecution Witness AHY is that, immediately after the attack on 9 April, he saw Mpambara standing with the former *bourgmestre* of Murambi *Commune*, Jean-Baptise Gatete, in front of Mugabo's Bar, near Karubamba Market.[347] Gatete asked "why this Tutsi issue was not over. 'Is there any shortage of bullets or grenades or *Interahamwe*? Tell me if you

[339] T. 26 September 2005 pp. 37-38 (Witness LED) ("Yes, the police were among the attackers … I saw one policeman called Ruhiguri"), 57 (neither the police nor the *gendarmes* "tried to repel the attacks. Actually, they instead helped the attackers. For instance, during the attack on the 9th, that evening the *gendarmes* also came and shot at us. And even in – rather, on the 11th and the 9th, a police – a communal policeman came with attackers and shot at us".). Cf. Prosecution Closing Brief, paras. 130, 139.
[340] T. 24 January 2006 p. 16-17 (Witness KU-2).
[341] T. 7 February 2006 p. 40 (Mpambara).
[342] *Id*.
[343] T. 12 January 2006 p. 29 (Santos).
[344] T. 9 January 2006 pp. 29, 42 (Santos); T. 7 February 2006 p. 40 (Mpambara). There appears to be a curious inconsistency as to where the two men met the *gendarmes*. Santos testified that he got into his vehicle and went to the *gendarmes* post; Mpambara testified that the *gendarmes* and police came to the church, and that he spoke with them there.
[345] T. 7 February 200 p. 42 (Mpambara). Santos neither confirmed nor denied that Mpambara had accompanied him to speak to the *gendarmes*. Cf. Prosecution Closing Brief, para. 161.
[346] Prosecution Closing Brief, para. 142.
[347] The MP, Kalibwende, was also said to the present. T. 29 September 2005 pp. 15-16 (Witness AHY).

need *Interahamwe*, and then I send them and this issue is resolved'".[348] Mpambara "did not utter any word in reply".[349] Mpambara denies being present at Mugabo's bar that afternoon.

146. Even if accepted as reliable, this fragmentary account by Witness AHY is inconclusive. Mpambara's silence might suggest opposition, or simply a refusal to cooperate. Indeed, Witnesses RU-37 and RU-18 testified that, two days later, Mpambara had an angry exchange with the *bourgmestre* of Murambi *Commune* at the time, a certain Mwange. Mwange asked Mpambara why the "weeds", meaning Tutsi, had not been removed from the *commune*. Mpambara responded "loudly that the problem in Rukara was not the bushes they had to cut down, the problem was the security of the people being killed".[350] The two men parted in anger.

147. Under these circumstances, cooperation between the Accused and Gatete to kill the Tutsi refugees at Rukara Parish is not the only reasonable inference to be drawn from this fragment of conversation. Furthermore, Witness AHY's testimony concerning Mpambara's visit to Paris Centre that morning, discussed above in section 5.3.2, raises doubts about his overall credibility. Finally, the testimony of Witnesses RU-37 and RU-18 concerning the Accused's reaction to Mwange indirectly contradicts the proposition that the Accused was colluding with the attackers from Murambi *Commune*. Accordingly, it has not been proven beyond a reasonable doubt that Mpambara's conversation with Gatete was for the purpose of discussing the killing of Tutsis.

5.3.5. Delivering Stones to Be Used in an Attack on the Church, 12 April

148. No further attacks were launched on the Parish on 10 and 11 April, but the refugees were becoming increasingly desperate, and the distribution of food more difficult.[351] On 11 and 12 April, Mpambara and Santos returned to Rwamagana to ask the *gendarmerie* commandant for further reinforcements or evacuation of the refugees to an empty school in Rwamagana. The commandant responded that he didn't have enough manpower or resources for either request.[352] On the second visit, the commandant suggested that Mpambara distribute guns in the communal armoury to former soldiers who could assist in defending the Church.[353]

149. Santos testified that, at around 3 or 4 p.m. on 12 April, Mpambara came and told him that "'[t]he assailants have already received orders to attack this evening'".[354] Santos further testified that:

> [H]e told me, "… I will try to find out whether I can convince them to postpone the attack to the next day and not today". He's saying that he was trying to play the game, sort of, to accept the attack but to have it postponed to the next day. The idea he had was that he would use the intervening period to assemble the retired police officers and the retired soldiers in order to protect the refugees.[355]

150. The uncorroborated testimony of Witness LED is that between 4 and 5 p.m., the Accused arrived in front of the church in his pick-up truck with about eight *Interahamwe* who proceeded to unload quartzite stones.[356] As soon as Mpambara left, these and other *Interahamwe* started throwing

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[348] *Id*. pp. 15-17.
[349] *Id*. p. 17.
[350] T. 20 January 2006 p. 37 (Witness RU-37); T. 25 January 2006 pp. 13-14 (Witness RU-18).
[351] T. 10 January 2006 pp. 8-9, 13 (Santos).
[352] *Id*. pp. 9-10, 13.
[353] *Id*. pp. 13-14.
[354] *Id*. p. 14.
[355] *Id*. p. 15. Witness AOI testified that there was "despair in the air" (T. 23 September 2005 p. 29).
[356] Contrary to the Prosecution suggestion, Witness AOI's testimony provides no corroboration for Witness LED's testimony. Witness AOI could confirm only that the she saw Mpambara driving at around that time in the same direction indicated by Witness LED. Indeed, Witness AOI's failure to mention an attack of the magnitude mentioned by Witness LED is significant. T. 23 September 2005 p. 29 (Witness AOI). Cf. Prosecution Closing Brief, para. 171.

the stones at the church, joined shortly thereafter by attackers with other weapons, including a gendarme who started firing his gun.[357]

151. Neither Father Santos nor Witness RU-18, both of whom were inside or near the church during this period, saw the Accused unloading stones or an attack of this nature.[358] This lack of corroboration from others, who were present inside the church and who would not likely have overlooked such an attack, is significant. Furthermore, Witness LED's account is undermined by a prior statement in which he had indicated that the Accused came to the church "three times", rather than just once, and that he "deposited the stones at various places outside in the parish". After Mpambara's departure "the third time, the *Interahamwe* attacked us".[359] This discrepancy is not easily explained as a transcription or translation error. Furthermore, Santos explained that cement and stone benches in front of the church were the source of the stones thrown at the church later that evening.[360] Consequently, the testimony of Witness LED does not establish beyond a reasonable doubt that the Accused transported stones and *Interahamwe* to Rukara church for the purpose of aiding and abetting the attack on the Tutsi refugees there.[361]

5.3.6. Failing to Arrest Looters or to Otherwise Protect Rukara Church, 12 April

152. The Prosecution asserts that, by his own admission, the Accused failed to arrest looters in Rukara Parish on 10 and 11 April and that he failed to arrest anyone involved in the Parish attack of 12 and 13 April. By 12 April, the Accused knew that the *gendarmes* were not committed to defending the refugees and should have replaced them with communal police or taken other steps to defend the Parish. The Prosecution argues that these actions, or omissions, were for the purpose of permitting other members of the joint criminal enterprise to carry out attacks against the Tutsi refugees, or to aid and abet such attacks.[362]

153. In response to a question about his failure to make more vigorous efforts to track down and arrest those involved in the attack at the Gahini Hospital, the Accused gave the following answer regarding his general strategy:

> And I said that if I use violence and I arrest people by force, what am I going to gain from that? … If I arrest those people and lock them up, then the police will not be available because they would be guarding those people locked up in the *commune* cell … The second option was to use violence. As you know, in every strategy, an administrator has to think about which way he is going to use. I was with the chief of police and the IPJ, and I asked him whether, if – "With the means we have, can we arrest those people? Can we stop them? Can we shoot them?" Then I said, "Violence leads to violence," and bearing in mind that most of these people were soldiers … and Butera had been a soldier and knew how to use a gun and grenades. And I said, "With the staff that we have, we cannot kill those people and overcome them. If we use violence, if I give the order and the police chief shoots at one of them, those could come and kill us – kill all of us, myself and the police, and together with the people we're supposed to protect". And I found that this strategy wouldn't lead us to anywhere. Instead, it would make matters worse. So, me as *bourgmestre*, I said, "I have to adopt a strategy of dissuasion". I had to show them that

[357] T. 26 September 2005 pp. 6-8, 30, 31-34, 36, 39, 57 (Witness LED).
[358] T. 10 January 2006 pp. 16-20 (Santos); T. 25 January 2006 p. 18 (Witness RU-18).
[359] T. 26 September 2005 p. 36 (Witness LED).
[360] T. 10 January 2006 p. 23 (Santos); T. 25 January 2006 p. 22 (Witness RU-18).
[361] The Prosecution discusses the "credibility of Mpambara's alibi for 3 p.m. to 6 p.m." at length in its closing brief, paras. 173-193. Having found that Witness LED's testimony is not sufficient to establish that the Accused unloaded stones at the church, the Chamber need not examine whether the alibi raises a reasonable doubt concerning the evidence of distribution. The alleged inconsistencies in the alibi evidence do not provide any additional support to Witness LED's testimony.
[362] Prosecution Closing Brief, paras. 228-237. Although these arguments are presented within the context of the accused's "failure to act", the Chamber will treat these submissions as if they are directed at proving the Accused's involvement in a joint criminal enterprise or aiding and abetting. Indeed, on occasion, the Prosecution also makes that submission: "…is evidence of his intention to ensure that they were not inhibited from carrying out the objective of the JCE…", paras. 228, 237.

there is administration. And when I looked at the whole situation, I found that we didn't have any leverage. Those people we were facing were stronger than us. So, we have to dissuade them, and without showing that the administration is weak, so that those people may not find that there is no administration and they can do anything they want. The second thing I thought about is that, if I give the order for them to shoot those people, those assailants, those are the policemen I am going to give orders to, and they are local people, they may not accept to shoot their kith and kin. If I tell someone to shoot a brother or a relative, is that possible? … So I chose the dissuasion strategy and tried to mitigate the situation so that it may not get worse. Mr. Prosecutor, I never said that I shouldn't arrest the assailants, but I was weak. And the only strategy that was left was to show that there is an administration because, in the end, it came to something. But I was not supposed to show the weakness of the authority. That is the strategy that I chose, Mr. Prosecutor, and Your Honour.[363]

Mpambara testified that, given the inadequacy of communal police resources, he had no choice but to rely on the *gendarmes* even after he became aware of their complicity in the attacks, and hoped that his complaints to the commandant would result in more or better-trained *gendarmes*.[364] The Defence tendered evidence, not seriously contested by the Prosecution, that *gendarmes* were not under the command of the *bourgmestre*.[365]

154. Although a few armed communal policemen could have deterred a large crowd of unarmed attackers, Defence and Prosecution witnesses alike testified that by 12 April the assailants were armed with guns and grenades, and included soldiers and *gendarmes*.[366] Under these circumstances, the Chamber cannot say that the failure of the communal police to maintain order at the Church demonstrates the Accused's collusion with the attackers. Another reasonable explanation is that Mpambara was afraid to oppose the attackers with direct force, fearing that they would turn on him with superior force. The Chamber does not find that the failure to arrest any of the attackers shows that the Accused was in league with them.[367]

155. In the absence of further evidence showing the Accused's cooperation with the attackers, and with some evidence that the Accused made efforts to secure the Parish, the Chamber cannot find beyond a reasonable doubt that the failure to arrest looters and otherwise protect Rukara Parish demonstrates his involvement in a joint criminal enterprise, or that he or that he substantially contributed to these crimes by other persons so as to be guilty of aiding and abetting.[368]

5.3.7. The Evidence in its Totality

156. The Chamber has been mindful of the inter-relationship of evidence concerning the different events described above and will now explicitly consider whether, taken as a whole, the evidence shows that the Accused was part of a joint criminal enterprise.

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[363] T. 9 February 2006 pp. 2-3 (Mpambara).
[364] T. 6 February 2006 pp. 22-24; T. 9 February 2006 p. 16.
[365] Exhibit D-48; T. 8 February 2006 pp. 3-4 (Mpambara).
[366] T. 25 January 2006 p. 20 (Witness RU-18) ("these soldiers started using rifles"); T. 16 January 2006 pp. 27-31 (Witness RU-62) ("some soldiers came on bicycles in a line, they were carrying grenades on their belts, and they were carrying also rifles"); T. 29 September 2005 p. 18 (Witness AHY) ("they told me that they were planning to attack in the evening; and they said there were soldiers who would be coming from Murambi to give them a hand").
[367] The only incidents of failures to arrest are to be derived from the Accused's own testimony.
[368] The Chamber notes that evidence from Witness AOI placing the Accused at the scene of the attack on 12-13 April was not relied upon by the Prosecution in its Closing Brief. If it had been relied upon, the Chamber would have found that the witness's credibility was seriously undermined by an inconsistent prior statement, which gave a very different account of her whereabouts during the attack. T. 23 September 2005 p. 52. Further doubts are raised by her testimony that a close relative of hers was killed during the attack, a fact which was contradicted by several other witnesses, and which she recanted when asked directly to confirm his death. T. 23 September 2005 pp. 48, 51; T. 25 January 2006 p. 23 (Witness RU-18); T. 10 January 2006 p. 30, T. 12 January 2006 p. 27 (Santos).

157. Father Santos was a central witness for the Defence in describing the atmosphere at the Parish complex and the general conduct of the Accused from 7 to 13 April 1994. The Prosecution attempted to undermine Father Santos' testimony by suggesting that the Accused's apparent good conduct was no more than a smokescreen to conceal his criminal acts.[369] The Prosecution also implied that Santos was biased in favour of Mpambara.[370]

158. Although not all aspects of Father Santos' testimony are equally reliable, particularly in respect to the timing of events, the Chamber nevertheless finds that he was an honest, truthful and unbiased witness. He has been a missionary priest since 1954 and had been in Rwanda since 1967, mostly at Rukara Parish itself. He understands and speaks Kinyarwanda well.[371] Tutsi refugees testified that he helped them at the church, and the Prosecution brought no evidence suggesting that he harboured an anti-Tutsi bias, despite an oblique suggestion to this effect.[372]

159. Father Santos's account of the Accused's reaction to his planned departure on 10 April is significant:

> I stopped [Mpambara] and I said, "Goodbye". And he said, "Why?" I said, "We are leaving for Spain". "You are leaving for Spain", he said. "How? And you are leaving the refugees behind?" He was somewhat shocked. He said, "If you leave today, they will kill all the refugees". And he went on to say, "I am not sure that if you stay it will save them". And he was pointing with his finger. "But if I had any bit of hope left, it was you, and if you leave everyone will be killed". I turned to my fellow priest and I told him, "Have you heard? I am remaining behind – I am staying behind…".[373]

If the Accused had wished to assist with the extermination of the Tutsi refugees without being discovered, then it is difficult to understand why he would plead with a foreigner to remain on the scene. It is always possible that the Accused was so Machiavellian and confident in his skills of deception that he wished Santos to remain behind as a dupe who would later attest to his good deeds. The Chamber considers this possibility to be remote, in light of Santos's ability to understand the language and his familiarity with people in the *commune*.

160. Indeed, Santos's testimony is directly and indirectly corroborated by a number of credible Rwandese witnesses. Defence Witnesses RU-37 and RU-18 are partners in a marriage of mixed ethnicity. They testified that the Accused helped them to marry despite the opposition of their families and others in the community.[374] Both witnesses testified that on 11 April, near Karubamba Market, the Accused publicly denounced the *bourgmestre* of Murambi *Commune*, Mwange, who was advocating

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[369] T. 9 February 2006 p. 5 (Mpambara) ("Q. In fact, Witness, isn't it the case that that the news delivered by Maniraho [about the meeting of attackers at Ruyenzi] caught you unawares in the company of the *gendarmerie* commandant, Santos, and the *sous-préfet*? … And you were compelled to go and meet the crowd and purport to discourage them because you didn't want to be associated with the killings…?"); T. 9 February 2005, p. 17 ("Q. In fact, you were playing a double-game, presenting yourself as a helpless victim of circumstances, weren't you?" by not telling Santos that he considered the *gendarmes* to be complicit with the attackers); T. 2 May 2006 p. 25 ("And it's submitted that it's clear that the Accused, as much as a double game as he likes, and liked, to play, was up to it in his neck").

[370] Prosecution Closing Brief, para. 155 (implying that Santos was complicit with *gendarmes* who were beckoning attackers towards Rukara church); T. 12 January 2006 p. 34 ("Q. So, you actually owe your life to Mpambara, don't you?"); T. 12 January 2006 pp. 35-36 ("Q. And, Witness, you couldn't stake your life to protest the slaughter of thousands of your Tutsi flock, did you?"); T. 12 January 2006 p. 2 ("Q. And, in fact ... you were seen in the company of Accused Mpambara on many occasions, isn't it?").

[371] T. 9 January 2006 pp. 4-5 (Santos).

[372] Assistance to refugees: T. 26 September 2005 p. 26 (Witness LED); T. 23 September 2005 p. 39 (Witness AOI). Alleged anti-Tutsi bias: T. 12 January 2006 pp. 6-7 ("Q. Witness, by your own evidence, it would be correct to suggest that you were concerned about the loss of the Hutu cause, 'yes' or 'no'? A. I was concerned about losing sight of the political ideology at the time. The Hutus were in power at the time. I wanted to support the order that existed in Rwanda at the time, whether such a political order was maintained by the Hutus or the Tutsi. The Hutus were in power, and it was my intention to support the action of the authorities to ensure that the tragic events should not destroy the political authority at the time or should not lead your political authority at the time to go astray").

[373] T. 10 January 2006 p. 6 (Santos).

[374] T. 20 January 2006 p. 27-30 (Witness RU-37); T. 25 January 2006 pp. 6-7 (Witness RU-18).

attacking the Tutsis.[375] The next day, Mwange was heard saying "'You should be patient… Mpambara is preventing you from killing those people, but I am going to bring people who will help you to kill those people".[376] Mpambara's public calls throughout Rukara *Commune* for the violence to stop are echoed in the testimonies of numerous witnesses, both Tutsi and Hutu. Félicien Serukwavu, a Tutsi, testified that, some time after 8 April, Mpambara addressed an angry crowd at Akabeza Centre to the effect that "I am warning you today whoever will again loot Tutsi property, kill, hunt down Tutsis and kill them, I am repeating to you that whoever does it will be prosecuted… Moreover, all these groups with machetes and clubs, I don't want them. Everybody should go back home".[377] The four witnesses to the meeting at Ruyenzi on 9 April all agree that the Accused conveyed the same sentiments there, in the presence of Karasira, the Tutsi *Inspecteur de Police Judiciaire*. Father Santos was one of those witnesses, and another was Witness R-01 who, in 1994, was a seminarian who provided medical and other assistance to the Tutsi refugees.[378]

161. Father Santos' general impression of the attitude of the Accused was that:

> In the gestures of the *bourgmestre*, I could see at all times the commitment to defend the refugees… [H]e didn't want to see anyone else being killed. He said he didn't want to be involved in this matter and wanted to go, but later on he said 'I am the *bourgmestre* and I have to stay.' So he felt helpless… [H]e wanted to flee but his conscience and his sense of responsibility obliged him to hold out… He could see himself being accused as a *bourgmestre* and he felt powerless because of the situation. He felt like fleeing in order not to be involved but, on the other hand, he felt obliged to stay – in order to live up to his responsibilities.[379]

This conclusion is based on several joint efforts by Mpambara and Santos on behalf of the refugees, including several visits to Rwamagana to obtain more *gendarmes*; attempts to fix the water supply; dissuading gangs from engaging in violence; and urging the *gendarmes* to protect the refugees. The Prosecution failed to raise any significant reason to doubt this testimony.

162. The Accused also undertook a variety of significant efforts to save Tutsis, including: driving eight kilometres from the Parish on 10 April to save the mother of a Tutsi priest, and then driving her, as well one of her sons and his wife and children, from the Parish church to Rwamagana;[380] colluding in the concealment of Witness RU-18, a Tutsi;[381] arranging for the evacuation of Karasira;[382] and giving out identity cards stamped "Hutu" to Tutsi refugees.[383] Although some of these actions may have been motivated primarily by personal attachment, together they demonstrate a significant effort to save Tutsis from danger.

163. By comparison, the evidence of the Accused's involvement in a joint criminal enterprise or other criminal conduct is weak, disconnected, and uncorroborated. There was direct testimony concerning only two events – instigation and distribution of grenades at Paris Centre and the distribution of stones at the Church – neither of which was corroborated. Neither Witness AHY nor Witness LED were particularly convincing for the reasons described above, and neither event is connected to other events in such a way as to make them more plausible or likely. The alleged intent to leave the refugees open to an attack is speculative and based on possible, but not necessary, inferences. The standard of proof when circumstantial evidence is relied upon is that the criminal

[375] T. 20 January 2006 p. 37 (Witness RU-37); T. 25 January 2006 p. 44 (Witness RU-18).
[376] T. 16 January 2006 p. 27 (Witness RU-62).
[377] T. 31 January 2006 pp. 10-11. Although this evidence does not relate directly to the Parish, it provides corroboration for the Accused's efforts there.
[378] T. 13 January 2006 p. 21 (Witness R-01) ("I arrived at the end of the meeting that had already ended. I had the feeling that it was an appeasement meeting because I had spoken with Father Santos earlier. I knew what he was doing. He himself had told me that he and Mpambara went everywhere trying to pacify people, so I concluded that it was an appeasement meeting"); T. 9 January 2006 p. 12 (Santos).
[379] T. 9 January 2006 p. 20 (Santos).
[380] T. 13 January 2006 pp. 7-8 (Witness R-01); T. 10 January 2006 p. 7 (Santos).
[381] T. 20 January 2006 pp. 35-36 (Witness RU-37).
[382] T. 25 January 2006 pp. 12, 46-47 (Witness RU-18).
[383] T. 30 January 2006 pp. 31, 47 (Kalisa); T. 31 January 2006 pp. 15, 16, 22 (Serukwavu).

conduct of the accused is the only reasonable conclusion. The cumulative weight of the evidence does not alter the finding that the Prosecution has not proven the material elements of the crimes charged beyond a reasonable doubt. On the contrary, the totality of the evidence confirms that there is reasonable doubt.

5.4. Conclusion

164. The Chamber finds that it has not been proven beyond a reasonable doubt that the Accused distributed weapons and incited genocide at Paris Centre on the morning of 9 April; that he colluded with Gatete to kill Tutsi refugees; that he distributed rocks to aid the attack on the Parish church on 12 April; or that he deliberately left Rukara Parish unprotected as part of his involvement in a joint criminal enterprise.

6. Factual Allegations Falling Outside of the Indictment

165. Article 20 (4) (a) of the Statute requires that an accused "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". This does not mean that all evidence on which the Prosecution intends to rely must be included in the indictment, but that the material facts must be articulated with sufficient particularity and accuracy to put the "accused [] in a reasonable position to understand the charges against him or her".[384] A Trial Chamber may permit material facts to be communicated to the Defence after the filing of the indictment as, for example, through the Pre-Trial Brief, opening statement, or other communications which make clear to the Defence that the material fact is part of the Prosecution case, and how it is relevant to the charges.[385] Even in the absence of a contemporaneous objection to the admission of evidence outside of the scope of the indictment, the Chamber may not base a conviction upon material facts of which the accused does not have reasonable notice.[386]

166. Whether a fact is material depends on its nature. An allegation that the Accused physically committed a criminal act is not only material, but must be specifically pleaded in the Indictment; it

[384] *Naletilic*, Judgement (AC), para. 27; *Rutaganda*, Judgement (AC) para. 301 ("Accordingly, the indictment must be sufficiently specific, meaning that it must reasonably inform the accused of the material charges, and their criminal characterization"); *Semanza*, Judgement (TC), para. 44 ("The fundamental question in determining whether an indictment is pleaded with sufficient particularity is whether an accused had enough detail to prepare his defence"); *Ntakirutimana*, Judgement (TC), para. 42. As to the requirement of accuracy: *Rutaganda*, Judgement (AC), para. 303 ("Before holding that an event charged is immaterial or that there are minor discrepancies between the indictment and the evidence presented at trial, a Chamber must normally satisfy itself that no prejudice shall, as a result, be caused to the accused. An example of such prejudice is the existence of inaccuracies likely to mislead the accused as to the nature of the charges against him"); *Ndindabahizi*, Judgement (TC), para. 28; *Semanza*, Judgement (TC), para. 44 ("The fundamental question in determining whether an indictment was pleaded with sufficient particularity is whether an accused had enough detail to prepare his defence"); *Ntagerura et al*., Judgement (TC), para. 32 ("The Chamber, however, does not expect the Prosecutor to perform an impossible task and recognizes that the nature or scale of the crimes, the fallibility of the witnesses' recollections, or witness protection concerns may prevent the Prosecution from fulfilling its legal obligations to provide prompt and detailed notice to the accused. If a precise date cannot be specified, a reasonable range of dates should be provided").

[385] *Naletilic*, Judgement (AC), para. 27 ("In [determining whether the accused had sufficient notice of a material fact], 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").

[386] *Naletilic*, Judgement (AC), para. 26 ("In reaching its judgement, a Trial Chamber can only convict the accused of crimes which are charged in the indictment… 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"). The result of failing to make a specific, contemporaneous objection to the use of evidence of which no notice has been given is that the burden falls on the Defence to show that it was not reasonable informed of the charge, and that it suffered prejudice. *Niyitegeka*, Judgement (AC), para. 200; *Ndindabahizi*, Judgement (TC), para. 29.

may not be communicated by other means.[387] On the other hand, details concerning crimes on a broad scale, in which the accused played an indirect role, may be pleaded with less specificity.[388]

167. The Defence objects that it did not have adequate notice of the allegation that the Accused was present during the beating of a young man named Murenzi on the morning of 7 April at Gahini Hospital.[389]

168. The Indictment contains no specific reference to this event. The Pre-Trial Brief, which was disclosed about three months before the start of trial, does indicate that:

> On or about the 7th of April at around 3.30 p.m. following a meeting at Akabeza at which he had instigated the killing of Tutsis, Jean Mpambara stood by and watched Samuel Gasana and six other armed *Interahamwe* assault and seriously injure two Tutsi civilians, Murenzi and his friend, with machetes and did not intervene to prevent or stop the assault.[390]

169. This allegation is said in the Pre-Trial Brief to be relevant to paragraphs 7 (ii) and 7 (vi) of the Indictment, which assert that the Accused participated in a campaign against the Tutsi population, which included "mobilizing Hutu civilians to identify, isolate, marginalize and attack their Tutsi neighbours" and "strategically directing, facilitating and aiding armed attacks against large groups of Tutsis". The Pre-Trial Brief also links this allegation to paragraph 11 of the Indictment, which begins with the words "On the evening of 7 April, after the meetings in Akabeza Center…"

170. The allegation in question cannot be relevant to the paragraphs identified in the Pre-trial Brief. Murenzi was with one friend when attacked, not part of a "large group". Rather than fitting into a campaign to "marginalize and attack their Tutsi neighbours", the event was an isolated attack on a person who was targeted because he was a stranger in the neighbourhood. Finally, the attack was said to be at 3:30 p.m., which is before the temporal scope of paragraph 11 of the Indictment.

171. The lack of connection between the material fact and the paragraphs in the Indictment points to a more fundamental issue: the conduct would, on its own, be a criminal act which should, in principle, have been expressly pleaded in the Indictment. Although the Accused is not himself alleged to have beaten Murenzi, his alleged involvement is precise, specific, and, if proven, is probably sufficient to show that he was guilty of a crime. The implication of the allegation is that his presence, combined with his inaction, had an encouraging effect on the attackers. In these circumstances, the requirement that "acts that were physically committed by the accused personally must be set forth in the indictment specifically" applies to this allegation. Furthermore, this allegation stands on its own in the sense that it is not significantly relevant to or probative of the broader crimes mentioned in paragraphs 7 and 11 of the Indictment. This distinguishes it from the Accused's alleged instigation at Ruyenzi which, although not specifically pleaded, is squarely covered by paragraph 18 (ii) of the Indictment that the Accused "transport[ed] and direct[ed] attackers" as part of the Rukara church attacks on 9 and 12 April.

172. Accordingly, the Chamber considers that the allegation of the Accused's presence during the beating of Murenzi has not been charged as a distinct criminal act, and has only been considered above to the extent necessary to set the scene for events at Gahini Hospital on 9 April.

173. Even assuming that notice of this allegation had been properly given, the Chamber finds that it has not been proven beyond a reasonable doubt. Witness LET testified that, around 3.30 p.m. on 7 April, she saw the Accused inside the compound of Gahini Hospital, standing next to his communal pick-up truck and escorted by two communal police, while a gang of youths beat two young Tutsis.

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[387] *Ntakirutimana*, Judgement (AC), paras. 25, 32.
[388] *Id*., para. 25.
[389] T. 2 May 2006 p. 57 (closing arguments).
[390] Pre-Trial Brief, para. 21. No mention of this event is made in the opening statement. T. 19 September 2005 pp. 3-6 (Prosecution opening statement).

Mpambara allegedly did nothing to stop the attack and left while it was ongoing.[391] As discussed in section 3.3.2, Prosecution Witness Dr. Wilson testified that he also witnessed this attack and that he intervened to rescue one of the young men, a fact which is corroborated by Witness LET.[392] However, Dr. Wilson did not testify that he saw the Accused inside the compound during the attack, or at any other time that day. After he had taken the young Tutsi inside the hospital, and after the attackers had dispersed, Dr. Wilson came upon Mpambara standing next to his vehicle a short distance away from the Akabeza Gate, accompanied by "some of the older members … of the community".[393] Mpambara himself recalled being there that day and speaking to Wilson, but denied witnessing any attack. He did admit that he learned of the attack and, apparently addressing the attackers themselves, said that "even if you don't know the person, you don't have the right to beat anybody".[394]

174. Witness LET's overall credibility was significantly undermined by her testimony that she saw Mpambara lead the attackers into the Gahini Hospital compound for the first attack on the morning of 9 April 1994, as discussed above in section 4.3.3. This testimony was contradicted by Prosecution Witness Dr. Wilson, and Defence Witness Elizabeth Hardinge, both of whom testified that he did not arrive until after the end of the first attack.[395] The Chamber has accepted the testimony of Dr. Wilson and Ms. Hardinge as credible in this respect, and finds it difficult to understand how Witness LET's testimony as to Mpambara's presence at that time could be the result of a mere error of memory. When this is combined with the lack of corroboration from Dr. Wilson that Mpambara was present inside the hospital compound on the afternoon of 7 April, the Chamber cannot find beyond a reasonable doubt that the Accused was present during the attack and that he knowingly failed to intervene.

Chapter IV: Verdict and Disposition

175. For the foregoing reasons, and having considered all of the evidence and the arguments of the parties, the Chamber finds the Accused NOT GUILTY on all counts of the Indictment, and is therefore acquitted.

176. Subject to any applications which may be made by the Parties upon receiving this Judgement, the Trial Chamber orders the immediate release of Jean Mpambara from the custody of the Tribunal, pursuant to Rule 99 (A) of the Rules.

Arusha, 11 September 2006.

[Signed] : Jai Ram Reddy; Sergei Alekseevich Egorov; Flavia Lattanzi

[391] T. 20 September 2005 pp. 10-12 (Witness LET).
[392] T. 19 September 2005 pp. 14, 34 (Wilson). Dr. Wilson believed that the other youth was also able to escape.
[393] T. 19 September 2005 pp. 15, 34 (Wilson) ("[Mpambara] was outside the hospital and a little way along to the south of the – of the back gate"). Dr. Wilson's testimony is not necessarily irreconcilable with that of Witness LET, who emphasized that Mpambara left while the attack was ongoing, and that she could not be sure whether Dr. Wilson was there at the same time as Mpambara. T. 20 September 2005 p. 13 (Witness LET).
[394] T. 7 February 2006 p. 2 (Mpambara).
[395] *Supra*, Section 3.3.3. The Prosecution not only refrained from relying on this evidence in its Closing Brief, but implicitly repudiated the testimony, saying that "When the accused arrived at Gahini Hospital at between 10.30 and 11 a.m. the attackers withdrew at his command…".

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Opinion individuelle du Juge Lattanzi

(Original : Français)

1. Je regrette de ne pouvoir partager certains des arguments développés par la majorité des juges de la Chambre dans les paragraphes 21 à 35 du Jugement, à propos des différentes modalités par lesquelles les omissions peuvent engager la responsabilité de leurs auteurs selon les Statuts des deux Tribunaux pénaux internationaux. Je me limiterai ici à souligner seulement quelques arguments plus significatifs que je ne peux partager.

2. Les omissions engagent la responsabilité de leur auteur avant tout conformément aux articles 6 (3), 7 (3) desdits Statuts, où elles sont explicitement considérées pour ce qui concerne la responsabilité du supérieur au regard des agissements de leurs subordonnés. D'une telle forme de responsabilité forme de responsabilité n'est pas question dans la présente Affaire, comme la Chambre bien le souligne[1].

3. Comme il résulte clairement de la jurisprudence des Chambres de première instance[2] et d'appel[3], la responsabilité par omission peut être envisagée aussi selon les articles 6 (1), 7 (1), en particulier comme une forme d'assistance ou d'encouragement (voire d'incitation[4]) à la commission du crime par l'auteur principal. Les omissions peuvent également engager la responsabilité d'un individu dans le cadre d'une entreprise criminelle conjointe (ECC)[5]. Dans ce cas, l'individu serait responsable d'une commission[6]. Ce sont en l'espèce les deux formes de responsabilité par omission que plaide le Procureur.

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[1] *Mpambara* Judgment (TC) 12 September 2006, p. 2, footnote 4.

[2] V. *Bagilishema*, TC Judgement, 7 June 2001, para 675, *Rutaganira* Jugement 1ère instance, 14 Mars 2005, p. 17, para 68. la Chambre de 1ère instance dans *Blaskic* a affirmé que l'*actus reus* de l'aide ou encouragement peut bien être réalisé par une 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 » (citée dans *Blaskic* judgment (AC), 29 July 2004, para. 47. V. aussi *Kvocka* TC Judgment, 2 November 2001, para. 251. Une récente, très intéressante décision sur l'omission comme modalité de commission d'un crime selon le Statut du TPIY, est celle de la Chambre de 1ère instance dans *Blagojevic*, où on donne une illustration approfondie de la loi applicable à cet aspect : *Blagojevic* Judgment TC 17 January 2005, p. 261, para. 726.

[3] La jurisprudence de la Chambre d'appel soit confirme essentiellement l'approche des jugements rendus par les Chambres de première instance, admettant la responsabilité par omission dans le cadre de l'aide et de l'encouragement prévus par l'article 6 (1), 7 (1) des deux Statuts, soit envisage la responsabilité par omission directement en appel. C'est ainsi que la Chambre d'appel dans *Blaskic* a considéré spécifiquement l'affirmation de la Chambre de 1ère instance sur l'aide et l'encouragement par omission en laissant ouvert seulement l'aspect de la source de l'obligation (Judgement, 29 July 2004, para 47). Dans *Ntagerura* aussi on a eu l'occasion, en appel même, d'occuper de la responsabilité selon l'art. 6 (1), mais on s'est limité à faire état de l'accord des parties sur le fait « qu'un accusé /peut/ être tenu pénalement responsable d'une omission sur la base de l'art. 6 (1) du Statut » (par. 334). Dans *Blaskic*, encore, la Chambre d'appel a considéré l'accusé responsable de traitements inhumains pour des manquements à une obligation d'agir, excluant sa responsabilité pour des actes positifs se rapportant au même chef et qui avait été retenue par la Chambre de première instance. Pour économie du discours je ne me réfère pas à d'autres décisions et jugements, en 1ère instance et appel, où les omissions ont été bien considérées comme forme de responsabilité selon les articles 6 (1) et 7 (1) des Statuts. Je ne partage donc pas l'avis de la majorité de la Chambre qu'en plus des omissions en présence de l'accusé ou en stricte connexion avec des actes positifs, "*other examples of aiding and abetting through failure to act are not to be easily found in the annals of the* ad hoc *Tribunals*" (*Mpambara* Jugdment, para. 23).

[4] "Instigation can take many different forms; it can be expressed or implied, and entail both acts and omissions". Blaskic Judgement TC 3 March 2000, para 270.

[5] La Chambre d'appel dans l'affaire *Kvocka* a approfondi les distinctions à faire par rapport à la *mens rea* et à l'effet substantiel entre une omission comme simple forme d'aide et encouragement et une omission dans le contexte d'une ECC (Judgement AC, 28 February 2005, para. 90).

[6] Je ne vois pas que "*it is hard to imagine that total passivity could demonstrate the requisite intent for co-perpetratorship*" (pararagraph 24 du Jugement) : cela dépend seulement des circonstances concrètes. La «passivité » coupable représente

4. Je ne vois pas que "liability for an omission may arise in a third, fundamentally different context: where the accused is charged with a duty to prevent or punish others from committing a crime", ni que "the culpability arises not by participating in the commission of a crime, but by allowing another person to commit a crime which the Accused has a duty to prevent or punish"[7] (sauf le contexte de la responsabilité du supérieur, à laquelle d'ailleurs la majorité de la Chambre n'entend pas se référer[8]).

5. A mon avis, l'expression *Failure of Duty to Prevent or Punish*, ne se référant pas à la disposition de l'art. 6 (3), ne vise pas un contexte différent par rapport aux contextes relatifs aux autres omissions plaidées, mais décrit des infractions particulières, toute omission coupable n'étant qu'un manquement au devoir d'agir. En effet, si les actions comportant une responsabilité pénale consistent dans la violation d'une règle juridique portant interdiction de faire, les omissions sources de responsabilité consistent toujours dans la violation d'une règle juridique portant obligation d'agir[9].

6. S'il est vrai que l'expression en question présente, surtout en ce qui concerne le manquement au devoir de punir, une certaine ambiguïté par rapport à la responsabilité selon l'Article 6 (3), par la charge plaidée on envisage la punition manquée des auteurs des crimes comme une facilitation, un encouragement à la commission de crimes ultérieurs pour lesquelles la responsabilité de l'Accusé serait encore engagée. Et cela pourrait bien être le cas surtout dans une situation, comme dans la présente affaire, d'attaques continues qui ont eu une stricte connexion tant spatiale que temporelle et même personnelle entre eux (la même Commune, une période de temps très court, parfois les mêmes attaquants). On se trouverait donc toujours dans le contexte de l'aide et encouragement selon l'art. 6 (1)[10].

7. Je regrette encore de ne pas pouvoir partager l'avis de la majorité de la Chambre que parmi les omissions plaidées par le Procureur dans la présente affaire comme forme de participation de l'Accusé à une ECC de la première catégorie ou comme aide ou encouragement donnés aux auteurs des crimes

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l'*actus reus* (violation d'un devoir d'agir), la *mens rea* est un autre élément à prouver : et on peut bien partager la *mens rea* des autres participants à la ECC même en omettant simplement de remplir un devoir d'agir.

[7] *Mpambara* Judgment, TC 12 September 2006, p.13, para. 25.

[8] V. à ce propos note 1 ci-dessus. Mais le langage utilisé dans le passage cité semble justement évoquer la responsabilité du supérieur.

[9] Sur la source de l'obligation d'agir la jurisprudence des deux Tribunaux se divise. Il y a des Chambres qui, suivant la décision d'Appel *Tadic* dans laquelle pour la première fois on s'est occupée de cette question, voient cette source seulement dans le droit pénal, tandis que d'autres Chambres prennent en considération une «obligation légale d'agir quelconque ». La dernière approche, en tout cas suivie le plus souvent. Malheureusement la question n'a pas été abordée sinon indirectement par la Chambre d'Appel dans l'Affaire *Ntagerura*. Ici, se trouvant confrontée à une décision de 1ère instance qui reprenait sur le point l'approche qu'on trouve dans *Tadic* sur la source pénale de l'obligation d'agir, la Chambre d'appel a décidé de ne pas approfondir cet aspect et de se limiter à considérer la question de la capacité d'agir, qui avait été à la base de l'opinion individuelle d'un Juge de 1ère instance. La Chambre a donc conclu dans le sens que « 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 », en ajoutant que « 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 ». A mon avis, le droit pénal, interne ou international, peut prévoir des conséquences en termes de responsabilité individuelle pour violation d'obligations prévues par d'autres branches du droit, comme c'est le cas pour les obligations posées à la charge des agents d'Etats.

[10] En principe, le manquement à un devoir d'agir comme fondement de la responsabilité pénale selon les articles 6 (1) et 7 (1) des deux Statuts s'exprime par une conduite précédente à la commission du crime et non pas par une conduite successive, telle que le manquement au devoir de punir. En effet, cette dernière infraction acquiert une considération autonome exclusivement dans le contexte de la responsabilité du supérieur selon les articles 6 (3) et 7 (3). Cela n'exclut toutefois pas la possibilité de considérer le manquement par un accusé au devoir de punir l'auteur d'un crime, selon les circonstances du cas, sous la responsabilité pour aide ou encouragement. Le manquement à ce devoir peut bien représenter un manquement au devoir d'empêcher des crimes ultérieurs et donc à en aider ou encourager la commission. C'est ce qu'aussi la Chambre 1ère instance dans l'Affaire *Blaskic* envisage, implicitement confirmée dans son opinion par la Chambre d'appel : « *the failure to punish past crimes, which entails the commander's responsibility under Article 7 (3), may, pursuant to Article 7 (1) and subject to the fulfilment of the respective* mens rea *and* actus reus *requirements, also be the basis for his liability for either aiding and abetting or instigating the commission of future crimes*" (Judgement TC, 29 July 2004, para. 337).

et que la Chambre considère dans ses conclusions, on ne pourrait pas considérer[11] *Failure of Duty to Prevent or Punish,* parce que la défense n'aurait pas été adéquatement informée à temps de cette « particulière omission »[12].

8. A mon avis, si la défense n'a pas pu exercer ses droits pour ne pas avoir reçu une information adéquate du prétendu manquement par l'Accusé au *devoir d'empêcher les crimes et d'en punir les auteurs*, on doit retenir qu'elle n'a même pas reçu une telle information en ce qui concerne les autres omissions plaidées, pour lesquelles la majorité de la Chambre ne relève aucun défaut de l'Acte d'accusation. Mais, pourtant, toute omission doit être plaidée selon les éléments qui la caractérisent, y compris l'obligation dont la violation comporterait une omission coupable selon le Statut

9. Si je partage pour l'essentiel, la reconstruction par la majorité de la Chambre des défauts que l'Acte d'accusation contre l'accusé Mpambara présentait et auxquels les successives écritures n'avaient pas réussi à remédier efficacement (mais cela par rapport à toute omission plaidée et non seulement au manquement au devoir de prévenir et punir), je suis toutefois de l'avis que l'Accusé n'a subit aucun préjudice à son droit de se défendre.

10. En effet, selon l'opinion de la Chambre d'appel, l'obligation qui est faite au Procureur d'informer l'accusé clairement et en détail des charges alléguées à son encontre, doit être considérée non de façon isolée, mais en fonction du droit de l'accusé à assurer sa défense. Dès lors, il est nécessaire d'évaluer si le Procureur en a donné une information adéquate par rapport à la compréhension qu'en a eu la Défense. En effet, s'il est vrai qu'« 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 », il n'en est pas moins vrai que la Chambre doit apprécier concrètement si l'accusé était ou non « *in a reasonable position to understand the charges against him or her* ». Encore, selon la Chambre d'appel, si la Chambre de 1ère instance « 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 »[13].

11. Une telle vérification doit donc se faire à la lumière des droits que la défense a concrètement exercé pendant le procès. Si, pour une raison ou une autre, ces droits ont été effectivement exercés malgré la faiblesse des informations fournies par le Procureur quant aux charges retenues contre l'accusé, il serait même contraire à l'intérêt de la justice que la Chambre décide de ne pas considérer ces charges. Ces charges doivent naturellement être considérées dans les limites de l'exercice concret des droits de la défense par rapport à chaque événement et à chaque fait matériel allégués dans l'Acte.

12. En l'espèce, à la lumière des preuves présentées par la Défense tout le long du procès (y compris le témoignage de l'accusé), je suis de l'avis qu'elle a effectivement exercé ses droits par rapport à toutes les omissions alléguées par le Procureur, y compris le « manquement de l'accusé au devoir tant d'empêcher que de punir » invoqué dans le cadre de la responsabilité pour participation à une ECC ou pour aide ou encouragement prévu à l'article 6 (1) du Statut[14].

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[11] Mpambara Judgment (TC) 12 septembre 2006, p 13, para. 35: "The Chamber will, however, consider the evidence of omissions adduced at trial to the extent that they may be probative of the accused's participation in a joint criminal enterprise or having aided and abetted another in the commission of a crime". Mais, on verra qu'on a fini par considérer aussi la charge contestée par la majorité de la Chambre.

[12] "There is no mention of any duty to prevent or punish crimes. It bears repeating that the prosecution is permitted to bring potentially incompatible charges against the Accused. The defect here is not the incompatibility, but the failure to distinctly explain that the omissions alleged against the Accused constituted a breach of his duty to prevent or punish the crimes of others" (Mpambara Judgement (TC), paragraph 34).

[13] Jugement *Ntagerura* (CA) 7 juillet 2006, para. 28.

[14] La Chambre a entendu les témoins de la défense évoquer les appels par l'accusé à la pacification et les assemblées convoquées dans ce but, les secours apportés par l'accusé avec le Père Santos aux réfugiés. Ils ont parlé aussi des enquêtes menées par l'accusé pour trouver les auteurs des crimes et du fait qu'il n'ait pas été à même de les porter à bien pour manque de moyens. Tous les témoins de la défense ont parlé de la continue et inutile demande d'aide par l'accusé auprès du sous-préfet et donc de l'indisponibilité de moyens suffisants pour pouvoir contraster les attaques et en punir les auteurs sur un

13. D'ailleurs, dans le but de vérifier si l'accusé pouvait en être retenu responsable, la Chambre a pris soin de considérer toutes les omissions alléguées au cours du procès, y compris celle qui est contestée par la majorité de la Chambre pour manque d'information adéquate (*failure of duty to prevent and punish*).

14. La Chambre a donc conclu, pour chaque attaque et charge alléguées à l'encontre de l'accusé, que les omissions n'étaient pas prouvées au-delà de tout doute raisonnable, ou qu'elles ne démontraient ni la participation à une ECC ni une assistance ou un encouragement aux attaques, raison du fait que certains éléments de ces conduites n'avaient pas été prouvés au-delà de tout doute raisonnable. Et je partage entièrement ces conclusions.

[Signé] : Flavia Lattanzi

territoire communal très étendu, dont la sécurité était assurée seulement par 6/7 policiers. L'accusé même a déclaré que si ces policiers avaient été utilisés pour arrêter les criminels et garder leur prison au lieu d'être affectés par lui à la sécurité des réfugiés, encore si faible, tous les réfugiés auraient été tués, tandis qu'il avait réussi à épargner beaucoup de vies. On lui a entendu dire qu'arrêter les attaquants aurait représenté un «suicide ». Ce sont là seulement certains des arguments portés par la défense pour contester les charges. Je renvoie à ce propos à ces témoignages ainsi que rapportés dans le Jugement.

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Annex I: Procedural History

1. Jean Mpambara was transferred into the custody of the Tribunal on 23 June 2001, having been arrested by national authorities in northern Tanzania on 20 June 2001.[1] The Indictment, confirmed by Judge Erik Møse on 23 July 2001, charged Mpambara with one count of genocide.[2] At his initial appearance on 8 August 2001, Mpambara pleaded not guilty.[3] The Chamber granted the Prosecution leave to amend the Indictment on 4 March 2005, by adding a count of complicity in genocide and a count of extermination as a crime against humanity.[4] Mpambara pleaded not guilty to these additional counts on 29 April 2005.[5] On 30 May 2005, the Chamber denied a Defence motion challenging the amended Indictment.[6]

2. The trial commenced on 19 September 2005. The Prosecution case consisted of ten witnesses heard over eight trial days, and twenty-five exhibits. The Prosecution closed its case on 29 September 2005, subject to the cross examination of Witness AHY, which was heard on 14 and 15 December 2005.[7] The Chamber denied the Defence request for a judgment of acquittal on 21 October 2005.[8] The Defence case lasted from 9 January to 9 February 2006, during which the Chamber heard sixteen witnesses, including the Accused, and received forty-eight exhibits.

3. Measures for the protection of witnesses were ordered before the trial started on behalf of the Prosecution on 29 May 2002, and for the Defence on 4 May 2005.[9] The Chamber granted a Prosecution request to add three witnesses to its witness list on 19 September 2005.[10] A second request by the Prosecution, to drop five witnesses on condition that leave would be granted for the addition of one new witness, was denied by the Chamber orally on 22 September 2005, on the basis that the conditional nature of the motion was improper. The Prosecution orally renewed its motion as an unconditional request, and the Chamber subsequently granted leave to drop five witnesses, while adding Witness AHY, but granted the Defence additional time to conduct investigations into the new witness's testimony.[11]

4. Pursuant to a request by both parties, the Chamber granted a motion for a site visit on 10 February 2006. The parties and the Chamber visited Rukara Commune on 27 April 2005.[12] Final briefs were filed by both parties on 24 April 2006, and closing arguments were heard on 2 and 3 May 2006.

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[1] The transfer was authorized under the Order for Transfer and Detention Under Rule 40 *bis* (TC), 21 June 2001, signed by Judge Lloyd G. Williams under Rule *bis* (J). The Accused first appeared before the Tribunal on 29 June 2001, at which time he confirmed his identity and was informed of his rights. T. 29 June 2001 pp. 4-10.

[2] Decision Confirming the Indictment (TC), 23 July 2001. On that same date, the Chamber issued a Warrant of Arrest and Order for Detention.

[3] T. 8 August 2001 p. 25.

[4] Decision on the Prosecution's Request for Leave for Leave to File an Amended Indictment (TC), 4 March 2005; Amended Indictment, 7 March 2005.

[5] T. 29 April 2005 p. 3.

[6] Decision on the Defence Preliminary Motion Challenging the Amended Indictment (TC), 30 May 2005. The Defence argued that the Amended Indictment was vague because it failed to specify the basis for the Accused's alleged criminal liability under Art. 6 (1) and to identify the form of joint criminal enterprise that the Prosecution intended to pursue.

[7] T. 29 Sept. 2005 p. 28. A brief status conference was held on 30 September 2005 to discuss witness protection measures for Witness AHY for the period between his examination-in-chief and his cross-examination. Together, with the two days of cross-examination held in December, the Prosecution case totaled eleven trial days.

[8] Decision on the Defence's Motion for Judgment of Acquittal, 21 Oct. 2005.

[9] Decision (Prosecutor's Motion for Protective Measures for Prosecution Witnesses) (TC), 29 May 2002; Decision on Protection of Defence Witnesses, 4 May 2005.

[10] The Prosecutor's Motion for Leave to Vary His List of Witnesses Pursuant to Rules 54 and 73 *bis* (E) (TC), 15 Sept. 2005; T. 19 Sept. 2005 pp. 1-2 (ordering the removal of Prosecution Witnesses AOO, APF and AVJ from the Prosecution's witness list).

[11] The motion was granted orally on 23 September 2005, with written reasons issued on 27 September 2005. T. 23 September 2005 pp. 59-60; Decision on the Prosecution's Request to Add Witness AHY (TC), 27 September 2005.

[12] Decision on the Prosecution Motion for a Site Visit, 10 February 2006.

Le Procureur c. Jean MPAMBARA

Affaire N° ICTR-2001-65

Fiche technique

- Nom: MPAMBARA
- Prénom: Jean
- Date de naissance: 1954
- Sexe: masculin
- Nationalité: rwandaise
- Fonction occupée au moment des faits incriminés: bourgmestre de Rukara
- Chefs d'accusation: génocide ou, à titre subsidiaire, complicité dans le génocide et crime contre l'humanité (extermination)
- Date de confirmation de l'acte d'accusation: 23 juillet 2001
- Date de modification de l'acte d'accusation: 27 novembre 2004
- Date et lieu de l'arrestation: 21 juin 2001, à Kigoma, en Tanzanie
- Date du transfert: 23 juin 2001
- Date de la comparution initiale: 8 août 2001
- Date du début du procès: 19 septembre 2005
- Précision sur le plaidoyer: non coupable
- Date et contenu du prononcé de la peine: 12 septembre 2006, acquittement et libération

The Prosecutor v. Mikaeli (alias "Mika") MUHIMANA

Case N° ICTR-95-1B

Case History

• Name: MUHIMANA

• First Name: Mikaeli (*alias* "Mika")

• Date of Birth: 1950 (approximately)

• Sex: male

• Nationality: Rwandan

• Former Official Function: Counsellor of Gishyita Sector, Gishyita *Commune*

• Date of Indictment's Confirmation: 28 November 1995

• Date of Indictment's Severance: 14 April 2003 (Case N° ICTR-95-1B), (before: Ndimbati Aloys, Rutaganira Vincent, Ryandikayo and Sikubwabo Charles)

• Counts: conspiracy to commit genocide, 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: 8 November 1999, in Tanzania

• Date of Transfer: 8 November 1999

• Date of Initial Appearance: 24 November 1999

• Date Trial Began: 29 March 2004

• Date and content of the Sentence: 28 April 2005, sentenced to life imprisonment

• Appeal: 21 May 2007, dismissed

On 22 November 1995, a joint indictment has been filed against Bagilishema Ignace, Kayishema Clément, Sikubwabo Charles, Ndimbati Aloys, Rutaganira Vincent, Muhimana Mika, Ryandikayo and Ruzindana Obed (ICTR-95-1).

On 6 November 1996, the Trial Chamber II ordered, at the Prosecution request, the joinder of the accused Clément Kayishema and Obed Ruzindana and the setting of a separate trial (see the file *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case N°ICTR-95-1).

On 15 September 1999, the Trial Chamber I ordered orally, at the Prosecution request, the severance of the accused Ignace Bagilishema from the joint indictment (see the file *The Prosecutor v. Ignace Bagilishema*, Case N°ICTR-95-1A).

Mika Muhimana's indictment was, for his part, severed during 2003, by a decision of the Trial Chamber I, at the Prosecutor request (Case N°ICTR-95-1B).

In 2003, the ICTR-95-1 case number has been only assigned to the case The Prosecutor v. Muhimana Mika, Ndimbati Aloys, Rutaganira Vincent, Ryandikayo and Sikubwabo Charles.

Order Re-Assigning Judges to a Case Before the Appeals Chamber and Re-Appointing a Pre-Appeal Judge
1 February 2006 (ICTR-95-1B-A)

(Original : English)

Appeals Chamber

Judge : Fausto Pocar, Presiding Judge

Mikaeli Muhimana – Appeals Chamber – Judges – Composition – Pre-appeal judge

International Instruments Cited :

Document IT/242 of the International Criminal Tribunal for the former Yugoslavia ; Rules of Procedure and Evidence, Rules 108 and 108 bis ; Statute, Art. 11 (3), 13 (4), 14 (2) and 24

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 that Trial Chamber III of the International Tribunal pronounced its judgement against Mikaeli Muhimana on 28 April 2005 and issued a reasoned opinion in writing in English on 26 May 2005 ("Trial Judgement");

NOTING the "Order of the Presiding Assigning Judge Judges to an Appeal before the Appeals Chamber" issued on 31 May 2005, which assigned a bench of the Appeals Chamber to this case and designated myself as Pre-Appeal Judge;

NOTING the "*Acte d'appel*" filed by Counsel for Mikaeli Muhimana on 26 January 2006;

NOTING Articles 11 (3), 13 (4), and 24 of the Statute of the International Tribunal and Rule 108 of the Rules of Procedure and Evidence of the International Tribunal ("Rules");

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;

CONSIDERING that pursuant to Article 14 (2) of the Statute of the International Criminal Tribunal for the former Yugoslavia, I am the Presiding Judge on all appeals cases on which I sit;

CONSIDERING that pursuant to Rule 108 *bis* of the Rules, as Presiding Judge, I may designate a Pre-Appeal Judge responsible for pre-hearing proceeding in this case;

CONSIDERING the trial management and case distribution needs of the Appeals Chamber;

ORDER that, in the case of *The Prosecutor v. Mikaeli Muhimana*, Case N°ICTR-95-1B-A, the Appeals chamber shall be composed as follows:

Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen

Judge Mehmet Güney
Judge Liu Daqun
Judge Wolfgang Schomburg

AND DESIGNATE Judge Liu Daqun as Pre-Appeal Judge in the above named case.

Done in French and English, the English text being authoritative.

Done this 1st day of February 2006, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

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Order Concerning the Filing of the Notice of Appeal 22 February 2006 (ICTR-95-1B-A)

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge; Mohamed Shahabuddeen; Mehmet Güney; Liu Daqun; Wolfgang Schomburg

Mikaeli Muhimana – Filing of the notice of appeal – Filing out of time, Validity, Discretion of the Appeals Chamber, Good cause, Availability of the French translation of the Judgement – Public notice of appeal, Disclosure of information related to a protected witness – Notice of appeal, Confidential document – Obligation for the Appellant to respect the protective measures of witnesses – Filing of a new notice of appeal

International Instrument Cited :

Rules of Procedure and Evidence, Rules 75 (A), 107, 111, 116 (A) and 116 (B)

International Cases Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Jean de Dieu Kamuhanda, Decision on Jean de Dieu Kamuhanda's Motion for an Extension of Time, 19 April 2005 (ICTR-99-54A) ; Trial Chamber, The Prosecutor v. Mikaeli Muhimana, Judgement and Sentence, 28 April 2005 (ICTR-95-1B) ; Appeals Chamber, The Prosecutor v. Mikaeli Muhimana, Decision on Motion for Extension of Time for Filing of Notice of Appeal, 2 June 2005 (ICTR-95-1B)

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Pavle Strugar, Decision on Defence Request for Extension of Time, 9 May 2005 (IT-01-42)

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 ("Tribunal"),

NOTING the "Judgement and Sentence" rendered in English by Trial Chamber III on 28 April 2005 ("Trial Judgement");

NOTING the "Decision on Motion for Extension of Time for Filing of Notice of Appeal" issued on 2 June 2005 ("Decision on Extension of Time"), in which the Pre-Appeal Judge granted Mikaeli Muhimana ("Appellant"), an extension of "no more than thirty days from the date of the filing of the French translation of the Trial Judgement" to file his notice of appeal pursuant to Rule 116 (B) of the Rules of Procedure and Evidence of the Tribunal ("Rules");[1]

NOTING that the French translation of the Trial Judgement was filed on 19 December 2005;[2]

NOTING the "*Acte d'appel*" filed on 26 January 2006 ("Notice of Appeal") by Counsel for the Appellant;

FINDING that because the Decision on Extension of Time clearly states that the Appellant was to file his Notice of Appeal no more than 30 days from the filing of the French translation of the Trial Judgement, or by 18 January 2006, the Notice of Appeal was filed out of time by eight days;

EMPHASIZING that Counsel in a case before the Tribunal must, at all times, comply with the Rules and rulings of the Tribunal, including those concerning time limits;[3]

EMPHASIZING that the filing of a notice of appeal marks the beginning of the appeal proceedings in a case, and that since the time limits for the filing of an appellant's brief, respondent's brief, and the appellant's brief in reply are calculated from the date on which the notice of appeal is filed, any delays at such an early stage will affect subsequent filings;[4]

CONSIDERING that Rule 116 (A) of the Rules provides that the Appeals Chamber may grant a motion to extend a time limit upon a showing of good cause but that such a motion should be filed prior to expiry of the time limit at issue;[5]

CONSIDERING that the Appellant failed to file a second motion for an extension of time limit prior to or on 18 January 2006 with regard to filing his Notice of Appeal;

CONSIDERING however, that the Appeals Chamber may "recognise, as validly done any act done after the expiration of a time limit";[6]

NOTING that Counsel for the Appellant submits that the Notice of Appeal was filed 30 days from the date of his receipt of the French version of the Trial Judgement;

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[1] Decision on Extension of Time, p. 4. The French translation, *Décision relative à la requête aux fins du report du délai de dépôt de l'acte d'appel* was filed on 7 June 2005.
[2] Le Procureur c. Mikaeli Muhimana, Affaire n°ICTR-95-1B-T, Jugement et sentence, 19 December 2005.
[3] See Code of Professional Conduct for Defence Counsel, Art. 12 (1). See also *Prosecutor v. Pavle Strugar*, Case N°IT-01-42-A, Decision on Defence Request for Extension of Time, 9 May 2005, p. 2.
[4] Decision on Extension of Time, p. 3.
[5] *Prosecutor v. Jean de Dieu Kamuhanda,* Case N°ICTR-99-54A-A, Decision on Jean de Dieu Kamuhanda's Motion for an Extension of Time, 19 April 2005, pp. 2-3 and n. 3. In this case, the Pre-Appeal Judge exceptionally granted a motion for an extension of time to file a reply, which was filed 136 days after the filing of the Respondent's Brief, that is, 121 days after the expiration of the 15-day deadline for filing briefs in reply during which the appellant should have filed any motion for extension of time. The Pre-Appeal Judge reprimanded the appellant for failing to file his motion for an extension of time within the 15-day deadline for filing the reply.
[6] See Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005, para. 12. See also *id.*, para. 1.

CONSIDERING that the Registry has confirmed that the French translation of the Trial Judgement was only served upon Counsel for the Appellant on 26 December 2005, that is, 7 days after its filing;[7]

CONSIDERING that pursuant to Rule 116 (B) of the Rules, good cause exists for extension of a time limit "[w]here 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 […]";

FINDING that similarly, in this case, good cause exists to recognize the filing of the Appellant's Notice of Appeal as validly done because it was only as of the date that the French translation of the Trial Judgement was made available to Counsel for the Appellant that the Appellant was in a position to consider the Trial Judgement in order to formulate his grounds of appeal from that judgement;[8]

NOTING FURTHER that the Notice of Appeal was filed publicly;

NOTING, however, that the Notice of Appeal discloses information as to a protected witness not found in the Trial Judgement, which risks identifying that protected witness;[9]

NOTING that in the exercise of caution the Registry temporarily placed the Notice of Appeal under seal;[10]

PURSUANT TO Rule 75 (A) as read with Rule 107 of the Rules;

HEREBY DIRECTS, *proprio motu*, the Registry to designate the Notice of Appeal a confidential document;

ORDERS the Appellant to re-examine the contents of the Notice of Appeal with a view to identifying all passages that are in contravention of any of the protective measures ordered by the Trial Chamber;

ORDERS the Appellant to file a public and redacted version of the Notice of Appeal within sixty (60) days of the filing of this order;

REMINDS the Appellant that this obligation does not change his pre-existing obligation to file his Appellant's brief, which shall be filed within 75 days of filing of the Notice of Appeal under Rule 111 of the Rules, that is, no later than 11 April 2006;

FURTHER REMINDS the parties that the information contained in the confidential Notice of Appeal shall not be communicated to any third party.

Done in English and French, the English text being authoritative;

Dated this 22nd day of February 2006, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

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[7] The French translation of the Trial Judgment was delivered to Counsel for the Appellant by DHL International.
[8] The Appeals Chamber notes that because Counsel for the Appellant received the French translation of the Trial Judgement on 26 December 2005, his Notice of Appeal filed on 26 January 2006 was actually filed 31 days from receipt of that translation of the Trial Judgement. However, the Appeals Chamber does not find that this extra day affects its decision to recognize the filing of the Appellant's Notice of Appeal as validly done.
[9] The Appeals Chamber notes that the protective measures applicable to this witness have not been rescinded, varied or augmented in accordance with Rule 75 of the Rules.
[10] The Appeals Chamber notes that this was pursuant to a request by a Legal Officer from the Appeals Chamber dated 27 January 2006.

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Decision on Appellant's Request for Extension of Time to File Additional Evidence Motion
26 April 2006 (ICTR-95-1B-A)

(Original : English)

Appeals Chamber

Judge : Liu Daqun, Pre-Appeal Judge

Mikaeli Muhimana – Extension of time – Absence of good cause – Motion denied

International Instrument Cited :

Rules of Procedure and Evidence, Rule 115

International Cases Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Mikaeli Muhimana, Decision on Motion for Extension of Time for Filing of Notice of Appeal, 2 June 2005 (ICTR-95-1B) ; Appeals Chamber, The Prosecutor v. Mikaeli Muhimana, Order Re-Assigning Judges to a Case Before the Appeals Chamber and Re-Appointing a Pre-Appeal Judge, 1 February 2006 (ICTR-95-1B) ; Appeals Chamber, The Prosecutor v. Mikaeli Muhimana, Order Concerning the Filing of the Notice of Appeal, 22 February 2006 (ICTR-95-1B) ; Appeals Chamber, The Prosecutor v. Emmanuel Ndindabahizi, Decision on the Admission of Additional Evidence, 4 April 2006 (ICTR-2001-71)

I, LIU DAQUN, 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 ("Tribunal") and the Pre-Appeal Judge in this case,[1]

BEING SEIZED of the "*Requête de l'Appelant aux fins de prorogation de délai pour la présentation des moyens de preuve supplémentaires*" filed on 13 March 2006 ("Request"),[2] by counsel for Mikaeli Muhimana ("Defence"), in which the Defence requests an extension of forty-five days to file a motion to present additional evidence pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules");

NOTING the "Réponse du Procureur à la requête de l'Appelant aux fins de prorogation de délai pour la présentation des moyens de preuve supplémentaires" filed by the Office of the Prosecutor on 17 March 2006 ("Response"),[3] opposing the Request;

[1] Order Re-Assigning Judges to a Case Before the Appeals Chamber and Re-Appointing a Pre-Appeal Judge, 1 February 2006, p. 3.
[2] See also the English translation of the Request, Appellant's Motion for Extension of Time to Present Additional Evidence, filed on 21 March 2006.
[3] The English translation entitled Prosecutor's Response to Appellant's "Motion for Extension of Time to Present Additional Evidence" was filed on 28 March 2006.

NOTING that the reply was filed out of time, that good cause has not been shown for the late filing, and that in consequence the reply will not be considered;[4]

CONSIDERING that a party requesting the admission of additional evidence on appeal pursuant to Rule 115 shall do so by motion filed "not later than seventy-five days from the date of the judgement, unless good cause is shown for further delay";

CONSIDERING FURTHER that the good cause requirement in Rule 115 obliges the moving party to demonstrate that it was not able to comply with the prescribed time limit, 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;[5]

NOTING the Defence's submission that it "has difficulty" complying with the prescribed time-limit because "the new information […] obtained must be verified in Rwanda and elsewhere, and […] the only person who can verify the information was assigned to the Defence team only on 31 March 2006 […]. Moreover, at the time he was assigned to the Appellant's Defence team, he was on mission abroad on behalf of another Accused […].";[6]

NOTING the Prosecution's submission that the arguments put forward do not amount to a showing of good cause because:

(a) The Defence argument is vague and cannot justify the requested extension;[7]

(b) The investigator was not assigned to the Defence team on 31 March 2006, as submitted by the Defence, but on 31 January 2006, effective from 1 February 2006;[8]

(c) The Appeals Chamber need not take into account other professional commitments of the Defence team in setting deadlines;[9]

(d) The Defence's request is premature and that even if the extension of forty-five days were to be granted, the Defence would still have to show good cause for filing an application under Rule 115 out of time;[10]

NOTING that the French version of the Judgement was served on the Defence on 26 December 2005 and that, accordingly, the deadline for filing a motion pursuant to Rule 115 was 13 March 2006;[11]

CONSIDERING that the Defence has failed to demonstrate why it was not able to comply with the prescribed time limit and provides no indication as to when it became aware of the new information;

CONSIDERING further that the Defence has not provided sufficiently detailed submissions, in that it states that the new information obtained must be verified in Rwanda and elsewhere, but fails to explain what the new information is, why it needs verification and why it could not have been verified earlier, and further fails to expound upon its submission that there is only one person who can verify this information;

FINDING that the Defence submissions do not demonstrate good cause;

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[4] Réplique de l'Appelant à la réponse du Procureur à la requête aux fins de prorogation de délai pour la présentation des moyens de preuve, filed on 29 March 2006 ("Reply"). Paragraph 12 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal provides that a reply may be filed within four days of the filing of the response.
[5] *Ndindabahizi v. Prosecutor*, Case N°ICTR-01-71-A, Decision on the Admission of Additional Evidence, 4 April 2006, p. 3.
[6] Request, para. 6.
[7] Response, para. 6.
[8] Response, para. 8.
[9] Response, para. 9.
[10] Response, para. 10.
[11] The seventy-five days start running from the date on which the French translation of the Trial Judgement was filed, see Order Concerning the Filing of the Notice of Appeal, 22 February 2006; Decision on Motion for Extension of Time for Filing of the Notice of Appeal, 2 June 2005; see also Rule 7 ter of the Rules which provides that where a time limit expires on a Saturday, as in this case, the time limit shall automatically be extended to the subsequent working day.

FOR THE FOREGOING REASONS,

DISMISS the Request.

Done in English and French, the English text being authoritative.

Done this 26th day of April 2006, at The Hague, The Netherlands.

[Signed] : Liu Daqun

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Scheduling Order
13 June 2006 (ICTR-95-1B-A)

(Original : English)

Appeals Chamber

Judge : Liu Daqun, Pre-Appeal Judge

Mikaeli Muhimana – Scheduling order – Status Conference

International Instrument Cited :

Rules of Procedure and Evidence, Rules 65 bis, 65 bis (B), 107 and 108 bis (B)

International Case Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Mikaeli Muhimana, Order Re-Assigning Judges to a Case Before the Appeals Chamber and Re-Appointing a Pre-Appeal Judge, 1 February 2006 (ICTR-95-1B)

I, LIU DAQUN, 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") and the Pre-Appeal Judge in this case,[1]

NOTING that pursuant to Rule 108 *bis* (B) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), "[t]he 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";

NOTING the "Judgement and Sentence" rendered in this case by Trial Chamber III on 28 April 2005;

[1] Order Re-Assigning Judges to a Case Before the Appeals Chamber and Re-Appointing a Pre-Appeal Judge, 1 February 2006, p. 3.

NOTING the "*Acte d'appel*" filed by Mikaeli Muhimana ("Appellant") on 26 January 2006;[2] the "*Memoire d'appel*" filed by the Appellant on 12 April 2006; and the "*Memoire de l'intimé*" filed by the Prosecution on 22 May 2006;

NOTING Rule 65 *bis* and Rule 107 of the Rules which allow "the Appeals Chamber or an Appeals Chamber Judge" to convene a status conference, to organise exchanges between the parties in order to ensure expeditious appeal proceedings;

CONSIDERING that the Appellant is currently in detention at the United Nations Detention Facility in Arusha, Tanzania, pending the hearing of his appeal;

CONSIDERING that the physical presence of Defence Counsel is not required, and that by agreement with the parties, Defence Counsel's attendance will be by telephone conference;[3]

PURSUANT to sub-Rule 65 *bis* (B) of the Rules and after consulting the parties;

HEREBY ORDER that a Status Conference be held before me on 7 July 2006 at 1230 hrs in Arusha, Tanzania.

Done in English and French, the English version being authoritative.

Done this 13th day of June 2006, at The Hague, The Netherlands.

[Signed] : Liu Daqun

[2] Pursuant to the Order Concerning the Filing of the Notice of Appeal, filed on 22 February 2006, the Pre-Appeal Judge directed the Registry to place the *Acte d'appel* under seal; on 24 April 2006, the Appellant filed, *Acte d'appel* (*Public et Caviardé*).
[3] See Rule 65 *bis* (C).

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Decision on Appellant's Motion for Extension of Time to File a Brief in Reply and Postponement of a Status Conference 21 June 2006 (ICTR-95-1B-A)

(Original : English)

Appeals Chamber

Judge : Liu Daqun, Pre-Appeal Judge

Mikaeli Muhimana – Extension of time – Postponement of a Status Conference – Extension of time, Absence of good cause – Status Conference cancelled – Start of the time limit for the filing of the brief in reply, Date of service to the Defence of the French translation of the Respondent's Brief – Motion granted in part

International Instrument Cited :

Rules of Procedure and Evidence, Rules 116 and 116 (A)

International Cases Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Emmanuel Ndindabahizi, Decision on « Requête Urgente aux Fins de Prorogation de Délai du mémoire en Appel », 5 April 2005 (ICTR-2001-71) ; Appeals Chamber, The Prosecutor v. Mikaeli Muhimana, Decision on Motion for Extension of Time for Filing of Notice of Appeal, 2 June 2005 (ICTR-95-1B) ; Appeals Chamber, The Prosecutor v.Emmanuel Ndindabahizi, Scheduling Order, 20 July 2005 (ICTR-01-71) ; 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. Mikaeli Muhimana, Order Re-Assigning Judges to a Case Before the Appeals Chamber and Re-Appointing a Pre-Appeal Judge, 1 February 2006 (ICTR-95-1B) ; Appeals Chamber, The Prosecutor v. Mikaeli Muhimana, Order Concerning the Filing of the Notice of Appeal, 22 February 2006 (ICTR-95-1B)

I, LIU DAQUN, 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 ("Tribunal") and the Pre-Appeal Judge in this case,[1]

BEING SEIZED of the "*Requête de l'appelant aux fins de réaménagement du calendrier judiciaire*" filed on 14 June 2006 ("Request"), by Counsel for Mikaeli Muhimana ("Defence" and "Appellant" respectively), in which the Defence requests an extension of time to file its brief in reply and further requests that the scheduled date of a Status Conference be postponed;

NOTING the "*Réponse du procureur à la '**Requête de l'appelant aux fins de réaménagement du calendrier judiciaire*'" filed by the Prosecution in French on 16 June 2006, in which the Prosecution opposes the Request;

[1] Order Re-Assigning Judges to a Case Before the Appeals Chamber and Re-Appointing a Pre-Appeal Judge, 1 February 2006, p. 3.

NOTING that the Defence has not filed a reply;

NOTING the "Judgement and Sentence" rendered by Trial Chamber III on 28 April 2005 ("Trial Judgement");

NOTING the "*Acte d'appel*" ("Notice of Appeal")[2] and the confidential "*Memoire d'appel*" ("Appeal Brief") filed by the Appellant on 26 January 2006 and 12 April 2006 respectively;

NOTING the "*Memoire de l'intimé*" ("Respondent's Brief") filed partly in English and French by the Prosecution on 22 May 2006;

NOTING that the Defence has not yet received the French translation of the Respondent's Brief and requests that if it becomes available between 14 June 2006 and 10 July 2006, the time limit for the filing of the brief in reply should start running on 10 July 2006;[3]

NOTING the Defence's submission that both Lead Counsel and Co-Counsel would be temporarily unavailable to reply to the Respondent's Brief because they have "been invited to attend the 89th Annual International Convention of the International Association of Lions Clubs in Boston from 30 June to 4 July 2006";[4]

CONSIDERING that pursuant to Rule 116 (A) of the Rules of Procedure and Evidence ("Rules") a motion to extend a time limit may be granted upon a showing of good cause;

CONSIDERING that the Defence fails to explain why the attendance of Counsel at the Annual Lions Club Convention would constitute good cause within the meaning of Rule 116 (A) of the Rules for extending the deadline for filing the brief in reply;

CONSIDERING ALSO that Counsel, when accepting an assignment as 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;[5]

CONSIDERING that the unexpected and probable unavailability of Counsel due to other professional duties does not amount to good cause within the meaning of Rule 116 of the Rules;[6]

NOTING the Scheduling Order for this case filed on 13 June 2006 scheduling a Status Conference to be held on 7 July 2006 in Arusha, Tanzania;

NOTING that the Defence additionally requests the postponement of the Status Conference because on the date scheduled "Counsel could be in mid-air on the return journey to Kinshasa from the Annual Lions Club Convention";[7]

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[2] The Notice of Appeal was placed under seal pursuant to the Order Concerning the Filing of the Notice of Appeal, filed on 22 February 2006; on 24 April 2006, the Appellant filed, *Acte d'appel* (*Public et Caviardé*).
[3] Request, paras. 14, 19. The Defence appears to imply that an extension of time would also be required pending the receipt of the Kinyarwanda translation of the response brief for the benefit of the Appellant. In light of the Pre-Appeal Judge's previous holding that an extension of time on such basis would not be appropriate since Counsel for the Appellant may discuss possible submissions with him as soon as a French translation is available, this point will not be considered further. See Decision on Motion for Extension of Time for Filing of Notice of Appeal, 2 June 2005, p. 3.
[4] Request, as per the Registry Translation (uncertified) ("Translation of the Request"), para. 15.
[5] See Emmanuel Ndindabahizi v. The Prosecutor, ICTR-01-71-A, Decision on "Requête Urgente aux Fins de Prorogation de Délai pour le Dépôt du mémoire en Appel ", 5 April 2005, p. 3; Ferdinand Nahimana et al. v. The Prosecutor, Case N°ICTR-99-52-A, 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 ("Barayagwiza Decision"), p. 5.
[6] *Barayagwiza* Decision, p. 5.
[7] Translation of the Request, para. 20.

NOTING that the Defence further submits that "so long as Counsel for the Appellant has not received the French translation of the Respondent's Brief, and the Appellant has not received the Kinyarwanda translation, the Status Conference would be pointless";[8]

CONSIDERING that Status Conferences allow a person in custody pending appeal the opportunity to raise issues in relation thereto, including the mental and physical condition of that person;[9]

CONSIDERING HOWEVER that the Appellant does not object to the postponement of the scheduled Status Conference;[10]

FOR THE FOREGOING REASONS,

GRANT the Request in part,

CANCEL the scheduled Status Conference;

DISMISS the Request for extension of time to file the brief in reply; and

REMIND the Defence that the brief in reply, if any, shall be filed within 15 days of service to the Defence of the French translation of the Respondent's Brief.

Done in English and French, the English text being authoritative.

Done this 21st day of June 2006, at The Hague, The Netherlands.

[Signed] : Liu Daqun

[8] Translation of the Request, para. 19.
[9] *Emmanuel Ndindabahizi v. The Prosecutor*, Case N°ICTR-01-71-A, Scheduling Order, 20 July 2005, p. 2.
[10] See Request, Annex III entitled "Solemn Declaration by the Applicant in Support of his Motion for Readjustment of the Judicial Calendar".

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Decision on Prosecutor's Motion Requesting the Appellant to File a Non-Confidential Appeal Brief
14 August 2006 (ICTR-95-B1-A)

(Original : English)

Appeals Chamber

Judge : Liu Daqun, Pre-Appeal Judge

Mikaeli Muhimana – Filing of a non-confidential Appeal Brief – Motion granted

International Instruments Cited :

Rules of Procedure and Evidence, Rules 75 and 108 ; Statute, Art. 21

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);

NOTING the Judgement and Sentence of 28 April 2005 ("Judgement") rendered by Trial Chamber III finding Mikaeli MUHIMANA ("Appellant") guilty of genocide and crimes against humanity of rape and murder, and sentencing him to a single sentence of life imprisonment;

NOTING the Appellant's Appeal Brief which was filed confidentially with the Registry on 12 April 2006;

BEING SEIZED of the "Prosecutor's Motion Seeking an Appeals Chamber Order for the Appellant to File a Redacted and Non-Confidential Appeal Brief" filed on 27 April 2006 ("Motion");

NOTING that the Appellant has not filed a Response to the Motion;

FINDING that the confidential filing of the Appellant's Appeal Brief does not serve the interests of justice;

CONSIDERING the terms of Article 21 of the Statute of the Tribunal, and Rules 75 and 108 of the Rules of Procedure and Evidence of the Tribunal;

ORDERS the Appellant to file a public and redacted version of the Appeal Brief within 15 (fifteen) days of the filing of this Decision;

Done in English and French, the English version being authoritative.

Done this 14th day of August 2006, at The Hague, The Netherlands.

[Signed] : Liu Daqun

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Decision on the Appellant's Motion to Note the Failure to File the Respondent's Brief within the Prescribed Time Limit 11 September 2006 (ICTR-95-1B-A)

(Original : English)

Appeals Chamber

Judge : Liu Daqun, Pre-Appeal Judge

Mikaeli Muhimana – Failure to file the Respondent's Brief within the time limit – Availability of the French translation of the Respondent's brief – Motion granted in part

International Cases Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Mikaeli Muhimana, Order Re-Assigning Judges to a Case Before the Appeals Chamber and Re-Appointing a Pre-Appeal Judge, 1 February 2006 (ICTR-95-1B) ; Appeals Chamber, The Prosecutor v. Mikaeli Muhimana, Order Concerning the Filing of the Notice of Appeal, 22 February 2006 (ICTR-95-1B) ; Appeals Chamber, The Prosecutor v. Mikaeli Muhimana, Decision on Prosecutor's Motion Requesting the Appellant to File a Non Confidential Appeal Brief, 14 August 2006 (ICTR-95-B1)

I, LIU DAQUN, 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 "International Tribunal", respectively) and the Pre-Appeal Judge in this case,[1]

NOTING the "Judgement and Sentence" rendered by Trial Chamber III on 28 April 2005 ("Trial Judgement");

NOTING the "*Acte d'appel*" ("Notice of Appeal")[2] and the confidential "*Mémoire d'appel*" ("Appeal Brief")[3] filed by the Appellant on 26 January 2006 and 12 April 2006 respectively;

BEING SEIZED of the "*Requête de l'Appelant aux fins de constater le défaut de dépôt dans les délais du mémoire de l'intimé*" filed on 5 June 2006 ("Motion"),[4] by Counsel for Mikaeli Muhimana ("Defence" and "Appellant" respectively), in which the Defence requests the Appeals Chamber to (i)

[1] Order Re-Assigning Judges to a Case before the Appeals Chamber and Re-Appointing a Pre-Appeal Judge, 1 February 2006, p. 3.
[2] The Notice of Appeal was placed under seal pursuant to the "Order Concerning the Filing of the Notice of Appeal", filed on 22 February 2006. The Appellant filed a public and redacted version of the Notice of Appeal on 24 April 2006.
[3] The Appellant filed a public and redacted version of the Appeal Brief on 30 August 2006, pursuant to the "Decision on Prosecutor's Motion requesting the Appellant to file a non-confidential appeal brief", filed on 14 August 2006.
[4] See also the English translation of the Motion, "Appellant's Motion to Note the Failure to File the Respondent's Brief within Prescribed Time Limit", filed on 17 August 2006.

consider that the time limit for the filing of the brief in reply starts to run only from the date when the Defence receives the French translation of the Respondent's Brief; (ii) direct the Registrar to provide the French translation of the Respondent's Brief without undue delay and a Kinyarwanda translation as soon as practicable; and (iii) to direct the Registrar to inform the Appeals Chamber when these translations have been served on the Appellant and Defence;

NOTING that the "Prosecutor's Response to '*Requête de l'Appelant aux fins de constater le défaut de dépôt dans les délais du mémoire de l'intimé*'" filed on 7 June 2006 ("Response") does not oppose the Motion and that the Prosecutor additionally requests that the Appeals Chamber order the Registrar to also inform the Prosecutor when the French translation has been served on the Appellant and Defence;

NOTING that the Defence did not file a reply;

NOTING that the Kinyarwanda translation of the Respondent's brief was filed on 31 August 2006;

NOTING that the Registry has informed the Pre-Appeal Judge that the French translation of the Respondent's brief will be provided by 15 October 2006;

CONSIDERING that the "Decision on Appellant's Motion for extension of time to file a brief in reply and postponement of a status conference", filed on 21 June 2006 explicitly states that the time limit for the filing of the brief in reply will start to run from the date of service to the Defence of the French translation of the Respondent's Brief;[5]

FOR THE FOREGOING REASONS

GRANT the Motion in part;

DIRECT the Registry to inform the Appeals Chamber and the Prosecution when the French translation of the Respondent's Brief has been served on the Defence;

DECLARE the Motion moot in all other respects.

Done in English and French, the English text being authoritative.

Done this 11th day of September 2006, at The Hague, The Netherlands.

[Signed] : Liu Daqun

[5] See Decision of 21 June 2006, p. 4: "REMIND the Defence that the brief in reply, if any, shall be filed within 15 days of service to the Defence of the French translation of the Respondent's Brief."

Decision on Appellant's Motion to Present Additional Evidence 25 September 2006 (ICTR-95-1B-A)

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge ; Mohamed Shahabuddeen ; Mehmet Güney ; Liu Daqun ; Wolfgang Schomburg

Mikaeli Muhimana – Presentation of additional evidence – Delay in filing the present motion – Previous motion, Extension of time – Availability of additional evidence prior to the rendering of the Judgement, Absence of new information – Absence of good cause – Motion denied

International Instruments Cited :

Rules of Procedure and Evidence, Rules 115 and 115 (A) ; Statute, Art. 2 and 3

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Mikaeli Muhimana, Judgement and Sentence, 28 April 2005 (ICTR-95-1B) ; Appeals Chamber, The Prosecutor v. Mikaeli Muhimana, Order Concerning the Filing of the Notice of Appeal, 22 February 2006 (ICTR-95-1B) ; Appeals Chamber, The Prosecutor v. Mikaeli Muhimana, Decision on Appellant's Request for Extension of Time to File Additional Evidence Motion, 26 April 2006 (ICTR-95-1B)

5. 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 ("Tribunal"), is seized of the "*Requête de l'appelant aux fins de la présentation des moyens de preuve supplémentaires*" filed on 25 April 2006[1] by Mikaeli Muhimana ("Rule 115 Motion" and "Appellant", respectively).

6. On 28 April 2005, Trial Chamber III convicted the Appellant of genocide, and rape and murder as crimes against humanity pursuant to Articles 2 and 3 of the Statute of the Tribunal ("Statute") respectively. He was sentenced to life imprisonment on each of the three counts, with the sentences to run concurrently.[2] The Appellant subsequently filed an appeal against the Trial Judgement,[3] and it is for this purpose that the Appellant seeks the admission of additional evidence.

7. As a preliminary matter, the Appeals Chamber notes that the French version of the Trial Judgement was served on the Appellant on 26 December 2005 and that, accordingly, the deadline for filing a motion pursuant to Rule 115 of the Rules of Procedure and Evidence ("Rules") was 13 March 2006.[4] However, on that day, the Appellant requested an extension of time to file a motion pursuant to

[1] The certified English translation, "Appellant's Motion to Present Additional Evidence" was filed on 13 July 2006. Prosecutor's Response to "*Requête de l'appelant aux fins de la présentation des moyens de preuve supplémentaires*", 5 May 2006 ("Response"), para. 3. The Appellant did not file a reply.

[2] *Prosecutor v. Mikaeli Muhimana*, Case N°ICTR-95-1B, Judgement and Sentence, 28 April 2005 ("Trial Judgement"), pp. 107 and 113.

[3] See *Acte d'appel*, filed on 26 January 2006.

[4] Rule 115 (A) provides that a motion to present additional evidence shall be filed no later than seventy-five days from the date of judgement. In this case, the seventy-five days start running from the date on which the French translation of the Trial Judgement was served on the Appellant, see Order Concerning the Filing of the Notice of Appeal, 22 February 2006, p. 3.

Rule 115,[5] submitting that he had difficulties complying with the prescribed time-limit because the new information had to be verified in Rwanda and elsewhere. He claimed that the only person who could verify the information had only recently been assigned to the Defence team and was at that time on mission abroad on behalf of another accused.[6] While making these claims in the Request, the Appellant failed to indicate when he became aware of the new information so as to establish that it had not been possible for him to comply with the time-limits for the reasons he gave in the Request.[7] The Appellant further failed to explain what the new information was and why it needed verification, and further failed to expound upon the submission that there was only one person who could verify this information.[8] As a result, the Pre-Appeal Judge found that the Appellant's submissions did not demonstrate good cause warranting an extension of time to file a Rule 115 motion and dismissed the Request in a decision dated 26 April 2006.[9]

8. However, one day prior to the Pre-Appeal Judge's decision dismissing the Request,[10] the Appellant filed his Rule 115 Motion. In that Rule 115 Motion, the Appellant proffers three items of purported additional evidence consisting of two experts' reports and a letter. He also makes submissions relating to a cassette, which is not tendered with the Rule 115 Motion.[11] In the Rule 115 Motion, the Appellant fails to make any submissions relating to whether good cause has been shown for the delay pursuant to Rule 115 (A), nor does he indicate whether or how the submissions made in the Request concerning the good cause requirement relate to the present motion. The Appeals Chamber further notes that it is apparent from the Rule 115 Motion that the materials sought to be admitted as additional evidence were available prior to the rendering of the Trial Judgement and consequently are not the "new information" that the Appellant was referring to in the Request.[12] For these reasons, the Appeals Chamber finds that good cause has not been shown for the delay in filing the present Rule 115 Motion.[13]

For the foregoing reasons, the Appeals Chamber DISMISSES the Rule 115 Motion.

Done in English and French, the English text being authoritative.

Dated this 25th day of September 2006, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

See also Rule 7 *ter* of the Rules which provides that where a time limit expires on a Saturday, as in this case, the time limit shall automatically be extended to the subsequent working day.

[5] Requête de l'Appelant aux fins de prorogation de délai pour la présentation des moyens de preuve supplémentaires, 13 March 2006 (" Request ").

[6] Request, para. 6.

[7] Decision on Appellant's Request for Extension of Time to File Additional Evidence Motion ("Decision on Extension of Time"), 26 April 2006, p. 3.

[8] Ibid.

[9] Decision on Extension of Time, p. 4.

[10] The Appeals Chamber notes that the Rule 115 Motion was subsequently re-filed on 28 April 2006 and that the new version included annexes referred to in paras 17, 21 and 23 of the Rule 115 Motion.

[11] With the exception of the cassette, these items are attached to the Rule 115 Motion. The First and Second Expert's Reports relate to issues which, by the Appellant's own admission, were discussed during trial, and as such could have been proffered as evidence at trial, (see Rule 115 Motion, paras 14, 18-20). The letter is dated 13 October 2004 and was thus also clearly available before the rendering of the Trial Judgement.

[12] The Appeals Chamber has previously taken into account the availability of documents in its assessment of the good cause requirement, see *Prosecutor v. Stanislav Galić,* Case N°IT-98-29-A, Decision on Defence Second Motion for Additional Evidence Pursuant to Rule 115, 21 March 2005, para. 5.

[13] A Rule 115 motion may be dismissed on this basis alone, see *Prosecutor v. Emmanuel Ndindabahizi*, Case N°ICTR-95-1B-A, Decision on the Admission of Additional Evidence, 4 April 2006, p. 3.

***

Scheduling Order
14 November 2006 (ICTR-95-1B-A)

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge; Mohamed Shahabuddeen; Mehmet Güney; Liu Daqun; Wolfgang Schomburg

Mikaeli Muhimana – Scheduling order – Timetable of the hearing

International Instrument Cited :

Rules of Procedure and Evidence, Rule 113

International Cases Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Mikaeli Muhimana, Decision on the Appellant's Motion to Note the Failure to File the Respondent's Brief within the Prescribed Time Limit, 11 September 2006 (ICTR-95-B1)

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 "Judgement and Sentence" rendered in this case by Trial Chamber III on 28 April 2005;

NOTING the "*Acte d'appel*" ("Notice of Appeal")[2294] and the "*Mémoire d'appel*" ("Appeal Brief") filed by the Appellant on 26 January 2006 and 12 April 2006 respectively; and the "*Mémoire de l'intimé*" ("Respondent's Brief") filed by the Prosecution on 22 May 2006;

NOTING that the Appellant has not filed a brief in reply in accordance with Rule 113 of the Rules of Procedure and Evidence and that time for filing this brief has lapsed;[2295]

HEREBY ORDERS that the appeal hearing in this case shall take place on Monday, 15 January 2007, in Arusha, Tanzania;

[2294] On 24 April 2006, the Appellant filed, *Acte d'appel* (*Public et Caviardé*).

[2295] On 21 June 2006 the Pre-Appeal Judge ordered that the Appellant's brief in reply, if any, shall be filed within fifteen days from the date of service of the French translation of the Respondent's Brief on the Defence, and directed the Registry to inform the Appeals Chamber and the Prosecution when the French translation of the Respondent's Brief has been served on the Defence, See "Decision on the Appellant's Motion to Note the Failure to File the Respondent's Brief within the Prescribed Time Limit" 11 September 2006, p. 3. The Registry advised the Appeals Chamber that the Respondent's Brief was served on the Appellant on 16 October 2006, See "Registrar's Submission Under Rule 33 (b) of the Rules on Decision on the Appellant's Motion to Note the Failure to File the Respondent's Brief within the Prescribed Time Limit" 18 October 2006, para. 2. Accordingly, the time for filing the brief in reply expired on 31 October 2006.

INFORMS the parties that the timetable of the hearing shall be as follows, subject to adjustments were appropriate:

9:00 a.m. – 9:15 a.m.	Introductory Statement by the Presiding Judge (15 minutes)
9:15 a.m. – 11:15 a.m.	Submissions of the Appellant (2 hours)
11:15 a.m. – 11:45 a.m.	*Pause (30 minutes)*
11:45 a.m. – 12:45 p.m.	Response of the Prosecutor (1 hour)
12:45 p.m. – 3:00 p.m.	Pause (2 hours and 15 minutes)
3:00 p.m. – 4:00 p.m.	Continued Response of the Prosecutor (1 hour)
4: 00 p.m. – 4:30 p.m.	*Pause (30 minutes)*
4:30 p.m. – 5:00 p.m.	Reply by the Appellant (30 minutes)
5: 00 p.m. – 5:15 p.m.	Brief Personal Address by Mr. Mikaeli Muhimana (optional)

Done in English and French, the English text being authoritative.

Dated this 14th day of November 2006, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

Le Procureur c. Mikaeli (alias « Mika ») MUHIMANA

Affaire N° ICTR-95-1B

Fiche technique

• Nom: MUHIMANA

• Prénom: Mikaeli (*alias* « Mika »)

• Date de naissance: 1950 (date approximative)

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: conseiller communal du secteur de Gishyita, commune de Gishyita

• Date de confirmation de l'acte d'accusation: 28 novembre 1995

• Date de la disjonction d'instance: 14 avril 2003 (Aff. N°ICTR-95-1B), (précédemment : Ndimbati Aloys, Rutaganira Vincent, Ryandikayo et Sikubwabo Charles)

• Chefs d'accusation: entente en vue de commettre le génocide, génocide, crimes contre l'humanité, violation de l'article 3 commun aux quatre Conventions de Genève de 1949 et violation du protocole additionnel II de 1977

• Date et lieu de l'arrestation: 8 novembre 1999, en Tanzanie

• Date du transfert: 8 novembre 1999

• Date de la comparution initiale: 24 novembre 1999

• Date du début du procès: 29 mars 2004

• Date et contenu du prononcé de la peine: 28 avril 2005, condamné à l'emprisonnement à vie

• Appel: 21 mai 2007, rejeté

Le 22 novembre 1995, un acte d'accusation joint a été dressé contre Bagilishema Ignace, Kayishema Clément, Sikubwabo Charles, Ndimbati Aloys, Rutaganira Vincent, Muhimana Mika, Ryandikayo et Ruzindana Obed (ICTR-95-1).

Par décision du 6 novembre 1996, la Chambre de première instance II a ordonné, à la demande du Procureur, la jonction d'instances et un procès séparé pour Clément Kayishema et Obed Ruzindana (voir le dossier *Le Procureur c. Clément Kayishema et Obed Ruzindana*, Aff. N°ICTR-95-1).

Par décision orale du 15 septembre 1999, la Chambre de première instance I a ordonné, à la demande du Procureur, la disjonction d'Ignace Bagilishema de l'acte d'accusation joint (voir le dossier *Le Procureur c. Ignace Bagilishema*, Aff. N°ICTR-95-1A).

Mika Muhimana a, pour sa part, été disjoint au cours de l'année 2003, par une décision de la Chambre de première instance I, à la demande du Procureur (Aff. N°ICTR-95-1B).

En 2003, le numéro d'affaire ICRT-95-1 est attribué au seul dossier Le Procureur c. Aloys Ndimbati, Vincent Rutaganira, Ryandikayo et Charles Sikubwabo.

The Prosecutor v. Bernard MUNYAGISHARI

Case N° ICTR-2005-84

Case History

• Name: MUNYAGISHARI

• First Name: Bernard

• Date of Birth: 1959

• Sex: male

• Nationality: Rwandan

• Former Official Function: Secretary General of the MRND political party for Gisenyi city and President of the *Interahamwe* for Gisenyi *préfecture*

• Date of Indictment's Confirmation: 8 September 2005

• Counts: Conspiracy to commit genocide, genocide, complicity in genocide, crimes against humanity (murder and rape)

• Date and Place of Arrest: Accused at large

Decision on Prosecution Request to Unseal Documents 6 June 2006 (ICTR-2005-84-I)

(Original : not specified)

Judge : Sergei Alekseevich Egorov

Bernard Munyagishari – Unsealing of documents – Absence of a current good cause – Motion granted

International Instrument Cited :

Rules of Procedure and Evidence, Rules 28 and 47 (D)

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Joseph Serugendo, Order to Unseal Indictment (Judge Khan), 28 September 2005 (ICTR-2005-84)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Judge Sergei Alekseevich Egorov, as designated by the President of the Tribunal pursuant to Rule 28 of the Tribunal's Rules of Procedure and Evidence ("the Rules");

BEING SEIZED OF the "*Requête du Procureur Aux Fins de Levée des Scelles*", etc., filed on 30 May 2006;

HEREBY DECIDES the motion.

1. On 8 September 2005, in my capacity as the designated "reviewing judge" under Rule 47 (D) of the Rules, I confirmed the Indictment of the Accused and issued a warrant of arrest and order for transfer and detention. At the Prosecution's request, these decisions and orders were placed under seal. The Prosecution now requests the unsealing of these documents which, in substance, constitutes a modification of the previous decisions. As the judge who issued these decisions, I retain an inherent jurisdiction to modify their terms and am properly seised of the present motion.[1]

2. Proceedings of this Tribunal should normally be held in public, unless good cause is shown why they must be confidential.[2] According to the Prosecution, the reasons which justified non-disclosure no longer exist. There is no reason to doubt this submission.

FOR THE ABOVE REASONS, I

GRANT the motion;

AUTHORIZE that the "Decision on Confirmation of an Indictment Against Bernard Munyagishari", and the "Warrant of Arrest and Order for Transfer and Detention of Bernard Munyagishari", both dated 8 September 2005, be reclassified as public documents.

Arusha, 6 June 2006.

[Signed] : Sergei Alekseevich Egorov

[1] Cf. *Serugendo*, Order to Unseal Indictment (Judge Khan), 28 September 2005.
[2] Article 19 (4), Statute.

Le Procureur c. Bernard MUNYAGISHARI

Aff. N° ICTR-2005-84

Fiche historique

• Nom: MUNYAGISHARI

• Prénom: Bernard

• Date de naissance: 1959

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: Secrétaire général du MRND dans la ville de Gisenyi et président des *Interahamwe* dans la préfecture de Gisenyi

• Date de confirmation de l'acte d'accusation: 8 septembre 2005

• Chefs d'accusation : entente en vue de commettre le génocide, génocide, complicité dans le génocide, crimes contre l'humanité (assassinat et viol)

• Date et lieu d'arrestation: accusé en fuite

The Prosecutor v. Tharcisse Muvunyi

1.1.
1.2.
1.3.
Case N° ICTR-2000-55A

Case History

• Name: MUVUNYI

• First Name: Tharcisse

• Date of Birth: 19 August 1953

• Sex: male

• Nationality: Rwandan

• Former Official Function: Commander of the *Ecole des Sous-officiers* (ESO)

• Date of Indictment's Confirmation: 2 February 2000

• Date of the Indictment's Severance: 11 December 2003

• Counts: genocide, complicity in the genocide, conspiracy to commit genocide, crimes against humanity

• Date and Place of Arrest: 5 February 2000, in England

• Date of Transfer: 30 October 2000

• Date of Initial Appearance: 8 November 2000

• Pleading: not guilty

• Date Trial Began: 28 February 2005

• Date and content of the Sentence: 12 September 2006, sentenced to 25 years imprisonment

• Appeal: 29 August 2008, conviction and sentence quashed by the Appeals Chamber

• Case to be retried on one count

2. Decision on Muvunyi's Supplemental Motion to Have Defence Witness MO72 Testify by Closed-Video Link Pursuant to Rules 54 and 71 (D) of the Rules of Procedure and Evidence
3. 21 February 2006 (ICTR-2000-55A-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Silva, Presiding Judge; Flavia Lattanzi; Florence Rita Arrey

Tharcisse Muvunyi – Testimony of a witness by closed-video link – Interests of justice, Vital testimony to the Defence, Unwillingness of the witness to travel to Arusha, Recent birth and tender age of her baby – Opportunity for the Prosecution during cross-examination to confront the witness – Disclosure of records pertaining to the witness to members of the Prosecution team – Motion granted in part

International Instrument Cited :

Rules of Procedure and Evidence, Rules 54, 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. 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. 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. Théoneste Bagosora et al., Decision on Testimony by Video-Conference, 20 December 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Tharcisse Muvunyi, Decision on Prosecutor's Motion to Have Prosecution Witnesses QCM and NN Testify by Closed Video-Link Pursuant to Rules 54 and 71 (D) of the Rules of Procedure and Evidence, 23 May 2005 (ICTR-2000-55A) ; Trial Chamber, The Prosecutor v. Tharcisse Muvunyi, Decision on Decision on Prosecutor's extremely urgent Motion Pursuant to TC II Directive of 23 May 2005 for Preliminary measures to Facilitate the use of Closed Video-link Facilities, 20 June 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) ; Trial Chamber, The Prosecutor v. Tharcisse Muvunyi, Decision on Tharcisse Muvunyi's Motion for Protection of Defence Witnesses, 20 October 2005 (ICTR-2000-55A)

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

SITTING as Trial Chamber II composed of Judge Asoka de Silva, Presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey (the "Chamber");

BEING SEIZED of the "Accused Tharcisse Muvunyi's *Addendum* or Supplemental Motion to Have Defence Witness M072 Testify by Closed-Video Link Pursuant to Rules 54 and 71 (D) of the Rules of Procedure and Evidence" filed on 17 February 2006 (the "Supplemental Motion");

NOTING that the Prosecution has not filed a response;[3]

RECALLING its "Decision on Muvunyi's Amended Motion to Have Defence Witnesses M005, M015, M036, M046 and M073 Testify by Closed-Video Link Pursuant to Rules 54 and 71 (D) of the Rules of Procedure and Evidence" rendered on 7 February 2006 (the "Decision of 7 February 2006");

NOW DECIDES the Motion pursuant to Rule 73 (A) of the Rules on the basis of written submissions filed by the Defence.

3.1.1. Submissions of the Defence

1. The Defence seeks to have Witness M072 added to the list of Defence witnesses authorised by the Chamber to testify via closed-video link in its Decision of 7 February 2006.

2, The Defence requests that the proceedings be closed to the public when the testimony could reveal the witness's identity and when any protective measures are being discussed. The Defence also requests that identifying records of the witness should not be disclosed to the public and that members of the Prosecution team should be prohibited from disclosing any records pertaining to this witness to any individual outside the Prosecution team in this case, including other Prosecutors at this Tribunal. The Defence asserts that it adopts the submissions made by the Prosecution in its motion to have Witnesses QCM and NN testify via closed-video link[4] as well as the ruling rendered by the Chamber in its Decision of 7 February 2006.

3. The Defence submits that Witness M072 resides in Rwanda; that she has been informed of all the security measures and services offered by the Tribunal's Witnesses and Victims Support Section (VSS); that the witness "recently had a baby and refuses to travel abroad with her newborn baby before the baby is six months old"; that the witness "will agree to testify from Kigali, Rwanda" by video link; and that the witness's testimony is "vital" to the defence of the Accused.

4. The Defence asserts that while protective measures are currently in place at the Tribunal, these measures do not provide adequate protection for the above witness and that recent events in Belgium show that the witness's fears are well-founded. The Defence cites a press release dated 23 December 2005 posted on the Tribunal's web site, confirming the death in Belgium of indictee and potential Prosecution witness Juvénal Uwilingiyimana. The Defence attaches a sworn *affidavit* from a Defence investigator confirming that Witness M072 has a newborn baby and is unwilling to travel outside of Rwanda while the baby is still less than six months old, but is willing to testify in Muvunyi's defence via video link from Kigali,

HAVING DELIBERATED

5. The Chamber recalls Rule 54 of the Rules, pursuant to which it is empowered to issue such orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial; Rule 90 (A) establishing the principle that witnesses should be heard directly unless directed otherwise by the Chamber; and Rule 71 (D) providing for a witness's deposition to be given by means of a video-conference.

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[3] In an e-mail communication dated 20 February 2006 in response to a Directive from the Chamber, the Prosecution indicated that it would not be filing a response to the Supplemental Motion.

[4] *The Prosecutor v. Tharcisse Muvunyi*, Case N°ICTR-2000-55A-T, "Prosecution Motion to have Witnesses QCM and NN Testify by Closed-Video Link", 14 April 2005.

6. The Chamber is mindful of the jurisprudence of the Tribunal establishing that a witness's testimony may be heard via video-conference in lieu of a physical appearance if it is in the interests of justice.[5] In determining what constitutes the interests of justice for the purposes of a motion for testimony by video-conference, the following factors are taken into consideration: (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.[6]

7. The Chamber also recalls its Decisions of 23 May 2005 and 20 June 2005 dealing with the Prosecution's request to introduce the testimonies of Witnesses QCM and NN via closed-video link,[7] as well as its Decision of 7 February 2006 authorising Defence Witnesses M005, M015, M036, M046 and M073 to testify via closed-video link. In all the circumstances, the Chamber determined that it was in the interests of justice to permit the witnesses to testify via video-conference.

8. The Chamber has examined the Defence submissions and the accompanying documents and takes note of the assertion that the testimony of Witness M072 is "vital" to the defence of the Accused. The Chamber also notes the reason adduced for the witness's unwillingness to travel to Arusha, namely the recent birth and tender age of her baby.

9. Under these circumstances, the Chamber is satisfied that the minimum conditions for the granting of a motion for video-conference testimony have been met and that it will be in the interests of justice to allow the Supplemental Motion. The Chamber is also satisfied that the Prosecution will have the opportunity during cross-examination to confront the witness and to remedy any potential prejudice.[8]

10. On the Defence request that identifying records of the witness should not be disclosed to the public, the Chamber reminds the Defence that this is already covered by standing orders for protective measures for witnesses.

11. With respect to the Defence request that other prosecutors at this Tribunal who are not members of the Prosecution team in this case should be prohibited from obtaining any records pertaining to these witnesses, the Chamber wishes to draw the attention of the Defence to its Decision of 7 February 2006 and, once again, to an earlier Decision in which the Chamber denied a similar argument.[9]

FOR THE FOREGOING REASONS, THE CHAMBER

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[5] *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" (TC), 22 February 2005, paras. 4-5.

[6] *The Prosecutor v. Bagosora et al.,* Case N°ICTR-98-41-T, "Decision on Testimony by Video-Conference" (TC), 20 December 2004; *The Prosecutor v. Bagosora et al.,* Case N°ICTR-98-41-T, "Decision on Prosecution Request for Testimony of Witness BT via Video-Link" (TC), 8 October 2004; *The Prosecutor v. Bagosora et al.*, Case N°ICTR-98-41-T, "Decision on Prosecution Motion for Special Protective Measures for Witnesses A and BY" (TC), 3 October 2003; *The Prosecutor v. Bagosora et al.,* Case N°ICTR-98-41-T, "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; *The Prosecutor v. Nahimana et al.,* Case N°ICTR-99-52-1, "Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures" (TC), 14 September 2001.

[7] *The Prosecutor v. Tharcisse Muvunyi,* Case N°ICTR-2000-55A-T, "Decision on Prosecutor's Motion to Have Prosecution Witnesses QCM and NN Testify by Closed Video-Link Pursuant to Rules 54 and 71 (D) of the Rules of Procedure and Evidence", 23 May 2005; and "Decision on Prosecutor's Extremely Urgent Motion Pursuant to Trial Chamber II Directive of 23 May 2005 for Preliminary Measures to Facilitate the Use of Closed-Video Link Facilities", 20 June 2005.

[8] *The Prosecutor v. Casimir Bizimungu et al.,* Case N°ICTR-99-50-T, TCII "Decision on Prosecutor's Extremely Urgent Motion Requesting that the Extraordinarily Vulnerable Witnesses X/006 and 039 Testify by Closed Video Transmission Link with a Location at The Haguc and Other Related Special Protective Measures Pursuant to Article 21 of the Statute and Rules 73 and 75 of the Rules of Procedure and Evidence", 4 June 2004, para. 8.

[9] *The Prosecutor v. Tharcisse Muvunyi,* Case N°ICTR-2000-55A-T, "Decision on Tharcisse Muvunyi's Motion for Protection of Defence Witnesses", 20 October 2005. See also *The Prosecutor v. Bagosora et al.,* Case N°ICTR-98-41-T (AC), "Decision on Interlocutory Appeal of Decision on Witness Protection Orders", 6 October 2005, paras. 43-46.

GRANTS the Supplemental Motion in part and

ORDERS that:

(i). The testimony of Defence Witness M072 shall be permitted to be introduced via a secure audio-video transmission link from a location in Kigali on Friday, 10 March 2006;

(ii). The Registry shall make all necessary arrangements in respect of the testimony via secure audio-video transmission link of Witness M072;

(iii). The Prosecution shall be prohibited from disclosing the identity, specific whereabouts, or any records pertaining to Witness M072 to anyone outside the Office of the Prosecutor;

(iv). Court proceedings where the testimony of Witness M072 could reveal her identity shall be closed to the public;

(v). Court proceedings where protective measures are considered shall also be closed to the public.

(vi). The Registry shall take immediate steps to ensure the successful implementation of this Order;

(vii). The Parties co-operate with the Registry in the implementation of this Order;

(viii). All examinations of the witness testifying by video-link shall take place from the courtroom in Arusha;

(ix). The Defence shall have one representative in Kigali to prepare the witness for her testimony;

(x). The parties shall make available to the Registry, not later than 1 March 2006, all exhibits they intend to use during their respective examinations of the witness;

(xi). The specific times of the hearing as well as the venue shall be communicated to all Parties as soon as a determination is made to that effect.

Arusha, 21 February 2006.

[Signed] : Asoka de Silva; Flavia Lattanzi; Florence Rita Arrey

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4. Decision on the Prosecutor's Motion to Admit Documents Tendered During the Cross-Examination of Defence Witness Augustin Ndindiliyimana
5. Rule 89 (C) of the Rules of Procedure and Evidence
6. 28 February 2006 (ICTR-2000-55A-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Silva, Presiding Judge; Flavia Lattanzi; Florence Rita Arrey

Tharcisse Muvunyi – Admission of documents tendered during a cross-examination – Relevance and probative value of the documents, Rights of the Accused – Admission of copies – Authenticity of

documents – Documents lacking of prima facie reliability – Documents marked for identification purposes only – 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. 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) ; 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 Asoka de Silva, Presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey (the "Chamber");

BEING SEIZED of the "The Prosecutor's Motion to Admit Documents Tendered during the Cross-Examination of Defence Witness Augustin Ndindiliyimana" filed on 31 January 2006 (the "Motion");

HAVING RECEIVED the "Accused's Response to the Prosecutor's Motion to Admit Documents Tendered during the Cross-Examination of Defence Witness Augustin Ndindiliyimana", filed on 13 February 2006 (the "Response");

CONSIDERING the Chamber's Oral Decision of 14 February 2006 granting:
(i) the "Accused Tharcisse Muvunyi's Motion for Continuance or Motion for Leave to File a Defence Response out of Time, Alternatively Motion for Reconsideration of Defence Response [to] Prosecutor's Motion to Admit Documents Tendered During the Cross-Examination of Defence Witness Augustin Ndindiliyimana" filed on 9 February 2006 (the "Defence Motion"), and
(ii) the "Amended Accused Tharcisse Muvunyi's Motion for Continuance or Motion for Leave to File a Defence Response out of Time Alternatively Motion for Reconsideration of Defence Response [to] Prosecutor's Motion to Admit Documents Tendered During the Cross-Examination of Defence Witness Augustin Ndindiliyimana", filed on 13 February 2006;

NOW DECIDES the Motion pursuant to Rule 73 (A) of the Rules on the basis of written submissions filed by the Parties.

6.1.1.
6.1.2. Submissions of the Parties

6.1.2.1. The Prosecution

1. The Prosecution requests the Chamber to admit into evidence certain documents tendered and marked for identification purposes as PID1 on 7 December 2005 during the cross-examination of Defence Witness Augustin Ndindiliyimana.

2. The Prosecution submits that the first document ("Document 1"), bearing the numbers KA017090 and KA017091 for the French original (and K0284552 for the English translation), is a letter dated 12 (*sic*) April 1994[1] addressed to the *bourgmestre* of an unidentified *commune*. According to the Prosecution, the document bears the header "Republic of Rwanda, Ministry of Defence,

[1] The French original bears the date of 21 April 1994 while the English translation erroneously bears the date of 12 April 1994.

Rwandan Army, Commandant Place BUT-GIK",[2] while the name of the Accused and the title "Lt Col, Cmd Place BUT-GIK" appear at the foot of the letter together with the alleged signature of the Accused and a seal that reads "Republique Rwandaise – …Place Butare-Gikongoro."[3] The Prosecution alleges that the letter relates to the implementation of the Ministry of Defence's recommendation about the recruitment of youth for civil defence purposes. The letter also proposes a meeting for the coordination of the program at 9:00 a.m. on 26 April 1994.

3. The Prosecution asserts that the second document ("Document 2") bearing number K0026811[4] is almost identical to Document 1. It is dated 21 April 1994 and proposes a coordination meeting on 25 April 1994 at 9:00 a.m. According to the Prosecution, the name of the Accused and title "Lt. Col., Cmd Place BUT-GIK" also appear at the foot of the letter along with the alleged signature of the Accused and a seal that reads "Republique rwandaise – Min. de place – Butare-Gikongoro".

4. The Prosecution submits that the third document ("Document 3") contains travel passes dated 10 May 1994 authorising three separate individuals to circulate freely and that the name of the Accused and title "Lt Col Comd OPS Butare" appear under the authorisation for each of the three individuals.

5. The Prosecution alleges that Documents 1 and 2 are probative and relevant to the allegations that the Accused enjoyed a position of military power and authority in his capacity as Commander of ESO, including those specific allegations contained in paragraphs 3.21, 3.22, 3.24 and 3.26 of the Indictment. According to the Prosecution, in this position of authority, the Accused exercised control over military operations in the Butare *Préfecture* which extended to the recruitment and supervision of the training of civilians youth. The Prosecution submits that the contents of these two documents meet the necessary *prima facie* threshold that the documents are relevant and have probative value. The Prosecution submits that Document 3 is probative and *prima facie* relevant to the allegations that the Accused enjoyed a position of authority and control over the civilians within the *Préfecture* of Butare reflected by his authority to grant permission for them to travel within that *Préfecture*.

6. Relying on jurisprudence from the ICTR[5] and the ICTY[6], the Prosecution submits that those three documents possess sufficient indicia of reliability for them to be admitted into evidence. According to the Prosecution, the information presented in Documents 1 and 2 provide clear and recognizable indicia on the face of the documents themselves while for Document 3, the name and title of the Accused appear under each of the travel authorisations. While the signature of the Accused does not appear on these authorisations, the Prosecution submits that only someone in his position possessed the requisite power in the *Préfecture* of Butare to grant such authorisation.

7. The Prosecution submits that during the proceedings of 7 December 2005 in this case, the objections raised by the Defence Counsel with regard to the recognition of the signature and the seal on the documents were made in the presence of the witness. The Prosecution alleges that the direct interruption of the witness' testimony by the Defence Counsel prevented the Prosecution from having a fair and objective opportunity to have the witness recognise the signature of the Accused on the PID1 Documents. The Prosecution submits that such non-recusal of the witness directly tainted the ability of the witness to give an objective testimony on the PID1 Documents. The Prosecution further submits that in light of the indicia of reliability on the face of the documents themselves, it is reasonable to assume that the witness, as a former General of the Army of the Republic of Rwanda,

[2] Unofficial English translation of the French original.
[3] The seal is partly unreadable.
[4] The document tendered to the Chamber on 7 December 2005 bears the numbers K0026811 and K0026812 for the French original but the copies attached to the Motion bear numbers K0313507 and K00313508 for the same French original. The Chamber will considered the documents tendered in Court on 7 December 2005 to render its decision in the present motion.
[5] *Rutaganda v. The Prosecutor*, Case N°ICTR-96-3-A, Judgement (AC), 26 May 2003, para. 33; *The Prosecutor v. Akayesu*, Case N°ICTR-96-4-A, Judgement, 1 June 2001, para. 286.
[6] *The Prosecutor v. Delalić*, Case N°IT-96-21-T, "Decision on the Motion of the Prosecution for the Admissibility of Evidence", 19 January 1998, paras. 20, 31, 33; *The Prosecutor v. Blaškić*, Case N°IT-95-14, "Decision on the Defence Motion for Reconsideration of the Ruling to Exclude from Evidence Authentic and Exculpatory Documentary Evidence", 30 January 1998, paras. 10-11.

would be familiar with these types of documents and that the said documents should therefore be admitted as evidence.

6.1.2.2. The Defence

8. The Defence submits that the witness to whom the documents were presented testified that the signatures on the document were not identical, the seal was incomplete on Document 1 and he could not confirm that the documents contained Muvunyi's signature as he did not know Muvunyi's signature. The Defence further submits that during the proceedings it had objected to the admission of PID1 for lack of offer or indicia of reliability and that the Prosecution has not demonstrated the reliability and probative value of those documents.

9. The Defence submits that for a document to be admitted under Rule 89 (C), the party seeking the admission of the said document should explain what the document is, why it is authentic and what it purports to be. The Defence states that the Prosecution has failed to do so in this case. It added that with respect to the only document the witness said he had seen before, the Prosecution failed to ask where the Witness had previously seen the document.

10. The Defence also submits that while there is no standard for authenticating a document, a moving party must show "sufficient indicia of reliability" to justify admission. Relying on a Decision rendered in the *Bagosora* case, the Defence alleges that to justify the admission of a document as an exhibit, evidence must be presented to show where the document was seized, the chain of custody since the seizure of the document, corroboration of the contents of the document with other evidence and the nature of the document itself, such as signatures, stamps, or even other forms of handwriting.[7] The Defence submits that the Prosecution has failed to provide any evidence to authenticate these documents. Moreover it submits that at any time the Prosecution could have moved for the witness to be excused from the proceedings but it did not do so.

11. The Defence further requests to be heard orally on this matter.

HAVING DELIBERATED

12. Rule 89 (C), gives the Chamber a broad discretion to admit evidence, including documents, which it deems relevant and of probative value. In *Bagosora et al*, it was held that relevance and probative value are threshold issues when deciding questions of admissibility and that the moving Party only needs to prove that the document has *prima facie* relevance and that it has probative value.[8] In *Nyiramasuhoko v. The Prosecutor*, the Appeals Chamber stated that evidence may be deemed inadmissible under Rule 89 (C) "where it is found to be so lacking in terms of indicia of reliability, such that it is not probative. …At the stage of admissibility, only the beginning of proof that evidence is reliable, namely, that sufficient indicia of reliability have been established, is required for evidence to be admissible."[9] A Trial Chamber's decision to admit evidence is a different consideration from the weight to be attached to the evidence; the latter question must be determined at the close of the case and after considering the evidence as a whole.

13. The Chamber considers, with respect to the admissibility of documents, that the moving Party must provide some indication of the document's authenticity such as the nature of the document, its author(s), the provenance of the document and its chain of custody from the time of seizure to its production in court. If a copy of a document is sought to be admitted, there should be some explanation about the non-availability of the original, or some confirmation that the copy sought to be

[7] *The Prosecutor v. Bagosora et al*., Case N°ICTR-98-41-T, "Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole", 13 September 2004, para. 10.
[8] *The Prosecutor v. Bagosora et al*, "Decision on Admission of TAB 19 of Binder Produced in Connection with the Appearance of Witness Maxwell Nkole," 13 September 2004, para. 7.
[9] *Nyiramasuhuko v. The Prosecutor*, "Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence", 4 October, 2004, para. 7.

tendered genuinely emanates from the original. In the Chamber's view, evidence tending to confirm some of these issues could indicate that a document is reliable and potentially of probative value.

14. The Chamber notes that Document 1 is a letter in French dated 21 April 1994 addressed to an unnamed *Bourgmestre* of Gikongoro. It purports to emanate from, and bears the name and alleged signature of the Accused in the capacity of "Comd Place, BUT-GIK."[10] This document conveys to the *Bourgmestre* the Defence Ministry's plan to train 10 youths from each *secteur* as part of a civil defence programme.

15. The Chamber notes that the document is an uncertified copy; no evidence has been led by the Prosecution as to the non-availability of the original letter; no evidence has been led to confirm that the signature on the document in fact matches the usual signature of the Accused. The Chamber also recalls that during his cross-examination, Witness Augustin Ndindiliyimana indicated that he could not tell if the signature on the document was that of the Accused.[11] The Chamber is convinced that while photocopies of documents may be admissible evidence before the Tribunal, a sufficient foundation must be laid for their admission so as to satisfy the Chamber that they are at least *prima facie* reliable. Where the moving party fails to demonstrate even "the beginning of proof that evidence is reliable", such evidence would clearly be inadmissible.[12] For the above reasons, the Chamber finds that Document 1 lacks the basic indications of reliability to make it admissible as evidence under the Rules.

16. The Chamber recalls the Prosecution submission that Document 2 is a letter in French dated 21 April 1994 and that it calls for a coordination meeting to be held at 9.00 a.m. on 25 April 1994. The name of the Accused, the title "Lt. Col., Cmd Place But-GIK", as well as a signature alleged to be that of the Accused, appear at the end of the letter. The Chamber observes that this document suffers from the same shortcomings pointed out with respect to Document 1. Document 2 therefore is not admissible as an exhibit because it lacks basic indicia of reliability.

17. Document 3 contains three type-written forms on which the names and identity card numbers of three individuals have been inserted by pen. At the top of each form, it is indicated "Butare le 10/5/1994". The forms do not appear to have been written on any official stationery. The following words appear at the end of each form: "Muvunyi Tharcisse Lt. Col Cmd OPS Butare". There is no signature. The Prosecution submits that the three forms are travel passes and that they are probative of the allegation that the Accused enjoyed a position of authority and control over the civilians within Butare *préfecture*. The Chamber finds that the mere mention of Muvunyi's name and alleged position on these documents is, without more, insufficient to establish that he prepared them or that they came from him personally or from his office. The Prosecution has not made any effort to establish the provenance of these documents, or to explain the absence of their originals. The Chamber is therefore left to speculate about these important threshold issues. Since the burden of proving admissibility lies on the moving party, the Chamber is not satisfied that the Prosecution has met that burden with respect to Document 3.

18. The Chamber recalls that in its Response, the Defence asked for oral arguments to be heard on this Motion. The Chamber is satisfied that having heard the parties in court during the course of the testimony of Defence Witness Augustin Ndindiliyimana, and having considered the written submissions from both sides, it is unnecessary to hear oral arguments on this motion.

19. For all the foregoing reasons, the Chamber finds that although Documents 1, 2 and 3 contained in PID1 appear at face value to be relevant to the present case, they cannot be admitted as exhibits

[10] A document dated 12 April 1994 is purported by the Prosecution to be a translation of the 21 April 1994 letter.
[11] Transcripts, 7 December 2005, p. 33.
[12] *Nyiramasuhuko v. The Prosecutor*, "Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence", 4 October, 2004, para. 7.

because they lack *prima facie* reliability. The documents will for now remain marked for identification purposes only.

THE CHAMBER THEREFORE

DENIES the Motion in its entirety.

Arusha, 28 February 2006.

[Signed] : Asoka de Silva; Flavia Lattanzi; Florence Rita Arrey

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7. Decision on Accused's Motion to Expand and Vary the Witness List 8. 28 March 2006 (ICTR-2000-55A-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Silva, Presiding Judge; Flavia Lattanzi; Florence Rita Arrey

Tharcisse Muvunyi – Variation of the witness list – Interests of justice – Potential importance of the proposed testimony to the Defence due to the most recent appearance of the witness – No indication to consider the proposed testimony as material to this case – Doubts on the will of the witness to testify – Motion denied

International Instruments Cited

Rules of Procedure and Evidence, Rules 73 (A), 73 ter (E) ; Statute, Art. 20 and 20 (4) (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. Jean de Dieu Kamuhanda, Decision on Kamuhanda's Extremely Urgent Motion for Leave to Vary the List of Defence Witnesses (Rule 73 ter), 15 April 2003 (ICTR-95-54A) ; 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. Aloys Simba, Decision on the Prosecution's Motion to Vary the Witness List, 27 August 2004 (ICTR-2001-76) ; 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 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 Asoka de Silva, Presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey (the "Chamber");

BEING SEIZED of the "Accused's Motion to Expand and Vary the Witness List", filed on 20 March 2006 (the "Motion");

HAVING RECEIVED the

(i) "Prosecutor's Response to Accused's Motion to Expand and Vary the Witness List Pursuant to Rule 73 *bis* (E)" (*sic*[1]), filed on 23 March 2006 (the "Response"); and the

(ii) "Defence Reply to the Prosecutor's Response to the Accused's Motion to Expand and Vary the Witness List Pursuant to Rule 73 *bis*", filed on 24 March 2006 (the "Reply);

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 written submissions filed by the Parties.

8.1.1. Submissions of the Parties

8.1.1.1. The Defence[2]

1. The Defence requests the Chamber to grant it leave to expand and vary its list of witnesses by adding a person alternatively known as Witness AOG, Witness X, Witness D, and Witness 006. The Defence asserts that this person recently testified in the "Military II" case as a witness for the Prosecution and has also previously testified in the "Government II" trial.

2. According to the Defence, there is reason to believe that "this witness has exculpatory information pertinent to the outcome of this case", including evidence that Colonel Gatsinzi was the Commander of ESO and that Muvunyi performed many acts that could show that he did not have actual authority to control soldiers in the Butare area.

3. The Defence submits that since AOG is "a highly protected witness for the Prosecution", the Defence is unable to determine his actual location or even his real name. The Defence therefore requests the Chamber to order the Witness and Victims Support Section (WVSS) and/or the Office of the Prosecutor (OTP) to assist the Defence in locating Witness AOG and arranging for his testimony.

4. The Defence further submits that Witness AOG "testified that Muvunyi came to him begging for help in controlling violence" and that this shows that Muvunyi lacked actual authority within the meaning of Article 6 (3) of the Statute.

5. Should Witness AOG refuse to testify in this case, argues the Defence, the Chamber may issue a *subpoena* requiring him to testify. The Defence argues further that the Chamber has "ample authority under Rule 98 to order the Prosecutor to produce the witness and his evidence."

8.1.1.2. The Prosecution

6. The Prosecution submits that the Defence has failed to show whether or not it has attempted in any way to contact AOG, or even whether AOG has indicated his willingness to testify on behalf of the Defence. The Prosecution further submits that the Defence has not shown whether it is aware of the likely content of AOG's testimony in the context of this particular trial and that it is not sufficient for the Defence to merely imply that such testimony may be exculpatory.

[1] Note that the correct provision governing the Defence's right to vary its list of witnesses is Rule 73 *ter* (E).
[2] This is a summary of the primary arguments made in both the Motion and the Reply.

7. According to the Prosecution, the Chamber should not be requested to issue a futile order, as it is possible that this "highly protected witness" could refuse to testify in this case.

8. The Prosecution asserts that the Defence request comes "too late in the day" to be meaningful for the purposes of this trial; that the application ought to have been made in a timely manner and at an appropriate stage in the proceedings; that the late notice is "highly prejudicial to the Prosecution"; that the Defence has failed to show the interest of justice that will be served or the existence of a good cause to guide the Chamber in determining whether or not to grant leave to vary the witness list; and that AOG's proposed testimony will be neither new nor material, as most of the Defence witnesses so far have given testimony on matters similar to what is being proposed for AOG.

9. Finally, the Prosecution submits that the Defence has failed to assist the Chamber in making a determination on whether or not to allow this application by failing to produce the exculpatory testimony purportedly made by AOG in the "Military II" and "Government II" trials.

HAVING DELIBERATED

10. The Chamber recalls that pursuant to Rule 73 *ter* (E) of the Rules, after the commencement of the Defence case, the Defence may move the Chamber for leave to vary its list of witnesses, if it considers it to be in the interests of justice. The Chamber is mindful of the rights of the Accused as enshrined in Article 20 of the Statute, and in particular of the provisions of Article 20 (4) (e) guaranteeing the right of the Accused "to obtain the attendance and examination of witnesses on his or her behalf under the same circumstances as witnesses against him or her."

11. The Chamber notes that in the jurisprudence of the Tribunal, a request for leave to vary the list of witnesses is evaluated in light of "the interests of justice" to be served by such a variation.[3] In evaluating the interests of justice, Trial Chambers typically take into consideration such factors as the materiality of the proposed testimony, the complexity of the case, and the level of prejudice to the opposing Party, "balanced against the right of the accused to have adequate time and facilities to prepare his Defence and his right to be tried without undue delay."[4] Trial Chambers also look at the stage the proceedings have reached, the probative value of the proposed testimony, and the reason for the late discovery of the witness.[5]

12. The Chamber has considered the Defence submission that it has brought the Motion at this late stage in the proceedings because it learnt of Witness AOG only after his recent testimony in the "Military II" case. The Chamber has also given due consideration to the importance the Defence attaches to the proposed testimony of Witness AOG.[6] In particular, the Chamber takes very seriously the Defence assertion that "this witness has exculpatory information pertinent to the outcome of this case." In the Chamber's view, should such an assertion prove to be true, it would have a significant impact on the continuation of these proceedings.

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[3] *The Prosecutor v. Nyiramasuhuko et al.*, Case N°ICTR-98-42-T, "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, para. 31; *The Prosecutor v. Nahimana et al.* ("Media Case"), Case N°ICTR-99-52-T, "Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses", 26 June 2001, paras. 16-20.

[4] *The Prosecutor v. Nyiramasuhuko et al.*, Case N°ICTR-98-42-T, "Decision on Prosecutor's Motion for Leave to Add a Handwriting Expert to His List of Witnesses", 14 October 2004, para. 11; *Prosecutor v. Nahimana et al.* ("Media Case"), Case N°ICTR-99-52-T, "Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses", 26 June 2001, para. 17.

[5] *The Prosecutor v. Bagosora et al.*, Case N°ICTR-98-41-T, "Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E)", 26 June 2003, paras. 14-22; *The Prosecutor v. Aloys Simba*, Case N°ICTR-01-76-I, "Decision on the Prosecution's Motion to Vary the Witness List", 27 August 2004, para. 7.

[6] *The Prosecutor v. Kamuhanda*, Case N°ICTR-95-54A-T, "Decision on Kamuhanda's Extremely Urgent Motion for Leave to Vary the List of Defence Witnesses (Rule 73 *ter*)", 15 April 2003, para. 7.

13. The Chamber notes that Witness AOG has previously testified before this Tribunal in at least three other trials,[7] but that the Defence has not provided any material from any of those trials in support of its assertions.[8] However, oral submissions by the Defence Counsel tend to indicate that the Defence request to have AOG added to its list of witnesses was motivated by the evidence the witness gave during his most recent appearance.[9] Therefore, in the interests of justice and to facilitate the proceedings, the Chamber has gone out of its way and has undertaken a thorough review of the transcripts of the witness's most recent testimony only.

14. Witness AOG testified by closed-video link from The Hague in the case of *The Prosecutor v. Ndindiliyimana et al*.[10] (also known as the "Military II" case) from 20 February to 3 March 2006. Although AOG spent nine days testifying before the Trial Chamber in the "Military II" case, it was only in a small part of his testimony on the ninth and final day that he mentioned the name of the Accused Muvunyi. That was in answer to questions by Defence Counsel during cross-examination.[11]

15. In the Chamber's view, none of the statements made by Witness AOG in the *Ndindiliyimana* case is directly related to any of the charges appearing in the Indictment against Muvunyi. Additionally, many of the Defence witnesses who have testified thus far in these proceedings have made similar general assertions about Muvunyi. Thus there is no indication from those transcripts that the proposed testimony of Witness AOG is material to this case.

16. Furthermore, the Chamber observes that this "highly protected witness" has always testified for the Prosecution in the past. Moreover, the Defence has not provided any reason for the Chamber to believe that even if the Defence were able to locate and interview the witness, he would be willing to testify in Muvunyi's defence.

17. Additionally, 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.

FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the Motion in its entirety.

Arusha, 28 March 2006.

[Signed] : Asoka de Silva; Flavia Lattanzi; Florence Rita Arrey

[7] In the cases of The Prosecutor v. Bagosora et al. around June 2004; The Prosecutor v. Karemera et al. around October 2005; and The Prosecutor v. Ndindiliyimana et al. in February – March 2006.
[8] Although some of Witness AOG's testimony in those proceedings may have been in closed session, there is no indication that the Defence has requested the Trial Chambers concerned for authorisation to obtain or review the transcripts.
[9] *The Prosecutor v. Tharcisse Muvunyi*, Case N°ICTR-2000-55A-T, English transcript of 6 March 2006, p. 3.
[10] Case N°ICTR-2000-56-T.
[11] *The Prosecutor v. Ndindiliyimana et al*., Case N°ICTR-00-56-T, English Transcript of 3 March 2006, pp. 14-16, on cross-examination by Defence Counsel for Augustin Bizimungu and pp. 41-42, on cross-examination by Defence Counsel for François-Xavier Nzuwonemeye. (In closed session.)

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9. Scheduling Order
10.29 March 2006 (ICTR-2000-55A-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Silva, Presiding Judge; lavia Lattanzi; Forence Rita Arrey

Tharcisse Muvunyi – Scheduling order – Filings of documents – Hearings of Witnesses – Hearings of the Parties' closing arguments

International Instrument Cited

Rules of Procedure and Evidence, Rules 54, 73, 85, and 86

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

SITTING as Trial Chamber II composed of Judges Asoka de Silva, Presiding, Flavia Lattanzi, and Florence Rita Arrey (the "Chamber");

HAVING HEARD

(i) the Defence oral submission made on the 22 March 2006 relating to the calling of a witness under Rule 85 (A) (vi) of the Rules;
(ii) the oral submissions of the Parties during the Status Conference held on 27 March 2006, relating to several procedural and scheduling matters relevant to future proceedings in this case, in particular, the Prosecutor's intention to file motions for rebuttal evidence and to call an expert witness;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules") in particular Rules 54, 73, 85, and 86 of the Rules;

HEREBY ORDERS that

(i) The Prosecutor shall file his motions, if any, for rebuttal evidence and to call an expert witness not later than Monday, 3 April 2006. The Defence shall have five days from the date of receipt of the Prosecutor's motion to file a response. The Prosecutor shall thereafter have two days within which to file a reply;

(ii) The Chamber will sit on 4 and 5 May 2006 to hear character witness(es), if any, that the Defence may wish to call, and, depending upon the outcome of the Prosecutor's motions referred to in (i) above, any other witness(es) the Prosecutor may be allowed to call;

(iii) The Chamber will hear the Parties' closing arguments on 22 and 23 May 2006, and hereby orders the Parties to file their closing briefs not later than 16 May 2006.

Arusha, 29 March 2006.

[Signed] : Asoka de Silva; Flavia Lattanzi; Florence Rita Arrey

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11. Decision on the Prosecutor's Motion Requesting a Review of the Scheduling Order and for an Extension of Time to File Closing Briefs and Present Oral Arguments
12. 12 April 2006 (ICTR-2000-55A-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Silva, Presiding Judge; Flavia Lattanzi; Florence Rita Arrey

Tharcisse Muvunyi – Review of the scheduling order – Extension of time – Discretion of the Chamber in setting the period between the conclusion of the presentation of evidence and the filing of final trial briefs – Review, Withdrawal of the assignment of Co-Counsel, Particular circumstance – Motion granted in part

International Instrument Cited

Rules of Procedure and Evidence, Rules 73 (A), 86 (A) and 86 (B)

International Cases Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Jean Bosco Barayagwiza, Separate Opinion of Judge Mohammed Shahabuddeen, 31 March 2000 (ICTR-97-19) ; 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)

I.C.T.R.: Appeals Chamber, The Prosecutor v. Stanislav Galić, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001 (IT-98-29) ; Appeals Chamber, The Prosecutor v. Zdravko Mucić et al., Judgement and Sentence Appeal, 8 April 2003 (IT-96-21) ; Appeals Chamber, The Prosecutor v. Stanislav Galić, Decision on Defence's Request for Reconsideration, 16 July 2004 (IT-98-29) ; Trial Chamber, The Prosecutor v. Slobodan Milošević, Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balevic, Vladislav Jovanovic, Vukasin Andric, and Dobre Aleksovski and Decision Proprio Motu Reconsidering Admission of Exhibits, 17 May 2005 (IT-02-54)

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

SITTING as Trial Chamber II composed of Judge Asoka de Silva, Presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey (the "Chamber");

BEING SEIZED of the "Prosecutor's Motion Requesting a Review of the Scheduling Order and for an Extension of Time to File Closing Briefs and Present Oral Arguments", filed on 30 March 2006 (the "Motion");

HAVING RECEIVED "Tharcisse Muvunyi's Response to the Prosecutor's Motion Requesting a Review of the Scheduling Order and for an Extension of Time to File Closing Briefs and Present Oral Arguments", filed on 03 April 2006 (the "Response");

RECALLING its Scheduling Order dated 29 March 2006;

NOTING the Registrar's "Decision of Withdrawal of the Assignment of Mr. Martin Joly, Co-Counsel for the Accused Person Mr. Tharcisse Muvunyi" filed on 6 April 2006;

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 written submissions filed by the Parties.

12.1.1. Submissions of the Parties

12.1.1.1. The Prosecution

1. The Prosecution requests the Chamber to review its Scheduling Order dated 29 March 2006 taking into consideration all of the procedural matters outlined during the Status Conference of 27 March 2006, and to revise the schedule such that the Parties will now be required to submit written briefs by 7 July 2006, and oral arguments on 14 and 15 August 2006.

2. The Prosecution submits that, in its view, the said Scheduling Order did not take the following factors into account: the submissions made by the Prosecution and by the Defence during the Status Conference; that the Parties will each be filing lengthy closing briefs that will need to be translated into French prior to the oral arguments; that in all cases before the Tribunal, the practice is to allow a period of four to six weeks following the presentation of evidence for the submission of closing briefs; and that the normal practice is to allow a period of at least four weeks after the submission of closing briefs before the presentation of oral arguments.

3. According to the Prosecution, because the Scheduling Order allows for only seven working days between the conclusion of the presentation of evidence and the submission of closing briefs, and only five working days between the submission of the closing briefs and the presentation of oral arguments, it is "grossly inadequate" as it does not take into account the "established existing obligations and commitments" that the Prosecution team has *vis-à-vis* another case before the Tribunal. In the Prosecution's view, this is both prejudicial to it and contrary to the interests of justice.

4. The Prosecution alleges that it understands that there might be a need to complete this trial soon in order to enable one of the Judges sitting on this case to attend to other commitments outside the seat of the Tribunal. The Prosecution proposes that "arrangements could be put in place to enable the said Judge to return to the Tribunal as and when her attendance is required". The Prosecution has attached to the Motion a comparative grid indicating the number of days allowed in other proceedings before the Tribunal for the filing of closing briefs and for the presentation of oral arguments.

12.1.1.2. The Defence

5. The Defence submits that while it does not necessarily concur with the reasons and rationale advanced by the Prosecution, it joins with the Prosecution in every respect to seek for relief. In addition, the Defence requests for more time to submit any final witnesses on rebuttal, rejoinder and mitigation, and also prays the Chamber to arrange for "a telephonic conference over scheduling issues."

6. The Defence asserts that it is "at present without co-counsel" and that Muvunyi's Lead Counsel is currently away from the Tribunal while the Legal Assistant is still in Arusha, but that it is "physically impossible" for them to work together in person on the final trial brief. The Defence also asserts that since the Chamber has not yet ruled on the Prosecution's request to call witnesses in rebuttal, the Defence does not know if a rejoinder will be necessary.

7. The Defence further submits that, due to administrative reasons, the proper forms for any witnesses on mitigation have not yet been processed, and that this needs to be done at least a month in advance of bringing the witness here. Therefore, according to the Defence, the current Scheduling Order "is unrealistic and is a denial of justice and due process of the Defence."

HAVING DELIBERATED

8. As a preliminary matter, the Chamber notes that the Rules do not provide for the review or reconsideration of interlocutory decisions "save with certification by the Trial Chamber" to the Appeals Chamber.[1] This is because the Tribunal has an interest in establishing the certainty and finality of its decisions and in encouraging the Parties to rely on these decisions without fearing that they could easily be altered.[2]

9. However, "the fact that the Rules do not so provide is not of itself determinative of the issue whether or not the power of reconsideration exists in 'particular circumstances.'"[3] The Appeals Chamber of the ICTY has held that a Chamber has the authority to reconsider and modify its prior decision if it is satisfied that there has been a change of circumstances, if it is persuaded that the decision was erroneous and has caused prejudice,[4] or if new information emerges pointing to an error of law, a miscarriage of justice or an abuse of discretion.[5] The Chamber will evaluate the submissions of the Parties in light of this jurisprudence.

10. The Chamber recalls all the issues it discussed with the Parties during the Status Conference held on Monday, 27 March 2006,[6] subsequent to which it rendered the Scheduling Order of Wednesday, 29 March 2006.

11. The Chamber also recalls the provisions of Rule 86 (A) of the Rules dealing with closing arguments and notes that the Rule does not establish any definite time period between the conclusion of the presentation of evidence and the filing of final trial briefs. Each Trial Chamber, in the exercise of its inherent discretion and taking into consideration the specific circumstances of the case, may set the date as it deems appropriate. This Chamber is not bound by the practice of other Trial Chambers and as such the data presented in the Prosecution's comparative grid are of little relevance.

12. The Chamber further recalls Rule 86 (B), which requires that each party's final trial brief be filed with the Chamber "not later than five days prior to the day set for the presentation of that party's closing argument." Contrary to the arguments advanced by the Prosecution, the Scheduling Order

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[1] See Rule 72 (B) on Preliminary Motions and Rule 73 (B) on Motions. Compare to Rule 120, which provides for a review of the Judgement where a new fact has been discovered which was not known to the moving party at the time of the proceedings.
[2] *The Prosecutor v. Bagosora et al.*, Case N°ICTR-98-41-T, "Decision on the 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.
[3] See the "Separate Opinion of Judge Mohammed Shahabuddeen" in *Barayagwiza v. The Prosecutor*, Case N°ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para. 3.
[4] *The Prosecutor v. Mucic et al.*, Case N°IT-96-2-A*bis*, "Judgement on Sentence Appeal", 8 April 2003, para. 49.
[5] *The Prosecutor v. Milosevic*, Case N°IT-02-54-T, "Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balevic, Vladislav Jovanovic, Vukasin Andric, and Dobre Aleksovski and Decision *Propio Motu* Reconsidering Admission of Exhibits" 17 May 2005, paras. 6-8; *The Prosecutor v. Galic*, Case N°IT-98-29-A, "Decision on Defence's Request for Reconsideration", 16 July 2004.; *The Prosecutor v. Galic*, Case N°IT-98-29-AR73, "Decision on Application by Prosecution for Leave to Appeal", 14 December 2001, para. 13.
[6] See the Transcript of the Proceedings of 27 March 2006.

clearly satisfied this requirement by establishing that the final trial briefs would be filed by 16 May 2006 while the closing arguments would be heard on 22 and 23 May 2006.

13. Subsequent to the filing of written submissions by the Parties requesting a review of the Scheduling Order, the Chamber was made aware of the Registrar's Decision withdrawing the assignment of the Co-Counsel for the Accused.[7] The Chamber notes that in the Registrar's Decision, it is stated that in a letter dated 21 March 2006, Co-Counsel notified Lead Counsel of his inability to continue in this case, and Lead Counsel wrote to the Registrar about the same issue on 27 March 2006. Yet Lead Counsel chose not to explicitly inform the Chamber about this important matter either at the Status Conference of 27 March 2006 or before it issued its Scheduling Order on 29 March 2006.

14. Nonetheless, in light of the *ad hoc* Tribunals' jurisprudence, the Chamber considers that the withdrawal of the assignment of Co-Counsel constitutes "new information" which was previously unknown to it and therefore creates a "particular circumstance" warranting a review of the Scheduling Order.

FOR THE FOREGOING REASONS, THE CHAMBER

GRANTS the Motion in part by reviewing the Scheduling Order of 29 March 2006 and

HEREBY ORDERS that:

(i) The Chamber will sit on 8 and 9 May 2006 to hear character witness(es), if any, that the Defence may wish to call, and any other witness(es) the Prosecutor may be allowed to call;

(ii) The Parties shall file their final trial briefs not later that 9 June 2006;

(iii) The Chamber will hear the Parties' closing arguments on 15 and 16 June 2006.

Arusha, 12 April 2006.

[Signed] : Asoka de Silva; Flavia Lattanzi; Florence Rita Arrey

[7] The Motion was filed on 30 March 2006, the Response on 3 April 2006, and the Registrar's "Decision of Withdrawal of the Assignment of Mr. Martin Joly, Co-Counsel for the Accused Person Mr. Tharcisse Muvunyi" was filed on 6 April 2006.

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13. Decision on the Prosecutor's Motion Pursuant to Trial Chamber's Directives of 7 December 2005 for the Verification of the Authenticity of Evidence Obtained out of Court Pursuant to Rules 89 (C) and (D) 14. 26 April 2006 (ICTR-2000-55A-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Silva, Presiding Judge; Flavia Lattanzi; Florence Rita Arrey

Tharcisse Muvunyi – Hearing of a handwriting expert to verify the authenticity of documents and to identify their signature, Admission of evidence – Rights of the Accused – Interests of justice – Opportunity for the Defence to call a witness to challenge the evidence of the proposed handwriting expert – Qualifications of the expert – Admission of evidence, Documents seized at the time of the arrest of the Accused, Legality of the search and the seizure of documents considering the Tribunal's Rules or international law, Domestic law of the place of the arrest – Motion granted

International Instruments Cited :

Rules of Procedure and Evidence of the I.C.T.R., Rules 73 (A), 89, 89 (C), 89 (D) and 94 bis ; Rules of Procedure and Evidence of the I.C.T.Y., Rule 39 ; Statute, Art. 28

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. 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 Prosecution Motion to Recall Witness Nyanjwa, 29 September 2004 (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. Pauline Nyiramasuhuko et al., Decision on Prosecutor's Motion for Leave to Add a Handwriting Expert to His Witness List, 14 October 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Tharcisse Muvunyi, Decision on the Prosecutor's Motion to Admit Documents Tendered During the Cross-Examination of Defence Witness Augustin Ndindiliyimana, 28 February 2006 (ICTR-2000-55A)

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. Milomir Stakić, Decision, 10 October 2002 (IT-97-24)

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

SITTING as Trial Chamber II composed of Judge Asoka de Silva, Presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey (the "Chamber");

BEING SEIZED OF the Prosecutor's "Motion pursuant to Trial Chamber's Directives of 7 December 2005 for the Verification of the Authenticity of Evidence Obtained out of Court Pursuant to Rules 89 (C) and (D)" filed on 30 March 2006 (the "Motion");

HAVING RECEIVED AND CONSIDERED:

(i) "Tharcisse Muvunyi's Reply (*sic*) to Prosecutor's Motion Pursuant to Trial Chamber's Directives of 7 December 2005 for Verification of the Authenticity of Evidence Obtained out of Court Pursuant to Rules 89 (C) and D" filed on 7 April 2006 (the "Response");
(ii) "Muvunyi's Objections to the Prosecutor's Request for a Handwriting Expert and Request for Cross-examination", filed on 18 April 2006;
(iii) "Prosecutor's Response to Accused's Objections to the Prosecutor's Request for a Handwriting Expert and Request for Cross-Examination" filed on 20 April 2006;

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Rules 89 (C) and (D) of the Rules;

NOW DECIDES the Motion on the basis of the written briefs filed by the Parties pursuant to Rule 73 (A) of the Rules;

14.1.1. Introduction

1. On 7 December 2005, during the cross-examination of Defence Witness Augustin Ndindiliyimana, the Prosecution attempted to tender a set of documents that purportedly bore the signature of the Accused, Tharcisse Muvunyi, in the capacity of "*Commandant de Place, Butare-Gikongoro*." The Defence objected on the ground that the documents lacked basic indicia of reliability, and were therefore inadmissible. The Chamber ruled that because the Witness indicated that he had not seen the documents before, and that he was not familiar with the seal or the signature on the said documents, they were inadmissible as exhibits, but would be marked for identification purposes only. They were accordingly marked as "PID1". The Chamber further indicated that the Prosecution could prove the authenticity of the documents at a later stage by calling witnesses.[1]

2. On 31 January 2006, the Prosecution filed a motion to admit the documents marked as "PID1" on the grounds that they were relevant and probative of certain allegations in the Indictment, and that they possessed sufficient indicia of reliability to be admissible as evidence.

3. On 28 February 2006, the Chamber rendered a Decision denying the Prosecution motion in its entirety on the basis that the documents contained in "PID1" were not *prima facie* reliable to be admissible under the Rules, and that they will remain marked for identification purposes only.

14.1.2. Submissions of the Parties

14.1.2.1. The Prosecution

4. The Prosecution relies on Rules 89 (C) and (D), and further argues that the Motion is filed pursuant to the Trial Chamber's directive of 7 December 2005 to prove the authenticity of the "PID1" documents by calling additional witnesses. The Prosecutor further argues that even if the only issue for the Trial Chamber's consideration was whether or not Witness Augustin Ndindiliyimana recognised the documents on the PID1 documents, it will still be necessary to call the handwriting expert as a rebuttal witness.[2]

5. The Prosecution asserts that by copy of this Motion, it gives notice of its intention to call a handwriting expert in the name of Mr. Antipas Nyanjwa, and seeks leave to call him to testify to the authenticity of the said documents. The Prosecution submits that if admitted, the handwriting expert will testify regarding the signatures and handwriting on the PID1 documents, having compared them to other similar documents authored by the Accused and obtained from the material seized from him following his arrest in the United Kingdom.

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[1] T. 7 December 2005, p. 34.
[2] "Prosecutor's Response to Accused's Objections to the Prosecutor's request for a Handwriting Expert and Request for Cross-Examination", filed on 20 April 2006, para. 3.

6. The Prosecution has attached the *curriculum vitae* of Mr. Nyanjwa which shows that he received his Bachelor of Arts Degree from Kurukshetra University (India) in 1993, and a Master of Arts Degree in Criminology and Forensic Science from the University of Sagar (India) in 1994. According to the documents submitted by the Prosecution, between 1998 and 2001, Mr. Nyanjwa completed several short-term post-graduate training courses including a seminar on "Questioned Documents" dealing with both handwritten and non-handwritten documents, a course on analysis of forged documents, and a familiarization course on forensic document examination. Since 1996, he has worked as a Forensic Document Examiner for the Kenyan Police Force. It is further asserted that Mr. Nyanjwa is an admitted expert and has given expert evidence before the Tribunal, but there is no indication of the case or cases in which he has testified.

14.1.2.2. The Defence

7. The Defence objects to the Prosecution Motion on the following three main grounds: (i) that it would be inappropriate to allow the Prosecution to re-open its case-in-chief at this stage of the proceedings; (ii) that the evidence sought to be introduced does not qualify as rebuttal evidence; and (iii) that granting the Motion would violate the right of the Accused to a trial without undue delay under Article 20 of the Statute.

8. Relying on the ICTY Trial Chamber Decision in the *Celebici* case, the Defence argues that in order to be granted leave to re-open its case-in-chief, the Prosecution must demonstrate that the evidence it seeks to introduce was previously unavailable to it physically, and could not have been obtained with the exercise of due diligence. According to the Defence submission, the Prosecution has failed to meet this burden and, therefore, admitting the proposed evidence would secure an unfair tactical advantage for the Prosecution.

9. With respect to rebuttal evidence, the Defence argues that the essence of the presentation of evidence in rebuttal is to call evidence to refute a particular piece of evidence which has been adduced by the Defence, and is therefore limited to matters that arise directly and specifically out of Defence evidence. The Defence submits that Trial Chambers are generally reluctant to grant leave to adduce rebuttal evidence where the object of such evidence is to fill gaps in the Prosecution case, or merely to allow the Prosecution to call additional evidence to meet contradictory Defence evidence.

10. Furthermore, the Defence argues that the order of presentation of evidence in Rule 85 presumes that the Prosecution will present its evidence to prove the Accused's guilt, followed by the presentation of evidence to meet the Prosecutor's evidence. According to the Defence submission, while the Prosecution may in certain circumstances be allowed to call further evidence, this is exceptional and cannot be done merely to reinforce evidence already brought or to call evidence previously deemed unnecessary.

11. The Defence submits that nothing Defence Witness Augustin Ndindiliyimana said during his cross-examination on 7 December 2005 with respect to the PID1 documents, would justify the calling of a hand-writing expert as a rebuttal witness.

12. The Defence asserts that if the proposed handwriting expert is allowed to testify for the Prosecution, it would have to find and retain a handwriting expert to examine the questioned documents, and subsequently, testify on behalf of the Defence. Since this process could, according to the Defence, take months, the right of the Accused to a trial without undue delay would be violated.

13. The Defence also objects to the use of any documents or material seized from the Accused at the time of his arrest in the United Kingdom as a basis for comparison with the questioned documents.

14. Finally, the Defence submits that the Prosecution Motion is frivolous and should be dismissed.

HAVING DELIBERATED

15. The Chamber notes the provisions of Rule 89 (C) and (D) of the Rules, and is mindful of the jurisprudence of the Tribunal to the effect that in exercising its discretion to admit evidence under Rule 89, it must consider the relevance and probative value of the proposed evidence. These must be weighed against the potential prejudice that may be occasioned to the accused person by admitting the evidence. Where, in the Chambers' assessment, the prejudicial effect of the proposed evidence is likely to outweigh its probative value, they would generally exercise their discretion against admitting such evidence.[3]

16. The Chamber notes that the Prosecution seeks to call the proposed handwriting expert to prove the authenticity of a set of three documents contained in PID1.

- Document 1 is a letter in French dated 21 April 1994 addressed to an unnamed *Bourgmestre* of Gikongoro. It purports to emanate from, and bears the name and alleged signature of the Accused in the capacity of "Comd Place, BUT-GIK." The document conveys to the *Bourgmestre* the Defence Ministry's plan to train 10 youths from each *secteur* as part of a civil defence programme.
- Document 2 is a letter in French dated 21 April 1994 and calling for a coordination meeting to be held at 9.00a.m. on 25 April 1994. Appearing on the document are the name of the Accused, the title "Lt. Col., Cmd Place But-Gik", as well as a signature alleged to be that of the Accused.
- Document 3 contains three type-written forms on which the names and identity card numbers of three individuals have been inserted by hand. At the top of each form, it is indicated "Butare le 10/5/1994." At the end of each form, it is written "Muvunyi Tharcisse, Lt. Col. Cmd OPS Butare."

17. The Chamber recalls that on 7 December 2005, the Prosecution attempted to tender these documents through Defence Witness Augustin Ndindiliyimana who indicated that he could not tell if the signatures on the PID1 documents were those of the Accused, and could not recognise the stamps on the documents. The Chamber ruled that the documents be marked for identification purposes only. The Prosecution now seeks to introduce the evidence of a proposed handwriting expert, Antipas Nyanjwa, to prove that the signatures on the PID1 documents were in fact those of the Accused. The question before the Chamber therefore is whether, considering all the circumstances, it would be appropriate to allow the Prosecution to call this handwriting expert for the limited purpose of proving that the documents contained in PID1 are authentic and that they bear the signature of the Accused.

18. The Chamber recalls the provisions of Rule 85 which outline the order of presentation of evidence before the Tribunal. In the Chamber's view, Rule 85 envisages that the Prosecution, as accuser, should present all evidence which is available to it, and which it considers relevant to proof of the allegations against the Accused, during the presentation of its own case. That way, the Accused is afforded a fair opportunity to answer the Prosecution evidence when he presents evidence in his defence. According to the ICTY Trial Chamber in the *Celebici* case, "there is the principle that matters probative of the Defendant's guilt should be adduced as part of the case of the Prosecution."[4]

19. Despite this general principle, the Chamber notes that in exercising its discretion to admit evidence under Rule 89 (C), it must seek to receive all evidence that is relevant to the discovery of the truth about the allegations in the Indictment without causing substantial prejudice to the rights of the Accused. Where some prejudice may result from the exercise of its discretion, the Chamber must

[3] *The Prosecutor v. Tharcisse Muvunyi*, Case N°ICTR-2000-55A-T, "Decision on the Prosecutor's Motion to Admit Documents Tendered During the Cross-Examination of Defence Witness Augustin Ndindiliyimana", 28 February 2006; *The Prosecutor v. Bagosora et al*., Case N°ICTR-98-41-T, "Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole", 13 September 2004; *Nyiramasuhuko v. The Prosecutor*, "Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence", A.C., 4 October 2004.

[4] *Prosecutor v. Zelnil Delalic et al* ("Celebici case"), "Decision on the Prosecutor's Alternative request to Reopen the Prosecutor's Case", 19 August 1998, para 18.

consider and adopt such procedural mechanisms that exist in the context of a criminal trial, as may be necessary to cure the prejudice and ensure that a fair trial ensues.

20. The Chamber has closely examined the PID1 documents and concludes, after careful consideration, that hearing evidence relating to these documents will further the Chamber's overall objective of discovering the truth about the allegations made against the Accused in this case.

21. The Chamber is mindful of the late stage of the proceedings. Nonetheless, it is the Chamber's view that the essence of the Motion touches upon the allegation that the Accused was *commandant de place* for Butare and Gikongoro. This allegation is not a new one, and the Defence has, during the presentation of its case, led evidence to contradict it. However, the Chamber is satisfied that the Defence could, in the interests of justice, be given the opportunity to call evidence to contradict or otherwise challenge the evidence of the proposed handwriting expert.

22. Having decided that evidence tending to verify the authenticity of the PID1 documents is admissible in the overall interests of justice, the Chamber must now pronounce itself on the qualifications of the proposed handwriting expert, Antipas Nyanjwa. The Chamber notes that pursuant to Rule 94 *bis*, Defence objects to the qualifications of the proposed handwriting expert and indicates its intention to cross-examine him if he takes the witness stand. The Chamber has carefully considered Mr. Nyanjwa's academic and professional qualifications, his experience in forensic document examination both in his native country and as an admitted handwriting expert before the Tribunal, as well as his expert report.[5] The Chamber is satisfied that by virtue of Mr. Nyanjwa's specialised knowledge, skill, training and experience, he can assist the Chamber in determining the authenticity of the signatures on the PID1 documents.

23. The Chamber notes the Defence objection that documents seized from the Accused at the time of his arrest in the United Kingdom should not be used for the purposes of comparison with the disputed signatures contained in PID1. The Defence argues that the Warrant of Arrest and Order for Transfer of the Accused dated 2 February 2000[6] did not authorise seizure of any materials from the Accused. As a result, argues the Defence, the documents seized from the Accused when he was arrested in the United Kingdom in 2000 were illegally seized and cannot be utilised by the Chamber for the purpose of comparing with other disputed documents.

23.* The Chamber notes the decision of the ICTY Appeals Chamber in *Stakic* where the Defence argued that certain documents seized from the Accused at the time of his arrest were illegally obtained and therefore should be excluded. The Defence further argued that admitting the documents would violate the fair trial rights of the Accused. The Appeals Chamber held that Rule 39 of the ICTY Rules empowers the Prosecutor to collect evidence and conduct on-site investigations, and that the Defence had failed to establish that in the circumstances of the case, the search and seizure were illegal under the Rules or international law.[7] The Chamber agrees with the ICTY Appeals Chamber that the Defence must show that the search and seizure as a result of which the documents were obtained were tainted with illegality either under the Tribunal's Rules or at international law.

24. In addition, the Chamber notes that the arrest and transfer of persons accused before the Tribunal involves the application of both international and domestic law. This is envisaged by Article 28 of the Tribunal's Statute which requires States to cooperate with the Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian

[5] The Chamber notes that Mr. Nyanjwa has testified as a handwriting expert before the Tribunal on at least two previous occasions. See *Prosecutor v. Nyiramasuhuko et al.*, "Decision on Prosecutor's Motion for Leave to Add a Handwriting Expert to His Witness List", 14 October 2004; and *Prosecutor v. Bagosora et al.*, "Decision on the Prosecution Motion to Recall Witness Nyanjwa", 29 September 2004.
[6] The Prosecutor v. Tharcisse Muvunyi, Idelphonse Nizeyimana, Idelphonse Hategikimana, "Warrant of Arrest and Order for Transfer and Detention", 2 February 2000.
* The wrong numeration is the fact of the Tribunal.
[7] *Prosecutor v. Milomir Stakic*, "Decision", 10 October 2002, A.C.

law. It is the Chamber's view that while the Warrant of Arrest and Order for Transfer of the Accused was issued by an International Tribunal, its actual execution had to take place with the cooperation of States and also under the provisions of the domestic law. The domestic law of the United Kingdom, where the Accused was arrested, provides sufficient grounds for search and seizure of materials either during the course of an arrest or after an arrest has been made.[8]

25. The Chamber is therefore satisfied on the basis of Rule 39 of the Tribunal's Rules, as well as the provisions of English law cited above, that a sufficient legal basis existed for the seizure of materials from the Accused at the time of his arrest, and for their subsequent use in proceedings before this Tribunal. The Defence submission on this issue therefore lacks merit and is dismissed.

FOR THE FOREGOING REASONS, THE CHAMBER

GRANTS the motion and hereby ORDERS that:

1. The proposed handwriting expert, Antipas Nyanjwa, shall testify on 8 or 9 May 2006;

2. The Defence shall, if it so desires, file a Motion to call a witness in rejoinder to contradict or otherwise challenge the evidence of the above-named Prosecution witness;

3. The said Defence witness in rejoinder shall, if the Motion is granted, testify on 1 and 2 June 2006.

Arusha, 26 April 2006.

[Signed] : Asoka de Silva; Flavia Lattanzi; Florence Rita Arrey

[8] See Police and Criminal Evidence Act, 1984.
Section 17 (1) (a) provides *inter alia*, that "… a constable may enter and search any premises for the purpose (a) of executing a warrant of arrest issued in connection with or arising out of criminal proceedings; …"
Section 18 (1) provides in relevant part that "… a constable may enter and search any premises occupied or controlled by a person who is under arrest for an arrestable offence, if he has reasonable grounds for suspecting that there is on the premises evidence … that relates (a) to that offence; or (b) to some other arrestable offence which is connected with or similar to that offence.
(2) A constable may seize and retain anything for which he may search under subsection (1) above."

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15. Reasons for the Oral Decision on Muvunyi's Motion for Certification to Appeal the Chamber's Decision of 26 April 2006
16. 12 May 2006 (ICTR-2000-55A-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Silva, Presiding Judge; Flavia Lattanzi; Florence Rita Arrey

Tharcisse Muvunyi – Certification to appeal – Handwriting expert – Issue significantly affecting the fair and expeditious conduct of the proceedings, Potential advancement of the proceedings due to an immediate resolution – Motion granted

International Instrument Cited :

Rules of Procedure and Evidence, Rule 73 (B)

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Tharcisse Muvunyi, Decision on the Prosecutor's Motion to Admit Documents Tendered During the Cross-Examination of Defence Witness Augustin Ndindiliyimana, 28 February 2006 (ICTR-2000-55A) ; Trial Chamber, The Prosecutor v. Tharcisse Muvunyi, Decision on the Prosecutor's Motion Pursuant to Trial Chamber's Directives of 7 December 2005 for the Verification of the Authenticity of Evidence Obtained out of Court Pursuant to Rules 89 (C) and (D), 26 April 2006 (ICTR-2000-55A)

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

SITTING as Trial Chamber II composed of Judge Asoka de Silva, Presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey (the "Chamber");

BEING SEIZED of the "Accused's Motion for Certification to Appeal the Decision of April 26, 2006 Pursuant to Rule 73", filed on 2 May 2006 (the "Motion");

HAVING RECEIVED the "Prosecutor's Response to Accused's Motion for Certification to Appeal the Decision of April 26, 2006 Pursuant to Rule 73", filed on 4 May 2006 (the "Response");

RECALLING its "Decision on the Prosecutor's Motion Pursuant to Trial Chamber's Directive of 7 December 2005 for Verification of Evidence Obtained out of Court Pursuant to Rules 89 (C) and (D)", rendered on 26 April 2006 (the "Impugned Decision");

RECALLING FURTHER its Oral Decision of 8 May 2006 granting the Defence Motion for Certification of Appeal pursuant to Rule 73 (A) of the Rules and indicating that the written reasons would soon follow (the "Oral Decision");[1]

[1] On 8 May 2006, prior to hearing the testimony of the handwriting expert, the Chamber rendered an Oral Decision granting the Defence Motion for Certification and stating that these written reasons would soon follow.

NOW PROVIDES THE REASONS for such Oral Decision on the basis of written submissions filed by the Parties.

16.1.1. Submissions of the Parties

16.1.1.1. The Defence

1. The Defence requests the Chamber to certify an appeal against the Decision of 26 April 2006 in which the Chamber granted the Prosecution leave to present the evidence of a handwriting expert with regard to the signatures appearing on certain documents admitted for identification purposes only. The Defence submits that by granting the Prosecution motion, the Chamber erred and that it "confused and mixed the principles of evidence admissibility in Rule 89 and the order of presentation of evidence in Rule 85."[2] The Defence further submits that the Chamber "abused its discretion in that it misdirected itself as to the principle of law to be applied" and "by failing to give sufficient weight to the order of trial set out in Rule 85 and the underlying reason for that policy."[3]

2. Quoting at length from a decision by the *Celebici* Trial Chamber at the ICTY, the Defence argues that "the order of presentation set out in Rule 85 is based on the principle that matters probative of the defendant's guilt should be adduced during the Prosecutor's case-in-chief."[4] According to the Defence, the Impugned Decision unfairly grants the Prosecution the opportunity to reopen its case, since the documents in question have long been in the Prosecution's possession and the proposed testimony of the handwriting expert could have been adduced earlier through the exercise of reasonable diligence.[5]

3. The Defence asserts that the Impugned Decision satisfies the criteria for certification because it "clearly affects the fair and expeditious conduct of the proceedings"[6] and because an "immediate decision by the Appeals Chamber would materially advance the proceeding by preventing the introduction of inadmissible evidence".[7]

16.1.1.2. The Prosecution

4. The Prosecution submits that the reasoning underlying the Defence request for certification is "misguided."[8] According to the Prosecution, in the Impugned Decision, the Chamber "gave sufficient weight to the order of trial set out in Rule 85"[9] and "accurately deals with issues relating to Rule 89 (C)".[10] The Prosecution further submits that even if the Chamber erred by granting leave to call the handwriting expert, the Defence still "bears the onus of demonstrating how such an error would significantly affect the fair and expeditious conduct of the proceedings or that its immediate resolution would materially advance the proceedings".[11] In the view of the Prosecution, the Impugned Decision was sound and the Defence request for certification should be denied.[12]

HAVING DELIBERATED

5. The Chamber recalls the provisions of Rule 73 (B) pursuant to which it may grant certification of an interlocutory appeal if the following two criteria are satisfied:

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[2] Para. 2 of the Defence Motion.
[3] Para. 10 of the Motion.
[4] Para. 5 (b) of the Motion.
[5] Paras. 11-12, 16 of the Motion.
[6] Para. 20 of the Motion.
[7] Para. 21 of the Motion.
[8] Para. 7 of the Prosecution Response.
[9] Para. 8 of the Response.
[10] Para. 8 of the Response.
[11] Para. 14 of the Response.
[12] Para. 16 of the Response.

(i) the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and

(ii) in the Chamber's opinion, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

6. The Chamber further recalls that during the cross-examination of Defence Witness Augustin Ndindiliyimana on 7 December 2005, the Prosecution attempted to tender into evidence certain documents purportedly bearing the signature of the Accused and identifying him as the *Commandant de place* of Butare and Gikongoro *préfectures*.[13] On that occasion, because the witness was unable to identify the signature and seal on the documents, the Chamber refused to admit them as exhibits. Instead, the Chamber admitted the documents for identification purposes only as "PID1".[14] The Chamber also directed that the Prosecution could prove the authenticity of the documents by calling other witnesses.[15]

7. In a subsequent written Decision, the Chamber again denied a Prosecution request to admit as exhibits the documents contained in PID1, noting that although the documents appeared at face value to be relevant to this case, they lacked *prima facie* reliability.[16] Relying on the Chamber's directive of 7 December 2005, the Prosecution filed a motion seeking leave to call a handwriting expert to testify to the authenticity of the documents contained in PID1. It is the Chamber's Decision of 26 April 2006 granting the Prosecution request that gave rise to this Defence Motion for certification of appeal.[17]

8. With respect to the criteria for granting certification, the Chamber notes that the allegation that Muvunyi was the *Commandant de place* of Butare and Gikongoro *préfectures* has been very seriously disputed throughout these proceedings. On the one hand, the allegation has constituted an important aspect of the Prosecution case. On the other hand, the Defence has consistently denied the allegation and has repeatedly challenged all attempts to introduce the said documents. Because the Impugned Decision allowed the Prosecution to call a handwriting expert to verify the signatures on the documents, it would have an impact on the rest of these proceedings. To that extent, the Chamber considers that the Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings. Thus, the first criterion for certification is satisfied.

9. The Chamber is also of the view that an immediate resolution by the Appeals Chamber may materially advance the proceedings, especially during the Chamber's evaluation of the evidence in the context of the final judgement. Therefore, the second criterion for certification has also been met.

FOR THE FOREGOING REASONS, THE CHAMBER

GRANTED the Defence Motion and

CERTIFIED an appeal against the Decision of 26 April 2006.

Arusha, 12 May 2006.

[Signed] : Asoka de Silva; Flavia Lattanzi; Florence Rita Arrey

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[13] See the Transcript of the Proceedings, 7 December 2005, pp. 26-40 (English).
[14] T. 7 December 2005, p. 34 (English).
[15] T. 7 December 2005, p. 34 (English).
[16] *The Prosecutor v. Tharcisse Muvunyi*, Case N°ICTR-2000-55A, "Decision on the Prosecutor's Motion to Admit Documents Tendered During the Cross-Examination of Defence Witness Augustin Ndindiliyimana", 28 February 2006, para. 19.
[17] *The Prosecutor v. Tharcisse Muvunyi*, Case N°ICTR-2000-55A, "Decision on the Prosecutor's Motion Pursuant to Trial Chamber's Directives of 7 December 2005 for the Verification of the Authenticity of Evidence Obtained out of Court Pursuant to Rules 89 (C) and (D)", 26 April 2006.

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17. Order Assigning Judges to a Case before the Appeals Chamber 18. 18 May 2006 (ICTR-2000-55A-AR73(C))

(Original : English)

Appeals Chamber

Judge : Fausto Pocar, Presiding Judge

Tharcisse Muvunyi – Appeals Chamber – Judges – Composition

International Instruments Cited :

Document IT/245 of the International Criminal Tribunal for the former Yugoslavia ; Rules of Procedure and Evidence, Rules 73 (C) and 107 ; 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 the Prosecutor's Motion Pursuant to Trial Chamber's Directives of 7 December 2005 for the Verification of the Authenticity of Evidence Obtained Out of Court Pursuant to Rules 89 (C) et (D)" rendered on 26 April 2006;

NOTING "Muvunyi's Interlocutory Appeal, Pursuant to Rule 73 (C) Pursuant to the Trial Chamber's Oral Decision of May 8, 2006 and Written Reasons for the Oral Decision of May 12, 2006" filed on 15 May 2006;

NOTING the Trial Chamber's Oral Decision of 8 May 2006 in which certification to appeal was granted and its "Reasons for the Oral Decision on Muvunyi's Motion for Certification to Appeal the Chamber's Decision of 26 April 2006" of 12 May 2006;

CONSIDERING Articles 11 (3) and 13 (4) of the Statute of the International Tribunal and Rules 73 (C) and 107 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 *Tharcisse Muvunyi v. The Prosecutor,* Case N°ICTR-2000-55A-AR73(C), shall be composed as follows:

Judge Fausto Pocar, Presiding
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz

Judge Wolfgang Schomburg

Done in English and French, the English version being authoritative.

Done this 18th day of May 2006, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

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19. Corrigendum to "Order Assigning Judges to a Case Before the Appeals Chamber"
20. 22 May 2006 (ICTR-2000-55A-AR73(C))

(Original : English)

Appeals Chamber

Judge : Fausto Pocar, Presiding Judge

Tharcisse Muvunyi – Corrigendum – Mistakes in the composition of the Appeals Chamber

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 "Order Assigning Judges to a Case before the Appeals Chamber" issued on 18 May 2006 ("Order");

NOTING that the "HEREBY ORDER" on page 2 of the Order should read as follows:

"HEREBY ORDER that the Bench in *Tharcisse Muvunyi v. The Prosecutor,* Case N°ICTR-2000-55A-AR73(C), shall be composed as follows:

Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg";

ON THE BASIS OF THE FOREGOING

HEREBY ORDER that the Order shall be amended to read as set out above.

Done in English and French, the English version being authoritative.

Done this 22nd day of May 2006, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

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21. Order for the Production of an Original Document Pursuant to Rules 54 and 98 22. 26 May 2006 (ICTR-2000-55A-T)

(Original : English)

Trial Chamber II

Judge : Asoka de Silva

Tharcisse Muvunyi – Production of an original document – Lack of clarity and legibility of the copy of the document attached to the motion

International Instrument Cited :

Rules of Procedure and Evidence, Rules 54, 73 (A) and 98

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

SITTING as Trial Chamber II composed of Judge Asoka de Silva, Designated pursuant to Rule 73 (A),

BEING SEIZED of the "Tharcisse Muvunyi's Motion for Admission of Witness Testimony Pursuant to Rule 92 *bis*", filed on 16 May 2006 (the "Motion");

HAVING RECEIVED the
(i) "Prosecutor's Response to Accused Tharcisse Muvunyi's Motion for Admission of Witness Testimony Pursuant to Rule 92 *bis*", filed on 19 May 2006 (the "Response"); and
(ii) "Tharcisse Muvunyi's Reply to the Prosecutor's Response to the Accused Tharcisse Muvunyi's Motion for Admission of Witness Testimony Pursuant to Rule 92 *bis*", filed on 22 May 2006 (the "Reply");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular, Rules 54 and 98;

NOTING that the copy of the *affidavit* attached to the Motion is not very clear and that some of the markings on it are not legible;

HEREBY ORDERS the Defence for the Accused Tharcisse Muvunyi, pursuant to Rules 54 and 98, to file with the Registry, not later than Friday, 2 June 2006, the original *affidavit* that is the subject of the Motion.

Arusha, 26 May 2006.

[Signed] : Asoka de Silva

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23. Decision on Interlocutory Appeal
24. 29 May 2006 (ICTR-2000-55A-AR73(C))

(Original : English)

Appeals Chamber

Judges : Wolfgang Schomburg, Presiding Judge; Mohamed Shahabuddeen; Mehmet Güney; Liu Daqun; Theodor Meron

Tharcisse Muvunyi – Interlocutory appeal – Admission of evidence, Discretion of the Trial Chamber – No abuse of the discretion of the Trial Chamber in allowing the Prosecution to present evidence concerning the authenticity of the documents – Admission of the documents only potential and ignorance of their probative value – Appeal denied

International Instrument Cited :

Rules of Procedure and Evidence, Rules 89 (C) and 89 (D)

International Cases Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecutor's Interlocutory Appeal Regarding Exclusion of Evidence, 19 December 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. Tharcisse Muvunyi, Decision on the Prosecutor's Motion Pursuant to Trial Chamber's Directives of 7 December 2005 for the Verification of the Authenticity of Evidence Obtained out of Court Pursuant to Rules 89 (C) and (D), 26 April 2006 (ICTR-2000-55A) ; Trial Chamber, The Prosecutor v. Tharcisse 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 (ICTR-2000-55A)

I.C.T.Y.: 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-2002-54)

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 Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of an interlocutory appeal filed by Tharcisse Muvunyi[1] against a Trial Chamber decision, allowing the parties to present expert testimony at the close of the case with respect to the authenticity of three disputed documents.[2] The

[1] *Tharcisse Muvunyi v. The Prosecutor*, Case N°ICTR-2000-55A-AR73(C), Muvunyi's Interlocutory Appeal, Pursuant to Rule 73 (C) Pursuant to the Trial Chamber's Oral Decision of May 8, 2006 and Written Reasons for the Oral Decision of May 12, 2006, filed 15 May 2006 ("Muvunyi Appeal").

[2] *The Prosecutor v. Tharcisse Muvunyi*, Case N°ICTR-2000-55A-T, Decision on the Prosecutor's Motion Pursuant to Trial Chamber's Directives of 7 December 2005 for the Verification of the Authenticity of Evidence Obtained out of Court Pursuant to Rules 89 (C) and (D), 26 April 2006 ("Impugned Decision"). The Trial Chamber certified the appeal in an oral

Prosecution responded to the appeal on 22 May 2006,[3] and Mr. Muvunyi filed his reply on 25 May 2006.[4] The Appeals Chamber is also seized of Mr. Muvunyi's separate motion to stay the trial proceedings pending the disposition of this appeal.[5]

24.1.1. Background

10. This appeal concerns the Prosecution's efforts to authenticate copies of three documents, allegedly identifying Mr. Muvunyi as *Commandant de la place* of Butare and Gikongoro *préfectures*.[6] The parties dispute whether Mr. Muvunyi held the position of area commander for the two *préfectures*, and the Trial Chamber characterized this issue as relevant to the indictment and important to the Prosecution's case.[7] The Prosecution first moved to tender these documents during the cross-examination of the first defence witness, Augustine Ndindiliyimana.[8] The Trial Chamber refused to admit them into evidence at that time because, in its view, the Prosecution had failed to establish their *prima facie* reliability.[9] The Trial Chamber admitted the documents for identification purposes only and directed that the Prosecution could call witnesses to authenticate the documents at a later stage.[10]

11. In the Impugned Decision, the Trial Chamber granted the Prosecution's request to call a handwriting expert to authenticate the documents, and heard the witness on 8 May 2006.[11] The Impugned Decision also authorized Mr. Muvunyi to call evidence to contradict or otherwise challenge the evidence of the Prosecution's handwriting expert.[12] The Defence elected to call its own handwriting expert, who is expected to testify on 5 June 2006.[13] The parties' final written and oral submissions in the case are anticipated in June 2006.[14]

12. On appeal, Mr. Muvunyi principally argues that the Trial Chamber abused its discretion in allowing the Prosecution to "reopen" its case at the close of the trial and to present additional incriminating evidence which could have been presented earlier through the exercise of due diligence.[15] The Prosecution concedes that the expert evidence and the disputed documents could, and perhaps should, have been presented during its case in chief in support of its proof that Mr. Muvunyi was the area commander, but nonetheless contends that its admission at this stage is well within the Trial Chamber's discretion and authority.[16]

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decision dated 8 May 2006 and issued its written reasons in *The Prosecutor v. Tharcisse Muvunyi*, Case N°ICTR-2000-55A-T, Reasons for the Oral Decision on Muvunyi's Motion for Certification to Appeal the Chamber's Decision of 26 April 2006, 12 May 2006 ("Certification Decision").

[3] *Tharcisse Muvunyi v. The Prosecutor*, Case N°ICTR-2000-55A-AR73(C), Prosecutor's Response to "Muvunyi's Interlocutory Appeal, Pursuant to Rule 73 (C) Pursuant to the Trial Chamber's Oral Decision of May 8, 2006 and Written Reasons for the Oral Decision of May 12, 2006", filed 22 May 2006 ("Prosecuton's Response").

[4] *Tharcisse Muvunyi v. The Prosecutor*, Case N°ICTR-2000-55A-AR73(C), Muvunyi's Reply to the Prosecutor's Response to Muvunyi's Interlocutory Appeal, filed 25 May 2006 ("Muvunyi Reply").

[5] *Tharcisse Muvunyi v. The Prosecutor*, Case N°ICTR-2000-55A-AR73(C), Emergency Motion to Stay the Trial Chamber Proceedings Pending the Outcome of Muvunyi's Interlocutory Appeal, Pursuant to Rule 73 (C) Pursuant to the Trial Chamber's Oral Decision of May 8, 2006 and Written Reasons for the Oral Decision of May 12, 2006, filed 15 May 2006 ("Muvunyi Emergency Motion"). The Prosecution responded in *Tharcisse Muvunyi v. The Prosecutor*, Case N°ICTR-2000-55A-AR73(C), Prosecutor's Response to the "Emergency Motion to Stay the Trial Chamber Proceedings Pending the Outcome of Muvunyi's Interlocutory Appeal, Pursuant to Rule 73 (C) Pursuant to the Trial Chamber's Oral Decision of May 8, 2006 and Written Reasons for the Oral Decision of May 12, 2006", filed on 18 May 2006 ("Prosecution Response to Muvunyi Emergency Motion"). Mr. Muvunyi replied on 22 May 2006.

[6] Certification Decision, paras. 6-9; Muvunyi Appeal, para. 2.

[7] Certification Decision, para. 8; Impugned Decision, para. 20.

[8] Impugned Decision, para. 1; Muvunyi Appeal, paras. 6-9.

[9] Impugned Decision, para. 1.

[10] Impugned Decision, para. 1.

[11] Impugned Decision, para. 21; Muvunyi Emergency Motion, para. 4.

[12] Impugned Decision para. 21.

[13] Muvunyi Appeal, para. 2; Prosecution Response to Muvunyi Emergency Motion, para. 6.

[14] Muvunyi Emergency Motion, para. 4.

[15] Muvunyi Appeal, paras. 13-21; Muvunyi Reply, paras. 7-23.

[16] Prosecution Response, paras. 3, 9, 12-26.

24.1.2. Discussion

13. The decision to admit or exclude evidence pursuant to Rule 89 (C) of the Rules of Procedure and Evidence of the Tribunal ("Rules") as well as decisions related to the general conduct of the proceedings are matters within the discretion of the Trial Chamber.[17] A Trial Chamber's exercise of discretion will be reversed 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.[18]

14. In the view of the Appeals Chamber, Mr. Muvunyi has identified no discernible error on the part of the Trial Chamber in allowing the parties to call evidence concerning the authenticity of the three disputed documents. The Appeals Chamber notes that the Prosecution cross-examined Mr. Ndindiliyimana on the basis of the documents. At the time, Mr. Muvunyi raised an issue concerning the reliability of the documents, and the Trial Chamber authorized the Prosecution to call additional evidence to verify their authenticity.[19] Rule 89 (D) of the Rules provides the Trial Chamber with clear authority to do so. In determining the timing of the testimony related to the authenticity of the documents, the Trial Chamber expressly considered the late stage of the proceedings and sought to avoid any possible prejudice to Mr. Muvunyi by allowing him to call evidence to contradict or otherwise challenge the evidence of the Prosecution's handwriting expert.[20] Mr. Muvunyi has pointed to no specific prejudice arising from this proposed procedure beyond an assertion of general unfairness.[21] In these circumstances, the Appeals Chamber cannot find that the Trial Chamber abused its discretion in allowing the Prosecution to present evidence concerning the authenticity of the documents.

15. Mr. Muvunyi's arguments focus on the possible admission of the three disputed documents. The Appeals Chamber observes that, at this stage, it is not clear if the three disputed documents will be admitted and, if so, what probative value, if at all, the Trial Chamber will give them in the context of its final assessment of the record.[22]

24.1.3. Disposition

16. For the foregoing reasons, the Appeals Chamber DISMISSES Mr. Muvunyi's appeal and DISMISSES as moot his request to stay the trial proceedings.

Done in English and French, the English version being authoritative.

Done this 29th day of May 2006, at The Hague, The Netherlands.

[Signed] : Wolfgang Schomburg

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[17] *The Prosecutor v. Théoneste Bagosora et al.*, Case N°ICTR-98-41-AR93, ICTR-98-41-AR93.2, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, 19 December 2003, para. 11 ("*Bagosora* Decision"). See also *Pauline Nyiramasuhuko v. The Prosecutor*, Case N°ICTR-98-42-AR73.2, Decision on Pauline Nyiramasukoho's Appeal on the Admissibility of Evidence, 4 October 2004, para. 5 ("*Nyiramasuhuko* Decision"); *Slobodan Milošević v. The Prosecutor*, Case N°IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, para. 9 ("*Milošević* Decision").

[18] *Milošević* Decision, para. 10; *Bagosora* Decision, para. 11.

[19] Impugned Decision, para. 1.

[20] Impugned Decision, paras. 18, 21.

[21] Muvunyi Appeal, para. 16 (a).

[22] *Nyiramasuhuko* Decision, paras. 7, 8 ("[A] distinction must be drawn between, on the one hand, admissibility of evidence, and, on the other, the exact probative weight to be attached to it […] [T] he admission into evidence does not in any way constitute a binding determination as to the authenticity or trustworthiness of the documents sought to be admitted. These are to be assessed by the Trial Chamber at a later stage in the case when assessing the probative weight to be attached to the evidence.").

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25. Decision on Motion to Strike or Exclude Portions of Prosecutor's Exhibit N°34, Alternatively Defence Objections to Prosecutor's Exhibit N°34
26. 30 May 2006 (ICTR-2000-55A-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Silva, Presiding Judge; Flavia Lattanzi; Florence Rita Arrey

Tharcisse Muvunyi – Exclusion of portions of an exhibit – Reconsideration of a decision – Admission of evidence – Differences between the original document in Kinyarwanda and the English translation supplied by the Prosecution, translation neither prima facie reliable nor authentic – Inherent power of the Chamber to reconsider its decision – Diligence of the parties – Motion granted

International Instrument Cited :

Rules of Procedure and Evidence, Rules 73 (A) and 89 (C)

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. 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)

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Zdravko Mucić et al., Judgement and Sentence Appeal, 8 April 2003 (IT-96-21) ; Appeals Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Prosecutor's Interlocutory Appeal Regarding Exclusion of Evidence, 19 December 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Slobodan Milošević, Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balevic, Vladislav Jovanovic, Vukasin Andric, and Dobre Aleksovski and Decision Proprio Motu Reconsidering Admission of Exhibits, 17 May 2005 (IT-02-54)

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

SITTING as Trial Chamber II composed of Judge Asoka de Silva, Presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey (the "Chamber");

BEING SEIZED of the "Motion to Strike or Exclude Portions of Prosecutor's Exhibit N°34, Alternatively Defence Objections to Prosecutor's Exhibit N°34", filed on 24 March 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");

NOW DECIDES the Motion pursuant to Rule 73 (A) of the Rules on the basis of the written submissions filed by the Defence.

26.1.1. Introduction

1. On 10 March 2006, during the cross-examination of Defence Witness MO15, the Prosecution put to the witness two paragraphs of a document purported to be a Judgement of the Special Bench of the War Council of the Republic of Rwanda, sitting in Butare. The Prosecution tendered the entire document to be admitted into evidence.[1] The Defence objected to the admission of this document as an exhibit.[2] The Prosecution entered what it purported to be the original document in Kinyarwanda and its purported English translation. The Chamber admitted those two documents as Prosecution Exhibits P. 34A and P. 34 respectively and directed that because the Defence had just been provided with a copy of the said document during the proceedings of 10 March 2006, it was free to review the document and bring any issues to the attention of the Chamber at a later stage.[3]

26.1.2. Submissions of the Defence

2. In its Motion, the Defence requests the Chamber to entirely exclude Prosecution Exhibit 34 ("Exhibit P. 34") and Prosecution Exhibit 34A ("Exhibit P. 34A"). Alternatively, the Defence urges the Chamber to exclude portions which do not appear relevant to the witness's credibility. Additionally, the Defence submits that the Chamber should strike from the record all other cross-examination based on this exhibit.[4]

3. The Defence submits that Exhibit P. 34, a document of 78 pages, marked K0364204 through K0364281, is allegedly a Judgement by the Special Bench of the War Council of the Republic of Rwanda, sitting in Butare, in Respect of Offences Constituting the Crime of Genocide or Crimes against Humanity (the "Judgement"). The Defence adds that Exhibit P. 34A is allegedly the Kinyarwanda version of Exhibit P. 34 and that this document was first disclosed to the Defence in court on the day it was put to Witness MO15 by the Prosecution. For the purpose of Rule 5 of the Rules, the Defence argues that this is the earliest opportunity it has to object to this document.

4. The Defence asserts that the authenticity and reliability of Exhibit P. 34 are questionable. It also states that only one paragraph of the document is relevant for the purpose for which the Prosecution introduced it and that the document was not provided in its entirety.[5]

5. The Defence further submits that Exhibit P. 34 is a third party's summation of how witnesses, including Defence Witness MO15, testified in the case in which the Judgement was allegedly rendered and does not contain actual statements of Defence Witness MO15.

6. The Defence asserts that the Prosecution was disingenuous at best and attempting a fraud on the Court at worst when it implied that Defence Witness MO15 had made "testifying for his former bosses an art form". Furthermore, and contrary to the Prosecution assertion, the Defence argues that the testimony of Witness MO15 before the Special Bench of the War Council of the Republic of Rwanda was for the Prosecutor, not for the Defence.

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[1] T. 10 March 2006, p. 40 (ICS).
[2] T. 10 March 2006, p. 40 (ICS).
[3] T. 10 March 2006, pp. 44, 48 and 50 (ICS).
[4] The submissions of the Defence are as follows: - in para. 1 of its Motion, the Defence seeks to exclude portions of the said exhibit or, alternatively, to exclude it entirely (see also the title of the Motion), - and in para. 15 of the same Motion, the Defence first asks the Chamber to exclude the entire exhibit or, alternatively, to "exclude all but the single paragraph possibly relevant to the witness' credibility".
[5] Exhibit P. 34, p. 15, between paras. 90 and 91, p. 16, between paras. 96 and 97.

7. Moreover, the Defence submits that even if the document is admissible, it is nothing more or less than the purported record of what occurred. According to the Defence, since the document is neither the witness's statement nor one adopted by him, it has no relevance to his credibility. The Defence adds that even if a portion of the document were admissible to impeach the witness, the remainder would not be relevant for that purpose.

HAVING DELIBERATED

8. The Chamber notes that the real issue raised by this Motion is whether the Chamber should reconsider its earlier Decision admitting Exhibits P34 and P34A into evidence. The Chamber recalls the jurisprudence of the ICTR and ICTY according to which a Trial Chamber may reconsider its own decisions if it discovers a new fact that was not known to the Chamber at the time the earlier decision was made, if it finds that a material change in circumstances has occurred, or if there is reason to believe that a previous decision was erroneous and therefore prejudicial to either party.[6]

9. Rule 89 (C) of the Rules gives the Chamber a broad discretion to admit evidence, including documents, which it considers relevant and of probative value.[7] The Appeals Chamber in *Nyiramasuhuko v. The Prosecutor* affirmed that "at the stage of admissibility, only the beginning of proof that evidence is reliable, namely, that sufficient indicia of reliability have been established, is required for evidence to be admissible."[8]

10. The Chamber has considered the Defence submissions, and had the opportunity to review Exhibits P. 34 and P. 34A more closely than was possible during the hearing. The Chamber notes that the Prosecution has not given any explanation about the source of the translation of the document in question. In addition, there is no indication that the said translation was certified as correct by the Tribunal's Language Services Section or any other person or organization.

11. The Chamber has, however, closely examined the document in Kinyarwanda *vis-à-vis* the purported English translation, and concludes that on their face, the two documents do not seem to relate to the same facts. The two documents appear to be different in their structure and do not address the same persons. For example, the names of "Rwangampuhwe", "Gatera", "Kajuga" (1st para.), "Mukarubibi" (2nd, 4th, 5th, 7th paras.), "EER" (2nd, 3rd paras.) "Karenzi" (3rd para.) appear on the first page of Exhibit P. 34A while they do not appear in the corresponding paragraphs or even the first two pages of Exhibit P. 34. Moreover, Exhibit P. 34 bears the following title on the top of the first page: "The Special Bench of the War Council of the Republic of Rwanda, sitting in Butare in Respect of Offences Constituting the Crime of Genocide or Crimes Against Humanity, Delivered the Following Judgement, On July 1998: the Hearing of Which where Held on 11, 25, 26 May; 9, 10, 16, 17, 18, 19, 24, 25 and 26 June 1998…". No such header can be found on top of Exhibit P. 34A. The Chamber also notes that the last two pages of Exhibit P. 34A contain tables indicating amounts in Rwandan Francs whereas the last two pages of document P. 34 contain text organised in paragraphs with no reference to any amount of money.

12. The Chamber also recalls that during the proceedings of 10 March 2006, the Prosecution relied exclusively on the document in English later entered as Exhibit P. 34, and it was only when the Chamber was marking the document as an exhibit that the Prosecution introduced a document in

[6] *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; *The Prosecutor v. Milosevic*, Case N°IT-02-54-T, "Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witness Mitar Balevic, Vladislav Jovanovic, Vukasin Andric, and Dobre Aleksovski, and Decision *Proprio Motu* Reconsidering Admission of Exhibits 837 and 838 Regarding Evidence of Defence Witness Barry Lituchy", 17 May 2005, paras. 6-8; *The Prosecutor v. Mucic et al.*, Case IT-96-21-A*bis*, "Judgement on Sentence Appeal", 8 April 2003, para. 49.

[7] *The Prosecutor v. Bagosora et al.*, Case N°ICTR-98-41-AR93 and ICTR-98-41-AR93.2, "Decision on the Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence", Appeals Chamber, 19 December 2003, para. 11.

[8] *Nyiramasuhuko v. The Prosecutor*, Case N°ICTR-2000-56-T, "Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence", 4 October 2004, para. 7.

Kinyarwanda to be admitted as the original version of Exhibit P. 34. Therefore, the Chamber considers that since Exhibit P. 34, the purported English translation, appears to be a different document from the original Kinyarwanda document, Exhibit P. 34 is not *prima facie* reliable or authentic.

13. The Chamber has also taken into account the Defence submission that the translator has indicated that two portions of the original document were missing and therefore could not be translated.[9] Having examined Exhibit P. 34A, the Chamber finds that pages marked K035894 through K035897 are missing.

14. In view of its finding that Exhibit P. 34 lacks *prima facie* reliability and authenticity, the Chamber concludes that the document should not have been admitted as an exhibit. The Chamber therefore invokes its inherent power to reconsider its Decision of 10 March 2006 admitting into evidence a purported translation into English of a Judgement of the War Council in Rwanda and its Kinyarwanda original as Exhibits P. 34 and P. 34A respectively.

15. In light of the Chamber's finding that this document lacks *prima facie* reliability or authenticity, the Chamber is of the view that the evidence associated with these exhibits and elicited during cross-examination, should equally not be taken into account.

16. Finally the Chamber wishes to remind the Parties of their obligation to act with all necessary diligence when submitting materials to be admitted as evidence.

FOR THE FOREGOING REASONS, THE CHAMBER

GRANTS the Defence Motion;

ORDERS that Prosecution Exhibit P. 34 and Prosecution Exhibit P. 34A be excluded from the record.

Arusha, 30 May 2006.

[Signed] : Asoka de Silva; Flavia Lattanzi; Florence Rita Arrey

[9] P. 15 of Exhibit P. 34, between paras. 90 and 91: "[Translator's note: pages 21 through 29 of the Jugement (*sic*) missing]; p. 16 of Exhibit P. 34, between paras. 96 and 97: "[Translator's note: pages 31 through 59 of the Judgement missing].

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27. Decision on Muvunyi's Additional Objections to the Deposition Testimony of Witness QX Pursuant to Articles 20 of the Statute and Rules 44, 44 bis and 73 (F) of the Rules of Procedure and Evidence 28. 31 May 2006 (ICTR-2000-55A-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Silva, Presiding Judge; Flavia Lattanzi; Florence Rita Arrey

Tharcisse Muvunyi – Objections to the deposition testimony of a witness – Rights of the Accused, Legal assistance, Examination of Prosecution's witnesses – Clarification of the notion of effective assistance of a Counsel – Special circumstances surrounding the recording of the witness's deposition, Accused represented only by the Duty Counsel, Behaviour of the Duty Counsel – Frivolous motion – Motion denied

International Instruments Cited :

International Covenant on Civil and Political Rights, Art. 14 ; Rules of Procedure and Evidence, Rules 44, 44 (A), 44 bis, 71, 73 (A) and 73 (F) ; Statute, Art. 20, 20 (4) (d) and 20 (4) (e)

International Cases Cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Jean Kambanda, Judgement, 19 October 2000 (ICTR-97-23) ; Appeals Chamber, The Prosecutor v. Jean-Paul Akayesu, Judgement, 1 June 2001 (ICTR-96-4 ; Trial Chamber, The Prosecutor v. Tharcisse Muvunyi et al., Decision on the Prosecutor's Extremely Urgent Motion for the Deposition of Witness QX, 11 November 2003 (ICTR-2000-55) ; Trial Chamber, The Prosecutor v. Tharcisse Muvunyi et al, Decision on the Accused's Request to Instruct the Registrar to Replace Assigned Lead Counsel, 18 November 2003 (ICTR-2000-55)

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Duško Tadić, Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence, 15 October 1998 (IT-94-1)

National Cases Cited :

Supreme Court of United States: Strickland v. Washington, 10 May 1984, 466 U.S. 668 (1984) ; United States v. Cronic, 14 May 1984, 466 U.S. 648 (1984)

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

SITTING as Trial Chamber II composed of Judge Asoka de Silva, Presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey (the "Chamber");

NOTING that Judge Florence Rita Arrey, 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 on her behalf;

BEING SEIZED of the "Corrected Accused's Additional Objections to the Deposition Testimony of Witness QX", filed on 27 April 2006 (the "Motion");[1]

HAVING RECEIVED the "Prosecutor's Response to Accused Tharcisse Muvunyi's Additional Objections to the Deposition Testimony of Witness QX", filed on 28 April 2006 (the "Response");

RECALLING the "Decision on the Prosecutor's Extremely Urgent Motion for Deposition of Witness QX (Rule 71 of the Rules of Procedure and Evidence)", rendered on 11 November 2003, (the "Decision of 11 November 2003");[2]

NOW DECIDES the Motion pursuant to Rule 73 (A) of the Rules on the basis of written submissions filed by the Parties.

28.1.1. Submissions of the Parties

28.1.1.1. The Defence
28.1.1.2.

1. The Defence prays the Chamber to strike from the record in this case, and not to consider the deposition testimony of Prosecution Witness QX taken on 4 and 5 December 2003. Alleging "ineffective assistance of counsel", the Defence submits that the Duty Counsel who represented the Accused at the deposition proceedings has "admitted that he was not familiar with the facts of the case". The Defence argues that as a consequence, Muvunyi was deprived of both his right to effective assistance of counsel and his right to cross-examination.

2. According to the Defence, the right to counsel provided in Article 20 of the Statute is "more than the right of an accused to have a warm body with a law license seated next to him in the courtroom." The Defence further argues that Rule 44 *bis* of the Rules "envisions that duty counsel will provide only initial legal advice to an accused or suspect until such time as permanent [representation] is arranged." In the view of the Defence, it cannot be expected that Duty Counsel will become intimately familiar with the case, conduct investigations and/or provide definitive legal advice to a suspect or accused person.

3. The Defence submits that the Appeals Chamber has interpreted the requirement of effective assistance of counsel to mean *competent* counsel.[3] The Defence further submits that the Supreme Court of the United States of America has determined that for a conviction or sentence to be vacated due to ineffective assistance of counsel, the defendant must show that there was deficient conduct falling outside the normal range of professional conduct, and that but for this deficient conduct, there is a reasonable probability that the result of the trial would have been different.[4] The Defence also asserts that the same Supreme Court has held that there is a presumption of ineffectiveness when Defence Counsel's performance is so deficient that there is a breakdown in the adversarial process to the extent that the Prosecutor's case is not tested in a meaningful way.[5]

4. Finally, the Defence submits that since the deposition was taken after one permanent lawyer had been dismissed and before a new one was assigned, "there was no counsel specifically charged with preparing the case for trial and determining where Witness QX's testimony fit into the overall scheme of the trial." The Defence further submits that Muvunyi "was denied his right to effective assistance of counsel," and that the Chamber can cure the error by striking the deposition testimony of Witness QX and not considering it for any reason.

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[1] Although the Defence does not so indicate, the Chamber understands that this "Corrected" version replaces the "Accused's Additional Objections to the Deposition Testimony of Witness QX" filed on 26 April 2006 and in which the name of the Accused was wrongly spelt.
[2] This Decision in the pre-trial phase was rendered by Trial Chamber III.
[3] Citing *The Prosecutor v. Akayesu*, Case N°ICTR-96-4-A, Judgement, 1 June 2001, paras 76-77.
[4] Citing *Strickland v. Washington*, Supreme Court of the United States, 466 U.S. 668, 1984.
[5] Citing *United States v. Cronic*, Supreme Court of the United States, 466 U.S. 648, 1984.

28.1.1.3. The Prosecution

5. The Prosecution submits that the Defence motion to strike the deposition testimony of Witness QX "is out of time, falling outside the time frame contemplated by the Rules" for the presentation of preliminary objections. In the view of the Prosecution, the Defence motion is not only a "frivolous application", but is "both spurious and vexatious" as well.

6. The Prosecution further submits that before the Trial Chamber rendered its Decision of 11 November 2003, it considered and deliberated upon the reasons advanced by the Prosecution for the taking of the deposition. The Prosecution also notes that in a subsequent decision, the Chamber found that Duty Counsel was "competent to conduct the taking of the deposition of Witness QX" and that nothing in the Defence motion changes that finding.

7. According to the Prosecution, absent new facts or exceptional circumstances which were unknown to the Chamber at the time of the Decision in November 2003, "there are no provisions in the Rules allowing for a review" of such decisions. Therefore, submits the Prosecution, the Chamber should dismiss the Motion and deny the Defence filing costs.

HAVING DELIBERATED

8. The Chamber is mindful of the Rights of the Accused enshrined in Article 20 of the Statute, and in particular of the "minimum guarantees" provided in Article 20 (4) (d) and (e), including the right of the Accused:

> (d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
>
> (e) 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.

9. The Chamber also recalls the provisions of Rule 44 *bis* on Duty Counsel, which should be read in conjunction with Rule 44 on the Appointment and Qualifications of Counsel. Pursuant to these rules, both Duty Counsel and Assigned Counsel are deemed to be competent. As stipulated in Rule 44 (A), 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."

10. The Appeals Chamber has developed considerable jurisprudence at both the ICTR and the ICTY on the issue of the effective assistance of counsel. In *Kambanda*, it noted that the effectiveness of representation by assigned counsel must be assured in accordance with the principles relating to the right to a defence, in particular the principle of equality of arms.[6] In *Akayesu*, it affirmed that indigent accused have the right to be assigned competent counsel and that such right to competent counsel is guaranteed under the International Covenant on Civil and Political Rights (Article 14), among other international legal instruments.[7] In the *Tadic* case, however, the Appeals Chamber established that the test to be applied in assessing counsel's competence is that unless "gross negligence" is shown to exist in the conduct of either Prosecution or Defence counsel, due diligence will be presumed.[8]

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[6] *Jean Kambanda v. The Prosecutor*, Case N°ICTR-97-23-A, Judgement, 19 October 2000, paras. 33-34 and related footnotes.

[7] *The Prosecutor v. Jean-Paul Akayesu*, Case N°ICTR-96-4-A, Judgement, 1 June 2001, para. 76.

[8] *The Prosecutor v. Dusko Tadić,* Case N°IT-94-1-A, "Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence", 15 October 1998, paras. 46-50.

11. The Chamber has also examined the two companion cases from the Supreme Court of the United States of America (US Supreme Court) cited by the Defence in support of the Motion. Apart from the fact that the Defence has failed to prove any deficient performance on the part of the Duty Counsel, as required by the US Supreme Court, it is worth noting that those cases are distinguishable from the instant one in multiple ways, but primarily because they both deal with final trial judgements involving convictions and sentences, while the present case is still at the trial stage and without a judgement.[9]

12. The Chamber is fully aware of the special circumstances under which the deposition of Witness QX was recorded in December 2003. In particular, the Chamber notes that pursuant to an application by the Accused, Trial Chamber III ordered the Registrar to withdraw Mr. Michael Fischer as Lead Counsel, but stated that this should not be interpreted as implying any delay in the commencement of the trial.[10] The Registrar on the following day gave effect to the Trial Chamber III Decision and appointed Mr. Francis Musei as Duty Counsel, pending the assignment of a new Lead Counsel for Muvunyi.[11] The deposition was taken in the presence of the Duty Counsel.

13. It should also be recalled that in the Decision of 11 November 2003, which authorised the taking of the deposition, Trial Chamber III determined that:

> "In the instant case, the Chamber considers that Witness QX's age, coupled with his critical state of health, constitutes exceptional circumstances within the meaning of Rule 71 of the Rules. If the state of his health worsened, the Prosecutor would be deprived of his evidence. Furthermore the Chamber notes the Prosecutor's submission that the anticipated evidence of Witness QX is highly important to its case not only because he was allegedly an eyewitness of the acts alleged by the Prosecutor against both Accused, but also because his status makes him a special witness. The Chamber therefore considers that the interests of justice require that the evidence of Witness QX be taken by way of deposition, pursuant to Rule 71 of the Rules, before commencement of trial, so as to adequately facilitate the administration of justice."[12]

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[9] In *Strickland v. Washington* [US Supreme Court, 466 U.S. 668, 1984], a criminal defendant acted against the advice of his assigned counsel and pleaded guilty to a string of murders and other violent crimes. He subsequently challenged the death sentence imposed on him by the trial court, alleging ineffective assistance of counsel. On appeal, the US Supreme Court held that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." The Court then established a two-part test requiring a defendant to show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defence.
United States v. Cronic [US Supreme Court, 466 U.S. 648, 1984] involved a criminal defendant indicted on mail fraud charges. Shortly before the scheduled trial date, his retained counsel withdrew and the trial court appointed a young real estate attorney to represent him. Whereas the Government had taken four-and-a-half years to investigate the case and had reviewed thousands of documents in the process, the young lawyer had only 25 days for pre-trial preparation. The intermediate US Court of Appeals subsequently reversed the 25-year prison sentence, concluding that the defendant did not have the effective assistance of counsel for his defence. The US Supreme Court in turn reversed the ruling of the Court of Appeals, holding that the right to the effective assistance of counsel is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." The Supreme Court also held that there is no necessary correlation between the amount of time spent on a case and the quality of representation delivered. It concluded that lawyers are presumed competent and that the burden rests on the defendant to demonstrate that there was a breakdown in the adversarial process.

[10] *The Prosecutor v. Tharcisse Muvunyi et al*, Case N°ICTR-2000-55-I (Joinder), "Decision on the Accused's Request to Instruct the Registrar to Replace Assigned Lead Counsel", 18 November 2003.

[11] "Decision of Withdrawal of Mr. Michael Fischer as Lead Counsel of the Accused Tharcisse Muvunyi", Registrar, 19 November 2003.

[12] *The Prosecutor v. Tharcisse Muvunyi, Idelphonse Nizeyimana, Idelphonse Hategekimana*, Case N°ICTR-2000-55-I, "Decision on the Prosecutor's Extremely Urgent Motion for Deposition of Witness QX (Rule 71 of the Rules of Procedure and Evidence)", 11 November 2003, para. 10.

14. In a subsequent Decision dated 27 November 2003, Trial Chamber III denied Muvunyi's request for certification to appeal the Decision of 11 November 2003, ruling that Muvunyi would be adequately represented by Duty Counsel during the taking of the deposition.[13]

15. A review of the transcripts of the deposition proceedings on 4 and 5 December 2003 reveals that despite Muvunyi's strict instructions to the contrary, he was in fact represented by Duty Counsel, Mr. Francis Musei.[14] At the conclusion of the Prosecution's examination-in-chief of Witness QX, Duty Counsel made the following statement:

> My Lord, lest I should be accused of negligence, I think I would have to participate in cross-examination, even in the absence of instruction as I had earlier said.[15]

16. Before commencing the cross-examination, Duty Counsel also requested and obtained from the Court an adjournment until the following day "in order to look into the evidence as a whole and make the necessary strategy in the approach of the witness."[16] The next day, 5 December 2003, Duty Counsel proceeded to cross-examine Witness QX and to represent the interests of the Accused.[17] The Chamber notes the Defence's allegation that the Duty Counsel has "admitted that he was not familiar with the facts of the case",[18] but after a review of the transcripts of the deposition proceedings, the Chamber has not been able to substantiate the allegation.

17. It is apparent from the foregoing analysis that Muvunyi's claim here falls short of meeting the standards established by the Appeals Chamber. The Chamber considers that during the deposition of Witness QX, Muvunyi was adequately represented by a Duty Counsel deemed competent pursuant to Rule 44; there was no indication of gross negligence on the part of the Duty Counsel; there was no allegation of improper or unprofessional conduct by counsel; his performance could not be said to have been deficient; there was no breakdown in the adversarial process; and, in the absence of a final judgement, there can be no claim that but for Duty Counsel's performance, the outcome of the trial would have been different. Furthermore, just because Duty Counsel's involvement in the case occurred between those of two permanent counsel, it does not necessarily follow that he was less competent or less effective at defending Muvunyi's cause. There is no necessary correlation between the amount of time spent on a case and the quality of representation delivered.[19]

18. The Chamber is of the opinion that not only was the Motion filed out of time, but the issues raised therein were already sufficiently ventilated as far back as November 2003 and are now *res judicata*. The Chamber notes, for instance, that Muvunyi's request for certification of appeal against the Decision authorising the taking of the deposition was denied[20] and that the Defence has not pointed to any new facts that would justify a review of those earlier Decisions. Therefore, the Chamber considers the Motion to be frivolous and subject to sanctions within the meaning of Rule 73 (F).

FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the Motion in its entirety and

ORDERS the Registry to deny the Defence all costs associated with the filing of the Motion.

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[13] *The Prosecutor v. Tharcisse Muvunyi, Idelphonse Nizeyimana, Idelphonse Hategekimana*, Case N°ICTR-2000-55-I, "Decision on the Request of the Accused for Certification of Appeal against the Decision Authorising the Deposition of Witness QX (Rule 73 (B) of the Rules of Procedure and Evidence)", 18 November 2003.
[14] T. 4 December 2003, p. 4.
[15] T. 4 December 2003, p. 27.
[16] T. 4 December 2003, p. 27.
[17] T. 5 December 2003, pp. 2-7.
[18] See para. 2 of the Motion.
[19] *United States v. Cronic,* US Supreme Court, 466 U.S. 648, 1984.
[20] *The Prosecutor v. Tharcisse Muvunyi, Idelphonse Nizeyimana, Idelphonse Hategekimana*, Case N°ICTR-2000-55-I, "Decision on the Request of the Accused for Certification of Appeal against the Decision Authorising the Deposition of Witness QX (Rule 73 (B) of the Rules of Procedure and Evidence)", 18 November 2003.

Arusha, 31 May 2006.

[Signed] : Asoka de Silva; Flavia Lattanzi; Florence Rita Arrey

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29.
30. Decision on Muvunyi's Motion for Rejoinder Witness Pursuant to Rule 85
31. 2 June 2006 (ICTR-2000-55A-T)

(Original : English)

Trial Chamber II

Judge : Asoka de Silva

Tharcisse Muvunyi – Rejoinder – Relief sought in the motion already granted – Motion moot

International Instrument Cited :

Rules of Procedure and Evidence, Rules 73 (A) and 85

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

SITTING as Judge Asoka de Silva, designated by the Trial Chamber, pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the "Rules");

BEING SEIZED of "Tharcisse Muvunyi's Motion for Rejoinder Witness Pursuant to Rule 85", filed on 16 May 2006 (the "Motion");

NOTING that the Prosecution has not made any submissions;

CONSIDERING that the relief sought in the Motion had already been granted in the

(i) Decision on the Prosecutor's Motion Pursuant to Trial Chamber's Directive of 7 December 2005 for Verification of Evidence Obtained out of Court Pursuant to Rules 89 (C) and (D), rendered on 26 April 2006; and the

(ii) Oral Ruling of 8 May 2006 modifying the Scheduling Order;[1]

HEREBY DECLARES the Motion moot.

Arusha, 2 June 2006.

[Signed] : Asoka de Silva

[1] English Transcript of 8 May 2006, pp. 3-5, p. 36.

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32. Decision on Muvunyi's Motion to Include all Testimony of Witness AOG/D/X/006 in the Appellate Record 33. 5 June 2006 (ICTR-2000-55A-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Silva, Presiding Judge; Flavia Lattanzi; Florence Rita Arrey

Tharcisse Muvunyi – Inclusion of all the evidence given by a witness in other proceedings before the Tribunal in the appellate record of this case – Anticipation of the outcome of the trial, Presumption of innocence – Premature motion – Motion denied

International Instruments Cited :

Rules of Procedure and Evidence, Rules 73 (A), 75 (F) and 75 (G) ; Statute, Art. 20 (3)

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

SITTING as Trial Chamber II composed of Judge Asoka de Silva, Presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey (the "Chamber");

NOTING that Judge Florence Rita Arrey, 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;

BEING SEIZED of "Muvunyi's Motion to Include all Testimony of Witness AOG/D/X/006 in the Appellate Record", filed on 18 April 2006 (the "Motion");

HAVING RECEIVED the "Prosecutor's Response to Accused Muvunyi's Motion to Include all Testimony of Witness AOG/X/006 in the Appellate Record", filed on 20 April 2006 (the "Response");

RECALLING the Chamber's "Decision on Accused's Motion to Expand and Vary the Witness List", filed on 28 March 2006 (the "Decision of 28 March 2006");

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 filed by the Parties.

33.1.1.

33.1.2. Submissions of the Parties

33.1.2.1. The Defence

33.1.2.2.

1. The Defence seeks to include in the appellate record of this case all documents utilized by the Chamber to render its Decision of 28 March 2006. It adds that it specifically seeks to include as part of the appellate record the testimony of the Witness variously known as X, D, AOG and 006 in its totality

in all proceedings that the Court reviewed. It further requests that these documents be sealed and form part of the record in this case for the purpose of appeal.

33.1.2.3. The Prosecution

2. The Prosecution submits that the Decision of 28 March 2006 renders the present Motion *res judicata*. The Prosecution further argues that if the Defence was dissatisfied with the Decision of 28 March 2006 it should have requested certification to file an interlocutory appeal in the time frame stipulated in Rule 73 (C) of the Rules. It adds that having failed to make such an application within the time frame required by the Rules, the Defence now seeks to enter the materials into the record through the back door.

3. The Prosecution further submits that the rules governing admissibility of evidence are clear. It adds that the Chamber, before reaching its Decision of 28 March 2006, had taken the proper steps under the law to safeguard the rights and interests of the Accused and cannot be said to have erred in its decision to exclude the testimony of the Witness as it took the extra step of reviewing the transcripts of the most recent testimony of Witness AOG/006 in the *Ndindiliyimana* case.

4. Finally, the Prosecution submits that should the materials be admitted as part of the record without availing the Prosecution a right to challenge the content of the transcripts and of the testimony of the witness, such admission would amount to a violation of the Prosecutor's rights and would require the Chamber to review its Decision of 28 March 2006.

HAVING DELIBERATED

5. The Chamber notes that the Defence seeks to include all the evidence given by Witness X/D/AOG/006 in other proceedings before the Tribunal in the appellate record of this case. The Chamber recalls Article 20 (3) of the Statute which guarantees the right of the Accused to be presumed innocent until proven guilty. This presumption subsists throughout the trial. It follows therefore that the issue of an appeal or the compilation of an appellate record does not arise until the trial comes to an end and until an appeal, if any, is filed. If the Chamber were to make the Order sought by the Defence, it would be prematurely anticipating the outcome of the trial in violation of the presumption of innocence. Therefore, the Chamber considers that the Defence request is premature.

6. Having decided that the Defence request is premature, the Chamber need not say more about the substance of the Motion. However, the Chamber would like to remind the Defence that the appropriate procedure to vary witness protection orders is to bring a motion before the Chamber that issued the protective order(s) pursuant to Rule 75 (F) and (G). An application to the current Chamber would only lie where the first Chamber is no longer seized of the matter.

FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the Defence Motion in its entirety.

Arusha, 5 June 2006.

[Signed] : Asoka de Silva; Flavia Lattanzi; Florence Rita Arrey

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34. Decision on Munvunyi's Motion to Exclude Prosecution Exhibit 33 35. 13 June 2006 (ICTR-2000-55A-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Silva, Presiding Judge; Flavia Lattanzi

Tharcisse Muvunyi – Exclusion of an exhibit – Review or reconsideration of an interlocutory decision – Mistake in the declarant of the statements contained in the exhibit, Witness who has not previously testified in this case – New information – Miscarriage of justice – Motion granted

International Instrument Cited :

Rules of Procedure and Evidence, Rules 15 bis, 73 (A) and 89 (C)

International Cases Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Jean Bosco Barayagwiza, Separate Opinion of Judge Mohammed Shahabuddeen, 31 March 2000 (ICTR-97-19) ; 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. Tharcisse Muvunyi, Decision on the Prosecutor's Motion Requesting a Review of the Scheduling Order and for an Extension of Time to File Closing Briefs and Present Oral Arguments, 12 April 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)Appeals Chamber, The Prosecutor v. Stanislav Galić, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001 (IT-98-29) ; Appeals Chamber, The Prosecutor v. Zdravko Mucić et al., Judgement and Sentence Appeal, 8 April 2003 (IT-96-21) ; Appeals Chamber, The Prosecutor v. Stanislav Galić, Decision on Defence's Request for Reconsideration, 16 July 2004 (IT-98-29) ; Trial Chamber, The Prosecutor v. Slobodan Milošević, Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balevic, Vladislav Jovanovic, Vukasin Andric, and Dobre Aleksovski and Decision Proprio Motu Reconsidering Admission of Exhibits, 17 May 2005 (IT-02-54)

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

SITTING as Trial Chamber II composed of Judge Asoka de Silva, Presiding, and Judge Flavia Lattanzi sitting under Rule 15 *bis*;

BEING SEIZED of the "Accused's Motion to Exclude Prosecutor's Exhibit 33 (41), Alternatively Motion to Reconsider the Decision of February 15, 2006 Concerning Exhibit 33 and Supplemental Objections to the Court's Decision", filed on 20 February 2006 (the "Motion");

HAVING RECEIVED and considered the

(i) "Prosecutor's Response to Tharcisse Muvunyi's Defence Motion to Exclude Prosecution Exhibit 33, Alternatively Motion to Reconsider the Decision of February 15, 2006 Concerning Exhibit

33 and Supplemental Objections to the Court's Decision", filed on 24 February 2006 (the "Response");[1] and the

(ii) "Accused's Reply to the Prosecutor's Response to the Accused's Motion to Exclude Prosecutor's Exhibit 33 (41), Alternatively Motion to Reconsider the Decision of February 15, 2006 Concerning Exhibit 33 and Supplemental Objections to the Court's Decision", filed on 1 March 2006;

RECALLING its Oral Decision of 15 February 2006 on the admissibility of Prosecution Exhibit 33 (the "Oral Decision");[2]

NOW DECIDES the Motion pursuant to Rule 73 (A) of the Rules on the basis of written submissions filed by the Parties.

35.1.1. Submissions of the Parties

35.1.1.1. The Defence Motion

1. The Defence requests the Chamber to reconsider its Oral Decision of 15 February 2006 in which it admitted into evidence, as Prosecution Exhibit 33, certain documents tendered during the cross-examination of Defence Witness MO80. The Defence specifically requests the Chamber to exclude the said Exhibit, alleging that it was admitted in error.

2. The Defence submits that the documents comprising Prosecution Exhibit 33 are "copies of collected statements of a witness" drawn from the Prosecutor's databank and tendered for the purpose of impeaching Witness MO80's credibility, but "not properly authenticated and/or proven up as reliable." According to the Defence, the person making those declarations is someone other than Witness MO80, requiring that "a credibility choice be made between the witness and the Declarant." In the view of the Defence, such a credibility choice by the Chamber "violates the Accused's right to cross-examination and his due process rights as guaranteed under Article 20 (4) (e) of the Statute and under Rule 90 (A)."

3. The Defence asserts that these out-of-court statements by a third party lack relevance with regard to the truthfulness of Witness MO80's testimony, as this is not a situation where the witness is confronted with a contradiction between his own prior inconsistent statements and his current testimony, one of which must be untruthful or incorrect. The Defence further asserts that no proof has been offered as to the truthfulness of the statements contained in the Exhibit, and that the reliability of the evidence offered is questionable. In the view of the Defence, before evidence can be admitted, it needs to be credible and there must be sufficient indicia of its reliability.

4. According to the Defence, the Prosecution made an erroneous submission when it claimed in open court that it was reading from a decision by the Appeals Chamber, rather than from a decision by the Trial Chamber, in the *Delalic* case. The Defence also submits that the Prosecution claimed there was no test to guide the Chamber in determining if there are sufficient indicia of reliability for the admission of an exhibit, whereas a test does in fact exist and has been applied before by Trial Chambers in the *Celebici* and *Tadic* cases.[3] The Defence alleges that "the Chamber fundamentally erred in allowing the exhibit to be admitted for the purposes of making a credibility choice rather than allowing the witness to be examined on the differences of the statements."

35.1.1.2. The Prosecution Response

[1] Note that the Prosecution's Response, to which is annexed a 20-page excerpt of the closed-session transcripts of the proceedings of 15 February 2006, is marked "Confidential".
[2] During the proceedings on 15 February 2006, the Exhibit in question was erroneously recorded as Prosecution Exhibit 41. (See pp. 22-23 of the English transcript, in closed session.) The error was corrected on 16 February 2006 and the same Exhibit was properly recorded as Prosecution Exhibit 33. (See p. 1 of the English transcript of the proceedings.)
[3] References omitted.

5. The Prosecution submits that there is "absolutely no legal basis to support the Defence Motion to exclude Prosecution Exhibit 33." It argues that while neither the Statute nor the Rules specifically provides for a right to request reconsideration of a previous decision, the jurisprudence of the ICTR has tended to imply the existence of such a right.[4] The Prosecution further argues that the Appeals Chamber has stated that interlocutory decisions may be reconsidered only in cases where a "clear error" has been exposed[5] or where a "special circumstance" exists.[6]

6. In the view of the Prosecution, since the Defence has demonstrated neither a "clear error" nor the existence of any "special circumstances" to warrant reconsideration, the Motion is both "frivolous and vexatious." Consequently, the Prosecution prays the Chamber to dismiss the Motion in its entirety and to deny fees to Counsel pursuant to Rules 46 and 73 (F).

35.1.1.3. The Defence Reply

7. The Defence asserts in its Reply that the Prosecution's Response is "at a minimum disingenuous and at most a blatant attempt to mislead the Trial Chamber as to the right of a party to move a Trial Chamber to reconsider an interlocutory decision". The Defence further asserts that a Chamber has an inherent power "to reconsider any decision when it is necessary to prevent an injustice."

8. Citing a recent decision in the case of *Bizimungu et al*., the Defence submits that the Prosecution at this Tribunal has itself had occasion to resort to motions for reconsideration where it considered the Trial Chamber's ruling to be unjust.[7] According to the Defence, all advocates appearing before the Tribunal "owe a duty of candor to the court" and the Prosecution owed a duty to inform the Chamber "that it had taken exactly the opposite position in another case" compared to this one.

9. The Defence submits that the Prosecution's request for sanctions is unjustified; that the Prosecution "is attempting to intimidate Muvunyi and his counsel"; and that the Chamber should consider taking appropriate action against the Prosecution "for its frivolous and misleading pleading." In the view of the Defence, it has met the test for reconsideration by outlining the argument as to the clear error and special circumstances involved in asking the Chamber to reconsider its prior ruling.

35.1.2. Deliberations

10. As preliminary matters, the Chamber reminds both Parties of the need to treat each other with the courtesy and respect expected from officers of the Court. The Chamber also reminds the Parties that it is quite capable of making an independent determination of the circumstances under which sanctions may be applied.

11. It is well settled in the jurisprudence of the *ad hoc* Tribunals that while the Rules do not specifically provide for the review or reconsideration of interlocutory decisions, a Trial Chamber may nonetheless reconsider and modify its prior decision if it is persuaded that the decision was made in error or has the potential to lead to a miscarriage of justice.[8] The Chamber will consider the Motion in light of this jurisprudence.

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[4] Citing *The Prosecutor v. Barayagwiza*, Case N°ICTR-97-19-AR72, "Decision on the Prosecutor's Request for Review or Reconsideration", 31 March 2000, para. 18.

[5] Citing *The Prosecutor v. Kanyabashi*, Case N°ICTR-96-15-AR72, "Decision on Motion for Review or Reconsideration", 20 September 2000.

[6] Citing *The Prosecutor v. Ignace Bagilishema*, Case N°ICTR-95-1A-A, "Decision on Motion for Review of the Decision by the President of the Appeals Chamber", 6 February 2002, para. 8.

[7] *The Prosecutor v. Casimir Bizimungu et al*., Case N°ICTR-99-50-T, "Reconsideration of Decisions on Protective Measures for Defence Witnesses Pursuant to Appeals Chamber Ruling of 16 November 2005", 17 February 2006.

[8] *The Prosecutor v. Tharcisse Muvunyi*, Case N°ICTR-2000-55A-T, "Decision on the Prosecutor's Motion Requesting a Review of the Scheduling Order and for an Extension of Time to File Closing Briefs and Present Oral Arguments", 13 April 2006, paras. 8-9; *The Prosecutor v. Mucic et al*., Case N°IT-96-2-A*bis*, "Judgement on Sentence Appeal", 8 April 2003, para. 49; *The Prosecutor v. Milosevic*, Case N°IT-02-54-T, "Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balevic, Vladislav Jovanovic, Vukasin Andric, and Dobre Aleksovski and Decision

12. The Chamber recalls its Oral Decision of 15 February 2006 admitting into evidence as Prosecution Exhibit 33 ("Exhibit P. 33"), the documents tendered by the Prosecution during the cross-examination of Defence Witness MO80. On that occasion the Prosecution indicated that the documents contained in the Exhibit were the signed statement and confession of one of MO80's former colleagues at a roadblock in 1994,[9] who had previously testified for the Prosecution before this Chamber under the pseudonym of YAQ.[10]

13. The stated purpose of introducing the documents in Exhibit P. 33, according to the Prosecution, was to impeach Defence Witness MO80's credibility by comparing his version of the events at the roadblock to the version given by Witness YAQ.[11] Counsel for the Defence objected to the admission of the documents on the grounds that MO80 was not their author and had no knowledge of them, and Counsel also questioned the authenticity and reliability of the documents in the Exhibit.[12] The Prosecution, purportedly[13] citing an Appeals Chamber decision in the *Delalić* case, responded that only the relevance and probative value of the documents, and not their authenticity or reliability, could be considered at this stage of the proceedings.[14]

14. The Chamber also recalls Rule 89 (C) of the Rules, which provides that a Chamber may admit any relevant evidence which it deems to have probative value. This Rule has been construed to mean that before a Chamber can admit any particular document, it must be satisfied that the document fulfils two conditions, namely that it is relevant and has probative value.[15] However, the Chamber is equally mindful of the requirement that for evidence to be admissible, it must possess "sufficient indicia of reliability."[16]

15. It is now the Chamber's belief that its Oral Decision admitting the documents contained in Exhibit P. 33 was based on the mistaken assumption that these were the statement and confession of Witness YAQ who has previously testified for the Prosecution in this case and whose demeanour and credibility the Chamber has had the opportunity to assess. In particular, the Chamber notes the following exchange between the Presiding Judge and the Prosecution Counsel:

MR. PRESIDENT:
Madam Prosecutor, could you kindly tell us -- one of these witnesses gave testimony in this court?

MS. ADEBOYEJO:
Yes, Your Honour. Yes, directly gave evidence before this Trial Chamber, Witness YAQ, Your Honours.[17]

Prorio Motu Reconsidering Admission of Exhibits" 17 May 2005, paras. 6-8; *The Prosecutor v. Galic*, Case N°IT-98-29-A, "Decision on Defence's Request for Reconsideration", 16 July 2004; *The Prosecutor v. Galic*, Case N°IT-98-29-AR73, "Decision on Application by Prosecution for Leave to Appeal", 14 December 2001, para. 13; See also the "Separate Opinion of Judge Mohammed Shahabuddeen" in *Barayagwiza v. The Prosecutor*, Case N°ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para. 3.

[9] T. 15 February 2006, p. 9 (in closed session, during cross-examination).

[10] Witness YAQ testified for the Prosecution in this matter on 31 May 2005.

[11] During his testimony, YAQ stated that his brother, who had been with him at the roadblock, had testified in the *Butare* case under the pseudonym of QBV. (T. 31 May 2005, pp. 15-16 (cross-examination))

[12] T. 15 February 2006, pp. 7-17 (in closed session, during cross-examination).

[13] It was actually from a Trial Chamber decision that the Prosecution Counsel was reading: *The Prosecutor v. Delalic*, Case N°IT-96-21-T (TC), "Decision on the Motion of the Prosecution for the Admissibility of Evidence", 19 January 1998, paras. 15-17.

[14] T. 15 February 2006, p. 12 (in closed session, during cross-examination).

[15] *The Prosecutor v. Tihomir Blaskic*, Case N°IT-95-14 (TC), "Decision on the Defence Motion for Reconsideration of the Ruling to Exclude from Evidence Authentic and Exculpatory Documentary Evidence", 30 January 1998, para. 10.

[16] *Pauline Nyiramasuhuko v. The Prosecutor,* Case N°ICTR-98-42-AR73.2 (AC), "Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence", 4 October 2004, para. 5.

[17] T. 15 February 2006, p. 9, lines 21-25 (in closed session, during cross-examination).

16. Having carefully examined the English and French versions of the documents contained in Exhibit P. 33,[18] the Chamber notes that the declarant in both the witness statement and the confession is not Witness YAQ. Rather, the declarant in both documents is YAQ's brother, who has not testified in the instant case.

17. In the Chamber's view, by pointing out that the declarant in the documents contained in Exhibit P. 33 was someone other than a witness who has previously testified in this case, the Defence has successfully demonstrated the existence of new information which was unknown to the Chamber at the time it rendered its Oral Decision. The Defence has also shown that the decision to admit the documents contained in Exhibit P. 33 could occasion a miscarriage of justice. The criteria for reconsideration have therefore been satisfied.

18. Finally, the Chamber has considered the Prosecution's request for sanctions and is not of the opinion that the Defence Motion is frivolous. Furthermore, the Chamber cautions the Prosecution to refrain from making erroneous and potentially misleading submissions.[19]

FOR THE FOREGOING REASONS, THE CHAMBER

GRANTS the Motion and

ORDERS that Prosecution Exhibit 33 be excluded from the record in this case.

Arusha, 13 June 2006.

[Signed] : Asoka de Silva; Flavia Lattanzi

[18] The Exhibit tendered in court did not include the original Kinyarwanda version of either document.
[19] See the comments associated with footnotes 13 and 17 above.

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36. Written Reasons for the Oral Decision on Accused Tharcisse Muvunyi's Motion for Trial Continuance Rendered on 6 June 2006
37. 15 June 2006 (ICTR-2000-55A-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Silva, Presiding Judge; Flavia Lattanzi

Tharcisse Muvunyi – Trial continuance – Errors in the transcript, Corrigenda issued by the Language Services Section – Motion denied

International Instrument Cited :

Rules of Procedure and Evidence, Rule 15 bis

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

SITTING as Trial Chamber II composed of Judge Asoka de Silva, Presiding, and Judge Flavia Lattanzi (the "Chamber"), pursuant to Rule 15 *bis* of the Rules of Procedure and Evidence;

BEING SEIZED of "Accused Tharcisse Muvunyi's Motion for Trial Continuance", filed on 29 May 2006 (the "Motion");

HAVING RECEIVED the "Prosecutor's Response to Accused Tharcisse Muvunyi's Motion for Trial Continuance", filed on 02 June 2006 (the "Response");

RECALLING the Chamber's Oral Decision of 6 June 2006 denying the Accused Tharcisse Muvunyi's Motion for Trial Continuance (the "Oral Decision");

NOTING that the Chamber rendered its:
(i) "Decision on Motion to Strike or Exclude Portions of Prosecutor's Exhibit N°34, Alternatively Defence Objections to Prosecutor's Exhibit N°34" on 30 May 2006;
(ii) "Decision on Muvunyi's Additional Objections to the Deposition Testimony of Witness QX, Pursuant to Article 20 of the Statute and Rules 44, 44 *bis* and 73 (F) of the Rules of Procedure and Evidence" on 31 May 2006;
(iii) "Decision on Muvunyi's Motion for Rejoinder Witness Pursuant to Rule 85" on 2 June 2006;

FURTHER NOTING that on 29 May 2006, the Appeals Chamber rendered its "Decision on Interlocutory Appeal", in which it also dismissed as moot the Defence request to stay the trial proceedings that was filed on 15 May 2006;

ALSO NOTING the *corrigenda* issued by the Language Services Section of the Tribunal on 30 May and further on 9 June 2006 following the order the Chamber issued on 6 June 2006, in connection with the errors or discrepancies in the French and English language transcripts relied upon by the Defence to support its Motion for Continuance;

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

NOW ISSUES the reasons for the Oral Decision.

37.1.1. Submissions of the Parties

37.1.1.1. The Defence

1. The Defence sought a stay of the trial proceedings for the following reasons: first, that it had not received any ruling on several pending motions that could have an impact on the course and direction of the final brief;[1] secondly, that it needed a translation into English of the Judgement rendered by the International Tribunal for the former Yugoslavia (the "ICTY") in the *Hadzihazanovic and Kubura* case; and thirdly, that it had found a series of translation errors in the transcripts of proceedings.

2. The Defence asserted that until these matters were resolved, it would be impossible for it to complete the final trial brief and for the Trial Chamber to deliberate. The Defence further submitted that the Accused was being denied the right to a fair trial until he knew what evidence had been properly admitted against him and until the transcript errors were corrected.

3. The Defence attached to its Motion two annexes. Annex A is a summary of the ICTY judgment the Defence seeks to have translated. Annex B contains a copy of correspondence with the Court Management Section of the Tribunal as well as samples of the discrepancies in translation it reported to the Court Management Section.

4. During the Proceedings of 5 June 2006, however, the Defence indicated that it was abandoning all other grounds of the Motion except the one relating to the correction of the alleged errors in the transcripts.

37.1.1.2. The Prosecution

5. The Prosecution submitted that the Defence had not shown any exceptional circumstances that warranted a postponement of the hearing of the rejoinder witness on 5 June 2006. The Prosecution added that the Chamber had already rendered decisions for two of the pending motions mentioned by the Defence,[2] and that the Appeals Chamber had also handed down its Decision on Muvunyi's Interlocutory Appeal, dismissing as moot the Defence application to stay the trial proceedings. The Prosecution further added that the Language Services Section had issued a corrigendum for the errors alleged in the Transcripts of 13 December 2005, 15 December 2005, and 13 March 2006. The Prosecution finally submitted that the translation of the ICTY Judgement in the *Hadzihasanovic* case should have been anticipated by the Defence team and could not justify continuance of the trial proceedings.

37.1.2. Reasons

6. The Chamber carefully examined the errors in the transcripts. It also examined the two *corrigenda* issued by the Language Services Section.

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[1] The Defence mentioned the following motions as pending: "Accused's Motion to Exclude Prosecutor's Exhibit 33", filed in February 2006; "Accused's Motion to Strike or Exclude Prosecutor's Exhibit 34", filed in March 2006; "Muvunyi's Motion to Include the Testimony of AOG/D/X/006 in the Appellate Record", filed in April 2006; "Muvunyi's Motion for Admission of Testimony Pursuant to Rule 92 *bis*"; "Interlocutory appeal".

[2] "Accused's Motion to Strike or Exclude Portions of the Prosecutor's Exhibit N°34, Alternatively Defence Objections to Prosecutor's Exhibit N°34"; "Accused's Additional Objections to the Deposition Testimony of Witness QX Pursuant to Article 20 of the Statute."

7. The Chamber noted that the Language Services Section rectified all the errors pointed out by the Defence in the transcripts of 13 December 2005, 15 December 2005 and 13 March 2006. The Chamber also noted that the Language Services Section did not address the alleged errors relating to Witness MO23 and so ordered that Section to review the evidence of Witness MO23 given on 16 March 2006, and if necessary, to issue a *corrigendum*. The Chamber further noted that one of the alleged errors in translation was not rectified in the *corrigendum* issued on 30 May 2006 because there was in fact no error and it appeared that the Defence wrongly quoted the English and corresponding French transcripts.[3]

FOR THE ABOVE REASONS, THE CHAMBER

DENIED the Motion.

Arusha, 15 June 2006.

[Signed] : Asoka de Silva; Flavia Lattanzi

[3] For Witness MO31, instead of 15 December 2005, page 20, lines 14-16 of the English transcripts and page 19, lines 27-31 of the French transcripts, the Defence should have quoted page 20, lines 14-16 and page 21, lines 3-4 of the English transcripts and the English transcripts would have matched the French transcripts.

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38. Decision on Muvunyi's Motion Substitution of Final Trial Brief 39. 20 June 2006 (ICTR-2000-55A-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Silva, Presiding Judge; Flavia Lattanzi; Florence Rita Arrey

Tharcisse Muvunyi – Substitution of the Final Trial Brief – Substance of the Final Trial Brief unchanged – Motion granted

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

SITTING as Trial Chamber II composed of Judge Asoka de Silva, Presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey (the "Chamber");

BEING SEIZED of "Tharcisse Muvunyi's Motion for Substitution of Final Trial Brief" filed on 19 June 2006 (the "Motion");

CONSIDERING the urgency of the situation, in view of the fact that the Closing Arguments of both Parties are scheduled to be heard on 22 and 23 June 2006;

HAVING CONSIDERED the Defence submission that it encountered "computer problems at the time of printing" the initial version of its Final Trial Brief filed on 15 June 2005;

ALSO NOTING the Defence submission that the substitute document "only corrects typographical errors, margins, numbering problems and footnote numbering issues" and that the substance of its Final Trial Brief "is not changed and that no new argument has been added";

THE CHAMBER HEREBY

GRANTS the Motion and

ORDERS that:

(i). The version of "Tharcisse Muvunyi's Final Trial Brief" filed on 19 June 2006 shall replace the version filed on 15 June 2006;

(ii). Any changes to the substance of the Final Trial Brief filed on 19 June 2006 or any new argument added thereto shall not be taken into consideration.

Arusha, 20 June 2006.

[Signed] : Asoka de Silva; Flavia Lattanzi; Florence Rita Arrey

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40. Judgement and Sentence
41. 12 September 2006 (ICTR-2000-55A-T)

(Original : English)

Trial Chamber II

Judges : Asoka de Silva, Presiding Judge; Flavia Lattanzi; Florence Rita Arrey

Tharcisse Muvunyi – Genocide, or in the alternative, Complicity in genocide, Direct and public incitement to commit genocide, Crimes against humanity (rape, other inhumane acts) – Admissibility and assessment of evidence – Specificity of the indictment related to the forms of responsibility – Notice – Establishment of facts, the Accused, Commander of the École des sous-officiers ("ESO") – Individual criminal responsibility under Articles 6 (1) and 6 (3) of the Statute, Definition – Genocide, General requirements of the Crime – Genocide, Knowledge by the Accused of the genocidal acts committed by ESO soldiers, Individual responsibility for aiding and abetting genocide – Genocide, Effective control over the ESO soldiers, Omission of the Accused to prevent or punish the commission of these crimes, Superior responsibility – Direct and public incitement to commit genocide, Definition of 'direct and public incitement', Genocidal implication of the words used by the Accused as understood by the audience, Knowledge and intent of the Accused – Crimes against humanity, General elements of the Crime, Definition of the attack, Standard of 'widespread or systematic', Definition of 'civilian population', Discriminatory grounds – Rape as a crime against humanity, Compatibility of the definitions proposed by the I.C.T.R. and the I.C.T.Y, Legal requirements for the offence of rape satisfied, Absence of evidence to support the responsibility of the Accused – Other inhumane acts as a crime against humanity, Effective control over the ESO soldiers, Omission of the Accused to prevent or punish the commission of these crimes – Verdict – Sentence – Gravity of the Offence, Form and degree of the Accused's participation, Individual circumstances – Aggravating circumstances found, Killing committed by soldiers under the command of the Accused, Particular action of the Accused – Abuse of the trust and confidence placed in the Accused by members of the society – Reaction of the Accused concerning the criminal behaviour of his subordinates, Absence of report to officers higher up the chain of command – Mitigating circumstances found, Absence of evidence related to direct orders, presence and direct participation or encouragement of the commission of the crimes – Individual circumstances of the Accused – Conviction of genocide, direct and public incitement to commit genocide and other inhumane acts as a crime against humanity, 25 years imprisonment – Credit for time served, 6 years, 7 months and 6 days

International Instruments Cited :

1977 Additional Protocol II to the Geneva Conventions ; Expert Report Pursuant UNSC Resolution 935, 1994/1125 ; 1949 Geneva Conventions, Art. 3 common ; Report of the International Law Commission on the Work of its Forty-Eighth Session 6 May – 26 July 1996, UN GAOR International Law Commission, 51st Sess., Supp. N°10, p. 91, UN Doc. A/51/10 (1996) ; Rules of Procedure and Evidence, Rules 47 (C), 92 bis, 94 (A), 96 (i), 101, 101 (D), 102 (A) and 103 ; Security Council, Resolution 955 (1994), 8 November 1994, S/RES/955 (1994) ; Special Rapporteur Reports, 1994/1157, Annexes I and II ; Statute of the I.C.T.R., Art. 1, 2, 2 (2), 2 (3) (c), 2 (3) (e), 3, 3 (a), 3 (b), 3 (c), 3 (d), 3 (e), 3 (f), 3 (g), 3 (h), 3 (i), 4, 6 (1), 6 (3), 20 (4) (a) and 23 ; Statute of the I.C.C., Art. 28 ; UNSG Report on Rwanda, 1994/924

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. 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) ; Appeals Chamber, The Prosecutor v. Jean-Paul Akayesu, Judgement, 1 June 2001 (ICTR-96-4) ; Appeals Chamber, The Prosecutor v. Clément Kayishema and Obed Ruzindana, Judgement (Reasons), 1 June 2001 (ICTR-95-1) ; Trial Chamber, The Prosecutor v. Ignace Bagilishema, Judgement, 7 June 2001 (ICTR-95-1A) ; Appeals Chamber, The Prosecutor v. Alfred Musema, Judgement, 16 November 2001 (ICTR-96-13) ; Appeals Chamber, The Prosecutor v. Ignace Bagilishema, Judgement (Reasons), 3 July 2002 (ICTR-95-1A) ; 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. Laurent Semanza, Judgement and Sentence, 15 May 2003 (ICTR-97-20) ; Trial Chamber, The Prosecutor v. Eliezer Niyitegeka, Judgement, 16 May 2003 (ICTR-96-14) ; Appeals Chamber, The Prosecutor v. Georges Rutaganda, Judgement, 26 May 2003 (ICTR-96-3) ; Trial Chamber, The Prosecutor v. Juvénal Kajelijeli, Judgment and sentence, 1 December 2003 (ICTR-98-44A) ; Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Judgement and Sentence, 3 December 2003 (ICTR-99-52) ; 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. 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. Emmanuel Ndindabahizi, Judgement, 15 July 2004 (ICTR-2001-71) ; 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 96-17) ; Trial Chamber, The Prosecutor v. Tharcisse Muvunyi, Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, 23 February 2005 (ICTR-2000-55A) ; Trial Chamber, The Prosecutor v. Tharcisse Muvunyi, The Prosecutor's Notice of the Filing of a Schedule of Particulars to the Indictment Pursuant to the Directive of the Trial Chamber, 28 February 2005 (ICTR-2000-55A) ; Trial Chamber, The Prosecutor v. Mikaeli Muhimana, Judgement and Sentence, 28 April 2005 (ICTR-95-1B) ; 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) ; 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) ; Trial Chamber, The Prosecutor v. Tharcisse Muvunyi, Decision on Accused Tharcisse Muvunyi's Motion to Exclude Testimony of Witnesses AFV, TM, QCS, QY and QBP and Motion to Strike QY's Testimony, 20 June 2005 (ICTR-2000-55A) ; Appeals Chamber, The Prosecutor v. Jean de Dieu Kamuhanda, Judgement, 19 September 2005 (ICTR-99-54) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Prosecution Motion for Judicial Notice, 9 November 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Aloys Simba, Judgement, 13 December 2005 (ICTR-2001-76) ; Appeals Chamber, The Prosecutor v. Édouard Karemera et al., Decision on Prosecutor's Interlocutory Appeal on Judicial Notice, 16 June 2006 (ICTR-98-44) ; Appeals Chamber, The Prosecutor v. Sylvestre Gacumbitsi, Appeal Judgement, 7 July 2006 (ICTR-2001-64) ; Appeals Chamber, The Prosecutor v. Sylvestre Gacumbitsi, Separate Opinion of Judge Shahabuddeen, 7 July 2006 (ICTR-2001-64)

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (IT-94-1) ; Trial Chamber, The Prosecutor v. Duško Tadić, Judgement, 7 May 1997 (IT-94-1) ; Trial Chamber, The Prosecutor v. Zejnil Delalić et al., Judgement, 16 November 1998 (IT-96-21) ; Trial Chamber, The Prosecutor v. Anto Furundžija, Judgement, 10 December 1998 (IT-95-17/1) ; Trial Chamber, The Prosecutor v. Goran Jelisić, Judgement, 14 December 1999 (IT-95-10) ; Trial Chamber, The Prosecutor v. Zoran Kupreškić et al., Judgement, 14 January 2000, (IT-95-16) ; Appeals Chamber, The Prosecutor v. Duško Tadić, Judgement in Sentencing, 26 January 2000 (IT-94-1) ; Trial Chamber, The Prosecutor v. Tihomir Blaškić, Judgement, 3 March 2000 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Zlatko Aleksovski, Judgement, 24 March 2000 (IT-95-14/1) ; Appeals Chamber, The Prosecutor v. Zejnil

Delalić et al., Judgement, 20 February 2001 (IT-96-21) ; Trial Chamber, The Prosecutor v. Dragoljub Kunarac et al., Judgement, 22 February 2001 (IT-96-23 and 23/1) ; Trial Chamber, The Prosecutor v. Dario Kordić and Mario Čerkez, Judgement, 26 February 2001 (IT-95-14/2) ; Appeals Chamber, The Prosecutor v. Goran Jelisić, Judgment, 5 July 2001 (IT-95-10) ; Trial Chamber, The Prosecutor v. Radislav Krstić, Judgement, 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. Milorad Krnojelac, Judgement, 15 March 2002 (IT-97-25) ; Appeals Chamber, The Prosecutor v. Dragoljub Kunarac, Judgement, 12 June 2002 (IT-96-23 and 23/1) ; Appeals Chamber, The Prosecutor v. Milomir Stakić, Decision, 10 October 2002 (IT-97-24) ; Trial Chamber, The Prosecutor v. Mladen Naletilić and Vinko Martinović, Judgment, 31 March 2003 (IT-98-34) ; 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) ; Trial Chamber, The Prosecutor v. Radoslav Brđanin and Momir Talić, Judgment, 1 September 2004 (IT-99-36) ; Appeals Chamber, The Prosecutor v. Dario Kordić and Mario Čerkez, Judgement, 17 December 2004 (IT-95-14/2) ; Trial Chamber, The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Judgement, 17 January 2005 (IT-2002-60)

International Military Tribunal of Nuremberg : Fritzsche Case, Judgement, June 1946 ; Streicher Case, Judgement, 1 October 1946

41.1.1. Table of Contents

41.1.2. Chapter I : Introduction

41.2. 1. The Tribunal and Its Jurisdiction

1. The Judgement in the case of *The Prosecutor v. Tharcisse Muvunyi* is issued by Trial Chamber II (the "Chamber") of the International Criminal Tribunal for Rwanda (the "Tribunal"), composed of Judge Asoka de Silva, presiding, Judge Flavia Lattanzi, and Judge Florence Rita Arrey.

2. The Tribunal was established by the United Nations Security Council after official United Nations reports indicated that genocide and widespread, systematic, and flagrant violations of international humanitarian law had been committed in Rwanda.[1] The Security Council determined that this situation constituted a threat to international peace and security; resolved to put an end to such crimes and to bring to justice the persons responsible for them; and expressed conviction that the Prosecution of such persons would contribute to the process of national reconciliation and to the restoration of peace. Consequently, on 8 November 1994, the Security Council acting under Chapter VII of the United Nations Charter, adopted Resolution 955 establishing the Tribunal.[2]

3. The Tribunal is governed by the Statute annexed to United Nations Security Council Resolution 955 (the "Statute") and by its Rules of Procedure and Evidence (the "Rules").[3]

4. The Tribunal has authority to prosecute persons responsible for serious violations of international humanitarian law committed in the Republic of Rwanda, and Rwandan citizens responsible for such violations committed in the territory of neighbouring States.[4] Articles 2, 3 and 4 of the Statute provide the Tribunal with subject-matter jurisdiction over acts of genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. The Tribunal's temporal jurisdiction is limited by Article 1 of the Statute to acts committed between 1 January 1994 and 31 December 1994.[5]

[1] UNSG Report on Rwanda, 1994/924; Expert Report Pursuant UNSC Resolution 935, 1994/1125; Special Rapporteur Reports, 1994/1157, Annexes I and II.
[2] UN Doc. S/RES/955 (1994).
[3] The Statute and the Rules are available at the Tribunal's website: <http://www.ictr.org>.
[4] Articles 1 and 5 of the Statute.
[5] The reference is missing in the English original version.

41.3. 2. Indictment

5. In the Indictment filed on 23 December 2003 (the "Indictment"), read together with the Schedule of Particulars filed on 28 February 2005, the Prosecution charged Tharcisse Muvunyi (the "Accused") with five counts pursuant to Articles 2 and 3 of the Statute: genocide, or in the alternative complicity in genocide, direct and public incitement to commit genocide, rape, and other inhumane acts as crimes against humanity. The Prosecution charged the Accused with individual criminal responsibility pursuant to Article 6 (1) and 6 (3) of the Statute for genocide, complicity in genocide and rape. As for the charge of direct and public incitement to commit genocide, the criminal liability of the Accused is sought only in respect of Article 6 (1), while Article 6 (3) is referred to for the count of other inhumane acts.

41.4. 3. Summary of Procedural History

6. The Accused was arrested on 5 February 2000 in the United Kingdom, and was transferred on 30 October 2000 to the United Nations Detention Facility in Arusha, Tanzania.[6] The Accused made his initial appearance on 8 November 2000 before Judge William Sekule and pleaded not guilty to all counts in the Indictment. In February 2005, the Chamber denied the Prosecution Motion for leave to amend the Indictment, but indicated that the Prosecution could, if it wished, file a Schedule of Particulars in order to arrange its pleading in a clearer manner provided that no new allegation was added. The Chamber added that if the Prosecution chose to do so, it should include the types of responsibility under Article 6 (1) or 6 (3) upon which it wished to rely.[7] The trial commenced on 28 February 2005 and closed on 23 June 2006. The Prosecution called 24 witnesses in the course of 47 trial days, including an investigator, a socio-linguistic expert, and a handwriting expert. The Defence also called 24 witnesses over 33 trial days, including a handwriting expert and a socio-linguistic expert. In addition, the Chamber admitted the sworn statement of one Defence witness in lieu of her oral testimony.[8] The Accused chose not to testify in his own defence.

41.5. 4. Overview of the Case

7. Immediately after the death of Rwandan President Juvénal Habyarimana on 6 April 1994, thousands of Tutsi civilians in many locations across the country were attacked and killed by Hutu militiamen and soldiers. By contrast, Butare *préfecture* remained relatively calm until 19 April 1994 when President Théodore Sindikubwabo visited the town to attend the investiture of a new *préfet*. It is alleged that during his speech, the President incited the public to join in the massacres. Thereafter, large numbers of Tutsi civilians residing in Butare, as well as refugees from other parts of Rwanda, were massacred by soldiers working in collaboration with members of the Hutu *Interahamwe* militia.

8. The Prosecution alleges in the Indictment that the Accused, by virtue of the fact that he became the Interim Commander of the *École des sous-officiers* (ESO) Camp and was the most senior military officer in Butare *préfecture* from 7 April 1994, was responsible for the activities of all the military personnel in the area. The Prosecution further alleges that instead of protecting the public, soldiers under the Accused's command committed various serious violations of international humanitarian law. These allegations form the basis of the charges preferred against the Accused in the Indictment.

9. The Defence, on its part, maintains that the Accused was never formally appointed to any position of authority over the military personnel either at the ESO or in Butare *préfecture* and therefore does not bear superior responsibility for the actions of the soldiers. The Defence also argues

[6] "ICTR Detainees – Status on 9 June 2005", online http://www.ictr.org/ENGLISH/factsheets/detainee.htm.
[7] *Prosecutor v. Muvunyi*, Decision on Prosecution's Motion for Leave to File an Amended Indictment, 23 February 2005.
[8] Oral Decision of 23 June 2006.

that there is no evidence that the Accused either directly participated in, or ordered the commission of, any of the crimes charged in the Indictment.

41.6. 5. Admissibility and Assessment of Evidence

10. The Rules give the Trial Chamber discretion to admit any relevant evidence which it deems to have probative value.[9] According to the Appeals Chamber, in determining admissibility, the Trial Chamber need only consider that evidence is relevant and displays sufficient indicia of reliability. The question of probative value should be determined at the end of the trial.[10] In admitting and assessing evidence, the Chamber is not bound to follow national rules of evidence, and shall apply rules of evidence which best favour a fair determination of the matter.

11. In general, the Chamber can make a finding of fact based on the evidence of a single witness if it finds such evidence relevant and credible.[11] It follows that the Chamber does not necessarily require evidence to be corroborated in order to make a finding of fact on it. Indeed, the Appeals Chamber has held that corroboration is not a rule of customary international law and as such shall ordinarily not be required by Trial Chambers.[12] With respect to sexual offences, Rule 96 (i) specifically provides that the Trial Chamber shall not require corroboration of the evidence of a victim of sexual violence.

12. The Chamber's discretion to admit any relevant evidence which it deems to have probative value also implies that while direct evidence is to be preferred, hearsay evidence is not *per se* inadmissible before the Trial Chamber. However, in certain circumstances, there may be good reason for the Trial Chamber to consider whether hearsay evidence is supported by other credible and reliable evidence adduced by the Prosecution in order to support a finding of fact beyond reasonable doubt.

13. The evidence of accomplices or of detained witnesses is similarly not inadmissible before the Trial Chamber. However, the Trial Chamber will, when necessary, approach such evidence with caution in order to ensure a fair trial and avoid prejudice to the Accused.

14. In determining witness credibility, the Trial Chamber has discretion to assess inconsistencies between a witness's pre-trial statements and his evidence in court and to determine the appropriate weight to be attached to such inconsistencies. The mere fact that inconsistencies exist does not mean that the witness completely lacks credibility.[13] Moreover, the Chamber notes that many of the witnesses who appeared before it had themselves suffered, or were witnesses to, untold physical and psychological suffering during the 1994 events in Rwanda. In many cases, giving evidence before the Tribunal entailed reliving these horrific experiences thereby provoking strong psychological and emotional reactions. This situation may impair the ability of such witnesses to clearly articulate their stories or to present them in a full and coherent manner. When the effect of trauma is considered alongside the lapse of time from 1994 to the present the Chamber believes that the mere fact that inconsistencies exist in a witness's story does not mean that the witness is not credible. Such inconsistencies go to the weight of the evidence rather than the credibility of the witness.

41.6.1.1.1. Witness Protection Issues

15. The Chamber has issued witness protection orders in respect of several Prosecution and Defence witnesses, and heard the evidence of several witnesses in closed session. In analysing such evidence, the Chamber was mindful of the need to avoid revealing the identity of protected or

[9] Rule 89 (C) provides that "A Chamber may admit any relevant evidence it deems to have probative value."
[10] *Nyiramasuhuko v. The Prosecutor*, "Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence", 4 October 2004, paras. 5, 7.
[11] *Musema,* Judgement (AC), para. 38; *Akayesu,* Judgement (TC), para. 135; *Kamuhanda*, Judgement (TC), paras 40, 41.
[12] *Tadić*, Judgement (AC), para. 539; *Kamuhanda,* Judgement (TC), para. 38.
[13] *Gacumbitsi*, Judgement (AC), paras. 74, 93.

otherwise vulnerable witnesses to the press or members of the public. Therefore, in presenting such evidence in this Judgement, the Chamber chose language which in its view, struck a balance between such witness protection concerns and the need to fully convey its reasoning.

41.6.1.1.2. Judicial Notice

16. The Appeals Chamber has held that the following are all facts of common knowledge, not subject to reasonable dispute and therefore qualify for judicial notice under Rule 94 (A): genocide took place in Rwanda between 6 April and 17 July 1994; there were widespread or systematic attacks against a civilian population based on Tutsi ethnic identification during the said period; there was a non-international armed conflict in Rwanda; and the Tutsi, Hutu, and Twa existed as ethnic groups in Rwanda in 1994.[14] The Chamber takes judicial notice of these facts and will therefore disregard any evidence the parties have led to prove or disprove such facts. However, this does not relieve the Prosecution of its burden to lead evidence to prove beyond reasonable doubt that the Accused's conduct and mental state rendered him individually responsible for genocide and crimes against humanity as charged in the Indictment.

41.6.2. Chapter II : Factual Findings

41.7. 1. Preliminary Matters

41.7.1.1.1. General Allegations

17. The Chamber notes that the allegations contained in Paragraphs 3.10, 3.10 (i), 3.11, 3.11 (i), 3.11 (ii), 3.12, 3.12 (i), 3.13, 3.14, and 3.16 do not attribute any specific criminal conduct to the Accused, and the Prosecution has not relied on them to prove any of the charges in the Indictment. The Chamber will therefore not make any factual findings on them.

41.7.1.1.2. Paragraphs of the Indictment not relied upon by the Prosecution

18. The Chamber also recalls that during its Closing Argument on 22 June 2006, the Prosecution indicated that it was not relying on the allegations contained in Paragraphs 3.37, 3.38, 3.39, 3.42, 3.43, 3.44, 3.49, 3.50, and 3.51 because it did not lead any evidence to support them.[15] Accordingly, the Chamber will not make factual findings on the said paragraphs and they are hereby dismissed.

41.7.1.1.3. Specificity of the Indictment

19. In its Closing Brief, the Defence argues that the Indictment alleges very few specific acts committed by the Accused and that based on the specific factual allegations in the Indictment, Muvunyi could not determine what acts he allegedly committed so as to mount an effective defence. It is argued that most references to Muvunyi contained in the Indictment are general in nature, and do not specify the particular criminal conduct he is accused of.[16]

20. The Defence further argues that the Indictment fails to allege any specific form of liability pursuant to Article 6 (1) of the Statute. It submits that the Prosecution must plead a specific form of liability under Article 6 (1) and the failure to do so results in ambiguity and a defective indictment.

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[14] *Prosecutor v. Karemera et al.*, "Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice", 16 June 2006, paras. 22-37.
[15] T. 22 June 2006, pp. 18-19.
[16] Defence Closing Brief, 19 June 2006, paras. 32-33.

While conceding that such a defect can in certain circumstances be cured through the Pre-Trial Brief, whether the Prosecution has effected such a cure must be considered in light of the Accused's right to a fair trial, including his entitlement to adequate time and facilities for the preparation of his defence.[17]

21. Concerning genocide, the Defence argues that the Indictment does not charge the Accused with actual participation in the crime of genocide in a specific manner and urges the Chamber to limit its consideration to personal participation in genocide.[18] The Defence also maintains that none of the allegations in the Indictment is made with sufficient specificity to support a conviction of the Accused for complicity in genocide.[19] Furthermore, the Defence submits that the Indictment fails to plead Article 6 (3) responsibility with sufficient specificity to support a conviction.[20]

22. The Chamber notes that generally, the Defence must raise objections to the form of the Indictment at the pre-trial stage, and interpose a timely objection to a defective pleading when the evidence is introduced at trial.[21] In any case, the Chamber will consider the Defence submission that the Prosecution failed to specifically plead the forms of participation under Article 6 (1). In the Chamber's view, while it is desirable that forms of participation under Article 6 (1) be specifically pleaded in the Indictment, there is no rule of law requiring such a form of pleading except where the Prosecution alleges joint criminal enterprise.[22] In *Semanza,* the Appeals Chamber referred to the Prosecutor's long established practice of merely quoting the provisions of Article 6 (1) and added that it would be "advisable" to plead the specific form of 6 (1) responsibility in relation to each individual count of the indictment. However, the Appeals Chamber did not state that this was a mandatory requirement.[23] The majority in *Gacumbitsi* indicated that in determining whether the form of participation has been adequately pleaded so as to give the accused clear and timely notice, the indictment must been considered as a whole.[24] Having considered the totality of the allegations in the Indictment the Chamber is satisfied that the Accused was put on notice that the Prosecution intended to prove that he was individually responsible for either ordering or aiding and abetting the commission of genocide or crimes against humanity.

23. With respect to the form of pleading responsibility under Article 6 (3), this Chamber is satisfied that the Indictment adequately sets out (a) that the Accused is the superior of sufficiently identified subordinates over whom he had effective control in the sense of the material ability to prevent or punish their criminal conduct; (b) that the said subordinates engaged in specific acts of criminal behaviour; (c) that the accused knew or had reason to know that the crimes were about to be committed or had been committed and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.[25]

41.7.1.1.4. Notice

24. An accused has the right "[t]o be informed promptly and in detail … of the nature and cause of the charges against him" according to Article 20 (4) (a) of the Statute. According to the Appeals Chamber, when considered in light of Rule 47 (C) of the Rules, this provision translates into a prosecutorial obligation "to state the material facts underpinning the charges in the indictment, but not

[17] Defence Closing Brief, 19 June 2006, paras. 37, 40. (The Closing-Brief does not contain Paragraphs 38, 39, 48, 49, 50, 51).
[18] Defence Closing Brief, 19 June 2006, para. 53.
[19] Defence Closing Brief, 19 June 2006, para. 71.
[20] Defence Closing Brief, 19 June 2006, para. 94.
[21] *Niyitegeka*, Judgement (AC), paras. 199, 200.
[22] *Gacumbitsi*, Judgement (AC), paras. 166, 167 and authorities cited therein.
[23] *Semanza*, Judgement (AC), para. 259. See also the Separate Opinion of Judge Shahabuddeen in *Gacumbitsi*, Judgement (AC) at para. 56, where he indicated that the Appeals Chamber's injunction in *Semanza* was not a universal procedural requirement and noted that "a practice of long standing is not terminated by an injunction as to what is 'advisable'.
[24] *Gacumbitsi*, Judgement (AC), paras. 123.
[25] *Blaškić*, Judgement (AC), para. 218.

the evidence by which such material facts are to be proven."[26] It also implies that the Prosecution must know its case before going to trial and to plead all the material facts in the Indictment with as much specificity as possible.[27]

25. The Chamber notes the Prosecution submission made during closing arguments that even though it had not specifically pleaded the killing of Karegeya in the Indictment, its timely disclosure of Witness YAA's unredacted statement, as well as the summary of this witness's testimony contained in the Pre-Trial Brief, provided adequate notice to the Defence so as to justify the admission of testimony on this event. Relying on the Appeals Chamber judgement in *Ntakirutimana,* the Prosecution argues that the Defence has not suffered any prejudice from the admission of this evidence.[28] The Chamber has examined the Pre-Trial Brief and the statement of Witness YAA and is satisfied that the Defence was given timely, clear and consistent notice of the material fact relating to the killing of Karegeya.[29]

26. The Chamber also notes that the attack on Tutsi refugees at Mukura forest is not specifically mentioned in the Indictment. However, the list of massacre sites provided in Paragraph 3.40 is not exhaustive, but merely a set of examples of such venues. Having considered the Indictment as a whole and subsequent communications made to the Defence by the Prosecution, the Chamber is satisfied that information regarding the attack and the Prosecutor's intent to lead evidence on it were disclosed to the Defence in a timely, consistent and clear manner. The Chamber notes that in the summary of proposed evidence of Witnesses XV and YAK contained in the Pre-Trial Brief, the Prosecution indicated that both witnesses would testify about the attack on refugees at Mukura forest by ESO soldiers and *Interahamwe*.[30] Similarly both witnesses referred to this attack in their pre-trial statements which, pursuant to the Chamber's order, were disclosed to the Defence at least 21 days prior to each witness testimony. Therefore, the Chamber concludes that the Accused's ability to defend himself will not be prejudiced if evidence relating to the Mukura forest attack is taken into account.[31]

27. In its Closing Brief, the Defence raised several objections, claiming it was not provided with proper notice on some of the evidence that the Prosecution was allowed to lead. The Defence requests that all such evidence be excluded in order to avoid prejudice to the Accused. The Chamber recalls that during the course of trial, the Defence objected to the evidence of several witnesses on the ground that it was not given adequate notice. These issues were considered and ruled upon by the Chamber either orally or in writing.[32] Consequently, in the absence of a showing of exceptional circumstances, the Chamber will not reconsider those issues.

28. The Defence urges the Chamber not to take the evidence of Witness QX into account. It submits that the summary of Prosecution Witness QX's testimony contained in the Pre-Trial Brief was barely intelligible and there was no indication that this witness would say anything adverse to the Accused. In the end, the Defence submits that it was not given adequate notice of Witness QX's deposition testimony and therefore did not have adequate time to prepare a defence to this testimony.[33] The Chamber recalls that during trial, the Defence brought a motion to exclude the deposition testimony of Witness QX on the ground that it had insufficient opportunity to mount an effective defence and for lack of competent counsel at the deposition hearing. The Chamber views the current submission as an attempt to reargue a matter already decided by the Chamber. In any case, the Chamber considers that the Accused was represented at the deposition hearing by Duty Counsel and

[26] *Semanza*, Judgement (AC), para 85; *Ntakirutimana,* Judgement (AC), para 25; *Gacumbitsi*, Judgement (AC), para. 49; *Kupreškić*, Judgement (AC), para. 88.
[27] *Simba*, Judgement (TC), para. 14.
[28] T. 22 June 2006, p. 19.
[29] *Ntakirutimana*, Judgement (AC), para. 27.
[30] Prosecutor's Pre-trial Brief, filed 24 January 2005.
[31] Statement of Witness YAK dated 7 June 2000; and Statement of Witness XV dated 12 January 2001.
[32] See *inter alia*, Oral Decision of 14 March 2005; "Decision on Accused Tharcisse Muvunyi's Motion to Exclude Testimony of Witnesses AFV, TM, QCS, QY and QBP and Motion to Strike QY's Testimony", 20 June 2005.
[33] Defence Closing Brief, 19 June 2006, para. 97.

has had the benefit of counsel's assistance throughout the proceedings before the current Chamber. Since the deposition hearing was held in December 2003, the Defence has had adequate opportunity to consider Witness QX's testimony, to carry out further investigations and cross-examine Prosecution witnesses with a view to challenging his evidence, and indeed to call defence evidence to contradict, or impugn the credibility and reliability of Witness QX's testimony. It is the Chamber's view that since the Defence failed to take advantage of those opportunities, it cannot argue at this stage that Witness QX's testimony should not be taken into account.

29. The Defence also objected to the evidence of Prosecution Witnesses YAO and YAN on the ground that these witnesses were called to support the counts of genocide or complicity in genocide, and that the Accused never had notice of, and therefore could not prepare a defence to, the witnesses' evidence relating to the charge of other inhumane acts.[34] The Chamber has closely examined the evidential summary of both witnesses contained in the Prosecution Pre-Trial Brief as well as their pre-trial statements, and is satisfied that both of them clearly refer to acts of beating that could provide material in support of the charge of other inhumane acts. The Defence argument on lack of notice is therefore untenable.

41.8.

41.9. 2. Tharcisse Muvunyi

30. Tharcisse Muvunyi, a Rwandan citizen, was born on 19 August 1953 in Mukarange *commune*, Byumba *préfecture*. He served in the Rwandan Army and as of 1 March 1994, and was Lieutenant-Colonel stationed at ESO.[35]

41.10. 3. The Issue of ESO Commander

41.10.1.1. 3.1. Indictment

31. Paragraphs 2.2 and 2.3 read:

> 2.2 Throughout the events referred to in this Indictment until he left Rwanda, Tharcisse Muvunyi held the office of i. He was appointed to this position on the 7th of April 1994 after his superior officer, Colonel Marcel Gatsinzi, was appointed Acting Chief of Staff of the Rwandan army.
>
> 2.3 In his capacity as Commander of ESO, the Accused had under his command the officers and soldiers of the school. He exercised authority and control over the *gendarmerie*, Ngoma Camp, as well as all the military operations in Butare *préfecture*.

41.10.1.2. 3.2. Evidence

41.10.1.2.1. Prosecution Witness KAL

32. Prosecution Witness KAL, a Tutsi man, served in the Rwandan Army from 1991 to 1994.[36] When he joined the Army in 1991, he was sent for a six-month training course at the ESO in Butare. At that time, Colonel Marcel Gatsinzi was Commander of ESO.[37]

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[34] Defence Closing Brief, paras. 119, 368, 375.
[35] *Prosecutor v. Muvunyi*, "Accused's Response to the Prosecutor's Request to Admit" filed on 27 January 2005; See also Exhibit D.5, admitted on 24 May 2005.
[36] T.1 March 2005, p. 4 (I.C.S.); Exhibit P.1, Personal Information Sheet of Witness KAL (Under Seal), admitted on 1 March 2005.
[37] T. 5 March 2005, pp. 5, 7 (I.C.S.).

33. On 6 April 1994, Witness KAL was still a student at MECATR, a school for army mechanics and transmission, and lived at the Kanombe Military Camp in Kigali. According to his evidence, that evening, he and his fellow students were sent to guard the MECATR school premises. When Witness KAL returned to ESO between 14 and 20 April 1994,[38] the Camp Commander was Colonel Tharcisse Muvunyi, who remained in that position until the time the witness left ESO for Gikongoro in June 1994.[39] During this period, the Accused gave orders which the witness had to carry out, and the witness saw Muvunyi address other people at two meetings held at the Accused's house. However, Witness KAL said he never spoke to the Accused directly because, as he put it, a mere soldier could not easily speak with a Commander.[40]

34. KAL testified that after his appointment as Chief of Staff, Colonel Gatsinzi came back to ESO on short visits "from time to time" between April and June 1994 during which the Colonel's helicopter would land inside the ESO Camp and would then leave again. After Gatsinzi was replaced as Chief of Staff, he returned to Butare, but not as ESO Commander. The witness believed it was common knowledge that Gatsinzi was appointed to negotiate an end to the war between the Rwandan Government and the RPF.[41]

41.10.1.2.2. Prosecution Witness YAA

35. Prosecution Witness YAA, a soldier in the Rwandan Army, was based at ESO between April and June 1994 but was posted to various locations during that period. He testified that on 7 or 8 April 1994, Colonel Marcel Gatsinzi, then Commander of ESO, was appointed as interim Chief of Staff of the Rwandan Army and he moved to Kigali.[42] According to YAA, Colonel Tharcisse Muvunyi took over command at ESO on 8 or 9 April even though the soldiers did not receive any information that Gatsinzi had been relieved of this position. YAA said that on 12 or 13 April 1994, he was deployed to the battlefront in Kigali but returned to ESO on 16 May and stayed there until 8 June 1994, when he left for Gikongoro and then Cyangugu.[43] During his stay at ESO, Witness YAA saw Muvunyi almost every day, knew the latter's office within the ESO Camp and saw him giving orders to the soldiers. According to the witness, Muvunyi was ESO Commander between 16 May and 8 June 1994.[44]

36. According to YAA's testimony, everyone inside the ESO Camp was under Muvunyi's orders.[45] He added, however, that Colonel Munyengango was also present at ESO during the events in question, but he did not assume command due to his health condition.[46]

Prosecution Witness YAP

37. In 1994, Witness YAP said he worked at the Butare University Hospital and lived not far from ESO.[47] YAP testified that he never met Muvunyi, but knew Muvunyi was the Commander of ESO because this was a matter of public knowledge. He knew soldiers who worked under Muvunyi's command such as Captain Nizeyimana and Second-Lieutenant Bizimana; these soldiers told him Muvunyi was their commander. Witness YAP thought that Muvunyi was Commander of ESO both before and after the death of President Habyarimana.[48] During cross-examination, he stated that he did not believe Marcel Gatsinzi was the Commander of ESO before the death of President Habyarimana,

[38] T. 1 March 2005, p. 8; 3 March 2005, p. 23 (I.C.S.).
[39] T. 2 March 2005, p. 11; T. 7 March 2005, p. 2 (I.C.S.).
[40] T. 2 March 2005, p. 11; T. 7 March 2005, pp. 9, 14 (I.C.S.).
[41] T. 2 March 2005, pp. 2, 3; T. 7 March 2005, pp. 6, 7 (I.C.S.).
[42] T. 8 March 2005, p. 32. (I.C.S.).
[43] T. 8 March 2005, pp. 17, 34, 35, 41 (I.C.S.).
[44] T. 10 March 2005, pp. 34, 35 (I.C.S.).
[45] T. 9 March 2005, p. 11 (I.C.S.).
[46] T. 10 March 2005, p. 16 (I.C.S.) (Cross-examination).
[47] Exhibit P.17 (under seal), admitted on 6 June 2005.
[48] T. 6 June 2005, p. 36 (I.C.S.).

even though he had heard on the radio that Gatsinzi stated he was Commander of ESO during a *Gacaca* court session.[49]

41.10.1.2.3. Prosecution Witness XV

38. Witness XV said that he worked at the Butare University Hospital in 1994.[50] He testified that around 15 or 16 April 1994, he received a letter signed by the Director of the Butare University Hospital and by "Commander Muvunyi" instructing him to return to work at the Hospital.[51] Sometime in May 1994, Muvunyi visited the Hospital and a colleague of witness XV told him that "that person was Muvunyi, and that he was the commander of the soldiers who were both within the hospital and those who were outside …".[52]

41.10.1.2.4. Prosecution Witness CCQ

39. Witness CCQ was born in Butare and said that he knew the authorities there quite well. He testified that Marcel Gatsinzi was Commander of ESO until the war started in April 1994, but that the Accused was also present at that time. After the war started, he used to see Muvunyi and Munyengango who were living at ESO and recalled that Muvunyi replaced Gatsinzi as Commander of ESO following the death of President Habyarimana, and specifically, as of 20 April.[53]

41.10.1.2.5. Prosecution Witness NN

40. Witness NN was a non-commissioned officer in the Rwandan Army from April to June 1994. He testified that Lieutenant-Colonel Muvunyi replaced Colonel Gatsinzi as Commander of ESO. He said he was present at ESO when the Accused arrived in March 1994 but could not remember whether Muvunyi or Munyengango was Colonel Gatsinzi's deputy. NN further testified that even though Augustin Bizimungu replaced Colonel Gatsinzi as Chief of Staff, Gatsinzi did not resume his duties as Commander of ESO until late May 1994 and the Accused remained in charge of ESO until that time. He confirmed that Colonel Munyengango was present at ESO and was sick. He added that Colonel Mugemanyi was also present at ESO but only arrived after 16 April 1994.[54]

Defence Witness Augustin Ndindiliyimana

41. Defence Witness General Augustin Ndindiliyimana was the Chief of Staff of the *Gendarmerie nationale* at the time of the events in 1994.[55] He testified that Colonel Marcel Gatsinzi was Commander of ESO on 6 April 1994.[56] On 7 April, Gatsinzi was appointed Interim Chief of Staff of the Rwandan Army and moved to Kigali to take up his new position. On 17 April 1994, Gatsinzi was replaced as Chief of Staff by Colonel (later General) Augustin Bizimungu. According to Augustin Ndindiliyimana, during the period when Gatsinzi served as Interim Chief of Staff, Lieutenant-Colonel Muvunyi acted as *de facto* Commander of ESO.[57] But after 17 April, Gatsinzi returned to ESO and "took over his unit, his school again" and remained in that position until June 1994 when the witness

[49] T. 6 June 2005, pp. 19, 36, 37 (I.C.S.).
[50] T. 16 May 2005, p. 9.
[51] T. 16 May 2005, p. 9.
[52] T. 16 May 2005, p. 21.
[53] T. 26 May 2005, pp. 14, 15, 23-25.
[54] T. 18 July 2005, pp. 4-5 (I.C.S.), p. 23 (I.C.S.); T. 19 July 2005, p. 53 (I.C.S.); T. 20 July 2005, p. 12 (I.C.S.), p. 24 (I.C.S.).
[55] Augustin Ndindiliyimana is charged before the Tribunal for conspiracy to commit genocide, genocide, complicity in genocide, crimes against humanity, and war crimes.
[56] T. 6 December 2005, p. 31.
[57] T. 7 December 2005, p. 43.

left Rwanda.[58] Augustin Ndindiliyimana said he never saw any *communiqué* placing Muvunyi in command of ESO.[59]

41.10.1.2.6. Defence Witness MO83

42. Defence Witness MO83 served in the Rwandan Army from 1985 to 1994 and was assigned to ESO at various times between 1989 and 1993. He testified that he was not at ESO in 1994 but understood that in April 1994, the Commander of ESO was Colonel Gatsinzi. MO83's evidence was that Gatsinzi remained Commander until the time Butare town was taken over by the RPF even though he did not state the date this took place.[60] Gatsinzi remained Commander of ESO throughout this period even though he would leave ESO to go for negotiations with the RPF and all other commanders at ESO were there only in an acting capacity.[61] The witness said he never saw a *communiqué* appointing Muvunyi as ESO Commander.[62]

41.10.1.2.7. Defence Witness MO31

43. Witness MO31 served in the Rwandan Army from 1976 to 1994 and has known Muvunyi since 1982.[63] From mid-May to mid-June 1994, he held a senior military position in Butare *préfecture*.[64]

44. According to the witness, there was no commander at ESO when he arrived in Butare in May 1994.[65] Later in his testimony, the witness stated that General Marcel Gatsinzi was the Commander of ESO from 17 April to 5 July 1994.[66] He indicated, however, that during the period he served in Butare, he was never required to report to the ESO Commander, and never carried out joint operations with the other military camps in the area.[67]

45. Witness MO31 said that after serving in Butare for about one month, he received a telegram from the Ministry of Defence relieving him of his duties. On the same day, Muvunyi also received a telegram transferring him from his duties at ESO. Witness MO31 testified that sometime in June 1994, a helicopter landed at the ESO Camp for a short while and then left. He therefore went to Muvunyi and asked him who was on board the helicopter. Muvunyi responded that it was the Minister of Defence and that he had taken the opportunity to ask the Minister why he was being transferred.[68] Muvunyi added that according to the Minister, the reason for his transfer was that he and one Ndayambaje no longer enjoyed the confidence of the government and that they were suspected of being accomplices of the RPF. Further, Muvunyi told him it was the government's view that if the RPF were to enter Butare, Muvunyi and Ndayambaje would not be able to defend the town.[69]

41.10.1.2.8. Defence Witness MO30

46. Witness MO30 testified that he and his family relocated from Kigali to Butare in 1992, and remained there until about 30 June 1994 when he left for Gikongoro.[70] During his stay in Butare, he

[58] T. 6 December 2005, pp. 32, 34.
[59] T. 8 December 2005, p. 2.
[60] T. 12 December 2005, p. 14.
[61] T. 12 December 2005, p. 8.
[62] T. 12 December 2005, p. 14; T. 13 December 2005, p. 15.
[63] T. 14 December 2005, pp. 34, 36 (I.C.S.).
[64] T. 14 December 2005, p. 34, 36 (I.C.S.).
[65] T. 15 December 2005, p. 9 (I.C.S.).
[66] T. 15 December 2005, p. 11 (I.C.S.).
[67] T. 15 December 2005, p. 16 (I.C.S.).
[68] T. 15 December 2005, p. 6 (I.C.S.).
[69] T. 15 December 2005, p. 28 (I.C.S.).
[70] T. 14 March 2006, pp. 5, 15 (I.C.S.).

became familiar with people in key positions in government, society, and business in the city. On 28 April 1994, Witness MO30 and one of his colleagues at work went to see Muvunyi at ESO to request fuel for their factory because it was said that the Ministry of Defence was managing the distribution of fuel supplies. Upon arrival, his colleague spoke to Muvunyi who responded that "the boss, Marcel Gatsinzi" was not there, that he had gone to Kigali, and that therefore he could not meet their needs.[71]

41.10.1.2.9. Defence Witness MO46

47. Defence Witness MO46 served in the Rwandan Army from 1971 to 1994 and has known Muvunyi for a very long time.[72] In April 1994, MO46 worked at the Ministry of Defence. On or about 20 April 1994, he was sent on an official mission to find out what was happening in Butare. Upon his arrival at ESO, he expected to meet with Colonel Marcel Gatsinzi who, according to the witness, was the Commander of the ESO Camp. However, because Gatsinzi was not available, he met with Lieutenant-Colonel Muvunyi who was an S-4 officer in charge of logistics. Witness MO46 told Muvunyi he was sent from the Ministry of Defence "because it was felt that the killings had already reached Butare", and there was a need to do something about the massacres. Muvunyi replied that he was not in a position to do anything about the killings because it was being said that Nizeyimana was the commander, and advised that MO46 should speak to Nizeyimana and Hategekimana if he wanted to put an end to the massacres.[73] Witness MO46 told the Chamber that when he spoke with Muvunyi, he knew quite well that Marcel Gatsinzi, and not Muvunyi, was the Commander of ESO Camp.[74] He explained further that following Gatsinzi's appointment as Interim Chief of Staff on 7 April, no one was appointed to the position of Commander or Interim Commander of ESO Camp.[75] He said Gatsinzi continued to direct the affairs of ESO at the same time that he served as Army Chief of Staff *ad interim* and that this situation remained until the time when the witness left his position at the Defence Ministry on 13 May 1994.[76] Witness MO46 explained that where a commander was appointed to another acting position, he continued to exercise the duties of his command until he was dismissed or replaced by someone else. He told the Chamber that due to his position at the Ministry of Defence he would have known if a commander or an interim commander had been appointed to replace Gatsinzi at ESO.[77]

41.10.1.2.10. Defence Witness MO15

48. Witness MO15 worked as an instructor at ESO at the time of the 1994 events.[78] He said that when he arrived in 1992, Colonel Marcel Gatsinzi commanded ESO and remained in that position until 7 April 1994 when he was appointed Interim Chief of Staff of the Rwandan Army. Witness MO15 added that Gatsinzi was not replaced as ESO Commander.[79] When asked if ESO had a Deputy Commander, he initially said ESO did not have a Deputy Commander, but later indicated that one Lieutenant-Colonel Baramyeretse "replaced Gatsinzi in his absence".[80] Muvunyi arrived at ESO in

[71] T. 14 March 2006, p. 15 (I.C.S.).
[72] T. 10 March 2006, pp. 57, 58 (I.C.S.).
[73] T. 13 March 2006, p. 39 (I.C.S.): "And he told me that it was the minister that has sent me and that was good, but the population was saying that Nizeyimana is a commander, and the commander of the camp maybe involved in the killings. "If you want us to stop the massacres, I don't have the power to do so. The person you should be talking to is Nizeyimana and Hategekimana. They are the ones who are in a position to stop the massacres."
[74] T. 13 March 2006, p. 38 (I.C.S.).
[75] T. 13 March 2006, p. 13 (I.C.S.). But see Article 8 of Law N°23/1986, "*Création et organisation de l'École des sous-officiers*", admitted as Exhibit D.49 on 13 March 2006, which provides that where the Commander of ESO is absent or unable to perform his duties, his duties shall be assumed by the Deputy Comander of ESO.
[76] T. 13 March 2006, p. 13 (I.C.S.).
[77] T. 13 March 2006, p. 13 (I.C.S.).
[78] T. 9 March 2006, p. 22 (I.C.S.).
[79] T. 8 March 2006, pp. 28, 32 (I.C.S.).
[80] T. 8 March 2006, pp. 25, 28, 32 (I.C.S.).

March 1994 and was designated the S-1/S-4 officer. Captain Idelphonse Nizeyimana was the S-2/S-3 officer responsible for training and operations.[81]

41.10.1.2.11. Defence Witness MO23

49. Witness MO23, who was a student at the ESO in 1994, testified that when General Bizimungu was appointed Chief of Staff, Colonel Gatsinzi came to ESO after three or four days and continued to function as the Commander. The witness stated that whenever he was on guard at the ESO entrance, he saw Gatsinzi coming almost every day and going into his office.[82]

41.10.1.3. 3.3. Deliberations

50. The Indictment asserts that from 7 April 1994, up to the time he left Rwanda, Tharcisse Muvunyi held the Office of Commander of ESO, a position he was appointed to after his superior officer, Marcel Gatsinzi, was appointed Acting Chief of Staff of the Rwandan Army. The Indictment further alleges that as ESO Commander, Muvunyi was the most senior among the officers and men at ESO and exercised authority over the Ngoma Camp and military operations in Butare. In support of the allegations contained in the Indictment that Muvunyi was the Acting Commander of ESO camp from 7 April 1994, the Prosecution has relied on the evidence of Witnesses KAL, YAA and NN, all of whom were soldiers attached to ESO at various times between April and June 1994. All three witnesses testified that Muvunyi assumed command of ESO after Marcel Gatsinzi's appointment as Interim Chief of Staff sometime between 7 and 9 April 1994. Although no evidence was led pointing to a formal instrument appointing the Accused to this position, his assumption of the position of ESO Commander was based on the provisions of Law N°23/1986 on the Establishment and the Organisation of ESO, which provides that in the absence of the Commander, the Deputy Commander shall assume the former's responsibilities.[83] Witnesses KAL, YAA, and NN, corroborated one another's testimony that Muvunyi, throughout the period in question, was giving orders to ESO soldiers. Although Colonel Munyengango was also present at ESO, the Chamber believes he was only there for medical reasons. The testimony of Witnesses KAL, YAA and NN that Muvunyi became ESO Commander after Gatsinzi's appointment as Interim Chief of Staff is supported by Witnesses YAP and XV, both of whom were civilians living in Butare during April 1994. The evidence of Witness XV that Muvunyi co-signed a letter instructing him to return to work lends further support to the allegation that Muvunyi was ESO Commander in April and May 1994.

51. The Defence witnesses gave various accounts as to who was in command of ESO after Gatsinzi was appointed Interim Chief of Staff of the Rwandan Army. In assessing their evidence the Chamber will give more weight to the testimony of witnesses who were present at ESO in the crucial months of April to June 1994. In this respect, the Chamber notes that Witness MO83 left ESO in 1993. Defence Witness MO31 contradicted himself when he testified that Gatsinzi was ESO Commander from 17 April to 5 July, but at the same time, said that when he arrived in Butare in May 1994, there was no ESO Commander; subsequently he explained that Muvunyi received a telegram sometime around the middle of June 1994 relieving him of his post at ESO. Indeed the overall tenor of MO31's testimony is consistent with an inference that Muvunyi was the most senior military officer at ESO. It is the Chamber's view that MO31's account that Muvunyi was at ESO until the middle of June 1994, is more consistent with the evidence of Prosecution Witnesses KAL and YAA who worked at ESO, and therefore had direct knowledge of day-to-day events at that Camp. Furthermore, the evidence of Witness MO46 that on 20 April 1994 he visited the ESO Camp as a delegate of the Ministry of Defence and met with Muvunyi instead of Gatsinzi, provides additional reason to believe that Muvunyi acted as ESO Commander in the absence of Gatsinzi. Defence Witnesses MO36 and MO30 testified that they attended several security committee meetings at the Office of the *préfet*, and that

[81] T. 8 March 2006, p. 28. (I.C.S.).
[82] T. 16 March 2006, pp. 19-20 (I.C.S.).
[83] Law N°23/1986, admitted as Exhibit D.49 on 13 March 2006. Article 8 provides: "[Le Commandant en second] est chargé de la coordination et de l'enseignement et remplace le Commandant de l'École en cas d'absence ou d'empêchement",

Muvunyi represented ESO at these meetings.[84] Taken in its totality, this evidence supports the conclusion that Muvunyi exercised the powers of the office of ESO Commander on the basis of law, and had effective control over the actions of ESO soldiers even though he might not have been formally appointed as such. As stated by the Appeals Chamber in the *Čelebiči* Judgement, the absence of a formal appointment is not fatal to a finding of criminal responsibility, provided it can be shown that the superior exercised effective control over the actions of his subordinates.[85] For this purpose, effective control reflects the superior's material ability to prevent or punish the commission of offences by his subordinates and it could arise from both a *de jure* and a *de facto* position of authority. Where *de jure* authority is proved, a court may presume the existence of effective control on a *prima facie* basis. Such a presumption can, however, be rebutted by showing that the superior had ceased to possess the necessary powers of control over subordinates who actually committed the crimes.[86]

52. The Chamber must also determine the period for which Muvunyi served as ESO Commander. Witnesses KAL and YAA testified that Muvunyi acted as ESO Commander from 7 April to June 1994. Prosecution Witness NN's testimony differs slightly on the temporal duration of Muvunyi's command. He told the Chamber that in late May 1994, Gatsinzi returned to ESO as Commander. Defence Witness Augustin Ndindiliyimana testified that on 4 May 1994, in his capacity as Chief of Staff of the *Gendarmerie nationale*, he visited Butare and held a meeting with military commanders in the area. He told the Chamber that Muvunyi attended the said meeting as the representative of ESO.[87]

53. The Defence has challenged the credibility of Prosecution Witnesses KAL, YAA, and NN.[88] With respect to Witnesses KAL and YAA, the Defence suggests that both of them were military deserters who, in April 1994, had been posted to the war front in Kigali, but had returned to the ESO Camp in Butare without instruction or approval. The Defence further disputes that Witness YAA returned to ESO on 16 May 1994, and indicated that he signed at least three statements in which he said he returned to ESO in late May. For these reasons, the Defence argues that the evidence of KAL and YAA should not be believed. The Chamber disagrees.

54. In the Chamber's view, the mere fact that Witnesses KAL and YAA left their positions at the battlefront in Kigali to return to Butare is not sufficient to dispute the veracity of their testimony relating to events that they witnessed during the course of their stay at ESO. The Chamber has carefully considered the specific circumstances surrounding the departure of Witnesses KAL and YAA from Kigali to ESO in Butare, alongside the general context of the ethnic-based killings that were then being perpetrated in Rwanda. In the Chamber's view, the fact of their desertion, does not *per se* affect the credibility and reliability of the evidence they gave about the issue of ESO Commander during the months of April and May 1994.

55. On the issue of the discrepancy in the date that Witness YAA might have returned to ESO from Kigali, the Chamber notes that in his statement dated 18 and 22 September 2000, Witness YAA indicated on three separate occasions that he returned to Butare in late May.[89] In his evidence before the Chamber, he stated that he returned to ESO on 16 May 1994.[90] The Chamber is of the view that this is a minor discrepancy that does not affect YAA's credibility. Moreover, the Chamber notes that when Witness YAA was confronted with this discrepancy during cross-examination, he explained that when he noticed it back in 2000, he brought it to the attention of one of the Prosecution investigators who promised to change it. He maintained that he told the investigators he returned to Butare at the middle of May 1994, not in late May. The Chamber accepts this as a sufficient explanation of the discrepancy between Witness YAA's evidence and his pre-trial Statement.

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[84] T. 7 March 2006, p. 23 (I.C.S.); T. 14 March 2006, p. 23 (I.C.S.).
[85] *Delalić et al.* (*Čelebiči*), Judgement (AC), "Celebici case", para. 196.
[86] *Delalić et al.* (*Čelebiči*), Judgement (AC), para. 197.
[87] T. 6 December 2005, p. 34; T. 7 December 2005, p. 43.
[88] Tharcisse Muvunyi's Final Trial Brief, pp. 44, 46, 59.
[89] Statement of Witness YAA, 18 and 22 September 2000. YAA explained that he met with the investigators on the two dates indicated.
[90] T. 9 March 2005, p. 8 (I.C.S.); T. 10 March 2005, pp. 17, 18 (I.C.S.) (Cross-examination).

56. With respect to Witness NN, the Defence submits that his evidence should not be relied upon because he was paid US$ 5,000.00 before he agreed to testify for the Prosecution, and his evidence is therefore tainted. The Chamber has carefully considered the Defence submission, the evidence of Witness NN and the circumstances surrounding the payment of US$ 5,000.00 to him by the Office of the Prosecutor. The Chamber is satisfied that the sum was paid to the witness as compensation for material and financial loss he suffered as a result of his quick relocation from Rwanda to another State, leaving behind his house and business. The Chamber believes that Witness NN was compelled to flee Rwanda because of threats he and his family received from people who did note like the fact that he was in contact with investigators of the Office of the Prosecutor and that he might be called to testify before the Tribunal. The Chamber is further satisfied that this payment, made on 7 May 2005,[91] did not colour or change Witness NN's testimony given on 18, 19 and 20 July 2005. The Chamber's finding in this respect is supported by the fact that the witness's testimony before the Chamber with respect to Muvunyi's position as ESO Commander, is generally consistent with his pre-trial statement given to Prosecution investigators on 16 July 1998, seven years before he took the witness stand or received the said compensation.[92]

57. In the Chamber's opinion, even if Muvunyi was never formally appointed ESO Commander, this does not detract from the fact that he effectively remained the most senior officer and commander on the ground with power and authority to make day-to-day operational decisions at ESO. Therefore, having considered the totality of the evidence adduced by the Prosecution and the Defence, the Chamber makes the following findings of fact:

- On 6 April 1994, Colonel Marcel Gatsinzi was the Commander of ESO and Tharcisse Muvunyi was the second most senior officer;
- On 7 April 1994, Gatsinzi was appointed Interim Chief of Staff of the Rwandan Army, a position he held until 17 April 1994;
- While he might have returned to Butare on a few occasions, Gatsinzi did not return to the position of ESO Commander;
- Colonel Tharcisse Muvunyi, as the second most senior officer at ESO, assumed the position of ESO Commander after his superior officer, Marcel Gatsinzi, was appointed Interim Chief of Staff on 7 April 1994; although there was no formal instrument or other official communication appointing him as such, his assumption of the post of ESO Commander was based, *inter alia*, on the provisions of Law N°23/1986 on the Establishment and Organization of ESO, which provides that in the absence of the Commander, the Deputy Commander shall assume his responsibilities.
- Muvunyi held this position until mid-June 1994, and during this period he had effective control over the actions of ESO soldiers.

41.11. 4. Muvunyi's Responsibility for Security in Butare and Gikongoro préfectures

41.11.1.1. 4.1. Indictment

[91] "Prosecutor's Ex-parte Response to the Trial Chamber's Order on the Prosecutor's Application [pursuant] to Rule 66 (C) of the Rules of Procedure and Evidence to be Relieved of His Obligation to Disclose Additional Information Concerning Prosecution Witness NN and for Special Protective Measures Pursuant to Rule 69 (A) of the Rules of Procedure and Evidence", 13 July 2005. Attachment 'C' to the Motion is a receipt signed by Witness NN on 7 May 2005, confirming receipt of the sum of US$ 5,000.00 from two investigators of the Office of the Prosecutor. Attachment 'A' is an *affidavit* signed by the Prosecutor's Chief Investigator detailing his Office's dealings with Witness NN and the circumstances surrounding the payment of the above sum.
[92] Statement of Witness NN dated 16 July 1998.

58. Paragraphs 3.21 and 3.22 of the Indictment read:

> 3.21 In Butare *préfecture*, the Commander of the ESO was the most senior military officer responsible for security operations in Butare and Gikongoro *préfectures*. He carries out the orders of the military high command as directed from the Army Chief of Staff. In instances where there was a breach of security, the *préfet* could summon the assistance of both the gendarmerie and the army to restore order.
>
> 3.22 In his capacity as the highest military authority in the *Préfecture* Tharcisse Muvunyi was part of the military presence to ensure security of the civilians in the *Préfecture* and part of his duties entailed: liaising with the *préfet* on matters of security; being part of the security council of the *préfet*; ensuring that the *préfet* enjoys the enabling environment to carry out his functions as the most senior civilian government representative; assisting the population in times of danger and carrying out all other functions necessary for the smooth running of the training school for soldiers.

41.11.1.2. 4.2. Evidence

41.11.1.2.1. Prosecution Witness KAL

59. Witness KAL explained that, in addition to the ESO, there were two other military camps in Butare during the course of the events between April and July 1994, namely the Ngoma Military Camp, and the Tumba *gendarmerie* Camp.[93] The Ngoma Camp was under the command of Lieutenant Hategekimana, while one Captain Rusigariye commanded the Tumba *gendarmerie* Camp. These individual camp commanders were under the overall command of the Sector Commander, who was the Commander of ESO. According to Witness KAL, as ESO Commander, Tharcisse Muvunyi was the hierarchical superior of the commanders of the other two military camps in Butare and had authority over the entire Butare and Gikongoro *préfectures*.[94] Colonel Muvunyi was not replaced as Camp Commander during the war.[95]

60. During examination-in-chief, KAL repeatedly identified the Accused as the "Sector Commander", a position which corresponded with ESO Commander and was hierarchically superior to the other commanders in Butare and Gikongoro; the Ngoma Camp and Tumba Camp commanders both reported to this Sector Commander.[96] When asked whether the term "*commandant de place*" was the same as "Area Commander", Witness KAL replied: "We used to say *commandant de place* instead of Area Commander."[97] During cross-examination, Defence Counsel asked Witness KAL to explain the distinction between "sector commanding officer" and "area commanding officer". In response the witness stated that: "Until July 1994, the Sector Commander was also called the *Commandant ops*, the ops Commander. Ops is short for operations. So this was the places where there was fighting. … The ops commander was the Sector Commander, and I told you that the ops commander was the superior of the Area Commander."[98]

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[93] T. 1 March 2005, p. 9 (I.C.S.).
[94] T. 1 March 2005, pp. 12-15 (I.C.S.). The Witness testified: "… the ESO military camp was commanded by Colonel Muvunyi at the time. Ngoma Military Camp was commanded by Lieutenant Hategekimana, and I also said that the Tumba Camp was commanded by Captain Rusigariye, but the last two commanders, that is, the Commander of Tumba Camp and the commander of Ngoma Military Camp, were under the command of the ESO Commander. That was the structure."
[95] T. 7 March 2005, p. 11 (I.C.S.).
[96] T. 1 March 2005, pp. 12, 16 (I.C.S.).
[97] T. 8 March 2005, pp. 2-3 (I.C.S.).
[98] T. 8 March 2005, pp. 2-3 (I.C.S.).

41.11.1.2.2. Prosecution Witness YAA

61. Witness YAA testified that ESO was under the authority of a Commander who was assisted by four immediate officers. These officers were in charge of administration and personnel (S-1), intelligence (S-2), training and operations (S-3), and logistics (S-4).[99] Apart from ESO, there were two other military camps in Butare, namely, Ngoma Camp, and the *gendarmerie* unit known as the *Groupement de Butare* located on Tumba Hill. He explained that both of these camps had their respective commanders, but they were also answerable to the ESO Commander who was *commandant de place*. Witness YAA recalled that in April 1994, the Commander of the Ngoma Camp was Lieutenant Hategekimana, and the Commander of the *gendarmerie* Camp in Tumba was Major Cyriaque Habyarabatuma.[100] Witness YAA testified that Muvunyi was the Area Commander or *commandant de place*.[101]

62. He further explained that when reference was made to an "area", it meant the various camps located within one *préfecture*. The highest-ranking officer of all the camps located within the area automatically became "Area Commander" or *commandant de place*, and he assumed overall responsibility for coordinating military operations and security in the area including activities of both the Army and the *gendarmerie*. According to Witness YAA, the Area Commander was appointed by the Chief of Staff and had to approve all reports sent from the area to the Office of the Chief of Staff.[102]

63. With respect to the other functions of the Area Commander, YAA explained that because of his primary responsibility for security in the area, the Area Commander could, for operational reasons, request the intervention of soldiers from other units within his area of authority. The Area Commander's responsibility also extended to the then *préfecture* of Gikongoro which had one *gendarmerie* camp. As a result, YAA stated, in his capacity as Area Commander, the ESO Commander had responsibility for military operations not only by soldiers of ESO Camp, but also the Ngoma Military Camp and the *gendarmerie* Camps on Tumba Hill and at Gikongoro.[103]

64. YAA drew a distinction between "Area Commander" and "Sector Commander". He explained that the concept of Sector Commander was introduced during the war and applied to areas where there were active hostilities. On the other hand, "Area Commanders" existed prior to the war. He said the term "Sector Commander" existed alongside "Area Commander", although he did not know of the existence of a Sector Commander in Butare.[104]

41.11.1.2.3. Prosecution Witness NN

65. Prosecution Witness NN testified that Colonel Marcel Gatsinzi was Commander of ESO in 1994, and, as such, he "was commander of the Butare, Gikongoro military region," which included the Ngoma Company and the Tumba *gendarmerie* in Butare and the *gendarmerie* Camp in Gikongoro. He explained that this meant the ESO Commander had higher authority than the commanders of each of these other camps.[105]

66. The witness drew a distinction between the positions of "Area Commander" or "*commandant de place"* on the one hand, and "Ops, or Operations Commander" on the other. He explained that

[99] T. 8 March 2005, pp. 27, 28 (I.C.S.).
[100] T. 8 March 2005, pp. 34, 35 (I.C.S.).
[101] T. 8 March 2005, p. 34 (I.C.S.).
[102] T. 10 March 2005, p. 9 (I.C.S.).
[103] T. 8 March 2005, p. 36 (I.C.S.). The witness explained as follows: "[the Area Commander] was responsible for security in the province in collaboration with his camp commanders in Butare, and it is he who coordinated all the activities, so much so that the Area Commander could request the intervention of the other soldiers for operations. Thus, his prerogatives extended even to Gikongoro province."
[104] T. 10 March 2006, pp. 9, 10 (I.C.S.).
[105] T. 18 July 2005, p. 12 (I.C.S.).

whereas the position of Ops commander was created when the war broke out in 1990, that of Area Commander existed well before the war. Before the war, the Area Commander dealt with administrative matters but also had military camps under his command and control. However, after the war began, the Area Commander was also given authority to deal with military operations in his area. The witness explained that when the French term "*place*" was used, it denoted a given space or region where there were military camps controlled or commanded by the Area Commander. These military camps had individual commanders, but those commanders had the Area Commander as their hierarchical superior. Witness NN said that he had never heard of a situation in which the Area Commander was not the highest-ranking officer in the area.[106]

67. Witness NN told the Chamber that the title "Ops Commander" related to activities and command of troops at the battlefront. The Ops Commander had authority over units or battalions that operated in a military region. The battalion commanders came under the authority of the Ops Commander.[107]

41.11.1.2.4. Prosecution Witness YAN

68. Prosecution Witness YAN testified that in mid-May 1994, he was abducted from *l'Économat général* in Butare town by a group of ESO soldiers under the command of Lieutenant Gakwerere. Thereafter, he was beaten and taken to ESO Camp where he observed *Interahamwe* and military men, the former armed with clubs, spears and rifles and dressed in *kitenge*. The witness did not know whether soldiers or *Interahamwe* had beaten him.[108]

69. YAN also testified that he was later taken to a Brigade, about 400 meters from ESO located just past the *Quartier arabe* in Butare. At the Brigade, he was held in a room with about fifteen Tutsi from Tumba and elsewhere. YAN saw both soldiers and *gendarmes* at the Brigade although he did not know who was in charge. The *gendarmes* wore red berets whereas the soldiers wore black or camouflage berets. During his detention, people were periodically taken away: "the *gendarmes* would open the rooms and then hand over the victims to the soldiers". Witness YAN also described repeatedly overhearing his guard, a *gendarme*, answer the phone. He said, "Each time that people were taken out, the *gendarmes* would say that it was Muvunyi who had given that order to take them away."[109]

70. Finally, Prosecution Witness YAN testified that he was released from the Brigade after someone pleaded with Muvunyi to have him released. This occurred to the disappointment of the *gendarmes*. He said: "the *gendarmes* were upset by the fact that I was not taken away as the others. They were wondering why Muvunyi was not giving the order to take me away. So I was subsequently released."

41.11.1.2.5. Prosecution Witness YAO

71. Prosecution Witness YAO testified that she was abducted from the Butare Cathedral by soldiers under the leadership of Lieutenant Gakwerere. She was taken to ESO where she saw Muvunyi, who ordered the soldiers to take her to the Brigade, where she was held for several weeks and beaten by soldiers and *gendarmes*. Soldiers and *gendarmes*, YAO explained, could be distinguished on the basis of their uniforms: some had red berets and some had black berets and some had camouflage and others had green uniforms.[110]

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[106] T. 19 July 2005, pp. 40, 43, 48 (I.C.S.).
[107] T. 19 July 2005, pp. 41, 42 (I.C.S.).
[108] T. 30 May 2005, pp. 4-7.
[109] T. 30 May 2005, pp. 7-9.
[110] T. 21 March 2005, p. 14.

41.11.1.2.6. Defence Witness Augustin Ndindiliyimana

72. Witness Augustin Ndindiliyimana testified that a *commandant de place* in the Army was a commander on the spot, an officer appointed by the Army Chief of Staff and given responsibility over a military area. The *commandant de place* was responsible, among other things, for recruitment, managing the reserve elements, coordinating activities involving the participation of military corps and elements from the various camps in the area, organizing ceremonies during peacetime, and participating in the activities of the *préfecture*.[111]

73. Ndindiliyimana explained that an Operational Sector Commander was different from the *commandant de place* because the former was the military commander in a given sector, and was responsible for the defence of the region. According to the witness, the term "Operational Sector" was used to identify combat areas or combat zones. In April 1994, he knew there were military operational sectors in the areas of Gisenyi, Ruhengeri, Rulindo, Mutara, Kigali and possibly Kibungu. He noted that the Butare sector "was not operational, so to speak" and confirmed during cross-examination that he never saw a message indicating that Butare had become an operational military sector.[112] According to Ndindiliyimana, a document presented by the Prosecution indicating that Muvunyi was "Ops Commander" was surely a mistake because, in principle, "one cannot designate oneself operational commander if one is not designated by the Minister responsible."[113]

74. Ndindiliyimana testified that Butare *préfecture* was divided into three sectors for security purposes, namely: the central area, which was occupied by ESO; the northern sector occupied by the Ngoma Company; and the southern sector controlled by the *gendarmerie* units from Tumba. The Commander of each sector was responsible for recording and reporting crimes and misconduct within his sector and for taking all necessary action. A member of the armed forces involved in misconduct could be subjected to the penal process by the office of the Public Prosecutor, or be dealt with under military disciplinary procedures. However, these two processes were not mutually exclusive.[114]

75. With respect to the relationship between the different military units in Butare, Augustin Ndindiliyimana told the Chamber that the ESO Commander had two hierarchical superiors as head of a military training school: in terms of courses and academics, he was answerable to the Ministry of Defence; in terms of administration, he was under the General Staff of the Army. The Commander of the Ngoma Camp answered to the Army General Staff headed by the Chief of Staff, and the Commander of the Tumba *gendarmerie* reported to the Chief of Staff of the *Gendarmerie nationale* on *gendarmerie* matters.[115]

41.11.1.2.7. Defence Witness MO83

76. Witness MO83 testified that a *commandant de place* or Area Commander is usually appointed by the Army High Command on the basis of an order from the Ministry of Defence. The high command would issue a telegram announcing the name of the *commandant de place*, his rank, his subordinates, the area he would command, and the scope of his authority. It was not automatic for a *commandant de place* to be the Operations Commander of a given region. He explained that no one could arrogate to himself the functions of an Area Commander, and if this happened, the Army High Command would take disciplinary action. The witness never saw a *communiqué* appointing Muvunyi as *commandant de place* for Butare.[116]

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[111] T. 6 December 2005, p. 30.
[112] T. 6 December 2005, pp. 22, 23.
[113] T. 7 December 2005, p. 47.
[114] T. 6 December 2005, p. 9.
[115] T. 6 December 2005, pp. 24, 31.
[116] T. 13 December 2005, pp. 13, 14.

41.11.1.2.8. Defence Witness MO31

77. Defence Witness MO31 told the Chamber that the *commandant de place* or Area Commander was the representative of the Ministry of Defence within the *préfecture* and that he was responsible for the coordination of activities concerning administration. He played an administrative role and liaised with the *préfet*. The witness stated that during the period of his stay in Butare from mid-May to mid-June 1994, the *commandant de place* in Butare was Marcel Gatsinzi.[117]

78. MO31 testified that during the 1994 war there were seven military "operational sectors" in Rwanda, namely: Gisenyi, Ruhengeri, Byumba, Kibungo, Mutara (later replaced by Nyanza), Rulindo, and Kigali city.[118] These sectors were designated by the Army Chief of Staff, and each operational sector was under the command of a Sector Commander, who in turn reported to the Army Chief of Staff. Witness MO31 told the Chamber that during the time he served in another military facility in Butare, he was not aware of any decision or communication designating a military operational sector in that *préfecture*. He said if such a decision were ever made, the Chief of Staff would have informed him by telegram.[119] Moreover, he indicated that during that period, he was never required to report to the ESO Commander, and never carried out joint operations with the other military camps in the area.[120]

41.11.1.2.9.

41.11.1.2.10. Defence Witness MO46

79. Defence Witness MO46 testified that the post of *commandant de place* existed during the time of the National Guard, which preceded the establishment of the *gendarmerie* and the Rwandan National Army.[121] The witness explained that the National Guard was responsible for the maintenance of law and order and fighting the enemy from outside.[122] He explained that *commandant de place* was a title later used within the Army and was not known outside the Army.[123] He added that the *commandant de place* was someone who was very important from the time of the coup d'état in 1973 because it was said that at that time the *commandant de place* was going to replace the *préfet*.[124]

80. MO46 testified that the *commandant de place* existed in the By-Law N°13.[125] When the Rwandan Army separated from the *gendarmerie*, the term *commandant de place* disappeared with the by-law because after the establishment of the *gendarmerie* as an entity distinct from the Rwandan Army, there was another article which said that anything different should be abrogated.[126] He explained that the *commandant de place* would have been a commander of a military camp and would determine who would be on the watch.[127] He explained that had the term *commandant de place* remained, it would be replaced by "C*ommandant de camp*".[128]

41.11.1.2.11. Defence Witness MO23

81. Defence Witness MO23 testified that after 6 April 1994, there were three companies of soldiers at ESO: a reserve company, which remained in the camp; a company charged with protecting the

[117] T. 15 December 2005, p. 4 (I.C.S.).
[118] T. 15 December 2005, p.16 (I.C.S.).
[119] T. 15 December 2005, pp. 23, 24 (I.C.S.).
[120] T. 15 December 2005, p.16 (I.C.S.).
[121] T. 13 March 2006, p. 12 (I.C.S.).
[122] T. 13 March 2006, p. 12 (I.C.S.).
[123] T. 13 March 2006, p. 12 (I.C.S.).
[124] T. 13 March 2006, p. 12 (I.C.S.).
[125] T. 13 March 2006, p. 13 (I.C.S.).
[126] T. 13 March 2006, p. 13 (I.C.S.).
[127] T. 13 March 2006, p. 13 (I.C.S.).
[128] T. 13 March 2006, p. 13 (I.C.S.).

camp; and the intervention company which handled security in Butare town.[129] MO23 noted that there was some collaboration between the ESO soldiers and the *gendarmes*. For example, MO23, who was himself a soldier in the intervention company which manned the roadblocks in Butare town, explained that *Inkotanyi* identified as such at the roadblocks would be handed over to the judicial department of the *gendarmerie*.[130] Additionally, the witness stated that there was at least one Military Police unit composed of both soldiers and *gendarmes* that was created at ESO with the aim of tracking down soldiers who deserted the army.[131]

41.11.1.3. 4.3. Deliberations

82. The Indictment alleges that as Commander of ESO, Muvunyi was the most senior military officer in Butare and was responsible for security operations in Butare and Gikongoro *préfectures*. The Prosecution further alleges that in carrying out his responsibilities for maintaining security of the civilian population in the two *préfectures*, the Accused acted in collaboration with the *préfet*, who was the most senior civilian administrator, as well as other local civil and military authorities. It is the Prosecution's case that Muvunyi became *commandant de place* and thereby assumed administrative and operational authority over military camps in the entire Butare and Gikongoro *préfectures* including the Ngoma Military Camp, and the *gendarmerie* Camp on Tumba Hill. The Prosecution argues that even though the Accused might not have enjoyed *de jure* authority over Ngoma Military and Tumba *gendarmerie* Camps, he had effective control over their operations.[132] In its Closing Brief, the Prosecution further argues that in view of his seniority among the officers at ESO on 7 April 1994, Muvunyi "automatically assumed" the position of ESO Commander after his superior officer, Marcel Gatsinzi, was appointed to a new position in Kigali.

83. To support these allegations, the Prosecution relies on the evidence of Witnesses KAL, YAA, and NN. The Prosecution also relies on the evidence of Defence Witnesses Ndindiliyimana, MO83, and MO31 to prove that the position of *commandant de place* existed in Rwandan military hierarchy during the events of 1994, that it was usually held by the most senior military officer in each *préfecture*, and that the duties of the position included overall administrative and operational command of the various Army and *gendarmerie* camps in the *préfecture*.

84. The Chamber has considered the evidence of Witness KAL that as "Sector Commander" Muvunyi was the hierarchical superior of all other commanders in Butare *préfecture*. Similarly, the Chamber recalls the evidence of Prosecution Witness YAA that Muvunyi was responsible for overall coordination of military operations in Butare and Gikongoro *préfectures*. With respect to Prosecution Witness NN, the Chamber recalls that he did not testify that Muvunyi became "Area Commander" but stated that Muvunyi succeeded Gatsinzi as ESO Commander.

85. The Chamber has also considered the evidence of the various Defence Witnesses on the issue of *commandant de place*. Augustin Ndindiliyimana distinguished between "*commandant de place"* and "Operational Sector Commander" noting that while the former was primarily an administrative position, the latter had operational responsibilities. The Chamber further notes from Ndindiliyimana's testimony that Butare was not one of the six military operational sectors in existence in Rwanda in 1994 and therefore did not have an "Operational Sector Commander". Particularly worthy of note is his evidence that the Ngoma Camp Commander was answerable directly to the Chief of Staff of the Rwandan Army, and that the Commander of the Tumba *gendarmerie* Camp answered directly to the Chief of Staff of the *Gendarmerie nationale*, a position which was held by Ndindiliyimana himself. The ESO Commander had two hierarchical superiors depending upon the issue at hand; for academic matters relating to the training activities of the school, the Commander was answerable to the Ministry of Defence. For operational matters, he answered to the Chief of Staff. It is the Chamber's view that

[129] T 16 March 2006, pp. 15-16 (I.C.S.).
[130] T 16 March 2006, pp. 16-17, 29 (I.C.S.).
[131] T 16 March 2006, p. 17 (I.C.S.).
[132] The Prosecutor's Closing Brief, Chapter III, especially paras. 129-132; 160, 161, 189, 190, 193.

Defence Witness Augustin Ndindiliyimana gave a coherent and cogent account of the distinction between Area Commander and Operational Sector Commander, and a very clear picture of the chain of command that governed the operations of the various military camps in Butare in 1994.

86. Notwithstanding the caution with which the Chamber must treat the testimony of Witness MO31, who asserted that Gatsinzi maintained his position as ESO Commander after 6 April, the Chamber cannot fail to consider the fact that he corroborates the evidence of Witness Ndindiliyimana with respect to the military structure in Rwanda and the existence of military operational sectors in 1994. In particular, both witnesses agree that Butare was not a military operational sector and therefore did not have a Sector Commander. MO31 also supports the view that the Area Commander fulfilled an administrative, rather than an operational role and reported to the Ministry of Defence. The evidence of Witness MO31 that during the time he served in Butare he never reported to the ESO Commander and was instead answerable to the Chief of Staff of the National Army, is particularly significant in this respect. This evidence supports the account of Witness Ndindiliyimana.

87. The Chamber is satisfied that the evidence of Defence Witnesses MO83 and MO46 on of the position of *commandant de place* generally corroborates that given by Defence Witnesses Ndindiliyimana and MO31. The Chamber has considered By-Law N°13, and notes that while it provided for the position of *commandant de place*, it governed the operations of the Rwandan National Guard, which was later disbanded.[133] However, it remains unclear to the Chamber whether the By-Law or any of its provisions remained in force in 1994.

88. The Chamber recalls that during the cross-examination of Defence Witness Ndindiliyimana, the Prosecution attempted to tender a set of documents that were said to bear the signature of the Accused in the capacity of "*commandant de place, Butare-Gikongoro*." The Chamber declined to admit the documents as exhibits and marked them for identification purposes ("PID1") subject to the Prosecution's right to call evidence later to prove their authenticity or reliability.[134] The Chamber subsequently granted a Prosecution motion to call a handwriting expert, who examined the documents contained in PID1, compared them to some undisputed signatures of the Accused, and concluded that the signatures on the disputed documents were made by the Accused.[135] The Chamber also granted a Defence motion to call a handwriting witness in rejoinder, who examined the same set of documents against known samples of the signature of the Accused, and testified that she could not tell as a matter of certainty that the signatures on the PID1 documents were made by the Accused. She told the Chamber that there were too few samples of the known signature of the Accused to make an effective comparison, that the quality of the photocopies supplied for analysis was poor, and that there was a distinct possibility that the signatures could have been manipulated. In light of this clearly conflicting expert opinion, the Chamber remains in doubt about whether the signatures on the PID1 documents were those of the Accused and therefore declines to admit the PID1 documents.

89. The Chamber notes the evidence of Witness QX that Lieutenant Hategekimana, then Commander of Ngoma Camp, collaborated with ESO soldiers to attack refugees at Ngoma Parish on or about the 30 April 1994. Prosecution Witness TQ also testified that Hategekimana together with Lieutenant Modeste Gatsinzi and Captain Nizeyimana, both from ESO, led a large-scale attack on Tutsi refugees at the *Groupe scolaire* on 29 April 1994. The Chamber has also considered the evidence of Defence Witness MO23 that on 8 April 1994, under Muvunyi's auspices, a Military Police unit composed of soldiers and *gendarmes* was created at ESO with the aim of tracking down army deserters. Finally Witnesses YAO and YAN both narrated that after their arrest from the Convent of the Little Sisters and the *Économat général* respectively, they were taken to ESO where they saw Muvunyi and pursuant to his instructions, were later transported and detained at the *gendarmerie* Brigade. The Chamber also recalls YAN's testimony that he survived the genocide because someone interceded with Muvunyi on his behalf, and even though many of his co-detainees at the *gendarmerie*

[133] By-Law N°13 was admitted into evidence as Exhibit "P.29" on 7 December 2005.
[134] T. 7 December 2005, p. 34.
[135] Exhibit P.37, admitted on 8 May 2006.

Brigade were taken away and killed, his life was spared because the Accused did not authorise that he be taken away.

90. The question before the Chamber is whether in light of all the evidence presented, the Prosecution has proved that the Accused, Tharcisse Muvunyi, exercised the functions of *commandant de place* with responsibility for security in Butare and Gikongoro *préfectures* from April to June 1994. In the Chamber's view this allegation has not been established beyond reasonable doubt. Indeed it is still unclear whether the office of *commandant de place* existed in Rwandan military hierarchy in 1994, whether it was merely an administrative position, or if it entailed both administrative and operational duties. The Chamber notes that the Prosecution listed a military expert in his Pre-Trial Brief but fail to call him to testify. Such expert testimony could have been of assistance to the Chamber. However, the Chamber is satisfied that as Interim Commander of ESO, the Accused had authority over ESO Camp with responsibility for the security of the civilian population within the central sector of Butare *préfecture* and had responsibility for the actions of ESO soldiers within this area.

91. Notwithstanding its finding that the Prosecution has not proved beyond reasonable doubt that the Accused exercised the functions of *commandant de place*, in assessing the Accused's individual responsibility as a superior, the Chamber shall take the following factors into consideration: whether the Accused had effective control over the actions of those subordinates in the sense of the material ability to prevent or punish their actions; whether he knew or had reason to know that his subordinates had committed or were about to commit specific crimes; and finally, whether the Accused failed to take necessary and reasonable measures to prevent or punish their unlawful conduct. Furthermore the individual responsibility of the Accused for specific events where his subordinates at ESO collaborated with units from Ngoma Camp or the *gendarmerie,* has to be assessed on a case-by-case basis. As stated in the *Čelebiči* judgement, in considering the question of superior responsibility, the Chamber must at all times be alive to the realities of any given situation, and do away with "veils of formalism" that may shield individuals from responsibility for committing the most serious crimes known to humanity.[136]

41.12. 5. Specific Allegations Against Tharcisse Muvunyi

41.12.1.1. 5.1. Swearing-in Ceremony of New préfet of Butare on 19 April 1994

41.12.1.1.1. 5.1.1. Indictment

92. Paragraphs 3.19 and 3.20 read:

> 3.19 On the 19th of April 1994, the swearing-in ceremony in Butare for the new *préfet*, Sylvain Nsabimana, was the occasion of a large gathering. The meeting, which had been announced and organized by the Interim Government, was held at the MRND headquarters in Butare. On that occasion, President Théodore Sindikubwabo made an inflammatory speech, openly and explicitly calling on the people of Butare to follow the example of the other *préfectures* and begin the massacres. He violently denounced the "*banyira ntibindeba*", meaning those who did not feel concerned. He asked them to "get out of the way" and "let us work". Prime Minister Jean Kambanda, who subsequently took the floor, did not contradict the President of the Republic.
>
> 3.20 Lieutenant-Colonel Tharcisse Muvunyi attended in his capacity as Commander of Military Operations in Butare. Because he was present at the ceremony and did not dissociate himself from the statements made by the President of the Republic, Lieutenant-Colonel Tharcisse Muvunyi gave a clear signal to the people that the massacres were condoned by the Military.

[136] *Delalić et al.* (*Čelebiči*), Judgement (TC), para. 377.

41.12.1.1.2.5.1.2. Evidence

41.12.1.1.3.

41.12.1.1.4. Prosecution Witness YAA

93. Prosecution Witness YAA testified that the situation in Butare changed following the speech given by Interim President Théodore Sindikubwabo in Butare on the occasion of the swearing-in of the new *préfet*, Sylvain Nsabimana.[137] The witness heard this speech over Radio Rwanda in Kigali, on 19 April 1994, the day it was delivered and a week before he left Kigali.[138] In the speech, Sindikubwabo called on the population to "do something", and said that those who "did not feel concerned" should "get up and work". YAA said that the killings by the *Interahamwe* were referred to as "work". The witness testified that this speech incited people in Butare to kill, because prior to its broadcast killings had not started in that city.[139]

41.12.1.1.5. Prosecution Witness NN

94. Witness NN testified that before President Sindikubwabo came to Butare, there had been no disturbances or killings there. On 19 April 1994, Sindikubwabo gave a speech at a meeting during his visit to Butare, which Witness NN heard over the radio. During that meeting, Sindikubwabo stressed the fact that members of the Butare population were behaving as if they were not concerned about what was happening. The day after the President's visit, there was disorder in Butare and the killings started. Taking into account the speech and its consequences, Witness NN stated that Sindikubwabo wanted to convey to members of the Butare population that they must do the same thing as people in other *préfectures*.[140]

95. Although Witness NN was not present at the meeting, he testified that he knew those who attended because whenever the President came to Butare, he was welcomed by the same people. According to Witness NN, the following authorities attended the meeting: the *préfet*, the Area Commander, the *bourgmestre*, and *préfecture* officials. In short, Sindikubwabo was welcomed by members of the local administration, as well as military authorities.[141]

41.12.1.1.6. Defence Witness MO01

96. On 6 April 1994, Defence Witness MO01 was working at the Nyakibanda Major Seminary located about nine kilometres from Butare.[142] He remained at the seminary until the beginning of July 1994 when he went into exile.[143] Witness MO01 stated that between 1 May and 1 July 1994, he visited the Bishopric in Butare on at least five occasions. Defence Witness MO01 told the Chamber that even though he heard on the radio that President Sindikubwabo visited Butare, he never heard that the President addressed a meeting on 19 or 20 April 1994. On 20 April, he travelled to Karubanda and

[137] T. 9 March 2005, pp. 14 and 15 (I.C.S.).
[138] T. 9 March 2005, p. 17 (I.C.S.).
[139] T. 9 March 2005, pp. 14, 15, 16 (I.C.S.).
[140] T. 18 July 2005, pp. 31-32 (I.C.S.).
[141] T. 18 July 2005, pp. 33-34 (I.C.S.): Witness NN testified: "I would therefore, like to point out that before the president came to Butare during that crisis period, and even when President Habyarimana was still president, wherever he went, he was welcomed by the *préfet* of the *préfecture* in question, by the Area Commander, the military authorities in the area and *bourgmestre*s. Even if the Defence states that I did not attend that meeting, I can say that I never went where President Habyarimana went. Whenever he came to Butare, I was among the personalities who welcomed him. For instance, when he held a meeting in the stadium, it was the same personalities who came to welcome him. Those same personalities, therefore, came to the meeting held by Sindikubwabo."
[142] T. 22 March 2006, pp. 4-5 (I.C.S.).
[143] T. 22 March 2006, pp. 4-5 (I.C.S.).

returned to Naykibanda Major Seminary a week later. However, Witness MO01 recalled having heard that the President came to Butare on a pacification mission.[144]

41.12.1.1.7. Defence Witness MO37

97. Witness MO37 lived in Nyamirambo, in Kigali *préfecture*, when the President of Rwanda died on 6 April 1994.[145] As a result of the deteriorating security situation in Kigali, he and his fiancée decided to leave for Butare about one week after the President's death. Upon their arrival in Butare, the situation was initially calm and they could even walk to attend mass at Bishopric.[146] However, on or about 19 April 1994, the Bishop of Butare told them it was no longer necessary for them to come to mass, and advised that they should stay at home. According to Witness MO37, when they arrived in Butare, the *préfet* was Jean-Baptiste Habyalimana. However, by 20 April, Mr. Habyalimana was no longer *préfet*; he had been removed from that position on 19 April by President Sindikubwabo during a speech the President made at the swearing-in ceremony of the new *préfet*, Nsabimana. Witness MO37 further explained to the Chamber that after the President's speech, the security situation in Butare town changed a great deal because killings started after the dismissal of *préfet* Habyalimana.[147]

41.12.1.1.8.5.1.3. Deliberations

98. In the Chamber's view, the evidence of both Prosecution and Defence witnesses demonstrates that on 19 April 1994, President Sindikubwabo addressed a crowd in Butare at the swearing-in ceremony of the new *préfet* of Butare, Sylvain Nsabimana. The Chamber notes that even though Prosecution Witnesses NN and YAA only heard the speech on the radio, their accounts of its contents are sufficiently similar to render them credible. The evidence shows that widespread killing of Tutsi civilians started in Butare after that speech. Further, the Chamber accepts YAA's interpretation of the President's speech, that when the President said "get up and work" and "do something", he was in fact calling the people to resort to violence. The Chamber has also examined the reports of the socio-linguistic experts called by both the Prosecution and the Defence and finds that in the context of the war in Rwanda in 1994 these words were understood as a call to eliminate members of the Tutsi ethnic group.[148]

99. However, the Chamber has not heard any reliable evidence that Muvunyi attended this meeting. Taking the totality of the evidence and the circumstances into account, the Chamber finds that the Prosecution has not proved beyond reasonable doubt that Muvunyi attended the meeting of 19 April 1994 at which President Sindikubwabo called on members of the Hutu ethnic group to "get up and work", which was understood as a call to kill Tutsis.

41.12.1.2. 5.2. Meeting of ESO Officer Corps after President Sindikubwabo's Speech at the Swearing-in Ceremony

41.12.1.2.1.5.2.1. Indictment

100. Paragraph 3.23 reads:

> 3.23 Subsequent to the visit of President Sindikubwabo and in exercising his *de jure* and *de facto* authority over the officers and men of the ESO, Lieutenant-Colonel Tharcisse Muvunyi called for a meeting of all the ESO commissioned and non-commissioned officer corps and informed them that the President's wishes should be considered as orders to be carried out.

[144] T. 22 March 2006, p. 18 (cross-examination).
[145] T. 9 Feburary 2006, p. 11 (I.C.S.).
[146] T. 9 February 2006, p. 14 (I.C.S.).
[147] T. 9 February 2006, p. 15 (I.C.S.).
[148] T. 6 July 2005, pp. 15-22.

41.12.1.2.2.5.2.2. Evidence

41.12.1.2.3. Prosecution Witness NN

101. Witness NN testified that Lieutenant-Colonel Muvunyi convened a meeting at the ESO Camp on 20 April 1994 which was attended by 10 to 15 officers and non-commissioned officers, including Captain Nizeyimana.[149] The meeting was convened by means of a message written on a blackboard in French, indicating that the meeting was for officers and high-ranking non-commissioned officers ("NCOs") of the ESO.[150]

102 Witness NN testified that during the meeting which lasted for one hour, Muvunyi repeated what President Sindikubwabo had said, that the people of Butare were indifferent and did not feel concerned.[151] Muvunyi then told officers at the meeting that they needed to consider what the President had said as an order that had to be executed.[152] After the meeting, the killings started.[153]

103. Witness NN also testified that Muvunyi reproached people for carrying out unauthorized missions. NN understood this to be a reference to his trip to the Rwanda-Burundi border to help Tutsis escape the fightings, because both Captain Nizeyimana and Muvunyi had asked him about the trip on 19 April 1994.[154]

41.12.1.2.4. Defence Witness MO15

104. Witness MO15 testified that on 20 April, Muvunyi convened a meeting of the service heads of ESO. MO15 did not attend, but his commander told him that Muvunyi chaired the meeting and stated that because the security situation had deteriorated in Butare, the defence system within ESO had to be strengthened.[155] On the morning of 20 April, Muvunyi conducted a roll call and told the soldiers that they needed to strengthen the defences and be vigilant in order to arrest looters irrespective of whether they were soldiers or civilians. MO15 added that Muvunyi left after making those remarks and Captain Nizeyimana took over from him. MO15 later overheard Nizeyimana telling some non-commissioned officers that Muvunyi's remarks about the security situation were not true, that the words of President Sindikubwabo had to be considered an order, and that Muvunyi was an accomplice of the RPF.[156]

41.12.1.2.5.5.2.3. Deliberations

[149] T. 18 July 2005, pp. 36, 37-38 (I.C.S.), T. 20 July 2005, p. 28, 30-32 (I.C.S.) (Cross-examination).
[150] T. 20 July 2005, p. 28 (I.C.S.) (Cross-examination).
[151] T. 18 July 2005, p. 38 (I.C.S.).
[152] T. 18 July 2005, p. 37 (I.C.S.).
[153] T. 18 July 2005, p. 37 (I.C.S.).
[154] T. 18 July 2005, p. 37 (I.C.S.).
[155] T. 9 March 2006, pp. 11, 12 (I.C.S.). According to Witness MO15, "Following the speech that was made by President Sindikubwabo, the highest ranking officer that was in Butare at the time was Lieutenant-Colonel Tharcisse Muvunyi, held a meeting attended by the service heads of ESO and this was on the 20th, in the afternoon. Those in attendance at the meeting of service heads were the three commanders of the – the three company commanders that were in Butare."

When asked by Defence Counsel about what transpired at the meeting, MO15 answered as follows: "As I said earlier on, I did not attend that meeting. I wasn't a service head nor was I a company commander. It is my company commander who told me what had transpired in the course of the meeting. He told me that that meeting had been chaired by Lieutenant-Colonel Muvunyi. He also said that the security situation had deteriorated in Butare town and the defence system, therefore, had to be strengthened within ESO, and that, furthermore, the company responsible for security in town had to display or show proof of more vigilance."
[156] T. 9 March 2006, p. 16 (I.C.S.).

105. The Chamber accepts the testimony of Prosecution Witness NN that on 20 April 1994 Muvunyi convened a meeting of ESO officers at which he repeated the contents of President Sindikubwabo's speech. The Chamber also finds that Muvunyi told those at the meeting they needed to understand what the President of the Republic meant to say, and consider the President's remarks as an order that had to be executed. The Chamber also accepts that shortly after this meeting, killings began in Butare.

106. The Chamber has considered the testimony of Defence Witness MO15 that on 20 April his superior officer told him Muvunyi convened a meeting of the service heads of ESO in which he discussed the deteriorating security situation in Butare and advocated for the ESO defence structure to be bolstered. In respect of the issue of whether it was Muvunyi or Nizeyimana who stated that President Sindikubwabo's words should be considered as an order, the Chamber attaches more weight to the testimony of Witness NN who was present at the meeting than to that of Witness MO15 who only gave hearsay evidence.

107. The Chamber therefore finds that at a meeting of ESO officers on 20 April 1994, Muvunyi told the officers to consider the content of President Sindikubwabo's speech as an order to be carried out.

41.12.1.3. 5.3. Establishment and Use of Roadblocks in Butare préfeture

41.12.1.3.1. 5.3.1. Indictment

41.12.1.3.2.

108. Paragraphs 3.33 and 3.34 read:

> 3.33 On 27th April 1994, the Interim Government ordered roadblocks to be set up, knowing that the roadblocks were being used to identify the Tutsi and their "accomplices" for the purpose of eliminating them. These orders were followed and had already been put in place in Butare.
>
> 3.34 These checkpoints were ostensibly to check for weapons and to prevent any infiltration by the enemy. The roadblocks were located at Rwasave, Rwabuye, the front of Hotel Faucon, in front of Ngoma Camp, in front of the Ibis Hotel, at the junction leading to the University hospital, beside *Chez Bihira* and in front of the ESO. These checkpoints served as points where searches were conducted on civilians for the purposes of identity control and to check against infiltration of the enemy.

41.12.1.3.3. 5.3.2. Evidence

41.12.1.3.4. Prosecution Witness QX

109. Prosecution Witness QX, a Tutsi priest, gave testimony by deposition from Kigali on 4 and 5 December 2003.[157] On 7 April 1994, he received the news of the death of President Habyarimana by telephone. Thereafter, he confirmed the news from a broadcast on Radio Rwanda which further announced that the entire population should stay at home. When he switched to Radio France International, he heard that "in Kigali they had started killing people."[158]

[157] "Decision on the Prosecutor's Extremely Urgent Motion for the Deposition of Witness QX, Rule 71 of the Rules of Procedure and Evidence", dated 11 November 2003. The Chamber reasoned that the witness's advanced age and poor health constituted exceptional circumstances under rule 71. The Chamber also took into account the fact that the witness was going to give an eyewitness account of the alleged massacres that took place at the Ngoma Parish on 30 April 1994.
[158] T. 4 December 2003, p. 3 (I.C.S.).

110. He also heard people saying that in Butare, members of the MRND had started putting up roadblocks on various roads and paths. He added that there were times when "people were allowed to go out and purchase some goods." On one such occasion, the witness went out and when he got close to the Ngoma Camp, he found that armed soldiers had erected and were manning a roadblock. Witness QX testified that "everybody passing through had to show his or her identity card."[159]

111. On another occasion, he was going to administer the sacrament to some sick people when he encountered a roadblock close to Ngoma Parish. This roadblock was manned by civilians carrying clubs and knives. He explained that all persons going through the roadblocks had to show their identity cards and that when it was determined that they were Tutsi, they were killed. He was not asked for his identity card at this roadblock but on his way back, those manning the roadblock demanded to see it. Witness QX told them that he had left it at home. They sent someone to accompany him to his home so he could produce the card. Upon arrival at Witness QX's home, he showed his identity card to the person who had accompanied him, and the latter said, "come with me, you have to explain this to those manning the roadblock." When he got there, he met a Hutu person who told him "to go back home" and promised to explain to those manning the roadblock what was happening.[160]

41.12.1.3.5. Prosecution Witness KAL

112. Prosecution Witness KAL, a soldier posted at ESO in 1994, testified that on one occasion between April and June 1994, he left the ESO Camp to buy milk from the Arab neighbourhood. As he approached the second entrance of the ESO Camp at a place called Charabu, he found a roadblock made out of tree trunks placed across the road. Most of the people manning the roadblock were soldiers from ESO. He specifically named Corporals Mazimpaka and Niyibizi from ESO *nouvelle formule* as being among them. Witness KAL testified that people were stopped at the roadblock to determine whether they were Tutsi or accomplices of the *Inkotanyi*. The word *Inkotanyi*, he explained, referred to opponents of the government in power at the time, people who were at the war front, or who had infiltrated Butare. Tutsis were considered *Inkotanyi*.[161]

113. Witness KAL said that people who were identified as Tutsi or *Inkotanyi* at the roadblock were taken inside the ESO Camp. Subsequently, they were taken away from the Camp by ESO soldiers, including Lieutenants Bizimana and Gatsinzi, as well as trainees of ESO *Nouvelle Formule*. The soldiers who took the arrested civilians away seemed to be following orders, they seemed to have been authorised to carry out killings and were proud of themselves for doing so.[162] Witness KAL admitted that he was not an eyewitness to the killing of any of the people taken away from the ESO Camp. He added, however, that the killings were a matter of public knowledge because the soldiers who carried them out returned to the camp and spoke openly about their actions.[163]

41.12.1.3.6. Prosecution Witness YAA

114. Witness YAA, a soldier who worked at ESO in 1994, testified that on 7 or 8 April 1994, he noticed that a roadblock had been created at a distance of 100 to 200 metres from ESO, in the Arab neighbourhood. The roadblock was manned by a group of about 12 armed soldiers from ESO. Each of

[159] T. 4 December 2003, p. 14 (I.C.S.). The witness stated that the roadblock was "close to the camp … was manned by soldiers and they were carrying weapons."
[160] T. 4 December 2003, pp. 13-14 (I.C.S.).
[161] T. 2 March 2005, pp. 7, 8, 12 (I.C.S.).
[162] T. 7 March 2005, p. 35 (I.C.S.).
[163] T. 7 March 2005, pp. 35-36. KAL testified as follows: "Soldiers crossed that roadblock to return to the camp, and they prided themselves on having arrested people. It was not difficult to know what was happening. In any case, as people passed, we could see new faces, and it was not possible not to be aware of that. Everybody spoke about it.… I personally did not witness any murder outside of ESO, but those who committed those murders prided themselves on having done so. Some of those people are still in Rwanda. You can find them in various *préfectures*."

the soldiers carried a personal weapon such as an FAL gun, an R-4 gun, or a J-3 gun. These were the same types of guns used at ESO. The guns were loaded with ammunition.[164]

115. Witness YAA testified that people were intercepted at the roadblock and asked to present their identity cards. Some of the people were struck with weapons. Those who were identified as Tutsi were beaten at the roadblock, while Hutu were allowed to pass through. He recalled that at an assembly of ESO soldiers on 7 April 1994, Captain Nizeyimana confirmed that President Habyarimana's plane was shot down by the RPF. Witness YAA further explained that since the Tutsi inside the country were generally regarded as accomplices of the RPF, they were also held responsible for the death of the President.[165]

116. On 12 or 13 April 1994, YAA and a detachment of ESO soldiers were deployed to Kigali. On their way, he saw a second roadblock at the Hotel Faucon. He noticed that a group of 10 to 12 armed trainee-soldiers from ESO were manning the roadblock. They were armed with FAL, R-4 and J-3 rifles. Some carried grenades. Although YAA did not stay long at the roadblock, he noticed that the soldiers were checking the identification papers of people passing through the roadblock.[166]

117. Witness YAA saw two other roadblocks in the city of Butare. One was at a crossroads leading to Gikongoro; the other was at Rwabuye. Both were manned by *Interahamwe* militia armed with firearms, including grenades, as well as traditional weapons such as machetes and spears. As they proceeded to Kigali, YAA saw other roadblocks on the road from Butare to Kigali and at each of these, people were being asked to present their identification papers.[167]

41.12.1.3.7. Prosecution Witness XV

118. Witness XV was an employee of the Butare University Hospital at the time of the events in question. On 7 April, he received news of the death of President Habyarimana through a broadcast on Radio Rwanda. The next day, "all the population was on the hills and roadblocks were ordered to be set up, especially in Butare." According to the witness, the roadblocks in the city were set up by soldiers from ESO and Ngoma Camps, and there was very frantic activity. He recalled the names "Rapide" and "Kazungu" as two ESO soldiers whom he saw at the roadblock. The latter bore this nickname because of his light complexion. At these roadblocks, those suspected of being Tutsi had to show their identity card and they could be mistreated just because of their physical appearance.[168]

41.12.1.3.8. Prosecution Witness CCQ

119. On 20 April 1994, Witness CCQ was taking his wife to the medical centre at the Butare *Groupe scolaire* with the help of a priest from Ngoma Parish. His wife had just suffered a heart attack. On the way, they came across a roadblock located at Hotel Faucon manned by about six to ten soldiers and *Interahamwe*. One of the soldiers stopped them and demanded to see their identity cards. CCQ knew some of the soldiers at the roadblock because they were natives of his *secteur*; he knew that they worked at the ESO.[169]

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[164] T. 8 March 2005, p. 42 (I.C.S.): YAA said: "Customarily, except for assemblies that were held when the flag was hoisted, each soldier had his or her arm, otherwise there was an ammunitions depot and each trainee, when going for lessons, put his gun in that armoury. But from April 1994 every trainee, every soldier had a gun loaded with ammunition."

[165] T. 8 March 2005, p. 43 (I.C.S.): YAA stated that: "… if I go by what was said in general, whenever people made mention of the RPF people understood that Tutsis inside the country were accomplices of the RPF. At the assembly held on the 7th in the morning, Captain Nizeyimana confirmed that President Habyarimana's plane had been shot down by the RPF, which meant that the Tutsis who were described as accomplices of the RPF were also responsible."

[166] T. 8 March 2005, pp. 42-43 (I.C.S.).

[167] T. 8 March 2005, p. 43; 9 March 2005, p. 7 (I.C.S.).

[168] T. 16 May 2005, pp. 7-8.

[169] T. 26 May 2005, pp. 14, 23.

120. Witness CCQ and his wife produced their identity cards which showed that they were Hutu.[170] The priest accompanying them did not have an identity card, but carried another document which showed that he was a priest and a Tutsi. The Tutsi priest was questioned at the roadblock for about one-and-a-half hours before they were let through. The priest was questioned because the soldiers had orders to arrest all Tutsis. They were only allowed to proceed from the roadblock after CCQ begged the soldiers and told them that his wife would die if they did not let them through. The soldiers insisted, however, that the Tutsi priest must return to them within 15 minutes using the same road.[171]

121. Witness CCQ further explained that while Hutu were allowed to pass through the roadblocks without any trouble, Tutsi were being chased away, their houses were being burnt down, and they were being attacked with firearms and traditional weapons. He stated that the roadblocks were established for the purpose of the attacks on the Tutsis.[172]

122. Witness CCQ testified that after leaving the roadblock at Hotel Faucon, they came across another roadblock in front of *Chez Bihira*. Even though there was no physical barrier at this place, there was a group of armed soldiers who stopped them and demanded to know their destination. They responded that they were taking a sick person to the hospital. CCQ added that they stopped only briefly at this roadblock because the soldiers noticed that they had already been checked at the previous roadblock.[173]

123. While at this second roadblock, Witness CCQ saw three slender-looking young persons, who appeared to be of Tutsi ethnicity. The soldiers were asking them to show their identity cards. He also saw one of the soldiers holding a bloodstained sword, which he brandished, saying that they had finished killing the *Inyenzi*. Witness CCQ understood this to mean the soldiers had finished killing Tutsi.[174]

124. After they arrived at the hospital, CCQ left his wife and went to buy some food. He took the same route as when they came to the medical centre, and therefore had to go through the roadblock at *Chez Bihira*. As he went by, he saw the bodies of the three young people whom he had left at the roadblock earlier, thrown in the gutter. They had been shot dead. CCQ could identify them from their attire and could tell that they were the same three people he had previously seen. He continued on his way to buy food in town and returned to the medical centre to join his wife.[175]

125. Witness CCQ also told the Chamber that on 21 April 1994, while on his way to visit his family at Matyazo, he saw Muvunyi together with Robert Kajuga[176] and soldiers at the roadblock in front of Hotel Faucon. He was on the other side of the road from where Muvunyi and his colleagues stood, but he could see them talking. He believed that Muvunyi was giving orders to the soldiers. CCQ was asked to show his identity card which he did and continued on his way.[177]

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[170] T. 26 May 2005, p. 15. The witness explained further: "My identity card indicated that I was Hutu. … I did not belong to the Hutu ethnic group. I am Tutsi, but my wife was Hutu. … The reason for that is that in 1959, my father changed his ethnicity in his identity card with the birth of the MDR party. So when my father was asked for his card he stated that he was Hutu, and that flowed on to us, his children. … It was in a bid to protect ourselves. War was raging at the time, a war that was similar to the war of 1994. However, at the time the killings were not at the scope of those that occurred in 1994."

[171] T. 26 May 2005, p. 15. At p. 31 of the transcript, witness explained that the priest had earlier given him 1000-2000 Rwandan francs to pay to the soldiers, but that this offered was turned down.

[172] T. 26 May 2005, p. 16:

"Q: Why do you say that the soldiers had been instructed to arrest Tutsis?

"A: That was the prevailing situation in Rwanda at the time, and everybody knew that, and we all knew what was going on. We were already being chased away; our houses were already being burnt down. We were already being attacked by firearms and clubs and what have you. So you understand that these roadblocks were set up for a purpose. You see, they didn't ask us to show the documents for the vehicle. We were simply asked to show our identification cards."

[173] T. 26 May 2005, p. 16.

[174] T. 26 May 2005, p. 16.

[175] T. 26 May 2005, p. 17.

[176] Kajuga was the alleged leader of the *Interahamwe* militia in Rwanda in 1994.

[177] T. 26 May 2005, pp. 17, 18.

126. Witness CCQ also testified that there were several roadblocks located in Butare. He said, "[f]rom Matyazo to the *School complex* and from the *School complex* to Tumba, there were roadblocks. I went through all those roadblocks. There was one in Matyazo; I went through that roadblock. There were roadblocks at the level of the Ngoma Camp. There was a roadblock in front of the university extension. There was a roadblock in front of Hotel Faucon. There was a roadblock in front of Bihira's home which was manned only by soldiers, and there was another roadblock at Pauline Nyiramasuhuko's. There was the Mukoni roadblock, as well as a roadblock which was at Tumba. I went through all that distance."[178]

41.12.1.3.9. Prosecution Witness YAN

127. Witness YAN lived in Gikongoro *préfecture* when President Habyarimana's plane was shot down. Sometime during the war, he moved from Gikongoro to Butare and went to live at a place called the *Procure*, otherwise known as *Économat général*, located close to the *Groupe scolaire*. He was arrested by ESO soldiers under the leadership of Lieutenant Gakwerere in mid-May and taken to ESO in the back of a white single-cabin pick-up truck. He was subsequently detained at the *Brigade* for two or three weeks. Upon release, he saw several roadblocks including at *Chez Bihira*, close to the University, next to Nyiramasuhuko's house, and opposite Hotel Faucon. All these roadblocks were manned by soldiers and *Interahamwe* militia. YAN believed that the soldiers collaborated with the *Interahamwe* and were manning the roadblocks together. Witness YAN described the *Interahamwe* as "killers" who had received military training. They wore *kitenge* fabric and carried guns and traditional weapons such as machetes.[179]

128. When asked by the Prosecution how he was able to go through all these roadblocks without being killed, YAN responded he could see the roadblocks, but avoided going through them.[180]

41.12.1.3.10. Prosecution Witness AFV

129. Witness AFV was an employee of the Butare University Hospital on 6 April 1994 when the President's plane was shot down. She testified that on 20 April 1994, she was stopped at a roadblock on her way home from the hospital. It was manned by a group of "more than four" armed soldiers who carried firearms, cartridge belts, and grenades. The roadblock was located at the intersection of the roads leading to the University Laboratory and the University Hospital. Witness AFV believed that the soldiers were from ESO because they carried weapons and wore the military uniforms with spotted colours that she knew soldiers from ESO wore. However, she did not notice the headgear that the soldiers might have been wearing, or even whether they wore any, because she was scared. In addition, she believed the soldiers were from ESO because the roadblock was only ten minutes away from the ESO Camp and the soldiers took turns at the roadblock.[181]

130. Witness AFV testified that the soldiers demanded that passers-by show their identity cards and separated the Hutu from the Tutsi. Those whose identity cards showed that they were Hutu were allowed to pass, but the Tutsi were detained at the roadblock and searched. Recounting her personal experience at the roadblock, AFV said she was searched, beaten and asked by the soldiers if she thought she was extraordinary. They also asked how she could dare go to work. Witness AFV added

[178] T. 26 May 2005, p. 19. Note that the "School Complex" refers to the "*Groupe scolaire*" of Butare (see French Transcripts).
[179] T. 30 May 2005, p. 10. "The roadblocks were manned by soldiers and *Interahamwes*. The *Interahamwes* collaborated with the soldiers. If they wanted to kill someone they would do so. It seems they were manning these roadblocks together." When asked by the Prosecutor to explain who the *Interahamwe* were, YAN stated: "*Interahamwes* were killers who had received military training. They had their kitenge fabric that they were wearing. And these were people who had been trained. They were people not like others; they had been trained."
[180] T. 30 May 2005, p. 11.
[181] T. 21 June 2005, p. 5.

that a girl who had accompanied her to the roadblock was killed by the soldiers in her presence when they realised that she was Tutsi, but that she had torn up her identity card. Her body was thrown in a gutter.[182]

131. Furthermore, AFV testified that one of the soldiers said to his colleagues, "Let us look at this Tutsi's sexual organs. How come you are working when others aren't?" He then told his colleagues that they should go along with her, and that she should come back and report to them the next day. The witness stated that she interpreted the soldier's statement to mean they would kill her after looking at her private parts. Witness AFV testified that two armed soldiers escorted her from the roadblock, and said they were going to take her home. Instead, they beat her and took her to the woods. Along the way, they hit her and said they were going to look at her sexual organ to see to what extent she was extraordinary. They called her names. She said, "I understood that they were going to hurt me, taking into account the fact that they were beating me and the fact that they had killed the girl who was in my company. I understood that they were going to kill me." The witness therefore asked the soldiers to kill her on the spot instead of taking her away to torture her.[183]

132. Despite her plea to be killed on the spot, the soldiers took her into the bush to a spot "very close to Mukoni as you go down towards the university." She estimated that the distance between this place and the roadblock was about two metres, but added that it was the equivalent of the distance between the witness stand and the main entrance to the courtroom. She added that "you could see the bush from the roadblock." According to the witness, she was taken into the bush sometime between 4.30 and 5.00 p.m. although she emphasized that this was only an estimate, as she was afraid and did not look at her watch. She was subsequently raped by the soldiers.[184]

41.12.1.3.11. Prosecution Witness YAQ

133. Witness YAQ testified that on 24 April 1994, he saw Muvunyi, in the company of local government officials including Nteziryayo, and Kalimanzira at a roadblock in Rumba *cellule*, Kibilizi *secteur*. The witness was one of those manning the roadblock. He said that Muvunyi and about 10 other people, including soldiers, arrived in a white Toyota vehicle, not a military vehicle. This was the first time the witness saw Muvunyi, and he did not know the names of the other officials who accompanied him until they were introduced at a "security meeting" held later that day near the roadblock. Witness YAQ testified that Gasana, Chairman of the Power Wing of the MDR Party, introduced Muvunyi at the meeting. The meeting was chaired by Muvunyi and Alphonse Nteziryayo. During cross-examination, YAQ denied mentioning in his statement of 4 February 2000 that Muvunyi was accompanied at the roadblock by Nteziryayo and Kalimanzira, instead of Nteziryayo and Nsabimana as he said before the Chamber.[185]

134. The Accused and the other military officers addressed the crowd. The Accused said, "Tomorrow, very early in the morning, if I do not find bodies, any dead bodies at this roadblock, I will conclude that you are all Tutsis. I myself will bring soldiers, and we will allow people from Shyanda – assailants from Shyanda, to come here, and they will even kill you."[186] The next day, that is 25 April 1994, the Accused returned to the roadblock to see if the killings had started. The witness testified that

[182] T. 21 June 2005, p. 13. Witness narrated her experience at the roadblock in the following words: "They asked passers by to present their identity cards and separated the Hutu from the Tutsi. And when the name Hutu was on your identity, you were allowed to pass, and the Tutsis were asked to stay, and they searched us. … They searched me; they asked me to show my identity card. And they were severe in their language to me. They asked me if I were an extraordinary person and asked how I could dare go to work. … I understood that they were going to hurt me because there was a girl who was in my company and who had just been killed and thrown into the gutter. … I had come down with that girl. She had torn her identity and therefore had none. And once soldiers realised that she was Tutsi, she was killed and thrown into the gutter in front of us."
[183] T. 21 June 2005, pp. 14, 15.
[184] T. 21 June 2005, p. 15.
[185] T. 31 May 2005, pp. 4, 5, 8, 16, 19.
[186] T. 31 May 2005, p. 6.

upon arrival of the Accused, there were dead bodies at the roadblock – "The first person to be killed and who was a Tutsi was Rwabigwi. There was also Rubanda, Isador Mutiganda, [and] Kayiranga. These are the names that I remember, but I believe there were about seven bodies."[187]

41.12.1.3.12. Defence Witness MO01

135. Defence Witness MO01 testified that on or around 14 April 1994, he went into Butare town from the Nyakibanda Major Seminary using the road that passed through the University of Butare to the *Chez Bihira* junction.[188] On his outward and return trips he did not see any soldiers on the road, nor did he see a roadblock at the *Chez Bihira* junction.[189] On 20 April, Witness MO01 left the Nyakibanda Major Seminary and travelled to the Karubanda Minor Seminary where he stayed for a week. He took the same road that he travelled on 14 April, and again there were no soldiers on the road, and he did not see a roadblock at *Chez Bihira*.[190]

136. Witness MO01 testified that sometime in June 1994, while on his way to the Butare Bishopric, he saw a roadblock at the *Chez Bihira* junction.[191] He believed that those manning the roadblock were civilians because the person who asked the witness to show his identity papers was not wearing a military uniform or military beret.[192]

41.12.1.3.13. Defence Witness MO23

137. April 1994, Witness MO23 was a student soldier at ESO *Nouvelle Formule*. He was assigned to the "Intervention Company" which was in charge of security in Butare town under the command of Lieutenant Gakwerere.[193] The Intervention Company was one of the units created on 8 April 1994 by Captain Nizeyimana during a roll-call which was also attended by Muvunyi. He said Muvunyi addressed the soldiers and advised them to be law abiding. According to the witness, a company in charge of protecting the ESO Camp was also created and placed under the command of Lieutenant Bizimana; and a Reserve Company under the command of Lieutenant Gatsinzi remained in the camp.[194]

138. Witness MO23 stated that the Intervention Company was in charge of creating roadblocks in Butare town. He said a roadblock was put up at the second entrance of ESO, in the Arab neighbourhood, and others were located at Hotel Faucon, Hotel Ibis, and at the *Chez Bihira* junction.[195] Witness MO23 said he was assigned to the *Chez Bihira* roadblock which was created on 9 April, but remained for only two days. According to Witness MO23, the Butare *préfectoral* committee decided that the roadblock was no longer necessary and it was therefore dismantled. During the period Witness MO23 stayed at the roadblock, he never arrested anybody.[196]

41.12.1.3.14. Defence Witness MO30

139. Defence Witness MO30 said that to his knowledge, there were no roadblocks in Butare from 7 to 8 April 1994. However, sometime between 8 and 10 April, he saw a single roadblock "towards the

[187] T. 31 May 2005, p. 7.
[188] T. 22 March 2006, p. 12. Throughout this witness's testimony, the name of this junction is spelt "Sebihira", which is a misspelling for "*Chez Bihira*".
[189] T. 22 March 2006, p. 12.
[190] T. 22 March 2006, p. 10.
[191] T. 22 March 2006, p. 12.
[192] T. 22 March 2006, p. 19.
[193] T. 13 March 2006, pp. 14, 15 (I.C.S.).
[194] T. 16 March 2006, p. 14 (I.C.S.).
[195] T. 16 March 2006, p. 15 (I.C.S.).
[196] T. 16 March 2006, pp. 16, 17, 29, 31 (I.C.S.).

Bihira Shop", which was a small roundabout on the road leading to the Butare Cathedral. This roadblock was up for only a day or two and was removed by 11 April.[197] Between 7 and 21 April, MO30 did no go to the Arab neighbourhood or ESO and did not see any roadblocks manned by military personnel during this period.[198]

140. Witness MO30 testified that there were a lot of roadblocks in Butare after 20 or 21 April 1994.[199] He recalled that there was a roadblock in front of Hotel Faucon, another one between the residence of Minister Nyiramasuhuko and the Protestant College, and a third one next to the University Hospital Laboratory. The University Laboratory roadblock was manned by young civilians whom he believed were students who had remained on campus. MO30 stated that he did not see a roadblock at *Chez Bihira* in May 1994.[200]

41.12.1.3.15. Defence Witness MO48

141. In April 1994, Witness MO48 lived in Mugusa *commune*, in Butare *préfecture*.[201] He heard the news of President Habyarimana's death on 7 April and noted that people in his *commune* were shocked. He estimated that about two weeks after the President's death, around 20 April 1994, the *conseiller* of his *secteur*, Tharcisse Singisabana, asked the members of the population to commence night patrols because "the situation was becoming serious."[202] Members of the population, both Hutu and Tutsi, had started killing each other.[203]

142. Defence Witness MO48 testified that roadblocks were set up with the intention of bringing people who did not have identity papers to the Communal Office. Those manning the roadblocks also searched bags to ensure that people were not carrying weapons. He explained that it was the people coming from Uganda who were *Inkotanyi* because they were working with the RPF.[204]

143. Witness MO48 said that he was posted to a roadblock at Cyamugasa, seven to eight kilometres from the Mugusa Communal Office on the road towards Cyiri-Gikonko. All the *cellules* were required to provide civilians armed with traditional weapons to man the roadblocks.[205] He worked at the roadblock for only four days after it was set up, because he fell ill with malaria and requested permission from the *responsable de cellule* to stop working. During the period he was at the roadblock, he never saw any soldiers, nor did he see anyone being killed; moreover, those who manned the roadblock during his absence never said anyone was killed at the roadblock. In fact, he added, those who manned the roadblock did not have authority to kill, they were prohibited from threatening anyone, and they did not carry guns.[206]

41.12.1.3.16. Defence Witness MO69

144. On 6 April 1994, Witness MO69 lived in Kigali with her family. Due to security concerns, she moved to Butare sometime in May. In Butare, Witness MO69 saw roadblocks at many places including at a junction leading to Gikongoro, and at Hotel Faucon. Initially, she said that the Hotel Faucon roadblock was manned by "young persons".[207] Later, however, she said the Hotel Faucon

[197] T. 14 March 2006, pp. 10, 28, 29 (I.C.S.).
[198] T. 14 March 2006, p. 11 (I.C.S.).
[199] T. 14 March 2006, p. 29 (I.C.S.).
[200] T. 14 March 2006, pp. 12, 13 (I.C.S.).
[201] T. 14 March 2006, p. 34; Exhibit D.53, admitted on 14 March 2006.
[202] T. 14 March 2006, pp. 37, 44 (I.C.S.).
[203] T. 14 March 2006, p. 44 (I.C.S.); T. 16 March 2006, p. 4 (cross-exmaination).
[204] T. 14 March 2006, pp. 46-47 (I.C.S.).
[205] T. 14 March 2006, pp. 37, 38 (I.C.S.).
[206] T. 14 March 2006, pp. 47, 48 (I.C.S.).
[207] T. 9 February 2006, p. 50 (I.C.S.).

roadblock was manned by soldiers "dressed in the usual uniform of the national army and berets" but added "there were other people around".[208]

41.12.1.3.17. Defence Witness MO73

41.12.1.3.18.

145. Witness MO73 and his family left their house in Rubungo *commune,* Kigali on or about 16 April 1994. They had received information that the *Interahamwe* were preparing to attack their family house. They travelled by car for about five hours and eventually arrived in Butare and secured accommodation at the Hotel Faucon. According to the witness, throughout their journey from Rubungo to Butare, and up to their arrival at Hotel Faucon, they did not come across any roadblocks.[209]

146. MO73 said that they left Hotel Faucon and moved to ESO on or about 20 April because the security situation in Butare had deteriorated as of 19 April 1994.[210] At ESO, Colonel Muvunyi gave accommodation to Witness MO73 and his family at one of the officers' quarters located about 50 metres from Muvunyi's own official residence. They stayed at ESO until about 21 May 1994, when Muvunyi provided a military escort composed of six soldiers in a pick-up truck and they crossed the border into Burundi.[211]

147. MO73 testified that during his stay at ESO in April and May 1994, there was a roadblock in front of the Camp.[212] He also said that on 23 or 24 April, he went from ESO to the Butare University campus to collect his belongings. He walked the distance, and passed through the University Hospital. He did not see any roadblocks manned by soldiers and did not see a roadblock at the University Laboratory. However, there was a roadblock on the small road leading to the Kigali/Butare main road at Kagaro. This roadblock was close to the University and the witness believed it was manned by students from the Law Faculty.[213] In addition, during his stay at ESO, he made about four or five trips to Butare town during which he passed Hotel Faucon. On each occasion, he noticed that there was a roadblock opposite the hotel manned by soldiers. He did not see or hear about anyone being abused at the roadblock "because the people were saying that the soldiers manning the roadblock were disciplined."[214]

41.12.1.3.19. Defence Witness MO15

148. Defence Witness MO15 testified that in order to ensure security in Butare, roadblocks were set up at various locations between 8 and 10 April 1994 including one near the ESO Camp within in the Arab neighbourhood, and others at Hotel Faucon, the Kigali-Gikongoro crossroad, and at *Chez Bihira*.[215] All the roadblocks were manned by military personnel from the Intervention Company under the leadership of Lieutenant Gakwerere. He explicitly denied that civilians manned the roadblocks.[216] The soldiers asked people passing through the roadblocks to show their identity cards, so as to prevent infiltration into their area by RPF forces.[217]

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[208] T. 9 Febuary 2006, p. 59 (I.C.S.).
[209] T. 6 March 2006, pp. 17, 19 (I.C.S.).
[210] T. 6 March 2006, p. 23 (I.C.S.).
[211] T. 6 March 2006, p. 31 (I.C.S.).
[212] T. 6 March 2006, p. 10 (I.C.S.).
[213] T. 6 March 2006, p. 26 (I.C.S.).
[214] T. 6 March 2006, p. 27 (I.C.S.).
[215] T. 9 March 2006, p. 6 (I.C.S.).
[216] T. 9 March 2006, p. 6 (I.C.S.).
[217] T. 9 March 2006, p. 6 (I.C.S.); T. 10 March 2006, p. 4 (I.C.S.).

149. Witness MO15 initially testified that the roadblock at *Chez Bihira* was dismantled nine days after it was set up,[218] but later said that the roadblocks at Hotel Faucon and the Kigali-Gikongoro crossroad, as well as the one at *Chez Bihira,* were still in place when he left Butare on 3 May 1994.[219]

41.12.1.3.20. 5.3.3. Deliberations

41.12.1.3.21.

150. The Chamber finds that roadblocks were set up in Butare in the days following the death of President Habyarimana. This conclusion is supported by Prosecution Witnesses XV, QX, KAL, and YAA, as well as Defence Witnesses MO15 and MO23.

151. The Chamber also finds that many of these roadblocks were created and operated by soldiers, specifically ESO soldiers. The Intervention Company was a unit created at ESO on 8 April 1994 and specifically tasked with creating and manning roadblocks in Butare town. As Defence Witness MO23 noted, the Company established such roadblocks near Hotel Faucon, Hotel Ibis, *Chez Bihira*, and in the Arab neighbourhood near ESO. Witnesses KAL, YAA, XV, CCQ, YAN, AFV, MO15 and MO23 all gave evidence that ESO soldiers were involved in creating and manning the roadblocks. Specifically, the Chamber notes the testimony of Prosecution Witnesses KAL and YAA, both of whom worked at ESO in 1994 and specifically identified ESO soldiers whom they knew at various roadblocks in Butare.

152. The Chamber finds that the Prosecution evidence was largely corroborated by the Defence. Witness Ndindiliyimana, MO01, MO23, MO30, MO48, MO69, MO73, and MO15 all acknowledged the existence of several roadblocks in Butare town, and testified that the roadblocks were intended for stopping persons to check their identification cards in hopes of weeding out RPF infiltrators. Defence Witnesses with a military background such as Ndindiliyimana, MO23, and MO15 all testified that the roadblocks in Butare were manned by soldiers coming from the ESO Camp.

153. The Chamber finds that at various times from 7 April to mid-June 1994, roadblocks existed at the following locations: at a distance of 100 or 200 metres from ESO Camp, as per the testimony of KAL, YAA, MO23, MO73, and MO15; Ngoma Camp, as established by QX and CCQ; Hotel Faucon, at the very least by April 20 or 21, in accordance with the testimony of YAA, CCQ, YAN, MO69, MO30, MO23, MO73 and MO15; Hotel Ibis, as per MO23's testimony; at least one in the vicinity of the University of Butare, pursuant to the testimony of CCQ, YAN, AFV, MO01, MO30, and MO73; *Chez Bihira*, as stated by CCQ, MO15, and MO23; Matyazo, as per the testimony of QX and CCQ; Rwabuye, in accordance with YAA's testimony; the Kigali-Gikongoro crossroads, as established by YAA and MO15; Cyamugasa, where MO48 worked; Rumba *cellule*, where YAQ testified that he worked; and several others, noted by Witness YAA.

154. Of these, there is no evidence suggesting that the Matyazo, Rwabuye, or Cyamugasa roadblocks were manned by soldiers. The Chamber finds that the Rwabuye roadblock was operated by armed civilian *Interahamwe*. Furthermore, the Ngoma Camp checkpoint was most likely manned by soldiers from that camp, and the Prosecution has not shown that ESO soldiers were at any time present at that location. Finally, the Chamber observes that the military forces and armed civilians were in many instances working together. For example, on 20 April, Witness CCQ saw six to ten soldiers at the Hotel Faucon roadblock along with several members of the civilian *Interahamwe*, who were armed with traditional weapons. CCQ also personally spotted the Accused in front of the Hotel Faucon talking with Robert Kajuga, the alleged leader of the *Interahamwe*, along with several soldiers and other *Interahamwe*. This identification evidence is, however, not corroborated by any other witness, and the Chamber concludes that it would be unsafe to rely on it, or to draw any inference therefrom

[218] T. 9 March 2006, p 4 (I. C.S).
[219] T. 9 March 2006, p. 4 (I.C.S.).

that Muvunyi acted in concert with, or otherwise ordered, instructed or permitted his subordinates to jointly operate with the *Interahamwe* at this roadblock.[220]

155. The Chamber finds that the roadblocks served as points where searches were systematically conducted on civilians for the purposes of identity control. The Chamber further finds that while the official rhetoric was that the roadblocks were to prevent infiltration by enemy forces, they were in fact used to identify Tutsi civilians for the purpose of eliminating them. Prosecution Witnesses YAA, CCQ, AFV, KAL, QX, XV, and YAN all offered evidence demonstrating the existence of identity checks at roadblocks in Butare.

156. The Chamber has considered Witness YAQ's testimony placing Muvunyi at the Rumba *cellule* roadblock on 24 April 1994 and finds it unreliable. YAQ was an *Interahamwe* militiaman and had reason to enhance Muvunyi's participation in the genocidal campaign and in that way attempt to diminish his own role therein. Moreover, his evidence on this issue is not supported by that of any other witness.

157. Taking all the Prosecution and Defence evidence into account, the Chamber is satisfied beyond reasonable doubt that between 7 April and 15 June 1994, roadblocks were set up in various parts of Butare town and manned by soldiers from ESO Camp. While these roadblocks were ostensibly set up to prevent infiltration by enemy soldiers, they were in fact systematically used to identify Tutsi civilians for elimination. Due to the large number of roadblocks set up in Butare, the widespread nature of killings at these roadblocks, the proximity of some of the roadblocks to the ESO Camp, and the fact that ESO soldiers were routinely deployed to man the roadblocks, the Chamber concludes that Muvunyi knew or had reason to know about them. The Chamber finds that Muvunyi failed to take necessary and reasonable measures to stop the unlawful killing of Tutsi civilians at these roadblocks by ESO soldiers.

41.12.1.4.

41.12.1.5. 5.4. Sensitisation Meetings

41.12.1.5.1.5.4.1. Indictment

158. Paragraphs 3.24 and 3.25 read:

> 3.24 During the events referred to in this Indictment, Lieutenant-Colonel Muvunyi, in the company of the Chairman of the civil defense program for Butare who later became the *préfet* of Butare *préfecture*, and other local authority figures, went to various *communes* all over Butare *préfecture* purportedly to sensitize the local population to defend the country, but actually to incite them to perpetrate massacres against the Tutsis. These sensitization meetings took place in diverse locations throughout Butare *préfecture* such as:
>
> - in Mugusa *commune* sometime in late April 1994;
>
> - at the Gikore Centre sometime in early May 1994;
>
> - in Muyaga *bureau communal* between the 3rd and 5th of June 1994;
>
> - in Nyabitare *secteur*, Muganza *commune* sometime in early June 1994.
>
> 3.25 At the meetings referred to in Paragraph 3.24 above, which were attended almost exclusively by Hutus, Lieutenant-Colonel Muvunyi, in conjunction with these local authority figures, publicly expressed virulent anti-Tutsi sentiments, which they communicated to the local population and militiamen in traditional proverbs. The people understood these proverbs to mean exterminating the Tutsis and the meetings nearly always resulted in the massacre of Tutsis who were living in the *commune* or who had taken refuge in the *commune*.

[220] *Bagilishema*, Judgement (AC), para. 75; *Kupreškić*, Judgement (AC), para. 39. In both cases, the Appeals Chamber urged "extreme caution" before relying upon identification evidence made under difficult circumstances.

41.12.1.5.2.5.4.2. Meetings at Nyantanga Trade Centre and at Nyakizu Communal Office

41.12.1.5.3.5.4.2.1 Evidence

41.12.1.5.4. Prosecution Witness CCR

159. Prosecution Witness CCR testified that on 6 April 1994 when President Habyarimana's plane was shot down, he lived in Nyakizu *commune*, Butare *préfecture*.

160. On 20 April, at about 10.00 a.m., CCR heard from an announcement by megaphone mounted on a vehicle that the population were invited to a "security meeting" at the Nyantanga Trade Centre. The meeting took place between 2.00 p.m. and 3.00 p.m. He attended the meeting, and so did members of all ethnic groups from the three *secteurs* that made up his *commune*. The meeting was also attended by Colonel Tharcisse Muvunyi, Captain Niyomugabo, Lieutenant Emmanuel, at least one military chaplain, the *préfet* of Butare and several other *commune* and *préfectoral* officials.[221]

161. Several officials spoke at the meeting. In his speech, the *bourgmestre* said the meeting was convened because the military commander of the area, Colonel Tharcisse Muvunyi, wished to come to the area to "get an assessment of the situation", and to tell the people "what needed to be done". Colonel Muvunyi then took the floor and stated as follows: "You are all aware that we are in a state of war. We are fighting the enemy just as we have fought the enemy in the past and that is the *Inyenzi*. Today they have taken on a new name – the RPF. This is a difficult war and that is why we seek your assistance. You, members of the population, you are expected to help us within the framework of our civilian defence."[222] Muvunyi added that there would be another meeting the next day where he would distribute weapons to the population of Nyakizu *commune*.[223]

162. The following day, 21 April, a second meeting was indeed held at the Nyakizu Communal Office. Tharcisse Muvunyi and the other officials addressed the population. The *bourgmestre* informed those gathered that "the government had decided to set up the civilian defence" and invited the Accused to explain the nature of the war and the measures that needed to be taken. In his turn, Muvunyi reminded the population of the previous day's meeting and stated: "The matter before us now is that our country is at war. We are fighting this war against the enemy, who has taken the name RPF, whereas it is the same enemy we fought in the past under the name *Inyenzi*." The Accused went on to say "the current war is a difficult war because the enemy before us is fighting us from a military front and is also using accomplices. As your soldiers, we are at the battle front and we have come here to make you aware so that you may fight the accomplices who are amongst you. […] The RPF *Inyenzi* has distributed weapons to its accomplices, and that was the reason why we, too, have brought weapons to you so that you may face the accomplices." Muvunyi added "Let this be clearly understood, and it is common knowledge, all Rwandans know it, these accomplices I am referring to are Tutsis and Hutus who are cowards. All these persons must be exterminated. We must get rid of this dirt."[224] Witness CCR stated that the population understood the word "*Inyenzi"* used by Muvunyi as an indirect reference to the Tutsi. With respect to the term "accomplices", Muvunyi had explained that this referred to the Tutsi members of the population.[225]

[221] T. 20 May 2005, p. 3.
[222] T. 20 May 2005, p. 4.
[223] T. 20 May 2005, p. 4.
[224] T. 20 May 2005, p. 12.
[225] T. 20 May 2005, p. 5.

163. CCR testified that weapons were distributed at the meeting and that later that evening some people were killed at the Nyakizu Communal office. The next day CCR witnessed the killing of eight people at the Nyantanga Trade Centre.

41.12.1.5.5. Defence Witness MO81

164. Defence Witness MO81, a Tutsi, testified that the Nyantanga Health Centre was located at virtually the same place as the Nyantanga Trade Centre.[226] Even though the two were separated by trees, MO81 explained that a person standing at the Health facility could clearly see the Trade Centre and vice-versa.[227]

165. According to MO81, the situation in Nyantanga remained calm until about 15 April, when people started killing each other, destroying houses and looting property.[228] He therefore went into hiding with his family until late June or early July when he went into exile in Burundi.[229] He said that he was not aware of any public meeting held at the Nyantanga Trade Centre before 15 April which was presided over by high officials of Butare *préfecture*. He added if any such meeting had taken place, he would have known because the Trade Centre was close to his home. Witness MO81 said he never saw any soldiers in the Nyantanga Health or Trade Centre before 15 April.

41.12.1.5.6. Defence Witness MO67

166. Defence Witness MO67 also testified that where the Nyantanga Trade Centre was located.[230] At approximately 11.00 a.m. one day, about one week after the President's death, while at work, she heard people shouting that the *Inkotanyi* were coming, and members of the population started fleeing. As a result, the witness also fled to Kibangu *secteur*, where she remained for about two hours before returning to Nyantanga.[231]

167. She explained that before that morning's incident, she never heard of a public meeting being held at the Nyantanga Trade Centre, and never saw any military vehicles in the area. According to MO67, she continued working near the Trade Centre up to the time she fled from Rwanda in July 1994.[232]

41.12.1.5.7. Defence Witness MO68

41.12.1.5.8.

168. Defence Witness MO68 also confirmed the proximity of Nyantanga Health Centre to Nyantanga Trade Centre and stated that if there was a meeting at the Trade Centre, someone at the Health Centre could hear what was being said.[233]

169. Around 15 or 16 April, MO68 heard people running and shouting. She knew that people were dying, but did not know who was being killed and by whom. Before the violence broke out on 15 April, she never saw or heard of a public meeting convened at the Nyantanga Trade Centre by senior government officials from the Butare *préfecture*.[234]

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[226] T. 7 February 2006, pp. 28-29 (I.C.S.).
[227] T. 7 February 2006, p. 32 (I.C.S.).
[228] T. 7 February 2006, p. 33 (I.C.S.).
[229] T. 7 February 2006, pp. 34, 35 (I.C.S.).
[230] T. 7 February 2006, pp. 4, 5 (I.C.S.).
[231] T. 7 February 2006, pp. 9, 10, 11 (I.C.S.)
[232] T. 7 February 2006, pp. 11, 12 (I.C.S.).
[233] T. 6 February 2006, pp. 23, 24, 27, 32, 33 (I.C.S.).
[234] T. 6 February 2006, p. 28 (I.C.S.).

41.12.1.5.9. Defence Witness MO39

41.12.1.5.10.

170. Defence Witness MO39 testified that between April and July 1994, he lived in Nyakizu *commune*.[235] About a week-and-half after the death of President Habyarimana, he accompanied *bourgmestre* Ntagazwa to Nyantanga and noticed that the security situation had deteriorated. However, according to the witness, *bourgmestre* Ntagazwa neither made a speech nor called or attended a meeting in Nyantanga during this trip. Furthermore, he did not see Tharcisse Muvunyi or any other military personnel during the visit.[236]

41.12.1.5.11. 5.4.2.2. Deliberations

171. The Chamber has considered the totality of the evidence heard on the alleged meetings held at Nyantanga Trade Centre and at Nyakizu Communal Bureau on 20 and 21 April 1994. The Prosecutor relied exclusively on the evidence of witness CCR to prove these allegations. The Chamber notes that the Defence strongly objected to the evidence of this witness on the ground that he is not credible. The Defence argued that Witness CCR's pre-trial statements are materially distinct from his evidence before the Chamber. In particular, the Defence submitted that in three statements CCR made in 2001, he referred to only one meeting held at the Nyantanga Trade Centre on 10 April 1994;[237] in none of the statements did he mention a meeting held at Nyakizu Communal Office, although in his statement of 22 February 2001, he indicated that he heard from someone that weapons were distributed at the Communal Office on 11 April 1994. Witness CCR testified that there were in fact two meetings which took place on 20 and 21 April 1994 at Nyantanga Trade Centre and Nyakizu Communal Office respectively. The Chamber observes that on 18 May 2005, barely two days before CCR took the witness stand, the Prosecutor filed a will-say statement indicating that the witness intended to correct the date "10 April 1994" in his statement of 22 February 2001, to read "20 April 1994", and the date "11 April 1994" to read "21 April 1994".

172. The Chamber considers that significant inconsistencies exist between Witness CCR's testimony and his pre-trial statements with respect to the dates and number of meetings at which the Accused is alleged to have made anti-Tutsi statements. The introduction of a will-say statement two days before the witness's testimony, seeking to align the proposed testimony with the Prosecution's theory of the case, is in the Chamber's opinion, at best suspect.

173. In addition to the inconsistencies between his testimony and his pre-trial statements, the Chamber notes that CCR was detained in Rwanda for six years from 1996 to 2002 on allegations that in 1994, he killed people including his mother and/or wife, and son.[238] In his testimony, the witness denied having killed anyone and said he was acquitted by a Gacaca court. He added that the person who killed his wife had confessed. He also maintained that his mother died while he was in prison. The Defence maintains that the witness was provisionally released and not acquitted. The Chamber notes that on 27 April 2006, the Prosecution filed an order of provisional release issued by the Court of First Instance in Butare on 11 November 2002, which requires Witness CCR to periodically report to the authorities in Butare. It also provides that the terms of the provisional release shall cease to apply once the witness is acquitted or convicted of the charges laid against him.[239] In the Chamber's view, the Defence has not shown that because of his prior detention in Rwanda in connection with the genocide, Witness CCR had a motive to lie and that he in fact lied on the witness stand so as to curry

[235] T. 10 Febraury 2006, p. 8 (I.C.S.).
[236] T. 10 February 2006, pp. 10, 11 (I.C.S.).
[237] The Prosecution investigators recorded three statements from Witness CCR dated 22 February 2001; 24 May 2001; and 28 August 2001. The statements were not tendered as Exhibits, but pursuant to the Chamber's Order, were disclosed at least 21 days prior to the date of Witness CCR testimony.
[238] Defence Exhibits D.2, D.3, D.4 (all under seal), admitted on 23 May 2005.
[239] Prosecutor's Report filed Pursuant to Trial Chamber's Directive of 24 May 2005, filed on 27 April 2006.

favour with the Rwandan authorities.[240] Nonetheless, it is the Chamber's view that Witness CCR is an alleged participant in the genocide, and the Chamber therefore views his evidence with caution.

174. CCR's testimony must be considered in light of the evidence of Defence Witnesses MO67, MO68, MO81, and MO39. The Chamber concludes that MO39 is not credible; he was evasive during his testimony and denied the obvious, including ever seeing any soldiers or hearing about killings in Nyakizu *commune* between April and July 1994. However, the Chamber believes that Defence Witnesses MO67, MO68, and MO81 gave coherent and convincing testimony about events in Nyantanga in April 1994. They gave similar accounts of the physical location of the Nyantanga Trade Centre; each of them said there were no killings before 15 April 1994; however, on that day, members of the population were scared and had to go into hiding because some people were shouting that the *Inkotanyi* had come; finally, each of them denied that there was a meeting held by civil and military figures at the Nyantanga Trade Centre in April 1994. The Chamber notes that the Defence witnesses each testified that there was no meeting at the Nyantanga Trade Centre before 15 April 1994 or anytime thereafter. On the other hand, Witness CCR's evidence is to the effect that a meeting was held at that location on 20 April 1994. The Chamber accepts the evidence of the Defence witnesses.

175. In light of the inconsistencies between Prosecution Witness CCR's pre-trial statements and his testimony before the Chamber, as well as the uncorroborated nature of that testimony, and the fact that three Defence witnesses who were in a position to know, testified that to their knowledge no meeting was held at the Nyantanga Trade Centre, the Chamber concludes that the Prosecution has not proved beyond reasonable doubt that a meeting took place at Nyantanga Trade Centre on 20 April 1994 at which the Accused addressed the population. The Chamber further disbelieves CCR's testimony that another meeting was held on 21 April 1994 at Nyakizu Communal Office during which the Accused distributed weapons to the population. The Prosecution has equally failed to prove this alleged meeting took place.

41.12.1.5.12. 5.4.3. Meeting at a Roadblock in Rumba *cellule*, Kibilizi *secteur*

41.12.1.5.13. 5.4.3.1. Evidence

41.12.1.5.14. Prosecution Witness YAQ

176. Prosecution Witness YAQ testified that in April 1994, he lived in Nyabiduha, Kibilizi *secteur*, Mugusa *commune*, in Butare *préfecture*. He admitted before the Chamber, as he did in his confession before the Rwandan authorities, that he participated in the genocide. He manned roadblocks, looted and burned down Tutsi property, and killed Tutsi people. On 24 April 1994, at about 1.00 p.m., while YAQ was on duty at a roadblock located at Rumba *cellule,* Kibilizi *secteur*, the Accused arrived in a white Toyota vehicle together with Colonel Alphonse Nteziryayo, one Nsabimana who later appointed *préfet,* Kalimanzira who was a senior civilian officer in Butare, and other people. The Accused wore a camouflage military uniform with a black beret which had a sign or badge on it. There was a large crowd of people present at the roadblock which was located at the intersection of the roads leading to Butare, Rubona and Gikongoro, in front of one Sakindi's house.[241]

177. The Accused and the other military officers addressed the crowd. During his speech, the Accused told the population that "[t]omorrow, very early in the morning, if I do not find bodies, any dead bodies at this roadblock, I will conclude that you are all Tutsis. I myself will bring soldiers, and we will allow people from Shyanda – assailants from Shyanda, to come here, and they will even kill

[240] *Ntakirutimana* Judgement (AC), para. 181 where it was stated that that the mere fact that a detained witness might have a motive to lie so as to gain favour with the authorities detaining him, is by itself insufficient to prove that the witness in fact told a lie on the stand.
[241] T. 31 May 2005, pp. 4-5.

you."[242] The next day, that is 25 April 1994, the Accused returned to the roadblock to see if the killings had started. The witness testified that upon arrival of the Accused, there were dead bodies at the roadblock – "The first person to be killed and who was a Tutsi was Rwabigwi. There was also Rubanda, Isador Mutiganda, Kayiranga. These are the names that I remember, but I believe there were about seven bodies."[243]

178. Witness YAQ said that before Muvunyi's speech, a soldier who had come along with the Accused posed the following rhetorical question: "You Hutus of this area, do you know how to cut the throats? ... You Hutus of this area, do you know how to cut people's neck?" This soldier then put his hands around his own neck and demonstrated to the population how they could cut other people's necks. After the soldier's speech, Nteziryayo also took the floor and said: "As from today, you should be aware that all the *communes* have finished, and I believe that you are aware that you should start eating the cattle of the Tutsis who are in this area, and you should burn down their houses."[244]

179. YAQ gave evidence that after hearing these speeches, members of the population were given matches by the leaders of the MRND and they proceeded to burn down houses belonging to the Tutsis and to eat their cattle. He added that the next day, 25 April 1994, the killings began.[245]

41.12.1.5.15.

41.12.1.5.16. 5.4.3.2. Deliberations

180. By his own admission, Witness YAQ was an accomplice to the 1994 genocidal killings in Rwanda and the Chamber therefore views his evidence with caution. The Chamber has considered Witness YAQ's testimony that while working at a roadblock in Rumba *cellule* on 24 April 1994, the Accused arrived with other military and civilian officials and threatened those manning the roadblock that if by the next day he does not find any dead bodies at that spot, he will consider all of them as Tutsis, and would bring assailants from another *commune* to attack and kill them. As a result of this threat, a number of Tutsis were killed the following day.

181. The Chamber recalls that the Tribunal can make a finding of fact on the basis of the evidence of a single witness if it finds such evidence relevant, reliable and probative of the material facts alleged in the Indictment.[246] However, the Chamber concludes that in the circumstances of the present case, the evidence of Witness YAQ is not sufficiently reliable or credible to ground a finding of fact beyond reasonable doubt that a meeting took place at a roadblock in Rumba *cellule* on 24 April 1994 at which the Accused incited the population to kill Tutsis. The Chamber will therefore not rely on this evidence and holds that the Prosecution has not proved beyond reasonable doubt that Muvunyi visited the roadblock at Rumba *cellule* on 24 April 1994 or that he threatened those manning the roadblock to kill Tutsis or otherwise get killed by assailants from another *commune*.

[242] T. 31 May 2005, p. 6.
[243] T. 31 May 2005, p. 7.
[244] T. 31 May 2005, p. 6.
[245] T. 31 May 2005, pp. 6-7: YAO said: "So after the authorities left, the leaders of the MRND parties, Léonidas, gave matchboxes to Muvoza … and we then started burning the houses of that very evening, and we started eating the cattle. … The next day, on the 25th, the killings began. Given that he had said that he would return to see whether the members of the population had, indeed, started killing people, he came back and there were dead bodies at the roadblock."
[246] *Tadić,* Judgement (AC), para. 65; *Kamuhanda*, Judgement (TC) para. 38; *Aleksovski,* Judgement (AC), para. 62; *Musema*, Judgement (AC), para. 31.

41.12.1.5.17. 5.4.4. Meeting at Gikonko, Mugusa *commune*

41.12.1.5.18.

41.12.1.5.19. 5.4.4.1. Evidence

41.12.1.5.20.

41.12.1.5.21. Prosecution Witness YAQ

182. Witness YAQ recalled that he attended another meeting held in Gikonko, in Mugusa *commune*, sometime in April or May 1994. The meeting was called by the *bourgmestre* of Mugusa, Mr. André Kabayiza.[247]

183. Most people who attended the meeting were armed Hutu men, but YAQ explained that a few Tutsi who carried Hutu identity cards might also have been present. Upon their arrival at the communal Office, YAQ and the other people found Muvunyi, Nteziryayo and Kalimanzira already there sitting in a red Toyota vehicle. Some people had surrounded the vehicle. There was a soldier at the back of the vehicle with a big gun mounted above the cabin. Muvunyi wore a military uniform and carried a pistol.[248]

184. The first speaker, Nteziryayo, said: "We can see that the *Inkotanyis* have already taken over the entire country because they are also in Butare. So you, the members of the population, you have not fought against the *Inkotanyis* as we instructed you to do, so return to the *commune*s and do the mopping up. The Tutsis who are still alive, whether they are young girls, men, or women who had been forced into marriage, and all those who look like them should be killed. The *Inkotanyis* have already taken over the country, and if you do not kill them, they are going to tell the *Inkotanyis* what you have done."[249]

185. *Conseiller* Gasana then told the crowd that while Nteziryayo was asking the population to go and mop up the Tutsi, he, Gasana, was aware that the *bourgmestre* was hiding a Tutsi. He said there was no reason for them to go and look for the snakes in the bushes when there were serpents or snakes right in front of their doors. YAQ testified that the reference to "serpents" or "snakes" in Gasana's speech was in fact an oblique reference to Tutsis. He said Gasana was referring to the Tutsis that the *bourgmestre* was hiding at the communal office, in particular, one Vincent Nkurikiyinka who was a friend of the *bourgmestre*.[250]

186. After Gasana made these remarks, the Accused then turned to the *bourgmestre* and said: "How could you be hiding a Tutsi when you are a *bourgmestre*? You have to hand him over so that he should be killed." The Accused added that "when a snake is near a calabash, it is necessary to break that calabash in order to get the snake."[251] YAQ informed the Chamber that as a result of what Muvunyi said, the *bourgmestre* ordered people to go below the communal office and bring out Vincent, the Tutsi man who was in hiding. A group of attackers went from the meeting to the communal offices where they captured Vincent, took him to his own house and killed him. Members of the population thereafter returned to their respective *commune*s to mop up the surviving Tutsis as they had been told.[252]

[247] T. 31 May 2005, p. 8.
[248] T. 31 May 2005, pp. 9-10.
[249] T. 31 May 2005, pp. 9-10.
[250] T. 31 May 2005, pp. 9-10.
[251] T. 31 May 2005, p. 10.
[252] T. 31 May 2005, pp. 10-11.

41.12.1.5.22. Defence Witness MO80

187. Defence Witness MO80, a Hutu, lived in Mugusa *commune*, Kibilizi *secteur*, in April 1994. He said that one or two weeks after President Habyarimana's death, *conseiller* Gasana directed that roadblocks should be set up in Mugusa *commune*. The witness was assigned to a roadblock located on the "junction of the main road from Butare and the one going to ISAE Rubona or the one going into Mugusa *commune*" near Sakindi's house where he worked for about two weeks.[253] During this period, he never took part in or heard of a public meeting involving the populations of Mugusa, Ndora, Uyaga and Muganza.[254] If such a meeting had taken place in his *secteur*, he would have known about it, although it would be difficult to know about meetings in the *commune* in general.[255]

188. MO80 also confirmed that a Tutsi civilian called Vincent Nkurikiyinka was abducted from his hiding place at the Communal Office and taken to his house where he was killed. The armed Hutu attackers were led by *conseiller* Gasana. This event took place in mid-May 1994.[256]

41.12.1.5.23. 5.4.4.2. Deliberations

189. The Chamber has considered Witness YAQ's evidence on the meeting held at Gikonko sometime in April or May 1994. The Chamber believes YAQ's account and notes that certain aspects of his testimony are supported by that of Defence Witness MO80. While the latter denied that there were any public meetings in his *secteur* in April or May 1994, he admitted he could not tell as a matter of certainty that meetings were not held in other parts of the *commune*. In the Chamber's view, the fact that Witness MO80 was not aware of the meeting at Gikonko does not mean that the meeting did not take place. The Chamber notes that both witnesses stated that *conseiller* Gasana was the leader of the armed attackers, that Vincent was abducted from the Mugusa Communal Office and that he was killed sometime in April or May 1994.

190. Having considered all the evidence, the Chamber finds beyond reasonable doubt that Muvunyi addressed Hutu members of the population in April or May 1994 in Gikonko. The Chamber also finds the Prosecution has proved beyond reasonable doubt that Muvunyi blamed the *bourgmestre* of Gikonko for hiding a Tutsi man and asked him to deliver the said man to the killers. The Chamber believes this aspect of Witness YAQ's evidence and finds that Muvunyi used the Rwandan proverb, "when a snake is near a calabash, it is necessary to break that calabash in order to get the snake", and that the population understood his remarks as a call to kill Tutsis.[257] The Chamber is also satisfied that Muvunyi knew that his audience would understand his words as a call to kill the Tutsi man Vincent. The Prosecution has proved beyond reasonable doubt, and the Chamber therefore finds that as a result of Muvunyi's remarks, Vincent, a Tutsi man, was arrested from his hiding place and killed by a group of armed attackers under the leadership of *conseiller* Gasana.

[253] T. 13 February 2006, p. 26 (I.C.S.); T. 14 February 2006, p. 4 (I.C.S.).
[254] T. 14 February 2006, p. 10 (I.C.S.).
[255] T. 14 February 2006, p. 22 (I.C.S.).
[256] T. 14 February 2006, p. 9 (I.C.S.); T. 15 February 2006, p. 5 (I.C.S.).
[257] Report of Prosecution Expert Witness Evariste Ntakirutimana presented to the Chamber on 6 July 2005.

41.12.1.5.24. 5.4.5. Meeting at Gikore Trade Centre

41.12.1.5.25.

41.12.1.5.26. 5.4.5.1. Evidence

41.12.1.5.27.

41.12.1.5.28. Prosecution Witness YAI

191. Witness YAI testified that he attended a "security" meeting at the market square of the Gikore Trade Centre towards the end of May 1994. The meeting started at about 1.00 p.m. Colonel Muvunyi attended the meeting accompanied by Jean-Baptiste Ruzindana, the *sous-préfet* of Butare called Laurent, the s*ous-préfet* of Gisagara called Dominic Ntawukuliyrayo and the *bourgmestre* of Nyaruhengeri *commune*.[258] Also in attendance were about one thousand local people, mainly Hutu from the Nyaruhengeri, Kegembe and Muganza *communes*.[259]

192. During his speech, Muvunyi reminded the population that the country was at war, and that they were fighting against the *Inkotanyi*. He informed the attendees that the *Inkotanyi* start by infiltrating areas they wish to attack, and that "[e]ven in our own area, the *Inkotanyi* were already present." He warned the population that if they were not vigilant, the *Inkotanyi* "will make it to [their] own homes." He further called on members of the population to "beef up the roadblocks; to conduct night patrols, and to take full control of their security."[260] On the issue of Hutu men who had forcefully taken Tutsi women as wives, the Accused told the population "to send these women back to their homes". In YAI's view, because the homes of the Tutsis had been destroyed and their property plundered, Muvunyi's reference to sending the women home "simply meant to deliver those persons to the killers."[261]

193. Next, YAI stated that Muvunyi pointed to a partially demolished house in front of him and said: "Look at that house that has been destroyed. You will be blamed for that. So level the houses; bring them down completely – those houses that are still standing – these Tutsi houses that are still standing. And in the place of those houses, cultivate and plant banana plantations and you will see what will happen."[262] Witness YAI testified that by these words, Muvunyi wanted to make sure that no one could in future give an account of what had transpired and "in so doing, make any Prosecution difficult."[263] He added that Muvunyi spoke in a "firm" tone during the meeting.

194. After Muvunyi, Jean-Baptiste Ruzindaza took the floor and invoked Biblical scripture from the Prophet Jeremiah about an enemy who came from the North and killed and destroyed everything in its path. According to YAI, Ruzindaza's speech was not a prayer for peace, but a "satanic prayer", because it was used to "call on people to kill." He recalled that Ruzindaza urged the population to be vigilant so as to avoid infiltration into their areas by the *Inkotanyi*. Ruzindaza also stated that it was unfortunate that the Hutu had not been trained to kill, and that parents should encourage their Hutu

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[258] T. 25 May 2005, p. 6: The witness could not recall the names of the other persons who came with the Accused.
[259] T. 25 May 2005, p. 6: He added that there were also a few members of the Twa ethnic group "because at the time, they had no problem."
[260] T. 25 May 2005, pp. 7-8.
[261] T. 25 May 2005, p. 8. "Q: Can you explain, in terms of the situation, the homes of these people? Where were there homes located?"
A: He was referring to the roots or the origin of these people. The places from which they came as they escaped. This was in Gikore in the south. The southern border with Burundi and these people came from all over – attempting to cross over into Burundi in order to escape and find freedom.
Q: Mr. Witness, to the best of your knowledge, at the time of the meeting, what had happened to the homes of Tutsi people?
A: The houses of Tutsis had been demolished and their property plundered. So when one said that these people were to be sent back to their home, that was not correct. It simply meant to deliver those persons to their killers."
[262] T. 25 May 2005, p. 9.
[263] T. 25 May 2005, p. 9.

children to "have a mastery of the art of killing."[264] Finally, the witness recalled that Ruzindaza employed the Rwandan proverb that "those who did not wish to spill their blood for their country would have dogs drink it", meaning that people should not be afraid to spill their blood for their country.[265]

41.12.1.5.29. Prosecution Witness CCP

195. Witness CCP testified that he first met the Accused at a meeting held in Gikore in May or June 1994. The meeting was held at a location opposite *Chez Vénuste Nkulikiyukuri* and was attended by members of the population from all ethnic groups. A number of officials were in attendance, including Muvunyi, the then *préfet* of Butare called Alphonse Nteziryayo, one Ruzindaza, the *bourgmestre* called Charles Kabeza, *conseillers*, and *Responsables de cellule*.[266] Nteziryayo, Muvunyi and Ruzindaza addressed the meeting.

196. During their respective speeches, Witness CCP stood at a distance of approximately 4 to 5 metres away from the speakers and so could see and hear them clearly. He testified that the *préfet,* Mr. Nteziryayo, told the population that the country had been attacked by the *Inyenzi/Inkotanyi*. He called on the young people to go and fight against the *Inkotanyi*, chase them away and take over their property. CCP recalled that Nteziryayo referred to Tutsi as "serpents" and said that their eggs should be destroyed. He concluded by warning the people gathered in the following terms: "When you refuse to pour or to shed your blood for the country, dogs will drink it for free." Witness CCP testified that he was frightened by the *préfet*'s words because he understood them to imply a call to members of the population to kill those who were being referred to as "serpents", and that the reference to "eggs" implied that little children, including newly-born babies, had to be killed.[267]

197. In his speech, Muvunyi told young Hutu men who had married Tutsi girls that they should either kill those girls or send them away. The Accused invoked a Rwandan proverb and said the Tutsi girls "should die elsewhere because they could poison" their Hutu husbands. Furthermore, the Accused told his audience that Tutsi were serpents that should be killed and their eggs crushed. The Accused added: "I know that very well […] I know that you have hidden girls and children. Go and seek them out and kill them." Witness CCP said he understood Muvunyi's words to be a call on young Hutu to kill Tutsi girls and that the reference to "serpents" was a way of saying that Tutsi and their children should be killed.[268]

198. CCP also testified that Muvunyi pointed to a partially demolished house opposite the meeting venue and called on the population to pull it down completely and grow plants in its place. During cross-examination, CCP reaffirmed this testimony, and clarified that the house in question belonged to a priest and that the Accused told the population to destroy it completely and plant pumpkins in its place. According to CCP, by asking the population to destroy the house and plant pumpkins in its place, Muvunyi wanted to "destroy all traces of genocide in Rwanda."[269]

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[264] T. 25 May 2005, p. 10.
[265] T. 25 May 2005, pp. 41-42.
[266] T. 9 June 2005, p. 4.
[267] T. 9 June 2005, pp. 5-6. "When I heard that message I was afraid because people were being referred to as serpents. People were being asked to kill them. When it is said that somebody is a serpent and that the person has to be killed, they were talking about people, and they were talking about eggs referring to little children and even babies who had just been born. So you would understand that those words were very intimidating."
[268] T. 9 June 2005, pp. 6-7. At p. 26, during cross-examination, Witness CCP stated as follows: "People who had detained these women for sexual purposes had to kill them or drive them away. … He [Muvunyi] said that the people who had subjected those girls to sexual slavery had to kill them, and those who could not kill them had to drive them away. He was worried, he was concerned that these women were going to exterminate Hutus by poisoning them. So he said he had no pity for those women."
[269] T. 9 June 2005, pp. 6, 41. "What I believe I said is that this person, Tharcisse Muvunyi, pointed to the house of a priest which had been partially destroyed and said that this house should be completely destroyed and pumpkins planted. And this is a plant that covers the entire ground when it is planted, and therefore you will not be able to see the ground or the soil that it covers."

199. The third official to speak, according to CCP, was Ruzindaza. The witness said that Ruzindana held a Bible during his speech and prayed to God to teach Hutu to kill, "as Tutsis grow up to kill."[270]

200. The meeting lasted for about an hour and ended in the afternoon. According to CCP, the following morning, "there was a disaster because as was prescribed, people were killed, and the instructions which were given were followed." He explained that those killed were Tutsi and those who did the killing were Hutu, but not all Hutu were involved in the killing.[271]

201. Witness CCP denied any personal involvement in the killings.[272] However, Defence Counsel referred to the witness's pre-trial statement of 19 October 1999, in which the witness is alleged to have admitted taking part in the hunt for and killing of Tutsis.[273] The witness admitted to making part of this statement, but denied that he participated in killing Tutsi.[274]

41.12.1.5.30. Defence Witness MO78

41.12.1.5.31.

202. Defence Witness MO78 testified that on the 23 or 24 May 1994, he attended a public meeting at Gikore *secteur*, Nyaruhengeri *commune*.[275] The meeting was organized by the *bourgmestre* of Nyaruhengeri, Charles Kabeza. According to Witness MO78, the purpose of the meeting was to promote peace in Nyaruhengeri, and to foster unity among members of the population.[276] He added that several officials attended the meeting including Tharcisse Muvunyi, Alphonse Nteziryayo, Sylvain Nsabimana (the *préfet* of Butare), Mr. Rosendarusa, and Dominic Ntawukuriryayo.[277]

203. Muvunyi spoke at the meeting and said that the purpose of the meeting was to restore security to the area and urged members of the population to remain united. He told them that the war was between the RPF and the Rwandan Army and that it did not concern the public. Muvunyi further told the population to fight against Army deserters, and also called on those with military equipment to return such materials in order not to frighten members of the population.[278]

204. Witness MO78 added that he did not recall that Muvunyi or any other speaker called on the population to get rid of their Tutsi wives, or to pull down structures belonging to Tutsis, or to plant anything in place of destroyed Tutsi houses. He further said he did not remember that any of the speakers invoked a Rwandan proverb or that someone said a prayer at the meeting.[279] Witness MO78

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[270] T. 9 June 2005, p. 7.
[271] T. 9 June 2005, p. 8.
[272] T. 9 June 2005, p. 16. Witness CCP explained that he was detained in 1996 upon his return from exile in Burundi on suspicion that he committed rape in 1994. He added that he was released after an investigation found him innocent of the rape allegation. However, CCP admitted that on one occasion during the events of 1994, a group of killers asked him to keep watch over three people – a girl and two of her brothers – while they embarked on their killing spree. He kept watch over the three people and delivered them back to the killers upon their return. The witness stated that he released the people back to the killers because it was said that they were going to be taken to one Buchumi, who would confirm that they were Hutus.
[273] T. 9 June 2005, p. 16; CCP testified: "These deaths signalled the killings in our area because the same morning a certain Rowansnashyroka, *alias* Zona, a Hutu, accompanied by about ten other Hutus, whose identity I cannot remember, came to look for me at my home and asked me to go with them to participate in the hunt for Tutsis, which they had organized. … They even threatened to kill me if I refused to follow them. … We had to look for the Tutsis in our secteur, assemble them together, kill them and throw their bodies into the lake."
[274] T. 9 June 2005, p. 16.
[275] T. 16 February 2006, pp. 13, 15.
[276] T. 16 February 2006, p. 16:
"Q. And what was the purpose -- or the announced purpose?
A. People were told that the purpose of the meeting was pacification in the entire Nyaruhengeri commune, and people were told that the officials who were to preside over the meeting were to inform the public that they were to bring about peace."
[277] T. 16 February 2006, p. 15.
[278] T. 16 February 2006, pp. 16, 17.
[279] T. 16 February 2006, p. 19.

confirmed that he knew Prosecution Witness YAI, but could not recall if the latter attended the meeting held at Gikore on 23 or 24 May 1994. He said he did not know Prosecution Witness CCP.[280]

41.12.1.5.32. Defence Witness MO30

205. Defence Witness MO30 testified that during the events of 1994, he saw Muvunyi at public meetings at the *commune* Office or at Amohoro stadium. The meetings were convened by the *préfet* to mobilise the population and to restore security to the area.[281] He explained that Muvunyi attended these meetings as the envoy or representative of the powers who were in command. According to Witness M030, in May 1994, there was a meeting in the urban *commune* attended by communal and *préfectoral* authorities, as well as private sector persons such as himself. Sometime in mid-June, Muvunyi and General Gatsinzi were both present at a public meeting chaired by the *préfet*. At this meeting, the authorities gave information to the population about their attitude towards work, on the road and in their homes.[282]

41.12.1.5.33. 5.4.5.2. Deliberations

206. The Chamber has considered the Defence objections that Prosecution Witnesses YAI and CCP should not be believed because they were both, at various times, arrested and detained in connection with the genocide. CCP admitted that in 1996 he was arrested on suspicion of having committed rape in 1994, but was subsequently found innocent and released. He also admitted that during the 1994 events, members of a Hutu militia had asked him to join them in hunting down and killing Tutsis and that they threatened to kill him if he refused. However, he states that he did not join the killing campaign because the killers had asked him to watch over a Tutsi girl and two of her brothers whom they later picked up from him. He explained that he handed the detainees over because it was said that they would be taken to one Buchumi to confirm that they were Hutu. It is not clear what happened to these three persons. The Chamber considers, in light of the above evidence, that Witness CCP is an accomplice to the genocidal killings that took place in Rwanda in 1994 and views his evidence with caution.

207. The Defence also argues that CCP should not be believed because he testified that Colonel Nteziryayo attended the Gikore meeting as *préfet* of Butare, and this could not have been the case since Nteziryayo was appointed *préfet* on 17 June 1994. The Defence produced Exhibit D13, a letter ostensibly emanating from the Rwandan Council of Ministers, appointing Nteziryayo to that position with effect from 17 June 1994.[283] The Chamber holds that this misstatement of the capacity in which Nteziryayo might have attended the Gikore meeting is immaterial to the issue to be determined and does not affect the overall credibility of Witness CCP. The Chamber has heard evidence from other witnesses that Nteziryayo was the Chairman of the civil defence program in Butare in 1994 before his appointment as *préfet*.[284] Considering the context of events in Rwanda in 1994, his attendance at a "security" or "sensitization" meeting is not inconsistent with the duties that the holder of such an office might be expected to carry out.

208. With respect to YAI, the Chamber notes that up to the time he testified, he was being held in Rwanda in connection with the killing of a Tutsi man named Mukunzi, together with his wife and children. The witness denies that he was involved in the killing of the Mukunzi family; on the contrary, he testified that he hid the Mukunzi family in his house in order to protect them from the killers, but that they were subsequently discovered and killed. The witness has not yet been tried in connection with the killings of the Mukunzi family. The Chamber recalls the Appeals Chamber's

[280] T. 16 February 2006, pp. 20, 21.
[281] T. 14 March 2006, pp. 21, 23 (I.C.S.).
[282] T. 14 March 2006, p. 23 (I.C.S.).
[283] Exhibit D.13, admitted on 9 June 2005.
[284] See Prosecution Witness TQ's testimony, 30 June 2005, pp. 30-31.

reasoning to the effect that merely because a detained witness might have a motive to lie so as to gain favour with the authorities detaining him, is, by itself, insufficient to prove that the witness in fact told a lie on the stand.[285] Nonetheless, the Chamber will assess Witness YAI's evidence with caution.

209. The Chamber has closely examined the evidence of YAI and CCP. Both witnesses testified that a meeting took place in Gikore sometime towards the end of May or early June 1994 and that Tharcisse Muvunyi attended the meeting and addressed the population as did a number of other military and civilian authorities. The Chamber is satisfied that during the meeting, Muvunyi called on young Hutu men to send their Tutsi wives away; he said Tutsi women could poison their husbands; he referred to Tutsis as "serpents" or "snakes" to be killed and their eggs crushed; and asked the population to pull down a partially demolished house that belonged to a Tutsi priest and plant crops in its place. The account that the two Prosecution witnesses gave of Muvunyi's speech at Gikore is strikingly similar. The Chamber has not received any evidence to suggest that they fabricated or otherwise colluded to harmonize their testimonies. The Chamber therefore concludes that they both gave reliable evidence of the Gikore meeting and the speech the Accused made there.

210. The Chamber adds that the evidence of Prosecution Witnesses YAI and CCP is corroborated by that of Defence Witness MO78 who confirmed that he saw Muvunyi at a public meeting in Gikore on 23 or 24 May 1994, and that Nteziryayo and Nsabimana were also in attendance. The Chamber, however, disbelieves Witness MO78's evidence to the extent he said that in their speeches, Muvunyi and the other officials promoted peace, security and friendly relations among members of the population. This evidence is rejected in light of the clear and coherent evidence to the contrary given by Witnesses YAI and CCP.

211. The Chamber therefore concludes that the Prosecution has proved beyond reasonable doubt that at a meeting held in Gikore in May 1994, Muvunyi made a speech in which he called for the killing of Tutsis, the destruction of Tutsi property, associated Tutsis with the enemy, and denigrated Tutsi people by associating them with snakes, serpents, and poisonous agents. The Chamber is also satisfied that his audience understood Muvunyi's words as a call to kill Tutsis, and that the Accused knew that this would be the effect of his words on the audience.

41.12.1.6. 5.5. Provision of Weapons to Militiamen

41.12.1.6.1. 5.5.1. Indictment

212. Paragraph 3.26 reads:

> 3.26 During the events referred to in this Indictment, Lieutenant-Colonel Muvunyi participated in the provision of weapons such as grenades to these militiamen to perpetrate attacks against the Tutsis.

5.5.2. Evidence

41.12.1.6.2. Prosecution Witness KAL

213. Witness KAL testified that he attended a secret meeting held at Lieutenant-Colonel Muvunyi's house located at *Joli Bois* inside the ESO Camp. Also present were Lieutenant Bizimana, and the *bourgmestres* of Ngoma and Huye *communes*. He said generally when bourgmestres met, they did so to request guns for themselves or for civilians trained at ESO. He added that the *bourgmestres* had enlisted civilians who had to learn to handle firearms. After the meeting, "people indeed came to the

[285] *Ntakirutimana*, Judgement (AC), para. 181.

Camp to receive a weeklong training on how to operate firearms."[286] He said that the training was conducted by soldiers of the ESO Camp. Captain Nizeyimana, who was officer in charge of operations and training at ESO, came from time to time to check on the progress of the training programme. KAL testified that upon completion of their training, these civilians were sent to the *communes* to "look for the enemy." He added that the trainees were issued various types of weapons before leaving the Camp, including Kalashnikov rifles, R-4 rifles, FAR rifles, G-3 rifles and grenades.[287]

41.12.1.6.3. Prosecution Witness YAA

214. Witness YAA testified that when he returned to ESO from Kigali in May 1994, he found out that Captain Nizeyimana and 2nd Lieutenant Modeste Gatsinzi were based in Mata, in Gikongoro *préfecture*, where they trained *Interahamwe* and Burundians on how to handle guns. Witness YAA explained that Nizeyimana returned to ESO a few times in order to obtain training equipment and ammunition as well as other supplies such as petrol and food for the trainees. He knew that Nizeyimana and Gatsinzi were based in Mata because when they came to ESO, he spoke to them. YAA added that when he fled from ESO on 8 June 1994, he met 2nd Lieutenant Gatsinzi at Gikongoro town. The latter was on board a van with trainees from ESO *Nouvelle Formule*. YAA spoke to Gatsinzi, who told him that he was based in Mata, where he was training *Interahamwe*.[288]

41.12.1.6.4. Prosecution Witness CCR

215. Witness CCR testified that at a meeting in Nyakizu *commune* on the 21st April 1994, Muvunyi told the population that weapons would be distributed after the meeting. He explained that priority would be given to those who already knew how to use weapons, and to reserve soldiers and policemen who were no longer in active service.[289]

216. CCR testified that during the meeting, he saw a deep-green CTA military truck that had weapons loaded on it. It was covered with tarpaulin. He does not state how he knew the truck was loaded with weapons. The witness was not present when the weapons were distributed, but later met at least three people with weapons, who confirmed to him that they received them at the meeting, and that they were part of weapons distributed by the Accused.[290]

41.12.1.6.5. Defence Witness MO67

217. Defence Witness MO67 testified that the Nyantanga Trade Centre was located in Nyakizu *commune*, Butare *préfecture*.[291] According to Witness MO67, from the time of the President's death until when she left for Gikongoro in July, she never heard or saw weapons being distributed at the Nyantanga Trading Centre.[292]

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[286] T. 1 March 2005, p. 28 (I.C.S.).
[287] T. 2 March 2005, pp. 4, 5 (I.C.S.).
[288] T. 9 March 2005, pp. 27, 28 (I.C.S.).
[289] T. 20 May 2005, p. 5.
[290] T. 20 May 2005, p. 12. In answer to the Prosecutor's question about how witness knew that weapons were distributed if he did not personally witness such distribution, CCR answered: "I found out in two ways: one, the vehicle in which the weapons were loaded was parked on the premises, and it was a CTA truck. Following the distribution of weapons, I saw three persons who were in possession of the weapons. … Now, Augustin Kabayiza came to my place of work with a brand new gun, a G-3 gun, which he had never owned before. So he showed us the gun, proudly displaying it. So I took it in my hand, and he said he had received the gun because he was a reserve officer or reserve soldier. … One Jean-Baptiste Bazaramba also had a gun. He had a Kalashnikov, a brand new Kalashnikov. The former communal police Kaganwa also had a gun, and it was a machine-gun, an old machine-gun."
[291] T. 6 February 2006, pp. 4, 22 (I.C.S.).
[292] T. 7 February 2006, p. 12 (I.C.S.).

41.12.1.6.6. Defence Witness MO68

218. Witness MO68 testified that there was no distribution of weapons at the Nyantanga Trade Centre and that throughout the 1994 events while she was in Nyantanga, she never saw any military vehicle or firearm.[293]

41.12.1.6.7. Defence Witness MO81

219. Witness MO81 testified that before 15 April he did not see any military personnel in the Nyantanga Trade Centre area and that he did not see any soldiers distributing weapons at the Centre or any other place. He said that he fled Rwanda for Burundi where he stayed for about one-and-half months and returned in late June or early July.[294]

41.12.1.6.8. 5.5.3. Deliberations

220. The Chamber notes that the Prosecution Closing Brief does not address Paragraph 3.26 of the Indictment. It is therefore unclear which witnesses the Prosecution wishes to rely on to prove this allegation, or if indeed it intends to support or abandon the paragraph. However, in the absence of express notice of withdrawal, the Chamber must consider whether the allegation is supported by any of the evidence brought before it.

221. Witness KAL is the only witness who testified that Muvunyi met with the *bourgmestres* of Ngoma and Huye *communes* and that after the meeting, civilians came to ESO for training and were given weapons and asked to go and "look for the enemy", understood as Tutsi civilians. The Chamber has serious doubts about KAL's testimony in this respect. He does not state when this meeting took place, and he speculates that "[g]enerally, when *bourgmestres* met, they were meeting to request guns for the civilians being trained at ESO Camp. These were civilians. Or they came to request guns for themselves. They came, in particular, to submit reports to the ESO Camp."[295] His testimony is not supported by that of any other witness.

222. The Chamber believes that if civilians were trained and issued weapons at ESO in 1994, this circumstance would have been known by more than one person. The fact that none of the other Prosecution witnesses spoke about this issue, including YAA and NN, who worked at ESO, reinforces the Chamber's doubts about the accuracy of Witness KAL's account. Consequently, the Chamber finds that the Prosecution has not proved beyond reasonable doubt that Muvunyi trained or distributed weapons to civilian militia at ESO in 1994.

223. Similarly, the Chamber has doubts about YAA's testimony that in May 1994, *Interahamwe* militiamen were trained by ESO soldiers Nizeyimana and Modeste Gatsinzi in Mata. At first, the witness said he heard that these two ESO officers were training *Interahamwe* and Burundians; then he said he met Gatsinzi in Gikongoro and the latter was accompanied by a truck-load of ESO *nouvelle formule* trainees; finally he said during their conversation, Gatsinzi told him he was training *Interahamwe* at Mata. The Chamber concludes that this inconsistent testimony leaves a reasonable doubt about whether Muvunyi provided weapons for the training of civilian militia to perpetrate attacks against Tutsis as alleged in the Indictment. The Chamber has already concluded (with respect to the "sensitization meetings") that CCR's testimony about the alleged meeting at Nyakizu Communal office on 21 April 1994 is not credible and therefore will not consider here the allegation that Muvunyi distributed weapons at that meeting.

[293] T. 6 February 2006, pp. 22, 30, 32, 33 (I.C.S.).
[294] T. 7 February 2006, pp. 32, 34, 35 (I.C.S.).
[295] T. 1 March 2005, p. 28 (I.C.S.).

41.12.1.7. 5.6. Attack on Wounded Refugees at the Butare University Hospital

41.12.1.7.1. 5.6.1. Indictment

224. Paragraph 3.29 reads:

> 3.29 On or about the 15th of April, Lieutenant-Colonel Muvunyi in the company of a section of soldiers participated in the attack on wounded refugees at the University Hospital in Butare separating the Tutsis from the Hutus and killing the Tutsi refugees.

41.12.1.7.2. 5.6.2. Evidence

41.12.1.7.3. Prosecution Witness XV

41.12.1.7.4.

225. Witness XV was an employee at the Butare University Hospital in 1994.[296] He testified that as a result of the deteriorating security situation following the death of the Rwandan President on 6 April 1994, he stayed at home with his Hutu wife and four children together with their two domestic servants until around the 15 or 16 April 1994.[297] On one of those dates, Witness XV received a letter signed by the Director of "the University Establishment" and "by Commander Muvunyi" instructing him to return to work. XV said he obeyed the instruction and returned to work at the University Hospital. At that point he added: "[t]hey hadn't started killing people". However, around the 18 or 19 April, his boss asked him to stop coming to work because "houses were being burnt and people had started running away" in the hills around Nyarutovu. He therefore stayed at home from that date until around 21 April, 1994. Meanwhile, his wife had taken the children to the University Hospital "because she used to work there and she thought that the children would be safer there." At this time, his neighbours houses were being burnt down, and people were being asked to ensure their own security.[298] XV said his family left the hospital only because the Head of Service at the hospital said "he didn't want to hold any refugees at the hospital and referred to them as *Inyenzi*."[299]

226. Witness XV returned to the hospital on or around the 21 April, after surviving an attack by ESO and Ngoma Camp soldiers and *Interahamwe* on refugees at Mukura forest.[300] Upon his arrival at the hospital, Witness XV saw some refugees and uniformed soldiers who were armed with guns. Shortly thereafter, the *Interahamwe* arrived and in collaboration with the soldiers, asked people to show their identity cards. XV recalled that anyone who did not have an identity card "was taken for a Tutsi, or was referred to as a Tutsi *Inyenzi*." Witness XV was not asked to show his identity card because a soldier whom he had helped in the past, assisted him to evade being asked to show his identity papers.[301]

227. Witness XV testified that sometime in May 1994, Muvunyi visited the hospital accompanied by other military officials and a lady called Nyiramasuhuko. Although Witness XV stated that he had seen Muvunyi before that date, specifically "in Butare Town" and "when he came from Taba", the witness also stated that it was one of his colleagues who told him that the person who was visiting the hospital that day was Muvunyi, and that "he was the commander of the soldiers who were both within the hospital and who were outside, and they had come to determine whether the work had been done

[296] T. 16 May 2005, p. 9; T. 18 May 2005, p. 26.
[297] T. 16 May 2005, pp. 8-9.
[298] T. 16 May 2005, p. 9.
[299] T. 17 May 2005, p. 1.
[300] T. 16 May 2005, p. 13.
[301] T. 16 May 2005, p. 16. Witness VX stated to the Chamber as follows: "What they did is that – a soldier whom I had helped and I – the doctors were aware of this, the nurses had asked me to assist that soldier. And this soldier told me that, "This Tutsi has treated me poorly, and I'll take him down the slopes to give him his reward."

properly."[302] Witness XV estimated that Muvunyi stayed at the hospital for about 20 minutes on that occasion, and even though he could not hear what Muvunyi was saying, he stood about "12 steps away from him", and could see him talking to the soldiers and civilians.[303]

228. After Muvunyi's departure, the soldiers continued to check the identity papers of the refugees during the day, and took people away at night "to be killed." Witness XV said he personally witnessed a soldier called Phillip Jeans, a native of Kibuye, shoot and kill a male refugee who had come from Ngoma. XV added that his own sister was taken away by soldiers on one Sunday and that she never returned after that.[304] He said during his stay at the hospital, he also saw other people being killed including a man called Claude Dogo, and a child who was suffering from diabetes.[305]

229. XV further testified that most of the refugees were wounded and hungry. Nonetheless, soldiers and *Interahamwe* took them away, and it was clear that "they were taking them to kill them in mass graves." The witness explained that he knew this because one of the refugees, whom the soldiers had taken away and tried to kill with a hoe, escaped and told the witness that the other refugees had been killed.[306] Witness XV explained that he survived the attacks because he wore a service robe and some nurses gave him their keys which enabled him to move from room to room. XV stated that on the day after his sister was taken away, he escaped from the hospital with the help of a staff member who put him on the hospital ambulance.[307]

41.12.1.7.5. Prosecution Witness YAP

230. Witness YAP was an employee of the Butare University Hospital between April and July 1994.[308] He testified that he did not know Tharcisse Muvunyi personally, but knew that Muvunyi was the Commander of ESO, "because everybody talked about it."[309] YAP also stated that he was friends with several soldiers from ESO and many of them talked about Muvunyi, their Commander. He mentioned Corporal Rwagihangi, Corporal Bicamumpaka, a certain Adele, and Corporal Mamishi.[310]

231. According to YAP's testimony, after he learnt of the death of President Habyarimana on 7 April, he went to the hospital and noticed that several things had changed. There were very few workers, the number of Tutsi refugees had increased, and soldiers had entered the hospital premises. Some of the refugees came from Gikongoro, and others from Nyaruteza, Mpare, Vumbi, and Runyinya *communes*. The refugees from Gikongoro and Nyaruteja were wounded. Those from the other *communes* were not wounded, but they were fleeing from areas that were under attack.[311] YAP testified that there was one refugee who had come from Kigali. This refugee informed Witness YAP that initially, nine of them had started the journey from Kigali to Butare. However, upon their arrival at Ngoma Camp, eight of the refugees were beaten to death by soldiers belonging to that camp. Their bodies were dumped at Mubumbano in Gishamvu *commune*. The *bourgmestre* of Gishambvu, Pascal Kambanda, took the bodies for an autopsy, and the surviving refugee came to the Butare University Hospital for an X-ray. That was how the said refugee met with Witness YAP. YAP testified that this refugee also died later.[312]

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[302] T. 16 May 2005, pp. 18, 21.
[303] T. 16 May 2005, pp. 21, 23.
[304] T. 16 May 2005, pp. 23, 24.
[305] T. 18 May 2005, p. 41 (I.C.S.).
[306] T. 16 May 2006, p. 17.
[307] T. 16 May 2005, p. 24.
[308] T. 6 June 2005, p. 2.
[309] T. 6 June 2005, pp. 19; 36. Under cross-examination, Witness YAP stated that he believed Muvunyi was ESO Commander both before and after the death of President Habyarimana.
[310] T. 6 June 2005, p. 39 (I.C.S.).
[311] T. 6 June 2005, pp. 2-4.
[312] T. 6 June 2005, p. 4.

232. Witness YAP testified that during the period he stayed at the Hospital, an ESO soldier called Bizimana (alias Rwatsi, or Ruhati) was training Burundian refugees at the hospital on how to handle and dismantle weapons.[313] YAP said the young Burundians lived under tents next to the paediatric service. When Witness YAP observed this activity, he reported it to the medical officer of the hospital, Jotham Hakizumukika. The latter in turn promised to inform the ESO Commander, and told YAP that the ESO Commander was Muvunyi. Three days later, YAP said he inquired from Jotham about the outcome of his contact with the ESO Commander. Jotham responded that when he informed the ESO Commander about YAP's report, the Commander told him that it was impossible to punish a soldier during wartime.[314]

233. Witness YAP also stated that sometime after 20 April 1994, he learnt about the existence of a Crisis Committee at the Hospital. The members of the Committee were Dr. Karemera, who was Dean of the Faculty of Medicine, Dr. Gatera, the Head of the Surgery Unit, and other civilians such as Twahirwa and Nshimyumukiza. The Committee also included 18 ESO soldiers including one Nizeyimana, Mberabagabo, Sekimonyo, Second-Lieutenant Rwanyonga who was a student at the Faculty of Medicine, Muzungu, and Nzema. He added that while the Crisis Committee was supposed to provide security at the hospital, it in fact sought out people and killed them.[315]

234. Prosecution Witness YAP testified that as a result of the deteriorating security situation, he stopped going to work on 18 April 1994. From that day until 3 July, he mostly remained in hiding at home, except for four occasions on which he visited the University hospital.[316] During his first visit on 20 April 1994 he saw a Corporal called Kayitana, who came from ESO with instructions that a search should be conducted within the hospital. YAP explained that this "search" actually involved "seek[ing] out the Tutsis who were within the hospital complex."[317] The witness admitted he did not speak to Kayitana directly, but said he was present when the latter spoke to the "officer in charge."[318]

235. In his further testimony before the Chamber, YAP said that even though he left the hospital premises as the people who were going to conduct the search arrived, he saw everything that happened. He explained to the Chamber that he withdrew to a location not far from both the ESO Camp and the University Hospital, and clearly saw all that transpired.[319] The search party included one Nyimyumukiza, Dr. Gatera, Dr. Karemera, the Vice-Rector of the University, soldiers and *Interhamwe* and they asked the Tutsi refugees to board a red pick-up vehicle that belonged to the hospital. The pick-up made several trips.

236. YAP testified that soldiers and some surviving refugees later told him that the pick-up truck took the refugees to the EER primary school. In particular, a female survivor told YAP that the refugees were taken from the University Hospital to EER.[320] This woman also told Witness YAP that those refugees who survived the journey from the University Hospital to EER were taken from EER to the *préfecture* Office. Some were then forced to flee to Kabilizi, while others were taken to Cyarwa and killed. The witness further testified that other refugees were taken and killed near an Electrogaz transformer located "quite close" to the University Hospital. Finally, YAP testified that the last remaining refugees arrived at Rango forest and were subsequently rescued by the RPF *Inkotanyi*. [321]

237. On his second visit to the hospital sometime in May, Witness YAP went to accompany one of his neighbours who had asked him for help because Witness YAP worked at the hospital. He stayed

[313] T. 6 June 2005, p. 3.
[314] T. 6 June 2005, pp. 3-4.
[315] T. 6 June 2005, p. 15.
[316] T. 6 June 2005, pp. 24-25 (I.C.S.).
[317] T. 6 June 2005, p. 6.
[318] T. 7 June 2005, p. 17.
[319] T. 6 June 2005, p. 8 (I.C.S.).
[320] T. 6 June 2005, p. 13.
[321] T. 6 June 2005, pp. 13-14.

for about "30 minutes … in any case, not up to an hour."[322] Upon their arrival, he noticed that there were many soldiers both in the parking lot and in the corridors. He observed that because the hospital was so close to ESO, the health facility had almost become a military camp. YAP said that with a few exceptions, all the other soldiers he saw were from ESO and they were armed.[323]

238. Witness YAP's third visit to the hospital after 18 April took place on a Sunday in late May or early June 1994. On this occasion, he noticed that the beds in the paediatric unit and the dermatology service were occupied by soldiers. He spoke briefly to the hospital director and returned the following Tuesday to receive his salary.[324] YAP testified that on that Tuesday (the fourth visit) the director sent the hospital ambulance to pick him up from and return him back to his house. Witness YAP did not tell the Chamber about anything he saw at the hospital on this visit.

41.12.1.7.6. Prosecution Witness AFV

239. During the events of April 1994, Witness AFV was an employee of the Butare University Hospital. She testified that normally, she walked from her house to her place of work. However, on 7 April, as a result of the death of President Habyarimana, the "security situation was precarious. People could not move around freely; roadblocks had been erected; Tutsis could not move around; they were being asked to present their identification papers, and everywhere, where they had to pass, they had to go through roadblocks which were manned by soldiers." Due to this difficult security situation, the service vehicle picked her up for work on 7 April. However, on 19 and 20 April, the said vehicle did not pick her up, so she had to walk to work. When she arrived at the hospital on 20 April, Witness AFV noticed the presence of an unusually large number of armed soldiers on the premises. This was unusual because normally, "a few soldiers would come there to seek treatment and they would not be carrying weapons."[325] The armed soldiers were wearing camouflage uniforms, the same type of uniforms that Witness AFV "saw the soldiers of the ESO putting on." She further testified that given their uniforms and the proximity of the ESO to the University Hospital, she believed that the soldiers came from ESO. AFV said she did not know what the soldiers were doing at the hospital, and that she left upon their arrival at about 1.00 p.m. She left at that time because the hospital director, one Jotham, denied her access to the hospital vehicle on the ground that she was Tutsi. According to AFV, Jotham said to her, "Come out, your time has come".[326] AFV testified that she walked home that afternoon, and on her way, she encountered a roadblock that was manned by soldiers.[327]

41.12.1.7.7. Prosecution Witness YAK

240. Prosecution Witness YAK testified that on or about the 25 April 1994, he left his aunt's house at about 3.00 a.m. to seek refuge at the Butare University Hospital. He said there was no other way of getting there, so he walked through the bush at night.

241. Upon his arrival at the University Hospital, he saw some tents in which Burundian refugees were living. The refugees were being supported by "Doctors Without Borders". In addition to the Burundian refugees, he also saw soldiers who came from ESO. He knew the soldiers were from ESO because when one stood at the hospital reception area, one could clearly see the soldiers coming from ESO.

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[322] T. 6 June 2005, p. 26 (I.C.S.).
[323] T. 6 June 2005, p. 16.
[324] T. 6 June 2005, pp. 17-18 (I.C.S.). Witness YAP gave evidence that on the third occasion, he visited the hospital because ESO soldiers who knew him, and who knew that he was a Pentecostal Christian asked him to come to the hospital and pray with them. They guaranteed his security and that was why he went.
[325] T. 21 June 2005, pp. 3-4.
[326] T. 21 June 2005, p. 4.
[327] T. 21 June 2005, p. 4.

242. YAK said that about five days after his arrival at the hospital, Muvunyi visited together with a female Major, and two soldiers wearing black berets. That was the first time he saw Muvunyi; in fact it was a female refugee who indicated to him that the visitor was Muvunyi. On that occasion, Muvunyi was wearing a single colour military uniform with no hat. A few minutes before Muvunyi's arrival, a bus carrying wounded soldiers had entered the hospital premises. Muvunyi arrived in a red Hilux vehicle. The female Major who came with Muvunyi said, "Are these refugees? I didn't bring any food for them. Let them go back to where they were." Muvunyi then asked a soldier who was on guard about what the refugees were doing at the hospital. As the soldiers began to carry their wounded colleagues in on stretchers, Muvunyi asked the female Major, in apparent reference to the refugees, "What are they still doing here?"[328]

243. Witness YAK further testified that during his stay at the University Hospital, soldiers from ESO came and told the female refugees to follow them to ESO so that they could give them food. The girls complied and followed the soldiers. However, the girls returned in tears. They told YAK and the other refugees that instead of giving them food, the ESO soldiers forced them to have sexual intercourse.[329]

244. YAK also gave an account of the activities of an *Interahamwe* called Diogène Harindintwali and a lady called Mukamurera who were widely known "to the public". The duo came and spoke to the soldiers at the University Hospital. The woman then walked among the refugees and pointed out some people. The soldiers following her then put aside the people she pointed out. All the people who were pointed out and put aside were young male refugees. YAK estimated that about 20 to 30 refugees were selected in this manner. Diogène, the *Interahamwe* put some of the selected refugees on board a double-cabin Toyota vehicle and the soldiers walked with the others to ESO Camp. YAK added that all but one of those selected and taken away from the hospital were killed. Some of the bodies were buried close to the laboratory, and Witness YAK and others had to give them a decent burial after 1994.[330] He said the lone survivor is still alive and lives with his family in Rwanda.

41.12.1.7.8. Prosecution Witness NN

245. Prosecution Witness NN testified that he learnt of a massacre of Tutsis at the Butare University Hospital sometime in May 1994. He said he was not in Butare when the massacre took place because Colonel Gatsinzi had sent him to Cyangugu, but learnt about it upon his return.[331] According to NN's testimony, those responsible for the massacre were wounded soldiers from Kanombe in collaboration with ESO soldiers assigned to protect the hospital. NN added that a number of hospital employees and wounded Tutsis were killed during the massacre. These wounded Tutsis were living in tents on the hospital compound. Witness NN further testified that after the attacks, he was requested to help save a female employee of the hospital who had been badly wounded during the attacks. With the assistance of one of the hospital doctors, he was able to evacuate the said female employee to his house and subsequently to the Burundian border.[332] NN said he did not witness anyone being killed within the premises of the ESO Camp.[333] Prosecution Witness YAA

246. Witness YAA testified that in 1994, the Butare University Hospital was situated about 400 metres from the ESO Camp. In the witness's view, "someone at ESO Camp could call out to someone at the university hospital at the top of his voice and … the latter could hear him or her easily."[334] He

[328] T. 29 June 2005, pp. 34 -35.
[329] T. 29 June 2005, p. 35.
[330] T. 29 June 2005, pp. 35-36.
[331] T. 18 July 2005, pp. 53-54. (I.C.S.) "I remember I was not there when those killings took place. Colonel Gatsinzi had sent me to Cyangugu and by the time I returned the killings had been committed." When asked by the Prosecutor if he remembered the month during which he was sent to Cyangugu by Gatsinzi, Witness NN replied: "It was in May."
[332] T. 18 July 2005, pp. 53-54 (I.C.S.).
[333] T. 20 July 2005, p. 41 (I.C.S.).
[334] T. 9 March 2005, p. 29 (I.C.S.).

said the hospital was guarded by ESO soldiers. YAA testified that after he returned to Butare from Kigali around the 16 May 1994, he stayed inside the ESO Camp because he feared for his security. On 8 June 1994, his Tutsi wife went into labour and he took her to the Butare University Hospital. He was accompanied by an ESO soldier called Kirezi, who was in charge of health at ESO, as well as Corporal Modeste Kayitana.[335] Kirezi called one Dr. Jotham at the University Hospital to ask for help, but the latter said he could not help them. Witness YAA and Kirezi therefore decided to take YAA's wife to the hospital. Upon their arrival, YAA noticed that the hospital was guarded by trainees from ESO. In particular, he saw a Sergeant called Sekimonyo and five ESO trainees accompanied him and his wife to the hospital maternity wing.[336]

247. Witness YAA said that even though he heard that people were killed at the Hospital, he did not witness any such killings. However, when he requested one of the nurses to allocate a room for his wife to rest after the delivery, the nurse advised YAA that he must stay with his wife in the room, otherwise she would be killed.[337] This nurse further told YAA that the ESO soldiers had killed people at the hospital, and that "those soldiers were not there to provide for the safety of patients. They, instead, contributed to exterminating the patients."[338] YAA added that the nurse advised him to stay with his wife because she was Tutsi. He further stated that people who were killed at the Hospital were Tutsis. After his wife delivered, YAA decided to take her back to the ESO Camp because they had "nowhere else to go."[339]

41.12.1.7.9. Defence Witness MO73

248. Defence Witness MO73 testified that during his stay at ESO between end of April and the beginning of May 1994, he went to the University Hospital on two occasions to visit a friend.[340] On both occasions, he did not notice a security presence at the hospital, and the environment appeared the same as it was prior to 6 April 1994. Witness MO73's friend told him that the *Interahamwe* had abducted some civilian patients from the hospital, and thought that those abducted might have been killed or otherwise harmed. The witness did not see any soldiers during his two visits to the hospital.[341]

41.12.1.7.10. Defence Witness MO30

41.12.1.7.11.

249. Witness MO30 testified that he visited the Butare University Hospital on two occasions during May and June 1994.[342] On his first visit in May, he went to the hospital to receive treatment for a hand injury he sustained at work. Because Witness MO30 knew the Chief Surgeon of the hospital he went straight to the surgery department where the wound on his finger was stitched. On the second visit, he went to see a person named Jonathan. According to Witness MO30 he did not observe any visible security presence when he went to the hospital on these two occasions, he did not have any problem moving around the hospital premises, and no one demanded to see his identification documents.[343]

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[335] T. 14 March 2005, p. 10 (I.C.S.).
[336] T. 9 March 2005, p. 29; 14 March 2005, p. 10 (I.C.S.).
[337] T. 9 March 2005, p. 29: YAA testified that when he asked the nurse to give them a room for his wife to rest after delivering their baby, the nurse responded as follows: "I am willing to give you a room provided you keep – you guard your wife, but if you leave, you run the risk of finding your wife dead."
[338] T. 9 March 2005, p. 30.
[339] T. 14 March 2005, p. 10. "I did not [*sic*] return to ESO because, of course – not because it was safer, but because I had nowhere else to go. Besides, that is where I lived."
[340] T. 6 March 2006, pp. 26-27 (I.C.S.).
[341] T. 6 March 2006, p. 28 (I.C.S.).
[342] T. 14 March 2006, p. 14 (I.C.S.).
[343] T. 14 March 2006, pp. 12, 13 (I.C.S.).

41.12.1.7.12. 5.6.3. Deliberations

250. It is alleged in the Indictment that on or about 15 of April 1994, the Accused, in the company of a section of soldiers, participated in an attack on wounded refugees at the Butare University Hospital. According to the Indictment, the attack involved separating the Tutsi from the Hutu and killing the former. The Prosecution specified in the Schedule of Particulars that it was charging Muvunyi with individual responsibility for the alleged crime pursuant to Article 6 (1) and 6 (3). In support of this allegation, the Prosecution relied on the evidence of Prosecution Witnesses XV, YAP, AFV, YAK, NN and YAA. On his part, the Accused called Defence Witnesses MO73 and MO30 to counter the allegation.

251. The Chamber finds that there are a number of inconsistencies in Witness XV's testimony which necessarily affect his credibility. In addition, there are some material discrepancies between the dates of the events as alleged in the Indictment and those given by Witness XV. For instance, whereas the Prosecution alleged in the Indictment that the attack on the refugees occurred around 15 April 1994, XV claimed he continued to go to work until about 19 April, that he fled to the Mukura forest around 21 April, where he survived an attack on refugees. Then, despite the lack of security and the apparent killing of Tutsis at the University Hospital, not only did he send his wife and children to seek refuge there, but he also went there himself. Additionally, it is not clear to the Chamber when exactly XV's family was sent to stay at the hospital and for how long they stayed there.

252. There are also some contradictions regarding the place of death of XV's sister. During his evidence-in-chief, XV suggested that soldiers from the ESO abducted his sister along with other Tutsi refugees who were never seen again. During cross-examination, however, it emerged that in judicial proceedings before the Rwandan courts, XV had sought compensation from a certain medical doctor for the death of his sister.[344]

253. The Chamber remains equally unpersuaded by XV's account of the alleged visit by the Accused to the Butare University Hospital premises. This is both because of XV's inability to indicate the timeframe within which the visit might have taken place and because of the alleged purpose of the visit. Moreover, the witness oscillated between saying that he knew and saw Muvunyi in the past, to saying that one of his colleagues at the hospital indicated to him that the military officer who visited the hospital on that day in May was "commander Muvunyi". Finally, the Defence was fairly successful in impeaching XV's credibility by pointing to material discrepancies between his pre-trial statements and his in-court testimony. Having considered all the above, the Chamber is not satisfied that Witness XV's evidence supports the allegation in the Indictment that Muvunyi participated in an attack on wounded Tutsi refugees at the Butare University Hospital on or about 15 April 1994.

254. The Chamber is satisfied that YAP is generally an honest and credible witness and has no reason to disbelieve his testimony. YAP appears to have known many of the ESO soldiers present at the Butare University Hospital and even identified some of them by name. He saw these soldiers at the hospital during three of his visits; after his first visit, he withdrew to a vantage point not far from the hospital from where he could observe the soldiers and *Interahamwe* loading refugees onto a pick-up truck. The Chamber notes that the attack on Tutsi refugees at Butare University Hospital about which Witness YAP testified, appeared to have taken place on 20 April but there is no evidence that the Accused was present during this attack or otherwise participated in it. In the end, the Chamber finds that while Witness YAP is credible, his evidence fails to support the allegation contained in Paragraph 3.29 of the Indictment.

255. The Chamber is satisfied that Prosecution Witness AFV gave relevant evidence to the effect that she saw an increased number of soldiers at the University Hospital on 20 April and that she thought they came from ESO. However, she did not speak of the abduction or killing of any refugees at the hospital nor did she at any time place Muvunyi at that location.

[344] T. 16 May 2005, p. 24; T. 17 May 2005, pp. 11-12; T. 18 May 2005, pp. 5-6, 39 (I.C.S.).

256. The Chamber finds that despite the passage of time and the fact that YAK was only 15 years old in 1994, in light of the totality of the evidence, he is a credible witness and gave an honest account of the events he witnessed at the Butare University Hospital in April and May 1994.

257. The Chamber considers that Witness NN gave hearsay evidence of the attack on refugees at Butare University Hospsital in April 1994. However, his evidence is corroborated by the account given by other Prosecution witnesses including YAK, YAP, AFV, and XV. The Chamber has already concluded that the payment of US$ 5,000.00 to Witness NN by the Office of the Prosecutor as compensation did not affect his credibility.

258. The Chamber notes that whereas the Indictment alleges that the attack on the refugees at the Butare University Hospital occurred around 15 April 1994, Witness YAA acknowledged that he only returned to Butare from Kigali around 16 May 1994, a full month after the alleged attack. It is apparent that YAA's account of killings at the University Hospital constitutes hearsay evidence, as he did not witness any killings but only heard that Tutsis were killed. Furthermore, YAA, being a soldier at ESO, knew the Accused personally, but did not place him at the scene of the alleged attack. However, his eyewitness account of the presence of ESO soldiers at the hospital lends credence to the testimony of other witnesses who said they saw soldiers and *Interahamwe* abducting Tutsi refugees from the hospital and killing them.

259. The Chamber observes that Witness MO73's testimony goes against the grain of the other witnesses' testimonies and finds him to be generally lacking in credibility. Whereas most of the others testified that ESO soldiers were present at the University Hospital during the relevant period and that they saw the soldiers conducting identity checks and separating the Tutsis from the Hutus, MO73 said that during his visits to the hospital in April and May, he did not see any soldiers on the premises. MO73 implicated only the *Interahamwe* in the abductions at the hospital while exonerating the soldiers. Noting that MO73 also stated that the Accused offered protection to him and his father, the Chamber cannot discount the possibility that MO73's purpose in coming to testify is to repay the Accused for his assistance rather than to assist the Chamber in finding out the truth.

260. The Chamber notes that Defence Witness MO30's visits to the University Hospital occurred during the months of May and June 1994, a considerable amount of time after the alleged attacks on the refugees. Thus, while he is generally a credible witness, his testimony is not relevant to the issue at hand.

261. Having considered all the evidence adduced by the Prosecution, the Chamber is not satisfied that it has been proved beyond reasonable doubt that Muvunyi participated in an attack on Tutsi refugees at the Butare University Hospital on or about 15 April 1994. However, the Chamber has heard evidence that sometime after 20 April 1994, ESO soldiers, in collaboration with *Interahamwe* and civilians abducted about 20 to 30 refugees from the University Hospital and killed them. The Chamber has considered the close proximity of ESO to the University Hospital, the presence of large numbers of Tutsi refugees at the hospital, and the presence of ESO soldiers at that location. Taking all relevant circumstances into account, the Chamber is satisfied beyond reasonable that the Accused had reason to know about the attack on Tutsi refugees at Butare University Hospital by ESO soldiers on or about 15 April 1994. Despite his superior military position over the said soldiers, and his material ability to intervene, he failed to do anything to prevent the attack or punish the soldiers' murderous conduct.

41.12.1.8. 5.7. Attack at Beneberika Convent

41.12.1.8.1. 5.7.1. Indictment

262. Paragraph 3.27 reads:

3.27 On the 30th of April 1994, Lieutenant-Colonel Muvunyi in the exercise of his de facto and de jure authority, ordered soldiers of the Ngoma Camp to the Beneberika Convent and kidnap the refugees at the Convent including women and children. A certain Lieutenant led this attack, and he kidnapped 25 people including the children of Professor Karenzi, who were never seen again.

41.12.1.8.2.5.7.2. Evidence

41.12.1.8.3. Prosecution Witness QCQ

263. Prosecution Witness QCQ estimated that she was 11 years old in 1994. She testified that she was living at the Beneberika Convent when the war began in 1994, and that her parents died during the war.[345]

264. Witness QCQ testified that on 6 April 1994, the nuns at the Convent told her that they had heard the news of President Habyarimana's death on the radio. The witness testified that as a result of this news, all activities inside the Convent, including their routine prayer sessions, ceased, and they no longer felt safe.[346]

265. Witness QCQ testified that afterwards, refugees from Butare, Kigali, and Gikongoro arrived at the Convent, and told QCQ that they had fled their homes because they were being attacked by *Interahamwe* and soldiers. According to QCQ, there were around 27 refugees, including young people, women, children, and an 18 month-old child.[347] QCQ further testified that all the refugees were killed, "except a few children who were amongst them".[348]

266. The witness testified that during her stay at the Convent, various attacks were launched on the Convent by *Interahamwe* and soldiers. QCQ said that during the first attack, the attackers did not get into the compound because a sister named Fréderique met them at the gate and told them that there were no Tutsis at the Convent.[349]

267. Witness QCQ testified that the second attack was also launched by *Interahamwe* and soldiers. She stated that the *Interahamwe* wore ordinary clothing, that they were armed with guns, clubs and machetes, and that they came with dogs. QCQ said that she was able to identify the soldiers because they wore uniforms. Some of the soldiers wore red caps, while others did not, and some wore military trousers and carried guns on their shoulders.[350]

268. QCQ testified that during the attack, she was not more than five metres away from the attackers. She said that the attackers asked the refugees to show their identity cards, but that not everyone had an identity card. QCQ testified that the assailants referred to those who refused to show their identity cards as *Inkotanyi* accomplices, and confiscated property belonging to some of the refugees. QCQ further testified that the assailants labelled some people as *Inkotanyi* merely by virtue of their physical appearance. The witness said that the assailants were Hutu, and that they referred to the Tutsi as *Inyenzi* and *Inkotanyi*.[351] Witness QCQ further testified that the assailants hit her and asked the nuns to confirm that she lived at the Convent, which they did.[352]

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[345] T. 14 March 2005, p. 23 (I.C.S.).
[346] T. 14 March 2005, p. 25.
[347] T. 14 March 2005, p. 25.
[348] T. 14 March 2005, p. 26.
[349] T. 14 March 2005, p. 26.
[350] T. 14 March 2005, p. 27.
[351] T. 14 March 2005, p. 27.
[352] T. 14 March 2005, p. 28.

269. QCQ testified about another child who was hit by the assailants. When the child's mother intervened to beg for mercy, the assailants said that they would only spare the child if it was a girl; if it was a boy, they would kill him, because "a serpent could not be spared". The assailants verified that the child was a girl and handed her to the nuns, but her mother was killed.[353] QCQ said that after the child's mother was killed, QCQ was the one who looked after the child.[354]

270. The witness testified that other children at the convent were killed by soldiers and *Interahamwe*. According to the witness, "All those children were killed, except Diane, Cecile, and Théodosie". In particular, QCQ indicated that the following children were killed: Thierry, Solange, and Marc Karenzi. According to QCQ, the Karenzi children were wounded when they arrived at the Convent: "Solange was wounded on the head. Her clothes had been torn. Her brother Marc Karenzi was bleeding on a leg." Witness QCQ testified that the children sustained these injuries as the result of the beatings they received from soldiers and *Interahamwe*.[355]

271. The witness testified that she was not present when the refugees were killed. However, she knew that they had been killed because she saw them being taken away by soldiers and *Interahamwe* in a Hilux vehicle, after which the soldiers returned to the Convent to fetch some beer and informed QCQ and the others of "what had happened".[356]

272. Witness QCQ further testified that the soldiers attacked the Convent again, ten minutes after the refugees left in the Hilux vehicle. According to QCQ, the soldiers had been drinking beer before this attack. They counted the children and told the nuns that "none of [them] must be missing". When they returned, one of the soldiers said, "Looking at the faces of these children, don't you think they are *Inkotanyi*?" A second solider replied, "You are drunk. Let us go", at which point the soldiers left.[357]

273. Witness QCQ gave evidence that during the third attack, the assailants went inside the Convent looking for walkie-talkies. In the process, they took off the veils of some of the nuns to see if the veils had left permanent marks on their foreheads. The purpose of this was to determine whether there were any people disguised as nuns.[358] Witness QCQ testified that she did not know the ESO.[359]

41.12.1.8.4. Prosecution Witness QCM

274. Prosecution Witness QCM testified that she knew Idelphonse Hategekimana to be the commander of the Ngoma Camp, which was located about two kilometres from the Beneberika Convent, where the witness lived.[360] QCM arrived at the Convent, which was located in Buye *cellule*, Butare,[361] in 1992.[362] QCM said that she first met Hategekimana in 1992.[363] He used to visit the Convent because one of the occupants, Frédérique Marie, was a friend of his. The witness testified that during the genocide, Hategekimana was also known by the nickname "Bikomago", which was the name of a Burundian soldier who killed many people after President Ndadaye was assassinated.[364]

275. Witness QCM testified that she saw Hategekimana at Buye on 30 April 1994. He was in military uniform, was carrying a stick in his hand, and was with many soldiers, civilians, and

[353] T. 14 March 2005, p. 28.
[354] T. 14 March 2005, pp. 30-31.
[355] T. 14 March 2005, p. 29.
[356] T. 14 March 2005, p. 29.
[357] T. 14 March 2005, p. 30.
[358] T. 14 March 2005, p. 30.
[359] T. 14 March 2005, p. 31.
[360] T. 11 July 2005, pp. 4-5 (I.C.S.).
[361] T. 11 July 2005, p. 3 (I.C.S.).
[362] T. 11 July 2005, p. 17 (I.C.S.).
[363] T. 11 July 2005, p. 3 (I.C.S.).
[364] T. 11 July 2005, p. 4.

Interahamwe.[365] The witness stated that she saw two vehicles outside, one with a "UNO" inscription and the other belonging to the "GK" project, but she was not sure whether Hategekimana and the others had arrived in those vehicles. The witness testified that there were about 100 or more soldiers in Hategekimana's company,[366] coming from ESO and Ngoma Camps.[367] The soldiers carried firearms, while the civilians, who numbered about 100, were armed with clubs and machetes.[368] The *Interahamwe* took positions behind the fence next to the vehicles that were parked outside the compound.[369]

276. Witness QCM identified a few people whom she recognised from the group who came to the Convent. They included the cardiologist Dr. Pierre Mugabo, his son Remy Mugabo, a man named Ignace, a lecturer from the *Groupe scolaire* called Valence, a person nicknamed Nyati, someone that Hategekimana called Makete, and Professor Blaise.[370]

277. QCM testified that she saw this group of over 200 people surround the Convent at about 11:00 a.m. on 30 April 2004.[371] The Convent had an outer wall with two gates and an inner wall with two gates leading inside. The witness stated that there were about 40 sisters at the Convent, including some who had come from different places to seek refuge. There were also neighbours who had sought refuge at the complex, and about 45 refugees who had come at various times. The majority of the refugees were children.[372]

278. The witness stated that the nuns hid the refugees upon their arrival. The nuns were in their respective rooms when the assailants arrived, but when they came into the courtyard and started shooting in the air, some of the nuns panicked and came out of their rooms. According to QCM, the nuns opened the gates into the courtyard for the assailants because the soldiers threatened to kill them if they did not do so.[373] While the assailants were knocking hard on the door, the Mother Superior of the Convent called *bourgmestre* Kanyabashi on the phone, but QCM did not know what happened, because Kanyabashi did not intervene.[374]

279. Witness QCM stated that the assailants claimed they had come to take all the civilians who were in the Convent. After firing in the air, they searched the Convent to find the people who were hiding, and then separated the refugees from the other people. The nuns remained in the Convent, whereas the refugees, including the children, were put in the GK project vehicle and taken away by the soldiers.[375] QCM testified that there were two Hutu children staying with them who had initially been placed with the civilians, but Hategekimana ordered a soldier to take them back into the house, as they were Hutus.[376]

280. The witness testified that the soldiers asked the nuns to display their identity cards, but they refused to do so, after which Hategekimana waved a document in the air and asked for their superior. They pointed out the superior to Hategekimana, at which point he said to her, "This warrant of arrest has been given to me by Muvunyi so that I should go and fetch civilians who are here".[377] QCM said that Hategekimana read the document out to them,[378] saying that it was an arrest warrant that allowed

[365] T. 11 July 2005, p. 4.
[366] T. 11 July 2005, p. 5 (I.C.S.).
[367] T. 11 July 2005, p. 28 (I.C.S.).
[368] T. 11 July 2005, p. 5 (I.C.S.).
[369] T. 11 July 2005, p. 27 (I.C.S.).
[370] T. 11 July 2005, p. 5 (I.C.S.).
[371] T. 11 July 2005, p. 6 (I.C.S.).
[372] T. 11 July 2005, pp. 7-8 (I.C.S.).
[373] T. 11 July 2005, p. 9 (I.C.S.).
[374] T. 11 July 2005, p. 17 (I.C.S.).
[375] T. 11 July 2005, p. 9 (I.C.S.).
[376] T. 11 July 2005, p. 10 (I.C.S.).
[377] T. 11 July 2005, p. 19 (I.C.S.); T. 11 July 2005, p. 10 (I.C.S.).
[378] T. 11 July 2005, p. 19 (I.C.S.).

him to arrest the people he was seeking and to kill them.[379] When QCM asked him to show her the warrant, he refused to give it to her, so she never read it herself.[380]

281. Witness QCM stated that the refugees were mainly Tutsis. There were a few Hutus among them, but it was only the Tutsis who were ordered to board the vehicles. The identification of the Tutsis was made possible because a nun who was Hategekimana's friend helped him to identify the Tutsis.[381] Witness QCM said that she was aware that the children were going to be killed and begged Hategekimana to spare them, but he refused and told her that once they were handed over to the *Interahamwe*, he no longer had any means of saving them.[382]

282. The witness testified that after the vehicle was loaded with the children, she continued to beg the attackers to leave them behind and attempted to get into the vehicle herself. Professor Blaise struck her with a cutting tool and told her to leave, saying that those were not her children.[383]

283. QCM also stated that she saw Remy Mugabo beating a student who went to secondary school with him and calling him an *Inyenzi*, but the soldiers around did nothing to stop him.[384]

284. The witness testified that the vehicles carrying the Tutsi refugees left the house at about 1:00 p.m., but the soldiers came back around 3:00 p.m. to get some drinks that were left over from a party that they had had. The witness asked them where they had put the children, and the soldiers told her that they had handed them over to the *Interahamwe*.[385]

285. Witness QCM stated that she only knew of Colonel Muvunyi as the commander of the ESO Camp. She said she had not met him and would not have been able to identify him.[386] However, QCM testified that she knew by sight more than 20 soldiers from among the assailants; she knew they were from ESO because they were her neighbours; but she did not know their names.[387]

41.12.1.8.5.5.7.3. Deliberations

286. The Indictment alleges that on 30 April 1994, the Accused ordered soldiers of the Ngoma Camp to kidnap refugees, including women and children, at the Beneberika Convent and that none of the 25 persons kidnapped was ever seen again. The Prosecution presented the evidence of Witnesses QCQ and QCM in support of this allegation.

287. Prosecution Witness QCQ was about 11 years old in 1994 and did not state the specific dates of the events she was describing. The Chamber concludes that despite her tender age in 1994 and the passage of time, she is very credible and provided a clear and convincing account of what she experienced. What is not clear from QCQ's testimony, however, is the provenance of the soldiers who attacked the Beneberika Convent or the date of the attacks.

288. The Chamber has considered the testimony of QCM and finds her to be a very credible witness. Not only did she recount facts based on her direct knowledge and personal experience, but her evidence is also strongly corroborated by that of Witness QCQ. There is no doubt that QCM knew Hategekimana as the Commander of the Ngoma Camp. She had seen him before because he had a friend at the Convent whom he used to visit. She even knew his nickname, "Bikomago".

[379] T. 11 July 2005, p. 10 (I.C.S.).
[380] T. 11 July 2005, p. 19 (I.C.S.).
[381] T. 11 July 2005, p. 11 (I.C.S.).
[382] T. 11 July 2005, pp. 10-11 (I.C.S.).
[383] T. 11 July 2005, p. 13 (I.C.S.).
[384] T. 11 July 2005, p. 13 (I.C.S.).
[385] T. 11 July 2005, p. 14 (I.C.S.).
[386] T. 11 July 2005, p. 10 (I.C.S.).
[387] T. 11 July 2005, p. 24 (I.C.S.).

289. Based on the evidence of Witnesses QCM and QCQ, the Chamber is satisfied that a group of soldiers and civilians under the leadership of Lieutenant Hategekimana of Ngoma Camp attacked Beneberika Convent on or about 30 April 1994 and abducted and subsequently killed a large number of unarmed Tutsi civilians. However, the Chamber has not received any direct evidence that Muvunyi ordered the said attack. The question for the Chamber's determination is whether it could be reasonably inferred from all the circumstances, including the allegation that Hategekimana waved a piece of paper which he claimed was a search warrant from the Accused, that Muvunyi ordered the said attack. In the Chamber's view, there is insufficient circumstantial evidence from which to conclude beyond reasonable doubt that Muvunyi ordered soldiers of ESO or Ngoma Camp to attack Beneberika Convent.

290. However, the Chamber must also determine in light of Paragraph 10, Sub-paragraph 2 of the Schedule of Particulars, whether the Accused bears superior responsibility for the attack on Beneberika Convent. In this respect, it is relevant to note that the Accused was the most senior military officer in Butare; that the attack was highly organized and targeted to the specific location of the Convent and the Tutsi refugees living there; and that soldiers from Ngoma Camp were acting together with soldiers from ESO and *Interahamwe*. The Chamber recalls Witness QCM's testimony to the effect that she knew some of the assailants. She could identify about 20 of them as being from ESO. The Chamber also notes from the evidence of Prosecution Witness Ghandi Shukry that the Convent was located at a distance of about 1.7 kilometres from the ESO Camp within the central corridor of Butare *préfecture* which fell within the security jurisdiction of the ESO Camp.

291. There is evidence before the Chamber that Ngoma Camp soldiers collaborated with ESO soldiers such as Captain Nizeyimana, Lieutenant Modeste Gatsinzi and Lieutenant Gakwerere to attack civilian refugees at the *Groupe scolaire* and other locations. These circumstances support the conclusion that such high-level co-ordination of military operations could not have taken place without the knowledge of the Accused, who was the most senior military officer in Butare at the time. In light of the circumstantial evidence, the Chamber is satisfied beyond reasonable doubt that the Accused had reason to know about the attack on Tutsi refugees at Beneberika Convent by soldiers from ESO and Ngoma Camps, together with the *Interahamwe*. Despite his effective control over the ESO soldiers, he failed to take necessary and reasonable measures to prevent the attack and to punish the perpetrators.

41.12.1.9. 5.8. Attack on Tutsi Lecturers and Students at the University of Butare

41.12.1.9.1. 5.8.1. Indictment

292. Paragraph 3.34 (i) reads:

> 3.34 (i) Furthermore, during the events referred to in this Indictment, soldiers from the ESO went to the University of Butare to kill the Tutsi lecturers and students as part of plans to exterminate the Tutsi intelligentsia. Lieutenant-Colonel Muvunyi by reason of his position of authority over the soldiers of the ESO and the widespread nature of these massacres, knew or had reason to know, that these acts were being committed and he failed to take measures to prevent, or to put an end to these acts, or punish the perpetrators.

41.12.1.9.2. 5.8.2. Evidence

41.12.1.9.3. Prosecution Witness KAL

41.12.1.9.4.

293. Prosecution Witness KAL testified that he knew Sergeant Major Sibomana, who was a student at ESO, but had the rank of a Sergeant Major. Sibomana was granted study leave to go to university. KAL said that Sibomana abducted students from the University and brought them back to the ESO Camp; he worked with the soldiers as if he had come back to the Army.[388]

294. According to KAL, Sergeant Major Sibomana had the duty of identifying students who were *Inkotanyi*. He and other soldiers scoured the town looking for such students, put them on board commandeered vans, and brought them to ESO Camp. The witness said that all the abducted students were subsequently taken out of the ESO Camp and killed.[389]

295. KAL testified that Sibomana did not act alone. KAL said that Sibomana, as well as others who were no longer in the Army, had received orders to look for *Inkotanyi* from the commander of the camp.[390] KAL explained that Sibomana sometimes went with students from ESO *nouvelle formule*, but there was total disorder and he went with whomever he wanted.[391]

296. When asked by the Chamber how he knew that Sibomana had received orders from the camp commander, KAL said that it was common knowledge that the Commander had issued an order. The witness explained that these events did not only take place over two or three days but over a long time. He added that Sibomana went out every day to look for these students, acting under orders from the commander of the camp.[392]

41.12.1.9.5. Prosecution Witness NN

297. Prosecution Witness NN testified that Chief Warrant Officer Damien Ntamuhanga was involved in the killing of students at Butare University. Ntamuhanga was the leader of an anti-looting team consisting of six *gendarmes* and other soldiers. This team was formed by Bizimana after the meeting chaired by Muvunyi on 20 April, and although it was purportedly designed to prevent soldiers from looting, the team went to kill civilians at the University.[393]

298. Witness NN described the killings at the University in further detail, noting that he had saved a female student from the University at the request of her family, and that student told him that Ntamuhanga and members of his military police group were killing students at the University and openly boasting about and describing the killings in detail. The girl that NN saved was studying at the Faculty of Medicine, which was located next to the University Hospital, not inside the main University campus. The Faculty of Medicine was two kilometres away from the ESO Camp. According to NN, the girl told him that the soldiers who had committed the massacres at the University were members of Ntamuhanga's military police group. NN added that if anyone had heard that he had gone to save that girl, he "would have had problems".[394]

299. NN further testified that Chief Warrant Officer Innocent Sibomana was also in charge of the group that killed students at the University,[395] and that Ntamuhanga was relieved by Colonel Marcel Gatsinzi as chief of the Military police in mid-May.[396]

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[388] T. 8 March 2005, pp. 6-7 (I.C.S.) (Cross-examination).
[389] T. 8 March 2005, p. 10 (I.C.S.) (Re-examination). When asked what happened to the students when they were taken out of ESO Camp, the witness stated that, "All those who had been taken to ESO Camp, not only the students, anyone who was taken out of that camp, was killed. It was not only those students, it was everyone."
[390] T. 8 March 2005, p. 11 (I.C.S.) (Re-examination).
[391] T. 8 March 2005, p. 11 (I.C.S.) (Re-examination).
[392] T. 8 March 2005, p. 11 (I.C.S.) (Re-examination).
[393] T. 18 July 2005, p. 49 (I.C.S.).
[394] T. 18 July 2005, p. 50 (I.C.S.).
[395] T. 18 July 2005, p. 50 (I.C.S.).

41.12.1.9.6.

41.12.1.9.7. 5.8.3. Deliberations

300. The Indictment alleges that ESO soldiers set out to kill Tutsi lecturers and students at the University of Butare as part of the plan to exterminate the Tutsi intelligentsia and that the Accused, by virtue of his position and authority over the soldiers, knew or had reason to know of these activities due to their widespread nature, but failed to stop the massacres or to punish their perpetrators.

301. The Chamber notes that Prosecution Witness KAL did not state any basis for his assertion that the Accused ordered the abduction and killing of Tutsi intellectuals. KAL neither saw any written order nor directly heard the Accused giving any orders in this regard. Rather, KAL appears to presume that there was such an order since it was common knowledge. In the Chamber's view, the Prosecution has not proved beyond reasonable doubt that the Accused issued an order for the abduction and killing of Tutsi intellectuals. The remaining issue, then, is whether the Accused knew or had reason to know about these attacks in view of their frequency, and the identity and position of the alleged perpetrators.

302. The Chamber recalls the testimony of Prosecution Witness NN, that Chief Warrant Officer Sibomana was one of those responsible for the attacks on Tutsi intelligentsia at the University of Butare, and that Sibomana and Ntamuhanga were members of the Military Police Unit set up by the Accused on 20 April 1994. According to NN, although the unit was intended to serve as an anti-looting squad, it ended up operating as a death squad instead, abducting and killing people at the University. NN personally helped save one student, who told him that Ntamuhanga and members of his Military Police group were killing students at the University and openly boasting about their acts. Furthermore, Witness NN's account of Sibomana's activities is largely corroborated by Witness KAL's testimony.

303. The Chamber notes that none of the 24 witnesses for the Defence testified specifically on this allegation. Based on the evidence before it, the Chamber concludes that ESO soldiers systematically sought and killed Tutsi lecturers and students from the University of Butare. Due to the widespread nature of these attacks, and the proximity of the ESO Camp to the University of Butare,[397] the Chamber finds that the Accused had reason to know that the attacks were taking place. The Chamber further finds that the Accused, as the commanding officer of the ESO, failed to do anything to stop the killing by ESO soldiers or to punish them for their illegal behaviour even though he had the material ability to do so. The Chamber is therefore satisfied that the Prosecution has proved the allegation in Paragraph 3.34 (i) beyond reasonable doubt.

41.12.1.10. 5.9. Arrest and Killing of Two Priests at Gihindamuyaua Monastery

41.12.1.10.1. 5.9.1. Indictment

304. Paragraph 3.28 of the Indictment reads:

> 3.28 On or about the 4th of May 1994, Lieutenant-Colonel Muvunyi requested that the Reverend Fathers at Gihindamuyaua Monastery to be brought to him (*sic*) and he subsequently separated the two Tutsi Fathers in the monastery from the Hutus, and they were subsequently killed.

41.12.1.10.2. 5.9.2. Evidence

[396] T. 20 July 2005, p. 19 (I.C.S.) (Cross-examination).
[397] Exhibit P.6, admitted on 16 March 2005.

305. The Chamber has not heard any evidence supporting the allegation contained in Paragraph 3.28 of the Indictment and therefore finds that the Prosecution has failed to prove the said allegation.

41.12.1.11. 5.10. Massacre of Tutsi Civilians by Soldiers and Interahamwe

41.12.1.11.1. 5.10.1. Indictment

306. Paragraphs 3.30, 3.31, 3.35, 3.36, 3.40, 3.46 and 3.48 read:

> 3.30 During the events referred to in this Indictment, Lieutenant-Colonel Muvunyi had the duty of ensuring the security and safety of the civilian population in the *préfecture*, as well as ensuring the discipline of the armed men under his command but failed in this duty. On several occasions in April 1994, Lieutenant-Colonel Muvunyi failed or refused to assist those whose lives were in danger or who asked for his help, particularly in Groupe *scolaire* and Ngoma Parish where Tutsi refugees were massacred.
>
> 3.31 Lieutenant-Colonel Muvunyi in most cases instigated, encouraged, facilitated, and or acquiesced to among others, the *Interahamwe* and soldiers committing killings, kidnappings and the destruction of property.
>
> 3.35 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 in Butare *préfecture* and elsewhere.
>
> 3.36 During the events referred to in this Indictment, officers and soldiers acting under the orders of Lieutenant-Colonel Muvunyi participated in the massacres of the civilian Tutsi population and of Hutu moderates in the opposition. Some of these civilian Tutsis were arrested and taken to either the Ngoma Camp or the ESO and later killed.
>
> 3.40 During the events referred to in this Indictment, thousands of civilians, mostly Tutsi, in Butare *préfecture*, were massacred, including at the following locations:
>
> - Ngoma Parish, Ngoma *commune*
> - Matyazo Dispensary, Matyazo
> - Kibeho Parish, Mugusa *commune*
> - Beneberika Convent, Sovu, Huye *commune*
> - Groupe scolaire, Ngoma
> - Économat général, Ngoma commune
> - Nyumba Parish, Gatare *commune*
> - Muslim Quarters, *Ngoma commune*.
>
> 3.45 On or about the 30th of April 1994, the Ngoma Parish was attacked. The Parish Priest requested for help from the Ngoma Camp and an hour later 2nd Lieutenant Niyonteze, who was second in command at the Ngoma Camp, arrived with 6 soldiers. Rather than take any action, 2nd Lieutenant Niyonteze demanded to know what right the Parish Priest had in keeping so many *Inyenzi* near a military camp. He proceeded to count the refugees and leave the parish without taking any action to stop the attackers. Lieutenant-Colonel Muvunyi by reason of his position of authority and the widespread nature of these massacres, knew or had reason to know that these acts were being committed and he failed to take measures to prevent, or to put an end to these acts, or punish the perpetrators.
>
> 3.46 On or about 5.00 p.m. of the same day, a certain Lieutenant arrived at the Parish with intent to arrest the Parish Priest who had escaped; but the refugees at the Parish including the women and children were all subsequently attacked by the soldiers and the *Interahamwe*. Muvunyi as

an authority figure failed to provide for the safety or security of the refugees but rather encouraged the attacks.

3.48 On or about the 24th of April, the refugees at the *Groupe scolaire* comprising of orphans evacuated from the Red Cross Centre at Kacyiru and other orphanages, were attacked by soldiers from the Ngoma Camp and the ESO. The soldiers from the Ngoma Camp were led by a certain Lieutenant while the soldiers from ESO were dispatched on the orders of a certain Captain and were led by 2nd Lieutenant Niyonteze. The Supervisor of the children called the ESO for assistance and spoke with Lieutenant-Colonel Muvunyi, who refused to send any assistance during the massacre.

307. As a preliminary matter, the Chamber notes on the one hand that it has not heard any evidence relating to attacks on Kibeho Parish, or Nyumba Parish. On the other hand, it has received evidence of attacks on Cyanika Parish and Mukura Forest which are not specifically listed in the Indictment. Having concluded above that the Defence did receive adequate warning of the Prosecution's intention to prove the said attacks, the Chamber will consider the evidence relating to them. In the following sections, the Chamber considers evidence relating to attacks on Ngoma Parish, Matyazo School, *Groupe scolaire*, Mukura Forest, and Cyanika Parish.

41.12.1.11.2. 5.10.2. Attack at Ngoma Parish and the Matyazo School Complex

41.12.1.11.3. 5.10.2.1. Attack at Ngoma Parish

41.12.1.11.4. Prosecution Witness QX

308. Prosecution Witness QX testified that from around 7 April 1994, people were being killed in the Butare area, and members of the population were therefore afraid to leave their homes. The witness testified that on 8 April, a young man called Rugomboka was taken away by soldiers, and later his body was found in a forest. On 14 April, he heard that Queen Rosalie Gicanda had been killed. Witness QX added that on that same day, he could see smoke coming from the direction of Runyinya *commune* and many refugees started fleeing from these areas because their houses were being burnt down, and people were being killed. Witness QX testified that *bourgmestre* Kanyabashi prevented the refugees from moving into Butare town, so they went to the Matyazo Health Centre. On 21 April, Witness QX heard intense gunfire and explosions coming from the direction of Matyazo. He subsequently saw people flocking to the Ngoma Parish to seek refuge. Witness QX explained that the fleeing refugees "hid in the sorghum fields, others hid in the bush, and at night they would crawl to the parish and hide at the parish itself."[398] He added that most of the refugees had wounds on their heads, and that they appeared to have been "hacked with sharp objects."

309. On 21 April, Witness QX and another person received a telephone call from a lady who advised them to flee from Ngoma Parish because she had information that people were planning to come and kill them. As a result of this information, Witness QX said they spent the night in the bush, but returned to the Parish the next morning and took the decision to remain there. He added that at this time, there was "a continuous influx of refugees" to the Ngoma Parish.[399]

310. According to Witness QX, about two or three days later, the *conseiller* of Matyazo loaded many "orphans whose parents had been killed in the night of the 21", onto a pick-up vehicle and brought them to Ngoma Parish. These children were among a group of between 480 and 490 refugees

[398] T. 4 December 2003, p. 17 (I.C.S.).
[399] T. 4 December 2003, p. 17 (I.C.S.).

at the parish. Witness QX added that all the refugees were Tutsi, "there was no soldier among them", and none of them was carrying a weapon.[400]

311. On 29 April 1994, Witness QX heard a group of people knocking very hard on the Parish gate. As a result, he and those with him concluded that they were being attacked, and decided to telephone for assistance and protection from the Ngoma Military Camp, which was located about 600 to 700 metres from the Parish. About 50 minutes after their call, a non-commissioned officer arrived at the parish with soldiers. He asked what was happening, asked if there were any refugees at the Parish and left saying they would be back the following day.[401]

312. Witness QX said that at around 10.00 a.m. on the following day, he "saw soldiers standing within the premises of the Parish" and he came out to greet them. The commander of the group asked where the Parish priest was, but left when he was told that the Parish priest was not around. However, the soldiers who had accompanied the commander stayed behind. The witness later found out that the said commander's name was Idelphonse Hategekimana, and that he was commander of the Ngoma Camp. He added that he noticed there were a lot of civilians who had come with the soldiers, that they were standing outside the church building, and that they "were carrying knives."[402]

313. After Hategekimana's departure, two of the soldiers who remained behind "went into the church building and got the refugees, all the refugees out." The crowd of armed people who were waiting outside the parish gate rushed into the compound "wanting to kill the refugees." Witness QX asked the soldiers to allow him to take the refugees back into the church to pray. The soldiers agreed. Because he knew the refugees were going to be killed, Witness QX took them back into the church building and they prayed together.[403] After this, the soldiers assured the refugees that no one would kill them, and that they would bring buses to take the refugees to a safe place where they would be protected. Thereafter, the soldiers started selecting people from among the refugees and taking them out in groups of four or five. Witness QX explained that he later learnt from survivors that once outside, these refugees were handed over to the crowd of armed civilians, who took them away and killed them. The witness stated "they were hit with clubs and they fell, they were killed – they were finished immediately. They made sure they finished them such that nobody cried out when they were killing them."[404] Witness QX emphasized that among the refugees who were killed at the Ngoma Parish were "orphans whose parents had been killed on the night of 21st April," and who had been brought to the parish by the *conseiller* of Matyazo.[405]

314. Witness QX explained that he knew the refugees were killed because after the attack, there were "a lot of dead bodies on the ground." He added that one of the soldiers told him to ask one of the priests to come out of hiding, and they agreed to pay this soldier 500,000 Rwandan francs, so that he would not kill the priest. However, they arranged to pay in instalments so that the soldier would keep coming back to ensure their protection.[406]

41.12.1.11.5. Prosecution Witness CCQ

41.12.1.11.6.

315. This witness testified that on 20 April 1994, he had to telephone the Ngoma Parish for assistance because his wife had suffered a heart attack. He spoke to a priest who later came in his vehicle and transported the witness and his sick wife to the medical centre at the Butare school

[400] T. 4 December 2003, p. 18 (I.C.S.).
[401] T. 4 December 2003, p. 19 (I.C.S.).
[402] T. 4 December 2003, p. 20 (I.C.S.).
[403] T. 4 December 2003, p. 21 (I.C.S.).
[404] T. 4 December 2003, p. 22 (I.C.S.).
[405] T. 4 December 2003, p. 18 (I.C.S.).
[406] T. 4 December 2003, p. 24 (I.C.S.).

complex.[407] Witness CCQ explained that they drove with the Tutsi Priest through several roadblocks on their way to the medical centre, including at Hotel Faucon and *Chez Bihira*, and subsequently arrived at the medical centre. The priest dropped off Witness CCQ and his wife, but before his departure, requested the witness to check on him later to make sure that he had safely arrived back to the Parish.

316. According to CCQ's testimony, on 21 April 1994, he first went to Matyazo to the school of the Pentecostal church where some members of his family had sought refuge and then proceeded to the Ngoma Parish to check on the priest who had helped him and his wife. Upon his arrival, he saw many refugees at the Parish. CCQ narrated that the refugees were initially afraid when they saw him, and thought he might have been one of the killers. However, the refugees were reassured when they saw him talking with the priest. Witness CCQ said that he visited the Ngoma Parish again on 22 April. On 24 April, as he passed by the Parish on his way to Matyazo, he discovered that the refugees had been killed. He saw their bodies, and could tell that they had been shot to death. Witness CCQ testified that he continued on his way to Matyazo to make sure that members of his family were alive.[408]

41.12.1.11.7. 5.10.2.2. Killings at Matyazo School Complex

41.12.1.11.8. Prosecution Witness CCQ

317. Prosecution Witness CCQ testified that he was at Matyazo school complex on the night of 21 April 1994 together with members of his family and many other refugees. The witness testified that the school was attacked, that the attackers threw grenades at the refugees, shot at them, and used petrol to burn them. CCQ stated that some members of his family, including his sisters, uncles and aunts survived the attack, but were wounded. He added that his family members remained in Matyazo *secteur* until May when they were killed.[409]

41.12.1.11.9. Prosecution Witness QX

318. Witness QX testified that on that 14 April 1994, he could see smoke coming from the direction of Runyinya *commune* and many refugees started fleeing from these areas because their houses were being burnt down, and people were being killed.[410] Witness QX further stated that *bourgmestre* Kanyabashi prevented the refugees from moving into Butare town, so they went to the Matyazo health centre. He added that the refugees were supposed to have been moved to Simbi Parish, but a certain priest informed that he had encountered "some members of the population who were armed with machetes and spears and who were going to the Simbi Parish in order to kill refugees who had sought refugee at the parish."[411] Witness QX said he heard intense gunfire and explosions coming from the direction of Matyazo on 21 April. He subsequently saw people flocking to the Ngoma Parish to seek refuge. Witness QX explained that the fleeing refugees "hid in the sorghum fields, others hid in the bush, and at night they would crawl to the parish and hide at the parish itself."[412] He added that most of the refugees had wounds on their heads, and that they appeared to have been "hacked with sharp objects." The witness said that on 21 April, "Tutsis living in Matyazo were killed, and the refugees at the Matyazo Health Centre, too, were killed." Witness QX testified that a man who had survived the attack at Matyazo Health Centre narrated to him what had happened.[413]

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[407] T. 26 May 2005, p. 14.
[408] T. 26 May 2005, p. 19.
[409] T. 26 May 2005, p. 19.
[410] T. 4 December 2003, p. 14 (I.C.S.).
[411] T. 4 December 2003, p. 15 (I.C.S.).
[412] T. 4 December 2003, p. 17 (I.C.S.).
[413] T. 4 December 2003, p. 17 (I.C.S.).

41.12.1.11.10. Prosecution Witness QY

319. Witness QY testified that in April 1994, she was 17 years old and lived in Matyazo, in Tonga *cellule*.[414] She testified that on 7 April 1994, she observed that people in her *commune* were buying and stockpiling provisions and that the security situation had begun to deteriorate. Witness QY said a vehicle carrying soldiers then arrived and took away the property of someone called Ngarambe. She believed that the soldiers came from ESO, because ESO was the closest camp to their neighbourhood. Witness QY added that the soldiers took away Ngarambe and killed him near a pit in Karubanda. She further testified that later that evening, Tutsis were gathered in the Matyazo school complex.

320. As a result of the deteriorating security situation, Witness QY left for the Matyazo primary school which was located at about a 10-minute walk from her residence. Upon her arrival at the school, QY saw *Interahamwe* armed with traditional weapons and firearms, and there were many Tutsi refugees. According to QY's testimony, the refugees arrived at the school complex at about 6.00 p.m., and were killed by soldiers and *Interahamwe* at about 8.00 p.m. She said she was one of three survivors of this attack. Later on she said she was the sole survivor.

321. Witness QY said that the *Interahamwe* were led by two men called Janvier and Bakare. She explained that during the attack by the *Interahamwe*, a vehicle carrying soldiers suddenly appeared. The soldiers joined the attack by pouring petrol on the refugees and starting a fire. QY explained that the refugees used their clothes to try to extinguish the fire. Witness QY was in a classroom that was set on fire, and she therefore came out. She tried to speak to one of the soldiers whom she knew, and asked him for help, but the soldier hit her with a machete on her head. The soldiers fired gunshots to force the refugees inside the blazing classroom. QY testified that in addition to the wound on her head, she also realised that one of her hands was burnt, and thought that it might have been because the hand bag she was carrying caught fire. Witness QY showed the Chamber both the scar on her forehead caused by the machete blow and her severely burnt left hand. QY stated that most of the refugees died during this attack, and that she was one of three survivors. She said she lay among the dead bodies and that she was subsequently carried away by some *Interahamwe* who had come to finish off the surviving refugees.

41.12.1.11.11. 5.10.2.3. Deliberations

322. It is alleged in the Indictment that *Interahamwe* militiamen, with the help of soldiers under the orders of the Accused, participated in the massacre of the civilian Tutsi population and politically moderate Hutus in Butare *préfecture* and elsewhere. It is further alleged that Tutsi refugees at Ngoma, the *Groupe scolaire* and other locations were attacked and killed by soldiers under the authority of the Accused acting in concert with *Interahamwe* militia. During some of these attacks, several pleas for assistance were made by victims at various locations across the *préfecture* to both the ESO and the Ngoma military camps and directly to the Accused, but no assistance was provided. In paragraphs 17, 21 and 27 of the Schedule of Particulars, the Prosecution alleges that Muvunyi bears individual criminal responsibility for the said attacks pursuant to Article 6 (1) and 6 (3) of the Statute.

323. The Chamber recalls that due to a number of exceptional circumstances, Prosecution Witness QX was allowed to give a deposition before the start of this trial. The Chamber is satisfied that QX gave a coherent and reliable account of the events he witnessed at the Ngoma Parish in April 1994. The Chamber finds that the Prosecution has proved beyond reasonable doubt that a large-scale attack was launched on the Tutsi refugees including orphans at the Ngoma Parish on 29 April 1994. The attack was led by Ngoma Camp soldiers and *Interahamwe* militia. There is no evidence to suggest that

[414] T. 8 June 2005, pp. 11, 12. During cross-examination, Defence counsel pointed out to the witness that in her statement of 15 January 1997, she indicated that in 1994, she lived in Ruhenda *cellule*. Under oath, before the Chamber, witness testified that she never lived in Ruhenda, and that she might have been confused in 1997 when she made the statement, because this was soon after the war. She added that when she gave her statement in 1997, she lived in Tonga Cellule.

ESO soldiers participated in this attack, or that Muvunyi gave direct orders for the attack to be carried out. Since most of the incidents recounted by Witness QX involved Ngoma Camp soldiers, the question arises as to whether the Accused had any control over the Ngoma Camp. As stated above, the Chamber finds that the Accused effectively assumed the position of ESO Commander, but it has not been proved beyond reasonable doubt the he was also *Commandant de place* of Butare and Gikongoro *préfectures*. Consequently, he cannot be held responsible for the actions of the Ngoma Camp soldiers. The only matter left to be determined is whether or not the Prosecution has adduced any evidence to prove beyond reasonable doubt that ESO soldiers collaborated with the Ngoma Camp soldiers in the alleged attacks.

324. The Chamber considers that Witness CCQ's evidence on the killing of Tutsi refugees at Ngoma Parish corroborates that of Witness QX. The Chamber attributes the slight difference in the dates mentioned by the witnesses to the lapse of time between 1994 and the dates of their testimony, as well as to the effect of trauma on the witnesses' memory. This minor discrepancy does not affect the overall reliable evidence that both witnesses gave about the attack and killing of several hundred unarmed Tutsi civilians at Ngoma Parish by soldiers and *Interahamwe*.

325. With respect to the alleged attack on Matyazo, the Chamber notes that the Prosecution witnesses gave different accounts of the location of this attack. Prosecution Witnesses CCQ and QY testified to an attack on Matyazo Primary School on or around 21 April 1994. Prosecution witness QX spoke of an attack on Matyazo Health Centre on 21 April 1994. CCQ did not state whether he was present during the attack, or who the alleged perpetrators were. QY only heard gunfire and explosions from the direction of Matyazo and gave hearsay testimony that the refugees at the Matyazo Health Centre were killed on 21 April.

326. The evidence of Witness QY that *Interahamwe* and ESO soldiers were responsible for that attack on Matyazo Primary school sometime after 7 April is not consistent with the evidence of the other witness for the Prosecution. The Chamber therefore finds that there was an attack on Tutsi refugees at Matyazo primary school sometime around 21 April 1994. However, the Chamber has not heard any reliable evidence on the identity of those responsible for the attack, and therefore cannot conclude that the Accused bears any form of responsibility for that attack. The allegation about the attack on Matyazo therefore fails.

327. Similarly, there is no doubt in the Chamber's mind that a large-scale attack was launched against Tutsi refugees at Ngoma Parish on or about 29 April 1994. The only evidence before the Chamber is that the attack was led by soldiers under the leadership of Lieutenant Hategekimana of Ngoma Camp. There is no evidence that ESO soldiers were involved in this attack. Furthermore, the Chamber has not heard any evidence to suggest that the Accused ordered, instigated or otherwise aided and abetted the said attack; nor has the Chamber heard any evidence pointing to the conclusion that the Accused knew or had reason to know about this attack. For these reasons, the Chamber finds that the Prosecution has failed to prove beyond reasonable doubt that the Accused was responsible for the attack on Tutsi refugees at Ngoma Parish on 29 April 1994.

41.12.1.11.12. 5.10.3. Attack at the *Groupe scolaire*

41.12.1.11.13. 5.10.3.1. Evidence

41.12.1.11.14. Prosecution Witness QBE

328. Witness QBE was an employee of the *Groupe scolaire* in April and May 1994. He testified that he was an eyewitness to two attacks launched on *Groupe scolaire* in the second half of April

1994.[415] According to QBE's testimony, the first attack was by a group of people apparently led by an *Interahamwe* dressed in *Kitenge* cloth. QBE added that this person was later identified as a member of the Presidential Guard, but he did not give a name. Witness QBE said that the attackers from outside were assisted by some employees of the *Groupe scolaire* including Faustin Twagirayezu, Faustin Niyonzima, Jean Paul, Jean-Marie and Diogène.[416]

329. Witness QBE explained that during the attack, he came out of the building but the attackers ordered him not to move, so he sat down in front of the Principal's office. He saw the attackers lead the refugees out of their dormitories and assemble them on a volleyball court. The attackers then proceeded to examine the refugees' identity cards and separated the Tutsi from the Hutu. The witness explained that the refugees who did not possess identity cards were separated based on their physical features.[417]

330. Witness QBE testified that on this occasion, the refugees were not killed because a certain Bicunda paid the attackers about 200,000 Rwandan francs to save their lives. The witness added that as a result of this incident, the rumour spread that Witness QBE was a member of the RPF and that he was the one paying money to save Tutsi lives.[418]

331. Witness QBE explained that the second attack also occurred in the second half of April. He narrated that one evening, as he prepared to leave the *Groupe scolaire* at about 5.00 p.m., he saw a camouflage military vehicle with a uniformed-soldier on board. Witness QBE tried to stop the vehicle, and asked the soldier where he was going to. According to QBE's testimony, the said soldier refused to stop the vehicle or answer the witness's question; instead, he retorted that he knew Witness QBE was a member of the RPF. The soldier drove out of the school complex.[419] QBE said that later on, he learnt from Bicunda who appeared to know the soldiers, that the soldier who was driving the vehicle was Lieutenant Gatsinzi and that he came from the Ngoma Military Camp. Bicunda also informed the witness that Lieutenant Gatsinzi had said because Witness QBE was hiding *Inkotanyi* at the *Groupe scolaire*, Gatsinzi would return the next day to kill QBE.[420]

332. Witness QBE further said that at about 6.00 p.m. the same day, he and the other people at the *Groupe scolaire* realised that while people could enter the school compound, no one was free to leave. He testified that two nuns who worked at the Butare Hospital had entered the school premises on their way home, but were prevented by soldiers from leaving the school. They spent the night at the school complex. QBE testified that having heard the nuns' story, and recalling his previous encounter with Lieutenant Gatsinzi, as well as the fact that two soldiers were guarding the main entrance of the school, he concluded that they were under attack by soldiers from Ngoma Camp.[421]

333. In light of Witness QBE's conclusion that the *Groupe scolaire* was under attack by soldiers from Ngoma Camp, he decided to seek assistance from the ESO Military camp, which was the Camp closest to the school, located approximately one or two kilometres away. He placed a telephone call to ESO Camp and spoke to a person at the guard post and requested to speak with the Camp Commander. The person who answered the call then handed it to someone else whom Witness QBE believed to be the Commander of the ESO Camp. According to QBE's testimony, he told the alleged Camp Commander that the *Groupe scolaire* was under attack and requested that he send troops to save them. The Camp Commander promised to come to their rescue. However, Witness QBE and the other refugees waited the whole night but no one came to protect them. Witness QBE testified that he learnt

[415] T. 15 June 2005, p. 20 (I.C.S.); T. 16 June 2005, p. 5 (I.C.S.).
[416] T. 16 June 2005, pp. 27, 28, 29 (I.C.S.).
[417] T. 15 June 2005, p. 21 (I.C.S.).
[418] T. 15 June 2005, pp. 21, 22, 24.
[419] T. 15 June 2005, p. 22 (I.C.S.).
[420] T. 15 June 2005, p. 22 (I.C.S.).
[421] T. 15 June 2005, pp. 22, 25, 26 (I.C.S.); T. 16 June 2005, pp. 18, 37.

later that the Commander of ESO Camp was Tharcisse Muvunyi, but admitted he had never met the said person and did not know him personally.[422]

334. Witness QBE testified that between 8.00 and 9.00 a.m. the next day, the *Groupe scolaire* was attacked. The witness said he saw Lieutenant Gatsinzi standing near the administrative buildings of the complex. Gatsinzi showed him a search warrant and asked him to read it and move back. QBE testified that even though he was too scared to read the document, he confirmed to Gatsinzi that he had read it. QBE further said that at the same time as he was being asked to read the search warrant, he saw other soldiers and *Interahamwe*, led by a *gendarme* called Diogène, arrive at the school. Gatsinzi then asked Witness QBE to accompany him and open the doors to the buildings in the school so that Gatsinzi could search for those he referred to as *Inkotanyi* in hiding. QBE added that he led Gatsinzi around the school complex and opened a few doors for him, but not the doors to the rooms where he knew Tutsi refugees to be hiding in. Lieutenant Gatsinzi marked those doors with a cross and said he would return later to check.[423]

335. Witness QBE explained that as he and Gatsinzi left the building, he saw a group of soldiers arriving at the *Groupe scolaire* from all directions. QBE further explained that the soldiers acted together with *Interahamwe* who were armed with traditional weapons and appeared to be under the leadership of Faustin Twagiramungu. Together, the military and civilian attackers discovered some of the refugees, including children who came from an orphanage in Kigali. They took the refugees outside, asked for their identity cards, and separated Tutsi from Hutu. Witness QBE testified that at this point, it became clear to him that the attackers were not looking for *Inkotanyi* but for Tutsis, because they referred to some people as *Inkotanyi* simply because of their physical features.[424]

336. Witness QBE further explained that as the Tutsis were being separated from the Hutus, they were being beaten by the soldiers, and were asked to lie down on the veranda of the office of the school director. The soldiers then brought two Mazda pick-up vehicles from the Red Cross and EMUJECO and, with the help of the *Interahamwe*, as well as Diogène and Jean-Marie, loaded the refugees on the vehicles. The two vehicles made two trips each with intervals of about thirty minutes and carried the refugees away. Witness QBE testified that the vehicles left the school premises at about 3.00 p.m, and that as they did, the refugees on board were still being beaten and some of them were almost dead. Witness QBE said that he never saw any of those refugees again. Witness QBE said that at about 6.00 p.m. on the day of the attack, he was informed by a nun that the refugees had been killed near the Butare CARAES centre, which is the psychiatric clinic of Butare. Witness QBE testified that one of the people taken away on that day was called Vincent and that he was in charge of the Red Cross orphans. By Witness QBE's account, the people who participated in the attack were approximately fifty soldiers, assisted by *Interahamwe* and some teachers of the school. He also estimated that about 100 Tutsi refugees were carried away in this manner.[425]

337. Witness QBE said that later that evening, Lieutenant Gatsinzi returned to the *Groupe scolaire* together with another soldier. They asked the witness to come with them into his office and demanded that he give them money. Witness QBE initially gave them 40,000 Rwandan francs, but they only left after demanding and receiving a further 40,000 francs from the witness. Witness QBE explained that there were no further attacks on the school until he left at the end of May, but that people continued to be abducted and killed.[426]

41.12.1.11.15. Prosecution Witness TQ

[422] T. 15 June 2005, pp. 22, 23, 26, 30 (I.C.S.).
[423] T. 15 June 2005, p. 27 (I.C.S.); T. 16 June 2006 pp. 44, 45 (I.C.S.).
[424] T. 15 June 2005, pp. 27, 28 (I.C.S.); T. 16 June 2005, pp. 45, 49 (I.C.S.).
[425] T. 15 June 2005, pp. 28, 29 (I.C.S.); T. 16 June 2005, pp. 46, 49, 51, 52 (I.C.S.).
[426] T. 15 June 2005, pp. 29, 30 (I.C.S.).

338. Prosecution Witness TQ testified that on 29 April 1994, at around 6:30-7:00 p.m., a large-scale attack was launched on the *Groupe scolaire* complex. TQ testified that at the time of the attack he did not know who had launched it, but he subsequently learnt that the attack was led by Second-Lieutenant Modeste Gatsinzi, who was a member of the Armed Forces and who, according to the witness, was from ESO. He was accompanied by soldiers and civilians, and in particular by a teacher from the Butare school complex, called Faustin Twagirayesu, who was also the *responsable de cellule* for Kabutare. Certain persons named Ndora and Muterere were also present.[427]

339. TQ estimated that there were over 50 assailants. The soldiers were wearing their camouflage uniforms and were carrying firearms. According to Witness TQ, they came from the ESO. TQ said that at the time, he was not aware that the soldiers were from the ESO, but he obtained this information afterwards from people who had followed what had happened.[428] Nathan Bicunda, the director of a company called SULFO in Kigali, who had come to take refuge at the orphanage on 7 April,[429] told him that he knew Modeste Gatsinzi, and that he had come from the ESO. Other people told TQ that they saw soldiers from the ESO. There was also a young soldier who told TQ that the soldiers who launched the attack were from ESO.[430] TQ also recalls that soldiers had already started to surround the *Groupe scolaire* complex the day before the attack.[431]

340. When the attack was launched on 29 April 1994, Witness TQ was in the refectory with the orphans. TQ first saw the attackers in front of the director's office. They then dispersed within the complex and went and asked the people in the dormitories to emerge. The refugees were gathered in the volleyball court opposite the director's office. At that point, the selection process started and the Tutsis were set apart from the others.[432] During this time, one of the Brothers was standing in front of the director's office, from where he could see the refugees being gathered on the volleyball court.[433] TQ testified that he was able to identify a number of the people on the court, including Vincent Wutabariyo, TQ's colleagues, and 18 of the Red Cross orphans, as well as some other children and refugees. Ten of the Red Cross supervisors were among those set aside on the volleyball court. Those set aside on the court were taken in front of the veranda, asked to lie down, and the soldiers and civilian *Interahamwe* fell on them. They were beaten, undressed, and loaded onto vehicles, taken to Rwasave and killed. According to Witness TQ, over 140 people were loaded onto the vehicles and taken away. TQ said that Rwasave was about two kilometres from the *Groupe scolaire*.[434] Witness TQ asked one of the Brothers to contact the authorities but he does not know if this was done.[435]

341. Witness TQ said that Bicunda, a Tutsi refugee, was not one of the persons taken away and killed.[436] This was because a soldier said, "Those members of Muvunyi's family should come closer",[437] whereupon Bicunda and other members of his family moved out and stood aside, and nobody touched them.[438] However, a child from Bicunda's family, nicknamed Kibwa, stayed away from other members of Bicunda's family and was taken away and killed. TQ learnt that an ambulance was sent for the child but it was already too late.[439] That child was the only person for whom an ambulance was sent that day.[440]

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[427] T. 27 June 2005, pp. 25, 26 (I.C.S.).
[428] T. 27 June 2005, p. 26 (I.C.S.).
[429] T. 27 June 2005, p. 15 (I.C.S.).
[430] T. 27 June 2005, p. 26 (I.C.S.).
[431] T. 30 June 2005, pp. 44, 45 (re-examination) (I.C.S.).
[432] T. 27 June 2005, pp. 27, 28 (I.C.S.).
[433] T. 27 June 2005, p. 27 (I.C.S.).
[434] T. 27 June 2005, p. 28 (I.C.S.).
[435] T. 27 June 2005, p. 29 (I.C.S.).
[436] T. 27 June 2005, p. 28 (I.C.S.).
[437] T. 27 June 2005, p. 28 (I.C.S.).
[438] T. 27 June 2005, p. 28 (I.C.S.); T. 30 June 2005, pp. 22, 23 (cross-examination) (I.C.S.).
[439] T. 30 June 2005, p. 23 (cross-examination) (I.C.S.).
[440] T. 30 June 2005, p. 45 (re-examination) (I.C.S.).

342. On the morning of 29 April 1994, TQ talked to Witness QBE and told him to ask for help from the Commander of ESO because the attack was coming from soldiers under the Commander's charge.[441] TQ testified that Witness QBE told him that he had telephoned the ESO and had spoken to Colonel Muvunyi.[442] QBE told TQ that Colonel Muvunyi said he would first check which soldiers were attacking them and then he would send help,[443] but nothing happened. Witness TQ also said he would not be surprised if Witness QBE said he did not make that call on the morning of 29 April 1994 but the night before.[444] TQ said that he subsequently learnt that Colonel Muvunyi refused to help and said he did not know the soldiers in question. In the afternoon, TQ asked Witness QBE to tell Colonel Muvunyi and the *préfet* that a number of persons had been abducted.[445]

343. On cross-examination, Witness TQ explained that when he gave his statement to the ICTR investigator on 28 and 29 July 1998, he knew a few of the assailants' names, but he did not know their complete respective identities. Witness TQ testified that he knew Lieutenant Modeste Gatsinzi, although not before the attack. He saw Lieutenant Gatsinzi the day of the attack and after that he often saw him moving around town, for instance in early May. TQ testified that he came to know Gatsinzi's name on the day of the attack.[446] Witness TQ further explained that when he gave his statement on 28 and 29 July 1998, he did not give Lieutenant Gatsinzi's name to the investigators for personal reasons.[447] TQ explained that at that time he himself had a pending case and that he had learnt that Gatsinzi held a position and that he had gone back to the RPF so TQ was afraid to mention his name for security reasons.[448]

344. Witness TQ first mentioned the involvement of Modeste Gatsinzi in the 29 April attack when he came to testify at the ICTR in the *Butare* case.[449] He did not recall mentioning any other soldier in the course of that testimony.[450] Witness TQ testified that now he can also identify Captain Nizeyimana, who was based at the ESO in 1994, as well as Mugabarigira, Hategekimana, as soldiers who took part in the attack of 29 April 1994 at the *Groupe scolaire*.[451] Witness TQ came to know the identity of those men during his trial before the Rwandan War Council.[452] Witness TQ testified that he did not know who was in charge of those soldiers on 29 April 1994.[453] TQ said that in the *Butare* trial before the ICTR, he did not say anything about Nizeyimana because no question was put to him in that regard.[454] Witness TQ further testified that a friend of Nathan Bicunda gave him information concerning the soldiers who took part in the attack of 29 April 1994.[455] TQ testified that Hategekimana was the commander of the Ngoma camp.[456]

345. In regards to the civilians who took part in the attack of 29 April 1994, Witness TQ can remember Diogène Nsabimana, whom he knew because they attended the same school and then were colleagues.[457] Witness TQ could not remember if Nsabimana also took part in the attack of 21 April 1994. TQ remembered that Deogène Nsabimana was working at the *Groupe scolaire* at the time of the

[441] T. 27 June 2005, p. 27 (I.C.S.); T. 30 June 2005, pp. 45, 46 (re-examination) (I.C.S.).
[442] T. 27 June 2005, p. 27 (I.C.S.); T. 30 June 2005, p. 12 (cross-examination) (I.C.S.).
[443] T. 27 June 2005, p. 27 (I.C.S.). Part of the sentence is missing in the English language transcripts. The French language transcripts were used.
[444] T. 30 June 2005, pp. 12, 13, 14 (cross-examination) (I.C.S.).
[445] T. 27 June 2005, p. 27 (I.C.S.).
[446] T. 28 June 2005, p. 11 (cross-examination) (I.C.S.).
[447] T. 28 June 2005, pp. 11, 12 (cross-examination) (I.C.S.).
[448] T. 28 June 2005, p. 12 (cross-examination) (I.C.S.).
[449] T. 28 June 2005, pp. 13, 14 (cross-examination) (I.C.S.).
[450] T. 28 June 2005, pp. 13, 14, 15 (cross-examination) (I.C.S.).
[451] T. 28 June 2005, p. 15 (cross-examination) (I.C.S.).
[452] T. 30 June 2005, pp. 40, 41 (re-examination) (I.C.S.).
[453] T. 28 June 2005, p. 15 (cross-examination) (I.C.S.).
[454] T. 28 June 2005, p. 16 (cross-examination) (I.C.S.).
[455] T. 28 June 2005, p. 17 (cross-examination) (I.C.S.).
[456] T. 30 June 2005, p. 44 (re-examination) (I.C.S.).
[457] T. 28 June 2005, p. 18 (cross-examination) (I.C.S.).

attack and that he was the person who opened the dormitory.[458] Witness TQ further testified that Jean-Marie Ovibar also participated in the attack of 29 April 1994.[459]

346. TQ testified that during the 29 April attack, he and others were able to identify soldiers from ESO, but during the proceedings before the War Council in Rwanda, Modeste Gatsinzi mentioned certain officers from Ngoma Camp, including Mugabarigira and Hategekimana.[460]

347. Following that attack, the atmosphere at the *Groupe scolaire* was bad. Distrust had increased. Tutsis were saying that Hutus were plotting against them, and Hutus did not want to stay close to Tutsis so that no one could say that they were together and thus kill them.[461]

348. Witness TQ testified that nobody, to his knowledge, did anything to prevent the attack on the refugees at the *Groupe scolaire* on 29 April 1994. TQ estimates that the military authorities could have prevented the attack because during the killings the soldiers supervised the others.[462]

349. TQ testified that when the attack occurred on 29 April 1994, he did not think about asking for assistance from Colonel Munyamunyi and his soldiers, who were being used for security across the street.[463] TQ said that at that time he did not know who Munyamunyi was. Witness TQ added that the soldiers who were guarding the school complex knew the attack was happening, so they could have protected the children and the refugees if they had wanted to do so. Witness TQ testified that on that date they knew who attacked them: people coming from ESO Commanded by Lieutenant Gatsinzi. These soldiers had been sent by the Commander of ESO along with other soldiers from the Ngoma Camp.[464]

350. Witness TQ testified that he reported the attack of 29 April 1994 to the Red Cross authorities and that they wanted to alert the authorities such as the *préfet*.[465] However, no written report was made.[466] TQ believes that he talked about this to the Italian Counsel, Pierre Antonio Costa, to whom he gave a report on the general situation, as well as to a nun, named Annunciata. Although he asked Witness QBE to report to the *préfet*, Witness TQ does not remember receiving any answer from him.[467] When TQ testified in the *Butare* case in 2004, he said that he was present when QBE telephoned *préfet* Nsabimana and that he heard what QBE was saying.[468] However, TQ never said that he was sure QBE was talking to the *préfet* at that time.[469]

41.12.1.11.16. Prosecution Witness NN

351. Witness NN testified that from April to June 1994, he was a soldier at ESO.[470] He said that during the 1994 events, there were two different groups of soldiers at ESO. The first group was under the leadership of Captain Nizeyimana and included other officers such as Chief Warrant Officer Kayinamura, second-Lieutenant Bizimana, and Second-Lieutenant Gakwerere. According to Witness NN, this group consisted mainly of soldiers from the north of Rwanda, they were extremists, and they engaged in widespread massacres of the civilian Tutsi population. Witness NN explained that the second group consisted of those who did not support the massacres. Witness NN said he was part of

[458] T. 28 June 2005, p. 18 (cross-examination) (I.C.S.).
[459] T. 28 June 2005, p. 19 (cross-examination) (I.C.S.).
[460] T. 28 June 2005, p. 2.
[461] T. 27 June 2005, p. 29 (I.C.S.).
[462] T. 27 June 2005, p. 29 (I.C.S.).
[463] T. 30 June 2005, pp. 21, 22 (cross-examination) (I.C.S.).
[464] T. 30 June 2005, p. 22 (cross-examination) (I.C.S.).
[465] T. 30 June 2005, pp. 23, 24 (cross-examination) (I.C.S.).
[466] T. 30 June 2005, p. 24 (cross-examination) (I.C.S.).
[467] T. 30 June 2005, p. 24 (cross-examination) (I.C.S.).
[468] T. 30 June 2005, p. 26 (cross-examination) (I.C.S.).
[469] T. 30 June 2005, pp. 26, 27 (cross-examination) (I.C.S.).
[470] T. 18 July 2005, p. 4 (I.C.S.).

the second group that consisted of Tutsis, people who looked like Tutsis and others who were not from the north and did not support the massacres. He explained that this group had its "own information network", and that they tried to obtain information about the killings to learn who was responsible.[471]

352. Witness NN testified that Second-Lieutenant Gatsinzi, an ESO soldier, participated in the killings at the *Groupe scolaire*, and that the victims were orphan children from SOS Kacyiru who had sought refuge in Butare.[472] He explained that while there were both adults and children at the *Groupe scolaire*, most of the refugees were children, and that he had seen them when he went to visit one Bicunda. Witness NN added that all the refugees he saw were civilians. He further stated that he was not an eyewitness to the killings, but saw the body of one of Bicunda's children at the mortuary. The Witness estimated that the killings at the *Groupe scolaire* took place in late May.[473]

41.12.1.11.17. Defence Witness MO38

353. Defence Witness MO38, a Tutsi woman, testified that in 1994 she lived in Kacyiru, in Kigali *préfecture* and worked as a nurse. On 6 April 1994, she heard about the death of President Habyarimana and also heard gunfire.[474] On 7 April she received a telephone call from someone who told her that some people had been killed in Kyovu district, and that the attackers were looking for witness M38's home with the intention of killing her and members of her family.[475]

354. Witness and her family therefore moved to the orphanage at Kacyiru and stayed there for two nights. On 9 April 1994, Witness MO38 and her family were evacuated to Butare together with the other children from the orphanage.[476] They arrived in Butare at 9.30 p.m. and lodged at the *Groupe scolaire*. According to the witness, Butare was quiet when they arrived, but around the 20 April, the security situation deteriorated.[477] Witness MO38 stated that on 21 April, the *Groupe scolaire* was attacked by the *Interahamwe* who wanted to kill the orphan children. The attackers separated the children into groups, based on their ethnicity. Witness MO38 initially testified that the children were protected by the other refugees, but later said it was soldiers who protected the children from the *Interahamwe*. She added that Prosecution Witnesses TQ and QBE paid 500,000 Rwandan francs to the *Interahamwe* in order to save the children.[478]

355. Witness MO38 further explained that at about 6.00 a.m. on 29 April, another attack was launched on the *Groupe scolaire* by soldiers and *Interahamwe*.[479] The soldiers remained outside the complex, while the *Interahamwe* came inside and together with one Diogène, asked all the refugees to come out to the courtyard. The soldiers and *Interahamwe* asked the refugees, including children, to lie down on the floor and they did. However, Witness MO38 explained that she and members of her family were asked to stand away from the other refugees; she later understood this was because Colonel Marcel Gatsinzi had asked the soldiers to protect them.[480] According to the witness, the remaining refugees were killed and their bodies dumped somewhere in ponds in Kabutare.[481]

356. Witness MO38 testified, without giving a specific figure, that there were many people at the *Groupe scolaire* during this attack including the orphans from Kigali. She confirmed that over fourteen children were killed during the attack by the *Interahamwe* "under the supervision of the

[471] T. 18 July 2005, pp. 42-43 (I.C.S.).
[472] T. 18 July 2005, p. 52 (I.C.S.).
[473] T. 18 July 2005, pp. 55, 56 (I.C.S.).
[474] T. 13 December 2005, p. 21 (I.C.S.).
[475] T. 14 December 2005, p. 6 (I.C.S.).
[476] T. 13 December 2005, p. 22 (I.C.S.); T. 14 December 2005, p. 8 (I.C.S.).
[477] T. 13 December 2005, p. 25 (I.C.S.).
[478] T. 13 December 2005, pp. 28, 29 (I.C.S.).
[479] T. 13 December 2005, pp. 32, 33 (I.C.S.).
[480] T. 13 December 2005, p. 35 (I.C.S.).
[481] T. 13 December 2005, p. 36 (I.C.S.).

soldiers." All the victims were unarmed Tutsi civilians.[482] On the other hand, the soldiers and *Interahamwe* were armed with various types of weapons. Witness MO38 said the soldiers who attacked the *Groupe scolaire* said they were coming from Gisenyi.[483]

41.12.1.11.18. 5.10.3.2. Deliberations

357. It is alleged in the Indictment that on or about 24 April 1994, refugees at the *Groupe Scolaire*, including orphans evacuated by the Red Cross from Kigali to Butare, were attacked by soldiers from Ngoma and ESO Camps. During the attack, the supervisor of the orphans called the ESO Camp for assistance and spoke with the Accused, but the latter refused to send troops to protect the refugees.

358. The Chamber has considered the testimony of Prosecution Witness QBE and finds him to be very credible. It is apparent from QBE's testimony that the *Groupe scolaire* was attacked by soldiers under the leadership of Lieutenant Modeste Gatisinzi working in collaboration with *Interahamwe*. The Chamber is satisfied from the totality of the evidence before it that Lieutenant Gatsinzi actually came from ESO, and not from Ngoma Camp as stated by Witness QBE. This error, in the Chamber's view, does not affect the reliability of Witness QBE's testimony. The Chamber also notes QBE's assertion that he telephoned the ESO Camp and spoke directly to the Camp Commander, even though there remains a lingering doubt as to whether the person at the other end of the telephone line was in fact the Accused. In any event, QBE testified that the ESO Camp was the closest military facility to the *Groupe scolaire*, as it was located only one or two kilometres away. Thus, it was reasonable to expect the Accused, as the highest-ranking military official at the Camp in late April 1994, to provide protection for the refugees at the school or to prevent soldiers under his command from attacking the facility. Due to the repeated nature of these attacks on the *Groupe scolaire*, the Accused had reason to know of them, but failed to take action either to prevent them or to punish their perpetrators.

359. The evidence of Prosecution Witness TQ corroborates that of Witness QBE with respect to the fact that the *Groupe scolaire* was attacked by ESO soldiers on or about 29 April 1994. TQ's evidence tends to suggest that the Accused was at least aware of the ongoing attack, even if he did not directly order it. TQ's testimony further corroborates QBE's assertion that he placed a telephone call to the ESO Commander to request for assistance. From the evidence of these two witnesses the Chamber notes that Bicunda and his family, who were Tutsis, were spared on account of their relation to the Accused.

360. The Chamber considers that the evidence of Witnesses QBE and TQ is corroborated in every material particular by that of Witnesses NN and MO38. In fact the salient issues that an attack was perpetrated on *Groupe scolaire* on 29 April 1994 by soldiers and *Interahamwe*, that Bicunda's family was saved by the Accused, that one of the Bicunda children was killed during the attack due to a mistaken identity, and that an ESO soldier called Lieutenant Modeste Gatsinzi led the group of military and civilian attackers, have all been corroborated and established beyond reasonable doubt. The Chamber notes Witness TQ's suggestion that during criminal proceedings in Rwanda, he learnt that both Hategekimana from the Ngoma Camp and Nizeyimana from the ESO Camp took part in the attack on the *Groupe scolaire*. This evidence, together with QBE's account that it was soldiers from Ngoma Camp who attacked the school, established that this attack was a joint operation involving soldiers from both ESO and Ngoma Camps.

361. The Chamber believes that MO38 deliberately tried to minimise the role of the Accused in saving her and her family and therefore does not believe her evidence that Colonel Gatsinzi was her family's saviour. Similarly, the Chamber disbelieves MO38's evidence that it was a group of *Interahamwe* with the assistance of soldiers from Gisenyi, who attacked the *Groupe scolaire*. The Chamber attributes this evidence to Witness MO38's desire to shield ESO soldiers and the Accused,

[482] T. 14 December 2005, p. 21 (cross-examination).
[483] T. 14 December 2005, pp. 20, 26 (cross-examination).

their commander, from responsibility for the *Groupe scolaire* massacres. The Chamber recalls its finding that ESO soldiers were under the effective control of the Accused. The Chamber also notes that the Accused saved the Bicunda family from being killed; that he sent an ambulance to rescue one of Bicunda's children; that Witness QBE telephoned the ESO Camp and reported the attack to someone alleged to be the Camp Commander; and that the attackers were under the leadership of Lieutenant Modeste Gatsinzi from ESO. These facts suggest that the Accused knew of the attack but failed to do anything to prevent or stop it, or otherwise punish the perpetrators.

362. The Chamber notes a number of apparent discrepancies in the testimony of Prosecution Witness TQ. For instance, it emerged during the cross-examination that TQ had deliberately failed to mention Lieutenant Modeste Gatsinzi's name to the ICTR Investigators in 1998, but that he had mentioned Gatsinzi's name during his 2004 testimony in the *Butare* trial before this Tribunal. Apparently, this was because TQ himself was an accused person in a pending case before the Rwandan War Council and he was afraid of mentioning Gatsinzi's name. TQ also testified that it was during the proceedings in Rwanda that he got to know the names of some of the other soldiers who participated in the attack on the *Groupe scolaire*, including Nizeyimana, Mugabarigira and Hategekimana, the Commander of the Ngoma Camp. TQ also stated that it was Modeste Gatsinzi who, during the proceedings in Rwanda, first mentioned the involvement of Ngoma Camp soldiers such as Mugabarigira and Hategekimana in the *Groupe scolaire* massacre. However, having considered all supporting and corroborative evidence relating to the attack on the *Groupe scolaire*, the Chamber is satisfied that Witness TQ gave a truthful and honest account of the events he witnessed at that location on 29 April 1994. Moreover, the Chamber is satisfied, on the basis of the Judgement of the Rwandan War Council of 20 January 2003 that Witness TQ was acquitted of the genocide-related charges laid against him in Rwanda.[484]

363. The Chamber finds that as Interim Commander of the ESO Camp and as the highest-ranking military official in Butare during these events in late April 1994, the Accused had a duty to act to prevent the attacks perpetrated by soldiers under his command on the civilian Tutsi population seeking refuge at the Groupe *scolaire*, barely two kilometres away from ESO. The Chamber finds that the nature and scale of the attack at the *Groupe scolaire* were such that the Accused could not have been unaware of it. His position as the most senior military officer in Butare placed on him a special duty to investigate actual or potential violations of criminal law by his subordinates and to prevent or punish such violations. In this regard, the Chamber recalls the view expressed in *Kayishema and Ruzindana* that military superiors have a more active duty to inform themselves of the activities of their subordinates when they knew, or, owing to the circumstances, should have known that those subordinates were committing or about to commit crimes.[485]

364. The evidence presented by Prosecution Witnesses QBE and TQ strongly suggests that the attack on the *Groupe scolaire* was a joint operation involving soldiers from both ESO and Ngoma Camps. Despite a direct telephone request made by Witness QBE to the ESO Camp to send help to protect the refugees, including orphans and Red Cross employees, no help was sent. Even if the Accused did not personally receive the call for help, Bicunda's family was spared because of an order from the Accused. Therefore, it is clear that he knew about the attack and had the material ability to stop it, but did nothing. The Chamber therefore finds that the Prosecution has proved beyond reasonable doubt that soldiers from ESO in collaboration with men from Ngoma Camp and *Interahamwe* militia attacked and killed a group of Tutsi civilians at *Groupe scolaire* on 29 April 1994. As Interim Commander of ESO and the most senior military officer in Butare, the Accused knew about this attack by his subordinates from ESO, but failed to take measures to prevent its occurrence or to punish the perpetrators in its aftermath.

[484] Judgement of the Rwandan War Council dated 20 January 2003 admitted and marked as Exhibit P.25 (English), P.25A (French) and P.25B (Kinyarwanda). See T. 30 June 2005, p. 33 (I.C.S).
[485] *Kayishema and Ruzindana*, Judgement (TC), para. 227.

41.12.1.11.19. 5.10.4. Attack on Tutsi Refugees at Mukura Forest

41.12.1.11.20. 5.10.4.1. Evidence

41.12.1.11.21. Prosecution Witness XV

365. Witness XV, an employee of the University Hospital, testified that from about 7 April 1994 when the news of the death of Rwanda's president spread in his *commune*, the security situation deteriorated. He said soldiers set up roadblocks and Tutsis were asked to show their identity cards.[486] XV testified that in light of this security environment, he decided to stay at home with his family. On 15 or 16 April, he received a letter from the Director of the university establishment, which was co-signed by "Commander Muvunyi", instructing him to go back to work, which he did. However, around the 18 or 19 April, he again stopped going to work on the advice of his boss because "houses were being burnt and people were running away."[487]

366. Witness XV further testified that around 21 April, houses near his own were being burnt down "and people were being told to ensure their own security." Witness XV therefore chose to move towards Mukura forest where some of his friends had already sought refuge. According to Witness XV's testimony, when he got to Mukura forest, he found about 800 Tutsi refugees, including "children, old women, old men, young men, and young women." He explained that shortly after the refugees arrived at the forest, "civilians and *Interahamwe* became aware of that" and "started to kill" them. Witness XV further explained that the refugees defended themselves "with sticks and other resources in order to ward off the situation" but they failed because soldiers had been called in to reinforce the Interahamwe. These soldiers, who Witness XV said came from the ESO and Ngoma Camps, soon arrived bearing arms and grenades.[488]

367. Witness XV informed the Chamber that after the attacks, he "noticed that there were some dead bodies", and that he escaped through the bushes and went towards to Tumba valley.[489]

41.12.1.11.22. Prosecution Witness YAK

368. Prosecution Witness YAK was a 15 year-old school boy in 1994, living in Huye *commune*, Butare *préfecture*. He testified that on 7 April 1994, he learnt that the plane carrying President Habyarimana had been shot down, and that the President was dead. Witness YAK said it was further announced that the *Inyenzi* were responsible for the President's death; and that the word "*Inyenzi*" meant Tutsi. YAK said the security situation in his *commune* changed after this date; night patrols were initially set up and operated jointly by Hutus and Tutsis, but later, the Hutus developed their own "means of communication" and did not want to conduct joint patrols with the Tutsis. The joint night patrols stopped around 15 to 17 April 1994. According to YAK's testimony, the Hutus from neighbouring *secteurs* started wearing banana leaves and marching; they told other Hutus to wear banana leaves on their person and place them on their houses, and that anyone who did not do so would be killed. YAK explained that this was a way of distinguishing Hutus from Tutsis. He said; "One could feel that there was something organised and they killed us."[490]

369. As a result of this deteriorating security situation, Witness YAK and other Tutsis spent the night in the bush, not far from a school. The refugees filled the classrooms of the school, and there was not enough space for everyone. Witness YAK said that the refugees came from neighbouring *secteurs*

[486] T. 16 May 2005, p. 7.
[487] T. 16 May 2005, pp. 8, 9.
[488] T. 16 May 2005, pp. 9, 13.
[489] T. 16 May 2005, p. 13.
[490] T. 29 June 2005, p. 26.

such as Dudinana, Runyinya, Karama, and Bvumbi. He said they remained at the school but were attacked by people wearing banana leaves. Some of the men tried to defend themselves, but realised it was impossible to do so. The refugees therefore decided to move towards Gasharu. By Witness YAK's account, there were between 4,000 and 5,000 refugees.[491] They went past Gasharu and settled on a platform called Nyagasoze, which was located in Mukura forest. YAK testified that because they had not eaten for a number of days, someone slaughtered one of his cows and distributed the meat among the refugees. As they settled down to eat, they were attacked by a group of civilians. Witness YAK said the refugees managed to repel this initial attack.[492]

370. Shortly after this first attack, there was another attack by soldiers who came from the direction of the tarred road, and descended from CT military trucks. YAK testified that in his estimation, there were about 100 armed soldiers in uniform; they wore black berets bearing the insignia of the Rwandan Army. Witness YAK further stated that he believed the soldiers came from ESO, because another Tutsi refugee told them that an *Interahamwe* called Diogène Harindintwali had gone to seek reinforcements from the ESO Military Camp. Witness YAK added that he could distinguish between soldiers and *gendarmes* because the latter wore red berets, while the soldiers wore black ones. He also explained that the soldiers at ESO were trainees.[493]

371. YAK explained that upon their arrival, the soldiers first fired three grenades mounted on guns towards the refugees, but that these grenades did not claim any victims. YAK stated the Chamber that the soldiers started shooting at the refugees, who because they were afraid to see the soldiers, had gathered in one place. He said this facilitated the "work" of the soldiers.[494] YAK said some people who stood close to him fell to the ground. He managed to slip away and lie down in a sorghum field. YAK said that the shooting lasted for about two hours. When the gunfire stopped and everything was quiet, YAK observed the soldiers withdraw into a nearby pine forest, and then back to their trucks. They drove off towards the direction of Butare. After the soldiers' departure, "members of the population came to finish off all those who hadn't been killed on the spot with guns – with gunshots". YAK explained that from his hiding spot in the sorghum field, he could hear the noise of striking machetes, as well as the screams and groans of the refugees who were being attacked. He said "those agonising cries" ended about 3.00 p.m., but he waited until nightfall and then walked to his aunt's place. His aunt was married to a Hutu man. He said he walked in the rain and under the cover of darkness and that those manning the roadblocks had already left. He arrived at his aunt's place at about 8.30 p.m., but had to leave again at 3.00 a.m., to join other refugees at the Butare University Hospital.[495]

41.12.1.11.23. 5.10.4.2. Deliberations

372. In the Chamber's view, Prosecution Witnesses XV and YAK largely corroborate each other on the attack on Tutsi refuges at Mukura forest and the identity of the attackers. The Chamber finds that soldiers from the ESO and Ngoma Camps were involved in the attack and that they worked in close collaboration with the *Interahamwe*. The Chamber also finds that the Accused, by virtue of his position as Interim ESO Commander and the most senior military officer in Butare, had reason to know of the attack on the civilian Tutsi population at Mukura forest. Due to the large number of refugees staying at Mukura and the nature of the attacks on them by the *Interahamwe*, the Accused had reason to know of their situation. Yet, instead of protecting the refugees and preventing the *Interahamwe* from further victimising them, ESO soldiers under the authority of the Accused participated in massacring them. The Chamber therefore concludes that the Prosecution has proved

[491] T. 29 June 2005, p. 27.
[492] T. 29 June 2005, pp. 28-29.
[493] T. 29 June 2005, p. 30.
[494] T. 29 June 2005, pp. 29-30. Witness YAK stated as follows: "We were refugees scattered all over the place. We saw soldiers and as Rwandan civilians were not used to soldiers, was (*sic*) afraid because those soldiers hadn't come to save us. We expected something to happen. So we assembled and apparently facilitated their work. … We assembled so they could shoot us easily, a gun, a bullet could hit more than one person, and that is exactly what those soldiers wanted to see."
[495] T. 29 June 2005, p. 33.

beyond reasonable doubt that ESO soldiers under the command and authority of the Accused collaborated with *Interahamwe* and other soldiers from Ngoma Camp to attack and kill Tutsi civilian refugees at Mukura forest. The Chamber further finds that the Accused had reason to know of this attack but failed to prevent it or to punish the perpetrators.

41.12.1.11.24. 5.10.5. Killing of Civilians at Cyanika Parish and at Kabutare

41.12.1.11.25.

41.12.1.11.26. 5.10.5.1. Evidence

41.12.1.11.27.

41.12.1.11.28. Prosecution Witness YAO

373. Prosecution Witness YAO testified that on 7 April 1994, she heard about the death of the Rwandan President. At the time, she lived with her parents and five siblings. They were all Tutsi. YAO testified that after the President's death, the behaviour of people in her area changed and members of her family were afraid. They therefore decided to leave their home and seek refuge elsewhere. Her parents and siblings went to Mushubi Parish, while Witness YAO spent the night in the bush. YAO testified that her parents, one of her brothers, as well as other people such as Kageruka, Rugambara, and Félicité were killed at Mushubi Parish on the night of 7 April. She learnt about this from her younger sisters who were with their parents when they died.[496]

374. YAO stated that after receiving the news of the death of her parents, she continued her flight so that she would not be killed. She first went to her aunt's place and subsequently to Cyanika Parish. Upon arrival at the Parish, she found two priests who were living there; later on, other refugees including men, women and children arrived from Karama and Rukondo. The refugees looked dirty and tired. YAO said that she spoke to some of the refugees and they told her they were fleeing because they had been attacked and their cows taken away; some said that their neighbours had been killed and so they decided to flee.[497] YAO said that she heard that on 16 April 1994, there was an attack on the refugees at Cyanika Parish. YAO testified she "heard that grenades were thrown, but… did not see the assailants."[498] She said she left the Cyanika Parish on 17 April 1994 and went to the Butare Cathedral. She found a priest and other refugees who had sought shelter there. YAO explained that it was quite a distance between the parish and the Cathedral and that it might have taken them up to three hours to walk the distance.

375. YAO explained that on 20 April 1994, while at the Cathedral, soldiers came and took the refugees to Kabutare. She explained that these soldiers wore military uniforms and were armed with guns. She said the soldiers asked the refugees to walk ahead of them and the soldiers followed on foot. Witness YAO said that when they arrived at Kabutare, the soldiers asked the refugees to lie down and then began shooting at them. As a consequence, most of the refugees were killed, others were injured, and there were a few survivors. Witness YAO explained that people survived because as the refugees were asked to lie down, some people fell on top of others and some of those beneath the crowd survived. Witness YAO said she was one of the lucky survivors.

[496] T. 21 March 2005, p. 7.
[497] T. 21 March 2005, p. 8.
[498] T. 21 March 2005, p. 8.

41.12.1.11.29. 5.10.5.2. Deliberations

41.12.1.11.30.

376. The Chamber is unable, on the basis of Witness YAO's testimony, to conclude that an attack took place at Cyanika or that the Accused or his subordinates were involved in it. It is not clear whether Witness YAO was present at Cyanika Parish during the alleged attack or if she was merely recounting hearsay evidence. Furthermore, she did not give any evidence regarding the identity of the assailants. The Chamber therefore finds that the Prosecution has failed to prove this allegation beyond reasonable doubt.

41.12.1.11.31. 5.10.6. General Conclusion on Massacre of Tutsi civilians

377. In conclusion, the Chamber finds that the Prosecution has proved beyond reasonable doubt that as ESO Commander, the Accused knew of the attacks by ESO soldiers on Tutsi refugees at the *Groupe scolaire*. The Chamber is also satisfied that the Accused had reason to know about the attacks at Mukura forest. However, the Chamber finds that the Prosecution has failed to prove that the Accused directly participated in, knew, or had reason to know about the attack on Tutsi refugees at Ngoma Parish, Matyazo School, and Cyanika Parish.

41.12.1.12. 5.11. Rape and Sexual Violence by Soldiers and Interahamwe during Attacks on Tutsi Civilians

41.12.1.12.1. 5.11.1. Indictment

378. Paragraphs 3.41 and 3.41 (i) read:

> 3.41 During the course of the acts referred to in Paragraph 3.40 above, many women and girls were raped and sexually violated in these locations or were taken by force or coerced to other locations, where they were raped and subjected to acts of sexual violence by *Interahamwe* and soldiers from the Ngoma Camp. Lieutenant-Colonel Muvunyi by reason of his position of authority and the widespread nature of these acts, knew or had reason to know, that these acts were being committed and he failed to take measures to prevent, or to put an end to these acts, or to punish the perpetrators.
>
> 3.41 (i) In most cases the rapes were aggravated by circumstances of gang rape, multiple rape, rape of virgin girls, rape of daughters in front of their mothers or other family members, which involved violence and degrading treatment to the persons involved. Most of these acts of sexual violence were accompanied by the killing of the victim.

41.12.1.12.2. 5.11.2. Evidence

41.12.1.12.3. Prosecution Witness AFV

379. Witness AFV, a Tutsi woman, worked at the Butare University Hospital at the time of President Habyarimana's death.[499] At about 1:00 p.m. on 20 April 1994, while walking home from work, she was stopped by soldiers manning a roadblock located at the intersection of the roads leading to the University Laboratory and the University Hospital.[500] There were about four armed soldiers in military uniforms with spotted colours similar to the uniforms she knew soldiers from the ESO wore. They also wore cartridge belts and carried grenades. AFV did not notice the headgear of the soldiers,

[499] T. 21 June 2005, p. 2; p. 28 (I.C.S.); Exhibit P.21 (Under seal).
[500] T. 21 June 2005, p. 5.

or even if they wore any. The witness believed the soldiers came from the ESO because the roadblock was not far from the ESO Camp "and the soldiers took turns" at the roadblock.[501]

380. AFV estimated that the roadblock was about a 10-minute walk from the ESO.[502] The soldiers asked passers-by to present their identity cards and separated the Hutu from the Tutsi. Hutu were allowed to pass, but Tutsi were asked to stay and were searched.[503]

381. Witness AFV testified that the soldiers searched her, beat her, and asked if she thought she was extraordinary. They asked her how she could dare go to work. They took her service keys. The witness feared the soldiers would harm her, because a Tutsi girl who had walked with AFV to the roadblock was killed by the soldiers when they discovered that she had torn up her identity card in order to conceal her ethnicity. Her body was thrown into the gutter.[504]

382. One of the soldiers said, "Let us look at this Tutsi's sexual organs. How come you are working when the others aren't?" The soldier then added, "Let's go along with her, but tomorrow you will have to come back and present yourself to me."[505] AFV believed the soldiers meant that they would kill her after looking at her sexual organ.[506] Two gun-toting soldiers said they would accompany Witness AFV home, but they in fact beat her up and took her into the woods.[507] She told them to kill her on the spot instead of taking her away to torture her.[508]

383. Once in the bush, one of the soldiers continued to beat and insult her. Another one took off his trousers. They undressed her, took off her underpants while she was sitting, tied her with her sweater, and blindfolded her with her other clothing. She protested that they should kill rather than rape her. One of the soldiers hit her head against the ground and she lost consciousness.[509]

384. When she regained consciousness, her attackers had left. She felt very weak, could not bring her legs together, and noticed she had lost a lot of blood; she had difficulty getting up.[510] AFV could see the blood coming from her sexual organ despite the fact that it was not daylight. She was still bleeding when she arrived home;[511] under the lights at home, she also noticed a white liquid or substance near her pubic area. Witness AFV believed the bleeding from her sexual organ and the white substance around her pubic area were because she was raped by the two soldiers.[512]

385. AFV testified that at the time of the events she was a nun and a virgin and had never had sexual intercourse before. Witness AFV added that she was no longer a nun because she could not continue to be one after losing her virginity; she said that the soldiers had deprived her of that status.[513]

41.12.1.12.4. Prosecution Witness QY

386. Prosecution Witness QY, a Tutsi, was 17 years old in 1994.[514] She testified that when the security situation in her *cellule* deteriorated after 7 April 1994, she went to the Matyazo Primary

[501] T. 21 June 2005, pp. 4, 5; p. 26 (Cross-examination).
[502] T. 21 June 2005, p. 11; p. 21 (Cross-examination).
[503] T. 21 June 2005, pp. 12, 13.
[504] T. 21 June 2005, p. 13.
[505] T. 21 June 2005, p. 14.
[506] T. 21 June 2005, p. 14.
[507] T. 21 June 2005, p. 14.
[508] T. 21 June 2005, p. 15.
[509] T. 21 June 2005, p. 15: Witness AFV quoted one of the soldiers as saying: "Don't kill her before we have a look at the sexual organ of a Tutsi, or of a Tutsi woman."
[510] T. 21 June 2005, p. 16.
[511] T. 21 June 2005, p. 17.
[512] T. 21 June 2005, p. 17.
[513] T. 21 June 2005, p. 18 (I.C.S.); p. 28 (Cross-examination) (I.C.S.).
[514] Exhibit P.18 (Under seal).

School, which was located about 10 minutes away from her residence.[515] As a result of an attack on Matyazo Primary School, Witness QY fled to different locations and ended up at the *préfecture* office where she found armed soldiers and *gendarmes*.[516]

387. QY recognised the *gendarmes* because they were wearing red berets.[517] She said the soldiers were raping girls. QY did not know how long she stayed at the *préfecture* Office, but subsequently she and other refugees were taken to the E.E.R. by soldiers and young bystanders.[518]

388. The refugees arrived at E.E.R. at about 6.00 p.m., and soon thereafter, QY was taken by a soldier to a nearby woodlot and raped. The soldier was wearing military gear and carried a gun. Witness QY suspected that the soldier came from ESO because the E.E.R. "was very close to the ESO, and that is where the military camp was. Even those who were at the Office of the *préfet* were from ESO."[519] Once they got inside the woods, the soldier forced her to take off her clothes. He then removed his trousers, remained in his underpants, and proceeded to insert his sexual organ into hers. QY started bleeding. The soldier then took her to the lower part of the woods and forced her to lie down. She did. Witness QY further explained: "When I lay down, he once again put his sexual organ into mine and did the same exercise, and after that he said, 'We are going to put our blood together, and I will not kill you.'" After this experience, she realised that she was "bleeding profusely" from her sexual organ and her clothes were wet. The soldier then took her back to the other refugees.[520]

389. Witness QY testified that sometime between April and July 1994, she was taken by three soldiers from the *préfecture* Office to a place at Rwabayanga. She could not identify the soldiers because the event took place at night and the population was "going through a very difficult time." The soldiers took her to a bar and restaurant, and then into "a small house which looked like a toilet." They put her on a bed inside the room. QY said, "One got on me, the other one spread my legs apart, and the other took to one side and took one of my legs, and the other took the other leg. … One of the soldiers got on me, and they took turns and then they left." When asked by the Prosecutor to explain what she meant by "they took turns", QY replied: "each of them introduced his sexual organ into mine."[521]

390. About three weeks after this incident, Witness QY said she was raped again by a soldier in the back courtyard of the *préfecture* Office. She said she could not remember the exact month this incident took place, but explained that the soldier took her to a very small house where he raped her. She said, "And he put me up against the wall … and then he raped me against the wall. … He took his sexual organ and introduced it into mine." The soldier left Witness QY in the small house. Later she went back to the other refugees within the premises of the *préfecture* Office.[522]

391. QY further explained to the Chamber that at some point between April and July 1994, she was taken away from the *préfecture* Office by a person "dressed in civilian clothes" to a place known as *Chez Mahenga*.[523] When this civilian took her away, soldiers were present at the *préfecture*. Witness QY and other refugees at the *préfecture* were subjected to several rapes by many people. All these rapes took place in the presence of soldiers as "the soldiers were practically living there."[524]

392. *Chez Mahenga* was about seven minutes away from the *préfecture* Office. Witness QY described it as a bar, or a drinking place which also had rooms. Upon their arrival at *Chez Mahenga*,

[515] T. 8 June 2005, p. 13.
[516] T. 8 June 2005, p. 14.
[517] T. 8 June 2005, p. 18.
[518] T. 8 June 2005, pp. 18, 19; T. 13 June 2005, p. 18 (cross-examination) (I.C.S.); T. 14 June 2005, p. 30 (cross-examination) (I.C.S.).
[519] T. 8 June 2005, p. 19.
[520] T. 8 June 2005, p. 19.
[521] T. 8 June 2005, p. 21.
[522] T. 8 June 2005, p. 22.
[523] T. 8 June 2005, p. 23; T. 14 June 2005, p. 21 (I.C.S.).
[524] T. 8 June 2005, p. 23.

she saw soldiers who had "forcibly married girls" and kept them at that location.[525] The girls were in rooms opposite her own; she could see them from her veranda, but could not speak to them. QY was kept in a room by her captor for about two to three days. He locked her up in that room and returned whenever he wanted to have sexual intercourse. QY explained that she "became a sort of wife" to her captor.[526] With respect to the general condition of women kept at *Chez Mahenga*, Witness QY told the Chamber, "we had become their women. We had no idea when they were going to come and take us out of where we were. We had simply become like their women. Nobody was spared; everybody was raped. … Many people were raped, and most of them died. There are others who were traumatized and still others who even had children with the rapists."[527] Her captor took her back to the *préfecture* Office after an announcement was made that there would be a search at *Chez Mahenga*. From the *préfecture* Office, she and other refugees were subsequently transported in buses to Nyange forest at the instructions of the *préfet*.[528]

393. During cross-examination, the witness was questioned about one Mazimpaka. She stated that while at the *préfecture* Office, she was raped by Mazimpaka. She explained that she could not remember when this incident took place, or if it was before or after the three soldiers raped her at Rwabayanga. QY further added that Mazimpaka was a soldier or a *gendarme,*[529] and that she came to know Mazimpaka's name during the latter's trial in Rwanda.[530]

41.12.1.12.5. Prosecution Witness TM

41.12.1.12.6.

394. In 1994, Prosecution Witness TM was a 44-year-old Tutsi farmer living in Gikongoro.[531] She testified that sometime around mid-April 1994, a group of civilians and soldiers came to her house to search for Tutsis. A Tutsi child called Rusunika, then living with her, was chased after and killed by the attackers.[532] The soldiers in the group included Katabirora, Sebuhoro and another who was referred to as "GP, *Garde présidentiel*."[533] TM knew both soldiers Katabirora and Sebuhoro well, and had in the past seen them manning a roadblock located about one kilometre from her house. She further said she used to see Katabirora who worked in Gikongoro town.[534] She believed that Katabirora was Hutu. The other people who came to her house included Ndayisaba, Ntawuhiganayo, and Isidore. The soldiers carried firearms and the civilians carried small hoes and machetes.[535]

395. Witness TM testified that after killing Rusunika, the Tutsi child, the attackers returned and raped her. Soldier Katabirora was the first to rape her. When she tried to resist, the latter hit her.[536] At the time of the rape, Witness TM was six months pregnant. Three days after she was raped, she suffered a miscarriage. She testified that she still felt pain in her back and head.[537]

41.12.1.12.7. Prosecution Witness YAI

396. Witness YAI testified that in late May 1994, at a security meeting held at Gikore, Muvunyi spoke about Hutu men who had forcefully taken Tutsi women as wives and asked the men to "[s]end

[525] T. 8 June 2005, p. 23.
[526] T. 8 June 2005, pp. 23-24.
[527] T. 8 June 2005, p. 24.
[528] T. 8 June 2005, p. 24.
[529] T. 14 June 2005, pp. 18, 19, 24 (Cross-examination) (I.C.S.).
[530] T. 14 June 2005, p. 17 (Cross-examination) (I.C.S.).
[531] Exhibit P. 22 (Under seal).
[532] T. 22 June 2005, pp. 3-4.
[533] T. 22 June 2005, p. 7.
[534] T. 22 June 2005, p. 6: "The soldiers worked in Gikongoro town, but I do not know where their camp was, I never went there."
[535] T. 22 June 2005, p. 3.
[536] T. 22 June 2005, p. 4.
[537] T. 22 June 2005, p. 4.

these women back to their homes".[538] According to the witness, when Muvunyi asked that the women be sent back to their homes, he simply meant that they should be delivered to the killers because the homes of the Tutsi women had already been destroyed.[539]

41.12.1.12.8. Prosecution Witness CCP

397. Prosecution Witness CCP, a Hutu,[540] testified that he attended the meeting at Gikore in May 1994.[541] He heard Muvunyi say that the Hutu men who had married Tutsi girls had to kill those girls, or if they were not capable of killing them, to send them away so they could be killed elsewhere.[542] According to CCP, Muvunyi stated that the Tutsi girls should die because they could poison their Hutu husbands.[543]

41.12.1.12.9. Prosecution Witness YAK

398. Witness YAK was 15 years old in 1994.[544] He found refuge at the Butare University Hospital after his family was killed.[545] According to the witness, soldiers from ESO came to the University Hospital and tried to lure the girls who were there. The refugees were hungry; the soldiers told the girls to follow them to ESO where they would be given food. However, the girls returned in tears and Witness YAK heard from another refugee that the girls were raped by the ESO soldiers.[546]

399. YAK testified that the soldiers within the University Hospital compound came from ESO. According to him, if one stood at the hospital reception area, one could see the soldiers coming from ESO.[547]

41.12.1.12.10. 5.11.3. Deliberations

400. The Indictment alleges that many women and girls were raped and sexually assaulted by *Interahamwe* and soldiers from the Ngoma Camp. At Paragraph 82 of its Pre-Trial Brief, however, the Prosecution stated that the acts of rape were committed by *Interahamwe* as well as soldiers from the Ngoma and ESO Camps and the *gendarmerie*. Similarly, during its Opening Statement, the Prosecution indicated that it would lead evidence to show that soldiers from the ESO and Ngoma Camps under the command of the Accused committed rape. The question to be considered is whether by including the ESO soldiers in the Pre-Trial Brief and its Opening Statement, the Prosecution discharged its obligation to give clear and timely notice in order to put the Defence on alert in respect of this charge.

401. Pursuant to Article 20 (4) (a) of the Statute, an accused has the right to be informed of the nature and cause of the charges against him. According to the Appeals Chamber, when considered in light of Rule 47 (C), this provision translates into a prosecutorial obligation "to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven."[548] The Chamber notes that the evidence of Witnesses AFV and QY that they were raped by

[538] T. 25 May 2005, p. 8.
[539] T. 25 May 2005, pp. 8-9, 41.
[540] T. 9 June 2005, p. 8.
[541] T. 9 June 2005, p. 3.
[542] T. 9 June 2005, pp. 6-7.
[543] T. 9 June 2005, p. 6.
[544] Exhibit P.24, admitted on 29 June 2005 (under seal).
[545] T. 29 June 2005, p. 33.
[546] T. 29 June 2005, pp. 35-36.
[547] T. 29 June 2005, p. 34.
[548] *Semanza,* Judgement (AC), para 85; *Ntakirutimana,* Judgement (AC), para 25; *Gacumbitsi,* Judgement (AC), para. 49; *Kupreškić,* Judgement (AC), para. 88.

soldiers from ESO does not support the very clear and specific allegation in the Indictment that soldiers from Ngoma Camp and *Interahamwe* were responsible for the said rapes. In the Chamber's view, the allegation that ESO soldiers committed rape in Butare in 1994 is a material fact that should have been pleaded in the Indictment, not a mere evidential detail that could be introduced at a later stage.

402. It is clear from the jurisprudence of the *ad hoc* Tribunals that in certain limited circumstances the Prosecution may cure a defective indictment by giving timely, clear and consistent notice to the Defence through subsequent communications such as the Pre-Trial Brief, witness statements, or the opening statement.[549] Thus, a vague or otherwise defective indictment can be cured through these means if it merely fails to set out the particulars of the Prosecution case with sufficient specificity. As stated by the ICTY Appeals Chamber, "the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defense."[550]

403. In the instant case, however, the Chamber is confronted with a very different problem. With respect to the rape charge, the Chamber is of the view that the Indictment is not vague. On the contrary, the Indictment clearly states that soldiers from Ngoma Camp committed rape. This is a clear and straightforward charge. There is no ambiguity in this. A careful consideration of all the charges contained in the Indictment reveals that the Prosecution clearly distinguished between the criminal acts attributed to soldiers from the Ngoma Camp and those attributed to ESO soldiers. There is specific reference to the Ngoma and ESO Camps in some charges while other charges refer only to one Camp and not to the other. Therefore, it cannot be said that it was a mistake on the part of the Prosecution to have listed only the Ngoma Camp under the rape charge. When the evidence was presented in Court during the trial, however, it turned out that it was not the soldiers from Ngoma Camp but those from the ESO Camp who had committed these acts. Lack of evidence to prove a charge does not make the charge defective.

404. For the Prosecution to turn around in its Pre-Trial Brief and state that the ESO soldiers as well as soldiers from Ngoma Camp and *Interahamwe* committed rape could be interpreted as a radical transformation of the Prosecution case. It is clear that the Accused did not have the opportunity to defend himself against such a fundamentally different case. The Chamber therefore considers that it would be prejudicial to consider the evidence of rape by ESO soldiers in light of the allegation in the Indictment.

405. It is clear from the Rules that the Prosecution cannot amend an existing charge in an indictment or introduce a new charge without following the proper procedure. Rule 50 deals with the amendment of indictments. Once the indictment is confirmed it can be amended only with leave of the Confirming Judge or the Trial Chamber, as the case may be. If new charges are added when the accused has already made an initial appearance before a Trial Chamber, a further appearance shall be held in order to enable the accused to enter a plea on the new charges.

406. These provisions would be null and void if the Prosecution could amend existing charges merely by giving notice in the opening statement or Pre-Trial Brief. As mentioned earlier, if the existing charge were merely vague or otherwise defective, such defects could be cured by providing timely, clear, and consistent notice. However, when these are new charges, the matter has to be referred to the Chamber to have the indictment amended.

407. It is generally alleged in the Indictment that the Accused was Interim Commander of ESO from about 7 April 1994. Thus the issue of his responsibility for the alleged criminal acts of his

[549] *Kupreškić,* Judgement (AC), para. 114; See also *Gacumbitsi* Judgement (AC), para. 55; *Ntakirutimana* Judgement (AC), para 27; *Niyitigeka* Judgement (AC), para. 195.
[550] *Kupreškić*, Judgement (AC), para. 88.

subordinates is an important matter that needs to be clearly spelt out in the Indictment, not a mere detail that can be added later at the convenience of the Prosecution. The Chamber recalls that the Prosecution sought leave to amend the Indictment, including a specific prayer to drop the rape charge, but its motion for amendment was denied on the ground, *inter alia*, that it came just before the commencement of the trial and that further delay in the opening of trial would prejudice the rights of the Accused.[551] The matter went up to the Appeals Chamber, which proceeded to elaborate on the distinctions between a new charge and the material facts underpinning an existing charge.[552] It should be noted, however, that the Prosecution did not seek in that instance to amend the rape charge.

408. To establish the rape charge, the Prosecution presented the evidence of three witnesses, viz, AFV, QY and TM, all alleged victims of rape. The Prosecution also presented Witnesses YAI, CCP and YAK to show that the Accused knew or should have known that the widespread rape of Tutsi women was taking place in Butare. The Defence did not present any witness to challenge the evidence on rape but argued that the Prosecution witnesses were not credible.

409. The Chamber has carefully considered the testimonies of Prosecution Witnesses AFV, QY and TM, and finds that their accounts of the rapes they endured are reliable. The Chamber fully understands the unique circumstances of rape victims and sympathises with them. However, in light of the very specific nature of the rape charge contained in the Indictment, and the nature of the evidence adduced at trial, the Chamber is of the view that the Prosecution has not proved beyond reasonable doubt that the Accused can be held responsible for the crime of rape as charged in Count 4 of the Indictment.

41.12.1.13. 5.12. Cruel Treatment of Tutsi Civilians by Soldiers

41.12.1.13.1.

41.12.1.13.2. 5.12.1. Indictment

410. Paragraph 3.47 reads:

> 3.47 During the events referred to in this Indictment, soldiers of the ESO and Ngoma Camp participated in the meting out of cruel treatment to Tutsi civilians by beating them with sticks, tree saplings and or rifle butts.

41.12.1.13.3. 5.12.2. Events at the Butare Cathedral and at ESO

41.12.1.13.4. 5.12.2.1. Evidence

41.12.1.13.5. Prosecution Witness YAO

411. Prosecution Witness YAO testified that on 17 May 1994, soldiers came to the Butare Cathedral and found her hiding in a cupboard located within the sacristy of the cathedral. They brought her out, and one of them called Gakwerere, forced her to roll in the mud. The other soldiers hit her and called her *Inyenzi*.[553]

412. YAO said the soldiers took her to the "bishop's house", from where they took another person out. She explained that when they arrived at the Bishop's house, some of the soldiers alighted from the

[551] *Prosecutor v. Muvunyi*, "Decision on the Prosecutor's Motion for Leave to File an Amended Indictment" (TC), 23 February 2005.
[552] *Prosecutor v. Muvunyi*, "Decision on Interlocutory Appeal" (AC), 12 May 2005.
[553] T. 21 March 2005, pp. 10, 11.

vehicle and went inside the house. Witness YAO was left in the vehicle with one soldier. The soldiers who went inside the house said they were going to look for *Inyenzi*, and returned with one person who they were beating, kicking and hitting with gun butts.[554] From the bishop's house, the soldiers drove with them to the nun's Convent, "the Convent of the *Petite Sœurs*", where they picked up two nuns. These nuns told Witness YAO that soldiers had killed people at the Convent.[555]

413. From the nun's Convent, the soldiers drove with them to ESO. Upon arrival at ESO, Lieutenant Gakwerere went to speak with Muvunyi. Gakwerere and Muvunyi then called one of the nuns who had been brought together with YAO. Even though YAO could not hear the question that was put to the nun by the soldiers, she heard the nun telling Gakwerere and Muvunyi that the people who had come to the Convent were unarmed refugees. Muvunyi also asked the nun why she did not make a list of all the refugees at the Convent, but she did not answer the question. YAO noted that Muvunyi was speaking in a "visibly angry" tone. She added that Muvunyi asked the soldiers to take the nun they had questioned back to the Convent, and Witnesses YAO and YAN to the Brigade.[556] YAO testified that Muvunyi was present when they were being taken away. She testified that the Brigade constituted two buildings in which people were jailed, and that it was very close to the ESO. She said it took them about four minutes to drive from ESO to the Brigade.

41.12.1.13.6. Prosecution Witness YAN

414. Witness YAN testified that on 6 April 1994 when President Habyarimana's plane was shot down, he lived in Gikongoro *préfecture*. Around 15 April, he moved to the Procure (*l'Économat général*).[557] Upon his arrival at the Procure, he found about 20 Tutsi refugees who had come there because they thought that the church buildings would not be attacked.[558]

415. YAN testified that when he got to Butare around 15 April, there was no violence.[559] However, around mid-May, he was arrested from his residence at the Procure by ESO soldiers under the command of Lieutenant Gakwerere. He explained that he knew the soldiers came from ESO because he had known Gakwerere for a long time. He also knew that at the material time, Ngoma Camp soldiers had been sent to the war front, and Butare town was therefore under the control of ESO soldiers.[560] YAN stated that at the time of his arrest, the soldiers accused him of being an *Inyenzi,* and that he had fired a gun. He denied that he ever owned a gun or fired one. He explained that the soldiers kicked him, hit him with gun butts, and threw him into the back of a single-cabin pick-up vehicle that belonged to the Nyiramasuhuko family. As a result of this treatment, he suffered multiple injuries to his face, his left side and his ribs. He was also wounded with a bayonet and told the Chamber the scar from that wound was still visible at the time of his testimony.

416. Witness YAN testified that when he was arrested at the Procure, some of the other refugees were killed. He said "I was arrested at the Procure and led outside that area to be placed in detention. It was said that I was an *Inyenzi* who had opened fire because a gunshot had been heard. So I was taken out of there. And other people who were there were killed."[561] YAN further testified that a guard at the Procure was shot dead when he attempted to resist the attack by the soldiers. According to YAN, the mission of the soldiers "was to commit genocide, to exterminate the Tutsis." He added that "all the people that they found were killed."[562]

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[554] T. 21 March 2005, p. 13.
[555] T. 21 March 2005, pp. 12, 13.
[556] T. 21 March 2005, p. 14.
[557] T. 4 May 2005, p. 4: "When I talk about the *Procure*, I'm talking about the *l'Économat général* which is very close to the Butare school complex. If you go a little lower, you get to the Butare health centre and *l'Économat* is opposite the Butare cathedral."
[558] T. 30 May 2005, pp. 4-5.
[559] T. 30 May 2005, p. 15.
[560] T. 30 May 2005, pp. 4-5.
[561] T. 30 May 2005, p. 4.
[562] T. 30 May 2005, p. 18.

417. According to Witness YAN, when he was thrown behind the pick-up truck, there was also a girl at the back of the truck who had been taken from the Butare Cathedral (Witness YAO). He said the two of them were taken together to the ESO where they found "a lot of soldiers and *Interahamwe* dressed in *kitenge*." He said some of the *Interahamwe* were armed with rifles, while others had machetes and clubs. Witness YAN testified that he was subjected to further mistreatment at ESO: "I was trampled upon, I was beaten, I was maltreated, and I was treated in a very inhumane way."[563] He said he appealed to one soldier whom he knew to intercede on his behalf, but the latter told him he had first to be questioned.

418. Witness YAN and the lady he came with in the pick-up (YAO) were subsequently taken to the Brigade and detained. He explained that the Brigade was located about 400 meters from ESO, and that it was near the Butare *préfecture* Office. He said that there were many other refugees in detention at the Brigade, and that while there, *gendarmes* would come and take out detainees. Whenever they did so, the *gendarmes* said it was Muvunyi who had ordered that specific persons be taken away. Witness YAN explained that a *gendarme* officer sat in an office next to the room where he was being detained, and whenever the phone rang, this officer would say it was Muvunyi who had telephoned to give orders that people be taken away. Witness YAN testified that those taken away in this manner never came back, "they were taken away to be killed".[564]

419. YAN informed the Chamber that he was released from detention as a result of intervention by someone who spoke to Muvunyi on his behalf. After his release, the *gendarmes* at the Brigade told him that he could not cross all the roadblocks and advised him to stay at the Brigade and die of hunger.[565] Undeterred by what the *gendarmes* had said, Witness YAN decided to leave the Brigade and head back to the Procure.

41.12.1.13.7. Defence Witness MO72

420. Defence Witness MO72 testified that on 17 May 1994, Lieutenant Gakwerere and one of his subordinates transported her and three other sisters from the Convent of the Little Sisters of Jesus Christ to ESO Camp.[566] They were taken in the back of a pick-up truck with three other individuals, including Callixte, and Witnesses YAN and YAO.[567] The witness recalled that when they arrived at the ESO, she saw three buses full of new recruits to be taken to the war front and other people whom she believed resided or worked at the ESO.[568]

421. She explained that Lieutenant Gakwerere told people at ESO that the nuns and other people aboard the truck had shot at the soldiers. The people who were in the buses came off and surrounded Witness MO72 and the other refugees brought to ESO by Gakwerere.[569] She explained that the crowd shoved the refugees, pulled at their clothes, called them *Inyenzis*, but did not strike them.[570] However, the witness admitted that one person attempted to attack YAN with a metallic implement.[571] She further stated that YAN asked a military Chaplain at ESO for assistance but the latter said he could not come to YAN's aid.[572]

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[563] T. 30 May 2005, pp. 6-7.
[564] T. 30 May 2005, pp. 13, 14 (I.C.S.).
[565] T. 30 May 2005, p. 10 (I.C.S.).
[566] T. 15 March 2006, p. 9 (I.C.S.).
[567] T. 15 March 2006, p. 12 (I.C.S.) and French transcripts p. 13 (I.C.S.). The witness gave the real names of Witnesses YAN and YAO in closed session.
[568] T. 15 March 2006, p. 13 (I.C.S.).
[569] T. 15 March 2006, p. 13 (I.C.S.).
[570] T. 15 March 2006, p. 15 (I.C.S.); p. 25 (cross-examination) (I.C.S.).
[571] T. 15 March 2006, p. 13 (I.C.S.).
[572] T. 15 March 2006, p. 13 (I.C.S.).

422. Witness MO72 also testified that Prosecution Witness YAO was never assaulted during the period they were at ESO. She added that YAO was not treated differently from any of the other persons arrested by the soldiers.[573] However the witness stated that YAO's clothes were wet but that she did not know how they got wet.[574]

423. The witness further explained that she had never met Tharcisse Muvunyi and never spoke to him while at ESO Camp.[575] According to her account, Lieutenant Gakwerere was the only person who came to speak to them. She added that the ESO Chaplain also stated that the nuns had reduced their Convent into an abode for *Inyenzi*. [576]

41.12.1.13.8. 5.12.2.2. Deliberations

424. The Chamber notes that Prosecution Witnesses YAO and YAN gave strikingly similar testimony about the date they were arrested, the identity of their attackers and their experiences at the time of arrest and subsequently at ESO and the *gendarmerie* Brigade. They both testified that the soldiers who arrested them were led by Lieutenant Gakwerere from ESO, that they were transported in the back of a pick-up truck, that they were beaten with rifle butts, kicked and trampled upon by the soldiers, and then taken to ESO. In particular, Witness YAO was asked to roll in the mud by Lieutenant Gakwerere while other soldiers kicked her and called her *Inyenzi*.

425. The Chamber considers that while Defence Witness MO72 denied that Prosecution Witnesses YAN and YAO were mistreated at ESO or during the course of their transportation to that Camp, when considered in its entirety, her evidence in fact corroborates that of the Prosecution witnesses. Defence Witness MO72 confirmed that she and the two Prosecution witnesses were among the people arrested and transported in the back of a pick-up truck to ESO Camp by soldiers led by Lieutenant Gakwerere on 17 May 1994. She further confirms that while at ESO, Witnesses YAN and YAO were pushed around by soldiers and *Interahamwe* militia and that YAN was threatened with a sharp object. MO72 also confirmed that the two Prosecution witnesses were transported from ESO and detained at the Brigade located some 400 metres from the ESO Camp.

426. Having considered all the evidence on this issue, the Chamber is satisfied beyond reasonable doubt that on or about 17 May 1994, Prosecution Witnesses YAO and YAN were arrested by ESO soldiers under the leadership of Lieutenant Gakwerere and severely beaten with rifle butts and other implements as a result of which Witness YAN sustained severe injuries on his head and abdomen. The Chamber is also satisfied that Witness YAO, a woman, was asked to roll in mud, beaten and called *Inyenzi*. Finally the Chamber finds as a fact that the persons who were responsible for the mistreatment of Witnesses YAO and YAN were subordinates of the Accused.

427. Taking all necessary factors into consideration, the Chamber is satisfied that the Prosecution has proved beyond reasonable doubt that the Accused knew about this attack and mistreatment of Tutsi civilians by his subordinates and did nothing to prevent it or to punish the perpetrators.

41.12.1.13.9. 5.12.3. Events at Beneberika Convent

41.12.1.13.10. 5.12.3.1. Evidence

[573] T. 15 March 2006, p. 15 (I.C.S.); p. 25 (cross-examination) (I.C.S.).
[574] T. 15 March 2006, p. 15 (I.C.S.); p. 25 (cross-examination) (I.C.S.).
[575] T. 15 March 2006, p. 16 (I.C.S.).
[576] T. 15 March 2006, p. 15 (I.C.S.).

41.12.1.13.11. Witness QCQ

428. Prosecution Witness QCQ testified that Beneberika Convent sheltered approximately 27 Tutsi refugees from Butare, Kigali and Gikongoro in April 1994.[577] She told the Chamber that several attacks were launched against the Convent during this time, the second of which was a large-scale strike that forced all occupants out.[578] During this assault, armed soldiers and *Interahamwe*, who were equipped with guns, clubs, machetes and dogs, forcefully entered the Convent and drove refugees out from their hiding places into the garden with their hands in the air.[579]

429. The witness further explained that the soldiers and *Interahamwe* sorted the refugees according to their *préfecture* of origin, beat them up, demanded to see their identity cards, and asked them to sing that the RPF was the source of all their problems.[580] The witness said that some refugees did not have an identity card, while other simply refused to present theirs.[581] The attackers forced some refugees to produce their cards. At other times, they simply labelled some refugees as *Inkotanyi* based on their physical appearance. According to the witness, the attackers referred to Tutsis as *Inkotanyi* and *Inyenzi*.[582] She also reported that some soldiers and *Interahamwe* confiscated property from the refugees.[583]

430. Witness QCQ recalled that "Karenzi's children," Solange, Marc and Thierry Karenzi, the youngest of whom was seven years old, were removed from their separate hiding places and beaten. When they arrived in the garden, Solange's clothes were torn and her head was bleeding, while Marc had a gash on his leg. Originally mistaken for Hutu, Thierry was spared at first, but eventually placed with those to be executed.[584] QCQ also explained that a group of children from Byumba were set aside except for Diane, Cécile and Théodise. After sorting out the refugees on the basis of ethnicity, the Tutsi refugees were loaded onto a Hilux vehicle, the assailants stepped on top of them and they drove away.[585] Later that day, the soldiers returned to fetch beer from the Convent and informed the inhabitants that they had killed the refugees.[586]

41.12.1.13.12. Witness QCM

431. Witness QCM testified at about 11.00 a.m. on 30 April 1994, a crowd of approximately 200 people. The armed attackers included 100 or more soldiers from ESO and Ngoma camps under the leadership of Lieutenant Hategekimana, along with 100 more civilians or *Interahamwe*.[587] QCM recalled that the soldiers carried firearms, while the civilians were armed with clubs and machetes.[588] The witness recalled that at the time of the attack there were about 40 sisters, and approximately 45 other refugees, the majority of whom were children, living at the Convent.[589]

432. After threatening to kill the nuns if they did not open the gates, the attackers entered the compound and fired shots in the air. As a result, other nuns came out from the dormitories.[590] The assailants claimed that they had come for all civilians who were in the building. The soldiers pulled individuals from their hiding places and subsequently separated refugees based on ethnicity and put

[577] T. 14 March 2005, pp. 25, 26.
[578] T. 14 March 2005, p. 26.
[579] T. 14 March 2005, pp. 25-26.
[580] T. 14 March 2005, p. 26.
[581] T. 14 March 2005, p. 27.
[582] T. 14 March 2005, p. 27.
[583] T. 14 March 2005, p. 27.
[584] T. 14 March 2005, p. 29.
[585] T. 14 March 2005, p. 29.
[586] T. 14 March 2005, p. 29.
[587] T. 11 July 2005, p. 5 (I.C.S.).
[588] T. 11 July 2005, p. 5 (I.C.S.).
[589] T. 11 July 2005, pp.7-8 (I.C.S.).
[590] T. 11 July 2005, p. 9 (I.C.S.).

the Tutsis aside.[591] According to QCM, one of the nuns who was a friend of Hategekimana, helped the latter to identity which refugees were Tutsi.[592]

433. Witness QCM reported that soldiers asked the nuns to present their identity cards. When the nuns refused, Hategekimana read from a document which he said was an arrest warrant from Tharcisse Muvunyi authorising him to arrest civilians from the Convent.[593] However, when QCM asked to see this document, Hategekimana refused to show it to her.[594]

434. QCM stated that the soldiers beat the Tutsi refugees as they were sorted from other civilians, loaded Tutsis onto a "GDK" vehicle and ordered them to lie down.[595] Then, along with a number of civilians, the soldiers stood on top of the refugees as they drove them away at around 1:00 p.m.[596] Witness QCM stated that she pleaded with Hategekimana to spare the children but the latter refused and told her that those who were handed over to the *Interahamwe* could not be saved.[597]

435. QCM testified that approximately 25 people that the soldiers took from the Convent on that day were never seen again.[598] She added that the soldiers returned to the Convent two hours later to collect some beer.[599] The witness asked them where they took the children. They responded that the children had been handed over to the *Interahamwe*.

41.12.1.13.13. 5.12.3.2. Deliberations

436. The Chamber has considered the evidence of Witnesses QCQ and QCM that sometime in April 1994, a group of armed soldiers and *Interahamwe* under the leadership of Lieutenant Hategekimana attacked Tutsi refugees sheltered at the Beneberika Convent. The group of refugees included at least 25 children from various *préfectures* in Rwanda. The nuns and other refugees, including children, were first sorted out based on their *préfecture* of origin, or on the basis of their ethnicity. The Tutsi refugees were consistently denigrated as *Inkotanyi* or *Inyenzi* and were set aside and maltreated by the soldiers and *Interahamwe* attackers. Witnesses QCQ and QCM gave similar accounts of the way the refugees were treated, including the fact that they were beaten, thrown in the back of a vehicle and trampled-upon by soldiers and *Interahamwe*, and that those who were taken away never returned and are presumed dead.

437. The Chamber believes that Prosecution Witnesses QCQ and QCM gave a frank and credible account of the events they witnessed at Beneberika Convent in April 1994. In particular, the Chamber finds that despite her young age (10 years) at the time of the events, Witness QCQ gave an accurate and coherent account of what she saw and experienced on that fateful day in April 1994. The Chamber therefore finds that soldiers under the leadership of Lieutenant Hategekimana, in the company of *Interahamwe* militia, attacked the Beneberika Convent in April 1994 during which they meted out cruel treatment to the refugees including many children.

41.12.1.13.14. 5.12.4. Events at the *Groupe scolaire*

41.12.1.13.15. 5.12.4.1. Evidence

[591] T. 11 July 2005, p. 9 (I.C.S.).
[592] T. 11 July 2005, p. 10 (I.C.S.).
[593] T. 11 July 2005, pp. 19-20.
[594] T. 11 July 2005, p. 10 (I.C.S.).
[595] T. 11 July 2005, p. 11 (I.C.S.).
[596] T. 11 July 2005, pp. 11, 13 (I.C.S.).
[597] T. 11 July 2005, pp. 10-11 (I.C.S.).
[598] T. 11 July 2005, p. 11 (I.C.S.).
[599] T. 11 July 2005, p. 14 (I.C.S.).

41.12.1.13.16. Prosecution Witness TQ

438. Prosecution Witness TQ testified that by 16 April 1994, about 700 people, including 400 orphans, 30 instructors and the elderly evacuated by the Red Cross, were transported to the *Groupe Scolaire* in Butare from Kacyiru, Kigali *préfecture*.[600]

439. At around 6:30 or 7:00 p.m. on 29 April 1994, a large-scale attack was launched on the *Groupe scolaire* complex. The witness testified that the assailants consisted of more than 50 armed soldiers from ESO. They were dressed in camouflage uniforms.[601] They gathered the refugees on the volleyball court, and began separating Tutsis from other people.[602] The soldiers set aside a number of people, including 18 orphans and 10 Red Cross employees who were presumed to be Tutsi. The soldiers then forced the Tutsi refugees to lie down on the floor, and proceeded to severely beat them up with the assistance of the *Interahamwe*. The refugees were then transported to Rwasave, and Witness TQ later learnt that they were all killed.[603] TQ estimated that more than 140 people were transported to Rwasave that day.[604]

41.12.1.13.17. Prosecution Witness QBE

440. Prosecution Witness QBE testified that the first attack on *Groupe Scolaire*, which took place during the second half of April 1994, was launched by a group of people who appeared to be led by an *Interahamwe*.[605] When the attack began, Prosecution Witness QBE came outside and was ordered to sit down in front of the principal's office.[606] The attackers led the refugees out of their dormitories and assembled them on a volleyball court. They separated the Tutsis from the Hutus by examining their identity cards or looking at their physical features.[607]

441. According to Prosecution Witness QBE, the second attack began late one evening during the second half of April 1994.[608] At about 5:00 p.m. he was preparing to leave the premises but encountered a camouflage vehicle with a soldier on board.[609] Witness QBE asked the soldier about what he was doing at the *Groupe scolaire*, but the soldier retorted that he knew QBE was a member of the RPF. At 6:00 p.m. the same day, other people assembled in the *Groupe Scolaire* and he realized that although it was possible to enter the compound, it was impossible to leave.[610] He therefore concluded that they had been attacked,[611] and that it was soldiers from the Ngoma Military Camp who had attacked them.[612]

442. The witness placed a telephone to the ESO Camp and asked to speak to the commander.[613] He was connected to someone he believed to be in charge and who he later learnt was Tharcisse Muvunyi.[614] QBE testified that Muvunyi promised to send troops to rescue them but that no one came.

443. The following morning, Lieutenant Gatsinzi arrived at the *Groupe scolaire* with a search warrant. QBE led the Lieutenant around the compound, opening a few rooms for him, but not the

[600] T. 27 June 2005, pp. 20-21 (I.C.S.).
[601] T. 27 June 2005, p. 26 (I.C.S.).
[602] T. 27 June 2005, p. 26 (I.C.S.).
[603] T. 27 June 2005, p. 28 (I.C.S.).
[604] T. 27 June 2005, p. 28 (I.C.S.).
[605] T. 16 June 2005, pp. 27-28 (I.C.S.).
[606] T. 16 June 2005, p. 28 (I.C.S.).
[607] T. 15 June 2005, p. 21 (I.C.S.).
[608] T. 15 June 2005, p. 22 (I.C.S.).
[609] T. 15 June 2005, p. 22 (I.C.S.).
[610] T. 15 June 2005, p. 22 (I.C.S.).
[611] T. 16 June 2005, p. 37 (I.C.S.).
[612] T. 15 June 2005, p. 26 (I.C.S.).
[613] T. 16 June 2005, p. 38 (I.C.S.).
[614] T. 15 June 2005, p. 24 (I.C.S.).

doors to rooms in which he knew people were hiding.[615] Lieutenant Gatsinzi marked those doors with a cross, and said he would come back later to check.[616] Prosecution Witness QBE further explained that as he left the building with Lieutenant Gatsinzi, he observed that soldiers had arrived and were in all corners of the *Groupe scolaire*.[617]

444. QBE stated that some *Groupe scolaire* teachers assisted Gatsinzi's troops and the *Interahamwe,* who eventually discovered some of the refugees, including some of the children from the orphanage in Kigali,[618] took them outside, asked for their identity cards, and separated the Tutsi from the Hutu.[619] The witness recalled that the soldiers and *Interahamwe* beat up the Tutsi refugees as they separated them from the Hutus.[620] Then they asked the refugees to lie down on the veranda of the office of the Director of the *Groupe scolaire*.[621] A total of about 100 Tutsi refugees were then loaded into two Mazda pickups and taken away.[622] From about 3.00 p.m., the vehicles made two trips, between which there was a time period of about 30 minutes.[623] Witness QBE added that due to the beatings the refugees received at the hands of the soldiers and *Interahamwe*, some of them were almost dead when they were taken away.[624]

41.12.1.13.18. Defence Witness MO38

41.12.1.13.19.

445. Witness MO38 testified that on the night of 28 April, while at the *Groupe scolaire*, she noticed that soldiers had encircled the complex.[625] At about 6:00 a.m. the following morning, all doors to the facility were locked. *Interahamwe* entered the *Groupe scolaire* and ordered the refugees to come out, while soldiers remained outside.[626] MO38 testified that it was the *Interahamwe* who were directing the people to lie down.[627] She also stated that she heard the soldiers saying they were coming from Gisenyi, that they were merciless and that they were not going to spare anyone. She further explained that Witnesses TQ and QBE were among the refugees who were tied and asked to lie on their stomach to prevent them from calling ESO. MO38's husband was lying about one metre from QBE and TQ. MO38 was able to observe the scene from a window.[628]

446. According to MO38, although Tharcisse Muvunyi did not send soldiers into the facility, he sent soldiers to guard the complex. She added that whenever the *Interahamwe* attacked the complex, people telephoned ESO and soldiers were sent to guard or protect the *Groupe Scolaire* from the *Interahamwe*.[629]

41.12.1.13.20. 5.13.4.2. Deliberations

447. The Chamber recalls its earlier conclusion that Witness MO38 was not credible with respect to her account of the role that soldiers played in the attack on *Groupe scolaire*. The Chamber will therefore base its findings on the evidence of Prosecution Witnesses TQ and QBE. From the evidence of those two witnesses, the Chamber is satisfied that during an attack on Tutsi refugees sheltered at the

[615] T. 15 June 2005, p. 27 (I.C.S.).
[616] T. 15 June 2005, p. 27 (I.C.S.).
[617] T. 16 June 2005, p. 45 (I.C.S.).
[618] T. 15 June 2005, p. 28 (I.C.S.).
[619] T. 15 June 2005, p. 28 (I.C.S.).
[620] T. 16 June 2005, p. 49 (I.C.S.).
[621] T. 15 June 2005, p. 28 (I.C.S.).
[622] T. 16 June 2005, p. 51 (I.C.S.).
[623] T. 16 June 2005, p. 51 (I.C.S.).
[624] T. 15 June 2005, p. 29 (I.C.S.); T. 16 June 2005, p. 52 (I.C.S.).
[625] T. 13 December 2005, pp. 32-33; T. 14 December 2005, pp. 17-18, 23 (Cross-examination).
[626] T. 13 December 2005, pp. 32-33; T. 14 December 2005, pp. 17-18 (Cross-examination).
[627] T. 13 December 2005, p. 35.
[628] T. 13 December 2005, pp. 33-34; T. 14 December 2005, p. 26 (Cross-examination).
[629] T. 14 December 2005, pp. 22-24 (Cross-examination); p. 30 (Question from the Bench).

Groupe scolaire complex on 30 April 1994, ESO soldiers under the leadership of Lieutenant Modeste Gatsinzi separated Tutsi refugees, including orphan children, from the other refugees, forced them to lie down on the floor of a volleyball court, and proceeded to severely beat them. Furthermore, the Chamber believes that those who were treated in this manner included at least 18 orphan Tutsi children, as well as employees of the Red Cross.

448. Moreover, it is the Chamber's belief that Muvunyi knew that this attack was planned or was taking place, but failed to take the necessary and reasonable measures to prevent it. The attackers were under Muvunyi's effective control because, as previously discussed,[630] they obeyed his instructions that members of the Bicunda family should not be killed. Therefore, if he had wanted to save the other refugees he could have done so. The Chamber finds that the Accused had the authority to prevent or stop the inhumane treatement of Tutsi civilians but failed to do so.

41.12.1.13.21. 5.12.5. Events at Various Roadblocks in Butare and Gikongoro

41.12.1.13.22. 5.12.5.1. Evidence

41.12.1.13.23. Prosecution Witness YAA

449. YAA testified that one roadblock was erected in the Arab Quarters, either between 7 and 8 April or even in the night of 6 April.[631] YAA saw it between 6 and 12 April when he went to a shop. He recalled that it was manned by 12 ESO soldiers, wearing dark green trousers and shirts, a camouflage jacket and shoes and caps that were normally worn by soldiers. They were armed with personal weapons. Each soldier had a loaded gun. The witness told the Chamber that people were intercepted at the roadblock and asked to show their identity cards. According to YAA's account, some people were struck with weapons.[632] Most of the persons intercepted were Tutsi and they were beaten up while Hutu were allowed to pass.[633] YAA did not know specifically why the soldiers targeted Tutsis, but surmised that Tutsis were generally perceived as RPF accomplices.[634]

41.12.1.13.24.

41.12.1.13.25. Prosecution Witness QY

450. Witness QY testified that she also encountered the Arab Quarters' roadblock in early April 1994.[635] As she approached the checkpoint, she recalled that ESO soldiers asked her where she was coming from and where she was going. She answered that she was coming from the University Hospital, where she had gone to receive treatment for an injury she had sustained at the hand of some Hutus. According to her account, the soldiers allowed her to pass through the roadblock as she stated that her father was a Hutu and her mother was a Tutsi. However, they undressed her and mocked various sections of her anatomy.[636]

[630] See the Chamber's discussion of the attack at the *Groupe scolaire*.
[631] T. 8 March 2005, p. 42 (I.C.S.).
[632] T. 8 March 2005, p. 42 (I.C.S.).
[633] T. 8 March 2005, p. 43 (I.C.S.).
[634] T. 8 March 2005, pp. 41-43 (I.C.S.).
[635] T. 8 June 2005, p. 17.
[636] T. 8 June 2005, p. 18.

41.12.1.13.26. Prosecution Witness AFV

41.12.1.13.27.

451. Witness AFV testified that at about 1:00 p.m. on 20 April 1994, she came up to a roadblock at the University Hospital laboratory. She stated that four armed soldiers carrying cartridge belts and grenades were manning the roadblock.[637] The soldiers asked passers-by to present identity cards and separated the Hutu from the Tutsi.[638] Hutu were allowed to pass, but Tutsi were asked to stay and were searched.[639]

452. AFV said that the soldiers searched her, beat her, and asked if she thought she was extraordinary. One of the soldiers said, "Let us look at this Tutsi's sexual organs. How come you are working when the others aren't?"[640]

453. The witness stated that two armed soldiers then accompanied her from the roadblock, claiming that they would accompany her home, but instead they took her to the woods.[641] As they walked, they beat her and stated that they were going to look at her sexual organ to see to what extent she was extraordinary.[642] AFV further testified that they then undressed her by taking off her underpants while she was sitting, tied her with her sweater, and blindfolded her with her other clothing.[643] She asked that he should kill her rather than rape her. One of the soldiers hit her head against the ground and she lost consciousness.[644] When she woke up, she realized she was bleeding from her sexual organ, and could not bring her legs together.

41.12.1.13.28. Defence Witness MO15

454. Defence Witness MO15 reported that during April 1994 roadblocks were setup at the Arab Quarters, at the Hotel Faucon, at the crossroads between Gikongoro and Kigali, and another at *Chez Bihira*.[645] According to Witness M015, the company responsible for providing personnel for the roadblocks was the *compagnie d'intervention*, which was commanded by Lieutenant Gakwerere from ESO.[646]

455. Although he did not know what instructions were given to the personnel manning the roadblocks, he knew that the soldiers were there to ensure security in Butare town.[647] He explained that the soldiers were asking for the identification documents of people who passed through the roadblocks.[648] Soldiers were always allowed to pass through the roadblocks but he did not know whether civilians who did not have identification papers could also pass the checkpoints.[649] Under cross-examination the witness explained that it was common knowledge that their enemies were infiltrating among the refugees and were carrying out their terrorist acts in the country; he testified that their enemies were the RPF.[650]

41.12.1.13.29. 5.12.5.2. Deliberations

[637] T. 21 June 2005, p. 12.
[638] T. 21 June 2005, p. 13.
[639] T. 21 June 2005, p. 13.
[640] T. 21 June 2005, p. 14.
[641] T. 21 June 2005, p. 14.
[642] T. 21 June 2005, pp. 14-15.
[643] T. 21 June 2005, p. 16.
[644] T. 21 June 2005, p. 16.
[645] T 9 March 2006, p. 4 (I.C.S.).
[646] T 9 March 2006, p. 4 (I.C.S.).
[647] T 9 March 2006, p. 6 (I.C.S.).
[648] T 9 March 2006, p. 6 (I.C.S.).
[649] T 9 March 2006, p. 6 (I.C.S.).
[650] T 10 March 2006, p. 14 (I.C.S.).

456. Having considered the evidence of Prosecution Witnesses YAA, AFV, and QY and Defence Witness MO15, the Chamber is satisfied beyond reasonable doubt that ESO soldiers stopped, searched and beat many Tutsi civilians at various roadblocks throughout Butare from April to June 1994. Prosecution Witnesses AFV and QY were among the victims of such mistreatment. Due to the large number of roadblocks set up in Butare, the widespread nature of attacks on Tutsis at these roadblocks, the proximity of some of the roadblocks to the ESO Camp, and the fact that ESO soldiers were routinely deployed to man the roadblocks, the Chamber concludes that Muvunyi had reason to know about them. As Commander of ESO Camp, Muvunyi had the human and material resources at his disposal to put a stop to the illegal activities of his subordinates at the roadblocks, but failed to do so. He also failed to punish their criminal conduct.

41.12.2.Chapter III : The Law

457. In the following sections, the Chamber will discuss the applicable law on individual criminal responsibility relevant to this case, before addressing the specific crimes charged in the Indictment and the Chamber's legal findings on the liability of the Accused.

41.13. 1. Individual Criminal Responsibility under Article 6 (1) and 6 (3)

458. In the Indictment and Schedule of Particulars, the Prosecution charged the Accused with individual criminal responsibility pursuant to Article 6 (1) for genocide, or in the alternative complicity in genocide, direct and public incitement to commit genocide, and for rape as a crime against humanity. The Accused is also charged with command responsibility under Article 6 (3) for genocide, or complicity in genocide, as well as rape and other inhumane acts as crimes against humanity.[651]

459. The principle of individual responsibility for serious violations of international criminal law is one of the key indicators of a paradigm shift from a view of international law as law exclusively made for and by States, to a body of rules with potential application to individuals. It is now recognized that the principle of individual responsibility for serious violations of international law, affirmed in Article 6 (1) of the Statute, is reflective of customary international law.[652] Indeed, it has been established since the Versailles Treaty and especially the Nuremberg and Tokyo trials, that crimes under international law are physically committed by individuals and that irrespective of their official status, only by punishing such individuals for their criminal conduct, can the fundamental values of international law have meaning and efficacy.

41.13.1.1. Article 6 (1)

460. The jurisprudence of the *ad-hoc* Tribunals has clearly established that criminal liability under Article 6 (1) is incurred not only by individuals who physically commit a crime, but also by those who are accomplices because they participated in or otherwise contributed to the commission of a crime by others.[653] Such forms of participation include planning, instigating, ordering, or aiding and abetting the principal offender's actions. Moreover, the participation of the Accused must have substantially

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[651] *Prosecutor v. Muvunyi*, Indictment, filed on 23 December 2003; Schedule of Particulars filed on 28 February 2005. Article 6 (1) of the Statute of the ICTR provides: "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."
Article 6 (3) provides: "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 the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable meansures to prevent such acts or to punish the perpetrators thereof."

[652] *Delalić et al.* (*Čelebiči*), Judgement (TC), para 321 and sources cited therein.

[653] *Akayesu*, Judgement (TC), para. 473; *Kayishema and Ruzindana*, Judgement (TC), para. 196; *Semanza*, Judgement (TC), para. 377; *Delalić et al.* (*Čelebiči*), Judgement, (TC), para 319.

contributed to, or have had a substantial effect on, the completion of the crime.[654] The Chamber notes that accomplice liability under Article 6 (1) is different from the substantive crime of complicity in genocide under Article 2 (3) (e) of the Statute.

461. The mental element required for responsibility under Article 6 (1) depends on the form of participation alleged by the Prosecution. An accused who is alleged to have "committed" an offence, in the sense of direct physical perpetration, must possess the requisite *mens rea* for the underlying offence.[655] Where it is alleged that the accused participated as an accomplice in the commission of a crime by another, his responsibility under Article 6 (1) will depend upon whether the Prosecution proves that he was aware of the *mens rea* of the principal perpetrator.[656] The requirement that the Accused must have knowledge of, rather than share, the principal perpetrator's *mens rea*, also applies to a charge of aiding and abetting genocide.[657]

462. Having analysed the general requirements for individual responsibility under Article 6 (1), the Chamber will now discuss the various forms of participation as laid down in the jurisprudence. The Chamber's discussion will be limited only to the forms of participation relevant to the present case.

41.13.1.1.1. Committing

463. Generally speaking, "committed" under Article 6 (1) has been interpreted to mean "direct and physical perpetration" of the crime by the accused himself or his culpable omission to fulfil a duty imposed by law and attracting a penal sanction. It also includes participation in the commission of a crime by way of joint criminal enterprise.[658] Since joint criminal enterprise is not pleaded in the present case, the Chamber need not address it in detail. As already discussed, an accused who is alleged to have "committed" an offence, in the sense of direct physical perpetration, must possess the requisite *mens rea* for the underlying offence.[659]

41.13.1.1.2. Instigating

464. To ground individual responsibility for instigation pursuant to Article 6 (1), the Accused must have encouraged, urged, or otherwise prompted another person to commit an offence under the Statute. Such instigation may arise from a positive act or a culpable omission. The instigation of the Accused must have a substantial nexus to the actual commission of the crime. Instigation differs from incitement in that it does not have to be direct or public. Therefore, private, implicit or subdued forms of instigation could ground liability under Article 6 (1) if the Prosecution can prove the relevant causal nexus between the act of instigation and the commission of the crime.[660]

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[654] *Kayishema and Ruzindana*, Judgement (TC), para. 207; affirmed by the Appeals Chamber, at para. 186; *Semanza*, Judgement (TC) para. 379; *Musema*, Judgement (TC) para. 126; *Kajelijeli*, Judgement (TC), para. 759.

[655] *Semanza*, Judgement (TC), para. 387; *Kayishema and Ruzindana*, Judgement (AC), para. 187: "… any finding of direct commission requires the direct personal or physical participation of the accused in the actual acts which constitute a crime under the Statute, together with the requisite knowledge."

[656] *Kayishema and Ruzindana*, Judgement (AC), para. 186; *Aleksovski*, Judgement (AC), para. 162; *Tadić*, Judgement (AC), para. 229; *Blaškić*, Judgement (AC), paras. 46, 49, 50.

[657] *Ntakirutimana*, Judgement (AC), para. 500, 501 and authorities cited therein; *Krstić*, Judgement (AC), paras. 140, 143. But see G. Mettraux, *International Crimes and the ad-hoc Tribunals,* 2005, p 287, who expresses "serious doubt" about the correctness of this position and suggests that a conviction for aiding and abetting genocide, should in certain circumstances, require proof that the aider and abettor possessed the specific intent to commit genocide.

[658] *Gacumbitsi*, Judgement (AC), para. 60; *Ntakirutimana*, Judgement (AC), para. 462; *Kayishema and Ruzindana*, Judgement (AC), para. 187, citing with approval *Tadić*, Judgement (AC), para. 188. See also *Simba*, Judgement (TC), para. 385; *Kajelijeli*, Judgement (TC), para. 764; *Kamuhanda*, Judgement (TC), para. 595.

[659] *Semanza*, Judgement (TC), para. 387; *Kayishema and Ruzindana*, Judgement (AC), para. 187: "… any finding of direct commission requires the direct personal or physical participation of the accused in the actual acts which constitute a crime under the Statute, together with the requisite knowledge."

[660] *Akayesu*, Judgement (TC), para. 482; *Bagilishema*, Judgement (TC), para. 30; *Kamuhanda*, Judgement (TC), para. 593; *Semanza*, Judgement (TC), para. 381, *Kajelijeli*, Judgement (TC), para. 381.

465. The *mens rea* required to establish a charge of instigating a statutory crime is proof that the Accused directly or indirectly intended that the crime in question be committed and that he intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of the crime would be a probable consequence of his acts.[661]

466. The instigation of the accused must have a substantial effect on the actual commission of the crime and represents a general form of participation relevant to every crime in the Statute. However, direct and public incitement is only relevant in the context of genocide and it is criminalised as such. The Prosecution must therefore prove that a person accused of direct and public incitement to commit genocide shared the special intent of the principal perpetrator.

41.13.1.1.3. Ordering

467. Ordering under Article 6 (1) requires that a person in a position of authority uses that position to issue a binding instruction to or otherwise compel another to commit a crime punishable under the Statute.[662] In *Semanza*, the Appeals Chamber held that "no formal superior-subordinate relationship between the Accused and the perpetrator is required" to establish the *actus reus* of "ordering" under Article 6 (1).[663] However, proof of such a relationship may be evidentially relevant to show that the person alleged to have issued the order, was in a position of authority.

468. The responsibility for ordering the commission of a crime could also be proved by circumstantial evidence, but as required by the jurisprudence, the Chamber will thoroughly evaluate such evidence and treat it with caution.

41.13.1.1.4. Aiding and Abetting

41.13.1.1.5.

469. Aiding and abetting reflect forms of accomplice liability. The aider and abettor is usually charged with responsibility for providing assistance that furthers the principal perpetrator's commission of a crime. It is therefore required that the conduct of the aider and abettor must have a substantial effect on the commission of the crime by the principal perpetrator, although it need not constitute an indispensable element of the ultimate crime.[664]

470. The jurisprudence has been fairly consistent in interpreting "aiding and abetting" as distinct legal concepts. The former implies assistance, and the latter implies facilitating, encouraging, or advising the commission of a crime.[665] The mental element required for liability as an aider and abettor is knowledge of the Accused that his conduct (either a positive act or culpable omission) assists the principal perpetrator in the commission of the crime.[666] With respect to aiding and abetting genocide, the only mental element required is proof that the Accused knew of the genocidal intent of the actual perpetrator, but he need not share this specific intent.[667]

471. Aiding and abetting genocide refers to "all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of

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[661] *Bagilishema*, Judgement (TC), para. 31. See also *Blaskic*, Judgement (TC), para 278; *Kordić and Cerkez*, Judgement (TC), para. 386, 387; *Naletilić and Martinović*, Judgement, (TC), para. 60.
[662] *Bagilishema*, Judgement (TC), para. 30.
[663] *Semanza*, Judgement (AC), para. 361, citing *Kordić and Čerkez*, para. 28.
[664] *Gacumbitsi*, Judgement (AC), para. 140; *Bagilishema*, Judgement (TC), para. 33, relying upon *Furundžija*, Judgement (TC), para. 199, to the effect that the conduct of the aider and abettor is not a *conditio sine qua non* for the commission of the crime.
[665] *Semanza*, Judgement (TC), para. 384; *Kamuhanda*, Judgement (TC), para. 596; *Rutaganda*, Judgement (TC), para. 42, 43.
[666] *Kajelijeli*, Judgement (TC), para. 768; *Kamuhanda*, Judgement (TC), para. 599.
[667] *Krstić*, Judgement (AC), paras. 140, 143.

genocide."[668] Although the terms aiding and abetting may appear synonymous, they are in fact different. "Aiding means giving assistance to someone. Abetting, on the other hand, would involve facilitating the commission of an act by being sympathetic thereto".[669] Thus, individual criminal responsibility can be incurred where there is either aiding or abetting, but not necessarily both. Besides, the aider or abettor need not be present during the commission of the crime.[670] Additionally, the ICTY Appeals Chamber has stated that in order for an accused person to be convicted of aiding and abetting the commission of a crime, it must be established that he had knowledge that the principal perpetrator(s) intended to commit the underlying crime.[671]

472. Liability for aiding and abetting can also be incurred by way of omission such as the case of the so-called "approving spectator" where a person in a position of authority is present either at the scene of the crime or within its immediate vicinity, under circumstances where his presence leads the perpetrators to believe that he approved, encouraged or was giving moral support to their actions. The *mens rea* required for liability as an approving spectator is knowledge on the part of the Accused that the perpetrators would see his presence as approval or encouragement.[672]

41.13.1.2. Article 6 (3)

473. Article 6 (3) of the Statute lays down the principle of superior or command responsibility which is well established in customary international law and specifically mentioned in the Geneva Conventions on international humanitarian law. While the principle was initially applied to the responsibility of military commanders for the criminal actions of their subordinates during war (hence the term "command responsibility"), it is now clearly established that both civilian and military superiors may, under appropriate circumstances, be held responsible for the actions of those under their authority or command.[673] In *Kayishema and Ruzindana,* the Trial Chamber concurred with the distinction drawn in the Rome Statute of the International Criminal Court (the "ICC") with respect to the mental element required for superior responsibility of military commanders *vis-à-vis* other superiors.[674] The Chamber in that case noted that Article 28 of the Statute of the ICC imposes a more active duty on military superiors to control the activities of subordinates under their effective command and control where they "knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes." Under such circumstances, the military commander is under an obligation to take all necessary and reasonable measures to prevent or punish criminal acts committed by his subordinates. On the other hand, non-military superiors are only expected to have known or consciously disregarded information which clearly indicated that their subordinates were committing or about to commit crimes. The Chamber agrees with this distinction and notes that the nature of military service and discipline is consistent with the expectation that superior military officers have a more active duty to inquire about the possible criminal behaviour of men under their command and to prevent or punish such behaviour when it occurs.

474. Irrespective of the civilian or military status of the Accused, the Prosecution must prove four essential elements in order to establish liability under Article 6 (3). It must lead evidence that proves beyond reasonable doubt that the Accused was the superior of the actual perpetrators of an offence punishable under the Statute; that he knew or had reason to know that a criminal act was about to be or

[668] *Blagojevic and Jokic*, Judgement (TC), 2005, para. 777; See also *Brdjanin and Talić*, Judgement (TC), para. 729; *Krnojelać*, Judgement (TC), paras. 88-90.
[669] *Akayesu*, Judgement (TC), para. 484. See also *Semanza*, Judgement (TC), para. 384.
[670] *Akayesu*, Judgement (TC), para. 484.
[671] *Vasiljević*, Judgement (AC), para. 142.
[672] *Akayesu*, Judgement (TC), para. 692; *Bagilishema*, Judgement (TC), paras. 34, 36.
[673] *Akayesu*, Judgement (TC), para. 491 suggesting that the application of superior responsibility to civilians is contentious. However, in *Kayishema and Ruzindana*, *Musema*, and *Kajelijeli*, the ICTR held civilian superiors responsible for the actions of their subordinates under Article 6 (3). See also the *Celebici* Case, para. 378 where the ICTY Trial Chamber stated that "… the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commander."
[674] *Kayishema and Ruzindana*, Judgement (TC), paras. 227, 228.

had been committed; that he had effective control over the perpetrators in the sense of the material ability to prevent or punish their crimes; and that he did not take necessary and reasonable measures to prevent or punish the commission of the crime.[675]

475. While the formal legal status of the Accused may be relevant to the determination of effective control, the power to prevent or punish cannot be inferred solely on the basis of the existence of formal status. Indeed, as stated by the Appeals Chamber in the *Kajelijeli* Judgement, power or authority for the purposes of Article 6 (3) responsibility can be attributed to superiors who hold their positions either on a *de jure* or a *de facto* basis.[676] For this purpose, effective control reflects the superior's material ability to prevent or punish the commission of offences by his subordinates. Where *de jure* authority is proved, a court may presume the existence of effective control on a *prima facie* basis. Such a presumption can, however, be rebutted by showing that the superior had ceased to possess the necessary powers of control over subordinates who actually committed the crimes.[677]

41.14.

41.15. 2. Genocide

41.15.1.1.

476. In Count 1 of the Indictment, the Prosecution charges the Accused with genocide following a series of specifically described acts or omissions through which he is alleged to be responsible for killing and/or causing serious bodily and mental harm to members of the civilian Tutsi population, with the intent to destroy, in whole or in part, the Tutsi ethnic group. These charges are pursuant to Article 6 (1) of the Statute, which holds the Accused individually responsible for his alleged direct participation in the crime, and Article 6 (3), which holds him individually responsible as a superior for the crimes allegedly committed by his subordinates.

477. The Statute provides a list of specific types of conduct which constitute the *actus reus* of genocide. Under Article 2 (2) of the Statute,[678] 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 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.

478. Because of its element of *dolus specialis* (special intent), which requires that the crime be committed with the specific intent to destroy in whole or in part, a national, ethnic, racial or religious group as such, genocide is considered a unique crime.[679]

41.15.1.2. Mens Rea

41.15.1.3.

479. For an accused person to be found guilty of the crime of genocide, it must be proved that he possessed the requisite *mens rea* in addition to committing any of the genocidal acts listed in Article 2 of the Statute.[680] Therefore, it must be established that he committed any of the enumerated acts in

[675] *Gacumbitsi*, Judgement (AC), para. 143; *Bagilishema*, Judgement (AC), para. 35; *Delalić et al.* (*Čelebiči*), Judgement (AC), para. 182 ff; *Blaškić*, Judgement (AC), para. 53-85.
[676] *Kajelijeli*, Judgement (AC), para. 85.
[677] *Delalić et al.* (*Čelebiči*), Judgement (AC), para. 197.
[678] Based on Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention"), adopted by the United Nations General Assembly on 9 December 1948. The Genocide Convention is considered part of customary international law, as reflected in the advisory opinion issued in 1951 by the International Court of Justice on reservations to the Genocide Convention.
[679] *Serushago*, Judgement (TC), para. 15; *Rutaganda*, Judgement (TC), para. 59.
[680] *Semanza*, Judgement (TC), paras. 311-313.

Article 2 (2) with the specific intent to destroy, in whole or in part, a group, as such, which is defined by one of the protected categories of nationality, race, ethnicity or religion.[681] While there is no upper or lower limit to the number of victims from the protected group, the Prosecution must prove beyond reasonable doubt that the perpetrator acted with the intent to destroy at least a substantial part of the group.[682] Furthermore, an accused can be found guilty of committing genocide even if his personal motivation went beyond the criminal intent to commit genocide.[683]

480. In *Akayesu*, the Trial Chamber noted that in the absence of a confession or other admission, it is inherently difficult to establish the genocidal intent of an accused. At the same time, it noted that a Chamber may make a valid inference about the mental state of the accused on the basis of a number of factors.[684] Thus, where it is impossible to adduce direct evidence of the perpetrator's intent to commit genocide, such intent may be inferred from the surrounding facts and circumstances.[685] In attempting to establish genocidal intent, the Chamber can rely on a variety of factors including the overall context in which the crime occurred, the systematic targeting of the victims on account of their membership in a protected group, the fact that the perpetrator may have targeted the same group during the commission of other criminal acts, the scale and scope of the atrocities committed, the frequency of destructive and discriminatory acts, whether the perpetrator acted on the basis of the victim's membership in a protected group and whether the perpetrator's intent was to destroy that group in whole or in part, as such.[686]

481. The Chamber concurs with this reasoning and will be guided by the above jurisprudence in determining whether the Accused in this case possessed specific genocidal intent.

41.15.1.4. "To Destroy"
41.15.1.5.

482. Article 2 of the Statute requires a showing that the perpetrator committed any of the enumerated acts with the intent to destroy a group. Trial Chambers at the Tribunal have tended to interpret the term broadly so that it not only entails acts that are undertaken with the intent to cause death but also includes acts which may fall short of causing death.[687]

41.15.1.6. "In Whole or in Part"

483. In order for an accused person to be convicted of genocide, the Prosecution must prove beyond a reasonable doubt that the accused acted with the intent to destroy the group as such, in whole or in part.[688] At the very least, it must be shown that the intent of the perpetrator was to destroy a substantial part of the group,[689] regardless of the number of victims actually involved.[690]

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[681] Article 2 (2) of the Statute; *Simba*, Judgement (TC), para. 412; *Ndindabahizi*, Judgement (TC), paras. 453-454; *Ntagerura et al*., Judgement (TC), para. 662. See also *Niyitegeka*, Judgement (AC) para. 48; *Ntakirutimana*, Judgement (TC), para. 784; *Bagilishema*, Judgement (TC), paras. 60-61; *Musema*, Judgement (TC), para. 164; *Rutaganda*, Judgement (TC), para. 49; *Kayishema and Ruzindana*, Judgement (TC), para. 91; *Akayesu*, Judgement (TC), para. 517.
[682] *Simba*, Judgement (TC), para. 412; *Semanza*, Judgement (TC), para. 316.
[683] *Ntakirutimana*, Judgement (AC), paras. 302-304; *Niyitegeka*, Judgement (AC), paras. 48-53.
[684] *Akayesu*, Judgement (TC), para. 523. See also *Bagilishema*, Judgement (TC), paras. 62-63; *Musema*, Judgement (TC), paras. 166-167; *Rutaganda*, Judgement (TC), paras. 61-63; *Kayishema and Ruzindana*, Judgement (TC), para. 93; *Jelišić*, Judgement (TC), para. 73.
[685] *Simba*, Judgement (TC), para. 413; *Kayishema and Ruzindana,* Judgement (Reasons) (AC), para. 159; *Rutaganda*, Judgement (AC), para. 525; *Gacumbitsi*, Judgement (AC), para. 40, noting that "by its very 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." See also *Krstić*, Judgement (AC), para. 34; *Jelisić*, Judgement (AC), para. 47.
[686] *Semanza,* Judgement (AC), paras. 261-262; *Rutaganda*, Judgement (AC), para. 525; *Ndindabahizi*, Judgement (TC), paras. 454; *Ntagerura et al*., Judgement (TC), para. 663.
[687] *Kayishema and Ruzindana*, Judgement (TC), para. 95;
[688] *Bagilishema*, Judgement (TC), para. 58; *Musema*, Judgement (TC), para. 165; *Rutaganda*, Judgement (TC), para. 60; *Kayishema and Ruzindana*, Judgement (TC), paras. 95, 96, 98; *Akayesu*, Judgement (TC), para. 521.
[689] *Bagilishema*, Judgement (TC), para. 64.
[690] *Semanza*, Judgement (TC), para. 316.

41.15.1.7.
41.15.1.8. Protected Groups

484. The jurisprudence of the Tribunal indicates that although the Statute does not clearly establish the criteria for determining protected groups under Article 2, the Trial Chambers have tended to decide the matter on a case-by-case basis, taking into consideration both the objective and subjective particulars, including the historical context and the perpetrator's intent.[691] In *Karemera*, the Appeals Chamber upheld the Trial Chamber's decision taking judicial notice of "the existence of the *Twa*, *Tutsi* and *Hutu* as protected groups falling under the Genocide Convention."[692] It is not disputed in the present case that the Tutsi are members of a protected group under the Statute.

41.15.1.9. "As Such"

485. The term "as such" has been interpreted to mean that the prohibited act must be committed against a person based on that person's membership in a specific group and specifically because the person belonged to this group, such that the real victim is not merely the person but the group itself.[693]

41.15.1.10. Killing Members of the Group
41.15.1.11.

486. In addition to establishing that an accused person possessed the requisite intent to commit genocide, the Prosecutor must also show that the accused intentionally killed one or more members of the group, and that the victim or victims belonged to the targeted protected group. A showing of premeditation is not necessary.[694]

41.15.1.12. Causing Serious Bodily or Mental Harm

487. Although the Statute does not provide definitions for the terms "serious bodily harm" and "serious mental harm", the various Trial Chambers have concluded that the intent of the framers was to punish serious acts of physical violence that do not necessarily result in the death of the victim. On the one hand, serious bodily harm has been held to include acts of sexual violence, ones that seriously injure the health of the victim, cause disfigurement, or result in serious injury to the victim's senses or organs.[695] An accused can be found guilty of causing serious bodily harm even if the injury suffered by the victim is not of a permanent or irremediable nature.[696] On the other hand, the term "serious mental harm" has been interpreted to mean a significant injury to the mental faculties of the victim.[697] For an accused to be convicted of causing serious bodily or mental harm under the Statute, it must be shown that the perpetrator, in addition to possessing the requisite *mens rea* for genocide, acted with intent to

[691] See, e.g., *Bagilishema*, Judgement (TC), para. 65; *Musema*, Judgement (TC), paras. 161-163; *Rutaganda*, Judgement (TC), paras. 56-58; *Kayishema and Ruzindana*, Judgement (TC), para. 98; *Akayesu*, Judgement (TC), para. 702. See also *Jelišić*, Judgement (TC), paras. 69-72 (using a subjective approach to determine definition of a group while holding that the intent of the drafters of the Genocide convention was that groups were to be defined objectively).
[692] *Karemera et al.*, "Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice" (AC), 16 June 2006, para. 25; "Decision on Prosecution Motion for Judicial Notice" (TC), 9 November 2005, para. 8.
[693] *Niyitigeka*, Judgement (TC), para. 410; *Akayesu*, Judgement (TC), para. 521.
[694] *Bagilishema*, Judgement (TC), paras. 55, 57-58; *Musema*, Judgement (TC), para. 155; *Rutaganda*, Judgement (TC), paras. 49, 50, 60; *Kayishema and Ruzindana*, Judgement (TC), paras. 99, 103; *Akayesu*, Judgement (TC), paras. 499-501; *Semanza*, Judgement (TC), para. 319. See also *Kayishema and Ruzindana*, Judgement (AC), para. 151.
[695] Kayishema and Ruzindana, Judgement (TC), para. 109; Semanza, Judgement (TC), para. 320. See also the Report of the International Law Commission on the Work of its Forty-Eighth Session 6 May – 26 July 1996, UN GAOR International Law Commission, 51st Sess., Supp. N°10, p. 91, UN Doc. A/51/10 (1996) ("The bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part.").
[696] *Bagilishema*, Judgement (TC), para. 59; *Musema*, Judgement (TC), para. 156; *Rutaganda*, Judgement (TC), para. 51; *Kayishema and Ruzindana*, Judgement (TC), para. 108; *Akayesu*, Judgement (TC), para. 502.
[697] *Kayishema and Ruzindana*, Judgement (TC), para. 110; *Semanza*, Judgement (TC), para. 321.

cause such harm to one or more members of the protected group in question and that the victim or victims did in fact belong to the targeted group.[698]

41.15.1.13. Other Enumerated Acts

488. The other acts of genocide enumerated in Article 2 (2) of the Statute, to wit, deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group, are not at issue in the present case and therefore will not be discussed by the Chamber.

41.15.1.13.1. Findings on the Accused's Responsibility for Genocide

489. The Prosecution alleges in Count 1 of the Indictment that pursuant to Article 6 (1) of the Statute, the Accused bears individual criminal responsibility for various acts of genocide.

490. To establish the Accused's individual criminal responsibility pursuant to Article 6 (1) of the Statute, the Prosecution relies on Paragraphs 2.2, 2.3, 3.10 (ii)-3.10 (v), 3.15, 3.17, 3.19, 3.20-3.30, 3.31, 3.32, 3.33, 3.34, 3.36, 3.40, 3.41-3.41 (i), 3.46, 3.48, and 3.52 of the Indictment.

491. The Prosecution also charges the Accused with genocide pursuant to Article 6 (3) of the Statute. Under this provision, the fact that any of the crimes enumerated in Articles 2 to 4 "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."

492. In alleging the Accused's superior responsibility pursuant to Article 6 (3) of the Statute, the Prosecution relies on Paragraphs 2.2, 2.3, 3.10 (ii)-3.10 (v), 3.17, 3.19, 3.20-3.30, 3.31, 3.32-3.34 (i), 3.35-3.43, 3.45 and 3.52 of the Indictment.

493. During the course of the trial, the Chamber heard extensive evidence from both Prosecution and Defence witnesses pointing to the fact that in the days and weeks following the death of President Habyarimana on 6 April 1994, Tutsi civilians in the Butare area were targeted for elimination. During that period, acts similar to those enumerated in Article 2 (2) of the Statute were perpetrated against the Tutsi population by soldiers from the ESO and Ngoma Camps, as well as by members of the *Interahamwe* Hutu militia.

494. The Chamber has carefully examined the Prosecution evidence in support of Count 1 of the Indictment (Genocide) and notes that at least 18 Prosecution witnesses[699] testified in support of the count of genocide. Among the facts established through these witnesses' testimonies are the following: that the Accused was the Interim Commander of the *École des sous-officiers* (ESO) in Butare, with authority over the school's soldiers and other military personnel; that ESO was charged with responsibility for security in central Butare *prefecture*, including Butare town; that ESO soldiers either by themselves, or in collaboration with soldiers from Ngoma Camp and *Interahamwe* militia, attacked and killed many unarmed Tutsi civilians at various locations throughout Butare town in April and May 1994; that the circumstances under which these attacks took place were such that the Accused knew or had reason to know about them; that the Accused had effective control over the ESO soldiers who

[698] *Bagilishema*, Judgement (TC), paras. 55, 59; *Musema*, Judgement (TC), paras. 154, 156; *Rutaganda*, Judgement (TC), paras. 49, 51, 60; *Kayishema and Ruzindana*, Judgement (TC), paras. 100, 108-110, 112-113; *Akayesu*, Judgement (TC), paras. 502, 712, 721.
[699] Prosecution Witnesses QX, KAL, YAA, QCQ, YAO, XV, CCR, CCQ, YAN, YAQ, YAP, CCP, QBE, TM, TQ, YAK, QCM and NN.

conducted these attacks, in the sense that he had the human and material resources at his disposal at ESO to either prevent the attacks or punish the perpetrators; and finally that the Accused failed to take necessary and reasonable measures to prevent attacks by ESO soldiers and *Interahamwe* militia and to punish their perpetrators.

495. The question before the Chamber is whether there is any clear evidence that the Accused planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of the genocide. While there is no reliable or convincing evidence of direct participation by the Accused in any of the alleged acts of genocide, the Chamber is satisfied that on the whole there is sufficient and corroborated evidence to demonstrate that the Accused, by virtue of his position, had reason to know that ESO soldiers and other persons were committing genocidal acts. The Chamber also concludes that despite his effective control over the said soldiers, the Accused deliberately refrained from taking appropriate action to prevent such crimes or to punish the perpetrators.

496. On the basis of the testimonies of the various witnesses, it is clear to the Chamber that the Accused himself possessed the intent to destroy, in whole or in part, the Tutsi ethnic group, as such. For instance, when soldiers from the ESO were in the process of attacking unarmed civilian Tutsi refugees at the *Groupe scolaire*, the Accused refused to come to the refugees' assistance. Instead, he gave instructions that members of a certain family should be separated from the other Tutsi refugees and should not be harmed. Indeed, even when one child from this family was mistakenly taken away together with the other Tutsi refugees, the Accused sent a vehicle to try to rescue the child. The overall conduct of the Accused during this event, including the fact that he implicitly allowed a large contingent of soldiers under his command to leave their Camp fully equipped with arms and ammunition to attack unarmed refugees, his instruction to these soldiers not to kill or otherwise harm members of the Bicunda family, while leaving the vast majority of unarmed Tutsi refugees at the mercy of the genocidal killers, amounted to tacit approval of the unlawful conduct of the ESO soldiers. This approval assisted and encouraged the killing of the Tutsi civilians at the *Groupe scolaire*. There is no doubt that in light of the general situation in Rwanda, and specifically in Butare in 1994, the Accused had knowledge that ESO soldiers, who were his subordinates, had attacked or were about to attack unarmed Tutsi civilians at the *Groupe scolaire* for no other reason than their Tutsi ethnic identification. By his tacit approval of the conduct of the ESO soldiers, the Accused substantially contributed to the crime of genocide. The Chamber therefore finds the Accused individually responsible for aiding and abetting genocide pursuant to Article 6 (1) of the Statute.

497. Furthermore, the Chamber concludes that the Accused is individually responsible as a superior for the killing of Tutsi civilians by ESO soldiers at the Butare University Hospital, at the University of Butare, at the Beneberika Convent, at Mukura forest, and at various roadblocks in Butare. In light of the material and human resources available to the Accused as Commander of ESO, he exercised effective control over the attackers in the sense of his material ability to prevent or punish their criminal wrongdoing. The Accused failed to take necessary and reasonable measures to prevent the killings or to punish the perpetrators. For the above reasons, the Chamber finds that the Accused bears superior responsibility under Article 6 (3) of the Statute for the crime of genocide.

498. The Chamber therefore finds Muvunyi guilty of genocide pursuant to Article 6 (1) of the Statute for the attack at the *Groupe scolaire*; and pursuant to Article 6 (3) for the attacks at the Butare University Hospital, the University of Butare, the Beneberika Convent, the Mukura forest, and at various roadblocks in Butare.

41.16. 3. Complicity in Genocide

41.16.1.1.

499. The Chamber recalls that Count 2 is charged as an alternative to Count 1 of the Indictment. Since the Accused has already been found guilty of genocide on Count 1, the Chamber sees no need to

make any finding on the charge of complicity in genocide in Count 2.[700] Count 2 is hereby DISMISSED.

41.17.

41.18. 4. Direct and Public Incitement to Commit Genocide

500. The Chamber notes that Article 2 (2) of the Statute defines the offence of genocide, and Article 2 (3) (c) provides that direct and public incitement to commit genocide is punishable as a specific crime. The Chamber notes that there is limited jurisprudence on direct and public incitement as an offence at international law. In both *Akayesu* and *Nahimana*, this Tribunal considered the International Military Tribunal (IMT) cases of *Streicher* and *Fritzsche* which dealt with incitement to murder and extermination as crimes against humanity.[701] After *Nuremberg,* this Tribunal's judgement in *Akayesu* was the first occasion on which an international tribunal considered direct and public incitement to commit genocide as a specific offence. The *Akayesu* Trial Chamber considered the meaning of incitement under both the common law and civil law traditions[702] and concluded that under the Genocide Convention and Article 2 (3) (c) of the Statute, direct and public incitement means:

> directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places at public gatherings, or through the sale or dissemination, offer for sale or display of written or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.[703]

501. The Chamber notes that the *Akayesu* definition of direct and public incitement received tacit approval from the Appeals Chamber, and has been consistently applied in other decisions of the Tribunal.[704] The Chamber therefore adopts the *Akayesu* Trial Chamber's definition of direct and public incitement, as well as its elaboration of the "direct" and "public" elements of that offence.

502. The "direct" element requires more than a vague or indirect suggestion of incitement, and implies that the expression which is alleged to be inciteful, specifically provoke another to engage in criminal conduct. In considering whether incitement is direct, the specific context in which it takes place is important.[705] Cultural and linguistic factors, as well as the kind of audience the message is addressed to, could help determine whether a particular speech qualifies as direct incitement. An important consideration for the Trial Chamber is whether the members of the audience to whom the message was directed immediately understood its implication.[706]

503. The Chamber agrees with the *Akayesu* judgement that the drafters of the Genocide Convention only intended to criminalize public incitement and to rule out what may constitute private forms of incitement. In determining its "public" character, the Chamber must consider the place where the incitement occurred and whether attendance was selective or limited.[707] There is no requirement that the incitement message be addressed to a certain number of people or that it should be carried through

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[700] *Kamuhanda*, Judgement (TC), para. 654.
[701] *Akayesu*, Judgement (TC), para. 550; *Nahimana*, Judgement (TC), paras. 981, 982. The IMT cases could not deal with direct and public incitement because that conduct was first criminalized by the Geneva Conventions of 1948.
[702] *Akayesu*, Judgement (TC), para. 555: "Incitement is defined in Common Law systems as encouraging or persuading another to commit an offence… Civil law systems punish direct and public incitement assuming the form of provocation, which is defined as an act intended to directly provoke another to commit a crime or a misdemeanour through speeches, shouting or threats, or any other means of audiovisual communication. Such provocation… is made up of the same elements as direct and public incitement to commit genocide covered by Article 2 of the Statute…"
[703] *Akayesu*, Judgement (TC), para. 559.
[704] *Akayesu*, Judgement (AC), *Niyitekega*, Judgement (TC), para. 431; *Kajelijeli*, Judgement (TC), paras. 850-855; *Nahimana*, Judgement (TC), paras. 1011-1015.
[705] *Nahimana*, Judgement (TC), para 1004, noting that context is equally important in considering the potential impact of expression.
[706] *Akayesu*, Judgement (TC), para. 557, 558; *Niyitekega*, Judgement (TC), para. 431;*Kajelijeli*, Judgement (TC), para 852.
[707] *Akayesu*, Judgement (TC), para. 555

a specific medium such as radio, television, or a loudspeaker. However, both the number and the medium may provide evidence in support of a finding that the incitement was public.

504. The *Akayesu* Trial Chamber explained the mental element required for direct and public incitement to commit genocide as follows:

> The *mens rea* required for the crime of direct and public incitement to commit genocide lies in the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must himself have the specific intent to commit genocide, namely, to destroy in whole or in part, a national, ethnical, racial or religious group as such.[708]

505. The Appeals Chamber has restated and affirmed the Trial Chamber's analysis of *mens rea* for direct and public incitement to commit genocide.[709] As an inchoate offence or *infraction formelle*, incitement to commit genocide is punishable as such, irrespective of whether or not it succeeded in producing the result intended.[710]

41.18.1.1.1.

41.18.1.1.2. Findings on the Accused's Responsibility for Direct and Public Incitement to Commit Genocide

506. The Accused is charged with direct and public incitement to commit genocide under Count 3 of the Indictment in that he planned, committed, instigated or otherwise aided and abetted the planning, preparation or execution of the said offence pursuant to Article 6 (1) of the Statute. In the Indictment, the Prosecution relied on Paragraphs 3.24 and 3.25 in support of this charge; in the Schedule of Particulars, the Prosecution indicated that it was also relying on Paragraph 3.32 of the Indictment. The Chamber has already found that the Prosecution failed to prove the allegation in Paragraph 3.32 of the Indictment.

507. The Chamber has found that at a meeting held at Gikonko in April or May 1994, the Accused addressed a crowd of Hutu male civilians during which he equated Tutsis to "snakes" that should be killed. The Chamber further found that the Accused chastised the *bourgmestre* of Gikonko for hiding a Tutsi man, and asked the latter to produce the said Tutsi so that he could be killed. As a result, a Tutsi man named Vincent Nkurikiyinka, was taken from his hiding place and killed by the mob. The Chamber concludes that Muvunyi's words were spoken in public, were directed to a group of assembled Hutu civilians, and were intended to provoke the said civilians to kill Tutsis. Indeed, when considered in the context of the language and culture of Rwanda, equating Tutsis to snakes was, in the words of socio-linguistic expert Ntakirutimana, synonymous with condemning members of this ethnic group to death. The Chamber is satisfied that Muvunyi knew that his audience immediately understood the genocidal implication of his words and therefore that he had the requisite intent to destroy members of the Tutsi ethnic group in whole or in part as such.

508. The Chamber notes that the Accused's statement that Vincent Nkurikiyinka should be brought out and killed could be interpreted as an order to commit an act of genocide. However, since the Prosecution relied on this incident only to support the count of incitement, the Chamber has not taken into account with respect to the genocide count.

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[708] *Akayesu*, Judgement (TC), para 560; cited with approval in *Nahimana*, Judgement (TC) para. 1012; and *Kajelijeli*, Judgement (TC), para 854.
[709] *Akayesu*, Judgement (AC), para. 222-224. See also *Niyitekega*, Judgement, (TC) para. 431; *Nahimana*, Judgement (TC), para. 1012; and *Kajelijeli*, Judgement (TC), para 854.
[710] *Akayesu*, Judgement (TC), para. 562: "… genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected of the perpetrator." See also *Niyitekega,* Judgement (TC) para 431; *Nahimana*, Judgement (TC), para.1013.

509. The Chamber has also found that at a public meeting held in Gikore in May 1994, Muvunyi made a speech in which he called for the killing of Tutsis, the destruction of Tutsi property, associated Tutsis with the enemy at a time of war, and denigrated Tutsi people by associating them with snakes and poisonous agents. The Chamber is satisfied that when considered in the context of the inter-ethnic killings prevalent in Rwanda in 1994, the war between the Tutsi-dominated Rwandan Patriotic Front rebels and the Hutu-dominated Rwandan Army, as well as the culture and language of Rwanda, the audience understood Muvunyi's remarks as a call to kill or otherwise eliminate members of the Tutsi population. The Chamber is also satisfied that Muvunyi knew that his words would be so understood by the audience, and therefore he had the intent to destroy in whole or in part members of the Tutsi ethnic group.

510. The Prosecution has proved all the elements of direct and public incitement to commit genocide under Article 2 (3) (c) of the Statute with respect to the meetings held at Gikonko in April and at Gikore in May 1994. The Chamber therefore finds the Accused bears individual criminal responsibility for that offence pursuant to Article 6 (1) of the Statute.

41.19. 5. Crimes against Humanity

41.19.1.1.

41.19.1.2. 5.1. General Elements

511. The Chamber notes that under Article 3 of the Statute, the definition of "Crimes Against Humanity" consists of two layers. The first layer, ("General Elements") is to the effect that a crime against humanity must be committed as part of a "widespread or systematic attack against any civilian population on national, ethnic, racial or religious grounds."[711] The second layer lists six specific ("underlying") crimes, plus one residual category of "other inhumane acts" which qualify as crimes against humanity when committed in the context of a widespread or systematic attack on a civilian population on any of the enumerated discriminatory grounds.[712] The two-layered requirement of crimes against humanity under the Statute has been interpreted and applied in a large number of cases before the Tribunal.[713]

512. There is a rich and consistent body of jurisprudence on the meaning of each of the terms that make up the general elements of crimes against humanity. An "attack" is defined as "[a]n unlawful act, event or series of events of the kind listed in Article 3 (a) through (i) of the Statute."[714] In accordance with customary international law, the twin elements "widespread" or "systematic" should be read disjunctively and not as cumulative requirements.[715] "Widespread" refers to the scale of the attack and the multiplicity of victims; "systematic" reflects the organized nature of the attack, excludes acts of random violence, and does not require a policy or plan.[716] However, the existence of such a plan or policy may, for evidential purposes, be relevant in proving that the civilian population was the target of the attack or of its widespread or systematic character.

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[711] Article 3 provides as follows:
"The International Criminal 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."

[712] *Kupreškić*, Judgement (TC), para. 563; *Akayesu*, Judgement (TC), para. 585.

[713] *Akayesu*, Judgement (TC), paras. 578-586; *Rutaganda*, Judgement (TC), paras. 64-78; *Musema*, Judgement (TC), paras. 199-213; *Bagilishema*, Judgement (TC), paras. 72-83; *Kamuhanda*, Judgement (TC), paras. 657-676; *Ntakirutimana*, Judgement (TC), paras. 802-804; *Semanza*, Judgement (TC), paras.324-333; *Niyitegeka*, Judgement (TC), paras. 438-440; *Kajelijeli*, Judgement (TC), paras. 862-883; *Ntagerura et al.*, Judgement (TC), 696-698; *Muhimana*, Judgement (TC), paras. 523-530; *Simba*, Judgement (TC), paras. 420-421.

[714] *Kajelijeli*, Judgement (TC), para 867; *Semanza*, Judgement (TC), para 327; *Akayesu*, Judgement (TC), para. 581.

[715] *Simba*, Judgement (TC), para. 421; *Semanza*, Judgement (TC), para. 328; *Tadić*, Judgement (TC), paras. 646-648.

[716] *Muhimana*, Judgement (TC), para 527; *Kajelijeli*, Judgement (TC), paras 871-872; *Semanza*, Judgement (TC), para 329; *Musema*, Judgement (TC), paras. 203-204.

513. In *Akayesu*, "civilian population" was defined as people not taking an active part in hostilities, members of the armed forces who have surrendered or otherwise laid down their arms, and those who, either for sickness, injury, detention or otherwise, have been placed *hors de combat*. The presence of non-civilians within a group of "civilians" as defined above, does not deny the population of its essential civilian character.[717] The *Bagilishema* Trial Chamber added, relying on *Blaškić*, that in determining the existence of a "civilian population" as a constitutive element of crimes against humanity, the Chamber must consider "the specific situation of the victim at the moment the crimes were committed, rather than his status."[718]

514. In Akayesu, the Appeals Chamber stated that except for the offence of persecution, international humanitarian law does not require proof of a discriminatory intent for all crimes against humanity. In providing that a crime against humanity under Article 3 of the Statute must be part of an attack against civilians on national, political, ethnic, racial, or religious grounds, the Security Council did not intend to depart from the meaning of crimes against humanity as understood under customary international law, or to introduce a new legal ingredient. Rather, the Council only intended to limit the jurisdiction of the Tribunal to try those crimes against humanity that fall within the listed discriminatory categories.[719] It follows therefore that it is irrelevant whether the particular victim of a crime against humanity was a member of a listed group if it can be proved that the perpetrator targeted the civilian population on one of the enumerated discriminatory grounds.[720]

41.19.1.3. 5.2. The Underlying Offences – Rape

515. Article 3 of the Statute lays down a non-exhaustive list of acts that constitute crimes against humanity including: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution, and other inhumane acts. Under Count 4 of the Indictment, the Prosecution charged the Accused with rape as a crime against humanity. In this sub-section, the Chamber will consider the elements required to prove rape as a crime against humanity.

516. The commission of rape constitutes a crime against humanity only if the Prosecution proves that an enumerated crime under Article 3 of the Statute was committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds. The Prosecution must also prove that the perpetrator acted with the knowledge of the broader context of the attack and with the knowledge that his act(s) formed part of the attack. However, the perpetrator does not need to share the purpose or goals of the broader attack. The "attack" is an element distinct from the acts enumerated in Article 3 of the Statute. There must exist an attack on a civilian population which is discriminatory and widespread or systematic before the perpetrator can be found to have committed a crime against humanity.[721]

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[717] *Akayesu*, Judgement (TC), para. 582; *Musema*, Judgement (TC), para. 207; *Semanza*, Judgement (TC), para. 330.
[718] *Bagilishema*, Judgement (TC), para. 79, citing *Blaškić*, Judgement (TC) para. 214.
[719] *Akayesu*, Judgement (AC), paras. 464-465. Indeed the Appeals Chamber has similarly held that the requirement under Article 5 of the ICTY Statute that crimes against humanity be "committed in armed conflict", did not reflect customary international law, that the Security Council only intended to place a jurisdictional limit on the types of crimes against humanity that the Tribunal could try, and that the nexus with an armed conflict was not a new constitutive element of crimes against humanity. See *Tadić*, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdicton", 2 October 1995, paras 139-140.
[720] *Akayesu* (TC), para. 584; *Muhimana* (TC), para 529.
[721] *Semanza*, Judgement (AC), para. 268-269, 327-332; *Muhimana*, Judgement (TC), paras. 524-526; *Gacumbitsi*, Judgement (TC), para. 297; *Kamuhanda*, Judgement (TC), para. 657; *Kajelijeli*, Judgement (TC), paras. 864-865, 869-871; *Kordić and Čerkez*, Judgement (AC), para. 94; *Blaškić*, Judgement (AC), para. 101, referring to *Kunarać et al*., Judgement (AC), para. 94; *Ntakirutimana*, Judgement (TC), para. 804; *Bagilishema*, Judgement (TC), para. 77; *Rutaganda*, Judgement (TC), para. 68; *Kayishema and Ruzindana*, Judgement (TC), para. 123; *Musema*, Judgement (TC), paras. 202-203; *Ntakirutimana*, Judgement (AC), para. 516. *Ndindabahizi*, Judgement (TC), para. 478; *Akayesu*, Judgement (TC), para. 579; *Simba*, Judgement (TC), para. 421; *Tadić*, Judgement (AC), paras. 248, 646-648; *Krnojelać*, Judgement (TC), para. 55; *Krstić*, Judgement (TC), para. 480; *Kordić and Čerkez*, Judgement (TC), para. 178; *Blaškić*, Judgement (TC), para. 202; *Kupreškić*, Judgement (TC), para. 544.

517. The jurisprudence of the *ad hoc* Tribunals reveals a rather chequered history of the definition of rape. Initially, in the *Akayesu* Judgement, this Tribunal proposed that a conceptual approach to defining rape would be more useful to international law and opined that a mechanical approach with its focus on objects and body parts, was unsuitable. The *Akayesu* Trial Chamber therefore proceeded to define rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive." The broader concept of "sexual violence", according to Akayesu, "includes rape [and] is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive."[722] The Chamber notes that this definition was endorsed in the *Musema*, *Niyitegeka*, and *Muhimana* Judgements.[723]

518. However, in both *Furundžija* and *Kunarac,* ICTY Trial Chambers reverted to defining rape in terms of sexual penetration through the use of body parts or other objects under forceful or otherwise coercive circumstances.[724] The definition of rape as sexual penetration of the vagina, anus, or mouth of the victim by the penis of the perpetrator or some other object used by him under coercive or forceful circumstances was partially approved by the Appeals Chamber in *Kunarac*. However, the Appeals Chamber expressed the view that *Furundžija* and earlier decisions defined rape more narrowly than was required under international law and reasoned that the emphasis on coercion, force, or threat of force did not recognise other factors that could render an act of sexual penetration non-consensual or non-voluntary. Consequently, the Appeals Chamber approved the definition of rape as:

> [t]he 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) of 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.[725]

519. The *mens rea* is the "intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim."[726]

520. In *Muhimana* this Tribunal expressed the view that the *Akayesu* and *Kunarac* definitions of rape are not incompatible and noted that "[w]hereas *Akayesu* referred broadly to a "physical invasion of a sexual nature", *Kunarac* went on to articulate the parameters of what would constitute a physical invasion of a sexual nature amounting to rape."[727]

521. The Chamber agrees with the above analysis and considers that the underlying objective of the prohibition of rape at international law is to penalise serious violations of sexual autonomy. A violation of sexual autonomy ensues whenever a person is subjected to sexual acts of the genre listed in *Kunarac* to which he/she has not consented, or to which he/she is not a voluntary participant. Lack of consent therefore continues to be an important ingredient of rape as a crime against humanity. The fact that unwanted sexual activity takes place under coercive or forceful circumstances may provide evidence of lack of consent on the part of the victim.[728]

522. The Chamber considers that in their result, both the *Akayesu* and *Kunarac* definitions of rape reflect this objective of protecting individual sexual autonomy and therefore are not incompatible. The

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[722] *Akayesu*, Judgement (TC), paras. 598, 686-688.
[723] *Musema*, Judgement (TC), paras. 229; *Niyitegeka*, Judgement (TC), para. 456; *Muhimana*, Judgement (TC), para. 551. See also *Delalic*, Judgement (TC), paras. 478-479.
[724] *Furundžija*, (TC), para 185.
[725] *Kunarać*, Judgement (TC), para 460; Kunarać, Judgement (AC), paras. 127-128.
[726] *Kunarać*, Judgement (TC), para. 412, 437, 460; *Kunarać*, Judgement (AC), para. 128.
[727] *Muhimana*, Judgement (TC), para. 550; *Kunarać*, Judgement (AC), para. 128.
[728] Rule 96 (ii) provides that "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." See also *Kunarac,* Judgement (TC), para. 457: "The basic principle which is truly common to these … legal systems is that serious violations of sexual autonomy are to be penalised. Sexual autonomy is violated wherever the person subjected to the acts has not freely agreed to it or is otherwise not a voluntary participant."

broad language in *Akayesu* that rape constitutes "physical invasion of a sexual nature", when properly interpreted, could include "sexual penetration" as stipulated in *Kunarac*. The Chamber therefore concludes that the offence of rape exists whenever there is sexual penetration of the vagina, anus or mouth of the victim, by the penis of the perpetrator or some other object under, circumstances where the victim did not agree to the sexual act or was otherwise not a willing participant to it. The *mens rea* consists of the intent of the perpetrator to effect such sexual penetration with knowledge that it occurs without the consent of the victim.[729]

523. In the Indictment, the Prosecutor alleges that the Accused bears superior responsibility pursuant to Article 6 (3) for the rapes described under Paragraphs 3.41 and 3.41 (i). In the Schedule of Particulars, the Prosecution indicated that the Accused was also being charged for responsibility under Article 6 (1) for aiding and abetting rape.[730]

524. The evidence provided in this case shows that Tutsi women as young as 17 years old were raped by soldiers during the months of April and May 1994 in the Butare and Gikongoro *préfectures*. The evidence before the Chamber establishes that Witnesses TM, QY and AFV were raped at various locations in Butare between April and May 1994. In each case, the evidence points to sexual penetration of the victim's vagina under circumstances in which they did not consent to such penetration. Moreover, each of these events took place in the context of widespread attacks against civilians in Butare in 1994. The legal requirements for the offence of rape as a crime against humanity have therefore been satisfied.

525. However, in order to hold the Accused culpable, the Prosecution must also prove that he aided or abetted the commission of these rapes, or otherwise bore superior responsibility for their commission.

526. Having concluded that the evidence heard by the Chamber does not support the specific allegation in the Indictment that soldiers from Ngoma Camp committed rape, and that it would be prejudicial and unfair to hold this evidence against the Accused, the Chamber hereby finds the Accused NOT GUILTY of rape under Count 4 of the Indictment.

41.19.1.4. 5.3. Crimes against Humanity – Other Inhumane Acts

527. Count 5 of the Indictment charges Tharcisse Muvunyi with other inhumane acts pursuant to Article 3 (i) of the ICTR Statute. The crime of "other inhumane acts" encompasses acts not specifically listed as crimes against humanity, but which are nevertheless of comparable nature, character, gravity and seriousness to the enumerated acts in sub-articles (a) to (h) of Article 3.[731] The inclusion of a residual category of crimes in Article 3 recognizes the difficulty in creating an exhaustive list of criminal conduct and the need for flexibility in the law's response.[732] The ICTY Appeals Chamber recently noted that the crime of "other inhumane acts" cannot in itself violate the principle of *nullum crimen sine lege certa* as it proscribes conduct which is forbidden under customary international law.[733] Whether an act falls within the ambit of Article 3 (i) has to be determined on a case-by-case basis.[734]

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[729] *Kamuhanda*, Judgement (TC), para. 709.
[730] *Prosecutor v. T. Muvunyi*, Case N°ICTR-2000-55A-T, "Indictment", 23 December 2005; "Prosecutor's Notice of the Filing of a Schedule of Particulars to the Indictment Pursuant to the Directive of the Trial Chamber", 28 February 2005.
[731] *Bagilishema*, Judgement (TC), para. 92; *Kayishema and Ruzindana*, Judgement (TC), paras. 150-151; *Musema*, Judgement (TC), para. 232.
[732] See *Kayishema* and *Ruzindana*, Judgement (TC), paras. 149-150.
[733] *Stakić*, Judgement (AC), para. 315.
[734] *Kayishema* and *Ruzindana*, Judgement (TC), para. 151, cited in *Kajelijeli,* Judgement (TC), para. 932.

528. With respect to the *actus reus* of the offence, inhumane acts have been found to include sexual violence[735], forcible transfer of civilians,[736] mutilation, beatings and other types of severe bodily harm.[737]

529. The act or omission must *deliberately* cause serious mental or physical suffering or injury or constitute a serious attack on human dignity.[738] If the inhumane act is witnessed by a third party, "an accused may be held liable under these circumstances only where, at the time of the act, the accused had the intention to inflict serious mental suffering on the third party, or where the accused knew that his act was likely to cause serious mental suffering and was reckless as to whether such suffering would result. Accordingly, if at the time of the act, the accused was unaware of the third party bearing witness to his act, then he cannot be held responsible for the mental suffering of the third party."[739]

41.19.1.4.1. Findings on the Accused's Responsibility for Other Inhumane Acts

530. The Chamber recalls its factual findings relating to the treatment of Witnesses YAN and YAO at the *Économat General*, the Butare Cathedral and at ESO, the open humiliation of the two Tutsi women namely, Witnesses QY and AFV at various roadblocks in Butare, the beatings and injuries caused to Tutsi civilians by ESO soldiers at Beneberika Covent and *Groupe scolaire*, and is satisfied that the treatment meted out to these people by ESO soldiers constitute inhumane treatment within the meaning of Article 3 (i) of the Statute. The Chamber is satisfied that in each of these instances, the Accused had reason to know of the illegal conduct of his subordinates, he had effective control over their actions, but that he failed to take necessary and reasonable measures to prevent or punish their illegal behaviour. The Chamber's conclusion on effective control is based in particular on the fact that the Accused had all the material and human resources at ESO at his disposal and could have sent troops to prevent or punish the commission of the said crimes. For example, the Chamber believes that the Accused not only gave instructions that the Bicunda family should not be harmed during the attack on the *Groupe scolaire*, he also attempted to save the life of one Bicunda child when he realised that the latter had been taken away to be killed with the other refugees. The Accused therefore bears criminal responsibility as a superior under Article 6 (3) for the actions of these subordinates and is guilty of other inhumane acts as crimes against humanity.

41.19.2.Chapter IV : Verdict

531. For the reasons set out in this Judgement, having considered all the evidence and arguments of the Parties, the Trial Chamber unanimously finds in respect of Tharcisse Muvunyi as follows:

Count 1: Genocide: GUILTY

Count 2: Complicity in Genocide: DISMISSED

Count 3: Direct and Public Incitement to Commit Genocide: GUILTY

Count 4: Crimes Against Humanity (Rape): NOT GUILTY

Count 5: Crimes Against Humanity (Other Inhumane Acts): GUILTY

41.19.3.Chapter V : Sentence

[735] *Kamuhanda,* Judgement (TC), para. 710; *Niyitegeka*, Judgement (TC), paras. 465-67; *Kajelijeli*, Judgement (TC), para. 916; *Akayesu*, Judgement (TC), para. 688.
[736] *Stakić*, Judgement (AC), para. 317; *Krstić*, Judgement (TC), para. 52.
[737] *Niyitegeka*, Judgement (TC), paras. 465-67; *Kajelijeli*, Judgement (TC), paras. 934-36.
[738] *Kayishema* and *Ruzindana*, Judgement (TC), para. 151.
[739] *Kayishema* and *Ruzindana*, Judgement (TC), para. 151, cited in *Kamuhanda*, Judgement (TC), para. 717, and *Kajelijeli,* Judgement (TC), para. 932.

41.20. 1. Introduction

532. In Resolution 955 (1994) which established the Tribunal, the United Nations Security Council reasoned that holding individuals responsible for the serious violations of international humanitarian law committed in Rwanda in 1994, would further the objectives of justice, deterrence, reconciliation and the restoration and maintenance of peace in that country. These objectives largely reflect the goals of sentencing in criminal law which are retribution, deterrence, rehabilitation, and societal protection. In determining the appropriate sentence to impose on the Accused in respect of the crimes for which he has been found guilty, the Chamber will be guided by these goals, as well as the provisions of the Statute and Rules relevant to sentencing. Article 23 of the Statute limits the punishment that the Tribunal can impose to imprisonment, and provides that in determining the terms of imprisonment, the Trial Chamber shall have recourse to the sentencing practice of Rwandan Courts and take into account the gravity of the offence and the individual circumstances of the Accused. Article 23 therefore provides legal authority for both the principles of gradation and individualisation in sentencing.[740]

533. Rule 101 provides that the Trial Chamber can impose a maximum penalty of life imprisonment, and shall take into account both aggravating and mitigating circumstances in determining the appropriate sentence to impose on the Accused. Aggravating circumstances must be proved beyond reasonable doubt, whereas mitigating circumstances need only be established on a balance of probabilities.[741] Where the Trial Chamber imposes a fixed term of imprisonment running short of a life sentence, it should give credit for time served by the accused from the time of his arrest to the date of his conviction and sentence

41.21.

41.22. 2. Submissions

534. In its Closing Brief and during Closing Arguments, the Prosecution submitted that the crimes charged against the Accused, in particular genocide and rape, are inherently grave offences that deserve the maximum punishment permissible under the Statute. It further argued that the sentencing practice of both this Tribunal and the Rwandan courts is consistent with imposition of the maximum penalty for genocide and rape. Under the Rwandan Organic Law, argues the Prosecution, upon conviction for such Category I offences, the Accused would be liable to capital punishment.

535. The Prosecution also argues that as a senior military officer with responsibility for civilian protection in Butare prefecture, the Accused abused his authority by allowing his subordinates to commit the heinous crimes alleged in the Indictment, and by his own incitement of the population to commit genocide against the Tutsis. It is argued that these are aggravating factors and should be considered as such.

536. According to the Prosecution, there are no mitigating circumstances in favour of the Accused, and he did not show any remorse for his own conduct or for the conduct of his subordinates. Finally, it is argued that the Prosecution did not intend to make the character of the Accused an issue in this trial, and therefore that the evidence of his good character introduced by the defence is irrelevant and should not be considered by the Chamber.

537. The Defence did not address sentencing issues in its Closing Brief or during Closing Arguments. It contented itself with the position that the Accused was not guilty of the crimes charged. However, pursuant to Rule 92 *bis*, the Defence introduced the sworn statement of the daughter of the accused to the effect that throughout his life, the Accused has been of good moral character and a law-abiding citizen who never discriminated against anyone on the basis of race, religion or ethnic

[740] *Musema*, Judgement (AC), para. 380, and authorities cited therein.
[741] *Kajelijeli*, Judgement (AC), para. 294; *Simba*, Judgement (TC), para. 438; *Muhimana*, Judgement (TC), para. 590.

background.[742] She added that as a soldier, the Accused treated all his subordinates alike and gave them equal opportunities regardless of their ethnic background. As a husband and father, the accused showed support and loyalty to his family, especially his two sons and one daughter and supported them in every manner possible so as to ensure that they grew up to be responsible and tolerant members of society. She urged that should the Chamber find her father guilty of any of the crimes charged, it should consider a sentence which reflects his entire life and his commitment to his family and to humanity, as well as his sense of honesty, respect and fairness to all manner of people.

41.23. 3. Deliberations

41.23.1.1. 3.1. Gravity of the Offence

538. The Chamber has considered the submissions of the Prosecution that genocide, direct and public incitement to commit genocide, and crimes against humanity such as rape are inherently grave offences deserving severe punishment. Indeed the Chamber considers that all offences subject to the jurisdiction of the Tribunal are inherently serious and offensive of our human conscience. For this reason, in exercising its discretion to determine the most appropriate sentence for the Accused, the Trial Chamber will do so in the context of the form and degree of the Accused's participation, as well as his individual circumstances so as to ensure that the sentence imposed is commensurate with the gravity of the offence. The Chamber has considered that under Rwandan law, Category I and II perpetrators of genocide and crimes against humanity are liable to the death penalty or to imprisonment for life.[743] Depending upon the circumstances, rape is punishable by imprisonment for a term of five to forty years.[744] The Chamber has also examined the jurisprudence of the Tribunal and notes that the maximum penalty of life imprisonment is usually reserved for those who held positions of authority and planned or ordered atrocities, as well as for those who committed crimes with particular zeal or sadism.[745]

41.23.1.2. 3.2. Individual, Aggravating and Mitigating Circumstances

539. The Chamber notes that throughout the events referred to in the Indictment, and in particular from 7 April to about 15 June 1994, the Accused was a senior military officer in the Rwandan Army. The Chamber has found that from about the 7 April 1994 to 15 June 1994, he was the most senior military officer in Butare. Apart from his superior military position, the accused was well-known in Butare and other parts of Rwanda as an active sportsman and basketball player who often participated in athletic and other sports events alongside his military colleagues and members of the civilian population. The official and social standing of the Accused therefore placed him among the leaders of the Butare community, with capacity to influence the course of many events including the conduct of his subordinate officers. The position of trust held by the Accused carried with it authority and responsibility to take all reasonable measures to protect members of the civilian population from attack. In the Chamber's view, the fact that the accused failed to prevent soldiers under his command

[742] "Tharcisse Muvunyi's Motion for Admission of Witness Testimony Pursuant to Rule 92 *bis*", filed on 16 May 2006. The statement was admitted into evidence by the Chamber's Oral Decision of 23 June 2006.
[743] Organic Law N°08/96, on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed since 1 October 1990, dated 30 August 1996. Article 2 defines category I and II offenders as follows: *Category 1:* (a) person whose criminal acts or whose acts of criminal participation place them among the planners, organizers, instigators, supervisors and leaders of the crime of genocide or of a crime against humanity; (b) persons who acted in positions of authority at the national, *préfectoral*, communal, sector or cell level, or in a political party, or fostered such crimes; (c) notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed; (d) persons who committed acts sexual torture;
Category 2: persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators of accomplices of intentional homicide or of serious assault against the person causing death. Article 14 stipulates that persons convicted in catgories I and II shall be liable to the death penalty or to life imprisonment.
[744] *Muhimana*, Judgement (TC), para. 592, citing Articles 360-361 of the Rwandan Penal Code.
[745] *Simba*, Judgement (TC), para.434; *Muhimana*, Judgement (TC), paras 606-614, recalling the particular zeal and sadism with which the accused perpetrated crimes against his victims; *Niyitegeka*, Judgement (TC), para. 486.

from committing wide scale atrocities against Tutsi civilians in Butare was an aggravating factor. Moreover, the Chamber considers the following as aggravating circumstances:

- the ethnic separation and subsequent killing of orphan children at the *Groupe scolaire* by soldiers under the command of the Accused in collaboration with civilian militia;
- the fact that the Accused chastised the *bourgmestre* in Nyakizu *commune* for hiding a Tutsi man and that pursuant to his instructions, the said man was produced and killed by an armed mob.

540. The Chamber has also considered evidence from several defence witnesses that the accused was responsible for protecting and thus saving the lives of Tutsi civilians including the former Bishop of Butare, Witness MO73 and his family, the Bicunda family, and the children of Witness MO69's sister. The Chamber does not consider this to be a mitigating factor. On the contrary, the Chamber considers that the selective exercise by the accused of his power to protect civilians based on friendship or family ties, was further evidence of his abuse of office and authority. His duty was to protect all civilians in danger irrespective of ethnicity or personal relationships. The Chamber further considers that the Accused was one of the people entrusted with responsibility for the security of the civilian population in Butare. By using his power, influence and official resources to protect his friends and family while leaving the vast majority of Tutsi civilians at the mercy of the genocidal killers, the Accused abused the trust and confidence placed in him by members of his society.

541. The Chamber also notes that several witnesses testified that the Accused, while the most senior military officer at ESO and in Butare *préfecture*, was in practice powerless. It is suggested that Lieutenant Nizeyimana was the real operational decision-maker at ESO, and that he either perpetrated or masterminded the commission of most of the crimes for which the Accused has been charged. Furthermore, it is alleged that the Accused was never fully trusted by the military and political authorities in Kigali, and was at times suspected to be a sympathiser of the RPF. In the Chamber's view, these should not be considered as mitigating circumstances because the Chamber has already found that the Accused had effective control over ESO soldiers and he was fully aware that crimes were being committed by his subordinates. In any case, if at his level, he found it impossible to rein in those subordinates, he had a duty and a responsibility to report their criminal behaviour to officers higher up the chain of command. To sit down and fold his hands on the basis that he could not do anything about the serious crimes being committed by his subordinates, was at a minimum, a dereliction of his duties.

542. The Chamber notes, however, that except for the crime of incitement, the Prosecution has not proved that the Accused at any time gave direct orders for the commission of the crimes for which he has been convicted, or that he was present and directly participated in or encouraged the commission of those crimes. This circumstance must be taken into account in determining the sentence to impose on the Accused.

543. The Chamber also considers that the good character of the Accused prior to 1994, his position as a husband and father of three children, and the fact that he spent most of his life working for the defence of his country are mitigating factors. Moreover, many Defence witnesses portrayed the Accused as a highly respected individual and devoted worshipper, an avid sportsman and basketball player who actively participated in the life of his community alongside his military colleagues, as well as members of the civilian population. Furthermore, the Chamber has heard evidence indicating that prior to 1994, the Accused never discriminated against anyone on the basis of ethnicity.

544. Having considered all the evidence and weighing the aggravating and mitigating circumstances, the Chamber is convinced that some mitigation is warranted.

545. The Chamber sentences Tharcisse Muvunyi to TWENTY-FIVE (25) YEARS' IMPRISONMENT.

41.23.1.3. 3.3. Credit for Time Served

546. The Chamber notes that the Accused was arrested in the United Kingdom on 5 February 2000 and has been in detention since then. This means that he has been in detention for 6 years, 7 months and 6 days. Pursuant to Rule 101 (D) of the Rules, the Accused shall be given credit for the time served from the date of his arrest to the date of this Judgement.

547. In accordance with Rule 102 (A) the sentence shall begin to run from the date of this Judgement, provided that where notice of appeal is filed, the enforcement of the sentence shall be stayed until the final determination of the appeal.

548. Pursuant to Rule 103 of the Rules, Tharcisse Muvunyi shall remain in the custody of the Tribunal pending his transfer to a State where he shall serve his prison sentence if no appeal is filed, or, until the final determination of any appeal that may be filed.

549. This Judgement is rendered in English, which remains the authoritative version. The Chamber directs the Registry to translate the Judgement into French and Kinyarwanda without delay.

550. Rendered on 12 September 2006, and signed on 17 September 2006, in Arusha, Tanzania.

[Signed] : Asoka de Silva; Flavia Lattanzi; Florence Rita Arrey

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41.23.2.Annex I: Procedural History

41.24. 1. Introduction

41.24.1.1. 1.1. The Tribunal and its Juridciction

1. The Judgement in the case of *The Prosecutor v. Tharcisse Muvunyi* is issued by Trial Chamber II ("the Chamber") of the International Criminal Tribunal for Rwanda ("the Tribunal"), composed of Judge Asoka de Silva, Presiding, Judge Flavia Lattanzi, and Judge Florence Rita Arrey.

2. The United Nations Security Council established the Tribunal after official United Nations reports indicated that genocide and widespread, systematic, and flagrant violations of international humanitarian law had been committed in Rwanda. The Security Council determined that this situation constituted a threat to international peace and security; resolved to put an end to such crimes and to bring to justice the persons responsible for them; and expressed conviction that the prosecution of such persons would contribute to the process of national reconciliation and to the restoration of peace. Thus on 8 November 1994, the Security Council acting under Chapter VII of the United Nations Charter, adopted Resolution 955 establishing the Tribunal.

3. The Tribunal is governed by the Statute annexed to United Nations Security Council Resolution 955 ("the Statute") and by its Rules of Procedure and Evidence ("the Rules").

4. The Tribunal has authority to prosecute persons responsible for serious violations of international humanitarian law committed in the Republic of Rwanda, and Rwandan citizens responsible for such violations committed in the territory of neighbouring States. Articles 2, 3 and 4 of the Statute grant the Tribunal subject-matter jurisdiction over acts of genocide, crimes against

humanity, and serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II. Article 1 of the Statute limits the Tribunal's temporal jurisdiction to acts committed between 1 January 1994 and 31 December 1994.

41.24.1.2. 1.2. The Accused
41.24.1.3.

5. The Indictment alleges that Tharcisse Muvunyi (the "Accused") was born on 19 August 1953 in Mukarange *commune*, Byumba *préfecture*, Rwanda.

6. According to the Indictment, the Accused was appointed Commander of the *Ecole des Sous-Officiers* (ESO), a military training school in Butare *préfecture*, on 7 April 1994. In this capacity, the Accused allegedly exercised authority over the soldiers of the school, the *gendarmerie*, Ngoma camp, and all military operations in Butare *préfecture*.

41.24.1.4. 1.3. Procedural Background

41.24.1.4.1.

41.24.1.4.2. 1.3.1. Pre-Trial Phase

7. A Warrant of Arrest and Order for Transfer and Detention were issued on 2 February 2000 by Judge Yakov Ostrovsky. On the same date, Judge Yakov Ostrovsky confirmed the joint indictment dated 21 January 2000, and issued an order of non-disclosure until the indictment had been served on all of the accused: Tharcisse Muvunyi, Idelphonse Hategekimana and Idelphonse Nizeyimana.

8. Muvunyi was arrested on 5 February 2000 in the United Kingdom, and was transferred on 30 October 2000 to the United Nations Detention Facility in Arusha, Tanzania. The Accused made his initial appearance before Judge William Sekule on 8 November 2000, and entered a plea of not guilty.

9. On 6 February 2001, Judge Yakov Ostrovsky granted a Prosecution motion to rescind the non-disclosure order regarding the original indictment.

10. On 25 April 2001, Judge Mehmet Güney granted a number of protection measures to prosecution witnesses, including the use of pseudonyms, closed sessions, and the non-disclosure to the public of witnesses' identifying information.

11. Trial Chamber III ("Chamber III"), composed of Judge Lloyd G. Williams, presiding, Judge Andresia Vaz, and Judge Khalida Rachid Khan, conducted the pre-trial proceedings between 11 November 2003 and 7 December 2004. From January 2005 onwards, the proceedings were held in Trial Chamber II for commencement of trial by the Bench rendering this Judgment.

12. On 15 April 2003, the Registrar denied the Accused's request to withdraw Mr. Michael Fischer from the position of Lead Counsel. The Accused applied to the President of the Tribunal for review of the Registrar's decision; his application was dismissed on 12 September 2003. However, in a decision dated 18 November 2003, Chamber III determined that the lack of communication between the Accused and his Lead Counsel hindered the judicial proceedings and constituted exceptional circumstances as provided by Rule 45 (H) of the Rules of Procedure and Evidence. Trial Chamber III therefore ordered the Registrar to withdraw Lead Counsel. Mr. Michael Fischer was consequently replaced by Mr. Francis Musei, Duty Counsel, on 19 November 2003.

13. On 11 November 2003, Chamber III authorised the deposition of Witness QX in Rwanda. On 27 November 2003, Chamber III denied the Accused's request for certification to appeal this decision, ruling that the Accused would be adequately represented by Duty Counsel during the deposition. Mr. William Taylor was appointed Lead Counsel on 7 January 2004.

14. At the Status Conference on 7 December 2004, the trial was scheduled to start on 28 February 2005. The Prosecution was ordered to file a Pre-Trial Brief before 25 January 2005.

41.24.1.4.3.1.3.2. The Indictment

41.24.1.4.4.

15. On 11 December 2003, Chamber III granted the Prosecutor's request to sever the indictment and to try the Accused separately, finding that it was in the interests of justice to try the Accused without delay. The Prosecutor filed an Amended Indictment (the "Indictment") on 22 December 2003, bearing the Case Number ICTR-2000-55A.

16. On 23 February 2005, the Chamber denied the Prosecutor leave to further amend the Indictment. The proposed changes included specifying the factual allegations underlying the charges, and dropping counts 4 and 5 (rape and inhumane acts as crimes against humanity). The Trial Chamber found that eight of the proposed amendments amounted to new charges. The Prosecutor was granted certification to appeal, and the Appeals Chamber upheld the Trial Chamber's decision. The Appeals Chamber found that although the Trial Chamber had erred in characterising certain proposed amendments as new charges, it had exercised its discretion reasonably in ruling that to accept changes at a date so close to the start of the trial would result in delays and prejudice to the Accused. On 24 June 2005, the Prosecutor filed a Schedule of Particulars which clarified the Indictment without expanding the charges.

17. The Indictment as amended charges the Accused with five counts: genocide, or alternatively complicity in genocide, direct and public incitement to commit genocide, rape as a crime against humanity, and other inhumane acts as a crime against humanity.

18. The Indictment alleges that these crimes were committed between 1 January and 31 December 1994 in Butare *préfecture*, Rwanda, where the Tutsi, the Hutu and the Twa were identified as racial or ethnic groups. The Indictment asserts that during this period, widespread or systematic attacks were directed against the civilian population on political, ethnic or racial grounds, and that a state of non-international armed conflict existed in Rwanda.

19. The Indictment alleges that the Accused, by reason of his position, knew or had reason to know that massacres and other atrocities were being committed in Butare by persons under his authority, but failed to prevent or put an end to these acts.

41.24.1.4.5. Trial Phase

41.24.1.4.6.

20. The trial of the Accused commenced on 28 February 2005. In the course of 76 trial days, the Chamber heard a total of 47 witnesses, of whom there were 24 for the Prosecution including one investigator and two expert witnesses, and 23 for the Defence, including one expert witness.

21. On 24 March 2005, the Prosecution filed a motion requesting leave to call 29 additional witnesses in view of the Chamber's decision not to allow the withdrawal of two charges from the indictment. The Chamber directed the Prosecution to reformulate its supplementary witness list to include only those whose testimonies would support counts 4 and 5 i.e. rape and other inhumane acts as crimes against humanity The Prosecution added six names to its original list of witnesses. In a decision dated 20 June 2005, the Chamber ruled against a Defence motion seeking to exclude these additional testimonies, concluding their statements indicated they could offer evidence regarding counts 4 and 5.

22. On 27 June 2005, the Defence filed a motion seeking to exclude the evidence of Witness TQ who the Defence asserted was a former employee of the International Committee of the Red Cross (ICRC) and who had previously given evidence in the Butare case. The Chamber rendered a decision on 13 October 2005 denying the Defence motion. The Chamber found that it was clear from Witness TQ's preliminary statement that he was working for the Belgian Red Cross Society (BRCS) at the relevant time, not the ICRC and that as BRCS is a national organization, it has no exceptional privilege of non-disclosure of information in the possession of an employee.

23. The Prosecution concluded its case on 20 July 2005.

24. On 15 August 2005, the Defence filed a motion for Judgment of Acquittal pursuant to Rule 98 *bis*. On 14 October 2005, the Chamber ruled against the Accused in relation to each Count of the Indictment. The Chamber concluded that there was sufficient evidence upon which a reasonable trier of fact could sustain a conviction in relation to each of the five counts in the Indictment. The Chamber found that in relation to Counts 1 and 2, a conviction could be sustained pursuant to Articles 6 (1) and 6 (3) of the Statute ; in relation to Count 3, a conviction could be sustained pursuant to Article 6 (1) of the Statute ; and in relation to Counts 4 and 5, a conviction could be sustained pursuant to Article 6 (3) of the Statute.

25. On 20 October 2005, the Chamber granted a number of protective measures for Defence witnesses which had been sought by the Defence and which had not been opposed by the Prosecution. The measures were granted with the proviso that the Defence provide the Prosecution with unredacted statements and witness identity information no less than 21 days prior to the evidence of the witness being heard. The Chamber concluded that further protective measures which had been requested by the Defence and opposed by the Prosecution, if granted, had the potential to affect the Prosecution's disclosure obligations and therefore were not in the interests of justice.

26. On 6 October 2005, the Defence filed a motion seeking an adjournment of the proceedings from 14 November 2005 to early 2006. The Chamber concluded that the matters raised by Counsel for the Accused could have been resolved internally within the Defence team, rejected the motion and ordered the Defence to commence the presentation of its case on 14 November 2005.

27. On 25 October 2005, the Prosecution filed a motion for disclosure of identifying information of Defence witnesses, indicating that the Prosecution had only received the name of the first Defence Witness MO60 but no further identifying information in relation to either this witness or any of the other 39 Defence witnesses. On 9 November 2005, the Chamber reiterated its orders of 20 October 2005 and further specified the type of identifying information the Defence should provide in relation to its witnesses.

28. On 14 November 2005, the Defence filed an emergency motion for continuance. On that same date, the Chamber handed down an oral decision, ordering the Defence to disclose the statements of its first three designated witnesses, MO60, MO70 and MO38, to the Prosecution no later than 21 November 2005 and the Defence to commence its case on 5 December 2005. In relation to the remaining Defence witnesses, the Chamber ordered that their identifying information be disclosed to the Prosecution at least 21 days prior to the date of their testimony and adjourned the proceedings to 5 December 2005.

29. The Defence case commenced on 5 December 2005.

30. On 21 December 2005, Lead Counsel for the Accused filed an application for the withdrawal of the assignment of his Co-Counsel, citing irreconcilable differences between them, and between Co-Counsel and other members of the Defence Team.

31. During the cross-examination of Defence Witness Augustin Ndindiliyimana on 7 December 2005, the Prosecution attempted to tender a set of documents that purportedly bore the signature of the

Accused, in the capacity of "*Commandant de Place*, Butare-Gikongoro." The Chamber ruled that the documents were inadmissible as exhibits, but would be marked for identification purposes as "PID1". The Chamber further indicated that the Prosecution could prove the authenticity of the documents at a later date by calling witnesses.

32. On 31 January 2006, the Prosecution filed a motion to admit the documents contained in PID1. On 28 February 2006, the Chamber rendered a decision denying the Prosecution motion to admit documents marked PID1 on the basis that, although the three documents appeared at face value to be relevant to the present case, the documents were not prima facie reliable to be admissible under the Rules. The Prosecution then filed a further motion on 30 March 2006 seeking leave to call a handwriting expert by the name of Mr. Antipas Nyanjwa to testify to the authenticity of the documents marked PID1. The Chamber concluded that hearing evidence relating to these documents would further the Chamber's overall objective of discovering the truth about the allegations made against the Accused and that Mr. Nyanjwa was qualified to give that evidence. The Chamber concluded that the Defence could be given the opportunity to call evidence to contradict or otherwise challenge the evidence of the proposed handwriting expert if they so desired.

33. On 20 March 2006, the Defence filed a motion to expand and vary the Defence witness list. The Defence sought leave to add a further witness who had recently testified in the "Military II" and "Government II" cases for the Prosecution on the grounds that the witness had exculpatory information pertinent to the outcome of this case. The Chamber rendered a decision on 28 March 2006 after having conducted an analysis of the transcript of the evidence of Witness AOG in the "Military II" case denying the Defence motion. The Chamber concluded that none of the statements made by this witness in that case directly related to any of the charges in the Indictment against Muvunyi, that in other prior cases the witness had always testified for the Prosecution and the Defence had provided no material to indicate that the witness would be willing to testify on behalf of the Accused.

34. The Prosecution and Defence filed their closing briefs on 15 June 2006. Closing Arguments were heard on 22 and 23 June 2006.

[Signed] : Asoka de Silva; Flavia Lattanzi ; Florence Rita Arrey

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42. Order Assigning Judges to a Case before the Appeals Chamber 43. 18 October 2006 (ICTR-2000-55A-A)

(Original : English)

Appeals Chamber

Judge : Fausto Pocar, Presiding Judge

Tharcisse Muvunyi – Appeals Chamber – Judges – Composition

International Instruments Cited :

Document IT/245 of the International Criminal Tribunal for the former Yugoslavia ; 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 Judgement and Sentence rendered by Trial Chamber II on 12 September 2006;

NOTING the "Accused Tharcisse Muvunyi's Notice of Appeal" filed by Counsel for Tharcisse Muvunyi on 12 October 2006;

NOTING the "Prosecution's Notice of Appeal and Motion for an Extension of Time Within Which to File the Notice of Appeal" filed on 17 October 2006;

CONSIDERING Articles 11 (3) and 13 (4) of the Statute and Rule 108 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. Tharcisse Muvunyi*, Case N°ICTR-2000-55A-A, shall be composed as follows:

Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Done in English and French, the English version being authoritative.

Done this 18th day of October 2006, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

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44. Decision on the Prosecution Motion for Extension of Time for Filing the Notice of Appeal
45. 22 November 2006 (ICTR-2000-55A-A)

(Original : not specified)

Appeals Chamber

Judges : Liu Daqun, Presiding Judge; Mohamed Shahabuddeen; Mehmet Güney; Theodor Meron; Wolfgang Schomburg

Tharcisse Muvunyi – Extension of time – Good cause, Delayed filing of the Judgement – Motion granted

International Instruments Cited :

Practice Direction on Formal Requirements for Appeals from Judgement, paragraph 1 (c) (iii) ; Rules of Procedure and Evidence, Rules 108 and 116 (A)

International Cases Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Jean de Dieu Kamuhanda, Decision on Jean de Dieu Kamuhanda's Motion for an Extension of Time, 19 April 2005 (ICTR-99-54A)

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Decision on Prosecution Motion for Extension of Time in Which to File the Prosecution Notice of Appeal, 15 February 2005 (IT-02-60)

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 ("Tribunal"), is seized of the "Prosecutor's Notice of Appeal and Motion for an Extension of Time Within Which to File Notice of Appeal", filed on 17 October 2006 ("Motion"), in which the Prosecution requests that its Notice of Appeal, filed together with the Motion, be considered timely;[1]

NOTING that Trial Chamber II of the Tribunal pronounced its Judgement against Tharcisse Muvunyi on 12 September 2006, and issued a reasoned opinion in writing in English on 18 September 2006 ("Trial Judgement");

NOTING that the Prosecution submits in support of its Motion that the time for filing the Notice of Appeal should start running from the date on which the Trial Judgement was filed;[2]

NOTING that Counsel for Tharcisse Muvunyi did not file a response to the Motion;

CONSIDERING that under Rule 108 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), "[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";

CONSIDERING therefore that the Prosecution's Notice of Appeal should have been filed no later than 12 October 2006;

CONSIDERING that Rule 116 (A) of the Rules provides that the Appeals Chamber may grant a motion to extend a time limit upon a showing of good cause;

CONSIDERING that such a motion should be filed prior to expiry of the time limit at issue;[3]

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[1] Motion, p. 2.
[2] Motion, p. 2.
[3] *Prosecutor v. Jean de Dieu Kamuhanda,* Case N°ICTR-99-54A-A, Decision on Jean de Dieu Kamuhanda's Motion for an Extension of Time, 19 April 2005, pp. 2-3 and n. 3. In this case, the Pre-Appeal Judge exceptionally granted a motion for an extension of time to file a reply, which was filed 136 days after the filing of the Respondent's Brief, that is, 121 days after the expiration of the 15-day deadline for filing briefs in reply during which the appellant should have filed any motion for

CONSIDERING that the Prosecution failed to file a motion for an extension of time limit prior to or on 12 October 2006 with regard to filing its Notice of Appeal;

CONSIDERING however, that the Appeals Chamber may "recognise, as validly done any act done after the expiration of a time limit";[4]

CONSIDERING that the Registry has confirmed that the Trial Judgement was only filed on 18 September 2006, that is, six days after its pronouncement;

NOTING that the Prosecution's Notice of Appeal was filed twenty-nine days from the date of the filing of the Trial Judgement;

CONSIDERING that paragraph 1 (c) (iii) of the Practice Direction on Formal Requirements for Appeals from Judgement requires a notice of appeal to identify "the finding or ruling challenged in the judgement, with specific reference to the page number and paragraph number";

CONSIDERING therefore, that the delayed filing of a Judgement may constitute good cause for the filing of a Notice of Appeal;[5]

FINDING that the Prosecution has established "good cause" within the meaning of Rule 116 of the Rules for extending the deadline for the filing of its Notice of Appeal by six days so as to allow it to fully acquaint itself with the Trial Judgement in preparing the Notice of Appeal;

FOR THE FOREGOING REASONS:

GRANTS the Motion.

Done in English and French, the English text being authoritative.

Done this 22nd day of November 2006, at The Hague, The Netherlands.

[Signed] : Liu Daqun

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extension of time. The Pre-Appeal Judge reprimanded the appellant for failing to file his motion for an extension of time within the 15-day deadline for filing the reply.

[4] See Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005, para. 12. See also *id*., para. 1.

[5] *Prosecutor v. Vidoje Blagojević and Dragan Jokić,* Case N°IT-02-60-A, Decision on Prosecution Motion for Extension of Time in Which to File the Prosecution Notice of Appeal, 15 February 2005, p. 3.

Le Procureur c. Tharcisse MUVUNYI

Affaire N° ICTR-2000-55A

Fiche technique

• Nom : MUVUNYI

• Prénom: Tharcisse

• Date de naissance: 19 août 1953

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: Commandant de l'Ecole des Sous-officiers (ESO)

• Date de confirmation de l'acte d'accusation: 2 février 2000

• Date de la disjonction de l'acte d'accusation: 11 décembre 2003

• Chefs d'accusation: génocide, complicité de génocide, entente en vue de commettre le génocide, crimes contre l'humanité

• Date et lieu de l'arrestation : 5 février 2000, en Grande-Bretagne

• Date du transfert : 30 octobre 2000

• Date de la comparution initiale: 8 novembre 2000

• Précision sur le plaidoyer: non coupable

• Date du début du procès: 28 février 2005

• Date et contenu du prononcé de la peine : 12 septembre 2006, condamné à 25 ans de prison

• Appel: 29 août 2008, culpabilité et condamnation annulées par la Chambre d'appel

• Affaire retournée en première instance pour nouveau jugement sur un chef d'accusation

Décision relative à la requête du Procureur intitulée « Motion Pursuant to Trial Chamber's Directives of 7 December 2005 for the Verification of the Authenticity of Evidence Obtained out of Court Pursuant to Rules 89 (C) and (D) » 26 avril 2006 (ICTR-2000-55A-T)

(Original : Anglais)

Chambre de première instance II

Juges : Asoka de Silva, Président; Flavia Lattanzi; Florence Rita Arrey

Tharcisse Muvunyi – Audition d'un expert en écritures pour vérification de l'authenticité de documents et pour identification de leur signature, Admission d'éléments de preuve – Droits de l'Accusé – Intérêts de la justice, possibilité pour la Défense d'appeler à la barre un témoin pour contester la déposition de l'expert en écritures proposé – Compétences de l'expert – Admission d'éléments de preuve, Documents saisis lors de l'arrestation de l'Accusé, Légalité de la fouille et de la saisie des documents au regard du Règlement et du droit international, Droit du lieu de l'arrestation – Requête acceptée

Instruments internationaux cités :

Règlement de procédure et de preuve du T.P.I.R., art. 73 (A), 89, 89 (C), 89 (D) et 94 bis – Règlement de procédure et de preuve du T.P.I.Y., art. 39 ; Statut, art. 28

Jurisprudence internationale citée :

T.P.I.R.: Chambre de première instance, Le Procureur c. Bagosora et consorts, Decision on Admission of Tub 19 of Binder Produced in connection with Appearance of Witness Mawell Nkole, 13 septembre 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on the Prosecution Motion to Recall Witness Nyanjwa, 29 septembre 2004 (ICTR-98-41) ; 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 de première instance, Le Procureur c. Pauline Nyiramasuhuko et consorts, Decision on Prosecutor's Motion for Leave to Add a Handwriting Expert to his Witness List, 14 octobre 2004 (ICTR-98-42) ; Chambre de première instance, Le Procureur c. Tharcisse Muvunyi, Decision on the Prosecutor's Motion to Admit Documents Tendered during the Cross-Examination of Defence Witness Augustin Ndindiliyimana, 28 février 2006 (ICTR-2000-55A)

T.P.I.Y.: Chambre de première instance, Le Procureur v. Zejnil Delalić et consorts, Décision relative à la demande alternative de l'accusation de reprendre l'exposé de ses moyens, 19 août 1998 (IT-96-21) ; Chambre de première instance, Le Procureur c. Milomir Stakić, Decision, 10 octobre 2002 (IT-97-24)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIEGEANT en la Chambre de première instance II (la « Chambre »), composée des juges Asoka de Silva, Président, Flavia Lattanzi et Florence Rita Arrey,

SAISI de la requête du Procureur intitulée « Motion pursuant to Trial Chamber's Directives of 7 December 2005 for the Verification of the Authenticity of Evidence Obtained out of Court Pursuant to Rules 89 (C) and (D) », déposée le 30 mars 2006 (la « Requête »),

AYANT REÇU ET EXAMINÉ

(i) La réponse de la Défense, intitulée « Tharcisse Muvunyi's Reply (sic) to Prosecutor's Motion Pursuant to Trial Chamber's Directives of 7 December 2005 for Verification of the Authenticity of Evidence Obtained out of Court Pursuant to Rules 89 (C) and (D) », déposée le 7 avril 2006 (la « Réponse ») ;

(ii) Les objections de l'accusé, intitulées « Muvunyi's Objections to the Prosecutor's Request for a Handwriting Expert and Request for Cross- Examination », déposées le 18 avril 2006 ;

(iii) La réponse du Procureur aux objections de l'accusé, intitulée « Prosecutor's Response to Accused's Objections to the Prosecutor's Request for a Handwriting Expert and Request for Cross-Examination », déposée le 20 avril 2006 ;

VU le Statut du Tribunal (le « Statut ») et le Règlement de procédure et de preuve (le « Règlement »), notamment les articles 89 (C) et (D),

STATUE sur la requête sur la base des conclusions écrites des parties, en application de l'article 73 (A) du Règlement,

Introduction

1. Le 7 décembre 2005, pendant le contre-interrogatoire du témoin à décharge Augustin Ndindiliyimana, le Procureur a voulu verser au dossier un jeu de documents qui auraient été signés par l'accusé, Tharcisse Muvunyi, en sa qualité de « commandant de place, Butare-Gikongoro ». La Défense s'y est opposée au motif que ces documents ne satisfaisaient nullement à la norme de fiabilité requise et étaient donc inadmissibles. Le témoin ayant affirmé n'avoir jamais vu ces documents auparavant et ne pas reconnaître le sceau et la signature y figurant, la Chambre a conclu que lesdits documents ne pouvaient être admis comme pièces à conviction, mais qu'ils recevraient une cote aux seules fins d'identification. Ils ont ainsi reçu la cote « PID1 ». La Chambre a ajouté que le Procureur pourrait établir leur authenticité ultérieurement en citant des témoins à cette fin[6].

2. Le 31 janvier 2006, le Procureur a déposé une requête en vue de l'admission des documents portant la cote « PID1 », arguant qu'ils étaient pertinents, établissaient la véracité de certaines allégations contenues dans l'acte d'accusation et satisfaisaient à la norme de fiabilité requise pour être admis comme éléments de preuve.

3. Le 28 février 2006, la Chambre a rendu une décision par laquelle elle rejetait la requête du Procureur dans sa totalité au motif que les documents portant la cote « PID1 » ne constituaient pas un commencement de preuve fiable pour être recevables en vertu du Règlement. Elle a décidé que ces documents conserveraient aux seules fins d'identification la cote qui leur avait été attribuée.

Arguments des parties

Le Procureur

4. Le Procureur invoque les dispositions des paragraphes (C) et (D) de l'article 89. Il précise qu'il a déposé sa Requête en application de la décision orale du 7 décembre 2005 afin d'établir l'authenticité des documents portant la cote « PID1 » en appelant à la barre des témoins supplémentaires. A supposer même que la Chambre n'aurait à examiner que le point de savoir si Augustin Ndindiliyimana reconnaissait les documents portant la cote « PID1 », il resterait néanmoins nécessaire d'appeler à la barre un expert en écritures pour apporter la contradiction[7].

[6] Compte rendu de l'audience du 7 décembre 2005, p. 31.

[7] Prosecutor's Response to Accused's Objections to the Prosecutor's Request for a Handwriting Expert and Request for Cross-Examination, 20 avril 2006, par. 3.

5. Dans sa Requête, le Procureur annonce son intention d'appeler à la barre un expert en écritures, Antipas Nyanjwa, pour établir l'authenticité desdits documents et il demande l'autorisation de citer celui-ci. Il précise que si cette autorisation est donnée, l'expert en écritures déposera au sujet des signatures et de l'écriture apparaissant sur les documents portant la cote « PID1 », ayant pu les comparer à des documents similaires dont l'accusé est l'auteur et qui figuraient parmi les pièces saisies à la suite de l'arrestation de celui-ci au Royaume-Uni.

6. Le Procureur a joint à sa Requête le *curriculum vitae* de M. Nyanjwa, d'où il résulte que celui-ci est licencié ès lettres de l'Université Kurukshetra (Inde) (1993) et titulaire d'une maîtrise en criminologie et en médecine légale de l'Université de Sagar (Inde) (1994). Selon les documents déposés par le Procureur, de 1998 à 2001 M. Nyanjwa a suivi plusieurs formations de courte durée ou effectué des stages d'études supérieures, notamment un séminaire sur les « documents contestés », (documents manuscrits et documents non manuscrits), un stage sur l'analyse des faux en écriture et un cours d'analyse scientifique des documents. Depuis 1996, il est chargé de l'analyse scientifique des documents auprès de la police kényane. Le Procureur ajoute que M. Nyanjwa est un expert reconnu et qu'il a témoigné en cette qualité devant le Tribunal, mais il ne précise pas dans quelle(s) affaire(s).

La Défense

7. La Défense s'oppose à la Requête du Procureur essentiellement pour les trois raisons que voici : (i) il ne faut pas permettre au Procureur de reprendre la présentation de ses moyens au présent stade de la procédure ; (ii) les documents dont le Procureur demande l'admission ne constituent pas des éléments de preuve en réplique ; (iii) en faisant droit à la Requête, on méconnaîtrait le droit de l'accusé d'être jugé sans retard excessif (art. 20 du Statut).

8. Se fondant sur une décision rendue par la Chambre de première instance du TPIY en l'affaire *Čelebići*, la Défense fait valoir que pour être autorisé à reprendre la présentation de ses moyens, le Procureur doit établir que les éléments de preuve qu'il souhaite produire n'étaient pas en sa possession auparavant et qu'il n'aurait pu les obtenir même en exerçant toute la diligence voulue. Pour la Défense, le Procureur ne remplit pas cette condition et, de ce fait, admettre les éléments de preuve proposés, ce serait lui accorder un avantage tactique indu.

9. Pour ce qui est des contre preuves du Procureur, la Défense fait valoir que le propre de la réplique est de produire une preuve pour réfuter un élément de preuve particulier que la Défense a présenté, et qu'elle se limite donc aux questions soulevées directement et expressément par les moyens de preuve à décharge. Elle fait valoir que les Chambres de première instance hésitent généralement à faire droit à des offres de preuve en réplique ayant pour seul but de compléter la thèse du Procureur ou, tout simplement, de permettre à celui-ci de citer des témoins supplémentaires pour contrer les arguments de la Défense.

10. La Défense rappelle l'ordre de présentation des moyens de preuve fixé par l'article 85 du Règlement selon lequel le Procureur présente sa preuve pour établir la responsabilité de l'accusé. La Défense présentant en retour ses moyens à décharge. Elle convient que le Procureur peut dans certains cas être autorisé à présenter des moyens de preuve supplémentaires, mais elle souligne le caractère exceptionnel de cette mesure qui ne peut avoir pour seul but de renforcer les éléments de preuve produits précédemment ou de présenter des éléments de preuve jugés non pertinents antérieurement.

11. Selon la Défense, rien de ce qu'a dit le témoin à décharge Augustin Ndindiliyimana, durant son contre-interrogatoire du 7 décembre 2005, à propos des documents portant la cote PID1 ne saurait justifier que le Procureur appelle à la barre un expert en écritures dans le cadre de sa réplique.

12. Elle considère que si ledit expert était autorisé à déposer à charge, elle se verrait contrainte de s'assurer les services d'un autre expert en écritures pour examiner les documents contestés et déposer ensuite à décharge. À l'entendre, tout ceci pourrait prendre des mois, et ce, au mépris du droit de l'accusé d'être jugé sans retard excessif.

13. Elle s'oppose également à ce qu'on utilise pour les comparer avec les documents contestés, des documents ou pièces de l'accusé saisis lors de son arrestation au Royaume-Uni.

14. Elle affirme enfin que la Requête du Procureur est fantaisiste et doit être rejetée.

Délibération

15. La Chambre tient compte des dispositions des paragraphes (C) et (D) de l'article 89 du Règlement, ainsi que de la jurisprudence du Tribunal selon laquelle, lorsqu'elle exerce le pouvoir que lui confère l'article 89 de décider s'il faut recevoir des éléments de preuve, elle doit peser la pertinence et la valeur probante de ces éléments, en regard du préjudice que pourrait subir l'accusé si ceux-ci étaient admis. En général, lorsque la Chambre estime que cet effet préjudiciable a des chances de l'emporter sur la valeur probante, elle choisira de rejeter ces éléments de preuve[8].

16. La Chambre prend note de l'intention du Procureur d'appeler à la barre l'expert en écritures proposé pour établir l'authenticité des pièces contenues dans le jeu de trois documents portant la cote PID1.

- Le document n°1, une lettre écrite en français et datée du 21 avril 1994, est adressé à un bourgmestre de Gikongoro dont le nom n'est pas mentionné. Il aurait pour auteur l'accusé, dont le nom figure sur le document et serait signé de lui en qualité de « Comd Place, BUT-GIK ». Il informe le bourgmestre du projet du Ministre de la défense de former 10 jeunes par secteur dans le cadre du programme de défense civile.
- Le document n°2, une lettre écrite en français et datée du 21 avril 1994, est une convocation à une réunion de coordination devant se tenir le 25 avril 1994 à partir de 9 heures. Sur le document figurent le nom de l'accusé, son titre (« Lt. Col., Cmd Place But-Gik ») et une signature qui serait la sienne.
- Le document n°3 contient trois formulaires dactylographiés sur lesquels le nom et le numéro de la carte d'identité de trois individus ont été inscrits à la main. En tête de chacun des formulaires apparaît la mention « Butare le 10/5/1994 ». A la fin, on lit la mention « Muvunyi Tharcisse, Lt. Col. Cmd OPS Butare ».

17. La Chambre rappelle que le 7 décembre 2005, le Procureur avait tenté de verser ces documents au dossier, lors du contre-interrogatoire du témoin Augustin Ndindiliyimana, lequel avait indiqué qu'il ne pouvait pas dire si la signature apparaissant sur les documents portant la cote PID1 était celle de l'accusé et n'avait pu reconnaître les sceaux qui y figuraient. La Chambre avait décidé d'attribuer à ces documents une cote aux seules fins d'identification. Le Procureur se propose à présent d'appeler à la barre un expert en écritures, Antipas Nyanjwa, pour prouver que la signature apparaissant sur lesdits documents est bel et bien celle de l'accusé. La Chambre doit donc déterminer, si, compte tenu de toutes les circonstances, il convient d'autoriser le Procureur à appeler à la barre l'expert en écritures, à seule fin d'établir que les documents portant la cote PID1 sont authentiques et qu'ils portent la signature de l'accusé.

18. La Chambre rappelle que l'article 85 du Règlement définit l'ordre de présentation des moyens de preuve devant le Tribunal. Selon elle, en vertu de cet article il appartient au Procureur, en tant qu'auteur de l'acte d'accusation, de produire, dans le cadre de la présentation de ses moyens, tous les éléments de preuve qui sont en sa possession et dont il estime qu'ils permettront de prouver les allégations portées contre l'accusé. De la sorte, celui-ci peut effectivement répondre aux arguments du

[8] Le Procureur c. Tharcisse Muvunyi, affaire N°ICTR-2000-55A-T, Decision on the Prosecutor's Motion to Admit Documents Tendered during the Cross-Examination of Defence Witness Augustin Ndindiliyimana, 28 février 2006 ; Le Procureur c. Bagosora et consorts, affaire N°ICTR-98-41-T, Decision on Admission of Tub 19 of Binder Produced in connection with Appearance of Witness Mawell Nkole, 13 septembre 2004 ; Nyiramasuhuko c. le Procureur, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, affaire N°ICTR-98-42-AR73.2, Chambre d'appel, 4 octobre 2004.

Procureur lorsqu'il présente ses propres moyens. Dans l'affaire *Čelebići,* la Chambre de première instance du TPIY a déclaré ce qui suit : « ... [le Procureur] doit présenter les éléments établissant la culpabilité de l'accusé dans le cadre de l'exposé de ses moyens[9] ».

19. Ce principe général étant posé, la Chambre relève que, dans l'exercice de son pouvoir discrétionnaire de recevoir des éléments de preuve en vertu de l'article 89 (C) du Règlement, elle doit s'efforcer de recevoir tous les éléments de preuve qu'elle juge pertinents pour faire la lumière sur les allégations portées dans l'acte d'accusation, sans pour autant léser substantiellement les droits de l'accusé. Lorsque l'exercice de son pouvoir discrétionnaire peut causer un tel préjudice, la Chambre doit se tourner vers les mécanismes mis au point par la procédure pénale afin de réparer le préjudice qui serait causé, et garantir la tenue d'un procès équitable.

20. Après un examen minutieux des documents portant la cote PID1, la Chambre conclut que l'audition d'un témoin qui déposera au sujet de ces documents va dans le sens de l'objectif qu'elle-même poursuit de faire la lumière sur les allégations portées contre l'accusé en l'espèce.

21. La Chambre n'ignore pas qu'on se trouve à un stade très avancé de la procédure. Elle estime néanmoins que ce qui est au cœur de la requête, c'est l'allégation selon laquelle l'accusé était le commandant de place de Butare et Gikongoro. Cette allégation, qui n'est pas nouvelle, a été contredite par la Défense lorsqu'elle a présenté ses moyens. Cependant, la Chambre est convaincue qu'il faudrait dans l'intérêt de la justice, donner la possibilité à la Défense d'appeler à la barre un témoin pour contredire ou autrement contester la déposition de l'expert en écritures proposé par le Procureur.

22. Ayant décidé que l'audition d'un témoin appelé à la barre pour établir l'authenticité des documents portant la cote PID1 est admissible dans l'intérêt de la justice, la Chambre doit à présent se prononcer sur les compétences d'Antipas Nyanjwa, l'expert proposé par le Procureur. Elle note que la Défense, se fondant sur l'article 94 *bis* du Règlement, conteste la qualification de l'expert en écritures proposé et fait part de son intention de contre-interroger celui-ci s'il est appelé à la barre. La Chambre a examiné attentivement les titres universitaires et la qualification professionnelle de M. Nyanjwa, son expérience dans le domaine de l'analyse scientifique des documents tant dans son pays natal qu'en qualité d'expert en écritures agréé auprès du Tribunal et le rapport d'expert qu'il a déposé[10]. Elle est convaincue, eu égard aux connaissances spécialisées de M. Nyanjwa, à ses compétences, à sa formation et à son expérience, qu'il peut aider la Chambre à déterminer l'authenticité de la signature au bas des documents portant la cote PID1.

23. La Chambre prend note de l'objection de la Défense selon laquelle les documents de l'accusé saisis lors de son arrestation au Royaume-Uni ne sauraient être utilisés aux fins de comparaison avec la signature contestée apparaissant au bas des documents portant la cote PID1. Selon la Défense, le mandat d'arrêt et l'ordonnance de transfèrement de l'accusé datés du 2 février 2000[11] n'autorisent pas la saisie des avoirs de l'accusé. Elle conclut donc que la saisie de documents de l'accusé lors de son arrestation au Royaume-Uni en 2000 était illégale et que la Chambre ne pourra les utiliser pour les comparer avec des documents contestés.

23.* La Chambre rappelle la décision rendue par la Chambre d'appel du TPIY dans l'affaire *Stakić*. La Défense avait fait valoir que certains documents de l'accusé saisis lors de son arrestation avaient été obtenus illégalement et devaient être exclus, car il y allait du droit de l'accusé à un procès

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[9] *Le Procureur c. Zejnil Delalić et consorts* («affaire *Čelebići* »), Décision relative à la demande alternative de l'Accusation de reprendre l'exposé de ses moyens, 19 août 1998, par 18.

[10] La Chambre relève que M. Nyanjwa a déjà témoigné deux fois au moins devant le Tribunal en tant qu'expert en écritures. Voir Le Procureur c. Nyiramasuhuko et consorts, Decision on Prosecutor's Motion for Leave to Add a Handwriting Expert to his Witness List, 14 octobre 2004 ; Le Procureur c. Bagosora et consorts, Decision on the Prosecution Motion to Recall Witness Nyanjwa, 29 septembre 2004.

[11] *Le Procureur c. Tharcisse Muvunyi, Idelphonse Nizeyimana et Idelphonse Hategekimana*, Mandat d'arrêt et ordonnance de transfert et de placement en détention, ainsi que de recherche et de saisie, 2 février 2000.

* La numérotation erronée est le fait du Tribunal.

équitable. La Chambre d'appel a conclu que l'article 39 du Règlement du TPIY habilitait le Procureur à recueillir tous éléments de preuve et à enquêter sur les lieux et que la Défense n'avait pas établi dans les circonstances de l'espèce que la fouille et la saisie avaient été effectuées de manière illégale au regard du Règlement ou du droit international[12]. La Chambre pense, comme la Chambre d'appel du TPIY, que la Défense doit établir que la fouille et la saisie des documents qui ont permis d'obtenir ces documents étaient entachées d'illégalité au regard du Règlement ou du droit international.

24. La Chambre relève que l'arrestation et le transfèrement d'accusés au Tribunal concernent à la fois le droit interne et le droit international. En effet, l'article 28 du Statut exige des Etats qu'ils collaborent avec le Tribunal à la recherche et au jugement des personnes accusées d'avoir commis des violations graves du droit international humanitaire. Pour la Chambre, le mandat d'arrêt et l'ordonnance de transfèrement de l'accusé ont été délivrés par un tribunal international, mais il a fallu la coopération des États et l'application du droit interne pour les exécuter. Le droit anglais – l'accusé a été arrêté au Royaume-Uni – permet la fouille et la saisie de pièces pendant ou après l'arrestation[13].

25. La Chambre est donc convaincue, se fondant sur l'article 39 du Règlement et sur les dispositions visées du droit anglais, qu'il existe une base juridique suffisante justifiant la saisie des pièces trouvées sur l'accusé lors de son arrestation et leur utilisation dans le cadre de procédures engagées devant le Tribunal. Aussi l'argument que la Défense fait valoir à cet égard n'est-il pas fondé, et il est écarté.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT à la Requête et PRESCRIT les mesures suivantes :

1. Antipas Nyanjwa, l'expert en écritures proposé par le Procureur, déposera le 8 ou le 9 mai 2006 ;

2. Si elle le souhaite, la Défense pourra déposer une requête demandant à pouvoir appeler à la barre un témoin en duplique pour contredire ou autrement contester la déposition du témoin à charge susmentionné ;

3. S'il est fait droit à cette requête, le témoin appelé en duplique pourra déposer les 1er et 2 juin 2006.

Fait à Arusha, le 26 avril 2006.

[Signé] : Asoka de Silva, Président; Flavia Lattanzi; Florence Rita Arrey

[12] *Le Procureur c. Milomir Stakić*, *Decision*, Chambre d'appel, 10 octobre 2002.
[13] Voir la Police and Criminal Evidence Act de 1984.
L'article 17 (1) (a) est libellé en partie comme suit « ... un agent de police est habilité à pénétrer et à perquisitionner dans tous locaux aux fins d'exécuter un mandat d'arrêt délivré dans le cadre d'une procédure criminelle ... » [traduction]
L'article 18 (1) est ainsi libellé en partie : «Un agent de police est habilité à pénétrer et à perquisitionner dans tous locaux occupés ou contrôlés par une personne détenue pour une infraction justifiant l'arrestation sans mandat, si cet agent a des raisons suffisantes de soupçonner que ces locaux contiennent des éléments de preuve ... liés (a) à l'infraction visée ; (b) à toute autre infraction justifiant l'arrestation sans mandat, qui est liée ou similaire à cette infraction ».
L'article 18 (2) est ainsi libellé : «Un agent de police est habilité à saisir et conserver toute pièce faisant l'objet de la perquisition visée au paragraphe (1) ci-dessus ».

The Prosecutor v. Siméon NCHAMIHIGO

Case N° ICTR-2001-63

Case History

• Name: NCHAMIHIGO

• First Name: Siméon

• Date of birth: 1959

• Sex: male

• Nationality: Rwandan

• Former Official Functions: *Substitut du Procureur de la République* [Deputy Prosecutor] in Cyangugu *préfecture*, and Secretary for the *Coalition pour la Défense de la République* (CDR) in Cyangugu *préfecture*

• Date of Indictment's Confirmation: 23 June 2001

• Date of Indictment's Amendments: 18 July 2006, 29 September 2006 and 11 December 2006

• Counts: genocide and crimes against humanity (murder, extermination and other inhumane acts)

• Date and Place of Arrest: 19 May 2001, in Tanzania

• Date of Transfer: 25 May 2001

• Date of Initial Appearance: 29 June 2001

• Date Trial Began: 25 September 2006

• Date and content of the Sentence: 6 December 1999, sentenced to life imprisonment

• Case on Appeal

Decision on Defence Motion to Set a Date for Trial
21 April 2006 (ICTR-2001-63-I)

(Original : not specified)

Trial Chamber I

Judge : Erik Møse, Presiding Judge

Siméon Nchamihigo – Setting of a date for trial – Status conference – Premature motion

International Instruments Cited :

Rules of Procedure and Evidence, Rules 62 (A) and 73

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Emmanuel Rukundo, Decision on the Motion of the Defence for Setting of a Date for the Commencement of Trial or Alternatively, the Transfer of the Case to a National Jurisdiction, 1 June 2005 (ICTR-2001-70) ; Trial Chamber, The Prosecutor v. Hormisdas Nsengimana, Decision on Nsengimana's Motion for the Setting of a Date for a Pre-Trial Conference, a Date for the Commencement of Trial, and for Provisional Release, 11 July 2005 (ICTR-2001-69)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Judge Erik Møse, designated by the Trial Chamber pursuant to Rule 73 of the Rules of Procedure and Evidence of the Tribunal;

BEING SEIZED OF the "Requête de la Défense aux fins de fixation de la date d'ouverture du procès", filed on 6 March 2006;

CONSIDERING the Prosecution Response, filed on 8 March 2006;

HEREBY DECIDES the motion.

Introduction

1. On 29 June 2001, the Accused made his initial appearance and pleaded not guilty to all three counts in the Indictment. The Defence complains that there has since been no progress in the case, and requests the setting of a date for the commencement of the trial. The Defence specifically asks that the trial start in September 2006 and that a Pre-trial Conference be scheduled accordingly. The Prosecution expresses its willingness to advance the proceedings and suggests that a Status Conference be held, as a Pre-trial Conference is premature.

Deliberations

2. At the initial appearance of the Accused, the Presiding Judge affirmed that "[t]he date for trial will be set later".[14] Such indication satisfies the provisions of Rule 62 (A) of the Rules and conforms to the Tribunal's jurisprudence.[15]

[14] *Nchamihigo*, T. 29 June 2001, p. 32.

3. The Chamber is mindful of the right of the Accused to be tried without undue delay. The date for commencement of any particular trial depends on a variety of factors, some of which cannot be determined in the absence of consultation with both parties. In order to facilitate this consultation, the Chamber directed the Registry to ascertain the parties' availability for a status conference. The Defence indicated that it could be available from 15 May 2006, and the conference has been scheduled for 19 May 2006. Setting a date for the commencement of trial prior to this consultation would be premature.

FOR THE ABOVE REASONS, THE CHAMBER

DECLARES the motion premature.

Arusha, 21 April 2006.

[Signed] : Erik Møse

[15] *Rukundo*, Decision on the Motion of the Defence for Setting of a Date for the Commencement of Trial or Alternatively, the Transfer of the Case to a National Jurisdiction (TC), 1 June 2005, para. 14 ("As regards the question of determination of a date for the commencement of the trial, the Chamber reiterates that it is a matter for the general administration of the Tribunal and its judicial calendar. The Tribunal evaluates priorities taking into account notably the gravity of the crimes charged, the rights of all accused to have a fair trial within a reasonable time and the availability of Tribunal facilities in setting the judicial calendar"; unofficial translation). This passage was also referred to and concurred with in *Nsengimana*, Decision on Nsengimana's Motion for the Setting of a Date for a Pre-Trial Conference, a Date for the Commencement of Trial, and for Provisional Release, 11 July 2005 (TC), paras. 14-15.

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Decision on Request for Extension of Time to Respond 28 June 2006 (ICTR-2001-63-I)

(Original : English)

Trial Chamber I

Judge : Erik Møse, Presiding Judge

Siméon Nchamihigo – Extension of time – Importance of the modifications proposed to the Indictment, Importance and complexity of the matter – Motion granted in part

International Instrument Cited :

Rules of Procedure and Evidence, Rule 73

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Judge Erik Møse, designated by the Trial Chamber pursuant to Rule 73 of the Rules of Procedure and Evidence of the Tribunal;

BEING SEIZED OF the "Requête de la Défense aux fins de demander l'extension du délai pour répondre à la requête du Procureur en modification de l'acte d'accusation", filed on 11 May 2006;

CONSIDERING the Prosecution Response thereto, filed on 15 May 2006;

HEREBY DECIDES the motion.

1. The Indictment against the Accused is dated 29 June 2001. On 5 May 2006, the Prosecution filed a request to amend the Indictment.[1] The Defence, in its motion, asks for an extension to respond to the Prosecution request until 17 July 2006. The Defence subsequently communicated to the Chamber that it would be prepared to file a response by 2 July 2006.

2. The motion also complains that the Defence had not received the French version of the proposed Amended Indictment. The Chamber notes that on 17 May 2006, the Prosecution filed the French translation.

3. In light of the modifications proposed to the Indictment, including an additional charge, and given the importance and complexity of the matter, the Chamber agrees that the five-day statutory time-period is too short a period to prepare an adequate response. Accordingly, the Defence will have until 3 July 2006 to file a response.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in part and extends the deadline until 3 July 2006.

Arusha, 28 June 2006.

[1] Nchamihigo, "Requête du procureur aux fins d'être autorisé à modifier l'acte d'accusation" (TC), 5 May 2006.

[Signed] : Erik Møse

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Decision on Request for Leave to Amend the Indictment 14 July 2006 (ICTR-2001-63-I)

(Original : not specified)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

Siméon Nchamihigo – Leave to amend the indictment – Factors weighed by the Chamber – Separation of the crimes of extermination and murder, Absence of prejudice to the Accused, Usual practice – Addition and removal of counts – Joint criminal enterprise, Clarification of the forms and nature of participation alleged – Specification of material facts – Addition of new material facts, Clarification of the notion of new charge, Prejudice or absence thereof to the Accused due to the new facts – Diligence of the Prosecution and its timeliness in bringing the motion – Witness protection, disclosure of witness statements – Motion granted in part

International Instruments Cited :

1949 Geneva Conventions, Art. 3 common ; 1977 Additional Protocol II to the Geneva Conventions ; Rules of Procedure and Evidence, Rules 11 bis, 50, 50 (A), 50 (A) (i), 50 (B), 50 (C) and 66 (A) (i)

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. 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. Juvénal Kajelijeli, Decision on Prosecutor's Motion to Correct the Indictment dated 22 December 2000 and Motion for Leave to File an Amended Indictment Warning to the Prosecutor's Counsels Pursuant to Rule 46 (A), 25 January 2001 (ICTR-98-44A) ; 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) ; Trial Chamber, The Prosecutor v. Mika Muhimana, Decision on Motion to Amend Indictment, 21 January 2004 (ICTR-95-1B) ; Trial Chamber, The Prosecutor v. Aloys Simba, Decision on Motion to Amend Indictment, 26 January 2004 (ICTR-2001-76) ; Appeals Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File an Amended Indictment, 12 February 2004 (ICTR-99-50) ; Trial Chamber, The Prosecutor v. Aloys *Simba, Decision on Defence Motion for New Initial Appearance, 5 March 2004 (ICTR-2001-76) ; 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) ; Trial Chamber, The Prosecutor v. Aloys Simba, Decision on the Defence's Preliminary Motion Challenging the Second Amended Indictment, 14 July 2004 (ICTR-2001-76) ; Appeals Chamber, The Prosecutor v. Gérard and Elizaphan Ntakirutimana, Judgement, 13 December 2004 (ICTR-96-10 and 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. Jean Mpambara, Decision on the Prosecution's Request*

for Leave to File an Amended Indictment, 4 March 2005 (ICTR-2001-65) ; Trial Chamber, The Prosecutor v. Tharcisse Renzaho, Décision sur la Requête du Procureur demandant l'autorisation de déposer un acte d'accusation modifié, 18 March 2005 (ICTR-97-31) ; Trial Chamber, The Prosecutor v. Jean Baptiste Gatete*, Decision on the Prosecution's Request for Leave to File an Amended Indictment, 21 April 2005 (ICTR-2000-61) ; Appeals Chamber, The Prosecutor v. Laurent Semanza, Judgement, 20 May 2005 (ICTR-97-20) ; 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. Tharcisse Renzaho, Decision on the Prosecutor's Application for Leave to Amend the Indictment Pursuant to Rule 50 (A) of the Rules of Procedure and Evidence, 13 February 2006 (ICTR-97-31)*

I.C.T.Y.: Trial Chamber, The Prosecutor v. Milorad Krnojelac, Decision on Prosecutor's Response to Decision of 24 February 1999, 20 May 1999 (IT-97-25) ; Trial Chamber, The Prosecutor v. Radislav Krstić, Judgment, 2 August 2001 (IT-98-33) ; Trial Chamber, The Prosecutor v. Enver Hadžihasanović and Amir Kubura, Decision on Form of the Indictment, 17 September 2003 (IT-01-47) ; Trial Chamber, The Prosecutor v. Sefer Halilovic, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2004 (IT-01-48) ; Trial Chamber, The Prosecutor v. Jovica Stanišić and Franco Simatović, Decision on Prosecution Motion for Leave to Amend the Amended Indictment, 16 December 2005 (IT-03-69) ; Appeals Chamber, The Prosecutor v. Milomir Stakić, Judgement, 22 March 2006 (IT-97-24)

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 du procureur aux fins d'être autorisé à modifier l'acte d'accusation", filed on 5 May 2006;

CONSIDERING the Defence Response, filed on 5 July 2006; and the Prosecution Reply, filed on 10 July 2006;

HEREBY DECIDES the motion.

Introduction

1. The current Indictment of the Accused, dated 29 June 2001, charges the Accused with three counts: genocide, or alternatively, complicity in genocide; extermination, or alternatively, murder, as a crime against humanity; and violations of Article 3 common to the Geneva Conventions and Additional Protocol II.[1] The Prosecution now seeks leave to alter the charges against the Accused and has drawn up a proposed Indictment. The Defence opposes the motion.

2. As a preliminary matter, the Chamber rejects the Defence argument that it should not consider the Prosecution reply to its response. Although such filings are not specifically permitted by the Rules of Procedure and Evidence, nor are they prohibited. The Chamber has discretion to consider such submissions and, in the present instance, chooses to do so.[2]

Submissions

3. The Prosecution proposes the following amendments to the current Indictment: separation of extermination as a crime against humanity and murder as a crime against humanity into two distinct

[1] The Accused pleaded not guilty to all three counts at his initial appearance on 29 June 2001.
[2] *Bagosora et al.*, Decision on Kabiligi Request for Particulars of the Amended Indictment, 27 September 2005 (TC), para. 3.

and independent counts, rather than as a single count in which the two crimes are pleaded in the alternative; removal of the counts of complicity in genocide and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto, and addition of a count of other inhumane acts as crimes against humanity under Article 3 (i) of the Statute; clarification that the Accused is charged with participating in a joint criminal enterprise; insertion of additional details, including names, dates and places with respect to other factual allegations, and removal of some generally phrased material facts; and, addition of new material facts such as, for example, an allegation that the Accused personally killed four Tutsi civilians.

4. The Prosecution states that many of the changes are justified by the discovery of new information which indicates a "much greater participation by the Accused" in the crimes charged, as well as participation in other inhumane acts as a crime against humanity.[3] The proposed Indictment is said to more accurately reflect the totality of the evidence against the Accused and provides more specificity as to the nature and cause of the charges against him. The Accused will suffer no prejudice if leave to amend is granted because, according to the Prosecution, the proposed Indictment is based largely on material which has already been disclosed to the Accused pursuant to Rule 66 (A).[4] Further, in the absence of any date for the opening of the trial the right of the Accused to be tried without undue delay under Article 20 (4) (c) of the Statute will not be compromised.[5]

5. The Prosecution claims that it has been diligent in moving for the amendments in a timely manner.[6] The failure to previously propose amendments to the Indictment is justified on the basis that the Prosecution was negotiating for the transfer of the present case to a national jurisdiction. The Prosecution did not consider it necessary to amend the Indictment while such negotiations were ongoing.[7]

6. In its motion, the Prosecution also requests that Witnesses BRG, BRD, BRE, BNB, BRF, BRK, BRH, BRR, BRQ, BRN, BRO, BPA, BRX, BOV, BPX, BRY, BRZ, BOU, and API be granted protective measures under Rules 53 (A), 69 and 75 (A) and that the statements be disclosed to the Defence only in redacted form, pursuant to an order of the chamber.[8]

7. The Defence opposes the motion. The five-year delay between the filing of the current Indictment and the present amendments is said to be unjustified. Many of the factual elements which the Prosecution now seeks to add to that Indictment were discovered some time ago; the Prosecution must have been aware of these facts, in light of the ongoing *Ntagerura* trial, which involved many of the same factual allegations that are now brought against the Accused.[9] Moreover, twelve of the new witnesses upon whom the new material facts are based are detainees, who should have been discoverable long before now.[10] Negotiations with a State for the purpose of transferring the case to a national jurisdiction provide no excuse for failing to amend the Indictment in a timely manner.[11]

8. Granting the Prosecution leave to amend the Indictment under these circumstances, argues the Defence, would be prejudicial to the Accused. The majority of paragraphs in the proposed Indictment contain entirely new information, including four new counts, that, according to the Defence, is not based on information which has already been disclosed.[12] As such, it is claimed that, if the amendment were granted, the Defence would have to start its work anew.[13] The inclusion of new charges would necessitate a further appearance and plea by the Accused, which would further delay the start of the

[3] Motion, para. 6 (iii); Brief in Support of Motion, para. 26.
[4] Motion, para. 6 (vi).
[5] Brief in Support of Motion, paras. 41-42, Prosecutor's Reply, para. 8. See also footnote 46 below.
[6] Motion, para. 6 (vii); Reply, para. 7.
[7] Brief in Support of Motion, para. 14.
[8] Motion, para. 7.
[9] Response, paras. 3, 84, 90-98, 106, 107.
[10] *Id*., para. 105.
[11] *Id*., paras. 3, 98.
[12] *Id*., paras, 5, 64, 66-68, 90-91, 156.
[13] *Id*., para. 73.

case.[14] Furthermore, the ameliorating effect of the amendments is negligible.[15] The proposed Indictment uses cumulative formulations to plead criminal responsibility, creating confusion and leaving doubt as to which forms of responsibility attach to each count.[16] For example, the proposed Indictment does not specify which forms of joint criminal enterprise the Prosecution is alleging.[17] The proposed Indictment would lead to additional contention and conflict between the parties.[18]

Deliberations

9. Rule 50 (A) (i) provides that, after the initial appearance of the Accused, an indictment may only be amended with leave of the Trial Chamber. The Chamber has discretion whether to grant leave on a case-by-case basis.[19] In making its determination, the Chamber must weigh three factors: the ameliorating effect of the changes on the clarity and precision of the case to be met; the diligence of the Prosecution in making the amendment in a timely manner that avoids creating an unfair tactical advantage; and the likely delay or other possible prejudice to the Defence, if any, caused by the amendment.[20] The Chamber must also consider whether a *prima facie* case exists to support any new charges in the proposed amendment.[21] At the time this motion was filed, no date for trial had been set. However, on 13 July 2006, the trial was scheduled to start on 25 September 2006. The impact of the proposed amendments will be considered in the context of this schedule.

(a) Separation of the Crimes of Extermination and Murder

10. Separation of the crimes of extermination and murder does not prejudice the Accused. As the current Indictment now stands, with the crimes pleaded in the alternative, the Defence would necessarily have had to prepare to meet both charges. Separation of the counts does not expand the legal basis of criminal liability alleged against the Accused, although it does potentially place him in greater jeopardy if convicted of both crimes. In the absence of any discernible prejudice, and in light of the usual practice of pleading these charges as separate crimes, the Chamber considers the amendment to be justified.

(b) Addition and Removal of Counts and Modes of Liability

11. The Prosecution proposes to withdraw two counts: complicity in genocide and violations of Article 3 common to the Geneva Conventions and Additional Protocol II. The consistent jurisprudence of the International Criminal Tribunals holds that, in the absence of specific pleading to the contrary, the material elements of complicity and aiding and abetting are substantially identical.[22] The removal

[14] *Id*.,paras. 77, 80, 124, 153, 154.
[15] *Id*., paras. 162, 166.
[16] *Id*., paras. 142-145.
[17] Response, para. 149.
[18] Response, para. 163.
[19] *Renzaho*, Decision on the Prosecutor's Application for Leave to Amend the Indictment Pursuant to Rule 50 (A) of the Rules of Procedure and Evidence (TC), 13 Feb 2006 ("Renzaho Trial Chamber Decision"), para. 9; *Ndindiliyimana*, Decision on Prosecutor's Motion Under Rule 50 for Leave to Amend the Indictment (TC), 26 March 2004, para 41; *Bizimungu et al*., Decision on the Prosecutor's Request for Leave to File an Amended Indictment (TC), 12 Feb 2004, para. 27.
[20] *Karemera*, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment (AC), 19 December 2003; *Gatete*, Decision on the Prosecution's Request for Leave to File an Amended Indictment (TC), 21 April 2005, para. 3; *Mpambara*. Decision on the Prosecution's Request for Leave to File an Amended Indictment (TC), 4 March 2005, para. 8; *Simba*, Decision on Motion to Amend Indictment (TC), 26 January 2004, para. 9.
[21] Rule 50 (A) (ii) states: "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".
[22] *Semanza,* Judgement (AC), 20 May 2005, para. 316 ("[i]n reaching this conclusion, the *Krstić* Appeals Chamber derived aiding and abetting as a mode of liability from Article 7 (1) of the ICTY Statute, but also considered that aiding and abetting constitutes a form of complicity, suggesting that complicity under Article 2 of the ICTR Statute… would also encompass aiding and abetting, based on the same *mens rea*"); *Bagosora et al*., Decision on Motions for Judgement of Acquittal (TC), 2 February 2005, para. 21 ("Aiding and abetting genocide and complicity in genocide are substantially overlapping, if not materially identical, forms of criminal conduct"); *Akayesu,* Judgement (TC), 2 September 1998, para. 546 (noting that

of the count of complicity in genocide therefore reduces the redundancy in the current Indictment and is, hence, in the interests of justice.

12. The Prosecution submits that lack of evidence justifies removal of the count of violations of Article 3 common to the Geneva Conventions and Additional Protocol II on the basis of lack of evidence to support the count. The Chamber takes note of the Prosecution position and grants the amendment.[23]

13. The proposed Indictment adds the new count of other inhumane acts as a crime against humanity. Except as addressed below in paragraph 21 of this Decision, detailed factual allegations supporting the count are provided in paragraphs 72-75 of the proposed Indictment. Some of the material facts alleged in support of the count were already included in the current Indictment in support of all three counts against the Accused.[24] Thus, some of the allegations are, in fact, already well-known to the Accused. Other allegations, added in paragraph 73 of the proposed Indictment, are also alleged in paragraph 31, in support of the count of genocide in that Indictment. The Chamber is of the view that the Defence will have sufficient time before the start of trial to conduct investigation into the new material facts in support of this count.

(c) Joint Criminal Enterprise

14. The proposed Indictment advances with greater particularity the theory of joint criminal enterprise as a mode of criminal liability.[25] Paragraph 21 of the current Indictment refers to this form of criminal responsibility, albeit ambiguously, stating that "Siméon Nchamihigo ordered, directed or acted in concert with administrative and military officials in Cyangugu *préfecture* ... in the planning, preparation or execution of a common scheme, strategy or plan". The proposed Indictment has clarified the forms and nature of participation alleged.[26] Paragraphs 16 and 18 of the proposed Indictment allege that the Accused

> knowingly and willfully participated in a joint criminal enterprise .... The purpose of the joint criminal enterprise was the destruction of the Tutsi racial or ethnic group in Cyangugu *préfecture* [*sic*] through the commission of the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity …. [T]hese crimes were the natural and foreseeable consequences of the execution of the common purpose of the joint criminal enterprise.

The specification that the crimes were the "natural and foreseeable consequence" of the common purpose gives notice to the Accused that he is charged not only with the "basic" form of joint criminal enterprise, but also the "extended" form. This precision allows the parties and Chamber to proceed on a clearer and more precise legal footing which is beneficial for the conduct of the trial. The Prosecution's proposal to integrate the theory of joint criminal enterprise in the proposed Indictment is therefore granted.

"aiding and abetting" in Article 6 (1) "are similar to the material elements of complicity"). See also *Krstić*, Judgement (TC), 2 August 2001, para. 640.

[23] In this regard, "a prosecutor who no longer intends to prosecute an accused on certain counts of the indictment needs no amendment of the indictment to achieve that end. He could, instead, simply declare, at the opening of the trial, that he will not present any evidence on those counts." *Muvunyi* Decision, para. 31.

[24] Compare para. 75 of the proposed Indictment with paras. 14, 20 and 21 of the current Indictment.

[25] *Stakic*, judgement (AC), 22 March 2006, para. 65 (characterizing joint criminal enterprise as "the existence a common purpose which amounts to or involves the commission of a crime provided for in the Statute").

[26] *Ntakirutimana*, Judgement (AC), 13 December 2004, paras. 463-467 *(The* "'basic' form of joint criminal enterprise ... is represented by cases where all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention .... [The] "systemic" form of joint criminal enterprise ... is a variant of the basic form, characterised by the existence of an organised system of ill-treatment .... The third category is an "extended" form of joint criminal enterprise. It concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of executing that common purpose"); *Simba,* Decision on the Defence's Preliminary Motion Challenging the Second Amended Indictment (TC), 14 July 2004, paras. 8-10; *Mpambara,* Decision on the Prosecution's Request for Leave to File an Amended Indictment (TC), 4 March 2005, para. 12; *Gatete*, Decision on the Prosecution's Request for Leave to File an Amended Indictment (TC), 21 April 2005, para. 5.

(d) Specification of Material Facts

15. The proposed Indictment refines the allegations in the current Indictment by, *inter alia,* specifying dates,[27] locations,[28] names and numbers of victims,[29] and names of individuals with whom the Accused allegedly collaborated in a joint criminal enterprise, or whom he allegedly ordered or instigated to attack and kill Tutsis.[30] These additional details may require further investigation by the Defence; on the other hand, they also assist in clarifying and narrowing otherwise general allegations. For example, the Chamber notes that the addition of Pierre Munyandamuta, Vincent Mvuyekure, Jean Bosco Habimana, Patrick Nsengumuremyi, Faustin Sinashebeje, and Nehemi Habirora as the Accused's alleged co-collaborators in the joint criminal enterprise may require additional investigation by the Defence. However, such additions provide a more accurate picture of the case the Prosecution intends to present at trial, and as such, have an ameliorating effect on the clarity and precision of the case to be met.

16. The Chamber finds an exception to this conclusion in the Prosecution's insertion of the phrases "throughout the Rwandan territory" in paragraph 46 and "throughout Rwanda" in paragraph 60 of the proposed Indictment. The addition of these phrases reduces the specificity of the Indictment, substantially increases the vagueness in the allegations and prejudices the Defence by vastly expanding the potential geographic scope of events. These amendments are, accordingly, rejected.

17. Some of the allegations in the Indictment are, in the Chamber's view, irrelevant to the charges against the Accused, or are outside the temporal scope of the Tribunal. The allegation in paragraph 58 of the proposed Indictment that the Accused accepted money is extraneous to the counts in both the current and proposed Indictment. The claim included in the proposed Indictment that the Accused warned Hutu boys not to approach Tutsi girls relates to a 1992 event which falls well outside the dates of jurisdiction of the Tribunal.[31] In the absence of some showing of the relevance of this fact to the charges within the Tribunal's temporal jurisdiction, leave is not granted for this amendment.

18. The Chamber notes that the spelling of the name of the stadium at which an attack is alleged to have occurred is inconsistent as between paragraph 5 ("Karampaka") and paragraph 9 ("Kamarampaka") of the proposed Indictment. The Prosecution is requested to correct the inconsistency.

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[27] For example, while the current Indictment refers in paras. 7-8 to the Accused's involvement "during April 1994" in supervising roadblocks, delivering weapons to men there, and ordering the killing of Tutsis at roadblocks, paragraph 24 of the proposed Indictment specifies one such particular incident in Kamembe which occurred "on or about 15 April 1994".

[28] The proposed Indictment provides details on the locations and attacks in which the Accused was allegedly involved that are not included with such specificity in the current Indictment, including: roadblocks at Gatandara and Cyapa (paras. 22, 28); and attacks at Nyakanyinka school (para. 33), Gihundwe *Secteur* (para. 35); Mibirizi convent (para. 36); and near Cyangugu prison (para. 44). The addition of paragraphs regarding these locations does not constitute the addition of new charges because these allegations clarify incidents taking place in the broader area of Cyangugu *préfecture* as already alleged in the current Indictment.

[29] The current Indictment mentions names of victims (see paras. 8, 12, 14, 20), but also heavily relies on statements such as that in para. 20 that "Nchamihigo ordered the killing of a number of individuals that were targeted for being Tutsi, or for being accomplices of the Tutsi" to put the Accused on notice of any victims not specifically mentioned. The proposed Indictment adds names and numbers of victims and situates their killing with greater precision: see, *inter alia*, the name of the accountant Canisius Kayihura (para. 53); a list of influential Tutsi or Tutsi accomplices (para. 43); the mention of thirteen FAR soldiers (para. 69); and the killings of Nsengumuremyi (paras. 24-25), Josephine Mukashema, Marie and Helene (para. 37), Gakwandi (para. 52), and Ndayisaba (paras. 63, 73).

[30] The proposed Indictment mentions names the Accused's alleged collaborators as follows: Christophe Nyandwi, Yusuf Munyakazi, Mubiligi Thompson, Pierre Munyandamutsa, Vincent Mwyekure, Jean Bosco Habimana, Anasthase Bizimungu, Patrick Nsengumuremyi, Faustin Sinashebeje, Nehemi Habirora, Samuel Imanishimwe, Marc Ruberanziza, Vedaste Habimana, and Emmanuel Bagambiki (para. 17). The proposed Indictment also includes the names of *Interahamwe* who were allegedly ordered or instigated by the Accused to kill, including: Martin Ndorimana (para. 26); Joseph Habineza (paras. 32, 50); and Jean Charles Uwimana (para. 34).

[31] Article 7 of the Statute states that 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."

(e) New Material Facts

19. Proposed amendments that add new material facts may be more prejudicial to the Accused and thus require greater scrutiny.[32] The Chamber notes that "[n]othing in Rule 50 prevents the prosecution, as a general matter, from offering amendments that are substantial".[33] However, "[o]nce the indictment is confirmed, the Prosecutor's power to amend a confirmed indictment is not unlimited and must be considered against the overall interests of justice as envisioned by Rule 50 (A)".[34] "There is no prejudice caused to the accused if he is given an opportunity to prepare a defence to the amended case."[35]

20. New charges in the proposed Indictment require a further appearance of the Accused under Rule 50 (B) and raise the possibility of preliminary motions and possible postponement of the trial date under Rule 50 (C). A "new charge" arises not only where there is a new count, but where new allegations could lead to criminal liability on a factual basis that was not previously reflected in the Indictment. The key question is whether the amendment introduces a basis for conviction that is factually or legally distinct from those already alleged in the Indictment.[36]

21. The proposed Indictment alleges in paragraphs 8, 21 (e), 70, and 76 that the Accused himself directly committed killings of Tutsis. These allegations constitute serious new charges, and their nature poses a potentially heavy investigatory burden on the Defence. The allegations, however, lack sufficient detail, such as the date of the alleged killings and the names of the victims, to allow the Defence to focus its investigations of the allegations.[37] As such, these new allegations do not improve the clarity of the case to be met, will not serve to streamline the scope of the trial and will result in prejudice to the Accused and undue delay of the proceedings. The following elements are therefore rejected from the proposed Indictment: "Siméon Nchamihigo himself killed Tutsi as well during the same time period, as described below in the concise statement of the facts relating to the charges" in paragraph 8; "and he himself used two of the weapons, particularly an R4 semi-automatic rifle to kill Tutsi and Hutu political opponents" in paragraph 21 (e); and the allegations in paragraphs 70 and 76.

22. The Accused is also now alleged to have personally led attacks in locations within Cyangugu *préfecture*[38] whereas the current Indictment alleges only that he ordered, instigated, or facilitated such attacks. Although the Accused's role in the events has changed, the events themselves are the same as are described in the current Indictment. Thus, although the added allegation does trigger the procedures concerning "new charges" prescribed by Rule 50 (B) and (C), the Defence's previous investigations should already have substantially addressed the subject-matter concerned. Any additional investigations as may be needed should not prejudice the Defence or cause undue delay of the case.

23. Paragraphs 39 and 59 of the proposed Indictment newly alleged that "[o]n an unknown date in July 1994, while fleeing to Zaire", the Accused "recognized a Tutsi woman in the pirogue and ordered or instigated the *Interahamwe* to kill her. The *Interahamwe* then allegedly "killed the Tutsi woman and

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[32] *Muvunyi* Decision, para. 35.
[33] *Karemera et al*., Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment (AC), 19 December 2003, para. 11.
[34] *Niyitegeka*, Decision on Prosecution Motion for Leave to Amend Indictment (TC), 21 June 2000, para. 32.
[35] *Renzaho* Trial Chamber Decision, para. 10, citing *Renzaho*, 18 March 2005, para. 47, citing in turn *Hadzhihasanovic and Kubura* (TC), 17 September 2003, para. 35.
[36] See *Halilovic*, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment (TC), 17 December 2004, para. 30; *Stanisic and Simatovic*, Decision on Prosecution Motion for Leave to Amend the Amended Indictment (TC), 16 December 2005. See also *Simba*, Decision on Defence Motion for New Initial Appearance (TC), 5 March 2004, paras. 6-7; *Kajelijeli*, Decision on Prosecutor's Motion to Correct the Indictment Dated 22 December 2000 and Motion for Leave to File an Amended Indictment (TC), 25 January 2001, paras. 29-31; *Krnojelac*, Decision on Prosecutor's Response to Decision of 24 February 1999 (TC), 20 May 1999, para. 20; *Muvunyi* Decision, para. 35.
[37] Paragraphs 70 and 76 only allege a fairly broad range of dates for the incident, or "[o]n an unknown date in April 1994". Paragraph 21 (e) alleges only that the killings occurred "[b]etween 6 April and 17 July 1994".
[38] See paras. 29, 30, 35, 36, and 47 of the proposed Indictment.

threw her body into the lake." Permitting the addition of such a seriously incriminating fact at this stage would prejudice the Accused, particularly in the absence of a convincing explanation for not proposing this new allegation earlier. This allegation is, accordingly, rejected.

24. With regard to the temporal scope of the proposed Indictment, the Chamber notes that the Prosecution extends the date range with regard to certain allegations in the proposed Indictment, including: the period during which the Accused is alleged to have acted as *Substitut du Procureur* in paragraph 3, the date range during which the Accused is alleged to have been a member of the Tuvindimwein paragraph 7, and the period during which the Accused is alleged to have been an *Interahamwe* leader in Cyangugu *préfecture* in paragraph 8.[39] None of these allegations, however, even with their expanded date ranges, could independently ground a conviction on any of the counts included in the proposed Indictment. They do not constitute new charges and, because these allegations tend to describe the context of the Accused rather than his actions relating to each count, they would not appear to cause prejudice to the Accused nor unduly delay the proceedings.

25. Paragraph 38 of the proposed Indictment extends the geographic scope of the allegations into Kibuye.[40] That expansion is not prejudicial to the Defence insofar as the allegations of ordering and instigating the *Interahamwe* are otherwise supported by the existing general allegations of paragraphs 5 and 20 in the current Indictment, and the new alleged incident is described with sufficient specificity for the Defence to prepare its case.[41]

26. The other additional facts in the proposed Indictment that do not constitute new charges clearly fall within the scope of the current Indictment and further specify its general allegations in paragraphs 5, 20, and 21.[42]These facts include, *inter alia,* acting as Deputy Prosecutor on the basis of a forged diploma in paragraph 3 of the proposed Indictment; issuing arrest warrants for Tutsi in paragraphs 4-5; the Accused's positions as "zone supervisor" in paragraphs 10 and 21 (a); and the specific locations of attacks and names of victim, as discussed above.

27. In this regard, the Chamber adopts the reasoning of the Appeals Chamber in *Karemera*:

> Although amending an indictment frequently causes delay in the short term, the Appeals Chamber takes the view that this procedure can also have the overall effect of simplifying proceedings by narrowing the scope of allegations, by improving the Accused's and the Tribunal's understanding of the Prosecution's case, or by averting possible challenges to the indictment or the evidence presented at trial. The Appeals Chamber finds that a clearer and more specific indictment benefits the accused, not only because a streamlined indictment may result in shorter proceedings, but also because the accused can tailor their preparations to an indictment that more accurately reflects the case they will meet, thus resulting in a more effective defence.[43]

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[39] The allegation in paragraph 7 of the proposed Indictment that the Accused was a member of the *Tuvindimwe* is itself a new allegation, but one that is sufficiently related to existing allegations of the Accused's organization and participation in the "political opposition in Cyangugu *préfecture*" that its addition should not prejudice the Accused. Current Indictment, para. 6.

[40] In particular, paragraph 38 of the proposed Indictment alleges that the Accused "ordered or instigated the *Interahamwe* in his area ... to go to Kibuye ... and participate in a number of attacks to kill Tutsi who had sought refuge at Bisesero in Kibuye *Prefecture*."

[41] Similarly, the mention of Bukavu in paragraph 32 of the proposed Indictment flows from the event in paras. 8 and 20 (c) of the current Indictment; however, as the Accused's driving to Zaire does not constitute a separate basis for criminal liability, this allegation does not constitute a new charge.

[42] Namely, as stated in the current Indictment, that the Accused "organized and participated in the campaign against the Tutsi and the political opposition in Cyangugu *préfecture*" (para. 5); "ordered the killing of a number of individuals that were targeted for being Tutsi, or for being accomplices of the Tutsi" (para. 20); and "ordered, directed or acted in concert with administrative and military officials ... in the planning, preparation or execution of a common scheme, strategy or plan … leading to the deaths of hundreds of persons" (para. 21).

[43] *Karemera et al*., Decision on Prosecutor's Interlocutory Appeal against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment (AC), 19 December 2003, para. 15.

Diligence of the Prosecution

28. Rule 50 does not require the Prosecution to amend an indictment as soon as it discovers new evidence supporting the amendment; however, it may not delay giving notice of the changes to the Defence to earn strategic advantage.[44] The Chamber recalls the *Muhimana* Decision on Motion to Amend Indictment:

> The Prosecution argues that these additional details have emerged as a result of ongoing investigations ... The existence of such new evidence, the date of its discovery, and the date of its disclosure to the Defence are important factors in weighing both whether Prosecution has acted diligently, and also whether there is surprise to the Defence that would justify a postponement of the schedule for trial, and which might raise the prospect of undue delay in the trial of the Accused.[45]

29. On 19 May, 2006, a status conference was held, with a view to setting a possible trial date. The conclusion was that the trial would begin sometime between September and November 2006.[46] That the trial date was not indicated when the present motion was brought, does not suffice to explain the Prosecution's timing of its motion to amend the Indictment. Aside from its assertions that the proposed Indictment is the product of ongoing investigations and derived from information "not available at the time the Indictment against the Accused was confirmed",[47] the Prosecution has provided little information regarding its diligence and timeliness in bringing this motion. This lack of information is especially notable, given that the current Indictment was confirmed on 29 June, 2001, more than five years ago. Nearly half of the witness statements submitted by the Prosecution in support of the proposed Indictment are dated June 2001 or earlier.

30. The Prosecution's reference to its efforts to refer the current Indictment to a national jurisdiction as provided in Rule 11 *bis*[48] has limited weight. The Prosecution should have continued efforts to avoid undue delay and move the case forward, regardless of 11 *bis* initiatives undertaken. However, this shortcoming in the Prosecution's motion is outweighed by other factors as described above, including the ameliorating effect of the amendments on the clarity and precision of the case to be met, and their tendency to streamline the judicial process, and by the fact that the Accused will have an adequate opportunity to prepare his defence.

Witness Protection

31. The Chamber authorizes the Prosecution to disclose witness statements in support of the proposed Indictment, as required by Rule 66 (A) (i), in redacted form so as to delete information which would reveal the witness's identity. However, should the Prosecution wish to be relieved of any other disclosure obligation, it must make an appropriate motion.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in part, allowing the Prosecution leave to amend the current Indictment in accordance with its motion, except as to the following phrases in the proposed Indictment: "Siméon Nchamihigo himself killed Tutsi as well during the same time period, as described below in the concise statement of the facts relating to the charges" in paragraph 8; the second sentence of paragraph 11 relating to a 1992 event; "and he himself used two of the weapons, particularly an R4 semi-automatic rifle to kill Tutsi and Hutu political opponents" in paragraph 21 (e); paragraph 58;

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[44] *Karemera et al*., Decision on Prosecutor's Interlocutory Appeal against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment (AC), 19 December 2003, para. 20.
[45] *Muhimana*, Decision on Motion to Amend Indictment (TC), 21 January 2004, para. 8.
[46] T. 19 May 2006 p. 13. As mentioned above (para. 9) the trial is now scheduled to commence on 25 September 2006.
[47] Motion, para. 26.
[48] Motion, para. 6 (vii).

"throughout the Rwandan territory" in paragraph 46 and "throughout Rwanda" in paragraph 60; paragraphs 70 and 76; and

GRANTS the Prosecution's request for witness protection measures, authorizing the Prosecution to file any witness statements in accordance with Rule 66 (A) (i) in redacted form to conceal the identities of the makers thereof.

Arusha, July 2006.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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Amended Indictment (In conformity with Trial Chamber I Decision dated 14 July 2006) 18 July 2006 (ICTR-2001-63-I)

(Original : not specified)

I. The Charges

1. The Prosecutor of the International Criminal Tribunal for Rwanda, pursuant to the authority stipulated in Article 17 of the Statute of the International Criminal Tribunal for Rwanda ("the Statute") charges:

Siméon Nchamihigo with the following crimes:

Count 1 : genocide, pursuant to Articles 2 (3) (a) and 6 (1) of the Statute;

Count 2: murder as a crime against humanity, pursuant to Articles 3 (a) and 6 (1) of the Statute;

Count 3: extermination as a crime against humanity, pursuant to Articles 3 (b) and 6 (1) of the Statute and

Count 4: other inhumane acts as a crime against humanity, pursuant to Articles 3 (i) and 6 (1) of the Statute.

II. The Accused

2. Siméon Nchamihigo was born on 8 September 1960 in Gatare *commune,* Cyangugu *Préfecture* (Rwanda). He was *Substitut du Procureur* [Assistant Prosecutor] at the Cyangugu Court of First Instance from sometime in 1991 until 17 July 1994.

3. Between 1 January and 17 July 1994, Siméon Nchamihigo acted in his capacity of *Substitut du Procureur* in the Office of the Prosecutor of the Republic in Cyangugu on the basis of a forged diploma which he produced sometime in 1991 in support of his application for the post of *Substitut du Procureur* in Rwanda. He was investigated by the Deputy Prosecutor General Ntakirutimana Charles in connection with the forged diploma, but the investigation was stopped when a pro-MRND Deputy Prosecutor General, Musekura Jean Damascene, was appointed to replace Ntakirutimana Charles.

4. On an unknown date around mid-April 1994, Siméon Nchamihigo, in his capacity of *Substitut du Procureur,* issued counterfeit warrants of arrest against Tutsi who had sought refuge at the Cyangugu Cathedral or at the Bishopric of Cyangugu, including Gapfumu, to enable and thus aid and abet officers from the office of the Prosecutor of the Republic, soldiers and *Interahamwe* to remove those refugees and kill them and they did so.

5. Similarly, on an unknown date around mid-April 1994, Siméon Nchamihigo, in his capacity as *Substitut du Procureur,* issued counterfeit warrants of arrest against Tutsi who had been transferred to Kamarampaka Stadium from various places. On or around the same date, the members of the *préfecture* security council, including Siméon Nchamihigo, brought outside the stadium those Tutsi. Siméon Nchamihigo ordered or instigated the *Interahamwe* to kill those Tutsi, or otherwise aided and abetted the killing of those Tutsi, resulting in the killing of those Tutsi by the *Interahamwe*.

6. From about 1992 until 17 July 1994, Siméon Nchamihigo, although he was *Substitut du Procureur,* was also involved in political activities in Cyangugu *Préfecture* both for the MRND, President Juvénal Habyarimana's political party and the political party known as *La Coalition pour la Défense de la République,* or CDR. CDR was a Hutu extremist party and allied to MRND. It opposed parties that were in opposition to the MRND.

7. Between 1 January and 17 July 1994, Siméon Nchamihigo was also a member of a clandestine group of Hutu civil servants working in Cyangugu, called *Tuvindimwe,* which was formed in 1991 or thereabouts. This group supported the MRND and CDR. *Tuvindimwe* recruited its members from the *Préfecture*, the Appeals Court, the *parquet general* [Public Prosecutor's office at the Appeal Court], the Court of First Instance and the *parquet de la république* [Public Prosecutor's office at the Court of First Instance]. Tutsi and moderate Hutu who opposed the MRND were excluded from *Tuvindimwe* because they were considered accomplices of the *Inkotanyi,* a term applied to the Tutsi-dominated Rwandan Patriotic Front, or RPF.

8. Between 1 February and 17 July 1994, Siméon Nchamihigo was an *Interahamwe* leader in Cyangugu *Préfecture*. He recruited many young Hutu men as *Interahamwe* and he instructed Habimana Jean Bosco *alias* Masudi, a former soldier, in collaboration with Sergeant Major Marc Ruberanziza, *alias* Bikomago, Christophe Nyandwi and caporal Aimé, to train the *Interahamwe* in Karambo military camp, to enable them to kill the Tutsi. In addition, Siméon Nchamihigo allowed *Interahamwe* to stay in his house in Cyangugu and he provided them with food and drink. He ordered or instigated these *Interahamwe* to kill the Tutsi, or otherwise, aided and abetted the killing of Tutsi, as described below in the concise statement of facts relating to the charges.

9. Between 6 April and 17 July 1994, Siméon Nchamihigo acted as a member of the *préfecture* security council of Cyangugu and participated in its meetings. The following persons, among others, were members of the *préfecture* security council: Emmanuel Bagambiki, *Préfet* of Cyangugu; Samuel Imanishimwe, commander of the Cyangugu military camp; Vincent Munyarugerero, commander of the Cyangugu *gendarmerie;* Bernadin Bayingana, President of the Cyangugu Court of First Instance; Paul Ndorimana, the Public Prosecutor of Cyangugu, who was often represented by Siméon Nchamihigo, and *sous-Préfets* Emmanuel Kamonyo, Théodore Munyangabe and François Nzeyimana. The *préfecture* security council met regularly to discuss matters relating to security in Cyangugu *Préfecture*. The *préfecture* security council was particularly active from 6 April 1994, following the death of President Habyarimana, until 17 July 1994. During this time it met more often and made decisions concerning the setting of roadblocks in Cyangugu, the transfer of refugees to Kamarampaka Stadium from locations where they had sought to escape the violence, the drawing of lists of Tutsi and moderate Hutu and the selection of individual refugees for removal from the Kamarampaka Stadium, as described below in the concise statements of the facts relating to the charges.

10. On or about 11 April 1994, a meeting was called by the *préfet* Emmanuel Bagambiki in the *préfecture* office which was attended by the *sous-Préfets*, *bourgmestres*, religious authorities, prominent businessmen who financed the MRND political party, the *Interahamwe* leaders and

political authorities of the MRND, CDR, MDR-power and PL-power parties. Civil servants, including Siméon Nchamihigo, were also present at the meeting. During this meeting, Siméon Nchamihigo and Callixte Nsabimana, manager of Shangasha Tea Factory, were appointed supervisors for the security of Gisuma and Gafunzo zones. At the end of the meeting, all zone supervisors, including Siméon Nchamihigo, went to Karambo military camp to receive weapons from Lieutenant Samuel Imanishimwe. Shortly thereafter, the zone supervisors, including Siméon Nchamihigo, distributed these weapons to the *Interahamwe* posted in their respective zones and ordered them to kill the Tutsi with those weapons.

III. General Allegations

11. Between 6 April and 17 July 1994, and during all the periods referred to in this indictment, Rwandan citizens were identified according to the following ethnic or racial classifications: Tutsi, Hutu and Twa.

12. Between 6 April and 17 July 1994, soldiers, *Interahamwe* and armed civilians attacked, killed or caused bodily or mental harm to members of the Tutsi ethnic group in Cyangugu *Préfecture* and throughout Rwandan, with intent to destroy, in whole or in part, the Tutsi ethnic group as such.

13. Between 6 April and 17 July 1994, in Cyangugu *Préfecture* and throughout Rwandan, *Interahamwe,* soldiers and armed civilians murdered individually identified or targeted people or committed widespread killings, as part of widespread or systematic attacks against Tutsi civilians and/or Hutu opponents. As result of these attacks, *Interahamwe,* soldiers and armed civilians killed hundreds of thousands of Tutsi civilians and Hutu political opponents in Cyangugu *Préfecture* and throughout Rwanda.

IV Individual Criminal Responsibility

14, Pursuant to Article 6 (1) of the Statute, Siméon Nchamihigo is criminally responsible for the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity, for planning, instigating, ordering, committing, or otherwise aiding and abetting in the planning, preparation or execution of the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity. Siméon Nchamihigo ordered people over whom he had authority by virtue of his position described in paragraphs 2, 3, 4, 5, 6, 8, 9 and 10 of this indictment, to commit the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity, and instigated or otherwise aided and abetted those who were not under his authority to commit the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity.

15. In addition to his responsibility under Article 6 (1) of the Statute for having planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity, Siméon Nchamihigo knowingly and willfully participated in a joint criminal enterprise, in his role as set out in paragraphs 2, 3, 4, 5, 6, 8, 9, 10 and 15 of this indictment. The purpose of the joint criminal enterprise was the destruction of the Tutsi racial or ethnic group in Cyangugu *Préfecture* through the commission of the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity. This joint criminal enterprise came into existence on or about 6 April 1994 and continued until 17 July 1994.

16. Siméon Nchamihigo and the other members of the joint criminal enterprise shared the same intent to effect the common purpose. To fulfill the common purpose, Siméon Nchamihigo acted in concert with *Interahamwe* Christophe Nyandwi, Yusuf Munyakazi, Mubiligi Thompson, Pierre

Munyandamutsa, *alias Pressé*, Mvuyekure Vincent, known as *Tourné*, Habimana Jean Bosco, *alias* Masudi, Bizimungu Anasthase, Nsengumuremyi Patrick, Sinashebeje Faustin, and Habirora Nehemi, among others, as well as other participants who were not *Interahamwe*, including Samuel Imanishimwe, commander of the Cyangugu military camp, Sergeant Major Marc Ruberanziza, *alias* Bikomago, Habimana Vedaste, and *Préfet* Emmanuel Bagambiki, among others.

17. In addition to his participation in a joint criminal enterprise as set out in paragraphs 15 and 16 above, Siméon Nchamihigo is responsible for the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity on the basis that these crimes were the natural and foreseeable consequences of the execution of the common purpose of the joint criminal enterprise. Siméon Nchamihigo intended to further the common purpose of the joint criminal enterprise. In addition, it was foreseeable that the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity, might be perpetrated by one or other members of the group and Siméon Nchamihigo willingly took that risk.

18. The particulars that give rise to Siméon Nchamihigo's individual responsibility for the crimes charged are set out in this indictment as follows:
- For the crime of genocide in paragraphs 19 through 43;
- For the crime of murder as a crime against humanity in paragraphs 44 through 55;
- For the crime of extermination as a crime against humanity in paragraphs 56 through 69 and
- For the crime of other inhuman acts as a crime against humanity in paragraphs 67 through 70.

V Crimes charged and Concise Statement of Facts

Count 1: Genocide

19. The Prosecutor of the international Criminal Tribunal for Rwanda charges Siméon Nchamihigo with genocide, a crime provided for in Article 2 (3) (a) of the Statute, in that between 6 April and 17 July 1994, in Cyangugu *Préfecture* (Rwanda), he was responsible for killing or causing serious bodily or mental harm to members of the Tutsi population, with the intent to destroy, in whole or in part, an ethnic or racial group as such, as described in the facts contained in paragraphs 20 through 43 of this indictment.

Concise Statement of the Facts Relating to Count 1

20. Following the death of the President of Rwanda, Juvenal Habyarimana, on 6 April 1994, the interim government formed on 8 April 1994 launched a national campaign aimed at mobilizing the government armed forces, civilian militia, *Interahamwe,* the local public administration and ordinary citizens to fight the Rwandan Patriotic Front, or RPF, a politico-military opposition group comprising mainly Tutsi. The Rwandan government armed forces and *Interahamwe* militia specifically targeted the Tutsi civilian population of Rwanda as domestic accomplices of an invading army, *ibyitso,* or categorically as a domestic enemy. Under the pretext of ensuring national defence, ordinary citizens of Rwanda, mainly Hutu, mobilized into action by the authorities, killed Tutsi and political opponents and looted their property. Between 6 April 1994 and 17 July 1994 hundreds of thousands of Tutsi and moderate Hutu were killed as a result of this campaign. Siméon Nchamihigo participated in the organization and the implementation of this campaign as follows:

(a) On or about 14 April 1994, during a meeting called by the *Préfet* Emmanuel Bagambiki in the MRND office in Cyangugu, all zone supervisors, including Siméon Nchamihigo, were requested to report on the ongoing massacres in their zones. During the meeting, Siméon Nchamihigo reported that he was facing difficulties in attacking the Shangi parish as so many Tutsi had sought refuge there and that, according to him, it was not possible to kill all of them with traditional weapons. He claimed that he needed fire arms, such as rifles and grenades. These were later given to him by Lieutenant Samuel

Imanishimwe in Karampo military camp Siméon Nchamihigo distributed the weapons to the *Interahamwe* and ordered or instigated them to attack the Shangi parish and to kill the Tutsi and they did so.

(b) In late April 1994, Siméon Nchamihigo participated in a meeting at Gihundwe *secteur* office the purpose of which was to put in place security measures. Acting *bourgmestre,* Manase Buvugamenshi, presided over the meeting, which was attended by Védaste Habimana, Siméon Nchamihigo and Christophe Nyandwi, president of the *Interahamwe* in Cyangugu *préfecture*, among others. During the meeting, Siméon Nchamihigo enquired about the security situation in the *secteur* and whether there were more Tutsi in hiding to be killed. Védaste Habimana replied that three days would suffice to "mop up" the *secteur*. In the context of the meeting, "to mop up" was understood to mean "to finish killing all the Tutsi." The "mopping up" of the *secteur* did in fact continue. By his enquiries regarding the remaining Tutsi to be killed, Siméon Nchamihigo instigated and aided and abetted the killing of these Tutsi.

(c) Between 6 April and 17 July 1994, Siméon Nchamihigo, in collaboration with Sergeant Major Marc Ruberanziza, *alias* Bikomago, Christophe Nyandwi, president of the *Interahamwe* at the *préfecture* level, Habimana Jean Bosco, *alias* Masudi, a former soldier and caporal Aimé, among others, organized and supervised military training for *Interahamwe* in Cyangugu *préfecture* to enable and thus to aid and abet them to kill the Tutsi.

(d) Between 6 April and 17 July 1994, Siméon Nchamihigo was involved with *Préfet* Emmanuel Bagambiki, Lieutenant Samuel Imanishimwe, and others, in the drawing up of lists of influential Tutsi and Hutu political opponents, on the basis of which the *préfecture* security council, including Siméon Nchamihigo, identified persons to be killed. As a result, Siméon Nchamihigo planned, ordered, instigated or aided and abetted the *Interahamwe* and other Hutu civilians in killing many Tutsi and Hutu political opponents, as described further below in paragraphs 20 (e), 23, 24, 25, 26, 29, 30, 31, 40, 41, 42 and 43 of this indictment.

(e) Between 6 April and 17 July 1994, Siméon Nchamihigo kept a stockpile of weapons in his residence in Cyangugu. He distributed weapons to the *Interahamwe* and ordered or instigated them to go and kill specifically named people, Tutsi and Hutu political opponents, or launch large-scale attacks against Tutsi, who were sometimes assembled in specific places, such as parishes and schools as described in paragraphs 28, 32, 33, 34, 35 and 37 of this indictment.

21. Between 6 April and 17 July 1994, Siméon Nchamihigo ordered or instigated the *Interahamwe* to erect several roadblocks in Cyangugu town and supervised the effective manning of these roadblocks. Such roadblocks included the Kadashya roadblock, manned by an *Interahamwe* leader, Pierre Munyandamutsa *alias Pressé,* an associate of Siméon Nchamihigo, the Cyapa roadblock manned by Mvuyekure Vincent, *alias* Tourné, and the Gatandara roadblock, manned by an *Interahamwe,* Habimana Jean Bosco. The aim of the roadblocks was to stop the Tutsi and Hutu opponents from fleeing to safer areas and to kill them. Siméon Nchamihigo controlled and supervised the roadblocks by inspecting them several times a day, and he ordered or instigated the *Interahamwe* who manned the roadblocks to kill the Tutsi attempting to pass through. Siméon Nchamihigo's *Interahamwe* killed many Tutsi at the roadblocks, sometimes in the presence of Siméon Nchamihigo. The *Préfet* of Cyangugu, Emmanuel Bagambiki appointed people like Ndagijimana Shabani to remove dead bodies at the roadblocks and throughout the Cyangugu city in this period. At the Gatandara roadblock, Siméon Nchamihigo ordered or instigated the *Interahamwe* to kill many Tutsi who had been selected in the Karampaka Stadium. The Cyapa roadblock was erected just next to Siméon Nchamihigo's residence. Siméon Nchamihigo ordered, instigated or aided and abetted the killing of Tutsi at that roadblock, including the catholic priest, Father Boneza Joseph.

22. On or about 7 April 1994, Siméon Nchamihigo arrived at a road block manned by a group of young Hutuin Kamembe and ordered or instigated them to look for all the Tutsi and RPF accomplices and hand them over to the *Interahamwe* and to set ablaze all the places where the opposition was well-

established. Following Siméon Nchamihigo's orders or instigation, the *Interahamwe* tracked down and killed many people, mostly Tutsi men, women and children, on or about 7 April 1994 and in the months that followed.

23. On or about 15 April 1994, in Kamembe, Siméon Nchamihigo arrived at a road block manned by about 20 people, comprised of *Interahamwe* and young armed Hutu alike. He read out to these people names of Tutsi who were reportedly hiding in Kamembe town, and ordered or instigated that they be hunted down. The names read out from the list by Siméon Nchamihigo included Gasali Aloys, Emilien Nsengumuremyi, Isidore Kagenza and Judge Jean-Marie Vianney Tabaro. After reading out the names and before leaving the roadblock, Siméon Nchamihigo ordered or instigated the *Interahamwe* to look for Tutsi and to kill them and aided and abetted by providing them with two grenades. These *Interahamwe* then hunted down and killed the Tutsi.

24. On an unknown date in May 1994, in execution of Siméon Nchamihigo's order or instigation issued at a road block in Kamembe on or about 15 April 1994, the *Interahamwe* found Emilien Nsengumuremyi and killed him. They continued to look for the other Tutsi whose names had been read out by Siméon Nchamihigo, in order to kill them.

25. On or about 28 or 30 April 1994, Siméon Nchamihigo went to a roadblock manned by the *Interahamwe*, including Ndorimana Martin, and ordered or instigated them to kill the accountant of Cyangugu*Préfecture*, Kayihura Canisus, a Tutsi, who had supposedly managed to obtain an identity card indicating that he belonged to the Hutu ethnic group.

26. On an unknown date in May 1994, Siméon Nchamihigo went to a roadblock in Kamembe and ordered or instigated the *Interahamwe* manning the roadblock to kill a Tutsi priest of the Mibirizi Catholic parish, whose name he did not reveal but who, according to him, was expected to pass by the roadblock in a vehicle. Siméon Nchamihigo had issued similar instructions at all the roadblocks that he supervised and he had threatened to kill the *Interahamwe* if they let the Tutsi priest through. In the presence of Siméon Nchamihigo, the *Interahamwe* killed the priest later that day at the roadblock erected at the entrance to Kamembe next to the residence of the accused and manned by the *Interahamwe* Habirora Nehemi and Patrick Nsengumuremyi.

27. On an unknown date in May 1994, at the Cyapa roadblock manned by the *Interahamwe* and the *gendarmes*, Siméon Nchamihigo took into the car he was driving two young Tutsi students, Uzier and Innocent, who were seeking a lift to go back home. Siméon Nchamihigo handed the two students over to the *Interahamwe* and ordered or instigated them to kill the Tutsi students, and they did so.

28. After President Juvénal Habyarimana's death on 6 April 1994, a large number of Tutsi and Hutu political opponents fleeing acts of violence and massacres, sought refuge in places considered safe in Cyangugu such as the main cathedral, Mibirizi parish, Hanika parish, Nkanka parish, Shangi parish, Nyamasheke parish, the Mibirizi hospital, the Gihundwe school and the Nyakanyinya school, among others. Other Tutsi and Hutu political opponents remained in their homes. Siméon Nchamihigo, in collaboration with Lieutenant Samuel Imanishimwe, Sergeant Major Marc Ruberanziza *alias* Bikomago, *Sous-Préfet* Theodore Muyengabe and Christophe Nyandwi, president of the *Interahamwe* at the *préfecture* level, ordered or instigated the *Interahamwe* to launch attacks against Tutsi and Hutu political opponents who had sought refuge in safe places and also on individuals in their homes. Siméon Nchamihigo personally led all these attacks, except the attack at Nkanka parish. During these attacks, Siméon Nchamihigo and the *Interahamwe* killed many people, as described in paragraphs 29 through 37 of this indictment.

29. On or about 7 April 1994, Siméon Nchamihigo led a group of *Interahamwe* in an attack on the residence of Doctor Nagafizi, a Tutsi regional chief medical officer of Cyangugu and member of the *Parti* Libéral, allegedly with RPF leanings, and an attack on the residence of a businessman called Kongo, a Hutu and member of the PSD political party. During the attacks, the *Interahamwe*, led by

Siméon Nchamihigo and ordered, instigated or aided and abetted by him, killed Doctor Nagazafi and Kongo.

30. On or about 7 April 1994, Siméon Nchamihigo ordered or instigated the *Interahamwe*, namely Mubiligi Thompson, to attack the residence of Trojean Ndayisaba a Tutsi trader and member of the PSD political party and to kill him. Trojean Ndayisaba was accused of receiving money from the RPF. During the attack, the *Interahamwe* killed the whole family of Trojean Ndayisaba and looted their house. The *Interahamwe* killed Trojena Ndayisaba himself afterwards on an unknown date between the end of April 1994 and early July 1994.

31. On or about 7 or 9 April 1994, Siméon Nchamihigo ordered or instigated the *Interahamwe*, including Habineza Joseph, *alias* Sekuse, to kill Theoneste Karangwa, an influential Tutsi trader and member of the PSD political party in Cyangugu. Siméon Nchamihigo said that the *Interahamwe* should not to kill Karangwa's wife because she was not Tutsi. The *Interahamwe* then attacked and killed Theoneste Karangwa and his driver Iyakaremye. Siméon Nchamihigo seized Karangwa's vehicle and later took it to Bukavu in neighboring Zaire.

32 On or about 12 April 1994, Siméon Nchamihigo ordered or instigated the *Interahamwe*, including Bizimungu Anasthase, and communal police, *gendarmes* and military reservists to attack the Nyakanyinka school and kill the Tutsi who sought refuge there. The attackers received from Siméon Nchamihigo grenades and rifles which were used during the attack and were thus aided and abetted by him in the attack. As a result, the *Interahamwe* and other attackers killed about 600 Tutsi.

33. On or about 12 April 1994, Siméon Nchamihigo, in collaboration with Samuel Imanishimwe, commander of Cyangugu military camp, and the *Sous-Préfet* Kamonyo, ordered or instigated the *Interahamwe* including Uwimana Jean Charles, *alias* Karoli, and a group of Hutu civilians, to attack the Hanika parish and kill all the refugees who were supposed to be Tutsi. As a result of Siméon Nchamihigo's order or instigation, the attackers killed about 1,500 people, including children and the aged.

34. On a day sometime between 14 and 15 April 1994, at about 8 o'clock in the morning, Siméon Nchamihigo led a group of *Interahamwe* and *Impuzamugambi* (the militiamen of the CDR political party), in an attack against Tutsi of the Gihundwe *Secteur*, particularly targeting Tutsi of Kabugi, Ruganda, Murindi and Murangi *Cellules*. During the attack, the *Interahamwe*, led by Siméon Nchamihigo, and ordered, instigated or aided and abetted by him, killed a large number of Tutsi and destroyed their houses.

35. On or about 18 April 1994, Siméon Nchamihigo, in collaboration with Lieutenant Samuel Imanishimwe, Sergeant Major Marc Rubenziza, *alias* Bikomago and *Sous-Préfet* Theodore Muyengabe, led a group of *Interahamwe* that attacked Mibirizi convent and Mibirizi hospital, where many Tutsi had sought refuge. During the attacks, the *Interahamwe*, led by Siméon Nchamihigo, and ordered, instigated or aided and abetted by him, massacred the Tutsi refugees and looted their property. After the attacks, Siméon Nchamihigo rewarded the killers with beer.

36. In late April or early May 1994, three young Tutsi girls, Mukashema Josephine, Marie and Helene, sought refuge in the residence of a certain Hutu named Jonas. Siméon Nchamihigo accused Jonas and his brother Niyikiza Jonathan of hiding *Inyenzi*. Siméon Nchamihigo, assisted by one of his *Interahamwe*, removed the three Tutsi girls from Jonas's house and took them away to an unknown place. On the same day, Siméon Nchamihigo told Niyikiza Jonathan that the *Inyenzi* had been killed and threatened Niyikiza Jonathan to kill him if he continued to hide Tutsi. By his actions, Siméon Nchamihigo committed, ordered, instigated or aided and abetted the killing of these Tutsi girls.

37. Between 20 and 25 June 1994 or thereabouts, Siméon Nchamihigo ordered or instigated the *Interahamwe* in his area, including Jean-Paul, Mvuyekure Vincent, *alias Tourné*, Nzeyimana, among others, to go to Kibuye together with Yusufu Munyakazi and his *Interahamwe,* and participate in a

number of attacks to kill Tutsi who had sought refuge at Bisesero in Kibuye *Préfecture*. The *Interahamwe* travelled in an Onatracom bus to Bisesero and assisted the Kibuye *Interahamwe* in killing the Tutsi. Together, they killed many Tutsi. On the return of the *Interahamwe* from Kibuye after one or two days, Siméon Nchamihigo rewarded them with drinks and food at the Gihundwe school.

38. After President Juvénal Habyarimana's death on 6 April 1994, Siméon Nchamihigo and other members of the *préfecture* security council, including *Préfet* Emmanuel Bagambiki and Lieutenant Samuel Imanishimwe, the Cyangugu military camp commander, decided to move refugees from their places of refuge and assembled them at Kamarampaka Stadium in Cyangugu, ostensibly with the purpose of providing the refugees with better security but with the aim of eliminating those who were suspected of being accomplices of the *Inkotanyi*.

39. On or about 14 April 1994, Siméon Nchamihigo, Lieutenant Samuel Imanishimwe and other members of the *préfecture* security council moved the refugees from the Gihundwe school to Kamarampaka stadium.

40. On or about 15 April 1994, Siméon Nchamihigo, Lieutenant Samuel Imanishimwe and other members of the *préfecture* security council moved the refugees from Cyangugu Cathedral and took them to Kamarampaka Stadium. The refugees transferred to the stadium that day included Baziruwiha Marianne, Nkusi Georges, Albert Twagiramungu, Jean Fidèle Murekezi, his wife Kanyamibwa Christine and their children, among others.

41. On or about 16 April 1994, Siméon Nchamihigo and other members of the *préfecture* security council, including *Préfet* Emmanuel Bagambiki, Lieutenant Samuel Imanishimwe and Christophe Nyandwi, President of the *Interahamwe* at the *Préfecture* level, went to Kamarampaka Stadium. The commander of the *gendarmerie* camp, using a megaphone, called out names of civilians who were alleged to be *Inkotanyi* accomplices from a list that had been prepared by the *préfecture* security council, including Siméon Nchamihigo. The list included: Benoît Sibomana, Jean-Fidèle Murekezi, Apiane Ndorimana, Albert Mugabo, Albert Twagiramungu, Ibambasi, Bernard Nkara, Trojean Nzisabira, Rémy Mihigo, Dominique Gapeli, Albert Mugabo and Marianne Baziruwiha. All of the individuals named on the list were Tutsi, except for Marianne Baziruwiha who was a Hutu and an influential member of the PSD political party in Cyangugu. The individuals were asked to come out, and were escorted out of the Stadium by Siméon Nchamihigo and the *préfecture* delegation. Outside the stadium, about four people of Tutsi origin, including Vital Nibagwire, Ananie Gatake, Jean-Marie Vianney Habimana *alias* Gapfumu, whom Siméon Nchamihigo and the other members of the *préfecture* delegation had brought from the cathedral, were waiting in vehicles. Siméon Nchamihigo and the *préfecture* delegation instructed soldiers to take the selected 16 people to the *gendarmerie* camp purportedly for questioning.

42. When, on or about 16 April 1994, Siméon Nchamihigo and other members of the *préfecture* security council took the 16 selected persons to the *gendarmerie* camp, they removed Marianne Baziruwiha from the group and instructed the drivers to proceed with the remaining 15, all Tutsi, to a place near Cyangugu prison. Siméon Nchamihigo then ordered or instigated the *Interahamwe* whom he had brought along with him from Mutongo Centre earlier the same day, including Bizimungu Anasthase, to kill the 15 remaining Tutsi. Following Siméon Nchamihigo's order or instigation, the *Interahamwe* killed the 15 Tutsi near Cyangugu prison and threw their dead bodies into a latrine in Gapfumu's compound

43. On or about 18 April 1994, Siméon Nchamihigo went back to Kamarampaka Stadium in a delegation of the *préfecture* security council, comprising *Préfet* Emmanuel Bagambiki, Samuel Imanishimwe, and *Sous-Préfet* Emmanuel Kamonyo, among others. Bagambiki, using a megaphone, called out about 20 names from a list which the *préfecture* security council had drawn up. They took the listed people out of the stadium. Some people of Tutsi origin, such as Antoine Nsengumuremyi and Felicien, whose names had not been called out, were nevertheless taken out of Kamarampaka

Stadium that day, together with the others. These people were subsequently killed and their bodies thrown into the Gataranga River or into mass graves. Siméon Nchamihigo and the *préfecture* delegation aided and abetted the killing of all those who had been taken out of the stadium.

Count 2 : Crime against humanity : Murder

44. The Prosecutor of the International Criminal Tribunal for Rwanda charges Siméon Nchamihigo with murder, as a crime against humanity, pursuant to Article 3 (a) of the Statute, in that between 6 April and 17 July 1994 he was responsible for the murder of a number of Tutsi and of people considered as Tutsis, as well as Hutu opponents, particularly in Cyangugu *Préfecture*, as part of a widespread or systematic attack against a civilian population on ethnic, racial or political grounds, as set out in paragraphs 45 through 55 of this indictment.

Concise statement of the facts relating to Count 2

45. On or about 7 April 1994, Siméon Nchamihigo led a group of *Interahamwe* in an attack on the residence of Doctor Nagafizi, a Tutsi regional chief medical officer of Cyangugu and member of the *Parti* Liberal, with RPF leanings, and an attack on the residence of a businessman called Kongo, a Hutu and member of the PSD political party. During the attacks, the *Interahamwe,* led by Siméon Nchamihigo and ordered, instigated or aided or abetted by him, killed Doctor Nagafazi and Kongo.

46. On or about 7 April 1994, Siméon Nchamihigo ordered or instigated the *Interahamwe,* namely Mubiligi Thompson, to attack the residence of Trojean Ndayisaba, a Tutsi trader and member of the PSD political party and to kill him. Trojean Ndayisaba was accused of receiving money from the RPF. During the attack, the *Interahamwe* killed the whole family of Trojean Ndayisaba and looted their house. The *Interahamwe* killed Trojean Ndayisaba himself afterwards on an unknown date between the end of April 1994 and early July 1994.

47. On or about 7 or 9 April 1994, Siméon Nchamihigo in collaboration with Nyandwi Christophe, an *Interahamwe* leader at the *préfecture* level, ordered or instigated *Interahamwe* to kill Zacharie Serubyogo, a Hutu trader and MDR political party member of Parliament, together with other people. The *Interahamwe* then killed Zacharie Serubyogo and many unknown people near Lake Kivu in the presence of Siméon Nchamihigo. After the killing of Zacharie Serubyogo, Siméon Nchamihigo ordered his *Interahamwe* to look for a Tutsi by the name of Theoneste Karangwa and kill him.

48. On or about 7 or 9 April 1994, Siméon Nchamihigo ordered or instigated *Interahamwe,* including Habineza Joseph, *alias* Sekuse, to kill Théoneste Karangwa, an influential Tutsi trader and member of the PSD political party in Cyangugu. Siméon Nchamihigo said that the *Interahamwe* should not to kill Karangwa's wife because she was not Tutsi. The *Interahamwe* then attacked and killed Théoneste Karangwa and his driver Iyakaremye. Siméon Nchamihigo seized Karangwa's vehicle and later took it to Bukavu in neighboring Zaire.

49. On or about 15 April 1994, Siméon Nchamihigo planned to kill Marianne Baziruwiha and looked for her that day because he considered her as an accomplice of the *Inkotanyi*. Marianne Baziruwiha was a Hutu, regional director of Agriculture in Cyangugu and an influential member of the PSD political party in Cyangugu.

50. Between 15 and 17 April 1994, Siméon Nchamihigo ordered or instigated a group of *Interahamwe* to kill a young Hutu student called Jean de Dieu Gakwandi, whom he had described as a traitor and an accomplice of the Tutsi. To this end, Siméon Nchamihigo gave a grenade to someone called David Habanakwabo, *alias* Vicky, and ordered him to join other *Interahamwe* in order to kill Jean de Dieu Gakwandi. The assailants hit Jean de Dieu Gakwandi with a club on the head. Jean de Dieu Gakwandi sustained serious injuries. The assailants left him there, unconscious, thinking he was dead.

51. On or about 28 or 30 April 1994, Siméon Nchamihigo went to a roadblock manned by *Interahamwe,* including Ndorimana Martin, and ordered or instigated them to kill the accountant of Cyangugu *Préfecture*, Canisius Kayihura, a Tutsi civilian, who had managed to obtain an identity card indicating that he belonged to the Hutu ethnic group.

52. In late April or early May 1994, three young Tutsi girls, Mukashema Josephine, Marie and Helene, sought refuge in the residence of a certain Hutu named Jonas. Siméon Nchamihigo accused Jonas and his brother Niyikiza Jonathan of hiding *Inyenzi*. Siméon Nchamihigo assisted by one of his *Interahamwe,* removed the three Tutsi girls from Jonas's house, took them away to an unknown place. On his return the same day, Siméon Nchamihigo told Niyikiza Jonathan that the *Inyenzi* had been killed and he threatened Niyikiza Jonathan to kill him if he continued to hide Tutsi. By his actions, Siméon Nchamihigo ordered, instigated or aided and abetted the killing of these Tutsi girls.

53. On an unknown date in May 1994, in execution of Siméon Nchamihigo's order or instigation issued at a road block in Kamembe on or about 15 April 1994, the *Interahamwe* found Emilien Nsengumuremyi and killed him. They continued to look for the other Tutsi whose names had been read out by Siméon Nchamihigo, in order to kill them because of their Tutsi origin.

54. On an unknown date in May 1994, Siméon Nchamihigo went to a roadblock in Kamembe and ordered or instigated the *Interahamwe* manning the roadblock to kill a Tutsi priest of the Mibirizi Catholic parish, Father Joseph Boneza, who was expected to pass by the roadblock in a vehicle. Siméon Nchamihigo had issued similar instructions at all the roadblocks that he supervised and he had threatened to kill the *Interahamwe* if they let the Tutsi priest through. Later that day and in the presence of Siméon Nchamihigo, the *Interahamwe* killed Father Joseph Boneza at the roadblock erected at the entrance to Kamembe next to the residence of the accused and manned by the *Interahamwe* Habirora Nehemi and Patrick Nsengumuremyi.

55. On an unknown date in May 1994, at the Cyapa roadblock manned by the *Interahamwe* and the *gendarmes*, Siméon Nchamihigo took into the car he was driving, two young Tutsi students, Uzier and Innocent, who were seeking a lift to go back home. Siméon Nchamihigo handed the two boys over to the *Interahamwe* and ordered or instigated them to kill the Tutsi students and they did so.

Count 3 : Crime against humanity : Extermination

56. The Prosecutor of the International Criminal Tribunal for Rwanda charges Siméon Nchamihigo with extermination as a crime against humanity, a crime stipulated in Article 3 (b) of the Statute, in that between 6 April and 17 July 1994, particularly in Cyangugu *préfecture*, Siméon Nchamihigo was responsible for the large scale killing of Tutsi or of people considered as Tutsi and of Hutu opponents, as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds, as described below in the concise statement of facts relating to the charges in paragraphs 57 through 65 of this indictment.

Concise statement of the facts relating to Count 3

57. Between 6 April and 17 July 1994, Siméon Nchamihigo, in collaboration with Sergeant Major Marc Ruberanziza, *alias* Bikomago, and Christophe Nyandwi, president of the *Interahamwe* at the *préfecture* level, ordered or instigated the *Interahamwe* to launch attacks against Tutsi civilians and Hutu opponents refugees in Hanika parish, Mibirizi parish, Mibirizi hospital, Nkanka parish, Shangi parish and Nyamasheke parish among other places where those people had sought refuge including their homes. Siméon Nchamihigo personally led all of these attacks, except the attack at Nkanka parish. During the attacks, the *Interahamwe* and other Hutu civilians led by Siméon Nchamihigo killed many civilians who thus were targeted as described in paragraphs 59, 60, 61, 62, 63, 64 and 65 of this indictment.

58. On or about 7 April 1994, Siméon Nchamihigo arrived at a road block manned by a group of young Hutu in Kamembe and ordered or instigated them to look for all the Tutsi and RPF accomplices and hand them over to the *Interahamwe* and to set ablaze all the places where the opposition was well-established. Following Siméon Nchamihigo's orders or instigation, the *Interahamwe* tracked down and killed many civilians, mostly Tutsi men, women and children, after or around 7 April 1994.

59. On or about 7 April 1994, Siméon Nchamihigo ordered or instigated the *Interahamwe*, namely Mubiligi Thompson, to attack the residence of Trojean Ndayisaba a Tutsi trader and member of the PSD political party and to kill him. Trojean Ndayisaba was accused of receiving money from the RFP. During the attack, the *Interahamwe* killed the whole family of Trojean Ndayisaba and looted their house. The *Interahamwe* killed Trojean Ndayisaba himself afterwards on an unknown date between the end of April 1994 and early July 1994.

60. On or about 12 April 1994, Siméon Nchamihigo ordered or instigated *Interahamwe*, including Bizimungu Anasthase, and communal police, *gendarmes* and military reservists to attack the Nyakanyinka school and kill the Tutsi civilians who sought refuge there. The attackers received from Siméon Nchamihigo grenades and rifles which were used during the attack, and were thus aided and abetted by him in the attack. As a result, the *Interahamwe* and other attackers killed about 600 Tutsi civilians.

61. On a day sometime between 14 and 15 April 1994, at about 8 o'clock in the morning, Siméon Nchamihigo, leading a group of *Interahamwe* and *Impuzamugambi* (the militiamen of the CDR political party), launched an attack against Tutsi of the Gihundwe *Secteur*, particularly targeting Tutsi of Kabugi, Ruganda, Murindi and Murangi *Cellules*. During the attack, the *Interahamwe* led by Siméon Nchamihigo, and ordered, instigated or aided and abetted by him, killed a large number of Tutsi and destroyed their houses.

62. On or about 15 April 1994 in Kamembe, Siméon Nchamihigo arrived at a road block manned by about 20 people comprised of *Interahamwe* and young armed Hutu alike. He read out to these people names of Tutsi who were reportedly hiding in Kamembe town, and ordered or instigated that they be hunted down. The names read out from the list by Siméon Nchamihigo included Gasali Aloys, Emilien Nsengumuremyi, Isidore Kagenza and Judge Jean-Marie Vianney Tabaro. After reading out the names and before leaving the road block, Siméon Nchamihigo ordered or instigated the *Interahamwe* to look for Tutsi and to kill them and aided and abetted by providing them with two grenades. These *Interahamwe* then hunted down and killed the Tutsi.

63. On an unknown date in April 1994, Siméon Nchamihigo led a group of *Interahamwe* in an attack on Mibirizi convent, where many Tutsi civilians had sought refuge. During the attack, the *Interahamwe*, led by Siméon Nchamihigo, and ordered, instigated or aided and abetted by him, massacred the Tutsi refugees and looted their property.

64. Between 6 April and 17 July 1994, Siméon Nchamihigo in collaboration with Lieutenant Samuel Imanishimwe, Yusuf Munyakazi and soldiers from the Rwandan armed forces, or FAR, targeted military detainees and civilians whom he accused of being accomplices of RPF and ordered, instigated or aided and abetted the killing of those military detainees as described in paragraph 65 of this indictment.

65. Thus, on or about 7 or 9 April 1994, Siméon Nchamihigo in collaboration with lieutenant Samuel Imanishimwe and Yusuf Munyakazi, went to Cyangugu prison and ordered the director of the prison to remove about 13 FAR soldiers who had been sent to jail for their alleged complicity with RPF. The detainees were taken to the *Préfecture* office. Siméon Nchamihigo then ordered, instigated or aided and abetted the killing of the 13 FAR soldiers. Following Siméon Nchamihigo's order, instigation or aiding and abetting, the 13 FAR soldiers who were no longer combatants, were killed and their dead bodies thrown into a garden of the *Préfecture* near the lake. Later on the same day,

Siméon Nchamihigo ordered or instigated other prisoners, including Ndamira Damien, to remove the dead bodies of the 13 FAR soldiers from the garden and bury them along with the dead bodies of 8 unknown persons found at the same place.

Count 4 : Crime against humanity : other inhumane acts

66. The Prosecutor of the International Criminal Tribunal for Rwanda charges Siméon Nchamihigo of other inhumane acts as a crime against humanity, a crime stipulated in Article 3 (i) of the Statute, in that between 6 April and 17 July 1994, throughout Rwanda, particularly in Cyangugu *Préfecture*, Siméon Nchamihigo was responsible for committing inhumane acts against Tutsi civilians or of people considered as Tutsi, and of Hutu opponents, as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds, as outlined in paragraphs 67 through 70 of this indictment.

Concise statement of the facts relating to Count 4

67. On or about 7 or 9 April 1994, Siméon Nchamihigo ordered or instigated *Interahamwe*, including Habineza Joseph, *alias* Sekuse, to kill Theoneste Karangwa, an influential Tutsi trader and member of the PSD political party in Cyangugu. Siméon Nchamihigo said that the *Interahamwe* should not to kill Theoneste Karangwa's wife because she was not Tutsi. Following Siméon Nchamihigo's order or instigation, the *Interahamwe* attacked and caught Theoneste Karangwa in his house. The *Interahamwe* then covered Theoneste Karangwa with his own mattress, poured fuel into the mattress and burnt Theoneste Karangwa, causing him great pain and suffering before his death. The *Interahamwe* also killed Theoneste Karangwa's driver by the name of Iyakaremye. Siméon Nchamihigo then seized Theoneste Karangwa's vehicle and later took it with him to Bukavu in neighboring Zaire, together with other vehicles and various items looted during the attacks.

68. On or about 7 April 1994, Siméon Nchamihigo ordered or instigated the *Interahamwe*, namely Mubiligi Thompson, to attack the residence of Trojean Ndayisaba, a Tutsi trader and member of the PSD political party and to kill him. Trojean Ndayisaba was accused of receiving money from the RFP. During the attack, the *Interahamwe* burnt the whole family of Trojean Ndayisaba inside their vehicle causing them great pain and suffering before their deaths. The *Interahamwe* killed Trojean Ndayisaba himself afterwards on an unknown date between the end of April 1994 and early July 1994.

69. Between 15 and 17 April 1994, Siméon Nchamihigo ordered or instigated a group of *Interahamwe* to kill a young Hutu student called Jean de Dieu Gakwandi, whom he had described as a traitor and an accomplice of the Tutsi. To this end, Siméon Nchamihigo gave a grenade to someone called David Habanakwabo, *alias* Vicky, and ordered him to join other *Interahamwe* in order to kill Jean de Dieu Gakwandi. The assailants hit Jean de Dieu Gakwandi with a club on the head causing him pain and suffering. Jean de Dieu Gakwandi sustained serious injuries. The assailants left him there, unconscious, thinking he was dead.

70. On 16 April 1994 or thereabouts, Siméon Nchamihigo and other members of the *préfecture* security council, including Lieutenant Samuel Imanishimwe and Christophe Nyandwi, removed from Karampaka Stadium about 15 Tutsi and 1 Hutu woman by the name of Marianne Baziruwiha, and took them to a place near the prison after dropping off Marianne Baziruwiha at the *gendarmerie* camp. Among the 15 Tutsi who were removed from the stadium by Siméon Nchamihigo and others, were Jean-Fidele Murekezi, Albert Twagiramumgu and Gapfumu. Siméon Nchamihigo then ordered or instigated the *Interahamwe* whom he had brought along with him from Mutongo Centre earlier the same day, including Bizimungu Anasthase, to kill the 15 Tutsi. Following Siméon Nchamihigo's order or instigation, the *Interahamwe* killed the 15 Tutsi near Cyangugu prison and threw their dead bodies into a latrine in Gapfumu's compound; before doing so the *interahamwe* removed the genitals of Jean-Fidele Murekezi and Albert Twagiramungu and the heart of Gapfumu.

The acts and omissions of Siméon Nchamihigo set out herein are punishable pursuant to Articles 22 and 23 of the Statute.

Done at Arusha, Tanzania, on 18th July 2006.

[Signed] : Hassan Bubacar Jallow

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Decision on Motions for Protective Measures for Prosecution Witnesses (Article 21 of the Statute and Rules 54, 69, 73 and 75 of the Rules of Procedure and Evidence) 26 July 2006 (ICTR-2001-63-PT)

(Original : English)

Trial Chamber III

Judge : Dennis C. M. Byron, Presiding Judge

Siméon Nchamihigo – Protective measures for witnesses – Real and objective fears – Controversial measures, Prohibition for the Accused from personally possessing any material that contains any identifying information unless he is in the presence of Counsel, Disclosure of a witness's identity – Motion granted in part – Measures granted : Confidentiality, Behaviour of the Defence, Possibility for the Defence to interview the witnesses, Disclosure of a witness's identity

International Instruments Cited :

Rules of Procedure and Evidence, Rules 69, 69 (C) and 75 ; Statute, Art. 21

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Hormisdas Nsengimana, Decision on Prosecutor's Motion for Protective Measures for Witnesses, 2 September 2002 (ICTR-2001-69) ; 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. Sylvestre Gacumbitsi, Decision on Prosecution Motion for Protective Measures for Victims and Witnesses, 20 May 2003 (ICTR-2001-64) ; Trial Chamber, The Prosecutor v. Athanase Seromba, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 30 June 2003 (ICTR-2001-66) ; 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 Bagosora Motion for Protection of Witnesses, 1 September 2003 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Jean-Baptiste Gatete, Decision on Prosecution Request for Protection of Witnesses, 11 February 2004 (ICTR-2000-61) ; 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. Aloys Simba, Decision on Defence Request for Protection of Witnesses, 25 August 2004 (ICTR-2001-76)

Introduction

1. The trial in the instant case is scheduled to begin on 25 September 2006. On 5 May 2006, the Prosecution requested the Chamber to grant leave to amend the Indictment against Simeon Nchamihigo, which had been filed on 29 June 2001. In its 14 July 2006 Decision on Request for Leave to Amend the Indictment, Trial Chamber I granted the Prosecution's request for witness protection measures as to Witnesses BRG, BRD, BRE, BNB, BRF, BRK, BRH, BRR, BRQ, BRN, BRO, BPA, BRX, BOV, BPX, BRY, BRZ, BOU, and API by authorizing the Prosecution to file any witness statements in support of the Amended Indictment pursuant to Rule 66 (A) (i) of the Rules of Procedure and Evidence in redacted form to conceal the identities of the makers thereof. The Chamber noted that the Prosecution would need to file an additional motion if it wished to be relieved of any further disclosure obligation.[1]

2. The Prosecution now moves the Chamber to order protective measures, described in paragraphs 33, 47 and 50 of a Motion filed on 24 July 2006, for the following 18 additional witnesses: Witnesses LDD, LM, BRP, LDC, LAG/BRL, BRI, BRJ, LDB, LAA, LBB/BNO, LCR, LDA, NM, LCJ/BRM, LF, NI, NL and LY.[2] It claims that there is a real fear for the safety of victims and potential witnesses based on an objective assessment of the security situation confronting such persons in and outside Rwanda, whether in Africa or elsewhere in the world, and has attached nineteen annexes to support its application. In a second Motion filed on the same day, the Prosecution urgently requests that the Chamber allow it to disclose, in redacted form, the statements of the above-listed additional 18 witnesses that it intends to call to testify at trial so that the Prosecution can comply with its disclosure obligations within the time limits set out by Rule 66 (A) (ii), namely sixty days before the trial start date, pending the outcome of the Chamber's Decision on the Prosecution's application for protective measure.[3]

3. The statutory time limit for the Defence to reply under Rule 73 (E) of the Rules has not yet expired, and the Defence has not yet submitted responses to these motions. Given, however, that the deadline for disclosure of the statements of all witnesses whom the Prosecution intends to call to testify at trial is sixty days before the trial start date and will therefore expire on 27 July 2006, and that the Defence may not be able to respond before that deadline expires, the Chamber considers it a measure necessary under Rule 54 for the conduct of the trial and in the interests of justice to provide a provisional decision based on the Prosecution submissions only. If necessary, the Chamber may render a subsequent decision based on any additional submissions from the parties.

Discussion

4. In accordance with Article 21 of the Statute and Rules 69 and 75, the Chamber will consider protective measures for witnesses that are appropriate to the safeguard the privacy and security of the victims and witnesses, without overriding the rights of the Accused. Measures for the protection of witnesses are granted on a case-by-case basis.

5. The jurisprudence of this Tribunal requires that the Prosecution demonstrate that the witnesses for whom protective measures are sought have a real fear for their safety or that of their family, and that an objective justification exists for this fear.[4] Such fears may be expressed by persons other than the witnesses themselves.

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[1] 14 July Decision, para. 31.

[2] Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, filed on 24 July 2006.

[3] *Requête en Extrême Urgence du Procureur aux fins d'être Autorisé à Communiquer à la Défense la Version Caviardée des Déclarations des Témoins de l'Accusation Avant une Décision de la Chambre de Première Instance sur la Requête du Procureur en Protection des Témoins,* filed on 24 July 2006.

[4] *Prosecutor v. Aloys Simba*, Case N°ICTR-01-76-I, Decision on Defence Request for Protection of Witnesses (TC), 25 August 2004, para. 5; *Prosecutor v. Théoneste Bagosora et al.*, Case N°ICTR-98-41-T, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, para. 2; *Bagosora et al.*, Decision on Kabiligi Motion for Protection of Witnesses (TC), 1 September 2003, para. 2.

6. After reviewing the information provided by the Prosecution, and taking into account the fairness of the trial and the rights of the Accused, the Chamber finds that there is subjective and objective fear on the part of the Prosecution witnesses such that witnesses, wherever they may reside, do justifiably fear that disclosure of their participation in the proceedings of this Tribunal would threaten their safety and security.[5]

7. The measures requested by the Prosecution are well-established and uncontroversial, with two exceptions. The measure proposed in sub-paragraph 47 (xi) of its Motion for protective measures would prohibit

> the Accused both individually or through any person working for the Defence, from personally possessing any material that contains any Identifying Information, including but not limited to, any copy of a witness statement even if the statement is in redacted form, unless the Accused is, at the time in possession, in the presence of Counsel; also instructing the United Nations Detention Centre authorities to ensure compliance with the prohibition set out in this paragraph.

The aim of this prohibition is said to be to ensure that protected information is not improperly shared between accused persons at the United Nations Detention Facility or otherwise.[6] While the Chamber is concerned by the example cited in the motion, it is not persuaded that the measure would achieve the desired objective. A more effective remedy is the diligence of Defence Counsel in notifying and reminding the Accused that witness identities may not be shared with other accused persons, and that any violation of this requirement is a serious matter. Furthermore, depriving the Accused of the statements of Prosecution witnesses could interfere with the preparation of the defence. Previous decisions have rejected this measure in the absence of a specific showing of misconduct by the Accused.[7]

8. The proposed measure in paragraph 33 of the Motion for protective measures is that the witness's identity be disclosed to the Defence twenty-one days before the date that the witness is expected to testify. The Prosecution asserts that this "rolling disclosure" has crystallised as the ordinary practice of the Tribunal.[8] The Chamber disagrees. Numerous decisions have required that the identity of all witnesses disclosed before the start of trial, particularly in the trials of a single Accused, where there is little likelihood of a long delay between disclosure of the witness's identity and their testimony.[9] According to Rule 69 (C) of the Rules, in order to allow adequate time for the preparation of both parties, the Chamber considers, in light of that an appropriate deadline is that witness identities, and unredacted witness statements, be disclosed to the Defence thirty days before the start of trial.

FOR THOSE REASONS, THE CHAMBER

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[5] *Simba*, Decision on Defence Request for Protection of Witnesses (TC), 25 August 2004, para. 6; *Prosecutor v. Nsengimana*, Case N°ICTR-2000-69-T, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (TC), 2 September 2002, para. 14.

[6] First Motion, para. 48.

[7] See, e.g., *Simba,* Decision on Prosecution Request for Protection of Witnesses (TC), 4 March 2004, para. 8; *Prosecutor v. Gatete,* Case N°ICTR-2000-61-I, Decision on Prosecution Request for Protection of Witnesses TC), 11 February 2004, para. 8; *Prosecutor v. Gacumbitsi,* Case N°ICTR-2001-64-I, Decision on Prosecution Motion for Protective Measures for Victims and Witnesses (TC), 20 May 2003, para. 19; *Prosecutor v. Zigiranyirazo,* Case N°ICTR-2001-73-I, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 25 February 2003, paras. 15-16.

[8] First Motion, para. 37.

[9] *Simba,* Decision on Prosecution Request for Protection of Witnesses (TC), 4 March 2004, para. 6; *Gatete,* Decision on Prosecution Request for Protection of Witnesses (TC), 11 February 2004, paras. 6-7; *Prosecutor v. Seromba,* Case N°ICTR-2000-66-I, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 30 June 2003, para. 7. Similarly, disclosure of the identity of all Defence witnesses is frequently required before the start of the Defence case. See, e.g, *Bagosora et al.,* Decision on Kabiligi Motion for Protection of Witnesses (TC), 1 September 2003, para. 10. Several such decisions were rendered after 6 July 2002 when Rule 69 (C), which had formerly required disclosure before trial, was amended to permit rolling disclosure at the Chamber's discretion. The numerous decisions prior to that date requiring disclosure before trial are omitted.

GRANTS in part the Motion, and

I. ORDERS the following protective measures for all Prosecution witnesses or potential Prosecution witnesses wherever they reside and who have not affirmatively waived their right to protective measures ("Protected Witness"):

1. The Prosecution is required to designate a pseudonym for each of the Protected Witnesses; the pseudonym shall be used whenever referring to such Protected Witness in Tribunal proceedings, communications, and discussions, both between the Parties and with the public. The use of such pseudonyms shall last until such time as the Trial Chamber orders otherwise.

2. The names, addresses, whereabouts, and other information that might identify or assist in identifying any Protected Witness ("Identifying Information") must be sealed by the Registry and not included in public or non-confidential Tribunal records.

3. To the extent that any names, addresses, relations, whereabouts or other Identifying Information is contained in existing records of the Tribunal, such Identifying Information must be expunged from the public record of the Tribunal and placed under seal.

4. Any Identifying Information concerning Protected Witness shall not be disclosed to the public or the media; this order shall remain in effect after the termination of the trial.

5. The Accused or any member of the Defence team shall not attempt to make any independent determination of the identity of any Protected Witness or encouraging or otherwise aiding any person to attempt to identify any such Protected Witness.

6. The names and identities of the Protected Witnesses shall be forwarded from the Prosecution to the Registry in confidence, and shall not be disclosed to the Defence unless otherwise ordered.

7. Nowhere and at no time shall the public or the media make audio or video recordings or broadcasts, or take photographs or make sketches of any Protected Witness, in relation to their testimony, without leave of the Trial Chamber.

8. The Defence and any representative acting on its behalf and/or the Accused shall provide reasonable notice to the Prosecution, prior to contacting any Protected Witness. Should the witness or potential witness concerned agree to the interview, or the parents or guardian of that person, if that person is under the age of 18, the Prosecution shall immediately undertake all necessary arrangements to facilitate the interview. The Witnesses and Victims Support Section of the Tribunal may facilitate the interview.

9. The Defence and/or the Accused shall keep confidential to itself any Identifying Information, and shall not expose, share, discuss or reveal, directly or indirectly, any Identifying Information to any person or entity other than the Accused, assigned Defence Counsel, or other persons the Registry designates as working on the Defence team.

10. The Defence and/or the Accused are required to provide the Witnesses and Victims Support Section a designation of all persons working on the immediate Defence team who will have access to any Identifying Information; the Defence are also required to notify WVSS in writing of any person leaving the Defence team and to confirm in writing to the WVSS that such person has remitted all material containing Identifying Information.

11. The Prosecution may withhold disclosure to the Defence of the identity of the Protected Witnesses and temporarily redact their Identifying Information from material disclosed to the Defence. The Identifying Information shall be disclosed by the Prosecution to the Defence thirty days prior to commencement the Prosecution case.

II. DENIES the remainder of the Motion.

Arusha, 26 July 2006, done in English.

[Signed] : Dennis C. M. Byron

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Order for Filing
(Rules 54 and 90 bis of the Rules of Procedure and Evidence)
9 August 2006 (ICTR-2001-63-PT)

(Original : English)

Trial Chamber III

Judge : Dennis C. M. Byron, Presiding Judge

Siméon Nchamihigo – Order for filing, Temporary transfer of detained witnesses – Reclassification as public

International Instrument Cited :

Rules of Procedure and Evidence, Rules 90 bis and 90 bis (B)

International Case 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)

1. The trial in this case is scheduled to begin on 25 September 2006. On 24 July 2006 the Prosecutor submitted an *Ex Parte* Motion for an Order for the Temporary Transfer of Witnesses Pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence. For the Chamber to grant such an Order, it must be satisfied according to Rule *90 bis* (B) that:

> (i) The presence of 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
>
> (ii) Transfer of the witness does not extend the period of his detention as foreseen by the requested State.

2. The Prosecutor contends that the requirements set out by Rule 90 *bis* of the Rules for the said transfer are met. In support of his Motion, the Prosecutor provided a copy of the letter to the relevant authorities requesting this confirmation. The Prosecutor further states that he expects the authorities to make the confirmation but no such evidence has yet been presented to the Chamber. To address that Motion, the Chamber is of the view that additional information is necessary.

3. The Prosecutor's ground for filing the Motion *ex parte* is to protect the identity of the witnesses. As a general rule, Motions must be filed *inter partes*.[1] The Chamber notes that the only identifying information in the Motion is in the Annexes, and finds that there is no danger of revealing any witness' identity if the substantive portion of the Motion is disclosed to the Defence.

FOR THOSE REASONS, THE CHAMBER

I. ORDERS the Prosecutor to provide any document that would support his Motion for temporary transfer of detained witnesses;

II. REQUESTS the Registrar to reclassify pages 1-3 of the Motion as public, while maintaining the *ex parte* nature of Annexes A, B and C.

Arusha, 9 August 2006, done in English.

[Signed] : Dennis C. M. Byron

[1] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera,* Case N°ICTR-98-44-R66, Decision on Motion to Unseal *Ex Parte* Submissions and to Strike Paragraphs 32.4 And 49 from the Amended Indictment (TC), 3 May 2005, par. 11.

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Scheduling Order
(Rule 54 of the Rules of Procedure and Evidence)
10 August 2006 (ICTR-2001-63-PT)

(Original : English)

Trial Chamber III

Judge : Dennis C. M. Byron, Presiding Judge

Siméon Nchamihigo – Scheduling order – Obligations for the Prosecutor

The trial in this case is scheduled to begin on 25 September 2006. On 7 August 2006, a Status Conference was held with the parties in preparation for trial. After discussions with the parties, and considering the rights of the accused to adequately prepare its Defence, the Chamber:

I. NOTES that the Prosecutor undertook to disclose the Rwandan judicial records of his detained witnesses as soon as possible;

II. ORDERS the Prosecutor to submit its pre-trial brief, list of exhibits, final list of witnesses, and the order of the witnesses to be called in the first trial session, by 25 August 2006;

III. ORDERS the Prosecutor to submit the admissions by the parties and a statement of other matters not in dispute, and a statement of contested matters of fact and law also by 25 August 2006.

Arusha, 10 August 2006, done in English.

[Signed] : Dennis C. M. Byron

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Order for the Transfer of Detained Witnesses
(Rule 90 bis of the Rules of Procedure and Evidence)
12 September 2006 (ICTR-2001-63-90bis)

(Original : English)

Trial Chamber III

Judge : Dennis C. M. Byron, Presiding Judge

Siméon Nchamihigo – Transfer of detained witnesses – Rwanda – Conditions satisfied – Motion granted

International Instrument Cited :

Rules of Procedure and Evidence, Rule 90 bis

1. The trial in this case is scheduled to begin on 25 September 2006. On 24 July 2006 the Prosecutor submitted an *Ex Parte* Motion for an Order for the Temporary Transfer of Witnesses Pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence. He asked that ten witnesses, who are currently detained and awaiting trial in Rwanda, be transferred to the United Nations Detention Facilities in Arusha so that they can testify as Prosecution witnesses in the present case. On 9 August 2006, the Chamber made an Order for Filing for the Prosecutor to provide additional evidence to support his Motion.

2. Rule 90 *bis* gives the Chamber power to make an order to transfer a detained person to the Detention Unit of the Tribunal if his or her presence has been requested. Before such an order can be made the applicant must show 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;

3. On 7 September 2006, the Prosecution filed a letter from the Rwandan Minister of Justice confirming that the ten requested witnesses who are detained in Rwanda will be available for the relevant time period to testify in this case. The Chamber is therefore satisfied that these witnesses are not required for criminal proceedings in Rwanda during that time and that the witnesses' presence at the Tribunal does not extend the period of their detention in Rwanda.

FOR THOSE REASONS, THE CHAMBER

I. GRANTS the Prosecution Motion;

II. REQUESTS the Registar, pursuant to Rule 90 *bis* of the Rules, to temporarily transfer the detained witnesses indicated in the letter from the Rwandan Minister of Justice dated 5 September 2006 to the United Nations Detention Facilities (UNDF) in Arusha, at an appropriate time prior to their scheduled dates to testify. Their return travel to Rwanda should be facilitated as soon as practically possible for each witness after the individual's testimony has ended.

II. REQUESTS the Governments of Rwanda and Tanzania to cooperate with the Registrar in the implementation of this Order.

III. REQUESTS the Registrar to cooperate with the authorities of the Governments Rwanda and Tanzania; Ensure proper conduct during transfer and during detention of the witness at the UNDF; Inform the Chamber of any changes in the conditions of detention determined by the Rwandan authorities and which may affect the length of stay in Arusha.

Arusha, 12 September 2006, done in English.

[Signed] : Dennis C. M. Byron

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Decision on Request for Certification of Appeal on Trial Chamber its Decision Granting Leave to Amend the Indictment (Rule 73 (B) of the Rules of Procedure and Evidence) 13 September 2006 (ICTR-2001-63-PT)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Florence Rita Arrey; Gberdao Gustave Kam

Siméon Nchamihigo – Certification to appeal – Possible prejudice to the Accused – Standard for certification to appeal not satisfied – 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. 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, Prosecutor v. Tharcisse Muvunyi, Decision on the Prosecutor's Motion for Certification to Appeal the Decision Denying Leave to File an Amended Indictment and for Stay of Proceedings, 16 March 2005 (ICTR-2000-55A) ; 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. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera, Decision on Defence Motions for Certification to Appeal Decision Granting Special Protective Measures for Witness ADE, 7 June 2006 (ICTR-98-44)

Introduction

1. The trial in the instant case is scheduled to begin on 25 September 2006. On 17 July 2006, Trial Chamber I granted in part the Prosecution request for leave to amend the Indictment ("Impugned Decision"). The Amended Indictment was filed by the Prosecution on 18 July 2006[1] and a further appearance for the Accused, along with a Status Conference, took place on 7 August 2006. The Defence has now applied for certification to appeal the Impugned Decision.[2]

Discussion

2. Rule 73 (B) of the Rules of Procedure and Evidence provides that a Trial Chamber may grant certification to appeal when (i) there is an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and (ii) that an immediate resolution by the Appeals Chamber may materially advance the proceedings. These two conditions are cumulative and are not determined on the merits of the appeal against the impugned Decision.[3]

[1] The Prosecution filed a *Corrigendum* to the 18 July 2006 Indictment on 25 July 2006 containing only technical changes to the Indictment.
[2] Filed on 20 July 2006; response filed 31 July 2006.
[3] *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-T, Decision on Defence Motions for Certification to Appeal Decision Granting Special Protective Measures for Witness ADE (TC), 7 June 2006, para. 5.

3. The two main errors alleged by the Defence are (1) that the Trial Chamber allowed some of the Prosecution's amendments because they were mischaracterized as clarifications and specifications instead of new charges and as such, erred when it concluded that the Accused will have adequate time to prepare his Defence, and (2) that the Trial Chamber erred when it concluded that the tardiness of the Prosecution's Motion under the circumstances did not cause any prejudice to the Accused. The Defence believes that because the Impugned Decision has violated the right of the Accused to be tried without undue delay and his right to adequately prepare his defence as guaranteed by Article 20 (4) of the Statute, it constitutes an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

4. The Defence asserts that an immediate resolution by the Appeals Chamber will materially advance the proceedings because the Accused will then know what the exact charges are against him before the start of trial. It relies on the Trial Chamber's decision in *Muvunyi* of 16 March 2005 which granted certification to appeal in a similar situation.[4]

5. The Prosecution opposes the Motion and states that the Defence has not made any arguments that touch upon an issue which might affect the fair and expeditions conduct of the proceedings.

6. Certification to appeal a Trial Chamber's decision is only granted in exceptional circumstances.[5] According to the Appeals Chamber in *Muvunyi*, a Trial Chamber's decision on a Motion to Amend the Indictment is an exercise of judicial discretion which, when done at a late stage of the trial process, must be considered in the context of potential prejudice to the accused.[6] The resulting decision can only be interfered with if the moving party proves a discernable error on the part of the Trial Chamber.[7]

7. Although an issue with the Indictment could be considered to significantly affect the fair conduct of the proceedings, the Chamber finds that the solutions to the errors alleged by the Defence will not expedite the conduct of the proceedings, nor will an immediate resolution be likely to materially advance the proceedings. In the *Muvunyi* case, even when the Appeals Chamber determined that the Trial Chamber mischaracterized amendments or potential amendments to the Indictment, as alleged here, those mischaracterizations did not affect the overall outcome of the impugned decision.[8] Similarly, in this case, there is no real challenge to the amendments, which are the basis of the decision, but that the result of adding those additions cause prejudice to the Accused because they were not done in a timely manner and he will not have sufficient time to prepare his defence. When a specific scenario arises, the Defence can move the Chamber for additional time to prepare its case in order to preserve the rights of the Accused to a fair trial. Consequently, the Chamber finds that Defence has not satisfied the standard for certification to appeal the Impugned decision.

FOR THOSE REASONS, THE CHAMBER

DENIES the Motion.

Arusha, 13 September 2006, done in English.

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[4] *Prosecutor v. Tharcisse Muvunyi*, Case N°ICTR-00-55A-AR73, Decision on the Prosecutor's Motion for Certification to Appeal the Decision Denying Leave to File an Amended Indictment and for Stay of Proceedings (TC), 16 March 2005.
[5] See for example: *Prosecutor v. Arsène Shalom Ntahobali and Pauline 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' (TC), 18 March 2004, para. 15.
[6] *Prosecutor v. Tharcisse Muvunyi*, Case N°ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005 (AC), 12 May 2005, paras. 5, 21.
[7] *Id*. at para. 5.
[8] *Id*. at para. 56.

[Signed] : Dennis C. M. Byron; Florence Rita Arrey; Gberdao Gustave Kam

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Decision on Defence Motion on Defects in the Form of the Indictment (Rule 50 (C) of the Rules of Procedure and Evidence) 27 September 2006 (ICTR-2001-63-R50)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Gberdao Gustave Kam; Robert Fremr

Siméon Nchamihigo – Defects in the form of the indictment – Consideration of late-filed preliminary motions, Motion on defects in the form of new charges as a result of the amendment of an indictment, Good cause – Clarification of the obligation for the Prosecution to set forth in the indictment a concise statement of the facts and of the crime(s) with which the suspect is charged – Case at the outset of the trial – Individual criminal responsibility, Participation of the Accused in an alleged crime considered as material facts, Clarification of the Prosecutor's obligations – Category of joint criminal enterprise – Specificity related to some facts and the identity of victims and co-perpetrators, vagueness, and relevance to the charges in the indictment – Motion granted in part

International Instruments Cited :

Rules of Procedure and Evidence, Rules 47 (C), 50 (C) and 72 (G) ; Statute, Art. 6 (1) and 17 (4)

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Laurent Semanza, Judgement and Sentence, 15 May 2003 (ICTR-97-20) ; Appeals Chamber, The Prosecutor v. Georges Rutaganda, Judgement, 26 May 2003 (ICTR-96-3) ; Trial Chamber, The Prosecutor v. André Ntagerura et al., Judgement and Sentence, 25 February 2004 (ICTR-99-46) ; Appeals Chamber, The Prosecutor v. Eliezer Niyitegeka, Judgement, 9 July 2004 (ICTR-96-14) ; Appeals Chamber, The Prosecutor v. Laurent Semanza, Judgement, 20 May 2005 (ICTR-97-20) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora, 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. Sylvestre Gacumbitsi, Appeal Judgement, 7 July 2006 (ICTR-2001-64) ; Appeals Chamber, The Prosecutor v. André Ntagerura, Appeal Judgement, 7 July 2006 (ICTR-96-10A) ; Trial Chamber, Prosecutor v. Siméon Nchamihigo, Decision on Request for Leave to Amend the Indictment, 14 July 2006 (ICTR-2001-63)

I.C.T.Y.: Trial Chamber, The Prosecutor v. Milorad Krnojelac, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999 (IT-97-25) ; 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. Zoran Kupreškić, Judgement, 23 October 2001 (IT-95-16) ; Trial Chamber, The Prosecutor v. Želijko Mejakić, Decision on Dusko Knezevic's Preliminary Motion on the Form of the Indictment, 4 April 2003 (IT-02-65) ; Appeals Chamber, The Prosecutor v. Milorad Krnojelac, Judgment, 17 September 2003 (IT-97-25) ; Trial Chamber, The Prosecutor v. Jovica Stanišić, Decision on Defence Preliminary Motions, 14 November 2003 (IT-03-69)

Introduction

1. The trial in the instant case commenced on 25 September 2006 with the Prosecution's Opening Statement. On 17 July 2006, Trial Chamber I granted the Prosecution leave to amend, in part, the Indictment of 29 June 2001.[1] In conformity with this Decision, the Prosecution filed an Amended Indictment on 18 July 2006. On 25 July 2006, the Prosecution filed a *Corrigendum* to the Indictment, which only changed certain incorrect paragraph numbers, and the French translation to the Indictment. The Amended Indictment charges the Accused with four counts: genocide, and murder, extermination and other inhumane acts as crimes against humanity. On 29 August 2006, the Defence submitted the present motion raising objections on defects in the form of the Amended Indictment under Rule 50 (C) of the Rules of Procedure and Evidence.

Discussion

I. Preliminary Matter

2. This motion was filed after the end of the 30-day period following the filing of the Amended Indictment during which the Defence may submit preliminary motions according to Rule 50 (C) of the Rules. Although the Defence has not offered any explanation for its delay in submitting the Motion, the Chamber notes that pursuant to Rule 72 (G), it has discretion to consider late-filed preliminary motions on defects in the form of an indictment upon showing good cause.[2] In the Chamber's view, the same principle can apply when a submission is made under Rule 50 (C) of the Rules since it also concerns the defects in the form of new charges as a result of the amendment of an Indictment. Due to the fact that it is still early in the trial process, the Chamber finds it necessary in the interests of justice and the rights of the Accused to a fair trial, to use its discretion and entertain the Defence submission.

II. Allegations of Defects in the Form of the Indictment

3. Article 17 (4) of the Tribunal's Statute and Rule 47 (C) of the Rules require the Prosecution to set forth in the Indictment a concise statement of the facts of the case and of the crime(s) with which the suspect is charged. According to the jurisprudence of the International Criminal Tribunal for Former Yugoslavia and of this Tribunal, this obligation must be interpreted in light of the rights of the accused[3] and obliges the Prosecutor to inform an accused of the charges against him in a prompt and detailed manner.[4] The key issue is whether the material facts are pleaded in an indictment with enough specificity so that an accused can adequately prepare his defence.[5] In assessing an indictment, each paragraph should not be read in isolation but rather should be considered in the context of the other paragraphs in the indictment.[6] It is possible that an indictment may not plead the material facts with the requisite degree of specificity because the necessary information is not in the Prosecution's possession. But the Prosecution is expected to know its case before it goes to trial. It is not acceptable for the Prosecution to omit material aspects of its main allegations in the indictment with the aim of moulding the case against this accused in the course of the trial depending on how evidence unfolds. An indictment, which does not set out the material facts with enough detail in this respect, is defective.

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[1] *Prosecutor v. Nchamihigo*, Case N°ICTR-2001-63-I, Decision on Request for Leave to Amend the Indictment (TC), dated 14 July but filed on 17 July 2006.
[2] See also *Prosecutor v. Bagosora*, Case N°ICTR-98-41-T, Trial Chamber, Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution pursuant to Rule 68 (A) (TC), 8 March 2006, at para. 2.
[3] Statute, Articles 19, 20 (2), 20 (4) (a) and 20 (4) (b).
[4] *Prosecutor v. Kupreškić*, Case N°IT-95-16-A, Judgement (AC), 23 October 2001, para. 88, 92; *Prosecutor v. Semanza*, Case N°ICTR-97-20-T, Judgement (TC), 20 May 2005, para. 85.
[5] *Prosecutor v. Ntagerura*, Case N°ICTR-99-46-T, Judgement (AC), 7 July 2006, para. 22.
[6] *Prosecutor v. Rutaganda*, Case N°ICTR-96-3, Judgement (AC), 26 May 2003, para. 304.

4. In its motion of 29 August 2006, the Defence submits that the form of the Amended Indictment against Siméon Nchamihigo is defective to the extent that it does not properly plead (i) the form of criminal responsibility under Article 6 (1) of the Statute, (ii) the category of joint criminal enterprise,[7] and (iii) fails to specify details relating to certain dates, places and persons. It claims that these defects affect his right to adequately prepare his defence and his right to a fair trial. The Prosecution opposes the Motion and claims that the Indictment conforms to the requirements set out by the jurisprudence and, in any event, much of the information that is requested in the Motion is detailed in material found in the disclosure of documents, witness statements and other pre-trial material.[8]

5. The Chamber accepts that according to the established jurisprudence, a defect in an indictment may be cured where the accused has received timely, clear, and consistent information from the Prosecution which resolves the ambiguity or clears up the vagueness.[9] However, in the instance case, since this case is at the outset of the trial, it is more appropriate that any more specific information on the allegations, which is currently in the Prosecution's possession, be included in the Indictment from now to ensure that any ambiguity concerning the charges against the Accused is removed. This would give effect to the right of the Accused to understand the charges against him and prepare adequately his defence. For these reasons, the Chamber will address the three categories of defects alleged in the Defence Motion.

(i) Defects Related to the Form of Individual Criminal Responsibility

6. According to the established jurisprudence, the mode and extent of an accused's participation in an alleged crime are always material facts that must be clearly set out in the indictment. The Prosecution must specify the form of criminal responsibility charged against an accused.[10] When the Prosecution alleges more than one form of participation for each crime, it has the obligation to specify the alleged acts of an accused giving rise to each form of participation charged.[11] Each count in the indictment must identify the precise legal qualification of the crime charged based on the material facts alleged in the indictment as well as the mode of the accused's alleged participation in the crime.[12] The count must also specify which paragraphs of the concise statement of the facts of the crime support the charge.[13]

7. The Defence submits that the Prosecution failed to specify which form of criminal liability is being invoked against the Accused in relation to each charge. It claims that paragraph 14 of the Indictment lacks specificity and raises ambiguity as to the modes of liability since all the forms under Article 6 (1) are pleaded. The Defence also argues that a number of paragraphs in the Amended Indictment fail to particularise the way in which the Accused participated in the crimes alleged, most notably in the context of the allegations of instigating and aiding and abetting.

8. In the Chamber's view, paragraph 14 of the Amended Indictment is a general paragraph introducing all the forms of liability which are then alleged throughout the Indictment. The Chamber notes that the forms of liability on which the Prosecution intends to rely under Article 6 (1) of the Statute are specified in relation to each factual allegation. This view is confirmed by the Prosecution's

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[7] Although considered a form of liability under Article 6 (1) of the Statute, joint criminal enterprise will be treated separately for clarity in this Decision.
[8] Prosecution Response at para. 7 and 9.
[9] Prosecutor v. Eliézer Niyitegeka, Case N°ICTR-96-14-A, Judgement (AC), 9 July 2004, para. 195; Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe, Case N°ICTR-99-46-A, Judgement (AC), 7 July 2006, para. 30; Prosecutor v. Sylvestre Gacumbitsi, Case N°ICTR-2001-64-A, Judgement (AC), 7 July 2006, para. 49.
[10] *Prosecutor v. Ntagerura*, Case N°ICTR-99-46-T, Judgement (TC), 25 February 2004, para. 37, *Prosecutor v. Krnojelac*, Case N°IT-97-25-A, Judgement (AC), 17 September 2003, para. 138.
[11] *Prosecutor v. Ntagerura*, Case N°ICTR-99-46-T, Judgment (AC), 7 July 2006, para. 25, *Prosecutor v. Ntagerura*, Case N°ICTR-99-46-T, Judgment (TC), 25 February 2004, fn 38.
[12] *Prosecutor v. Semanza*, Case N°ICTR-97-20-T, Judgement (TC), 15 May 2003, para. 59; *Prosecutor v. Krnojelac*, Case N°IT-97-25-A, Judgement (AC), 17 September 2003, para. 138.
[13] *Prosecutor v. Semanza*, Case N°ICTR-97-20-T, Judgement (TC), 15 May 2003, para. 59.

submission in its reply to the Defence motion. The Chamber is satisfied that the forms of liability concerning the alleged crimes committed by the Accused are sufficiently pleaded in relation to each fact.

9. The Defence submits that the allegations in paragraphs 28 and 36, which refer to the Accused's direct participation in the crimes alleged, must be struck from the Amended Indictment because they do not coherently allege the forms of criminal liability consistently with the second sentence of paragraph 14. They must also be struck because they are inconsistent with Decision of Trial Chamber I granting leave to amend the Indictment except when it is alleged that the Accused personally committed the murders.[14]

10. Paragraphs 28 and 36 must be read in the context of paragraphs 28 through 37 of the Indictment. These paragraphs contain specific factual allegations including modes of liability for each of these factual allegations. Similarly paragraph 14 as a whole contains all the modes of liability referred to in paragraphs 28 through 37. The allegations specify a reasonable range of dates, a precise location and the exact names of the victims involved. The Chamber is therefore satisfied that paragraphs 28 and 36 are set out with enough detail and clarity to allow the Accused to understand the charges against him and prepare his defence. The Chamber is not convinced that a reference to the commission of killing by the Accused at paragraph 36 will require more investigation than for the allegation that he ordered, instigated or aided and abetted the killing of some Tutsi girls as stated in the paragraph, and can see no inconsistency with the Decision of Trial Chamber I.

11. The Defence argues that paragraphs 5, 34, 35, 43, 64 and 65 fail to explain the way in which the Accused instigated or aided and abetted the crimes alleged, in particular it does not understand how both forms of liability could be pleaded on the same facts. It requests that the Prosecution indicate the alleged acts of the Accused that give rise to each form of participation charged, because otherwise it appears that the Prosecution does not know what theory it intends to prove on these allegations.

12. In the Chamber's view, paragraphs 5, 34, 35, 43, 64 and 65 provide sufficient detail concerning the acts by which the Accused allegedly participated in the commission of the crimes to allow the Accused to understand the charges against him. The words "ordered, instigated, or aided and abetted the crime" are the legal terms which may be applied to the Accused's participation as described under these paragraphs.

13. The Defence also complains that paragraphs 27, 29, 41, and 49 do not specifically state the means by which the Accused participated in the criminal facts alleged. These paragraphs allege certain actions taken by the Accused, and all include specific forms of liability pursuant to Article 6 (1). Whether the alleged action by the Accused amounts to the criminal responsibility pleaded is a matter to be decided at a later stage in the trial. For the purposes of this Motion, the Chamber finds no defects in this regard.

(ii) Defects Related to the Category of Joint Criminal Enterprise

14. Joint criminal enterprise is considered as a form of participation in the crime coming from the word "committing" contained in Article 6 (1) of the Statute. The jurisprudence established the existence of three forms of joint criminal enterprise: basic, systemic and extended. According to the jurisprudence, when pleading responsibility as a participant in a joint criminal enterprise, it is preferable that the Indictment refers to the particular form of joint criminal enterprise envisaged. However, more than one form of joint criminal enterprise can be pleaded for the same facts, similarly to other forms of individual criminal responsibility pursuant to Article 6 (1).[15] The indictment must

[14] The Defence relies upon para. 21 of the Decision filed on 17 July 2006.
[15] See footnote 11.

also set out the purpose of the enterprise, the identity of the co-participants, and the nature of the accused's participation in the enterprise.[16]

15. The Defence argues that the Amended Indictment does not specify which category of joint criminal enterprise is alleged against the Accused, but instead includes both the basic and extended categories and that a criminal act cannot fall within both forms of joint criminal enterprise at the same time. It further submits that the Amended Indictment fails to particularise which specific criminal activities refer to which category of joint criminal enterprise both within paragraphs 15, 16 and 17, and within the concise statement of facts relating to each count of the Amended Indictment.

16. As Trial Chamber I pointed out in its Decision of 14 July 2006, the Amended Indictment makes clear to the Accused that he is charged with both the basic and extended forms of joint criminal enterprise.[17] Here, the Indictment must be read as a whole: paragraphs 15 to 17 of the Indictment plead without ambiguity the basic and extended forms of joint criminal enterprise. Paragraph 17 provides the names of the members of the joint criminal enterprise, and as paragraph 14 of the Indictment, these paragraphs introduce the factual allegations pleaded in the subsequent paragraphs where, in each instance, the mode of liability is specified. As a result, the Accused is sufficiently aware of the material facts, which make up the Prosecution's theory of joint criminal enterprise and can, on this basis, adequately prepare his defence.

(iii) Defects Related to the Failure to Specify Precise Dates, Locations, the Identity of Victims and Co-Perpetrators, Vagueness, and Relevance to the Charges in the Indictment

17. The specificity with which material facts must be pleaded depends on the form of participation charged against an accused.[18] With respect to allegations of direct commission of criminal acts, an indictment must specify the identity of the victims, the time and place of the events, and the means by which the acts were committed.[19] In light of the nature or scale of the crimes, the fallibility of witnesses' recollections and considerations tied to witness protection, the Prosecution is not expected to plead these material facts with absolute precision.[20] If a precise date cannot be specified, a reasonable range of dates can be provided;[21] and if victims cannot be individually identified, then the Prosecution should refer to their category or position as a group.[22] Where the Prosecution cannot provide greater detail, then the indictment must clearly indicate that it provides the best information available.[23]

18. The Defence submits that the concise statement of the facts included in the Amended Indictment is defective to the extent that some allegations are not relevant to the charges against the Accused or that the Indictment lacks details relating to certain dates, places and persons and therefore results in grave prejudice to the Accused.

19. The Defence first claims these defects with respect to paragraphs 3, 6 and 7 of the Indictment. The Chamber notes that these paragraphs provide context and background concerning the Accused,

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[16] *Prosecutor v. Stanisic*, Case N°IT-03-69-PT, Decision on Defence Preliminary Motions (TC), 14 November 2003; *Prosecutor v. Mejakic*, Case N°IT-02-65-PT, Decision on Dusko Knezevic's Preliminary Motion on the Form of the Indictment (TC), 4 April 2003.
[17] *Nchamihigo*, Trial Chamber I Decision filed on 17 July 2006, para. 14.
[18] *Prosecutor v. Ntagerura*, Case N°ICTR-99-46-T, Judgement (AC), 7 July 2006, at para. 23.
[19] *Prosecutor v. Semanza*, Case N°ICTR-97-20-T, Judgment (TC), 15 May 2003, at para. 45.
[20] *Prosecutor v. Kupreškić*, Case N°IT-95-16-A, Judgement (AC), 23 October 2001, at para. 89; *Prosecutor v. Krnojelac,* Case N°IT-97-25-A, Decision on the Defence Preliminary Motion on the Form of the Indictment (TC), 24 February 1999, at para. 40.
[21] *Prosecutor v. Brđanin*, Case N°IT-99-36-PT, Decision on Objections to the Form of Amended Indictment (TC), 20 February 2001, at para. 22.
[22] *Ibid.*; *Prosecutor v. Krnojelac*, Case N°IT-97-25-A, Decision on the Defence Preliminary Motion on the Form of the Indictment (TC), 24 February 1999, at paras. 40, 55, 58.
[23] *Brđanin*, Decision on Momir Objections by Momir Talić to the Form of Amended Indictment (TC), 20 February 2001, at para. 22.

indicated by the heading of the section and the content of the paragraphs themselves. As Trial Chamber I stated in its Decision of 14 July 2006, none of these allegations could independently ground a conviction on any of the counts included in the Indictment.[24] The Defence's contention on this issue is therefore rejected.

20. The Defence argues that paragraphs 4, 5, 8 to 10 of the Indictment also lack details. These paragraphs are however introducing the allegations against the Accused as fully described in the concise statement of the facts related to the charges.[25] Read as a whole along with the other allegations in the Indictment, paragraphs 4, 5, and 8 are not defective. Paragraph 10, however, mentions a meeting held on or about 11 April 1994, which allegedly lead to the distribution of weapons. Nowhere else in the Indictment is a meeting alleged to be held on that day, although there are similarities in paragraph 10 with paragraph 20 (a), where the meeting is alleged to be held on or about 14 April 1994. Due to this confusion, the Chamber finds that the dates of the meetings and distribution of weapons should be specified in paragraphs 10 and 20 (a), and that clarification should be made if paragraph 20 (a) is meant to elaborate on the meeting introduced in paragraph 10. If these two paragraphs are not referring to the same meeting, then more details should be given in paragraph 10 as to when the weapons were distributed and orders were given to kill the Tutsi with those weapons.

21. The Defence also argues that references to the *Interahamwe* in the Amended Indictment are imprecise in that the Prosecution does not define the nature of the *Interahamwe* and does not specifically identify its members. The Defence reasons that this information is all the more necessary as the Amended Indictment alleges that the *Interahamwe* executed a number of the crimes charged where responsibility has been attributed to the Accused. The Chamber notes that in some instances, the identities of the alleged perpetrators of the crimes, including *Interahamwe* are specified in the Indictment. There are other instances where the use of the term *Interahamwe* does not refer to an individual's name in particular. Where the Prosecution knows the names of the *Interahamwe* who committed the particular acts, they should be provided. If it is impossible to provide more specific information due to the large number of *Interahamwe* involved or other reason, this should be clearly indicated in the Indictment. The definition or meaning of "*Interahamwe*", however, is not a matter that needs to be specified in the Indictment.

22. In addition, the Defence identifies a number of paragraphs in the Amended Indictment which suffer from a lack of detail and clarity in the following ways:

(a) Time-frame

23. The Defence claims that paragraphs 20 (a), (c), (d), 26, 27, 31, 41, and 43 do not specify with enough detail the date, time or length of time in which the criminal allegations took place. The Chamber notes that the time-frame of the Accused receiving and later distributing weapons for an attack on the Shangi parish as alleged in paragraph 20 (a) is not clear. Although a range of dates is given for the military training alleged in paragraph 20 (c), and the drawing of lists in 20 (d) this range is rather large, and if possible, should be better specified. The language in paragraphs 26 and 27 indicates that the dates in question are unknown and in Paragraph 31 that the most specific date is given for the allegations in those paragraphs. Reading the Indictment as a while, the Chamber can infer that the lists referred to in paragraphs 41 and 43 were made during the large time-frame specified in paragraph 20 (d), but that if a more precise time-frame is known, it should be clarified.

(b) Location

[24] Para. 24.
[25] See in particular last sentence of Paragraph 9 of the Indictment: "as described below in the concise statements of the facts relating to the charges".

24. The Defence asserts that paragraphs 21, 22, 23, 24, 25 are not clear on where the facts involved occurred. Paragraphs 21, 22, 23, 24 and 25 all mention roadblocks in Cyangugu town. Each of these paragraphs gives a satisfactory detailed factual account of alleged criminal events, without always specifying the exact roadblock. If the name of the actual roadblock is known, the Chamber finds that it should be specified.

(c) Individual Identification - Victims, Organizers and Perpetrators

25. It is contended by the Defence that paragraphs 26, 27, 30, 32, 38, 39, 40, 41, 43, 47, 64, and 65 do not sufficiently name the individual victims, organizers or perpetrators of the crimes in question. Pursuant to the jurisprudence, if individuals cannot be specified, than sufficient detail can be given on the group or the individuals. This information, however, must be according to what the Prosecution actually has in its possession. The Prosecution's response, as stated above, is that the details requested here are not required by the Indictment but regardless, have already been provided to the Defence through other informal means such as disclosure.

26. As already stated, amending the Indictment at this stage of the proceedings is the most appropriate way to ensure that the Accused understands the charges against him. It is only when the information is unavailable, or the scale too large should individuals be referred to within groups or positions. If the information is presently available, as inferred by the Prosecution's response, then it should be specified in the Indictment.

(d) Vagueness

27. The Defence claims that the Amended Indictment contains a number of vague and imprecise expressions such as "among others" (at paragraphs 16, 20 (c), 37 and 43), "other" or "other members" (at paragraphs 38 to 42, 60 and 70) or "members of security council" (at paragraph 5). Paragraph 16 indicates the members of the joint criminal enterprise. The Prosecution should state all known members, but if it is unable to do so, it should be mentioned. Paragraph 20 (c), 37 and 43 make specific allegations against individuals. All known identities for these individuals should be provided, or stated that it is unable to do so. Paragraphs 5, 38 to 42, and 70 refer to members of the *préfecture* security council, who have been defined in paragraph 9. In paragraph 60, which alleges that the *Interahamwe* and other attackers killed about 600 civilians, the Prosecution should clarify the identities of these attackers to the extent possible.

(e) Relevance

28. The reference in paragraph 31 to the theft of the vehicle by the Accused and the planning to kill Marianne Baziruwiha in paragraph 49 are alleged to be irrelevant to the actual charges in the Indictment and should be struck.

29. In relation to the allegation of vehicle theft the argument of irrelevance is refuted by Rule 88 (B) of the Rules which provides that 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. With regard to paragraph 49 the facts relating to the Marianne Baziruwiha as set out in that paragraph and in paragraphs 42 and 43 of the Indictment do not make any reference to her having been killed. Repetition of the incident in paragraph 49 as murder as a crime against humanity is incongruous if there is no allegation that she was killed. The Prosecution should either amend the paragraph to indicate that Marianne Baziruwiha was killed or strike out the paragraph.

FOR THOSE REASONS, THE CHAMBER

I. GRANTS the Motion in part, and

II. ORDERS

1. The Prosecution to clarify the dates of the meetings, reception and distribution of weapons and the orders to kill the Tutsi mentioned in paragraphs 10 and 20 (a)

2. The Prosecution to provide further details to the extent available on the names and identities of the *Interahamwe* in paragraphs 8, 10, 13, 20, 20 (a), 20 (e), 21, 22, 23, 24, 26, 27, 28, 29, 34, 35, 36, 37, 45, 47, 50, 52, 53, 54, 55, 57, 61, 63, and 69;

3. The Prosecution to provide more specific time-frames to the extent possible in paragraphs 20 (a), 20 (c), 20 (d), 41 and 43;

4. The Prosecution to provide the name of the exact roadblock, or the best detail available concerning the roadblocks mentioned in paragraphs 21, 22, 23, 24, and 25;

5. The Prosecution to provide to the extent possible the identities of persons mentioned in paragraphs 26, 27, 30, 32, 38, 39, 40, 41, 43, 47, 64, and 65;

6. The Prosecution to specify to the extent possible the identities of the members of the joint criminal enterprise in paragraph 16, and the individuals involved in the factual allegations in paragraphs 20 (c), 37, 43 and 60;

7. The Prosecution to amend paragraph 49 to indicate that Marianne Baziruwiha was murdered or strike out the paragraph altogether;

8. The Amended Indictment in conformity with this decision shall be filed by 29 September 2006.

III. DENIES the remainder of the Motion.

Arusha, 27 September 2006, done in English.

[Signed] : Dennis C. M. Byron; Gberdao Gustave Kam; Robert Fremr

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Revised Amended Indictment (In conformity with Trial Chamber III Decision dated 27 September 2006) 29 September 2006 (ICTR-2001-63-I)

(Original : not specified)

I. The Charges

1. The Prosecutor of the International Criminal Tribunal for Rwanda, pursuant to the authority stipulated in Article 17 of the Statute of the International Criminal Tribunal for Rwanda ("the Statute") charges:

Siméon Nchamihigo with the following crimes:

Count 1: genocide, pursuant to Articles 2 (3) (a) and 6 (1) of the Statute;

Count 2: murder as a crime against humanity, pursuant to Articles 3 (a) and 6 (1) of the Statute;

Count 3: extermination as a crime against humanity, pursuant to Articles 3 (b) and 6 (1) of the Statute and

Count 4: other inhumane acts as a crime against humanity, pursuant to Articles 3 (i) and 6 (1) of the Statute.

II. The Accused:

2. Siméon Nchamihigo was born on 8 September 1960 in Gatare *commune,* Cyangugu *Préfecture* (Rwanda). He was *Substitut du Procureur* [Assistant Prosecutor] at the Cyangugu Court of First Instance from sometime in 1991 until 17 July 1994.

3. Between 1 January and 17 July 1994, Siméon Nchamihigo acted in his capacity of *Substitut du Procureur* in the Office of the Prosecutor of the Republic in Cyangugu on the basis of a forged diploma which he produced sometime in 1991 in support of his application for the post of *Substitut du Procureur* in Rwanda. He was investigated by the Deputy Prosecutor General Ntakirutimana Charles in connection with the forged diploma, but the investigation was stopped when a pro-MRND Deputy Prosecutor General, Musekura Jean Damascene, was appointed to replace Ntakirutimana Charles.

4. On an unknown date around mid-April 1994, Siméon Nchamihigo, in his capacity of *Substitut du Procureur,* issued counterfeit warrants of arrest against Tutsi who had sought refuge at the Cyangugu Cathedral or at the Bishopric of Cyangugu, including Gapfumu, to enable and thus aid and abet officers from the office of the Prosecutor of the Republic, soldiers and *Interahamwe* to remove those refugees and kill them and they did so.

5. Similarly, on an unknown date around mid-April 1994, Siméon Nchamihigo, in his capacity as *Substitut du Procureur,* issued counterfeit warrants of arrest against Tutsi who had been transferred to Kamarampaka Stadium from various places. On or around the same date, the members of the *préfecture* security council, including Siméon Nchamihigo, brought outside the stadium those Tutsi. Siméon Nchamihigo ordered or instigated the *Interahamwe* to kill those Tutsi, or otherwise aided and abetted the killing of those Tutsi, resulting in the killing of those Tutsi by the *Interahamwe*.

6. From about 1992 until 17 July 1994, Siméon Nchamihigo, although he was *Substitut du Procureur,* was also involved in political activities in Cyangugu *Préfecture* both for the MRND, President Juvénal Habyarimana's political party and the political party known as *La Coalition pour la Défense de la République,* or CDR. CDR was a Hutu extremist party and allied to MRND. It opposed parties that were in opposition to the MRND.

7. Between 1 January and 17 July 1994, Siméon Nchamihigo was also a member of a clandestine group of Hutu civil servants working in Cyangugu, called *Tuvindimwe,* which was formed in 1991 or thereabouts. This group supported the MRND and CDR. *Tuvindimwe* recruited its members from the *Préfecture*, the Appeals Court, the *parquet general* [Public Prosecutor's office at the Appeal Court], the Court of First Instance and the *parquet de la république* [Public Prosecutor's office at the Court of First Instance]. Tutsi and moderate Hutu who opposed the MRND were excluded from *Tuvindimwe* because they were considered accomplices of the *Inkotanyi,* a term applied to the Tutsi-dominated Rwandan Patriotic Front, or RPF.

8. Between 1 February and 17 July 1994, Siméon Nchamihigo was an *Interahamwe* leader in Cyangugu *Préfecture*. He recruited many young Hutu men as *Interahamwe*, including Jean de Dieu Utabazi, Janvier Borauzima, Faustin Sinashebeje and Joseph Habineza and he instructed Habimana

Jean Bosco *alias* Masudi, a former soldier, in collaboration with Sergeant Major Marc Ruberanziza, *alias* Bikomago, Christophe Nyandwi and caporal Aimé, to train these, among other *Interahamwe* in Karambo military camp, to enable them to kill the Tutsi. In addition, Siméon Nchamihigo allowed *Interahamwe* to stay in his house in Cyangugu and he provided them with food and drink. He ordered or instigated the *Interahamwe* to kill the Tutsi, or otherwise, aided and abetted the killing of Tutsi, as described below in the concise statement of facts relating to the charges.

9. Between 6 April and 17 July 1994, Siméon Nchamihigo acted as a member of the *préfecture* security council of Cyangugu and participated in its meetings. The following persons, among others, were members of the *préfecture* security council: Emmanuel Bagambiki, *Préfet* of Cyangugu; Samuel Imanishimwe, commander of the Cyangugu military camp; Vincent Munyarugerero, commander of the Cyangugu *gendarmerie;* Bernadin Bayingana, President of the Cyangugu Court of First Instance; Paul Ndorimana, the Public Prosecutor of Cyangugu, who was often represented by Siméon Nchamihigo, and *sous-Préfets* Emmanuel Kamonyo, Théodore Munyangabe and François Nzeyimana. The *préfecture* security council met regularly to discuss matters relating to security in Cyangugu *Préfecture*. The *préfecture* security council was particularly active from 6 April 1994, following the death of President Habyarimana, until 17 July 1994. During this time it met more often and made decisions concerning the setting of roadblocks in Cyangugu, the transfer of refugees to Kamarampaka Stadium from locations where they had sought to escape the violence, the drawing of lists of Tutsi and moderate Hutu and the selection of individual refugees for removal from the Kamarampaka Stadium, as described below in the concise statements of the facts relating to the charges.

10. On or about 11 April 1994, a meeting was called by the *préfet* Emmanuel Bagambiki in the *préfecture* office which was attended by the *Sous-Préfets*, *bourgmestres,* religious authorities, prominent businessmen who financed the MRND political party, the *Interahamwe* leaders and political authorities of the MRND, CDR, MDR-power and PL-power parties. Civil servants, including Siméon Nchamihigo, were also present at the meeting. During this meeting, Siméon Nchamihigo and Callixte Nsabimana, manager of Shangasha Tea Factory, were appointed supervisors for the security of Gisuma and Gafunzo zones. At the end of the meeting, all zone supervisors, including Siméon Nchamihigo, went to Karambo military camp to receive weapons from Lieutenant Samuel Imanishimwe. Shortly thereafter, the zone supervisors, including Siméon Nchamihigo, distributed these weapons to Anasthase Bizimungu and other *Interahamwe* posted in their respective zones and ordered them to kill the Tutsi with those weapons.

III. General Allegations

11. Between 6 April and 17 July 1994, and during all the periods referred to in this indictment, Rwandan citizens were identified according to the following ethnic or racial classifications: Tutsi, Hutu and Twa.

12. Between 6 April and 17 July 1994, soldiers, *Interahamwe* and armed civilians attacked, killed or caused bodily or mental harm to members of the Tutsi ethnic group in Cyangugu *Préfecture* and throughout Rwandan, with intent to destroy, in whole or in part, the Tutsi ethnic group as such.

13. Between 6 April and 17 July 1994, in Cyangugu *Préfecture* and throughout Rwandan, *Interahamwe,* soldiers and armed civilians murdered individually identified or targeted people or committed widespread killings, as part of widespread or systematic attacks against Tutsi civilians and/or Hutu opponents. As result of these attacks, *Interahamwe,* soldiers and armed civilians killed hundreds of thousands of Tutsi civilians and Hutu political opponents in Cyangugu *Préfecture* and throughout Rwanda.

IV Individual Criminal Responsibility

14, Pursuant to Article 6 (1) of the Statute, Siméon Nchamihigo is criminally responsible for the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity

and other inhumane acts as a crime against humanity, for planning, instigating, ordering, committing, or otherwise aiding and abetting in the planning, preparation or execution of the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity. Siméon Nchamihigo ordered people over whom he had authority by virtue of his position described in paragraphs 2, 3, 4, 5, 6, 8, 9 and 10 of this indictment, to commit the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity, and instigated or otherwise aided and abetted those who were not under his authority to commit the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity.

15. In addition to his responsibility under Article 6 (1) of the Statute for having planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity, Siméon Nchamihigo knowingly and willfully participated in a joint criminal enterprise, in his role as set out in paragraphs 2, 3, 4, 5, 6, 8, 9, 10 and 15 of this indictment. The purpose of the joint criminal enterprise was the destruction of the Tutsi racial or ethnic group in Cyangugu *préfecture* through the commission of the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity. This joint criminal enterprise came into existence on or about 6 April 1994 and continued until 17 July 1994.

16. Siméon Nchamihigo and the other members of the joint criminal enterprise shared the same intent to effect the common purpose. To fulfill the common purpose, Siméon Nchamihigo acted in concert with *Interahamwe* Christophe Nyandwi, Yusuf Munyakazi, Mubiligi Thompson, Pierre Munyandamutsa, *alias Pressé*, Mvuyekure Vincent, known as *Tourné*, Habimana Jean Bosco, *alias* Masudi, Bizimungu Anasthase, Nsengumuremyi Patrick, Sinashebeje Faustin, and Habirora Nehemi, among others, as well as other participants who were not *Interahamwe*, including Samuel Imanishimwe, commander of the Cyangugu military camp, Sergeant Major Marc Ruberanziza, *alias* Bikomago, Habimana Vedaste, and *Préfet* Emmanuel Bagambiki, among others.

17. In addition to his participation in a joint criminal enterprise as set out in paragraphs 15 and 16 above, Siméon Nchamihigo is responsible for the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity on the basis that these crimes were the natural and foreseeable consequences of the execution of the common purpose of the joint criminal enterprise. Siméon Nchamihigo intended to further the common purpose of the joint criminal enterprise. In addition, it was foreseeable that the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity, might be perpetrated by one or other members of the group and Siméon Nchamihigo willingly took that risk.

18. The particulars that give rise to Siméon Nchamihigo's individual responsibility for the crimes charged are set out in this indictment as follows:

-For the crime of genocide in paragraphs 19 through 43;
-For the crime of murder as a crime against humanity in paragraphs 44 through 55;
-For the crime of extermination as a crime against humanity in paragraphs 56 through 69 and
-For the crime of other inhuman acts as a crime against humanity in paragraphs 67 through 70.

V Crimes charged and Concise Statement of Facts

Count 1: Genocide

19. The Prosecutor of the international Criminal Tribunal for Rwanda charges Siméon Nchamihigo with genocide, a crime provided for in Article 2 (3) (a) of the Statute, in that between 6 April and 17

July 1994, in Cyangugu *Préfecture* (Rwanda), he was responsible for killing or causing serious bodily or mental harm to members of the Tutsi population, with the intent to destroy, in whole or in part, an ethnic or racial group as such, as described in the facts contained in paragraphs 20 through 43 of this indictment.

Concise Statement of the Facts Relating to Count 1

20. Following the death of the President of Rwanda, Juvenal Habyarimana, on 6 April 1994, the interim government formed on 8 April 1994 launched a national campaign aimed at mobilizing the government armed forces, civilian militia, *Interahamwe,* the local public administration and ordinary citizens to fight the Rwandan Patriotic Front, or RPF, a politico-military opposition group comprising mainly Tutsi. The Rwandan government armed forces and *Interahamwe* militia specifically targeted the Tutsi civilian population of Rwanda as domestic accomplices of an invading army, *ibyitso,* or categorically as a domestic enemy. Under the pretext of ensuring national defence, ordinary citizens of Rwanda, mainly Hutu, mobilized into action by the authorities, killed Tutsi and political opponents and looted their property. Between 6 April 1994 and 17 July 1994 hundreds of thousands of Tutsi and moderate Hutu were killed as a result of this campaign. Siméon Nchamihigo participated in the organization and the implementation of this campaign as follows:

(a) On or about 14 April 1994, during a meeting called by the Prefect Emmanuel Bagambiki in the MRND office in Cyangugu, all zone supervisors, including Siméon Nchamihigo, were requested to report on the ongoing massacres in their zones. During the meeting, Siméon Nchamihigo reported that he was facing difficulties in attacking the Shangi parish as so many Tutsi had sought refuge there and that, according to him, it was not possible to kill all of them with traditional weapons. He claimed that he needed fire arms, such as rifles and grenades. These were later given to him by Lieutenant Samuel Imanishimwe in Karampo military camp Siméon Nchamihigo distributed the weapons to the *Interahamwe* and ordered or instigated them to attack the Shangi parish and to kill the Tutsi and they did so some time in April 1994 with Yussuf Munyakazi and others.

(b) In late April 1994, Siméon Nchamihigo participated in a meeting at Gihundwe *secteur* office the purpose of which was to put in place security measures. Acting *bourgmestre,* Manase Buvugamenshi, presided over the meeting, which was attended by Védaste Habimana, Siméon Nchamihigo and Christophe Nyandwi, president of the *Interahamwe* in Cyangugu *préfecture*, among others. During the meeting, Siméon Nchamihigo enquired about the security situation in the *secteur* and whether there were more Tutsi in hiding to be killed. Védaste Habimana replied that three days would suffice to "mop up" the *secteur*. In the context of the meeting, "to mop up" was understood to mean "to finish killing all the Tutsi." The "mopping up" of the *secteur* did in fact continue. By his enquiries regarding the remaining Tutsi to be killed, Siméon Nchamihigo instigated and aided and abetted the killing of these Tutsi.

(c) Between 6 April and 17 July 1994, Siméon Nchamihigo, in collaboration with Sergeant Major Marc Ruberanziza, *alias* Bikomago, Christophe Nyandwi, president of the *Interahamwe* at the *préfecture* level, Habimana Jean Bosco, *alias* Masudi, a former soldier and caporal Aimé, among others, organized and supervised military training for *Interahamwe* in Cyangugu *préfecture* namely: Jean de Dieu Utabazi, Janvier Borauzima, Faustin Sinashebeje, Joseph Habineza amongst others to enable and thus to aid and abet them to kill the Tutsi.

(d) On unknown dates in April and May 1994 Siméon Nchamihigo was involved with *Préfet* Emmanuel Bagambiki, Lieutenant Samuel Immanshimwe, and others, in the drawing up of lists of influential Tutsi and Hutu political opponents, on the basis of which the *préfecture* security council, including Siméon Nchamihigo, identified persons to be killed. As a result, Siméon Nchamihigo planned, ordered, instigated or aided and abetted the *Interahamwe* and other Hutu civilians in killing many Tutsi and Hutu political opponents, as described further below in paragraphs 20 (e), 23, 24, 25, 26, 29, 30, 31, 40,41, 42 and 43 of this indictment.

(e) Between 6 April and 17 July 1994, Siméon Nchamihigo kept a stockpile of weapons in his residence in Cyangugu. He distributed weapons to the *Interahamwe* who included David Habanakwabo and Jeremy Nsengiyumva and others and ordered or instigated them to go and kill specifically named people, Tutsi and Hutu political opponents, or launch large-scale attacks against Tutsi, who were sometimes assembled in specific places, such as parishes and schools as described in paragraphs 28, 32, 33, 34, 35 and 37 of this indictment.

21. Between 6 April and 17 July 1994, Siméon Nchamihigo ordered or instigated the *Interahamwe* to erect several roadblocks in Cyangugu town and supervised the effective manning of these roadblocks. Such roadblocks included a roadblock near the Kamembe Market and the Pendeza roadblock on the road to the Airport as well as the Kadashya roadblock, manned by an *Interahamwe* leader, Pierre Munyandamutsa *alias Pressé,* an associate of Siméon Nchamihigo, the Cyapa roadblock manned by Mvuyekure Vincent, *alias* Tourné, and the Gatandara roadblock, manned by an *Interahamwe,* Habimana Jean Bosco. The aim of the roadblocks was to stop the Tutsi and Hutu opponents from fleeing to safer areas and to kill them. Siméon Nchamihigo controlled and supervised the roadblocks by inspecting them several times a day, and he ordered or instigated the *Interahamwe* who manned the roadblocks to kill the Tutsi attempting to pass through. Siméon Nchamihigo's *Interahamwe* killed many Tutsi at the roadblocks, sometimes in the presence of Siméon Nchamihigo. The *Préfet* of Cyangugu, Emmanuel Bagambiki appointed people like Ndagijimana Shabani to remove dead bodies at the roadblocks and throughout the Cyangugu city in this period. At the Gatandara roadblock, Siméon Nchamihigo ordered or instigated the *Interahamwe* to kill many Tutsi who had been selected in the Karampaka Stadium. The Cyapa roadlock was erected just next to Siméon Nchamihigo's residence. Siméon Nchamihigo ordered, instigated or aided and abetted the killing of Tutsi at that roadblock, including the catholic priest, Father Boneza Joseph.

22. On or about 7 April 1994, Siméon Nchamihigo arrived at a road block manned by a group of young Hutuin Kamembe and ordered or instigated them to look for all the Tutsi and RPF accomplices and hand them over to the *Interahamwe* and to set ablaze all the places where the opposition was well-established. Following Siméon Nchamihigo's orders or instigation, the *Interahamwe* tracked down and killed many people, mostly Tutsi men, women and children, on or about 7 April 1994 and in the months that followed.

23. On or about 15 April 1994, in Kamembe, Siméon Nchamihigo arrived at a road block manned by about 20 people, comprised of *Interahamwe* and young armed Hutu alike. He read out to these people names of Tutsi who were reportedly hiding in Kamembe town, and ordered or instigated that they be hunted down. The names read out from the list by Siméon Nchamihigo included Gasali Aloys, Emilien Nsengumuremyi, Isidore Kagenza and Judge Jean-Marie Vianney Tabaro. After reading out the names and before leaving the roadblock, Siméon Nchamihigo ordered or instigated the *Interahamwe* to look for Tutsi and to kill them and aided and abetted by providing them with two grenades. These *Interahamwe* then hunted down and killed the Tutsi.

24. On an unknown date in May 1994, in execution of Siméon Nchamihigo's order or instigation issued at a road block in Kamembe on or about 15 April 1994, the *Interahamwe* including Mvuyekure Vincent *alias Tourné* found Emilien Nsengumuremyi and killed him. They continued to look for the other Tutsi whose names had been read out by Siméon Nchamihigo, in order to kill them.

25. On or about 28 or 30 April 1994, Siméon Nchamihigo went to a roadblock manned by the *Interahamwe*, including Ndorimana Martin, and ordered or instigated them to kill the accountant of Cyangugu *Préfecture*, Kayihura Canisus, a Tutsi, who had supposedly managed to obtain an identity card indicating that he belonged to the Hutu ethnic group.

26. On an unknown date in May 1994, Siméon Nchamihigo went to a roadblock in Kamembe and ordered or instigated the *Interahamwe* manning the roadblock who included Vincent Mvuyekure *alias Tourné* to kill a Tutsi priest of the Mibirizi Catholic parish, whose name he did not reveal but who,

according to him, was expected to pass by the roadblock in a vehicle. Siméon Nchamihigo had issued similar instructions at all the roadblocks that he supervised and he had threatened to kill the *Interahamwe* if they let the Tutsi priest through. In the presence of Siméon Nchamihigo, the *Interahamwe* killed the priest later that day at the roadblock erected at the entrance to Kamembe next to the residence of the accused and manned by the *Interahamwe* Habirora Nehemi and Patrick Nsengumuremyi.

27. On an unknown date in May 1994, at the Cyapa roadblock manned by the *Interahamwe* including Vincent Mvuyekure *alias Tourné*, Patrick Nsengumuremyi and the *gendarmes*, Siméon Nchamihigo took into the car he was driving two young Tutsi students, Uzier and Innocent, who were seeking a lift to go back home. Siméon Nchamihigo handed the two students over to the *Interahamwe* and ordered or instigated them to kill the Tutsi students, and they did so.

28. After President Juvénal Habyarimana's death on 6 April 1994, a large number of Tutsi and Hutu political opponents fleeing acts of violence and massacres, sought refuge in places considered safe in Cyangugu such as the main cathedral, Mibirizi parish, Hanika parish, Nkanka parish, Shangi parish, Nyamasheke parish, the Mibirizi hospital, the Gihundwe school and the Nyakanyinya school, among others. Other Tutsi and Hutu political opponents remained in their homes. Siméon Nchamihigo, in collaboration with Lieutenant Samuel Imanishimwe, Sergeant Major Marc Ruberanziza *alias* Bikomago, *Sous-Préfet* Theodore Muyengabe and Christophe Nyandwi, president of the *Interahamwe* at the *préfecture* level, ordered or instigated the *Interahamwe* including Kamenero to launch attacks against Tutsi and Hutu political opponents who had sought refuge in safe places and also on individuals in their homes. Siméon Nchamihigo personally led all these attacks, except the attack at Nkanka parish. During these attacks, Siméon Nchamihigo and the *Interahamwe* killed many people, as described in paragraphs 29 through 37 of this indictment.

29. On or about 7 April 1994, Siméon Nchamihigo led a group of *Interahamwe* including Christophe Nyandwi among others in an attack on the residence of Doctor Nagafizi, a Tutsi regional chief medical officer of Cyangugu and member of the *Parti* Libéral, allegedly with RPF leanings, and an attack on the residence of a businessman called Kongo, a Hutu and member of the PSD political party. During the attacks, the *Interahamwe*, led by Siméon Nchamihigo and ordered, instigated or aided and abetted by him, killed Doctor Nagazafi and Kongo.

30. On or about 7 April 1994, Siméon Nchamihigo ordered or instigated the *Interahamwe,* namely Mubiligi Thompson, to attack the residence of Trojean Ndayisaba a Tutsi trader and member of the PSD political party and to kill him. Trojean Ndayisaba was accused of receiving money from the RPF. During the attack, the *Interahamwe* killed the whole family of Trojean Ndayisaba and looted their house. The *Interahamwe* killed Trojean Ndayisaba himself afterwards on an unknown date between the end of April 1994 and early July 1994.

31. On or about 7 or 9 April 1994, Siméon Nchamihigo ordered or instigated the *Interahamwe*, including Habineza Joseph, *alias* Sekuse, to kill Theoneste Karangwa, an influential Tutsi trader and member of the PSD political party in Cyangugu. Siméon Nchamihigo said that the *Interahamwe* should not to kill Karangwa's wife because she was not Tutsi. The *Interahamwe* then attacked and killed Theoneste Karangwa and his driver Iyakaremye. Siméon Nchamihigo seized Karangwa's vehicle and later took it to Bukavu in neighboring Zaire.

32 On or about 12 April 1994, Siméon Nchamihigo ordered or instigated the *Interahamwe*, including Bizimungu Anasthase, and communal police, *gendarmes* and military reservists to attack the Nyakanyinka school and kill the Tutsi who sought refuge there. The attackers received from Siméon Nchamihigo grenades and rifles which were used during the attack and were thus aided and abetted by him in the attack. As a result, the *Interahamwe* and other attackers killed about 600 Tutsi.

33. On or about 12 April 1994, Siméon Nchamihigo, in collaboration with Samuel Imanishimwe, commander of Cyangugu military camp, and the *Sous-Préfet Kamonyo*, ordered or instigated the

Interahamwe including Uwimana Jean Charles, *alias* Karoli, and a group of Hutu civilians, to attack the Hanika parish and kill all the refugees who were supposed to be Tutsi. As a result of Siméon Nchamihigo's order or instigation, the attackers killed about 1,500 people, including children and the aged.

34. On a day sometime between 14 and 15 April 1994, at about 8 o'clock in the morning, Siméon Nchamihigo led a group of *Interahamwe* and *Impuzamugambi* (the militiamen of the CDR political party) including Ndorimana Martin, in an attack against Tutsi of the Gihundwe *Secteur,* particularly targeting Tutsi of Kabugi, Ruganda, Murindi and Murangi *Cellules*. During the attack, the *Interahamwe,* led by Siméon Nchamihigo, and ordered, instigated or aided and abetted by him, killed a large number of Tutsi and destroyed their houses.

35. On or about 18 April 1994, Siméon Nchamihigo, in collaboration with Lieutenant Samuel Imanishimwe, Sergeant Major Marc Rubenziza, *alias* Bikomago and *Sous-Préfet* Theodore Muyengabe, led a group of *Interahamwe which included Gendarme Mandela and Anathase Bizimungu, among others,* that attacked Mibirizi convent and Mibirizi hospital, where many Tutsi had sought refuge. During the attacks, the *Interahamwe,* led by Siméon Nchamihigo, and ordered, instigated or aided and abetted by him, massacred the Tutsi refugees and looted their property. After the attacks, Siméon Nchamihigo rewarded the killers with beer.

36. In late April or early May 1994, three young Tutsi girls, Mukashema Josephine, Marie and Helene, sought refuge in the residence of a certain Hutu named Jonas. Siméon Nchamihigo accused Jonas and his brother Niyikiza Jonathan of hiding *Inyenzi*. Siméon Nchamihigo, assisted by one of his *Interahamwe* namely Banga Kaboyi Johnson, removed the three Tutsi girls from Jonas's house and took them away to an unknown place. On the same day, Siméon Nchamihigo told Niyikiza Jonathan that the *Inyenzi* had been killed and threatened Niyikiza Jonathan to kill him if he continued to hide Tutsi. By his actions, Siméon Nchamihigo committed, ordered, instigated or aided and abetted the killing of these Tutsi girls.

37. Between 20 and 25 June 1994 or thereabouts, Siméon Nchamihigo ordered or instigated the *Interahamwe* in his area, including Jean-Paul, Mvuyekure Vincent, *alias Tourné*, Nzeyimana, among others, to go to Kibuye together with Yusufu Munyakazi and his *Interahamwe,* and participate in a number of attacks to kill Tutsi who had sought refuge at Bisesero in Kibuye *Préfecture*. The *Interahamwe* travelled in an Onatracom bus to Bisesero and assisted the Kibuye *Interahamwe* in killing the Tutsi. Together, they killed many Tutsi. On the return of the *Interahamwe* from Kibuye after one or two days, Siméon Nchamihigo rewarded them with drinks and food at the Gihundwe school.

38. After President Juvénal Habyarimana's death on 6 April 1994, Siméon Nchamihigo and other members of the *préfecture* security council, including *Préfet* Emmanuel Bagambiki and Lieutenant Samuel Imanishimwe, the Cyangugu military camp commander, decided to move refugees from their places of refuge and assembled them at Kamarampaka Stadium in Cyangugu, ostensibly with the purpose of providing the refugees with better security but with the aim of eliminating those who were suspected of being accomplices of the *Inkotanyi*.

39. On or about 14 April 1994, Siméon Nchamihigo, Lieutenant Samuel Imanishimwe and other members of the *préfecture* security council including Emmanuel Bagambiki moved the refugees from the Gihundwe school to Kamarampaka stadium.

40. On or about 15 April 1994, Siméon Nchamihigo, Lieutenant Samuel Imanishimwe and other members of the *préfecture* security council including Emmanuel Bagambiki moved the refugees from Cyangugu Cathedral and took them to Kamarampaka Stadium. The refugees transferred to the stadium that day included Baziruwiha Marianne, Nkusi Georges, Albert Twagiramungu, Jean Fidèle Murekezi, his wife Kanyamibwa Christine and their children, among others.

41. On the 16th of April 1994, Siméon Nchamihigo and other members of the *préfecture* security council, including *Préfet* Emmanuel Bagambiki, Lieutenant Samuel Imanishimwe, Christophe Nyandwi, President of the *Interahamwe* at the *Préfecture* level, Major Munyarugerero, Theodeore Munyangabe, *sous-préfet*, Paul Ndorimana, Prosecutor, Simeon Remesh, Headmaster of Gihundwe Primary School, Ngagi, customs officer and Sergeant Major Marc Ruberanziza went to Kamarampaka Stadium. The commander of the *gendarmerie* camp, using a megaphone, called out names of civilians who were alleged to be *Inkotanyi* accomplices from a list that had been prepared by the *préfecture* security council, including Siméon Nchamihigo. The list included: Benoit Sibomana, Jean-Fidèle Murekezi, Apiane Ndorimana, Albert Mugabo, Albert Twagiramungu, Ibambasi, Bernard Nkara, Trojean Nzisabira, Rémy Mihigo, Dominique Gapeli, Albert Mugabo and Marianne Baziruwiha. All of the individuals named on the list were Tutsi, except for Marianne Baziruwiha who was a Hutu and an influential member of the PSD political party in Cyangugu. The individuals were asked to come out, and were escorted out of the Stadium by Siméon Nchamihigo and the *préfecture* delegation. Outside the stadium, about four people of Tutsi origin, including Vital Nibagwire, Ananie Gatake, Jean-Marie Vianney Habimana *alias* Gapfumu, whom Siméon Nchamihigo and the other members of the *préfecture* delegation had brought from the cathedral, were waiting in vehicles. Siméon Nchamihigo and the *préfecture* delegation instructed soldiers to take the selected 16 people to the *gendarmerie* camp purportedly for questioning.

42. When, on or about 16 April 1994, Siméon Nchamihigo and other members of the *préfecture* security council took the 16 selected persons to the *gendarmerie* camp, they removed Marianne Baziruwiha from the group and instructed the drivers to proceed with the remaining 15, all Tutsi, to a place near Cyangugu prison. Siméon Nchamihigo then ordered or instigated the *Interahamwe* whom he had brought along with him from Mutongo Centre earlier the same day, including Bizimungu Anasthase, to kill the 15 remaining Tutsi. Following Siméon Nchamihigo's order or instigation, the *Interahamwe* killed the 15 Tutsi near Cyangugu prison and threw their dead bodies into a latrine in Gapfumu's compound

43. On or about 18 April 1994, Siméon Nchamihigo went back to Kamarampaka Stadium in a delegation of the *préfecture* security council, comprising *Préfet* Emmanuel Bagambiki, Samuel Imanishimwe, and *Sous-Préfet* Emmanuel Kamonyo, among others. Bagambiki, using a megaphone, called out about 20 names from a list which the *préfecture* security council had drawn up. They took the listed people out of the stadium. Some people of Tutsi origin, such as Antoine Nsengumuremyi and Felicien, whose names had not been called out, were nevertheless taken out of Kamarampaka Stadium that day, together with the others. These people were subsequently killed and their bodies thrown into the Gataranga River or into mass graves. Siméon Nchamihigo and the *préfecture* delegation aided and abetted the killing of all those who had been taken out of the stadium.

Count 2: Crime against humanity : Murder

44. The Prosecutor of the International Criminal Tribunal for Rwanda charges Siméon Nchamihigo with murder, as a crime against humanity, pursuant to Article 3 (a) of the Statute, in that between 6 April and 17 July 1994 he was responsible for the murder of a number of Tutsi and of people considered as Tutsis, as well as Hutu opponents, particularly in Cyangugu *Préfecture*, as part of a widespread or systematic attack against a civilian population on ethnic, racial or political grounds, as set out in paragraphs 45 through 55 of this indictment.

Concise statement of the facts relating to Count 2

45. On or about 7 April 1994, Siméon Nchamihigo led a group of *Interahamwe* including Nyandwi Christophe in an attack on the residence of Doctor Nagafizi, a Tutsi regional chief medical officer of Cyangugu and member of the *Parti* Liberal, with RPF leanings, and an attack on the residence of a

businessman called Kongo, a Hutu and member of the PSD political party. During the attacks, the *Interahamwe,* led by Siméon Nchamihigo and ordered, instigated or aided or abetted by him, killed Doctor Nagafizi and Kongo.

46. On or about 7 April 1994, Siméon Nchamihigo ordered or instigated the *Interahamwe,* namely Mubiligi Thompson, to attack the residence of Trojean Ndayisaba, a Tutsi trader and member of the PSD political party and to kill him. Trojean Ndayisaba was accused of receiving money from the RPF. During the attack, the *Interahamwe* killed the whole family of Trojean Ndayisaba and looted their house. The *Interahamwe* killed Trojean Ndayisaba himself afterwards on an unknown date between the end of April 1994 and early July 1994.

47. On or about 7 or 9 April 1994, Siméon Nchamihigo in collaboration with Nyandwi Christophe, an *Interahamwe* leader at the *préfecture* level, ordered or instigated *Interahamwe including Joseph Habineza, among others* to kill Zacharie Serubyogo, a Hutu trader and MDR political party member of Parliament, together with other people. The *Interahamwe* then killed Zacharie Serubyogo and many unknown people near Lake Kivu in the presence of Siméon Nchamihigo. After the killing of Zacharie Serubyogo, Siméon Nchamihigo ordered his *Interahamwe* to look for a Tutsi by the name of Theoneste Karangwa and kill him.

48. On or about 7 or 9 April 1994, Siméon Nchamihigo ordered or instigated *Interahamwe,* including Habineza Joseph, *alias* Sekuse, to kill Théoneste Karangwa, an influential Tutsi trader and member of the PSD political party in Cyangugu. Siméon Nchamihigo said that the *Interahamwe* should not to kill Karangwa's wife because she was not Tutsi. The *Interahamwe* then attacked and killed Théoneste Karangwa and his driver Iyakaremye. Siméon Nchamihigo seized Karangwa's vehicle and later took it to Bukavu in neighboring Zaire.

49. Deleted.

50. Between 15 and 17 April 1994, Siméon Nchamihigo ordered or instigated a group of *Interahamwe who included David Habanakwabo, Rusine and Nzeyimana,* to kill a young Hutu student called Jean de Dieu Gakwandi, whom he had described as a traitor and an accomplice of the Tutsi. To this end, Siméon Nchamihigo gave a grenade to someone called David Habanakwabo, *alias* Vicky, and ordered him to join other *Interahamwe* in order to kill Jean de Dieu Gakwandi. The assailants hit Jean de Dieu Gakwandi with a club on the head. Jean de Dieu Gakwandi sustained serious injuries. The assailants left him there, unconscious, thinking he was dead.

51. On or about 28 or 30 April 1994, Siméon Nchamihigo went to a roadblock manned by *Interahamwe,* including Ndorimana Martin, and ordered or instigated them to kill the accountant of Cyangugu *Préfecture*, Canisius Kayihura, a Tutsi civilian, who had managed to obtain an identity card indicating that he belonged to the Hutu ethnic group.

52. In late April or early May 1994, three young Tutsi girls, Mukashema Josephine, Marie and Helene, sought refuge in the residence of a certain Hutu named Jonas. Siméon Nchamihigo accused Jonas and his brother Niyikiza Jonathan of hiding *Inyenzi*. Siméon Nchamihigo assisted by one of his *Interahamwe namely* Banga Kaboyi Johnson, removed the three Tutsi girls from Jonas's house, took them away to an unknown place. On his return the same day, Siméon Nchamihigo told Niyikiza Jonathan that the *Inyenzi* had been killed and he threatened Niyikiza Jonathan to kill him if he continued to hide Tutsi. By his actions, Siméon Nchamihigo ordered, instigated or aided and abetted the killing of these Tutsi girls.

53. On an unknown date in May 1994, in execution of Siméon Nchamihigo's order or instigation issued at a road block in Kamembe on or about 15 April 1994, the *Interahamwe* including Christophe Nyandwi, found Emilien Nsengumuremyi and killed him. They continued to look for the other Tutsi whose names had been read out by Siméon Nchamihigo, in order to kill them because of their Tutsi origin.

54. On an unknown date in May 1994, Siméon Nchamihigo went to a roadblock in Kamembe and ordered or instigated the *Interahamwe* manning the roadblock to kill a Tutsi priest of the Mibirizi Catholic parish, Father Joseph Boneza, who was expected to pass by the roadblock in a vehicle. Siméon Nchamihigo had issued similar instructions at all the roadblocks that he supervised and he had threatened to kill the *Interahamwe* if they let the Tutsi priest through. Later that day and in the presence of Siméon Nchamihigo, the *Interahamwe* killed Father Joseph Boneza at the roadblock erected at the entrance to Kamembe next to the residence of the accused and manned by the *Interahamwe* Habirora Nehemi and Patrick Nsengumuremyi.

55. On an unknown date in May 1994, at the Cyapa roadblock manned by the *Interahamwe* including Nsengumuremyi Patrick and the *gendarmes*, Siméon Nchamihigo took into the car he was driving, two young Tutsi students, Uzier and Innocent, who were seeking a lift to go back home. Siméon Nchamihigo handed the two boys over to the *Interahamwe* and ordered or instigated them to kill the Tutsi students and they did so.

Count 3: Crime against humanity : Extermination

56. The Prosecutor of the International Criminal Tribunal for Rwanda charges Siméon Nchamihigo with extermination as a crime against humanity, a crime stipulated in Article 3 (b) of the Statute, in that between 6 April and 17 July 1994, particularly in Cyangugu *préfecture*, Siméon Nchamihigo was responsible for the large scale killing of Tutsi or of people considered as Tutsi and of Hutu opponents, as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds, as described below in the concise statement of facts relating to the charges in paragraphs 57 through 65 of this indictment.

Concise statement of the facts relating to Count 3

57. Between 6 April and 17 July 1994, in particular from 7 April to the end of May 1994, Siméon Nchamihigo, in collaboration with Sergeant Major Marc Ruberanziza, *alias* Bikomago, and Christophe Nyandwi, president of the *Interahamwe* at the *préfecture* level, ordered or instigated the *Interahamwe* amongst whom was Kamenero, to launch attacks against Tutsi civilians and Hutu opponents refugees in Hanika parish, Mibirizi parish, Mibirizi hospital, Nkanka parish, Shangi parish and Nyamasheke parish among other places where those people had sought refuge including their homes. Siméon Nchamihigo personally led all of these attacks, except the attack at Nkanka parish. During the attacks, the *Interahamwe* and other Hutu civilians led by Siméon Nchamihigo killed many civilians who thus were targeted as described in paragraphs 59, 60, 61, 62, 63, 64 and 65 of this indictment.

58. On or about 7 April 1994, Siméon Nchamihigo arrived at a road block manned by a group of young Hutu in Kamembe and ordered or instigated them to look for all the Tutsi and RPF accomplices and hand them over to the *Interahamwe* and to set ablaze all the places where the opposition was well-established. Following Siméon Nchamihigo's orders or instigation, the *Interahamwe* tracked down and killed many civilians, mostly Tutsi men, women and children, after or around 7 April 1994.

59. On or about 7 April 1994, Siméon Nchamihigo ordered or instigated the *Interahamwe*, namely Mubiligi Thompson, to attack the residence of Trojean Ndayisaba a Tutsi trader and member of the PSD political party and to kill him. Trojean Ndayisaba was accused of receiving money from the RFP. During the attack, the *Interahamwe* killed the whole family of Trojean Ndayisaba and looted their house. The *Interahamwe* killed Trojean Ndayisaba himself afterwards on an unknown date between the end of April 1994 and early July 1994.

60. On or about 12 April 1994, Siméon Nchamihigo ordered or instigated *Interahamwe*, including Bizimungu Anasthase, and communal police, *gendarmes* and military reservists to attack the

Nyakanyinka school and kill the Tutsi civilians who sought refuge there. The attackers received from Siméon Nchamihigo grenades and rifles which were used during the attack, and were thus aided and abetted by him in the attack. As a result, the *Interahamwe* and other attackers killed about 600 Tutsi civilians.

61. On a day sometime between 14 and 15 April 1994, at about 8 o'clock in the morning, Siméon Nchamihigo, leading a group of *Interahamwe* and *Impuzamugambi* (the militiamen of the CDR political party) including Ndorimana Martin, launched an attack against Tutsi of the Gihundwe *Secteur*, particularly targeting Tutsi of Kabugi, Ruganda, Murindi and Murangi *Cellules*. During the attack, the *Interahamwe* led by Siméon Nchamihigo, and ordered, instigated or aided and abetted by him, killed a large number of Tutsi and destroyed their houses.

62. On or about 15 April 1994 in Kamembe, Siméon Nchamihigo arrived at a road block manned by about 20 people comprised of *Interahamwe* and young armed Hutu alike. He read out to these people names of Tutsi who were reportedly hiding in Kamembe town, and ordered or instigated that they be hunted down. The names read out from the list by Siméon Nchamihigo included Gasali Aloys, Emilien Nsengumuremyi, Isidore Kagenza and Judge Jean-Marie Vianney Tabaro. After reading out the names and before leaving the road block, Siméon Nchamihigo ordered or instigated the *Interahamwe* to look for Tutsi and to kill them and aided and abetted by providing them with two grenades. These *Interahamwe* then hunted down and killed the Tutsi.

63. On an unknown date in April 1994, Siméon Nchamihigo led a group of *Interahamwe, which included Anathase Bizimungu in their number, accompanied by Gendarme Mandela,* in an attack on Mibirizi convent, where many Tutsi civilians had sought refuge. During the attack, the *Interahamwe*, led by Siméon Nchamihigo, and ordered, instigated or aided and abetted by him, massacred the Tutsi refugees and looted their property.

64. Between 6 April and 17 July 1994, Siméon Nchamihigo in collaboration with Lieutenant Samuel Imanishimwe, Yusuf Munyakazi and soldiers from the Rwandan armed forces, or FAR, targeted military detainees and civilians whom he accused of being accomplices of RPF and ordered, instigated or aided and abetted the killing of those military detainees as described in paragraph 65 of this indictment.

65. Thus, on or about 7 or 9 April 1994, Siméon Nchamihigo in collaboration with lieutenant Samuel Imanishimwe and Yusuf Munyakazi, went to Cyangugu prison and ordered the director of the prison to remove about 13 FAR soldiers who had been sent to jail for their alleged complicity with RPF. The detainees were taken to the *Préfecture* office. Siméon Nchamihigo then ordered, instigated or aided and abetted the killing of the 13 FAR soldiers. Following Siméon Nchamihigo's order, instigation or aiding and abetting, the 13 FAR soldiers who were no longer combatants, were killed and their dead bodies thrown into a garden of the *Préfecture* near the lake. Later on the same day, Siméon Nchamihigo ordered or instigated other prisoners, including Ndamira Damien, to remove the dead bodies of the 13 FAR soldiers from the garden and bury them along with the dead bodies of 8 unknown persons found at the same place.

Count 4: Crime against humanity : other inhumane acts

66. The Prosecutor of the International Criminal Tribunal for Rwanda charges Siméon Nchamihigo of other inhumane acts as a crime against humanity, a crime stipulated in Article 3 (i) of the Statute, in that between 6 April and 17 July 1994, throughout Rwanda, particularly in Cyangugu *Préfecture*, Siméon Nchamihigo was responsible for committing inhumane acts against Tutsi civilians or of people considered as Tutsi, and of Hutu opponents, as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds, as outlined in paragraphs 67 through 70 of this indictment.

Concise statement of the facts relating to Count 4

67. On or about 7 or 9 April 1994, Siméon Nchamihigo ordered or instigated *Interahamwe*, including Habineza Joseph, *alias* Sekuse, to kill Theoneste Karangwa, an influential Tutsi trader and member of the PSD political party in Cyangugu. Siméon Nchamihigo said that the *Interahamwe* should not to kill Theoneste Karangwa's wife because she was not Tutsi. Following Siméon Nchamihigo's order or instigation, the *Interahamwe* attacked and caught Theoneste Karangwa in his house. The *Interahamwe* then covered Theoneste Karangwa with his own mattress, poured fuel into the mattress and burnt Theoneste Karangwa, causing him great pain and suffering before his death. The *Interahamwe* also killed Theoneste Karangwa's driver by the name of Iyakaremye. Siméon Nchamihigo then seized Theoneste Karangwa's vehicle and later took it with him to Bukavu in neighboring Zaire, together with other vehicles and various items looted during the attacks.

68. On or about 7 April 1994, Siméon Nchamihigo ordered or instigated the *Interahamwe*, namely Mubiligi Thompson, to attack the residence of Trojean Ndayisaba, a Tutsi trader and member of the PSD political party and to kill him. Trojean Ndayisaba was accused of receiving money from the RFP. During the attack, the *Interahamwe* burnt the whole family of Trojean Ndayisaba inside their vehicle causing them great pain and suffering before their deaths. The *Interahamwe* killed Trojean Ndayisaba himself afterwards on an unknown date between the end of April 1994 and early July 1994.

69. Between 15 and 17 April 1994, Siméon Nchamihigo ordered or instigated a group of *Interahamwe* which included in their number David Habanakwabo, Rusine and Nzeyimana, among others, to kill a young Hutu student called Jean de Dieu Gakwandi, whom he had described as a traitor and an accomplice of the Tutsi. To this end, Siméon Nchamihigo gave a grenade to someone called David Habanakwabo, *alias* Vicky, and ordered him to join other *Interahamwe* in order to kill Jean de Dieu Gakwandi. The assailants hit Jean de Dieu Gakwandi with a club on the head causing him pain and suffering. Jean de Dieu Gakwandi sustained serious injuries. The assailants left him there, unconscious, thinking he was dead.

70. On 16 April 1994 or thereabouts, Siméon Nchamihigo and other members of the *préfecture* security council, including Lieutenant Samuel Imanishimwe and Christophe Nyandwi, removed from Karampaka Stadium about 15 Tutsi and 1 Hutu woman by the name of Marianne Baziruwiha, and took them to a place near the prison after dropping off Marianne Baziruwiha at the *gendarmerie* camp. Among the 15 Tutsi who were removed from the stadium by Siméon Nchamihigo and others, were Jean-Fidele Murekezi, Albert Twagiramumgu and Gapfumu. Siméon Nchamihigo then ordered or instigated the *Interahamwe* whom he had brought along with him from Mutongo Centre earlier the same day, including Bizimungu Anasthase, to kill the 15 Tutsi. Following Siméon Nchamihigo's order or instigation, the *Interahamwe* killed the 15 Tutsi near Cyangugu prison and threw their dead bodies into a latrine in Gapfumu's compound; before doing so the *Interahamwe* removed the genitals of Jean-Fidele Murekezi and Albert Twagiramungu and the heart of Gapfumu.

The acts and omissions of Siméon Nchamihigo set out herein are punishable pursuant to Articles 22 and 23 of the Statute.

Done at Arusha, Tanzania, on 29 September 2006.

[Signed] : Hassan Bubacar Jallow

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Order for Judicial Records
(Rules 98 and 54 of the Rules of Procedure and Evidence)
12 October 2006 (ICTR-2001-63-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Gberdao Gustave Kam; Robert Fremr

Siméon Nchamihigo – Order, Judicial records, Witnesses

International Instrument Cited :

Rules of Procedure and Evidence, Rules 54, 90 (G) and 98

International Case Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Reasons for the Decision on Request for Admission of Additional Evidence, 8 September 2004 (ICTR-96-10 et ICTR-96-17)

1. The Defence made an application today, 12 October 2006, for the Chamber to order the Prosecution to obtain the complete judicial records from the Rwandan government regarding Prosecution Witness LDB. After hearing the start of his testimony yesterday morning, it became apparent that LDB's judicial records were incompletely disclosed by the Prosecution. The Defence submitted that the Prosecution witness list contains 9 other detained witnesses whose judicial files are also likely to be incomplete. It further requests the Chamber to adjourn the proceedings and order the Prosecution not to call any of those detained witnesses until the complete judicial records have been disclosed.

2. The Prosecution claims that it has made its best efforts to obtain the judicial records, that it disclosed all the material it received, and that it could not force the Rwandan government to produce additional documentation.

3. Trial Chambers have concluded that disclosure of judicial records is not merely for the benefit of the preparation of the Defence but it is also required to assist the Trial Chamber in its assessment of witness credibility pursuant to Rule 90 (G) of the Rules.[1]

4. During Witness LDD's testimony earlier this week, evidence was adduced concerning judicial records that were not previously disclosed to the Defence. In response to the Defence's submission, on 10 October 2006, the Chamber ordered the Prosecution to request the judicial records regarding Witness LDD from the Rwandan authorities. If necessary, depending on the information in the documents disclosed, the Defence can move the Chamber to allow further cross-examination of the witness. As of today, the Prosecution has not yet made that request.

5. For the present application, the Chamber notes that the Defence has not specified, because it is not aware, for which witnesses the judicial records remain incomplete. The Defence has demonstrated that the file for Witness LDB is obviously incomplete, and has submitted that the same situation may

[1] See for example: *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case N°ICTR-96-10-A, ICTR-96-17-A, Reasons for the Decision on Request for Admission of Additional Evidence (AC), 8 September 2004, paras. 47-52.

exist for other detained Prosecution witnesses. Without a specific factual submission, it is purely speculation at this point as to which judicial records exist that have not been disclosed.

6. The Prosecution is in the best position to know what judicial records should exist for its witnesses and must review the information already disclosed and determine what is incomplete from the judicial files of its detained witnesses. The Defence has agreed to assist the Prosecution in this determination.

7. The Chamber therefore considers that it is appropriate to use its power pursuant to Rule 98 at this time and requires the Prosecution to use its best efforts to obtain the incomplete records from the Rwandan authorities and disclose them to the Defence. This action is also permitted by Rule 54, whereby a Trial Chamber may issue orders necessary for the preparation or conduct of the trial, either at the request of either party or *proprio motu*. The Chamber's order in no way minimizes the Defence's obligation to prepare its case.

FOR THOSE REASONS, THE CHAMBER

DIRECTS the Prosecution and the Defence, as agreed, to meet tomorrow, Friday 13 October 2006, and consult on what judicial records should be requested from the Rwandan authorities;

ORDERS, pursuant to Rule 98 of the Rules, the Prosecution to submit a request to the Rwandan authorities for the required judicial records by Monday, 16 October 2006, a copy of the request shall be filed with CMS. In that request, the Prosecution shall require a response from the Rwandan authorities in one week's time, by Monday, 23 October 2006. If the Rwandan authorities require more time to comply with the request, it shall be asked to inform the Prosecution by which date it will be able to comply with the request. Any response shall be filed with CMS. If there is no response received from the Rwandan authorities, this shall also be communicated to the Chamber through CMS.

AMENDS its oral decision of 10 October 2006 and DIRECTS the Prosecution's request to the Rwandan authorities regarding the judicial records of Witness LDD to be included in the upcoming request of 16 October 2006.

Arusha, 12 October 2006, done in English.

[Signed] : Dennis C. M. Byron; Gberdao Gustave Kam; Robert Fremr

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Scheduling Order
(Rule 54 of the Rules of Procedure and Evidence)
25 October 2006 (ICTR-2001-63-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Gberdao Gustave Kam; Robert Fremr

Siméon Nchamihigo – Scheduling order – Filing of written submissions – Beginning of a trial session

International Instrument Cited :

Rules of Procedure and Evidence, Rule 67

1. The first trial session in this case took place from 25 September 2006 to 20 October 2006 with the start of the Prosecution's case. On 19 October 2006, the Chamber requested submissions from the Defence on whether its statements in court were in compliance with Rule 67 of the Rules of Procedure and Evidence on providing a notice of alibi. A schedule for submissions was expressed by the Chamber but is reiterated below.

2. On 20 October 2006, a Status Conference was held with the parties in preparation for the next trial session. After discussions with the parties, and considering the rights of the accused to adequately prepare its Defence and to have a trial without undue delay, the Chamber:

i. ORDERS the Defence to file its written submission on its compliance with Rule 67 of the Rules by Friday, 3 November 2006; the Prosecution will file any response by Wednesday, 8 November 2006; the Defence will file any reply by Monday, 13 November 2006;

ii. REQUESTS the Registrar to assist in the arrangements for the next trial session to begin on Tuesday, 9 January 2007, for full-day sessions, until Friday, 9 February 2007, for the completion of the Prosecution case;

Arusha, 25 October 2006, done in English.

[Signed] : Dennis C. M. Byron; Gberdao Gustave Kam; Robert Fremr

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Order for the Transfer of Detained Witnesses (Rule 90 bis of the Rules of Procedure and Evidence) 7 December 2006 (ICTR-2001-63-90bis)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Gberdao Gustave Kam; Robert Fremr

Siméon Nchamihigo – Transfer of detained witnesses – Rwanda – Conditions satisfied – Motion granted – Previous motion on the same issue denied

International Instrument Cited :

Rules of Procedure and Evidence, Rules 73 (A) and 90 bis

1. The first trial session in this case took place from 25 September to 20 October 2006. The next trial session is scheduled to begin on 9 January 2006 for the completion of the Prosecution's case. On 1 December 2006, the Prosecution submitted a Confidential Urgent Motion for an Order for the Temporary Transfer of Witnesses Pursuant to Rules 73 (A) and 90 *bis* of the Rules of Procedure and

Evidence. It asked that the witnesses listed in Annex A, who are currently detained and awaiting trial in Rwanda, be transferred to the United Nations Detention Facilities ("UNDF") in Arusha so that they can testify as Prosecution witnesses in the next trial session.

2. In order for a detained person to be transferred to UNDF so that he/she can testify before the Tribunal, the Chamber must be satisfied that the requirements pursuant to Rule 90 *bis* have been met. The applicant must show 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;

3. In support of his Motion, the Prosecution filed two letters from the Rwandan Minister of Justice dated 22 November and 28 November 2006 confirming that the ten requested witnesses, currently detained in Rwanda will be available from 2 January to 28 February 2007 to testify in this case. The Chamber is therefore satisfied that the standard pursuant to Rule 90 *bis* has been met insofar as these witnesses are not required for criminal proceedings in Rwanda during that time, and that the witnesses' presence at the Tribunal does not extend the period of their detention in Rwanda.

4. The Chamber notes that the Prosecution submitted a Motion for an Order for the Temporary Transfer of Detained Witnesses on 21 September 2006, which included one of the detainees who is subject to the present Motion. The letter from the Rwandan Minister of Justice in support of that Motion dated 20 September 2006, but only distributed to the Chamber and the Parties on 26 October 2006, confirmed the availability of the two named detainees only for the time-period referred to in the Prosecution's letter of request, being from 25 September to 20 October 2006. Consequently, the Chamber does not find that the requirements pursuant to Rule 90 *bis* have been met for that Motion.

FOR THOSE REASONS, THE CHAMBER

I. GRANTS the Prosecution Motion of 1 December 2006;

II. REQUESTS the Registrar, pursuant to Rule 90 *bis* of the Rules, to temporarily transfer the ten detained witnesses indicated in the letters from the Rwandan Minister of Justice dated 22 November and 28 November 2006 to the United Nations Detention Facilities (UNDF) in Arusha, at an appropriate time prior to their scheduled dates to testify. Their return travel to Rwanda should be facilitated as soon as practically possible for each witness after the individual's testimony has ended.

III. REQUESTS the Governments of Rwanda and Tanzania to cooperate with the Registrar in the implementation of this Order.

IV. REQUESTS the Registrar to cooperate with the authorities of the Governments Rwanda and Tanzania; Ensure proper conduct during transfer and during detention of the witness at the UNDF; Inform the Chamber of any changes in the conditions of detention determined by the Rwandan authorities and which may affect the length of stay in Arusha.

V. DENIES the Prosecution's Motion on the same issue of 21 September 2006.

Arusha, 7 December 2006, done in English.

[Signed] : Dennis C. M. Byron; Gberdao Gustave Kam; Robert Fremr

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Decision on Defence Motion for Non-Conformity of the Indictment with the Trial Chamber's Decision on Defects in the Form of the Indictment (Article 20 of the Statute) 7 December 2006 (ICTR-2001-63-T)

(Original : English)

Trial Chamber III

Judges : Dennis C. M. Byron, Presiding Judge; Gberdao Gustave Kam; Robert Fremr

Siméon Nchamihigo – Non-conformity of the indictment with the Trial Chamber's decision – Clarification concerning some facts and identities of individuals – Motion granted in part

International Instruments Cited :

Rules of Procedure and Evidence, Rules 54, 90 (G) and 98 ; Statute, Art. 20

International Case Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Siméon Nchamihigo, Decision on Defence Motion on Defects in the Form of the Indictment, 27 September 2006 (ICTR-2001-63)

Introduction

1. The trial in this case began on 25 September 2006. The Prosecution filed an Amended Indictment on 18 July 2006 and its *Corrigendum* on 25 July 2006. On 27 September 2006, the Trial Chamber's Decision on the Defence Motion on Defects in the Form of the Indictment ("Decision on Defects") ordered the Prosecution to make additions and changes to the Amended Indictment. The Prosecution filed its Revised Amended Indictment on 29 September 2006. The Defence now asserts that this new version of the Indictment does not conform to the Chamber's orders and that the non-compliance violates the rights of the Accused to know the charges against him and prepare his defence.[1] It therefore requests the Chamber to order the Prosecutor to conform to the Decision on Defects, or to strike the paragraphs in question from the Indictment. The Prosecution submits that the Revised Amended Indictment conforms to the Decision on Defects, but proposes further amendments to it.

Discussion

2. Article 20 of the Statute provides for the minimum rights of the Accused. Subsection 4 (a) provides for the Accused to be informed promptly and in detail in a language which he understands and of the nature and cause of the charges against him. The Defence alleges that the Prosecution failed in three respects to comply with the Decision on Defects. The Chamber will review the merits of these alleged failures, and determine the appropriate remedy for any breach.

[1] The Prosecutor v. Simeon Nchamihigo, Case N°ICTR-2001-63-T, Requête de la Défense en Non Conformité de L'Acte D'Accusation Révisé Avec la Décision de la Chambre de Première Instance « Decision on Defence Motion for Defects in the Form of the Indictment » Rendue le 27 Septembre 2006, filed on 9 October 2006.

Clarifications in Paragraphs 10 and 20 (a)

3. The Defence complains that the Prosecution failed to comply with the Chamber's order to clarify certain dates in paragraphs 10 and 20 (a) of the Amended Indictment and resolve the doubt whether the meetings pleaded in those two paragraphs were the same or different meetings.[2]

4. In the Revised Amended Indictment, the Prosecution made no clarification in this regard to paragraphs 10 and 20 (a) in the Revised Amended Indictment but in its response to the Defence motion, the Prosecution stated that those paragraphs refer to different and separate events[3] and that there is no better information on the dates than already alleged. The Chamber specifically required the provision of information to the extent possible and, in the absence of further information, is satisfied that the Prosecution has now complied with this aspect of the Decision on Defects. The allegation in paragraph 10 is now under the heading of "The Accused" and is not included in the statement of facts supporting any of the charges in the Indictment. If that allegation is meant to support one of the charges in the Indictment, then it should be included in the facts of the relevant count(s).

Clarifications Concerning Alleged Roadblocks

5. The Prosecution contends that although it complied with the Chamber's order in the Decision on Defects which instructed the Prosecution to provide the best detail available in the Revised Amended Indictment concerning the roadblocks mentioned in paragraphs 21, 22, 23, 24, and 25, it furnished "additional" details in its response to the Motion in order to assist the Defence.

6. The "additional" details on the roadblocks provide for their easier identification allowing the Accused to better understand the charges against him and are what the Prosecution was required to have originally included in the Revised Amended Indictment. In this respect, the Prosecution breached the Chamber's orders.

7. Under the circumstances, the Chamber does not find – and the Defence has not shown – any prejudice to the Accused which would justify the removal of these paragraphs from the Indictment and considers that the Prosecution should include the "additional" details in the Indictment.

Clarifications Concerning the Identities of Individuals

8. The Defence contends that the Prosecution failed to comply with the order to specify, to the extent possible, the identities of the individuals in paragraphs 26, 30, 32, 54, 60, 61, 64 and 65 of the Amended Indictment. The Prosecution responds that no further names are available for paragraphs 26, 30, 32, 60, 61 and 65.

9. In the absence of further evidence, the Chamber cannot conclude that its order has been breached in relation to these paragraphs. However, the Chamber notes that the Prosecution made no comment as to whether further details could be provided for paragraph 64 and directs the Prosecution to clarify, its position with respect to this paragraph and if more specific information exists, it should be provided.

10. With regard to paragraph 54, the Prosecution provided information in its Response clarifying the location of the roadblocks manned by Nchamihigo although not ordered to do so by the Decision on Defects, while asserting that it has no further information on the identities of individuals mentioned in the paragraph. Although the Chamber does not find that there was any breach of its order for this paragraph it directs the Prosecution to include the information on the roadblocks in the Indictment.

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[2] *Nchamihigo,* Decision on Defence Motion on Defects in the Form of the Indictment (TC), 27 September 2006 ("Decision on Defects"). para. 20; Order 1.

[3] *Nchamihigo*, Prosecution's Reply to the Defence Motion, filed on 16 October 2006, paras. 5-7.

Conclusion

11. The Chamber conveys its concern as to how the Prosecution complied with the Chamber's Decision on Defects. Although it did not entirely act in accordance with the Chamber's orders in the Decision on Defects of 27 September 2006, the additional details provided in the Prosecution's Response to the Defence Motion remedy the deficiencies. The Chamber therefore directs the Prosecution to file a new Indictment including the additional information.

FOR THOSE REASONS, THE CHAMBER

GRANTS the Motion in part;

I. ORDERS the Prosecution to file a new Revised Amended Indictment with the proposed additional details as submitted for paragraphs 21, 22, 23, 24, 25, and 54 of the Amended Indictment by 11 December 2006;

II. ORDERS the Prosecution to review its submission concerning paragraph 64 and make any appropriate additions to this paragraph in the new Revised Amended by 11 December 2006;

III. ORDERS that the Prosecution specify what crime or crimes, if any, the facts pleaded in paragraph 10 of the Indictment are meant to support in the new Revised Amended Indictment and include it, if appropriate, in the facts of the relevant count(s) by 11 December 2006.

IV. DENIES the remainder of the Motion.

Arusha, 7 December 2006, done in English.

[Signed] : Dennis C. M. Byron; Gberdao Gustave Kam; Robert Fremr

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Second Revised Amended Indictment (In conformity with Trial Chamber III Decision dated 7 December 2006) 11 December 2006 (ICTR-2001-63-I)

(Original : not specified)

I. The Charges

1. The Prosecutor of the International Criminal Tribunal for Rwanda, pursuant to the authority stipulated in Article 17 of the Statute of the International Criminal Tribunal for Rwanda ("the Statute") charges:

Siméon Nchamihigo with the following crimes:

Count 1 : genocide, pursuant to Articles 2 (3) (a) and 6 (1) of the Statute;

Count 2: murder as a crime against humanity, pursuant to Articles 3 (a) and 6 (1) of the Statute;

Count 3: extermination as a crime against humanity, pursuant to Articles 3 (b) and 6 (1) of the Statute and

Count 4: other inhumane acts as a crime against humanity, pursuant to Articles 3 (i) and 6 (1) of the Statute.

II. The Accused

2. Siméon Nchamihigo was born on 8 September 1960 in Gatare *commune,* Cyangugu *Préfecture* (Rwanda). He was *Substitut du Procureur* [Assistant Prosecutor] at the Cyangugu Court of First Instance from sometime in 1991 until 17 July 1994.

3. Between 1 January and 17 July 1994, Siméon Nchamihigo acted in his capacity of *Substitut du Procureur* in the Office of the Prosecutor of the Republic in Cyangugu on the basis of a forged diploma which he produced sometime in 1991 in support of his application for the post of *Substitut du Procureur* in Rwanda. He was investigated by the Deputy Prosecutor General Ntakirutimana Charles in connection with the forged diploma, but the investigation was stopped when a pro-MRND Deputy Prosecutor General, Musekura Jean Damascene, was appointed to replace Ntakirutimana Charles.

4. On an unknown date around mid-April 1994, Siméon Nchamihigo, in his capacity of *Substitut du Procureur,* issued counterfeit warrants of arrest against Tutsi who had sought refuge at the Cyangugu Cathedral or at the Bishopric of Cyangugu, including Gapfumu, to enable and thus aid and abet officers from the office of the Prosecutor of the Republic, soldiers and *Interahamwe* to remove those refugees and kill them and they did so.

5. Similarly, on an unknown date around mid-April 1994, Siméon Nchamihigo, in his capacity as *Substitut du Procureur,* issued counterfeit warrants of arrest against Tutsi who had been transferred to Kamarampaka Stadium from various places. On or around the same date, the members of the *préfecture* security council, including Siméon Nchamihigo, brought outside the stadium those Tutsi. Siméon Nchamihigo ordered or instigated the *Interahamwe* to kill those Tutsi, or otherwise aided and abetted the killing of those Tutsi, resulting in the killing of those Tutsi by the *Interahamwe*.

6. From about 1992 until 17 July 1994, Siméon Nchamihigo, although he was *Substitut du Procureur,* was also involved in political activities in Cyangugu *Préfecture* both for the MRND, President Juvénal Habyarimana's political party and the political party known as *La Coalition pour la Défense de la République,* or CDR. CDR was a Hutu extremist party and allied to MRND. It opposed parties that were in opposition to the MRND.

7. Between 1 January and 17 July 1994, Siméon Nchamihigo was also a member of a clandestine group of Hutu civil servants working in Cyangugu, called *Tuvindimwe,* which was formed in 1991 or thereabouts. This group supported the MRND and CDR. *Tuvindimwe* recruited its members from the *Préfecture*, the Appeals Court, the *parquet general* [Public Prosecutor's office at the Appeal Court], the Court of First Instance and the *parquet de la république* [Public Prosecutor's office at the Court of First Instance]. Tutsi and moderate Hutu who opposed the MRND were excluded from *Tuvindimwe* because they were considered accomplices of the *Inkotanyi,* a term applied to the Tutsi-dominated Rwandan Patriotic Front, or RPF.

8. Between 1 February and 17 July 1994, Siméon Nchamihigo was an *Interahamwe* leader in Cyangugu *Préfecture*. He recruited many young Hutu men as *Interahamwe*, including Jean de Dieu Utabazi, Janvier Borauzima, Faustin Sinashebeje and Joseph Habineza and he instructed Habimana Jean Bosco *alias* Masudi, a former soldier, in collaboration with Sergeant Major Marc Ruberanziza, *alias* Bikomago, Christophe Nyandwi and caporal Aimé, to train these, among other *Interahamwe* in Karambo military camp, to enable them to kill the Tutsi. In addition, Siméon Nchamihigo allowed *Interahamwe* to stay in his house in Cyangugu and he provided them with food and drink. He ordered

or instigated the *Interahamwe* to kill the Tutsi, or otherwise, aided and abetted the killing of Tutsi, as described below in the concise statement of facts relating to the charges.

9. Between 6 April and 17 July 1994, Siméon Nchamihigo acted as a member of the *préfecture* security council of Cyangugu and participated in its meetings. The following persons, among others, were members of the *préfecture* security council: Emmanuel Bagambiki, *Préfet* of Cyangugu; Samuel Imanishimwe, commander of the Cyangugu military camp; Vincent Munyarugerero, commander of the Cyangugu *gendarmerie*; Bernadin Bayingana, President of the Cyangugu Court of First Instance; Paul Ndorimana, the Public Prosecutor of Cyangugu, who was often represented by Siméon Nchamihigo, and *sous-Préfets* Emmanuel Kamonyo, Théodore Munyangabe and François Nzeyimana. The *préfecture* security council met regularly to discuss matters relating to security in Cyangugu Prefecture. The *préfecture* security council was particularly active from 6 April 1994, following the death of President Habyarimana, until 17 July 1994. During this time it met more often and made decisions concerning the setting of roadblocks in Cyangugu, the transfer of refugees to Kamarampaka Stadium from locations where they had sought to escape the violence, the drawing of lists of Tutsi and moderate Hutu and the selection of individual refugees for removal from the Kamarampaka Stadium, as described below in the concise statements of the facts relating to the charges.

10. Paragraph moved to paragraph 20 (f).

III. General Allegations

11. Between 6 April and 17 July 1994, and during all the periods referred to in this indictment, Rwandan citizens were identified according to the following ethnic or racial classifications: Tutsi, Hutu and Twa.

12. Between 6 April and 17 July 1994, soldiers, *Interahamwe* and armed civilians attacked, killed or caused bodily or mental harm to members of the Tutsi ethnic group in Cyangugu *Préfecture* and throughout Rwandan, with intent to destroy, in whole or in part, the Tutsi ethnic group as such.

13. Between 6 April and 17 July 1994, in Cyangugu *Préfecture* and throughout Rwandan, *Interahamwe,* soldiers and armed civilians murdered individually identified or targeted people or committed widespread killings, as part of widespread or systematic attacks against Tutsi civilians and/or Hutu opponents. As result of these attacks, *Interahamwe,* soldiers and armed civilians killed hundreds of thousands of Tutsi civilians and Hutu political opponents in Cyangugu *Préfecture* and throughout Rwanda.

IV Individual Criminal Responsibility

14, Pursuant to Article 6 (1) of the Statute, Siméon Nchamihigo is criminally responsible for the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity, for planning, instigating, ordering, committing, or otherwise aiding and abetting in the planning, preparation or execution of the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity. Siméon Nchamihigo ordered people over whom he had authority by virtue of his position described in paragraphs 2, 3, 4, 5, 6, 8, 9 and 10 of this indictment, to commit the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity, and instigated or otherwise aided and abetted those who were not under his authority to commit the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity.

15. In addition to his responsibility under Article 6 (1) of the Statute for having planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity

and other inhumane acts as a crime against humanity, Siméon Nchamihigo knowingly and willfully participated in a joint criminal enterprise, in his role as set out in paragraphs 2, 3, 4, 5, 6, 8, 9, 10 and 15 of this indictment. The purpose of the joint criminal enterprise was the destruction of the Tutsi racial or ethnic group in Cyangugu *préfecture* through the commission of the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity. This joint criminal enterprise came into existence on or about 6 April 1994 and continued until 17 July 1994.

16. Siméon Nchamihigo and the other members of the joint criminal enterprise shared the same intent to effect the common purpose. To fulfill the common purpose, Siméon Nchamihigo acted in concert with *Interahamwe* Christophe Nyandwi, Yusuf Munyakazi, Mubiligi Thompson, Pierre Munyandamutsa, *alias Pressé*, Mvuyekure Vincent, known as *Tourné*, Habimana Jean Bosco, *alias* Masudi, Bizimungu Anasthase, Nsengumuremyi Patrick, Sinashebeje Faustin, and Habirora Nehemi, among others, as well as other participants who were not *Interahamwe*, including Samuel Imanishimwe, commander of the Cyangugu military camp, Sergeant Major Marc Ruberanziza, *alias* Bikomago, Habimana Vedaste, and *Préfet* Emmanuel Bagambiki, among others.

17. In addition to his participation in a joint criminal enterprise as set out in paragraphs 15 and 16 above, Siméon Nchamihigo is responsible for the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity on the basis that these crimes were the natural and foreseeable consequences of the execution of the common purpose of the joint criminal enterprise. Siméon Nchamihigo intended to further the common purpose of the joint criminal enterprise. In addition, it was foreseeable that the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity, might be perpetrated by one or other members of the group and Siméon Nchamihigo willingly took that risk.

18. The particulars that give rise to Siméon Nchamihigo's individual responsibility for the crimes charged are set out in this indictment as follows:
- For the crime of genocide in paragraphs 19 through 43;
- For the crime of murder as a crime against humanity in paragraphs 44 through 55;
- For the crime of extermination as a crime against humanity in paragraphs 56 through 69 and
- For the crime of other inhuman acts as a crime against humanity in paragraphs 67 through 70.

V Crimes charged and Concise Statement of Facts

Count 1: Genocide

19. The Prosecutor of the international Criminal Tribunal for Rwanda charges Siméon Nchamihigo with genocide, a crime provided for in Article 2 (3) (a) of the Statute, in that between 6 April and 17 July 1994, in Cyangugu *Préfecture* (Rwanda), he was responsible for killing or causing serious bodily or mental harm to members of the Tutsi population, with the intent to destroy, in whole or in part, an ethnic or racial group as such, as described in the facts contained in paragraphs 20 through 43 of this indictment.

Concise Statement of the Facts Relating to Count 1

20. Following the death of the President of Rwanda, Juvenal Habyarimana, on 6 April 1994, the interim government formed on 8 April 1994 launched a national campaign aimed at mobilizing the government armed forces, civilian militia, *Interahamwe,* the local public administration and ordinary citizens to fight the Rwandan Patriotic Front, or RPF, a politico-military opposition group comprising mainly Tutsi. The Rwandan government armed forces and *Interahamwe* militia specifically targeted the Tutsi civilian population of Rwanda as domestic accomplices of an invading army, *ibyitso,* or categorically as a domestic enemy. Under the pretext of ensuring national defence, ordinary citizens of

Rwanda, mainly Hutu, mobilized into action by the authorities, killed Tutsi and political opponents and looted their property. Between 6 April 1994 and 17 July 1994 hundreds of thousands of Tutsi and moderate Hutu were killed as a result of this campaign. Siméon Nchamihigo participated in the organization and the implementation of this campaign as follows:

(a) On or about 14 April 1994, during meetings called by the *Préfet* Emmanuel Bagambiki in the MRND office in Cyangugu, all zone supervisors, including Siméon Nchamihigo, were requested to report on the ongoing massacres in their zones. During the meeting, Siméon Nchamihigo reported that he was facing difficulties in attacking the Shangi parish as so many Tutsi had sought refuge there and that, according to him, it was not possible to kill all of them with traditional weapons. He claimed that he needed fire arms, such as rifles and grenades. These were later given to him by Lieutenant Samuel Imanishimwe in Karampo military camp Siméon Nchamihigo distributed the weapons to the *Interahamwe* and ordered or instigated them to attack the Shangi parish and to kill the Tutsi and they did so some time in April 1994 with Yussuf Munyakazi and others.

(b) In late April 1994, Siméon Nchamihigo participated in a meeting at Gihundwe *secteur* office the purpose of which was to put in place security measures. Acting *bourgmestre,* Manase Buvugamenshi, presided over the meeting, which was attended by Védaste Habimana, Siméon Nchamihigo and Christophe Nyandwi, president of the *Interahamwe* in Cyangugu *préfecture*, among others. During the meeting, Siméon Nchamihigo enquired about the security situation in the *secteur* and whether there were more Tutsi in hiding to be killed. Védaste Habimana replied that three days would suffice to "mop up" the *secteur*. In the context of the meeting, "to mop up" was understood to mean "to finish killing all the Tutsi." The "mopping up" of the *secteur* did in fact continue. By his enquiries regarding the remaining Tutsi to be killed, Siméon Nchamihigo instigated and aided and abetted the killing of these Tutsi.

(c) Between 6 April and 17 July 1994, Siméon Nchamihigo, in collaboration with Sergeant Major Marc Ruberanziza, *alias* Bikomago, Christophe Nyandwi, president of the *Interahamwe* at the *préfecture* level, Habimana Jean Bosco, *alias* Masudi, a former soldier and caporal Aimé, among others, organized and supervised military training for *Interahamwe* in Cyangugu *préfecture* namely: Jean de Dieu Utabazi, Janvier Borauzima, Faustin Sinashebeje, Joseph Habineza amongst others to enable and thus to aid and abet them to kill the Tutsi.

(d) On unknown dates in April and May 1994 Siméon Nchamihigo was involved with *Préfet* Emmanuel Bagambiki, Lieutenant Samuel Immanshimwe, and others, in the drawing up of lists of influential Tutsi and Hutu political opponents, on the basis of which the *préfecture* security council, including Siméon Nchamihigo, identified persons to be killed. As a result, Siméon Nchamihigo planned, ordered, instigated or aided and abetted the *Interahamwe* and other Hutu civilians in killing many Tutsi and Hutu political opponents, as described further below in paragraphs 20 (e), 23, 24, 25, 26, 29, 30, 31, 40,41, 42 and 43 of this indictment.

(e) Between 6 April and 17 July 1994, Siméon Nchamihigo kept a stockpile of weapons in his residence in Cyangugu. He distributed weapons to the *Interahamwe* who included David Habanakwabo and Jeremy Nsengiyumva and others and ordered or instigated them to go and kill specifically named people, Tutsi and Hutu political opponents, or launch large-scale attacks against Tutsi, who were sometimes assembled in specific places, such as parishes and schools as described in paragraphs 28, 32, 33, 34, 35 and 37 of this indictment.

(f) On or about 11 April 1994, a meeting was called by the *préfet* Emmanuel Bagambiki in the *préfecture* office which was attended by the *Sous-Préfets*, *bourgmestres,* religious authorities, prominent businessmen who financed the MRND political party, the *Interahamwe* leaders and political authorities of the MRND, CDR, MDR-power and PL-power parties. Civil servants, including Siméon Nchamihigo, were also present at the meeting. During this meeting, Siméon Nchamihigo and Callixte Nsabimana, manager of Shangasha Tea Factory, were appointed supervisors for the security

of Gisuma and Gafunzo zones. At the end of the meeting, all zone supervisors, including Siméon Nchamihigo, went to Karambo military camp to receive weapons from Lieutenant Samuel Imanishimwe. Shortly thereafter, the zone supervisors, including Siméon Nchamihigo, distributed these weapons to Anasthase Bizimungu and other *Interahamwe* posted in their respective zones and ordered them to kill the Tutsi with those weapons.

21. Between 6 April and 17 July 1994, Siméon Nchamihigo ordered or instigated the *Interahamwe* to erect several roadblocks in Cyangugu town and supervised the effective manning of these roadblocks. Such roadblocks included a roadblock near the Kamembe Market and the Pendeza roadblock on the road to the Airport as well as the Kadashya roadblock, manned by an *Interahamwe* leader, Pierre Munyandamutsa *alias Pressé,* an associate of Siméon Nchamihigo, the Cuyapa roadblock manned by Mvuyekure Vincent, *alias* Tourné, and the Gatandara roadblock, manned by an *Interahamwe,* Habimana Jean Bosco. The aim of the roadblocks was to stop the Tutsi and Hutu opponents from fleeing to safer areas and to kill them. Siméon Nchamihigo controlled and supervised the roadblocks by inspecting them several times a day, and he ordered or instigated the *Interahamwe* who manned the roadblocks to kill the Tutsi attempting to pass through. Siméon Nchamihigo's *Interahamwe* killed many Tutsi at the roadblocks, sometimes in the presence of Siméon Nchamihigo. The *Préfet* of Cyangugu, Emmanuel Bagambiki appointed people like Ndagijimana Shabani to remove dead bodies at the roadblocks and throughout the Cyangugu city in this period. At the Gatandara roadblock, Siméon Nchamihigo ordered or instigated the *Interahamwe* to kill many Tutsi who had been selected in the Karampaka Stadium. The Cyapa roadlock was erected just next to Siméon Nchamihigo's residence. Siméon Nchamihigo ordered, instigated or aided and abetted the killing of Tutsi at that roadblock, including the catholic priest, Father Boneza Joseph.

22. On or about 7 April 1994, Siméon Nchamihigo spoke to Thomas Mubiligi and a group of young Hutu in Kamembe and ordered or instigated them to look for all the Tutsi and RPF accomplices and hand them over to the *Interahamwe* and to set ablaze all the places where the opposition was well-established. Following Siméon Nchamihigo's orders or instigation, the *Interahamwe* tracked down and killed many people, mostly Tutsi men, women and children, on or about 7 April 1994 and in the months that followed.

23. On or about 15 April 1994, in Kamembe, Siméon Nchamihigo arrived at a road block near the *Banque de Kigali* manned by about 20 people, comprised of *Interahamwe* and young armed Hutu alike. He read out to these people names of Tutsi who were reportedly hiding in Kamembe town, and ordered or instigated that they be hunted down. The names read out from the list by Siméon Nchamihigo included Gasali Aloys, Emilien Nsengumuremyi, Isidore Kagenza and Judge Jean-Marie Vianney Tabaro. After reading out the names and before leaving the roadblock, Siméon Nchamihigo ordered or instigated the *Interahamwe* to look for Tutsi and to kill them and aided and abetted by providing them with two grenades. These *Interahamwe* then hunted down and killed the Tutsi.

24. On an unknown date in May 1994, in execution of Siméon Nchamihigo's order or instigation issued at a road block near the *Banque de Kigali* in Kamembe on or about 15 April 1994, the *Interahamwe* including Mvuyekure Vincent *alias Tourné* found Emilien Nsengumuremyi and killed him. They continued to look for the other Tutsi whose names had been read out by Siméon Nchamihigo, in order to kill them.

25. On or about 28 or 30 April 1994, Siméon Nchamihigo went to a roadblock near Paul Ndorimana's house manned by the *Interahamwe,* including Ndorimana Martin, and ordered or instigated them to kill the accountant of Cyangugu *Préfecture*, Kayihura Canisus, a Tutsi, who had supposedly managed to obtain an identity card indicating that he belonged to the Hutu ethnic group.

26. On an unknown date in May 1994, Siméon Nchamihigo went to a roadblock in Kamembe and ordered or instigated the *Interahamwe* manning the roadblock who included Vincent Mvuyekure *alias* Tourné and Thomas Mubiligi to kill a Tutsi priest of the Mibirizi Catholic parish, whose name he did

not reveal but who, according to him, was expected to pass by the roadblock in a vehicle. Siméon Nchamihigo had issued similar instructions at all the roadblocks that he supervised and he had threatened to kill the *Interahamwe* if they let the Tutsi priest through. In the presence of Siméon Nchamihigo, the *Interahamwe* killed the priest later that day at the roadblock erected at the entrance to Kamembe next to the residence of the accused and manned by the *Interahamwe* Habirora Nehemi and Patrick Nsengumuremyi. Later on the Catholic priest was known to be Father Joseph Boneza.

27. On an unknown date in May 1994, at the Cyapa roadblock manned by the *Interahamwe* including Vincent Mvuyekure *alias Tourné*, Patrick Nsengumuremyi and the *gendarmes*, Siméon Nchamihigo took into the car he was driving two young Tutsi students, Uzier and Innocent, who were seeking a lift to go back home. Siméon Nchamihigo handed the two students over to the *Interahamwe* and ordered or instigated them to kill the Tutsi students, and they did so.

28. After President Juvénal Habyarimana's death on 6 April 1994, a large number of Tutsi and Hutu political opponents fleeing acts of violence and massacres, sought refuge in places considered safe in Cyangugu such as the main cathedral, Mibirizi parish, Hanika parish, Nkanka parish, Shangi parish, Nyamasheke parish, the Mibirizi hospital, the Gihundwe school and the Nyakanyinya school, among others. Other Tutsi and Hutu political opponents remained in their homes. Siméon Nchamihigo, in collaboration with Lieutenant Samuel Imanishimwe, Sergeant Major Marc Ruberanziza *alias* Bikomago, *Sous-Préfet* Theodore Muyengabe and Christophe Nyandwi, president of the *Interahamwe* at the *préfecture* level, ordered or instigated the *Interahamwe* including Kamenero to launch attacks against Tutsi and Hutu political opponents who had sought refuge in safe places and also on individuals in their homes. Siméon Nchamihigo personally led all these attacks, except the attack at Nkanka parish. During these attacks, Siméon Nchamihigo and the *Interahamwe* killed many people, as described in paragraphs 29 through 37 of this indictment.

29. On or about 7 April 1994, Siméon Nchamihigo led a group of *Interahamwe* including Christophe Nyandwi among others in an attack on the residence of Doctor Nagafizi, a Tutsi regional chief medical officer of Cyangugu and member of the *Parti* Libéral, allegedly with RPF leanings, and an attack on the residence of a businessman called Kongo, a Hutu and member of the PSD political party. During the attacks, the *Interahamwe*, led by Siméon Nchamihigo and ordered, instigated or aided and abetted by him, killed Doctor Nagazafi and Kongo.

30. On or about 7 April 1994, Siméon Nchamihigo ordered or instigated the *Interahamwe,* namely Mubiligi Thompson, to attack the residence of Trojean Ndayisaba a Tutsi trader and member of the PSD political party and to kill him. Trojean Ndayisaba was accused of receiving money from the RPF. During the attack, the *Interahamwe* killed the whole family of Trojean Ndayisaba and looted their house. The *Interahamwe* killed Trojean Ndayisaba himself afterwards on an unknown date between the end of April 1994 and early July 1994.

31. On or about 7 or 9 April 1994, Siméon Nchamihigo ordered or instigated the *Interahamwe*, including Habineza Joseph, *alias* Sekuse, to kill Theoneste Karangwa, an influential Tutsi trader and member of the PSD political party in Cyangugu. Siméon Nchamihigo said that the *Interahamwe* should not to kill Karangwa's wife because she was not Tutsi. The *Interahamwe* then attacked and killed Theoneste Karangwa and his driver Iyakaremye. Siméon Nchamihigo seized Karangwa's vehicle and later took it to Bukavu in neighboring Zaire.

32 On or about 12 April 1994, Siméon Nchamihigo ordered or instigated the *Interahamwe*, including Bizimungu Anasthase, and communal police, *gendarmes* and military reservists to attack the Nyakanyinka school and kill the Tutsi who sought refuge there. The attackers received from Siméon Nchamihigo grenades and rifles which were used during the attack and were thus aided and abetted by him in the attack. As a result, the *Interahamwe* and other attackers killed about 600 Tutsi.

33. On or about 12 April 1994, Siméon Nchamihigo, in collaboration with Samuel Imanishimwe, commander of Cyangugu military camp, and the *Sous-Préfet Kamonyo*, ordered or instigated the

Interahamwe including Uwimana Jean Charles, *alias* Karoli, and a group of Hutu civilians, to attack the Hanika parish and kill all the refugees who were supposed to be Tutsi. As a result of Siméon Nchamihigo's order or instigation, the attackers killed about 1,500 people, including children and the aged.

34. On a day sometime between 14 and 15 April 1994, at about 8 o'clock in the morning, Siméon Nchamihigo led a group of *Interahamwe* and *Impuzamugambi* (the militiamen of the CDR political party) including Ndorimana Martin, in an attack against Tutsi of the Gihundwe *Secteur,* particularly targeting Tutsi of Kabugi, Ruganda, Murindi and Murangi *Cellules*. During the attack, the *Interahamwe,* led by Siméon Nchamihigo, and ordered, instigated or aided and abetted by him, killed a large number of Tutsi and destroyed their houses.

35. On or about 18 April 1994, Siméon Nchamihigo, in collaboration with Lieutenant Samuel Imanishimwe, Sergeant Major Marc Rubenziza, *alias* Bikomago and *Sous-Préfet* Theodore Muyengabe, led a group of *Interahamwe which included Gendarme Mandela and Anathase Bizimungu, among others,* that attacked Mibirizi convent and Mibirizi hospital, where many Tutsi had sought refuge. During the attacks, the *Interahamwe,* led by Siméon Nchamihigo, and ordered, instigated or aided and abetted by him, massacred the Tutsi refugees and looted their property. After the attacks, Siméon Nchamihigo rewarded the killers with beer.

36. In late April or early May 1994, three young Tutsi girls, Mukashema Josephine, Marie and Helene, sought refuge in the residence of a certain Hutu named Jonas. Siméon Nchamihigo accused Jonas and his brother Niyikiza Jonathan of hiding *Inyenzi*. Siméon Nchamihigo, assisted by one of his *Interahamwe* namely Banga Kaboyi Johnson, removed the three Tutsi girls from Jonas's house and took them away to an unknown place. On the same day, Siméon Nchamihigo told Niyikiza Jonathan that the *Inyenzi* had been killed and threatened Niyikiza Jonathan to kill him if he continued to hide Tutsi. By his actions, Siméon Nchamihigo committed, ordered, instigated or aided and abetted the killing of these Tutsi girls.

37. Between 20 and 25 June 1994 or thereabouts, Siméon Nchamihigo ordered or instigated the *Interahamwe* in his area, including Jean-Paul, Mvuyekure Vincent, *alias Tourné*, Nzeyimana, among others, to go to Kibuye together with Yusufu Munyakazi and his *Interahamwe,* and participate in a number of attacks to kill Tutsi who had sought refuge at Bisesero in Kibuye *Préfecture*. The *Interahamwe* travelled in an Onatracom bus to Bisesero and assisted the Kibuye *Interahamwe* in killing the Tutsi. Together, they killed many Tutsi. On the return of the *Interahamwe* from Kibuye after one or two days, Siméon Nchamihigo rewarded them with drinks and food at the Gihundwe school.

38. After President Juvénal Habyarimana's death on 6 April 1994, Siméon Nchamihigo and other members of the *préfecture* security council, including *Préfet* Emmanuel Bagambiki and Lieutenant Samuel Imanishimwe, the Cyangugu military camp commander, decided to move refugees from their places of refuge and assembled them at Kamarampaka Stadium in Cyangugu, ostensibly with the purpose of providing the refugees with better security but with the aim of eliminating those who were suspected of being accomplices of the *Inkotanyi*.

39. On or about 14 April 1994, Siméon Nchamihigo, Lieutenant Samuel Imanishimwe and other members of the *préfecture* security council including Emmanuel Bagambiki moved the refugees from the Gihundwe school to Kamarampaka stadium.

40. On or about 15 April 1994, Siméon Nchamihigo, Lieutenant Samuel Imanishimwe and other members of the *préfecture* security council including Emmanuel Bagambiki moved the refugees from Cyangugu Cathedral and took them to Kamarampaka Stadium. The refugees transferred to the stadium that day included Baziruwiha Marianne, Nkusi Georges, Albert Twagiramungu, Jean Fidèle Murekezi, his wife Kanyamibwa Christine and their children, among others.

41. On the 16th of April 1994, Siméon Nchamihigo and other members of the *préfecture* security council, including *Préfet* Emmanuel Bagambiki, Lieutenant Samuel Imanishimwe, Christophe Nyandwi, President of the *Interahamwe* at the *Préfecture* level, Major Munyarugerero, Theodeore Munyangabe, *sous-préfet*, Paul Ndorimana, Prosecutor, Simeon Remesh, Headmaster of Gihundwe Primary School, Ngagi, customs officer and Sergeant Major Marc Ruberanziza went to Kamarampaka Stadium. The commander of the *gendarmerie* camp, using a megaphone, called out names of civilians who were alleged to be *Inkotanyi* accomplices from a list that had been prepared by the *préfecture* security council, including Siméon Nchamihigo. The list included: Benoit Sibomana, Jean-Fidèle Murekezi, Apiane Ndorimana, Albert Mugabo, Albert Twagiramungu, Ibambasi, Bernard Nkara, Trojean Nzisabira, Rémy Mihigo, Dominique Gapeli, Albert Mugabo and Marianne Baziruwiha. All of the individuals named on the list were Tutsi, except for Marianne Baziruwiha who was a Hutu and an influential member of the PSD political party in Cyangugu. The individuals were asked to come out, and were escorted out of the Stadium by Siméon Nchamihigo and the *préfecture* delegation. Outside the stadium, about four people of Tutsi origin, including Vital Nibagwire, Ananie Gatake, Jean-Marie Vianney Habimana *alias* Gapfumu, whom Siméon Nchamihigo and the other members of the *préfecture* delegation had brought from the cathedral, were waiting in vehicles. Siméon Nchamihigo and the *préfecture* delegation instructed soldiers to take the selected 16 people to the *gendarmerie* camp purportedly for questioning.

42. When, on or about 16 April 1994, Siméon Nchamihigo and other members of the *préfecture* security council took the 16 selected persons to the *gendarmerie* camp, they removed Marianne Baziruwiha from the group and instructed the drivers to proceed with the remaining 15, all Tutsi, to a place near Cyangugu prison. Siméon Nchamihigo then ordered or instigated the *Interahamwe* whom he had brought along with him from Mutongo Centre earlier the same day, including Bizimungu Anasthase and Jean Bosco Habimana to kill the 15 remaining Tutsi. Following Siméon Nchamihigo's order or instigation, the *Interahamwe* killed the 15 Tutsi near Cyangugu prison and threw their dead bodies into a latrine in Gapfumu's compound

43. On or about 18 April 1994, Siméon Nchamihigo went back to Kamarampaka Stadium in a delegation of the *préfecture* security council, comprising *Préfet* Emmanuel Bagambiki, Samuel Imanishimwe, and *Sous-Préfet* Emmanuel Kamonyo, among others. Bagambiki, using a megaphone, called out about 20 names from a list which the *préfecture* security council had drawn up. They took the listed people out of the stadium. Some people of Tutsi origin, such as Antoine Nsengumuremyi and Felicien, whose names had not been called out, were nevertheless taken out of Kamarampaka Stadium that day, together with the others. These people were subsequently killed and their bodies thrown into the Gataranga River or into mass graves. Siméon Nchamihigo and the *préfecture* delegation aided and abetted the killing of all those who had been taken out of the stadium.

Count 2: Crime against humanity : Murder

44. The Prosecutor of the International Criminal Tribunal for Rwanda charges Siméon Nchamihigo with murder, as a crime against humanity, pursuant to Article 3 (a) of the Statute, in that between 6 April and 17 July 1994 he was responsible for the murder of a number of Tutsi and of people considered as Tutsis, as well as Hutu opponents, particularly in Cyangugu *Préfecture*, as part of a widespread or systematic attack against a civilian population on ethnic, racial or political grounds, as set out in paragraphs 45 through 55 of this indictment.

Concise statement of the facts relating to Count 2

45. On or about 7 April 1994, Siméon Nchamihigo led a group of *Interahamwe* including Nyandwi Christophe in an attack on the residence of Doctor Nagafizi, a Tutsi regional chief medical officer of Cyangugu and member of the *Parti* Liberal, with RPF leanings, and an attack on the residence of a

businessman called Kongo, a Hutu and member of the PSD political party. During the attacks, the *Interahamwe,* led by Siméon Nchamihigo and ordered, instigated or aided or abetted by him, killed Doctor Nagafizi and Kongo.

46. On or about 7 April 1994, Siméon Nchamihigo ordered or instigated the *Interahamwe,* namely Mubiligi Thompson, to attack the residence of Trojean Ndayisaba, a Tutsi trader and member of the PSD political party and to kill him. Trojean Ndayisaba was accused of receiving money from the RPF. During the attack, the *Interahamwe* killed the whole family of Trojean Ndayisaba and looted their house. The *Interahamwe* killed Trojean Ndayisaba himself afterwards on an unknown date between the end of April 1994 and early July 1994.

47. On or about 7 or 9 April 1994, Siméon Nchamihigo in collaboration with Nyandwi Christophe, an *Interahamwe* leader at the *préfecture* level, ordered or instigated *Interahamwe including Joseph Habineza, among others* to kill Zacharie Serubyogo, a Hutu trader and MDR political party member of Parliament, together with other people. The *Interahamwe* then killed Zacharie Serubyogo and many unknown people near Lake Kivu in the presence of Siméon Nchamihigo. After the killing of Zacharie Serubyogo, Siméon Nchamihigo ordered his *Interahamwe* to look for a Tutsi by the name of Theoneste Karangwa and kill him.

48. On or about 7 or 9 April 1994, Siméon Nchamihigo ordered or instigated *Interahamwe,* including Habineza Joseph, *alias* Sekuse, to kill Théoneste Karangwa, an influential Tutsi trader and member of the PSD political party in Cyangugu. Siméon Nchamihigo said that the *Interahamwe* should not to kill Karangwa's wife because she was not Tutsi. The *Interahamwe* then attacked and killed Théoneste Karangwa and his driver Iyakaremye. Siméon Nchamihigo seized Karangwa's vehicle and later took it to Bukavu in neighboring Zaire.

49. Deleted.

50. Between 15 and 17 April 1994, Siméon Nchamihigo ordered or instigated a group of *Interahamwe who included David Habanakwabo, Rusine and Nzeyimana,* to kill a young Hutu student called Jean de Dieu Gakwandi, whom he had described as a traitor and an accomplice of the Tutsi. To this end, Siméon Nchamihigo gave a grenade to someone called David Habanakwabo, *alias* Vicky, and ordered him to join other *Interahamwe* in order to kill Jean de Dieu Gakwandi. The assailants hit Jean de Dieu Gakwandi with a club on the head. Jean de Dieu Gakwandi sustained serious injuries. The assailants left him there, unconscious, thinking he was dead.

51. On or about 28 or 30 April 1994, Siméon Nchamihigo went to a roadblock manned by *Interahamwe,* including Ndorimana Martin, and ordered or instigated them to kill the accountant of Cyangugu *Préfecture*, Canisius Kayihura, a Tutsi civilian, who had managed to obtain an identity card indicating that he belonged to the Hutu ethnic group.

52. In late April or early May 1994, three young Tutsi girls, Mukashema Josephine, Marie and Helene, sought refuge in the residence of a certain Hutu named Jonas. Siméon Nchamihigo accused Jonas and his brother Niyikiza Jonathan of hiding *Inyenzi*. Siméon Nchamihigo assisted by one of his *Interahamwe namely* Banga Kaboyi Johnson, removed the three Tutsi girls from Jonas's house, took them away to an unknown place. On his return the same day, Siméon Nchamihigo told Niyikiza Jonathan that the *Inyenzi* had been killed and he threatened Niyikiza Jonathan to kill him if he continued to hide Tutsi. By his actions, Siméon Nchamihigo ordered, instigated or aided and abetted the killing of these Tutsi girls.

53. On an unknown date in May 1994, in execution of Siméon Nchamihigo's order or instigation issued at a road block in Kamembe on or about 15 April 1994, the *Interahamwe* including Christophe Nyandwi, found Emilien Nsengumuremyi and killed him. They continued to look for the other Tutsi whose names had been read out by Siméon Nchamihigo, in order to kill them because of their Tutsi origin.

54. On an unknown date in May 1994, Siméon Nchamihigo went to the roadblocks in Kamembe that he supervised, including the Cuyapa and the *Banque de Kigali* roadblocks, and ordered or instigated the *Interahamwe* manning the roadblocks, including Vincent Mvuyekure *alias Tourné* and Thomas Mubiligi, to kill a Tutsi priest of the Mibirizi Catholic parish, Father Joseph Boneza, who was expected to pass by the roadblock in a vehicle. Siméon Nchamihigo threatened to kill the *Interahamwe* if they let the Tutsi priest through. Later that day and in the presence of Siméon Nchamihigo, the *Interahamwe* killed Father Joseph Boneza at the roadblock erected at the entrance to Kamembe next to the residence of the accused and manned by the *Interahamwe* Habirora Nehemi and Patrick Nsengumuremyi.

55. On an unknown date in May 1994, at the Cyapa roadblock manned by the *Interahamwe* including Nsengumuremyi Patrick and the *gendarmes*, Siméon Nchamihigo took into the car he was driving, two young Tutsi students, Uzier and Innocent, who were seeking a lift to go back home. Siméon Nchamihigo handed the two boys over to the *Interahamwe* and ordered or instigated them to kill the Tutsi students and they did so.

Count 3: Crime against humanity : Extermination

56. The Prosecutor of the International Criminal Tribunal for Rwanda charges Siméon Nchamihigo with extermination as a crime against humanity, a crime stipulated in Article 3 (b) of the Statute, in that between 6 April and 17 July 1994, particularly in Cyangugu *préfecture*, Siméon Nchamihigo was responsible for the large scale killing of Tutsi or of people considered as Tutsi and of Hutu opponents, as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds, as described below in the concise statement of facts relating to the charges in paragraphs 57 through 65 of this indictment.

Concise statement of the facts relating to Count 3

57. Between 6 April and 17 July 1994, in particular from 7 April to the end of May 1994, Siméon Nchamihigo, in collaboration with Sergeant Major Marc Ruberanziza, *alias* Bikomago, and Christophe Nyandwi, president of the *Interahamwe* at the *préfecture* level, ordered or instigated the *Interahamwe* amongst whom was Kamenero, to launch attacks against Tutsi civilians and Hutu opponents refugees in Hanika parish, Mibirizi parish, Mibirizi hospital, Nkanka parish, Shangi parish and Nyamasheke parish among other places where those people had sought refuge including their homes. Siméon Nchamihigo personally led all of these attacks, except the attack at Nkanka parish. During the attacks, the *Interahamwe* and other Hutu civilians led by Siméon Nchamihigo killed many civilians who thus were targeted as described in paragraphs 59, 60, 61, 62, 63, 64 and 65 of this indictment.

58. On or about 7 April 1994, Siméon Nchamihigo arrived at a road block manned by a group of young Hutu in Kamembe and ordered or instigated them to look for all the Tutsi and RPF accomplices and hand them over to the *Interahamwe* and to set ablaze all the places where the opposition was well-established. Following Siméon Nchamihigo's orders or instigation, the *Interahamwe* tracked down and killed many civilians, mostly Tutsi men, women and children, after or around 7 April 1994.

59. On or about 7 April 1994, Siméon Nchamihigo ordered or instigated the *Interahamwe*, namely Mubiligi Thompson, to attack the residence of Trojean Ndayisaba a Tutsi trader and member of the PSD political party and to kill him. Trojean Ndayisaba was accused of receiving money from the RFP. During the attack, the *Interahamwe* killed the whole family of Trojean Ndayisaba and looted their house. The *Interahamwe* killed Trojean Ndayisaba himself afterwards on an unknown date between the end of April 1994 and early July 1994.

60. On or about 12 April 1994, Siméon Nchamihigo ordered or instigated *Interahamwe*, including Bizimungu Anasthase, and communal police, *gendarmes* and military reservists to attack the Nyakanyinka school and kill the Tutsi civilians who sought refuge there. The attackers received from Siméon Nchamihigo grenades and rifles which were used during the attack, and were thus aided and abetted by him in the attack. As a result, the *Interahamwe* and other attackers killed about 600 Tutsi civilians.

61. On a day sometime between 14 and 15 April 1994, at about 8 o'clock in the morning, Siméon Nchamihigo, leading a group of *Interahamwe* and *Impuzamugambi* (the militiamen of the CDR political party) including Ndorimana Martin, launched an attack against Tutsi of the Gihundwe *Secteur*, particularly targeting Tutsi of Kabugi, Ruganda, Murindi and Murangi *Cellules*. During the attack, the *Interahamwe* led by Siméon Nchamihigo, and ordered, instigated or aided and abetted by him, killed a large number of Tutsi and destroyed their houses.

62. On or about 15 April 1994 in Kamembe, Siméon Nchamihigo arrived at a road block manned by about 20 people comprised of *Interahamwe* and young armed Hutu alike. He read out to these people names of Tutsi who were reportedly hiding in Kamembe town, and ordered or instigated that they be hunted down. The names read out from the list by Siméon Nchamihigo included Gasali Aloys, Emilien Nsengumuremyi, Isidore Kagenza and Judge Jean-Marie Vianney Tabaro. After reading out the names and before leaving the road block, Siméon Nchamihigo ordered or instigated the *Interahamwe* to look for Tutsi and to kill them and aided and abetted by providing them with two grenades. These *Interahamwe* then hunted down and killed the Tutsi.

63. On an unknown date in April 1994, Siméon Nchamihigo led a group of *Interahamwe, which included Anathase Bizimungu in their number, accompanied by Gendarme Mandela,* in an attack on Mibirizi convent, where many Tutsi civilians had sought refuge. During the attack, the *Interahamwe*, led by Siméon Nchamihigo, and ordered, instigated or aided and abetted by him, massacred the Tutsi refugees and looted their property.

64. Deleted.

65. On or about 7 or 9 April 1994, Siméon Nchamihigo in collaboration with lieutenant Samuel Imanishimwe and Yusuf Munyakazi, went to Cyangugu prison and ordered the director of the prison to remove about 13 FAR soldiers who had been sent to jail for their alleged complicity with RPF. The detainees were taken to the *Préfecture* office. Siméon Nchamihigo then ordered, instigated or aided and abetted the killing of the 13 FAR soldiers. Following Siméon Nchamihigo's order, instigation or aiding and abetting, the 13 FAR soldiers who were no longer combatants, were killed and their dead bodies thrown into a garden of the *Préfecture* near the lake. Later on the same day, Siméon Nchamihigo ordered or instigated other prisoners, including Ndamira Damien, to remove the dead bodies of the 13 FAR soldiers from the garden and bury them along with the dead bodies of 8 unknown persons found at the same place.

Count 4: Crime against humanity : other inhumane acts

66. The Prosecutor of the International Criminal Tribunal for Rwanda charges Siméon Nchamihigo of other inhumane acts as a crime against humanity, a crime stipulated in Article 3 (i) of the Statute, in that between 6 April and 17 July 1994, throughout Rwanda, particularly in Cyangugu *Préfecture*, Siméon Nchamihigo was responsible for committing inhumane acts against Tutsi civilians or of people considered as Tutsi, and of Hutu opponents, as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds, as outlined in paragraphs 67 through 70 of this indictment.

Concise statement of the facts relating to Count 4

67. On or about 7 or 9 April 1994, Siméon Nchamihigo ordered or instigated *Interahamwe*, including Habineza Joseph, *alias* Sekuse, to kill Theoneste Karangwa, an influential Tutsi trader and member of the PSD political party in Cyangugu. Siméon Nchamihigo said that the *Interahamwe* should not to kill Theoneste Karangwa's wife because she was not Tutsi. Following Siméon Nchamihigo's order or instigation, the *Interahamwe* attacked and caught Theoneste Karangwa in his house. The *Interahamwe* then covered Theoneste Karangwa with his own mattress, poured fuel into the mattress and burnt Theoneste Karangwa, causing him great pain and suffering before his death. The *Interahamwe* also killed Theoneste Karangwa's driver by the name of Iyakaremye. Siméon Nchamihigo then seized Theoneste Karangwa's vehicle and later took it with him to Bukavu in neighboring Zaire, together with other vehicles and various items looted during the attacks.

68. On or about 7 April 1994, Siméon Nchamihigo ordered or instigated the *Interahamwe*, namely Mubiligi Thompson, to attack the residence of Trojean Ndayisaba, a Tutsi trader and member of the PSD political party and to kill him. Trojean Ndayisaba was accused of receiving money from the RFP. During the attack, the *Interahamwe* burnt the whole family of Trojean Ndayisaba inside their vehicle causing them great pain and suffering before their deaths. The *Interahamwe* killed Trojean Ndayisaba himself afterwards on an unknown date between the end of April 1994 and early July 1994.

69. Between 15 and 17 April 1994, Siméon Nchamihigo ordered or instigated a group of *Interahamwe* which included in their number David Habanakwabo, Rusine and Nzeyimana, among others, to kill a young Hutu student called Jean de Dieu Gakwandi, whom he had described as a traitor and an accomplice of the Tutsi. To this end, Siméon Nchamihigo gave a grenade to someone called David Habanakwabo, *alias* Vicky, and ordered him to join other *Interahamwe* in order to kill Jean de Dieu Gakwandi. The assailants hit Jean de Dieu Gakwandi with a club on the head causing him pain and suffering. Jean de Dieu Gakwandi sustained serious injuries. The assailants left him there, unconscious, thinking he was dead.

70. On 16 April 1994 or thereabouts, Siméon Nchamihigo and other members of the *préfecture* security council, including Lieutenant Samuel Imanishimwe and Christophe Nyandwi, removed from Karampaka Stadium about 15 Tutsi and 1 Hutu woman by the name of Marianne Baziruwiha, and took them to a place near the prison after dropping off Marianne Baziruwiha at the *gendarmerie* camp. Among the 15 Tutsi who were removed from the stadium by Siméon Nchamihigo and others, were Jean-Fidele Murekezi, Albert Twagiramumgu and Gapfumu. Siméon Nchamihigo then ordered or instigated the *Interahamwe* whom he had brought along with him from Mutongo Centre earlier the same day, including Bizimungu Anasthase, to kill the 15 Tutsi. Following Siméon Nchamihigo's order or instigation, the *Interahamwe* killed the 15 Tutsi near Cyangugu prison and threw their dead bodies into a latrine in Gapfumu's compound; before doing so the *Interahamwe* removed the genitals of Jean-Fidele Murekezi and Albert Twagiramungu and the heart of Gapfumu.

The acts and omissions of Siméon Nchamihigo set out herein are punishable pursuant to Articles 22 and 23 of the Statute.

Done at Arusha, Tanzania, on 11 December 2006.

[Signed] : Hassan Bubacar Jallow

Le Procureur c. Siméon NCHAMIHIGO

Affaire N° ICTR-2001-63

Fiche technique

• Nom : NCHAMIHIGO

• Prénom : Siméon

• Date de naissance : 1959

• Sexe : masculin

• Nationalité : rwandaise

• Fonction occupée au moment des faits incriminés: substitut du Procureur de la République en préfecture de Cyangugu, et secrétaire de la Coalition pour la Défense de la République (CDR) en préfecture de Cyangugu

• Date de confirmation de l'acte d'accusation: 23 juin 2001

• Date des modifications de l'acte d'accusation: 18 juillet 2006, 29 septembre 2006 et 11 décembre 2006

• Chefs d'accusation: génocide et crimes contre l'humanité (assassinat, extermination et autres actes inhumains)

• Date et lieu de l'arrestation: 19 mai 2001, en Tanzanie

• Date du transfert: 25 mai 2001

• Date de la comparution initiale: 29 juin 2001

• Date du début du procès: 25 septembre 2006

• Date et contenu du prononcé de la peine: 24 septembre 2008, condamné à l'emprisonnement à vie

• Procès en appel

Décision relative à la requête de la Défense aux fins de fixation de la date d'ouverture du procès
21 avril 2006 (ICTR-2001-63-I)

(Original : Anglais)

Chambre de première instance I

Juge : Erik Møse

Siméon Nchamihigo – Fixation de la date d'ouverture du procès – Date de tenue d'une conférence de mise en état – Requête prématurée

Instrument international cité :

Règlement de procédure et de preuve, Art. 62 (A) and 73

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Emmanuel Rukundo, Décision relative à la requête de la Défense aux fins de fixation de la date d'ouverture du procès ou, à défaut, du transfert de l'affaire devant une juridiction nationale, 1 juin 2005 (ICTR-2001-70) ; Chambre de première instance, Le Procureur c. Hormisdas Nsengimana, Decision on Nsengimana's Motion for the setting of a date for a pre-trial conference, a date for the commencement of trial, and for provisional release, 11 juillet 2005 (ICTR-2001-69)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIEGEANT en la personne du juge Erik Møse, désigné par la Chambre de première instance en vertu de l'article 73 du *Règlement de procédure et de preuve* (le « Règlement ») du Tribunal,

SAISI de la Requête de la Défense aux fins de fixation de la date d'ouverture du procès, déposée le 6 mars 2006,

VU la Réponse du Procureur, déposée le 8 mars 2006,

STATUE CI-APRÈS sur la Requête.

Introduction

1. Le 29 juin 2001 a eu lieu la comparution initiale de l'accusé qui a alors plaidé non coupable des trois chefs figurant dans l'acte d'accusation. La Défense se plaint que, depuis lors, le dossier n'a pas progressé et demande la fixation d'une date pour l'ouverture du procès. Elle demande en particulier que le procès commence en septembre 2006 et qu'une conférence préalable au procès soit programmée en conséquence. Le Procureur indique sa volonté de faire avancer la procédure et propose de tenir une conférence de mise en état, étant donné qu'une conférence préalable au procès est prématurée.

Délibérations

2. Lors de la comparution initiale de l'accusé, le Président de Chambre a déclaré : « La date du procès sera fixée plus tard »[1]. Cette indication répond aux exigences de l'article 62 (A) du Règlement et est conforme à la jurisprudence du Tribunal[2].

3. La Chambre est consciente du droit de l'accusé d'être jugé sans retard excessif. La date de commencement de tout procès dépend de divers facteurs, dont certains ne peuvent être déterminés sans consultation avec les parties. Afin de faciliter ladite consultation, la Chambre a chargé le Greffe de s'assurer de la disponibilité des parties pour la tenue d'une conférence de mise en état. La Défense a fait savoir qu'elle pouvait être disponible à partir du 15 mai 2006, et la conférence a été prévue pour le 19 mai 2006. Fixer une date pour l'ouverture du procès avant cette consultation serait prématuré,

PAR CES MOTIFS, LA CHAMBRE

DIT la requête prématurée.

Arusha, le 21 avril 2006.

[Signé] : Erik Møse

[1] Affaire *Nchamihigo,* compte rendu de l'audience du 29 juin 2001. p. 39.

[2] Affaire *Rukundo,* Décision relative à la requête de la Défense aux fins de fixation de la date d'ouverture du procès ou, à défaut, du transfert de l'affaire devant une juridiction nationale (Chambre de première instance), 1er juin 2005, par. 14 (« Concernant la question de la détermination de la date d'ouverture du procès, la Chambre réaffirme qu'une telle question relève de l'administration générale du Tribunal et de son calendrier judiciaire. Le Tribunal évalue les priorités en tenant compte notamment de la gravité des faits reprochés, du droit de tous les accusés à bénéficier d'un procès équitable dans des délais raisonnables et des disponibilités des services du Tribunal qui conditionnent la fixation du calendrier judiciaire »; traduction non certifiée). Ce passage a aussi été cité et approuvé dans l'affaire *Nsengimana Decision on Nsengimana's Motion for the Setting of a Date for a Pre-Trial Conference, a Date for the Commencement of Trial, and for Provisional Release,* 11 juillet 2005 (Chambre de première instance), par. 14 et 15.

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Décision sur la requête aux fins de prorogation du délai imparti pour répondre 28 juin 2006 (ICTR-2001-63-I)

(Original : Anglais)

Chambre de première instance I

Juge : Erik Møse, Président

Siméon Nchamihigo – Prorogation de délai – Importance des modifications proposées à l'acte d'accusation, Importance et complexité de l'affaire – Requête acceptée en partie

Instrument international cité :

Règlement de procédure et de preuve, Art. 73

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA,

SIEGEANT en Chambre constituée du juge Erik Møse, désigné par la Chambre de première instance en application de l'article 73 du Règlement de procédure et de preuve du Tribunal,

SAISI de la « Requête de la Défense aux fins de demander l'extension du délai pour répondre à la requête du Procureur en modification de l'acte d'accusation », déposée le 11 mai 2006,

CONSIDERANT la réponse du Procureur déposée le 15 mai 2006,

STATUE A PRESENT sur la requête.

1. L'acte d'accusation établi contre l'accusé est daté du 29 juin 2001. Le 5 mai 2006, le Procureur a déposé une requête aux fins d'être autorisé à modifier l'acte d'accusation.[1] Dans sa requête, la Défense demande que le délai qui lui est imparti pour répondre à la requête du Procureur soit reporté au 17 juillet 2006. Elle a par la suite indiqué à la Chambre qu'elle serait en mesure de déposer une réponse le 2 juillet 2006.

2. La Défense se plaint également de ne pas avoir reçu la version française du projet d'acte d'accusation modifié. La Chambre note que le 17 mai 2006, le Procureur a déposé ladite traduction.

3. Au vu des modifications proposées, parmi lesquelles figure notamment un chef d'accusation supplémentaire, et étant donné l'importance et la complexité de l'affaire, la Chambre convient que le délai réglementaire de cinq jours est trop court pour préparer une réponse adéquate. En conséquence, la Défense aura jusqu'au 3 juillet 2006 pour déposer sa réponse.

PAR CES MOTIFS, LA CHAMBRE :

[1] *Nchamihigo*, Requête du Procureur aux fins d'être autorisé à modifier l'acte d'accusation (Chambre de première instance), 5 mai 2006.

FAIT DROIT en partie à la requête et prolonge le délai jusqu'au 3 juillet 2006.

Arusha, le 28 juin 2006.

[Signé] : Erik Møse

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Acte d'accusation modifié (Conformément à la décision rendue par la Chambre de première instance I le 14 juillet 2006) 25 juillet 2006 (ICTR-2001-63-I)

(Original : Anglais)

I. Accusations

1. Le Procureur du Tribunal pénal international pour le Rwanda, en vertu des pouvoirs que lui confère l'article 17 du Statut du Tribunal pénal international pour le Rwanda (le « Statut »), accuse

Siméon Nchamihigo

des crimes suivants :

Premier chef d'accusation : génocide, en application des articles 2 (3) (a) et 6 (1) du Statut ;

Deuxième chef d'accusation : assassinat constitutif de crime contre l'humanité, en application des articles 3 (a) et 6 (1) du Statut ;

Troisième chef d'accusation : extermination constitutive de crime contre l'humanité, en application des articles 3 (b) et 6 (1) du Statut ;

Quatrième chef d'accusation : autres actes inhumains constitutifs de crimes contre l'humanité, en application des articles 3 (i) et 6 (1) du Statut.

II. L'accusé

2. Né le 8 septembre 1960 au Rwanda dans la commune de Gatare (préfecture de Cyangugu), Siméon Nchamihigo a occupé le poste de substitut du procureur de la République près le tribunal de première instance de Cyangugu de 1991 au 17 juillet 1994.

3. Entre le 1er janvier et le 17 juillet 1994, Siméon Nchamihigo a exercé la fonction de substitut du procureur au parquet de la République de Cyangugu sur la base d'un faux diplôme qu'il avait produit en 1991 à l'appui de sa candidature au poste de substitut du procureur au Rwanda. Le procureur général adjoint Charles Ntakirutimana avait ouvert une enquête sur l'affaire de son faux diplôme, mais cette enquête a été arrêtée à la suite du remplacement de Charles Ntakirutimana par un procureur général adjoint proche du MRND nommé Jean Damascène Musekura.

4. À une date inconnue située vers la mi-avril 1994, Siméon Nchamihigo, en sa qualité de substitut du procureur, a émis de faux mandats d'arrêt contre des Tutsis qui s'étaient réfugiés à la cathédrale ou à l'évêché de Cyangugu, notamment Gapfumu, afin de permettre à des fonctionnaires en service au parquet de la République, à des militaires et à des *Interahamwe* de les enlever pour les tuer et ils l'ont fait. Par cet acte, l'accusé entendait aider et encourager ces fonctionnaires, militaires et *Interahamwe* à enlever les réfugiés en question pour les tuer.

5. A une date inconnue située aussi vers la mi-avril 1994, Siméon Nchamihigo, en sa qualité de substitut du procureur, a émis de faux mandats d'arrêt contre des Tutsis qui avaient été transférés de divers lieux au stade Kamarampaka. Le même jour ou vers cette date, les membres du conseil de sécurité préfectoral, dont Siméon Nchamihigo, ont emmené ces Tutsis hors du stade. Siméon Nchamihigo a ordonné aux *Interahamwe* de tuer lesdits Tutsis, les a incités à agir de la sorte ou les a de toute autre manière aidés et encouragés à le faire, provoquant ainsi le meurtre de ces Tutsis par les *Interahamwe*.

6. D'une date située vers 1992 au 17 juillet 1994, Siméon Nchamihigo, en dépit de sa qualité de substitut du procureur, a participé à des activités politiques dans la préfecture de Cyangugu tant pour le compte du MRND, le parti du Président Juvénal Habyarimana, que pour celui du parti politique dénommé « Coalition pour la défense de la République » (CDR). Parti extrémiste hutu, la CDR était l'alliée du MRND et combattait les partis opposés au MRND.

7. Entre le 1er janvier et le 17 juillet 1994, Siméon Nchamihigo était également membre d'un groupe clandestin de fonctionnaires hutus en poste à Cyangugu, dénommé *Tuvindimwe*, qui avait été créé aux alentours de 1991. Ce groupe soutenait le MRND et la CDR. Il recrutait ses membres à la préfecture, à la cour d'appel, au parquet général, au tribunal de première instance et au parquet de la République. Les Tutsis et les Hutus modérés opposés au MRND n'étaient pas admis dans les rangs de *Tuvindimwe*, puisqu'ils étaient considérés comme complices des *Inkotanyi*, terme désignant les membres du Front patriotique rwandais (FPR) composé en majorité de Tutsis.

8. Entre le 1er février et le 17 juillet 1994, Siméon Nchamihigo était l'un des chefs des *Interahamwe* de la préfecture de Cyangugu. Il a recruté de nombreux jeunes hommes hutus comme *Interahamwe* et a demandé à un ancien militaire nommé Jean Bosco Habimana, *alias* Masudi, de former les *Interahamwe* au camp militaire de Karambo, en collaboration avec le sergent-chef Marc Ruberanziza, *alias* Bikomago, Christophe Nyandwi et le caporal Aimé, pour leur permettre de tuer les Tutsis. En outre, il a hébergé des *Interahamwe* à Cyangugu et leur donnait de la nourriture et de la boisson. Il a ordonné à ces *Interahamwe* de tuer les Tutsis, les a incités à agir de la sorte ou les a de toute autre manière aidés et encouragés à le faire, comme le Procureur le précisera plus loin dans l'exposé succinct des faits incriminés.

9. Entre le 6 avril et le 17 juillet 1994, Siméon Nchamihigo a joué le rôle de membre du conseil de sécurité préfectoral de Cyangugu et a participé aux réunions de ce conseil. Le conseil de sécurité préfectoral était composé des personnes suivantes, pour ne citer que celles-ci : Emmanuel Bakambiki, préfet de Cyangugu, Samuel Imanishimwe, commandant du camp militaire de Cyangugu, Vincent Munyarugerero, commandant de l'unité de gendarmerie de Cyangugu, Bernadin Bayingana, président du tribunal de première instance de Cyangugu, Paul Ndorimana, procureur de la République de Cyangugu souvent représenté par Siméon Nchamihigo, et les sous-préfets Emmanuel Kamonyo, Théodore Munyangabe et François Nzeyimana. Ses membres se réunissaient régulièrement pour délibérer sur les questions touchant à la sécurité dans la préfecture de Cyangugu. Le conseil de sécurité préfectoral a été particulièrement actif du 6 avril – après la mort du Président Habyarimana – au 17 juillet 1994. Au cours de cette période, il siégeait plus souvent et a pris certaines décisions concernant la mise en place de barrages routiers à Cyangugu, le transfert au stade Kamarampaka des réfugiés qui s'étaient mis à l'abri des violences dans tel ou tel lieu d'asile, l'établissement de listes de Tutsis et de Hutus modérés ainsi que le choix des divers réfugiés qui seraient enlevés du stade susmentionné, comme le Procureur le précisera plus loin dans l'exposé succinct des faits incriminés.

10. Le 11 avril 1994 ou vers cette date, le préfet Emmanuel Bakambiki a convoqué au bureau préfectoral une réunion à laquelle ont participé les sous-préfets, les bourgmestres, les autorités religieuses, les commerçants de premier plan qui finançaient le MRND, les chefs des *Interahamwe* ainsi que les autorités politiques membres du MRND, de la CDR, du MDR-*Power* et du PL-*Power*. Certains fonctionnaires, dont Siméon Nchamihigo, étaient aussi présents. Lors de la réunion, Siméon Nchamihigo et Callixte Nsabimana, directeur de l'usine de thé de Shangasha, ont été désignés pour contrôler l'évolution de la sécurité dans la zone de Gisuma et celle de Gafunzo. A la fin de la réunion, tous les contrôleurs de zone, dont Siméon Nchamihigo, se sont rendus au camp militaire de Karambo pour recevoir des armes du lieutenant Samuel Imanishimwe. Peu après, les contrôleurs de zone, dont Siméon Nchamihigo, ont distribué ces armes aux *Interahamwe* de leurs zones respectives et ordonné à ceux-ci de s'en servir pour tuer les Tutsis.

III. Allégations générales

11. Entre le 6 avril et le 17 juillet 1994 et à toutes les autres époques visées dans le présent acte d'accusation, les citoyens rwandais étaient classés selon les catégories ethniques ou raciales suivantes : Tutsis, Hutus et Twas.

12. Entre le 6 avril et le 17 juillet 1994, dans la préfecture de Cyangugu et toutes les autres régions du Rwanda, des militaires, des *Interahamwe* et des civils armés ont attaqué des membres du groupe ethnique tutsi, les ont tués ou ont porté atteinte à leur intégrité physique ou mentale, dans l'intention de détruire en tout ou en partie le groupe ethnique tutsi comme tel.

13. Entre le 6 avril et le 17 juillet 1994, dans la préfecture de Cyangugu et toutes les autres régions du Rwanda, des *Interahamwe,* des militaires et des civils armés ont tué des personnes spécialement désignées ou visées ou ont commis des meurtres généralisés dans le cadre d'attaques généralisées ou systématiques dirigées contre les civils tutsis et/ou les opposants hutus. Par ces attaques, les *Interahamwe,* les militaires et les civils armés en question ont tué des centaines de milliers de civils tutsis et d'opposants politiques hutus dans la préfecture de Cyangugu et toutes les autres régions du Rwanda.

IV. Responsabilité pénale individuelle

14. En application de l'article 6 (1) du Statut, Siméon Nchamihigo est pénalement responsable des crimes de génocide, d'assassinat constitutif de crime contre l'humanité, d'extermination constitutive de crime contre l'humanité et d'autres actes inhumains constitutifs de crimes contre l'humanité pour avoir planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter ces crimes. Il a donné aux personnes sur lesquelles il avait autorité en vertu de ses fonctions indiquées aux paragraphes 2, 3, 4, 5, 6, 8, 9 et 10 du présent acte d'accusation l'ordre de commettre lesdits crimes et a incité ou de toute autre manière aidé et encouragé celles qui n'étaient pas placées sous son autorité à les commettre.

15. Outre la responsabilité susvisée qu'il encourt en application de l'article 6 (1) du Statut pour avoir planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé été encouragé à planifier, préparer ou exécuter les crimes de génocide, d'assassinat constitutif de crime contre l'humanité, d'extermination constitutive de crime contre l'humanité et d'autres actes inhumains constitutifs de crimes contre l'humanité, Siméon Nchamihigo a participé sciemment et délibérément à une entreprise criminelle commune dans ses rôles exposés aux paragraphes 2, 3, 4, 5, 6, 8, 9, 10 et 15 du présent acte d'accusation. Cette entreprise criminelle commune avait pour but la destruction du groupe racial ou ethnique tutsi dans la préfecture de Cyangugu par la perpétration des crimes de génocide, d'assassinat constitutif de crime contre l'humanité, d'extermination constitutive de crime contre l'humanité et d'autres actes inhumains constitutifs de crimes contre l'humanité. Née le 6 avril 1994 ou vers cette date, elle a duré jusqu'au 17 juillet 1994.

16. Siméon Nchamihigo et les autres parties à l'entreprise criminelle commune partageaient l'intention de réaliser le but assigné d'un commun accord à cette entreprise. Pour l'atteindre, Siméon Nchamihigo a agi de concert avec les *Interahamwe* Christophe Nyandwi, Yusuf Munyakazi, Thompson Mubiligi, Pierre Munyandamutsa, *alias* Pressé, Vincent Mvuyekure, *alias* Tourné, Jean Bosco Habimana, *alias* Masudi, Anasthase Bizimungu, Patrick Nsengumuremyi, Faustin Sinashebeje et Nehemi Habirora, pour ne citer que ceux-là, ainsi que d'autres personnes qui n'étaient pas des *Interahamwe,* notamment Samuel Imanishimwe, commandant du camp militaire de Cyangugu, le sergent-chef Marc Ruberanziza, *alias* Bikomago, Vidaste Habimana et le préfet Emmanuel Bagambiki.

17. Outre sa participation à l'entreprise criminelle commune évoquée plus haut aux paragraphes 15 et 16, Siméon Nchamihigo est responsable des crimes de génocide, d'assassinat constitutif de crime contre l'humanité, d'extermination constitutive de crime contre l'humanité et d'autres actes inhumains constitutifs de crimes contre l'humanité en ce que ces crimes étaient les conséquences naturelles et prévisibles de la réalisation du but assigné d'un commun accord à l'entreprise criminelle commune. Siméon Nchamihigo entendait faciliter la réalisation de ce but. Au demeurant, il était prévisible que les crimes de génocide, d'assassinat constitutif de crime contre l'humanité, d'extermination constitutive de crime contre l'humanité et d'autres actes inhumains constitutifs de crimes contre l'humanité pourraient être perpétrés par tel ou tel membre du groupe, mais Siméon Nchamihigo a délibérément pris ce risque.

18. Les faits détaillés pour lesquels Siméon Nchamihigo est individuellement responsable des crimes retenus sont exposés dans le présent acte d'accusation comme suit :

- aux paragraphes 19 à 43 pour le crime de génocide,
- aux paragraphes 44 à 55 pour le crime d'assassinat constitutif de crime contre l'humanité,
- aux paragraphes 56 à 65 pour le crime d'extermination constitutive de crime contre l'humanité,
- aux paragraphes 66 à 70 pour le crime d'autres actes inhumains constitutifs de crimes contre l'humanité.

V. Crimes reprochés à l'accusé et exposé succinct des faits

Premier chef d'accusation : Génocide

19. Le Procureur du Tribunal pénal international pour le Rwanda accuse Siméon Nchamihigo de génocide, crime prévu à l'article 2 (3) (a) du Statut, en ce qu'entre le 6 avril et le 17 juillet 1994, dans la préfecture de Cyangugu (Rwanda), il s'est rendu responsable du meurtre de membres de la population tutsie ou d'atteintes graves à leur intégrité physique ou mentale dans l'intention de détruire, en tout ou en partie, un groupe ethnique ou racial comme tel, comme l'illustrent les faits exposés aux paragraphes 20 à 43 du présent acte d'accusation.

Exposé succinct des faits relatifs au premier chef d'accusation

20. Après le décès du Président rwandais Juvénal Habyarimana survenu le 6 avril 1994, le Gouvernement intérimaire formé le 8 avril 1994 a lancé une campagne nationale visant à mobiliser les forces armées gouvernementales, les milices civiles, les *Interahamwe*, l'Administration publique locale et les citoyens ordinaires pour combattre le Front patriotique rwandais (FPR), groupe d'opposition à caractère politico-militaire composé en majorité de Tutsis. Les forces armées du Gouvernement rwandais et les milices *Interahamwe* ont en particulier pris pour cible la population civile tutsie du Rwanda accusée d'être une complice intérieure (*ibyitso*) d'une armée d'invasion ou carrément une ennemie intérieure. Sous prétexte d'assurer la défense nationale, des citoyens rwandais ordinaires appartenant essentiellement à l'ethnie hutue qui avaient été chauffés à blanc par les autorités ont tué les Tutsis ainsi que les opposants politiques et pillé leurs biens. Entre le 6 avril et le 17 juillet 1994, des centaines de milliers de Tutsis et de Hutus modérés ont été tués à cause de la campagne en

question. Siméon Nchamihigo a participé à l'organisation et à la mise en œuvre de cette campagne de la manière suivante :

(a) Le 14 avril 1994 ou vers cette date, lors d'une réunion convoquée dans les locaux du MRND Cyangugu par le préfet Emmanuel Bakambiki, tous les contrôleurs de zone, dont Siméon Nchamihigo, ont été invités à rendre compte du déroulement des massacres dans leurs zones respectives. Siméon Nchamihigo a déclaré qu'il avait des difficultés à attaquer la paroisse de Shangi, de très nombreux Tutsis y ayant trouvé refuge, et que selon lui, il n'était pas possible de les tuer tous à l'aide d'armes traditionnelles. Il a dit avoir besoin d'armes à feu, telles que les fusils et les grenades. Par la suite, des fusils et des grenades lui ont été remis par le lieutenant Samuel Imanishimwe au camp militaire de Karambo. Il a distribué ces armes aux *Interahamwe* et leur a ordonné d'attaquer la paroisse de Shangi pour tuer les Tutsis ou les a incités à agir de la sorte. Les *Interahamwe* l'ont fait.

(b) Vers la fin du mois d'avril 1994, Siméon Nchamihigo a participé à une réunion au bureau du secteur de Gihundwe. Celle-ci avait pour objet la mise en place de mesures de sécurité et était présidée par le bourgmestre par intérim Manase Buvugamenshi. Y ont participé Védaste Habimana, Siméon Nchamihigo et Christophe Nyandwi, président des *Interahamwe* de la préfecture de Cyangugu, ainsi que d'autres personnes. Lors de la réunion, Siméon Nchamihigo a demandé si la sécurité régnait dans le secteur et s'il y avait encore des Tutsis cachés à tuer. Védaste Habimana a répondu que trois jours suffiraient pour « nettoyer » le secteur. Dans le cadre de la réunion, le terme « nettoyer » signifiait « achever de tuer tous les Tutsis ». Le « nettoyage » du secteur a effectivement continué. Par ses questions concernant le reste des Tutsis à tuer, Siméon Nchamihigo a incité des gens à tuer ces Tutsis et les a aidés et encouragés à le faire.

(c) Entre le 6 avril et le 17 juillet 1994, Siméon Nchamihigo, en collaboration avec le sergent-chef Marc Ruberanziza, *alias* Bikomago, Christophe Nyandwi, président des *Interahamwe* à l'échelon préfectoral, un ancien militaire nommé Jean Bosco Habimana, *alias* Masudi, et le caporal Aimé, pour ne citer que ces personnes-là, a organisé et supervisé la formation militaire des *Interahamwe* dans la préfecture de Cyangugu pour leur permettre de tuer les Tutsis et, partant, les aider et encourager à le faire.

(d) Entre le 6 avril et le 17 juillet 1994, Siméon Nchamihigo a participé avec le préfet Emmanuel Bakambiki, le lieutenant Samuel Imanishimwe et d'autres personnes à l'établissement de listes de Tutsis influents et d'opposants politiques hutus sur la base desquelles le conseil de sécurité préfectoral, dont Siméon Nchamihigo était membre, désignait les gens tuer. Il s'ensuit que Siméon Nchamihigo a planifié le meurtre de nombreux Tutsis et opposants politiques hutus, a ordonné aux *Interahamwe* et à d'autres civils hutus de le commettre, les a incités à agir de la sorte ou les a aidés et encouragés à le faire, comme le Procureur le précisera ci-après aux paragraphes 20 (e), 23, 24, 25, 26, 29, 30, 31, 40, 41, 42 et 43 du présent acte d'accusation.

(e) Entre le 6 avril et le 17 juillet 1994, Siméon Nchamihigo avait un stock d'armes chez lui à Cyangugu. Il distribuait ces armes aux *Interahamwe* et leur ordonnait d'aller tuer des personnes nommément désignées – Tutsis et opposants politiques hutus – ou lancer des attaques de grande envergure contre les Tutsis qui se rassemblaient parfois dans des lieux précis tels que les paroisses et les établissements scolaires ou les incitait à le faire, comme le précisent les paragraphes 28, 32, 33, 34, 35 et 37 du présent acte d'accusation.

21. Entre le 6 avril et le 17 juillet 1994, Siméon Nchamihigo a ordonné aux *Interahamwe* d'établir plusieurs barrages routiers dans la ville de Cyangugu ou les a incités à le faire et vérifiait si ces barrages étaient bien tenus. Il s'agit, entre autres, du barrage routier de Kadashya tenu par un des chefs des *Interahamwe* nommé Pierre Munyandamutsa, *alias* Pressé, qui avait des liens avec Siméon Nchamihigo, du barrage routier de Cyapa tenu par Vincent Mvuyekure, *alias* Tourné, et de celui de Gatandara tenu par un *Interahamwe* nommé Jean Bosco Habimana. Les barrages routiers avaient pour but d'empêcher les Tutsis et les opposants hutus de se réfugier dans des zones plus sures, afin de les tuer. Siméon Nchamihigo avait la haute main sur ces barrages et veillait à leur bon fonctionnement en

les inspectant plusieurs fois par jour. Il ordonnait aux *Interahamwe* qui les tenaient de tuer les Tutsis tentant de les franchir ou incitait les intéressés à le faire. Les *Interahamwe* placés sous ses ordres ont tué de nombreux Tutsis aux barrages routiers, parfois en sa présence. Emmanuel Bakambiki, préfet de Cyangugu, a désigné des gens comme Shabani Ndagijimana pour enlever les cadavres aux barrages routiers et dans toute la ville de Cyangugu à l'époque. Au barrage routier de Gatandara, Siméon Nchamihigo a ordonné aux *Interahamwe* de tuer de nombreux Tutsis qui avaient été choisis au stade Kamarampaka ou les a incités à le faire. Le barrage routier de Cyapa se trouvait tout près de sa maison. Il a ordonné de tuer des Tutsis à ce barrage, notamment le père Joseph Boneza, prêtre catholique, a incité les meurtriers à agir de la sorte ou les a aidés et encouragés le faire.

22. Le 7 avril 1994 ou vers cette date, Siméon Nchamihigo est arrivé à un barrage routier tenu par un groupe de jeunes Hutus à Kamembe. Il leur a donné l'ordre de rechercher tous les Tutsis et les complices du FPR pour les livrer aux *Interahamwe* et d'incendier toutes les localités où l'opposition était bien établie ou les a incités à le faire. A la suite des ordres de Siméon Nchamihigo ou de ses actes d'incitation, les *Interahamwe* ont traqué et tué de nombreuses personnes, qui étaient pour la plupart des hommes, des femmes et des enfants tutsis, le 7 avril 1994 ou vers cette date et au cours des mois suivants.

23. Le 15 avril 1994 ou vers cette date à Kamembe, Siméon Nchamihigo est arrivé à un barrage routier tenu par un groupe d'*Interahamwe* et de jeunes Hutus armés comptant une vingtaine de personnes. Il leur a donné lecture des noms de Tutsis qui, selon les informations qu'il avait reçues, se cachaient dans la ville de Kamembe et leur a ordonné de traquer ces Tutsis ou les a incités à le faire. Sur la liste des noms lus figuraient Aloys Gasali, Emilien Nsengumuremyi, Isidore Kagenza et le juge Jean-Marie Vianney Tabaro. Après la lecture des noms et avant son départ du barrage routier, Siméon Nchamihigo a ordonné aux *Interahamwe* de rechercher les Tutsis pour les tuer ou les a incités à agir de la sorte et les a aidés et encouragés à le faire en leur fournissant deux grenades. Par la suite, les *Interahamwe* ont traqué et tué les Tutsis.

24. En mai 1994, à une date inconnue, les *Interahamwe* ont retrouvé Emilien Nsengumuremyi et l'ont tué en exécution de l'ordre que Siméon Nchamihigo avait donné à un barrage routier à Kamembe ou par suite de l'incitation à laquelle il avait procédé à cet endroit le 15 avril 1994 ou vers cette date. Ils ont continué à rechercher les autres Tutsis dont Siméon Nchamihigo avait lu les noms en vue de les tuer.

25. Le 28 ou le 30 avril 1994 ou vers ces dates, Siméon Nchamihigo s'est rendu à un barrage routier tenu par des *Interahamwe*, dont Martin Ndorimana, et leur a ordonné de tuer un Tutsi nommé Canisius Kayihura, comptable de la préfecture de Cyangugu soupçonné d'avoir réussi à obtenir une carte d'identité indiquant qu'il appartenait au groupe ethnique hutu, ou les a incités à le tuer.

26. En mai 1994, à une date inconnue, Siméon Nchamihigo s'est rendu à un barrage routier à Kamembe et a ordonné aux *Interahamwe* qui tenaient le barrage de tuer un prêtre tutsi de la paroisse catholique de Mibirizi qui, selon lui, devait passer par ce barrage à bord d'un véhicule, sans révéler le nom du prêtre en question, ou les a incités à le tuer. Il avait donné des instructions similaires à tous les autres barrages routiers qu'il contrôlait et menacé de tuer les *Interahamwe* s'ils laissaient ce prêtre tutsi passer. En sa présence, les *Interahamwe* ont tué le prêtre visé dans le courant de la journée au barrage routier établi à l'entrée de Kamembe, près de la maison de l'accusé, et tenu par les *Interahamwe* Nehemi Habirora et Patrick Nsengumuremyi.

27. En mai 1994, à une date inconnue, Siméon Nchamihigo s'est rendu au barrage routier de Cyapa tenu par les *Interahamwe* et les gendarmes. Après avoir pris à bord du véhicule qu'il conduisait deux jeunes élèves tutsis nommés Uzier et Innocent qui faisaient de l'auto-stop pour rentrer chez eux, il les a remis aux *Interahamwe* et a ordonné à ceux-ci de tuer ces élèves ou les a incités à le faire. Les *Interahamwe* ont tué les deux jeunes élèves tutsis.

28. Après le décès du Président Juvénal Habyarimana survenu le 6 avril 1994, un grand nombre de Tutsis et d'opposants politiques hutus de la préfecture de Cyangugu fuyant les violences et les massacres se sont réfugiés dans des lieux jugés sûrs tels que la grande cathédrale, la paroisse de Mibirizi, la paroisse de Hanika, la paroisse de Nkanka, la paroisse de Shangi, la paroisse de Nyamasheke, l'hôpital de Mibirizi, l'école de Gihundwe et celle de Nyakanyinya, pour ne citer que ceux-là. D'autres Tutsis et opposants politiques hutus sont restés chez eux. Siméon Nchamihigo, en collaboration avec le lieutenant Samuel Imanishimwe, le sergent-chef Marc Ruberanziza, *alias* Bikomago, le sous-préfet Théodore Muyengabe et Christophe Nyandwi, président des *Interahamwe* à l'échelon préfectoral, a ordonné aux *Interahamwe* de lancer des attaques contre les Tutsis et les opposants politiques hutus qui avaient trouvé refuge dans les lieux sûrs susvisés et ceux qui étaient restés chez eux ou les a incités à le faire. Il a personnellement dirigé toutes ces attaques, à l'exception de celle perpétrée à la paroisse de Nkanka. Lors des attaques en question, Siméon Nchamihigo et les *Interahamwe* ont tué de nombreuses personnes, comme le précisent les paragraphes 29 à 37 du présent acte d'accusation.

29. Le 7 avril 1994 ou vers cette date, Siméon Nchamihigo, à la tête d'un groupe d'*Interahamwe*, a attaqué le domicile du docteur Nagafizi, directeur régional de la santé publique de Cyangugu appartenant à l'ethnie tutsie et membre du Parti libéral qui aurait été proche du FPR, ainsi que celui d'un commerçant hutu nommé Kongo qui était membre du PSD. Lors de ces attaques, les *Interahamwe* dirigés par Siméon Nchamihigo ont tué le docteur Nagafizi et Kongo sur son ordre, à son instigation ou avec son aide et ses encouragements.

30. Le 7 avril 1994 ou vers cette date, Siméon Nchamihigo a ordonné aux *Interahamwe* – plus précisément à Thompson Mubiligi – d'attaquer le domicile de Trojean Ndayisaba, commerçant tutsi membre du PSD, pour le tuer ou les a incités à le faire. Trojean Ndayisaba était accusé d'avoir reçu de l'argent du FPR. Lors de l'attaque, les *Interahamwe* ont tué tous les membres de sa famille et pillé leur maison. Ils ont tué Trojean Ndayisaba lui-même par la suite à une date inconnue entre la fin d'avril et le début de juillet 1994.

31. Le 7 ou le 9 avril 1994 ou vers ces dates, Siméon Nchamihigo a ordonné aux *Interahamwe*, notamment Joseph Habineza, *alias* Sekuse, de tuer Théoneste Karangwa, commerçant tutsi influent et membre influent de la section du PSD de Cyangugu ou les a incités à le tuer. Siméon Nchamihigo a demandé aux *Interahamwe* d'épargner l'épouse de Karangwa, celle-ci n'étant pas Tutsie. Par la suite, les *Interahamwe* ont attaqué et tué Théoneste Karangwa ainsi que son chauffeur Iyakaremye. Siméon Nchamihigo s'est emparé du véhicule de Théoneste Karangwa et l'a emporté plus tard à Bukavu, au Zaïre voisin.

32. Le 12 avril 1994 ou vers cette date, Siméon Nchamihigo a ordonné aux *Interahamwe*, notamment à Anasthase Bizimungu, ainsi qu'aux agents de la police communale, aux gendarmes et aux réservistes de l'armée d'attaquer l'école de Nyakanyinka pour tuer les Tutsis qui s'y étaient refugiés ou les a incités à le faire. Il a fourni aux assaillants des grenades et des fusils qui ont été utilisés lors de l'attaque. Ainsi, il les a aidés et encouragés à perpétrer cette attaque. Par suite, les *Interahamwe* et les autres assaillants ont tué environ 600 Tutsis.

33. Le 12 avril 1994 ou vers cette date, Siméon Nchamihigo, en collaboration avec Samuel Imanishimwe, commandant du camp militaire de Cyangugu, et le sous-préfet Kamonyo, a ordonné aux *Interahamwe*, notamment à Jean Charles Uwimana, *alias* Karoli, et un groupe de civils hutus d'attaquer la paroisse de Hanika pour tuer tous les réfugiés qui étaient présumés être des Tutsis ou les a incités à le faire. En raison de l'ordre que Siméon Nchamihigo avait donné ou de l'incitation à laquelle il avait procédé, les assaillants ont tué environ 1 500 personnes, y compris des enfants et des personnes âgées.

34. Le 14 ou le 15 avril 1994 vers 8 heures, Siméon Nchamihigo, à la tête d'un groupe d'*Interahamwe* et d'*Impuzamugambi* (miliciens de la CDR), a lancé une attaque contre les Tutsis du secteur de Gihundwe, visant en particulier ceux des cellules de Kabugi, Ruganda, Murindi et Murangi.

Lors de cette attaque, les *Interahamwe* dirigés par Siméon Nchamihigo ont tué de nombreux Tutsis et détruit leurs maisons sur son ordre, à son instigation ou avec son aide et ses encouragements.

35. Le 18 avril 1994 ou vers cette date, Siméon Nchamihigo, en collaboration avec le lieutenant Samuel Imanishimwe, le sergent-chef Marc Rubenziza, *alias* Bikomago, et le sous-préfet Théodore Muyengabe, était à la tête d'un groupe d'*Interahamwe* qui a attaqué le couvent et l'hôpital de Mibirizi ou de nombreux Tutsis s'étaient réfugies. Lors de ces attaques, les *Interahamwe* dirigés par Siméon Nchamihigo ont massacre les refugiés tutsis et pillé leurs biens sur son ordre, à son instigation ou avec son aide et ses encouragements. Après les attaques, Siméon Nchamihigo a récompensé les meurtriers par de la bière.

36. Vers la fin d'avril ou au début de mai 1994, trois jeunes filles tutsies nommées Joséphine Mukashema, Marie et Hélène se sont réfugiées chez un Hutu répondant au nom de Jonas. Siméon Nchamihigo a accusé Jonas et son frère Jonathan Niyikiza de cacher des *Inyenzi*. Aidé de l'un des *Interahamwe* placés sous ses ordres, il a fait sortir les trois filles tutsies de la maison de Jonas et les a amenées à un lieu inconnu. Le même jour, il a dit à Jonathan Niyikiza que les *Inyenzi* avaient été tuées et a menacé de tuer celui-ci au cas où il continuerait de cacher des Tutsis. Par ses actes, Siméon Nchamihigo a commis, ordonné, incité à commettre ou aidé et encouragé à commettre le meurtre des filles tutsies en question.

37. Entre le 20 et le 25 juin 1994 ou vers cette période, Siméon Nchamihigo a ordonné aux *Interahamwe* de sa zone, notamment à Jean-Paul, Vincent Mvuyekure, *alias* Tourné, et Nzeyimana, de se rendre à Kibuye en compagnie de Yusufu Munyakazi et des *Interahamwe* placés sous les ordres de celui-ci pour participer à un certain nombre d'attaques visant à tuer les Tutsis qui s'étaient réfugiés à Bisesero dans la préfecture de Kibuye ou les a incités à le faire. Ces *Interahamwe* se sont rendus à Bisesero à bord d'un des autobus de l'Onatracom et ont aidé ceux de Kibuye à tuer les Tutsis. Ensemble, ils ont tué de nombreux Tutsis. Lorsque les *Interahamwe* de sa zone sont rentrés de Kibuye après un ou deux jours, Siméon Nchamihigo leur a offert à boire et à manger à l'école de Gihundwe pour les récompenser.

38. Après le décès du Président Juvénal Habyarimana survenu le 6 avril 1994, Siméon Nchamihigo et d'autres membres du conseil de sécurité préfectoral, dont le préfet Emmanuel Bakambiki et le lieutenant Samuel Imanishimwe, commandant du camp militaire de Cyangugu, ont décidé de faire partir les réfugiés des lieux ou ils avaient trouvé asile et les ont regroupés au stade Kamarampaka de Cyangugu, officiellement pour mieux assurer leur sécurité, mais dans le but d'éliminer ceux qui étaient suspectés d'être complices des *Inkotanyi*.

39. Le 14 avril 1994 ou vers cette date, Siméon Nchamihigo, le lieutenant Samuel Imanishimwe et d'autres membres du conseil de sécurité préfectoral ont transféré au stade Kamarampaka les réfugiés qui se trouvaient à l'école de Gihundwe.

40. Le 15 avril 1994 ou vers cette date, Siméon Nchamihigo, le lieutenant Samuel Imanishimwe et d'autres membres du conseil de sécurité préfectoral ont transféré au stade Kamarampaka les réfugiés qui se trouvaient à la cathédrale de Cyangugu. Parmi les réfugiés transférés au stade ce jour-là figuraient Marianne Baziruwiha, Georges Nkusi, Albert Twagiramungu, Jean-Fidèle Murekezi, son épouse Christine Kanyamibwa et leurs enfants.

41. Le 16 avril 1994 ou vers cette date, Siméon Nchamihigo et d'autres membres du conseil de sécurité préfectoral, dont le préfet Emmanuel Bakambiki, le lieutenant Samuel Imanishimwe et Christophe Nyandwi, président des *Interahamwe* à l'échelon préfectoral, se sont rendus au stade Kamarampaka. A l'aide d'un mégaphone, le commandant du camp de gendarmerie a donné lecture des noms de civils accusés d'être complices des *Inkotanyi*. La liste des ces noms avait été établie par les membres du conseil de sécurité préfectoral, dont Siméon Nchamihigo. Y figuraient Benoît Sibomana, Jean-Fidèle Murekezi, Apiane Ndorimana, Albert Mugabo, Albert Twagiramungu, Ibambasi, Bernard Nkara, Trojean Nzisabira, Rémy Mihigo, Dominique Gapeli, Albert Mugabo et Marianne Baziruwiha.

Toutes ces personnes étaient des Tutsis, à l'exception de Marianne Baziruwiha qui était Hutue et membre influent de la section du PSD de Cyangugu. Elles ont été invitées à sortir de la foule et escortées par Siméon Nchamihigo et la délégation préfectorale jusqu'à l'extérieur du stade où attendaient dans des véhicules quatre Tutsis, dont Vital Nibagwire, Ananie Gatake et Jean-Marie Vianney Habimana, *alias* Gapfumu, que Siméon Nchamihigo et les autres membres de la délégation préfectorale avaient amenés de la cathédrale. Siméon Nchamihigo et la délégation préfectorale ont demandé à des militaires de conduire les 16 personnes choisies au camp de gendarmerie, sous prétexte de vouloir les y interroger.

42. Après que Siméon Nchamihigo et d'autres membres du conseil de sécurité préfectoral eurent amené au camp de gendarmerie les 16 personnes choisies le 16 avril 1994 ou vers cette date, ils ont retiré Marianne Baziruwiha du groupe et demande aux chauffeurs de conduire les 15 autres, tous des Tutsis, à un endroit situé près de la prison de Cyangugu. Siméon Nchamihigo a ordonné aux *Interahamwe* qu'il avait amenés du centre de Mutongo le même jour, dont Anasthase Bizimungu, de tuer les 15 Tutsis ou les a incités à le faire. A la suite de l'ordre donné par Siméon Nchamihigo ou de l'incitation à laquelle il avait procédé, les *Interahamwe* ont tué ces 15 Tutsis près de la prison de Cyangugu et jeté leurs cadavres dans une fosse d'aisances chez Gapfumu.

43. Le 18 avril 1994 ou vers cette date, Siméon Nchamihigo est rentré au stade Kamarampaka dans une délégation du conseil de sécurité préfectoral comprenant, entre autres, le préfet Emmanuel Bakambiki, Samuel Imanishimwe et le sous-préfet Emmanuel Kamonyo. A l'aide d'un mégaphone, Bakambiki a donné lecture d'une vingtaine de noms inscrits sur une liste que le conseil de sécurité préfectoral avait établie. La délégation a amené hors du stade les personnes inscrites sur la liste. Certaines personnes d'origine tutsie dont les noms n'avaient pas été lus, comme Antoine Nsengumuremyi et Félicien, ont néanmoins été emmenées du stade Kamarampaka ce jour-là avec les autres. Toutes les personnes retirées du stade ont été tuées par la suite et leurs corps jetés dans la rivière Gataranga ou dans des charniers. Siméon Nchamihigo et la délégation préfectorale ont aidé et encouragé les meurtriers à les tuer.

Deuxième chef d'accusation : Assassinat constitutif de crime contre l'humanité

44. Le Procureur du Tribunal pénal international pour le Rwanda accuse Siméon Nchamihigo d'assassinat constitutif de crime contre l'humanité, en application de l'article 3 (a) du Statut, en ce qu'entre le 6 avril et le 17 juillet 1994, en particulier dans la préfecture de Cyangugu, il s'est rendu responsable du meurtre d'un certain nombre de Tutsis et de personnes considérées comme des Tutsis, ainsi que d'opposants hutus, dans le cadre d'une attaque généralisée ou systématique dirigée contre une population civile en raison de son appartenance ethnique, raciale ou politique, comme le précisent les paragraphes 45 à 55 du présent acte d'accusation.

Exposé succinct des faits relatifs au deuxième chef d'accusation

45. Le 7 avril 1994 ou vers cette date, Siméon Nchamihigo, à la tête d'un groupe d'*Interahamwe*, a attaqué le domicile du docteur Nagafizi, directeur régional de la santé publique de Cyangugu appartenant à l'ethnie tutsie et membre du Parti libéral qui aurait été proche du FPR, ainsi que celui d'un commerçant hutu nommé Kongo qui était membre du PSD. Lors de ces attaques, les *Interahamwe* dirigés par Siméon Nchamihigo ont tué le docteur Nagafizi et Kongo sur son ordre, à son instigation ou avec son aide et ses encouragements.

46. Le 7 avril 1994 ou vers cette date, Siméon Nchamihigo a ordonné aux *Interahamwe* – plus précisément à Thompson Mubiligi – d'attaquer le domicile de Trojean Ndayisaba, commerçant tutsi membre du PSD, pour le tuer ou les a incités à le faire. Trojean Ndayisaba était accusé d'avoir reçu de l'argent du FPR. Lors de l'attaque, les *Interahamwe* ont tué tous les membres de sa famille et pillé leur maison. Ils ont tué Trojean Ndayisaba lui-même par la suite à une date inconnue entre la fin d'avril et le début de juillet 1994.

47. Le 7 ou le 9 avril 1994 ou vers ces dates, Siméon Nchamihigo, en collaboration avec Christophe Nyandwi, un des chefs des *Interahamwe* à l'échelon préfectoral, a ordonné aux *Interahamwe* de tuer Zacharie Serubyogo, commerçant hutu et député membre du MDR, ainsi que d'autres personnes ou les a incités à le faire. Par la suite, les *Interahamwe* ont tué Zacharie Serubyogo et de nombreuses personnes inconnues près du lac Kivu en présence de Siméon Nchamihigo. Après le meurtre de Zacharie Serubyogo, Siméon Nchamihigo a ordonné aux *Interahamwe* de rechercher un Tutsi nomme Théoneste Karangwa pour le tuer.

48. Le 7 ou le 9 avril 1994 ou vers ces dates, Siméon Nchamihigo a ordonné aux *Interahamwe,* notamment à Joseph Habineza, *alias* Sekuse, de tuer Théoneste Karangwa, commerçant tutsi influent et membre influent de la section du PSD de Cyangugu ou les a incités à le tuer. Siméon Nchamihigo a demandé aux *Interahamwe* d'épargner l'épouse de Karangwa, celle-ci n'étant pas Tutsie. Par la suite, les *Interahamwe* ont attaqué et tué Théoneste Karangwa ainsi que son chauffeur Iyakaremye. Siméon Nchamihigo s'est emparé du véhicule de Théoneste Karangwa et l'a emporté plus tard à Bukavu, au Zaïre voisin.

49. Le 15 avril 1994 ou vers cette date, Siméon Nchamihigo a formé le projet de tuer Marianne Baziruwiha et l'a recherchée ce jour-là, puisqu'il la considérait comme une complice des *Inkotanyi*. Hutue, Marianne Baziruwiha était le directeur régional de l'agriculture de la préfecture de Cyangugu et un membre influent de la section du PSD de Cyangugu.

50. Entre le 15 et le 17 avril 1994, Siméon Nchamihigo a ordonné à un groupe d'*Interahamwe* de tuer un jeune élève hutu nommé Jean de Dieu Gakwandi qu'il avait qualifié de traître et de complice des Tutsis ou a incité le groupe à le tuer. A cet effet, il a donné une grenade à un certain David Habanakwabo, *alias* Vicky, et lui a ordonné de se joindre à d'autres *Interahamwe* pour tuer Jean de Dieu Gakwandi. Les assaillants ont frappé Jean de Dieu Gakwandi à la tête à l'aide d'un gourdin, le blessant grièvement. Ils l'ont laissé inconscient sur les lieux, pensant qu'il était mort.

51. Le 28 ou le 30 avril 1994 ou vers ces dates, Siméon Nchamihigo s'est rendu un barrage routier tenu par des *Interahamwe,* dont Martin Ndorimana, et leur a ordonné de tuer un civil tutsi nommé Canisius Kayihura, comptable de la préfecture de Cyangugu qui avait réussi à obtenir une carte d'identité indiquant qu'il appartenait au groupe ethnique hutu, ou les a incités à le tuer.

52. Vers la fin d'avril ou au début de mai 1994, trois jeunes filles tutsies nommées Joséphine Mukashema, Marie et Hélène se sont refugiés chez un Hutu répondant au nom de Jonas. Siméon Nchamihigo a accusé Jonas et son frère Jonathan Niyikiza de cacher des *Inyenzi*. Aidé de l'un des *Interahamwe* placés sous ses ordres, il a fait sortir les trois filles tutsies de la maison de Jonas et les a amenées à un lieu inconnu. Le même jour, à son retour, il a dit à Jonathan Niyikiza que les *Inyenzi* avaient été tuées et a menacé de donner la mort à celui-ci au cas où il continuerait de cacher des Tutsis. Par ses actes, Siméon Nchamihigo a ordonné, incité à commettre ou aidé et encouragé à commettre le meurtre des filles tutsies en question.

53. En mai 1994, à une date inconnue, les *Interahamwe* ont retrouvé Emilien Nsengumuremyi et l'ont tué en exécution de l'ordre que Siméon Nchamihigo avait donné à un barrage routier à Kamembe ou par suite de l'incitation à laquelle il avait procédé à cet endroit le 15 avril 1994 ou vers cette date. Ils ont continué à rechercher les autres Tutsis dont Siméon Nchamihigo avait lu les noms en vue de les tuer, en raison de leur origine tutsie.

54. En mai 1994, à une date inconnue Siméon Nchamihigo s'est rendu à un barrage routier à Kamembe et a ordonné aux *Interahamwe* qui tenaient le barrage de tuer le père Joseph Boneza, prêtre tutsi de la paroisse catholique de Mibirizi qui devait passer par ce barrage à bord d'un véhicule, ou les a incités le tuer. Il avait donné des instructions similaires à tous les autres barrages routiers qu'il contrôlait et menacé de tuer les *Interahamwe* s'ils laissaient ce prêtre tutsi passer. En sa présence, les *Interahamwe* ont tué le père Joseph Boneza dans le courant de la journée au barrage routier établi à

l'entrée de Kamembe, près de la maison de l'accusé, et tenu par les *Interahamwe* Nehemi Habirora et Patrick Nsengumuremyi.

55. En mai 1994, à une date inconnue, Siméon Nchamihigo s'est rendu au barrage routier de Cyapa tenu par les *Interahamwe* et les gendarmes. Après avoir pris à bord du véhicule qu'il conduisait deux jeunes élèves tutsis nommés Uzier et Innocent qui faisaient de l'auto-stop pour rentrer chez eux, il les a remis aux *Interahamwe* et a ordonné ceux-ci de tuer ces élèves ou les a incités à le faire. Les *Interahamwe* ont tué les deux jeunes élèves tutsis.

Troisième chef d'accusation : Extermination constitutive de crime contre l'humanité

56. Le Procureur du Tribunal pénal international pour le Rwanda accuse Siméon Nchamihigo d'extermination constitutive de crime contre l'humanité, crime prévu à l'article 3 (b) du Statut, en ce qu'entre le 6 avril et le 17 juillet 1994, en particulier dans la préfecture de Cyangugu, il s'est rendu responsable du meurtre de Tutsis ou de personnes considérées comme des Tutsis et d'opposants hutus, commis sur une grande échelle dans le cadre d'une attaque généralisée ou systématique dirigée contre une population civile en raison de son appartenance politique, ethnique ou raciale, comme le Procureur le précisera ci-après dans l'exposé succinct des faits incriminés figurant aux paragraphes 57 à 65 du présent acte d'accusation.

Exposé succinct des faits relatifs au troisième chef d'accusation

57. Entre le 6 avril et le 17 juillet 1994, Siméon Nchamihigo, en collaboration avec le sergent-chef Marc Ruberanziza, *alias* Bikomago, et Christophe Nyandwi, président des *Interahamwe* à l'échelon préfectoral, a ordonné aux *Interahamwe* de lancer des attaques contre les civils tutsis et les opposants hutus qui s'étaient refugiés à la paroisse de Hanika, à la paroisse de Mibirizi, à l'hôpital de Mibirizi, à la paroisse de Nkanka, à la paroisse de Shangi, à la paroisse de Nyamasheke et dans d'autres lieux, ainsi que ceux qui étaient restés chez eux, ou a incité les *Interahamwe* à le faire. Il a personnellement dirigé toutes ces attaques, à l'exception de celle perpétrée à la paroisse de Nkanka. Lors des attaques en question, les *Interahamwe* et les autres civils hutus dirigés par Siméon Nchamihigo ont tué de nombreux civils qui avaient été ainsi pris pour cibles, comme le précisent les paragraphes 59, 60, 61, 62, 63, 64 et 65 du présent acte d'accusation.

58. Le 7 avril 1994 ou vers cette date, Siméon Nchamihigo est arrivé à un barrage routier tenu par un groupe de jeunes Hutus à Kamembe. Il leur a donné l'ordre de rechercher tous les Tutsis et les complices du FPR pour les livrer aux *Interahamwe* et d'incendier toutes les localités où l'opposition était bien établie ou les a incités à le faire. À la suite des ordres de Siméon Nchamihigo ou de ses actes d'incitation, les *Interahamwe* ont traqué et tué de nombreux civils qui étaient pour la plupart des hommes, des femmes et des enfants tutsis après le 7 avril 1994 ou vers cette date.

59. Le 7 avril 1994 ou vers cette date, Siméon Nchamihigo a ordonné aux *Interahamwe* – plus précisément à Thompson Mubiligi – d'attaquer le domicile de Trojean Ndayisaba, commerçant tutsi membre du PSD, pour le tuer ou les a incités à le faire. Trojean Ndayisaba était accusé d'avoir reçu de l'argent du FPR. Lors de l'attaque, les *Interahamwe* ont tué tous les membres de sa famille et pillé leur maison. Ils ont tué Trojean Ndayisaba lui-même par la suite à une date inconnue entre la fin d'avril et le début de juillet 1994.

60. Le 12 avril 1994 ou vers cette date, Siméon Nchamihigo a ordonné aux *Interahamwe*, notamment à Anasthase Bizimungu, ainsi qu'aux agents de la police communale, aux gendarmes et aux réservistes de l'armée d'attaquer l'école de Nyakanyinka pour tuer les civils tutsis qui s'y étaient réfugiés ou les a incités à le faire. Il a fourni aux assaillants des grenades et des fusils qui ont été

utilisés lors de l'attaque. Ainsi, il les a aidés et encouragés à perpétrer cette attaque. Par suite, les *Interahamwe* et les autres assaillants ont tué environ 600 civils tutsis.

61. Le 14 ou le 15 avril 1994 vers 8 heures, Siméon Nchamihigo, à la tête d'un groupe d'*Interahamwe* et d'*Impuzamugambi* (miliciens de la CDR), a lancé une attaque contre les Tutsis du secteur de Gihundwe, visant en particulier ceux des cellules de Kabugi, Ruganda, Mwindi et Murangi. Lors de cette attaque, les *Interahamwe* dirigés par Siméon Nchamihigo ont tué de nombreux Tutsis et détruit leurs maisons sur son ordre, à son instigation ou avec son aide et ses encouragements.

62. Le 15 avril 1994 ou vers cette date à Kamembe, Siméon Nchamihigo est arrivé à un barrage routier tenu par un groupe d'*Interahamwe* et de jeunes Hutus armés comptant une vingtaine de personnes. Il leur a donné lecture des noms de Tutsis qui, selon les informations qu'il avait reçues, se cachaient dans la ville de Kamembe et leur a ordonné de traquer ces Tutsis ou les a incités à le faire. Sur la liste des noms lus figuraient Aloys Gasali, Émilien Nsengumuremyi, Isidore Kagenza et le juge Jean-Marie Vianney Tabaro. Après la lecture des noms et avant son départ du barrage routier, Siméon Nchamihigo a ordonné aux *Interahamwe* de rechercher les Tutsis pour les tuer ou les a incités à agir de la sorte et les a aidés et encouragés à le faire en leur fournissant deux grenades. Par la suite, les *Interahamwe* ont traqué et tué les Tutsis.

63. En avril 1994, à une date inconnue, Siméon Nchamihigo, à la tête d'un groupe d'*Interahamwe*, a attaqué le couvent de Mibirizi où de nombreux civils tutsis avaient trouvé refuge. Lors de cette attaque, les *Interahamwe* dirigés par Siméon Nchamihigo ont massacré ces refugiés tutsis et pillé leurs biens sur son ordre, à son instigation ou avec son aide et ses encouragements.

64. Entre le 6 avril et le 17 juillet 1994, Siméon Nchamihigo, en collaboration avec le lieutenant Samuel Imanishimwe, Yusuf Munyakazi et des militaires appartenant aux Forces armées rwandaises (FAR), a pris pour cibles des militaires placés en détention et des civils qu'il accusait d'être complices du FPR et a ordonné de tuer, incité à tuer ou aidé et encouragé à tuer les militaires détenus, comme le précise le paragraphe 65 du présent acte d'accusation.

65. Ainsi, le 7 ou le 9 avril 1994 ou vers ces dates, Siméon Nchamihigo, en collaboration avec le lieutenant Samuel Imanishimwe et Yusuf Munyakazi, s'est rendu à la prison de Cyangugu et a ordonné au directeur de la prison de faire sortir 13 soldats des FAR qui avaient été incarcérés sous prétexte qu'ils étaient complices du FPR. Ces détenus ont été amenés au bureau préfectoral. Par la suite, Siméon Nchamihigo a ordonné de tuer, incité à tuer ou aidé et encouragé à tuer les 13 soldats des FAR. A la suite de l'ordre qu'il a donné, de l'incitation à laquelle il a procédé ou de l'aide et des encouragements qu'il a apportés, ces 13 soldats des FAR qui n'étaient plus des combattants ont été tués et leurs corps jetés dans l'un des jardins de la préfecture près du lac. Dans le courant de la journée, Siméon Nchamihigo a ordonné à d'autres prisonniers, dont Damien Ndamira, d'enlever les cadavres des 13 victimes du jardin pour les enterrer avec ceux de huit personnes inconnues trouvés au même endroit ou les a incités à le faire.

Quatrième chef d'accusation : Autres actes inhumains constitutifs de crime contre l'humanité

66. Le Procureur du Tribunal pénal international pour le Rwanda accuse Siméon Nchamihigo d'autres actes inhumains constitutifs de crimes contre l'humanité, crimes prévus à l'article 3 (i) du Statut, en ce qu'entre le 6 avril et le 17 juillet 1994, sur l'ensemble du territoire rwandais, en particulier dans la préfecture de Cyangugu, il s'est rendu responsable d'actes inhumains commis contre des civils tutsis ou des personnes considérées comme des Tutsis et des opposants hutus dans le cadre d'une attaque généralisée ou systématique dirigée contre une population civile en raison de son appartenance politique, ethnique ou raciale, comme le précisent les paragraphes 67 à 70 du présent acte d'accusation.

Exposé succinct des faits relatifs au quatrième chef d'accusation

67. Le 7 ou le 9 avril 1994 ou vers ces dates, Siméon Nchamihigo a ordonné aux *Interahamwe*, notamment à Joseph Habineza, *alias* Sekuse, de tuer Théoneste Karangwa, commerçant tutsi influent et membre influent de la section du PSD de Cyangugu ou les a incités le tuer. Siméon Nchamihigo a demandé aux *Interahamwe* d'épargner l'épouse de Karangwa, celle-ci n'étant pas Tutsie. A la suite de l'ordre qu'il avait donné ou de l'incitation à laquelle il avait procédé, les *Interahamwe* ont attaqué Théoneste Karangwa chez lui et l'ont attrapé. Après cela, les *Interahamwe* ont couvert Théoneste Karangwa de son propre matelas, versé de l'essence sur le matelas et brulé Théoneste Karangwa, lui faisant ainsi éprouver des douleurs et des souffrances atroces avant de mourir. Ils ont également tué son chauffeur nommé Iyakaremye. Siméon Nchamihigo s'est emparé du véhicule de Théoneste Karangwa et l'a emporté plus tard à Bukavu, au Zaïre voisin, avec d'autres véhicules et divers objets pillés durant les attaques.

68. Le 7 avril 1994 ou vers cette date, Siméon Nchamihigo a ordonné aux *Interahamwe* – plus précisément à Thompson Mubiligi – d'attaquer le domicile de Trojean Ndayisaba, commerçant tutsi membre du PSD, pour le tuer ou les a incités à le faire. Trojean Ndayisaba était accusé d'avoir reçu de l'argent du FPR. Lors de l'attaque, les *Interahamwe* ont brûlé tous les membres de sa famille dans leur véhicule, leur faisant ainsi éprouver des douleurs et des souffrances atroces avant de mourir. Ils ont tué Trojean Ndayisaba lui-même par la suite à une date inconnue entre la fin d'avril et le début de juillet 1994.

69. Entre le 15 et le 17 avril 1994, Siméon Nchamihigo a ordonné à un groupe d'*Interahamwe* de tuer un jeune élève hutu nommé Jean de Dieu Gakwandi qu'il avait qualifié de traître et de complice des Tutsis ou a incité le groupe à le tuer. A cet effet, il a donné une grenade à un certain David Habanakwabo, *alias* Vicky, et lui a ordonné de se joindre à d'autres *Interahamwe* pour tuer Jean de Dieu Gakwandi. Les assaillants ont frappé Jean de Dieu Gakwandi à la tête à l'aide d'un gourdin, lui faisant ainsi éprouver des douleurs et des souffrances. Jean de Dieu Gakwandi a été grièvement blessé. Les assaillants l'ont laissé inconscient sur les lieux, pensant qu'il était mort.

70. Le 16 avril 1994 ou vers cette date, Siméon Nchamihigo et d'autres membres du conseil de sécurité préfectoral, dont le lieutenant Samuel Imanishimwe et Christophe Nyandwi, ont retiré du stade Kamarampaka 15 Tutsis ainsi qu'une Hutue nommée Marianne Baziruwiha et ont amenés les 15 Tutsis à un endroit situé près de la prison après avoir déposé Marianne Baziruwiha au camp de gendarmerie. Parmi les 15 Tutsis retirés du stade par Siméon Nchamihigo et ses acolytes figuraient Jean-Fidèle Murekezi, Albert Twagiramungu et Gapfumu. Siméon Nchamihigo a ordonné aux *Interahamwe* qu'il avait amenés du centre de Mutongo le même jour, dont Anasthase Bizimungu, de tuer ces 15 Tutsis ou les a incités à le faire. À la suite de l'ordre donné par Siméon Nchamihigo ou de l'incitation à laquelle il avait procédé, les *Interahamwe* ont tué les 15 Tutsis près de la prison de Cyangugu et jeté leurs cadavres dans une fosse d'aisances chez Gapfumu, après avoir enlevé les organes génitaux de Jean-Fidèle Murekezi, ceux d'Albert Twagiramungu et le cœur de Gapfumu.

Les actes et les omissions de Siméon Nchamihigo exposés dans le présent acte d'accusation sont punissables selon les dispositions des articles 22 et 23 du Statut.

Arusha (Tanzanie), le … juillet 2006.

[Signé] : Hassan Bubacar Jallow

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Ordonnance de dépôt de documents (Articles 54 et 90 bis du Règlement de procédure et de preuve) 9 août 2006 (ICTR-2001-63-PT)

(Original : Anglais)

Chambre de première instance III

Juge : Dennis C. M. Byron, Président

Siméon Nchamihigo – Ordonnance de dépôt de documents, Transfèrement provisoire de témoins détenus – Levée de confidentialité

Instrument international cité :

Règlement de procédure et de preuve, Art. 90 bis et 90 bis (B)

Jurisprudence internationale citée :

T.P.I.R.: Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision relative à la requête demandant la levée de la confidentialité de certains écrits unilatéraux et la suppression des paragraphes 32.4 et 49 de l'acte d'accusation modifié, 3 mai 2005 (ICTR-98-44)

1. L'ouverture du procès en l'espèce est prévue pour le 25 septembre 2006. Le 24 juillet 2006, le Procureur a déposé une requête unilatérale intitulée *« Prosecutor's* Ex Parte *Motion for an Order for the Temporary Transfer of Witnesses Pursuant to Rule 90* bis *of the Rules of Procedure and Evidence »*. En application de l'article 90 *bis* (B) du Règlement, pour rendre une telle ordonnance la Chambre de première instance doit s'assurer que les conditions suivantes sont remplies :

> (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.

2. Le Procureur fait valoir que les conditions de transfèrement énoncées à l'article 90 *bis* du Règlement de procédure et de preuve sont remplies. À l'appui de sa requête, il joint copie de la lettre adressée aux autorités compétentes pour leur demander de confirmer que les conditions susmentionnées sont réunies. Il ajoute qu'il attend cette confirmation, et, pour l'instant, la Chambre n'est pas en possession de cette information. Or pour pourvoir se prononcer sur la Requête, la Chambre doit disposer d'un complément d'information.

3. Le Procureur justifie le dépôt de sa requête unilatérale par la nécessité de protéger l'identité des témoins. En règle générale, les requêtes doivent être formées sous l'empire du contradictoire[1]. La Chambre relève qu'en l'occurrence, les seules informations permettant d'identifier les témoins figurent dans les annexes et conclut qu'il n'y a pas de risque de révélation de l'identité des témoins si la partie principale de la requête est communiquée à la Défense.

PAR CES MOTIFS, LA CHAMBRE

[1] *Le Procureur c. Edouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera*, affaire N°ICTR-98-44-R66, Décision relative à la Requête demandant la levée de la confidentialité de certains écrits unilatéraux et la suppression des paragraphes 32. 4 et 49 de l'acte d'accusation modifié, Chambre de première instance, 3 mai 2005, par. 11.

I. ENJOINT au Procureur de présenter tous documents à l'appui de la Requête en vue du transfèrement provisoire de témoins détenus,

II. PRIE le greffe de lever la confidentialité des pages 1 à 3 de la Requête tout en maintenant le caractère unilatéral des annexes A, B et C.

Fait à Arusha, le 9 août 2006.

[Signé] : Dennis C. M. Byron

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Ordonnance relative à la communication de dossiers judiciaires (Art. 98 et 54 du Règlement) 12 octobre 2006 (ICTR-2001-63-T)

(Original : Anglais)

Chambre de première instance III

Juge : Dennis C. M. Byron, Président; Gberdao Gustave Kam; Robert Fremr

Siméon Nchamihigo – Ordonnance, Communication de dossiers judiciaires, Témoins

Instrument international cité :

Règlement de procédure et de preuve, Art. 54, 90 (G) et 98

Jurisprudence internationale citée :

T.P.I.R.: Chambre d'appel, Le Procureur c. Elizaphan Ntakirutimana et Gérard Ntakirutimana, Reasons for the Decision on Request for Admission of Additional Evidence, 8 septembre 2004 (ICTR-96-10 et ICTR-96-17)

1. Ce jour, 12 octobre 2006, la Défense a prié la Chambre d'inviter le Procureur à demander au Gouvernement rwandais communication du dossier judiciaire complet du témoin à charge LDB. Dès le début de la déposition de LDB hier matin, il était apparu que son dossier judiciaire n'avait pas été communiqué dans son intégralité par le Procureur. La Défense fait valoir que sur la liste des témoins à charge figurent neuf autres témoins détenus dont les dossiers judiciaires seraient également incomplets. Elle demande en outre à la Chambre de suspendre la procédure et d'enjoindre au Procureur de n'appeler à la barre aucun de ces témoins détenus jusqu'à communication de l'intégralité de leurs dossiers judiciaires.

2. Le Procureur affirme qu'il a tout mis en œuvre pour obtenir les dossiers judiciaires en question, qu'il a communiqué toutes les pièces qu'il avait reçues et qu'il n'était pas en son pouvoir d'obliger le Gouvernement rwandais à fournir des documents supplémentaires.

3. Des Chambres de première instance ont jugé que la communication de dossiers devait non seulement permettre à la Défense de se préparer, mais aussi aider la Chambre à apprécier la crédibilité des témoins conformément à l'article 90 (G) du Règlement[1].

4. Lors de la comparution du témoin LDD en début de semaine, la Défense avait pu établir que des dossiers judiciaires ne lui avaient pas encore été communiqués. Aussi la Chambre a-t-elle, le 10 octobre 2006, invité le Procureur à demander le dossier judiciaire du témoin LDD aux autorités rwandaises. Le cas échéant, en fonction des renseignements contenus dans les documents qui seraient communiqués, la Défense pouvait prier la Chambre de lui permettre de procéder à un nouveau contre-interrogatoire du témoin. À ce jour, le Procureur n'a toujours pas formulé ladite demande.

5. S'agissant de la présente demande de la Défense [12 octobre 2006], la Chambre relève que la Défense n'a pas précisé, parce qu'elle l'ignore, pour quels témoins les dossiers judiciaires demeurent incomplets. La Défense a établi que le dossier du témoin LDB était manifestement incomplet et soutenu que ce pourrait être le cas des dossiers d'autres témoins à charge détenus. En l'absence de précisions, il est impossible à ce stade de déterminer quels sont les dossiers judiciaires existants qui n'ont pas été communiqués.

6. Le Procureur est bien placé pour savoir quels sont les dossiers judiciaires existants pour les témoins à charge. Il lui incombe de faire le point des renseignements déjà communiqués et de vérifier ce qui manque dans les dossiers judiciaires des témoins à charge détenus. La Défense a accepté d'aider le Procureur dans cet exercice de vérification.

7. La Chambre estime donc nécessaire d'user du pouvoir que lui confère l'article 98 du Règlement et demande au Procureur de tout mettre en œuvre pour obtenir des autorités rwandaises les pièces qui manquent aux dossiers, et de communiquer celles-ci à la Défense. Cette décision se fonde également sur l'article 54 du Règlement qui dispose qu'à la demande d'une des parties ou de sa propre initiative, une Chambre de première instance peut délivrer les ordonnances nécessaires aux fins de la préparation ou de la conduite du procès. L'ordonnance de la Chambre ne relève aucunement la Défense de son obligation de préparer sa cause.

PAR CES MOTIFS, LA CHAMBRE

I. ENJOINT au Procureur et à la Défense de se réunir comme convenu demain, vendredi 13 octobre 2006, pour s'accorder sur les dossiers judiciaires à demander aux autorités rwandaises.

II. INVITE le Procureur, conformément à l'article 98 du Règlement, à adresser aux autorités rwandaises, d'ici au lundi 16 octobre 2006, une demande en vue de la communication des dossiers judiciaires requis et à déposer une copie de ladite demande à la Section de l'administration des Chambres. Il devra préciser aux autorités rwandaises que leur réponse est attendue d'ici au lundi 23 octobre 2006. Si celles-ci estiment avoir besoin de plus de temps pour se conformer à la demande, il leur sera demandé de préciser au Procureur quand elles seront en mesure de satisfaire à celle-ci. Toute réponse obtenue des autorités rwandaises sera déposée à la Section de l'administration des Chambres. En cas d'absence de réponse, la Chambre devra également en être informée par le canal de ladite Section.

III. MODIFIE sa décision orale du 10 octobre 2006 et INVITE le Procureur à inclure la demande qu'il devait adresser aux autorités rwandaises en vue de la communication du dossier judiciaire du témoin LDD dans celle qu'il leur adressera le 16 octobre 2006.

Fait à Arusha, le 12 octobre 2006.

[1] Voir, par exemple, *Le Procureur c. Elizaphan Ntakirutimana et Gérard Ntakirutimana*, affaires N°ICTR-96-10-A et N°ICTR-96-17-A, Reasons for the Decision on Request for Admission of Additional Evidence (Chambre d'appel), 8 septembre 2004, par. 47 à 52.

[Signé] : Dennis C. M. Byron; Gberdao Gustave Kam; Robert Fremr

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Deuxième version revue et corrigée de l'Acte d'accusation modifié (Etablie conformément à la décision rendue par la Chambre de première instance III le 7 décembre 2006) 11 décembre 2006 (ICTR-2001-63-I)

(Original : Anglais)

I. Accusations

1. Le Procureur du Tribunal pénal international pour le Rwanda, en vertu des pouvoirs que lui confère l'article 17 du Statut du Tribunal pénal international pour le Rwanda (le « Statut »), accuse

Siméon Nchamihigo

des crimes suivants :

Premier chef d'accusation : génocide, en application des articles 2 (3) (a) et 6 (1) du Statut ;

Deuxième chef d'accusation : assassinat constitutif de crime contre l'humanité, en application des articles 3 (a) et 6 (1) du Statut ;

Troisième chef d'accusation : extermination constitutive de crime contre l'humanité, en application des articles 3 (b) et 6 (1) du Statut ;

Quatrième chef d'accusation : autres actes inhumains constitutifs de crimes contre l'humanité, en application des articles 3 (i) et 6 (1) du Statut.

II. L'accusé

2. Né le 8 septembre 1960 au Rwanda dans la commune de Gatare (préfecture de Cyangugu), Siméon Nchamihigo a occupé le poste de substitut du procureur de la République près le tribunal de première instance de Cyangugu de 1991 au 17 juillet 1994.

3. Entre le 1er janvier et le 17 juillet 1994, Siméon Nchamihigo a exercé la fonction de substitut du procureur au parquet de la République de Cyangugu sur la base d'un faux diplôme qu'il avait produit en 1991 à l'appui de sa candidature au poste de substitut du procureur au Rwanda. Le procureur général adjoint Charles Ntakirutimana avait ouvert une enquête sur l'affaire de son faux diplôme, mais cette enquête a été arrêtée à la suite du remplacement de Charles Ntakirutimana par un procureur général adjoint proche du MRND nommé Jean Damascène Musekura.

4. À une date inconnue située vers la mi-avril 1994, Siméon Nchamihigo, en sa qualité de substitut du procureur, a émis de faux mandats d'arrêt contre des Tutsis qui s'étaient réfugiés à la cathédrale ou à l'évêché de Cyangugu, notamment Gapfumu, afin de permettre à des fonctionnaires en service au parquet de la République, à des militaires et à des *Interahamwe* de les enlever pour les tuer et ils l'ont

fait. Par cet acte, l'accusé entendait aider et encourager ces fonctionnaires, militaires et *Interahamwe* à enlever les réfugiés en question pour les tuer.

5. A une date inconnue située aussi vers la mi-avril 1994, Siméon Nchamihigo, en sa qualité de substitut du procureur, a émis de faux mandats d'arrêt contre des Tutsis qui avaient été transférés de divers lieux au stade Kamarampaka. Le même jour ou vers cette date, les membres du conseil de sécurité préfectoral, dont Siméon Nchamihigo, ont emmené ces Tutsis hors du stade. Siméon Nchamihigo a ordonné aux *Interahamwe* de tuer lesdits Tutsis, les a incités à agir de la sorte ou les a de toute autre manière aidés et encouragés à le faire, provoquant ainsi le meurtre de ces Tutsis par les *Interahamwe*.

6. D'une date située vers 1992 au 17 juillet 1994, Siméon Nchamihigo, en dépit de sa qualité de substitut du procureur, a participé à des activités politiques dans la préfecture de Cyangugu tant pour le compte du MRND, le parti du Président Juvénal Habyarimana, que pour celui du parti politique dénommé « Coalition pour la défense de la République » (CDR). Parti extrémiste hutu, la CDR était l'alliée du MRND et combattait les partis opposés au MRND.

7. Entre le 1er janvier et le 17 juillet 1994, Siméon Nchamihigo était également membre d'un groupe clandestin de fonctionnaires hutus en poste à Cyangugu, dénommé *Tuvindimwe*, qui avait été créé aux alentours de 1991. Ce groupe soutenait le MRND et la CDR. Il recrutait ses membres à la préfecture, à la cour d'appel, au parquet général, au tribunal de première instance et au parquet de la République. Les Tutsis et les Hutus modérés opposés au MRND n'étaient pas admis dans les rangs de *Tuvindimwe*, puisqu'ils étaient considérés comme complices des *Inkotanyi*, terme désignant les membres du Front patriotique rwandais (FPR) composé en majorité de Tutsis.

8. Entre le 1er février et le 17 juillet 1994, Siméon Nchamihigo était l'un des chefs des *Interahamwe* de la préfecture de Cyangugu. Il a recruté de nombreux jeunes hommes hutus dont Jean de Dieu Utabazi, Janvier Borauzima, Faustin Sinashebeje et Joseph Habineza, comme *Interahamwe* et a demandé à un ancien militaire nommé Jean Bosco Habimana, *alias* Masudi, de former les *Interahamwe* au camp militaire de Karambo, en collaboration avec le sergent-chef Marc Ruberanziza, *alias* Bikomago, Christophe Nyandwi et le caporal Aimé, pour leur permettre de tuer les Tutsis. En outre, il a hébergé des *Interahamwe* à Cyangugu et leur donnait de la nourriture et de la boisson. Il a ordonné à ces *Interahamwe* de tuer les Tutsis, les a incités à agir de la sorte ou les a de toute autre manière aidés et encouragés à le faire, comme le Procureur le précisera plus loin dans l'exposé succinct des faits incriminés.

9. Entre le 6 avril et le 17 juillet 1994, Siméon Nchamihigo a joué le rôle de membre du conseil de sécurité préfectoral de Cyangugu et a participé aux réunions de ce conseil. Le conseil de sécurité préfectoral était composé des personnes suivantes, pour ne citer que celles-ci : Emmanuel Bakambiki, préfet de Cyangugu, Samuel Imanishimwe, commandant du camp militaire de Cyangugu, Vincent Munyarugerero, commandant de l'unité de gendarmerie de Cyangugu, Bernadin Bayingana, président du tribunal de première instance de Cyangugu, Paul Ndorimana, procureur de la République de Cyangugu souvent représenté par Siméon Nchamihigo, et les sous-préfets Emmanuel Kamonyo, Théodore Munyangabe et François Nzeyimana. Ses membres se réunissaient régulièrement pour délibérer sur les questions touchant à la sécurité dans la préfecture de Cyangugu. Le conseil de sécurité préfectoral a été particulièrement actif du 6 avril – après la mort du Président Habyarimana – au 17 juillet 1994. Au cours de cette période, il siégeait plus souvent et a pris certaines décisions concernant la mise en place de barrages routiers à Cyangugu, le transfert au stade Kamarampaka des réfugiés qui s'étaient mis à l'abri des violences dans tel ou tel lieu d'asile, l'établissement de listes de Tutsis et de Hutus modérés ainsi que le choix des divers réfugiés qui seraient enlevés du stade susmentionné, comme le Procureur le précisera plus loin dans l'exposé succinct des faits incriminés.

10. Ce paragraphe a été déplacé pour créer le paragraphe 20 (f).

III. Allégations générales

11. Entre le 6 avril et le 17 juillet 1994 et à toutes les autres époques visées dans le présent acte d'accusation, les citoyens rwandais étaient classés selon les catégories ethniques ou raciales suivantes : Tutsis, Hutus et Twas.

12. Entre le 6 avril et le 17 juillet 1994, dans la préfecture de Cyangugu et toutes les autres régions du Rwanda, des militaires, des *Interahamwe* et des civils armés ont attaqué des membres du groupe ethnique tutsi, les ont tués ou ont porté atteinte à leur intégrité physique ou mentale, dans l'intention de détruire en tout ou en partie le groupe ethnique tutsi comme tel.

13. Entre le 6 avril et le 17 juillet 1994, dans la préfecture de Cyangugu et toutes les autres régions du Rwanda, des *Interahamwe,* des militaires et des civils armés ont tué des personnes spécialement désignées ou visées ou ont commis des meurtres généralisés dans le cadre d'attaques généralisées ou systématiques dirigées contre les civils tutsis et/ou les opposants hutus. Par ces attaques, les *Interahamwe,* les militaires et les civils armés en question ont tué des centaines de milliers de civils tutsis et d'opposants politiques hutus dans la préfecture de Cyangugu et toutes les autres régions du Rwanda.

IV. Responsabilité pénale individuelle

14. En application de l'article 6 (1) du Statut, Siméon Nchamihigo est pénalement responsable des crimes de génocide, d'assassinat constitutif de crime contre l'humanité, d'extermination constitutive de crime contre l'humanité et d'autres actes inhumains constitutifs de crimes contre l'humanité pour avoir planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter ces crimes. Il a donné aux personnes sur lesquelles il avait autorité en vertu de ses fonctions indiquées aux paragraphes 2, 3, 4, 5, 6, 8, 9 et 10 du présent acte d'accusation l'ordre de commettre lesdits crimes et a incité ou de toute autre manière aidé et encouragé celles qui n'étaient pas placées sous son autorité à les commettre.

15. Outre la responsabilité susvisée qu'il encourt en application de l'article 6 (1) du Statut pour avoir planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé été encouragé à planifier, préparer ou exécuter les crimes de génocide, d'assassinat constitutif de crime contre l'humanité, d'extermination constitutive de crime contre l'humanité et d'autres actes inhumains constitutifs de crimes contre l'humanité, Siméon Nchamihigo a participé sciemment et délibérément à une entreprise criminelle commune dans ses rôles exposés aux paragraphes 2, 3, 4, 5, 6, 8, 9, 10 et 15 du présent acte d'accusation. Cette entreprise criminelle commune avait pour but la destruction du groupe racial ou ethnique tutsi dans la préfecture de Cyangugu par la perpétration des crimes de génocide, d'assassinat constitutif de crime contre l'humanité, d'extermination constitutive de crime contre l'humanité et d'autres actes inhumains constitutifs de crimes contre l'humanité. Née le 6 avril 1994 ou vers cette date, elle a duré jusqu'au 17 juillet 1994.

16. Siméon Nchamihigo et les autres parties à l'entreprise criminelle commune partageaient l'intention de réaliser le but assigné d'un commun accord à cette entreprise. Pour l'atteindre, Siméon Nchamihigo a agi de concert avec les *Interahamwe* Christophe Nyandwi, Yusuf Munyakazi, Thompson Mubiligi, Pierre Munyandamutsa, *alias* Pressé, Vincent Mvuyekure, *alias* Tourné, Jean Bosco Habimana, *alias* Masudi, Anasthase Bizimungu, Patrick Nsengumuremyi, Faustin Sinashebeje et Nehemi Habirora, pour ne citer que ceux-là, ainsi que d'autres personnes qui n'étaient pas des *Interahamwe*, notamment Samuel Imanishimwe, commandant du camp militaire de Cyangugu, le sergent-chef Marc Ruberanziza, *alias* Bikomago, Vidaste Habimana et le préfet Emmanuel Bagambiki.

17. Outre sa participation à l'entreprise criminelle commune évoquée plus haut aux paragraphes 15 et 16, Siméon Nchamihigo est responsable des crimes de génocide, d'assassinat constitutif de crime contre l'humanité, d'extermination constitutive de crime contre l'humanité et d'autres actes inhumains

constitutifs de crimes contre l'humanité en ce que ces crimes étaient les conséquences naturelles et prévisibles de la réalisation du but assigné d'un commun accord à l'entreprise criminelle commune. Siméon Nchamihigo entendait faciliter la réalisation de ce but. Au demeurant, il était prévisible que les crimes de génocide, d'assassinat constitutif de crime contre l'humanité, d'extermination constitutive de crime contre l'humanité et d'autres actes inhumains constitutifs de crimes contre l'humanité pourraient être perpétrés par tel ou tel membre du groupe, mais Siméon Nchamihigo a délibérément pris ce risque.

18. Les faits détaillés pour lesquels Siméon Nchamihigo est individuellement responsable des crimes retenus sont exposés dans le présent acte d'accusation comme suit :

- aux paragraphes 19 à 43 pour le crime de génocide,
- aux paragraphes 44 à 55 pour le crime d'assassinat constitutif de crime contre l'humanité,
- aux paragraphes 56 à 69 pour le crime d'extermination constitutive de crime contre l'humanité,
- aux paragraphes 67 à 70 pour le crime d'autres actes inhumains constitutifs de crimes contre l'humanité.

V. Crimes reprochés à l'accusé et exposé succinct des faits

Premier chef d'accusation : Génocide

19. Le Procureur du Tribunal pénal international pour le Rwanda accuse Siméon Nchamihigo de génocide, crime prévu à l'article 2 (3) (a) du Statut, en ce qu'entre le 6 avril et le 17 juillet 1994, dans la préfecture de Cyangugu (Rwanda), il s'est rendu responsable du meurtre de membres de la population tutsie ou d'atteintes graves à leur intégrité physique ou mentale dans l'intention de détruire, en tout ou en partie, un groupe ethnique ou racial comme tel, comme l'illustrent les faits exposés aux paragraphes 20 à 43 du présent acte d'accusation.

Exposé succinct des faits relatifs au premier chef d'accusation

20. Après le décès du Président rwandais Juvénal Habyarimana survenu le 6 avril 1994, le Gouvernement intérimaire formé le 8 avril 1994 a lancé une campagne nationale visant à mobiliser les forces armées gouvernementales, les milices civiles, les *Interahamwe*, l'Administration publique locale et les citoyens ordinaires pour combattre le Front patriotique rwandais (FPR), groupe d'opposition à caractère politico-militaire composé en majorité de Tutsis. Les forces armées du Gouvernement rwandais et les milices *Interahamwe* ont en particulier pris pour cible la population civile tutsie du Rwanda accusée d'être une complice intérieure (*ibyitso*) d'une armée d'invasion ou carrément une ennemie intérieure. Sous prétexte d'assurer la défense nationale, des citoyens rwandais ordinaires appartenant essentiellement à l'ethnie hutue qui avaient été chauffés à blanc par les autorités ont tué les Tutsis ainsi que les opposants politiques et pillé leurs biens. Entre le 6 avril et le 17 juillet 1994, des centaines de milliers de Tutsis et de Hutus modérés ont été tués à cause de la campagne en question. Siméon Nchamihigo a participé à l'organisation et à la mise en œuvre de cette campagne de la manière suivante :

(a) Le 14 avril 1994 ou vers cette date, lors d'une réunion convoquée dans les locaux du MRND à Cyangugu par le préfet Emmanuel Bakambiki, tous les contrôleurs de zone, dont Siméon Nchamihigo, ont été invités à rendre compte du déroulement des massacres dans leurs zones respectives. Siméon Nchamihigo a déclaré qu'il avait des difficultés à attaquer la paroisse de Shangi, de très nombreux Tutsis y ayant trouvé refuge, et que selon lui, il n'était pas possible de les tuer tous à l'aide d'armes traditionnelles. Il a dit avoir besoin d'armes à feu, telles que les fusils et les grenades. Par la suite, des fusils et des grenades lui ont été remis par le lieutenant Samuel Immanishimwe au camp militaire de Karampo. Il a distribué ces armes aux *Interahamwe* et leur a ordonné d'attaquer la paroisse de Shangi pour tuer les Tutsis ou les a incités à agir de la sorte. Les *Interahamwe* l'ont fait en avril 1994 avec la participation de Yussuf Munyakazi et d'autres personnes.

(b) Vers la fin du mois d'avril 1994, Siméon Nchamihigo a participé à une réunion au bureau du secteur de Gihundwe. Celle-ci avait pour objet la mise en place de mesures de sécurité et était présidée par le bourgmestre par intérim Manase Buvugamenshi. Y ont participé Védaste Habimana, Siméon Nchamihigo et Christophe Nyandwi, président des *Interahamwe* de la préfecture de Cyangugu, ainsi que d'autres personnes. Lors de la réunion, Siméon Nchamihigo a demandé si la sécurité régnait dans le secteur et s'il y avait encore des Tutsis cachés à tuer. Védaste Habimana a répondu que trois jours suffiraient pour « nettoyer » le secteur. Dans le cadre de la réunion, le terme « nettoyer » signifiait « achever de tuer tous les Tutsis ». Le « nettoyage » du secteur a effectivement continué. Par ses questions concernant le reste des Tutsis à tuer, Siméon Nchamihigo a incité des gens à tuer ces Tutsis et les a aidés et encouragés à le faire.

(c) Entre le 6 avril et le 17 juillet 1994, Siméon Nchamihigo, en collaboration avec le sergent-major Marc Ruberanziza, *alias* Bikomago, Christophe Nyandwi, président des *Interahamwe* à l'échelon préfectoral, un ancien militaire nommé Jean Bosco Habimana, *alias* Masudi, et le caporal Aimé, pour ne citer que ces personnes-là, a organisé et supervisé la formation militaire des *Interahamwe* dans la préfecture de Cyangugu, à savoir Jean de Dieu Utabazi, Janvier Borauzima, Faustin Sinashebeje, Joseph Habineza et d'autres personnes, pour leur permettre de tuer les Tutsis et, partant, les aider et encourager à le faire.

(d) En avril et mai 1994, à des dates inconnues, Siméon Nchamihigo a participé avec le préfet Emmanuel Bakambiki, le lieutenant Samuel Immanishimwe et d'autres personnes à l'établissement de listes de Tutsis influents et d'opposants politiques hutus sur la base desquelles le conseil de sécurité préfectoral, dont Siméon Nchamihigo était membre, désignait les gens à tuer. Il s'ensuit que Siméon Nchamihigo a planifié le meurtre de nombreux Tutsis et opposants politiques hutus, a ordonné aux *Interahamwe* et à d'autres civils hutus de le commettre, les a incités à agir de la sorte ou les a aidés et encouragés à le faire, comme le Procureur le précisera aux paragraphes 20 (e), 23, 24, 25, 26, 29, 30, 31, 40, 41, 42 et 43 du présent acte d'accusation.

(e) Entre le 6 avril et le 17 juillet 1994, Siméon Nchamihigo avait un stock d'armes chez lui à Cyangugu. Il a distribué ces armes aux *Interahamwe,* dont David Habanakwabo et Jeremy Nsengiyumva, et leur a ordonné d'aller tuer des personnes nommément désignées – Tutsis et opposants politiques hutus – ou lancer des attaques de grande envergure contre les Tutsis qui se rassemblaient parfois dans des lieux précis tels que les paroisses et les établissements scolaires ou les a incités à le faire, comme le précisent les paragraphes 28, 32, 33, 34, 35 et 37 du présent acte d'accusation.

(f) Le 11 avril 1994 ou vers cette date, le préfet Emmanuel Bakambiki a convoqué au bureau préfectoral une réunion à laquelle ont participé les sous-préfets, les bourgmestres, les autorités religieuses, les commerçants de premier plan qui finançaient le MRND, les chefs des *Interahamwe* ainsi que les autorités politiques membres du MRND, de la CDR, du MDR-*Power* et du PL-*Power*. Certains fonctionnaires, dont Siméon Nchamihigo, étaient aussi présents. Lors de la réunion, Siméon Nchamihigo et Callixte Nsabimana, directeur de l'usine de thé de Shangasha, ont été désignés pour contrôler l'évolution de la sécurité dans la zone de Gisuma et celle de Gafunzo. A la fin de la réunion, tous les contrôleurs de zone, dont Siméon Nchamihigo, se sont rendus au camp militaire de Karambo pour recevoir des armes du lieutenant Samuel Imanishimwe. Peu après, les contrôleurs de zone, dont Siméon Nchamihigo, ont distribué ces armes aux *Interahamwe* de leurs zones respectives et ordonné à ceux-ci de s'en servir pour tuer les Tutsis.

21. Entre le 6 avril et le 17 juillet 1994, Siméon Nchamihigo a ordonné aux *Interahamwe* d'établir plusieurs barrages routiers dans la ville de Cyangugu ou les a incités à le faire et vérifiait si ces barrages étaient bien tenus. Il s'agit, entre autres, d'un barrage routier établi près de la Banque de Kigali et tenu par Thomas Mubiligi, de celui mis en place près du marché de Kamembe, de celui de Pendeza sur la route de l'aéroport et de celui de Kadashya, tenus par un des chefs des *Interahamwe* nommé Pierre Munyandamutsa, *alias* Pressé, qui avait des liens avec Siméon Nchamihigo, de celui de

Cuyapa tenu par Vincent Mvuyekure, *alias* Tourné, et de celui de Gatandara tenu par un *Interahamwe* nommé Jean Bosco Habimana. Les barrages routiers avaient pour but d'empêcher les Tutsis et les opposants hutus de se réfugier dans des zones plus sûres, afin de les tuer. Siméon Nchamihigo avait la haute main sur ces barrages et veillait à leur bon fonctionnement en les inspectant plusieurs fois par jour. Il ordonnait aux *Interahamwe* qui les tenaient de tuer les Tutsis tentant de les franchir ou incitait les intéressés à le faire. Les *Interahamwe* placés sous ses ordres ont tué de nombreux Tutsis aux barrages routiers, parfois en sa présence. Emmanuel Bakambiki, préfet de Cyangugu, a désigné des gens comme Shabani Ndagijimana pour enlever les cadavres aux barrages routiers et dans toute la ville de Cyangugu à l'époque. Au barrage routier de Gatandara, Siméon Nchamihigo a ordonné aux *Interahamwe* de tuer de nombreux Tutsis qui avaient été choisis au stade Karampaka ou les a incités à le faire. Le barrage routier de Cyapa se trouvait tout près de sa maison. Il a ordonné de tuer des Tutsis à ce barrage, notamment le père Joseph Boneza, prêtre catholique, a incité les meurtriers à agir de la sorte ou les a aidés et encouragés à le faire.

22. Le 7 avril 1994 ou vers cette date, Siméon Nchamihigo a parlé à Thomas Mubiligi et à un groupe de jeunes Hutus à Kamembe. A cette occasion, il leur a donné l'ordre de rechercher tous les Tutsis et les complices du FPR pour les livrer aux *Interahamwe* et d'incendier toutes les localités où l'opposition était bien établie ou les a incités à le faire. A la suite des ordres de Siméon Nchamihigo ou de ses actes d'incitation, les *Interahamwe* ont traqué et tué de nombreuses personnes, qui étaient pour la plupart des hommes, des femmes et des enfants tutsis, le 7 avril 1994 ou vers cette date et au cours des mois suivants.

23. Le 15 avril 1994 ou vers cette date à Kamembe, Siméon Nchamihigo est arrivé à un barrage routier établi près de la Banque de Kigali et tenu par Thomas Mubiligi ainsi qu'un groupe d'*Interahamwe* et de jeunes Hutus armés comptant une vingtaine de personnes. Il leur a donné lecture des noms de Tutsis qui, selon les informations qu'il avait reçues, se cachaient dans la ville de Kamembe et leur a ordonné de traquer ces Tutsis ou les a incités à le faire. Sur la liste des noms lus figuraient Aloys Gasali, Émilien Nsengumuremyi, Isidore Kagenza et le juge Jean-Marie Vianney Tabaro. Après la lecture des noms et avant son départ du barrage routier, Siméon Nchamihigo a ordonné aux *Interahamwe* de rechercher les Tutsis pour les tuer ou les a incités à agir de la sorte et les a aidés et encouragés à le faire en leur fournissant deux grenades. Par la suite, les *Interahamwe* ont traqué et tué les Tutsis.

24. En mai 1994, à une date inconnue, les *Interahamwe,* dont Vincent Mvuyekure, *alias* Tourné, ont retrouvé Émilien Nsengumuremyi et l'ont tué en exécution de l'ordre que Siméon Nchamihigo avait donné à un barrage routier établi près de la Banque de Kigali à Kamembe ou par suite de l'incitation à laquelle il avait procédé à cet endroit le 15 avril 1994 ou vers cette date. Ils ont continué à rechercher les autres Tutsis dont Siméon Nchamihigo avait lu les noms en vue de les tuer.

25. Le 28 ou le 30 avril 1994 ou vers ces dates, Siméon Nchamihigo s'est rendu à un barrage routier établi près de chez Paul Ndorimana et tenu par des *Interahamwe,* dont Martin Ndorimana. Il a ordonné à ceux-ci de tuer un Tutsi nommé Canisius Kayihura, comptable de la préfecture de Cyangugu soupçonné d'avoir réussi à obtenir une carte d'identité indiquant qu'il appartenait au groupe ethnique hutu, ou les a incités à le tuer.

26. En mai 1994, à une date inconnue, Siméon Nchamihigo s'est rendu aux barrages routiers mis en place à Kamembe, notamment à ceux établis près de Cuyapa et de la Banque de Kigali, et a ordonné aux *Interahamwe* qui les tenaient, dont Vincent Mvuyekure, *alias* Tourné, et Thomas Mubiligi, de tuer un prêtre tutsi de la paroisse catholique de Mibirizi qui, selon lui, devait passer par l'un de ces barrages à bord d'un véhicule, sans révéler le nom du prêtre en question, ou les a incités à le tuer. Il avait donné des instructions similaires à tous les autres barrages routiers qu'il contrôlait et menacé de tuer les *Interahamwe* s'ils laissaient ce prêtre tutsi passer. En sa présence, les *Interahamwe* ont tué le prêtre visé dans le courant de la journée au barrage routier établi à l'entrée de Kamembe, près de la maison de l'accusé, et tenu par les *Interahamwe* Nehemi Habirora et Patrick Nsengumuremyi. On a su par la suite que ce prêtre catholique était le père Joseph Boneza.

27. En mai 1994, à une date inconnue, Siméon Nchamihigo s'est rendu au barrage routier de Cyapa tenu par les *Interahamwe,* dont Vincent Mvuyekure, *alias* Tourné, et Patrick Nsengumuremyi, ainsi que les gendarmes. Après avoir pris à bord du véhicule qu'il conduisait deux jeunes élèves tutsis nommés Uzier et Innocent qui faisaient de l'auto-stop pour rentrer chez eux, il les a remis aux *Interahamwe* et a ordonné à ceux-ci de tuer ces élèves ou les a incités à le faire. Les *Interahamwe* ont tué les deux jeunes élèves tutsis.

28. Après le décès du Président Juvénal Habyarimana survenu le 6 avril 1994, un grand nombre de Tutsis et d'opposants politiques hutus fuyant les violences et les massacres se sont réfugiés dans des lieux de la préfecture de Cyangugu jugés sûrs tels que la grande cathédrale, la paroisse de Mibirizi, la paroisse de Hanika, la paroisse de Nkanka, la paroisse de Shangi, la paroisse de Nyamasheke, l'hôpital de Mibirizi, l'école de Gihundwe et celle de Nyakanyinya, pour ne citer que ceux-là. D'autres Tutsis et opposants politiques hutus sont restés chez eux. Siméon Nchamihigo, en collaboration avec le lieutenant Samuel Imanishimwe, le sergent-major Marc Ruberanziza, *alias* Bikomago, le sous-préfet Théodore Muyengabe et Christophe Nyandwi, président des *Interahamwe* à l'échelon préfectoral, a ordonné aux *Interahamwe*, dont Kamenero, de lancer des attaques contre les Tutsis et les opposants politiques hutus qui avaient trouvé refuge dans les lieux sûrs susvisés et ceux qui étaient restés chez eux ou les a incités à le faire. Il a personnellement dirigé toutes ces attaques, à l'exception de celle perpétrée à la paroisse de Nkanka. Lors des attaques en question, Siméon Nchamihigo et les *Interahamwe* ont tué de nombreuses personnes, comme le précisent les paragraphes 29 à 37 du présent acte d'accusation.

29. Le 7 avril 1994 ou vers cette date, Siméon Nchamihigo, à la tête d'un groupe d'*Interahamwe* dont faisait partie Christophe Nyandwi, a attaqué le domicile du docteur Nagafizi, responsable régional de la santé publique de Cyangugu appartenant à l'ethnie tutsie et membre du Parti libéral qui aurait été proche du FPR, ainsi que celui d'un commerçant hutu nommé Kongo qui était membre du PSD. Lors de ces attaques, les *Interahamwe* dirigés par Siméon Nchamihigo ont tué le docteur Nagafizi et Kongo sur son ordre, à son instigation ou avec son aide et ses encouragements.

30. Le 7 avril 1994 ou vers cette date, Siméon Nchamihigo a ordonné aux *Interahamwe* – plus précisément à Thompson Mubiligi – d'attaquer le domicile de Trojean Ndayisaba, commerçant tutsi membre du PSD, pour le tuer ou les a incités à le faire. Trojean Ndayisaba était accusé d'avoir reçu de l'argent du FPR. Lors de l'attaque, les *Interahamwe* ont tué tous les membres de sa famille et pillé leur maison. Ils ont tué Trojean Ndayisaba lui-même par la suite à une date inconnue entre la fin d'avril et le début de juillet 1994.

31. Le 7 ou le 9 avril 1994 ou vers ces dates, Siméon Nchamihigo a ordonné aux *Interahamwe*, notamment Joseph Habineza, *alias* Sekuse, de tuer Théoneste Karangwa, commerçant tutsi influent et membre influent de la section du PSD de Cyangugu ou les a incités à le tuer. Il a demandé aux *Interahamwe* d'épargner l'épouse de Karangwa, celle-ci n'étant pas Tutsie. Par la suite, les *Interahamwe* ont attaqué et tué Théoneste Karangwa ainsi que son chauffeur Iyakaremye. Siméon Nchamihigo s'est emparé du véhicule de Théoneste Karangwa et l'a emporté plus tard à Bukavu, au Zaïre voisin.

32. Le 12 avril 1994 ou vers cette date, Siméon Nchamihigo a ordonné aux *Interahamwe*, notamment à Anasthase Bizimungu, ainsi qu'aux agents de la police communale, aux gendarmes et aux réservistes de l'armée d'attaquer l'école de Nyakanyinka pour tuer les Tutsis qui s'y étaient refugiés ou les a incités à le faire. Il a fourni aux assaillants des grenades et des fusils qui ont été utilisés lors de l'attaque. Ainsi, il les a aidés et encouragés à perpétrer cette attaque. Par suite, les *Interahamwe* et les autres assaillants ont tué environ 600 Tutsis.

33. Le 12 avril 1994 ou vers cette date, Siméon Nchamihigo, en collaboration avec Samuel Imanishimwe, commandant du camp militaire de Cyangugu, et le sous-préfet Kamonyo, a ordonné aux *Interahamwe*, notamment à Jean Charles Uwimana, *alias* Karoli, et un groupe de civils hutus

d'attaquer la paroisse de Hanika pour tuer tous les réfugiés qui étaient présumés être des Tutsis ou les a incités à le faire. En raison de l'ordre que Siméon Nchamihigo avait donné ou de l'incitation à laquelle il avait procédé, les assaillants ont tué environ 1 500 personnes, y compris des enfants et des personnes âgées.

34. Le 14 ou le 15 avril 1994 vers 8 heures, Siméon Nchamihigo, à la tête d'un groupe d'*Interahamwe* et d'*Impuzamugambi* (miliciens de la CDR) dont faisait partie Martin Ndorimana, a lancé une attaque contre les Tutsis du secteur de Gihundwe, visant en particulier ceux des cellules de Kabugi, Ruganda, Murindi et Murangi. Lors de cette attaque, les *Interahamwe* dirigés par Siméon Nchamihigo ont tué de nombreux Tutsis et détruit leurs maisons sur son ordre, à son instigation ou avec son aide et ses encouragements.

35. Le 18 avril 1994 ou vers cette date, Siméon Nchamihigo, en collaboration avec le lieutenant Samuel Imanishimwe, le sergent-major Marc Rubenziza, *alias* Bikomago, et le sous-préfet Théodore Muyengabe, était à la tête d'un groupe d'*Interahamwe* comprenant le gendarme Mandela et Anathase Bizimungu, entre autres, qui a attaqué le couvent et l'hôpital de Mibirizi où de nombreux Tutsis s'étaient réfugiés. Lors de ces attaques, les *Interahamwe* dirigés par Siméon Nchamihigo ont massacré les réfugiés tutsis et pillé leurs biens sur son ordre, à son instigation ou avec son aide et ses encouragements. Après les attaques, Siméon Nchamihigo a récompensé les meurtriers par de la bière.

36. Vers la fin d'avril ou au début de mai 1994, trois jeunes filles tutsies nommées Joséphine Mukashema, Marie et Hélène se sont réfugiées chez un Hutu répondant au nom de Jonas. Siméon Nchamihigo a accusé Jonas et son frère Jonathan Niyikiza de cacher des *Inyenzi*. Aidé de l'un des *Interahamwe* placés sous ses ordres, à savoir Johnson Banga Kaboyi, il a fait sortir les trois filles tutsies de la maison de Jonas et les a amenées à un lieu inconnu. Le même jour, il a dit à Jonathan Niyikiza que les *Inyenzi* avaient été tuées et a menacé de donner la mort à celui-ci au cas où il continuerait de cacher des Tutsis. Par ses actes, Siméon Nchamihigo a commis, ordonné, incité à commettre ou aidé et encouragé à commettre le meurtre des filles tutsies en question.

37. Entre le 20 et le 25 juin 1994 ou vers cette période, Siméon Nchamihigo a ordonné aux *Interahamwe* de sa zone, notamment à Jean-Paul, Vincent Mvuyekure, *alias* Tourné, et Nzeyimana, de se rendre à Kibuye en compagnie de Yusufu Munyakazi et des *Interahamwe* placés sous les ordres de celui-ci pour participer à un certain nombre d'attaques visant à tuer les Tutsis qui s'étaient réfugiés à Bisesero dans la préfecture de Kibuye ou les a incités à le faire. Ces *Interahamwe* se sont rendus à Bisesero à bord d'un des autobus de l'Onatracom et ont aidé ceux de Kibuye à tuer les Tutsis. Ensemble, ils ont tué de nombreux Tutsis. Lorsque les *Interahamwe* de sa zone sont rentrés de Kibuye après un ou deux jours, Siméon Nchamihigo leur a offert à boire et à manger à l'école de Gihundwe pour les récompenser.

38. Après le décès du Président Juvénal Habyarimana survenu le 6 avril 1994, Siméon Nchamihigo et d'autres membres du conseil de sécurité préfectoral, dont le préfet Emmanuel Bakambiki et le lieutenant Samuel Imanishimwe, commandant du camp militaire de Cyangugu, ont décidé de faire partir les réfugiés des lieux ou ils avaient trouvé asile et les ont regroupés au stade Kamarampaka de Cyangugu, officiellement pour mieux assurer leur sécurité, mais dans le but d'éliminer ceux qui étaient suspectés d'être complices des *Inkotanyi*.

39. Le 14 avril 1994 ou vers cette date, Siméon Nchamihigo, le lieutenant Samuel Imanishimwe et d'autres membres du conseil de sécurité préfectoral, dont Emmanuel Bakambiki, ont transféré au stade Kamarampaka les réfugiés qui se trouvaient à l'école de Gihundwe.

40. Le 15 avril 1994 ou vers cette date, Siméon Nchamihigo, le lieutenant Samuel Imanishimwe et d'autres membres du conseil de sécurité préfectoral, dont Emmanuel Bakambiki, ont transféré au stade Kamarampaka les réfugiés qui se trouvaient à la cathédrale de Cyangugu. Parmi les réfugiés transférés au stade ce jour-là figuraient Marianne Baziruwiha, Georges Nkusi, Albert Twagiramungu, Jean-Fidèle Murekezi, son épouse Christine Kanyamibwa et leurs enfants.

41. Le 16 avril 1994, Siméon Nchamihigo et d'autres membres du conseil de sécurité préfectoral, dont le préfet Emmanuel Bakambiki, le lieutenant Samuel Imanishimwe, Christophe Nyandwi, président des *Interahamwe* à l'échelon préfectoral, le major Munyamgerero, le sous-préfet Théodore Munyangabe, le procureur Paul Ndorimana, Siméon Remesh, directeur de l'école primaire de Gihundwe, Ngagi, douanier, et le sergent-major Marc Ruberanziza, se sont rendus au stade Kamarampaka. A l'aide d'un mégaphone, le commandant du camp de gendarmerie a donné lecture des noms de civils accusés d'être complices des *Inkotanyi*. La liste des ces noms avait été établie par les membres du conseil de sécurité préfectoral, dont Siméon Nchamihigo. Y figuraient Benoît Sibomana, Jean-Fidèle Murekezi, Apiane Ndorimana, Albert Mugabo, Albert Twagiramungu, Ibambasi, Bernard Nkara, Trojean Nzisabira, Rémy Mihigo, Dominique Gapeli, Albert Mugabo et Marianne Baziruwiha. Toutes ces personnes étaient des Tutsis, à l'exception de Marianne Baziruwiha qui était hutue et membre influent de la section du PSD de Cyangugu. Elles ont été invitées à sortir de la foule et escortées par Siméon Nchamihigo et la délégation préfectorale jusqu'à l'extérieur du stade où attendaient dans des véhicules quatre Tutsis, dont Vital Nibagwire, Ananie Gatake et Jean-Marie Vianney Habimana, *alias* Gapfumu, que Siméon Nchamihigo et les autres membres de la délégation préfectorale avaient amenés de la cathédrale. Siméon Nchamihigo et la délégation préfectorale ont demandé à des militaires de conduire les 16 personnes choisies au camp de gendarmerie, sous prétexte de vouloir les y interroger.

42. Après avoir amené au camp de gendarmerie les 16 personnes choisies le 16 avril 1994 ou vers cette date, Siméon Nchamihigo et les autres membres du conseil de sécurité préfectoral ont retiré Marianne Baziruwiha du groupe et demandé aux chauffeurs de conduire les 15 autres, tous des Tutsis, à un endroit situé près de la prison de Cyangugu. Siméon Nchamihigo a ordonné aux *Interahamwe* qu'il avait amenés du centre de Mutongo le même jour, dont Anasthase Bizimungu et Jean Bosco Habimana, de tuer les 15 Tutsis ou les a incités à le faire. A la suite de l'ordre donné par Siméon Nchamihigo ou de l'incitation à laquelle il avait procédé, les *Interahamwe* ont tué ces 15 Tutsis près de la prison de Cyangugu et jeté leurs cadavres dans une fosse d'aisances chez Gapfumu.

43. Le 18 avril 1994 ou vers cette date, Siméon Nchamihigo est rentré au stade Kamarampaka dans une délégation du conseil de sécurité préfectoral comprenant, entre autres, le préfet Emmanuel Bakambiki, Samuel Imanishimwe et le sous-préfet Emmanuel Kamonyo. A l'aide d'un mégaphone, Bakambiki a donné lecture d'une vingtaine de noms inscrits sur une liste que le conseil de sécurité préfectoral avait établie. La délégation a amené hors du stade les personnes inscrites sur la liste. Certaines personnes d'origine tutsie dont les noms n'avaient pas été lus, comme Antoine Nsengumuremyi et Félicien, ont néanmoins été emmenées du stade Kamarampaka ce jour-là avec les autres. Toutes les personnes retirées du stade ont été tuées par la suite et leurs corps jetés dans la rivière Gataranga ou dans des charniers. Siméon Nchamihigo et la délégation préfectorale ont aidé et encouragé les meurtriers à les tuer.

Deuxième chef d'accusation : Assassinat constitutif de crime contre l'humanité

44. Le Procureur du Tribunal pénal international pour le Rwanda accuse Siméon Nchamihigo d'assassinat constitutif de crime contre l'humanité, en application de l'article 3 (a) du Statut, en ce qu'entre le 6 avril et le 17 juillet 1994, en particulier dans la préfecture de Cyangugu, il s'est rendu responsable du meurtre d'un certain nombre de Tutsis et de personnes considérées comme des Tutsis, ainsi que d'opposants hutus, dans le cadre d'une attaque généralisée ou systématique dirigée contre une population civile en raison de son appartenance ethnique, raciale ou politique, comme le précisent les paragraphes 45 à 55 du présent acte d'accusation.

Exposé succinct des faits relatifs au deuxième chef d'accusation

45. Le 7 avril 1994 ou vers cette date, Siméon Nchamihigo, à la tête d'un groupe d'*Interahamwe* dont faisait partie Christophe Nyandwi, a attaqué le domicile du docteur Nagafizi, responsable

régional de la santé publique de Cyangugu appartenant à l'ethnie tutsie et membre du Parti libéral qui aurait été proche du FPR, ainsi que celui d'un commerçant hutu nommé Kongo qui était membre du PSD. Lors de ces attaques, les *Interahamwe* dirigés par Siméon Nchamihigo ont tué le docteur Nagafizi et Kongo sur son ordre, à son instigation ou avec son aide et ses encouragements.

46. Le 7 avril 1994 ou vers cette date, Siméon Nchamihigo a ordonné aux *Interahamwe* – plus précisément à Thompson Mubiligi – d'attaquer le domicile de Trojean Ndayisaba, commerçant tutsi membre du PSD, pour le tuer ou les a incités à le faire. Trojean Ndayisaba était accusé d'avoir reçu de l'argent du FPR. Lors de l'attaque, les *Interahamwe* ont tué tous les membres de sa famille et pillé leur maison. Ils ont tué Trojean Ndayisaba lui-même par la suite à une date inconnue entre la fin d'avril et le début de juillet 1994.

47. Le 7 ou le 9 avril 1994 ou vers ces dates, Siméon Nchamihigo, en collaboration avec Christophe Nyandwi, un des chefs des *Interahamwe* à l'échelon préfectoral, a ordonné aux *Interahamwe,* dont Joseph Habineza, de tuer Zacharie Serubyogo, commerçant hutu et député membre du MDR, ainsi que d'autres personnes ou les a incités à le faire. Par la suite, les *Interahamwe* ont tué Zacharie Serubyogo et de nombreuses personnes inconnues près du lac Kivu en présence de Siméon Nchamihigo. Après le meurtre de Zacharie Serubyogo, Siméon Nchamihigo a ordonné aux *Interahamwe* de rechercher un Tutsi nommé Théoneste Karangwa pour le tuer.

48. Le 7 ou le 9 avril 1994 ou vers ces dates, Siméon Nchamihigo a ordonné aux *Interahamwe,* dont Joseph Habineza, *alias* Sekuse, de tuer Théoneste Karangwa, commerçant tutsi influent et membre influent de la section du PSD de Cyangugu ou les a incités à le tuer. Il a demandé aux *Interahamwe* d'épargner l'épouse de Karangwa, celle-ci n'étant pas Tutsie. Par la suite, les *Interahamwe* ont attaqué et tué Théoneste Karangwa ainsi que son chauffeur Iyakaremye. Siméon Nchamihigo s'est emparé du véhicule de Théoneste Karangwa et l'a emporté plus tard à Bukavu, au Zaïre voisin.

49. Paragraphe supprimé.

50. Entre le 15 et le 17 avril 1994, Siméon Nchamihigo a ordonné à un groupe d'*Interahamwe* dont faisaient partie David Habanakwabo, Rusine et Nzeyimana de tuer un jeune élève hutu nommé Jean de Dieu Gakwandi qu'il avait qualifié de traître et de complice des Tutsis ou a incité le groupe à le tuer. Il a donné une grenade à David Habanakwabo, *alias* Vicky, et lui a ordonné de se joindre à d'autres *Interahamwe* pour tuer Jean de Dieu Gakwandi. Les assaillants ont frappé Jean de Dieu Gakwandi à la tête à l'aide d'un gourdin, le blessant grièvement. Ils l'ont laissé inconscient sur les lieux, pensant qu'il était mort.

51. Le 28 ou le 30 avril 1994 ou vers ces dates, Siméon Nchamihigo s'est rendu un barrage routier tenu par des *Interahamwe,* dont Martin Ndorimana, et leur a ordonné de tuer un civil tutsi nommé Canisius Kayihura, comptable de la préfecture de Cyangugu qui avait réussi à obtenir une carte d'identité indiquant qu'il appartenait au groupe ethnique hutu, ou les a incités à le tuer.

52. Vers la fin d'avril ou au début de mai 1994, trois jeunes filles tutsies nommées Joséphine Mukashema, Marie et Hélène se sont réfugiées chez un Hutu répondant au nom de Jonas. Siméon Nchamihigo a accusé Jonas et son frère Jonathan Niyikiza de cacher des *Inyenzi*. Aidé de l'un des *Interahamwe* placés sous ses ordres, à savoir Johnson Banga Kaboyi, il a fait sortir les trois filles tutsies de la maison de Jonas et les a amenées à un lieu inconnu. Le même jour, à son retour, il a dit à Jonathan Niyikiza que les *Inyenzi* avaient été tuées et a menacé de donner la mort à celui-ci au cas où il continuerait de cacher des Tutsis. Par ses actes, Siméon Nchamihigo a ordonné, incité à commettre ou aidé et encouragé à commettre le meurtre des filles tutsies en question.

53. En mai 1994, à une date inconnue, les *Interahamwe,* dont Christophe Nyandwi, ont retrouvé Émilien Nsengumuremyi et l'ont tué en exécution de l'ordre que Siméon Nchamihigo avait donné à un barrage routier à Kamembe ou par suite de l'incitation à laquelle il avait procédé à cet endroit le 15

avril 1994 ou vers cette date. Ils ont continué à rechercher les autres Tutsis dont Siméon Nchamihigo avait lu les noms en vue de les tuer, en raison de leur origine tutsie.

54. En mai 1994, à une date inconnue, Siméon Nchamihigo s'est rendu aux barrages routiers établis à Kamembe qu'il supervisait, dont ceux de Cuyapa et de la Banque de Kigali, et a ordonné aux *Interahamwe* qui les tenaient, dont Vincent Mvuyekure, *alias* Tourné, et Thomas Mubiligi, de tuer le père Joseph Boneza, prêtre tutsi de la paroisse catholique de Mibirizi qui devait passer par l'un de ces barrages à bord d'un véhicule, ou les a incités à le tuer. Siméon Nchamihigo a menacé de tuer les *Interahamwe* s'ils laissaient ce prêtre tutsi passer. En sa présence, les *Interahamwe* ont tué le père Joseph Boneza dans le courant de la journée au barrage routier établi à l'entrée de Kamembe, près de la maison de l'accusé, et tenu par les *Interahamwe* Nehemi Habirora et Patrick Nsengumuremyi.

55. En mai 1994, à une date inconnue, Siméon Nchamihigo s'est rendu au barrage routier de Cyapa tenu par les *Interahamwe,* dont Patrick Nsengumuremyi, et les gendarmes. Après avoir pris à bord du véhicule qu'il conduisait deux jeunes élèves tutsis nommés Uzier et Innocent qui faisaient de l'auto-stop pour rentrer chez eux, il les a remis aux *Interahamwe* et a ordonné à ceux-ci de tuer ces élèves ou les a incités à le faire. Les *Interahamwe* ont tué les deux jeunes élèves tutsis.

Troisième chef d'accusation : Extermination constitutive de crime contre l'humanité

56. Le Procureur du Tribunal pénal international pour le Rwanda accuse Siméon Nchamihigo d'extermination constitutive de crime contre l'humanité, crime prévu à l'article 3 (b) du Statut, en ce qu'entre le 6 avril et le 17 juillet 1994, en particulier dans la préfecture de Cyangugu, il s'est rendu responsable du meurtre de Tutsis ou de personnes considérées comme des Tutsis et d'opposants hutus, commis sur une grande échelle dans le cadre d'une attaque généralisée ou systématique dirigée contre une population civile en raison de son appartenance politique, ethnique ou raciale, comme le Procureur le précisera ci-après dans l'exposé succinct des faits incriminés figurant aux paragraphes 57 à 65 du présent acte d'accusation.

Exposé succinct des faits relatifs au troisième chef d'accusation

57. Entre le 6 avril et le 17 juillet 1994, en particulier du 7 avril jusqu'à la fin de mai 1994, Siméon Nchamihigo, en collaboration avec le sergent-major Marc Ruberanziza, *alias* Bikomago, et Christophe Nyandwi, président des *Interahamwe* à l'échelon préfectoral, a ordonné aux *Interahamwe,* dont Kamenero, de lancer des attaques contre les civils tutsis et les opposants hutus qui s'étaient réfugiés à la paroisse de Hanika, à la paroisse de Mibirizi, à l'hôpital de Mibirizi, à la paroisse de Nkanka, à la paroisse de Shangi, à la paroisse de Nyamasheke et dans d'autres lieux, ainsi que ceux qui étaient restés chez eux, ou a incité les *Interahamwe* à le faire. Il a personnellement dirigé toutes ces attaques, à l'exception de celle perpétrée à la paroisse de Nkanka. Lors des attaques en question, les *Interahamwe* et les autres civils hutus dirigés par Siméon Nchamihigo ont tué de nombreux civils qui avaient été ainsi pris pour cibles, comme le précisent les paragraphes 59, 60, 61, 62, 63, 64 et 65 du présent acte d'accusation.

58. Le 7 avril 1994 ou vers cette date, Siméon Nchamihigo est arrivé à un barrage routier tenu par un groupe de jeunes Hutus à Kamembe. Il leur a donné l'ordre de rechercher tous les Tutsis et les complices du FPR pour les livrer aux *Interahamwe* et d'incendier toutes les localités où l'opposition était bien établie ou les a incités à le faire. À la suite des ordres de Siméon Nchamihigo ou de ses actes d'incitation, les *Interahamwe* ont traqué et tué de nombreux civils qui étaient pour la plupart des hommes, des femmes et des enfants tutsis après le 7 avril 1994 ou vers cette date.

59. Le 7 avril 1994 ou vers cette date, Siméon Nchamihigo a ordonné aux *Interahamwe* – plus précisément à Thompson Mubiligi – d'attaquer le domicile de Trojean Ndayisaba, commerçant tutsi membre du PSD, pour le tuer ou les a incités à le faire. Trojean Ndayisaba était accusé d'avoir reçu de l'argent du FPR. Lors de l'attaque, les *Interahamwe* ont tué tous les membres de sa famille et pillé leur maison. Ils ont tué Trojean Ndayisaba lui-même par la suite à une date inconnue entre la fin d'avril et le début de juillet 1994.

60. Le 12 avril 1994 ou vers cette date, Siméon Nchamihigo a ordonné aux *Interahamwe*, dont Anasthase Bizimungu, ainsi qu'aux agents de la police communale, aux gendarmes et aux réservistes de l'armée d'attaquer l'école de Nyakanyinka pour tuer les civils tutsis qui s'y étaient réfugiés ou les a incités à le faire. Il a fourni aux assaillants des grenades et des fusils qui ont été utilisés lors de l'attaque. Ainsi, il les a aidés et encouragés à perpétrer cette attaque. Par suite, les *Interahamwe* et les autres assaillants ont tué environ 600 civils tutsis.

61. Le 14 ou le 15 avril 1994 vers 8 heures, Siméon Nchamihigo, à la tête d'un groupe d'*Interahamwe* et d'*Impuzamugambi* (miliciens de la CDR) dont faisait partie Martin Ndorimana, a lancé une attaque contre les Tutsis du secteur de Gihundwe, visant en particulier ceux des cellules de Kabugi, Ruganda, Murindi et Murangi. Lors de cette attaque, les *Interahamwe* dirigés par Siméon Nchamihigo ont tué de nombreux Tutsis et détruit leurs maisons sur son ordre, à son instigation ou avec son aide et ses encouragements.

62. Le 15 avril 1994 ou vers cette date à Kamembe, Siméon Nchamihigo est arrivé à un barrage routier tenu par un groupe d'*Interahamwe* et de jeunes Hutus armés comptant une vingtaine de personnes. Il leur a donné lecture des noms de Tutsis qui, selon les informations qu'il avait reçues, se cachaient dans la ville de Kamembe et leur a ordonné de traquer ces Tutsis ou les a incités à le faire. Sur la liste des noms lus figuraient Aloys Gasali, Émilien Nsengumuremyi, Isidore Kagenza et le juge Jean-Marie Vianney Tabaro. Après la lecture des noms et avant son départ du barrage routier, Siméon Nchamihigo a ordonné aux *Interahamwe* de rechercher les Tutsis pour les tuer ou les a incités à agir de la sorte et les a aidés et encouragés à le faire en leur fournissant deux grenades. Par la suite, les *Interahamwe* ont traqué et tué les Tutsis.

63. En avril 1994, à une date inconnue, Siméon Nchamihigo, à la tête d'un groupe d'*Interahamwe* comprenant Anathase Bizimungu et accompagné du gendarme Mandela, a attaqué le couvent de Mibirizi où de nombreux civils tutsis avaient trouvé refuge. Lors de cette attaque, les *Interahamwe* dirigés par Siméon Nchamihigo ont massacré ces réfugiés tutsis et pillé leurs biens sur son ordre, à son instigation ou avec son aide et ses encouragements.

64. Paragraphe supprimé.

65. Le 7 ou le 9 avril 1994 ou vers ces dates, Siméon Nchamihigo, en collaboration avec le lieutenant Samuel Imanishimwe et Yusuf Munyakazi, s'est rendu à la prison de Cyangugu et a ordonné au directeur de la prison de faire sortir 13 soldats des FAR qui avaient été incarcérés sous prétexte qu'ils étaient complices du FPR. Ces détenus ont été amenés au bureau préfectoral. Par la suite, Siméon Nchamihigo a ordonné de tuer, incité à tuer ou aidé et encouragé à tuer les 13 soldats des FAR. A la suite de l'ordre qu'il a donné, de l'incitation à laquelle il a procédé ou de l'aide et des encouragements qu'il a apportés, ces 13 soldats des FAR qui n'étaient plus des combattants ont été tués et leurs corps jetés dans l'un des jardins de la préfecture près du lac. Dans le courant de la journée, Siméon Nchamihigo a ordonné à d'autres prisonniers, dont Damien Ndamira, d'enlever les cadavres des 13 victimes du jardin pour les enterrer avec ceux de huit personnes inconnues trouvés au même endroit ou les a incités à le faire.

Quatrième chef d'accusation : Autres actes inhumains constitutifs de crime contre l'humanité

66. Le Procureur du Tribunal pénal international pour le Rwanda accuse Siméon Nchamihigo d'autres actes inhumains constitutifs de crimes contre l'humanité, crimes prévus à l'article 3 (i) du Statut, en ce qu'entre le 6 avril et le 17 juillet 1994, sur l'ensemble du territoire rwandais, en particulier dans la préfecture de Cyangugu, il s'est rendu responsable d'actes inhumains commis contre des civils tutsis ou des personnes considérées comme des Tutsis et des opposants hutus dans le cadre d'une attaque généralisée ou systématique dirigée contre une population civile en raison de son appartenance politique, ethnique ou raciale, comme le précisent les paragraphes 67 à 70 du présent acte d'accusation.

Exposé succinct des faits relatifs au quatrième chef d'accusation

67. Le 7 ou le 9 avril 1994 ou vers ces dates, Siméon Nchamihigo a ordonné aux *Interahamwe*, notamment à Joseph Habineza, *alias* Sekuse, de tuer Théoneste Karangwa, commerçant tutsi influent et membre influent de la section du PSD de Cyangugu ou les a incités le tuer. Il a demandé aux *Interahamwe* d'épargner l'épouse de Karangwa, celle-ci n'étant pas Tutsie. A la suite de l'ordre qu'il avait donné ou de l'incitation à laquelle il avait procédé, les *Interahamwe* ont attaqué Théoneste Karangwa chez lui et l'ont attrapé. Après cela, les *Interahamwe* ont couvert Théoneste Karangwa de son propre matelas, versé de l'essence sur le matelas et brulé Théoneste Karangwa, lui faisant ainsi éprouver des douleurs et des souffrances atroces avant de mourir. Ils ont également tué son chauffeur nommé Iyakaremye. Siméon Nchamihigo s'est emparé du véhicule de Théoneste Karangwa et l'a emporté plus tard à Bukavu, au Zaïre voisin, avec d'autres véhicules et divers objets pillés durant les attaques.

68. Le 7 avril 1994 ou vers cette date, Siméon Nchamihigo a ordonné aux *Interahamwe* – plus précisément à Thompson Mubiligi – d'attaquer le domicile de Trojean Ndayisaba, commerçant tutsi membre du PSD, pour le tuer ou les a incités à le faire. Trojean Ndayisaba était accusé d'avoir reçu de l'argent du FPR. Lors de l'attaque, les *Interahamwe* ont brûlé tous les membres de sa famille dans leur véhicule, leur faisant ainsi éprouver des douleurs et des souffrances atroces avant de mourir. Ils ont tué Trojean Ndayisaba lui-même par la suite à une date inconnue entre la fin d'avril et le début de juillet 1994.

69. Entre le 15 et le 17 avril 1994, Siméon Nchamihigo a ordonné à un groupe d'*Interahamwe* dont faisaient partie David Habanakwabo, Rusine et Nzeyimana, pour ne citer que ceux-là, de tuer un jeune élève hutu nommé Jean de Dieu Gakwandi qu'il avait qualifié de traître et de complice des Tutsis ou a incité le groupe à le tuer. Il a donné une grenade à David Habanakwabo, *alias* Vicky, et lui a ordonné de se joindre à d'autres *Interahamwe* pour tuer Jean de Dieu Gakwandi. Les assaillants ont frappé Jean de Dieu Gakwandi à la tête à l'aide d'un gourdin, lui faisant ainsi éprouver des douleurs et des souffrances. Jean de Dieu Gakwandi a été grièvement blessé. Les assaillants l'ont laissé inconscient sur les lieux, pensant qu'il était mort.

70. Le 16 avril 1994 ou vers cette date, Siméon Nchamihigo et d'autres membres du conseil de sécurité préfectoral, dont le lieutenant Samuel Imanishimwe et Christophe Nyandwi, ont retiré du stade Kamarampaka 15 Tutsis ainsi qu'une Hutue nommée Marianne Baziruwiha et ont amenés les 15 Tutsis à un endroit situé près de la prison après avoir déposé Marianne Baziruwiha au camp de gendarmerie. Parmi les 15 Tutsis retirés du stade par Siméon Nchamihigo et ses acolytes figuraient Jean-Fidèle Murekezi, Albert Twagiramungu et Gapfumu. Siméon Nchamihigo a ordonné aux *Interahamwe* qu'il avait amenés du centre de Mutongo le même jour, dont Anasthase Bizimungu, de tuer ces 15 Tutsis ou les a incités à le faire. A la suite de l'ordre donné par Siméon Nchamihigo ou de l'incitation à laquelle il avait procédé, les *Interahamwe* ont tué les 15 Tutsis près de la prison de Cyangugu et jeté leurs cadavres dans une fosse d'aisances chez Gapfumu, après avoir enlevé les organes génitaux de Jean-Fidèle Murekezi, ceux d'Albert Twagiramungu et le cœur de Gapfumu.

Les actes et les omissions de Siméon Nchamihigo exposés dans le présent acte d'accusation sont punissables selon les dispositions des articles 22 et 23 du Statut.

Arusha (Tanzanie), le 11 décembre 2006.

[Signé] : Hassan Bubacar Jallow

The Prosecutor v. Emmanuel NDINDABAHIZI

Case N° ICTR-2001-71

Case History

• Name: NDINDABAHIZI

• First Name: Emmanuel

• Date of Birth: 1950

• Sex: male

• Nationality: Rwandan

• Former Official Function: Minister of Finance in the Interim Government

• Date of Indictment's Confirmation: 5 July 2001

• Date of Indictment's Amendment: 7 July 2003

• Counts: genocide and crimes against humanity (extermination, murder)

• Date and Place of Arrest: 12 July 2001, in Verviers, Belgium

• Date of Transfer: 25 September 2001

• Date of Initial Appearance: 19 October 2001

• Date Trial Began: 1 September 2003

•Date and content of the Sentence: 15 July 2004, sentenced to life imprisonment

• Appeal: 16 January 2007, dismissed

Decision on the Admission of Additional Evidence
4 April 2006 (ICTR-2001-71-A)

(Original : English)

Appeals Chamber

Judges : Wolfgang Schomburg, Presiding Judge; Mohamed Shahabuddeen; Mehmet Güney; Liu Daqun; Theodor Meron

Emmanuel Ndindabahizi – Admission of additional evidence on appeal – Motion filed far outside the time frame – Absence of good cause – Confidentiality lifted – Motion denied

International Instruments Cited :

Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal, paragraph 12 ; Rules of Procedure and Evidence, Rule 115

International Case Cited :

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Dario Kordić and Mario Čerkez, Judgement, 17 December 2004 (IT-95-14/2)

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 "International Tribunal", respectively),

BEING SEIZED of the "*Deuxième Requête de l'Appelant en Présentation de Moyens de Preuve Supplémentaires – Article 115 du Règlement*" filed confidentially on 28 February 2006 ("Motion"), in which counsel for Emmanuel Ndindabahizi ("Defence" and "Appellant", respectively) seeks to introduce evidence given by Mr. Fidèle Uwizeye on 14 April 2005 in the case of *Prosecutor v. Bizimungu et al.*, Case N°ICTR-99-50-T, as additional evidence on appeal pursuant to Rule 115 of the Rules of Procedure and Evidence ("Rules");

NOTING the "Prosecutor's Response to '*Deuxième Requête de l'Appelant en Présentation de Moyens de Preuve Supplémentaires – Art. 115 du Règlement*'" filed on 10 March 2006 ("Response"), in which the Prosecution requests that the Motion be dismissed in its entirety;

NOTING the "Réponse aux observations de l'intimé sur la deuxième requête de l'appelant en présentation de moyens de preuve supplémentaires – Article 115 du Règlement" filed by the Appellant confidentially on 20 March 2006 ("Reply") ;

NOTING that the confidential filing of the Motion and Reply does not serve the interests of justice and that the Defence orally confirmed that it does not object to the lifting of the confidentiality;

NOTING that according to paragraph 12 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal a reply may be filed within four days of the filing of the response;

NOTING that the Reply was filed untimely;

CONSIDERING that pursuant to Rule 115 of the Rules, an application for the admission of additional evidence on appeal shall be "filed with the Registrar not later than seventy-five days from the date of the judgement, unless good cause is shown for further delay";

CONSIDERING that the Defence filed the Motion far outside the time frame set out in Rule 115 of the Rules;

CONSIDERING that the good cause requirement obliges the moving party to show that it was not able to comply with the time limit set out in the Rule, and that it filed the motion as soon as possible after it became aware of the existence of the evidence sought to be admitted;[1]

CONSIDERING the reasons advanced by the Prosecution on the issue of good cause, in particular

- that the Appellant was in possession of the transcripts for nearly 10 months before he filed the Motion;[2]
- that the Appellant had already indicated in his appeal brief that he was going to "request that the trial record of this testimony be produced" and that he would "file a motion for the same witness to testify in the instant case";[3] and
- that the Pre-Appeal Judge, during the third status conference of 8 February 2006, advised the Appellant to pay particular attention to the admissibility criteria under Rule 115, should he seek admission of the transcripts under Rule 115;[4]

FINDING that the Appellant has failed to address the issue of good cause and that consequently good cause has not been shown;

Therefore

LIFTS the confidentiality of Motion and Reply; and

DISMISSES the Motion.

Done in both English and French, the English text being authoritative.

Dated this 4th day of April 2006, at The Hague, The Netherlands.

[Signed] : Wolfgang Schomburg

[1] *Prosecutor v. Kordić and 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.
[2] Response, para. 6.
[3] Response, para. 7, referring to para. 318 of the Appellant Brief of 9 May 2005.
[4] Response, para. 10, referring to T. 8 February 2006, p. 7.

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Scheduling Order
11 May 2006 (ICTR-2001-71-A)

(Original : English)

Appeals Chamber

Judges : Wolfgang Schomburg, Presiding Judge; Mohamed Shahabuddeen; Mehmet Güney; Liu Daqun; Theodor Meron

Emmanuel Ndindabahizi – Scheduling order – Timetable of the hearing – Public proceedings, Mémoire d'appel of the Prosecution with all confidential information including the identity of protected witnesses

International Instrument Cited :

Rules of Procedure and Evidence, Rules 78, 107 and 114

International Case Cited :

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Mladen Naletilić and Vinko Martinović, Decision on Vinko Martinović's Withdrawal of Confidential Status of Appeal Brief, 4 May 2005 (IT-98-34)

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 ("Tribunal");

NOTING the "Judgement and Sentence" rendered in this case by Trial Chamber I on 15 July 2004;

NOTING the "*Acte d'appel*" filed by Emmanuel Ndindabahizi ("Appellant") on 13 August 2004; the "*Mémoire d'appel*" filed by the Appellant confidentially on 9 May 2005; the "Corrigendum *au Mémoire d'appel*" filed by the Appellant on 14 June 2005; the "Respondent's Brief" filed by the Office of the Prosecutor ("Prosecution") on 17 June 2005; and the "*Réponse au Mémoire de l'Intimé*" filed by the Appellant on 14 November 2005;

CONSIDERING that the filing of the briefs in this appeal is complete;

CONSIDERING that pursuant to Rules 78 and 107 of the Rules of Procedure and Evidence ("Rules"), all proceedings before the Appeals Chamber, including the parties' filings as part of the proceedings, shall be public unless there are exceptional reasons for keeping them confidential,[1] and that parties shall file public redacted versions of all confidential briefs filed on appeal from the Trial Chamber's judgement;[2]

[1] Cf. Rule 75 of the Rules.
[2] Cf. *Prosecutor v. Mladen Naletilić and Vinko Martinović*, IT-98-34-A, Decision on Vinko Martinović's Withdrawal of Confidential Status of Appeal Brief, 4 May 2005, p. 3.

RECALLING that on 28 April 2006 Mr. Konitz, Appellant's lead counsel, confirmed in writing his availability for the hearing in this case on 6 July 2006;

PURSUANT to Rule 114 of the Rules;

HEREBY ORDERS that the hearing of the appeal shall take place on Thursday, 6 July 2006, in Arusha, Tanzania;

INFORMS the parties that a letter will be sent in due course to the parties specifying issues that the parties will be invited to address during the hearing, without prejudice to any matter relevant to the appeal the parties or the Appeals Chamber may wish to raise;

SPECIFIES that the identification of such issues can in no way be interpreted as an expression of the Appeals Chamber's opinion on the merits of the appeal;

INFORMS the parties that the timetable of the hearing will be as follows:

9:00 – 9:15	Introductory Statement by the Presiding Judge (15 minutes)
9:15 – 11:15	Submissions of the Appellant (2 hours)
11:15 – 11:45	Pause (30 minutes)
11:45 – 12:30	Response of the Prosecution (45 minutes; to be continued)
12:30 – 15:00	Pause (2 hours and 30 minutes)
15:00 – 16:15	Continued Response of the Prosecution (1 hour and 15 minutes)
16:15 – 16:45	Pause (30 minutes)
16:45 – 17:15	Reply Final Word (Personal Address) by Emmanuel Ndindabahizi (optional); and

ORDERS the Appellant to file a public version of his "*Mémoire d'appel*" as soon as practicable wherein all confidential information, including the identity of protected witnesses, is duly redacted.

Done in English and French, the English text being authoritative.

Dated this eleventh day of May 2006, at The Hague, The Netherlands.

[Signed] : Wolfgang Schomburg

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Decision on Defence "Requête de l'Appelant en reconsidération de la décision du 4 avril 2006 en raison d'une erreur matérielle" 14 June 2006 (ICTR-2001-71-A)

(Original : English)

Appeals Chamber

Judges : Wolfgang Schomburg, Presiding Judge; Mohamed Shahabuddeen; Mehmet Güney; Liu Daqun; Theodor Meron

Emmanuel Ndindabahizi – Reconsideration of an interlocutory decision – Existence of a clear error of reasoning in the impugned decision or of particular circumstances justifying its reconsideration in order to prevent an injustice, Absence of evidence – Motion denied

International Instruments Cited :

Rules of Procedure and Evidence, Rule 115

International Cases Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Eliézer Niyitegeka, Decision on Defence Extremely Urgent Motion for Reconsideration of Decision dated 16 December 2003, 19 December 2003 (ICTR-96-14) ; 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)

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Stanislav Galić, Decision on Defence's Request for Reconsideration, 16 July 2004 (IT-98-29)

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 "International Tribunal", respectively) is seized of the "Requête de l'appelant en reconsidération de la décision du 4 avril 2006 en raison d'une erreur matérielle", filed by Emmanuel Ndindabahizi ("Appellant") on 24 April 2006 ("Motion for Reconsideration").

A. Procedural Background

17. On 4 April 2006, the Appeals Chamber rendered its "Decision on the Admission of Additional Evidence" ("Rule 115 Decision") in which it found that the Appellant had not shown good cause for his non-compliance with the time limit set out in Rule 115 of the Rules of Procedure and Evidence ("Rules"). Consequently, the Appeals Chamber dismissed the Appellant's motion to present additional evidence.[1] With his Motion for Reconsideration, the Appellant requests the Appeals Chamber to reconsider its Rule 115 Decision. The Prosecution filed the "Prosecutor's Response to 'Requête de l'appelant en reconsidération de la décision du 4 avril 2006 en raison d'une erreur matérielle'" on 26 April 2006 ("Second Prosecution Response"). The Appellant did not file a reply.

B. Standard for Reconsideration

18. The Appeals Chambers of both ICTR and ICTY have repeatedly held that they have an inherent discretionary power to reconsider a previous interlocutory decision "if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice".[2]

C. Discussion

19. The Appellant argues that the Appeals Chamber erred in noting incorrect filing dates of the following two filings:

[1] "Deuxième requête de l'appelant en présentation de moyens de preuve supplémentaires – Article 115 du règlement", confidentially filed by the Appellant on 28 February 2006.

[2] *Kajelijeli v. Prosecutor*, Case N°ICTR-98-44A-A, Judgement, 23 May 2005, paras 203-04; *Nahimana et al. v. Prosecutor*, Case N°ICTR-99-52-A, Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005, p. 2; *Niyitegeka v. Prosecutor*, Case N°ICTR-96-14-A, Decision on Defence Extremely Urgent Motion for Reconsideration of Decision Dated 16 December 2003, 19 December 2003, pp. 2-3; *Prosecutor v. Galić*, Case N°IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2.

- "Prosecutor's Response to 'Deuxième Requête de l'Appelant en Présentation de Moyens de Preuve Supplémentaires – Art. 115 du Règlement'", filed on 10 March 2006 ("First Prosecution Response"), and
- "Réponse aux observations de l'intimé sur la deuxième requête de l'appelant en présentation de moyens de preuve supplémentaires – Article 115 du Règlement", filed on 20 March 2006 ("Appellant's Reply").

The Appellant submits that his lead counsel Mr. Michel Konitz had not been notified of the First Prosecution Response until 13 March 2006, and that the Appellant's Reply had in fact been filed on 17 March 2006. He argues that consequently, the Appellant had complied with the time limit provided by paragraph 12 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal, *i.e.* four days. He further submits that the Appeals Chamber might have come to a different conclusion in the Rule 115 Decision had it considered the Appellant's Reply.

20. The Appellant submits in Annex 2 to his Motion for Reconsideration the "*Fiche de Transmission Pour Dépôt de Documents à la S.A.C.*" which shows the date of 17 March 2006 (Friday). This transmission sheet, however, does not prove that the Appellant's Reply had indeed been received at the ICTR on that day, as the date on it was not filled in by the Registry.

21. Annex 2 also contains a *lettre de transmission* of Mr. Konitz in which he requests the Registry to file the Appellant's Reply. While the letterhead indicates that the letter was written on 17 March 2006, the stamp in the upper right corner of the letter shows that it was received in the UNICTR Fax Centre on 18 March 2006 at 9.49 am local time. Furthermore, as this day (Saturday) was a non-working day of the Tribunal, the filing of the Appellant's Reply must be considered as falling on the first working day thereafter, *i.e.* Monday, 20 March 2006.

22. It is not necessary to examine whether the Defence had been notified of the First Prosecution Response as late as on 13 March 2006, as the time limit for filing the Appellant's Reply has not been met. Consequently, the Appellant has not satisfied the Appeals Chamber of the existence of a clear error of reasoning in the impugned decision, or of particular circumstances justifying its reconsideration in order to prevent injustice.

D. Disposition

23. The Motion for Reconsideration is rejected.

Done in French and English, the English text being authoritative.

Dated this fourteenth day of June 2006, at The Hague, The Netherlands.

[Signed] : Wolfgang Schomburg

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Scheduling Order
13 November 2006 (ICTR-2001-71-A)

(Original : English)

Appeals Chamber

Judges : Wolfgang Schomburg, Presiding Judge; Mohamed Shahabuddeen; Mehmet Güney; Liu Daqun; Theodor Meron

Emmanuel Ndindabahizi – Scheduling order – Pronouncement of the judgement on appeal

International Instrument Cited :

Rules of Procedure and Evidence, Rule 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 and 31 December 1994 ("International Tribunal");

PURSUANT to Rule 118 (D) of the Rules of Procedure and Evidence;

HEREBY ORDERS that the judgement on appeal shall be pronounced in a public hearing on Tuesday, 16 January 2007, at 9.00 am, in Courtroom Laïty Kama in Arusha, Tanzania.

Done in English and French, the English text being authoritative.

Dated this thirteenth day of November 2006, at The Hague, The Netherlands.

[Signed] : Wolfgang Schomburg

Le Procureur c. Emmanuel NDINDABAHIZI

Affaire N° ICTR-2001-71

Fiche technique

• Nom: NDINDABAHIZI

• Prénom: Emmanuel

• Date de naissance: 1950

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: Ministre des Finances du Gouvernement intérimaire

• Date de confirmation de l'acte d'accusation: 5 juillet 2001

• Date de modification de l'acte d'accusation: 7 juillet 2003

• Chefs d'accusation: génocide et crimes contre l'humanité (extermination, meurtre)

• Date et lieu de l'arrestation: 12 juillet 2001, à Verviers, Belgique

• Date du transfert: 25 septembre 2001

• Date de la comparution initiale: 19 octobre 2001

• Date du début du procès: 1 septembre 2003

• Date et contenu du prononcé de la peine : 15 juillet 2004, condamné à l'emprisonnement à vie

• Appel: 16 janvier 2007, rejeté

The Prosecutor v. Eliezer NIYITEGEKA

Case N° ICTR-96-14

Case History

• Name: NIYITEGEKA

• First Name: Eliezer

• Date of Birth: 1952

• Sex: male

• Nationality: Rwandan

• Former Official Function: Minister of Information of Interim Government

• Date of Indictment's Confirmation: 15 July 1996

• Date of Indictment's Amendments: 29 April 1999, 26 June 2000 and 28 February 2001

• Counts: genocide, and subsidiary, 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: 9 February 1999, in Kenya

• Date of Transfer: 11 February 1999

• Date of Initial Appearance: 15 April 1999

• Pleading: not guilty

• Date Trial Began: 17 June 2002

• Date and content of the Sentence: 16 May 2003, sentenced to life imprisonment

• Appeal: 9 July 2004, dismissed

Decision on Request for Review
30 June 2006 (ICTR-96-14-R)

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge; Mohamed Shahabuddeen; Liu Daqun; Theodor Meron; Wolfgan Schomburg

Eliezer Niyitegeka – Review – Criteria for review – Final judgement – New facts, Clarification of the notion – Absence of new facts that could have been decisive factors in reaching the original decision – Rules governing the admission of evidence as alternatives to the provisions governing the review proceedings – Obligation for the Prosecution to disclose exculpatory evidence to the Defence, Violation, Absence of material prejudice to the Accused – Motions denied

International Instruments Cited :

Rules of procedure and evidence, Rules 5, 37 (B), 68, 68 (A), 68 (B), 68 (D), 68 (E), 89 (C), 91, 115, 119, 120 and 121 ; Statute, Art. 24 and 25

International Cases Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Jean-Bosco Barayagwiza, Decision on Review and/or Reconsideration, 14 September 2000 (ICTR-97-19) ; Trial Chamber, The Prosecutor v. Eliezer Nyitegeka, Judgement, 16 May 2003 (ICTR-96-14) ; Appeals Chamber, The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Decision on Request for Admission of Additional Evidence, 8 April 2004 (ICTR-96-10 and ICTR-96-17) ; 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. Ferdinand Nahimana et al., *Decision on Appellant Hassan Ngeze's Motion for Leave to Present Additional Evidence, 14 February 2005 (ICTR-99-52) ; Chamber, The Prosecutor v. Jean de Dieu Kamuhanda, Decision on Appellant's Motion for Admission of Additional Evidence on Appeal, 12 April 2005 (ICTR-99-54A) ; Appeals Chamber, The Prosecutor v. Eliézer Niyitegeka, Decision on Niyitegeka's Urgent Request for Legal Assistance, 20 June 2005 (ICTR-96-14) ; Appeals Chamber, The Prosecutor v. Eliézer Niyitegeka, Decision on the Prosecutor's Motion to Move for Decision on Niyitegeka's Request for Review Pursuant to Rules 120 and 121 and the Defence Extremely Urgent Motion Pursuant to Rule 116 for Extension of Time Limit, Rule 68 (A), (B) and (E) for Disclosure of Exculpatory Evidence Both of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda and Response to Prosecutor's Motion of 15 August 2005 Seeking a Decision, in the Absence of any Legal Submissions from the Applicant, 28 September 2005 (ICTR-96-14) ; Appeals Chamber, The Prosecutor v. Eliézer Niyitegeka, Decision on Extremely Urgent Defence Motion Seeking an Extension of Time Pursuant to Rule 116 of the Rules of Procedure and Evidence and the Prosecution's Motion for Filing of Additional Material, 2 November 2005 (ICTR-96-14)*

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Tihomir Blaskić, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefings Schedule, and Additional Filings, 26 September 2000 (IT-95-14) ; Appeals Chamber, The Prosecutor v. Hazim Delić, Decision on Motion for Review, 25 April 2002 (IT-96-21) ; Appeals Chamber, The Prosecutor v. Goran Jelisić, Decision on Motion for Review, 2 May 2002 (IT-95-10) ; Appeals Chamber, The Prosecutor v. Duško Tadić, Decision on Motion for Review, 30 July 2002 (IT-94-1) ; Appeals Chamber, The Prosecutor v. Drago Josipović, Decision on Motion for Review, 7 March 2003 (IT-95-16) ; 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. Dario Kordić and Mario Čerkez, Decision on Appellant's Notice and Supplemental Notice on Prosecution's Non-Compliance

with its Disclosure Obligation under Rule 68 of the Rules, 11 February 2004 (IT-95-14/2) ; Appeals Chamber, The Prosecutor v. Drago Josipović, Decision on Motion for Review, 2 April 2004 (IT-95-16) ; Appeals Chamber, The Prosecutor v. Radislav Krstić, Judgement, 19 April 2004 (IT-98-33) ; Trial Chamber II, The Prosecutor v. Naser Orić, Decision on Urgent Defence Motion Regarding Prosecutorial Non-Compliance with Rule 68, 27 October 2005 *(IT-03-68) ; Trial Chamber, The Prosecutor v. Naser Orić, Decision on Ongoing Complaints About Procedural Non-Compliance with Rule 68 of the Rules, 13 December 2005 (IT-03-68)*

Contents

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 Serious Violations Committed in the Territory of Neighbouring States, between 1 January and 31

December 1994 (the "Tribunal") is seized of requests for review by Eliézer Niyitegeka (the "Applicant") filed on 27 October 2004, 7 February 2005, 17 August 2005 and 10 October 2005.

2. The Applicant, the former Minister of Information in the Rwandan Interim Government in 1994, was tried and sentenced to life imprisonment by Trial Chamber I of the Tribunal on 16 May 2003 for genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; and murder, extermination, and other inhumane acts as crimes against humanity.[1]

3. The Applicant appealed his conviction on the ground that the Trial Judgement was manifestly unfair and in breach of his statutory right to a fair trial, as well as on various other legal and factual grounds. On 9 July 2004, the Appeals Chamber dismissed his appeal in its entirety and affirmed the sentence of imprisonment for the remainder of his life.[2]

I. The Request for Review

4. The Applicant submits that transcripts of the radio broadcasts of the *compte rendus* of various Cabinet meetings in which he allegedly participated and an *affidavit* of one of his alibi witnesses as well as certain testimonies of witnesses in other cases amount to "new facts" within the meaning of Article 25 of the Statute and Rules 120 and 121 of the Rules, warranting review of the trial and appeal judgements in his case.

A. Applicable Law

5. The provisions of Article 25 of the Statute and Rules 120 and 121 of the Rules govern review proceedings before the Tribunal.

- Article 25 of the Statute: 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.

- Rule 120 of the Rules: 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 of the Rules: 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.

6. Accordingly, in order for the Chamber to proceed to the review of its decision, the moving party must demonstrate that:

[1] Trial Judgement, paras. 481 *et seq*.
[2] Appeal Judgement, para. 270.

a – *there is a new fact*, which is defined as "new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings".[3] By the phrase "not in issue", the Appeals Chamber has held that "it must not have been among the factors that the deciding body could have taken into account in reaching its verdict";[4]

b – the new fact must not have been known to the moving party at the time of the proceedings before the Trial Chamber or the Appeals Chamber. However, "[I]t is irrelevant whether the new fact already existed before the original proceedings or during such proceedings. What is relevant is whether the deciding body and the moving party knew about the fact or not";[5]

c – *the lack of discovery of the new fact must not have been through the lack of diligence on the part of the moving party*. By analogy to the jurisprudence relating to the admission of additional evidence in appeals proceedings, diligence shall mean that the 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 […] before the Chamber."[6]

d – the new fact, if proved, could have been a decisive factor in reaching the original decision.[7]

7. These criteria are cumulative.[8] However, the Appeals Chamber recalls that in "wholly exceptional circumstances", where the impact of a "new fact" on the decision would be such that to ignore it would lead to a miscarriage of justice, review might be possible even though the "new fact" was known to the moving party, or was discoverable by it through the exercise of due diligence.[9]

B. Analysis

8. The Applicant requests the Appeals Chamber to review the factual findings and legal conclusions in the Judgements of both the Trial and Appeals Chambers.[10] The Appeals Chamber recalls that review proceedings under Article 25 of the Statute and Rule 120 of the Rules are available only with respect to the final judgement.[11] As a result, the Appeals Chamber shall only consider whether its Judgement of 9 July 2004 should be reviewed.

9. The alleged "new facts" to be considered by the Appeals Chamber are, in principle, limited to those raised by the Applicant in his requests filed *pro se* on 27 October 2004,[12] 7 February 2005,[13] and 17 August 2005,[14] as elaborated in the Additional Submissions filed by Defence Counsel within the scope of the Appeals Chamber's Decisions of 20 June 2005 [15] and 28 September 2005. [16] Exceptionally, the Appeals Chamber will nevertheless consider the alleged "new fact" raised by

[3] *Tadić,* Decision on Motion for Review, para. 25.
[4] *Tadić,* Decision on Motion for Review, para. 25.
[5] *Tadić,* Decision on Motion for Review, para. 25; *Delić,* Decision on Motion for Review, para. 11.
[6] *Ntagerura et al*., Decision on Prosecution Motion for Admission of Additional Evidence, para. 9; *Kamuhanda*, Decision on Motion for Admission of Additional Evidence, para. 9; *Krstić*, Decision on Applications for Admission of Additional Evidence, pp. 3-4; *Semanza*, Decision on Motion of Additional Evidence, para. 6; *Nahimana et al*., Decision on Appellant's Motion for Leave to Present Additional Evidence, p. 3; *Ntakirutimana E. and G*., Reasons for the Decision on Request for Admission of Additional Evidence, paras. 11-13.
[7] *Delić,* Decision on Motion for Review, paras. 7-8; *Jelisić*, Decision on Motion for Review, pp. 2-3; *Tadić,* Decision on Motion for Review, para. 20; *Josipović*, Decision on Motion for Review, paras. 11-12; *Josipoviæ*, Second Decision on Motion for Review, p. 3.
[8] *Josipović*, Decision on Motion for Review, para. 21.
[9] Appeal's Chamber Decision of 20 June 2005, fn. 10; see also *Barayagwiza*, Decision on the Prosecutor's Request for Review, para. 65; *Josipović*, Decision on Motion for Review, para. 13; *Tadić,* Decision on Motion for Review, para. 26; *Delić,* Decision on Motion for Review, para. 15.
[10] Applicant's Additional Brief to request for Review, para. 17; *Requête en admission d'un élément de preuve nouveau*, 17 août 2005, para. 21; Applicant's Request for Review, para. 33; Applicant's Reply to Prosecution's Response to Request for Review, para. 28.
[11] *Delić,* Decision on Motion for Review, para. 5; *Josipović*, Decision on Motion for Review, paras. 14-15; *Tadić,* Decision on Motion for Review, para. 24.
[12] Applicant's Request for Review.
[13] Applicant's Additional Brief to request for Review.
[14] Applicant's Request for Admission of New Evidence.
[15] Appeal's Chamber Decision of 20 June 2005.
[16] Appeal's Chamber Decision of 28 September 2005.

transcripts AV/908 and RSFO112, raised for the first time in the Additional Submissions, as they are intrinsically linked to the transcripts of cassettes AV/906 and AV/907 which formed the substance of the original request of 27 October 2004. The alleged "new fact" based on video tape KV-00-0030-0043, despite the deficiencies in the manner in which it was introduced, will also be considered given the Appeals Chamber's Decision of 2 November 2005,[17] which directed the Prosecution to disclose the CD-Roms labelled KV00-0030 and KV00-0030B in order to assist the Defence in replying to the Prosecution's Response to Additional Submissions.

10. The Appeals Chamber will now examine the "new facts" alleged by the Applicant.

1. First alleged "new fact": Transcripts of the radio broadcast of the compte rendu of the Cabinet Meeting of 10 April 1994

11. The Applicant relies upon transcripts of the cassettes (AV/906, AV/907, AV/908 and RSFO122) of his radio broadcast of the *compte rendu* of the Cabinet Meeting of 10 April 1994 to prove that he was in Kigali that day,[18] contrary to the testimony of Prosecution Witness GGH,[19] and that, therefore, he could not have been 185 kilometers away in Rugarama, Gisovu *commune*, transporting arms, as the Trial Chamber found. The Applicant alleges that Prosecution Witness GGH gave false testimony within the meaning of Rule 91 of the Rules.[20] According to the Applicant, the transcripts amount to a "new fact" within the meaning of Article 25 and Rules 120 and 121.[21] Alternatively, the Applicant argues that the transcripts could be considered to be a "decisive factor" warranting substantive consideration of the application for review in order to prevent a miscarriage of justice.[22] The Applicant argues that the transcripts "could" or "would" have affected the original verdict. In response, the Prosecution submits that the transcripts do not amount to a "new fact" as they are merely new evidence of issues already discussed in the original proceedings, and that they "could" not have been a decisive factor in reaching the original decision.[23]

(a) Whether the transcripts of the radio broadcast of the *compte rendu* of the Cabinet Meeting of 10 April 1994 constitute a "new fact"

12. The Applicant seeks to introduce the transcripts of cassettes in order to prove a fact that he already asserted, albeit without evidence, at trial: that he was in Kigali on 10 April 1994, attending a Cabinet Meeting.[24] This purported "new fact" was thus known to the Applicant at trial. The Appeals Chamber recalls that "(the) Jurisprudence of the Tribunal has elaborated on the difference between a new fact in the sense of Rule 119 [Rule 120 ICTR] and additional evidence in sense of Rule 115 of the Rules. In the *Delić* review, the Appeals Chamber held that: 'the distinction is thus between a fact which was not in issue or considered in the original proceedings (a 'new fact' within the meaning of Rule 119) and additional evidence of a fact which was in issue or considered in the original proceedings but which evidence was not available to be given in those proceedings ('additional evidence' within the meaning of Rule 115)." The Appeals Chamber in *Delić* further held that "(i)f the material proffered consists of additional evidence relating to a fact which was in issue or considered in the original proceedings, this does not constitute a "new fact" within the meaning of Rule 119, and the review procedure is not available."[25] The transcripts of the cassettes are information of an evidentiary nature concerning the Applicant's participation in the Cabinet Meeting of 10 April 1994. However, the transcripts relate to the alibi of the Applicant's participation in the Cabinet Meeting of

[17] Second Appeal's Chamber Decision of 2 November 2005.
[18] Applicant's Additional Submissions, paras. 133-138.
[19] Applicant's Request for Review, paras. 12-15.
[20] Applicant's Reply to Prosecution's Response to Request for Review, para. 14; Applicant's Brief in Reply to Prosecution's Response to Additional Brief to Request for Review, para. 16; Applicant's Request for Admission of New Evidence, para. 20.
[21] Applicant's Request for Review, para. 8; Applicant's Reply to Prosecution's Response to Request for Review, para. 3.
[22] Applicant's Additional Submissions, paras. 121-131.
[23] Prosecutor's Response to Applicant's Request for Review, paras. 2, 24; Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 15.
[24] Trial Judgement, para. 67.
[25] *Delić,* Decision on Motion for Review, para. 11.

10 April 1994 in relationship with the credibility of Prosecution Witness GGH,[26] both being matters that were already considered at trial.[27] Accordingly, the transcripts cannot amount to a "new fact" for the purposes of a review application and the Appeals Chamber is not obliged to examine them further. Nonetheless, the Appeals Chamber will consider whether, assuming the radio broadcast of the *compte rendu* of the Cabinet Meeting of 10 April 1994 could be characterized as a new fact", they could have been a decisive factor in reaching the original decision.

(b) Whether the transcripts of the radio broadcast of the *compte rendu* of the Cabinet Meeting of 10 April 1994 could have been a decisive factor in reaching the original decision

13. The Applicant's assertion that he made the radio broadcast of the said meeting at 2 p.m.[28] conflicts with Applicant's Defence Counsel's assertion that the said radio broadcast took place at 7 p.m.,[29] reinforcing the credibility of Prosecution Witness GGH. Accordingly, the Applicant's allegation that the said witness gave false testimony, pursuant to Rule 91 of the Rules,[30] lacks foundation. Furthermore the particular factual finding of the Applicant transporting arms on 10 April 1994 was not critical to his conviction for any crime. It is briefly referenced in paragraph 411 of the Trial Judgement with respect to the crime of genocide, but no particular weight was placed upon it. The other evidence relating to the genocide count is overwhelming, such that the conviction on that count would stand even if the transcripts were credited and the factual finding on transport of arms on 10 April 1994 were quashed. Furthermore the finding on transport of arm was not at all relied upon with respect to the other counts.

14. In the opinion of the Appeals Chamber the Applicant has failed to establish that the contents of the radio broadcast of the *compte rendu* of the Cabinet Meeting of 10 April 1994 are such that the transcripts of said radio broadcast could have been a decisive factor in reaching the original decision.

2. Second alleged "new fact": Transcripts of the radio broadcast of the compte rendu of the Cabinet Meeting of 16 April 1994

15. The Applicant relies upon transcripts of a cassette AV/917 of a radio broadcast of the *compte rendu* of a Cabinet Meeting of 16 April 1994 to prove that he was in Murambi (Gitarama) on that day, and that he gave an account thereof on Radio Rwanda on three successive occasions.[31] Accordingly, he argues that he could not have been 100 kilometers away in Kibuye, where Prosecution Witness KJ[32] had testified to seeing him on that day at the *Gendarmerie* camp requisitioning arms and *gendarmes* in order to launch an attack at Mubuga church in Gishyita *commune*.[33] The Applicant insists that the relevant transcripts not only discredit Prosecution Witness KJ's testimony,[34] but also prove that Prosecution Witness KJ gave false testimony.[35] The Applicant submits that the transcripts constitute a "new fact" within the meaning of Article 25 and Rules 120 and 121,[36] or, alternatively, that they are a "decisive factor" warranting review of the findings of the Trial and Appeals Chambers

[26] Applicant's Reply to Prosecution's Response to Request for Review, paras. 2-3; Applicant's Additional Submissions, para. 171.
[27] Trial Judgement, paras. 56-68; Appeal Judgement, paras. 108-117.
[28] Applicant's Request for Review, para. 15 (a); Applicant's Additional Submissions, paras. 134-136, 138, 169.
[29] Trial Judgement, para. 67; Applicant's Request for Review, para. 13.
[30] Applicant's Reply to Prosecution's Response to Request for Review, para. 14; Applicant's Brief in Reply to Prosecution's Response to Additional Brief to Request for Review, para. 16; Applicant's Request for Admission of New Evidence, para. 20.
[31] Applicant's Request for Review, paras. 19-21; Applicant's Additional Submissions, paras. 140, 173.
[32] Sometimes referred to by the Applicant by the incorrect pseudonym of JK.
[33] Applicant's Request for Review, paras. 17, 20.
[34] Applicant's Request for Review, para. 21; Applicant's Reply to Prosecution's Response to Request for Review, paras. 23, 26-27; Applicant's Additional Submissions, paras. 176, 199-200, 235-236.
[35] Applicant's Reply to Prosecution's Response to Request for Review, para. 23; Applicant's Brief in Reply to Prosecution's Response to Additional Brief to Request for Review, paras. 16, 18; Applicant's Request for Admission of New Evidence, para. 20.
[36] Applicant's Request for Review, paras. 8, 21; Applicant's Reply to Prosecution's Response to Request for Review, para. 3.

on the credibility of Prosecution Witness KJ and the alibi for 16 April 1994[37] in order to avoid a miscarriage of justice.[38] The Prosecution responds that the transcripts do not constitute a "new fact", being evidence of a fact already in issue during the proceedings and that the transcripts "could" and "would" not have been a decisive factor in reaching the original decision.[39]

(a) Whether the transcripts of the radio broadcast of the *compte rendu* of the Cabinet Meeting of 16 April 1994 constitutes a "new fact"

16. The Appeals Chamber is of the opinion that the transcripts of cassette AV/917 constitute information of an evidentiary nature, relating to the Applicant's alibi of participation in the Cabinet Meeting of 16 April 1994 and the credibility of Prosecution Witness KJ. Nonetheless, the alibi and the implications it may have for the credibility of Prosecution Witness KJ, are not new facts, having already been pleaded during the proceedings.[40] Accordingly, the transcripts of cassette AV/917 relating to the said meeting do not amount to a "new fact" for the purposes of a review application and the Appeals Chamber is not obliged to examine them further. Nonetheless, the Appeals Chamber will consider whether, assuming the radio broadcast of the *compte rendu* of the Cabinet Meeting of 16 April 1994 could be characterized as a "new fact", they could have been a decisive factor in reaching the original decision.

(b) Whether the transcripts of the radio broadcast of the *compte rendu* of the Cabinet Meeting of 16 April 1994 could have been a decisive factor in reaching the original decision

17. The identical contents of the radio broadcast transcripts presented by the Applicant suggest that he made only one radio broadcast regarding the said meeting, which radio broadcast was recorded and aired subsequently twice, without it being necessary for the Applicant to be present at the radio station each time to read out the same *compte rendu*.[41]

18. The Applicant's contends that, before the meeting in the morning of 16 April 1994, he gave an interview which, according to him, was transcribed into a 10-page document.[42] However, he indicates neither the starting nor finishing time or the duration of the interview, making it impossible to determine when he was at the Cabinet Meeting.

19. In the Appeals Chamber's view the Applicant has failed to demonstrate that the transcripts of the radio broadcast of the *compte rendu* of the Cabinet Meeting of 16 April 1994 could have been a decisive factor in reaching the original decision.

3. Third alleged "new fact": Video footage KV00-0030 recorded on video tape KV-00-0030-0043 of the Cabinet Meeting/Press Conference presumably held on 13 May 1994

20. The Applicant submits BBC footage (recorded on video tape numbered KV-00-0030-0043) as proof that he was in a Cabinet Meeting/Press Conference on 13 May 1994 in Murambi (Gitarama). He argues that this confirms that he could not have been present on the same day at Muyira Hill (Kibuye), 100 kilometers away, participating in an attack, nor in Kucyapa, participating in a meeting. His presence at these events was alleged by Prosecution Witnesses GGY, HR, GGR, DAF, GGM and GGH.[43] The Applicant submits that the video not only discredits the testimonies of Prosecution

[37] Applicant's Additional Submissions, paras. 176, 186-187, 199-200, 235-236 (referring to Trial Judgement, paras. 78, 83; Appeal Judgement, para. 132).
[38] Applicant's Additional Submissions, paras. 121, 129-130.
[39] Prosecutor's Response to Applicant's Request for Review, paras. 2, 30-31, 34; Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 23.
[40] Trial Judgement, paras. 69-83; Appeal Judgement, paras. 118-132.
[41] Prosecutor's Response to Applicant's Request for Review, para. 32.
[42] Applicant's Request for Review, para. 20 (c).
[43] Applicant's Additional Submissions, paras. 118, 139, 163, 171, 284-285, 289-290; Applicant's Reply to Prosecution's Response to Additional Submissions, paras. 56, 70, 75.

Witnesses GGY,[44] HR,[45] GGR,[46] DAF,[47] GGM[48] and GGH,[49] but confirms that their testimony was false.[50] The Applicant submits that, should the Appeals Chamber not find that the video tape amounts to a "new fact", it may consider it to be a "decisive factor", and review the findings concerning the attack on 13 May 1994 and the credibility of the relevant Prosecution witnesses, in order to prevent a possible miscarriage of justice.[51] The Prosecution responds that it remains unconvinced that the recorded meeting was held on 13 May 1994.[52] In the Prosecution's view, the video is of questionable value as alibi evidence, and does not disclose any "new fact" that would have been a decisive factor in reaching the original decision.[53]

(a) Whether the video footage KV00-0030 recorded on video tape numbered KV-00-0030-0043 constitutes a "new fact"

21. In the Appeals Chamber's view, the video footage represents information of an evidentiary nature relating to the Applicant's alibi of participation in a Cabinet Meeting/Press Conference of 13 May 1994, and a factor in considering the testimonies of Prosecution Witnesses GGY, HR, GGR, DAF, GGM and GGH. Nonetheless, the Applicant's attendance at the Cabinet Meeting/Press Conference of 13 May 1994, which the Applicant aims to prove with the video footage, cannot be considered a "new fact" as the issue was discussed at trial[54] and the Appeals Chamber is not obliged to examine it further. Nevertheless, the Appeals Chamber will consider whether, assuming the video footage could be characterized as a new fact", it could have been a decisive factor in reaching the original decision.

(b) Whether the video footage KV00-0030 recorded on video tape numbered KV-00-0030-0043 could have been a decisive factor in reaching the original decision

22. Even if the Cabinet Meeting/Press Conference[55] were held on 13 May 1994,[56] as testified to by Defence Witness TEN-10,[57] it does not imply that the Applicant could not have participated in the attack in Muyira and the meeting in Kucyapa on that day. Indeed the attack is supposed to have taken place on 13 May 1994 between 7:00 and 10:00 a.m.,[58] whereas according to Defence Witness TEN-10 the Cabinet Meetings were held usually from 8:00 a.m. to 2:00 p.m. or beyond.[59] The Applicant has failed to show that he participated in the said Cabinet Meeting/Press Conference from the beginning and that he could not have participated in the attack in Muyira and in the meeting in Kucyapa, and join the Cabinet Meeting/Press Conference at a later stage.

23. The Appeals Chamber finds that the Applicant has failed to establish that video footage KV00-0030 relating to the Cabinet Meeting/Press Conference allegedly held on 13 May 1994 could have been a decisive factor in reaching the original decision.

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[44] Trial Judgement, paras. 131-133.
[45] Trial Judgement, paras. 134-135.
[46] Trial Judgement, paras. 136-138.
[47] Trial Judgement, paras. 139-140.
[48] Trial Judgement, paras. 141-144.
[49] Trial Judgement, paras. 145-146.
[50] Applicant's Reply to Prosecution's Response to Additional Submissions, para. 117 (7).
[51] Applicant's Additional Submissions, paras. 121, 129-130, 171, 278, 290, 311, 342; Applicant's Reply to Prosecution's Response to Additional Submissions, paras. 67-71.
[52] Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 51.
[53] Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 51.
[54] Trial Judgement, paras. 79-82.
[55] Applicant's Reply to Prosecution's Response to Additional Submissions, paras. 59-60, 70.
[56] Applicant's Reply to Prosecution's Response to Additional Submissions, paras. 68, 71.
[57] Applicant's Reply to Prosecution's Response to Additional Submissions, paras. 68 (b), 69.
[58] Trial Judgement, para. 178.
[59] Trial Judgement, para. 80.

4. Fourth alleged "new fact": Affidavit of a potential Defence Witness TEN-3 in the Applicant's trial

24. The Applicant produces an *affidavit* signed on 13 August 2005 by the potential Defence Witness TEN-3 as proof that, on 20 May 1994, he was on a mission in Gisenyi and Goma and thus cannot be the person who, according to Prosecution Witness DAF, raped and murdered a girl on that day in Bisesero, 150 kilometers away.[60] The Applicant claims that Prosecution Witness DAF gave false testimony within the meaning of Rule 91 of the Rules.[61] The Applicant submits that it was intended that the author of the *affidavit* would be a Defence witness TEN-3 at trial but could not appear,[62] and that this *affidavit* was not available at the time in spite of due diligence.[63] The Applicant asserts that the *affidavit* constitutes a "new fact",[64] and, in any case, a "decisive factor" affecting the Trial and the Appeals Chambers' findings on the credibility of Prosecution Witness DAF and his testimony,[65] as well as the Trial Chamber's finding on the murder of the girl on 20 May 1994.[66] The Prosecution responds that the *affidavit* is not reliable,[67] that its author is not credible,[68] and that the Applicant failed to exercise due diligence to have Witness TEN-3 testify as a *viva voce* witness during trial.[69] The Prosecution concludes that the *affidavit* is not a "new fact"[70] and that it could not have been a decisive factor in reaching the original decision.[71]

(a) Whether the *affidavit* of the potential Defence Witness TEN-3 in the Applicant's trial constitutes a "new fact"

25. The Appeals Chamber finds that the *affidavit* constitutes information of an evidentiary nature, relating to the Applicant's alibi of having been on mission in Goma and Gisenyi on 20 May 1994 as well as to the credibility of Prosecution Witness DAF. The Appeals Chamber is of the view that although the *affidavit* is "new" material, having been signed on 13 August 2005, the Applicant's alibi of being on mission in Goma and Gisenyi on 20 May 1994, which it seeks to corroborate, is not new, having already been considered during the original proceedings. Equally the issue of the credibility of Witness DAF has been examined at trial and on appeal.[72] The Appeals Chamber notes that the Applicant himself acknowledges that the *affidavit* is not a "new fact", but rather additional evidence of his alibi, which had already been considered in the light of the testimonies of Witnesses TEN-9 and TEN-10.[73] While the Appeals Chamber is not obliged to examine it further it will nonetheless consider whether, assuming the *affidavit* of the potential Defence Witness TEN-3 in the Applicant's trial could be characterized as a "new fact", it could have been a decisive factor in reaching the original decision.

[60] Applicant's Request for Admission of New Evidence, paras. 6, 8, 15; Applicant's Additional Submissions, paras. 249-254, 269; Applicant's Brief in Reply to Prosecution's Response to Request for Admission of New Evidence, para. 4.
[61] Applicant's Request for Admission of New Evidence, para. 20.
[62] Applicant's Request for Admission of New Evidence, para. 9. Applicant's Brief in Reply to Prosecution's Response to Request for Admission of New Evidence, para. 28; Applicant's Additional Submissions, para. 269.
[63] Applicant's Request for Admission of New Evidence, para. 4; Applicant's Brief in Reply to Prosecution's Response to Request for Admission of New Evidence, para. 4.
[64] Applicant's Additional Brief to request for Review.
[65] Applicant's Request for Admission of New Evidence, para. 4; Applicant's Brief in Reply to Prosecution's Response to Request for Admission of New Evidence, para. 4.
[66] Applicant's Additional Submissions, paras. 249-262, 269. For the findings see Trial Judgement, paras. 298, 301; Appeal Judgement, paras. 167-171.
[67] Prosecution's Response to Applicant's Request for Admission of New Evidence, paras. 5-11.
[68] Prosecution's Response to Applicant's Request for Admission of New Evidence, paras. 2, 12-13.
[69] Prosecution's Response to Applicant's Request for Admission of New Evidence, paras. 2, 23-27.
[70] Prosecution's Response to Applicant's Request for Admission of New Evidence, paras. 2, 14.
[71] Prosecution's Response to Applicant's Request for Admission of New Evidence, paras. 2, 28-31.
[72] Trial Judgement, paras. 162-168, 293; Appeal Judgement, paras. 164-172.
[73] Trial Judgement, paras. 292-302; Appeal Judgement, paras. 164-172.

(b) Whether the *affidavit* of the potential Defence Witness TEN-3 in the Applicant's trial could have been a decisive factor in reaching the original decision

26. Even assuming that the alleged mission of the Applicant and of the potential Witness TEN-3 to Goma and Gisenyi lasted from 19 to 20 May in the afternoon, or even to 21 May 1994, it has not been established that the Applicant remained at all times with the potential witness and could not have travelled to Bisesero without the latter's knowledge before returning to Gisenyi. Likewise, Dr. Zilimwabagabo's testimony, which the Applicant recalls in this connection, that a reception was held to mark an agreement with SHABAIR on a day which he no longer recalls "around 10 a.m." at *Hôtel Izuba* in the presence of the Applicant[74] who, moreover, has never mentioned the said reception, is not sufficient to establish that the said reception was held on 20 May 1994, nor does it rule out the possibility that the Applicant could have travelled to Bisesero after the reception. Furthermore, the receipt from the *Hôtel Méridien Izuba* in Gisenyi for the period from 15 May to 1 June 1994, does not show that the Applicant actually stayed at the hotel on 20 May 1994 and did not leave it at any point on that day.[75]

27. The indication at point 7 of the *affidavit* that potential Witness TEN-3 returned to Gisenyi with the Applicant in the *afternoon* of 20 May 1994,[76] and the statement at point 9 of the same *affidavit* that the mission to Gisenyi and Goma lasted from 19 May until *8 a.m.* on 20 May, constitutes an inherent contradiction which undermines the credibility of its author (potential witness TEN-3),[77] as well as the probative value of the *affidavit* itself. The Applicant's explanation that there is a typographic mistake at point 9, and that it should read "from 19 until the morning of 2[1] May"[78] is not only unpersuasive, but also reinforces Witness DAF's credibility, as it contradicts Defence Witness TEN-10's testimony that the mission lasted from 10 to 20 May 1994.[79] Moreover, what is at issue is not when the Applicant allegedly returned from mission, but rather his schedule on 20 May 1994. Accordingly, it is irrelevant for the Applicant to argue that point 8 of the *affidavit* cures the contradiction between points 7 and 9 thereof,[80] as point 8 only indicates that the Applicant returned on 21 May, but contains no details as to his schedule on 20 May 1994.

28. The Appeals Chamber concludes that the Applicant has failed to demonstrate that the contents of the *affidavit* of the potential Defence Witness TEN-3 in his trial relating to the events of 20 May 1994 could have been a decisive factor in reaching the original decision.

5. Fifth alleged "new fact": Transcripts of the radio broadcast of the compte rendu of the Cabinet Meetings of 10 and 17 June 1994

29. The Applicant relies on the transcripts of cassettes AV/1040 and AV/1053 of the radio broadcast *comptes rendus* of the Cabinet meetings of 10 and 17 June 1994 to prove his presence in Murambi that day. He claims that he gave an account of the meetings on radio on 11 and 18 June 1994,[81] and thus he could not have been with the *Interahamwe* and *bourgmestres* in Kibuye, 200 kilometers away, planning an attack against the Tutsi refugees at Bisesero as testified by

[74] Prosecution's Response to Applicant's Request for Admission of New Evidence, see Annexe 1; Applicant's Brief in Reply to Prosecution's Response to Request for Admission of New Evidence, para. 20; Applicant's Additional Submissions, para. 272.
[75] Applicant's Request for Admission of New Evidence, para. 8; Applicant's Brief in Reply to Prosecution's Response to Request for Admission of New Evidence, paras. 32-33; Prosecution's Response to Applicant's Request for Admission of New Evidence, para. 25, fn. 24.
[76] Prosecution's Response to Applicant's Request for Admission of New Evidence, para. 7.
[77] Prosecution's Response to Applicant's Request for Admission of New Evidence, para. 12; Applicant's Additional Submissions, para. 275; Applicant's Brief in Reply to Prosecution's Response to Request for Admission of New Evidence, paras. 6-8.
[78] Applicant's Brief in Reply to Prosecution's Response to Request for Admission of New Evidence, para. 9.
[79] Trial Judgement, para. 299; Applicant's Request for Admission of New Evidence, paras. 5, 20; Applicant's Brief in Reply to Prosecution's Response to Request for Admission of New Evidence, para. 35.
[80] Applicant's Brief in Reply to Prosecution's Response to Request for Admission of New Evidence, para. 9.
[81] Applicant's Additional Submissions, paras. 141-142, 193-195.

Prosecution Witness GGV.[82] The Applicant contends that the said transcripts not only discredit Prosecution Witness GGV and his testimony, which is false,[83] but tend to corroborate the testimony of Defence Witness TEN-10. The Applicant submits that the transcripts constitute a "new fact" within the meaning of Article 25 of the Statute and Rules 120 and 121 of the Rules.[84] Alternatively, he requests the Appeals Chamber to consider them as a "decisive factor" of such import that they warrant the review of the findings on the credibility of Prosecution Witness GGV and the Applicant's activities of 10 and 17 June 1994[85] in order to prevent a miscarriage of justice.[86] The Prosecution responds that the transcripts do not represent a "new fact", but evidence of a fact already in issue during the proceedings, not capable of being a decisive factor in the original decision.[87]

(a) Whether the transcripts of the radio broadcast of the *compte rendu* of the Cabinet Meetings of 10 and 17 June 1994 constitute a "new fact"

30. The Appeals Chamber is of the opinion that the transcripts constitute information of an evidentiary nature, relating to the Applicant's alibi of participation in the Cabinet Meetings of 10 and 17 June 1994 and, consequently, the credibility of Witness GGV. However, having been raised as such during the proceedings,[88] the Applicant's alibi based on his attendance at the Cabinet Meetings of 10 and 17 June 1994, in support of which the transcripts are introduced, is not a "new fact" within the meaning of Rule 120. Likewise, the contention that Prosecution Witness GGV's evidence was not credible is also not new as it was examined on appeal[89] and pleaded to some extent before the Trial Chamber.[90] While the Appeals Chamber is not obliged to examine them further it will nonetheless consider whether, assuming the transcripts of the radio broadcast of the *compte rendu* of the Cabinet Meetings of 10 and 17 June 1994 could be characterized as a "new fact", they could have been a decisive factor in reaching the original decision.

(b) Whether the transcripts of the radio broadcast of the *compte rendu* of the Cabinet Meetings of 10 and 17 June 1994 could have been a decisive factor in reaching the original decision

31. The transcripts of the radio broadcasts of 11 and 18 June 1994 reporting on Cabinet Meetings respectively held on 10 and 17 June 1994 do not prove that the Applicant effectively participated in the said meetings,[91] held a day preceding each radio broadcast. Accordingly, even assuming that Cabinet Meetings were held on 10 and 17 June 1994 in Muramba, and that the Applicant gave an account thereof on the radio, the transcripts do not prove that the Applicant physically participated in the cabinet meetings[92] or that if he was a participant, that he was present throughout the day. Furthermore, the transcripts of the radio broadcast of the *compte rendu* of the cabinet meeting held on 17 June 1994, indicating that the said meeting lasted from 9 a.m. or 10 a.m. until 5 p.m. or 6 p.m.,[93] discredit the testimony of Defence Witness TEN-10 that the meeting lasted from 10 a.m. or 11 a.m. to 5 p.m. or 7 p.m., thereby confirming the Trial Chamber's finding that the Witness is not credible.[94]

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[82] Applicant's Request for Review, paras. 22-28.
[83] Applicant's Reply to Prosecution's Response to Request for Review, paras. 23, 27; Applicant's Additional Submissions, paras. 219-228, 231-236; Applicant's Request for Admission of New Evidence, para. 20 ; Applicant's Brief in Reply to Prosecution's Response to Additional Brief to Request for Review, para. 16.
[84] Applicant's Request for Review, para. 8; Applicant's Reply to Prosecution's Response to Request for Review, para. 3. Applicant's Additional Submissions, paras. 141-142.
[85] Applicant's Additional Submissions, paras. 213-228 (referring to Trial Judgement, paras. 213, 221, 225; Appeal Judgement, para. 156).
[86] Applicant's Additional Submissions, paras. 121-131
[87] Prosecutor's Response to Applicant's Request for Review, paras. 30-31; Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, paras. 30, 42.
[88] See Trial Judgement, paras. 214, 222-224.
[89] Appeal Judgement, paras. 146-157.
[90] Trial Judgement, paras. 214, 222-224; Prosecutor's Response to Applicant's Request for Review, para. 28.
[91] Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, paras. 28, 40.
[92] Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, paras. 28 and 40.
[93] Applicant's Additional Submissions, para. 142.
[94] *The Prosecutor v. Eliézer Niyitegeka*, Case N°ICTR-96-14-T, Judgement and Sentence, 16 May 2003, para. 214.

32. The Appeals Chamber finds that the Applicant has failed to establish that the contents of the transcripts of the radio broadcast of the *compte rendu* of the Cabinet Meetings held on 10 and 17 June 1994 could have been a decisive factor in reaching the original decision.

6. Sixth alleged "new fact": The agenda of the Cabinet Meeting of 22 June 1994, the testimonies of Witness PP in the Kayishema/Ruzindana case and the testimonies of Witnesses BE, BH, BB and AT in the Muhimana case

33. The Applicant states that, at 09:00 a.m. on 22 June 1994, he participated in a Cabinet Meeting in Muramba (Gisenyi).[95] Consequently, he could not have been at the scene of the murder, decapitation and emasculation of Assiel Kabanda, executed on the same day, in a location 240 kilometers away from Muramba, contrary to the testimony of Prosecution Witness GGO.[96] The Applicant further claims that Witness PP in the *Kayishema and Ruzindana* case, as well as Witnesses BE, BB, BH and AT in the *Muhimana* case, did not testify that he was among those involved in the killing.[97] Thirdly, the Applicant notes that the witnesses in the *Muhimana* case gave a description of the location of the murder contradictory to that given by Prosecution Witness GGO.[98] The Applicant argues that the agenda of the Cabinet Meeting of 22 June 1994, as well as the testimonies of the various witnesses, not only affect the credibility of the Prosecution Witness GGO,[99] but also corroborate the credibility of Defence Witness TEN-10.[100] The Applicant claims that Prosecution Witness GGO gave false testimony within the meaning of Rule 91 of the Rules.[101] The Applicant submits that the agenda and the various testimonies of witnesses amount to a "new fact" under Article 25 of the Statute and Rule 120 of the Rules. Alternatively, the Appellant submits that the Appeals Chamber may admit them as "decisive factors" warranting review of the Chambers' findings on the credibility of Witness GGO and the murder of Kabanda on 22 June 1994, in order to avoid a miscarriage of justice.[102] The Prosecution responds that the testimonies of Prosecution witnesses are not a "new fact" but evidence of a fact known at trial,[103] that the said testimonies do not suggest the innocence or mitigate the guilt of the Applicant, or affect the credibility of Prosecution Witness GGO,[104] and that they could not have been a decisive factor in reaching the original decision.[105]

(a) Whether the agenda of the Cabinet Meeting of 22 June 1994 and the testimony of Witness PP in *Kayishema/Ruzindana* case and the testimony of Witnesses BE, BH, BB and AT in the *Muhimana* case constitutes a "new fact"

34. Regarding the alibi of the Applicant's participation in the Cabinet Meeting of 22 June 1994, and the credibility of Prosecution Witness GGO, the Appeals Chamber is of the view that the agenda of the said meeting constitutes information of an evidentiary nature. However, the Applicant's attendance at the Cabinet Meeting of 22 June 1994, which the agenda seeks to establish, is not a "new fact", since it had been raised during the original proceedings.[106] Similarly, the credibility of

[95] Applicant's Additional Submissions, paras. 246, 248.
[96] Applicant's Additional Brief to request for Review, paras. 2-4; Applicant's Brief in Reply to Prosecution's Response to Additional Brief to Request for Review, paras. 7-9; Applicant's Additional Submissions, paras. 241, 248. For a summary of the testimony *see* Trial Judgement, paras. 303-304.
[97] Applicant's Additional Brief to request for Review, para. 13 (c); Applicant's Additional Submissions, para. 242.
[98] Applicant's Additional Brief to request for Review, paras. 2, 8-12, 13 (a), 15; Applicant's Additional Submissions, para. 243.
[99] Applicant's Additional Brief to request for Review, paras. 1, 14; Applicant's Additional Submissions, para. 241.
[100] Applicant's Additional Submissions, paras. 245, 246, 248.
[101] Applicant's Additional Brief to request for Review, para. 13 (d); Applicant's Brief in Reply to Prosecution's Response to Additional Brief to Request for Review, para. 9; Applicant's Request for Admission of New Evidence, para. 20.
[102] Applicant's Additional Submissions, paras. 121, 129-130, 246-248.
[103] Prosecutor's Response to Applicant's Additional Brief to Request for Review, paras. 4, 8-9, 14, 18-20.
[104] Prosecutor's Response to Applicant's Additional Brief to Request for Review, para. 28.
[105] Prosecutor's Response to Applicant's Additional Brief to Request for Review, paras. 4, 21-22, 29-30.
[106] Trial Judgement, para. 308.

Prosecution Witness GGO, which the agenda is argued to impugn, was dealt with during the original proceedings and on appeal.[107]

35. While the testimony of Witness PP in the *Kayishema and Ruzindana* case could be seen as information of an evidentiary nature, the fact that the Applicant was not named as being among the persons present at the scene of the crime, which the testimony seeks to corroborate, does not raise a new issue, having been specifically considered during the proceedings.[108] The testimonies of Prosecution Witnesses BE, BH, BB and AT in the *Muhimana* case, which seek to corroborate this argument and which might be considered as information of an evidentiary nature,[109] fail to meet the requirements of Rule 120 for the same reason.

36. Accordingly, the Appeals Chamber concludes that there is no merit in the Applicant's argument that both the agenda of the Cabinet Meeting of 22 June 1994 and the testimonies of witnesses in other cases constitute a "new fact".[110] While the Appeals Chamber is not obliged to examine them further it will nonetheless consider whether, assuming the agenda of the Cabinet Meeting of 22 June 1994 and the testimonies of witnesses in other cases could be characterized as a "new fact", they could have been a decisive factor in reaching the original decision.

(b) Whether the agenda of the Cabinet Meeting of 22 June 1994 and the testimony of Witness PP in the *Kayishema/Ruzindana* case and the testimony of Witnesses BE, BH, BB and AT in the *Muhimana* case could have been a decisive factor in reaching the original decision

37. Regarding the Applicant's attendance at the Cabinet Meeting of 22 June 1994, the entry "MININFOR" at point 4 of the agenda of the said meeting, which according to the Applicant, refers to the "Minister of Information"[111] is not unequivocal. The said entry in the agenda does not rule out the possibility that the Minister of Information may have sent a representative, or that the schedule of the meeting may have been subsequently amended to enable him to address the meeting earlier so that he could leave or that he did not attend the meeting at all. Even if considered to be of impeccable provenance, the agenda is not proof of anything other than the fact that a meeting was scheduled, but not that it actually took place with all anticipated participants present at all or throughout the meeting.

38. With regard to the issue of the Applicant's presence at the scene of Mr. Kabanda's murder, the Appeals Chamber has already ruled that the fact that Witness DAF, testifying in *Kayishema/Ruzindana* as Witness PP, did not specifically name the Applicant as being present at the scene of the murder[112] does not mean necessarily that he was absent.[113] The Applicant offers no reason why anything more should be inferred from the fact that Witnesses BE, BH, BB and AT in the *Muhimana* case did not say that he was present.

39. The letter convening the meeting of 22 June 1994, which was a Wednesday, cannot reinforce Defence Witness TEN-10's testimony that such meetings were usually held on Fridays.[114]

40. The Appeals Chamber finds that the Applicant has failed to show that the agenda of the Cabinet Meeting of 22 June 1994 and the testimony of Witness PP in the *Kayishema/Ruzindana* case and the testimony of Witnesses BE, BH, BB and AT in the *Muhimana* case could have been a decisive factor in reaching the original decision.

7. Supplementary arguments concerning other facts

[107] Appeal Judgement, paras. 93-96, 175, 182; Trial Judgement, para. 310.
[108] Trial Judgement, para. 309; Appeal Judgement, para. 180.
[109] Trial Judgement, para. 309; Appeal Judgement, para. 180.
[110] Applicant's Reply to Prosecution's Response to Request for Review, para. 3.
[111] Applicant's Additional Brief to request for Review, paras. 4-5.
[112] Appeal Judgement, para. 94.
[113] Appeal Judgement, para. 180.
[114] Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 65.

41. In the Additional Submissions, the Applicant's Counsel makes arguments concerning facts outside the scope of the Applicant's three original requests for review and the mandate given to her in the Appeals Chamber's Decisions of 20 June 2005 and 28 September 2005. One of these arguments relates, in particular, to the integrity of a certain Prosecution Counsel involved in the trial, the merit of which is addressed further down.[115] Defence Counsel also contests the findings of the Appeals Chambers on his participation in the attack on the Muyira Hill between 17 and 30 April 1994, as well as his participation in the meeting held on 3 May 1994 in the office of Kibuye *Préfecture*.[116]

42. The Appeals Chamber notes that the opportunity granted to the Defence to file Additional Submissions was limited to those alleged "new facts" raised by the Applicant in his requests filed *pro se* on 27 October 2004,[117] 7 February 2005,[118] and 17 August 2005.[119] Accordingly, any other alleged "new fact" invoked for the first time in the Additional Submissions exceeds the scope of the additional submissions as permitted in the Appeals Chamber's Decisions of 20 June and 28 September 2005. As explained above, the Appeals Chamber has exceptionally considered the alleged new facts raised by transcripts AV/908 and RSFO112 and video footage KV-00-0030-0043. However, the Appeals Chamber recalls that review proceedings may not be used to re-litigate issues considered in the original proceedings and declines to address on review matters that are outside the alleged "new facts" raised by the Applicant and in respect of which the Applicant or his Counsel did not bring any new evidentiary information.

II. The Request for application of Rules 89 (c) and 115 of the Rules as alternative to Article 25 and Rules 120 and 121

43. The Applicant suggests that Rules 89 (C) and 115 of the Rules can apply as alternatives to the provisions of Article 25 and Rules 120 and 121 governing the review proceedings.

A. Application of Rule 89 (C) instead of Article 25 and Rule 120

44. The Applicant requests the Appeals Chamber to issue an order admitting into evidence the materials submitted in support of his application,[120] pursuant Rule 89 (C) according to which "A Chamber may admit any relevant evidence which it deems to have probative value."

45. The Appeals Chamber considers that the general provision of Rule 89 (C) governing admission of evidence cannot supersede the *lex specialis* of Article 25 of the Statute and Rule 120 of the Rules in respect of review proceedings, for which the Statute and the Rules have set a different and more restrictive standard. It thus does not apply in this case.

B. Application of Rule 115 instead of Article 25 and Rule 120

46. In his submissions, the Applicant also referred to the provisions of Rule 115 of the Rules on the admission of additional evidence. Rule 115 of the Rules reads as follows:

> (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 seventy-five days from the date of the

[115] See *infra* paras. 72-75.
[116] Applicant's Additional Submissions, paras. 280, 343-345.
[117] Applicant's Request for Review.
[118] Applicant's Additional Brief to request for Review.
[119] Applicant's Request for Admission of New Evidence.
[120] Applicant's Additional Submissions, paras. 31, 360 (4); Applicant's Reply to Prosecution's Response to Additional Submissions, para. 117 (6).

judgement, unless good cause is shown for further delay. Rebuttal material may be presented by any party affected by the motion.

(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 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.

47. The Appeals Chamber notes that there is a fundamental distinction between the admission of additional of evidence on appeal and a review based on a "new fact".[121] Rule 115 provides for the admission of additional evidence in appellate proceedings only, and is related to Article 24 of the Statute. Rule 120, on the other hand, pertains to review proceedings under Article 25 of the Statute and constitutes an "exceptional" procedure; it does not represent a second appeal.[122] Further, there is a distinction in the nature of the additional material which may be considered under Rule 115 and that which may be considered during a review proceeding.[123] While Rule 115 accepts any relevant and credible additional evidence of an issue which has already been considered at trial,[124] Article 25 and Rule 120 require a "new fact", defined as "*new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings*".[125] As noted above, the Appeals Chamber will only permit review on the basis of new evidence of a fact known at trial under exceptional circumstances.

48. The Appeals Chamber holds that it is incorrect for parties to rely on the provisions of Rule 115 for the purpose of review instead of relying on Article 25 of the Statute and Rule 120 of the Rules.

III. Alleged Rule 68 violations and related material prejudice

49. In an argument closely related to his submissions on the alleged "new facts", the Applicant further alleges that the Prosecution failed to disclose exculpatory evidence to the Defence, violating Rule 68 of the Rules and the Professional Code of Conduct to his prejudice within the meaning of Rule 5 of the Rules.[126]

A. Applicable Law

50. The relevant provisions are Rule 68 (A), (B), (D) and (E) read as follows:

Rule 68: Disclosure of Exculpatory Evidence (as amended in April 2004)

(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.

(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

[121] *Delić*, Decision on Motion for Review, para. 9.
[122] Review is frequently described as an "exceptional" procedure: *Tadić*, Decision on Motion for Review, para. 24.
[123] *Delić*, Decision on Motion for Review, para. 11.
[124] *Delić*, Decision on Motion for Review, paras. 11, 13.
[125] *Tadić*, Decision on Motion for Review, para. 25; *Josipović*, Decision on Motion for Review, paras. 18-19.
[126] Applicant's Request for Review, para. 30; Applicant's Reply to Prosecution's Response to Request for Review, para. 28; Applicant's Additional Submissions, para. 99.

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.

51. However, the Prosecution may be relieved of the obligations under Rule 68, if the existence of the relevant exculpatory evidence is known and the evidence is accessible to the appellant, as the appellant would not be prejudiced materially by this violation.[127]

52. Once the Defence has satisfied a Chamber that the Prosecution failed to comply with Rule 68, the Chamber, in addressing what is the appropriate remedy (if any), must examine whether the Defence has been materially prejudiced by the breach of Rule 68.[128]

B. Submissions of the Parties and Discussion

53. The Applicant submits that despite various orders of the Trial Chamber directing the Prosecution to disclose exculpatory materials pursuant to Rule 68, the Prosecution, notwithstanding its undertaking to comply,[129] withheld the transcripts of cassettes AV/906, AV/907, AV/908; purported to disclose the transcripts of cassettes RSFO122, AV/917, AV/1040, AV/1053 and video tape KV-0030-0043, but did so only partially;[130] and failed to disclose the testimonies of Prosecution Witnesses BE, BB, BH and AT in the *Muhimana* case. The Applicant contends that these failures[131] deprived him of exculpatory material supporting his alibis for 10 and 16 April, 13 May, 10, 17 and 22 June 1994, to his prejudice within the meaning of Rule 5 of the Rules.[132] According to the Applicant, the Prosecution violated the Prosecutor's Regulation N°2 (1999).[133] The Prosecution responds that failure to disclose the transcripts of cassettes AV/906, AV/907, AV/908 was not wilful,[134] and that other similar material, bearing upon the same alleged facts, was disclosed.[135] The Prosecution further submits that the transcripts of the other cassettes were disclosed to the Defence,[136] albeit in different versions or languages (Kinyarwanda), that there was no obligation under Rule 68 to communicate the testimonies of Prosecution witnesses in the *Muhimana* case to the Applicant, and that the Applicant did not suffer prejudice,[137] as none of the testimonies would have been a "decisive factor".[138] According to the Prosecution, the Applicant failed to demonstrate that the Prosecution did not adhere to the standard of professional conduct set out in the Prosecutor's Regulation N02 (1999).[139]

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[127] *Kordić*, Decision on Appellant's Notice and Supplemental Notice, para. 20; *Blaskić*, Decision on the Appellant's Motions for the Production of Material, para. 38; see also *Niyitegeka,* Appeal's Chamber Decision of 28 September 2005, p. 8.
[128] *Orić*, Decision on Defence Motion on Non-Compliance with Rule 68, p. 4; see also *Orić*, Decision on Complaints About Non-Compliance with Rule 68 of the Rules, para. 24; *Krstić*, Appeal Judgement, para. 153.
[129] Applicant's Request for Review, para. 10.
[130] Applicant's Additional Submissions, paras. 106-20, 133-142; Prosecutor's Response to Applicant's Request for Review, paras. 2, 26, see also Annex 1, Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, paras. 16, 24, 32, 46, 50.
[131] Applicant's Additional Submissions, paras. 1, 3-4, 69, 346-358, 360.
[132] Applicant's Request for Review, paras. 16, 21, 30, 33; Applicant's Reply to Prosecution's Response to Request for Review, paras. 10, 28; Applicant's Additional Submissions, para. 99.
[133] Applicant's Reply to Prosecution's Response to Request for Review, paras. 6-7, 17, 19, 25, 28; Applicant's Brief in Reply to Prosecution's Response to Additional Brief to Request for Review, paras. 1, 14-15.
[134] Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, paras. 11, 44.
[135] Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, paras. 2, 6, 14.
[136] Prosecutor's Response to Applicant's Request for Review, paras. 2, 26-27, 34.
[137] Prosecutor's Response to Applicant's Request for Review, paras. 2, 6, 8, 24; Prosecutor's Response to Applicant's Additional Brief to Request for Review, paras. 4, 21; Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 14.
[138] Prosecutor's Response to Applicant's Request for Review, paras. 14, 24, 30-31; Prosecutor's Response to Applicant's Additional Brief to Request for Review, paras. 4, 29, 30.
[139] Prosecutor's Response to Applicant's Additional Brief to Request for Review, para. 30.

54. The Appeals Chamber will now examine the alleged violations of Rule 68.

1. Transcripts of cassettes AV/906, AV/907, AV/908 and RSFO122 relating to the Applicant's alibi for 10 April 1994

55. With regard to cassettes AV/906, AV/907 and AV/908, the Appeals Chamber finds that the Prosecution failed to fulfil its obligations under Rule 68 (C) by its failure to make appropriate disclosure to the Applicant of material that was in its custody.[140] The Prosecution's argument that, as the Applicant possessed information regarding the meeting and its radio broadcast as indicated by the cross-examination of Witness GGH,[141] and there is no indication that the Defence prompted a search of Prosecution database, cannot excuse the Prosecution's breach of a fundamental obligation owed to the Applicant under the Rules.

56. The Applicant's allegation that the Prosecution made a tactical decision not to disclose the transcripts[142] is, however, unsubstantiated. It has also not been established that the Prosecution acted in bad faith in spite of the Trial Chamber's Decisions of 4 February 2000 and 27 February 2001, and the assurance given by the Prosecution itself to disclose any exculpatory evidence that came into its possession.[143] Accordingly, the Applicant's claim that the Prosecution violated paragraph 2 (a), (d) and (h) of the Prosecutor's Regulation N°2 as well as general standards of professional conduct,[144] lacks foundation. The allegation by the Applicant of a conspiracy to fabricate evidence against him[145] is similarly lacking in substantiation and merits no further consideration.

57. The Appeals Chamber recalls its finding above that the finding during the original proceedings of transport of guns by the Applicant on 10 April 1994, which the transcripts of cassettes AV/906, AV/907 and AV/908 are meant to contest, was not critical to his conviction for any crime.[146] Therefore the said transcripts would have been disclosed during the original proceedings and they would not have affected the convictions.

58. In light of the foregoing, the Appeals Chamber finds that the Applicant has failed to show that the non-disclosure of the transcripts of cassettes AV/906, AV/907 and AV/908 caused him material prejudice.

59. Regarding the transcripts of cassette RSFO122, the Appeals Chamber finds the Applicant's allegation of non-disclosure[147] to lack foundation as the record shows that the transcripts were disclosed to him,[148] and that he also referred to them in his notices of alibi dated 25 September and 18 October 2002,[149] despite their being in Kinyarwanda.[150] The Appeals Chamber, therefore, does not find that non-compliance with the Rules has been established.

2. Transcripts of cassette AV/917 relating to the Applicant's alibi for 16 April 1994

60. On the basis of the record before it, the Appeals Chamber considers that an 11-page translation of the transcripts of cassette AV/917 was disclosed to the Applicant on 19 April 2000,[151] before the

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[140] See Prosecutor's Response to Applicant's Request for Review, paras. 2, 6-7; Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, paras. 11, 12, 43-44.
[141] Prosecutor's Response to Applicant's Request for Review, paras. 2, 7, 10, 12.
[142] Applicant's Reply to Prosecution's Response to Request for Review, para. 19.
[143] Applicant's Brief in Reply to Prosecution's Response to Additional Brief to Request for Review, para. 11.
[144] Applicant's Reply to Prosecution's Response to Request for Review, paras. 5-8, 17, 23, 25, 28.
[145] Applicant's Additional Submissions, paras. 77-79. See also Appeal Judgement, para. 252.
[146] See *supra* para. 13.
[147] Applicant's Additional Submissions, para. 137.
[148] Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 46.
[149] Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 46.
[150] Applicant's Additional Submissions, para. 138; Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para 45.
[151] Prosecutor's Response to Applicant's Request for Review, Annex I, Exhibits A, B and C; Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, paras. 21-22, Appendix 8.

Applicant's key alibi witness testified. The Appeals Chamber notes that the same document was requested again by the Defence on 18 September 2002, and disclosed again on 25 October 2002.[152]

61. The Appeals Chamber finds that the Prosecution disclosed only the 11-page version of the translation and that it failed to disclose the full 29-page version of the transcripts, in its possession since, at the latest, 20 August 2001.[153] The Appeals Chamber notes the Prosecution's contention that, although the 29-page version may have been physically available at that time, it was not properly recorded in its database until 5 February 2004 and therefore could not have been discovered by an electronic search during the trial. The Appeals Chamber recalls that Rule 68 (B) requires the Prosecution to make available to the Appellant, "in electronic form, collections of relevant material held by the Prosecution, together with appropriate computer software with which the Defence can search such collections electronically" and as such the Prosecution cannot rely upon its failure to diligently update electronic records. Similarly, the Prosecution cannot prevail on its argument that the 11-page version of the transcripts disclosed to the Applicant is substantially the same as the 29-page version.[154]

62. In considering Rule 5, however, the Applicant does not satisfy the Appeals Chamber that material prejudice was caused by the failure to disclose the 29-page version of the transcript of cassette AV/917. The Applicant has not demonstrated that the difference in content between the shorter and longer versions was such that having possession of the longer one would have made a material difference in the preparation of his case.

63. In light of the foregoing, the Appeals Chamber finds that the Applicant has failed to show that this Rule 68 violation caused him material prejudice.

3. Video footage KV-00-0030 relating to the Applicant's alibi for 13 May 1994

64. The Appeals Chamber notes that the material portion of the video tape relating to the Applicant's alibi for 13 May 1994 was disclosed to the Applicant as KV00-0030 and KV00-0030B.[155] The Appeals Chamber observes that the Applicant had requested the disclosure of a cassette identified as KV00-0030-0043. The Appeals Chamber notes that the Applicant invoked the said video tape in his notices of alibi dated 16 June, 25 September and 18 October 2002[156] and, therefore, the argument that it was not disclosed to him is not convincing. Given the similarity of names and content, and the prior notice provided by the Prosecution of when the relevant video would be disclosed, the Appeals Chamber finds unsustainable the Applicant's argument that neither he nor his Defence team would have recognised KV00-0030 and KV00-0030B to be the requested disclosure material. The Appeals Chamber considers that the Prosecution could have, as a matter of courtesy, alerted the Defence that the video footage disclosed under the names KV00-0030 and KV00-0030B is the relevant portion of the cassette requested as KV00-0030-0043. However, the Applicant's arguments that the Prosecution must have drawn his attention to the fact that the numbering and format of the video tape was different[157] or must have provided more specific guidance as to the importance of the said tape[158] is without merit, as there is no *prima facie* obligation for the Prosecution to identify the material being disclosed as potentially exculpatory.[159]

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[152] Prosecutor's Response to Applicant's Request for Review, Annex 1, "Exhibits A, B, C"; Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, Appendices 9-10.
[153] Applicant's Additional Submissions, para. 140; Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 18.
[154] Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 19.
[155] Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 50, Appendices 15, 16.
[156] Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 50, Appendices 4, 5, 6.
[157] Applicant's Reply to Prosecution's Response to Additional Submissions, para. 72.
[158] Applicant's Reply to Prosecution's Response to Additional Submissions, para. 73.
[159] *Krstić*, Appeal Judgement, paras. 190-193.

65. The Appeals Chamber concludes that the Applicant has failed to demonstrate a violation of Rule 68 of the Rules in this respect.

4. Transcripts of cassettes AV/1040 and AV/1053 of 11 and 18 June 1994 relating to the Applicant's alibi for 10 and 17 June 1994

66. Based on the submissions, the Appeals Chamber considers that Kinyarwanda transcripts of cassettes AV/1040 and AV/1053 were disclosed to the Applicant by 28 October 2002, before the Applicant's key alibi witness testified.[160]

67. The Appeals Chamber considers that, as the Applicant mentioned the transcripts of cassette AV/1040 in the notice of alibi dated 16 June 2002, and the transcripts of cassette AV/1053 in the notices of alibi dated 25 September, 16 June and 18 October 2002,[161] he must have been aware of their contents before they were disclosed to him by the Prosecution. Therefore, the Applicant's claim that cassette AV/1040 was blank[162] when it was first disclosed to him does not establish that he suffered material prejudice. Further, the Applicant's assertion that he received the transcripts of cassettes AV/1040 and AV/1053 only on 9 October 2004 thanks to another accused person to whom the cassettes had been disclosed, is also unpersuasive.[163]

68. The Appeals Chamber considers that even though the Applicant speaks Kinyarwanda as his mother tongue, and had chosen to rely on Kinyarwanda versions of transcripts in his notice of alibi,[164] the Prosecution is not justified in failing to disclose a translation in one of the official languages of the Tribunal as soon as it is available.[165] The Appeals Chamber notes, however, that the Applicant has not indicated that failure to supply a translation was an obstacle to making use of the transcripts. The fact that the transcripts were relied upon in the Notices of Alibi suggests that the Applicant and his defence team surmounted the difficulties of language and accordingly suffered no prejudice.

69. In light of the foregoing, the Appeals Chamber finds that the Applicant has failed to show that this Rule 68 violation caused him material prejudice.

5. Testimonies of witnesses in the Kayishema and Ruzindana case and Muhimana case pertaining to the Applicant's alibi for 22 June 1994

70. The Appeals Chamber recalls its earlier finding that the failure of Prosecution Witness PP in the *Kayishema and Ruzindana* case to implicate the Applicant directly in Assiel Kabanda's murder did not foreclose the possibility of the Applicant's presence at the scene.[166] By the same analysis, the testimony of Prosecution Witnesses BE, BB, BH and AT in the *Muhimana* case, which also do not implicate the Applicant in the same event do not necessarily suggest an exculpatory factor and the Prosecution was under no obligation under Rule 68 to disclose the said testimonies to the Applicant.

71. In light of the foregoing, the Appeals Chamber finds that, the Applicant has failed to demonstrate that Prosecution Counsel did not adhere to the standards of professional conduct set out under Prosecutor's Regulation N°2 and a material prejudice within the meaning of Rule 5 of the Rules has not been shown.

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[160] Prosecutor's Response to Applicant's Request for Review, paras. 26-27, 34; Annex I, Exhibits B and C; Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, paras. 24-25, 32, 36.
[161] Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, paras. 26, 34-35.
[162] Applicant's Additional Submissions, para. 115; Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, para. 31.
[163] See Applicant's Reply to Prosecution's Response to Request for Review, para. 18.
[164] Prosecutor's Response, with Confidential Appendices, to Applicant's Additional Submissions, paras. 29, 33.
[165] Pursuant to Rule 3 of the Rules, the working languages of the Tribunal shall be English and French.
[166] Appeal Judgement, para. 180.

6. Integrity of a certain Prosecution Counsel involved in the Applicant's Trial

72. The Appeals Chamber is of the opinion that most of the arguments relating to the involvement in this case of a certain prosecuting Counsel who had been subject to professional discipline in her home jurisdiction were already raised by the Applicant and rejected at the appeals stage and the Appeals Chamber will not consider them *de novo* as review proceedings is not an opportunity simply to re-litigate unsuccessful appeals.

73. Therefore the Appeals Chamber will address the merit of the Applicant's arguments only insofar as they relate to the recently discovered communications showing that the said Counsel was not consistently supervised at trial – as was suggested by the Appeals Chamber – and insofar as they relate to the existence of disclosure violations that may have occurred as a result of the involvement of said Counsel in his case.

74. As to the supervision of the prosecuting Counsel, the Appeals Chamber notes that it was not critical to its disposition of this ground of the Applicant's appeal. The Appeals Chamber rather held that the attorney's suspension from the New York bar did not preclude the prosecutor from entrusting her with authority under Rule 37 (B) of the Rules, that she remained bound by the ethical constraints imposed on all counsel before the International Tribunal, that her suspension was for reasons unrelated to the Applicant's case and that the attorney's involvement in his case did not in any event compromise the Applicant's right to a fair trial. None of those conclusions of the Appeals Chamber at the appeal stage is put in question by the materials submitted at the review stage.

75. Regarding the prejudice which would have resulted from the disclosure violations, the Appeals Chamber recalls its above finding that they did not materially prejudice the Applicant.

IV. Disposition

76. The Appeals Chamber

DISMISSES all requests of the Applicant and the Prosecution;

REMINDS the Prosecution of its fundamental obligations in respect of disclosure of exculpatory material pursuant to Rule 68 of the Rules.

Done in English and French, the English text being authoritative.

Done this 30th day of June 2006, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

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V. Declaration of Judge Shahabuddeen 30 June 2006 (ICTR-96-14-R)

(Original : not specified)

1. I agree with the outcome of today's decision and with the greater part of its reasoning. I write to clarify my views on two interrelated points. First, the Appeals Chamber repeatedly states that, if evidence does not "amount to a 'new fact' for the purposes of a review application", "the Appeals Chamber is not obliged to examine [it] further".[1] Second, the Appeals Chamber holds that "in 'wholly exceptional circumstances', where the impact of a 'new fact' on the decision would be such that to ignore it would lead to a miscarriage of justice, review might be possible even though the 'new fact' was known to the moving party, or was discoverable by it through the exercise of due diligence."[2] These two positions are not reconcilable.

2. Article 25 authorizes review only "[w]here a new fact has been discovered which was not known at the time of the proceedings". In other words, it requires that a new fact be established, as well as that that new fact must have been unknown at the time of the proceedings. If the matter concerned does not meet these criteria, article 25 gives no power of review even if a miscarriage of justice would have been perpetrated. But since, as it seems to me, it is necessary to avert a miscarriage of justice however it arises, the power to do so must derive from a source other than article 25 where this provision does not reasonably cover the case. That power can only be the inherent jurisdiction of the Appeals Chamber.

3. The inherent jurisdiction is familiar to the Tribunal. It need not be thought that, because it is styled "inherent", it comes from nowhere: it is impliedly given by the Statute to the Tribunal as a judicial body, being an understood accompaniment of the jurisdiction which the Statute expressly grants. In exceptional circumstances, the Appeals Chamber ought to be able to correct its errors without artificially and awkwardly disguising what it is doing as an article 25 review. And it need not be feared that the floodgates will be opened: As stated in my declaration appended to a recent decision of the ICTY Appeals Chamber in *Žigić*,[3] the ICTY Appeals Chamber's judgement in *Čelebići* (relating to sentencing) set appropriate limiting standards for evaluating requests for reconsideration of judgements on the basis of the Tribunal's inherent powers.

4. It bears noting that in *Žigić*, in which the ICTY Appeals Chamber disagreed with the rule established by it in *Čelebići*, the ICTY Appeals Chamber reasoned that article 25 alone provided a sufficient remedy for injustice because "the requirement of the existence of a 'new fact' has been interpreted broadly". Today's decision, however, neither invokes nor illustrates a "broad" interpretation of that requirement, which is instead rather strictly enforced. I do not object to strict enforcement that is consistent with article 25. What I do object to is the notion that, where the determination is that article 25 is inapplicable, that ends the Appeals Chamber's obligation to ensure that justice is done.

5. I do not suggest that the present decision is unjust in its actual consequences. I agree with the Appeals Chamber's analysis that none of the evidence the applicant now seeks to introduce could have

[1] Decision of the Appeals Chamber, paras. 12, 16, 21, 25, 30, 36.
[2] Decision of the Appeals Chamber, para. 7.
[3] Decision on Zoran Žigić's Motion for Reconsideration of Appeals Chamber Judgement, Case N°IT-98-30/1-A, 26 June 2006.

been a decisive factor in the Appeals Chamber's judgement. I therefore support the outcome of the case. But I reaffirm my declaration in *Žigić*.

Done in English and in French, the English text being authoritative.

Dated this 30 June 2006, at The Hague, The Netherlands.

[Signed] : Mohamed Shahabuddeen

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VI. Annex A - Procedural Background

1. On 27 October 2004, the Applicant personally, and without the assistance of Counsel, filed a "Requête en révision du jugement/réparation du préjudice causé par la violation, par le Procureur, du Règlement et des règlements internes" (the "Applicant's Request for Review"). In that filing he asserts that the transcripts of radio broadcasts concerning Cabinet Meetings in which he had allegedly participated on 10 and 16 April 1994, as well as on 10 and 17 June 1994, and which were not disclosed to him by the Prosecution, constitute "new facts" pursuant to Article 25 of the Statute of the Tribunal (the "Statute") and Rules 120 and 121 of the Rules of Procedure and Evidence of the Tribunal (the "Rules"). He also claims that these transcripts represent a "decisive factor" in that they impugn the credibility of various witnesses. He argues that to ignore the said transcripts "could" or "would" lead to a miscarriage of justice.

2. On 6 December 2004, the Prosecution filed the "Prosecutor's Response to Requête en Révision du Jugement/Réparation du Préjudice causé par la Violation, par le Procureur, du Règlement et des Règlements Internes" (the "Prosecution's Response to Applicant's Request for Review"), stating that some of the transcripts had been disclosed to the Applicant in the original proceedings and that, in any event, nothing in them amounts to a "new fact" or a "decisive factor". On 29 December 2004, the Applicant filed his "Réplique à la réponse du Procureur à la Requête en révision du jugement/réparation du préjudice causé par la violation, par le Procureur, du Règlement et des règlements internes" (the "Applicant's Reply to the Prosecution's Response to Applicant's Request for Review") in which he reiterates that the transcripts in question had not been communicated to him and that the facts in them amounted to "new facts". He submits that the transcripts "could" or "would" have been a "decisive factor".

3. On 7 February 2005, the Applicant filed his "Mémoire supplémentaire à la « Requête en révision du jugement/réparation du préjudice causé par la violation, par le Procureur, du Règlement et des règlements internes »" (the "Applicant's Additional Brief to Request for Review"). He claims that the testimony of Witness PP in the Kayishema and Ruzindana case, and of Witnesses BE, BH, BB and AT in the Muhimana case, also amount to a "new fact" warranting a review of the Trial Chamber's finding on his alibi for the murder of Assiel Kabanda on 22 June 1994. The Applicant alleges that these exculpatory materials had not been disclosed to him by the Prosecution. The Prosecution responded on 18 March 2005, in the "Prosecutor's Response to "Mémoire supplémentaire à la « requête en révision du Jugement/réparation du préjudice causé par la violation, par le Procureur, du Règlement et des règlements internes »" (the "Prosecution's Response to Applicant's Additional Brief to Request for Review"), stating that the relevant witness testimonies do not represent a "new fact" warranting review within the meaning of Article 25 of the Statute and Rules 120 and 121 of the Rules. The Applicant replied on 31 March 2005 in his "Mémoire en Réplique à la Réponse du Procureur du 18 mars 2005 au Mémoire supplémentaire à la « Requête en révision du jugement/réparation du préjudice causé par la violation, par le Procureur, du Règlement et des règlements internes »" (the "Applicant's Brief in

Reply to Prosecution's Response to the Additional Brief to Request for Review"). He reiterates his original position that the testimonies do constitute a "new fact" warranting review.

4. On 6 May 2005, the Applicant filed *pro se* a "*Requête urgente en assistance de l'équipe de la défense*" (the "Applicant's Urgent Request for Legal Assistance"), pursuant to Article 20 of the Statute and Rules 54 and 107 of the Rules. He requested the Appeals Chamber to order that his Defence team be allowed to resume their representation of him at the preliminary examination stage of his Request for Review.[1] By its "Decision on Niyitegeka's Urgent Request for Legal Assistance" filed on 20 June 2005 (the "Appeals Chamber's Decision of 20 June 2005"), the Appeals Chamber granted the Urgent Request for Legal Assistance and instructed the Registry to assign Counsel, Ms. Geraghty, for a limited period for the purpose of assisting the Applicant at the stage of the preliminary examination. Therein, the Applicant was instructed, should he deem it necessary, to file additional submissions to his application no later than 20 days from the date of assignment of Ms. Geraghty. The Appeals Chamber further ordered the Prosecution to respond to the Applicant's additional submissions (if it chose to do so) no later than 15 days after the date of the Applicant's filing, and directed the Applicant to reply to any such response no later than 7 days subsequently.

5. On 15 August 2005, the Prosecution filed the "Prosecutor's Motion to Move for Decision on Niyitegeka's Requests for Review pursuant to Rules 120 and 121" (the "Prosecution's Motion to Move for Decision"). It stated that Counsel for the Applicant had not filed any additional submissions within the 20 day deadline and had also not moved for an extension of time by showing good cause pursuant to Rule 116 of the Rules.[2] It therefore requested the Appeals Chamber to render a decision, pursuant to Rule 121, on the basis of the record before it.[3] It also requested the Appeals Chamber not to consider the merits of a late filing unless good cause was shown pursuant to Rule 116 of the Rules, in which case it sought to file further submissions with regard to the issue of good cause.[4] On 18 August 2005, the Applicant filed the "Extremely Urgent Defence Motion Pursuant to Rule 116 for an Extension of Time Limit and Rule 68 (a), (b) and (e) for Disclosure of Exculpatory Evidence Both of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda and Response to Prosecutor's Motion of 15 August 2005 Seeking a Decision, in the Absence of any Legal Submissions from the Applicant" (the "Defence Extremely Urgent Motion for Extension of Time Limit and for Disclosure of Exculpatory Evidence"). It asserted that the terms of Counsel's contract with the Tribunal, dated 20 July 2005, varied or interpreted the 20 days granted to the Applicant by the Appeals Chamber's Decision of 20 June 2005 to mean working days,[5] that the opportune date for filing the additional submissions was thus 19 August 2005,[6] and that, accordingly, the Defence had not failed to comply with the Appeals Chamber's orders.[7] Counsel also requested the Appeals Chamber to order the Prosecution to make full and complete disclosure of exculpatory material, as well as to grant an extension of time for the filing deadline on the grounds, *inter alia*, of allowing the Defence to obtain an *affidavit* and English translation of all pleadings since 26 October 2004.

6. On 28 September 2005, by its "Decision on the Prosecutor's Motion to Move for Decision on Niyitegeka's Requests for Review pursuant to Rules 120 and 121 and the Defence Extremely Urgent Motion Pursuant to Rule 116 for [an] Extension of Time Limit and Rule 68 (A), (B) and (E) for Disclosure of Exculpatory Evidence Both of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda and Response to Prosecutor's Motion of 15 August 2005 Seeking a Decision, in the Absence of any Legal Submissions from the Applicant" (the "Appeals Chamber's Decision of 28 September 2005"), the Appeals Chamber instructed the Applicant to file, through Counsel, his additional submissions no later than ten days from receipt of the decision. The Defence motion was dismissed in all other respects, and the decision on the Prosecution's Motion to Move for

[1] Applicant's Urgent Request for Legal Assistance, para. 11.
[2] Prosecution's Motion to Move for Decision on the Applicant's Request for Review, paras. 4-6.
[3] Prosecution's Motion to Move for Decision on the Applicant's Request for Review, para. 7.
[4] Prosecution's Motion to Move for Decision on the Applicant's Request for Review, para. 8.
[5] Defence Extremely Urgent Motion for Extension of Time and for Disclosure of Exculpatory Evidence, para. 12.
[6] Defence Extremely Urgent Motion for Extension of Time and for Disclosure of Exculpatory Evidence, para. 16.
[7] Defence Extremely Urgent Motion for Extension of Time and for Disclosure of Exculpatory Evidence, para. 17.

Decision deferred. The Appeals Chamber further instructed the Prosecution to respond to the Applicant's additional submissions no later than 15 days from the date of filing, and the Applicant to make any reply within the following 7 days.

7. On 17 August 2005, the Applicant filed, *pro se* and confidentially, his "*Requête de Monsieur Eliézer Niyitegeka aux fins de l'admission d'un élément de preuve nouveau*" (the "Applicant's Request for Admission of New Evidence") pursuant to Rules 54, 89, 107 and 120 of the Rules, submitting an affidavit signed by a potential Defence Witness TEN-3 which he claims represents a "new fact", decisive with regard to the charge of murder of a 13-15 year old girl on 20 May 1994. On 26 September 2005, the Prosecution confidentially filed its "*Réponse du Procureur à la «Requête de Monsieur Eliézer Niyitegeka aux fins de l'admission d'un élément de preuve nouveau»*" (the "Prosecution's Response to Applicant's Request for Admission of New Evidence"), contesting the credibility both of the *affidavit* and of its author (potential Defence Witness TEN-3), and asserting that the said *affidavit* would not have affected the original verdict. On 11 October 2005, the Applicant filed *pro se* his confidential "*Mémoire en réplique à la Réponse du Procureur à la « Requête de Monsieur Eliézer Niyitegeka aux fins de l'admission d'un élément de preuve nouveau »*" (the "Applicant's Brief in Reply to Prosecution's Response to Request for Admission of New Evidence") in which he contests the Prosecution's arguments made in its Response.

8. Two confidential documents appended to the Applicant's Request for Admission of New Evidence prompted the Prosecution to file, on 26 August 2005, a "Motion to Request for an Investigation into Breach of Confidentiality pursuant to Rules 33 (A), 54, 73 (A) and 107" (the "Prosecution's Motion for Investigation into Breach of Confidentiality"). The Prosecution requested that the Appeals Chamber direct the Registrar to conduct an investigation into the manner in which the Applicant received the two confidential documents and to inform the Chamber and the Prosecution of the outcome of the investigation; the Prosecution also requested that the Appeals Chamber disregard the two documents in considering the merits of the Applicant's Third Request for Review (made in the Applicant's Request for Admission of New Evidence). The Applicant responded on 2 September 2005, again confidentially and *pro se*, in the "*Réponse de Monsieur Eliézer Niyitegeka à la requête du Procureur intitulée* 'Motion to Request [an] Investigation into Breach of Confidentiality Pursuant to Rules 33 (A), 54, 73 (A) and 107'" (the "Applicant's Response to the Prosecution's Motion for Investigation into Breach of Confidentiality"). By its confidential "Decision on the Prosecutor's Motion to Request an Investigation into Breach of Confidentiality Pursuant to Rules 33 (A), 54, 73 (A) and 107" filed on 2 November 2005 (the "Appeals Chamber Decision of 2 November 2005"), the Appeals Chamber directed the Prosecution to conduct an investigation into both the circumstances and extent of the breach of confidentiality, and requested the Registrar to provide the Prosecution with the cooperation required in the conduct of the investigations. The Appeals Chamber deferred its decision on whether to disregard the content of the two documents to its decision on the Applicant's Request for Admission of New Evidence and dismissed the remainder of the Prosecution's Motion.

9. On 10 October 2005, Defence Counsel filed "Additional Submissions of Applicant made pursuant to Appeals Chamber Decision dated 20 June 2005 in the Matter of an Application for Review and/or Reconsideration and for Receipt of Evidence Pursuant to Article 25 and Rule 120, Rule 89 (C), Rule 115, Rule 54 and Rule 107" (the "Applicant's Additional Submissions"). Defence Counsel elaborates extensively on the alleged "new facts" and the "violations of Rule 68" previously argued by the Applicant, and relies on various additional arguments to show that the alleged "new facts" would have been "decisive factors" in both the decisions of the Trial Chamber and the Appeals Chamber, and thus that to ignore them would lead to a miscarriage of justice. On 25 October 2005, the Prosecution filed its "Prosecutor's Response, with Confidential Appendices, to 'Additional Submissions of Applicant made pursuant to Appeals Chamber Decision dated 20 June 2005 in the matter of an Application for Review and/or Reconsideration and for Receipt of Evidence pursuant to Article 25 and Rule 120, Rule 89 (C), Rule 115, Rule 54 and Rule 107'" (the "Prosecution's Response with Confidential Appendices to the Applicant's Additional Submissions") further contesting the

allegations of Rule 68 violations and noting that the additional submissions exceed the scope of the Appeals Chamber's decisions of 20 June and 28 September 2005.

10. On 31 October 2005, the Applicant filed an "Extremely Urgent Defence Motion Pursuant to Rule 116 of the Rules of the International Criminal Tribunal for Rwanda, Seeking an Extension of Time" (the "Defence Motion for Extension of Time") to seek an extension of time to reply to the Prosecutor's Response with Confidential Appendices to the Additional Submissions. On 31 October 2005, the Prosecution filed the "Prosecutor's Response to Extremely Urgent Defence Motion pursuant to Rule 116 of the Rules of the International Criminal Tribunal for Rwanda, Seeking an Extension of Time" (the "Prosecution's Response to Defence Motion for Extension of Time") in which it did not oppose the extension of time requested by the Defence. By the "Prosecutor's Motion for Filing of Additional Material" (the "Prosecution's Motion for Additional Material"), filed on the same date, the Prosecution sought to file video footage (labelled KV00-0030 and KV00-0030B) in response to a request from the Defence. In its "Decision on [the] Extremely Urgent Defence Motion Seeking an Extension of Time pursuant to Rule 116 of the Rules of Procedure and Evidence and the Prosecution's Motion for Filing of Additional Material" filed on 2 November 2005 (the Second Appeals Chamber Decision of 2 November 2005), the Appeals Chamber granted the Defence motion and ordered the Defence to file a reply to the Prosecution's Response with Confidential Appendices to the Additional Submissions no later than 9 November 2005; secondly, it granted the Prosecution's Motion and directed the Prosecution to file two sets of the video footage referred to therein immediately upon receipt of the decision; and, thirdly, it requested the Registrar immediately to communicate to Defence Counsel, by an express courier, one set of the additional material. On the same day, the Defence confidentially filed its "Provisional Applicant's Reply to Prosecutor's Response [dated 25/10/2005] to 'Additional Submissions' of Applicant made pursuant to Appeals Chamber Decisions of 20 June 2005 and 28 September 2005 in the Matter of an Application for Review and/or Reconsideration and for Receipt of Evidence pursuant to Article 25 and Rule 120, Rule 89 (c), Rule 54 and Rule 107" (the "Provisional Reply to Prosecution's Response to the Additional Submissions").

11. On 10 November 2005, the Defence filed the updated "Applicant's Reply to Prosecutor's Response [dated 25/10/2005] to 'Additional Submissions' of Applicant Made Pursuant to Appeals Chamber Decision of 20 June 2005 and 28 September 2005 in the Matter of an Application for Review and/or Reconsideration and for Receipt of Evidence pursuant to Article 25 and Rule 120, Rule 89 (C), Rule 54 and Rule 107" (the "Applicant's Reply to Prosecution's Response to Additional Submissions"), as corrected on 18 November 2005, to replace the Provisional Reply to Prosecution's Response to the Additional Submissions. Defence Counsel further elaborated on the alleged disclosure failure by the Prosecution, alleging in particular that the Prosecution had still not disclosed a "true and full copy" of the video footage labelled KV00-0030 and further requesting that the Prosecution be directed to make continuing disclosure of all matters highlighted by the Applicant.

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Order Assigning Judges to a Case Before the Appeals Chamber 14 August 2006 (ICTR-96-14-R)

(Original : English)

Appeals Chamber

Judge : Fausto Pocar, Presiding Judge

Eliezer Niyitegeka – Appeals Chamber – Judges – Composition

International Instruments Cited :

Document IT/245 of the International Criminal Tribunal for the former Yugoslavia ; 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 Review" rendered by the Appeals Chamber on 30 June 2006;

NOTING the "Requête en reconsidération de la 'Decision on Request for Review' du 30 juin 2006" filed by Counsel for the Defence on 2 August 2006;

CONSIDERING Articles 11 (3) and 13 (4) of the Statute 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. Eliézer Niyitegeka*, Case N°ICTR-96-14-R, shall be composed as follows:

Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

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 Request for Reconsideration of the Decision on Request for Review 27 September 2006 (ICTR-96-14-R)

(Original : English)

Appeals Chamber

Judge : Fausto Pocar, Presiding Judge ; Mohamed Shahabuddeen; Liu Daqun; Theodor Meron; Wolfgang Schomburg

Eliezer Niyitegeka – Reconsideration – Absence of power to reconsider a final judgement – Clarification of the notion of final judgement – Motion denied

International Cases Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Jean Bosco Barayagwiza, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000 (ICTR-97-19) ; Appeals Chamber, The Prosecutor v. Eliezer Niyitegeka, Judgement, 9 July 2004 (ICTR-96-14) ; Appeals Chamber, The Prosecutor v. Eliézer Niyitegeka, Decision on Request for Review, 30 June 2006 (ICTR-96-14)

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Zoran Žigić, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005", 26 June 2006 (IT-98-30/1)

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 ("International Tribunal"),

RECALLING that the Appeals Chamber rendered its Judgement in this case on 9 July 2004 ("Appeal Judgement"), in which it sentenced Eliézer Niyitegeka ("Niyitegeka") to life-imprisonment;[1]

RECALLING the "Decision on Request for Review" rendered on 30 June 2006 ("Impugned Decision"), in which the Appeals Chamber dismissed all requests submitted by Niyitegeka on 27 October 2004, 7 February 2005, 17 August 2005, and 10 October 2005 for review of the Appeals Judgement pursuant to Article 25 of the Statute and Rules 120 and 121 of the Rules of Procedure and Evidence of the International Tribunal;[2]

BEING SEIZED OF the "*Requête en reconsidération de la 'Decision on Request for Review' du 30 juin 2006*" filed by Niyitegeka on 1 August 2006 ("Request for Reconsideration"), in which he: (1) seeks reconsideration of the Impugned Decision on grounds that he is a victim of a miscarriage of justice due to the existence of clear errors in the Appeals Chamber's reasoning in the Impugned Decision that have caused him grave material prejudice;[3] and (2) requests that, prior to the Appeals Chamber's full consideration of his Request for Reconsideration, it extend his Counsel's mandate to assist him in obtaining an Affidavit from Mr. Kambanda and in filing additional submissions that would provide further evidence of the persuasiveness of his alibi;[4]

NOTING the "Prosecutor's Response to Niyitegeka's 'Requête en reconsidération de la Decision on Request for Review du 30 juin 2006'" filed on 10 August 2006;

NOTING the "Réplique de l'Appelant à la Réponse du Procureur à la '*Requête en reconsidération de la Decision on Request for Review du 30 juin 2006*'" filed by Niyitegeka on 17 August 2006;

CONSIDERING that the Appeals Chamber recently held that: although it has inherent discretionary power to reconsider its own decisions in exceptional circumstances, "there is no power to reconsider a final judgement" because it is inconsistent with the Statute of the International Tribunal, "which provides for a right of appeal and the right of review but not for a second right of appeal by the avenue of reconsideration of a final judgement"; existing proceedings for appeal and

[1] *Niyitegeka v. The Prosecutor*, Case N°ICTR-96-14-A, Judgement, 9 July 2004, paras 1, 270.
[2] Decision on Request for Review, 30 June 2006, para. 76.
[3] Request for Reconsideration, paras. 49, 55, 66, 69.
[4] *Id*., paras 74-75.

review established under the Statute provide sufficient safeguards for due process and the right to a fair trial; and it is in the interests of justice for both victims and convicted persons who are entitled to "certainty and finality of legal judgements";[5]

CONSIDERING further that a final judgement is a decision which terminates the proceedings in a case;[6]

FINDING, by majority, that because the Impugned Decision rejected Niyitegeka's requests for review of the Appeal Judgement, it is a final decision closing the proceedings in this case;

HEREBY DISMISSES the Appellant's Request for Reconsideration; and

DECLARES the request therein for extension of Counsel's mandate as moot.

Done in English and French, the English text being authoritative.

Done this 27th day of September 2006, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

[5] *Prosecutor v. Žigić*, Case N°IT-98-30/1-A, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005", 26 June 2006, para. 9.
[6] *Barayagwiza v. The Prosecutor*, Case N°ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para. 49.

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Declaration of Judge Shahabuddeen
27 September 2006 (ICTR-96-14-R)

(Original : English)

24. On the merits, I agree with the dismissal of the request for reconsideration of the decision denying the appellant's request for review. However, I am not persuaded by the holding of the Appeals Chamber that it has no power to reconsider a decision on a request for review.

2. In *Žigić*, the Appeals Chamber, disagreeing with the rule established by it in *Čelebići*, held that "there is no power to reconsider a final judgement."[1] I disagree with the conclusion of the majority in this case that the Appeals Chamber's "Decision on Request for Review" of 30 June 2006 ("impugned decision") likewise is not subject to the Appeals Chamber's inherent discretionary power to reconsider its own decisions.

3. The impugned decision of the Appeals Chamber did not address, on the merits, the original findings in this case. The Appeals Chamber found that the test for review in Rules 120 and 121 had not been met by the applicant in that he had not presented a new fact that, if proven, could have been a decisive factor in reaching the appeal judgement. No other Chamber previously considered the question whether there was a new fact. This question was raised for the first time in the applicant's Request for Review and decided for the first time in the impugned decision.

4. In *Žigić*, the Appeals Chamber emphasized that the Statute of the Tribunal "provides for a right of appeal and a right of review but not for a second right of appeal by the avenue of reconsideration of a final judgement."[2] The rationale for the rule barring reconsideration of a final judgement is that an appellant, having had the opportunity to contest the original findings against him through appeal and review proceedings, is not entitled to a further bite at the cherry by way of a request for reconsideration. In this case, by contrast, the Appeals Chamber's decision marked the first time that any Chamber considered the applicant's arguments concerning the existence of new facts and their possible impact on the judgement. In my view, the Appeals Chamber has jurisdiction to reconsider such a decision, which is not subject to any further appeal or review proceedings, in order to correct a clear miscarriage of justice. This power should be exercised only in exceptional circumstances. However, consistent with the reasoning in *Žigić* and in the interests of justice, the exercise of this power should not be precluded altogether.

5. Nonetheless, the applicant has not demonstrated either a clear error of reasoning in the impugned decision or an injustice that warrants the exercise of the Appeals Chamber's inherent jurisdiction to reconsider the impugned decision. For this reason, I support the outcome of the case.

Done in English and in French, the English text being authoritative.

27 September 2006, The Hague, The Netherlands.

[Signed] : Mohamed Shahabuddeen

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[1] *Prosecutor v. Žigić*, Case N°IT-98-30/1-A, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005," 26 June 2006, para. 9.
[2] *Id.*

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Separate Opinion of Judge Meron
27 September 2006 (ICTR-96-14-R)

(Original : English)

1. I agree with my learned colleagues that the Appeals Chamber must dismiss the Request for Reconsideration. I write separately, however, because I base my position solely on the fact that Niyitegeka has neither demonstrated a clear error of reasoning in the Impugned Decision nor shown that reconsideration is necessary in order to prevent injustice.[1]

25. In the *Čelebići* Judgement on Sentence Appeal,[2] the Appeals Chamber concluded that it "has an inherent power to reconsider any decision, including a judgment where it is necessary to do so in order to prevent an injustice."[3] Yet in a separate opinion, one colleague and I explained that to decide the matter then before the Appeals Chamber, there was no need to determine whether it has inherent power to reconsider its judgements.[4] We therefore reserved our position on whether the Appeals Chamber has such an inherent power.[5] Recently, the Appeals Chamber overturned the rule it established in the *Čelebići* Judgement on Sentence Appeal, holding instead that "there is no power to reconsider a final judgement."[6] I was not on the bench of the Appeals Chamber that departed from the holding of the *Čelebići* Judgement on Sentence Appeal. In the case where the Appeals Chamber so departed – *Prosecutor v. Žigić* – as in *Čelebići,* I therefore had no occasion to consider whether the Appeals Chamber has the power to reconsider a final judgement that it renders.

26. I continue to reserve my position on this question, as Niyitegeka's Request for Reconsideration must be dismissed regardless of whether the Appeals Chamber may reconsider one of its final judgements. A motion for reconsideration cannot succeed without "demonstrat[ing] the existence of a clear error of reasoning in the [impugned decision], or of circumstances justifying its reconsideration in order to avoid injustice".[7] The Request for Reconsideration raises one frivolous challenge to the manner in which, in one part of the Impugned Decision, the Appeals Chamber applied the requirement that a review request be based on a new fact.[8] Aside from this, the Request for Reconsideration never

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[1] See *Prosecutor v. Blagojević and Jokić*, Case N°IT-02-60-A, Decision on Dragan Jokić's Supplemental Motion for Extension of Time to File Appeal Brief, 31 August 2005 ("*Blagojević and Jokić* Decision"), para. 7 (noting that "in order to succeed in a motion for reconsideration, [a party] would have to demonstrate the existence of a clear error of reasoning in the [impugned decision], or of circumstances justifying its reconsideration in order to avoid injustice"); *Prosecutor v. Naletelić and Martinović*, Case N°IT-98-34-A, Decision on Naletelić's Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence, 7 July 2005, para. 20 (making the same point).

[2] *Prosecutor v. Mucić, Delić and Landžo*, Case N°IT-96-21-A*bis*, Judgment on Sentence Appeal, 8 April 2003 ("*Čelebići* Judgement on Sentence Appeal").

[3] *Ibid*., para. 49.

[4] *Čelebići* Judgement on Sentence Appeal, Separate Opinion of Judges Meron and Pocar, para. 1.

[5] Ibid.

[6] *Prosecutor v. Žigić*, Case N°IT-98-30/1-A, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005", 26 June 2006, para. 9.

[7] *Blagojević and Jokić* Decision, para. 7.

[8] Request for Reconsideration, paras 24-25. Niyitegeka points to a paragraph of the Trial Judgement stating that his counsel tried to prove he "was at a government council meeting in Kigali the entire day on 10 April" 1994. Request for Reconsideration, para. 24 (quoting *Prosecutor v. Niyitegeka,* Case N°ICTR-96-14-T, Judgement, 16 May 2003 ("Trial Judgement"), para. 67). He then quotes the Trial Judgement's assertion that he adduced no evidence of this meeting, Request for Reconsideration, para. 24 (quoting Trial Judgement, para. 67), and contends that as "he is being compelled to prove the veracity of his alibi … the factual evidence of the meeting of 10 April 1994" that he sought to introduce in the review proceeding "does constitute a 'new fact'." Request for Reconsideration, para. 25. As the Impugned Decision explained, however, a new fact is "new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings". Impugned Decision, para. 6 (quoting *Prosecutor v. Tadić,* Case N°IT-94-1-R, Decision on Motion for Review,

attempts to show error in the Appeals Chamber's conclusion that arguments raised in the Request for Review did not pertain to new facts,[9] and that these arguments therefore could not satisfy the four requirements – laid out in paragraph 6 of the Impugned Decision – for obtaining review of a judgement. Though Niyitegeka challenges the Impugned Decision's conclusions that different pieces of alleged "new evidence" could not – if they had been presented in time – have been a decisive factor in the original decision on an issue, the Request for Reconsideration fails to show that the Appeals Chamber clearly erred in reaching these conclusions,[10] or that failure to revisit them would lead to a miscarriage of justice. The Request for Reconsideration likewise fails to show any clear error in the rejection of Niyitegeka's Rule 68 arguments, or that failure to revisit them would lead to a miscarriage of justice.[11] Further, while making clear that Niyitegeka remains concerned about a Prosecution attorney in this case who was subjected to professional discipline in her home jurisdiction,[12] the Request for Reconsideration fails to suggest that in the Impugned Decision, the Appeals Chamber erred: (a) in considering only whether newly discovered communications would have led it to handle the issue differently in the Appeals Judgement, and (b) in determining that the newly discovered communications would not have had such an effect, as they relate to an issue the Appeals Chamber did not consider crucial when it addressed the import of the professional discipline to which the attorney was subjected.[13]

27. In sum, the arguments Niyitegeka now raises do not meet the requirements for obtaining reconsideration. I therefore concur in the outcome without joining in the majority's explanation for it.

Done in both English and French, the English text being authoritative.

Done on the 27th day of September 2006, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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30 July 2002, para. 25). The new evidence that Niyitegeka offers to show that the 10 April 1994 meeting occurred therefore does not constitute a new fact.

[9] The Request for Reconsideration encourages the Appeals Chamber to "endorse" the views on the "new fact" requirement expressed by Judge Shahabuddeen in a separate opinion in *Prosecutor v. Barayagwiza*. Request for Reconsideration, paras 14-15 (referring to *Prosecutor v. Barayagwiza*, Case N°ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, Separate Opinion of Judge Shahabuddeen, para. 47). The Request for Reconsideration, however, never explains how doing so might prompt the Appeals Chamber, when considering whether arguments raised in the Request for Review pertain to new facts, to reach results different from those reached in the Impugned Decision. In fact, in the cited paragraph, Judge Shahabuddeen explains the "new fact" requirement in a manner consistent with the way it was applied in the "Impugned Decision".

[10] Niyitegeka errs when he suggests that the Impugned Decision assumed an accused who raises the defence of alibi has the burden of proving the alibi. See Motion for Reconsideration, para. 15 (arguing that the Impugned Decision makes this assumption). Paragraphs of the Impugned Decision cited by Niyitegeka in making this argument do not suggest that an accused has the burden of proof when asserting an alibi defence. See Impugned Decision, paras 14, 19, 22, 23, 28, 32, 40.

[11] The Request for Reconsideration asserts that, contrary to what the Impugned Decision held, Niyitegeka was prejudiced by the Prosecution's improper failure to disclose transcripts of cassettes AV906, AV 907, and AV 908. Niyitegeka, however, does not explain how the Appeals Chamber might have erred in concluding, at paragraph 57 of the Impugned Decision, that the finding Niyitegeka sought to contest with these transcripts is not "critical to his conviction for any crime". See Motion for Reconsideration, paras 21-23. The Request for Reconsideration also challenges the conclusion that Niyitegeka was not prejudiced by the fact that the Prosecution improperly disclosed only 11 of the 29 pages of the transcript of cassette AV/917. Though Niyitegeka asserts that the remaining 18 pages would have helped him to better establish his whereabouts on 16 April 1994, he offers no coherent explanation for why it was clearly erroneous to conclude, on the basis of his submissions during the review proceeding, that these 18 pages would have provided no such assistance. Moreover, he does not explain why failure to reconsider the extent of his prejudice would lead to a miscarriage of justice. See Motion for Reconsideration, paras 30-31.

[12] See Motion for Reconsideration, paras 67-69.

[13] See Impugned Decision, paras 72-75.

Le Procureur c. Eliezer NIYITEGEKA

Affaire N° ICTR-96-14

Fiche technique

• Nom: NIYITEGEKA

• Prénom: Eliezer

• Date de naissance: 1952

• Sexe: masculin

• Nationalité: Rwandaise

• Fonction occupée au moment des faits incriminés: Ministre de l'information du gouvernement intérimaire

• Date de confirmation de l'acte d'accusation: 15 juillet 1996

• Date des modifications de l'acte d'accusation: 29 avril 1999, 26 juin 2000 et 28 février 2001

• Chefs d'accusation: génocide et subsidiairement, complicité de génocide, incitation publique et directe à commettre le génocide, crime 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 février 1999, au Kenya

• Date du transfert: 11 février 1999

• Date de la comparution initiale: 15 avril 1999

• Précision sur le plaidoyer: non coupable

• Date du début du procès: 17 juin 2002

• Date et contenu du prononcé de la peine: 16 mai 2003, condamné à l'emprisonnement à vie

• Appel: 9 juillet 2004, rejeté

The Prosecutor v. Hormisdas NSENGIMANA

Case N° ICTR-2001-69

Case History

• Name: NSENGIMANA

• First Name: Hormisdas

• Date of Birth: 1954

• Sex: male

• Nationality: Rwandan

• Former Official Functions: priest, with the function of Rector of *Christ Roi* college, in Nyanza, Nyabisundi *commune*, Butare *préfecture*

• Date of Indictment's Confirmation: 5 July 2001

• Counts: genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, and crimes against humanity (murder, extermination)

• Date and Place of Arrest: 21 March 2002, in Cameroon

• Date of Transfer: 10 April 2002

• Date of Initial Appearance: 16 April 2002

• Date Trial Began: 22 June 2007

• Date and content of the sentence: 17 November 2009, Acquitted

Scheduling Order
Rule 54 of the Rules of Procedure and Evidence
21 November 2006 (ICTR-2001-69-I)

(Original : English)

Trial Chamber II

Judges : William H. Sekule, Presiding Judge; Arlette Ramaroson; Solomy Balungi Bossa

Hormisdas Nsengimana – Scheduling order – Leave to amend the indictment – Filing of any material supporting the motion

International Instrument Cited :

Rules of Procedure and Evidence, Rules 50, 50 (A) and 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 »), pursuant to Rule 54 of the Rules of Procedure and Evidence;

SEIZED of the Confidential « Prosecutor's Motion for Leave to File an Amended Indictment » (the « Motion ») to which is attached the proposed Amended Indictment as Annex A, and the Confidential « Brief in Support of the Prosecutor's Motion for Leave to File an Amended Indictment, » filed on 2 October 2006;

NOTING the « Mémoire en Réplique à la « Requête du Procureur demandant à pouvoir déposer un acte d'accusation modifié » » to which is attached the « Mémoire comparatif du projet d'acte d'accusation modifié et de l'acte d'accusation actuel» filed on 25 October 2006;

RECALLING the relevant provisions of Rule 50 that;

> (A) (i) […] At or after […] initial appearance, an amendment of an indictment may only be made by leave granted by that 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.

NOTING that the Prosecution has not disclosed to the Chamber any material in support of the expanded allegations contained in the proposed amended Indictment;

HEREBY

ORDERS the Prosecution to file with the Registry, within a week from this Order, an unredacted version of any material which may be useful in supporting the Motion accompanied by a precise table specifying which material supports which expanded/ new factual allegations and/ or new charges, as well as a redacted version of the same which includes the appropriate redactions for the Defence, if necessary;

DIRECTS the Registry;

I. To immediately provide the Chamber with the confidential unredacted version of the Prosecution's supporting materials and table after receiving them from the Prosecution;

II. To serve upon the Defence the redacted French version of the Prosecution's supporting materials and table and to follow up on any translation issues arising from the filing of the said material;

INSTRUCTS the Defence to file any further response within five days of the notification of the redacted French version of the Prosecution's supporting materials and table;

INSTRUCTS the Prosecution to file any reply within five days of the notification of the Defence further response.

Arusha, 21 November 2006.

[Signed] : William H. Sekule; Arlette Ramaroson; Solomy Balungi Bossa

Le Procureur c. Hormisdas NSENGIMANA

Affaire N° ICTR-2001-69

Fiche technique

• Nom: NSENGIMANA

• Prénom: Hormisdas

• Date de naissance: 1954

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: prêtre, en charge de la fonction de recteur du collège Christ Roi à Nyanza, commune de Nyabisundi, préfecture de Butare

• Date de confirmation de l'acte d'accusation: 5 juillet 2001

• Chefs d'accusation: génocide, incitation directe et publique à commettre le génocide, entente en vue de commettre le génocide et crimes contre l'humanité (meurtre et extermination)

• Date et lieu de l'arrestation: 21 mars 2002, au Cameroun

• Date du transfert: 10 avril 2002

• Date de la comparution initiale: 16 avril 2002

• Date du début du procès: 22 juin 2007

• Date et contenu du prononcé de la peine: 17 novembre 2009, acquitté

The Prosecutor v. Joseph NZABIRINDA

Case N° ICTR-2001-77

Case history

• Name: NZABIRINDA

• First Name: Joseph (nicknamed “Biroto”)

• Date of Birth: 1957

• Sex: male

• Nationality: Rwandan

• Former Official Function: Former employee of Ngoma *commune* as *Encadreur* of the youths

• Date of Indictment’s Confirmation: 13 December 2001

• Counts: genocide or, alternatively, complicity in the genocide, crimes against humanity (extermination, rape)

• Date and Place of Arrest: 21 December 2001, in Brussels, Belgium

• Date of Transfer: 21 March 2002

• Date of Initial Appearance: 27 March 2002

• Pleading: guilty

• Date Trial Began: 14 December 2006

• Date and content of the Sentence: 23 February 2007, sentenced to 7 years imprisonment

• Date of release after completing his sentence: 19 December 2008

Decision on Extremely Urgent Defence Motion for Protective Measures for Defence Witnesses
5 October 2006 (ICTR-01-77-I)

(Original : French)

Trial Chamber II

Judges : Arlette Ramaroson, Presiding Judge; William H. Sekule; Solomy Balungi Bossa

Joseph Nzabirinda – Protective Measures for witnesses – Real and objective fears – Absence of evidence – Motion denied

International Instruments Cited :

Rules of Procedure and Evidence, Rules 69, 73 (A) and 75 ; Statute, Art. 21

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Joseph Nzabirinda, Decision on Prosecution Motion to Order Protective Measures for Victims and Witnesses, 4 May 2004 (ICTR-2001-77)

I.C.T.Y.: Trial Chamber, The Prosecutor v. Zoran Kupreškić, Decision on Prosecution Motion to Delay Disclosure of Witness Statements, 21 May 1998 (IT-95-16) ; Trial Chamber, The Prosecutor v. Radoslav Brđanin and Momir Talić, Decision on Motion by Prosecution for Protective Measures, 3 July 2000 (IT-99-36)

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");

BEING SEIZED of the Extremely Urgent Defence Motion for Protective Measures for the Defence Witnesses filed on 5 September 2006 (the "Motion");

CONSIDERING
(i) the Prosecutor's Response to the Defence Motion for Protective Measures for Defence Witnesses filed on 12 September 2006 (the "Prosecutor's Response");
(ii) the Defence Answer to the Prosecutor's Response to the Defence Motion for Protective Measures for Defence Witnesses filed on 18 September 2006 (the "Defence Answer")

CONSIDERING the Statute of the Tribunal (the "Statute") and to the Rules of Procedure and Evidence (the "Rules"), in particular Rules 69 and 75 thereof;

NOW DECIDES based on the written briefs filed by the parties pursuant to Rule 73 (A).

Submissions of the Parties

The Defence

1. The Defence relies on Articles 14, 19 (1) and 21 of the Statute and Rules 69 and 75 of the Rules to request that an order for protective measures in respect of Defence witnesses be issued as soon as possible.

2. The Defence submits that the witnesses in respect of whom protective measures are sought currently reside in Rwanda or are in exile, but certain members of their families are still in Rwanda and have not expressly waived their right to such protective measures. According to the Defence, most of them have stated that, for various reasons, they fear for their safety once they have testified before the Tribunal.

3. For the above reasons, the Defence requests that 18 witnesses be assigned pseudonyms and granted wide protective measures, ranging from denying the public and the press all access to their identity to restrictions on the circulation within the Prosecution team of information concerning them.

The Prosecution

4. The Prosecution does not challenge the Motion except with regard to measures relating to restrictions on the circulation of information among the various Prosecution teams. The Prosecution argues that its office is an indivisible whole,[1] and that such restrictions sought by the Defence are contrary to the provisions of Rules 68 and 75 (F), which place wide disclosure obligations on the Prosecution *vis-à-vis* the entire Defence.

The Defence Answer

5. The Defence contends that the restrictive measures sought to relate only to information and documents which might reveal the identity of the witnesses, and not to the content of their testimonies. It argues that the Prosecution may discharge its disclosure obligation by using information and documents provided by the Defence witnesses, with passages which might reveal witnesses' identity being redacted.

6. The Defence further submits that under Rule 75 there is no inconsistency between protective measures ordered in respect of a witness in first proceedings and the Prosecutor's disclosure obligation in second proceedings.

Deliberation

7. Article 21 of the Statute, taken together with Rules 69 and 75, provides that either party may request the Chamber, in exceptional circumstances, to order appropriate measures for the protection of victims and witnesses. The Chamber may also order such measures *proprio motu*.[2]

8. Case law established by ICTR and by the International Criminal Tribunal for the Former Yugoslavia ("ICTY") provides that witnesses in respect of whom protective measures are sought must face a real threat to their own safety and to that of their family, and that their fear must be objectively justified.[3] The Chamber further recalls that "any fears expressed by potential witnesses themselves that they may be in danger or at risk are *not in themselves* sufficient to establish any real *likelihood* that they may be in danger or at risk. Something more than that must be demonstrated to warrant an interference with the rights of the accused which these redactions represent".[4]

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[1] *The Prosecutor v. Bagosora and Others*, Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005, para. 43.
[2] *Prosecutor v. Kupreškić*, Case N°IT-95-16, Decision on Prosecution Motion to Delay Disclosure of Witness Statements, 21 May 1998, para. 7.
[3] *The Prosecutor v. Nzabirinda*, Decision on Prosecution Motion to Order Protective Measures for Victims and Witnesses, 4 May 2004, para. 5.
[4] *Prosecutor v. Radoslav Brdanin and Momir Talić*, Decision on Prosecution Motion for Protective Measures, 3 July 2000, para. 26.

9. The Chamber notes that the Defence merely refers to vague fears said to have been expressed by most of its witnesses without adducing any evidence in support of such a claim. Moreover, the said witnesses are not identified, as opposed to those not having such fears; nor has the Defence clearly explained the objective reasons justifying the alleged fears. The Chamber therefore denies the Defence Motion in its entirety.

FOR THESE REASONS

THE TRIBUNAL

DENIES the Motion

Arusha, 5 October 2006.

[Signed] : Arlette Ramaroson; William H. Sekule; Solomy Balungi Bossa

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Decision on the Defence Motion for the Setting of a Date for the Commencement of Trial and Provisional Release
13 October 2006 (ICTR-2001-77-I)

(Original : French)

Trial Chamber II

Judges : Arlette Ramaroson, Presiding Judge; William H. Sekule; Solomy Balungi Bossa

Joseph Nzabirinda – Setting a date for the commencement of the trial – Provisional release – Setting a date, Commencement of the trial or pre-trial conference, Right of the Accused to be tried without undue delay, Convening of a status conference – Provisional release, Length of the Accused's pre-trial detention not disproportionate in relation to the gravity of the charged crimes, Absence of consultation of the host country and the country to which the Accused seeks to be released, Absence of certainty concerning the appearance of the Accused – Motion granted in part

International Instrument Cited :

Rules of Procedure and Evidence, Rules 65 (B), 65 bis and 73

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Emmanuel Rukundo, Decision on the Motion of the Defence for Setting of a Date for the Commencement of Trial or Alternatively, the Transfer of the Case to a National Jurisdiction, 1 June 2005 (ICTR-2001-70) ; Trial Chamber, The Prosecutor v. Hormisdas Nsengimana, Decision on Nsengimana's Motion for the Setting of a Date for a Pre-Trial Conference, a Date for the Commencement of Trial, and for Provisional Release, 11 July 2005 (ICTR-2001-69) ; Appeals Chamber, The Prosecutor v. Homisdas Nsengimana, Decision on Application by

Hormisdas Nsengimana for Leave to Appeal the Trial Chamber's Decision on Provisional Release, 23 August 2005 (ICTR-2001-69)

I.C.T.Y.: Trial Chamber, The Prosecutor v. Zejnil Delalić and al., Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić, 25 September 1996 (IT-96-21)

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");

BEING SEIZED of the "Defence Motion for the Setting of a Date for the Commencement of Trial and Provisional Release", pursuant to Rule 73 of the Rules of Procedure and Evidence, filed on 11 September 2006 (the "Motion");

CONSIDERING the "Prosecutor's Response to Defence Motion for the Setting of a Date for the Commencement of Trial and Provisional Release", filed on 15 September 2006 and the "Defence Reply to the Prosecutor's Response to Defence Motion for the Setting of a Date for the Commencement of Trial and Provisional Release", filed on 18 September 2006;

CONSIDERING the "Reply to the Prosecutor's Response to Defence Motion for the Setting of a Date for the Commencement of Trial and Provisional Release", pursuant to Rule 73 of the Rules of Procedure and Evidence, and the annexes filed on 9 October 2006;

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

NOW DECIDES as follows, based solely on the written Briefs of the parties, pursuant to Rule 73.

Submissions by the Parties

The Defence

1. The Defence submits that since the initial appearance of the Accused on 27 March 2002, the Chamber has not convened a status conference or set a date for the commencement of trial. The Defence contends that it is ready to go to trial and requests a date for a pre-trial conference and a date for trial.[1] In the alternative, the Chamber should set a date for a status conference.

2. In the event that the Tribunal is unable to set a date for trial, the Defence requests the provisional release of the Accused pursuant to Rule 65.[2]

3. The Defence further submits that pending the commencement of trial, the Accused may, upon his provisional release, reside in Belgium where he already enjoys refugee status, since he has an alien registration certificate in Belgium and his family resides there. The Defence defers to the Tribunal to work out the modalities for his provisional release with Belgium, his potential host country.

4. The Defence further argues that it is in the interest of justice to uphold the principle of freedom, which is the rule in criminal law, rather than the principle of pre-trial detention, which should be the exception. It also contends that the Accused has been in detention for almost five years, in breach of all international instruments guaranteeing the right to a fair trial.

[1] The Defence cites Articles 19 (1), 19 (3) and 20 (4) of the Statute and Rule 62 (A) of the Rules and other international instruments on the right of an accused to be tried without undue delay.
[2] The Defence also relies on certain international instruments and ICTY case law: *Baskic* [*sic*], *Djukić* and *Simić*.

The Prosecutor's Response

5. The Prosecutor raises no objection to the setting of a date for the commencement of trial, recalling that such matters fall within the jurisdiction of the Tribunal's Administration.

6. However, the Prosecution objects to the Motion for provisional release, arguing that the Accused has not demonstrated that if released, he will appear for trial and will not pose a danger to any victim, witness or other person, pursuant to Rule 65 (B). Nor has it been demonstrated that the Belgian authorities have agreed to host the Accused in their country.

The Defence's Reply

7. With regard to the Motion for the setting of a date for the commencement of trial, the Defence submits that even if the decision to set a date for trial is not within the Judges' jurisdiction, they should, in any case, uphold the right of the Accused to a fair trial and ensure that the Accused is brought to trial without undue delay.

8. With regard to the Motion for provisional release pending the commencement of trial, the Defence argues that the Accused will make a formal oral and written undertaking to appear for trial and to not pose a danger to any victims or witnesses; that the Accused has never refused to cooperate with the Prosecution; that the Prosecution has never demonstrated that the Accused poses a potential danger to victims and witnesses if released.

Deliberation

Request for setting a date for the commencement of trial, a pre-trial conference or a status conference

9. The Chamber recalls the Tribunal's case law on the setting of a date for the commencement of trial, as expounded in *Rukundo* and echoed in *Nsengimana*:

> As regards the issue of setting of a date for the commencement of trial, the Chamber notes that such would come under the authority of the Tribunal's Administration and would be determined by its judicial calendar. In setting its priorities on the judicial calendar, the Tribunal would take into account, *inter alia,* the gravity of the charges, the right of every accused person to a fair trial without undue delay and the Tribunal's facilities.[3]

10. The Chamber notes that it is difficult to set a date for the commencement of trial or for a pre-trial conference because of the institutional constraints of the Tribunal. Nevertheless, the Chamber acknowledges the need for the Accused to be tried without undue delay.

11. Thus, the Chamber orders that a status conference be convened immediately between the parties pursuant to Rule 65 *bis* so as to expedite the commencement of trial and, accordingly, directs the Registrar to contact the parties.

Provisional release of the Accused

12. The Chamber is aware of the length of the Accused's pre-trial detention but notes that it is not disproportionate in relation to the gravity of the crimes with which he is charged.[4]

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[3] *Rukundo*, Decision on the Motion of the Defence for Setting of a Date for the Commencement of Trial or Alternatively, the Transfer of the Case to a National Jurisdiction, ICTR-01-70-PT, 1 June 2005, para. 14; *Nsengimana*, Decision on Nsengimana's Motion for the Setting of a Date for a Pre-Trial Conference, a Date for the Commencement of Trial, and for Provisional Release, ICTR-01-69-I, 11 July 2005, paras. 14-15.

[4] *Nsengimana*, Decision on Application by Hormisdas Nsengimana for Leave to Appeal the Trial Chamber's Decision on Provisional Release, ICTR-01-69-AR 65, Appeals Chamber, 23 August 2005.

13. The Chamber takes note of Rule 65 (B) laying down the conditions for provisional release and specifying that provisional release may be ordered by a 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". The Chamber also notes that these conditions are cumulative.[5]

14. The Chamber recalls that "it is not a prerequisite to obtaining provisional release to provide guarantees from the state to which the accused seeks to be released, or from anyone else, that he will appear for trial".[6] However, the Chamber finds that neither Tanzania, the host country, nor Belgium, the country to which the Accused seeks to be released, have been consulted on this issue, taking into account the arguments advanced in support of this Motion. But the Chamber notes that "the observance of such conditions as are necessary to ensure the presence of the accused at trial" necessarily implies that the Governments of both States have been consulted. As noted by the Appeals Chamber, "it is advisable for an applicant for provisional release to provide such a guarantee from a governmental body as the International Tribunal does not have the power to execute an arrest warrant in the event that the accused does not appear for trial". Considering the gravity of the charges against the Accused and the evidence adduced by the Defence, the Chamber is not persuaded that the Accused will appear for trial if released. Accordingly, the Chamber denies the Motion for provisional release.

FOR THESE REASONS,

THE TRIBUNAL

GRANTS the Motion partly;

DIRECTS the Registrar to consult the parties as soon as possible with a view to setting a date for a status conference;

DENIES the Motion for provisional release.

Arusha, 13 October 2006.

[Signed] : Arlette Ramaroson; William H. Sekule; Solomy Balungi Bossa

[5] *Delalić and Others,* Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić. (TC), IT-96-21, 25 September 1996, para. 1.
[6] *Nsengimana,* Decision on Application by Hormisdas Nsengimana for Leave to Appeal the Trial Chamber's Decision on Provisional Release, (AC), ICTR-01-69-AR65, 23 August 2005.

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Decision on the Prosecution's under Seal and Confidential Motion for Leave to Amend the Indictment
8 December 2006 (ICTR-2001-77-PT)

(Original : English)

Trial Chamber II

Judges : Arlette Ramaroson, Presiding Judge ; William H. Sekule ; Solomy Balungi Bossa

Joseph Nzabirinda – Leave to amend the indictment – Amendment after the initial appearance of the Accused – Withdrawal of counts and removal of factual allegations supporting them, Principle of non bis in idem – Addition of one count, Supporting material, Indictment sufficiently clear to allow the Accused to adequately prepare his Defence – Absence of trial date – Absence of prejudice to the Accused – Further appearance of the Accused – Motion granted in part

International Instruments Cited:

Rules of Procedure and Evidence, Rules 47, 47 (F) (i), 50, 50 (A) (i) and 50 (B) ; Statute, Art. 3 (a) and 6 (1)

International Cases Cited:

I.C.T.R.: 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) ; Trial Chamber, The Prosecutor v. Tharcisse Renzaho, Décision sur la Requête du Procureur demandant l'autorisation de déposer un acte d'accusation modifié, 18 March 2005 (ICTR-97-31) ; 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. Paul Bisengimana, Decision on the Prosecutor's Request for Leave to Amend an Indictment, 27 October 2005 (ICTR-2000-60)

I.C.T.Y.: Trial Chamber, The Prosecutor v. Enver Hadžihasanović and Amir Kubura, Decision on Form of the Indictment, 17 September 2003 (IT-01-47)

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 Confidential "Prosecutor's Request for Leave to Amend an Indictment Pursuant to Rules 72 [sic], 73, 50 and 51 of the Rules of Procedure and Evidence," filed on 20 November 2006 (the "Motion");

CONSIDERING the Statute of the Tribunal (the "Statute"), specifically Articles 19 and 20, and the Rules of Procedure and Evidence (the "Rules"), in particular Rules 47 (E), (F), (G), 50, and 73;

NOW DECIDES the matter pursuant to Rule 73 (A), on the basis of the Parties' written submissions.

Introduction

1. Judge Navanethem Pillay confirmed the Indictment against the Accused Joseph Nzabirinda (the "Accused") on 13 December 2001 (the "Current Indictment"). In its Motion, the Prosecution seeks leave to amend the Current Indictment by withdrawing all four counts and substituting one new count. On 21 November 2006, the Defence indicated that it did not intend to respond to this Motion.

2. On 27 November 2006, the Chamber ordered the Prosecution to provide material in support of the new count of murder as a crime against humanity and to clarify certain aspects of the proposed Amended Indictment of 20 November 2006, within three days.[1] On 29 November 2006, the Prosecution requested an extension of time[2] which was granted until 4 December 2006.[3] On that date, the Prosecution filed supporting material and a new proposed Amended Indictment (the "proposed Amended Indictment").

3. The Defence indicated on 6 December 2006 that the Accused accepted the facts as set out in the proposed Amended Indictment, but not all elements of the supporting material filed together with that proposed Amended Indictment.[4] On 7 December 2006, the Prosecution stated that it would not reply.[5]

Submissions of the Parties

The Prosecution

4. The Prosecution requests the Chamber to grant leave for it to amend the Current Indictment by withdrawing the following four charges:
(i) Count 1 : genocide – Art. 2 (3) (a) and 6 (1);
(ii) Count 2 : complicity in genocide – Art. 2 (3) (a) and 6 (1);
(iii) Count 3 : extermination as a crime against humanity – Art. 3 (b) and 6 (1);
(iv) Count 4 : rape as a crime against humanity – Art. 3 (b) and 6 (1).[6]

5. The Prosecution also seeks to delete the factual allegations supporting these four counts and intends to lead no evidence in relation to these charges. It requests the Chamber to adjudge that such withdrawal is in conformity with the principle of *non bis in idem*.[7]

6. The Prosecution further seeks to retain the charge of Art. 3 (a), 6 (1).[8]

7. The Prosecution submits that Rule 50 of the Rules and the jurisprudence of the Tribunal allow for the amendment of an indictment after the initial appearance of the Accused.[9] The Prosecution adds that its request is justified in law and will not result in any delay in the commencement of trial, as no

[1] Confidential Scheduling Order of 27 November 2006.
[2] "The Prosecutor's Request to Extend the Time Period in which to File an Amended Indictment Pursuant to Confidential Scheduling Order of 27 November 2006".
[3] See correspondence between Registry and Prosecution dated 29 November 2006.
[4] Réponse de la Défense concernant l'acte d'accusation amendé conformément à la décision du 27 novembre 2006 et les preuves pour fonder le nouveau chef unique d'assassinat, filed on 6 December 2006.
[5] See correspondence of the Prosecution to the Chamber of 7 December 2006.
[6] The Motion, para. 2.
[7] Réponse de la Défense concernant l'acte d'accusation amendé conformément à la décision du 27 novembre 2006 et les preuves pour fonder le nouveau chef unique d'assassinat, filed on 6 December 2006, paras. 12-13.
[8] The Motion, para. 3. The Chamber notes, however, that there is no charge of murder as a crime against humanity in the Current Indictment. This will be discussed below.
[9] The Motion, para. 23.

new Defence investigation is necessary to prepare for it.[10] Additionally, the factual basis of the murder charge presents a lighter burden than was the case under the Current Indictment.[11]

8. The Prosecution also submits that the proposed amendment will allow for a more expeditious trial within a relatively shorter period of judicial time, and adds that as no trial date has been set, an amendment at this stage will not prejudice the Accused.[12]

The Defence

9. The Defence indicates that the Accused accepts the facts as set out in paras. 15, 19, and 20 of the proposed Amended Indictment. The Accused does not oppose the explicit mention made of the count of murder as a crime against humanity in the proposed amended Indictment.[13]

Deliberations

The Applicable Standard Under Rule 50

10. In considering the Motion, the Chamber notes the relevant provisions of Rule 50 and Rule 47 of the Rules, which indicate that an indictment may be amended after the initial appearance of the Accused, if the Prosecution discharges its burden of setting out the factual and legal justifications for such amendments.[14]

11. The Chamber recalls that as stated by this Chamber in the *Renzaho* case,[15] the fundamental question in relation to granting leave to amend an indictment is whether it will unfairly prejudice the accused.[16]

On the Request to Withdraw Four Counts and Delete All Factual Allegations Alleged in Support of the Withdrawn Counts

12. The Chamber notes that the Prosecution seeks leave to withdraw four counts and delete all factual allegations alleged in support of the withdrawn counts. Considering that the Defence does not oppose the Motion and that the withdrawal of four counts and the removal of factual allegations supporting them may result in a more expeditious trial that promotes judicial economy and the rights of the Accused, the Chamber grants this Prosecution request.

13. With regard to the Prosecution prayer that the Chamber declares the withdrawal of counts to be in accordance with the *non bis in idem* principle, the Chamber notes that this prayer is premature at this stage of the proceedings. The Chamber therefore denies this prayer.

On the Request to Add one Count and the Potential Prejudice to the Accused

14. The Chamber notes that "[n]ew charges do not prohibit a Chamber from granting the Prosecution leave to amend an indictment."[17] Rather, the most important consideration for the Chamber is the potential prejudice to the Accused.[18]

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[10] The Motion, paras. 22, 24.
[11] The Motion, para. 24.
[12] The Motion, paras. 25-26.
[13] Réponse de la Défense concernant l'acte d'accusation amendé conformément à la décision du 27 novembre 2006 et les preuves pour fonder le nouveau chef unique d'assassinat, filed on 6 December 2006, para. 11.
[14] *Prosecutor v. Mika Muhimana*, Decision on Motion to Amend Indictment, 21 January 2004, para. 4; *Prosecutor v. Casimir Bizimungu et al.*, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 6 October 2003, para. 27.
[15] Prosecutor v. Tharcisse Renzaho, Décision sur la Requête du Procureur demandant l'autorisation de déposer un acte d'accusation modifié, 18 March 2005, para. 47, quoting Prosecutor v. Enver Hadžihasanović and Amir Kubura, Décision relative à la forme de l'acte d'accusation, 17 September 2003, para. 35.
[16] *Prosecutor v. Paul Bisengimana*, Decision on the Prosecutor's Request for Leave to Amend an Indictment, 27 October 2005, para. 18.

15. As no material had been filed in support of the new count, the Chamber pointed out to the Prosecution in its Scheduling Order that while the Prosecution proposed to "retain" the charge of murder as a crime against humanity, there was no such count in the Current Indictment. Since the charge of murder was a new count, the Chamber ordered that the Prosecution file supporting material, pursuant to Rules 50 (A) (i), 47 (F) (i) of the Rules.

16. The Chamber has noted the supporting material the Prosecution filed with regard to the new charge of murder as a crime against humanity, and the clarifications that have been made in the proposed Amended Indictment in response to the Chamber's Scheduling Order. After carefully reviewing the proposed Amended Indictment and the supporting material, the Chamber considers that there is a *prima facie* case against the Accused for the charge of murder within the meaning of Rules 50 (A) (i), 47 (E) of the Rules. The Chamber is also of the view that the proposed Amended Indictment is sufficiently clear to allow the Accused to adequately prepare his Defence.

17. The Chamber observes that the Accused accepts the facts as set out in the proposed Amended Indictment.[19] Further, the Defence does not oppose the Motion.[20]

18. The Chamber notes that no trial date has been set and that there is thus no prejudice to the Accused caused by delay because of an amendment to the Current Indictment.[21] The Chamber therefore grants the Prosecution's request to substitute a new count, namely, murder as a crime against humanity.

19. Finally, the Chamber considers that a further appearance of the Accused should be scheduled as soon as practicable to enable him to enter a plea on the murder count, in accordance with Rule 50 (B) of the Rules. It therefore directs the Registry to undertake the necessary steps.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS leave to amend the Indictment by withdrawing all four counts and substituting a new count of murder pursuant to Art. 3 (a), 6 (1) of the Statute;

DENIES the prayer for an order that the withdrawal of counts is an application of the principle of *non bis in idem*;

ORDERS the Prosecution to file an Amended Indictment in both English and French with the Registry and the Chamber by Monday, 11 December 2006;

ORDERS that a further appearance of the Accused shall be held as soon as practicable and that the Registry make all necessary arrangements to that effect.

Arusha, 8 December 2006.

[Signed] : Arlette Ramaroson; William H. Sekule; Solomy Balungi Bossa

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[17] *Prosecutor v. Tharcisse Muvunyi*, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision on 23 February 2005 (AC), 12 May 2005, para. 38.
[18] *Prosecutor v. Paul Bisengimana*, Decision on the Prosecutor's Request for Leave to Amend an Indictment, 27 October 2005, para. 22.
[19] Réponse de la Défense concernant l'acte d'accusation amendé conformément à la décision du 27 novembre 2006 et les preuves pour fonder le nouveau chef unique d'assassinat, filed on 6 December 2006, para. 13.
[20] See correspondence of the Defence to the Chamber of 5 December 2006.
[21] *Prosecutor v. Augustin Ndindiliyimana et al.*, Decision on Prosecutor's Motion under Rule 50 for Leave to Amend the Indictment, 26 March 2004, para. 53.

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Decision on Nzabirinda's under Seal-Extremely Urgent motion for Protective Measures for Character Witnesses 13 December 2006 (ICTR-2001-77-PT)

(Original : English)

Trial Chamber II

Judges : Arlette Ramaroson, Presiding Judge; William H. Sekule; Solomy Balungi Bossa

Joseph Nzabirinda – Protective measures for character witnesses – Real and objective fears – Motion granted in part – Measures : confidentiality, possibility for the Prosecution to contact the witnesses

International Instruments cited:

Rules of Procedure and Evidence, Rules 69, 69 (C), 73 (A) and 75 ; Statute, Art. 14, 19 and 21

International Cases Cited:

I.C.T.R.: Trial Chamber, The Prosecutor v. Joseph Nzabirinda, Decision on Prosecution Motion to Order Protective Measures for Victims and Witnesses, 4 May 2004 (ICTR-2001-77) ; Trial Chamber, The Prosecutor v. Edouard Karemera, Order on Protective Measures for Prosecution Witnesses, 10 December 2004 (ICTR-98-44) ; 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. Paul Bisengimana, Decision on Bisengimana's Extremely Urgent Motion for Protective Measures for Character Witnesses, 20 December 2005 (ICTR-2000-60)

I.C.T.Y.: Trial Chamber, The Prosecutor v. Radoslav Brđanin and Momir Talić, Decision on Motion by Prosecution for Protective Measures, 3 July 2000 (IT-99-36) ; Trial Chamber, The Prosecutor v. Zoran Kupreškić, Decision on Prosecution Motion to Delay Disclosure of Witness Statements, 21 May 1998 (IT-95-16)

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 Confidential "Requête additionnelle en extrême urgence de la Défense aux fins de prescription de mesures de protection des témoins, " dated 5 December 2006 but filed on 11 December 2006 (the "Motion");

NOTING that the Prosecution does not oppose the Motion;[1]

[1] On 11 December 2006, Counsel for the Prosecution indicated that he does not oppose the Motion in an electronic mail addressed to the Chamber Coordinator.

CONSIDERING the Statute of the Tribunal (the "Statute"), in particular Articles 14, 19 and 21 of the Statute, and the Rules of Procedure and Evidence (the "Rules"), specifically Rules 69 and 75;

NOW DECIDES the Motion pursuant to Rule 73 (A) of the Rules on the basis of the written submissions of the Defence.

The Defence

1. The Defence relies upon Articles 14, 19 (1) and 21 of the Statute and Rules 69 and 75 of the Rules to request protective measures in favour of Witnesses LZI, LBH, LBG, CAN and LDK. It alleges that those witnesses will be called as character witnesses following the plea agreement between Joseph Nzabirinda and the Office of the Prosecutor.

2. The Defence submits that witnesses for whom such measures are sought expressly required protection as an essential condition for their testimony before the Chamber. Furthermore the Defence asserts that it fears for the safety of its witnesses in light of what has happened to some "genocide trial" witnesses or to their relatives, after having testified before the Tribunal.

3. The Defence submits that both Witnesses LZI and CAN currently reside in Rwanda and their relationship with the Accused could really jeopardize their security if they were to testify openly. As for Witness LDK, the Defence alleges that she resides outside Rwanda but most of her family members, including her mother still live within that country. This witness wishes to safeguard her privacy against potential threats and troubles that might occur in case her neighbours find out that she came to testify in Arusha. With regard to Witness LBH, the Defence argues that she belongs to a religious congregation which has expressed fears for the safety of the witness and that of the congregation itself if she testifies under her real identity and openly. Finally, Witness LBG fears for her safety and that of her children given the nature of relationship she has with the Accused.

4. Accordingly, the Defence requests the aforesaid witnesses be granted wide protective measures including the sealing of their identities from the public and the media.

Deliberations

5. Article 21 of the Statute together with Rules 69 and 75 of the Rules provide that any Party may move the Chamber, in exceptional circumstances, to grant appropriate protective measures for victims or witnesses. The Chamber may also do so *proprio motu*.[2]

6. The case law of both ICTR and ICTY provide that witnesses for whom protective measures are sought must incur a real threat for their own safety or for their family and that their fear must be objectively grounded.[3] The Chamber further recalls that "any fears expressed by potential witnesses themselves that they may be in danger or at risk are *not in themselves* sufficient to establish any real *likelihood* that they may be in danger or at risk. Something more than that must be demonstrated to warrant an interference with the rights of the accused which these redactions represent".[4]

7. The Chamber has reviewed the Defence arguments with respect to the need to safeguard the privacy and security of Witnesses LZI, LBH, LBG, CAN and LDK, and finds that the fears expressed by the concerned witnesses appear to be underscored by an objective basis. The Chamber will

[2] Le Procureur c. Kupreskic, Case N°IT-95-16, « Décision relative à la requête de l'accusation aux fins de reporter la communication des déclarations de témoins », 21 May 1998, para. 7.
[3] *The Prosecutor v. Nzabirinda,* « Decision on Prosecutor's Motion for Protective Measures for Victims and Witnesses », 4 May 2004, para. 5.
[4] *The Prosecutor v. Radoslav Brdanin & Momir Talic* "Decision on Motion by Prosecution for Protective Measures", 3 July 2000, para. 26.

therefore consider if the measures sought are in conformity with the case law which governs the matter.

8. The Chamber observes that the measure referred to in Paragraph 25 of the Motion requesting that the identity of the character witnesses concerned, their addresses, whereabouts, or any other document which might reveal their identity, be placed under seal and not appear on any document of the Tribunal, is consonant with the current practice of both the Tribunal[5] and this Chamber.[6] Accordingly, the Chamber grants that measure with respect to Witnesses LZI, LBH, LBG, CAN and LDK.

9. The Chamber further observes that the sealing of identifying information sought in Paragraph 32 of the Motion is apparently similar to the measure referred to above. The Chamber further observes that once identifying information is put under seal, any document containing such information is inaccessible to the media and the public rendering the measures sought in Paragraphs 27 and 32 of the Motion moot.

10. The Chamber notes the measure indicated in Paragraph 26 of the Motion requiring the Registry to only communicate the identity of the witnesses concerned or any information that might reveal their identity to the Witnesses and Victims Support Section. The Chamber observes that this is consonant with the Tribunal's practice.[7] However, the Chamber also notes that the measure does not provide disclosure timeframes of the witnesses' identifying information to the Prosecution. The Chamber recalls that Rule 69 (C) provides that, "[s]ubject to Rule 75, the identity of the victim and witness shall be disclosed within such time as determined by the Trial Chamber to allow adequate time for the preparation of the Prosecution and the Defence." The Chamber grants that measure with respect to Witnesses LZI, LBH, LBG, CAN and LDK and orders that the disclosure of the identity of those witnesses to the Prosecution be carried out 21 days before the witnesses are scheduled to testify.

11. As for the measure indicated in Paragraph 28 of the Motion requesting that the Prosecution shall not communicate the identity of the witnesses concerned, as well as their addresses, whereabouts, or any other information likely to reveal their identity to anyone else; the Chamber understands that the communication of identifying information is limited to staff of the Office of the Prosecutor. The Chamber finds that this measure is consonant with the Tribunal's practice and therefore granted.[8]

12. The Chamber considers that the measure referred to in Paragraph 29 of the Motion, which requests that the Prosecution inform the Defence in writing of any request for authorisation to contact the witnesses is consonant with the Tribunal's practice[9] and thus grants that measure for Witnesses LZI, LBH, LBG, CAN and LDK.

13. The Chamber notes that the measure sought in Paragraph 30 of the Motion and which requests that the public and the media be prohibited from taking photographs and making sketches, or audio and/or video recordings of the witnesses concerned, unless authorised to do so by the Chamber, is

[5] See for example, *The Prosecutor v. Karemera* (TC), Order on Protective Measures for Prosecution Witnesses, 10 December 2004, p. 2.
[6] *Prosecutor v. Renzaho*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes alleged in the Indictment, 17 August 2005, para. 13.
[7] *The Prosecutor v. Karemera* (TC), Order on Protective Measures for Prosecution Witnesses, 10 December 2004, p. 2; *Prosecutor v. Renzaho*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes alleged in the Indictment, 17 August 2005, para. 13.
[8] *The Prosecutor v. Bisengimana,* Decision on Bisengimana's Extremely Urgent Motion for Protective Measures for Character Witnesses, 20 December 2005, para. 12.
[9] *The Prosecutor v. Karemera* (TC), Order on Protective Measures for Prosecution Witnesses, 10 December 2004, p. 3; *Prosecutor v. Renzaho*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes alleged in the Indictment, 17 August 2005, para. 13.

consonant with the Tribunal's practice.[10] Therefore, the Chamber grants the aforesaid measure for Witnesses LZI, LBH, LBG, CAN and LDK.

14. As to the measure indicated in Paragraph 31 of the Motion allowing the Defence to designate each witness it intends to call with a pseudonym to be used in proceedings before the Tribunal, the communications and consultations between the Parties or with the public, until the Chamber decides otherwise, the Chamber is of the opinion that this measure corresponds to the Tribunal's practice[11] and is necessary for the protection of witnesses. It therefore grants that measure with respect to Witnesses LZI, LBH, LBG, CAN and LDK.

FOR THE ABOVE REASONS,

THE TRIAL CHAMBER

GRANTS the measures requested in Paragraphs 25, 26, 28, 29, 30, and 31 of the Motion.

DECLARES MOOT the measures requested in Paragraphs 27 and 32 of the Motion.

Arusha, 13 December 2006.

[Signed] : Arlette Ramaroson; William H. Sekule; Solomy Balungi Bossa

[10] *The Prosecutor v. Karemera* (TC), Order on Protective Measures for Prosecution Witnesses, 10 December 2004, p. 3; *Prosecutor v. Renzaho*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes alleged in the Indictment, 17 August 2005, para. 13.

[11] *The Prosecutor v. Karemera* (TC), Order on Protective Measures for Prosecution Witnesses, 10 December 2004, p. 3; *Prosecutor v. Renzaho*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes alleged in the Indictment, 17 August 2005, para. 13.

Le Procureur c. Joseph NZABIRINDA

Affaire N° ICTR-2001-77

Fiche technique

• Nom: NZABIRINDA

• Prénom: Joseph (surnommé “Biroto”)

• Date de naissance: 1957

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: employé de la commune de Ngoma en tant qu’encadreur de la jeunesse

• Date de confirmation de l’acte d’accusation: 13 décembre 2001

• Chefs d’accusation: génocide, ou à titre subsidiaire, complicité de génocide, crimes contre l’humanité (extermination et viol)

• Date et lieu de l’arrestation: 21 décembre 2001, à Bruxelles, en Belgique

• Date du transfert: 21 mars 2002

• Date de la comparution initiale: 27 March 2002

• Précision sur le plaidoyer: coupable

• Date du début du procès: 14 décembre 2006

• Date et contenu du prononcé de la peine: 23 février 2007, condamné à 7 ans de prison

• Date de libération après avoir purgé sa peine: 19 décembre 2008

Décision sur la requête en extrême urgence de la Défense aux fins de prescriptions des mesures de protection des témoins
5 octobre 2006 (ICTR-2001-77-I)

(Original : Français)

Chambre de première instance II

Juges : Arlette Ramaroson, Présidente; William H. Sekule; Solomy Balungi Bossa

Joseph Nzabirinda – Mesures de protection de témoins – Crainte réelle et objective – Absence de preuve – Requête rejetée

Instruments internationaux cités :

Règlement de procédure et de preuve, art. 69, 73 (A) et 75 ; Statut, art. 21

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Joseph Nzabirinda, Décision relative à la requête du Procureur en prescription de mesures de protection des victimes et des témoins, 4 mai 2004 (ICTR-2001-77)

T.P.I.Y. : Chambre de première instance, Le Procureur c. Zoran Kupreškić, Décision relative à la requête de l'accusation aux fins de reporter la communication des déclarations de témoins, 21 mai 1998 (IT-95-16) ; Chambre de première instance, Le Procureur c. Radoslav Brđanin et Momir Talić, http://www.icty.org/x/cases/brdanin/tdec/fr/00703PM213375.htm*Décision relative à la Requête de l'accusation aux fins de Mesures de Protection, 3 juillet 2000 (IT-99-36)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÈGEANT en la Chambre de première instance II, composée de Arlette Ramaroson, Présidente, des juges William H. Sekule et Solomy B. Bossa (la « Chambre »);

ÉTANT SAISI de la « Requête en extrême urgence de la Défense aux fins de prescriptions des mesures de protection des témoins » déposée le 5 septembre 2006 (la « requête »);

VU
(i) la réponse du Procureur intitulée « *Prosecutor's Response to Defence Motion for Protective Measures for Defence Witnesses* » déposée le 12 septembre 2006 (la « réponse du Procureur »);
(ii) la « réplique de la Défense à la réponse du Procureur relative à la requête de la Défense aux fins de prescriptions de mesure de protections des témoins » déposée le 18 septembre 2006 (la « réplique de la Défense »);

VU le Statut du Tribunal (le « Statut ») et le Règlement de procédure et de preuve (le « Règlement »), notamment les Articles 69 et 75 du Règlement;

STATUANT sur la base des mémoires déposés par les parties conformément à l'Article 73 (A) du Règlement;

Soumissions des parties

La Défense

1. La Défense s'appuie sur les articles 14, 19 (1) et 21 du Statut et sur les articles 69 et 75 du Règlement pour demander qu'une ordonnance de protection des témoins à décharge soit rendue le plus rapidement possible.

2. La Défense soumet que les témoins pour lesquels de mesures de protection sont demandées résident actuellement au Rwanda ou sont en exil mais certains membres de leur famille sont encore au Rwanda et qu'ils n'ont pas expressément renoncé à leur droit aux mesures de protection. Selon la Défense, la plupart d'entre eux ont fait savoir qu'ils craignaient pour leur sécurité pour de multiples raisons une fois qu'ils auraient déposé devant le Tribunal.

3. Il résulte de ce qui précède la Défense demande qu'il soit attribué des pseudonymes à dix huit témoins et que de larges mesures de protection leur soient accordées, variant de l'interdiction de tout accès du public et de la presse à leur identité à une circulation très limitée des informations les concernant au sein de l'équipe du Procureur.

Le Procureur

4. Le Procureur ne fait pas objection à la requête sauf en ce qui concerne les mesures relatives à la restriction de la communication de l'information entre les différentes équipes du Procureur. Il soutient à ce propos que son bureau forme un tout indivisible;[12] par ailleurs, les restrictions sollicitées par la Défense seraient contraires aux dispositions des articles 68 et 75 (F) du Règlement qui lui prescrivent de larges obligations de communication vis-à-vis de toute la Défense.

La réplique de la Défense

5. La Défense souligne que les mesures de restriction sollicitées ne concernent que les informations et documents de nature à révéler l'identité des témoins et non le contenu de leurs témoignages. Elle précise que le Procureur pourrait ainsi s'acquitter de son obligation de communication en utilisant les informations ou documents fournis par les témoins de la Défense expurgés des passages de nature à révéler leur identité.

6. La Défense soumet en outre que l'article 75 du Règlement n'emporte aucune contradiction entre les mesures de protection des témoins ordonnées dans une première affaire et l'obligation de communication du Procureur dans une deuxième affaire.

Délibérations

7. Les dispositions de l'article 21 du Statut, ensemble avec celles des articles 69 et 75 du Règlement, prévoient la possibilité pour toute partie de demander à la Chambre, dans des circonstances exceptionnelles, des mesures de protection appropriées des victimes ou des témoins. La Chambre peut aussi adopter de telles mesures de sa propre initiative.[13]

8. La jurisprudence établie du Tribunal de céans et du Tribunal pénal international pour l'ex-Yougoslavie (le « TPIY ») prévoit que les témoins pour lesquels les mesures de protection sont demandées doivent encourir une menace réelle pour leur propre sécurité ou celle de leur famille, et que leur crainte doit être objectivement justifiée.[14] Par ailleurs, la Chambre rappelle que la « crainte exprimée par des témoins potentiels qui pourraient courir un danger ou des risques ne suffit pas *en soi*

[12] *Le Procureur c. Bagosora et al.*, Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 octobre 2005, para. 43.
[13] *Le Procureur c. Kupreškić*, Case N°IT-95-16, « Décision relative à la requête de l'accusation aux fins de reporter la communication des déclarations de témoins », 21 mai 1998, para.7.
[14] *Le Procureur c. Nzabirinda*, « Décision relative à la requête du Procureur en prescription de mesures de protection des victimes et des témoins », 4 mai 2004, para.5.

à établir que ce danger ou ces risques constituent réellement *une probabilité*. Il en faut plus pour justifier l'atteinte aux droits de l'accusé que représentent les expurgations en question ».[15]

9. La Chambre note que la Défense se contente d'évoquer de vagues craintes qui habiteraient la plupart de ses témoins sans offrir aucun élément de preuve au soutien d'une telle assertion. Lesdits témoins ne sont d'ailleurs pas identifiés par rapport à ceux qui n'auraient pas de telles craintes pas plus que la Défense n'a clairement spécifié les raisons objectives fondant la crainte alléguée. La Chambre rejette ainsi la requête de la Défense dans son entièreté.

PAR CES MOTIFS

LE TRIBUNAL,

REJETTE la requête.

Arusha le 5 octobre 2006.

[Signé] : Arlette Ramaroson; William H. Sekule; Solomy Balungi Bossa

[15] *Le Procureur c. Radoslav Brdanin et Momir Talic*, « Décision relative à la requête de l'accusation aux fins de mesures de protection », 3 juillet 2000, para. 26.

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Décision relative à la requête de la Défense aux fins de fixer la date d'ouverture du procès de l'accusé et d'obtenir sa mise en liberté provisoire en attendant cette date 13 octobre 2006 (ICTR-2001-77-I)

(Original : Français)

Chambre de première instance II

Juges : Arlette Ramaroson, Présidente; William H. Sekule; Solomy Balungi Bossa

Joseph Nzabirinda – Fixation de la date d'ouverture du procès – Mise en liberté provisoire – Fixation d'une date, Ouverture du procès ou conférence préalable au procès, Droit de l'accusé d'être jugé dans des délais raisonnables, Convocation d'une conférence de mise en état – Mise en liberté provisoire, Durée de la détention provisoire de l'accusé non disproportionnée par rapport à la gravité des crimes retenus, Absence de consultation du pays hôte et du pays où l'accusé entend résider suite à sa mise en liberté, Absence de certitude quant à la comparution de l'accusé – Requête acceptée en partie

Instrument international cité :

Règlement de procédure et de preuve, art. 65 (B), 65 bis and 73

Jurisprudence internationale citée :

T.P.I.R.: Chambre de première instance, Le Procureur c. Emmanuel Rukundo, Decision on the Motion of the Defence for Setting of a Date for the Commencement of Trial or Alternatively, the Transfer of the Case to a National Jurisdiction, 1 juin 2005 (ICTR-2001-70) ; Chambre de première instance, Le Procureur c. Hormisdas Nsengimana, Decision on Nsengimana's Motion for the setting of a date for a pre-trial conference, a date for the commencement of trial, and for provisional release, 11 juillet 2005 (ICTR-2001-69) ; Chambre d'appel, Le Procureur c. Hormisdas Nsengimana, Décision relative à la demande d'Hormisdas Nsengimana sollicitant l'autorisation d'interjeter appel de la décision de la chambre de première instance relative à sa demande de mise en liberté provisoire, 23 août 2005 (ICTR-2001-69)

T.P.I.Y.: Chambre de première instance, Le Procureur c. Zejnil Delalić et consorts, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić, 25 September 1996 (IT-96-21)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance II composée de Arlette Ramaroson, Présidente, des juges William H. Sekule et Solomy B. Bossa (la « Chambre ») ;

ÉTANT SAISI de la « Requête article 73 du Règlement de procédure et de preuve aux fins de fixer la date d'ouverture du procès de l'Accusé et d'obtenir en attendant sa mise en liberté » déposée le 11 septembre 2006 (la « requête ») ;

VU la « *Prosecutor's Response to Defence Motion for the Setting of a Date for the Commencement of Trial and Provisional Release* » déposée le 15 septembre 2006 et la « Réplique de la Défense à la réponse du Procureur relative à la requête de la Défense aux fins de fixer la date d'ouverture du procès de l'Accusé et d'obtenir en attendant sa mise en liberté » déposée le 18 septembre 2006 ;

VU la « Réplique à la réponse du Procureur relative à la requête article 73 du Règlement de Procédure et de preuve de la Défense aux fins de fixer la date d'ouverture du procès de l'Accusé et d'obtenir en attendant sa mise en liberté » et annexes déposées le 9 octobre 2006

VU le Statut du Tribunal (le « Statut ») et le Règlement de procédure et de preuve (le « Règlement »),

STATUANT sur la base des mémoires déposés par les parties conformément à l'Article 73 du Règlement,

Arguments des parties

La Défense

1. La Défense soutient que depuis la comparution initiale de l'Accusé le 27 mars 2002, la Chambre n'a pas convoqué de conférence de mise en état, ni fixé de date pour l'ouverture du procès. La Défense s'estime prête et demande l'organisation d'une conférence préalable au procès et la fixation d'une date pour son commencement.[1] Alternativement, la Chambre devrait fixer une date pour une conférence de mise en état.

2. Si le Tribunal ne peut fixer de date pour l'ouverture du procès, la Défense demande la mise en liberté provisoire de l'Accusé en vertu de l'article 65 (A) du Règlement.[2]

3. La Défense ajoute que dans l'attente de l'ouverture de son procès, l'Accusé pourrait s'établir immédiatement en Belgique où il bénéficie du statut de réfugié ; que sa famille y réside et qu'il est titulaire d'un certificat d'inscription aux registres des étrangers. La Défense s'en remet au Tribunal pour circonscrire les conditions de la mise en liberté provisoire avec la Belgique, éventuel pays d'accueil.

4. La Défense rappelle qu'il y va de l'intérêt de la justice de garantir le principe de liberté qui prévaut en droit pénal sur celui de la détention provisoire qui doit rester l'exception. Elle ajoute que l'Accusé est en détention depuis près de cinq ans, en violation de toutes les normes internationales régissant le droit à un procès équitable.

La réponse du Procureur

5. Le Procureur ne s'oppose pas à la fixation d'une date pour le commencement du procès tout en rappelant qu'il s'agit d'une prérogative d'administration générale du Tribunal.

6. Le Procureur s'oppose par contre, à la requête en mise en liberté provisoire en arguant que l'Accusé n'a pas démontré que s'il était libéré, il comparaîtrait au procès et ne mettrait pas en danger une victime, un témoin ou toute autre personne, conformément à l'Article 65 (B) du Règlement. En outre, il n'est pas démontré que les autorités belges ont accepté d'accueillir l'Accusé sur leur territoire.

La réplique de la Défense

7. Concernant la demande de la fixation d'une date d'ouverture du procès, la Défense soutient que même si la décision de fixer la date du procès ne relève pas de l'autorité des juges saisis de l'affaire en dernier ressort, ces juges n'en demeurent pas moins les garants du droit de l'accusé à un procès

[1] La Défense cite les articles 19 (1), 19 (3) et 20 (4) du Statut et à l'Article 62 (A) du Règlement et autres instruments internationaux affirmant le droit de l'accusé à être jugé dans un délai raisonnable.
[2] La Défense s'appuie également sur certains instruments internationaux et la jurisprudence du TPIY : Affaires *Baskic* [*sic*], *Djukic* et *Simic*.

équitable et qu'il est du devoir de ces juges de veiller à ce que la mise en état de l'affaire se fasse sans trop de retard.

8. Concernant la demande de mise en liberté provisoire en attendant l'ouverture du procès, la Défense soutient que l'Accusé s'engagera solennellement, oralement et par écrit, à se présenter au procès et à ne pas faire pression sur les victime et les témoins ; que l'Accusé n'a jamais refusé de coopérer avec le Procureur ; que le Procureur n'a jamais donné aucune preuve du danger potentiel couru par les victimes ou les témoins si l'accusé était mis en liberté provisoire.

Après en avoir délibéré

Sur la demande de fixation d'une date d'ouverture du procès et d'une conférence préalable au procès ou d'une conférence de mise en état

9. La Chambre rappelle la jurisprudence du Tribunal concernant la fixation de la date d'ouverture du procès telle qu'énoncée dans l'affaire *Rukundo* et reprise dans l'affaire *Nsengimana* :

> Concernant la question de la détermination de la date d'ouverture du procès, la Chambre réaffirme qu'une telle question relève de l'administration générale du tribunal et de son calendrier judiciaire. Le Tribunal évalue les priorités en tenant compte notamment de la gravité des faits reprochés, du droit de tous les accusés à bénéficier d'un procès équitable dans des délais raisonnables et des disponibilités des services du Tribunal qui conditionnent la fixation du calendrier judiciaire.[3]

10. La Chambre estime que la fixation d'une date pour l'ouverture du procès ou la date d'une conférence préalable au procès est difficile au regard des contraintes institutionnelles du Tribunal. Il n'en demeure pas moins qu'elle garde à l'esprit la nécessité pour l'Accusé d'être jugé dans des délais raisonnables.

11. Par conséquent, la Chambre donne les instructions nécessaires pour qu'une conférence de mise en état soit rapidement convoquée en vertu de l'article 65 *bis* du Règlement afin de permettre des échanges de vues entre les parties de nature à favoriser un déroulement rapide du procès. À cet effet, elle instruit le Greffe de consulter les parties.

Sur la demande de mise en liberté provisoire de l'Accusé

12. La Chambre est consciente de la durée de la détention provisoire de l'Accusé mais estime qu'elle n'est pas disproportionnée par rapport à la gravité des crimes retenus contre lui.[4]

13. La Chambre rappelle l'article 65 (B) du règlement stipulant les conditions préalables à la mise en liberté provisoire et prescrivant qu'elle ne peut être ordonnée par une chambre « 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 ». La Chambre rappelle également que ces conditions sont cumulatives.[5]

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[3] Rukundo, ICTR-01-70-PT, Decision on the Motion of the Defence for Setting of a Date for the Commencement of Trial or Alternatively, the Transfer of the Case to a National Jurisdiction, 1 juin 2005, para. 14; Nsengimana, ICTR-01-69-I, Decision on Nsengimana's Motion for the setting of a date for a pre-trial conference, a date for the commencement of trial, and for provisional release, 11 juillet 2005, paras 14 and 15.

[4] *Nsengimana*, ICTR-01-69-AR65, Décision relative à la demande d'Hormisdas Nsengimana sollicitant l'autorisation d'interjeter appel de la décision de la chambre de première instance relative à sa demande de mise en liberté provisoire, (AC), 23 août 2005.

[5] Delalić et al., IT-96-21, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić (TC), 25 September 1996, para. 1.

14. La Chambre rappelle que l'Accusé « n'est pas tenu comme condition préalable à l'obtention de sa mise en liberté provisoire, de fournir des garanties de l'État où il demande à être libéré ou de qui que ce soit d'autre qu'il se représentera ».[6] Néanmoins, la Chambre constate que ni la Tanzanie, le pays hôte, ni la Belgique, le pays où l'Accusé entend résider suite à sa mise en liberté, n'ont été approchées sur cette proposition, d'après les éléments apportés à l'appui de la requête. Or, la Chambre estime que l'observation de conditions nécessaires pour garantir la présence de l'Accusé au procès implique nécessairement que les gouvernements de ces deux États aient été consultés. Comme l'a rappelé la Chambre d'appel, « il est souhaitable que le requérant fournisse pareille garantie d'un organe gouvernemental, le Tribunal n'ayant aucun pouvoir pour exécuter son propre mandat d'arrêt si l'accusé ne se représente pas ».[7] Compte tenu de la gravité des accusations portées contre l'Accusé et sur la base des informations fournies par la Défense, la Chambre n'est pas convaincue que l'Accusé se présenterait au procès s'il était libéré. Par conséquent, elle rejette la demande de mise en liberté provisoire.

PAR CES MOTIFS,

LE TRIBUNAL

FAIT partiellement droit à la requête ;

INSTRUIT le Greffe de consulter les parties dans les plus brefs délais en vue de la fixation d'une conférence de mise en état ;

REJETTE la requête sur la demande de mise en liberté provisoire.

Arusha, le 13 octobre 2006.

[Signé] : Arlette Ramaroson; William H. Sekule; Solomy Balungi Bossa

[6] *Nsengimana*, ICTR-01-69-AR65, Décision relative à la demande d'Hormisdas Nsengimana sollicitant l'autorisation d'interjeter appel de la décision de la chambre de première instance relative à sa demande de mise en liberté provisoire, (AC), 23 août 2005.
[7] Idem.

The Prosecutor v. Tharcisse RENZAHO

Case N° ICTR-97-31

Case History

• Name: RENZAHO

• First name: Tharcisse

• Date of birth: 1944

• Sex: male

• Nationality: Rwandan

• Former Official Function: *Préfet* of Kigali

• Date of Indictment's Confirmation: 19 June 1996

• Date of Amended Indictment: 16 February 2006

• Counts: genocide or, alternatively, complicity in genocide, crime against humanity (murder, rape), serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

• Date and Place of Arrest: 29 September 2002, Democratic Republic of Congo

• Date of Transfer: 30 September 2002

• Date of initial appearance: 21 November 2002

• Pleading: non guilty

• Date Trial Began: 8 January 2007

• Date and content of the Sentence: 14 July 2009, sentenced to life imprisonment

• Case on Appeal

Decision on the Prosecutor's Application for Leave to Amend the Indictment Pursuant to Rule 50 (A) of the Rules of Procedure and Evidence 13 February 2006 (ICTR-97-31-I)

(Original : English)

Trial Chamber II

Judges : Arlette Ramaroson, Presiding Judge; William H. Sekule; Solomy Balungi Bossa

Tharcisse Renzaho – Leave to amend the indictment – Deletion of some paragraphs, Correction of grammar and spelling errors and addition of some words or sentences – Absence of prejudice to the Accused, No date set for the commencement of the trial, Absence of any new counts or charges – Further appearance of the Accused not required – Motion granted

International Instruments Cited :

Rules of Procedure and Evidence, Rules 47, 47 (E), 47 (F), 47 (G), 50, 50 (B), 50 (C), 73 and 73 (A) ; Statute, Art. 19 and 20

International Cases Cited :

I.C.T.R.: 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) ; Appeals Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File an Amended Indictment, 12 February 2004 (ICTR-99-50) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision On The Prosecutor's Motion For Leave To Amend The Indictment - Rule 50 Of The Rules Of Procedure And Evidence, 13 February 2004 (ICTR-98-44) ; 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) ; Trial Chamber, The Prosecutor v. Tharcisse Renzaho, Décision sur la Requête du Procureur demandant l'autorisation de déposer un acte d'accusation modifié, 18 March 2005 (ICTR-97-31)

I.C.T.Y.: Trial Chamber, The Prosecutor v. Enver Hadžihasanović and Amir Kubura, Decision on Form of the Indictment, 17 September 2003 (IT-01-47)

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 "Prosecutor's Application for Leave to Amend the Indictment Pursuant to Rule 50 (A) of the Rules of Procedure and Evidence", filed on 19 October 2005 (the "Motion");

NOTING that the Defence indicated by letter filed on 21 December 2005 that it did not wish to respond to the Motion;

CONSIDERING the Statute of the Tribunal (the "Statute"), specifically Articles 19 and 20 of the Statute, and the Rules of Procedure and Evidence (the "Rules"), in particular Rules 47 (E), (F), and (G), 50, and 73 of the Rules;

NOW DECIDES the matter pursuant to Rule 73 (A) of the Rules, on the basis of the Motion,

Submissions of the Prosecution

1. The Prosecution moves the Chamber for leave to further amend the Amended Indictment against Tharcisse Renzaho.[8] The Prosecution argues that the Second Amended Indictment, as shown in Annex A of the Motion, does not contain any new Counts or charges requiring a further appearance.[9]

2. The Prosecution submits that the amendment is sought for the following reasons:

(a) To specify, in accordance with the recent Appeals Chamber jurisprudence, which has developed since the previous Application for leave to amend, and for the benefit of both the Accused and the Trial Chamber, the legal basis for the factual allegations against the Accused;

(b) To extract from the existing Indictment irrelevant factual material and to clarify some of the remaining factual material;

(c) To extract from the existing Indictment inaccurate legal pleading;

(d) To correct errors of grammar and spellling.[10]

3. The Prosecution alleges that it intends to include in the proposed amended indictment, the modes of participation alleged under Article 6 (1) of the Statute in relation to individual factual allegations. The Prosecution submits that such exercise is required by the jurisprudence of the Appeals Chamber in the *Kvočka* case.[11] Furthermore, the Prosecution submits that it seeks to make some small changes to the detail of some of the material facts already pleaded.[12]

4. The Prosecution argues that it seeks to remove material from the current Indictment which can no longer form part of its case because of the death or reluctance of some witnesses to testify.[13]

5. The Prosecution alleges that there are also a number of minor errors of grammar, spelling and nomenclature within the current Indictment which need rectifying.[14]

6. The Prosecution submits that the proposed amendments includes the withdrawal of certain paragraphs in the Indictment, which will not only reduce the workload of the Accused in preparing his Defence, but also reduce the Prosecution evidence at trial, thereby making the trial more expeditious.[15]

7. The Prosecution asserts that the proposed Amended Indictment sets out more precisely and concisely all the allegations against the Accused whilst at the same time withdrawing from it details which are irrelevant, legally inaccurate, or not within the power of the Prosecution to prove from the current Indictment.[16]

8. The Prosecution submits that the amendments are proposed for the purpose of clarifying the Prosecutor's case against the Accused both in terms of the facts alleged and the legal basis of the allegations. According to the Prosecution, such clarification will significantly reduce the length of the

[8] The Prosecution annexed to its Motion three documents: Annex A: the "Second Amended Indictment With Changes Shown on its Face", Annex B: "Justification for Amendments by Paragraph" and Annex C, the "Second Amended Indictment Without Changes Shown on its Face."
[9] Paragraphs 3 and 17 of the Motion.
[10] Paragraph 3 of the Motion.
[11] *The Prosecutor v. Kvočka* (AC), IT-98-30/1, 28 February 2005, pp. 14-29.
[12] Paragraph 6 of the Motion.
[13] Paragraph 7 of the Motion.
[14] Paragraph 8 of the Motion.
[15] Paragraph 20 of the Motion.
[16] Paragraph 16 of the Motion.

trial by assisting both the Accused and the Trial Chamber in their understanding of the case against the Accused. [17]

Deliberations

9. The Chamber notes the relevant provisions of Rules 50 and 47 of the Rules. The Chamber notes that after the initial appearance of an accused, the Trial Chamber has discretion whether to grant leave to amend an indictment and that this determination must be made on a case-by-case basis.[18] The Prosecution has the burden to set out the factual and legal justifications for the proposed amendments.[19] In general, "amendments pursuant to Rule 50 are granted in order to (a) add new charges; (b) develop the factual allegations found in the confirmed indictment; and (c) make minor changes to the indictment."[20]

10. According to the Tribunal jurisprudence, the fundamental question in relation to granting leave to amend an indictment is whether the amendment will prejudice the accused unfairly. There is no prejudice caused to the accused if he is given an adequate opportunity to prepare a defence to the amended case. [21]

11. After having considered all the documents annexed to the Motion, specifically Annex B, the Chamber notes that the Prosecution's proposed amendments could be classified into two broad categories.

12. First, the Prosecution requests the deletion of some paragraphs. The Chamber is of the view that the proposed amendments on this point may "increase the fairness and efficiency of proceedings, and should be encouraged and usually accepted".[22] Such amendments may result in a more expeditious trial, particularly if there is a reduction in the number of witnesses and, thus, a reduction in the number of trial days, thereby promoting judicial economy and the Accused's right to be tried without undue delay.[23]

13. Second, the Prosecution intends to correct errors of grammar and spelling in the current Indictment and at the same time proposes to add some words or sentences. The Chamber is of the opinion that the proposed amendments on this point, only constitute "minor changes to the amended indictment" and/or "develop the factual allegations found in the confirmed indictment" and that they do not amount to any new Counts or charges against the Accused. Therefore, the Chamber finds that the proposed amendments on these points should be allowed.

14. In light of the foregoing and recalling that the Defence did not respond to the Motion, the Chamber finds that granting the Prosecution's request for a further amendment of the Indictment is unlikely to prejudice the Accused given that no date has been set for the commencement of the trial and that the Proposed Amended Indictment does not contain any new counts or charges within the

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[17] Paragraph 18 of the Motion.

[18] *Prosecutor v. Ndindiliyimana et al*, Case N°ICTR-2000-56-I, Decision on Prosecutor's Motion under Rule 50 for Leave to Amend the Indictment (TC), 26 March 2004, para. 41 (citing *Prosecutor v. Bizimungu et al.,* ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File an Amended Indictment (AC), 12 February 2004, para. 27 (the "Bizimungu Appeals Chamber Decision").

[19] *Prosecutor v Muhimana*, Case N°ICTR-1995-1B-I, Decision on Motion to Amend Indictment, 21 January 2004, para. 4 (the "Muhimana Decision"); *Prosecutor v. Bizimungu et al.,* Case N°ICTR-99-50-I, Decision on the Prosecutor's Request for Leave to File an Amended Indictment (TC), 06 October 2003, para. 27 (the "Bizimungu Trial Chamber Decision").

[20] *Bizimungu* Trial Chamber Decision, para. 26.

[21] Prosecutor v. Renzaho, Case N°ICTR-97-31-I, Décision sur la Requête du Procureur demandant l'autorisation de déposer un acte d'accusation modifié, 18 March 2005, para. 47 citing Prosecutor v. Hadzhihasanovič and Kubura, Case N°IT-01-47-PT, Décision relative à la forme de l'acte d'accusation, 17 September 2003, para. 35.

[22] *Ndindiliyimana*, para. 43 (citing *Bizimungu* Appeals Chamber Decision, Para. 19).

[23] *Prosecutor v. Karemera et al.,* Case N°ICTR-98-44-T, Decision On The Prosecutor's Motion For Leave To Amend The Indictment - Rule 50 Of The Rules Of Procedure And Evidence, 13 February 2004, paras. 41-45 (the "Karemera Trial Chamber Decision").

meaning of Rule 50 (B) and (C) of the Rules. In the circumstances, the Chamber notes that a further appearance would, not be required.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion;

ORDERS the Prosecution to file the Amended Indictment in both languages on or before close of business Friday, 17 February, 2006;

ORDERS that a further appearance shall not be held.

Arusha, 13 February 2006.

[Signed] : Arlette Ramaroson; William H. Sekule; Solomy Balungi Bossa

***

Second Amended Indictment
16 February 2006 (ICTR-97-31-I)

(Original : English)

I. The Prosecutor of the United Nations International Criminal Tribunal for Rwanda, pursuant to the authority stipulated in Article 17, of the Statute of the International Criminal Tribunal Rwanda (the "Statute") charges:

Tharcisse Renzaho

With :

Count I - genocide, pursuant to Articles 2 (3) (a), 6 (1) and 6 (3) of the Statute, or in the alternative;
Count II - complicity in genocide, pursuant to Articles 2 (3) (e), 6 (1) and 6 (3) of the Statute;
Count III - murder as crime against humanity, pursuant to Articles 3 (a), 6 (1) and 6 (3) of the Statute;
Count IV - rape as crime against humanity, pursuant to Articles 3 (g) and 6 (3) of the Statute;
Count V - murder as a violation of Article 3 common to the Geneva Conventions of 1949 and Additional Protocol II of 1977, as incorporated pursuant to Articles 4 (a), 6 (1) and 6 (3) of the Statute; and
Count VI - rape as a violation of Article 3 common to the Geneva Conventions of 1949 and Additional Protocol II of 1977, as incorporated pursuant to Articles 4 (e) and 6 (3) of the Statute

II. The Accused

1. Tharcisse Renzaho was born in 1944 in Gaseta *Secteur*, Kigarama *Commune*, Kibungo *Préfecture*, Republic of Rwanda.

2. Tharcisse Renzaho was at all times referred to in this indictment:

(A) A senior public official who,

(i) was *Préfet* of Kigali *ville*;

(ii) was Chairman of the Civil Defense Committee for Kigali *ville*; and

(iii) consequently had *de jure* and *de facto* control over *bourgmestres*, *conseillers de secteur*, *responsables de cellule*, *nyumbakumi* (ten-house leaders), administrative personnel, *gendarmes*, communal police, *Interahamwe*, militias, and armed civilians in that he could order such persons to commit or to refrain from committing unlawful acts and could discipline or punish them for unlawful acts or omissions.

(B) A Colonel in the *Forces Armées Rwandaises* ("FAR") and as such was a senior military official who had *de jure* and *de facto* control over all armed forces who were under his command in that he could order such persons to commit or to refrain from committing discipline or punish them for unlawful acts or omissions.

(C) A member of the crisis committee set up on the night of 6 April 1994 composed of senior military officers, including Major-General Augustin Ndindiliyimana – Chairman, Colonel Marcel Gatsinzi, Colonel Leonidas Rusatira, Colonel Balthazar Ndengeyinka, Colonel Felicien Muberuka, Colonel Joseph Murasampongo and Lt. Colonel Ephrem Rwabalinda and as such was a senior military official who had *de jure* and *de facto* control over all armed forces who were under his command in that he could order such persons to commit or to refrain from committing unlawful acts and could discipline or punish them for unlawful acts or omissions.

(D) A "combatant" pursuant to Articles 1 and 2 of Protocol II Additional to Geneva Conventions of 12 August 1949.

(E) By virtue of his rank, office and links with prominent figures in the community, and his role as *de facto* Minister of the Interior in Kigali *Préfecture*, any person wishing to leave Kigali *ville* needed an authorization signed by him and therefore his authorization necessarily had influence in other *préfecture*.

III. Charges and Concise Statement of Facts

3. At all times referred to in this indictment there existed in Rwanda a minority racial or ethnic group known as Tutsi, officially identified as such by the government of Rwanda. The majority of the population of Rwanda was comprised of a racial or ethnic group known as the Hutu, also officially identified as such by the government of Rwanda.

4. Between 6 April 1994 and 17 July 1994, throughout Rwanda, and in Kigali in particular, *Interahamwe* militias, soldiers of the FAR and armed civilians targeted and attacked the civilian population based on ethnic or racial identification as Tutsi, or perceived sympathies to the Tutsi. During the attacks some Rwandan citizens killed or caused serious bodily or mental harm to persons perceived to be Tutsi. As a result of these attacks, large numbers of ethnically or racially identified Tutsi were killed.

5. During the period of 7 April 1994 though 17 July 1994, there existed a non-international armed conflict throughout Rwanda, particularly in Kigali-*ville préfecture*. The belligerents in said non-international armed conflict were the FAR and the Rwandan Patriotic Front ("RPF"). During the relevant period of 7 April 1994 through 4 July 1994, the FAR occupied portions of Kigali-*ville*, trained and armed the *Interahamwe*; and were supported in the conflict by the *Interahamwe*, the *gendarmerie*

and *préfectural* communal police. During this period the RPF occupied the eastern stretches of Kacyiru and parts of Kicukiro *communes*.

Count 1: Genocide

The Prosecutor of the International Criminal Tribunal for Rwanda charges Tharcisse Renzaho with genocide, a crime stipulated in Article 2 (3) (b) of the Statute, in that on or between the dates of 7 April 1994 and 17 July 1994 throughout Rwanda, particularly in Kigali-*ville Préfecture*, Tharcisse Renzaho was responsible for killing or causing serious bodily or mental harm to members of the Tutsi racial or ethnic group, including acts of sexual violence, with intent to destroy, in whole or in part, a racial or ethnic group, as such, as outlined in paragraphs 6 though 43.

Alternatively,

Count II: Complicity in genocide

The Prosecutor of the International Criminal Tribunal for Rwanda charges Tharcisse Renzaho with complicity in genocide, a crime stipulated in Article 2 (3) (e) of the Statute, in that on or between the dates of 7 April 1994 and 17 July 1994 throughout Rwanda, particularly in Kigali-*ville Préfecture*, Tharcisse Renzaho was responsible for killing or causing serious bodily or mental harm to members of the Tutsi racial or ethnic group, including acts of sexual violence, with intent to destroy, in whole or in part, a racial or ethnic group, as such, or with knowledge that other people intended to destroy, in whole or in part, the Tutsi racial or ethnic group, as such, and that his assistance would contribute to the crime of genocide, as outline in paragraphs 6 through 43.

Concise Statement of Facts for Counts I and II

Individual Criminal Responsibility pursuant to Article 6 (1)

6. Pursuant to Article 6 (1) of the Statute, the accused, Tharcisse Renzaho is individually responsible for the crimes of genocide or complicity in genocide because he planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of these crimes. With respect to the commission of those crimes, Tharcisse Renzaho ordered those over whom he had command responsibility and control as a result of his position and authority described in paragraph 2 and he instigated and aided and abetted those over whom he did not have command responsibility and control. In addition, the accused willfully and knowingly participated in a joint criminal enterprise whose object, purpose, and foreseeable outcome was the commission of genocide against the Tutsi racial or ethnic group and persons identified as Tutsi or presumed to support the Tutsi in Kigali *Préfecture* as well as throughout Rwanda. To fulfil this criminal purpose, the accused acted with leaders and members of the FAR, including Colonel Théoneste Bagosora and Colonel Ephrem Setako and Major Nyirahakizimana; the Presidential Guard; the *Interahamwe*, including Odette Nyirabagenzi, Angeline Mukandutiye and Ngerageza; the "Civil Defense Forces"; communal police; civilian militias; local administrative officials; other soldiers and militiamen; other known participants, such as Father Wenceslas Munyeshyaka and Bishop Samuel Musabyimana; and other unknown participants, all such actions being taken either directly or through subordinates, for at least the period of mid-1993 through 17 July 1994. The particulars that give rise to the accused's individual criminal responsibility including his participation in this joint criminal enterprise are set forth in paragraphs 7 though 23.

Roadblocks

7. From and after 7 April 1994, Tharcisse Renzaho instructed soldiers, *gendarmes*, militia, local citizens and demobilized soldiers and others to construct and man roadblocks throughout Kigali-*ville* including those at Gitega and near the Ontracom facility. These soldiers, *gendarmes*, militia, local citizens and demobilized soldiers and others were members of the joint criminal enterprise referred to in paragraph 6 above, who used these roadblocks to intercept, identify and kill Tutsi from 7 April to 17 July 1994. In so doing, Tharcisse Renzaho planned, ordered, instigated, committed or otherwise aided and abetted genocide.

8. On or about 7 April 1994, and regularly thereafter, in broadcasts over Radio Rwanda, Tharcisse Renzaho instructed soldiers, *gendarmes*, militia, local citizens and demobilized soldiers, who were members of the joint criminal enterprise referred to in paragraph 6 above, to construct and to man roadblocks, which, from 7 April to 17 July 1994, were used by them to intercept, identify and kill Tutsi, while allowing movement of commercial goods and the majority Hutu population. In so doing, Tharcisse Renzaho planned, ordered, instigated, committed or otherwise aided and abetted genocide.

9. On or about 10 April 1994, at a meeting at the *Préfecture* office of Kigali-*ville*, Tharcisse Renzaho ordered *conseillers* and *responsables de cellule* to set up roadblocks, which, from 10 April to 17 July 1994 were used by *conseillers*, *responsables de cellule*, *Interahamwe*, local citizens, *gendarmes*, soldiers and demobilized soldiers, who were members of the joint criminal enterprise referred to in paragraph 6 above to identify and to kill Tutsi. In so doing, Tharcisse Renzaho planned, ordered, instigated, committed or otherwise aided and abetted genocide.

10. On diverse unknown dates in April and May 1994 Tharcisse Renzaho convened a meetings at which he instructed *nyumbakumi, responsables de cellule, conseillers and bourgmestres* to remain vigilant at roadblocks and to make sure that *Inyenzi* do not succeed in hiding among the population. As a consequence of these instructions, Tutsi were intercepted, identified and killed at the roadblocks in Kigali-*ville*. In convening these meetings and giving these instructions, Tharcisse Renzaho planned, ordered, instigated, committed or otherwise aided and abetted genocide.

The Killing Campaign in Kigali-*ville*

11. On diverse unknown dates between mid-1993 and 17 July 1994, Tharcisse Renzaho regularly permitted and encouraged *Interahamwe* and *Impuzamugambi* groups to meet at his house in Kanombe and elsewhere for the purpose of receiving military training. These *Interahamwe* and *Impuzamugambi* were members of the joint criminal enterprise referred to in paragraph 6 above, who killed and/or caused serious bodily or mental harm to Tutsi between 6 April and 17 July 1994. By permitting and encouraging the training of *Interahamwe* and *Impuzamugambi* Tharcisse Renzaho planned, instigated, committed or otherwise aided and abetted genocide.

12. On diverse unknown dates between mid-1993 and 17 July 1994, Tharcisse Renzaho distributed weapons and ammunition to members of the *Interahamwe* and *Impuzamugambi* at his house in Kanombe and elsewhere. These *Interahamwe* and *Impuzamugambi* were members of the joint criminal enterprise referred to in paragraph 6 above, who killed and/or caused serious bodily or mental harm to Tutsi between 6 April and 17 July 1994. In so distributing weapons and ammunition Tharcisse Renzaho planned, instigated, committed or otherwise aided and abetted genocide.

13. Between 6 April and 17 July 1994, Tharcisse Renzaho provided and facilitated the provision of bonds, permits, *laissez-passers*, and food to enable the movement and equipping of the *Interahamwe*, militia, soldiers and *gendarmes*. These *Interahamwe*, militia, soldiers and *gendarmes* were members of the joint criminal enterprise referred to in paragraph 6 above, who killed and/or caused serious bodily or mental harm to Tutsi between 6 April and 17 July 1994. By his actions described above Tharcisse Renzaho planned, committed or otherwise aided and abetted genocide.

14. On or about 8 April 1994 Tharcisse Renzaho planned, committed, ordered, instigated or aided and abetted the killing of the Director of the *Banque rwandaise de développement*. He confirmed this to Colonel Bagosora, who was a member of the joint criminal enterprise referred to in paragraph 6 above, by radio on or about that same date.

15. On or about 9 April 1994, Tharcisse Renzaho, while dressed in the military uniform of a senior military official, led armed *Interahamwe* at Kajari in Kanombe. The *Interahamwe*, who were members of the joint criminal enterprise referred to in paragraph 6 above, entered houses of Tutsi and killed the Tutsi who resided there. Tharcisse Renzaho thereby ordered, instigated, committed, or otherwise aided and abetted the killing of the Tutsi.

16. On or about 16 April 1994 at a meeting at the Kigali-*ville* prefectural headquarters, Tharcisse Renzaho ordered *conseillers* to obtain firearms from the Ministry of Defence to be distributed at the *secteur* level. These weapons were used by *conseillers* and militia, who were members of the joint criminal enterprise referred to in paragraph 6 above, to kill Tutsi, and by so distributing firearms Tharcisse Renzaho planned, instigated, committed or otherwise aided and abetted genocide.

17. On or about 30 April 1994, Tharcisse Renzaho dismissed, among other people, *secteur conseillers* Jean-Baptiste Rudasingwa and Celestin Sezibera, because he believed they were opposed to the killing of Tutsi. By replacing the aforementioned persons with *conseillers* who supported the killing of Tutsi Tharcisse Renzaho aided and abetted this killing.

18. On an unknown date within the period between on or about 7 and 30 May 1994, while at a meeting at Bishop Samuel Musabyimana's residence, Tharcisse Renzaho agreed to supply guns to Musabyimana. Tharcisse Renzaho thereafter during the same period tendered several Kalashnikov rifles, which were delivered by Major Nyirahakizimana. Said rifles were distributed among the militias and were used to kill Tutsi, and by providing rifles Tharcisse Renzaho aided and abetted the killing.

19. In the month of June 1994 Tharcisse Renzaho, together with Colonel Ephrem Setako and Colonel Bagosora, who were members of the joint criminal enterprise referred to in paragraph 6 above, attended an impromptu meeting at a roadblock near Hotel Kiyovu in Kigali where they instructed those present to kill all Tutsi. A number of Tutsi were then killed.

Specific Sites

20. Between 7 April and 17 July 1994 thousands of Tutsi took refuge in *Centre d'étude des langues africaines* ("CELA"), St. Paul's Pastoral Centre ("St Paul's") and Ste. Famille Parish Church ("Ste. Famille"). Father Wenceslas Munyeshyaka was in charge of Ste. Famille; Odette Nyirabagenzi was the *conseiller de secteur* directly under the command and authority of Tharcisse Renzaho; and Angeline Mukandutiye was the school inspector as well as a leader of the *Interahamwe* and in *de facto* control of Bwahirimba *secteur*. Mukandutiye was directly under the command of and accountable to Tharcisse Renzaho.

21. On or about 22 April 1994, while in the company of Odette Nyirabagenzi and Angeline Mukandutiye, and of Father Munyeshyaka, soldiers and *Interahamwe*, who were members of the joint criminal enterprise referred to in paragraph 6 above, Tharcisse Renzaho ordered the removal of approximately sixty Tutsi men from CELA who were taken away and killed by soldiers and *Interahamwe*. By so doing, Tharcisse Renzaho ordered, instigated, committed or otherwise aided and abetted genocide. During other dates unknown, he ordered and instigated the murder of many other Tutsi at CELA.

22. On or about 14 June 1994, while in the company of Odette Nyirabagenzi and Angeline Mukandutiye, and *Interahamwe*, soldiers, and *gendarmes*, who were members of the joint criminal enterprise referred to in paragraph 6 above, Tharcisse Renzaho ordered and instigated and committed or otherwise aided and abetted the *Interahamwe*, soldiers and *gendarmes* to remove sixty Tutsi boys from St. Paul's, and to kill these Tutsi boys.

23. On or about 17 June 1994, while in the company of Odette Nyirabagenzi and Angeline Mukandutiye, Tharcisse Renzaho ordered and instigated soldiers, militia and communal police, who were members of the joint criminal enterprise referred to in paragraph 6 above, to attack Tutsi who had sought refuge Ste. Famille and many Tutsi were killed.

Criminal Responsibility as a Superior pursuant to Article 6 (3)

24. Pursuant to Article 6 (3) of the Statute, the accused, Tharcisse Renzaho, is responsible for the crimes of genocide or complicity in genocide because specific criminal acts were committed by subordinates of the accused and the accused knew or had reason to know that such subordinates were about to commit such acts before they were committed or that such subordinates had committed such acts and the accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. These subordinates included the leaders and members of the FAR, including Major Nyirahakizimana; the Presidential Guard; the *Interahamwe*, including Odette Nyirabagenzi, Angeline Mukandutiye and Ngerageza; the "Civil Defense Forces"; communal police; civilian; local administrative officials; other soldiers and militiamen; other known participants, such as Father Wenceslas Munyeshyaka and Bishop Samuel Musabyimana; and other unknown participants. The particulars that give rise to the accused's individual criminal responsibility pursuant to Article 6 (3) are set forth in paragraphs 25 through 43.

Roadblocks

25. From and after 7 April 1994, roadblocks throughout Kigali-*ville* including at Gitega and near the Ontracom facility were constructed and manned by soldiers, *gendarmes,* militia and demobilized soldiers under the effective control of Tharcisse Renzaho, who used the roadblocks to identify and to kill Tutsi and Tharcisse Renzaho failed or refused to take the necessary or reasonable measures to prevent such acts or to punish the perpetrators thereof.

26. On or about 10 April 1994, following a meeting at the *Préfecture* office of Kigali-*ville, conseillers* and *responsables de cellule* who were under the effective control of Tharcisse Renzaho, set up roadblocks and used these roadblocks to identify and to kill Tutsi, and Tharcisse Renzaho failed or refused to take the necessary or reasonable measures to prevent such acts or to punish the perpetrators thereof.

27. At diverse unknown dates in April and May 1994 Tharcisse Renzaho convened meetings at which he instructed *nyumbakumi, responsables de cellule, conseillers and bourgmestres* who were under his effective control to remain vigilant at roadblocks and to make sure that *Inyenzi* did not succeed in hiding among the population. As a consequence of these instructions, Tutsi were intercepted, identified and killed at the roadblocks in Kigali-*ville*, and Tharcisse Renzaho failed or refused to take the necessary or reasonable measures to prevent such acts or to punish the perpetrators thereof.

The Killing Campaign in Kigali-*ville*

28. At diverse unknown dates between mid-1993 and 17 July 1994, Tharcisse Renzaho permitted *Interahamwe* and *Impuzamugambi* groups to meet at his house in Kanombe and elsewhere for the purpose of receiving military training. These *Interahamwe* and *Impuzamugambi* were under the effective control of Tharcisse Renzaho and between 6 April and 17 July they killed or caused serious bodily or mental harm to Tutsi. Tharcisse Renzaho failed or refused to take the necessary or reasonable measures to prevent such acts or to punish the perpetrators thereof.

29. At diverse unknown dates between mid-1993 and 17 July 1994, Tharcisse Renzaho distributed weapons and ammunition to members of the *Interahamwe* and *Impuzamugambi* at his house in Kanombe and elsewhere. These *Interahamwe* and *Impuzamugambi* were under the effective control of Tharcisse Renzaho and between 6 April and 17 July 1994 they killed or caused serious bodily or mental harm to Tutsi. Tharcisse Renzaho failed or refused to take the necessary or reasonable measures to prevent such acts or to punish the perpetrators thereof.

30. Between 6 April and 17 July 1994, Tharcisse Renzaho provided and facilitated the provision of bonds, permits, *laissez-passers*, and food to enable the movement and equipping of the *Interahamwe*, militia, soldiers and *gendarmes* who were participating in the killing of Tutsi, and had effective control over them in the sense of having the power to prevent or punish their acts.

31. On 8 April 1994, Tharcisse Renzaho communicate with Colonel Bagosora by radio confirming that those under his effective control had killed the manager of the *Banque Rwandaise de Développement*, and Tharcisse Renzaho failed or refused to take the necessary or reasonable measures to prevent such acts or to punish the perpetrators thereof.

32. On or about 9 April 1994, Tharcisse Renzaho, while dressed in the military uniform of a senior military official, accompanied armed *Interahamwe* at Kajari in Kanombe. Tharcisse Renzaho's subordinates in the *Interahamwe* entered houses of Tutsi and killed the Tutsi who resided there in Tharcisse Renzaho's presence without his objection. Tharcisse Renzaho failed or refused to take the necessary or reasonable measures to prevent such acts or to punish the perpetrators thereof.

33. On or about 16 April 1994 following a meeting at the Kigali-*ville* prefectural headquarters, *conseillers* under the effective control of Tharcisse Renzaho obtained firearms from the Ministry of Defense to be distributed at the *secteur* level. These weapons were used to kill Tutsi and Tharcisse Renzaho failed or refused to take the necessary or reasonable measures to prevent such acts or to punish the perpetrators thereof.

34. On multiple unknown dates between April and July 1994, Tharcisse Renzaho refused or failed to punish *Interahamwe* members under his effective control, command and supervision whom he knew to have participated in the killing of Tutsi and moderate Hutu in Kigali.

35. On or about 30 April 1994, Tharcisse Renzaho dismissed, among other people, *secteur conseillers* Jean-Baptiste Rudasingwa and Celestin Sezibera, because he believed they were opposed to the killing of Tutsi. Tharcisse Renzaho replaced the aforementioned persons with *conseillers* who supported the killing of Tutsi, thus showing his effective control over local administrative officials in Kigali-*ville*.

Specific Sites

36. Between 7 April and 17 July 1994 thousands of Tutsi took refuge in CELA, St. Paul's and Ste. Famille. Father Wenceslas Munyeshyaka was in charge of Ste. Famille; Odette Nyirabagenzi was the *conseiller de secteur* directly under the cornmand and authority of Tharcisse Renzaho; and Angeline Mukandutiye was the school inspector as well as a leader of the *Interahamwe* and in *de facto* control

of Bwahirimba *secteur*. Mukandutiye was under the effective control of and accountable to Tharcisse Renzaho.

37. Between 7 April and 17 July 1994, Tharcisse Renzaho's including but not limited to Father Munyeshyaka, Odette Nyirabagenzi and Angeline Mukandutiye, and other *Interahamwe* leaders, planned, prepared, ordered, instigated, and carried out attacks on members of the racial or ethnic Tutsi group in Kigali. These attacks took place at Ste. Famille, St. Paul's, Kadaffi Mosque and CELA, among other places in the Nyarugenge *secteur* and were carried out with intent to kill or cause mental and bodily harm to members of the racial or ethnic Tutsi group in whole or in part. Tharcisse Renzaho failed or refused to take the necessary or reasonable measures to prevent such acts or to punish the perpetrators thereof.

38. On or about 22 April 1994, Tharcisse Renzaho's subordinates, Odette Nyirabagenzi, Father Munyeshyaka and Angeline Mukandutiye, soldiers and *Interahamwe,* removed and caused the murder of sixty Tutsi men at CELA. During other dates unknown in April, May and June 1994 they removed and caused the murder of many other Tutsi at CELA, and Tharcisse Renzaho failed or refused to take the necessary or reasonable measures to prevent such acts or to punish the perpetrators thereof.

39. On or about 14 June 1994, Tharcisse Renzaho's subordinates, Odette Nyirabagenzi and Angeline Mukandutiye, and *Interahamwe,* soldiers and *gendarmes* removed and caused the murder of sixty Tutsi boys from St. Paul's, and Tharcisse Renzaho failed or refused to take the necessary or reasonable measures to prevent such acts or to punish the perpetrators thereof.

40. On or about 17 June 1994, Tharcisse Renzaho's subordinates, including but not limited to Nyirabagenzi and Angeline Mukandutiye, soldiers, militia and communal police attacked and killed Tutsi who had sought refuge St. Famille, and Tharcisse Renzaho failed or refused to take the necessary or reasonable measures to prevent such as acts or to punish the perpetrators thereof.

Sexual Violence

41. Tutsi women were raped by *Interahamwe* militia, soldiers and other individuals under the effective control of Tharcisse Renzaho on April 16 and diverse unknown dates during the months of April, May and June 1994. *Conseillers* under the direct command and authority of Tharcisse Renzaho reported on a regular basis about the rape of Tutsi women by *Interahamwe* militia, soldiers and other individuals under the effective control of Tharcisse Renzaho. Tharcisse Renzaho failed or refused to take the necessary or reasonable measures to prevent such rapes or to punish the perpetrators thereof,

42. Father Munyeshyaka and *Interahamwe*, under the effective control of Tharcisse Renzaho, compelled Tutsi women to provide them with sexual pleasures in exchange for the woman's safety at Ste. Famille during the period in which Tutsi sought refuge at Ste. Famille in the months of April, May and June 1994. Tharcisse Renzaho knew or had reason to know that these acts were being perpetrated against Tutsi women and he failed or refused to prevent or to punish the perpetrators of these forced sexual acts at Ste. Famille.

43. *Interahamwe*, soldiers, and armed civilians under the effective control of Tharcisse Renzaho maintained Tutsi women at houses in central Kigali, where they compelled the women provide them with sexual pleasures in exchange for the women's safety on diverse unknown dates during the months of April, May and June 1994. Tharcisse Renzaho knew or had reason to know that these acts were being perpetrated against Tutsi women as he failed or refused to prevent or to punish the perpetrators of these forced sexual acts.

Count III: Murder as a crime against humanity

The Prosecutor of the International Criminal Tribunal for Rwanda charges Tharcisse Renzaho with murder as a crime against humanity, a crime stipulated in Article 3 (a) of the Statute, in that on and between 6 April and July 1994 throughout Rwanda, particularly in Kigali-*ville Préfecture*, Tharcisse Renzaho, with intent to kill members of the Tutsi racial or ethnic group or persons identified as Tutsi or presumed to support the Tutsi, was responsible for the killing of such persons as part of a widespread or systematic attack against that civilian population on racial, ethnic and political grounds, as set forth in paragraphs 44 through 51.

Concise Statement of Facts for Count III

Individual Criminal Responsibility pursuant to Article 6 (1)

44. Pursuant to Article 6 (1) of the Statute, the accused, Tharcisse Renzaho, is individually responsible for murder as a crime against humanity because he planned, instigated, ordered, committed or otherwise planning, preparation or execution of this crime. With respect to the commission of this crime, Tharcisse Renzaho ordered those over whom he had command responsibility and control as a result of his position and authority described in paragraph 2 and he instigated and aided and abetted those over whom he did not have command responsibility and control. In addition, the accused willfully and knowingly participated in a joint criminal enterprise whose object, purpose and foreseeable outcome was the commission of crimes against humanity against the Tutsi racial or ethnic group and persons identified as Tutsi or presumed to support the Tutsi or to be politically opposed to "Hutu Power" in Kigali *Préfecture* as well as throughout Rwanda on racial, ethnic or political grounds. To fulfill this criminal purpose, the accused acted with leaders and members of the FAR; the Presidential Guard; the *Interahamwe,* such as Odette Nyirabagenzi; the "Civil Defense Forces"; communal police; civilian militias; local administrative officials; other soldiers and militiamen; other known participants, such as Father Wenceslas Munyeshyaka; and other unknown participants, all such actions being taken either directly or through their subordinates for at least the period of 12 April through 15 June 1994. The particulars that give rise to the accused's individual criminal responsibility including his participation in this joint criminal enterprise are set forth in paragraphs 45 through 47.

45. On or about 22 April 1994, in the presence of others, Tharcisse Renzaho selected and ordered and instigated the killing of specific people from CELA; including James, Charles, Wilson and Déglote Rwanga and Emmanuel Gihana. The aforementioned were killed by *Interahamwe,* soldiers and *gendarmes* who were members of the joint criminal enterprise referred to in paragraph 44 above, and by his actions described herein Tharcisse Renzaho ordered, instigated, committed or otherwise aided and abetted this murder.

46. On or about 28 April 1994, Tharcisse Renzaho ordered members of the *Interahamwe* to Nyarugenge *commune* to find and kill nine Tutsi, including Francois Nsengiyumva; a man whose name was Kagorora, as well as his two sons, Emile and Aimable; and a man whose name was Rutiyomba. These persons were subsequently killed by the *Interahamwe,* who were members of the joint criminal enterprise referred to in paragraph 44 above, pursuant to Tharcisse Renzaho's orders. In so doing, Tharcisse Renzaho planned, ordered, instigated, committed or otherwise aided and abetted this murder.

47. On or about 15 June 1994, Tharcisse Renzaho ordered Odette Nyirabagenzi to kill André Kameya, a journalist who was critical of the Interim Government. On or about 15 June 1994, while in the company of *Interahamwe,* Odette Nyirabagenzi, who was a member of the joint criminal enterprise referred to in paragraph 44 above, found and had killed pursuant to Tharcisse Renzaho's orders. By his

actions detailed herein, Tharcisse Renzaho ordered, instigated, committed or otherwise aided and abetted this murder.

Criminal Responsibility as a Superior pursuant to Article 6 (3)

48. Pursuant to Article 6 (3) of the Statute, the accused, Tharcisse Renzaho, is responsible for the murder as a crime against humanity because specific criminal acts were committed by subordinates of the accused and the accused knew or had reason to know that such subordinates were about to commit such acts before they were committed or that such subordinates had committed such acts and the accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. These subordinates included leaders and members of the FAR; the Presidential Guard; the *Interahamwe*, such as Odette Nyirabagenzi; the "Civil Defense Forces"; communal police; civilian militias; local administrative officials; other soldiers and militiamen; other known participants, such as Father Wenceslas Munyeshyaka; and other unknown participants. The particulars that give rise to the accused's individual criminal responsibility pursuant to Article 6 (3) are set forth in paragraphs 59 through 51.

49. On or about 22 April 1994, *Interahamwe* and soldiers under the effective control of Tharcisse Renzaho killed certain persons in refuge at CELA, including but not limited to James, Charles, Renzaho and Déglote Rwanga and Emmanuel Gihana, and Tharcisse Renzaho failed or refused to take the necessary or reasonable measures to prevent such acts or to punish the perpetrators thereof.

50. On or about 28 April 1994, members of the *Interahamwe* under effective control of Tharcisse Renzaho went to Nyarugenge *commune* and found and killed nine Tutsi, including Francois Nsengiyumva; a man whose name was Kagorora, as well as his two sons, Emile and Aimable; and a man whose name was Rutiyomba and Tharcisse Renzaho failed or refused to take the necessary or reasonable measures to prevent such acts or to punish the perpetrators thereof.

51. On or about 15 June 1994, Tharcisse Renzaho's subordinates, Odette Nyirabagenzi and a Company of *Interahamwe*, found and killed André Kameya, a journalist who was critical of the Interim Government and Tharcisse Renzaho failed or refused to take the necessary or reasonable measures to prevent such acts or to punish the perpetrators thereof.

Count IV: Rape as a Crime against humanity

The Prosecutor of the International Criminal Tribunal for Rwanda charges Tharcisse Renzaho with rape as a crime against humanity, a crime stipulated in Article 3 (g) of the Statute, in that on an between 7 April and 17 July 1994 throughout Rwanda, particularly in Kigali-*ville Préfecture,* Tharcisse Renzaho, members of the Tutsi racial or ethnic group or persons identified as Tutsi were raped by subordinates of Tharcisse Renzaho as part of a widespread or systematic attack against that civilian population on racial and ethnic grounds, as set forth in paragraphs 52 through 55.

Concise Statement of Facts for Count IV

Criminal Responsibility as a Superior pursuant to Article 6 (3)

52. Pursuant to Article 6 (3) of the Statute, the accused, Tharcisse Renzaho, is responsible for the rape as a crime against humanity because specific criminal acts were committed by subordinates of the accused and the accused knew or had reason to know that such subordinates were about to commit such acts before they were committed or that such subordinates had committed such acts and the accused failed to take the necessary and reasonable measures to prevent such acts or to punish the

perpetrators thereof. These subordinates included leaders and members of the FAR; the Presidential Guard; the *Interahamwe;* the "Civil Defense Forces"; communal police; civilian militias; local administrative officials; other soldiers and militiamen; other known participants, such as Father Wenceslas Munyeshyaka; and other unknown participants. The particulars that give rise to the accused's individual criminal responsibility are set forth in paragraphs 53 through 55.

53. Tutsi women were raped by *Interahamwe* militia, soldiers and other individuals under the effective control of Tharcisse Renzaho on April 16 and diverse unknown dates during the months of April, May and June 1994. *Conseillers* under the direct command and authority of Tharcisse Renzaho reported on a regular basis about the rape of Tutsi women by *Interahamwe* militia, soldiers and other individuals under the effective control of Renzaho. Tharcisse Renzaho failed or refused to take the necessary or reasonable measures to prevent such rapes or to punish the perpetrators thereof.

54. Father Munyeshyaka and *Interahamwe* under the effective control of Tharcisse Renzaho compelled Tutsi women to provide them with sexual pleasures in exchange for the woman's safety at Ste. Famille in the period in which Tutsi sought refuge at Ste. Famille during the months of April, May and June 1994. Tharcisse Renzaho knew or had reason to know that these acts were being perpetrated against Tutsi women and he failed or refused to punish the perpetrators of these forced sexual acts at Ste. Famille.

55. *Interahamwe* soldiers and armed civilians under the effective control of Tharcisse Renzaho maintained Tutsi women at houses in central Kigali, where they compelled the women provide them with sexual pleasures in exchange for the women's safety on diverse unknown dates during the month of April, May and June 1994. Tharcisse Renzaho knew or had reason to know that these acts were being perpetrated against Tutsi women and he failed or refused to punish the perpetrators of these forced sexual acts.

Count V: Murder as a violation of article 3 common to the Geneva Conventions

The Prosecutor of the International Criminal Tribunal for Rwanda charges Tharcisse Renzaho with murder as a violation of article 3 common to the Geneva Conventions of 1949 and Additional Protocol II of 1977, a crime stipulated in Article 4 (a) of the Statute, in that Tharcisse Renzaho was responsible for the killings of non-combatant Tutsi men and youths during the period 7 April through 17 July 1994 when throughout Rwanda, particularly in Kigali-*ville Préfecture*, there was a non-international armed conflict within the meaning of Articles 1 and 2 of Protocol II Additional to the Geneva Convention of 1949, and the killing of the victims was closely related to the hostilities or committed in conjunction with the armed conflict and the victims were persons taking no part in that conflict; all as is set forth in paragraphs 56 through 60.

Concise Statement of Facts for Count V

Individual Criminal Responsibility pursuant to Article 6 (1)

56. Pursuant to Article 6 (1) of the Statute, the accused, Tharcisse Renzaho is individually responsible for murder as a violation of Article 3 Common to the Geneva Conventions of 1949 and Additional Protocol II of 1977 because he planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of these crimes. With respect to the commission of those crimes, Tharcisse Renzaho ordered those over whom he had command responsibility and control as a result of his position and authority described in paragraph 2 and he instigated and aided and abetted those over whom he did not have command responsibility and control. In addition, the accused participated in a joint criminal enterprise whose object, purpose, and foreseeable outcome was

the commission of war crimes against non-combatant members of the Tutsi racial or ethnic group in Kigali *Préfecture* as well as throughout Rwanda. To fulfill this criminal purpose, the accused acted with leaders and members of the FAR; the Presidential Guard; the *Interahamwe*; the "Civil Defense Forces"; communal police; civilian militias; local administrative officials; other soldiers and militiamen; and other known and unknown participants, all such actions being taken either directly or through their subordinates for at least the period of 6 April 1994 through 4 July 1994. The particulars that give rise to the accused's individual criminal responsibility including his participation in this joint criminal enterprise are set forth in paragraphs 57 and 58.

57. Between 16 and 17 June 1994 the RPF fought their way to St. Paul's in Nyarugenge in Kigali-*ville* and rescued a large number of non-combatant Tutsi.

58. Pursuant to the authority vested in Tharcisse Renzaho as described in paragraph 2, and in retaliation for the actions of the RPF described in paragraph 57, Tharcisse Renzaho on or about 17 June 1994 ordered, instigated or otherwise aided and abetted soldiers of the FAR and *Interahamwe* to take and kill at least seventeen non-combatant Tutsi men from Ste. Famille who had not been rescued by the RPF.

Criminal Responsibility as a Superior pursuant to Article 6 (3)

59. Pursuant to Article 6 (3) of the Statute, the accused, Tharcisse Renzaho, is responsible for murder as a violation of Article 3 common to the Geneva Conventions of 1949 and Additional Protocol II of 1977 because specific criminal acts were committed by subordinates of the accused and the accused knew or had reason to know that such subordinates were about to commit such acts before they were committed or that such subordinates had committed such acts and the accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. These subordinates included leaders and members of the FAR; the Presidential Guard; the *Interahamwe*; the "Civil Defense Forces"; communal police; civilian militias; local administrative officials; other soldiers and militiamen; and other known and unknown participants. The particulars that give rise to the accused' individual criminal responsibility pursuant to Article 6 (3) are set forth in paragraph 60.

60. In retaliation for the actions of the RPF described in paragraph 57, on or about 17 June 1994, soldiers of the FAR and *Interahamwe*, who were subordinates under the effective control of Tharcisse Renzaho, killed at least seventeen non-combatant Tutsi men from Ste. Famille who had not been rescued by the RPF and Tharcisse Renzaho failed or refused to take the necessary or reasonable measures to prevent such acts or to punish the perpetrators thereof.

Count VI: Rape as a violation of Article 3 common to the Geneva Conventions of 1949

The Prosecutor of the International Criminal Tribunal for Rwanda charges Tharcisse Renzaho with rape as a violation of Article 3 common to the Geneva Conventions of 1949 and Additional Protocol II of 1977, a crime stipulated in Article 4 (e) of the Statute, in that Tharcisse Renzaho was responsible for the rape of non-combatant Tutsi women during the period between 7 April and 17 July 1994 when throughout Rwanda, particularly in Kigali-*ville Préfecture*, there was a non-international armed conflict within the meaning of Articles 1 and 2 of Protocol II Additional to the Geneva Convention of 1949, and the raping of the victims was closely related to the hostilities or committed in conjunction with the armed conflict and the victims were persons taking no part in that conflict; all as set forth in paragraphs 61 through 65.

Concise Statement of Facts for Count VI

Criminal Responsibility as a Superior pursuant to Article 6 (3)

61. Pursuant to Article 6 (3) of the Statute, the accused, Tharcisse Renzaho, is responsible for rape as a violation of Article 3 common to Conventions of 1949 and Additional Protocol II of 1977 because specific criminal acts were committed by subordinates of the accused and the accused knew or had reason to know that such subordinates were about to commit such acts before they were committed or that such subordinates had committed such acts and the accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. These subordinates included leaders and members of the FAR; the Presidential Guard; the *Interahamwe*, such as Odette Nyirabagenzi; the "Civil Defense Forces"; communal police; civilian militias; local administrative officials; other soldiers and militiamen; other known participants, such as Father Wenceslas Munyeshyaka; and other unknown participants. The particulars that give rise to responsibility pursuant to Article 6 (3) are set forth in paragraphs 62 through 65.

62. During the relevant periods of 7 April 1994 through 4 July 1994, the FAR occupied central areas of Kigali, including Nyarugenge *commune* and the area around the Ste. Famille Church. The FAR trained and armed the *Interahamwe* and were supported in the conflict by the *Interahamwe,* the *gendarmerie*, *préfectural* communal police, and armed civilians.

63. Tutsi women were raped by *Interahamwe* militia, soldiers and other individuals under the effective control of Tharcisse Renzaho on April 16 and diverse unknown dates during the months of April, May and June 1994. *Conseillers* under the direct command and authority of Tharcisse Renzaho reported on a regular basis about the rape of Tutsi women by *Interahamwe* militia, soldiers and other individuals under the effective control of Tharcisse Renzaho. Tharcisse Renzaho failed or refused to take the necessary or reasonable measures to prevent such rapes or to punish the perpetrators thereof.

64. Father Munyeshyaka and other *Interahamwe* under the effective control of Tharcisse Renzaho compelled Tutsi women to provide them with sexual pleasures in exchange for the woman's safety at Ste. Famille in the period in which Tutsi sought refuge at Ste. Famille during the months of April, May and June 1994. Tharcisse Renzaho knew or had reason to know that these acts were being perpetrated against Tutsi women and he failed or refused to prevent or punish the perpetrators of these forced sexual acts at Ste. Famille.

65. *Interahamwe* soldiers and armed civilians under the effective control of Tharcisse Renzaho maintained Tutsi women at houses in central Kigali, where they compelled the women provide them with sexual pleasures women's safety on diverse unknown dates during the months of April, May and June 1994. Tharcisse Renzaho knew or had reason to know that these acts were being perpetrated against Tutsi women and he failed or refused to prevent or to punish the perpetrators of these forced sexual acts.

The acts and omissions of Tharcisse Renzaho detailed herein are punishable in pursuant to Articles 22 and 23 of the Statute.

Signed at Arusha, Tanzania, this 16th Day of February 2006.

[Signed] : Hassan B. Jallow

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Decision on Preliminary Motion on Defects in the Form of the Indictment 5 September 2006 (ICTR-97-31-I)

(Original : English)

Trial Chamber II

Judges : Arlette Ramaroson, Presiding Judge; William H. Sekule; Solomy Balungi Bossa

Tharcisse Renzaho – Defects in the form of the indictment – Admissibility of the motion – Necessity to distinguish between the crimes charged under the individual criminal responsibility and those under the superior responsibility – Sufficient precisions as to the Accused's alleged authority, Preparation by the Accused of his Defence – Precisions as to the dates and places of commission of the crimes and the identity of the victims, Scale of the crimes, Preparation by the Accused of his Defence – Precisions as to the identity of the Accused' subordinates and his co-perpetrators, Reference to the category or the official position of these as a group – Motion denied

International Instruments Cited :

Rules of Procedure and Evidence, Rules 72 and 73 (A) ; Statute, Art. 4 (a), 4 (b), 6 (1), 6 (3) and 21 (2)

International Cases Cited :

I.C.T.Y.: Trial Chamber, The Prosecutor v. Zejnil Delalić, Decision on Motion by the Accused Zejnil Delalić Based on Defects in the Form of the Indictment, 2 October 1996 (IT-96-21) ; Trial Chamber, The Prosecutor v. Milorad Krnojelac, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999 (IT-97-25) ; Appeals Chamber, The Prosecutor v. Zoran Kupreškić, Judgement, 23 October 2001 (IT-95-16)

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;

BEING SEIZED of:

(i) The Preliminary Motion on Defects in the Form of the Indictment (Rule 72 (B) (ii) of the Rules of Procedure and Evidence), filed on 31 March 2006 (the "Motion");

(ii) The Prosecutor's Response to the Accused's *Requête en exception préjudicielle pour vices de formes de l'acte d'accusation*, filed on 10 April 2006 (the "Prosecutor's Response");

(iii) The Defence Reply to the Prosecutor's Response to the Preliminary Motion on Defects in the Form of the Indictment (Rule 72 (B) (ii) of the Rules of Procedure and Evidence), filed on 23 May 2006 (the "Defence's Reply").

CONSIDERING:

(i) The Decision on the Prosecutor's Application for Leave to Amend the Indictment pursuant to Rule 50 (A) of the Rules of Procedure and Evidence, rendered on 13 February 2006 (the "Decision of 13 February 2006");

(ii) The Second Amended Indictment against Tharcisse Renzaho, dated 16 February 2006 (the "Amended Indictment of 16 February 2006");

(iii) The Prosecutor's Pre-Trial Brief, filed on 31 October 2005 (The "Prosecutor's Pre-Trial Brief");

(iv) The Status Conference of 3 June 2005; and

(v) The Status Conference of 10 March 2006;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 72 of the Rules;

DECIDES on the basis of the briefs of the parties, pursuant to Rule 73 (A) of the Rules

Submissions of the Parties

The Defence

1. The Defence submits that the charges in the Amended Indictment are vague and imprecise, which is inconsistent with prevailing case law.[1]

2. The Defence prays the Chamber to order the Prosecution:

- To draw a distinction between the crimes charged pursuant to Article 6 (1) of the Statute and the ones charged under Article 6 (3) of the Statute;
- To provide further particulars as to the nature and extent of the Accused's alleged control over the different organizations and administrations;
- To drop the charges in respect of joint criminal enterprise alleged in paragraphs 6 to 44 and 56 of the Amended Indictment;
- To specify the nature of the relationship between the Accused and the perpetrators of the acts for which he allegedly incurs superior responsibility;
- To provide details for identification of the alleged victims. Alternatively, to order the Prosecution to disclose information in its possession for proper identification of the victims and determination of their number. Otherwise, to order that where the Prosecution is unable to provide any of the above information, it should clearly state so in the Indictment;
- Lastly, to order the Prosecution to specify the dates and place of commission of the alleged crimes.

3. The Defence submits that the facts alleged with respect to the Accused's superior responsibility should be pleaded differently from those which form the basis of his individual responsibility; this, the Defence claims, has not been done in the instant case.[2] In this connection, the Defence cites, among others, Count 2 (paragraphs 7 and 25, 9 and 29, 10 and 27), Count 3 (paragraphs 45 and 49) and Count 5 (paragraphs 58 and 50).[3]

4. The Defence contends that no persons are named in the charge of conspiracy in respect of war crimes, but that only organizations are named, such as FAR, Presidential Guard and *Interahamwe*.[4]

[1] Paragraphs 38 and 39 of the Motion. The Defence refers to the *Kupreškić* Judgement of 23 October 2001, the *Niyitegeka* Judgement of 16 May 2003 affirmed by the Appeals Chamber on 9 July 2004, the *Ntakirutimana* Judgement of 19 February 2006, and the *Bizimungu* Decision of 15 July 2004.

[2] Paragraph 43 of the Motion.

[3] Paragraphs 50-52 of the Motion.

[4] Paragraph 54 of the Motion.

5. The Defence submits that the charges of participation in a joint crimina1 enterprise should be withdrawn from the Amended Indictment, arguing that it seems absurd to indicate that the supposed co-perpetrators or accomplices of the Accused participated in a joint criminal enterprise, whereas they have not been afforded the opportunity to defend themselves against such charges. The Defence further submits that participation in a joint criminal enterprise with unnamed persons is not provided for in the Statute nor any other legal system.[5]

6. The Defence submit that it is by virtue of his control and authority, as alleged in the Amended Indictment, that the Accused committed or ordered the commission of the *crimes* charged, adding that these is, however, no material fact underpinning such authority.[6]

7. With regard to the Accused's superior responsibility, the Defence submits, among others, that his superior position *vis-à-vis* the *gendarmes* is not specified, neither is the militia group he is alleged to have belonged to, or those who had control over him and those over whom he had control.[7] The Defence further submits that the Accused is alleged to have played the role of "*de facto* Minister of the Interior" during the events, whereas no material fact supports such allegation and it is not stated how he acquired this position.[8]

8. The Defence also avers that the allegations relating to the Accused's individual responsibility are vague and imprecise.[9]

9. The Defence submits that the adverb "*about*", whenever used to indicate a date in the Indictment, should be stricken, as it is synonymous with the adverb "*around*", the use of which has already been rejected in case law.[10] The Defence points out that the adverb "about" is used 25 times in the current Amended Indictment.[11]

10. The Defence submits that the Indictment contains numerous expressions that are considered to be too vague. It cites, for instance, such expressions as "*from June 1994*" in paragraphs 7 and 25, and "*on an unknown date within the period between, on or about 7 and 30 May 1994 or around that period*" in paragraph 18.[12] The Defence further avers that the adjective "*unknown*" is synonymous with "*vague*".[13]

11. The Defence contends that the Amended Indictment is imprecise as to the venue of some of the alleged crimes, citing as such examples as: "*throughout Kigali*-ville prefecture" in paragraphs 7 and 25 and "*at Ste Famille parish, St Paul's, Kadaffi mosque and CELA, among other places in the Nyarugenge* secteur" in paragraph 37. The Defence further contends that the locations where the crimes were committed are not specified in many paragraphs, including paragraphs 8, 9, 10, 53 and 63. [14]

12. It is the submission of the Defence that the Amended Indictment is imprecise, as it contains counts which do not mention the names of victims of the alleged crimes,[15] and that according to case law, the Prosecution is required to provide, to the extent possible, details as to the identity and number

[5] Paragraphs 55-57 of the Motion.
[6] Paragraphs 59-60 of the Motion.
[7] Paragraph 61 of the Motion.
[8] Paragraphs 65-66 of the Motion.
[9] Paragraphs 72 of the Motion.
[10] Paragraphs 82-83 of the Motion.
[11] Paragraph 84 of the Motion.
[12] Paragraph 88 of the Motion.
[13] Paragraph 90 of the Motion.
[14] Paragraphs 91-95 of the Motion.
[15] Paragraph 98 of the Motion. The Defence mentions paragraphs 7 to 13, 15, 16, 18, 19, 21 to 23, 25 to 29, 32 to 34, 38 to 43, 53 to 55, 58, 60, 63 to 65.

of victims of the crimes charged[16] or at least indicate their category or position as a group.[17] The Defence also submits that where, for objective reasons, the Prosecution is unable to meet the aforementioned requirements, it must state clearly in the Indictment that it is unable to do so and that it has provided the best information it can, which has not been done in the instant case.[18] The Defence also argues that simply referring to the victims as "Tutsi" is insufficient.[19] Lastly, the Defence submits that the use of the adverb "*among others*" in paragraphs 45 and 49 of the Indictment to identify the victims of a crime should be avoided as it may prejudice the Accused's preparation of his defence.[20]

13. The Defence submits that all the alleged subordinates of the Accused are not identified in the introductory paragraphs of the counts relating to his superior criminal responsibility,[21] or are not identified at all.[22] In fact, the Indictment simply mentions "*Interahamwe"* in paragraphs 28, 29, 30, 32, 34, 38, 39, 41, 42, 43, 49, 50, 51, 53, 55, 60, 63, 64 and 65, and "*soldiers*" in paragraph 30.[23] The Amended Indictment equally uses even more imprecise expressions such as in paragraph 31, where the perpetrators are identified as "*those under his effective control*" or in paragraph 63, where they are identified as "*other individuals*".[24] The Defence underlines that such imprecise expressions are bound to impair the preparation of the Accused's defence,[25] adding that where the Prosecution cannot specify the identity of the perpetrators of the alleged crimes for objective reasons, it will be sufficient for the Prosecution to identify them by reference to the "category" or group to which they belong. The Defence further states that where the Prosecution is unable to identify them by name, it must clearly stare in the Indictment that it was unable to do so.[26] The Defence also contends that if any of these matters is to be established by inference, the Prosecution "must identify in the indictment the facts and circumstances from which the inference is sought to be drawn".[27]

14. In conclusion, the Defence submits that the Indictment is not sufficiently precise on certain points to enable the Accused to exercise his rights, and that the lack of precision as to dates, causes the Accused, among others things, serious prejudice, as it deprives him of the possibility of presenting a defence of alibi. Wherefore, the Defence concludes, the Indictment must be pleaded in sufficient detail to enable the Defence to exercise its full rights.[28]

The Prosecution

15. The Prosecution submits that it is a matter for the Trial Chamber, after hearing all the evidence, to conclude which, if any, of the alleged modes of responsibility pleaded is most appropriate. The Prosecution stresses that it is the duty of the Prosecution to prepare an indictment, setting out the facts which it considers it can prove together with the mode or modes of responsibility charged. The Prosecution therefore submits that the Defence claim that the Prosecution failed to distinguish allegations of the Accused's superior responsibility from those of his individual responsibility is unfounded.[29]

16. The Prosecution contends that the Amended Indictment and the Pre-Trial Brief (pp. 9-14) provide sufficient detail as to the alleged authority of the Accused.[30]

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[16] Paragraphs 96 and 101 of the Motion
[17] Paragraph 99 of the Motion.
[18] Paragraphs 102-103 of the Motion.
[19] Paragraph 100 of the Motion.
[20] Paragraphs 104-105 of the Motion.
[21] Paragraphs 111 of the Motion. The Defence refers to the paragraphs 24, 48, 52, 59 and 61 of the Indictment.
[22] Paragraph 113 of the Motion.
[23] Paragraph 114 of the Motion.
[24] Paragraphs 116 of the Motion.
[25] Paragraph 118 of the Motion.
[26] Paragraphs 119-120 of the Motion.
[27] Paragraph 121 of the Motion.
[28] Paragraphs 174-177 of the Motion.
[29] Paragraph 6 of the Response.
[30] Paragraph 7 of the Response.

17. As to the alleged imprecision regarding the dates, places, victims and perpetrators of the crimes charged, the Prosecution states that the degree of precision sought by the Defence is excessive. The Prosecution states that it has included in the Amended Indictment as much detail as it is able, without pleading evidence or revealing the identity of protected witnesses.[31] The Prosecution further submits that the Indictment should be read as a whole.[32]

18. The Prosecution contends that in the context of the events which occurred in Rwanda during the period referred to in the Indictment, it is impossible to specify the identity of each of the Accused's co-perpetrator in the joint criminal enterprise, arguing that the alleged co-perpetrators very often belonged to large militia groups, or bands of soldiers or civilians whose members were not individually identifiable. The Prosecution submits that in any case, the Pre-Trial Brief contains information that sheds light on this issue. [33]

The Defence Reply

19. The Defence reiterates that in keeping with prevailing case law, the Indictment must clearly distinguish the facts relating to the Accused's criminal responsibility under Article 6 (1) of the Statute from those by which he incurs responsibility under Article 6 (3).[34]

20. The Defence submits that details regarding the dates, locations, victims and perpetrators of the alleged crimes must be provided in the Indictment to enable the Accused to make full answer and defence and that if the Prosecution is unable to provide such details with respect to the victims, it has to give the reason therefor.[35]

21. The Defence submits that it is possible to state with precision the circumstances of the events which occurred in a specific location in the presence of many persons, such as the events at Saint Paul, Sainte Famille or CELA. Lack of precision would be prejudicial to the Accused's rights, as he would be unable to present, among others, a defence of alibi. Lastly, the Defence submits that a Pre-Trial Brief cannot cure defects in the Indictment.[36]

Deliberations

22. The Chamber notes that the present Motion was filed within the time limits provided for in Rule 72 of the Rules and is therefore admissible.

23. The Chamber further notes that the issues raised by the Defence in the present Motion may be classified into three categories, namely, the need to distinguish between the crimes charged under Article G (3) and those charged under Article G (3); lack of precision as to the Accused's alleged authority; and lack of precision as to the dates and places of commission of the crimes, the identify of the victims, the Accused's subordinates and co-perpetrators in the context of the joint criminal enterprise.

Need to distinguish between the crimes charged under Article 6 (1) and those charged under Article 6 (3)

24. The Chamber notes that it is settled jurisprudence that an accused may be charged for the same crime under Articles 6 (1) and 6 (3) of the Statute, only if the Prosecution clearly specifies in the

[31] Paragraph 12 of the Response.
[32] Paragraph 9 of the Response.
[33] Paragraph 13 of the Response.
[34] Paragraph 171 of the Reply.
[35] Paragraphs 174 and 176 of the Reply.
[36] Paragraphs 178-179 of the Reply.

Indictment the manner in which the accused allegedly incurs criminal responsibility both as a perpetrator and as a superior under the aforementioned articles.[37]

25. After reviewing all the paragraphs of the Indictment referred to by the Defence in its Motion,[38] the Chamber finds that the Prosecution has sufficiently articulated, for each crime charged, the manner in which the Accused allegedly incurs criminal responsibility both as a perpetrator and as a superior. Accordingly, the Defence request is denied.

Lack of precision as to the Accused's alleged authority

26. The Chamber notes the Defence submissions, particularly the assertion that no material fact has been articulated in the Amended Indictment to establish the basis of the Accused's alleged authority.

27. The Chamber notes that paragraph 2 of the Amended Indictment sets out such particulars as the identity and duties of the Accused during the events of 1994. In the Chamber's opinion such details sufficiently inform the Accused of the position of authority he may have held. In particular, the Chamber finds that paragraph 2 (C) clearly mentions the persons over whom the Accused exercised control when he was a member of the crisis committee set up on the night of 6 April 1994, as well as groups of people placed under his authority, and that paragraph 6 specifically mentions such names as Angeline Mukandutiye, an alleged *Interahamwe,* and Father Wecenslaus who allegedly participated in the genocide.

28. With regard to the specific facts underpinning the Accused's alleged position of *de facto* Minister of the Interior, paragraph 2 (E) of the Amended Indictment states that any person wishing to leave the town of Kigali needed an authorization signed by the Accused. In the Chamber's view, such detail is sufficient to inform the Accused of the nature and cause of the charge against him in order for him to prepare a meaningful defence.

29. Accordingly, the Chamber denies the Defence request for more particulars as to the alleged authority of the Accused.

30. The Chamber further notes the Defence assertions on the imprecision of the allegations relating to the Accused's individual responsibility. The Chamber considers that the Defence has failed to demonstrate such imprecision. Accordingly, the Defence request is denied.

Lack of precision as to the dates and places of commission of the crimes, the identity of the victims, the Accused' subordinates and his co-perpetrators

31. As regards the determination of dates and places of commission of the crimes and the identity of victims, the Chamber refers to *Kupreškić,* where it was held that:

> The Prosecution's obligation to set out concisely the facts of its case in the indictment must be interpreted in conjunction with Articles 21 (2) and (4) (a) and (b) of the Statute. These provisions state that, in the determination of any charges against him, an accused is entitled to a fair hearing and, more particularly, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. In the jurisprudence of the Tribunal, 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 proven. Hence, the question whether an indictment is

[37] *Prosecutor v. Delalić,* Decision on Motion by the Accused Zejnil Delalić Based on Defects in the Form of the Indictment (TC), 2 October 1996.

[38] The Defence refers to Count 2, paragraphs 7 and 25, 9 and 29, 10 and 27, 11 and 28, 12 and 29, 13 and 30, 14 and 31, 15 and 32, 16 and 33, 17 and 35, 20 and 36, 21 and 38, 22 and 39, 23 and 40; Count 3, paragraphs 45 and 49, 46 and 50, 47 and 51 and Count 5, paragraphs 58 and 60.

> pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.[39]
>
> The Appeals Chamber must stress initially that the materiality of a particular fact cannot be decided in the abstract. It is dependent on the nature of the Prosecution case. A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the accused. For example, in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victims, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail. Obviously, there may be instances where 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".[40] *

32. The Chamber endorsers the above opinion in *Kupreškić* and considers that the "sheer scale of the crimes" alleged against the Accused in the instant case "makes it impracticable to require a high degree of specificity in such matters as the identity of the victims, dates and places of commission of the crimes". Accordingly, the Chamber finds that the details provided in the Amended Indictment on the said matters are sufficient to enable the Accused to prepare his defence.

33. With regard to the Defence claims on the lack of precision as to the identity of the other participants in the crimes charged, the Chamber endorses the finding in the *Krnojelac* Decision, namely that "if the Prosecution is unable to identify those directly participating in such events by name, it will be sufficient for it to identify them at least by reference to their 'category' (or their official position) as a group".[41]

34. In the light of the foregoing jurisprudence, the Chamber finds that the use of such expressions "*Interahamwe*", "militiamen", "soldiers", "*gendarmes*", "*Impuzamugambi*", "demobilized soldiers", "*conseillers*", "*responsables of cellule*", "*nyumbakumi*", "*bourgmestres*", "communal police", "armed civilians" or "other *Interahamwe* leaders" in the Amended Indictment is sufficient to describe the persons over whom the Accused exercised authority or who acted concomitantly with him during the period referred to in the Indictment. Furthermore, the Chamber is of the view that the other defects alleged by the Defence in paragraphs 115 to 117 of its Motion[42] are not prejudicial. Accordingly, the Defence request on this point is denied.

35. Lastly, the Chamber finds unfounded the Defence submission that the charges of participation in a joint criminal enterprise should be withdrawn from the Amended Indictment on the grounds that it is absurd to indicate that the purported co-perpetrators or accomplices of the Accused participated in a joint criminal enterprise, whereas they have not been afforded the opportunity to defend themselves against such charges.

FOR THESE REASONS

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[39] *Kupreškić* Appeals Judgement (AC), 23 October 2001, para. 88.

[40] *Id*., para. 89.

* A paragraph is missing in the English translation made by the Tribunal. See the French original version.

[41] *Krnojelać*, "Decision on the Defence Preliminary Motion on the Form of the Indictment" (TC) 24 February 1999, para. 46.

[42] Paragraph 115 of the Motion reads as follows: "The Indictment uses even more imprecise expressions in some paragraphs".
Paragraph 116: "Such paragraphs include :

- Paragraph 31 where the perpetrators are identified as "*those under his effective control*";
- Paragraphs 41 and 53 where the perpetrators are identified as "*other individuals*";
- Paragraph 63 where the perpetrators are identified as "*Tharcisse Renzaho's subordinates, including but not limited to* ..."; and
- Paragraph 40 "including but not limited".

Paragraph 117: "The Prosecutor even refers to '*those present*' in paragraph 19".

THE TRIBUNAL,

DENIES the Defence Motion.

Arusha, 5 September 2006.

[Signed] : Arlette Ramaroson, Presiding Judge; William H. Sekule; Solomy Balungi Bossa

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Order for transfer of Five Prosecution Witnesses Pursuant to Rule 90 Bis 12 December 2006 (ICTR-97-31-I)

(Original : English)

Trial Chamber I

Judge : Erik Møse, Presiding Judge

Tharcisse Renzaho – Transfer of detained witnesses – Rwanda – Conditions satisfied – Motion granted

International Instrument Cited:

Rules of Procedure and Evidence, Rules 90 bis and 90 bis (B)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding;

BEING SEIZED OF the Prosecutor's "Request for an Order Transferring Detained Witnesses Pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence", filed on 30 November 2006;

CONSIDERING the Renzaho Response to the Prosecution Request for Transfer of Detained Witnesses under Rule 90 *bis,* filed on 4 December 2006;

HEREBY DECIDES the motion,

1. The Prosecution requests an order for the temporary transfer of five of its witnesses, Witnesses ALG, AWE, BUO, GLJ and UB, currently detained in Rwanda, to the Detention Unit of the Tribunal in Arusha for the purpose of testifying in the present case before the Chamber. The Prosecution requests that the witnesses be ordered transferred until such time as they have completed their testimony, as a fixed period may prove too inflexible. The Defence does not oppose the Prosecutor's request.[1]

[1] Response, para. 25.

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 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"

3. The trial against the Accused Renzaho is scheduled to begin on 8 January 2007. The Prosecutor states that it has taken the necessary steps to ensure that the five witnesses in question are not required for criminal proceedings in Rwanda during the proposed period of transfer.[2] The Prosecution further avers that the transfer of each of the witnesses will not extend the period of their detention.[3] Finally, annexed to its motion, the Prosecution filed a letter from the Rwandan Ministry of Justice, dated 28 November 2006, confirming that the five requested witnesses who are detained in Rwanda will be available from 2 January to 2 February 2007 to testify in this case. The Chamber is satisfied that the conditions of Rule 90 *bis* are satisfied.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Prosecution motion;

INSTRUCTS the Registrar, pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence and conditional upon the agreement of the Government of Rwanda, to temporarily transfer the five detained witnesses indicated in the letter from the Rwandan Ministry of Justice dated 11 November 2006, and having the pseudonyms ALG, AWE, BUO, GLJ and UB, to the United Nations Detention Facilities (UNDF) in Arusha, at an appropriate time prior to their scheduled dates to testify. Their return travel to Rwanda should be facilitated as soon as practically possible for each witness after the individual's testimony has ended, but in any case, no later than 28 February 2007;

FURTHER INSTRUCTS the Registrar to:

(A) transmit this decision to the Governments of Rwanda and Tanzania;

(B) ensure the proper conduct of the transfers 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; and

REQUESTS the Government of Rwanda to facilitate the transfers in cooperation with the Registrar and the Government of Tanzania.

Arusha, 12 December 2006.

[Signed] : Erik Møse

[2] Motion, para. 4.
[3] Motion, para. 5.

Le Procureur c. Tharcisse RENZAHO

Affaire N° ICTR-97-31

Fiche technique

• Nom : RENZAHO

• Prénom: Tharcisse

• Date de naissance: 1944

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: Préfet de Kigali

• Date de confirmation de l'acte d'accusation: 19 juin 1996

• Date de modification de l'acte d'accusation: 16 février 2006

• Chefs d'accusation: génocide, ou à titre subsidiaire, complicité dans le génocide, crimes contre l'humanité (assassinat et viol), violations graves de l'article 3 commun aux conventions de Genève de 1949 et du Protocole additionnel II

• Date et lieu de l'arrestation: 29 septembre 2002, République démocratique du Congo

• Date du transfert: 30 septembre 2002

• Date de la comparution initiale: 21 novembre 2002

• Précision sur le plaidoyer: non coupable

• Date du début du procès: 8 janvier 2007

• Date et contenu du prononcé: 14 juillet 2009, condamné l'emprisonnement à vie

• Procès en appel

Décision relative à la requête du Procureur en modification de l'acte d'accusation conformément à l'article 50 (A) du Règlement de procédure et de preuve 13 février 2006 (ICTR-97-31-I)

(Original : Français)

Chambre de première instance II

Juges : Arlette Ramaroson, Présidente; William H. Sekule; Solomy Balungi Bossa

Tharcisse Renzaho – Modification de l'acte d'accusation – Suppression de certains paragraphes, Correction de fautes de grammaire et d'orthographe et ajout de certains mots ou phrases – Absence de préjudice pour l'accusé, Date de l'ouverture du procès pas encore fixée, Absence de nouveaux chefs ni de nouvelles accusations – Nouvelle comparution initiale de l'accusé pas nécessaire – Requête acceptée

Instruments internationaux cités :

Règlement de preuve et de procédure, art. 47, 47 (E), 47 (F), 47 (G), 50, 50 (B), 50 (C), 73 et 73 (A) ; Statut, art. 19 et 20

Jurisprudence internationale citée :

T.P.I.R.: Chambre de première instance, Le Procureur c. Casimir Bizimungu et consorts, Décision relative à la requête du Procureur demandant l'autorisation de disposer un acte d'accusation modifié, 6 octobre 2003 (ICTR-99-50) ; Chambre de première instance, Le Procureur c. Mika Muhimana, Décision relative à la requête du Procureur aux fins d'obtenir l'autorisation de modifier un acte d'accusation, 21 janvier 2004 (ICTR-95-1B) ; Chambre d'appel, Le Procureur c. Casimir Bizimungu et consorts, Décision intitulée « Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 october 2003 Denying Leave to File an Amended Indictment », 12 février 2004 (ICTR-99-50) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, Décision relative à la requête du Procureur aux fins d'être autorisé a modifier l'acte d'accusation, article 50 du Règlement de procédure et de preuve, 13 février 2004 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Augustin Ndindiliyimana et consorts, Décision relative à la requête formée par le Procureur en vertu de l'article 50 du Règlement de procédure el de preuve aux fins d'être autorisé à modifier l'acte d'accusation du 20 janvier 2000 confirmé le 28 janvier 2000, 26 mars 2004 (ICTR-2000-56) ; Chambre de première instance, Le Procureur c. Tharcisse Renzaho, Décision sur la requête du Procureur demandant l'autorisation de déposer un acte d'accusation modifié, 18 mars 2005 (ICTR-97-31)

T.P.I.Y.: Chambre de première instance, Le Procureur c. Enver Hadžihasanović et Amir Kubura, Décision relative à la forme de l'acte d'accusation, 17 septembre 2003 (IT-01-47)

LE TRIBUNAL PÉNAL 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 Balungi Bossa (la « Chambre »),

SAISI de la Requête du Procureur en modification de l'acte d'accusation conformément à l'article 50 (A) du Règlement de procédure et de preuve, déposée le 19 octobre 2005 (la « Requête »),

ATTENDU que la Défense a indiqué dans une lettre déposée le 21 décembre 2005 qu'elle ne souhaitait pas répondre à la Requête,

VU le Statut du Tribunal (le « Statut »), notamment en ses articles 19 et 20, et le *Règlement de procédure et de preuve* (le « Règlement »), notamment en ses articles 47 (E), (F) et (G), 50 et 73,

STATUE sur la question dont il est saisi sur la seule base de la Requête, en vertu de l'article 73 (A) du Règlement.

Argument du Procureur

1. Le Procureur prie la Chambre de l'autoriser à modifier de nouveau l'acte d'accusation établi contre Tharcisse Renzaho[4]. Il fait valoir que le Deuxième acte d'accusation modifié qu'il a établi et joint à la Requête comme annexe A ne contient pas de nouveaux chefs ni de nouvelles accusations qui commanderaient une nouvelle comparution initiale de l'accusé[5].

2. Au dire du Procureur, l'autorisation de procéder à une nouvelle modification est sollicitée pour les raisons suivantes :

(a) Préciser, dans l'intérêt de l'accusé et de la Chambre, les bases juridiques des allégations factuelles portées contre l'accusé, conformément à la jurisprudence récente de la Chambre d'appel qui marque une évolution par rapport à celle qui était en vigueur au moment où la requête en modification antérieure a été formée ;

(b) Supprimer les éléments de fait énoncés dans l'acte d'accusation actuel qui ne présentent aucun intérêt et apporter des précisions sur certains des éléments de fait restants ;

(c) Supprimer les arguments de droit présentés dans l'acte d'accusation actuel qui ne sont pas exacts ;

(d) Corriger des fautes de grammaire et d'orthographe[6].

3. Le Procureur dit vouloir inclure dans le nouvel acte d'accusation modifié les modes de participation retenus en vertu de l'article 6 (1) du Statut pour chacune des allégations factuelles que l'acte contient. Il précise que la Chambre d'appel prescrit cette opération dans l'arrêt qu'elle a rendu en l'affaire *Kvočka*[7]. En outre, il tient à apporter quelques modifications mineures à l'exposé détaillé de certains faits essentiels déjà énoncés dans l'acte d'accusation[8].

4. Le Procureur dit vouloir aussi supprimer les éléments figurant dans l'acte d'accusation actuel qui ne peuvent plus faire partie de sa thèse parce que certains témoins sont décédés ou rechignent à comparaître[9].

5. Selon lui, l'acte d'accusation actuel contient également un certain nombre de fautes de grammaire, d'orthographe et de désignation mineures qu'il convient de corriger[10].

6. Le Procureur fait valoir que parmi les modifications envisagées figure le retrait de certains paragraphes de l'acte d'accusation, ce qui permettra non seulement d'alléger la tâche de l'accusé lors

[4] Le Procureur a joint trois pièces à sa Requête : l'annexe A qui est une version du Deuxième acte d'accusation modifié indiquant les modifications apportées, l'annexe B qui expose les raisons d'être des modifications par paragraphe et l'annexe C qui est une version du Deuxième acte d'accusation modifié ne faisant pas ressortir ces modifications.
[5] Paragraphes 3 et 17 de la Requête.
[6] Paragraphe 3 de la Requête.
[7] *Le Procureur c. Kvočka*, affaire n°IT-98-30/1-A (Chambre d'appel), *Judgement*, 28 février 2005, p. 14 à 29.
[8] Paragraphe 6 de la Requête.
[9] Paragraphe 7 de la Requête.
[10] Paragraphe 8 de la Requête.

de la préparation de sa défense, mais encore d'écourter la présentation des moyens à charge, rendant ainsi le procès plus rapide[11].

7. Il affirme que dans le projet d'acte d'accusation modifié, il énonce de façon plus précise et plus concise toutes les allégations portées contre l'accusé tout en abandonnant les informations fournies dans l'acte d'accusation actuel qui ne présentent aucun intérêt, sont juridiquement inexactes ou ne peuvent être établies par lui[12].

8. D'après lui, les modifications envisagées visent à apporter des éclaircissements sur les accusations qu'il porte contre la personne poursuivie, tant sur le plan des faits allégués que sur celui du fondement juridique de ses allégations. Ces éclaircissements, estime-t-il, réduiront considérablement la durée du procès en aidant l'accusé et la Chambre à mieux comprendre les faits reprochés à celui-ci[13].

Délibérations

9. Relevant les dispositions pertinentes des articles 50 et 47 du Règlement, la Chambre rappelle que la Chambre de première instance a toute latitude pour autoriser ou ne pas autoriser la modification de l'acte d'accusation après la comparution initiale d'un accusé et qu'elle doit statuer sur la question au cas par cas[14]. Il incombe au Procureur de présenter les éléments de fait et de droit qui justifient les modifications envisagées[15]. [U]ne requête en modification d'un acte d'accusation originel confirmé est généralement formée [et accueillie] pour les motifs suivants : (a) pour ajouter de nouveaux chefs d'accusation à [l']acte d'accusation confirmé ; (b) pour étoffer et développer les allégations factuelles présentées à l'appui des chefs d'accusation initiaux déjà confirmés ; (c) pour apporter des changements mineurs à l'acte d'accusation »[16].

10. Selon la jurisprudence du Tribunal, la question fondamentale qu'il y a lieu de trancher pour autoriser la modification d'un acte d'accusation est de savoir si celle-ci portera injustement préjudice à l'accusé. L'accusé ne subit aucun préjudice des lors qu'on lui accorde dûment la possibilité de préparer sa défense contre les accusations modifiées[17].

11. De l'examen de toutes les pièces jointes à la Requête, notamment l'annexe B, la Chambre constate que les modifications envisagées par le Procureur pourraient être classées en deux grandes catégories.

12. Premièrement, le Procureur demande l'autorisation de supprimer certains paragraphes. La Chambre est d'avis que les modifications envisagées sur ce point peuvent « renforcer l'équité et la

[11] Paragraphe 20 de la Requête.
[12] Paragraphe 16 de la Requête.
[13] Paragraphe 18 de la Requête.
[14] *Le Procureur c. Ndindiliyimana et consorts*, affaire n°ICTR-2000-56-I, Décision relative à la requête formée par le Procureur en vertu de l'article 50 du Règlement de procédure et de preuve aux fins d'être autorisé à modifier l'acte d'accusation du 20 janvier 2000 confirmé le 28 janvier 2000, 26 mars 2004, par. 41 (la « Décision *Ndindiliyimana* ») [citant *Le Procureur c. Bizimungu et consorts*, affaire n°ICTR-99-50-I, Décision relative à la requête du Procureur demandant l'autorisation de déposer un acte d'accusation modifié (Chambre de première instance), 6 octobre 2003, par. 27 (la «Décision *Bizimungu* de la Chambre de première instance »)].
[15] *Le Procureur c. Muhimana*, affaire n°ICTR-1995-1B-I, Décision relative à la requête du Procureur aux fins d'obtenir l'autorisation de modifier un acte d'accusation, 21 janvier 2004, par. 4 (la Décision *Muhimana* ») ; *Le Procureur c. Bizimungu et consorts*, affaire n°ICTR-99-50-I, Décision *Bizimungu* de la Chambre de première instance, par. 27.
[16] Décision *Bizimungu* de la Chambre de première instance, par. 26.
[17] *Le Procureur c. Renzaho,* affaire n°ICTR-97-31-I, Décision sur la requête du Procureur demandant l'autorisation de déposer un acte d'accusation modifié, 18 mars 2005, par. 47 [citant *Le Procureur c. Hadžihasanović et Kubura,* affaire n°IT-01-47-PT, Décision relative à la forme de l'acte d'accusation, 17 septembre 2003, par. 351.

rationalité du procès [et] devrai[en]t être encouragé[es] et généralement admis[es]» [18]. Les modifications de cette nature peuvent contribuer à l'accélération de la procédure, notamment si elles entraînent une réduction du nombre de témoins et, partant, celle du nombre de jours d'audience, ce qui permettrait de mieux assurer l'économie des ressources du Tribunal et de préserver le droit d'être jugé sans retard excessif dont jouit l'accusé[19].

13. Deuxièmement, le Procureur entend corriger des fautes de grammaire et d'orthographe commises dans l'acte d'accusation actuel et y ajouter certains mots ou certaines phrases. La Chambre estime que loin d'être de nouveaux chefs d'accusation ou de nouvelles accusations, les modifications prévues sur ce point ne constituent que des « changements mineurs [apportés] à l'acte d'accusation » et/ou des éléments tendant à (« étoffer et développer les allégations factuelles présentées à l'appui des chefs d'accusation initiaux déjà confirmés ». Elle en conclut qu'il y a lieu d'autoriser les modifications envisagées sur le premier et le second point.

13*. Au vu de ce qui précède et rappelant que la Défense n'a pas répondu à la Requête, la Chambre conclut que l'accusé ne risque de subir aucun préjudice si elle autorise le Procureur à modifier de nouveau l'acte d'accusation, d'autant plus que la date de l'ouverture n'a pas encore été fixée et que le projet d'acte d'accusation modifié ne contient pas de nouveaux chefs ni de nouvelles accusations au sens des paragraphes (B) et (C) de l'article 50 du Règlement. Dans ces circonstances, la Chambre signale qu'une nouvelle comparution initiale de l'accusé ne serait pas nécessaire.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT à la Requête ;

ORDONNE au Procureur de déposer l'acte d'accusation modifié, dans les deux langues de travail du Tribunal, au plus tard le vendredi 17 février 2006 à l'heure de la fermeture des bureaux ;

DIT qu'il n'y aura pas de nouvelle comparution initiale de l'accusé.

Arusha, le 13 février 2006.

[Signé] : Arlette Ramaroson, Présidente; William H. Sekule; Solomy Balungi Bossa

[18] Décision Ndindiliyimana, par. 43 [citant Le Procureur c. Bizimungu et consorts, affaire n°ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment (Chambre d'appel), 12 février 2004, par. 19 (la (« Décision Bizimungu de la Chambre d'appel »)].

[19] *Le Procureur c. Karemera et consorts*, affaire n°ICTR-98-44-T, Décision relative à la requête du Procureur aux fins d'être autorisé à modifier l'acte d'accusation (article 50 du Règlement de procédure et de preuve), 13 février 2004, par. 41 à 45 (la Décision *Karemera*).

* La numérotation erronée est le fait du Tribunal.

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Deuxième acte d'accusation modifié 16 février 2006 (ICTR-97-31-I)

(Original : Anglais)

I. Le Procureur du Tribunal pénal international pour le Rwanda, agissant en vertu des pouvoirs que lui confère l'article 17 du Statut du Tribunal pénal international pour le Rwanda (le « Statut »), accuse

Tharcisse Renzaho

des crimes énumérés ci-après :

Premier chef d'accusation - génocide, en application des articles 2 (3) (a), 6 (1) et 6 (3) du Statut, ou, à chef titre subsidiaire ;
Deuxième chef d'accusation - complicité dans le génocide, en application des articles 2 (3) (e), 6 (1) et 6 (3) du Statut ;
Troisième chef d'accusation - assassinat constitutif de crime contre l'humanité, en application des articles 3 (a), 6 (1) et 6 (3) du Statut ;
Quatrième chef d'accusation - viol constitutif de crime contre l'humanité, en application des articles 3 (g) et 6 (3) du Statut ;
Cinquième chef d'accusation - meurtre constitutif de violation de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II de 1977, en application des articles 4 (a), 6 (1) and 6 (3) du Statut ;
Sixième chef d'accusation - viol constitutif de violation de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II de 1977, en application des articles 4 (e) et 6 (3) du Statut.

II. L'accusé

1. Tharcisse Renzaho est né au Rwanda en 1944 dans le secteur de Gaseta, (commune de Kigarama, préfecture de Kibungo).

2. Durant toute la période visée dans le présent acte d'accusation, Tharcisse Renzaho était :

(F) Haut fonctionnaire :

(i) Exerçant les fonctions de préfet de Kigali-Ville ;

(ii) Exerçant les fonctions de Président du Comité de défense civile de Kigali-Ville ;

(iii) Exerçant par conséquent un contrôle de droit comme de fait sur les bourgmestres, les conseillers de secteur, les responsables de cellule, les *nyumbakumi* (chefs de chaque ensemble de dix maisons), le personnel administratif, les gendarmes, les agents de la police communale, les *Interahamwe*, les miliciens et les civils armés, en ce qu'il pouvait ordonner à ces personnes de commettre ou de s'abstenir de commettre des actes illégaux et les discipliner ou les punir de leurs actes ou omissions contraires à la loi.

(G) Colonel au sein des Forces armées rwandaises (ci-après les « FAR ») et, à ce titre, haut responsable militaire exerçant un contrôle de droit comme de fait sur toutes les forces

armées placées sous son commandement, en ce qu'il pouvait ordonner à ces personnes de commettre ou de s'abstenir de commettre des actes illégaux et les discipliner ou les punir de leurs actes ou omissions contraires à la loi.

(H) Membre du comité de crise créé dans la nuit du 6 avril 1994, qui était composé d'officiers militaires supérieurs, notamment du général-major Augustin Ndindiliyimana (Président), du colonel Marcel Gatsinzi, du colonel Léonidas Rusatira, du colonel Balthazar Ndengeyinka, du colonel Félicien Muberuka, du colonel Joseph Murasampongo et du lieutenant-colonel Ephrem Rwabalinda, et, à ce titre, un haut responsable militaire exerçant un contrôle de droit comme de fait sur toutes les forces armées placées sous son autorité, en ce qu'il pouvait ordonner à ces personnes de commettre ou de s'abstenir de commettre des actes illégaux et les discipliner ou les punir de leurs actes ou omissions contraires à la loi.

(I) « Combattant » au sens des articles 1 et 2 du Protocole additionnel II aux Conventions de Genève du 12 août 1949.

(J) En raison de son rang, de son poste et des relations qu'il entretenait avec d'éminentes personnalités de la communauté, ainsi que du rôle de Ministre de l'intérieur de fait qu'il jouait dans la préfecture de Kigali, toute personne désireuse de quitter Kigali-Ville devait avoir une autorisation signée de lui et, de ce fait, son autorisation avait nécessairement une influence dans d'autres préfectures.

III. Accusations et relation concise des faits

3. Durant toute la période visée dans le présent acte d'accusation, il existait au Rwanda un groupe racial ou ethnique minoritaire connu sous le nom de « groupe tutsi » et officiellement identifié comme tel par les pouvoirs publics rwandais. La majorité de la population rwandaise était constituée d'un groupe racial ou ethnique connu sous le nom de « groupe hutu », lui aussi officiellement identifié comme tel par les pouvoirs publics rwandais.

4. Entre le 6 avril et le 17 juillet 1994, sur l'ensemble du territoire rwandais et à Kigali en particulier, des miliciens *Interahamwe,* des militaires des FAR et des civils armés ont pris pour cible et attaqué la population civile identifiée comme appartenant au groupe ethnique ou racial tutsi ou considérée comme des personnes sympathisant avec les Tutsis. Au cours des attaques, certains citoyens rwandais ont tué des personnes soupçonnées d'appartenir au groupe ethnique tutsi ou porté gravement atteinte à leur intégrité physique ou mentale. Ces attaques ont entraîné la mort d'un grand nombre de personnes identifiées comme membres du groupe ethnique ou racial tutsi.

5. Durant la période allant du 7 avril au 17 juillet 1994, un conflit armé ne présentant pas un caractère international se déroulait sur l'ensemble du territoire rwandais, en particulier dans la préfecture de Kigali-Ville. Il opposait les FAR au Front patriotique rwandais (« FPR »). Au cours de la période allant du 7 avril au 4 juillet 1994 qui rentre dans l'intervalle susmentionné, les FAR ont occupé des parties de Kigali-Ville, entraîné et armé les *Interahamwe* et mené la guerre avec l'appui des *Interahamwe*, de la gendarmerie et de la police communale de la préfecture. À cette époque, le FPR occupait les parties orientales de la commune de Kacyiru et certaines localités de la commune de Kicukiro.

Premier chef d'accusation : Génocide

Le Procureur du Tribunal pénal international pour le Rwanda accuse Tharcisse Renzaho de génocide, crime prévu à l'article 2 (3) (a) du Statut, en ce que les 7 avril et 17 juillet 1994 ou entre ces dates, sur l'ensemble du territoire rwandais, en particulier dans la préfecture de Kigali-Ville, Tharcisse Renzaho a été responsable du meurtre de membres du groupe racial ou ethnique tutsi ou d'atteintes

graves à leur intégrité physique ou mentale, y compris d'actes de violence sexuelle, commis dans l'intention de détruire en tout ou en partie un groupe racial ou ethnique comme tel, ainsi qu'il est exposé aux paragraphes 6 à 43.

À titre subsidiaire

Deuxième chef d'accusation : Complicité dans le génocide

Le Procureur du Tribunal pénal international pour le Rwanda accuse Tharcisse Renzaho de complicité dans le génocide, crime prévu à l'article 2 (3) (e) du Statut, en ce que les 7 avril et 17 juillet 1994 ou entre ces dates, sur l'ensemble du territoire rwandais, en particulier dans la préfecture de Kigali-Ville, Tharcisse Renzaho a été responsable du meurtre de membres du groupe racial ou ethnique tutsi ou d'atteintes graves à leur intégrité physique ou mentale, y compris d'actes de violence sexuelle, commis dans l'intention de détruire en tout ou en partie un groupe racial ou ethnique comme tel ou en sachant que d'autres personnes avaient l'intention de détruire en tout ou en partie le groupe racial ou ethnique tutsi comme tel et que son aide contribuerait à la perpétration du crime de génocide, ainsi qu'il est exposé aux paragraphes 6 à 43.

Relation concise des faits relatifs aux premier et deuxième chefs d'accusation

Responsabilité pénale individuelle prévue à l'article 6 (1) du Statut

6. En application de l'article 6 (1) du Statut, l'accusé Tharcisse Renzaho est individuellement responsable du crime de génocide ou de celui de complicité dans le génocide pour avoir planifié, incité à commettre, ordonné, commis, ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter ces crimes. S'agissant de la commission desdits crimes, Tharcisse Renzaho a non seulement usé de ses fonctions et de ses pouvoirs décrits au paragraphe 2 pour ordonner aux personnes placées sous son commandement et son contrôle de les commettre, mais encore incité et aidé et encouragé des personnes qui ne relevaient pas de son commandement et de son contrôle à le faire. En outre, l'accusé a participé volontairement et en toute connaissance de cause à une entreprise criminelle commune dont l'objet, le but et le résultat prévisible étaient de commettre le génocide du groupe racial ou ethnique tutsi et des personnes identifiées comme appartenant à ce groupe ou présumées soutenir les Tutsis tant dans la préfecture de Kigali que sur le reste du territoire rwandais. Pour atteindre ce but criminel, l'accusé a agi de concert avec des dirigeants et des membres des FAR, dont le colonel Théoneste Bagosora, le colonel Ephrem Setako et le major Nyirahakizimana, les membres de la Garde présidentielle, les *Interahamwe*, notamment Odette Nyirabagenzi, Angeline Mukandutiye et Ngerageza, les « Forces de défense civile », la police communale, des milices civiles, les autorités administratives locales, d'autres militaires et miliciens, d'autres personnes connues, comme le père Wenceslas Munyeshyaka et l'évêque Samuel Musabyimana, et des personnes inconnues, tous les actes considérés étant accomplis directement ou par l'intermédiaire de subordonnés, pendant au moins la période allant du milieu de l'année 1993 au 17 juillet 1994. Les faits précis à raison desquels sa responsabilité pénale individuelle est engagée, notamment sa participation à l'entreprise criminelle commune, sont exposés aux paragraphes 7 à 23.

Barrages routiers

7. À partir du 7 avril 1994, Tharcisse Renzaho a ordonné aux militaires, aux gendarmes, aux miliciens, à la population locale, aux soldats démobilisés et à d'autres personnes d'établir et de tenir des barrages routiers partout dans la préfecture de Kigali-Ville, y compris à Gitega et près des installations de l'Ontracom. Ces militaires, gendarmes, miliciens, « locaux », soldats démobilisés et autres ont participé à l'entreprise criminelle commune visée au paragraphe 6 ci-dessus et se sont servis

de ces barrages routiers pour intercepter, identifier et tuer des Tutsis du 7 avril au 17 juillet 1994. Ce faisant, Tharcisse Renzaho a planifié, ordonné, incité à commettre, commis ou toute autre manière aidé et encouragé le génocide.

8. Le 7 avril 1994 ou vers cette date, et de façon régulière par la suite, sur les ondes de Radio Rwanda, Tharcisse Renzaho a ordonné aux militaires, aux gendarmes, aux miliciens, à la population locale et aux soldats démobilisés, qui participaient à l'entreprise criminelle commune visée au paragraphe 6 ci-dessus, d'établir et de tenir des barrages routiers qui ont servi, du 7 avril au 17 juillet 1994, à intercepter, identifier et tuer des Tutsis, tout en laissant passer les marchandises et les membres de la population majoritaire hutue. Ce faisant, Tharcisse Renzaho a planifié, ordonné, incité à commettre, commis ou de toute autre manière aidé et encouragé le génocide.

9. Le 10 avril 1994 ou vers cette date, à une réunion tenue au bureau préfectoral de Kigali-Ville, Tharcisse Renzaho a ordonné aux conseillers et aux responsables de cellule d'établir des barrages routiers que les conseillers, les responsables de cellule, les *Interahamwe*, les éléments de la population locale, les gendarmes, les militaires et les soldats démobilisés, qui participaient à l'entreprise criminelle commune visée au paragraphe 6 ci-dessus, ont utilisé entre le 10 avril et le 17 juillet 1994 pour identifier et tuer des Tutsis. Ce faisant, Tharcisse Renzaho a planifié, ordonné, incité à commettre, commis ou de toute autre manière aidé et encouragé le génocide.

10. À diverses dates indéterminées en avril et mai 1994, Tharcisse Renzaho a convoqué des réunions au cours desquelles il a ordonné aux *nyumbakumi*, aux responsables de cellule, aux conseillers et aux bourgmestres d'être vigilants aux barrages routiers et de veiller à ce que les *Inyenzi* ne réussissent pas à se cacher au sein de la population. Par suite de ces instructions, des Tutsis ont été interceptés, identifiés et tués aux barrages routiers établis dans la préfecture de Kigali-Ville. En convoquant ces réunions et en donnant ces instructions, Tharcisse Renzaho a planifié, ordonné, incité à commettre, commis ou de toute autre manière aidé et encouragé le génocide.

Campagne de massacre menée dans la préfecture de Kigali-Ville

11. À diverses dates indéterminées durant la période allant du milieu de l'année 1993 au 17 juillet 1994, Tharcisse Renzaho a régulièrement autorisé et encouragé des groupes d'*Interahamwe* et d'*Impuzamugambi* à se réunir chez lui à Kanombe et ailleurs pour y recevoir une formation militaire. Ces *Interahamwe* et ces *Impuzamugambi* ont participé à l'entreprise criminelle commune visée au paragraphe 6 ci-dessus et tué des Tutsis et/ou porté gravement atteinte à leur intégrité physique ou mentale entre le 6 avril et le 17 juillet 1994. En autorisant et en encourageant la formation dispensée aux *Interahamwe* et aux *Impuzamugambi*, Tharcisse Renzaho a planifié, incité à commettre, commis ou de toute autre manière aidé et encouragé le génocide.

12. À diverses dates indéterminées durant la période allant du milieu de l'année 1993 au 17 juillet 1994, Tharcisse Renzaho a distribué des armes et des munitions aux membres des *Interahamwe* et des *Impuzamugambi* chez lui à Kanombe et ailleurs. Ces *Interahamwe* et ces *Impuzamugambi* ont participé à l'entreprise criminelle commune visée au paragraphe 6 ci-dessus, et tué des Tutsis et/ou porté gravement atteinte à leur intégrité physique ou mentale entre le 6 avril et le 17 juillet 1994. En distribuant ainsi des armes et des munitions, Tharcisse Renzaho a planifié, incité à commettre, commis ou autre manière aidé et encouragé le génocide.

13. Entre le 6 avril et le 17 juillet 1994, Tharcisse Renzaho a assuré et facilité la délivrance de bons, permis et laissez-passer, ainsi que la fourniture de vivres, pour permettre aux *Interahamwe*, miliciens, soldats et gendarmes de se déplacer et de s'équiper. Ces *Interahamwe*, miliciens, soldats et gendarmes ont participé à l'entreprise criminelle commune visée au paragraphe 6 ci-dessus, et tué et/ou porté gravement atteinte à l'intégrité physique et mentale des Tutsis entre le 6 avril et le 17 juillet 1994. Par ses agissements décrits ci-dessus, Tharcisse Renzaho a planifié, commis ou de toute autre manière aidé et encouragé le génocide.

14. Le 8 avril 1994 ou vers cette date, Tharcisse Renzaho a planifié, commis, ordonné, incité à perpétrer ou aidé et encouragé à perpétrer l'assassinat du directeur de la Banque rwandaise de développement. Il a confirmé ce fait par radiotéléphone, à la même date ou vers cette date, au colonel Bagosora qui participait à l'entreprise criminelle commune visée au paragraphe 6 ci-dessus.

15. Le 9 avril 1994 ou vers cette date, Tharcisse Renzaho, en tenue d'officier supérieur, a mené des *Interahamwe* amés à Kajari (commune de Kanombe). Ces *Interahamwe*, qui participaient à l'entreprise criminelle commune visée au paragraphe 6 ci-dessus, ont pénétré dans les maisons de Tutsis et tué ceux qui s'y trouvaient. Tharcisse Renzaho a, de ce fait, ordonné, incité à commettre, commis ou de toute autre manière aidé et encouragé le massacre des Tutsis.

16. Le 16 avril 1994 ou vers cette date, à une réunion tenue au bureau préfectoral de Kigali-Ville, Tharcisse Renzaho a ordonné aux conseillers de se procurer des armes à feu au Ministère de la défense pour les distribuer dans les secteurs. Ces armes ont été utilisées par des conseillers et des miliciens, qui participaient à l'entreprise criminelle commune visée au paragraphe 6 ci-dessus, pour tuer des Tutsis. En distribuant ainsi des armes, Tharcisse Renzaho a planifié, incité à commettre, commis ou de toute autre manière aidé et encouragé le génocide.

17. Le 30 avril 1994 ou vers cette date, Tharcisse Renzaho a démis de leurs fonctions plusieurs personnes, dont les conseillers de secteur Jean-Baptiste Rudasingwa et Célestin Sezibera, parce qu'il les croyait hostiles au massacre des Tutsis. En nommant des conseillers favorables au massacre des Tutsis à la place des personnes démises de leurs fonctions, Tharcisse Renzaho a aidé et encouragé à commettre ce massacre.

18. À une date indéterminée, entre le 7 et le 30 mai 1994 ou vers période, Tharcisse Renzaho, qui participait à une réunion chez l'évêque Samuel Musabyimana, a accepté de fournir des armes à feu à celui-ci. Par la suite, durant la même période, Tharcisse Renzaho a fourni plusieurs pistolets-mitrailleurs kalachnikovs qui ont été livrés par le major Nyirahakizamana. Ces armes ont été distribuées aux miliciens et ont servi à tuer des Tutsis. En fournissant ces armes, Tharcisse Renzaho a aidé et encouragé à commettre le massacre.

19. En juin 1994, Tharcisse Renzaho, accompagné des colonels Ephrem Setako et Bagosora, qui participaient à l'entreprise criminelle commune visée au paragraphe 6, a assisté à une réunion impromptue au barrage routier situé près de l'hôtel Kiyovu à Kigali et ordonné aux personnes présentes de tuer tous les Tutsis. Un certain nombre de Tutsis ont été ensuite tués.

Lieux visés

20. Entre le 7 avril et le 17 juillet 1994, des milliers de Tutsis avaient trouvé refuge au Centre d'étude des langues africaines (le « CELA »), au Centre pastoral Saint-Paul (« Centre Saint-Paul ») et à l'église de la paroisse de la Sainte Famille (« Sainte Famille »). Le père Wenceslas Munyeshyaka était responsable de la paroisse de la Sainte Famille ; Odette Nyirabagenzi était conseillère de secteur et était placée directement sous le commandement et l'autorité de Tharcisse Renzaho ; Angeline Mukandutiye, inspectrice de l'enseignement, était aussi un des chefs des *Interahamwe* et exerçait un contrôle de fait sur le secteur de Bwahirimba. Elle relevait directement de Tharcisse Renzaho et rendait compte à celui-ci.

21. Le 22 avril 1994 ou vers cette date, accompagné d'Odette Nyirabagenzi, d'Angéline Mukandutiye et du père Munyeshyaka, ainsi que de militaires et d'*Interahamwe*, qui participaient à l'entreprise criminelle commune visée au paragraphe 6 ci-dessus, Tharcisse Renzaho a donné l'ordre d'expulser du CELA une soixantaine d'hommes tutsis, qui ont été emmenés et tués par des soldats et des *Interahamwe*. Ce faisant, Tharcisse Renzaho a ordonné, incité à commettre, commis ou de toute

autre manière aidé et encouragé le génocide. À d'autres dates indéterminées, il a ordonné et incité à commettre le meurtre de nombreux autres Tutsis au CELA.

22. Le 14 juin 1994 ou vers cette date, accompagné d'Odette Nyirabagenzi et d'Angeline Mukandutiye, ainsi que d'*Interahamwe*, de militaires et de gendarmes, qui participaient à l'entreprise criminelle commune visée au paragraphe 6 ci-dessus, Tharcisse Renzaho a ordonné, incité à commettre, commis ou de toute autre manière aidé et encouragé les *Interahamwe*, les militaires et les gendarmes à commettre l'acte consistant à expulser de Saint-Paul 60 garçons tutsis et à les tuer.

23. Le 17 juin 1994 ou vers cette date, accompagné d'Odette Nyirabagenzi et d'Angeline Mukandutiye, Tharcisse Renzaho a ordonné à des militaires, à des miliciens et à des agents de la police communale, qui participaient à l'entreprise criminelle commune visée au paragraphe 6 ci-dessus, d'attaquer les Tutsis réfugiés à l'église de la Sainte Famille et les a incités à agir de la sorte. De nombreux Tutsis ont été tués.

Responsabilité pénale du supérieur hiérarchique en vertu de l'article 6 (3) du Statut

24. En vertu de l'article 6 (3) du Statut, l'accusé Tharcisse Renzaho est responsable du crime de génocide ou de complicité dans le génocide, en ce que ses subordonnés ont commis des actes criminels précis et il n'a pas pris les mesures nécessaires et raisonnables pour prévenir ceux-ci ou pour en punir les auteurs, alors qu'il savait ou avait des raisons de savoir que les subordonnés en question étaient sur le point de commettre ou avaient commis ces actes. Au nombre de ces subordonnés figuraient des responsables et des membres des FAR, notamment le major Nyirahakizimana, les éléments de la Garde présidentielle, des *Interahamwe*, dont Odette Nyirabagenzi, Angeline Mukandutiye et Ngerageza, les « Forces de défense civile », les agents de la police communale, des miliciens civils, les autorités administratives locales, d'autres militaires et miliciens, d'autres personnes connues, comme le père Wenceslas Munyeshyaka et l'évêque Samuel Musabyimana, ainsi que des personnes inconnues. Les faits détaillés par lesquels l'accusé a engagé sa responsabilité pénale individuelle en application de l'article 6 (3) sont exposés aux paragraphes 25 à 43.

Barrages routiers

25. À partir du 7 avril 1994, des barrages routiers tenus par des militaires, gendarmes, miliciens et soldats démobilisés relevant du contrôle effectif de Tharcisse Renzaho ont été établis partout dans la préfecture de Kigali-Ville, y compris à Gitega et près des installations de l'Ontracom. Ces barrages routiers ont servi à identifier et à tuer des Tutsis, et Tharcisse Renzaho s'est abstenu ou a refusé de prendre les mesures nécessaires ou raisonnables pour empêcher que de tels actes ne soient commis ou en punir les auteurs.

26. Le 10 avril 1994 ou vers cette date, à l'issue d'une réunion tenue au bureau préfectoral de Kigali-Ville, des conseillers et des responsables de cellule placés sous le contrôle effectif de Tharcisse Renzaho ont établi des barrages routiers qui ont servi à identifier et tuer les Tutsis. Tharcisse Renzaho s'est abstenu ou a refusé de prendre les mesures nécessaires ou raisonnables pour empêcher que de tels actes ne soient commis ou en punir les auteurs.

27. À différentes dates indéterminées en avril et mai 1994, Tharcisse Renzaho a convoqué des réunions et y a donné pour instructions aux *nyumbakumi*, responsables de cellule, conseillers et bourgmestres qui étaient placés sous son contrôle effectif d'être vigilants aux barrages routiers et de s'assurer que les *Inyenzi* ne réussissaient pas à se cacher au sein de la population. Par suite de ces instructions, des Tutsis ont été interceptés, identifiés et tués aux barrages routiers dans la préfecture de Kigali-Ville. Tharcisse Renzaho s'est abstenu ou a refusé de prendre les mesures nécessaires ou raisonnables pour empêcher que de tels actes ne soient commis ou en punir les auteurs.

Campagne de massacres à travers toute la préfecture de Kigali-Ville

28. À différentes dates indéterminées durant la période allant du milieu de l'année 1993 au 17 juillet 1994, Tharcisse Renzaho a autorisé des groupes d'*Interahamwe* et d'*Impuzamugambi* à se réunir chez lui à Kanombe et ailleurs pour recevoir une formation militaire. Ces *Interahamwe* et ces *Impuzamugambi* étaient placés sous le contrôle effectif de Tharcisse Renzaho. Entre le 6 avril et le 17 juillet 1994, ils ont tué des Tutsis ou porté gravement atteinte à leur intégrité physique et mentale. Tharcisse Renzaho s'est abstenu ou a refusé de prendre les mesures nécessaires ou raisonnables pour empêcher que de tels actes ne soient commis ou en punir les auteurs.

29. À différentes dates indéterminées durant la période allant du milieu de l'année 1993 au 17 juillet 1994, Tharcisse Renzaho a distribué des armes et des munitions à des groupes d'*Interahamwe* et d'*Impuzamugambi* chez lui à Kanombe et ailleurs. Ces *Interahamwe* et *Impuzamugambi* étaient placés sous le contrôle effectif de Tharcisse Renzaho. Entre le 6 avril et le 17 juillet 1994, ils ont tué des Tutsis ou porté gravement atteinte à leur intégrité physique et mentale. Tharcisse Renzaho s'est abstenu ou a refusé de prendre les mesures nécessaires ou raisonnables pour empêcher que de tels actes ne soient commis ou en punir les auteurs.

30. Entre le 6 avril et le 17 juillet 1994, Tharcisse Renzaho a assuré et facilité la délivrance de bons, permis et laissez-passer, ainsi que la fourniture de vivres, pour permettre aux *Interahamwe*, miliciens, soldats et gendarmes qui participaient aux massacres des Tutsis de se déplacer et de s'équiper. Il exerçait un contrôle effectif sur eux, en ce qu'il avait le pouvoir d'empêcher ou de sanctionner leurs actes.

31. Le 8 avril 1994, Tharcisse Renzaho a confirmé par radiotéléphone au colonel Bagosora que des personnes placées sous son contrôle effectif avaient tué le directeur de la Banque rwandaise de développement. Tharcisse Renzaho s'est abstenu ou a refusé de prendre les mesures nécessaires pour empêcher que de tels actes ne soient commis ou en punir les auteurs.

32. Le 9 avril 1994 ou vers cette date, Tharcisse Renzaho, en tenue d'officier supérieur, s'est rendu en compagnie d'*Interahamwe* armés à Kajari (commune de Kanombe). Ses subordonnés membres du mouvement *Interahamwe* ont pénétré dans les maisons de Tutsis et les y ont tués en sa présence et sans aucune objection de sa part. Tharcisse Renzaho s'est abstenu ou a refusé de prendre les mesures nécessaires ou raisonnables pour empêcher que de tels actes ne soient commis ou en punir les auteurs.

33. Le 16 avril 1994 ou vers cette date, à l'issue d'une réunion tenue au bureau préfectoral de Kigali-Ville, des conseillers placés sous le contrôle effectif de Tharcisse Renzaho ont obtenu du Ministère de la défense des armes à feu à distribuer dans les secteurs. Ces armes ont servi à tuer des Tutsis. Tharcisse Renzaho s'est abstenu ou a refusé de prendre les mesures nécessaires ou raisonnables pour empêcher que de tels actes ne soient commis ou en punir les auteurs.

34. À de nombreuses dates indéterminées entre avril et juillet 1994, Tharcisse Renzaho a refusé ou s'est abstenu de punir des *Interahamwe* placés directement sous son contrôle, son commandement et sa supervision et dont il savait qu'ils avaient participé au massacre de Tutsis et de Hutus modérés à Kigali.

35. Le 30 avril 1994 ou vers cette date, Tharcisse Renzaho a démis de leurs fonctions plusieurs personnes, dont les conseillers de secteur Jean-Baptiste Rudasingwa et Célestin Sezibera, parce qu'il les croyait hostiles au massacre des Tutsis. Il a remplacé ces personnes par des conseillers favorables au massacre des Tutsis, ce qui établit qu'il exerçait un contrôle effectif sur les autorités administratives locales de Kigali-Ville.

Lieux visés

36. Entre le 7 avril et le 17 juillet 1994, des milliers de Tutsis se sont réfugiés au CELA, au Centre Saint-Paul et à l'église de la paroisse de la Sainte Famille. Le père Wenceslas Munyeshyaka était responsable de la paroisse de la Sainte Famille ; Odette Nyirabagenzi, conseillère de secteur, était placée directement sous le commandement et l'autorité de Tharcisse Renzaho. Angeline Mukandutiye, inspectrice de l'enseignement, était aussi un des chefs des *Interahamwe* et exerçait un contrôle de fait sur le secteur de Bwahirimba. Elle était placée sous le contrôle effectif de Tharcisse Renzaho et rendait compte à celui-ci.

37. Entre le 7 avril et le 17 juillet 1994, des subordonnés de Tharcisse Renzaho, dont le père Munyeshyaka, Odette Nyirabagenzi et Angeline Mukandutiye, pour ne citer que ceux-là, et d'autres responsables du mouvement *Interahamwe* ont planifié, préparé, ordonné, incité à commettre et mené des attaques contre des membres du groupe racial ou ethnique tutsi à Kigali. Ces attaques ont été perpétrées à la paroisse de la Sainte Famille, au Centre Saint-Paul, à la mosquée Kadaffi et au CELA, entre autres lieux, dans le secteur de Nyarugenge, dans l'intention de tuer les membres de l'ensemble ou d'une partie du groupe racial ou ethnique tutsi ou de porter atteinte à leur intégrité physique et mentale. Tharcisse Renzaho s'est abstenu ou a refusé de prendre les mesures nécessaires ou raisonnables pour empêcher que de tels actes ne soient commis.

38. Le 22 avril 1994 ou vers cette date, des subordonnés de l'occurrence Odette Nyirabagenzi, le père Munyeshyaka et Angéline Mukandutiye, ainsi que des militaires et des *Interahamwe,* ont enlevé et fait tuer 60 hommes tutsis au CELA. À d'autres dates indéterminées en avril, mai et juin 1994, ils ont enlevé et fait tuer de nombreux autres Tutsis au CELA Tharcisse Renzaho s'est abstenu ou a refusé de prendre les mesures nécessaires et raisonnables pour empêcher que de tels actes ne soient commis ou en punir les auteurs.

39. Le 14 juin 1994 ou vers cette date, des subordonnés de Tharcisse Renzaho, en l'occurrence Odette Nyirabagenzi et Angeline Mukandutiye, ainsi que des *Interahamwe*, des militaires et des gendarmes ont enlevé et fait tuer 60 garçons tutsis au Centre Saint-Paul. Tharcisse Renzaho s'est abstenu ou a refusé de prendre les mesures nécessaires pour empêcher que de tels actes ne soient commis ou en punir les auteurs.

40. Le 17 juin 1994 ou vers cette date, des subordonnés de Tharcisse Renzaho, notamment Odette Nyirabagenzi et Angeline Mukandutiye, pour ne citer qu'elles, ainsi que des militaires, des miliciens et des agents de la police communale ont attaqué et tué des Tutsis qui s'étaient réfugiés à l'église de la paroisse de la Sainte Famille. Tharcisse Renzaho s'est abstenu ou a refusé de prendre les mesures nécessaires et raisonnables pour empêcher que de tels actes ne soient commis ou en punir les auteurs.

Atteintes à l'intégrité sexuelle

41. Des femmes tutsies ont été violées par des miliciens *Interahamwe,* des militaires et d'autres personnes relevant du contrôle effectif de Tharcisse Renzaho le 16 avril et à différentes dates indéterminées en avril, mai et juin 1994. Des conseillers placés directement sous le commandement et l'autorité de Tharcisse Renzaho faisaient régulièrement état de viols commis sur des femmes tutsies par des miliciens *Interahamwe,* des militaires et d'autres personnes relevant aussi de son contrôle effectif. Tharcisse Renzaho s'est abstenu ou a refusé de prendre les mesures nécessaires ou raisonnables pour empêcher ces viols ou pour en punir les auteurs.

42. Le père Munyeshyaka et des *Interahamwe* placés sous le contrôle effectif de Tharcisse Renzaho ont contraint des femmes tutsies à leur procurer des plaisirs sexuels, en échange de la sécurité de celles-ci, à la paroisse de la Sainte Famille pendant la période où les Tutsis y avaient trouvé refuge, en avril, mai et juin 1994. Tharcisse Renzaho savait ou avait des raisons de savoir que ces actes sexuels sous la contrainte étaient commis sur femmes tutsies à la paroisse de la Sainte Famille et s'est abstenu ou a refusé d'empêcher qu'ils soient commis ou d'en punir les auteurs.

43. Des *Interahamwe,* des militaires et des civils armés relevant du contrôle effectif de Tharcisse Renzaho ont séquestré des femmes tutsies dans certaines maisons situées au centre de Kigali, où ils les ont contraintes à leur procurer des plaisirs sexuels en échange de la sécurité de ces femmes à diverses dates indéterminées en avril, mai et juin 1994. Tharcisse Renzaho savait ou avait des raisons de savoir que ces actes sexuels forcés étaient en train d'être commis sur des femmes tutsies à la paroisse de la Sainte Famille, et s'est abstenu ou a refusé d'empêcher que ces actes ne soient commis ou d'en punir les auteurs.

Troisième chef d'accusation: Assassinat constitutif de crime contre l'humanité

Le Procureur du Tribunal pénal international pour le Rwanda accuse Tharcisse Renzaho d' assassinat constitutif de crime contre l'humanité crime prévu à l'article 3 (a) du Statut, en ce que les 6 avril et 17 juillet 1994 ou entre ces deux dates, sur l'ensemble du territoire rwandais, en particulier dans la préfecture de Kigali-Ville, Tharcisse Renzaho, animé de l'intention de tuer des membres du groupe racial ou ethnique tutsi ou des personnes identifiées comme appartenant à ce groupe ou présumées soutenir les Tutsis, a été responsable du meurtre de ces personnes commis dans le cadre d'une attaque généralisée et systématique dirigée contre cette population civile en raison de son appartenance raciale, ethnique et politique, ainsi qu'il est exposé aux paragraphes 44 à 51.

Relation concise des faits relatifs au troisième chef d'accusation

Responsabilité pénale individuelle prévue à l'article 6 (1)

44. En application de l'article 6 (1) du Statut, l'accusé Tharcisse Renzaho est individuellement responsable d'assassinat constitutif de crime contre l'humanité pour avoir planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter ce crime. S'agissant de la commission dudit crime, Tharcisse Renzaho a non seulement usé de ses fonctions et de ses pouvoirs décrits au paragraphe 2 pour ordonner aux personnes placées sous son commandement et son contrôle de le commettre, mais encore incité et aidé et encouragé des personnes qui ne relevaient pas de son commandement et de son contrôle à le faire. En outre, l'accusé a participé volontairement et en toute connaissance de cause à une entreprise criminelle commune dont l'objet, le but et le résultat prévisible étaient de commettre des crimes contre l'humanité contre le groupe racial ou ethnique tutsi et les personnes soit identifiées comme appartenant à ce groupe, soit présumées soutenir les Tutsis ou politiquement opposées au « Hutu *Power* », tant dans la préfecture de Kigali que sur le reste du territoire rwandais, en raison de l'appartenance raciale, ethnique ou politique des victimes. Pour atteindre ce but criminel, l'accusé a agi de concert avec des dirigeants et des membres des FAR, les membres de la Garde présidentielle, des *Interahamwe*, comme Odette Nyirabagenzi, les « Forces de défense civile », la police communale, des milices civiles, les autorités administratives locales, d'autres militaires et miliciens, d'autres personnes connues, comme le père Wenceslas Munyeshyaka, et des personnes inconnues, tous les actes considérés étant accomplis directement ou par l'intermédiaire de subordonnés pendant au moins la période allant du 12 avril au 15 juin 1994. Les faits détaillés par lesquels l'accusé a engagé sa responsabilité pénale individuelle, y compris sa participation à l'entreprise criminelle commune, sont exposés aux paragraphes 45 à 47.

45. Le 22 avril 1994 ou vers cette date, en présence de tiers, Tharcisse Renzaho a choisi de faire tuer, ordonné de le faire et incité à tuer certaines personnes se trouvant au CELA, notamment James, Charles, Wilson et Déglote Rwanga ainsi qu'Emmanuel Gihana. Ces personnes ont été tuées par des *Interahamwe*, militaires et gendarmes qui participaient à l'entreprise criminelle commune visée au paragraphe 44 ci-dessus. Par ses agissements, tels qu'ils sont décrits dans le présent acte d'accusation, Tharcisse Renzaho a ordonné, incité à commettre, commis ou de toute autre manière aidé et encouragé ces meurtres.

46. Le 28 avril 1994 ou vers cette date, Tharcisse Renzaho a ordonné à des *Interahamwe* de se rendre dans la commune de Nyarugenge pour y rechercher et tuer neuf Tutsis, dont François Nsengiyumva, un homme du nom de Kagorora, de même que ses deux fils Émile et Aimable, et un homme du nom de Rutiyomba. Ces personnes ont été par la suite tuées par les *Interahamwe* qui participaient à l'entreprise criminelle commune visée au paragraphe 44 ci-dessus en exécution des ordres de Tharcisse Renzaho. Ce faisant, Tharcisse Renzaho a planifié, ordonné, incité à commettre, commis ou de toute autre manière aidé et encouragé à commettre ce meurtre.

47. Le 15 juin 1994 ou vers cette date, Tharcisse Renzaho a ordonné à Odette Nyirabagenzi de tuer André Kameya, journaliste qui critiquait le Gouvernement intérimaire. Le 15 juin 1994 ou vers cette date, en compagnie d'*Interahamwe*, Odette Nyirabagenzi, qui participait à l'entreprise criminelle commune visée au paragraphe 44 ci-dessus, a trouvé André Kameya et l'a fait tuer en exécution des ordres de Tharcisse Renzaho. Par ses agissements, tels qu'ils sont exposés dans le présent acte d'accusation, Tharcisse Renzaho a ordonné, incité à commettre, commis ou de toute autre manière aidé et encouragé à commettre ce meurtre.

Responsabilité pénale du supérieur hiérarchique en vertu de l'article 6 (3) du Statut

48. En application de l'article 6 (3) du Statut, l'accusé Tharcisse Renzaho est responsable de meurtre constitutif de crime contre l'humanité en ce que ses subordonnés ont commis des actes criminels précis, et il n'a pas pris les mesures nécessaires et raisonnables pour prévenir ceux-ci ou pour en punir les auteurs, alors qu'il savait ou avait des raisons de savoir que les subordonnés en question étaient sur le point de commettre ou avaient commis ces actes. Au nombre de ces subordonnés figuraient des responsables et des membres des FAR, les éléments de la Garde présidentielle, des *Interahamwe*, dont Odette Nyirabagenzi, les « Forces de défense civile », les agents de la police communale, des miliciens civils, les autorités administratives locales, d'autres militaires et miliciens, d'autres personnes connues, comme le père Wenceslas Munyeshyaka, et des personnes inconnues. Les faits détaillés par lesquels l'accusé a engagé sa responsabilité pénale individuelle prévue à l'article 6 (3) sont exposés aux paragraphes 49 à 51.

49. Le 22 avril 1994 ou vers cette date, des *Interahamwe* et des militaires placés sous le contrôle effectif de Tharcisse Renzaho ont tué certaines personnes qui avaient trouvé refuge au CELA, notamment James, Charles, Wilson et Déglote Rwanga ainsi qu'Emmanuel Gihana, pour ne citer que celles-là. Tharcisse Renzaho s'est abstenu ou a refusé de prendre les mesures nécessaires ou raisonnables pour empêcher que de tels actes ne soit commis ou en punir les auteurs.

50. Le 28 avril 1994 ou vers cette date, des *Interahamwe* placés sous le contrôle effectif de Tharcisse Renzaho se sont rendus dans la commune de Nyurugenge où ils ont trouvé et tué neuf Tutsis, dont François Nsengiyumva, un homme du nom de Kagorora, de même que ses deux fils, Émile et Aimable, et un homme du nom de Rutiyomba. Tharcisse Renzaho s'est abstenu ou a refusé de prendre les mesures nécessaires ou raisonnables pour empêcher que de tels actes soient commis ou en punir les auteurs.

51. Le 15 juin 1994 ou vers cette date, des subordonnés de Tharcisse Renzaho, en l'occurrence Odette Nyirabagenzi et un groupe d'*Interahamwe*, ont trouvé et tué André Kameya, journaliste qui critiquait le Gouvernement intérimaire. Tharcisse Renzaho s'est abstenu ou a refusé de prendre les mesures nécessaires ou raisonnables pour empêcher que de tels actes ne soit commis ou en punir les auteurs.

Quatrième chef d'accusation : Viol constitutif de crime contre l'humanité

Le Procureur du Tribunal pénal international pour le Rwanda accuse Tharcisse Renzaho de viol constitutif de crime contre l'humanité, crime prévu à l'article 3 (g) du Statut, en ce que les 7 avril et 17 juillet 1994 ou entre ces dates, sur tout le territoire rwandais, en particulier dans la préfecture de Kigali-Ville, des membres du groupe racial ou ethnique tutsi ou des personnes identifiées comme étant des Tutsies ont été violés par des subordonnés de Tharcisse Renzaho dans le cadre d'une attaque généralisée et systématique dirigée contre cette population civile en raison de son appartenance raciale ou ethnique, ainsi qu'il est exposé aux paragraphes 52 à 55 ci-après.

Relation concise des faits relatifs au quatrième chef d'accusation

Responsabilité pénale du supérieur hiérarchique prévue à l'article 6 (3)

52. En application de l'article 6 (3) du Statut, l'accusé Tharcisse Renzaho est responsable de viol constitutif de crime contre l'humanité, en que ses subordonnés ont commis des actes criminels précis, et il n'a pas pris les mesures nécessaires et raisonnables pour prévenir ceux-ci ou pour en punir les auteurs, alors qu'il savait ou avait des raisons de savoir que les subordonnés en question étaient sur le point de commettre ou avaient commis ces actes. Au nombre de ces subordonnés figuraient des responsables et des membres des FAR, les éléments de la Garde présidentielle, des *Interahamwe,* les « Forces de défense civile », les agents de la police communale, des miliciens civils, les autorités administratives locales, d'autres militaires et miliciens, d'autres personnes connues, comme le père Wenceslas Munyeshyaka, et des personnes inconnues. Les faits détaillés par lesquels l'accusé a engagé sa responsabilité pénale individuelle sont exposés aux paragraphes 53 à 55.

53. Des femmes tutsies ont été violées par des miliciens *Interahamwe,* des militaires et d'autres personnes placés sous le contrôle effectif de Tharcisse Renzaho le 16 avril et à différentes dates indéterminées en avril, mai et juin 1994. Des conseillers placés directement sous le commandement et l'autorité de Tharcisse Renzaho faisaient régulièrement état de viols commis sur des femmes tutsies par des miliciens *Interahamwe,* des militaires et d'autres personnes agissant aussi sous le contrôle effectif de Renzaho. Tharcisse Renzaho s'est abstenu ou a refusé de prendre les mesures nécessaires ou raisonnables pour empêcher ces viols ou pour en punir les auteurs.

54. Le père Munyeshyaka et des *Interahamwe* placés sous le contrôle effectif de Tharcisse Renzaho ont contraint des femmes tutsies à leur procurer des plaisirs sexuels, en échange de la sécurité de celles-ci, à la paroisse de la Sainte Famille, pendant la période où des Tutsis y avaient trouvé refuge, en avril, mai et juin 1994. Tharcisse Renzaho savait ou avait des raisons de savoir que ces actes sexuels étaient commis sous la contrainte sur des femmes tutsies et s'est abstenu ou a refusé d'en punir les auteurs.

55. Des *Interahamwe*, des militaires et des civils armés relevant du contrôle effectif de Tharcisse Renzaho ont séquestré des femmes tutsies dans certaines maisons situées au centre de Kigali, où ils les ont contraintes à leur procurer des plaisirs sexuels en échange de la sécurité de ces femmes à diverses dates indéterminées en avril, mai et juin 1994. Tharcisse Renzaho savait ou avait des raisons de savoir que ces actes sexuels étaient commis sous la contrainte sur des femmes tutsies à la paroisse de la Sainte Famille, et il s'est abstenu ou a refusé d'en punir les auteurs.

Cinquième chef d'accusation : Meurtre constitutif de violation de l'article 3 commun aux Conventions de Genève de 1949

Le Procureur du Tribunal pénal international pour le Rwanda accuse Tharcisse Renzaho de meurtre constitutif de violation de l'article 3 commun aux conventions de Genève de 1949 et du Protocole additionnel II de 1977, crime prévu à l'article 4 (a) du Statut, en ce que Tharcisse Renzaho a été responsable du meurtre d'adultes et de jeunes tutsis qui ne prenaient pas part aux combats pendant la

période allant du 7 avril au 17 juillet 1994, à l'époque où un conflit armé ne présentant pas un caractère international, au sens des articles 1 et 2 du Protocole additionnel II aux Conventions de Genève de 1949, se déroulait sur l'ensemble du territoire rwandais, en particulier dans la préfecture de Kigali-Ville, ce meurtre étant étroitement lié aux hostilités ou commis dans le cadre du conflit armé et les victimes des personnes qui ne jouaient aucun rôle dans ledit conflit, ainsi qu'il est exposé aux paragraphes 56 à 60.

Relation concise des faits relatifs au cinquième chef d'accusation

Responsabilité pénale individuelle prévue à l'article 6 (1)

56. En application de l'article 6 (1) du Statut, l'accusé Tharcisse Renzaho est individuellement responsable de meurtre constitutif de violation de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II de 1977 pour avoir planifié, incité à commettre, ordonné, commis, ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter ce crime. S'agissant de la commission desdits crimes, Tharcisse Renzaho a non seulement usé de ses fonctions et de ses pouvoirs décrits au paragraphe 2 pour ordonner aux personnes placées sous son commandement et son contrôle de les commettre, mais encore incité et aidé et encouragé des personnes qui ne relevaient pas de son commandement et de son contrôle à le faire. En outre, l'accusé a participé volontairement et en toute connaissance de cause à une entreprise criminelle commune dont l'objet, le but et le résultat prévisible étaient de commettre des crimes de guerre dans la préfecture de Kigali et sur le reste du territoire rwandais contre des membres du groupe racial ou ethnique tutsi qui ne prenaient pas part aux combats. Pour atteindre ce but criminel, l'accusé a agi de concert avec des dirigeants et des membres des FAR, les membres de la Garde présidentielle, les *Interahamwe*, les « Forces de défense civile », des agents la police communale, les milices civiles, les autorités administratives locales, d'autres militaires et miliciens, d'autres personnes connues et des personnes inconnues, tous les actes considérés étant accomplis directement ou par l'intermédiaire de subordonnés, pendant au moins la période allant du 6 avril au 4 juillet 1994. Les faits détaillés par lesquels l'accusé a engagé sa responsabilité pénale individuelle, y compris sa participation à la présente entreprise criminelle commune, sont exposés aux paragraphes 57 et 58.

57. Entre le 16 et le 17 juin 1994, les combattants du FPR ont réussi à atteindre le Centre Saint-Paul situé à Nyarugenge dans la préfecture de Kigali-Ville où ils ont sauvé un grand nombre de Tutsis non-combattants.

58. Le 17 juin 1994 ou vers cette date, en vertu de ses pouvoirs décrits au paragraphe 2 et en représailles aux actions du FPR mentionnées au paragraphe 57, Tharcisse Renzaho a ordonné, incité à commettre ou de toute autre manière aidé et encouragé des militaires des FAR et des *Interahamwe* à extraire de la paroisse Sainte Famille pour les tuer au moins 17 hommes tutsis non-combattants qui n'avaient pas été sauvés par le FPR.

Responsabilité pénale du supérieur hiérarchique prévue à l'article 6 (3)

59. En application de l'article 6 (3) du Statut, l'accusé Tharisse Renzaho est responsable de meurtre constitutif de violation de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II de 1977 en ce que ses subordonnés ont commis des actes criminels précis et il n'a pas pris les mesures nécessaires et raisonnables pour prévenir ceux-ci ou pour en punir les auteurs, alors qu'il savait ou avait des raisons de savoir que les subordonnés en question étaient sur le point de commettre ou avaient commis ces actes. Au nombre de ces subordonnés figuraient des responsables et des membres des FAR, les éléments de la Garde présidentielle, des *Interahamwe,* les « Forces de défense civile », les agents de la police communale, des miliciens civils, les autorités administratives locales, d'autres militaires et miliciens, d'autres personnes connues et des personnes inconnues. Les

faits détaillés par lesquels l'accusé a engagé sa responsabilité pénale individuelle prévue à l'article 6 (3) sont exposés au paragraphe 60.

60. Le 17 juin 1994 ou vers cette date, en représailles aux actions du FPR indiquées au paragraphe 57, des militaires des FAR et des *Interahamwe*, qui étaient des subordonnés relevant du contrôle effectif de Tharcisse Renzaho, ont tué au moins 17 hommes tutsis non-combattants réfugiés à la paroisse de la Sainte Famille qui n'avaient pas été sauvés par le FPR. Tharcisse Renzaho s'est abstenu ou a refusé de prendre les mesures nécessaires ou raisonnables pour empêcher que de tels actes ne soient commis ou pour en punir les auteurs.

Sixième hef d'accusation : Viol constitutif de violation de l'article 3 commun aux Conventions de Genève de 1949

Le Procureur du Tribunal pénal international pour le Rwanda accuse Tharcisse Renzaho de viol constitutif de violation de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II de 1977, crime prévu à l'article 4 (e) du Statut, en ce que Tharcisse Renzaho a été responsable du viol de femmes tutsies qui ne prenaient pas part aux combats pendant la période allant du 7 avril et 17 juillet 1994, à l'époque où un conflit armé ne présentant pas un caractère international, au sens des articles 1 et 2 du Protocole additionnel II aux Conventions de Genève de 1949, se déroulait sur l'ensemble du territoire rwandais, en particulier dans la préfecture de Kigali-Ville, ce viol étant étroitement lié aux hostilités ou commis dans le cadre du conflit armé et les victimes des personnes qui ne jouaient aucun rôle dans ledit conflit, ainsi qu'il est exposé aux paragraphes 61 à 65.

Relation concise des faits relatifs au sixième chef d'accusation

Responsabilité pénale du supérieur hiérarchique prévue à l'article 6 (3)

61. En application de l'article 6 (3) du Statut, l'accusé Tharcisse Renzaho est responsable de viol constitutif de violation de l'article 3 commun Conventions de Genève de 1949 et du Protocole additionnel II de 1977 en ce que ses subordonnés ont commis des actes criminels précis, et il n'a pas pris les mesures nécessaires et raisonnables pour prévenir ceux-ci ou pour en punir les auteurs, alors qu'il savait ou avait des raisons de savoir que les subordonnés en question étaient sur le point de commettre ou avaient commis ces actes. Au nombre de ces subordonnés figuraient des responsables et des FAR, les éléments de la Garde présidentielle, des *Interahamwe*, dont Odette Nyirabagenzi, les « Forces de défense civile », les agents de la police communale, des miliciens civils, les autorités administratives locales, d'autres militaires et miliciens, d'autres personnes connues, comme le père Wenceslas Munyeshyaka, et des personnes inconnues. Les faits détaillés par lesquels l'accusé a engagé sa responsabilité pénale individuelle prévue à l'article 6 (3) sont exposés aux paragraphes 62 à 65.

62. Au cours de la période allant du 7 avril au 4 juillet 1994 qui rentre dans l'intervalle susmentionné, les FAR ont occupé les zones centrales de Kigali, notamment la commune de Nyarugenge et la région environnant l'église de la paroisse de la Sainte Famille. Ils ont entraîné et armé les *Interahamwe* et menaient la guerre avec l'appui des *Interahamwe*, de la gendarmerie, de la police communale de la préfecture et de civils armés.

63. Des femmes tutsies ont été violées par des miliciens *Interahamwe*, des militaires et d'autres éléments placés sous le contrôle effectif de Tharcisse Renzaho le 16 avril et à différentes dates indéterminées en avril, mai et juin 1994. Des conseillers placés directement sous le commandement et l'autorité de Tharcisse Renzaho faisaient régulièrement état de viols commis sur des Tutsies par des miliciens *Interahamwe*, des militaires et d'autres éléments placés sous le contrôle effectif de Tharcisse Renzaho. Celui-ci s'est abstenu ou a refusé de prendre les mesures nécessaires ou raisonnables pour empêcher ces viols ou en punir les auteurs.

64. Le père Munyeshyaka et d'autres *Interahamwe* placés sous le contrôle effectif de Tharcisse Renzaho ont contraint des Tutsies à leur procurer des plaisirs sexuels, en échange de la sécurité de celles-ci, à la paroisse de la Sainte Famille, pendant la période où des Tutsis y avaient trouvé refuge, en avril, mai et juin 1994. Tharcisse Renzaho savait ou avait des raisons de savoir que ces actes sexuels étaient commis sous la contrainte sur des Tutsies à la paroisse de la Sainte Famille, et il s'est abstenu ou a refusé de les empêcher ou d'en punir les auteurs.

65. Des *Interahamwe*, des militaires et des civils armés placés sous le contrôle effectif de Tharcisse Renzaho ont séquestré des Tutsies dans des maisons situées au centre de Kigali ; ils les y ont contraintes à leur procurer des plaisirs sexuels, en échange de la sécurité de ces femmes, à diverses dates indéterminées en avril, mai et juin 1994. Tharcisse Renzaho savait ou avait des raisons de savoir que ces actes sexuels étaient commis sous la contrainte sur des Tutsies, et il s'est abstenu ou a refusé de les empêcher ou d'en punir les auteurs.

Les actes et les omissions de Tharcisse Renzaho exposés dans le présent acte d'accusation sont punissables conformément aux articles 22 et 23 du Statut.

Arusha (Tanzanie), le 16 février 2006.

[Signé] : Hassan B. Jallow

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Décision sur la requête en exception préjudicielle pour vices de forme de l'acte d'accusation
5 septembre 2006 (ICTR-97-31-I)

(Original : Français)

Chambre de première instance II

Juges : Arlette Ramaroson, Présidente; William H. Sekule; Solomy Balungi Bossa

Tharcisse Renzaho – Vices de forme de l'acte d'accusation – Recevabilité de la requête – Nécessité de distinguer entre les faits incriminés comme auteur des faits et ceux comme supérieur hiérarchique – Précisions suffisantes quant à l'autorité alléguée de l'accusé, Préparation de la défense de l'accusé – Précisions relative à la détermination des dates et lieux de la commission des faits et à l'identification des victimes, Ampleur des crimes, Préparation de la défense de l'accusé – Précisions relative à l'identification des subordonnés de l'accusé et de ses coauteurs, Référence à la catégorie à laquelle ceux-ci appartenaient en tant que groupe ou leurs fonctions officielles – Requête rejetée

Instruments internationaux cités :

Règlement de preuve et de procédure, art. 72 et 73 (A) ; Statut, art. 4 (a), 4 (b), 6 (1), 6 (3) et 21 (2)

Jurisprudence internationale citée :

T.P.I.Y.: Chambre de première instance, Le Procureur c. Zejnil Delalić, Décision concernant l'exception préjudicielle de l'Accusé Delalić relative à des vices de forme de l'acte d'accusation, 2 octobre 1996 (IT-96-21) ; 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. Zoran Kupreškić, Arrêt, 23 octobre 2001 (IT-95-16)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÈGEANT en la Chambre de première instance II, composée de Arlette Ramaroson, Présidente, des juges William H. Sekule et Solomy B. Bossa;

ÉTANT SAISI :

(i) de la « Requête en exception préjudicielle pour vices de forme de l'acte d'accusation, article 72 (B) (ii) du Règlement de la procédure et de preuve » déposée le 31 mars 2006 (la « requête »);

(ii) de la réponse du Procureur intitulée « *Prosecutor's Response to* 'Requête en exception préjudicielle pour vices de forme de l'acte d'accusation' » déposée le 10 avril 2006 (la « réponse du Procureur »);

(iii) la « Réplique à la réponse du Procureur à la requête de la Défense en exception préjudicielle pour vices de forme de l'acte d'accusation, article 72 (B) (ii) du Règlement de la procédure et de preuve » déposée le 23 mai 2006 (la « réplique de la Défense »);

NOTANT :

(i) la « Décision relative à la requête du Procureur en modification de l'acte d'accusation conformément à l'article 50 (A) du Règlement de procédure et de preuve », rendue le 13 février 2006 (la « décision du 13 février 2006 »);

(ii) le deuxième acte d'accusation modifié établi à l'encontre de l'accusé Tharcisse Renzaho en date du 16 février 2006 (l'« Acte d'accusation modifié du 16 février 2006 »);

(iii) le mémoire préalable au procès du Procureur, déposé le 31 octobre 2005 (le « Mémoire du Procureur »);

(iv) la conférence de mise en état du 3 juin 2005 et

(v) la conférence préalable au procès du 10 mars 2006;

VU le Statut du Tribunal (le « Statut ») et le Règlement de procédure et de preuve (le « Règlement »), notamment l'article 72 du Règlement;

STATUANT sur la base des mémoires déposés par les parties conformément à l'article 73 (A) du Règlement;

Soumissions des parties

La Défense

1. La Défense soutient que les accusations portées contre l'Accusé dans l'acte d'accusation modifié sont vagues et imprécises, ce qui est contraire aux exigences de la jurisprudence en la matière.[1]

2. La Défense prie la Chambre d'ordonner au Procureur :

- de faire une distinction entre les faits reprochés à l'Accusé sous l'article 6 (1) et sous l'article 6 (3) du Statut, respectivement ;
- de fournir des précisions quant à la nature et à la réalité des pouvoirs de l'Accusé sur les différentes organisations et administrations sur lesquelles il est accusé d'avoir eu autorité ;
- de retirer les chefs d'accusation concernant l'entreprise criminelle commune contenus aux points 6-44 et 56 de l'acte d'accusation modifié ;
- de préciser la nature du lien entre l'Accusé et les auteurs des actes pour lesquels sa responsabilité de supérieur hiérarchique est mise en cause ;
- de fournir les informations permettant d'identifier les victimes alléguées. À titre subsidiaire, d'ordonner au Procureur de fournir des détails qui sont en sa possession permettant d'identifier au mieux les victimes et de déterminer leur nombre. Autrement, d'ordonner au Procureur de stipuler expressément dans l'acte d'accusation qu'il est dans l'incapacité totale de fournir ces renseignements ;
- finalement, de fournir des précisions quant aux dates et aux lieux de commission des crimes allégués.

3. La Défense soumet que les faits reprochés à l'Accusé en tant que supérieur hiérarchique devraient être différents de ceux qui sont à l'appui de sa responsabilité individuelle, ce qui n'a pas été fait dans le cas présent.[2] La Défense cite, entre autres, les paragraphes 7 et 25, 9 et 29, 10 et 27 du deuxième chef d'accusation, les paragraphes 45 et 49 du troisième chef d'accusation et les paragraphes 58 et 50 du cinquième chef d'accusation.[3]

4. La Défense affirme qu'aucun nom de personne n'est évoqué dans l'entreprise criminelle commune concernant les accusations pour crimes de guerre et que seuls des noms d'organisations sont donnés, à savoir, le FAR, la Garde Présidentielle et les *Interahamwe*.[4]

5. La Défense soumet que les accusations d'entreprise criminelle commune devraient être retirées de l'acte d'accusation modifié aux motifs qu'il est inconcevable que des prétendus coauteurs ou complices de l'Accusé soient désignés comme ayant participé à une entreprise criminelle commune sans que ces personnes aient été en mesure de se défendre contre de telles accusations. En outre, la Défense souligne que la notion d'entreprise criminelle commune avec des inconnus n'est prévue ni par le Statut, ni par aucun système juridique.[5]

6. La Défense soutient que d'après l'acte d'accusation modifié, c'est en raison de ses pouvoirs et de son autorité que l'Accusé a commis ou ordonné de commettre les faits qui lui sont reprochés. Cependant il s'avère qu'aucun fait matériel n'est avancé pour établir le fondement de cette prétendue autorité.[6]

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[1] Paragraphes 38 et 39 de la requête. La Défense cite l'arrêt *Kupreskič* du 23 octobre 2001, le jugement de la Chambre de première instance dans l'affaire *Niyitegeka* du 16 mai 2003 confirmé par la Chambre d'Appel le 9 juillet 2004, le jugement dans l'affaire *Ntakirutimana* du 19 février 2006 et celui dans l'affaire *Bizimungu* en date du 15 juillet 2004.
[2] Paragraphe 43 de la requête.
[3] Paragraphes 50-52 de la requête.
[4] Paragraphe 54 de la requête.
[5] Paragraphes 55-57 de la requête.
[6] Paragraphes 59-60 de la requête.

7. En ce qui concerne la responsabilité de l'Accusé en tant que supérieur hiérarchique, la Défense affirme, entre autre, que sa position hiérarchique vis-à-vis des gendarmes n'est pas indiquée, ni la milice à laquelle il est supposé appartenir, ni de qui il dépendait et qui dépendait de lui.[7] La Défense soumet qu'il est également reproché à l'Accusé d'avoir joué le rôle de « Ministre de l'Intérieur de fait » pendant la période incriminée alors qu'aucun fait matériel ne l'étaye et que l'on ignore comment l'Accusé aurait acquis cette qualité.[8]

8. En ce qui concerne les accusations relatives à la responsabilité individuelle de l'Accusé, la Défense prétend qu'elles manquent tout autant de précision.[9]

9. La Défense affirme que l'utilisation de l'adverbe « *vers* » pour indiquer une date dans l'acte d'accusation modifié devrait être proscrite comme étant le synonyme d'« *environ* » qui est déjà interdit par la jurisprudence.[10] La Défense indique que le Procureur a utilisé à vingt-cinq reprises cet adverbe dans le présent acte d'accusation modifié.[11]

10. La Défense soumet que l'acte d'accusation comporte de nombreuses expressions qui sont jugées trop vagues. A titre d'exemple, elle cite les expressions « *A partir de juin 1994* » qu'on retrouve aux paragraphes 7 et 25 et « *A une date indéterminée entre le 7 et le 30 mai 1994 ou vers cette période* » au paragraphe 18.[12] Par ailleurs, la Défense prétend que l'adjectif « *indéterminé* » est lui-même synonyme de « *vague* ».[13]

11. La Défense prétend que l'acte d'accusation modifié est imprécis quant à la détermination de certains lieux de commission des infractions alléguées. A titre d'exemple, aux paragraphes 7 et 25 il est écrit « *partout dans la préfecture de Kigali Ville* », ou encore « *à la paroisse Sainte famille, au centre Saint Paul, à la mosquée Kadaffi et au CELA, entre autres lieux, dans le secteur de Nyarugenge* » au paragraphe 37. En outre, de nombreux paragraphes ne précisent même pas les lieux de commission des infractions, entre autres, les paragraphes 8, 9, 10, 53 et 63.[14]

12. La Défense soumet que l'acte d'accusation modifié est imprécis en ce qu'il comporte des chefs d'accusations qui ne mentionnent pas les noms des victimes des crimes allégués.[15] Selon la jurisprudence, le Procureur est tenu de donner dans la mesure du possible tous les détails relatifs à l'identité et au nombre des victimes[16] ou tout au moins, d'indiquer la catégorie à laquelle lesdites victimes appartenaient ou leur situation en tant que groupe.[17] Si le Procureur ne peut remplir les conditions susmentionnées pour des raisons objectives, il doit le stipuler clairement dans l'acte d'accusation tout en indiquant qu'il a fourni les renseignements les plus précis dont il disposait, ce qui n'a pas été fait dans le cas présent.[18] La Défense indique en outre que définir les victimes comme « *Tutsis* » ne suffit pas.[19] Finalement, la Défense allègue que l'utilisation de l'adverbe « *notamment* » aux paragraphes 45 et 49 de l'acte d'accusation pour désigner les victimes d'un crime est à proscrire dans la mesure où elle est de nature à porter préjudice à la préparation de la défense de l'Accusé.[20]

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[7] Paragraphe 61 de la requête.
[8] Paragraphes 65-66 de la requête.
[9] Paragraphe 72 de la requête.
[10] Paragraphes 82-83 de la requête.
[11] Paragraphe 84 de la requête.
[12] Paragraphe 88 de la requête.
[13] Paragraphe 90 de la requête.
[14] Paragraphes 91-95 de la requête.
[15] Paragraphe 98 de la requête. La Défense énumère les paragraphes 7 à 13, 15, 16, 18, 19, 21 à 23, 25 à 29, 32 à 34, 38 à 43, 53 à 55, 58, 60, 63 à 65.
[16] Paragraphes 96 et 101 de la requête.
[17] Paragraphe 99 de la requête.
[18] Paragraphes 102-103 de la requête.
[19] Paragraphe 100 de la requête.
[20] Paragraphes 104-105 de la requête.

13. La Défense soumet que les supposés subordonnés de l'Accusé ne sont pas tous identifiés dans les paragraphes introductifs des chefs d'accusation concernant sa responsabilité pénale en tant que supérieur hiérarchique,[21] ou bien que leur identité n'est pas du tout précisée.[22] Sur ce dernier point, l'acte d'accusation se contente de citer, à titre d'exemple, les « *Interahamwe* » dans les paragraphes 28, 29, 30, 32, 34, 38, 39, 41, 42, 43, 49, 50, 51, 53, 55, 60, 63, 64 et 65; ou encore des « *soldats* » au paragraphe 30.[23] L'acte d'accusation modifié utilise également des formules encore plus vagues, comme dans le paragraphe 31, où les auteurs sont cités comme « *des personnes placées sous son contrôle effectif* » ou comme « *d'autres éléments* », ainsi qu'il est indiqué au paragraphe 63.[24] La Défense souligne que les imprécisions de cette nature ne peuvent que porter préjudice à la préparation de la défense de l'Accusé.[25] Dans l'hypothèse où le Procureur ne serait pas en mesure d'identifier les auteurs des crimes allégués pour des raisons objectives, la Défense affirme qu'il suffit au Procureur de les désigner, en précisant la « catégorie » ou le groupe auxquels lesdites personnes appartiennent. S'il appert que le Procureur ne peut identifier les auteurs nommément, il doit stipuler clairement dans l'acte d'accusation qu'il n'était pas en mesure de le faire.[26] Finalement, la Défense soumet que si ces éléments ont été déterminés par déduction, le Procureur « doit identifier, dans l'acte d'accusation, les faits et circonstances censés conduire à cette déduction ».[27]

14. En guise de conclusion, la Défense soumet que l'acte d'accusation n'est pas suffisamment précis sur certains points pour permettre à l'Accusé d'exercer ses droits et que les imprécisions quant aux dates des faits, à titre d'exemple, lui sont extrêmement préjudiciables puisqu'elles l'empêchent de faire valoir une défense d'alibi. Par conséquent, l'acte d'accusation doit être précisé pour permettre l'exercice effectif des droits de la défense.[28]

Le Procureur

15. Le Procureur soumet qu'il appartient à la Chambre, après avoir entendu tous les moyens de preuve, de déterminer le mode de participation éventuel qui pourrait être retenu contre l'Accusé. Le rôle du Procureur est de confectionner un acte d'accusation étayé par des faits qu'il considère pouvoir prouver en y énonçant le(s) mode(s) de participation reprochés à l'Accusé. Ainsi, les soumissions de la Défense alléguant que les faits reprochés à l'Accusé en tant que supérieur hiérarchique devraient être différents de ceux qui sont à l'appui de sa responsabilité individuelle, sont mal fondées.[29]

16. Le Procureur allègue que l'acte d'accusation modifié ainsi que le mémoire préalable au procès aux pages 9 à 14 fournissent suffisamment de détails en ce qui concerne l'autorité alléguée de l'Accusé.[30]

17. Quant aux imprécisions alléguées relatives aux dates et aux lieux de la commission des faits, aux victimes et aux auteurs, le Procureur soumet que le degré de précision sollicité par la Défense est excessif. Le Procureur souligne qu'il a inclus dans l'acte d'accusation modifié tous les détails possibles y afférant sans pour autant plaider sa cause ni révéler l'identité des témoins protégés.[31] Le Procureur précise en outre que l'acte d'accusation devrait être considéré et lu dans son intégralité.[32]

18. Le Procureur prétend que compte tenu des événements qui se sont déroulés au Rwanda pendant la période incriminée, il lui est impossible d'apporter de plus amples informations concernant

[21] Paragraphes 111 de la requête. La Défense indique les paragraphes 24, 48, 52, 59 et 61 de l'acte d'accusation.
[22] Paragraphe 113 de la requête.
[23] Paragraphe 114 de la requête.
[24] Paragraphe 116 de la requête.
[25] Paragraphe 118 de la requête.
[26] Paragraphes 119-120 de la requête.
[27] Paragraphe 121 de la requête.
[28] Paragraphes 174-177 de la requête.
[29] Paragraphe 6 de la réponse.
[30] Paragraphe 7 de la réponse.
[31] Paragraphe 12 de la réponse.
[32] Paragraphe 9 de la réponse.

l'identification de chacun des co-auteurs de l'Accusé dans le cadre d'une entreprise criminelle commune. Ces prétendus co-auteurs appartenaient le plus souvent à d'importants groupes de miliciens, de militaires ou de civils qui n'étaient pas identifiables. Le Procureur soumet que dans tous les cas, le mémoire préalable au procès apporte plus de clarté sur ce point.[33]

La Réplique de la Défense

19. La Défense réitère que selon la jurisprudence, le Procureur doit clairement distinguer dans l'acte d'accusation, les faits qui engagent la responsabilité pénale de l'accusé sur la base de l'article 6 (1) du Statut de ceux qui engagent sa responsabilité selon l'article 6 (3).[34]

20. La Défense ajoute que les détails relatifs aux dates, aux lieux de commission des faits, aux victimes et aux auteurs des crimes allégués doivent être apportés dans l'acte d'accusation pour permettre à l'accusé de faire valablement valoir ses moyens de défense. Dans le cas où le Procureur ne peut pas fournir lesdits détails en ce qui concerne les victimes, il est tenu d'en donner la raison.[35]

21. La Défense soumet que lorsqu'il s'agit d'événements ayant eu lieu à un endroit précis en présence de nombreuses personnes tels que les événements de Saint Paul, Sainte Famille ou du CELA, il est possible d'être précis quant aux circonstances. A défaut, le procès ne respecterait pas les obligations qui pèsent sur lui en matière de droits de la défense en empêchant l'accusé de se défendre notamment en faisant valoir des défenses d'alibi. Finalement, la Défense allègue que la communication d'un mémoire préalable ne peut pas pallier les carences de l'acte d'accusation.[36]

Délibérations

22. La Chambre note que la présente requête a été déposée dans les délais légaux conformément à l'article 72 du Règlement et qu'il convient de la déclarer recevable.

23. La Chambre note ensuite que les points soulevés par la Défense dans la présente requête peuvent être classés en trois catégories, à savoir, la nécessité de distinguer entre les faits incriminés sous les articles 6 (1) et 6 (3) du Statut; l'absence de précision relative à l'autorité alléguée de l'Accusé; et l'absence de précision relative à la détermination des dates et lieux de la commission des faits, à l'identification des victimes, des subordonnés de l'Accusé et de ses coauteurs dans le cadre de l'entreprise criminelle commune.

Sur la nécessité de distinguer entre les faits incriminés sous les articles 6 (1) et 6 (3) du Statut

24. La Chambre note qu'il est de jurisprudence constante qu'un accusé peut être poursuivi pour un même fait à la fois sous les articles 6 (1) et 6 (3) du Statut, à la seule condition que le Procureur ait clairement précisé dans l'acte d'accusation la manière dont l'accusé a prétendument engagé sa responsabilité pénale tant comme auteur des faits que comme supérieur hiérarchique, en conformité avec les articles susvisés.[37]

25. La Chambre a passé en revue tous les paragraphes de l'acte d'accusation invoqués par la Défense dans sa requête[38] et conclut que le Procureur a suffisamment précisé pour chacun des faits concernés dans le présent acte d'accusation modifié, la manière dont l'Accusé a prétendument engagé

[33] Paragraphe 13 de la réponse.
[34] Paragraphe 171 de la réplique.
[35] Paragraphes 174 et 176 de la réplique.
[36] Paragraphes 178-179 de la réplique.
[37] *Delalić*, « Décision concernant l'exception préjudicielle de l'Accusé *Delalić* relative à des vices de forme de l'acte d'accusation », 2 octobre 1996.
[38] Il s'agit des points 7 et 25, 9 et 29, 10 et 27, 11 et 28, 12 et 29, 13 et 30, 14 et 31, 15 et 32, 16 et 33, 17 et 35, 20 et 36, 21 et 38, 22 et 39, 23 et 40 du deuxième chef d'accusation; des points 45 et 49, 46 et 50, 47 et 51 du troisième chef d'accusation et enfin des points 58 et 60 du cinquième chef d'accusation.

sa responsabilité pénale tant comme auteur des faits que comme supérieur hiérarchique et qu'il échet, par conséquent, de rejeter la demande de la Défense sur ce point.

Sur l'absence de précision quant à l'autorité alléguée de l'Accusé

26. La Chambre note les soumissions de la Défense, particulièrement celle qui allègue qu'aucun fait matériel n'est avancé dans l'acte d'accusation modifié pour établir le fondement de la prétendue autorité de l'Accusé.

27. La Chambre note que le paragraphe 2 de l'acte d'accusation modifié détaille l'identité et les fonctions de l'Accusé durant les évènements de 1994. La Chambre considère que ces indications sont suffisantes pour informer l'Accusé de la position d'autorité qu'il aurait occupée. En particulier, la Chambre note que le paragraphe 2 (C) indique précisément les personnes sur lesquelles l'Accusé aurait exercé une autorité lorsqu'il était membre du Comité de crise mis en place dans la nuit du 6 avril 1994 ainsi que les catégories de personnes placées sous son autorité et que notamment au paragraphe 6, figurent des noms précis comme celui d'Angeline Mukandutiye, membre supposé des interahamwe, ou du Père Wenceslas qui aurait participé au génocide.

28. Concernant les faits spécifiques à l'appui de l'allégation selon laquelle l'Accusé était Ministre de l'Intérieur de fait, il est précisé au paragraphe 2 (E) de l'Acte d'accusation modifié que toute personne souhaitant quitter la ville de Kigali devait en obtenir l'autorisation signée de l'Accusé. La Chambre considère qu'une telle indication est suffisante pour informer l'Accusé de la nature des allégations retenues contre lui afin de lui permettre de préparer effectivement sa défense.

29. En conséquence, la Chambre rejette la demande de la Défense demandant plus de précision quant à l'autorité alléguée de l'Accusé.

30. En outre, la Chambre a noté l'argument de la défense concernant l'imprécision des charges portant sur la responsabilité individuelle de l'Accusé. La Chambre est d'avis que la Défense n'a pas démontré que de telles imprécisions existent et rejette la requête de la défense sur ce point.

Sur l'absence de précision relative à la détermination des dates et lieux de la commission des faits; à l'identification des victimes, des subordonnés de l'Accusé et de ses coauteurs

31. S'agissant de la détermination des dates et lieux de la commission des faits et à l'identification des victimes, la Chambre rappelle ce qui a été énoncé dans l'affaire *Kupreškić* :

> L'obligation qui est faite à l'Accusation de faire dans l'acte d'accusation un exposé concis des faits de l'espèce doit être interprétée à la lumière des dispositions des articles 21 (2), 4 (a) et (b) du Statut, lesquelles précisent que toute personne contre laquelle des accusations sont portées a droit à ce que sa cause soit entendue équitablement, et, plus particulièrement, à être informée de la nature et des motifs des accusations portées contre elle et à disposer du temps et des moyens nécessaires à la préparation de sa défense. La jurisprudence du Tribunal impose dès lors à l'Accusation de présenter les faits essentiels qui fondent les accusations portées dans l'acte d'accusation, mais non les éléments de preuve qui doivent établir ces faits. Dès lors, pour qu'un acte d'accusation soit suffisamment précis, il faut en particulier qu'il expose de manière suffisamment circonstanciée les faits incriminés essentiels pour informer clairement un accusé des accusations portées contre lui afin qu'il puisse préparer sa défense.[39]
>
> La Chambre d'appel se doit d'abord de souligner que l'on ne peut décider dans l'abstrait qu'un fait est ou non essentiel. Tout dépend de la nature de la cause de l'Accusation. Un élément décisif pour déterminer le degré de précision avec lequel l'Accusation est tenue de détailler les faits de l'espèce dans l'acte d'accusation est la nature du comportement criminel reproché à l'accusé. Ainsi, lorsque l'Accusation reproche à un accusé d'avoir personnellement commis des

[39] Arrêt *Kupreškić*, 23 octobre 2001, para. 88.

actes criminels, les faits essentiels, tels que l'identité de la victime, le moment et le lieu du crime et son mode d'exécution, doivent être exposés en détail. À l'évidence, il peut exister des cas où l'ampleur même des crimes exclut « que l'on [puisse] exiger un degré de précision aussi élevé sur l'identité des victimes et la date des crimes ».[40]

C'est le cas, par exemple, lorsque l'Accusation reproche à un accusé d'avoir participé, au sein d'un peloton d'exécution, au meurtre de centaines de personnes. La nature d'une telle affaire n'exige pas que chacune des victimes soit identifiée dans l'acte d'accusation. De même, une personne peut être accusée d'avoir participé, pendant longtemps, dans les rangs de l'armée à un très grand nombre d'attaques contre des civils, qui ont entraîné la mort ou le déplacement forcé d'un grand nombre de personnes. Dans ce cas, l'Accusation n'a pas besoin d'identifier chaque victime tuée ou expulsée pour s'acquitter de l'obligation qui lui incombe de préciser dans l'acte d'accusation les faits de l'espèce essentiels. Toutefois, dans la mesure où l'identité de la victime constitue pour l'accusé une information précieuse pour la préparation de sa défense, l'Accusation doit la lui révéler si elle est en mesure de le faire.[41]

32. La Chambre fait sienne cette jurisprudence et considère que « l'ampleur des crimes » reprochés à l'Accusé dans le cas présent exclut « que l'on [puisse] exiger un degré de précision aussi élevé sur l'identité des victimes, la date et le lieu des crimes ». Par conséquent, la Chambre conclut que les informations fournies dans l'acte d'accusation modifié en ce qui les concerne, sont suffisantes pour la préparation de la défense de l'accusé.

33. S'agissant des allégations soulevées par la Défense concernant l'absence d'informations sur les autres participants aux crimes, la Chambre reprend la conclusion énoncée dans la décision *Krnojelac*,[42] à savoir que, si le Procureur se trouvait dans l'impossibilité de désigner nommément les personnes ayant directement pris part aux événements « il suffirait qu'elle les identifie en précisant la « catégorie » à laquelle ils appartenaient en tant que groupe ou leurs fonctions officielles »

34. Partant de cette jurisprudence, la Chambre trouve suffisante l'utilisation des expressions « des *Interahamwe* », « des miliciens », « des militaires », « des gendarmes », « des *Impuzamugambi* », « des soldats démobilisés », « des conseillers », « des responsables de cellule », « des *nyumbakumi* », « des bourgmestres », « des soldats », « des agents de la police communale », « des civils armés » ou encore « d'autres personnes du mouvement *Interahamwe* » dans le présent acte d'accusation modifié, pour désigner les personnes qui étaient sous l'autorité ou de concomitance avec l'Accusé pendant la période incriminée. En se basant sur cette même jurisprudence, la Chambre est d'avis que les autres vices allégués par la Défense aux paragraphes 115 à 117 de sa requête[43] ne sont pas préjudiciables et qu'il convient de rejeter la demande sur ce point.

35. Enfin, la Chambre considère l'allégation que les accusations d'entreprise criminelle commune devraient être retirées de l'acte d'accusation modifié aux motifs qu'il est inconcevable que des prétendus coauteurs ou complices de l'Accusé soient désignés comme ayant participé à une entreprise

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[40] *Id*., para. 89.
[41] *Id*., para. 90.
[42] *Krnojelac*, « Décision relative à l'exception préjudicielle de la Défense pour vices de forme de l'acte d'accusation », Chambre de première instance, 24 février 1999.
[43] Paragraphe 115 de la requête se lit comme suit: "L'acte d'accusation utilise également des formules encore plus vagues dans certains points des chefs d'accusation"
Paragraphe 116 : « Il en est ainsi :

- dans le chef d'accusation du point 31 où les auteurs sont cités comme « *des personnes placées sous son contrôle effectif* » ;
- dans les chefs d'accusation des points 41 et 53 où les auteurs seraient « … *et d'autres personnes* » ;
- dans le chef d'accusation du point 63 où les auteurs sont identifiés comme « *des subordonnés de Tharcisse Renzaho, dont (…) pour ne citer que ceux-là* »
- et dans le chef d'accusation du point 40 « …*pour ne citer que celles-là* ».

Paragraphe 117 : « Le Procureur va même jusqu'à se contenter d'indiquer « *des personnes présentes* » dans le chef d'accusation du point 19.

criminelle commune sans que ces personnes aient été en mesure de se défendre contre de telles accusations, comme étant dépourvue de toute base juridique.

PAR CES MOTIFS

LE TRIBUNAL,

REJETTE la requête de la Défense;

Arusha, le 5 septembre 2006.

[Signé] : Arlette Ramaroson; William H. Sekule; Solomy Balungi Bossa

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Décision relative à la demande aux fins de certification d'appel de la décision du 5 septembre 2006 en vertu de l'article 72 (B)
25 octobre 2006 (ICTR-97-31-PT)

(Original : Français)

Chambre de première instance II

Juges : Arlette Ramaroson, Présidente; William H. Sekule; Solomy Balungi Bossa

Tharcisse Renzaho – Certification d'appel – Décision rendue sur une requête en exceptions préjudicielles, Absence de question susceptible de compromettre sensiblement l'équité et la rapidité ou l'issue du procès contre l'accusé – Requête rejetée

Instrument international cité :

Règlement de preuve et de procédure, art. 72, 72 (A), 72 (B), 72 (B) (ii) et 73

Jurisprudence internationale citée :

T.P.I.R.: Chambre de première instance, Le Procureur c. Bagosora et al, Decision on Certification of Interlocutory Appeal from Decisions on Severance and Scheduling of Witnesses, 11 septembre 2003 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. 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 of Evidence, 4 February 2005 (ICTR-97-21)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance II, composée des juges Arlette Ramaroson, Présidente, William H. Sekule et Solomy B. Bossa (la « Chambre »);

ÉTANT SAISI de la « Requête aux fins d'autorisation d'interjeter appel de la décision du 5 septembre 2006 en vertu de l'article 72 (B) du Règlement de preuve et de procédure » déposée le 11 septembre 2006 (la « requête »);

CONSIDÉRANT la « Prosecutor's Response to Motion Requesting Certification to Appeal Trial Chamber Decision dated 5 September 2006 Regarding Rule 72 (B) » (la «réponse») et la XX déposée le XX 2006 ;

VU la "Décision sur la requête en exception préjudicielle pour vices de forme de l'acte d'accusation » du 5 septembre 2006 (la « Décision contestée »);

VU le Statut du Tribunal (le « Statut ») et le Règlement de procédure et de preuve (le « Règlement »), notamment l'article 72 du Règlement;

STATUANT sur la base des mémoires déposés par les parties conformément à l'article 72 (A) *in fine* du Règlement;

Introduction

1. Le 5 septembre 2006, la Chambre a rejeté la requête de la Défense en exceptions préjudicielles pour vices de forme de l'acte d'accusation. Dans sa décision, la Chambre avait conclu que le Procureur avait suffisamment précisé dans l'acte d'accusation la manière dont l'accusé a prétendument engagé sa responsabilité pénale comme auteur des faits et comme supérieur hiérarchique. La Chambre avait également rejeté les demandes de la Défense pour davantage de précision quant à l'autorité alléguée de l'accusé et celles relatives à la détermination des dates et lieux de la commission des faits, à l'identification des victimes, des subordonnés de l'accusé et de ses co-auteurs. La Défense souhaite contester cette décision et demande en conséquence l'autorisation d'interjeter appel. Le Procureur s'oppose à cette requête.

Soumissions

2. S'appuyant sur les articles 17-4 et 20-4 du Statut et l'article 47 (C) du Règlement, la Défense conteste la validité de l'acte d'accusation en raison des accusations vagues et imprécises portées contre l'accusé alors que le respect des droits de la défense requiert que l'accusé soit informé clairement des charges contre lui.[1] La Défense soutient que l'égalité des armes entre le Procureur et la Défense a été rompue et que la décision de la Chambre touche une question susceptible de compromettre sensiblement l'équité du procès.

3. La Défense estime également que la décision contestée est susceptible de compromettre sensiblement la rapidité du procès ou son issue car les précisions de l'acte d'accusation réclamées par la Défense accéléreraient sensiblement la rapidité du procès.[2] La Défense en conclut que le règlement immédiat de cette question par la Chambre d'appel pourrait concrètement faire avancer la procédure car il emporterait une amélioration des garanties du procès sur le plan de l'équité et de la rapidité.

4. Le Procureur soumet que la Défense n'a pas démontré que les circonstances exceptionnelles de certification d'appel sont réunies.[3] Au contraire, la Défense s'est contentée de réitérer ou d'élargir les arguments avancés au soutien de la requête initiale. En particulier, la Défense n'a pas prouvé que la

[1] La Défense cite le jugement d'appel *Kupreskic* (23 octobre 2001), les jugements de première instance dans les affaires *Niyitegeka* (16 mai 2003), *Ntakirutimana* (19 févier 2003), *Brdanin et Talic* (TPIY), 20 février 2001. La Défense s'appuie également sur l'article 10 de la déclaration universelle des droits de l'homme, les jugements de la cour européenne des droits de l'homme dans l'affaire *Neumeister c. Autriche* (27 juin 1968) et dans l'affaire *Dumbo Beheer Bv. Pays Bas* (27 octobre 1993)

[2] La Défense cite plusieurs textes fondamentaux régionaux et internationaux, ainsi que les affaires *Blaskic*, *Delalic*, *Kunarac*, *Djukic*, *Kupresckic*, *Bikindi* et *Ntagerura et autres*.

[3] Le Procureur cite la décision *Bizimungu et al.* du 17 novembre 2004.

Chambre a commis une erreur lors de son appréciation du caractère approprié de l'acte d'accusation modifié.[4] En outre, la Défense n'a pas démontré en quoi une résolution immédiate de la question par la Chambre d'appel pourrait faire avancer la procédure, étant donné que rien n'empêche l'affaire d'être entendue en l'état.

5. En conclusion, le Procureur soutient que la Chambre a correctement identifié et analysé les questions soulevées par la Défense dans sa requête en exceptions préjudicielles et que les modes de participation de l'Accusé aux crimes allégués sont suffisamment précisés dans l'acte d'accusation.

Délibérations

6. La Chambre rappelle que les décisions rendues sur une requête en exceptions préjudicielles ne sont pas susceptibles d'appel d'après l'article 72 (B) du Règlement sauf pour les exceptions d'incompétence, auquel cas l'appel est de droit. Exceptionnellement, aux termes de l'article 72 (B) (ii), la Chambre peut accorder l'autorisation de faire appel d'une telle décision 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. » La Chambre rappelle que ce critère est similaire au critère de certification d'appel requis pour les requêtes déposées en vertu de l'article 73.[5]

7. La Chambre n'est pas convaincue par l'argument de la Défense suivant lequel la décision contestée touche une question susceptible de compromettre sensiblement l'équité et la rapidité ou l'issue du procès contre l'Accusé. En effet, la Chambre note que la Défense s'est contentée de réitérer les arguments développés au soutien de la requête initiale ayant abouti à la décision contestée. La Défense en a ensuite déduit que l'équité, la rapidité et l'issue du procès en seraient affectées. Or, la Chambre rappelle que les conditions de certification requièrent que les critères de l'article 72 (B) soient, en l'espèce démontrés d'une manière spécifique et qu'une simple référence aux arguments à l'appui de la décision contestée ne suffit pas.[6]

8. Les conditions de l'article 72 (B) étant cumulatives, la Chambre n'examinera pas les arguments de la Défense à l'appui de la deuxième condition et rejette par conséquent la requête dans son entièreté.

PAR CES MOTIFS

LE TRIBUNAL,

REJETTE la requête de la Défense.

Arusha, le 25 octobre 2006.

[Signé] : Arlette Ramaroson; William H. Sekule; Solomy Balungi Bossa

[4] Le Procureur cite la décision *Boskovski* du 26 mai 2006 (TPIY) et la décision interlocutoire *Bagosora et al*. du 6 octobre 2005.
[5] Le Procureur c. Bagosora et al, Decision on Certification of Interlocutory Appeal from Decisions on Severance and Scheduling of Witnesses, 29 octobre 2003, para.8.
[6] 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 of Evidence", 4 February 2005, para. 11.

The Prosecutor v. Juvénal Rugambarara

Case N° ICTR-2000-59

Case History

• Name: RUGAMBARARA

• First Name: Juvénal

• Date of Birth: 1959

• Sex: male

• Nationality: Rwandan

• Former Official Function: *Bourgmestre* of Bicumbi, *préfecture* of Kigali-Rural

• Date of Indictment's Confirmation: 13 July 2000

• Count: crime against humanity (extermination)

• Date and Place of Arrest: 11 August 2003, in Uganda

• Date of Transfer: 13 August 2003

• Date of Initial Appearance: 15 August 2003

• Pleading: guilty

• Date Trial Began: 13 July 2007

• Date and content of the Sentence: 16 November 2007, sentenced to 11 years imprisonment

Decision on the Motion for Protective Measures for Defence Witnesses 8 May 2006 (ICTR-2000-59-I)

(Original : English)

Trial Chamber II

Judges : Asoka De Silva, Presiding Judge; Taghrid Hikmet; Seon Ki Park

Juvénal Rugambarara – Protective measures for witnesses – Real and objective fears – Absence of independent material provided by the Defence – Motion denied

International Instruments Cited :

Rules of Procedure and Evidence, Rules 69, 73 (A) and 75 ; Statute, Art. 19, 20 and 21

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Aloys Simba, Decision on Defence Request for Protection of Witnesses, 25 August 2004 (ICTR-2001-76) ; Trial Chamber, The Prosecutor v. Juvénal Rugambarara, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, 28 October 2005 (ICTR-2000-59) ; 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)

I.C.T.Y.: Trial Chamber, The Prosecutor v. Slobodan Milošević, Second Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, 18 June 2002 (IT-02-54)

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 Prescription de mesures visant à la protection des témoins à décharge" filed on 24 April 2006"[7] (the "Motion");

NOTING that the Prosecution has not filed a response;

CONSIDERING the Statute of the Tribunal (the "Statute"), in particular Articles 19, 20 and 21 and of the Statute, and the Rules of Procedure and Evidence (the "Rules"), specifically Rules 69 and 75 of the Rules;

NOW DECIDES the Motion pursuant to Rule 73 (A) of the Rules on the basis of the written submissions of the Defence.

Submissions of the Defence

1. The Defence for Juvénal Rugambarara requests the Chamber to order protective measures for its potential witnesses pursuant to Articles 19 to 21 of the Statute and Rules 69 and 75 of the Rules.

[7] Motion for Protective Measures for Defence Witnesses (unofficial translation).

2. The Defence submits that the witnesses it intends to call reside in Rwanda, in other African nations, in Europe and in North America.

3. The Defence refers to the Chamber's Decision of 31 January 2006, in which protective measures for Prosecution witnesses were granted, and submits that the witnesses the Defence intends to call are in the same situation as the Prosecution witnesses and the witnesses of other accused persons.

4. The Defence submits that the witnesses it has contacted have expressed their fears to testify before the Tribunal if their identities are known or revealed.

5. The Defence requests that the Chamber grant eleven specific witness protection measures outlined on pages 2-4 of the Motion.

6. Finally, the Defence submits that if the Chamber wishes to see any supporting material or hear reasons orally in support of the present Motion, it should order a closed session.

Deliberations

7. The Chamber recalls that measures for protection of witnesses are granted on a case-by-case basis.[8] The Chamber further recalls its Decisions of 28 October 2005 and 31 January 2006 in this matter in which it held, *inter alia*, that witnesses for whom protective measures are sought, must have a real fear for their own safety or the safety of their family, and that *this subjective fear must be objectively justified*.[9] Finally, the Chamber recalls the ICTY decision in the *Milosević* case, where the Trial Chamber stated that "fears expressed by potential witnesses are not in themselves sufficient to establish a real likelihood that they may be in danger or at risk."[10]

8. The Chamber notes the Defence's submissions that its potential witnesses have expressed concerns over their fate if they testify before the Tribunal. The Chamber observes, however, that the Defence has not provided any independent material that demonstrates that the fears of its potential witnesses are well founded. The Chamber reiterates that without any such material, it is left to speculate about the security situation of potential witnesses and no reasoned decision on protective measures can be made.

9. As regards the Defence submission to order a closed session, the Chamber is of the opinion that an application for protective measures for witnesses can be dealt with on the basis of written submissions and reminds the Defence that any supporting material can be provided by way of confidential filing.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion as currently formulated without prejudice to the right of the Defence to file a fresh motion with the appropriate supporting material.

Arusha, 8 May 2006.

[Signed] : Asoka De Silva; Taghrid Hikmet; Seon Ki Park

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[8] *Prosecutor v. Aloys Simba*, Case N°01-76-I, Decision on Defence Request for Protection of Witnesses (TC), 25 August 2004, para. 5.
[9] *Prosecutor v. Juvenal Rugambarara,* Decision on the Prosecutor's Motion for Protective Measures for Witnesses, 28 October 2005, para. 6; Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 31 January 2006, para. 9.
[10] *Prosecutor v. Milosević*, Case N°IT-02-54, Second Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses (TC), 18 June 2002, para. 7.

Le Procureur c. Juvénal Rugambarara

Affaire N° ICTR-2000-59

Fiche historique

• Nom: RUGAMBARARA

• Prénom: Juvénal

• Date de naissance: 1959

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: Bourgmestre de Bicumbi, préfecture de Kigali Rurale

• Date de confirmation de l'acte d'accusation: 13 juillet 2000

• Chef d'accusation: crime contre l'humanité (extermination)

• Date et lieu de l'arrestation: 11 août 2003, en Ouganda

• Date du transfert: 13 août 2003

• Date de la comparution initiale: 15 août 2003

• Précision sur le plaidoyer: coupable

• Date du début du procès: 13 juillet 2007

• Date et contenu du prononcé: 16 novembre 2007, condamné à 11 ans d'emprisonnement

The Prosecutor v. Emmanuel RUKUNDO

Case N° ICTR-2001-70

Case History

- Name: RUKUNDO
- First Name: Emmanuel
- Date of Birth: 1959
- Sex: male
- Nationality: Rwandan
- Former Official Function: Military chaplain at Ruhengeri *préfecture*, transferred afterwards to Kigali
- Date of Indictment's Confirmation: 5 July 2001
- Date of Indictment's Amendment: 6 October 2006
- Counts: genocide and crimes against humanity (murder, extermination)
- Date and Place of Arrest: 12 July 2001, in Geneva, Switzerland
- Date of Transfer: 20 September 2001
- Date of Initial Appearance: 26 September 2001
- Date of Trial began: 15 November 2006
- Date and content of the sentence: 27 February 2009, sentenced to 25 years imprisonment
- Case on Appeal

Decision on the Prosecutor's Request for Leave to File an Amended Indictment 28 September 2006 (ICTR-2001-70-PT)

(Original : English)

Trial Chamber II

Judge : Asoka de Silva, Presiding Judge

Emmanuel Rukundo – Leave to amend an indictment – Factors taken into consideration – Material facts underpinning the already-existing charges against the Accused, Clarification of the notion – Obligation for the Prosecution to clarify some ambiguities, to delete a passage, to specify some information and to harmonise the names of various locations mentioned in the proposed amended indictment – Absence of prejudice to the rights of the Accused to a fair and expeditious trial – Motion granted

International Instruments Cited :

Rules of Procedure and Evidence, Rules 50 and 73 (A) ; Statute, Art. 6 (1) and 6 (3)

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) ; Appeals Chamber, The Prosecutor v. Casimir Bizimungu et al., Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File an Amended Indictment, 12 February 2004 (ICTR-99-50); 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); Trial Chamber, The Prosecutor v. Tharcisse Muvunyi, Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, 23 February 2005 (ICTR-2000-55A) ; 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)

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Zoran Kupreškić, Judgement, 23 October 2001 (IT-95-16)

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

SITTING as Trial Chamber II composed of Judge Asoka de Silva, designated pursuant to Rule 73 (A);

BEING SEIZED OF the "Prosecutor's Request for Leave to File an Amended Indictment" filed on 25 November 2005 (the "Motion");

HAVING RECEIVED AND CONSIDERED the

(i) "Brief in Support of the Prosecutor's Request for Leave to File an Amended Indictment" filed on 29 November 2005 (the "Support Brief");

(ii) "*Réponse du Père Emmanuel Rukundo à la* Prosecutor's Request for Leave to File an Amended Indictment" filed on 01 December 2005 (the "Response");

(iii) "Prosecutor's Response (*sic*) to Emmanuel Rukundo's Response to the Prosecutor's Request for Leave to File an Amended Indictment" filed on 12 December 2005 (the "Reply");

(iv) "*Réplique à la* 'Prosecutor's Response to Emmanuel Rukundo *à la* Prosecutor's Request for Leave to File an Amended Indictment'" filed on 15 December 2005 (the "Rejoinder"); and

(v) "À Messieurs les Président et Juges composant la Chambre de première instance III du Tribunal pénal international pour le Rwanda" filed on 2 March 2006 (the "Further Submission" by the Defence Counsel)

NOTING that the original Indictment against Emmanuel Rukundo was dated 22 June 2001 and filed with the Registry on 25 June 2001;

RECALLING that the Confirming Judge partially confirmed the Indictment in a Decision dated 5 July 2001; rendered an Additional Act of Confirmation on 12 September 2001; and a Second Additional Act of Confirmation on 21 September 2001;

RECALLING FURTHER that in compliance with Trial Chamber III's "Decision on Preliminary Motion" dated 26 February 2003, the Prosecution submitted an Amended Indictment dated 27 March 2003 and filed on 31 March 2003;

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

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

Introduction

1. On 25 November 2005, the Prosecution submitted a Motion for Leave to File an Amended Indictment, followed by a Support Brief and a translation into French of the proposed Amended Indictment. The Accused, working *pro se*, filed a Response, to which the Prosecution sent a Reply and the Accused then filed a Rejoinder. After her appointment as Counsel for the Accused, Ms Condé also made a Further Submission addressing the issue. The case was formally transferred from Trial Chamber III to Trial Chamber II on 14 September 2006[1] and the trial is scheduled to commence in November 2006.

Submissions of the Parties

The Prosecution

2. Relying on Rule 50 of the Rules, the Prosecution requests leave of the Chamber to file an Amended Indictment. It argues that since Rule 50 does not explicitly prescribe a time-limit within which the Prosecution may move to amend an indictment, this leaves open the possibility of amending the indictment at any time in light of the circumstances of each individual case.

[1] See Interoffice Memorandum from the President of the Tribunal to the Chief of the Court Management Section dated 14 September 2006.

3. The Prosecution submits that its Motion is justified in law and on the evidence and that the proposed Amended Indictment should be granted for the following reasons: it is based on the same charges and no substantial changes have been made to the initial counts of the current Indictment; it sets forth the facts and charges with greater particularity and captures the nature of the Accused's culpability with greater clarity; it brings the existing Indictment in accordance with the jurisprudence of the ICTR and current charging practices of the Office of the Prosecutor; it will not prejudice the rights of the Accused to a fair trial and it will, on the contrary, expedite the trial; it expands and elaborates on the factual basis of the existing charges against the Accused; it is based on a substantial volume of the evidence that has already been disclosed to the Accused under Rule 66 (A); any new allegations are supported by the same factual elements pleaded in the original Indictment thus mitigating any prejudice or surprise to the Accused; and it does not amount to a "substitution" of the existing Indictment.

4. The Prosecution further submits that it has deleted some paragraphs from the current Indictment and consolidated others, so that each charge is now pleaded with greater particularity and specificity in respect of the involvement of the Accused. It argues that the proposed Amended Indictment will give the Accused the ability to better prepare a defence and will allow the trial to proceed more expeditiously. Additionally, the Prosecution submits that in the proposed Amended Indictment there are new allegations that nevertheless do not alter the crimes charged, so the possibility of prejudice to the Accused is greatly reduced. Finally, the Prosecution argues that it is not acting maliciously and that the arguments raised by the Accused concerning this Motion are matters of evidence that will be dealt with at trial.

The Defence

5. The Accused submits, first of all, that the Amended Indictment dated 27 March 2003 has never been "ratified" by the Chamber. He further submits that the proposed amendment of 25 November 2005 does not add any clarity to the existing charges but substantially alters the spirit and the letter of the Indictment. According to the Accused, the Motion is merely an attempt by the Prosecution to reintroduce the charge of superior responsibility that had been rejected by the Confirming Judge in July 2001. He argues that as a chaplain he had no authority over any soldiers or armed civilians and therefore that it is unfair to hold him responsible for any crimes allegedly committed by them. Finally, the Accused submits that the repeated attempts to modify the Indictment suggest that there is no evidence against him. He therefore prays the Chamber not only to deny the Motion but also to order the Prosecution to withdraw the Indictment.

6. Counsel for the Defence endorses the Accused's submissions, but adds that should the Chamber be minded to grant the Motion, it should direct the Prosecution to specify which communal office in Gitarama *préfecture* is referred to at paragraph 10 (iv) of the proposed Amended Indictment.

Deliberations

7. The Chamber recalls the provisions of Rule 50 of the Rules, pursuant to which it may grant leave to amend an indictment. While the Rule does not establish the criteria for granting such leave, the jurisprudence of the Tribunal unambiguously places the onus on the Prosecution to demonstrate the factual and legal justifications for any amendment sought. In determining whether to grant leave to amend an indictment, a Trial Chamber may take the following factors into consideration: the interests of justice;[2] judicial economy;[3] the likely prejudice to an accused's right to a fair and expeditious trial;[4]

[2] *The Prosecutor v. Tharcisse Muvunyi*, Case N°ICTR-2000-55A-PT, "Decision on the Prosecutor's Motion for Leave to File an Amended Indictment", 23 February 2005, para. 26.

[3] ***THE PROSECUTOR V. AUGUSTIN NDINDILIYIMANA ET AL*, CASE N°ICTR-2000-56-I, "DECISION ON PROSECUTOR'S MOTION UNDER RULE 50 FOR LEAVE**

the existence of newly discovered evidence that was unknown to the Prosecution at the time the initial indictment was drafted and confirmed;[5] the nature and scope of the proposed amendment;[6] and whether the proposed changes more accurately describe "the totality of the criminal conduct of the accused."[7] The Chamber will evaluate the Parties' submissions on the basis of this jurisprudence.

8. Having compared the contents of the proposed Amended Indictment to those of the current Indictment, the Chamber finds that paragraphs 10 (ii), 10 (iii), and 10 (iv) of the proposed Amended Indictment contain new factual allegations that were not included in the current Indictment. The Chamber notes, for instance that whereas the current Indictment at paragraphs 9 through 12 makes a general reference to "attacks against the Tutsis" at various locations in Gitarama *préfecture* during the months of April and May 1994, the proposed Amended Indictment goes further by providing greater particulars on the venues, the criminal conduct alleged and the victims. Thus, while the substantive charge of genocide remains the same in both versions of the Indictment, the amendment provides more specifics. Under the Tribunal's jurisprudence, the Prosecution is required to plead the material facts upon which it relies to establish its counts or charges in the indictment. However, a failure to plead those material facts may, in certain limited circumstances, be remedied by clear and timely notice to the Defence.[8]

9. The Chamber is of the view that these allegations are merely additional material facts underpinning the already-existing charges against the Accused[9] and is therefore satisfied that no new charges have been added and that the proposed changes plead the facts with greater specificity and clarity. As the Appeals Chamber has stated,

> "There is a clear distinction between counts or charges made in an indictment and the material facts that underpin that charge or count. 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). The distinction between the two is one that is quite easily drawn."[10]

10. The Chamber notes that the Prosecution has charged the Accused for the same crimes in both the current Indictment and the proposed Amended Indictment, namely, genocide, murder as a crime against humanity, and extermination as a crime against humanity. In both versions of the Indictment, the Prosecution has charged the Accused with individual criminal responsibility pursuant to Article 6 (1) of the Statute for all three counts. In the Chamber's view, although the Accused is being charged with individual criminal responsibility for his alleged direct participation in the crimes or for aiding and abetting others in the commission of a crime, the language of the proposed Amended Indictment

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TO AMEND THE INDICTMENT ISSUED ON 20 JANUARY 2000 AND CONFIRMED ON 28 JANUARY 2000", 26 MARCH 2004, PARAS. 40-44.

[4] *The 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.

[5] *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.

[6] *Prosecutor v. Bizimungu et al.,* Case N°ICTR-99-50-AR50, "Appeals Decision on Prosecutor's Interlocutory Appeal against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004", para. 16.

[7] *The Prosecutor v. Anatole Nsengiyumva*, "Decision on the Prosecutor's Request for Leave to Amend the Indictment", 2 September 1999, p. 4; *The Prosecutor v. Jean Bosco Barayagwiza*, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 11 April 2000, p. 4.

[8] *The Prosecutor v. Kupreskic et al.*, Case N°IT-95-16, Judgement (AC), 23 October 2001, para. 114.

[9] *The Prosecutor v. E. Niyitegeka*, Case N°ICTR-96-14-I, "Decision on the Prosecutor's Request for Leave to File an Amended Indictment", 21 June 2000.

[10] *The Prosecutor v. Tharcisse Muvunyi*, Case N°ICTR-2000-55A-AR73, "Decision on Prosecution Interlocutory Appeal against Trial Chamber II Decision of 23 February 2005", 12 May 2005, para. 19.

still makes reference to the Accused's "authority over soldiers and armed civilians". This is ambiguous and could be interpreted as if the Prosecution is also charging the Accused with superior responsibility pursuant to Article 6 (3). The Chamber therefore calls on the Prosecution to clarify this ambiguity by explicitly indicating the forms of responsibility with which the Accused is being charged.

11. At the same time, the Chamber observes that the Prosecution alleges criminal conduct falling outside the Tribunal's temporal and territorial jurisdiction. At paragraphs 5 through 8 of the proposed Amended Indictment, for instance, there are repeated references to events that occurred prior to 1 January 1994. Unless such passages fall within the recognised and applicable exceptions, the Chamber will consider them as background or context material and not as substantive charges against the Accused. Similarly, at paragraph 23, there is a reference to an event that allegedly occurred in Switzerland in 1996. The Chamber urges the Prosecution to delete that passage as it refers to events falling outside both the temporal and territorial jurisdiction of the Tribunal. Additionally, the Chamber agrees with the Defence that the Indictment needs to specify which one of the several communal offices in Gitarama *préfecture* is referred to at paragraph 10 (iv) of the proposed Amended Indictment.

12. Moreover, it is alleged at paragraph 15 of the proposed Amended Indictment that the Accused "and other authorities" instigated and ordered militiamen to kill several persons and to commit other crimes. However, it is not clear who those "other authorities" might have been and if the Accused is being charged with a form of joint criminal enterprise. The Prosecution should clearly state what form of responsibility is being pleaded under paragraph 15 of the proposed Amended Indictment. In particular, the Prosecution should ensure that no new charge against the Accused is being introduced.

13. Furthermore, at paragraph 18 of the proposed Amended Indictment, the Accused is being charged with genocide for denouncing one Father Alphonse Mbuguje who was later killed. In the same paragraph, it is alleged that *Kangura* newspaper and radio RTLM also denounced Father Alphonse Mbugeje (*sic*) thereby causing his death. The same allegations are repeated at paragraph 25 under the murder charge. It remains unclear to the Chamber if it is the same victim who is mentioned in both instances and whether it was the denunciation by the Accused or by the media outlets that led to the death of the victim. The Chamber instructs the Prosecution to clarify this ambiguity.

14. In a similar vein, the Chamber notes that the Prosecution frequently uses different terms to refer to apparently the same venue. For example, the terms "*petit séminaire*" and "minor seminary" appear to refer to the same place while "*grand séminaire*" and "major seminary", or "*Collège Saint Joseph*" and "St. Joseph College" also seem to indicate the same venue. In the interests of clarity and uniformity, the Chamber urges the Prosecution to harmonise the names of the various locations throughout the Indictment.

15. In conclusion, the Chamber is satisfied that the proposed Amended Indictment does not amount to a substitution of the current Indictment, does not introduce any new charges against the Accused, contains no substantial changes in comparison to the current Indictment, sets forth the facts and allegations with greater particularity, and will not prejudice the rights of the Accused to a fair and expeditious trial.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS in part the Prosecution's request for leave to file an Amended Indictment and:

ORDERS the Prosecution to specify which communal office of Gitarama *préfecture* is referred to at paragraph 10 (iv) of the proposed Amended Indictment;

ORDERS the Prosecution to delete from the proposed Amended Indictment the reference to an event that allegedly occurred in Switzerland in 1996;

ORDERS the Prosecution to clarify the ambiguity surrounding the reference to the Accused's alleged "authority over soldiers and armed civilians" and the presumed existence of a superior-subordinate relationship;

ORDERS the Prosecution to clearly indicate the form of responsibility being pleaded at paragraph 15 and throughout the proposed Amended Indictment;

ORDERS the Prosecution to clarify the allegations contained at paragraphs 18 and 25 of the proposed Amended Indictment;

ORDERS the Prosecution to harmonise the names of the various locations referred to in the proposed Amended Indictment";

ORDERS the Prosecution to file a new Amended Indictment in French and English reflecting the above Orders no later than Friday, 6 October 2006;

FURTHER ORDERS the Registry to immediately serve the new Amended Indictment, in French and English, on the Accused and his Counsel.

Arusha, 28 September 2006.

[Signed] : Joseph Asoka de Silva

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Amended Indictment
6 October 2006 (ICTR-2001-70-I)

(Original : not specified)

I. The Prosecutor of the United Nations International Criminal Tribunal for Rwanda, ("the Prosecutor") pursuant to the authority stipulated in Article 17 of the Statute of the International Criminal Tribunal for Rwanda ("the Statute") charges:

Emmanuel Rukundo

With

Count 1 : Genocide

Count 2: Murder as a crime against humanity

Count 3 : Extermination as a crime against humanity

II. The Accused:

A. Emmanuel Rukundo was born in 1 December 1959, at Mukingi, Gitarama *prefecture*, Rwanda.

B. At all material times referred to in this indictment, Emmanuel Rukundo was a priest and military chaplain in the Rwandan Armed Forces (hereinafler, the "RAF"), as follows:

(i) He was ordained a priest on 28 July 1991, and served as parish priest in Kanyanza Parish, in Gitarama *Prefecture*.

(ii) He was appointed as military chaplain in the RAF in February 1993. In May 1993, he was posted to Ruhengeri and Gisenyi military sectors.

(iii) Relying on the authority due to his position as a priest and military chaplain in the RAF, Emmanuel Rukundo ordered, instigated, or aided and abetted soldiers, *interhamwe* and armed civilians, variously, in Gitarama *Prefecture*, notably at the Gitarama *commune* office at Nyabikenke; the Bishop's office of the Diocese of Kabgayi, otherwise called *L'évêché;* Saint Léon Minor Seminary; a place called TRAFIPRO, and otherwise known as CND; Saint Joseph College; Kabgayi Major Seminary; and two primary schools and other facilities in Kabgayi, in which Tutsi refugees sought protection in April – July 1994, to commit the crimes that are described below in this indictment. Similarly, he ordered, instigated, or aided and abetted *gendarmes* to do a killing in Cyangugu *Prefecture*, as described below in this indictment.

III. Charges and Concise Statement of facts

1. At all times referred to in this indictment there existed in Rwanda a minority ethnic or racial group known as Tutsis, officially identified as such by the government. The majority of the population was comprised of an ethnic or racial group known as Hutus, also officially identified as such by the government.

2. During the course of 1994, particularly between 6 April and 17 July 1994, there were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks soldiers, *Interahamwe* militia and armed civilians targeted and attacked Tutsis on the basis that they were Tutsis, with intent to destroy, in whole or in part, the Tutsi ethnic group as such. As a result of the attacks, there were a large number of deaths of persons of Tutsi ethnic identification.

Count 1: Genocide

The Prosecutor charges Emmanuel Rukundo with genocide, a crime stipulated in Article 2 (3) (a) of the Statute, in that from 6 April through 17 July 1994, in Rwanda, notably in Gitarama and Cyangugu *Prefectures*, Emmanuel Rukundo was responsible for killing or causing serious bodily or mental harm to members of the Tutsi racial or ethnic group with the intent to destroy, in whole or in part, a racial or ethnic group, as such, as outlined in paragraphs 3 through 22 below.

Concise Statement of Facts for Count 1

Individual Criminal Responsibility

Pursuant to Article 6 (1) of the Statute, the accused, Emmanuel Rukundo, is individually responsible for the crime of genocide because he planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of this crime, with the object, purpose, and foreseeable outcome being the commission of genocide against the Tutsi racial or ethnic group, and persons identified as Tutsis, in Gitarama and Cyangugu *Prefectures*, Rwanda. With respect to the commission of this crime, Emmanuel Rukundo, relying on the authority due to his position as a priest and military chaplain in the RAF, ordered, instigated, or aided and abetted soldiers, armed civilians and the *interahamwe* militia, for at least the period of 6 April through 17 July 1994, to do the acts described below in this indictment. The particulars that give rise to his individual criminal responsibility are set forth in paragraphs 3 through 22 below.

3. Emmanuel Rukundo was known as an extremist. He hated the Tutsi. Since about 1973, he fought against his Tutsi colleagues at the Saint Léon Minor Seminary in Kabgayi. He was expelled from this seminary in 1973, because of his racist tendencies and was known to be sectarian at Nyakibanda Major Seminary, in Butare, by several clergy.

4. After the attack by the Rwandan Patriotic Front (hereinafter, "the RPF") in Rwanda, in October 1990, Emmanuel Rukundo, while at the Nyakibanda Major Seminary, created and led a group of extremists called *Ngarukiragihugu* to collect money to purchase ammunition and compose songs with extremist passions to support the RAF in fighting the RPF. At that time he swore that he would take to the bush if the RPF won the war.

5. In spite of his attitude, he was ordained a priest in July 1991, by Monsignor Thaddée Nsengiyumva, and was appointed as priest of Kanyanza Parish in Gitarama.

6. From 1990 through 1994, Emmanuel Rukundo showed hatred for Tutsi priests and systematically denounced them as accomplices of the *Inkotanyi*, saying that the Nyakibanda Major Seminary was a bastion of the Tutsi, and that it was difficult to live in such a milieu as a Hutu, and as one who would become a priest.

7. In particular, in the months of April and May 1994, Emmanuel Rukundo denounced as an *Inkotanyi* one of his colleagues, the priest Alphonse Mbuguje, declaring him an *Inyenzi* collaborator who contributed in funding RPF-*Inkotanyi* activities.

8. In February 1993, Emmanuel Rukundo was appointed army chaplain in the RAF, a function he exercised during 1994. As army chaplain from 1993 through 1994, Emmanuel Rukundo dressed in military uniform, bore arms and had armed soldiers as his escort.

9. During February 1994, in reaction to the Arusha Agreements, Emmanuel Rukundo took the Hutu extremist position and was involved in the campaigns for mobilization of the Hutu against the Tutsi and at that time he stated that Tutsi are a people to destroy and that he must fight against them by all means.

10. Beginning after 6 April 1994, there were widespread and systematic attacks against the Tutsis in Gitarama *Prefecture*. During this time many Tutsis of this *prefecture* left their houses to seek refuge in different places in Kabgayi, including those under the control of the Diocese of Kabgayi, such as Saint Léon Minor Seminary, Saint Joseph College, Kabgayi Major Seminary, Gitarama Parish, a place named "TRAFIPRO", otherwise called "CND", and two primary schools and other facilities. Emmanuel Rukundo ordered, instigated, or aided and abetted the hunting down and killing of Tutsi refugees at these locations, notably as follows:

(i) In April 1994, Emmanuel Rukundo moved around in Gitarama, dressed in military uniform, armed with a pistol and an R4 rifle, and escorted by four or five soldiers. Sometime in this month, Emmanuel Rukundo went to Gitarama Parish hunting for the parish priest Father Juvenal Bamboneyeho, accusing him of hiding Tutsis in his parish and threatening that their days were numbered, meaning that Tutsis were all soon to be killed.

(ii) Between 12 and 15 April 1994, Emmanuel Rukundo, dressed in military uniform, armed and accompanied by soldiers, stopped at a roadblock around *Imprimerie de Kabgayi,* near the St. Léon Minor Seminary, to talk to and observe the activities of soldiers who were checking the identity cards of persons who passed through the roadblock. Several Tutsis were arrested by soldiers and *interahamwe* at this roadblock and killed nearby. Emmanuel Rukundo's presence at this roadblock provided encouragement to these soldiers and *interahamwe* to carry on with the killing of Tutsis at this location. Emmanuel

Rukundo thus instigated or aided and abetted the killing of Tutsis at the *Imprimerie de Kabgayi* roadblock.

(iii) Between 12 and 15 April 1994, Emmanuel Rukundo brought soldiers to St. Joseph's College, Kabgayi, and ordered or instigated a search of Tutsi refugees purportedly having links with the *Inkotanyi*. During this period, the soldiers killed refugees, including Madame Rudahunga, who was killed at her home. The soldiers also took away Tutsi refugees, including two of Madame Rudahunga's children; a young man named Justin; and a young woman named Jeanne, all Tutsis, to the home of the Rudahungas, where they had killed Madame Rudahunga, and grievously beat the two children, Justin, and Jeanne with machetes and left them for dead. Emmanuel Rukundo, who was at the location at all material times, ordered, instigated, or aided and abetted the killing of Madame Rudahunga and the causing of grievous bodily harm to her two children, and to Justin and Jeanne.

(iv) On or about 15 April 1994, Emmanuel Rukundo went to the Nyabikenke *Commune* office in Gitarama where several Tutsis had taken refuge and ordered or instigated policemen to shoot at Tutsi refugees at that location resulting in several deaths. By so doing, Emmanuel Rukundo ordered, instigated, or aided and abetted the killing of Tutsis at the Nyabikenke *Commune* office.

(v) On or about 16 April 1994, Emmanuel Rukundo, dressed in military uniform, armed, and escorted by armed soldiers, moved about the Bishop's house at Kabgayi, yelling and asking if any Tutsi or "*Inkotanyi*" were hiding there. As a result, Tutsi priests, fearing for their lives, went into hiding. By so doing, Emmanuel Rukundo caused Tutsis who had taken refuge at the Bishop's house at Kabgayi serious mental harm.

11. During the months of April and May 1994, Emmanuel Rukundo went regularly to the Saint Léon Minor Seminary at Kabgayi and to the place named TRAFIPRO, otherwise called CND, as he hunted for Tutsis to kill. Emmanuel Rukundo was dressed in military uniform, armed and had a military escort, and was often accompanied by other soldiers and the *interahamwe* who committed killings of Tutsis at these two locations. His particular actions are described in paragraphs 12, 13, 14 and 15 below.

12. During the months of April and May 1994, Emmanuel Rukundo visited the Saint Léon Minor Seminary, and identified Tutsi refugees, who were then taken away by soldiers and killed, and on one such occasion he had a list of names of Tutsi refugees to be killed, which list was used by soldiers and *interahamwe* who had accompanied him, to remove and kill the victims. By so doing, Emmanuel Rukundo ordered, instigated, or aided and abetted the killing of Tutsis at this location.

13. On diverse dates during the months of April and May 1 994, immediately following Emmanuel Rukundo's departure on several occasions from the Saint Léon Minor Seminary, soldiers and *interahamwe* militiamen, as ordered, instigated, or aided and abetted by him, beat, kicked and whipped Tutsi refugees who had not been taken away to be killed. By subjecting these Tutsis refugees to such brutality, Emmanuel Rukundo ordered, instigated, or aided and abetted the causing of serious bodily and mental harm to these victims.

14. On one occasion on or about 15 May 1994, at the Saint Léon Minor Seminary, Emmanuel Rukundo, armed and escorted by an armed solider, took a young Tutsi refugee woman into his room, locked the door, and sexually assaulted her. These acts of Emmanuel Rukundo caused her serious mental harm.

15. During the months of April and May 1994, Emmanuel Rukundo went several times to a place in Kabgayi named "TRAFIPRO", or otherwise called "CND", to kill Tutsis. On some of these occasions, he was seen in the Company of authorities, including Prime Minister Jean Kambanda, Bishop Thaddée Nsengiyumva of Kabgayi, and others unknown to the Prosecutor. Very soon after

each of these visits, soldiers and *interahamwe* militiamen, as ordered, instigated, or aided and abetted by Emmanuel Rukundo, came back to the CND and killed several Tutsi refugees, and took away other Tutsi refugees and killed or inflicted serious bodily or mental harm upon them.

16. On a date sometime in the period between about 7 April and the end of May 1994, Emmanuel Rukundo led a group of armed soldiers to Gitarama Parish, Diocese of Kabgayi, Gitarama *Prefecture*, in search of Tutsi refugees to kill. When Emmanuel Rukundo did not find the Parish priest whom he accused of being an accomplice of the *Inkotanyi,* he threatened a Tutsi man whom he met, saying that the days of the "*Inkotanyi*" (meaning all Tutsis) were numbered. By so doing, Emmanuel Rukundo caused this Tutsi man serious mental harm.

17. On or about 14 May 1994, Emmanuel Rukundo spoke to the Bernadine Sisters, in Nyarugenge *secteur* and *commune* in Kigali-Ville *Prefecture*, describing Father Alphonse Mbuguje, as *an Inkotanyi* and saying that his whereabouts were known and indicating that Father Alphonse Mbuguje would be killed. Father Alphonse Mbuguje was killed on 30 May 1994 by *gendarmes* in Cyangugu *Prefecture*. As noted in paragraph 7 above, Emmanuel Rukundo denounced this victim as an *Inkotanyi* to the authorities, and this denunciation contributed substantially to the killing of the victim. Emmanuel Rukundo thus instigated or aided and abetted the killing of Father Alphonse Mbuguje.

18. During the month of May 1994, Emmanuel Rukundo went several times to the Kabgayi Major Seminary, and met the priests staying there, including some Tutsi priests, named Védaste Nyiribakwe, Célestin Niyonshuti, Tharcise Gakuba, and one named Callixte Musonera. He publicly stated, within the hearing of the Tutsi priests, that the Major Seminary was full of *inyenzi* meaning Tutsis, and that they all must be killed. By his conduct, Emmanuel Rukundo inflicted serious mental harm on the priests, to whom he had spoken.

19. On or about 24 May 1994, a group of soldiers and *interahamwe*, led by Emmanuel Rukundo, launched an attack on the Kabgayi Major Seminary. The attackers, using a list, called out, removed and took away about twenty Tutsi clergy men and women and two Tutsi lay persons from the Kabgayi Major Seminary and then killed them. By his conduct, Emmanuel Rukundo ordered, instigated, or aided and abetted the killing of these Tutsis.

20. On a date sometime in the second half of May 1994, Emmanuel Rukundo went to the Bernadine sisters' convent in Nyarugenge *secteur* and *commune* in Kigali-Ville *Prefecture*, and told them that certain Tutsi clergy, including Father Felix Ntaganira, Father Niyonshuti Celestin, Father Tharcisse Gabuka, Father Callixte Musonera, Father Martin, and Sister Bénigne, had been killed. (In fact, Father Felix Ntaganira had escaped death.)

21. Emmanuel RUKUNDO left Rwanda after the defeat of the Rwanda army by the RPF in July 1994, and went into exile in Switzerland.

Count 2: Murder as a Crime against humanity.

The Prosecutor charges Emmanuel Rukundo with murder as a crime against humanity*, a crime stipulated in Article 3 (a) of the Statute*, in that from 6 April through 17 July 1994, in Gitarama and Cyangugu *Prefectures*, Rwanda, Emmanuel Rukundo is individually responsible for the murder of the persons identified in paragraphs 22 and 23 below as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds.

Concise Statement of Facts for Count 2

Pursuant to Article 6 (1) of the Statute, the accused, Emmanuel Rukundo, is individually responsible for the crime of murder as a crime against humanity, because he planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of this crime, with the object, purpose, and foreseeable outcome being the commission of crimes against humanity against the Tutsi racial or ethnic group or persons identified as Tutsi in Gitarama and Cyangugu *Prefectures*, Rwanda, on racial, ethnic or political grounds. With respect to the commission of this crime, Emmanuel Rukundo ordered, instigated, or aided and abetted soldiers, armed civilians and *interahamwe* for at least the period of 6 April through 17 July 1994, to do the acts described below. The particulars that give rise to his individual criminal responsibility are set forth in paragraphs 22 through 23 below.

22. Between 12 and 15 April 1994, Emmanuel Rukundo brought soldiers to St. Joseph's College, Kabgayi, and ordered or instigated a search of Tutsi refugees purportedly having links with the *Inkotanyi*. The soldiers took away Madame Rudahunga and shot and killed her at her home. Emmanuel Rukundo, who was at the location at al1 material times, ordered, instigated, or aided and abetted the killing of Madame RUDAHUNGA, a Tutsi.

23. On or about 14 May 1994, Emmanuel Rukundo spoke to the Bernadine Sisters, in Nyarugenge *secteur* and *commune* in Kigali-Ville *Prefecture*, describing Father Alphonse Mbuguje, as an *Inkotanyi* and saying that his whereabouts were known and indicating that Father Alphonse Mbuguje would be killed. Father Alphonse Mbuguje was killed on 30 May 1994 by *gendarmes* in Cyangugu *Prefecture*. As noted in paragraph 7 above, Emmanuel Rukundo denounced this victim as an *Inkotanyi* to the authorities, and this denunciation contributed substantially to the killing of the victim. Emmanuel Rukundo thus instigated or aided and abetted the killing of Father Alphonse Mbuguje.

Count 3: Extermination as a crime against humanity

The Prosecutor charges Emmanuel Rukundo with extermination as a crime against humanity, *a crime stipulated in Article 3 (b) of the Statute,* in that from 6 April through 17 July 1994, in Gitarama and Cyangugu *Prefectures*, Rwanda, Emmanuel Rukundo was individually criminally responsible for extermination as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds, as outlined in paragraphs 24 though 30 below.

Concise Statement of Facts for Count 3

Individual Criminal Responsibility

Pursuant to Article 6 (1) of the Statute, the accused, Emmanuel Rukundo is individually responsible for the crime of extermination as a crime against humanity, because he planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of this crime. With respect to the commission of this crime, Emmanuel Rukundo ordered, instigated, or aided and abetted soldiers, armed civilians and *interahamwe* for at least the period of 6 April through 17 July 1994, in Gitarama and Cyangugu *Prefectures*, Rwanda, to do the acts described in paragraphs 24 through 30 below. The particulars that give rise to his individual criminal responsibility are set forth in paragraphs 24 though 30 below.

24. During February 1994, in reaction to the Arusha Agreements, Emmanuel Rukundo took the Hutu extremist position and was involved in the campaigns for mobilization of the Hutu against the Tutsi and at that time he stated that Tutsi are a people to destroy and that he must fight against them by all means.

25. Beginning after 6 April 1994, there were widespread and systematic attacks against the Tutsis in Gitarama *Prefecture*. During this time many Tutsis of this *prefecture* left their houses to seek refuge

in different places in Kabgayi, including those under the control of the Diocese of Kabgayi, such as Saint Léon Minor Seminary, Saint Joseph College, Kabgayi Major Seminary, Gitarama Parish, a place named "TRAFIPRO", otherwise called "CND", and two primary schools and other facilities. Emmanuel Rukundo ordered, instigated, or aided and abetted the hunting down and killing of Tutsi refugees at these locations, notably as follows:

(i) In April 1994, Emmanuel Rukundo moved around in Gitarama, dressed in military uniform, armed with a pistol and an R4 rifle, and escorted by four or five soldiers. Sometime in this month, Emmanuel Rukundo went to Gitarama Parish hunting for the parish priest Father Juvenal Bamboneyeho, accusing him of hiding Tutsis in his parish and threatening that their days were numbered, meaning that Tutsis were all soon to be killed.

(ii) Between 12 and 15 April 1994, Emmanuel Rukundo, dressed in military uniform, armed and accompanied by soldiers, stopped at a roadblock around *Imprimerie de Kabgayi,* near the St. Léon Minor Seminary, to talk to and observe the activities of soldiers who were checking the Identity cards of persons who passed through the roadblock. Several Tutsis were arrested by soldiers and *interahamwe* at this roadblock and killed nearby. Emmanuel Rukundo's presence at this roadblock provided encouragement to these soldiers and *interahamwe* to carry on with the killing of Tutsis at this location. Emmanuel Rukundo thus instigated or aided and abetted the killing of Tutsis at the *Imprimerie* de *Kabgayi* roadblock.

(iii) Between 12 and 15 April 1994, Emmanuel Rukundo brought soldiers to St. Joseph's College, Kabgayi, and ordered or instigated a search of Tutsi refugees purportedly having links with the *Inkotanyi*. During this period, the soldiers killed refugees, including Madame Rudahunga, who was killed at her home. The soldiers also took away Tutsi refugees, including two of Madame Rudahunga's children; a young man named Justin; and a young woman named Jeanne, all Tutsis, to the home of the Rudahungas, where they had killed Madame Rudahunga, and grievously beat the two children, Justin, and Jeanne with machetes and left them for dead. Emmanuel Rukundo, who was at the location at all material times, ordered, instigated, or aided and abetted the killing of Madame Rudahunga and the causing of grievous bodily harm to her two children, and to Justin and Jeanne.

(iv) On or about 15 April 1994, Emmanuel Rukundo went to the Nyabikenke *Commune* office in Gitarama where several Tutsis had taken refuge and ordered or instigated policemen to shoot at Tutsi refugees at that location resulting in several deaths. By so doing, Emmanuel Rukundo ordered, instigated, or aided and abetted the killing of Tutsis at the Nyabikenke *Commune* office.

(v) On or about 16 April 1994, Emmanuel Rukundo, dressed in military uniform, armed, and escorted by armed soldiers, moved about the Bishop's house at Kabgayi, yelling and asking if any Tutsi or *"Inkotanyi"* were hiding there. As a result, Tutsi priests, fearing for their lives, went into hiding. By so doing, Emmanuel Rukundo caused Tutsis who had taken refuge at the Bishop's house at Kabgayi serious mental harm.

26. During the months of April and May 1994, Emmanuel Rukundo went regularly to the Saint Léon Minor Seminary, Kabgayi Major Seminar, and to the place named TRAFIPRO, otherwise called CND, as he hunted for Tutsis to kill. Emmanuel Rukundo was dressed in military uniform, armed and had a military escort, and was often accompanied by other soldiers and the *interahamwe* who committed killings of Tutsis at these two locations. His particular actions are described in paragraphs 27, 28, 29 and 30 below.

27. During the months of April and May 1994, Emmanuel Rukundo visited the Saint Léon Minor Seminary, and identified Tutsi refugees, who were then taken away by soldiers and killed, and on one such occasion he had a list of names of Tutsi refugees to be killed, which list was used by soldiers and

Interahamwe who had accompanied him, to remove and kill the victims. By so doing, Emmanuel Rukundo ordered, instigated, or aided and abetted the killing of Tutsis at this location.

28. During the month of May 1994, Emmanuel Rukundo went several times to the Kabgayi Major Seminary, and met the priests staying there, including some Tutsi priests, named Védaste Nytribakwe, Célestin Niyonshuti, Tharcisse Gabuka, and one named Callixte Musonera. He publicly stated, within the hearing of the Tutsi priests, that the Major Seminary was full of *Inyenzi* meaning Tutsis, and that they all must be killed. By his conduct, Emmanuel Rukundo inflicted serious mental harm on the priests, to whom he had spoken.

29. On or about 24 May 1994, a group of soldiers and *Interahamwe,* led by Emmanuel Rukundo, launched an attack on the Kabgayi Major Seminary. The attackers, using a list, called out, removed and took away about twenty Tutsi clergy men and women and two Tutsi lay persons from the Kabgayi Major Seminary and then killed them. By his conduct, Emmanuel Rukundo ordered, instigated, or aided and abetted the killing of these Tutsis.

30. On a date sometime in the second half of May 1994, Emmanuel Rukundo went to the Bernadine sisters' convent in Nyarugenge *secteur* and *commune* in Kigali-Ville *Prefecture*, and told them that certain Tutsi clergy, including Father Felix Ntaganira, Father Niyonshuti Celestin, Father Tharcisse Gabuka, Father Callixte Musonera, Father Martin, and Sister Bénigne, had been killed. (In fact, Father Felix Ntaganira had escaped death.)

The acts and omissions of Emmanuel Rukundo detailed herein are punishable pursuant to Articles 22 and 23 of the Statute of the Tribunal.

Done in Arusha, Tanzania, this 6th October 2006.

[Signed] : Hassan Bubacar Jallow, Prosecutor

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Decision on the Prosecutor's Motion for the Transfer of Detained Witness AMA Pursuant to Rule 90 bis of the Rules of Procedure and Evidence 3 November 2006 (ICTR-2001-70-PT)

(Original : English)

Trial Chamber II

Judge : Asoka de Silva, Presiding Judge

Emmanuel Rukundo – Transfer of a detained witness – Rwanda – Absence of any response from the Rwandan Minister of Justice – Transfer authorised after the confirmation from the Rwandan Minister of Justice that the conditions for the transfer are satisfied – Obligation for the Prosecution to provide the Chamber with all necessary supporting documents related to future transfers of detained witnesses

International Instrument Cited :

Rules of Procedure and Evidence, Rules 90 bis and 90 bis (B)

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva (the "Chamber");

BEING SEISED OF "The Prosecutor's Request for an Order Transferring a Detained Witness Pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence", filed on 26 October 2006 (the "Motion");

TAKING INTO CONSIDERATION that the trial against the accused is scheduled to start on 15 November 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.

NOTING the Prosecutor's letter of 26 October 2006 to the Rwandan Minister of Justice seeking confirmation that the conditions for the transfer of detained Witness AMA under the Rules are met;

NOTING that it has to date not been served with any response from the Rwandan Minister of Justice to the Prosecution request;

HEREBY ORDERS that Witness AMA shall, at any time after the date of this Order, and upon confirmation from the Rwandan Minister of Justice that the presence of the detained witness is not required for any criminal proceedings in progress in Rwanda during the period the witness is required by the Tribunal, be transferred temporarily to the Tribunal's Detention Facilities in Arusha. His detention in Arusha shall not go beyond 15 December 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 may occur regarding witness AMA's conditions of detention in the requested State, which may possibly affect the length of the temporary detention, and promptly 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;

INSTRUCTS the Prosecution, in future applications for transfer of detained witnesses, to provide the Chamber with all necessary supporting documents pursuant to Rule 90 *bis* at the time of filing of the Motion.

Arusha, 3 November 2006.

[Signed] : Asoka de Silva

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Decision on the Prosecution Motion for Variation of the Protective Measures for Witness CSH
24 November 2006 (ICTR-2001-70-T)

(Original : English)

Trial Chamber II

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

Emmanuel Rukundo – Variation of the protective measures of a witness – Closed session testimony – Safe transportation and secure accommodation for the witness, Competence of the Witnesses and Victims Support Section – Motion denied

International Instrument Cited :

Rules of Procedure and Evidence, Rule 34

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Emmanuel Rukundo, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 24 October 2002 (ICTR-2001-70)

Introduction

1. By its decision of 24 October 2002, Trial Chamber III granted protective measures to prosecution witnesses and victims residing in Rwanda and neighbouring countries. The Chamber denied protective measures for witnesses not living in Rwanda or neighbouring countries on the ground that the Prosecution failed to provide evidence of threats to their lives or to offer any explanation to justify their protection.[1] On 15 November 2006, the trial against Emmanuel Rukundo commenced. On 20 November 2006, the Prosecution filed a "Motion for Variation of Protective Measures for Witness CSH." The Prosecution submits that due to security concerns, and in order to avoid being identified by other witnesses, Witness CSH has indicated that he would only travel from Kigali to Arusha by way of commercial flight, that while in Arusha, he will not share accommodation with other witnesses at the UN-ICTR "Safe House", and further, that he is only willing to testify in closed session.

Deliberations

2. The Chamber will determine the request for closed session testimony upon oral application made by the Prosecution at the commencement of Witness CSH's testimony.

3. The Chamber considers that the remaining two orders sought by the Prosecution directly relate to the safe transportation and secure accommodation of Witness CSH, and that these are matters of an operational or logistical nature, which fall squarely within the competence of the Witnesses and Victims Support Section (WVSS). The Chamber's Decision on protective measures contemplates that

[1] *The Prosecutor v. Emmanuel Rukundo*, "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses", 24 October 2002, para. 16.

WVSS is fully competent to make judgements on the fine details relating to the day-to-day management of witnesses while in Arusha, as well as their mode of transportation to and from the Tribunal.

4. Furthermore, Rule 34 of the Rules of Procedure and Evidence empowers the WVSS, under the authority if the Registrar, to recommend the adoption of protective measures for victims and witnesses.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion;

DIRECTS the Prosecution to bring this matter to the attention of the WVSS, who may recommend to the Registrar the adoption of necessary and appropriate measures for the safe travel and secure accommodation of Witness CSH while in Arusha, taking into account the security concerns expressed by the witness.

Arusha, 24 November 2006, done in English.

[Signed] : Asoka de Silva; Taghrid Hikmet; Seon Ki Park

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Decision on Prosecutor's Motion for the Trial Chamber to Take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94 (A)
29 November 2006 (ICTR-2001-70-T)

(Original : English)

Trial Chamber II

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

Emmanuel Rukundo – Judicial notice – Reference to the Semanza and Karemera et al. cases – Motion granted

International Instruments Cited :

1977 Additional Protocol II ; 1948 Convention on the Prevention and Punishment of the Crime of Genocide ; 1949 Geneva Conventions ; Rules of Procedure and Evidence, Rule 89 (C) and 94 (A) ; Statute, Art. 20 (3)

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. Édouard Karemera et al., Decision on Prosecutor's Interlocutory Appeal on Judicial Notice, 16 June 2006 (ICTR-98-44)

Introduction

1. On 13 November 2006, the Prosecution filed a Motion for the Trial Chamber to take Judicial Notice of Facts of Common Knowledge pursuant to Rule 94 (A) of the Rules of Procedure and Evidence. The Defence did not file a Response.

2. The Prosecution identifies the following six facts and submits that they were recognised by the Appeals Chamber as facts of common knowledge within the meaning of Rule 94 (A):[1]

(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, Twa;

(iii) Between 6 April 1994 and 17 July 1994, throughout Rwanda, there were 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 Tutsi. As a result of the attacks, there were a large number of deaths of persons of Tutsi ethnic identity;

(iv) Between 6 April 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 Convention of 12 August 1949 on 5 May 1964 and having acceded to Protocols Additional thereto of 1977 on 19 November 1984.

3. The Prosecution further submits that based on the Appeals Chamber's holding in respect of these six facts, the Trial Chamber shall not require that evidence be led to prove their existence and is bound to take judicial notice of them.

Deliberations

4. The Chamber has reviewed Rule 94 (A), the Judgement of the Appeals Chamber in *Semanza,* and the Decision on the Prosecutor's Interlocutory Appeal on Judicial Notice rendered in the case of *Karemera et al*.[2]

5. The Chamber notes that Rule 94 (A) imposes a mandatory requirement. This implies that once a certain fact is determined to be so notorious as not to be subject to reasonable dispute, it qualifies as a fact of common knowledge thereby dispensing with the need to lead evidence to prove its existence. With respect to such facts, the Trial Chamber's broad discretion under Rule 89 (C) to admit evidence which it deems to have probative value, is superseded by the specific, binding provision contained in Rule 94 (A).[3]

6. The Trial Chamber further notes that the practice of taking judicial notice of facts of common knowledge is well-established both under domestic and international criminal law, and that it is neither inconsistent with the presumption of innocence contained in Article 20 (3) of the Statute, nor does it relieve the Prosecution of its burden to establish beyond reasonable doubt that the Accused is guilty of the specific criminal conduct alleged in the Indictment. Rather, taking judicial notice provides an alternative way of discharging the Prosecution's burden by obviating the need to lead evidence on

[1] The Prosecution relies on *Laurent Semanza v. The Prosecutor,* Judgement (A.C.), 20th May 2005; and *The Prosecutor v. E. Karemera et al*, "Decision on the Prosecutor's Interlocutory Appeal of Decision on Judicial Notice", 16 June 2006.
[2] *Semanza,* Appeal Judgement supra; *Karemera et al.,* Decision on Judicial Notice, *supra* note 1.
[3] *Karemera et al.* ; Decision on Judicial Notice", *supra*, para. 23.

facts of common knowledge.[4] In this manner, the doctrine of judicial notice advances judicial economy.

7. The Chamber notes that in the *Semanza* Judgement, the Appeals Chamber confirmed the Trial Chamber's finding taking judicial notice of the fact that between April and July 1994, Rwandan citizens were classified by ethnic group; that widespread or systematic attacks against a civilian population based on Tutsi ethnic identification occurred during that time; that between 1 January 1994 and 17 July 1994, there was an armed conflict not of an international character in Rwanda; that on 16 April 1975, Rwandan became a State Party to the Convention on the Prevention and Punishment of the Crime of Genocide (1948); and that 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 July 1977.[5]

8. The Chamber further notes that in the *Karemera et al*. Decision, the Appeals Chamber affirmed the Trial Chamber's holding taking judicial notice of "the existence of the *Twa, Tutsi,* and *Hutu* as protected groups falling under the Genocide Convention" and reasoned that when compared to the formulation in the *Semanza* Appeal Judgement, the Trial Chamber's formulation of this fact equally, or even more clearly, relieves the Prosecution's burden to introduce evidence proving protected-group status under the Genocide Convention.[6]

9. With respect to genocide, the Chamber recalls the reasoning of the Appeals Chamber in the *Karemera et al*. Decision that the fact that genocide took place in Rwanda in 1994 is now "a part of world history", that it is "a classic instance of a 'fact of common knowledge'", and that its notoriety is confirmed by various United Nations documents, by the Security Council resolution establishing the Tribunal, various government and non-governmental reports on the situation in Rwanda in 1994, multiple Appellate and Trial Chamber Judgements of the Tribunal, as well as countless books, articles, and media reports.[7] The occurrence of genocide in Rwanda in 1994 is therefore not subject to reasonable dispute and thus qualifies for judicial notice under Rule 94 (A).

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Prosecution Motion; and

TAKES judicial notice of fact (i), (iii), (iv), (v), and (vi) as formulated under paragraph 1 above. With respect to fact (ii), takes judicial notice that between 1 January 1994 and 17 July 1994, the *Twa*, *Tutsi*, and *Hutu* existed in Rwanda as protected groups falling under the Genocide Convention.

Arusha, 29 November 2006, done in English.

[Signed] : Asoka de Silva; Taghrid Hikmet; Seon Ki Park

[4] *Ibid*. paras. 30, 37.
[5] Semanza Appeal Judgment, para. 192.
[6] *Karemera et al* "Decision on Judicial Notice", supra, para. 25.
[7] *Ibid*., para. 35.

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Decision on Prosecutor's Motion for Protective Measures for Witnesses CCF, CCJ, BLC, BLS and BLJ
29 November 2006 (ICTR-2001-70-T)

(Original : English)

Trial Chamber II

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

Emmanuel Rukundo – Protective measures of witnesses, Witnesses living in Europe – Real and objective fears, Explanation of the notions – Absence of demonstration by the Prosecution that witnesses not living in Rwanda and neighbouring countries face threats to their lives – Previous protective measures of witnesses not living in Rwanda and neighbouring countries due to particular facts and circumstances, Absence of principle of general application – Obligation for the Prosecution to provide the Chamber with all the material necessary for it to make a reasoned decision – Motion denied

International Instruments Cited :

Rules of Procedure and Evidence, Rules 54, 69 and 75; Statute, Art. 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. Pauline Nyiramasuhuko et al., Decision on Pauline Nyiramasuhuko's Motion for Protective Measures for Defence Witnesses and Their Family Members, 20 March 2001 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Emmanuel Rukundo, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 24 October 2002 (ICTR-2001-70) ; 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 Witnesses, 28 October 2005 (ICTR-2000-59)

I.C.T.Y.: Trial Chamber, The Prosecutor v. Slobodan Milošević, Second Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, 18 June 2002 (IT-02-54)

Introduction

1. By decision of 24 October 2002, Trial Chamber III granted protective measures to Prosecution witnesses and victims residing in Rwanda and neighbouring countries. The Chamber denied protective measures for witnesses not living in Rwanda or neighbouring countries on the ground that the Prosecution failed to provide evidence of threats to their lives or to offer any explanation to justify their protection.[3701] On 15 November 2006, the trial against Emmanuel Rukundo commenced. On 21 November 2006, the Prosecution filed a "Motion for Protective Measures for Witnesses CCF, CCJ, BLC, BLS and BLJ." The Prosecution notes that these witnesses live in Europe and are therefore not

[3701] *The Prosecutor v. Emmanuel Rukundo*, "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses", 24 October 2002, para. 16.

covered by the protective measures granted by the Decision on protective measures dated 24 October 2004.[3702]

Deliberations

2. The Chamber recalls that Article 21 of the Statute empowers the Tribunal to make rules for the protection of victims and witnesses and provides that protective measures may include the conduct of *in camera* proceedings and the protection of personal identity. Rule 54 gives the Chamber a general power to issue orders necessary for the conduct of a trial; Rule 69 provides that either party may apply to the Chamber to order non-disclosure of the identity of witnesses who may be in danger or at risk. Finally, Rule 75 stipulates the power of the Chamber to order measures appropriate for the privacy or security of witnesses, and states that such measures must be consistent with the rights of the accused.

3. The Chamber recalls the jurisprudence of the Tribunal and of the ICTY that to justify the grant of protective measures on the basis of fear for the security of potential witnesses or members of their family, the witness' subjective expressions of fear must be underscored by objective considerations.[3703] In other words, the fears expressed by potential witnesses are not in themselves sufficient to establish a real likelihood that they may be in danger or at risk.[3704] In the practice of the Tribunal, the moving party has demonstrated such objective basis through affidavits attesting to the state of insecurity in the witness' place of residence, the presence at such place of individuals either related to, friends with, or otherwise supportive of the accused, or other circumstances demonstrating that if the identity of the witness(es) and the fact that they may testify before the Tribunal are known, such witness(es) may face danger to their lives or to the lives of their family members.

4. The Chamber notes the Prosecution statement that it has requested the WVSS to obtain the details of the security concerns of the relevant witnesses and that it will submit this information in due course. At the same time, the Prosecution seeks to rely on the supporting material annexed to its Motion for protective measures filed in 2002. The Chamber recalls that in deciding that Motion, Trial Chamber III reviewed the *affidavit* and other documents annexed to the Motion and concluded that while they show that a volatile security situation existed in Rwanda and neighbouring countries thereby justifying the grant of protective measures to witnesses living in those areas, the supporting material did not contain any evidence to show that witnesses not living in Rwanda and neighbouring countries faced threats to their lives. The Chamber further noted that the Prosecution failed to give any other explanation why protective measures should be granted to this category of witnesses under Rule 75.

5. The Chamber has again reviewed the material annexed to the Prosecution Motion of 2002 and concludes that it relates to insecurity and potential threats faced by witnesses and victims in Rwanda and the Great Lakes region. It does not address the situation of witnesses living outside those areas. By seeking to rely on the same supporting material in this Motion for protective measures for witnesses living in Belgium, France, Italy and Sweden, the Prosecution essentially calls upon the Chamber to engage in judicial speculation about the security situation of these witnesses. Such a course of action would be inapposite for the Trial Chamber.

6. The Chamber notes the Prosecution argument that certain trial chambers have granted protective measures for witnesses residing outside Rwanda and neighbouring countries on the ground that the

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[3702] "Prosecutor's Motion for Protective Measures for Witnesses CCF, CCJ, BLC, BLS, and BLJ", 21 November 2006, para. 3, where it is stated that witnesses CCF and CCJ reside in Belgium, BLS in Italy, BLJ in France and BLC in Sweden.

[3703] *The Prosecutor v. J. Rugambarara*, "Decision on the Prosecutor's Motion for Protective Measures for Witnesses", 28 October 2005, paras. 6, 7; *The Prosecutor v. T. Renzaho*, "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment", 17 August 2005, para. 7; *The Prosecutor v. T. Bagosora et al*, "Decision on the Extremely Urgent Request Made by the Defence for Protection Measures for Mr. Bernard Ntuyahaga", 13 September 1999, para. 28.

[3704] *Prosecutor v. Milosević*, "Second Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses (ICTY), 18 June 2002, para. 7.

same security situation would affect any potential witness even if residing outside of the Region.[3705] The Chamber considers that such decisions are explicable on their own particular facts and circumstances, and by no means lay down principles of general application.

7. The Chamber wishes to remind the Prosecution of its obligation to provide the Chamber with all the material necessary for it to make a reasoned decision. Witness protective measures are matters of great importance to the Tribunal requiring trial chambers to carefully weigh the dangers to prospective witnesses with a view to ensuring the highest levels of protection, without compromising the rights of the Accused to receive all information necessary to mount an effective defence. Such a balancing exercise cannot be done in a vacuum. The Chamber concludes that the Prosecution has failed to demonstrate an objective basis for the fears allegedly expressed by Witnesses CCF, CCJ, BLC, BLS and BLJ. The Motion, as currently presented, must therefore fail.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion.

Arusha, 29 November 2006, done in English.

[Signed] : Asoka de Silva; Taghrid Hikmet; Seon Ki Park

[3705] *The Prosecutor v. Nyiramasuhuko and Ntahobali*, "Decision on Pauline Nyiramasuhuko's Motion for Protective Measures for Defence Witnesses and their Family Members", 20 March 2001, para. 13.

Le Procureur c. Emmanuel RUKUNDO

Affaire N° ICTR-2001-70

Fiche technique

• Nom: RUKUNDO

• Prénom: Emmanuel

• Date de naissance: 1959

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: aumônier de l'armée dans la préfecture de Ruhengeri, affecté ensuite à Kigali

• Date de confirmation de l'acte d'accusation: 5 juillet 2001

• Date de modification de l'acte d'accusation: 6 octobre 2006

• Chefs d'accusation: génocide et crimes contre l'humanité (assassinat, extermination)

• Date et lieu de l'arrestation: 12 juillet 2001, à Genève, en Suisse

• Date du transfert: 20 septembre 2001

• Date de la comparution initiale: 26 septembre 2001

• Date du début du procès: 15 Novembre 2006

• Date et contenu du prononcé de la peine: 27 février 2009, condamné à 25 ans d'emprisonnement

• Procès en appel

The Prosecutor v. Georges Rutaganda

Case N° ICTR-96-3

Case History

• Name: RUTAGANDA

• First Name: Georges Anderson Nderubumwe

• Date of Birth: 1958

• Sex: male

• Nationality: Rwandan

• Former Official Function: Businessman and second Vice President of *Interahamwe*

• Date of Indictment's Confirmation: 16 February 1996

• 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: 10 October 1995, in Zambia

• Date of Transfer: 26 May 1996

• Date of Initial Appearance: 30 May 1996

• Pleading: not guilty

• Date Trial Began: 18 March 1997

• Date and content of the Sentence: 6 December 1999, sentenced to life imprisonment

• Appeal: 26 May 2003, dismissed

Order Assigning Judges to a Case Before the Appeals Chamber 27 April 2006 (ICTR-96-3-R)

(Original : English)

Appeals Chamber

Judge : Fausto Pocar, Presiding Judge

Vincent Rutaganira – Appeals Chamber – Judges – Composition

International Instruments Cited :

Document IT/242 of the International Criminal Tribunal for the former Yugoslavia ; Rules of Procedure and Evidence, Rule 120 ; Statute, Art. 11 (3) et 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 Judgement rendered by the Appeals Chamber in this case on 26 May 2003;

NOTING the « Requête aux fins d'une demande en reconsidération et/ou révision de l'Arrêt rendu le 26 mai 2003 par la Chambre d'Appel dans l'Affaire Rutaganda c/ Procureur (ICTR-96-3-A) et en réparation du préjudice causé par la violation par le Procureur des règlements du Tribunal » and the « Requête aux fins de voir la Chambre d'Appel trancher sur la question de commission d'office d'une assistance juridique à M. Rutaganda » confidentially filed on 13 April 2006;

CONSIDERING Articles 11 (3) and 13 (4) of the Statute of the International Tribunal and Rule 120 of the Rules of Procedure and Evidence;

CONSIDERING the composition of the Appeals Chamber of the International Tribunal as set out in document IT/242 issued on 17 November 2005;

HEREBY ORDER that the Bench in *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor,* Case N°ICTR-96-3-R, shall be composed as follows:

Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Done in English and French, the English version being authoritative.

Done this 27th day of April 2006, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

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Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification
8 December 2006 (ICTR-96-03-R)

(Original : not specified)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge; Mohamed Shahabuddeen; Mehmet Güney; Andrésia Vaz; Theodor Meron

Georges Rutaganda – Reconsideration – Review – Assignment of a Counsel – Disclosure – Clarification – Reconsideration and clarification, Power of reconsideration, Final judgement – Review, Allegation of new facts – Review of a final judgement, Cumulative criteria, Knowledge by the deciding body about the fact in arriving at the decision – Absence of new facts, Diligence of the Accused, Absence of wholly exceptional circumstances warranting review – Alleged new facts related to sentencing, Failure of the Prosecution to comply with its disclosure obligation of material in its custody, Absence of wholly exceptional circumstances warranting review – Assignment of a Counsel, Fairness of the proceedings, Assistance of a Counsel – Disclosure of full identity and unredacted statements of all Prosecution witnesses – Motions denied

International Instruments Cited :

Rules of Detention, Art. 82 ; Rules of Procedure and Evidence, Rules 44 (A), 68, 120 and 121; Statute, Art. 25

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Georges Rutaganda, Decision on the Defence Motion for Disclosure of Evidence, 4 September 1998 (ICTR-99-03) ; Trial Chamber, The Prosecutor v. Georges Anderson Rutaganda, Judgement and Sentence, 6 December 1999 (ICTR-96-3) ; Appeals Chamber, The Prosecutor v. Jean Bosco Barayagwiza, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000 (ICTR-97-19) ; Appeals Chamber, The Prosecutor v. Juvénal Kajelijeli, Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing, 8 May 2000 (ICTR-98-44) ; Appeals Chamber, The Prosecutor v. Laurent Semanza, Decision, 31 May 2000 (ICTR-97-20) ; Appeals Chamber, The Prosecutor v. Clément Kayishema and Obed Ruzindana, Judgement (Reasons), 1 June 2001 (ICTR-95-1) ; 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. Aloys Simba, Decision on Matters Related to Witness KDD's Judicial Dossier, 1 November 2004 (ICTR-2001-76) ; Appeals Chamber, The Prosecutor v. Juvénal Kajelijeli, Judgement, 23 May 2005 (ICTR-98-44A) ; Appeals Chamber, The Prosecutor v. Eliézer Niyitegeka, Decision on Niyitegeka's Urgent Request for Legal Assistance, 20 June 2005 (ICTR-96-14) ; Appeals Chamber, The Prosecutor v. Édouard 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. Eliézer Niyitegeka, Decision on Request for Review, 30 June 2006 (ICTR-96-14) ; Appeals Chamber, The Prosecutor v. Eliézer Niyitegeka,

Decision on Request for Reconsideration of the Decision on Request for Review, 27 September 2006 (ICTR-96-14) ; Appeals Chamber, The Prosecutor v. Ferdinand Nahimana et al., 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. 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. Hazim Delić, Decision on Motion for Review, 25 April 2002 (IT-96-21) ; Appeals Chamber, The Prosecutor v. Duško Tadić, Decision on Motion for Review, 30 July 2002 (IT-94-1) ; Appeals Chamber, The Prosecutor v. Zdravko Mucić et al., Judgement and Sentence Appeal, 8 April 2003 (IT-96-21) ; 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. Miroslav Kvočka, Judgement, 28 February 2005 (IT-98-30/1) ; Appeals Chamber, The Prosecutor v. Zoran Žigić, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005", 26 June 2006 (IT-98-30/1) ; Appeals Chamber, The Prosecutor v. Zoran Žigić, Decision on Zoran Zigić's Request for Review under Rule 119, 25 August 2006 (IT-98-30/1) ; 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) ; Appeals Chamber, The Prosecutor v. Mlađo Radić, Decision on Defence Request for Review, 31 October 2006 (IT-98-30/1) ; Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Decision on Prosecutor's Request for Review or Reconsideration, 23 November 2006 (IT-95-14)

National Case Cited :

Rwandan Court, Théogène Rutayisire, Judgement, 1997

28. 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 with five requests, filed by Georges Rutaganda ("Mr. Rutaganda").

I. Background

29. In its Judgement of 26 May 2003, the Appeals Chamber confirmed Mr. Rutaganda's convictions for genocide and extermination as a crime against humanity, entered an additional conviction for serious violations of Article 3 common to the Geneva Conventions, and upheld his sentence of life imprisonment.[3706] In upholding the convictions of the Trial Chamber, the Appeals Chamber affirmed the Trial Chamber's findings that Mr. Rutaganda distributed weapons and aided and abetted killings in Cyahafi sector; ordered, committed, and aided and abetted in crimes committed in the area of the Amgar garage; participated in the massacres at *École Technique Officiel* ("ETO"); and participated in the forced diversion of refugees to Nyanza and the subsequent massacre there.[3707]

30. On 13 April 2006, Mr. Rutaganda filed a consolidated motion containing a request for reconsideration, review, and for assignment of counsel.[3708] The Prosecution filed a Consolidated

[3706] *Georges Rutaganda v. The Prosecutor*, Case N°ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement"); *The Prosecutor v. Georges Rutaganda*, Case N°ICTR-96-3-T, 6 December 1999 ("*Rutaganda* Trial Judgement"). The Appeals Chamber also overturned a conviction for murder as a crime against humanity. See *Rutaganda* Appeal Judgement, paras 490-507.

[3707] *Rutaganda* Appeal Judgement, paras 294-489.

[3708] Requête aux fins d'une demande en reconsidération et/ou en révision de l'arrêt rendu le 26 Mai 2003 par la Chambre d'Appel dans l'affaire Rutaganda c. Procureur (ICTR-96-3-A) et, en réparation du préjudice cause par la violation par le

Response[3709] to the Request for Reconsideration, Request for Review, and Request for Assignment of Counsel on 23 May 2006, and Mr. Rutaganda filed a Consolidated Reply on 7 June 2006.[3710] In addition, on 17 August 2006, Mr. Rutaganda filed a Request for Disclosure,[3711] and the Prosecution filed its Response to the Request for Disclosure on 28 August 2006.[3712] Mr. Rutaganda filed his Reply to the Request for Disclosure on 8 September 2006.[3713]

31. In addition, on 26 October 2006, Mr. Rutaganda filed a Request for Clarification.[3714] The Prosecution filed a Response on 1 November 2006,[3715] and Mr. Rutaganda replied on 13 November 2006.[3716]

II. Discussion

A. Requests for Reconsideration and Clarification

32. In his Request for Reconsideration, Mr. Rutaganda requests the Appeals Chamber to reconsider its Judgement, arguing that the Appeals Chamber erred in its treatment of his arguments challenging the Trial Chamber's findings on: (1) his role in distributing weapons in connection with the killings in Cyahafi sector; (2) his role in the detention and killing of Tutsis at Amgar garage; and (3) his "humanitarian acts" which negate his genocidal intent and mitigate his sentence.[3717] In making this request, Mr. Rutaganda invokes the Appeals Chamber's inherent jurisdiction to reconsider its decisions in order to prevent manifest injustice.[3718]

33. While Mr. Rutaganda seeks to rely upon the Appeals Chamber's inherent power to reconsider its own decisions, that power does not extend to final judgements. This limitation on the power of reconsideration was clearly established by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Zigić* Reconsideration Decision[3719] and followed by this Appeals

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Procureur des règlements du Tribunal; Requête aux fins de voir la Chambre d'Appel trancher sur la question de commission d'office d'une assistance juridique à M. Rutaganda, 13 April 2006 ("Consolidated Request"). For clarity, the Appeals Chamber refers to each of the three requests separately in the text as: Request for Reconsideration, Request for Review, and Request for Assignment of Counsel.

[3709] Prosecutor's Response to "Requête aux fins d'une demande en reconsidération et/ou en révision de l'arrêt rendu le 26 mai 2003 par la Chambre d'Appel dans l'affaire Rutaganda c. Procureur (ICTR-96-3-A) et en réparation du préjudice cause par la violation par le Procureur des règlements du Tribunal" and "Requête aux fins de voir la Chambre d'Appel trancher sur la question de commission d'office d'une assistance juridique à M. Rutaganda", 23 May 2006 ("Consolidated Response").

[3710] Réplique de l'Appelant au "Prosecutor's Response to 'Requête aux fins d'une demande en reconsidération et/ou en révision de l'arrêt rendu le 26 mai 2003 par la Chambre d'Appel dans l'affaire Rutaganda c. Procureur (ICTR-96-3-A) et en réparation du préjudice cause par la violation par le Procureur; Requête aux fins de voir la Chambre d'Appel trancher sur la question de commission d'office d'une assistance juridique a M. Rutaganda, 7 June 2006 ("Consolidated Reply").

[3711] Requête aux fins de voir le Procureur divulguer l'identité complète, les déclarations non caviardées et autres documents pertinent des témoins à charge dans l'affaire Rutaganda, 17 August 2006 ("Request for Disclosure").

[3712] Prosecution's Response to "Requête aux fins de voir le Procureur divulguer l'identité complète, les déclarations non caviardées et autres documents pertinent des témoins à charge dans l'affaire Rutaganda", 28 August 2006 ("Response to Disclosure Request").

[3713] Réplique par l'Appelant au "Prosecution's Response to 'Requête aux fins de voir le Procureur divulguer l'identité complète, les déclarations non caviardées et autres documents pertinent des témoins à charge dans l'affaire Rutaganda'", 8 September 2006 ("Reply to Disclosure Request").

[3714] Requête urgente en clarification suite à la décision de la Chambre d'Appel rendue dans l'affaire Zigić (IT-98-30/1-A) le 26 juin 2006, 26 October 2006 ("Request for Clarification").

[3715] Réponse du Procureur à la "Requête urgente suite à la décision de la chambre d'appel, rendu dans l'affaire Zigić (IT-98-30-1/A) le 20 juin 2006 déposée par Georges Anderson Nderubumwe Rutaganda", 1 November 2006 ("Response").

[3716] Réplique par l'Appelant à "la Réponse du Procureur à 'la Requête urgente en clarification suite à la décision de la Chambre d'Appel, rendue dans l'affaire Zigić (IT-98-30/1-A) le 20 juin 2006'", 13 November 2006 ("Reply").

[3717] Consolidated Request, paras 13, 14, 26-111.

[3718] Consolidated Request, paras 16-25, citing *The Prosecutor v. Zdravko Mucić et al.*, Case N°IT-96-21-A*bis*, Judgement on Sentence Appeal, 8 April 2003, paras 48-58 ("*Mucić et al*. Appeal Judgement").

[3719] *The Prosecutor v. Zoran Zigić*, Case N°IT-98-30/1-A, Decision on Zoran Zigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005", 26 June 2006, para. 9 ("*Zigić* Reconsideration

Chamber in the *Niyitegeka* Reconsideration Decision.[3720] In his Request for Clarification, Mr. Rutaganda argues that this precedent should not be applied to his case as to do so would be a retroactive application of law.[3721] The Appeals Chamber is not satisfied that Mr. Rutaganda's argument constitutes cogent reasons in the interest of justice for the Appeals Chamber to depart from the jurisprudence established in the *Niyitegeka* case.[3722] Existing procedures for appeal and review set forth in the Statute provide sufficient safeguards for due process and fair trial.[3723] Accordingly, Mr. Rutaganda's Request for Reconsideration and Request for Clarification are dismissed.

B. Request for Review

34. In his Request for Review, Mr. Rutaganda asks the Appeals Chamber for review of his final judgement based on several alleged new facts, which he claims undermine his convictions and his sentence.[3724] He submits alleged new facts related to the events in Cyahafi sector and near the Amgar garage, the findings of the Trial Chamber relating to his genocidal intent, and his sentence. With respect to his convictions for other events, including the massacres at ETO and in Nyanza, Mr. Rutaganda asks the Appeals Chamber to draw inferences from the alleged errors highlighted in his submissions that his convictions on the basis of those events are also questionable, and indicates his intent to file further requests for review when additional new facts are discovered.[3725]

1. Standard of Review

35. Review proceedings are governed by Article 25 of the Statute and Rules 120 and 121 of the Rules. Review of a final judgement is an exceptional procedure and is not meant to provide an additional opportunity for a party to remedy its failings at trial or on appeal.[3726] Review may be granted only when the moving party satisfies the following cumulative criteria: (1) there is a new fact; (2) the new fact was not known to the moving party at the time of the original proceedings; (3) the lack of discovery of that new fact was not the result of lack of due diligence by the moving party; and (4) the new fact *could* have been a decisive factor in reaching the original decision.[3727] In wholly exceptional circumstances, the Appeals Chamber may grant review, even where the second or third criteria are not satisfied, if ignoring the new fact *would* result in a miscarriage of justice.[3728]

36. The Appeals Chamber recalls that a "new fact" refers to new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings.[3729] By the phrase "not in issue", the Appeals Chamber has held that "it must not have been among the factors that the deciding

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Decision"). See also *The Prosecutor v. Tihomir Blaškić*, Case N°IT-95-14-R, Decision on Prosecutor's Request for Review or Reconsideration, 23 November 2006, paras 79, 80 ("*Blaškić* Review Decision").

[3720] *The Prosecutor v. Eliézer Niyitegeka*, Case N°ICTR-96-14-R, Decision on Request for Reconsideration of the Decision on Request for Review, 27 September 2006, pp. 1-2 ("*Niyitegeka* Reconsideration Decision"). See also *Blaškić* Review Decision, paras 79, 80.

[3721] Request for Clarification, paras 5-22.

[3722] *See The Prosecutor v. Zlatko Aleksovski*, Case N°IT-96-14/1-A, Judgement, 24 March 2000, paras 107-109. See also *Blaškić* Review Decision, paras 79, 80.

[3723] *Niyitegeka* Reconsideration Decision, pp. 1-2.

[3724] Consolidated Request, paras 112-249.

[3725] Consolidated Request, paras 115, 116.

[3726] *Eliézer Niyitegeka v. The Prosecutor*, Case N°ICTR-96-14-R, Decision on Request for Review, 30 June 2006, paras 5-7 ("*Niyitegeka* Review Decision"). See also *Jean-Bosco Barayagwiza v. The Prosecutor*, Case N°ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para. 43 ("*Barayagwiza* Review Decision").

[3727] *Niyitegeka* Review Decision, paras 5-7. See also *Blaškić* Review Decision, para. 7; *The Prosecutor v. Zoran Zigić*, Case N°IT-98-30/1-R.2, Decision on Zoran Zigić's Request for Review under Rule 119, 25 August 2006, para. 8 ("*Zigić* Review Decision"); *The Prosecutor v. Mlađo Radić,* Case N°T-98-30/1-R.1, Decision on Defence Request for Review, 31 October 2006, paras 9-11 ("*Radić* Review Decision").

[3728] *Niyitegeka* Review Decision, para. 7; *Blaškić* Review Decision, para. 8; *Radić* Review Decision, para. 11; *The Prosecutor v. Duško Tadić*, Case N°IT-94-1-R, Decision on Request for Review, 30 July 2002, paras 26, 27 ("*Tadić* Review Decision").

[3729] *Niyitegeka* Review Decision, para. 6. See also *Blaškić* Review Decision, paras 14, 15; *Tadić* Review Decision, para. 25.

body could have taken into account in reaching its verdict."[3730] In other words, what is relevant is whether the deciding body knew about the fact or not in arriving at the decision.[3731]

2. Alleged New Facts relating to Cyahafi Sector

37. The Trial Chamber convicted Mr. Rutaganda, in part, for his role in distributing weapons to *Interahamwe* on 8, 15, and 24 April 1994 in Cyahafi sector.[3732] Mr. Rutaganda's role in distributing weapons and the subsequent attacks in Cyahafi sector forms part of his conviction for genocide and extermination as a crime against humanity.[3733] Mr. Rutaganda appealed the findings related to the distribution of weapons, challenging the notice provided in the Indictment for three separate incidents of weapons distribution as well as the credibility of witnesses.[3734] The Appeals Chamber rejected Mr. Rutaganda's ground of appeal against the Trial Chamber's factual findings.[3735]

38. In his Request for Review, Mr. Rutaganda points to several alleged new facts that came to light in a trial judgement of a Rwandan court in the case of Théogène Rutayisire ("*Rutayisire* Judgement") which, in his view, could have been a decisive factor in his case with respect to the three incidents of weapons distribution on 8, 15, and 24 April 1994 and the subsequent attacks in Cyahafi sector.[3736] The alleged new facts arising from the *Rutayisire* Judgement relate to the factual findings on the events in Cyahafi sector and the credibility of the witnesses in Mr. Rutaganda's case.

(a) Alleged New Facts Related to the Factual Findings on the Events in Cyahafi Sector

39. Mr. Rutaganda submits that the *Rutayisire* Judgement concerns the same events as considered in his case related to the Cyahafi sector but provides a starkly different account than his trial judgement of how and when these events unfolded and of who spearheaded them.[3737] According to Mr. Rutaganda, the *Rutayisire* Judgement refers to a single distribution of weapons and attack on 16 April 1994, and places blame for this on Michel Haragirimana, the former *conseiller* of Cyahafi sector.[3738] Furthermore, Mr. Rutaganda points to witness testimonies cited in the *Rutayisire* Judgement, which do not mention him distributing weapons in Cyahafi sector or the following attacks for which he was convicted.[3739]

40. The *Rutayisire* Judgement and the allegation that its factual findings are inconsistent with the findings of the Trial Chamber do not warrant review. In its Judgement, the Appeals Chamber considered and rejected Mr. Rutaganda's claim that only one distribution and attack occurred in Cyahafi sector in April 1994.[3740] Moreover, Mr. Rutaganda concedes that throughout his trial he maintained that local authorities were responsible for the distribution of weapons in Cyahafi sector.[3741] Though the *Rutayisire* Judgement was not before the Trial Chamber or the Appeals Chamber, the alleged factual errors in the Trial Chamber's Judgement, which Mr. Rutaganda claims are illustrated by it, were considered or could have been taken into account in rendering the verdict. Moreover, the Appeals Chamber does not consider the witnesses' alleged failures to discuss Mr. Rutaganda's activities in a separate trial involving a different accused to constitute new facts for the purposes of

[3730] *Niyitegeka* Review Decision, para. 6. See also *Blaškić* Review Decision, paras 14, 15; *Tadić* Review Decision, para. 25.
[3731] *Blaškić* Review Decision, para. 14.
[3732] *Rutaganda* Trial Judgement, paras 195-201, 385-386.
[3733] *Rutaganda* Trial Judgement, paras 402, 416.
[3734] *Rutaganda* Appeal Judgement, paras 294-341.
[3735] *Rutaganda* Appeal Judgement, paras 306, 315, 321, 331, 338, 340, 341.
[3736] Consolidated Request, paras 144-190. Mr. Rutaganda provided a free translation into French of the Kinyarwanda version of the *Rutayisire* Judgement. The Prosecution does not contest the translation.
[3737] Consolidated Request, paras 145-170.
[3738] Consolidated Request, paras 147, 152-154, 159, 161, 163.
[3739] Consolidated Request, paras 154-156.
[3740] *Rutaganda* Appeal Judgement, paras 339-341.
[3741] Consolidated Request, para. 154.

review. As the Appeals Chamber has previously stated, "to suggest that if something were true a witness would have included it in a statement or a confession letter is obviously speculative and, in general, it cannot substantiate a claim that a Trial Chamber erred in assessing the witness's credibility."[3742] Accordingly, these alleged factual inconsistencies do not constitute new facts which would allow review.

(b) Alleged New Facts Related to Witness Credibility

41. Mr. Rutaganda first points to alleged material inconsistencies between the accounts of Witnesses T, J, and AA, whose evidence underlies his conviction for these events, and their apparent statements before Rwandan authorities in the *Rutayisire* case.[3743] Mr. Rutaganda notes that, unlike in his trial, these witnesses implicated Théogène Rutayisire rather than him as the head of the *Interahamwe* and for distributing weapons and directing the attacks.[3744]

42. Second, Mr. Rutaganda refers to other credibility issues which surface from the *Rutayisire* Judgement, including findings on the general lack of credibility of these three witnesses, the possible perjury of Witnesses J and AA, and the possible role these two witnesses played in the crimes. In particular, Mr. Rutaganda notes that the *Rutayisire* Judgement held the testimony of these individuals to be contradictory and unreliable.[3745] Furthermore, Mr. Rutaganda highlights that in his case, Witnesses J and AA denied providing testimony before any other authority involving him or the crimes in Cyahafi sector.[3746] Mr. Rutaganda notes, however, that the *Rutayisire* Judgement reflects that these witnesses provided *pro justitia* statements to Rwandan authorities prior to their testimony in his case before the Tribunal.[3747] Finally, Mr. Rutaganda submits that the *Rutayisire* Judgement reveals that Witnesses J and AA were part of a crime syndicate during the period relevant to Mr. Rutaganda's convictions and thus were accomplices whose testimony should have been viewed with caution.[3748]

43. The Appeals Chamber notes that Mr. Rutaganda's arguments pertain to witness credibility, which was heavily litigated throughout the proceedings in his case.[3749] Nonetheless, the Prosecution does not dispute that the points raised by Mr. Rutaganda related to witness credibility are new facts or that he lacked awareness of them during the original proceedings. Rather it takes issue with Mr. Rutaganda's diligence in raising these matters and further asserts that none of these points could have impacted the outcome in his case.[3750] Additionally, it argues that the findings in the *Rutayisire* case are not binding on the Tribunal and that Mr. Rutaganda's assertion that Witnesses J and AA committed perjury is not supported by a review of the record.[3751]

44. In assessing the credibility of Witnesses T, J, and AA, the Trial Chamber and, subsequently the Appeals Chamber, were not aware that these witnesses apparently gave such statements to Rwandan authorities on the distribution of weapons and the criminal responsibility for attacks in Cyahafi sector. Therefore, these statements were not in issue during the trial or appeals proceedings, and thus constitute new facts. The Appeals Chamber also accepts that Mr. Rutaganda was not aware of these

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[3742] *Juvénal Kajelijeli v. The Prosecutor*, Case N°ICTR-98-44A-A, Judgement, 23 May 2005, para. 176 ("*Kajelijeli* Appeal Judgement").
[3743] Consolidated Request, paras 146, 147, 152, 157, 163, 178-190. Mr. Rutaganda notes that Witnesses T, J, and AA never appeared before the trial court in Kigali, despite its repeated efforts to obtain their testimony, because they would have been publicly disavowed. Consolidated Request, paras 179-181 (citing *Rutayisire* Judgement).
[3744] Consolidated Request, paras 147, 152, 157, 163.
[3745] Consolidated Request, paras 157, 159, 163.
[3746] Consolidated Request, paras 158, 182-185.
[3747] Consolidated Request, paras 183, 185.
[3748] Consolidated Request, paras 178, 187.
[3749] See *Rutaganda* Trial Judgement, paras 195-201, 226, 227, 252-261; *Rutaganda* Appeal Judgement, paras 307-341, 345-396. See also *The Prosecutor v. Georges Rutaganda,* Case N°96-3-A, Defense Appeal Brief, 1 May 2001, parts VI, VII.
[3750] Consolidated Response, paras 125, 126.
[3751] Consolidated Response, paras 127, 128, 133.

statements during the original proceedings given his undisputed submissions that he only recently discovered the *Rutayisire* Judgement.[3752]

45. Nonetheless, the Appeals Chamber is not satisfied that Mr. Rutaganda acted with the requisite diligence in discovering and bringing these issues forward. Mr. Rutaganda explains that he became aware of the *Rutayisire* Judgement only by chance when reviewing a volume of Rwandan trial judgements.[3753] Mr. Rutaganda submits that he could not have obtained the judgement earlier given security concerns, which prevented his counsel from undertaking investigations in Rwanda.[3754] Moreover, he notes that the Prosecution would have been fully aware of the *Rutayisire* case given the overlap in witnesses and events, and that it thus failed to disclose this information to him, preventing him from learning about it sooner.[3755]

46. The Appeals Chamber does not find Mr. Rutaganda's explanation concerning his diligence convincing. The Rwandan trial court conducted proceedings in the *Rutayisire* case from January 1998 and pronounced its judgement on 22 February 1999.[3756] At this same time, Mr. Rutaganda was engaged in trial proceedings before this Tribunal.[3757] The Rwandan trial court rendered the *Rutayisire* Judgement almost ten months before Mr. Rutaganda's trial judgement and nearly three and a half years before the Appeals Chamber heard oral arguments in his appellate proceedings.[3758] Mr. Rutaganda's explanation that security concerns prevented his counsel from traveling to Rwanda is both unsupported and unpersuasive. To the extent that there is any validity to Mr. Rutaganda's claims, it was incumbent on his counsel to request a stay of the proceedings until appropriate arrangements could have been made to undertake any necessary investigations in Rwanda. In other words, Mr. Rutaganda had the burden to exhaust all measures afforded by the Statute and Rules to obtain the presentation of this evidence.[3759] Mr. Rutaganda has not demonstrated that he has done so. At this late stage, the Appeals Chamber will not accept a claim that unspecified security concerns rendered the possible credibility issues arising from the *Rutayisire* case undiscoverable or inaccessible despite an exercise of due diligence. Moreover, Mr. Rutaganda has not demonstrated that the Prosecution was in possession or even aware of the *Rutayisire* Judgement.

47. In addition, the Appeals Chamber is not satisfied that this case presents wholly exceptional circumstances warranting review. In light of the finding of lack of due diligence, the Appeals Chamber may grant review only if ignoring the new facts *would* result in a miscarriage of justice.[3760] In this case, the Appeals Chamber is not satisfied that the *Rutayisire* Judgement can definitively establish the credibility issues advanced by Mr. Rutaganda. First, the *Rutayisire* Judgement results from a separate proceeding against a different accused.[3761] Second, the pre-trial statements, which these witnesses apparently provided to the Rwandan authorities, are only alluded to in the *Rutayisire* Judgement and are not relied upon as establishing its findings. As Mr. Rutaganda notes, the three witnesses did not in fact appear as witnesses in the *Rutayisire* case.[3762]

[3752] See Consolidated Response, para. 114.
[3753] Consolidated Request, para. 114.
[3754] Consolidated Request, para. 120.
[3755] Consolidated Request, para. 118.
[3756] Consolidated Request, Annex IV.
[3757] Mr. Rutaganda first appeared before the Tribunal on 30 May 1996. His trial opened on 18 March 1997. The defence case commenced on 8 February 1999. His trial ended on 17 June 1999. See *Rutaganda* Trial Judgement, paras 7, 8, 11; *Rutaganda* Appeal Judgement, para. 5.
[3758] Mr. Rutaganda's trial judgement was rendered on 6 December 1999, and the Appeals Chamber heard arguments on 4 and 5 July 2002. *See Rutaganda* Appeal Judgement, paras 5, 9.
[3759] See, e.g., *The Prosecutor v. Duško Tadić*, Case N°IT-94-1-A, Judgement, 15 October 1999, paras 52, 53, 55.
[3760] *Niyitegeka* Review Decision, para. 7; *Radić* Review Decision, para. 11; *Tadić* Review Decision, paras 26, 27.
[3761] See also *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case N°ICTR-95-1-A, Judgement, 1 June 2001, para. 143 ("two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence") ("*Kayishema and Ruzindana* Appeal Judgement").
[3762] Consolidated Request, para. 180. The Prosecution, however, seems to suggests that Witness T in fact appeared at the trial in Rwanda. See Consolidated Response, para. 129. The Prosecution's contention, however, does not appear to be supported by the text of the *Rutayisire* Judgement.

48. Moreover, even assuming that the *Rutayisire* Judgement could cast sufficient doubt on the evidence of Witnesses T, J, and AA, the Appeals Chamber is not convinced that this would disturb the finding of Mr. Rutaganda's culpability for the distribution of weapons and subsequent attacks in Cyahafi sector. First, the Trial Chamber did not rely on the evidence of Witness AA in making findings on these events. Moreover, the testimonies of Witnesses J and T underlie the findings for the distributions of weapons on 15 and 24 April 1994, respectively.[3763] The Trial Chamber did not rely on any of these impugned witnesses, however, in support of its findings that Mr. Rutaganda distributed weapons on 8 April 1994[3764] and thus, the findings for this event would remain undisturbed. Second, the Appeals Chamber considers that Mr. Rutaganda's conviction and life sentence equally and independently rest on his role in the massacres at ETO and in Nyanza, which do not rely on the evidence of these witnesses. In particular, the Appeals Chamber recalls that it declined to revisit Mr. Rutaganda's life sentence, after quashing a conviction of murder in his appeal, noting in particular the gravity of the events in Nyanza alone.[3765] Therefore, granting review based on the alleged credibility issues related to Witnesses T, J, and AA relating to the distributions of weapons and attacks in Cyahafi sector would not alter the findings related to Mr. Rutaganda's role in the attacks at ETO and in Nyanza and, ultimately, his convictions and life sentence for genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions.

49. Accordingly, the Appeals Chamber dismisses Mr. Rutaganda's Request for Review based on the new facts related to the events in Cyahafi sector.

3. Alleged New Facts Related to the Amgar Garage

50. The Trial Chamber convicted Mr. Rutaganda for genocide and crimes against humanity, in part, based on his role in the detention and killing of Tutsis in the vicinity of his offices at the Amgar garage.[3766] Mr. Rutaganda appealed these findings, primarily challenging the Trial Chamber's assessment of the underlying evidence of Witnesses Q, T, and BB.[3767] The Appeals Chamber rejected Mr. Rutaganda's appeal.[3768]

51. Mr. Rutaganda seeks review of his convictions based again on alleged new facts arising from the *Rutayisire* Judgement, which he submits could have been decisive in considering the factual findings for the events related to Amgar garage.[3769] In particular, Mr. Rutaganda points to the credibility issues impacting Witnesses T and AA, as discussed above.[3770] He also notes that no witness in the *Rutayisire* case, despite proximity and familiarity with the area, mentions the killing of Tutsis near the Amgar garage or Mr. Rutaganda's responsibility for crimes committed in that area.[3771]

52. In addition, Mr. Rutaganda points to *affidavits* supplied by Mr. Amadou Démé, a former intelligence officer with the United Nations Assistance Mission in Rwanda ("UNAMIR"),[3772] according to which the Amgar garage appeared to be an ordinary place of business.[3773] Mr. Rutaganda notes that Mr. Démé's observations concerning the Amgar garage further call into question the credibility of witness accounts about the crimes which occurred there.[3774]

[3763] *Rutaganda* Trial Judgement, paras 176-180, 193, 197, 199.
[3764] The distribution of weapons on 8 April 1994 is based on the evidence of Witness U. *Rutaganda* Trial Judgement, paras 188-192, 198. Moreover, the Trial Chamber also noted the evidence of Witness Q, which it found reliable, who testified that it was common knowledge that Mr. Rutaganda distributed weapons. *Rutaganda* Trial Judgement, paras 194, 195.
[3765] See *Rutaganda* Appeal Judgement, para. 592. In particular, the Appeals Chamber recalled that, of the 4,000 persons in Nyanza, only approximately 200 survived the massacre.
[3766] *Rutaganda* Trial Judgement, paras 228-261, 388, 389, 406.
[3767] *Rutaganda* Appeal Judgement, paras 342-396.
[3768] *Rutaganda* Appeal Judgement, paras 359, 368, 376, 379, 384, 392, 396.
[3769] Consolidated Request, paras 171-177.
[3770] Consolidated Request, paras 172, 178-181, 184-190.
[3771] Consolidated Request, paras 173-176.
[3772] Consolidated Request, paras 112, 191-209, Exhibit V.
[3773] Consolidated Request, paras 204, 205.
[3774] Consolidated Request, paras 208, 209.

53. The Appeals Chamber does not consider that the alleged silence of witnesses in the *Rutayisire* case with respect to Mr. Rutaganda's activities at the Amgar garage or Mr. Démé's observations during a brief visit to the Amgar garage amount to new facts.[3775] The Appeals Chamber observes that Mr. Rutaganda presented similar evidence concerning the lack of prisoners at the Amgar garage during his trial.[3776] Thus, this is not a new fact, as it was in issue during his original proceedings.[3777] Moreover, for the reasons set forth above, the Appeals Chamber is also not satisfied that the alleged credibility issues advanced by Mr. Rutaganda with respect to Prosecution Witnesses T and AA warrant review.[3778]

54. Accordingly, the Appeals Chamber dismisses Mr. Rutaganda's request for review based on the alleged new facts related to the events at Amgar garage.

4. Alleged New Facts Related to Genocidal Intent

55. Mr. Rutaganda seeks review of the findings on his genocidal intent on the basis of the alleged new facts contained in several *affidavits* supplied by Mr. Amadou Démé and Ambassador Clayton Yaache, the former head of UNAMIR's Humanitarian Affairs Cell ("Démé *Affidavits*" and "Yaache *Affidavit*", respectively).[3779] Mr. Rutaganda submits that the new facts contained in these *affidavits* could have played a decisive role in the Trial Chamber's findings on his genocidal intent.[3780] The Démé *Affidavits* recount Mr. Rutaganda's role in negotiating the safe passage and evacuation of refugees from the *Hôtel des Mille Collines* to RPF held territory on 3 May 1994.[3781] According to his *affidavits*, Mr. Démé sought and received Mr. Rutaganda's urgent assistance to prevent an imminent massacre of the refugees by a mob of assailants during the evacuation at great personal danger to Mr. Rutaganda.[3782] The Yaache *Affidavit* corroborates Mr. Démé's account of Mr. Rutaganda's role during the transfer of refugees and concludes that Mr. Rutaganda played a "key role" in saving the lives of the evacuees.[3783] In addition, Mr. Rutaganda points to a statement, signed by him and broadcast on Radio Rwanda on 25 April 1994, wherein he appealed for calm.[3784]

56. In the Appeals Chamber's view, the Démé and Yaache *Affidavits* as well as the Radio Rwanda broadcast simply constitute additional evidence of issues previously considered and, therefore, fail to provide a basis upon which review may be granted.[3785] Mr. Rutaganda testified at length during his trial about his role in the evacuation of the refugees from the *Hôtel des Mille Collines*.[3786] In addition, Mr. Rutaganda challenged the reasonableness of the Trial Chamber's findings on his genocidal intent on appeal pointing to evidence of his assistance to Tutsis during this period.[3787] The Appeals Chamber recalls that, in concluding that Mr. Rutaganda had genocidal intent, the Trial Chamber emphasized his direct participation in the widespread attacks and killings committed against Tutsis who were

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[3775] Cf. *Kajelijeli* Appeal Judgement, para. 176.
[3776] *Rutaganda* Trial Judgement, paras 239-241.
[3777] *Niyitegeka* Review Decision, para. 6. See also *Tadić* Review Decision, para. 25.
[3778] Furthermore, the Appeals Chamber recalls that the Trial Chamber refused to rely on Witness AA's testimony when it determined the evidence insufficient to support the charge that Mr. Rutaganda stationed *Interahamwe* at a road block near the entrance of the Amgar garage. See Trial Judgement, paras 205, 209-211, 219, 225, 226. Additionally, the Appeals Chamber ignored testimony provided by Witness AA when it overturned the Trial Chamber's findings that Mr. Rutaganda killed Emmanuel Kayitare. See Appeal Judgement, paras 490-506. Thus, striking Witness AA's testimony would have no effect on Mr. Rutaganda's convictions related to killings at the Amgar garage.
[3779] Consolidated Request, paras 112, 191-217, Exhibits V, VI.
[3780] Consolidated Request, paras 207, 209, 217.
[3781] Consolidated Request, paras 197, 198.
[3782] Consolidated Request, paras 198-208.
[3783] Consolidated Request, paras 212-214.
[3784] Consolidated Request, paras 242, 243, 244.
[3785] See *The Prosecutor v. Hazim Delić,* Case N°IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002, para. 11 ("If the material proffered consists of additional evidence relating to a fact which *was* in issue or considered in the original proceedings, this does not constitute a 'new fact' […], and the review procedure is not available.").
[3786] T. 22 April 1999 pp. 63-80, 182-187.
[3787] *Rutaganda* Appeal Judgement, paras 532-537.

systematically selected for killing because of their ethnicity.[3788] The Appeals Chamber dismissed Mr. Rutaganda's challenge to the findings on his genocidal intent,[3789] bearing in mind the evidence and arguments related to his assistance to Tutsis during this period.[3790] The Appeals Chamber recalls the view it expressed at the time: "a reasonable trier of fact could very well not take account of some of the illustrations provided by the Appellant, which appear immaterial within the context of the numerous atrocities systematically and deliberately perpetrated against members of the Tutsi group."[3791]

57. Accordingly, the Appeals Chamber finds that Mr. Rutaganda's assistance to UNAMIR on behalf of the refugees at the *Hôtel des Mille Collines* and his appeal for calm on 25 April 1994 do not constitute new facts for the purposes of review because the issues raised by this material were considered during his original proceedings.[3792]

5. Alleged New Facts Related to Sentencing

58. Mr. Rutaganda also seeks review of his sentence based on a number of alleged procedural irregularities which he submits could have impacted his sentence.[3793] The Appeals Chamber addresses each in turn.

(a) Alleged Illegal Detention

59. Mr. Rutaganda seeks review of his sentence based on an alleged 171-day period of illegal detention following his initial arrest in Zambia.[3794] He claims that, despite having received asylum in Zambia, Zambian authorities arrested him on immigration charges on 10 October 1995, verbally informing him at the time of his arrest of the Tribunal's interest in prosecuting him.[3795] He notes that on 22 November 1995, the Prosecutor filed a request under Rule 40 of the Rules to provisionally detain him for ninety days pending investigations and the confirmation of an indictment.[3796] Mr. Rutaganda explains that on 12 January 1996, a Zambian judge ordered the release of other Rwandans arrested with him, confirming the illegality of their arrest.[3797] Mr. Rutaganda submits, however, that he remained illegally detained until 29 March 1996, when the Prosecution provided him with his indictment.[3798]

60. Invoking the Appeals Chamber decisions in the *Barayagwiza, Semanza,* and *Kajelijeli* cases, Mr. Rutaganda submits that this violation would have had an impact on his sentence had it been adduced at trial.[3799] He argues that he has not raised this issue until now due to professional negligence on the part of his counsel who failed to challenge the illegal detention at the outset of the proceedings and who also failed to make sentencing submissions.[3800]

[3788] *Rutaganda* Trial Judgement, para. 399.
[3789] *Rutaganda* Appeal Judgement, paras 530, 531.
[3790] *Rutaganda* Appeal Judgement, paras 532-537.
[3791] *Rutaganda* Appeal Judgement, para. 537. See also *The Prosecutor v. Miroslav Kvočka et al.*, Case N°IT-98-30/1-A, Appeal Judgement, 28 February 2005, paras 232-233 (noting that evidence of political tolerance, affiliation with Muslims, and being married to a Muslim would not preclude a reasonable trier of fact, in light of all the evidence, from finding that the accused held a specific discriminatory intent toward Muslims).
[3792] *Niyitegeka* Review Decision, para. 6. See also *Tadić* Review Decision, para. 25
[3793] Consolidated Request, paras 219-249.
[3794] Consolidated Request, paras 112, 133-143.
[3795] Consolidated Request, para. 133.
[3796] Consolidated Request, para. 134.
[3797] Consolidated Request, para. 135.
[3798] Consolidated Request, para. 136.
[3799] Consolidated Request, paras 136, 142.
[3800] Consolidated Request, paras 137, 141, 143.

61. The Appeals Chamber recalls that Mr. Rutaganda first raised allegations of illegal detention in his Notice of Appeal,[3801] and accordingly this allegation does not constitute a new fact, as it could have been taken into account in the Appeals Chamber's judgement.[3802] However, while this allegation was raised in the Notice of Appeal, it was not addressed in his appeal brief. In addition, during the appeals hearing, Mr. Rutaganda's counsel confirmed that he had abandoned his appeal against the sentence.[3803] Accordingly, this argument has been waived.[3804] Moreover, Mr. Rutaganda has failed to demonstrate that his counsel's decision to withdraw this argument on appeal constitutes professional negligence that would result in a miscarriage of justice. In such circumstances, the Appeals Chamber declines to consider this issue further.

(b) Alleged Disclosure Violations

62. Mr. Rutaganda points to other procedural irregularities in his case, which in his view could impact on his sentence.[3805] He submits that the Prosecution failed to disclose the *Rutayisire* Judgement as well as interviews with Michel Haragirimana and Joseph Setiba, which are allegedly exculpatory.[3806] He argues that, according to information in his possession, the Prosecution had custody of this material.[3807] In addition, he complains that the Prosecution failed to disclose a transcript of his Radio Rwanda statement, dated 25 April 1994, in which he appealed for calm.[3808] As discussed above, Mr. Rutaganda claims that this transcript would have negated his genocidal intent.[3809]

63. To establish a violation of the Rule 68 disclosure obligation, the Defence must: (1) establish that additional material exists in the possession of the Prosecution; and (2) present a *prima facie* case that the material is exculpatory.[3810] Initially, as the Prosecution submits,[3811] Mr. Rutaganda has not demonstrated that the Prosecution was in possession of the *Rutayisire* Judgement at any relevant point or that it is in possession of exculpatory statements of Michel Haragirimana and Joseph Setiba. The Appeals Chamber recalls that Rule 68 does not impose an obligation on the Prosecution to search for material of which it does not have knowledge.[3812]

64. With regards to the Radio Rwanda transcript dated 25 April 1994, the Appeals Chamber finds that the Prosecution failed to fulfill its obligation under Rule 68 to make appropriate disclosure of material in its custody. Mr. Rutaganda's submissions indicate that this transcript was transcribed on 21

[3801] *The Prosecutor v. Georges Rutaganda,* Case N°96-3-A, *Acte d'Appel*, 26 January 2000, para. 5 ("Notice of Appeal").
[3802] *Niyitegeka* Review Decision, para. 6. See also *Tadić* Review Decision, para. 25.
[3803] See *Rutaganda* Appeal Judgement, para. 586, n. 1081.
[3804] See, e.g., *Eliézer Niyitegeka v. The Prosecutor*, Case N°96-14-A, Judgement, 9 July 2004, para. 199 ("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 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."), quoting *Kayishema and Ruzindana* Appeal Judgement, para. 91. The Appeals Chamber observes that Mr. Barayagwiza, Mr. Semanza, and Mr. Kajelijeli each challenged their unlawful detention at the earliest opportunity. See, e.g., *Jean-Bosco Barayagwiza v. The Prosecutor*, Decision, 2 November 1999, paras 3, 8; *Laurent Semanza v. The Prosecutor*, Case N°ICTR-97-20-A, Decision, 31 May 2000, paras 10, 17, 114-121; *The Prosecutor v. Juvénal Kajelijeli*, Case N°ICTR-98-44-I, Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of the 8 December 1999 Hearing, 8 May 2000.
[3805] Consolidated Request, paras 219-249.
[3806] Consolidated Request, paras 233, 234, 246, 247.
[3807] Consolidated Request, paras 246, 247.
[3808] Consolidated Request, paras 243, 245.
[3809] Consolidated Request, paras 242-245.
[3810] *Kajelijeli* Appeal Judgement, para. 262.
[3811] Prosecutor's Response, paras 143, n. 188, 145.
[3812] *The Prosecutor v. Miroslav Bralo*, Case N°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, para. 30 ("*Bralo* Appeal Decision"). However, the Prosecution must actively review the material in its possession for exculpatory material. See *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 June 2006, paras 9, 10 ("*Karemera et al*. Appeal Decision").

January 2000 and was disclosed by the Prosecution in several other cases before the Tribunal.[3813] The Prosecution does not dispute this or that the transcript could have included material tending to exculpate Mr. Rutaganda.[3814] The Prosecution offers no explanation as to why it failed to disclose this material to Mr. Rutaganda. The Appeals Chamber recalls that the Prosecution has a positive and continuous obligation under Rule 68 of the Rules.[3815] The Appeals Chamber finds that the Prosecution acted in violation of its obligation to disclose in this case. However, even when the Appeals Chamber is satisfied that the Prosecution has failed to comply with its Rule 68 obligations, it will examine whether the Defence has actually been prejudiced by such failure before considering whether a remedy is appropriate.[3816] For the reasons mentioned above in considering Mr. Rutaganda's request for review of the finding on his genocidal intent, the Appeals Chamber does not consider that the Prosecution's failure warrants a remedy that would impact on Mr. Rutaganda's sentence. Thus, the Appeals Chamber denies Mr. Rutaganda's request for review of his sentence based on this disclosure violation. However, the Prosecution should take this as a clear warning that, in the future, the Appeals Chamber may impose appropriate sanctions should it be found to be in violation of its Rule 68 obligation.

(c) Alleged Presentation of False Evidence

65. Mr. Rutaganda also claims that the Prosecution presented false evidence in his case.[3817] He points to Prosecution exhibits related to the geographic and topographical aspects of the Amgar garage and its surrounding area, which he claims do not comport with reality.[3818] In addition, he also refers to an 11 January 1994 cable sent by General Roméo Dalliare to the United Nations headquarters in New York providing an assessment, based on his intelligence sources, that the *Interahamwe* was organized, armed, and prepared to kill up to one thousand Tutsis within a twenty minute period.[3819] Mr. Rutaganda explains that this evidence was tendered by the Prosecution through an expert witness Professor Filip Reyntjens.[3820] Mr. Rutaganda points to recent defence evidence in the *Bagosora et al.* trial, which he claims undermines the credibility of this exhibit.[3821] The Prosecution rejects Mr. Rutaganda's allegations as unsupported by evidence.[3822]

66. The Appeals Chamber considers that Mr. Rutaganda has failed to provide an evidentiary basis to support his allegations that the Prosecution presented falsified evidence at trial.[3823] The Appeals Chamber also notes that Mr. Rutaganda has not identified any finding related to his criminal responsibility implicated by these assertions. Additionally, Mr. Rutaganda's submissions seek to re-litigate the authenticity and credibility of evidence and do not present new facts upon which review may be granted. Accordingly, these arguments do not warrant review.

C. Request for Assignment of Counsel

67. In his Request for Assignment of Counsel, Mr. Rutaganda asks the Appeals Chamber to direct the Registrar to assign Ms. Sarah Bihegue as his counsel under the Tribunal's legal aid system in order

[3813] Consolidated Request, para. 242.
[3814] Prosecutor's Response, para. 144.
[3815] *Karemera et al.* Appeal Decision, para. 10. See also *Ferdinand Nahimana et al. v. The Prosecutor*, Case N°99-52-A, 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, para. 6.
[3816] See, e.g., *Kajelijeli* Appeal Judgement, para. 262; *The Prosecutor v. Radislav Krstić*, Case N°IT-98-33-A, Judgement, 19 April 2004, para. 153; *Bralo* Appeal Decision, para. 31.
[3817] Consolidated Request, paras 219-231.
[3818] Consolidated Request, paras 219-223.
[3819] Consolidated Request, paras 224-227.
[3820] Consolidated Request, para. 224.
[3821] Consolidated Request, paras 228-231.
[3822] Consolidated Response, paras 139, 140, 141, 142.
[3823] The Appeals Chamber notes that Mr. Rutaganda has submitted sketches, which he argues highlight the irregularities of the Prosecution exhibits. In the Appeals Chamber's view, Mr. Rutaganda's sketches are merely extensions of his argument and fail to provide evidentiary support for his claim.

to assist him in pursuing post-conviction relief.[3824] In support of this request, he argues that this assignment of counsel is in the interest of justice given the demands of his case.[3825] Furthermore, Mr. Rutaganda alleges that, in violation of Article 82 of the Rules of Detention, the Tribunal has frustrated his attempts to freely communicate with counsel of his choice, who has agreed to represent him on a *pro bono* basis, notwithstanding his repeated pleas to the Registrar and the President to grant access.[3826] In the alternative, he requests the Appeals Chamber to order the Registrar to allow him unimpeded access to counsel of his choice who has agreed to represent him on a *pro bono* basis.[3827]

68. The Appeals Chamber recalls that review is an exceptional remedy and that an applicant is only entitled to assigned counsel, at the Tribunal's expense, if the Appeals Chamber authorizes the review.[3828] Nonetheless, counsel may be assigned at the preliminary examination stage, normally for a very limited duration, if it is necessary to ensure the fairness of the proceedings.[3829] Mr. Rutaganda has already made extensive and detailed submissions supported by a number of exhibits in his Request for Review. The Appeals Chamber is not satisfied that additional briefing would be of assistance in the present inquiry. In such circumstances, Mr. Rutaganda's Request for Review does not warrant the assignment of counsel under the auspices of the Tribunal's legal aid system.

69. Nonetheless, as a general matter, Mr. Rutaganda may be assisted by counsel in connection with a request for review at his own expense or on a *pro bono* basis provided the counsel files a power of attorney with the Registrar and satisfies the requirements to appear before the Tribunal. The Registry informed Mr. Rutaganda of this in its letter dated 21 October 2004, explaining that his former counsel could contact him.[3830] Thereafter, Mr. Rutaganda filed a notice to the Deputy Registrar indicating that he had retained his former counsel to assist him.[3831] Even putting aside that Rule 44 (A) of the Rules refers to the counsel filing a power of attorney, Mr. Rutaganda has not pointed to any instance after that point where he was denied access to his counsel.[3832] The Appeals Chamber further observes that, in his request, he refers to the *pro bono* assistance which he received from his former counsel during this period.[3833] Accordingly, the Appeals Chamber declines to consider further Mr. Rutaganda's alleged violations of his right to communicate with counsel. In any event, as a general rule, such matters should first and foremost be addressed by the Registrar.[3834]

D. Request for Disclosure

70. In his Request for Disclosure, Mr. Rutaganda seeks the disclosure of the full identity and unredacted statements of all Prosecution witnesses called in his case, which he submits was not done or, at least, not done in a timely fashion.[3835] In addition, he requests the Appeals Chamber to order the Prosecution to search for statements made by these witnesses before Rwandan judicial authorities and

[3824] Consolidated Request, paras 250, 266 (see also prayer for relief para. S).
[3825] Consolidated Request, para. 264.
[3826] Consolidated Request, paras 252-263.
[3827] Consolidated Request, prayer for relief para. S.
[3828] *Eliézer Niyitegeka v. The Prosecutor*, Case N°96-14-R, Decision on Niyitegeka's Urgent Request for Legal Assistance, 20 June 2005 ("*Niyitegeka* Counsel Decision").
[3829] *Niyitegeka* Counsel Decision.
[3830] The Registry informed Mr. Rutaganda of as much in its letter to him dated 21 October 2004, explaining that his former counsel could contact him. See Consolidated Request, Annex XVI (Letter from Aminatta N'gum, Acting Chief of the Tribunal's Defence Counsel and Detention Management Section, to Mr. Rutaganda, dated 21 October 2004).
[3831] Consolidated Request, para. 261, Exhibit XVIII.
[3832] Mr. Rutaganda refers to an incident in March 2005. However, his correspondence refers to a communication with his sister. See Consolidated Request, para. 262, Exhibit XIX.
[3833] See Consolidated Request, para. 114 (noting that the Démé and Yaache *Affidavits* were obtained as a result of the "persistent and voluntary research carried out by his former Defence team.").
[3834] Cf. *The Prosecutor v. Zeljko 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. 7 ("The Registrar has the primary responsibility of determining matters relating to the assignment of counsel under the legal aid system.").
[3835] Request for Disclosure, paras 5, 11-35.

to disclose such statements to him.[3836] In this respect, Mr. Rutaganda notes that the Prosecution has carried out similar searches in other cases.[3837]

71. The Prosecution responds that it provided Mr. Rutaganda with unredacted copies of statements and the full identities of the witnesses at the time of their testimony in accordance with the Trial Chamber's witness protection order.[3838] Moreover, it submits that it does not possess any exculpatory statements made by witnesses in the *Rutaganda* case before Rwandan authorities. It further argues that it has no obligation to obtain such material from Rwanda.[3839]

72. The Appeals Chamber considers that Mr. Rutaganda's request for disclosure lacks merit. The Trial Chamber concluded that the Prosecution had fulfilled its obligations to disclose witness statements and identifying material.[3840] To the extent that this conclusion was erroneous or that the modalities for disclosure were objectionable, it was Mr. Rutaganda's prerogative to bring this issue to the attention of the Trial Chamber in the first instance and, if necessary, to raise it on appeal.[3841] The Appeals Chamber declines to consider such complaints in review proceedings. As the Appeals Chamber previously held, the Prosecution has no obligation to obtain judicial material related to its witnesses from Rwanda.[3842] Though the Prosecution has made such inquiries of its own accord in some cases, these voluntary efforts do not expand the nature of its disclosure obligations.

73. The Appeals Chamber notes that many Trial Chambers, in the exercise of their discretion, have requested the Prosecution to assist the defence and use its good offices in order to obtain such material in the interests of facilitating the trial proceedings.[3843] Mindful of the exceptional nature of review proceedings, the Appeals Chamber denies Mr. Rutaganda's request to order the Prosecution to obtain this material from Rwanda. Accordingly, the Appeals Chamber dismisses Mr. Rutaganda's Request for Disclosure in its entirety.

III. Disposition

74. For the foregoing reasons, Mr. Rutaganda's Requests for Reconsideration and Clarification, Request for Review, Request for Assignment of Counsel, and Request for Disclosure are denied.

Done in English and French, the English version being authoritative.

Done this 8th day of December 2006, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

[3836] Request for Disclosure, paras 5, 36-40.
[3837] In this respect, Mr. Rutaganda points to the case of Hassan Ngeze where the Prosecution obtained statements made before a Gacaca proceeding of Witness EB. See Request for Disclosure, para. 39. In Annex D to the Request for Disclosure, Mr. Rutaganda submits the cover page of this confidential disclosure. The Prosecution argues that this constitutes a breach of the witness protection order in Mr. Ngeze's case and asks the Appeals Chamber to order the Prosecution to investigate this alleged breach for contempt. See Response to Disclosure Request, paras 20, 22. The Appeals Chamber, however, declines to issue such an order. The Appeals Chamber observes that Annex D, submitted by Mr. Rutaganda, is simply a cover page related to the disclosure and contains no identifying information. Mr. Rutaganda asserts that he did not receive any protected information. Reply to Disclosure Request, para. 27. Based on the material before it, the Appeals Chamber sees no reason to question this averment.
[3838] Response to Disclosure Request, paras 4, 8-16.
[3839] Response to Disclosure Request, paras 4, 17-22.
[3840] See *The Prosecutor v. Georges Rutaganda*, Case N°99-03-T, Decision on the Defence Motion for Disclosure of Evidence, 4 September 1998, pp. 2, 7, 8.
[3841] *Rutaganda* Appeal Judgement, para. 192.
[3842] *Kajelijeli* Appeal Judgement, para. 263.
[3843] *The Prosecutor v. Aloys Simba*, Case N°ICTR-01-76-T, Decision on Matters Related to Witness KDD's Judicial Dossier, 1 November 2004, paras 11, 15.

Le Procureur c. Georges Rutaganda

Case N° ICTR-96-3

Fiche technique

• Nom: RUTAGANDA

• Prénom: Georges Anderson Nderubumwe

• Date de naissance: 1958

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: homme d'affaires et second vice-président des *Interahamwe*

• Date de confirmation de l'acte d'accusation: 16 février 1996

• 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: 10 octobre 1995, en Zambie

• Date du transfert: 26 mai 1996

• Date de la comparution initiale: 30 mai 1996

• Précision sur le plaidoyer : non coupable

• Date du début du procès: 18 mars 1997

• Date et contenu du prononcé de la peine: 6 décembre 1999, condamné à l'emprisonnement à vie

• Appel: 26 mai 2003, rejeté

Ordonnance portant affectation de juges dans une affaire devant la Chambre d'appel
27 avril 2006 (ICTR-96-3-R)

(Original : Anglais)

Chambre d'appel

Juge : Fausto Pocar, Président

George Rutaganda – Chambre d'appel – Juges – Composition

Instruments internationaux cités :

Document IT/242 du Tribunal pénal international pour l'Ex-Yougoslavie ; Règlement de procédure et de preuve, art. 120 ; 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 l'arrêt prononcé par la Chambre d'appel en l'espèce le 26 mai 2003 ;

VU la Requête aux fins d'une demande en reconsidération et/ou révision de l'Arrêt rendu le 26 mai 2003 par la Chambre d'Appel dans l'Affaire Rutaganda c/ Procureur (ICTR-96-3-A) et en réparation du préjudice causé par la violation par le Procureur des règlements du Tribunal et la Requête aux fins de voir la Chambre d'Appel trancher sur la question de commission d'office d'une assistance juridique à M. Rutaganda, déposées sous le sceau de la confidentialité le 13 avril 2006 ;

VU les articles 11 (3) et 13 (4) du Statut du Tribunal international et l'article 120 du *Règlement de procédure et de preuve* ;

VU la composition de la Chambre d'appel du Tribunal international énoncée dans le document n°IT/242 en date du 17 novembre 2005 ;

ORDONNONS que dans l'affaire n°ICTR-96-3-R, *Georges Anderson Nderubumwe Rutaganda c. Le Procureur,* la Chambre d'appel sera composée des juges suivants :

Fausto Pocar, Président
Mohamed Shahabuddeen
Mehmet Güney
Andrésia Vaz
Theodor Meron

Fait en français et en anglais, le texte anglais faisant foi.

Fait le 27 avril 2006, à La Haye (Pays-Bas).

[Signé] : Fausto Pocar

Le Procureur c. Vincent RUTAGANIRA

Affaire N° ICTR-95-1C

Fiche technique

• Nom: RUTAGANIRA

• Prénom: Vincent

• Date de naissance: 1940 (date approximative)

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: conseiller communal du secteur de Mubuga, commune de Gishyita

• Date de confirmation de l'acte d'accusation: 28 novembre 1995

• Chefs d'accusation: entente en vue de commettre le génocide, génocide, crimes contre l'humanité, violation de l'article 3 commun aux quatre Conventions de Genève de 1949 et violation du protocole additionnel II de 1977

• Date et lieu de l'arrestation: 4 mars 2002, en Tanzanie (reddition volontaire)

• Date du transfert: 4 mars 2002

• Date de la comparution initiale: 26 mars 2002

• Précision sur le plaidoyer: non coupable, puis coupable au jugement

• Date du début du procès: 8 décembre 2004

• Date et contenu du prononcé de la peine: 14 mars 2005, condamné à 6 ans d'emprisonnement

• Date de libération après avoir purgé sa peine: 2 mars 2008

Le 22 novembre 1995, un acte d'accusation joint a été dressé contre Bagilishema Ignace, Kayishema Clément, Sikubwabo Charles, Ndimbati Aloys, Rutaganira Vincent, Muhimana Mika, Ryandikayo et Ruzindana Obed (ICTR-95-1).

Par décision du 6 novembre 1996, la Chambre de première instance II a ordonné, à la demande du Procureur, la jonction d'instances et un procès séparé pour Clément Kayishema et Obed Ruzindana (voir le dossier *Le Procureur c. Clément Kayishema et Obed Ruzindana*, Aff. N°ICTR-95-1).

Par décision orale du 15 septembre 1999, la Chambre de première instance I a ordonné, à la demande du Procureur, la disjonction d'Ignace Bagilishema de l'acte d'accusation joint (voir le dossier *Le Procureur c. Ignace Bagilishema*, Aff. N°ICTR-95-1A).

Mika Muhimana a, pour sa part, été disjoint au cours de l'année 2003, par une décision de la Chambre de première instance I, à la demande du Procureur (Aff. N°ICTR-95-1B). En 2003, le numéro d'affaire ICTR-95-1 est attribué au seul dossier *Le Procureur c. Aloys Ndimbati, Vincent Rutaganira, Charles Ryandikayo et Charles Sikubwabo*.

Aloys Ndimbati, Charles Ryandikayo et Charles Sikubwabo n'ayant toujours pas été retrouvés, Vincent Rutaganira, s'étant rendu volontairement au Tribunal en 2002, fut jugé seul sous le n°ICTR-95-1C.

The Prosecutor v. André Rwamakuba

Case N° ICTR-98-44C

Case History

• Name: RWAMAKUBA

• First Name: André

• Date of Birth: 1950

• Sex: male

• Nationality: Rwandan

• Former Official Function: Minister of Education

• Date of Indictment's Confirmation: 6 April 1999

• Counts: genocide, conspiracy to commit genocide and 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: 21 October 1998, in Namibie

• Date of Transfer: 23 October 1998

• Date of Initial Appearance: 26 October 2001

• Date of Indictment's Severance: 14 February 2005 (Case N° ICTR-98-44C), (before joint to Karemera Edouard, Ngirumpatse Mathieu et Nzirorera Joseph, ICTR-98-44)

• Date Trial Began: 9 June 2005

• Date and content of the Sentence: 20 September 2006, acquittal

Order for the Transfer of Detained Witnesses from Rwanda (Rule 90 bis of the Rules of Procedure and Evidence) 9 January 2006 (ICTR-98-44C-R90bis)

(Original : English)

Trial Chamber III

Judges : Dennis C.M. Byron, Presiding Judge

André Rwamakuba – Transfer of detained witnesses – Rwanda – Conditions satisfied – Motion granted

International Instrument Cited :

Rules of Procedure and Evidence, Rules 73 (A), 90 bis, 90 bis (A) and 90 bis (B)

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

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, ("Chamber"), pursuant to Rule 54 of the Rules of Procedure and Evidence ("Rules");

BEING SEIZED of the "Defence Motion for Order for Transfer of Witnesses Detained in Rwanda", pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence ("Motion"), filed on 3 January 2006;

NOTING the resumption of the present trial scheduled on 16 January 2005;

NOW DECIDES the Motion pursuant to Rule 73 (A) of the Rules:

Introduction

1. The Defence requests the Chamber, pursuant to Rule 90 *bis* of the Rules, to order the temporary transfer of Witnesses with the pseudonyms 7.3, 4.16 and 9.22 from Rwanda, where they are currently detained, to the United Nations Detention Unit (UNDF) in Arusha, Tanzania, so that they can testify in the present case.

Deliberations

2. Rule 90 *bis* (A) of the Rules gives the Chamber power to make an order to transfer a detained person to the Detention Unit of the Tribunal if his or her presence has been requested. Rule 90 *bis* (B) lays out the conditions to be met, as shown by the applicant, before such an order can be made:

(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;

3. The Defence has exhibited a letter from the Minister of Justice in Rwanda dated 28 December 2005 confirming the availability of Witnesses 7.3, 4.16 and 9.22, amongst others, to testify during the indicated period of the upcoming trial session, which is from 16 January 2006 to 10 February 2006. The Chamber is therefore satisfied that these witnesses are not required for criminal proceedings in

Rwanda during that time and that the witnesses' presence at the Tribunal does not extend the period of their detention in Rwanda.

FOR THE ABOVE REASONS, THE CHAMBER

ORDERS the Registar, pursuant to Rule 90 *bis* of the Rules, to temporarily transfer Detained Witnesses known by the pseudonyms 7.3, 4.16 and 9.22 to the UNDF facility in Arusha, at an appropriate time prior to their scheduled dates to testify. Their return travel to Rwanda should be facilitated as soon as practically possible for each witness after the individual's testimony has ended.

REQUESTS the Governments of Rwanda and Tanzania to cooperate with the Registrar in the implementation of this Order.

DIRECTS the Registrar to cooperate with the authorities of the Governments Rwanda and Tanzania; Ensure proper conduct during transfer and during detention of the witness at the UNDF; Inform the Chamber of any changes in the conditions of detention determined by the Rwanda authorities and which may affect the length of stay in Arusha.

Arusha, 9 January 2006, done in English.

[Signed] : Dennis C. M. Byron; Karin Hökborg; Gberdao Gustave Kam

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Decision on Confidential Ex Parte Motion for Subpoenas Directed to Defence Witnesses (Rule 54 of the Rules of Procedure and Evidence) 20 January 2006 (ICTR-98-44C-T)

(Original : English)

Trial Chamber III

Judges : Dennis C.M. Byron, Presiding Judge; Karin Hökborg; Gberdao Gustave Kam

André Rwamakuba – Ex parte motion – Subpoenas directed to Defence witnesses – Ex parte applications justified – Subpoenas, Relevance of witnesses – Testimony via video-link – Motion granted in part

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. Aloys Simba, Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link, 4 February 2004 (ICTR-2001-76) ; 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 on the Defence Request for Taking the Evidence of Witness FMP1 by Deposition, 9 February 2005 (ICTR-

2001-76) ; 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. Tharcisse Muvunyi, Decision on Decision on Prosecutor's extremely urgent Motion Pursuant to TC II Directive of 23 May 2005 for Preliminary measures to Facilitate the use of Closed Video-link Facilities, 20 June 2005 (ICTR-2000-55A) ; Trial Chamber, The Prosecutor v. André Rwamakuba, Decision on Defence Confidential Motion for the Testimony of defence Witness 1.15 be taken by Video-link, 8 December 2005 (ICTR-98-44C) ; Trial Chamber, The Prosecutor v. André Rwamakuba, Decision on Confidential Ex parte Motion for Subpoenas directed to Defence witnesses, 16 December 2005 (ICTR-98-44C)

I.C.T.Y.: Trial Chamber, The Prosecutor v. Blagoje Simić et al., Decision on (1) Application by Stevan Todorovic to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 February 2000 (IT-95-9)

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

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Karin Hökborg and Gberdao Gustave Kam ("Chamber");

BEING SEIZED of the "Confidential *ex parte* Motion for *subpoenas* directed to Defence Witness" ("Motion"), filed by the Defence for the Accused ("Defence") on 17 January 2006;

HEREBY DECIDES the Motion pursuant Rules 73 (A) and 54 of the Rules of Procedure and Evidence ("Rules").

Introduction

1. The Defence case in this trial started on 7 November 2005. Respectively on 29 September 2005 and 16 December 2005, at the Defence's request, the Chamber ordered protective measures with respect to Defence Witnesses,[1] and issued *subpoena* orders directed to four Defence witnesses.[2] The Defence now seeks the Chamber to issue further *subpoena* orders regarding Witness 4.7., 4.18., 9.21. and 9.22.

Deliberations

2. As a preliminary matter, the Chamber considered whether or not the *ex parte* filing of the Motion is appropriate under the circumstances; recalling the reasoning in its previous decision on *subpoenas* in the present case, the Chamber concludes that *ex parte* applications are necessary when they respond to the interests of justice and where the disclosure of the information conveyed by the application to the other party in the proceedings would be likely to cause prejudice to an individual involved in or related to that application[3]. The Chamber therefore finds that in the particular circumstances of the case, disclosure of the present Motion to the other party risks causing prejudice to the witnesses.

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[1] *Prosecutor v. André Rwamakuba*, Case N°ICTR-98-44C, Decision on Defence Motion for Protective Measures (TC), 21 September 2005, as amended on 2 November 2005, see *Rwamakuba* Case, Decision on Prosecution Motion For Variation, or in Alternative Reconsideration of the Decision on Protective Measures for Defence Witnesses (TC), 2 November 2005.

[2] *Prosecutor v. André Rwamakuba*, Case N°ICTR-98-44C, Decision on Confidential *Ex parte* Motion for *Subpoenas* directed to Defence witnesses, 16 December 2005

[3] See, *Prosecutor v. André Rwamakuba*, Case N°ICTR-98-44C, *Decision on Confidential Ex parte* Motion for *Subpoenas* directed to Defence witnesses, 16 December 2005; See also, *Prosecutor v. Simic et al.*, Case N°IT-95-9, Decision on (1) Application by Stevan Todorovic to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material (TC), 28 February 2000, par. 40 (*Simic et al.* Decision); *Karemera et al.*, Case N°ICTR-98-44-R66, Decision on Motion to Unseal Ex Parte Submissions and to Strike Paragraphs 32.4 And 49 from the Amended Indictment, 3 May 2005.

3. As regards the content of the Motion, the Defence submits that the testimony of Witnesses 4.7, 4.18, 9.21 and 9.22 is relevant with regard to the charges against the Accused relating to his presence at Butare Hospital on or between 18 and 25 of April 1994. It contends that these four witnesses would not testify voluntarily due to major concerns for their security. The Defence further submits that the lack of cooperation of the Rwandan authorities and the spreading of allegations against the Defence team affected the preparation of the defence of the Accused and the presentation of evidence at trial, which became in part unavailable due to the witnesses' unwillingness to testify. Such evidence, according to the Defence, is not adequately replaceable and it would constitute corroboration of the evidence of other witnesses regarding the absence of the Accused from Butare during the period considered by the Indictment.

4. With regard to Defence Witness 9.21, the Chamber notes that in addition to the unwillingness of this Witness to come and testify in Arusha, the Witness stated that she does not know the Accused and therefore would not be able to testify either as Prosecution or Defence witness. Further, the Chamber is not convinced that the anticipated testimony of Witness 9.21, as indicated in her statement attached to the Motion, is material to the cause of the Accused.[4] The Chamber will therefore not order the attendance of this Witness. With regard to witness 4.7, the Chamber observes that the expected testimony of the Witness, as it appears from the Statement attached to the Motion, lacks materiality to the case.[5] For the same reason, the Chamber will not order the attendance of this Witness.

5. Concerning Defence Witnesses 9.22 and 4.18, the Chamber is satisfied that good reason has been adduced for their unwillingness to travel to Arusha and that their proposed evidence may be relevant to the Defence case.

6. However, after considering the specific circumstances surrounding Witnesses 9.22 and 4.18, the Chamber is of the view that issuing of subpoenas orders could be avoided, at this stage, if the witnesses would accept to give their testimony voluntarily by means of video-link testimony. The Chamber estimates that the taking of a video-link testimony can properly address the Witnesses' concerns and will also guarantee that the Witnesses will be heard during the time allocated for the Defence case. The Chamber recalls that video-link testimony has been authorized by this Tribunal on several occasions, including in the present case, as an additional measure for witness protection on the basis of Rule 75 of the Rules[6]. In addition, the Chamber notes that the Prosecution does not oppose in principle testimony via video-link.[7] Therefore the Chamber deems that, under the particular circumstances of the case, a video-link testimony would serve the interests of justice and would guarantee the rights of the Accused to be safeguarded by avoiding to delay the completion of the trial. Nevertheless, the Chamber reserves its discretion to issue subpoenas addressed to witnesses 9.22 and 4.18 in the event they should refuse to testify by video-link;

FOR THE ABOVE REASONS, THE CHAMBER

I. REQUESTS the Registry to enquire on the availability of witnesses 9.22 and 4.18 to testify by video-transmission and subsequently report to the Chamber, as soon as possible, on arrangements made to secure their testimony via video-link;

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[4] See Statement of Witness 9.21, in Annex B of the Defence Motion.
[5] See Statement of Witness 4.7, in Annex B of the Defence Motion.
[6] *Prosecutor v. André Rwamakuba*, Case N°ICTR-98-44C, Decision on Defence Confidential Motion for the Testimony of defence Witness 1.15 be taken by Video-link, 8 December 2005; *Prosecutor v. Simba*, ICTR-2001-76-I, Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link (TC), 4 February 2004, para. 4; *Prosecutor v Bagosora et al*., Decision on Testimony by Video-Conference (TC), 20 December 2004, *Prosecutor v. Simba*, Decision on the Defence Request for Taking the Evidence of Witness FMP1 by Deposition (TC), 9 February 2005; *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, Decision on Decision on Prosecutor's extremely urgent Motion Pursuant to TC II Directive of 23 May 2005 for Preliminary measures to Facilitate the use of Closed Video-link Facilities, 20 June 2005.
[7] Statement made by Prosecution Lead Counsel, T. 18 January 2005.

II. DISMISSES the Defence Motion with regard to subpoenas orders for Witnesses 9.21 and 4.7.

Arusha, 20 January 2005, done in English.

[Signed] : Dennis C.M. Byron; Karin Hökborg; Gberdao Gustave Kam

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Decision on Bagosora Motion for Disclosure of Closed Session Testimony of Defence Witness 3/13
24 February 2006 (ICTR-98-44C-T)

(Original : English)

Trial Chamber III

Judges : Dennis C.M. Byron, Presiding Judge; Karin Hökborg; Gberdao Gustave Kam

André Rwamakuba – Disclosure of closed session testimony – Théoneste Bagosora – Balance between the witness protection and the legitimate needs of the Defence to be informed – Obligation for the Defence to comply with the applicable witness protection – Motion granted

International Instrument Cited :

Rules of Procedure and Evidence, Rules 75 (A) and 75 (F)

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal, 5 June 2003 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. Eliezer Niyitegeka, Decision on the Defence Motion for Release of Closed Session Transcript of Witness KJ, 23 June 2003 (ICTR-96-14) ; Trial Chamber, The Prosecutor v. Juvénal Kajelijeli, Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal, 7 October 2003 (ICTR-98-44A) ; 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) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Aloys Simba's Motion for Disclosure of Closed Session Transcripts and Unredacted Statements of Witness FA1 in the Nyiramasuhuko et al. Trial, 27 May 2004 (ICTR-97-21) ; 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. Théoneste Bagasora et al., Decision on Disclosure of Confidential Material Requested By Defence for Ntahobali, 24 September 2004 (ICTR-98-41)

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Tihomir Blaskić, Decision on Joint Motion of Enver Hadžihasanović, Mehmed Alagić and Amir Kubura for Access to All Confidential Material, Transcripts and Exhibits in the Case Prosecutor v. Tihomir Blaškić, 24 January 2003 (IT-95-14)

Introduction

1. The Defence of an accused in another trial before this Tribunal, Théoneste Bagosora, requests access to the closed session transcripts of Defence Witness 3/13, who testified on behalf of the Accused in the present case on 24 January 2006.[1] The Bagosora Defence indicates that Witness 3/13 is scheduled to testify on its behalf in the near future, and argues that the closed session transcripts would assist in deciding whether to actually call the witness and, if so, the preparation of his testimony. The Bagosora Defence agrees to be bound by the terms of the witness protection order applicable in the present case.[2]

Deliberations

2. The present application requires the Chamber to consider the balance of witness protection concerns, upon which the closed session hearings were based, and the legitimate needs of the Bagosora Defence for information which may be material to its preparations.

3. The authority to hear testimony in closed session derives from Rule 75 (A), which provides that a Chamber may "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". The witness appears to have disclosed to the Bagosora Defence that he testified as a protected witness in the present case. Little if any security interest would be advanced by denying the Bagosora Defence access to the closed session testimony of a person who has agreed to testify on its behalf.

4. Rule 75 (F) does not automatically authorize disclosure in the present case. Rule 75 (F) permits the Prosecution to discharge its disclosure obligations notwithstanding the existence of witness protection measures, and requires the party in receipt of the confidential information to comply with the applicable witness protection order. No showing has been made that the Prosecution is subject to any disclosure obligation in respect of Witness 3/13. It is the Registry, not the Prosecution, which is in possession of, and controls access to, closed session transcripts.

5. Rule 75 (F) is relevant, however, to the extent that it codifies a consistent jurisprudence of granting Defence requests for the testimony of Prosecution witnesses in other trials.[3] Even though the present application concerns a Defence witness's testimony which is not the subject of any specific disclosure obligation, a "party is always entitled to seek material from any source to assist in the preparation of its case if the documents sought have been identified or described by their general nature and if a legitimate forensic purpose for such access has been shown".[4] Given that Witness 3/13 is scheduled to appear shortly as a witness on behalf of the Accused Bagosora, and that his testimony may overlap in substance with the subject-matter of his testimony in the present case, the closed session testimony of the witness is likely to be of material assistance. This interest significantly outweighs any witness protection concerns which might arise from disclosure to the Bagosora Defence. Furthermore, the parties have been consulted and do not object to the disclosure.

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[1] Requête de La Défense de Bagosora, filed on 20 February 2006.

[2] *Requête*, para. 7. The governing witness protection order is: *Rwamakuba*, Decision on Defence Motion for Protective Measures (TC), 21 September 2005 ("Defence Witness Protection Order").

[3] *Bagosora et al*., Decision on Disclosure of Confidential Material Requested By Defence for Ntahobali (TC), 24 September 2004; *Nahimana et al*., Decision on Disclosure of Transcripts and Exhibits of Witness X (TC), 3 June 2004; *Nyiramasuhuko et al*., Decision on Aloys Simba's Motion for Disclosure of Closed Session Transcripts and Unredacted Statements of Witness FAI in the *Nyiramasuhuko et al*. Trial (TC), 27 May 2004; *Bagosora et al*., Decision on Motion By Nzirorera for Disclosure of Closed Session Testimony of Witness ZF (TC), 11 November 2003; *Kajelijeli*, Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal (TC), 7 October 2003; *Niyitegeka*, Decision on the Defence Motion for Release of Closed Session Transcript of Witness KJ (TC), 23 June 2003; *Nahimana et al*., Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal (TC), 5 June 2003.

[4] *Blaškić*, Decision on Joint Motion of Enver Hadžihasanović, Mehmed Alagić and Amir Kubura for Access to All Confidential Material, Transcripts and Exhibits in the Case *Prosecutor v. Tihomir Blaškić* (AC), 24 January 2003, p. 4.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

ORDERS the Registry to disclose the closed session transcripts of Witness 3/13 to the Bagosora Defence;

ORDERS that the Bagosora Defence, including the Accused, is bound by the terms of the Rwamakuba Defence Witness Protection Order in respect of Witness 3/13.

Arusha, 24 February 2006.

[Signed] : Dennis C.M. Byron; Karin Hökborg; Gberdao Gustave Kam

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Decision on Admission of Exhibits (Rule 89 of the Rules of Procedure and Evidence) 5 April 2006 (ICTR-98-44C-T)

(Original : English)

Trial Chamber III

Judges : Dennis C.M. Byron, Presiding Judge; Karin Hökborg; Gberdao Gustave Kam

André Rwamakuba – Admission of Exhibits – Judicial notice of facts – Admission of Exhibits, Relevance of evidence, Probative value – Judicial notice of facts, Facts of common knowledge, Adjudicated facts – Motion granted in part

International Instrument Cited :

Rules of Procedure and Evidence, Rules 89 (C), 94 (A) and 94 (B)

International Cases Cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Laurent Semanza, Decision on the Prosecutor's Further Motion for Judicial Notice Pursuant to Rules 94 and 54, 15 March 2001 (ICTR-97-20) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu, Decision on Prosecution's Motion for Judicial Notice Pursuant to Rules 73, 89 and 94, 2 December 2003 (ICTR-99-50) ; Trial Chamber, The Prosecutor v. Casimir Bizimungu, Decision on Bicamumpaka's Motion for Judicial Notice, 11 February 2004 (ICTR-99-50) ; Appeals Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. André Rwamakuba, Decision on Defense Motion for Judgment of Acquittal, 28 October 2005 (ICTR-98-44C-R98bis) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Prosecution Motion for Judicial Notice, 9 November 2005 (ICTR-98-44-R94)

1. The Defence closed its case in the present proceedings on 9 February 2006. The Chamber will now deal with some pending legal matters before hearing the closing arguments of the parties scheduled on 21 April 2006.

2. First, during cross-examination of Prosecution Witness ALA, the Defence requested the witness to provide a list of the names of people who survived the killings at the Kayanga Health Centre. The witness wrote down a few names. This list has only been marked for identification as ID 2. The Prosecution did not oppose its admission.[1] The Defence also sought the admission into evidence of a statement given by Prosecution Witness XV to the Defence investigator.[2] The Prosecution objected to its admission on grounds of violation of protective measures. The Prosecution further moved the Chamber to admit into evidence a document prepared in July 1994 by *Médecins Sans Frontières* and entitled "Genocide in Rwanda, Witness Accounts", which was marked for identification as IP 7. At that time, the Defence did not oppose its admission but requested more time to analyze it.[3]

3. Pursuant to Rule 89 (C) of the Rules of Procedure and Evidence, the Chamber has the discretionary power to admit any relevant evidence which it deems to have probative value, to the extent that it may be relevant to the proof of allegations pleaded in the Indictment.[4]

4. In the instant case, after reviewing the above-mentioned documents, the Chamber considers that they are relevant to the case and therefore should be admitted into evidence. It must be noted that the admissibility of evidence is not to be confused with the assessment of the weight to be accorded to the evidence, an issue to be decided by the Chamber at a later stage.

5. Second, on 28 October 2005, the Chamber reserved its ruling on two Defence requests seeking: (1) judicial notice of the fact that Joseph Nzirorera and Mathieu Ngirumpatse were not Ministers in the Interim Government of 8 April 1994, have not been accused of crimes in Butare in any other document before the Tribunal, and, up until the testimony of Witness XV in the instant trial, have never been associated with the Accused; (2) notice of the fact that the Kabakobwa massacre was on 22 April 1994 and that the Witness HF could not have been a victim of it as this witness testified during this trial.[5]

6. Rule 94 of the Rules provides that (A) a Trial Chamber shall take judicial notice of facts of common knowledge and (B) that a Trial Chamber 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. Trial Chambers have consistently defined facts of common knowledge as "facts of such notoriety, so well known and acknowledged that no reasonable individual with relevant concern can possibly dispute them".[6] "Adjudicated Facts" have been defined in the jurisprudence as "facts which have been finally determined in a proceeding before the Tribunal [and] […] one upon which it has deliberated, and thereupon made a finding in proceedings that are final, in that no appeal has been instituted therefrom or if instituted, the facts have been upheld".[7]

7. In the Chamber's view, the facts of which the Defence seeks judicial notice in the present case do not fall within the ambit of Rule 94 of the Rules. They are neither facts of such notoriety that no

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[1] See: T.14 June 2005, pp. 81-82.
[2] See: T. 6 September 2005, pp.49-56; T. 7 September 2005, p. 1; T.09 February 2006, pp. 18-19.
[3] See: T. 10 June 2005, p. 31.
[4] *Prosecutor v. Pauline Nyiramasuhuko*, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, par. 12.
[5] *Prosecutor v. André Rwamakuba*, Case N°ICTR-98-44C-R98*bis*, Decision on Defence Motion for Judgement of Acquittal, par. 10.
[6] *Prosecutor v. Casimir Bizimungu et al.*, Case N°ICTR-99-50-I, Decision on Prosecution's Motion for Judicial Notice Pursuant to Rules 73, 89 and 94 (TC), 2 December 2003, par. 23; *Prosecutor v. Laurent Semanza*, Case N°ICTR-97-20-T, Decision on the Prosecutor's Further Motion for Judicial Notice Pursuant to Rules 94 and 54, 15 March 2001, par. 23.
[7] *Prosecutor v. Casimir Bizimungu et al.*, Case N°ICTR-99-50-I, Decision on Bicamumpaka's Motion for Judicial Notice, 11 February 2004, par. 4-5; *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-R94, Decision on Prosecution Motion for Judicial Notice (TC), 9 November 2005, par. 14.

reasonable individual can dispute them nor facts which have been finally determined in a proceedings before the Tribunal. The Defence application falls therefore to be rejected.

THE CHAMBER HEREBY

I. DECIDES that the following documents should be admitted into evidence:

- A list of the names of people who survived the killings that were done at the Kayanga Health Centre written down by Prosecution Witness ALA and marked for identification as ID. 2;
- A statement given by Prosecution Witness XV to the Defence investigator;
- A document prepared in July 1994 by *Médecins Sans Frontières*, entitled "Genocide in Rwanda, Witness Accounts", which has been marked for identification as IP 7;

II. REQUESTS the Registry to enter the above-mention documents and provide them with the appropriate exhibit numbers;

III. DENIES the Defence request for judicial notice.

Arusha, 5 April 2006, done in English.

[Signed] : Dennis C.M. Byron; Karin Hökborg; Gberdao Gustave Kam

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Judgement
20 September 2006 (ICTR-98-44C-T)

(Original : English)

Trial Chamber III

Judges : Dennis C.M. Byron, Presiding Judge; Karin Hökborg; Gberdao Gustave Kam

André Rwamakuba – Conspiracy to commit genocide, Direct and public incitement to genocide, Genocide or alternatively complicity in genocide, Rape and extermination as crimes against humanity, Serious violations of Article 3 Common to the Geneva Conventions – Factual allegation, political activities of the Accused, role as a member of the MDR party, role as Minister of the Interim Government, Context or background from which inferences could be drawn – Assessment of the evidence, Principles, Presumption of Innocence, Chamber's Discretionary power – Lack of consistency between the indictment and the Prosecution evidence, Different and irreconcilable versions of the facts given by the witnesses – Credibility or reliability of the witnesses – Alibi, Presence of the Accused outside of Rwanda during the facts, Studies at the Prince Leopold Institute in Belgium and attendance at a World Health Organization Conference in Egypt – Governmental meeting in Kigali, Road access to Gikomero – Alibi, Absence of the Accused in Butare – Violation of the right of the Accused to legal assistance during the first months of his detention – Verdict – Acquittal – Immediate release – Right of the Accused to seek reparation for the violation of his rights

International Instruments Cited :

1949 Geneva Conventions, Art. 3 Common ; International Covenant on Civil and Political Rights, Art. 2 (3) (a); Rules of Procedure and Evidence, Rules 47 (C), 99 (A) and 99 (B) ; Security Council, Resolution 955 (1994), 8 November 1994, S/RES/955 (1994) ; Statute, Art. 2, 3, 6 (1), 17 (4)

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Augustin Bizimana et al., Confirmation and Non-Disclosure of the Indictment, 29 August 1998 (ICTR-98-37) ; Trial Chamber, The Prosecutor v. Jean-Paul Akayesu, Judgement, 2 September 1998 (ICTR-96-4) ; Trial Chamber, The Prosecutor v. André Rwamakuba, Warrant of Arrest and Order for Transfer and Detention, 8 October 1998 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Clément Kayishema and Obed Ruzindana, Judgement, 21 May 1999 (ICTR-95-1) ; Trial Chamber, The Prosecutor v. Alfred Musema, Judgement, 27 January 2000 (ICTR-96-13) ; Appeals Chamber, The Prosecutor v. Jean Bosco Barayagwiza, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000 (ICTR-97-19) ; Appeals Chamber, The Prosecutor v. Laurent Semanza, Decision, 31 May 2000 (ICTR-97-20) ; 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. André Rwamakuba, Decision on André Rwamakuba's Motion for Severance, 12 December 2000 (ICTR-98-44) ; Appeals Chamber, The Prosecutor v. Jean-Paul Akayesu, Judgement, 1 June 2001 (ICTR-96-4) ; Appeals Chamber, The Prosecutor v. Clément Kayishema and Obed Ruzindana, Judgement (Reasons), 1 June 2001 (ICTR-95-1) ; Trial Chamber, The Prosecutor v. Ignace Bagilishema, Judgement, 7 June 2001 (ICTR-95-1A) ; Appeals Chamber, The Prosecutor v. André Rwamakuba, Decision (Appeal Against Dismissal of Motion Concerning Illegal Arrest and Detention), 11 June 2001 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Eliezer Nyitegeka, Judgement, 16 May 2003 (ICTR-96-14) ; Appeals Chamber, The Prosecutor v. Georges Rutaganda, Judgement, 26 May 2003 (ICTR-96-3) ; Trial Chamber, The Prosecutor v. Augustin Bizimana, Félicien Kabuga, Edouard Karemera, Mathieu Ngirumpatse, Callixte Nzabomimana, Joseph Nzirorera and André Rwamakuba, Decision on the Prosecutor's Motion for severance of Félicien Kabuga's Trial and for Leave to the Accused's Indictment, 1 September 2003 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Augustin Bizimana et al., Decision on the Prosecutor's Motion for Separate Trials and for Leave to File an Amended Indictment, 8 October 2003 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Juvénal Kajelijeli, Judgment and sentence, 1 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. 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. Aloys Simba, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, 29 July 2004 (ICTR-2001-76) ; Appeals Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 28 September 2004 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera et al., Decision on Severance of André Rwamakuba and Amendments of the Indictment, 7 December 2004 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera, Order on Protective Measures for Prosecution Witnesses, 10 December 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) ; Trial Chamber, The Prosecutor v. André Rwamakuba, Decision on Prosecution Motion for Reconsideration or, in the Alternative, Certification to Appeal Chamber's Decision Denying Request for Adjournment, 29 September 2005 (ICTR-98-44C) ; Trial Chamber, The Prosecutor v. André Rwamakuba, Decision on Defence Confidential Motion for the Testimony of defence Witness 1.15 be taken by Video-link, 8 December 2005 (ICTR-98-44C) ; Trial Chamber, The Prosecutor v. André Rwamakuba, Decision on Defense Motion for a View Locus in Quo, 16 December 2005 (ICTR-98-44C) ; Appeals Chamber, The Prosecutor v. Édouard Karemera et al., Decision on Prosecutor's Interlocutory Appeal on Judicial Notice, 16 June 2006 (ICTR-98-44) ; Appeals Chamber, The Prosecutor v. Sylvestre

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National Case Cited :

Rwandan Court, Ntawangaheza et al. (Sahera), Judgement, 23 March 1998

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1. This Tribunal has the authority to prosecute persons responsible for serious violations of international humanitarian law, including genocide and crimes against humanity, committed in the territory of Rwanda and Rwandan citizens responsible for such crimes committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.[1] Under Article 2 of the Statute, genocide is an act committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.[2] The crime against humanity is defined as a crime committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.[3]

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* The text of the Indictment is reproduced in the *2005 Report*.

[1] Statute, Articles 1 to 4.

[2] Statute, Article 2 (2): Genocide means any of the following acts committed with the 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 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.

[3] Statute, Article 3: 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:

2. The Appeals Chamber has held that genocide against Tutsi and widespread or systematic attacks against a civilian population based on Tutsi ethnic identification occurred in Rwanda between April and July 1994 are facts of common knowledge not subject to reasonable dispute.[4] As the Appeals Chamber recalled, this ruling does not lessen the Prosecution's burden of proof: it must still demonstrate that the specific events alleged in an Indictment constituted genocide or a crime against humanity and that the conduct and mental state of an Accused establishes his culpability for such crimes.

3. The Accused, André Rwamakuba, was born in 1950 in Nduba, Gikomero *commune*, Kigali rural *préfecture*. He is qualified as a doctor having studied at Butare University, Rwanda, in Zaïre (now the Democratic Republic of Congo) and in Belgium.[5] He was a public health specialist and in 1992 was appointed Director of the Kigali Health Region. In 1994, after the death of Rwandan President Juvénal Habyarimana, he was appointed Minister of Primary and Secondary Education in the Interim Government, and took oath on 9 April 1994. He was a member of the *Mouvement démocratique du Rwanda* (MDR) party.[6]

4. André Rwamakuba was first arrested on 2 August 1995 upon what appears to have been an independent initiative of the Namibian authorities. Once contacted, the Prosecution indicated that it had instructed its office in Kigali to take urgent steps to ascertain whether it was interested in the prosecution of Rwamakuba on charges within the Tribunal's jurisdiction.[7] A month later, the Prosecution notified the Namibian authorities that it did not possess evidence which would entitle it to request his detention.[8] Rwamakuba was subsequently released on 8 February 1996.

5. Three years after that initial arrest, the Prosecution did file an indictment against André Rwamakuba and seven other co-Accused.[9] Rwamakuba was arrested by the Namibian authorities on 21 October 1998, in compliance with a Tribunal warrant of arrest and Order for transfer and detention,[10] and transferred to the United Nations Detention Facilities ("UNDF") in Arusha the following day. Rwamakuba pleaded not guilty to all the charges against him.[11]

6. After four of his co-Accused were severed from the 1998 Indictment,[12] the trial against André Rwamakuba and the three remaining co-Accused, namely Edouard Karemera, Mathieu Ngirumpaste

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(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.

[4] *Karemera et al*., Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC), paras. 29 and 35; see also: *Semanza* Appeal Judgement, para. 192.

[5] *Curriculum vitae* of André Rwamakuba (Exh. D. 184); Prosecution Closing Brief, para. 6 and footnote 3; Defence Closing Brief, pp. 2-5.

[6] Indictment, para. 1; Prosecution Pre-Trial Brief, para. 11; Prosecution Closing Brief, paras. 7-10; Defence Closing Brief.

[7] See Prosecution's letter of 22 December 1995, attached to the Defence "Additional Evidence in Support of Motion for Stay of Proceedings on Grounds of Undue Delay of 13 May 2005", filed on 1 June 2005; *Rwamakuba*, Decision on André Rwamakuba's Motion for Severance (TC), paras. 30 and 32.

[8] See Prosecution's letter of 18 January 1996, attached to the Defence "Additional Evidence in Support of Motion for Stay of Proceedings on Grounds of Undue Delay of 13 May 2005", filed on 1 June 2005.

[9] *Bizimana et al*., Confirmation and Non-Disclosure of the Indictment, 29 August 1998.

[10] *Rwamakuba*, Warrant of Arrest and Order for Transfer and Detention (TC).

[11] See: Initial Appearance, T. 7 April 1999.

[12] See *Bizimana et al*. Case, Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Juvénal Kajelijeli (TC); *Bizimana et al*., Decision on the Prosecutor's Motion for severance of Félicien Kabuga's Trial and for Leave to the Accused's Indictment (TC); *Bizimana et al*., Decision on the Prosecutor's Motion for Separate Trials and for Leave to File an Amended Indictment (TC).

and Joseph Nzirorera, commenced on 27 November 2003. Thirteen Prosecution witnesses were heard before the trial was interrupted in May 2004 as a result of the Presiding Judge's withdrawal from the case. A rehearing of the case with a different bench was then necessary.[13] The new Chamber subsequently granted the Prosecution's request for severance of Rwamakuba from the joined Indictment and ordered a separate trial pursuant to an Amended Indictment.[14] This Indictment filed 10 days later charges André Rwamakuba with genocide, or in the alternative complicity in genocide, and crimes against humanity.[15] At a further initial appearance held on 21 March 2005, the Chamber entered a plea of not guilty to all counts in the absence of the Accused.[16] The Defence for André Rwamakuba did not dispute that genocide occurred in Rwanda in 1994, but contested the Accused's participation in any of the crimes alleged in the Indictment.[17] Following the Chamber's rulings on the defects in the form of the Indictment, the Prosecution filed its final version on 10 June 2005.[18]

7. The trial in the instant case commenced on 9 June 2005. Eighteen Prosecution witnesses were heard, including one investigator and one expert witness, over 39 trial days.[19] Two Prosecution witnesses refused to testify. The Chamber was not requested to issue a subpoena order for these witnesses to appear before the Tribunal. Rather, the Prosecution moved for an adjournment of the proceedings until some unspecified time in October 2005.[20] After several opportunities were given to the Prosecution to clarify if and when these witnesses would testify, the Chamber denied the Prosecution's application considering the interests of justice and the right of the Accused to be tried without undue delay.[21] In its ruling, it found that the Prosecution demonstrated a lack of diligence and had failed to persuade the Chamber that these two witnesses were critical to the case against the Accused.[22]

8. The Defence case commenced on 7 November 2005 and 31 witnesses were called over 39 days.[23] The Chamber undertook a site visit in Rwanda with the parties in January 2006.[24] Key locations relevant to the charges against André Rwamakuba were viewed in Kigali, Gikomero and Butare areas.[25] The closing arguments of both parties were heard on 21 April 2006, approximately 10 weeks after the close of the Defence case.[26]

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[13] *Karemera et al*., Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC); *Karemera et al*., Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC).

[14] *Karemera et al*., Decision on severance of André Rwamakuba and for Leave to File Amended Indictment (TC).

[15] Amended Indictment filed on 10 June 2005, counts 1 to 4.

[16] André Rwamakuba did not appear before the Chamber. His Counsel asserted that Rwamakuba had been provided with the Indictment and had been apprised of its content (T. 21 March 2005). The Amended Indictment was filed on 23 February 2005 and re-filed on 9 March 2005, due to typographical errors and in accordance with the Chamber's Order to Re-File the Amended Indictment (TC).

[17] See for e.g.: T. 21 April 1994, p. 35.

[18] *Rwamakuba*, Decision on Defects in the Form of the Indictment (TC). See also: T. 6 June 2005; T. 9 June 2005.

[19] The Prosecution conducted its case during two trial sessions: from 9 June to 15 July 2005 and from 22 August to 13 September 2005. The expert witness was heard in part via teleconference; both parties agreed on it (T. 22, 23 and 24 August 2005).

[20] T. 13 September 2005, p. 3. See *Rwamakuba*, Decision on Prosecution Motion for Reconsideration or, in the Alternative, Certification to Appeal Chamber's Decision Denying Request for Adjournment (TC).

[21] T. 13 September 2005, pp. 13-14.

[22] *Rwamakuba*, Decision on Prosecution Motion for Reconsideration or, in the Alternative, Certification to Appeal Chamber's Decision Denying Request for Adjournment (TC).

[23] The Defence case was conducted during two trial sessions: from 7 November to 16 December 2005 and from 17 January to 9 February 2006. At the Defence's request, four witnesses testified via video-link. The Prosecution did not oppose. See: *Rwamakuba*, Decision on Confidential Motion for the Testimony of Defence Witness 1/15 (TC); T. 18 January 2006, p. 37; T. 19 January 2006, p. 3.

[24] *Rwamakuba*, Decision on Defence Motion for A View *Locus In Quo* (TC).

[25] Minutes for the Site Visit to Rwanda in the *Rwamakuba* case, 13-16 January 2005.

[26] T. 21 April 2006.

9. From the outset André Rwamakuba refused to attend court proceedings. According to his Counsel, this was due to the Accused's belief that the evidence against him was being manipulated.[27] The Chamber nevertheless regularly invited him to attend the proceedings, through the Registrar and his Counsel.[28] The trial proceeded in the absence of the Accused in accordance with Rule 82 *bis* of the Rules.[29]

10. The charges against the Accused are discussed in Chapter I. The Chamber then reviews the evidence adduced during the trial and will reach its findings in Chapter II. Chapter III pertains to the rights of the Accused and Chapter IV contains the verdict.

Chapter I – Charges Against the Accused

11. In its Closing Brief, the Prosecution contends that by his acts and omissions, André Rwamakuba is criminally responsible under Article 6 (1) of the Statute for having planned, ordered, instigated and committed the crimes of genocide, or complicity in genocide, murder and extermination as crimes against humanity in Gikomero *commune* and at Butare University Hospital during April 1994.[30] It also submits that as Minister of Primary and Secondary Education, Rwamakuba "did nothing, either to denounce the crimes committed against the Tutsi, [o]r to dissociate himself from the [Interim Government]". It submits that by these omissions, Rwamakuba directly failed to discharge the duties entrusted to him, which he had sworn to fulfil, and that he encouraged the genocidal activities.[31]

12. The Prosecution further contends that "a Trial Chamber may find an accused guilty when it is satisfied that the accused participated in a crime by committing any one of the acts covered by the Statute, *even if the Chamber does not endorse the Prosecution's case*".[32] It adds that "[a]s a Tribunal of fact and law, the Chamber may accept any argument that it finds relevant to the facts of the case, on condition that the said argument is consistent with the provisions of Article 6 (1) of the Statute".[33] In the Prosecution's view, the question of notifying the Accused of the charges against him in that respect does not arise, since he was informed of the forms of responsibility under Article 6 (1) of the Statute for which he was being prosecuted and which have been established by the Prosecution.[34]

13. Article 17 (4) of the Statute and Rule 47 (C) of the Rules require the Prosecution to set forth in the Indictment a concise statement of the facts of the case and of the crime(s) with which the suspect is charged. This obligation must be interpreted in light of the rights of the accused to a fair trial, to be informed of the charges against him, and to have adequate time and facilities for the preparation of his defence.[35] According to the jurisprudence of both *ad hoc* Tribunals, 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 proven.[36]

14. The Indictment, therefore, has to fulfil the fundamental purpose to inform the Accused of the charges against him with sufficient particularity to enable him to mount his defence.[37] Failure to set forth the specific material facts of a crime constitutes a material defect in the Indictment. This defect

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[27] See: T. 6 June 2005, pp. 2-3.
[28] See for e.g.: T. 6 June 2005, p. 4; T. 27 June 2005, p. 2; T. 4 July 2005, pp. 1-2; T. 11 July 2005, pp. 1-2; T. 22 August 2005, pp. 1-2; T. 29 August 2005, p. 1; T. 1 November 2005, p. 1; T. 7 November 2005, p. 1; T. 14 November 2005, p. 1 ; T. 17 January 2006, p. 3.
[29] A chronology of the case is annexed to this Judgement (Annex II).
[30] Prosecution Closing Brief, paras. 19, 208, 216-217, 239, 243-244, 248, 268 and 269.
[31] Prosecution Closing Brief, para. 265.
[32] Prosecution Closing Brief, para. 266 (emphasis added).
[33] Ibidem.
[34] Prosecution Closing Brief, para. 266.
[35] Statute, Articles 19, 20 (2), 20 (4) (a) and 20 (4) (b).
[36] *Ntakirutimana* Appeal Judgement, paras. 25 and 470; *Rutaganda* Appeal Judgement, paras. 301-303; *Ntagerura* Appeal Judgement, para. 21; *Naletilic* Appeal Judgement, para. 26.
[37] *Ntakirutimana* Appeal Judgement, paras. 25 and 470; *Ntagerura* Appeal Judgement, para. 22.

may nonetheless be cured, and a conviction entered, where the accused has received timely, clear, and consistent information from the Prosecution which resolves the ambiguity or clears up the vagueness.[38] In assessing whether a defective indictment was cured, the Chamber must determine whether the accused was in a reasonable position to understand the charges against him or her and to confront the Prosecution's case.[39]

15. In the present case, after a brief description of the Accused, his authority and legal duties,[40] the four counts of the Indictment charge André Rwamakuba pursuant to Articles 2, 3 and 6 (1) of the Statute, with genocide, or in the alternative, complicity in genocide, and extermination and murder as crimes against humanity regarding events that took place on or between 6 and 30 April 1994 in Gikomero *commune* and at Butare University Hospital.[41] These four counts set out the crimes for which the Accused is charged. The respective succeeding paragraphs set out the concise statement of facts on which the allegations are based.[42]

16. Paragraph 11 of the Indictment details how between 10 and 20 April 1994, in Gikomero *commune*, the Accused allegedly delivered machetes that were subsequently used in killing or attempting to kill Tutsi. Paragraphs 12, 13, 23 and 26 of the Indictment describe how during the same period and in the same *commune*, the Accused allegedly ordered and participated in the killing of three persons identified as Tutsi and in the massacre of Tutsi refugees at the Kayanga Health Centre. The alleged participation of the Accused in massacres at Butare University Hospital between 18 and 25 April 1994 is set forth at paragraphs 15 to 16, 23 and 26 of the Indictment.

17. The Indictment also describes André Rwamakuba's alleged political status and related political activities. It sets out how he conducted sensitization campaigns against Tutsi in Gikomero *commune* between 26 July 1993 and June 1994.[43] It alleges that as a Minister of Primary and Secondary Education of the Interim Government of 8 April 1994, he took part in the conception and the implementation of the Government's policies to exterminate the Tutsi throughout Rwanda.[44] The Accused is also defined as a member of the extremist wing of the *Mouvement Démocratique du Rwanda*, MDR "Hutu Power", which was allegedly created on or about 26 July 1993 and had a specific ideology of exterminating the Tutsi.[45]

18. The Indictment does not allege the Accused's criminal responsibility as superior for crimes committed by subordinates.[46] In addition to alleging complicity in genocide,[47] the Indictment includes only a general reference to Article 6 (1) of the Statute in relation to each of the four counts. In accordance with the settled jurisprudence, such general reference implies that the Accused is prosecuted for all forms of individual participation set out by Article 6 (1) of the Statute, namely planning, instigating, ordering, committing and aiding and abetting in the planning, preparation or execution of a crime.[48] The Appeals Chamber and some Trial Chambers have stated that this provision is interpreted "[to cover] first and foremost the physical perpetration of a crime by the offender

[38] *Niyitegeka* Appeal Judgement, para. 195; *Ntagerura* Appeal Judgement, paras. 30; *Gacumbitsi* Appeal Judgement, para. 49.
[39] *Rutaganda* Appeal Judgement, para. 303; see also: *Ntakirutimana* Appeal Judgement, paras. 27 and 469-472; *Ntagerura* Appeal Judgement, paras. 30 and 67; *Gacumbitsi* Appeal Judgement, para. 49.
[40] See Indictment, paras. 1 and 2.
[41] The Amended Indictment was filed on 10 June 2005, and is attached to the present Judgement (see Annex 1).
[42] See the use of the words "as follows" at the end of each introductory paragraph of each Count.
[43] Indictment, paras. 3 to 5.
[44] Indictment, paras. 1, 7, 9, 14 and 19.
[45] Indictment, para. 3.
[46] Statute, Article 6 (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 criminal responsibility if he or she knew or had reasons 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.
[47] According to the jurisprudence, complicity in genocide is a form of liability. See: *Ntakirutimana* Appeal Judgement, para. 500; *Semanza* Appeal Judgement, para. 316; *Krstić* Appeal Judgement, para. 139.
[48] *Ntakirutimana* Appeal Judgement, para. 473.

himself, or the culpable omission of an act that was mandated by a rule of criminal law."[49] In the present case, there is no allegation of any legal duty under which the Accused was mandated to act and which failure to do so would constitute a criminal act.

19. Reading the Indictment as whole, the Chamber concludes that the allegations describing the political activities of the Accused provide the context or background from which inferences could be drawn either concerning his intent, his disposition or other elements of his individual participation in specific crimes in Gikomero *commune* and at Butare University Hospital between 6 and 30 April 1994. This conclusion is in accordance with the clear and consistent notice given by the Prosecution throughout its representations of the case, its Pre-Trial Brief and Opening Statement, and its evidence adduced during the trial, as described hereinafter.

20. When André Rwamakuba was jointly indicted with three co-Accused, all were charged with conspiracy to commit genocide, direct and public incitement to genocide, genocide, or alternatively complicity in genocide, rape and extermination as crimes against humanity, and serious violations of Article 3 Common to the Geneva Conventions.[50] That Indictment pleaded not only the direct criminal responsibility of the four Accused as perpetrators or accomplices but also as superiors for the crimes committed by their subordinates. The Prosecutor's theory alleged a "huge government conspiracy of State-sponsored genocide".[51]

21. In 2004, before the rehearing of the trial began, the Prosecution requested the severance of André Rwamakuba from the joint Indictment. It contented that "it [was] not necessary to support a joint trial to prosecute Rwamakuba effectively" and that it intended to focus the case entirely on Rwamakuba's "direct participation in crimes", thereby removing any allegation of conspiracy to commit genocide or joint criminal enterprise responsibility.[52]

22. The Prosecution reiterated this affirmation several times.[53] It stated in open court that the entire case was to be based on André Rwamakuba's own acts and omissions and that it was not going to "attempt to bring in proof of Rwamakuba's meeting and conspiring with other interim government ministers and other MRND leaders to commit genocide".[54] The Prosecution also indicated that any pleading of 'common purpose' implicating Rwamakuba as a co-perpetrator of crimes committed throughout Rwanda in furtherance of a government conspiracy to commit genocide had been removed from the Indictment.[55]

23. At first, André Rwamakuba opposed the Prosecution's application for severance.[56] Subsequently, his Defence altered its position on the premise of the Prosecution's stated new theory

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[49] See: *Tadić* Appeal Judgement, para. 188; *Kayishema* Appeal Judgement, para. 187; *Musema* Judgement, para. 123; *Bagilishema* Judgement, para. 29 and footnote 19; *Kamuhanda* Judgement, para. 595; *Kajelijeli* Judgement, para. 764; *Ntagerura* Judgement, para. 659.

[50] In 1998, the Prosecution filed an Indictment against Augustin Bizimana, Félicien Kabuga, Juvénal Kajelijeli, Edouard Karemera, Mathieu Ngirumpaste, Callixte Nzabomimana, Joseph Nzirorera and André Rwamakuba. As a result of the severance of four of these co-Accused, the Prosecution charged André Rwamakuba jointly with Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera (see: Amended Indictment filed on 18 February 2004).

[51] See Prosecutor's Consolidated Motion to Sever Rwamakuba from the Joint Indictment and to Try Him Separately, For Leave to File a Separate Amended Indictment against Rwamakuba, and For Leave to File a Separate Amended Indictment against Karemera, Ngirumpatse and Nzirorera, filed on 20 December 2004, para. 11; see also Prosecutor's Motion for Leave to File an Amended Separate Indictment against Karemera, Ngirumpatse and Nzirorera, filed on 19 November 2004, para. 14.

[52] Prosecutor's Motion of 19 November 2004, paras. 14 and 21.

[53] See T. 25 November 2004, p. 13; Prosecutor's Consolidated Motion.

[54] T. 25 November 2004, p. 13.

[55] Prosecutor's Consolidated Motion of 20 December 2004, para. 15.

[56] At that stage, the Defence considered that a joint trial would assist the Chamber in placing in context the nature of Rwamakuba's activities as a Minister and would assist to controvert the prosecution's theory of a concerted government plan to which all Ministers were party. The Defence further expressed its concern that the proposed Separate Indictment at that time did not reflect the stated intent of the Prosecution in its severance motion. It contended that the proposed Separate Indictment did not in fact reduce the substance of the Prosecution case against the Accused. The Defence was therefore of the

against the Accused.[57] It stressed the significance of that understanding in determining its advice to the Accused and to his subsequent consent not to oppose severance.[58] The Prosecution replied that "it [was] evident that the Prosecutor [intended] to establish Rwamakuba's criminal responsibility under the Statute for commission of crimes in Gikomero and Butare and [would] *not rely upon the doctrine of joint criminal enterprise or seek to establish his criminal responsibility for acts and omissions of the Interim Government throughout Rwanda*".[59] The Prosecution further submitted that the question of what evidence it may adduce to establish his responsibility was different and that it intended to offer evidence of his ministerial appointment, "*to prove elements of the Prosecution case such as* mens rea *for genocide*".[60] The Chamber granted the severance of André Rwamakuba on the basis of the Prosecution's assertions and its stated revised theory against the Accused.[61]

24. Later, when replying to the Defence Motion on Defects in the Form of the Indictment, the Prosecution reiterated the same position.[62] In the light of these submissions, the Chamber ruled that one particular paragraph which could have raised ambiguities concerning the exact nature of the responsibility alleged against the Accused was to be struck from the Indictment.[63]

25. The Prosecution's Pre-Trial Brief also presents the factual allegations against the Accused divided between events in Gikomero *Commune* and at Butare University Hospital, and alleges his criminal responsibility under Article 6 (1) of the Statute for crimes committed in those specific locations.[64] The Prosecution Opening Statement was consistent with this theory.[65]

26. Until the submission made at the latest stage by the Prosecution in its Closing Brief, there was therefore no indication in the Indictment, the Pre-Trial Brief or the Opening Statement that the charges against the Accused included a responsibility, as a Minister of the Interim Government, for not having denounced the crimes committed against the Tutsi or for not dissociating himself from the Government, and for a failure to discharge the duties entrusted to him as a member of the Government. On the contrary, from the outset, the Prosecution gave clear and consistent information both to the Accused and to the Chamber that its case was limited to Rwamakuba's direct participation in criminal activities in two specific locations[66] within a specific time-frame.[67] Before and during the presentation of the evidence at trial, the Prosecution never claimed to revise this stated position.

27. The Chamber notes that in its closing arguments the Defence reiterated its understanding of the Prosecution's case against the Accused. It emphasised that it had conducted the Defence of André Rwamakuba on the plain understanding that "command responsibility, joint criminal enterprise, were out and that the relevance of his being a minister was confined to disposition and ideology".[68]

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view that the Accused's interests were best served within a joint trial, rather than dealt with in a less coherent manner to support indirect responsibility by virtue of his alleged influence and effective control as a Minister and so called "high ranking member of Hutu power" (Response on Behalf of Dr Rwamakuba to the Prosecutor's Motions for Separate Trials, filed on 24 November 2004, paras. 36-38).

[57] Rwamakuba's Response to the Prosecution's Motion to Sever and File a Separate Amended Indictment, filed on 10 January 2005, p. 2.

[58] *Ibid*., pp. 2 and 4: [The Defence] have altered [its] position and provided advice to the Accused in the light of the increased clarity of the Prosecution position expressed in the renewed motion, and on the premise that the Prosecution will adhere to their expressed position. […] It is therefore [the Defence] understanding that the position is that, on severance, the Prosecution seeks to prove culpability solely through evidence of events in Gikomero and Butare that concern Rwamakuba […] [and] does not intend to rely on the doctrine of joint criminal enterprise.

[59] Prosecutor's Reply to the Defence Submissions on the Consolidated Motion to Sever Rwamakuba from the Joint Indictment and for Leave to Amend the Indictment, filed on 10 February 2005, para. 2 (emphasis added).

[60] Prosecutor's Reply, filed on 10 February 2005, para. 3 (emphasis added).

[61] *Karemera et al*., Decision on Severance of André Rwamakuba and For Leave to File Amended Indictment (TC).

[62] *Réponse du Procureur à la requête de la Défense en date du 27 avril 2005, intitulée* "Preliminary Motion on Behalf of the Accused on Defects in the Form of the Indictment of 23 February 2005", filed on 4 May 2005.

[63] *Rwamakuba*, Decision on Defects in the Form of the Indictment (TC), para. 18.

[64] Prosecution Pre-Trial Brief, paras. 15 to 29, 30 to 40 and 74.

[65] T. 9 June 2005.

[66] Gikomero *Commune* and Butare University Hospital.

[67] Between 6 and 30 April 1994.

[68] T. 21 April 2006, pp. 37 and 39.

28. It would therefore be contrary to the fundamental right of the Accused to a fair trial, including his right to defend himself and to know the charges against him, if the Chamber were to accede to a Prosecution request to find the Accused criminally responsible for omissions which were neither set forth in the Indictment nor subsequently notified by timely, clear, and consistent information from the Prosecution.[69] The Prosecution is expected to know its case before it goes to trial rather than seek to mould its case at the end of the trial depending on how the evidence unfolded.

29. The Chamber therefore considers that in the present case, the Prosecution charges André Rwamakuba, pursuant to Article 6 (1) of the Statute,[70] with genocide, or alternatively, complicity in genocide, and crimes against humanity for acts allegedly committed between 6 and 30 April 1994 in Gikomero *commune* and at Butare University Hospital, as pleaded in Counts 1 to 4 of the Indictment. Any factual allegation related to André Rwamakuba's political activities or role as a member of the MDR party or as Minister of the Interim Government must be considered as context or background from which inferences could be drawn concerning, for instance, his intent, disposition or other elements of the crimes.[71]

Chapter II - Findings

30. Before addressing its factual findings (II), the Chamber briefly discusses two applicable rules on evidentiary matters (I).

I. Rules on Evidentiary Matters

31. In the Chamber's view, there are two principles especially significant in the assessment of the evidence: first, the presumption of innocence of each accused person (I.1.); and second, the Chamber's discretionary power concerning the assessment of the evidence in view of a fair determination of the matter (I.2.).

I.1. Presumption of Innocence

32. Each accused is presumed innocent.[72] Accordingly, the Prosecution bears the onus of establishing the accused's guilt beyond reasonable doubt.[73] The Defence does not have to adduce rebuttal evidence to the Prosecution's case. The Prosecution will fail to discharge its persuasive burden of proof if the Defence's evidence raises a reasonable doubt within the Prosecution's case.[74] This principle also applies when the accused denies commission of the crimes with which he is charged because he was not at the scene of the crime at the time of its commission: "the Prosecution's burden is to prove the accused's guilt as to the alleged crimes beyond reasonable doubt in spite of the proffered alibi".[75] According to the settled jurisprudence, if the defence is reasonably possibly true, it must be successful.[76]

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[69] Compare with *Ntagerura* Judgement, para. 34, in which the Trial Chamber did not consider the Prosecutor's argument, *which were advanced for the first time during the presentation of closing arguments*, to hold the accused criminally responsible based on the theory of joint criminal enterprise. The Appeals Chamber confirmed this finding (*Ntagerura* Appeal Judgement, paras. 33-46).

[70] For planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation or execution of these crimes.

[71] See: Indictment, paras. 3 to 9, 14 and 17-19.

[72] Statute, Article 20 (3).

[73] See also Rule 87 (A):

[…] 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.

[74] *Kayishema* Judgement, para. 117; *Musema* Judgement, para. 213; *Niyitegeka* Judgement, paras. 60-61.

[75] *Kajelijeli* Judgement, para. 43.

[76] *Niyitegeka* Judgement, paras. 60-61.

I.2. Chamber's Discretionary power in the Assessment of the Evidence

33. The Rules of Procedure and Evidence govern the proceedings. The Chamber is not bound by national rules of evidence and may, in cases not otherwise provided for in the Rules, 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.[77] A Chamber may also admit any relevant evidence which it deems to have probative value.[78]

34. Considering these principles, corroboration of evidence is not necessarily required: a Chamber may rely on a single witness' testimony as proof of a material fact.[79] A Chamber also has a broad discretion to admit hearsay evidence, even when it cannot be examined at its source and when it is not corroborated by direct evidence.[80]

35. The probative value to be attached to testimony is determined according to its credibility and reliability. When a witness is found to be credible, a Chamber must also determine whether his or her evidence is reliable. When applying these criteria, a Chamber must consider the evidence as a whole, including other witnesses' testimonies and the exhibits admitted.[81]

II. Factual Findings

36. In the present case, the Prosecution's evidence consisted mainly of hearsay evidence concerning both the content of the allegations and also the identification of André Rwamakuba. Five of the 18 Prosecution witnesses claimed to have direct knowledge of Rwamakuba.[82] Two witnesses also gave uncorroborated evidence to support specific allegations in the Indictment.[83] The Prosecution did not specify why this was the case and it must be presumed that this was the best evidence available. The Defence called witnesses who had both direct and indirect knowledge of Rwamakuba and many of them claimed to have been eyewitnesses to events alleged in the Indictment.

37. The Chamber will assess the evidence in order to determine whether the Prosecution has proved beyond reasonable doubt that any of the criminal acts pleaded in the Indictment[84] were planned, instigated, ordered, committed or aided and abetted by the Accused, or with respect to the genocide that he was complicit in these acts, in Gikomero *commune* and at Butare University Hospital in April 1994. If established, the Chamber will determine whether these criminal acts were committed with the specific intent to destroy, in whole or in part, the Tutsi group, and whether these acts were committed as a part of a widespread or systematic attack against the Tutsi civilian population on political, ethnic, or racial grounds. Pursuant to the established jurisprudence, the criminal intent of an accused may be proved through inferences from the facts and circumstances of a case.[85] This approach does not relieve the Prosecution of its burden of proving each element of its case, including genocidal intent, beyond reasonable doubt.[86]

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[77] Rules 89 (A) and (B).
[78] Rules 89 (C).
[79] See for e.g.: *Semanza* Appeal Judgement, para. 153; *Gacumbitsi* Appeal Judgement, para. 72.
[80] See for e.g.: *Akayesu* Appeal Judgement, para. 286; *Kajelijeli* Judgement, para. 45; *Gacumbitsi* Appeal Judgement.
[81] *Ntagerura* Appeal Judgement, paras. 172-174.
[82] See: Prosecution Witnesses GLM and GIT claimed that they personally knew André Rwamakuba's family; Prosecution Witnesses GIN and ALA claimed that they were personally introduced to Rwamakuba; Prosecution Witness XV testified that he used to see Rwamakuba when the latter was a student.
[83] See Prosecution Witness GAC with respect to the delivery of machetes at Kamanzi's house; and Prosecution Witness GIN regarding the killing of three people at the Gikomero *secteur* office.
[84] According to the Indictment: killings, or causing serious bodily or mental harm to the Tutsi population, or deliberately inflicting conditions of life upon the Tutsi population that were calculated t bring about its physical destruction in whole or in part, as genocide, and murder or extermination as crimes against humanity.
[85] *Gacumbitsi* Appeal Judgement, paras. 39-41; *Rutaganda* Appeal Judgement, para. 525; see also: *Akayesu* Judgement, paras. 523-524; *Bagilishema* Judgement, para. 63; *Gacumbitsi* Judgement, para. 252.
[86] *Gacumbitsi* Appeal Judgement, para. 41.

38. The case against the Accused revolves around two sets of events allegedly committed in Gikomero *commune* and at Butare University Hospital. They are reviewed in Sections II.1. and II.2. respectively.

39. For each allegation, the Chamber will bear in mind that the Indictment is the main accusatory instrument. As discussed in Chapter I, the Pre-Trial Brief and the Opening Statement may, in some circumstances, resolve any ambiguities in the Indictment, provided that the Accused was in a reasonable position to understand the charges against him and confront the Prosecution case.

40. The evidence will be assessed as a whole, although the different elements of the assessment of the evidence are divided into sub-sections in the interests of clarity. For each allegation, the Chamber discusses the identification of the Accused, and the credibility and reliability of the Prosecution and Defence witnesses, including the alibi evidence. The Chamber will use various criteria in its assessment of the evidence, such as internal discrepancies in the witness' testimony, inconsistencies with other witnesses' testimony, inconsistencies with the witness' prior statements, relationship between the witness and the Accused and other witnesses, the criminal record of the witness, the impact of trauma on a witness' memory, discrepancies in translation, social and cultural factors, and the demeanour of the witness. References to admitted exhibits will also be made where appropriate.

41. Most Prosecution and Defence witnesses were granted protective measures in order to prevent public disclosure of their identities.[87] The Chamber seeks to set forth the basis of its reasoning as clearly as possible, whilst avoiding disclosure of any information that may reveal the identity of protected witnesses.

II.1. Alleged Criminal Acts Committed by André Rwamakuba in Gikomero Commune

42. The *commune* of Gikomero, presently named Gasabo District, lies approximately 25 kilometres north of Kigali town.[88] In 1994, it was within the *préfecture* of Kigali Rural and was divided into ten *secteurs*, including the Bumbogo, Gasabo, Gicaca, Gikomero, Gishaka, Kayanga, Nduba, Rutunga, Sha and Shango *secteurs*.[89] Each *secteur* was divided into *cellules*. Gikomero *commune* was surrounded by the *communes* of Giti, Gikoro, Rubungo, Rutongo and Mugambazi.[90] The Chamber and the parties went to Gikomero *commune* in January 2006 and viewed specific locations relevant to the case including the Trading Centre, the *secteur* Office, the Protestant School site, Kayanga School, Kayanga Health Centre and the Ndatemwa Trading Centre.[91]

43. The Indictment alleges that from 26 July 1993 until June 1994, André Rwamakuba travelled around various *secteurs* of the Gikomero *commune* organizing and participating in meetings which called upon the Hutu majority to exterminate the Tutsi, recruiting members for "MDR-Hutu Power" and supporting the "Hutu Power" (II.1.1.). It further alleges that between 10 and 11 April 1994, after these sensitization campaigns, Rwamakuba delivered weapons that were to be used to kill the Tutsi to the homes of André Muhire, near Ndatemwa Trading Centre in Gasabo *secteur*, and Etienne Kamanzi, located in the Kayanga *secteur* (II.1.2.). He is also alleged to have instigated the killing of three unknown men, but identified as Tutsi, at the Gikomero *secteur* office (II.1.3.).[92] Finally, between 13 and 15 April 1994, Rwamakuba allegedly went to the Kayanga Health Centre where he signalled the

[87] *Karemera et al.*, Order on Protective Measures for Prosecution Witnesses (TC); *Rwamakuba*, Decision on Defence Motion for Protective Measures (TC), and Decision on Prosecution Motion For Variation, or in Alternative Reconsideration of the Decision on Protective Measures for Defence Witnesses (TC).
[88] Distance between Kigali town and Gikomero *secteur* Office, Exh. P. 2. The Defence acknowledges that the routes to Gikomero *commune* are reasonably reviewed in that document (Defence Closing Brief, p. 22).
[89] See: Testimony of Prosecution investigator Upendra Baghel, T. 13 June 2005, pp. 8-9; Defence Closing Brief, para. 23.
[90] See Exh. P. 2.
[91] Minutes for the Site Visit to Rwanda in the *Rwamakuba* case, 13-16 January 2005 (Annex A).
[92] Exh. P. 2.

beginning of the massacres against Tutsi refugees and witnessed their killing committed by soldiers and *Interahamwe* (II.1.4.).

44. The Chamber will address each of these allegations in turn, and assess the related evidence. Neither the Indictment nor the Prosecution Pre-Trial Brief and Opening Statement are very explicit, but they seem to suggest, as does the evidence adduced, that for each event alleged, the Accused commuted between Kigali town and the various locations in Gikomero *commune*.[93]

45. The Prosecution and Defence witnesses agree that in April 1994, attacks and massacres were committed in Gikomero *commune* against the Tutsi population, and specifically at the Ndatemwa Trading Centre, Gikomero Protestant School, Gishaka Parish and the Kayanga Health Centre.[94] Prosecution and Defence witnesses also described an *Interahamwe* named Ephrem Nyirigera, the communal *brigadier* named Michel Nyarwaya and the communal accountant named Mathias Rubanguka as three of the main leaders of the attacks and massacres against Tutsi throughout Gikomero *commune* during the 1994 genocide.[95] The Defence denies that André Rwamakuba was involved in any of those attacks and massacres.

II.1.1. Alleged Public Instigation in Gikomero from July 1993 through June 1994

46. The Prosecution alleges at paragraphs 3 to 5 of the Indictment that

> 3. […] After the establishment of MDR "Power" on 26 July 1993 or thereabouts, André Rwamakuba, practically every weekend, up to and including January 1994, and often accompanied by local authorities and officials of MDR "Power", traveled about his home *commune* in Gikomero, Kigali-rural *préfecture*. He organized meetings and participated in rallies in Kayanga, Gikomero, Rutunga, Gasabo and Gicaca *secteurs*. During the rallies, André Rwamakuba distributed songs of the Parmehutu party. The *Accused's* objective at the time was to recruit members for MDR "Power" party and to support "Hutu Power". The *Accused* called upon the Hutu majority to oppose the Arusha Peace Accords and to exterminate the Tutsi.
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> 4. During those "sensitization" campaigns in Gikomero *commune*, particularly in January 1994, André Rwamakuba occasionally went about in a vehicle equipped with a public address system exhorting Hutu to unite in order to get rid of Tutsi. His announcements, the objective of which was to exhort Hutu to unite in order to get rid of Tutsi, included repeated statements that "the time has come for you, Hutu, to get rid of the enemy".
>
> 5. During the period from January through June 1994, André Rwamakuba made statements at various meetings and public gatherings in Gikomero *commune*, or publicly associated himself with statements or acts by other persons at such gatherings. Thus, from January 1994 and during the entire period preceding the events of April 1994 in Sha, Nduba, Shango, Kayanga and Gikomero *secteurs,* and in the *communes* adjoining Gikomero, namely Rutungo, Rubungo and Kanombe, he publicly instigated participants to combat "the enemy", all the Tutsi being characterized as "the enemy", "accomplices of the enemy" or "accomplices of RPF". After these gatherings, during which the Accused called for the extermination of Tutsi, the participants became excited, aggressive and disposed to physically attack and destroy the Tutsi as a group. Such speeches by the Accused signaled the start of killings in the *commune*. Furthermore, after the killings began in early April 1994, André Rwamakuba often praised and congratulated militiamen publicly for and on having killed Tutsi, thereby instigating other militias and armed civilians to participate in further attacks and massacres against the Tutsi population.

[93] See also the Prosecution Pre-Trial Brief, Opening Statement and Prosecution Closing Brief.
[94] These events are discussed below.
[95] See Prosecution Witnesses GAB, GAC and GIN; Defence Witnesses 3/1, 4/16, 6/10, 7/18 and 9/20.

(1) Evidence Adduced

47. Six Prosecution Witnesses testified that between 1992 and March 1994, André Rwamakuba came to Gikomero *commune* several times.[96] Some of them attested that during that period, he participated in MDR party meetings at Kayanga Primary School (1.1.), and in political rallies in four *secteurs* (1.2.). It was also said that Rwamakuba was present at gatherings in bars, and used a vehicle equipped with a loudspeaker in order to call for the extermination of the Tutsi (1.3.) and to recruit members for the MDR extremist wing, "Hutu Power" (1.4.).

48. The Prosecution contends that the sensitization campaigns allegedly conducted by the Accused between 23 July 1993 and April 1994 were principally aimed at laying the groundwork for the struggle against the Tutsi in which André Rwamakuba personally involved himself.[97] This Tribunal is only competent to prosecute individuals for crimes committed between 1 January and 31 December 1994.[98] Evidence of events prior to 1994 that can establish a "pattern, design or systematic course of conduct by the accused" or provide a context or background to crimes falling within the temporal jurisdiction of the Tribunal is however admissible.[99] Moreover, in the light of the discussion under Chapter I regarding the charges against the Accused, the Chamber will consider the evidence on the alleged public instigation in Gikomero *commune* discussed hereinafter as circumstantial evidence that could be relevant concerning the alleged crimes committed by the Accused in the Gikomero *commune* in April 1994.

(1.1.) MDR Party Meetings at Kayanga Primary School

49. Prosecution Witnesses GIQ, GAC and GAB did not personally know André Rwamakuba, but testified that they saw him at an MDR party meeting or several such party meetings held at Kayanga Primary School. None of them could recollect the exact date of the meeting or meetings. Witness GIQ placed a meeting at the school in 1992 "before the split of the MDR party", GAC could not specify the year of the event,[100] and GAB testified that a meeting took place in 1993 at Kayanga Primary School.

50. Prosecution Witness GIQ testified that in 1992, he saw André Rwamakuba with MDR leaders Anastase Gasana, Faustin Twagiramungu and Aloys Munyangazu recruiting members for their party in the courtyard of Kayanga Primary School. The witness recognized Anastase Gasana and Aloys Munyangazu because he knew them prior to that event.[101] He also recognized Twagiramungu because he used to hear him on the radio and was able to recognize his voice.[102] Along with the other party dignitaries, Rwamakuba was introduced to the crowd by Gasana,[103] as a native of Gikomero. They were told that those dignitaries were united and that they all belonged to the MDR party. Rwamakuba did not make any public statement on that day.

51. Prosecution Witness GAC also testified about an MDR rally organized by Faustin Twagiramungu at an unspecified date in the courtyard of Kayanga Primary School, which MRND party members also attended out of curiosity.[104] According to the witness, Twagiramungu, the then Prime Minister Agathe Uwilingiyimana, Jean De Dieu Kamuhanda and André Rwamakuba were introduced at the rally by the person conducting the ceremony. The witness heard approximately five people giving speeches, including Twagiramungu, who made a long speech about the MDR in his

[96] See Prosecution Witnesses ALA, GAB, GAC, GIQ, GIT and GLM.
[97] Prosecution Closing Brief, para. 49.
[98] Statute, Article 1.
[99] *Simba*, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction (AC); *Nahimana* Judgement, para. 101.
[100] T. 4 July 2005, p. 50; T. 5 July 2006, p. 43. Although the English transcript mentions the year "1992", the witness was testifying to a 1993 meeting (see: French version of the transcript at p. 43).
[101] T. 15 June 2005, p. 53.
[102] T. 15 June 2005, p. 53.
[103] T. 15 June 2005, p. 55.
[104] T. 4 July 2005, p. 46.

capacity as chairman of the party.[105] He also heard Rwamakuba addressing the population using language which, in the witness' view, amounted to calling on the audience to attack and kill Tutsi.[106] GAC also attested that the objective of the Kayanga Primary School rally was to call on the people to accept the coalition between the MDR-Power, the MDR-PARMEHUTU and the MRND-Power. He further testified that "Twagiramungu taught the Hutu to kill the Tutsi", and that the participants, including Twagiramungu, implemented the killing of Tutsis.[107]

52. Prosecution Witness GAB also testified to an MDR Power party meeting held in the courtyard of Kayanga Primary School in 1993, where he saw André Rwamakuba and other authorities attending that meeting.[108] The witness asserted that Twagiramungu and Gasana were not present.[109] According to GAB, the main objective of the rally was to sensitize members of the MDR, Hutus in general, to the fact that their enemy was the Tutsi "who had attacked Rwanda".[110] The witness heard the MDR Power representative say that the enemy of the MDR and of the Hutu in general was "the Tutsi who collaborate with the *Inkotanyi*." As soon as the witness heard this statement, he left the meeting. He did not know whether Rwamakuba took the floor to make a speech on that day.[111] The witness testified that after this meeting, there was a conflict between the Hutu and the Tutsi in Kayanga.[112]

(1.2.) Political Rallies in Sha, Nduba, Shango and Kayanga secteurs

53. Prosecution Witnesses GLM and GIT claimed to know André Rwamakuba personally,[113] and testified to various rallies that took place between 1993 and March 1994 in Sha, Nduba, Shango and Kayanga *secteurs* where Rwamakuba was said to have been present. None of them attended any of those rallies, but rather learned of them from other persons present.[114] These witnesses further testified that prior to each rally they heard or saw a vehicle equipped with a loudspeaker which was used to invite the population to attend the rallies.

54. Around October 1993, on a Sunday "about two months after the Hutu Power wing of the MDR had been created", Witness GLM saw André Rwamakuba pass where the witness lived on his way to and from Nduba *secteur*. He saw him in a car equipped with a megaphone calling out to people to attend a rally.[115] The witness was not present at the rally in Nduba, but a man[116] later told him that Rwamakuba had been there.[117] According to that man, Rwamakuba spoke to the public at the rally and explained the political situation in the country, and specifically that "the Hutu needed to unite their forces so that they can exterminate the Tutsi." He is also alleged to have said that "all the evils that the country was faced with were due to the Tutsi; the Tutsi were at the origin of all these evils, so they

[105] T. 4 July 2005, p. 46.
[106] According to the witness, André Rwamakuba said: "According to you, who are those who are many more than the others: is it people who have tinned roofs or those who have thatched roof?" Rwamakuba added: "if you were asked to burn down the house of people, which houses are with thatched roofs would it take much time?" GAC explained that he understood it as "If I were to order today that Tutsis be killed from now, would you think - did you think that there would be survivors?" (T. 4 July 2005, pp. 6 and 45).
[107] T. 4 July 2005, p. 44.
[108] T. 5 July 2005, p. 19.
[109] T. 5 July 2005, p. 45.
[110] T. 5 July 2005, p. 19.
[111] T. 5 July 2005, p. 20.
[112] T. 5 July 2005, p. 20.
[113] GLM and GIT are brothers. They both stated that their family and Rwamakuba's family were well acquainted since they were neighbours. GIT knew Rwamakuba when he was a secondary school pupil. He would have visited Rwamakuba's parents several times and met the Accused on these occasions. GLM was also used to see André Rwamakuba on visits to Gikomero. In particular, he met him at a parents' meeting of the free secondary school in Nduba, the *École Technique Libre* (ETL), which had been created by Rwamakuba and in which GLM had registered one of his elder brother's children. (See: T. 21 June 2005, pp. 65-66; T. 16 June 2005, p. 4).
[114] T. 16 June 2005, p. 10.
[115] T. 16 June 2005, p. 11.
[116] The name of the man was provided by Witness GLM, Exh. P. 32 (under seal).
[117] T. 16 June 2005, p. 11. The name of the man has been written down by Witness GLM, Exh. P. 32 (under seal).

needed to be exterminated so that the country could be governed properly after having gotten rid of that problem."[118]

55. The witness testified that a similar event occurred at the end of November 1993, also on a Sunday.[119] Witness GLM was standing close to his house and saw a passing vehicle equipped with loudspeakers calling on the people to attend an MDR Power meeting to learn about the ideals and program of the party.[120] He saw André Rwamakuba driving the vehicle while the person next to him was speaking into the loudspeaker. On the following day, a man[121] who had attended the meeting met the witness at his workplace[122] and told him that Rwamakuba had publicly addressed a meeting held in Shango *secteur*. According to this informant, the meeting was related to the extermination of the Tutsi. It was allegedly said that since the Tutsis were behaving like traitors to the country, they had to be exterminated. Party members were told that the MDR Power was the party which contained the word "power," representing the force or the strength of Hutu to be counted on to exterminate the Tutsi. Witness GLM asserted that it was Rwamakuba who addressed the population about the MDR Power and the party's program.[123]

56. In January 1994, GLM again heard a vehicle equipped with a loudspeaker pass on the hill opposite his house. The message from the loudspeaker called upon the people to attend a rally at Kayanga *secteur*. Slogans of MDR Power were diffused asking the Hutu to unite. GLM was not able to see the person driving the vehicle, because it passed too far away from him.[124] The witness did not attend the Kayanga rally, but again, a man[125] who had attended told him that André Rwamakuba and other people who had come from Kigali were introduced to the audience. During the rally, the ideals of the MDR Power – the extermination of the Tutsi in particular – were "taught". It was said that the Hutu should not scatter into several parties but should instead unite into one party in order to exterminate the Tutsi.[126]

57. Prosecution Witness GIT was told about rallies or meetings organized in the centre of Sha *secteur*, in the square near the Kayanga School of Kayanga *secteur* and on the football field of Nduba *secteur* between August 1993 and March 1994. He did not attend these meetings but he did see André Rwamakuba going to the rallies on five separate occasions, driving a red pick-up truck, the last occasion being in March 1994.[127] Witness GIT would see Rwamakuba passing because he lived at a distance of 15 meters from the road coming from Kigali and going in the direction of the rallies.[128] He saw other people in the vehicle with Rwamakuba but did not know their names. According to the witness, they were singing in praise of their party and wearing caps and small flags bearing the MDR Power emblem.[129] Two people informed the witness about the content of the meetings and Rwamakuba's participation at the various rallies.[130] The latter had allegedly taken the floor and said that the time had come to eliminate the enemy Tutsi who were causing problems throughout the country.[131]

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[118] T. 16 June 2005, p. 12.
[119] T. 16 June 2005, p. 13.
[120] T. 16 June 2005, pp. 12-13
[121] The name of the man was provided by Witness GLM, Exh. P. 32 (under seal).
[122] T. 16 June 2005, p. 13 and Exh. P. 32 (under seal).
[123] T. 16 June 2005, p. 14.
[124] T. 16 June 2005, pp. 14-15.
[125] T. 16 June 2005, p. 15. The name of the man was provided by Witness GLM, Exh. P. 32 (under seal).
[126] T. 16 June 2005, p. 17.
[127] T. 22 June 2005, p. 5.
[128] T. 21 June 2005, p. 69.
[129] T. 21 June 2005, p. 71. According to the witness, the caps and flags were red and black – the colour of their party. Some others wore the *Interahamwe* uniform of the MRND.
[130] T. 21 June 2005, p. 73.
[131] T. 22 June 2005, p. 2.

(1.3.) Calls for the Extermination of the Tutsi

58. Prosecution Witnesses GLM and ALA testified that they once heard André Rwamakuba personally call for the extermination of the Tutsi. Witness ALA saw him during the third week of January 1994 in his cellule on a Sunday, around one o'clock in the afternoon.[132] The witness was in his house, which is near the commercial centre. He heard a voice coming from a megaphone and went to see what was happening. He saw a khaki coloured Peugeot model 505 equipped with a megaphone, which was idling near the commercial centre with three people on board.[133] As ALA was approaching the vehicle, he was called by one of its passengers, Anastase Gasana who knew the witness, and asked to repair the vehicle.[134] Gasana then introduced the witness to the other two people in the vehicle, Aloys Munyangazu and André Rwamakuba.[135] As the witness was attempting to repair the car, Rwamakuba took the megaphone and called out to the people saying several times that "it was time for the Hutus to get rid of the enemy". The witness asserted that a reasonable person would have understood that Rwamakuba was referring to the Tutsi when speaking about the enemy.[136] Witness GLM testified that in February 1994,[137] he saw Rwamakuba in Froduard Birasa's bar in Nduba Centre[138] and heard him say that the Tutsis were a big problem and it was time to get rid them.[139] Rwamakuba is alleged not to have gone into greater depth on the matter because of GLM's presence. The witness stated that this was the only time he heard Rwamakuba speak such words.[140] In GLM's view, the people present at the bar planned to exterminate the Tutsi and later implemented this extermination plan.[141]

(1.4.) Recruitment of Members for the MDR "Hutu Power"

59. Prosecution Witnesses GIQ and ALA testified that they saw or heard André Rwamakuba recruiting members for the MDR party. In January 1994, Witness GIQ saw him in Emmanuel Rubagumya's bar. Rwamakuba had bought people drinks and was telling them that they should join the MDR party, recruit other members and that they should kill anyone who refused to join the party.[142] GIQ also testified that he saw Rwamakuba in 1992 or in 1993 in a white vehicle which was equipped with loudspeakers playing songs glorifying the MDR-Power Hutu.[143] The songs were asking the Hutu to unite, and claiming that due to this unity, they would overcome. Rwamakuba was accompanied by the then Minister of Information, Pascal Ndengejeho. The vehicle was going slowly, ensuring that people could hear what was being said including GIQ who was standing close to where the vehicle passed.[144] Witness ALA testified that he saw Rwamakuba in the third week of October 1993, on or about 22 October 1993, in a vehicle passing by in Kayanga.[145] He was speaking to Mathias Rubanguka and Gérard Gakuba from his car.[146] Later, Rubanguka informed the witness that Rwamakuba was recruiting members for the "MDR power", and was looking for people whom he could trust to assist him with additional recruitment.

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[132] T. 14 June 2005, pp. 47 and 75.
[133] T. 14 June 2005, p. 46.
[134] The witness explained that he knew Anastase Gasana from when he was still a Professor at Nyakinama University. The witness was a friend of Gasana's borther and therefore used to visit them (T. 14 June 2005, p. 46).
[135] T. 14 June 2005, p. 46.
[136] T. 14 June 2005, p. 75.
[137] T. 16 June 2005, p. 31.
[138] T. 16 June 2005, p. 17.
[139] T. 16 June 2005, pp. 9-10 and 30-31.
[140] T. 20 June 2005, p. 55.
[141] T. 16 June 2005, p. 19.
[142] T. 15 June 2005, pp. 30-32. According to the witness, the following persons were also in the bar: Callixte Kabarira, Sebahinzi, Joseph Ayirwanda and his son Frédéric Turatsinze. Emmanuel Rubagumya, Callixte Kabarira, and Sebahinzi are in prison in Remera. Ayirwanda and Frédéric Turatsinze are both dead.
[143] T. 15 June 2005, pp. 30-31.
[144] T. 15 June 2005, pp. 31 and 59.
[145] T. 14 June 2005, pp. 48 and 70.
[146] T. 14 June 2005, p. 71.

(2) Assessment of the Evidence

60. In the Chamber's view, the Prosecution witnesses' testimonies on the alleged sensitization campaigns led by the Accused in Gikomero are not consistent with certain allegations in the Indictment (2.1.). Furthermore, the Prosecution evidence is tainted by internal contradictions (2.2.) and directly contradicted by the defence alibi evidence (2.3.).

(2.1.) Lack of Consistency between the Indictment and the Prosecution Evidence

61. Testimony was given on eleven instances between 1992 and March 1994 during which André Rwamakuba allegedly came to Gikomero *commune*. It has not been shown that towards the end of 1993 and in early January 1994, the Accused went to Gikomero *commune* "practically every week-end", as alleged in paragraph 3 of the Indictment. None of the witnesses testified about meetings held in Gikomero, Rutunga, Gasabo and Gicaca *secteurs*, or in the adjoining *communes* of Rutungo, Rubungo and Kanombe, although one Prosecution witness testified that he saw Rwamakuba passing by in a vehicle in Rutunga and Gasabo *secteurs* at the beginning of 1994.[147] The Prosecution, therefore, failed to prove that during meetings in these *secteurs* and *communes*, the Accused instigated participants to "combat" and exterminate the Tutsi, as alleged in paragraph 5 of the Indictment.

(2.2.) Reliability Issues

62. The identification of the Accused raises a number of concerns. Witnesses GIT and GLM, who are brothers, are the sole witnesses claiming to know André Rwamakuba personally. They said they were neighbours of Rwamakuba's parents, and have known him for a long time. Neither of them, however, could give a satisfactory description of Rwamakuba nor much detail concerning how they came to know him.[148] It is interesting to note that Witness GIT claimed not to know whether his brother was testifying in this case, although they live near one another and both testified in this case within a short space of time.[149]

63. Both GAB and GAC testified that they saw André Rwamakuba for the first time at the stone-laying ceremony of a primary school in Rutunga, in the company of the then Minister of Primary and Secondary School, Faustin Munyanzesa.[150] GAB could not specify the exact date of this ceremony, except that it was before 1994, but GAC placed the event in 1992. Neither witness had any prior knowledge of Rwamakuba. The latter was pointed out to GAC by a young man who used to live in Rutunga.[151] He was also told that Rwamakuba was working in the Ministry of Health. GAB stated that the Accused was introduced to the assembly as "the doctor André Rwamakuba, a native of Gikomero *commune*."[152] It is noteworthy that GAB was only fifteen years old at that time and was not able to provide any details about the event. In contrast to Witness GAB's testimony, GAC did not specify that Rwamakuba was introduced during the alleged rally held in 1993 at Kayanga Primary School.

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[147] Witness GIQ did not hear or see André Rwamakuba say anything and did not see him do anything (T. 15 June 2005, p. 32).

[148] Prosecution Witness GIT described André Rwamakuba as follows: "Someone who was of average size. Now, as for his complexion, his skin was between light complexion and dark complexion, the light complexion being the more dominant. He was not a fat man, nor was he thin; between the two. […] He was someone who was solid in build, and he was neither too big nor too thin." (T. 23 June 2005, p. 53).
Prosecution Witness GLM described Rwamakuba as follows: "a man of average size, his complexion was neither dark nor light, medium. He seemed to have a tendency to have chubby cheeks and very little hair." "He was a well built man and I would say that he wasn't thin." "His voice was deep and somewhat rough." (T. 20 June 2005, p. 4).

[149] T. 22 June 2005, p. 20; T. 24 June 2005, pp. 12 and 16.

[150] T. 4 July 2005, p. 35.

[151] T. 4 July 2005, p. 37.

[152] T. 5 July 2005, p. 43.

64. The lack of consistency between the Indictment and the testimonies adduced on this aspect of the case was compounded by witnesses who gave different and irreconcilable versions of the facts. Witnesses GAC, GAB, GIQ, GLM and GIT testified about various rallies held in Gikomero *commune*. The Prosecution seemed to present these as separate rallies held on different occasions.[153] It is however uncertain as to whether the witnesses testified to the same rallies or to different ones. Different dates were given for a meeting at Kayanga Primary School, which the same authorities were alleged to have attended and at which similar speeches were given. In his testimony, Witness GAC could not specify the year of the Kayanga School meeting, but in a previous signed statement, had attested that it took place at the end of 1993.[154] Witness GAB testified to the presence of Rwamakuba at a Kayanga meeting in 1993, and although Witness GIQ acknowledged the existence of a meeting in 1993 in Kayanga he specified that Rwamakuba was not in attendance.[155]

65. The Chamber recalls that the evidence of GIT and GLM is indirect and mostly hearsay in many respects. The source of Witness GIT's information casts doubt upon the reliability of his testimony. According to this witness, his informer was respectable and honest, but Witness GLM asserted that a man with the same name as GIT's informer was partial, biased and disrespectful towards others.[156]

66. Some major aspects of GLM's testimony are also vague and inconsistent. When the Prosecution asked who GLM thought had called for the extermination of Tutsi, the witness replied that the person usually there to speak about MDR Power was André Rwamakuba.[157] He also recalled the Nduba *secteur* rally as having been held on a Sunday, whereas later, he stated that he *was told* that it was on a Sunday.[158] Similarly, he first said that he saw André Rwamakuba holding the megaphone and calling on people to come and attend the Nduba rally,[159] but during cross-examination, stated instead that Rwamakuba was driving the car and that the person sitting beside him was speaking through the megaphone.[160] The witness placed the event at Birasa's bar in February 1994,[161] then at the end of the year in 1993, only to later reaffirm that it was in February 1994.[162] This important event at Birasa's bar, where Witness GLM allegedly heard Rwamakuba calling for the extermination of Tutsi, was mentioned for the first time in court. Also mentioned for the first time in court was Rwamakuba's alleged discussion about the split in MDR-Hutu Power. GLM claimed that he had already mentioned these details to the Prosecution, but that the first investigators recorded only a summary and the subsequent team of investigators made many mistakes in the document and did not return to him to enable the necessary corrections to be made.[163] The Chamber however notes that on 11 February 1998, GLM signed a statement describing Rwamakuba's political and anti-Tusti activities which mentioned Birasa as one of the extremists with whom Rwamakuba used to work.[164]

67. The testimony of these witnesses is also contradicted by other Prosecution witnesses' testimonies. Witness ALA described an incident where André Rwamakuba travelled with Anastase Gasana and called for the extermination of the Tutsi in Gasana's presence. GAC alleged that at the Kayanga Primary School meeting, Faustin Twagiramungu "taught to kill the Tutsi". Witnesses GIT, GIQ and Prosecution Expert Witness Alison Des Forges, however, testified that Anastase Gasana and

[153] Prosecution Closing Arguments, paras. 33-48.
[154] Exh. D. 34 A and B (under seal). In the same statement, he declared that the meeting took place at the Kayanga *secteur* office and that he could no longer remember what André Rwamakuba said on that occasion. On the contrary, the witness testified in court that the meeting took place in the courtyard of the Kayanga School. He further stated the alleged speech made by Rwamakuba on that occasion.
[155] T. 15 June 2005, p. 58.
[156] T. 20 June 2005, p. 2 and Exh. P. 32.
[157] T. 16 June 2005, p. 14.
[158] T. 20 June 2005, p. 57.
[159] T. 16 June 2005, p. 11.
[160] T. 20 June 2005, p. 57.
[161] T. 16 June 2005, p. 31.
[162] T. 16 June 2005, pp. 17, 22, 30 and 31; T. 20 June 2005, pp. 53-55; T. 21 June 2005, p. 2.
[163] T. 20 June 2005, pp. 55-56; T. 21 June 2005, pp. 2-3.
[164] Exh. D. 19 A and B (under seal).

Faustin Twagiramungu were all moderate MDR politicians.[165] Witness GIQ stated that he would have been surprised to see Rwamakuba and Gasana together.[166] GAC's placing of Jean de Dieu Kamuhanda at the MDR meeting in Kayanga was also contradicted by evidence that Kamuhanda was an MRND politician.[167]

68. GLM's testimony concerning a meeting in Nduba *secteur* around October 1993, "about two months after" the creation of the MDR-Power wing[168] is also inconsistent with the Prosecution expert witness' evidence. She described the process of division within the MDR as starting from February 1993 (when the Rwandan Patriotic Front ("RPF") violated the ceasefire and launched a massive military advance across the northern part of Rwanda causing the displacement of hundreds of thousands of people) until 23 July 1993 when Twagiramungu was expelled from the MDR party because he wished, *inter alia*, to maintain the party's collaboration with the RPF.[169] Twagiramungu's expulsion was confirmed by Defence Witness Jean-Marie Nkezebera, a former member of the MDR's political bureau and vice-president of the party in the Kigali area. Therefore, GLM's assertion that Twagiramungu attended an MDR-Power meeting around October 1993 appears inherently unlikely. In addition, the expert witness stated that, after the October 1993 assassination of the Burundian President – the first freely and fairly elected Hutu President – by Tutsi soldiers, Froduald Karamira introduced the concept of Hutu Power at a massive political rally at the Amohoro stadium in Kigali.[170] Although the expert witness was told that there was a meeting in Gitarama in September 1993 where the term "Hutu power" was used, she agreed that the term originated at the rally in October 1993. This testimony conflicts with GAC's testimony, who instead testified to the use of the term or slogan "power" at rallies in 1992 and in the earlier parts of 1993.

69. These inconsistencies cannot be justified by the time elapsed, translation discrepancies, or the manner in which the statements were taken. They become still more significant when viewed against the alibi evidence adduced by the Defence.

(2.3.) Alibi

70. The Defence alleges that André Rwamakuba could not have participated in the alleged public instigations in Gikomero between September 1993 and March 1994 because he was not in Rwanda for most of that time.[171] Evidence was adduced that between 23 September 1993 and 10 March 1994, the Accused was studying at the Prince Leopold Institute in Antwerp, Belgium, and that between 17 and 29 March 1994, he attended a World Health Organization (WHO) Conference in Aswan, Egypt. The Defence put the Prosecution on notice of the Belgian alibi at a preliminary hearing held in 2000.[172] In addition, the Defence served notice of the alibi to the Prosecution at the outset of trial and disclosed the names and addresses of witnesses and other evidence which it intended to rely upon in the presentation of this defence.[173]

71. To support the alibi, the Defence called six witnesses who mostly relied on their own diaries or personal documents to recollect the exact dates when they met André Rwamakuba during the time in

[165] GIT testified that when the MDR party came into conflict, Gasana joined the moderate wing (T. 21 June 2005, p. 67); T. 15 June 2005, pp. 54-55.
[166] T. 15 June 2005, p. 56.
[167] See Defence Witness 1/5, T. 13 December 2005, p. 28. This was not disputed by the Prosecution.
[168] T. 16 June 2005, p. 11.
[169] T. 14 July 2005, pp. 15-16.
[170] T. 14 July 2005, p. 17.
[171] Defence Closing Brief, p. 230 and seq.
[172] *Prosecutor v. André Rwamakuba*, Case N°ICTR-98-44-I, T. 7 November 2000.
[173] See Confidential Alibi Notice, filed on 8 June 2005, *Corrigendum* to Confidential Alibi Notice, filed on 14 June 2005 and Further Alibi Details, filed on 21 June 2005.

question.[174] The Prosecution did not dispute and the Chamber accepts that the Accused was trained as a medical doctor, studying medicine in Belgium between 1970 and 1974 and then at Butare University between 1975 and 1978,[175] and had a career as a public health specialist, being appointed Director of the Kigali Health Region in 1992.[176]

72. Defence Witnesses Henri Van Balen and Pierre Mercenier are co-founders of the Prince Leopold Institute (Institute of Tropical Medicine) in Antwerp, Belgium.[177] Both of them have had long medical careers working with both Belgian authorities and international organizations such as the World Health Organization.[178] In 1993-1994, they were both professors of public health at the Antwerp Institute of Tropical Medicine. Relying on various documents,[179] both testified that André Rwamakuba participated in a training course at the Institute in Belgium between 27 September 1993 and March 1994. According to Professor Mercenier's attestation, the training course ended on 9 March 1994.[180] The report drafted by Rwamakuba and the attestation signed by Professor Van Balen, however, mentioned the end date of the course as 27 March 1994.[181] The explanation given for the discrepancy in this date was that since the training report submitted by Rwamakuba was made to the Belgian Technical Cooperation for scholarship purposes and had to cover a six months period, it did not correspond with the exact end date of the course.[182] Professor Van Balen explained further that in May 1995, Rwamakuba, who was in Namibia at the time, wrote him a letter requesting certification of his training in Antwerp. In his letter, Rwamakuba explained that he was looking for work in Namibia and had had to leave Rwanda where he abandoned all of his documents. Since Professor Mercenier was already retired when Henri Van Balen received the letter, the latter drafted the certificate on the basis of Rwamakuba's training report. The witness stated that as he had personal knowledge that Rwamakuba had completed the six-month scholarship, he therefore did not pay attention to the exact dates.

73. Professors Van Balen and Pierre Mercenier could not categorically attest to André Rwamakuba's presence every day in Belgium during the period of his training,[183] but they specified that it was a full-time course and that he would have had to stay in Belgium for its duration. Professor Mercenier testified that initially he would have seen Rwamakuba about once per week and later on, about once a fortnight. Both Professors also saw him from time to time in passing in the corridors of the Institute.[184] They further testified to specific dates when meetings had been arranged with him, as recorded in their diaries. Henri Van Balen noted that his diary mentions a meeting with Rwamakuba on 13 October 1993 to discuss a colloquium,[185] and Pierre Mercenier stated that he met Rwamakuba on 21 February 1994 in Belgium to discuss the end of the training and his prospective mission to Rwanda in April 1994.[186]

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[174] Defence Witness Edith Van Wynsberghe, Pierre Mercenier, Henri Van Balen, François Monet, 1/1 and 3/A. Due to the particularly close relationship between the Accused and Witness 3/A and the age of the witness at the time of the event, the Chamber is of the view that it will be more appropriate to set aside this evidence.
[175] *Curriculum vitae* of André Rwamakuba (Exh. D. 184) and Prosecution Closing Brief at para. 6, footnote 3: "The Prosecutor does not dispute the periods and the studies undertaken by the Accused."
[176] Exh. D. 184; Prosecution Closing Brief, para. 6 and Defence Closing Brief, pp. 2-5.
[177] T. 14 December 2005, p. 2.
[178] Ibidem.
[179] Both witnesses relied upon their own diaries. Professor Van Balen produced the following documents: Training report drafted by André Rwamakuba, attestation signed by Professor Van Balen in May 1995, letter drafted by the Secretary of the Institute dated 28 January 1993, attestation by Professor Mercenier, letter drafted by the Secretary of the Institute dated 25 February 1994 (Exh. D. 186).
[180] Exh. D. 186 (B).
[181] Exh. D. 186 (A and D); T. 6 December 2005, pp. 34-35 and 42-43.
[182] T. 6 December 2005, p. 43; T. 14 December 2005, pp. 8, 15 and 17.
[183] T. 6 December 2005, pp. 35, 42 and 44; T. 14 December 2005, p.15.
[184] T. 14 December 2005, pp. 4-12 (Witness Van Balen) and T. 6 December 2005, p. 43 (Witness Mercenier).
[185] T. 14 December 2005, p. 4.
[186] T. 6 December 2005, pp. 36 and 45.

74. Doctor Francis Monet is a doctor specialized in tropical medicine who was working for the Belgian Technical Cooperation in Rwanda from 1990 to 1994.[187] He came to know André Rwamakuba when the latter was appointed as the Director of the Kigali Health Region in 1992. They used to meet on a daily basis when they were both in Rwanda.[188] Doctor Monet confirmed that he was present at the airport when Rwamakuba left Rwanda on 23 September 1993, between 6.30 and 7 a.m., for Belgium. The witness relied on his diary,[189] but could also recall that event because, on that occasion, he had been somewhat upset that Rwamakuba had arrived very late to the airport for his flight. He also testified that he was at the airport for Rwamakuba's return to Rwanda on the morning of 10 March 1994. According to the witness, Rwamakuba did not return to Rwanda between 23 September 1993 and 10 March 1994. While the witness did not recall receiving any news from the Accused during that period, he submitted that it was practically impossible for Rwamakuba to return to Rwanda without him knowing about it. Even if Rwamakuba had not contacted him directly, he was still certain that others would have told him of his return.[190]

75. Defence witness Edith Van Wynsberghe met André Rwamakuba during his medical studies in Belgium in 1973. She stated that she saw him approximately ten times while he was attending the training course at the Tropical Institute of Antwerp in Belgium, between September 1993 and March 1994. Relying on various receipts,[191] the witness was able to recollect specific dates when she met Rwamakuba during that period. She saw him sometime between the end of November 1993 and the beginning of December 1993, when she went to Antwerp to order a sewing machine.[192] She later visited him for his birthday on 27 December 1993, at his house in Antwerp.[193] She could not confirm where Rwamakuba was between about 1 December 1993 and 27 December 1993.[194] Around 6 January 1994, the witness and her daughter accompanied Rwamakuba to look for a used car in another town in Belgium.[195] On 2 March 1994, she took Rwamakuba to a pharmacy in Antwerp to buy medical supplies.[196] She also accompanied the Accused to the airport on 9 March 1994 when he left Belgium for Rwanda.[197]

76. Defence Witness 1/1, who is a close relative of André Rwamakuba, testified that he left Rwanda to pursue a program of study in Belgium between late September 1993 and March 1994.[198] Witness 1/1 confirmed that Rwamakuba never came back to Rwanda during that period. The witness further provided some correspondence received by Rwamakuba at an address in Belgium where Edith Vanwynsberghe testified having visited him for his birthday and Rwamakuba's diary from 1993 diary with references to his stay in Belgium.[199]

77. The Defence also adduced evidence concerning André Rwamakuba's presence in Egypt between 17 and 29 March 1994. Edith Van Wynsberghe saw Rwamakuba again on 18 March 1994, while he was in transit at the airport in Brussels.[200] Doctor Francis Monet testified that he met him in

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[187] T. 14 December 2005, p. 23.
[188] Witness Monet came to know André Rwamakuba in particular as a result of the latter's appointment in 1992 as Director of the Kigali Health Region. The witness stated that he met Rwamakuba on a daily basis (T. 14 December 2005, p. 24).
[189] Exh. D. 187. Only one page of his diary was entered into evidence, the entire diary was offered for inspection by the Chamber.
[190] T. 14 December 2005, pp. 26-27, 38-39, 48-49.
[191] Exh. D. 182.
[192] The receipt is dated 8 December 1993; the witness came to Antwerp a week or so before the delivery date.
[193] T. 1 December 2005, p. 57.
[194] T. 2 December 2005, p.3.
[195] T. 1 December 2005, p. 57.
[196] T. 1 December 2005, pp.57-58; Exh. D. 182.
[197] The witness recollected this meeting by producing the customs documents concerning the medical supplies bought which were stamped and dated by the Belgian customs authorities; T. 1 December 2005, pp.60-61 and Exh. D. 182.
[198] Witness 1/1 placed the return day of André Rwamakuba in Rwanda on 14 March 1994. Confronted with Rwamakuba's passport, the witness conceded that the date was given according to the witness' recollection; T. 14 December 2005, p. 58; T. 15 December, pp. 25, 32-35.
[199] Exh. D. 190 and D. 193.
[200] T. 1 December 2005, pp.60-61. The witness assisted André Rwamakuba in buying a mobile phone and a fax. She relied on a receipt dated 18 March 1994 (Exh. D. 182).

Kigali on the evening of his return from Egypt at the Regional Health Centre offices on 29 March 1994.[201] Professor Henri Van Balen testified that Rwamakuba was to attend an international conference organized by the WHO in Egypt upon completion of the course in Belgium. The secretary of the Institute told Professor Van Balen that she had made reservations for Rwamakuba to attend this conference, but that these were not final tickets. Finally, Witness 1/1 also testified that André Rwamakuba left Rwanda on 17 March 1994 and returned on 29 March 1994 from a seminar in Egypt.

78. Defence Witness Monet testified that between André Rwamakuba's return from Belgium and departure to Egypt, he saw him every day at the Regional Health Centre since they were working together. On 11 March 1994, they went together with a delegation of Belgian members of Parliament to Rutungo Hospital.[202] Witness 1/1 testified that during the same period, Rwamakuba visited his parents once in Gikomero to console them over the death of a relative who died in February.[203]

79. The Defence tendered into evidence the Rwandan passport of André Rwamakuba, which was in the custody of the UNDF and provided to the parties for inspection.[204] This passport was issued in Kigali in August 1993, with a visa for studies (as intern) issued by the Belgian Embassy on 2 September 1993, an entry stamp dated 23 September 1993 for Belgium and an exit stamp dated 9 March 1994 from Belgium, a single-entry visa for Egypt issued on 17 March 1994, entry and exit stamps for Egypt, a transit stamp for Kenya dated 28 March 1994, and an exit stamp from Kenya dated 29 March 1994.[205]

80. The Chamber finds these Defence witnesses individually credible and reliable. Henri Van Balen, Pierre Mercenier and François Monet were professors and colleagues of André Rwamakuba and nothing has emerged to indicate that they would have any particular interest in protecting him by providing false testimony. Their evidence is supported by various documents admitted into exhibit. Edith Van Wynsberghe, although closer to the Accused, also gave a fair and probable account of the facts, which was based on her analysis of the specific documents she had in her possession and which were tendered into exhibit. None of these documents admitted into evidence were rebutted by the Prosecution. The Chamber took particular care with the evidence of Defence Witness 1/1, as a close relative of the Accused; it is nonetheless satisfied that she was also reliable.

81. The Chamber accepts the explanation given by Professors Van Balen and Mercenier concerning the inconsistency between the dates of André Rwamakuba's attendance at the training program in Belgium on the certificates and in the report. It is noteworthy that the Accused requested Van Balen's confirmation of his attendance at the training program before his arrest by the Namibian authorities in 1995.[206]

82. The Chamber also notes that the Prosecution failed to rebut the alibi evidence. It acknowledged that the Accused was in Belgium between September 1993 and March 1994, but submitted that he must have come back to Rwanda at the times the witnesses testified to having seen him. The Prosecution was aware of the defence alibi a long time before the beginning of the trial and was therefore in a position to conduct a proper investigation,[207] it did, however, not adduce any evidence to support its theory, nor did it explain the fact that there were no records of these alleged trips in Rwamakuba's passport which was in the UNDF's possession.[208] The Prosecution did rely upon a copy of a page from another Rwandan passport belonging to Rwamakuba, containing a picture of the

[201] T. 14 December 2005, pp. 28-29. The witness referred to his diary which also had an entry on 17 March 1994 stating the day André Rwamakuba left for Egypt.
[202] T. 14 December 2005, p. 27.
[203] T. 15 December 2005, pp. 3, 24-25.
[204] T. 22 August 2005, pp. 12-13; T. 24 August 2005, p. 68; T. 7 September 2005, pp. 4-5.
[205] Exh. D. 151.
[206] The Accused was arrested on 2 August 1995.
[207] *Prosecutor v. André Rwamakuba*, Case N°ICTR-98-44-I, T. 7 November 2000.
[208] Exh. D. 151.

Accused and a description of his identity,[209] but it was not able to tender other pages failing to possess the entire document and was not able to provide any other information concerning its source.[210]

83. In the Chamber's view, the proffered alibi concerning André Rwamakuba's absence from Rwanda between 23 September 1993 and 29 March 2004 is sufficient to cast reasonable doubt upon the allegations regarding the Accused's participation in public meetings and gatherings during that period in Gikomero *commune*. The Chamber notes that paragraph 5 of the Indictment could be interpreted as alleging the participation of the Accused in sensitization meetings beyond 29 March 2004, extending through June 1994. This possible contention was not clarified, nor supported by the Prosecution evidence. Witnesses ALA, GAB, GAC, GIQ, GIT and GLM testified to meetings held only until March 1994, and not beyond. Other Prosecution witnesses testified to the Accused's participation in specific attacks against Tutsi in April 1994 during which he congratulated militiamen,[211] but their testimonies did not include any statements made by the Accused at various meetings or that he participated in any specific gatherings. This lack of clarity of the charges in the Indictment and the Prosecution's evidence cannot, for reasons of fairness, be interpreted to the disadvantage of the Accused.

84. In light of the earlier conclusions regarding inconsistencies in the Prosecution evidence and the unreliability of the Prosecution witnesses and considering the proffered alibi, the Chamber finds that the Prosecution has failed to prove, beyond reasonable doubt, the allegations set forth in paragraphs 3 to 5 of the Indictment.

II.1.2. Alleged Delivery of Machetes by André Rwamakuba in Gikomero *Commune* in April 1994

85. The Prosecution alleges at paragraph 11 of the Indictment that:

> Between 10 and 20 April 1994, André Rwamakuba delivered bags of machetes to the home of André Muhire, near Ndatemwa trading center in Gasabo *secteur,* in his home *commune* of Gikomero, Kigali-rural *préfecture*. On that occasion, between 10 and 11 April, André Rwamakuba held a meeting with several influential local members of MDR "Hutu Power" political party, including the persons known as Joas Habimana, Chairman of MDR "Power" in Rutunga *secteur*, Ndamage and André Muhire. Several days later, about 13 April, André Muhire distributed the machetes to local residents, who then used them to attack and massacre the Tutsi population. Following such attacks, many Tutsi were killed, including residents of Ndatemwa Centre, namely the wife of a man called Gakumba and her son, Kambanda, and the persons known as Kanuma, Rwihimba, Kankidi, Rutembya, Rutembesa, and many unidentified refugees from Rutongo, Nkuzuzu and Rutanga *secteurs*. Again, between 10 and 11 April 2004, André Rwamakuba delivered bags of machetes to the home of Etienne Kamanzi, the director of the Kayanga Health Center. The Accused knew, or had reasons to know, that the machetes would be used in attacks against the Tutsi in those areas, thereby aiding and abetting the killing campaign against the Tutsi population.

86. The Chamber will address first the delivery of machetes to André Muhire's home (II.1.2.1.) and then the one to Etienne Kamanzi's home (II.1.2.2.).

II.1.2.1. Alleged Delivery of Machetes to André Muhire and Subsequent Massacres of Tutsi at Ndatemwa Trading Centre

87. Despite the large time-frame pleaded at the beginning of paragraph 11 of the Indictment, "between 10 and 20 April 1994", the subsequent sentence of this paragraph specifies that the Accused

[209] Exh. P. 3.
[210] Exh. P. 3.
[211] See below: evidence on the alleged murder of three Tutsi near the Gikomero office *secteur* and on the massacre at the Kayanga Health Centre.

delivered bags of machetes to the home of André Muhire "*between 10 and 11 April*"[212] and that the machetes were distributed "*several days later, about 13 April*". As confirmed in the Prosecution Pre-Trial Brief, Opening Statement and Closing Arguments, there is no doubt that it was the Prosecution's case that this event took place "between 10 and 11 April 1994".[213] The Chamber will therefore take into consideration this more specific time-frame when dealing with the assessment of the evidence.

(1) Evidence Adduced

88. Ndatemwa Trading Centre is located in the Gasabo *secteur* of the Gikomero *commune*, approximately 36 kilometres from Kigali town,[214] where André Rwamakuba was living at the time of the allegations in the Indictment. Both Prosecution and Defence witnesses testified that between 9 and 11 April 1994, two Tutsi named Rutembya and Rutembesa, were beaten up at that Centre and then taken to Kayanga Health Centre where they were subsequently killed.[215] These witnesses also testified that an attack was led against the Tutsi population at Ndatemwa Trading Centre on 13 April 1994.[216] The detailed recollection of this event differs between Prosecution and Defence witnesses.

89. Prosecution Witness GII stated that, between 10 and 11 April 1994 in the afternoon, while he was standing on the road a few meters from Muhire's house in Ndatemwa Trading Centre, he saw five bags unloaded from the boot of a white car and taken into Muhire's house. André Rwamakuba had already come out of the car. Prosecution Witnesses AVD and AVC affirmed that they saw a car with a similar description arriving at Ndatemwa Centre,[217] although they placed this event on a different date than Witness GII: AVD asserted that this event occurred on 12 April 1994 in the afternoon; [218] AVC stated first that he saw the car between 10 and 13 April 1994, and during cross-examination he said that it could have been on 12 April 1994.[219] Witness AVD saw three bags being unloaded from the boot of the car and taken into Muhire's house. AVC testified that the vehicle stayed at Muhire's home for less than an hour,[220] but GII and AVD indicated that Rwamakuba remained at Muhire's house for approximately one to two hours in the company of other persons.[221] According to Witness GII, Joas Habimana, Ndamage and other people were also in Muhire's house; and Witness AVD placed Ndoli and Murangira at the house. Witness AVC was also told that Rwamakuba went to Muhire's house on that occasion with an *Interahamwe* named Ephrem.[222] The Prosecution Witnesses asserted that machetes were distributed by Muhire to young people from Rutungo and Gasabo *secteurs*[223] during the night of 12 April or the morning of 13 April 1994.[224] Witness AVD further stated that Muhire was assisted by Ndoli and Murangira on that occasion. The Prosecution witnesses testified that after that distribution, houses of Tutsi were attacked and destroyed. According to Witness GII, Tutsi from the commune but also Tutsi refugees from Rubungo and Kanombe were killed.

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[212] Emphasis added.
[213] Prosecution Pre-Trial Brief, para. 19; Opening Statement, T. 9 June 2005, p. 8; Prosecution Closing Brief, paras. 50-52.
[214] See Exh. P. 2: distance between Kigali/Remera and Gikomero *secteur* office is 25 kilometres; the distance between this office and Ndatemwa Centre is 11 kilometres.
[215] Prosecution Witness AVC testified that Rutembya and Rutembesa were beaten up on 9 or 11 April 1994 (T. 27 June 2005, pp. 33-35); Prosecution Witness AVD said that this event took place during the same week of Habyarimana's death but before André Rwamakuba's arrival at the Ndatemwa Trading Centre (T. 28 June 2005, pp. 5-6); Prosecution Witness GII testified that this event took place on or about 11 April 1994 (T. 23 June 2005, pp. 43-44). According to Defence Witnesses 9/20, Rutembya and Rutembesa were beaten up on 11 April 1994 (T. 7 November 2005, p. 22); and Defence Witness 4/16 said that it happened between 11 and 12 April 1994 (T. 19 January 2006, p. 57).
[216] Defence Closing Brief, p. 83.
[217] T. 28 June 2005, pp. 19 and 39; T. 27 June 2006, p. 12.
[218] Witness AVD testified that the event took place "four or five days after Habyarimana's death". Responding to the Defence Counsel, the witness said that Rwamakuba arrived on 12 April 1994 in the afternoon (T. 28 June 2006, pp. 7 and 31).
[219] T. 27 June 2006, pp. 12 and 35.
[220] The witness stated that the vehicle stayed for approximately 10 to 15 minutes (T. 27 June 2005, p. 54).
[221] T. 28 June 2005, p. 9.
[222] T. 27 June 2005, pp. 12-13 and 54.
[223] AVD specified that they were young *Interahamwe*, Hutus.
[224] AVC testified that the machetes were distributed after Rwamakuba's departure, in the night of 12 April 1994; GII stated that the machetes were distributed on 13 April 1994, around 9.40 am; AVD situated the distribution on the "morning of the third day" after the beating up of two people at the Centre (T. 28 June 2006, p. 30).

90. Defence Witnesses 9/20 and 4/16 gave very different accounts of the events at Ndatemwa Trading Centre. They stated that the events took place on13 April 1994 and, on that day, Ephrem Nyirigera, accompanied by three communal policemen, about fifteen *Interahamwe* from Ruhengeri as well as refugees from Gitega and members of the local population, looted houses belonging to Tutsi and threatened the people with machetes and clubs.[225] That attack was stopped by the intervention of the *Conseiller* from Gasabo *secteur*, named Ntamuhanga, who was assisted by soldiers. The Defence witnesses asserted that no killings occurred in Ndatemwa[226] or Gasabo *secteur*,[227] except for the two brothers, named Rutembesa and Rutembya, who were beaten on or about 11 April 1994 and then subsequently killed at Kayanga Health Centre.[228] They also asserted that André Rwamakuba never came to Ndatemwa during that period.

(2) Assessment of the Evidence

91. The Chamber notes that the testimonies of the Prosecution witnesses are not consistent with the allegations against the Accused (2.1.). In addition, they are generally unreliable, especially when considering the evidence adduced to support the Accused's alibi (2.2.).

(2.1.) Lack of Consistency between the Indictment and the Prosecution Evidence

92. Witnesses AVC's and AVD's testimonies that Rwamakuba delivered machetes to Muhire's home on 12 April 1994 are inconsistent with the allegation that this event took place between 10 and 11 April 1994.[229]

93. Witnesses GII, AVC and AVD also testified that two Tutsi named Rutembya and Rutembesa were *beaten up* on 9 or 11 April 1994 at the Ndatemwa Centre, *before* the alleged delivery of machetes at Muhire's house, and were killed later at the Kayanga Health Centre. This evidence, corroborated by testimony from Defence witnesses,[230] is inconsistent with the allegation that Rutembya and Rutembesa were killed as a result of attacks against some Tutsi after the delivery of machetes by Rwamakuba at Ndatemwa Trading Centre.

(2.2.) Reliability Issues

94. The identification of André Rwamakuba at the time of the alleged machetes delivery to Muhire's home is unreliable. AVC and AVD had no prior knowledge of him when he allegedly arrived at Ndatemwa Trading Centre. Their identification of the Accused is based on untested hearsay evidence. Witness AVC who was hiding in a clump of bushes and could not see the people in the car, was told by two men that the person who had arrived in the car was Rwamakuba.[231] AVD testified that he could not see the people in the car due to the crowd surrounding it. In court, AVC and AVD were not able to offer any physical description of the person they claim to be Rwamakuba.

95. GII is the sole Prosecution witness who claimed to have prior knowledge of André Rwamakuba. GII allegedly saw Rwamakuba when the latter came to attend a meeting at Muhire's

[225] T. 7 November 2005, pp. 24-25 (Witness 9/20); T. 19 January 2006, pp. 57-58 (Witness 4/16).
[226] Witness 9/20.
[227] Witness 4/16.
[228] T. 7 November 2005, pp. 22-24 (Witness 9/20); T. 19 January 2006, pp. 57-58 (Witness 4/16).
[229] Indictment, para. 11; Prosecution Pre-Trial Brief, para. 19; Opening Statement, T. 9 June 2005, p. 8; Prosecution Closing Brief, paras. 50-52.
[230] See: Witness 9/20 and 4/16.
[231] T. 27 June 2005, pp. 44, 50 and 54. According to AVC, one of these men had also just met André Rwamakuba. He is dead now and the second man who identified him as Rwamakuba to AVC is in exile but the witness does not know whether he is still alive.

house, on 4 or 5 April 1994, with the President of MDR-Power in Rutunga *secteur*, Joas Habimana, and the MDR-Power representative at Gasabo, Ndamage. On that occasion, people told GII that it was Rwamakuba who had come to attend this meeting. GII claimed that a few days later, when Rwamakuba came to deliver machetes at Muhire's place, he recognized him as the man who was identified to him on 4 or 5 April 1994.

96. The Chamber notes that GII identified André Rwamakuba from information given to him by unknown and unidentified people. The witness described him in very general terms[232] and was only able to specify that he wore spectacles. The Defence, however, challenged that Rwamakuba wore spectacles at that time and tendered into evidence a letter from the UNDF Commanding Officer stating that the Accused had "no spectacle in his possession upon his transfer to the UNDF". [233] In addition, Defence witnesses who had personal knowledge of Rwamakuba, testified that he never wore glasses.[234]

97. Alibi evidence from the Defence strengthens the doubt on GII's reliability to identify André Rwamakuba. According to Defence Witness François Monet, Rwamakuba spent the day of 5 April 1994 from 7.30 a.m. to 5.30 p.m. with himself and Pierre Mercenier.[235] Not only did he rely on his diary entries to confirm this date,[236] but the witness also asserted that he remembered very well Rwamakuba's presence on that day since the latter had been leading the delegation when they met with the Director General of Health. Although Pierre Mercenier could not actually remember whether the Accused was present on 5 April 1994, he claimed that he would have been surprised if he had not met him on that day. The other possible date given by Witness GII as having met Rwamakuba was 4 April 1994. That day was Easter Monday, and testimony was given that Rwamakuba spent the day with his family in Kigali. [237] Considering GII's untested indirect evidence on Rwamakuba's identification and the reliability of the Defence witness' testimony, the Chamber finds that there is some reasonable doubt that GII would have seen Rwamakuba on 4 or 5 April 1994 when the Accused allegedly came to attend a meeting at Muhire's place. This doubt is supported by the Defence evidence on the road access to Gikomero in April 1994.

(2.3.) Road Access to Gikomero

98. The Defence disputed that the Accused could have been present in Gikomero *commune* at the time of the alleged event. The parties agreed and the Chamber accepts that André Rwamakuba was sworn in as a Minister of the Interim Government on 9 April 1994, attended a governmental meeting held in Kigali at the *Hotel des Diplomates* on 11 April 1994,[238] and was living in Kigali until 12 April 1994 when he went to Gitarama with the convoy of the Interim Government.[239] The admission of these facts has a major impact on the Prosecution's theory since at the onset of this trial, the Defence challenged the accessibility from and to Gikomero *commune* due to geographical and military obstacles to road travel in April 1994. In its Closing Brief, the Prosecution submitted that the Defence did not show that it was impossible to move to Gikomero at that time.[240] It further contended that as a Minister, Rwamakuba could move more easily around the country than an ordinary citizen.[241] No

[232] The witness said: "His skin is not too dark. He's not very big, but he's quite robust, quite solid, average size, average height, neither too tall nor too short; he was wearing a jacket and also spectacles."
[233] Exh. D. 215.
[234] See: Edith Van Wynsberghe (T. 1 December 2005, p. 61); Witness 1/1 (T. 14 December 2005, p. 65); Witness 1/15 (T. 18 January 2006, p. 14) and Witness 9/1 (T. 29 November 2005, pp. 37 and 63-65).
[235] They first met in the morning at the Kigali Regional Health headquarters. Then, the three of them also spent the afternoon together, including at meeting with the director general of public health in the Ministry, during which they discussed the project and the work they were planning to do in Rwanda.
[236] Exh. D. 187.
[237] Witness 1/1, T. 15 December 2005, pp. 35-36. The Prosecution Counsel did not dispute that the 4th April 1994 was Easter Monday.
[238] These are facts not disputed by the parties. See Prosecution Closing Brief, para. 68; Defence Closing Brief.
[239] Ibidem.
[240] Prosecution Closing Brief, paras. 190-192.
[241] Prosecution Closing Brief, para. 192.

evidence, however, was adduced in support of that submission. The Chamber recalls that, contrary to the Prosecution's assertion, the Accused is presumed innocent and does not have to prove anything. If the evidence adduced by the Defence raises reasonable doubt, the Prosecution has failed to establish the guilt of the Accused.

99. In the present case, the Prosecution decided not to call any witness to rebut the Defence allegation "but preferred to focus on the credibility and limited knowledge of Defence witnesses on this point".[242] It only called investigator Upendra Baghel who testified to a study he conducted in 2003, and who spoke of several routes between Kigali and Gikomero *commune*. According to his report, the average distance between Kigali and Ndatemwa Trading Centre is approximately 36 kilometres which would have taken one and a half hours to travel.[243] The Defence acknowledged that the routes and timing of journeys to Gikomero *commune* were reasonably reviewed in that document, "with the caveat that [the timings] were based on a journey in a good, four wheel drive vehicle, in the dry season, and in peace time".[244] The Prosecution investigator admitted that the routes were hilly and difficult, and that he had no knowledge of the conditions for travel in that area in 1994.[245] He also denied having knowledge of the positions occupied by the military between 8 and 30 April 1994. The weight of his evidence is therefore less than that of a witness who was present in the relevant area in 1994.

100. Defence witnesses, who were present in Gikomero or tried to get there in April 1994, testified that shortly after 7 April 1994, four main routes between Kigali and Gikomero *commune* were all effectively severed by military positions of the RPF.[246] According to Witness 9/20, it was impossible that André Rwamakuba came to Ndatemwa between 10 and 13 April 1994, because the people who lived there could not move about and were ordered to stay home.[247] The witness explained that the road from Kigali to Ndatemwa was impassable and that vehicles could only travel from Rutunga to Ndatemwa and could go no further.[248] The witness asserted that no Minister came to Gikomero in the days in leading up to 13 April 1994.[249] Defence Witness 6/10 stated that from 9 April 1994, roads, especially those from Rutongo, were not practicable because the RPF had already taken control of that area. He could not see how a vehicle would have left Kigali and come to the east.[250] Defence Witness 7/3 confirmed this evidence and stated that between President Habyarimana's death and 14 April 1994, it was not easy to travel from Gikomero to Kigali because the RPF had overrun strategic positions, especially on Gikomero hills.[251] According to Defence Witnesses 1/5, 3/13 and 3/4, several roads from Kigali leading up to Gikomero could not be used after 8 or 9 April 1994 because of the RPF's presence and ongoing fighting.[252] Defence Witness 3/22 also testified that it was not possible to get to and from Kigali after 12 April 1994 because there were soldiers on the roads.[253] He acknowledged that there were other secondary roads that might have been used to Gikomero, but those small roads were connected to the main road coming from Kigali, which was blocked.[254] His testimony was corroborated by Defence Witness 4/12 who lived close to the road. This witness asserted that,

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[242] Prosecution Closing Brief, para. 178.
[243] Exh. P. 2.
[244] Defence Closing Brief, p. 22.
[245] T. 13 June 2005, pp. 39-40.
[246] See references below.
[247] T. 7 November 2005, p. 27.
[248] T. 9 November 2005, p. 6.
[249] T. 9 November 2005, p. 6.
[250] T. 24 November 2005, p. 8.
[251] T. 19 January 2006, pp. 14-15.
[252] The RPF was occupying Remera (road near the Kigali Stadium and Hotel Amahoro) and the "CND" (Parliament - road from German Radio Station *Deutsche Welle*) and the road that goes out towards Kanombe. See: Defence Witnesses 3/4 (T. 17 January 2006, p. 6-12); 3/13 (T. 24 January 2006, pp. 15, 30 and 32); 1/5 (T. 13 December 2005, pp. 24 and 38). Moreover, Defence Witness 2/18 said that after 13 April 1994, no one could leave Kigali to get to Gikomero because Kigali and Remera were captured at that time (T. 23 January 2006, p. 28), and Defence Witness 3/22 testified that Defence Witness 3/22 further testified that after 12 April 1994, it was no longer possible to get to and from Kigali because there were soldiers on the roads (T. 30 November 2005, p. 16).
[253] T. 30 November 2005, p.16.
[254] T. 30 November 2005, pp.29-31.

after 12 April 1994, he did not see any other vehicle apart from the four vehicles carrying soldiers who were going to fight the *Inkotanyi*.[255] He claimed that the road was not safe and Rwamakuba would not have risked his life to get from Kigali to Gikomero at that time.[256] Defence witness 2/18 stated that after 13 April 1994, no one could leave Kigali to get to Gikomero because Kigali and Remera were already captured.[257]

101. It was also a major part of the Defence case that André Rwamakuba's name was not mentioned during the *Gacaca* proceedings in relation to the events that took place in Gikomero *commune* in April 1994. This was supported by the evidence given by several Defence witnesses who lived in the area in 1994, or were participating in *Gacaca* proceedings in the *commune*. Defence Witnesses 3/1, 3/22, 3/11 and 4/16 asserted that they never saw or heard of a Minister coming to Gikomero in the days leading up to 13 April 1994.[258] Defence Witnesses 7/18 and 9/31 said that Rwamakuba never came to Gikomero after 6 April 1994.[259] Witnesses 1/5, 4/12, 6/10 and 7/18 asserted that they never heard that Rwamakuba played any role in the genocide.[260] Particularly, several Defence Witnesses also contended that they did not hear any mention of the Accused's name in the *Gacaca* hearings concerning the 1994 massacres in Gikomero.[261] Defence Witness 3/10, however, testified that, in September or October 2005 after the beginning of the present trial, two of the Prosecution Witnesses mentioned André Rwamakuba's name in the *Gacaca* hearings in the witness' cellule.[262]

102. The Chamber finds that these Defence witnesses generally gave a consistent and objective account of the facts sufficient to levy a reasonable doubt on the Prosecution's case. Witnesses 9/20 and 3/1 had no personal relationship with the Accused: they do not know him personally and admit that they would not recognize him.[263] They are both Tusti, whose family members were killed during the genocide in 1994.[264] One of them is a coordinator of a local *Gacaca* court in Rwanda. Witness 1/5 did not know André Rwamakuba very well.[265] It was not shown that these witnesses would have any particular interest to defend him. For instance, the Prosecution did not attempt to question Witness 3/4 concerning his knowledge of Rwamakuba or the existence of any relationship with him.[266] The Chamber notes that Defence Witnesses 3/10, 6/10 and 7/18 knew Rwamakuba's family very well and that Witnesses 4/16 and 7/3 have criminal records. Due to these individual circumstances, the Chamber has taken particular care in assessing their testimonies.[267] The evidence adduced from these witnesses does corroborate the testimony of the other Defence witnesses. The Prosecution's cross-examination of Defence Witnesses 3/10, 6/10, 7/18, 4/16 and 7/3 did not raise any convincing element to show that they were unbelievable or unreliable, nor did the Prosecution adduce any evidence to rebut their testimonies on the above issues.

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[255] T. 22 November 2005, pp. 22-23.
[256] T. 22 November 2005, pp. 22-23.
[257] T. 23 January 2006, p. 28.
[258] T. 10 November 2005, p. 8 (Witness 3/1); T. 30 November 2005, p.17 (Witness 3/22); Witness 1/5 never heard of André Rwamakuba coming to Gikomero *commune* between 8 and 17 April 1994 (T. 12 December 2005, p. 26).
[259] T. 1 December 2005, p. 33 (Witness 7/18). Defence Witness 9/31 stated that he never saw André Rwamakuba in Gikomero *secteur* during April 1994 (T. 1 February 2006, p. 8).
[260] T. 12 December 2005, p. 26 (Witness 1/5); T. 24 November 2005, p. 7 (Witness 4/12); T. 24 November 2005, p. 24 (Witness 6/10). Witness 7/18 added that she had not heard people at Gikomero or in the Rutare camp for displaced persons discussing Rwamakuba in connection with the massacres (T. 1 December 2005, p. 9).
[261] See: Defence Witnesses 3/1 (T. 10 November 2005, p. 9); 3/22 (T. 30 November 2005, p. 34); 4/12 (T. 24 November 2005, p. 7); 4/16 (T. 19 January 2006, p. 55); 5/16 (T. 2 February 2006, p. 34); 9/31 (T. 1 February 2006, p. 9); 6/10 (T. 24 November 2005, p. 25).
[262] T. 15 November 2005, pp. 19-20.
[263] T. 7 November 2005, p. 26; T. 10 November 2005, p. 25.
[264] T. 7 November 2005, pp. 19, 31 and 32; T. 10 November 2005, p. 3.
[265] T. 12 December 2005, p. 26 (Witness 1/5).
[266] T. 17 January 2005.
[267] Defence Witness 3/10 knew Rwamakuba's family very well; 4/16 is charged in his country with killings of four people but claims his innocence. Defence Witnesses 6/10 and 7/18 were very closed to the Accused's family; they are moreover relatives. Defence Witness 7/14 was Prosecution Witness GIN's relative and Defence Witness 7/3 has a criminal record related to the 1994 genocide.

103. Furthermore, the evidence given on the content of the alleged bags delivered and the subsequent massacres of Tutsi people was merely hearsay evidence. None of the Prosecution witnesses actually saw the content of the bags. They were told later that machetes were brought and the inhabitants were requested to start killing the Tutsi.[268] They also did not see the alleged massacres of Tutsi since they fled the area on 13 April 1994 and only learned about it when they returned to the Centre months later and when human skeletal remains were found. These witnesses did not mention the name of any particular victims of the 13 April 1994 attack at Ndatemwa Trading Centre. Their evidence was challenged by the Defence. There was direct testimony that André Muhire never distributed any machetes. Evidence was also adduced regarding the criminal charges against Muhire in Rwanda. It was specified that he was never prosecuted for distributing machetes and that André Rwamakuba's name was never mentioned in his Rwandan judicial records. Witness 9/20 furthermore stated that no new machetes were distributed at that time in Ndatemwa because individuals used their own weapons which they took from their own houses.[269]

104. The absence of any reliable identification of the Accused at the time and place of the alleged event, his undisputed presence to certain locations during the considered period, the evidence on the potential hazards of travel to and from Gikomero, the absence of any reliable evidence on the exact context of the alleged event, all cumulatively contribute to cast a reasonable doubt that the Accused delivered machetes to André Muhire at Ndatemwa Trading Centre as alleged in paragraph 11 of the Indictment.

II.1.2.2. Alleged Delivery of Machetes to Etienne Kamanzi Used in Attacks against Tutsi

105. The Prosecution alleges that, between 10 and 11 April 1994, the Accused delivered bags of machetes to the home of Etienne Kamanzi, director of the Kayanga Health Centre, and that he knew, or had reasons to know, that the machetes would be used in attacks against the Tutsi in the areas.[270] Kamanzi's home was located in Kayanga *secteur*, Gikomero *commune*, which is approximately six kilometres from the Ndatemwa Trading Centre and 30 kilometres northeast of Kigali town where André Rwamakuba resided until 12 April 1994. On that date, he moved to Gitarama which is 53 kilometres southwest of Kigali.[271]

(1) Evidence Adduced

106. Prosecution Witness GAC, who claimed to be an eyewitness of this event, was the sole witness called to testify on this allegation. He also claimed that he knew André Rwamakuba since he had already seen him on three occasions before that event.[272]

107. The witness testified that "on the day following the death of [President] Habyarimana"[273] or a few days after the President's death, between 10 and 13 April 1994,[274] he saw André Rwamakuba unloading bags containing machetes from a white car and giving them to Etienne Kamanzi.[275] The witness heard Rwamakuba blaming Kamanzi for continuing to provide medical treatment to Tutsi at

[268] See: Witnesses AVC, AVD and GII.
[269] The witness added that, during the *Gacaca* sessions, she never heard about the distribution of new machetes at Ndatemwa Trading Centre (T. 7 November 2005, p. 27).
[270] Indictment, para. 11.
[271] Exh. P. 2.
[272] See above: Alleged Public Instigation in Gikomero from July 1993 through June 1994.
[273] T. 4 July 2005, p. 7.
[274] T. 4 July 2005, pp. 50-53.
[275] T. 4 July 2005, pp. 8 and 58

the Kayanga Health Centre.[276] He saw Rwamakuba give machetes to Kamanzi indicating that it was the "medicine to treat them", namely to kill the Tutsi.[277] Witness GAC then saw a woman named Anatalie Mukarulinda telling Rwamakuba and Kamanzi that she had six "Abakigas"[278] who could work and she requested machetes for them. Kamanzi then gave, in the presence of Rwamakuba, six machetes to Mukarulinda.[279] GAC saw Mukarulinda distributing the machetes to the six Abakigas.[280] The witness did not see machetes being distributed to other persons, but he attested that when the killing began, everyone was provided with a new and recently sharpened machete.[281]

108. Witness GAC claimed to be "aware"[282] that the Abakigas used the machetes to kill Tutsi. The witness learnt from a *conseiller* that a policeman named Nyarwaya had taken part in a meeting in Nduba the day before the attacks, with *Interahamwe*, policemen and *conseillers*, where instructions were issued.[283] According to the witness, on or about 13 April 1994, the six Abakigas went toward Rutunga Trading Centre.[284] Then, Nyarwaya, who was standing at the Rutunga marketplace, shot his gun in the air and told the Abakigas to "begin".[285] The witness was not present at the market at that time.[286] After the gunshot, the Abakigas began burning down houses, looting and assaulting neighbouring persons, beginning with Mukarulinda's neighbours.[287] According to Witness GAC, the victims of the attacks were Tutsi and the perpetrators were Hutu. These attacks by the Abakigas marked the beginning of the massacres in Kayanga. The witness stated that the first person who was killed was an inhabitant;[288] then Tutsi patients of the Kayanga Health Centre were killed after 13 April 1994 and until the end of the week by *Interahamwe* from Gasabo.[289]

(2) Assessment of the Evidence

109. The Chamber notes that Witness GAC was a Prosecution witness in the *Kamuhanda* case. The Defence submits that his evidence should not be admitted since the Trial Chamber in the *Kamuhanda* case found him not credible.[290] It contends that once a Trial Chamber finds a witness not credible, in respect of significant and substantial testimony, it is only appropriate in the most exceptional circumstances for the Prosecution to tender him as a witness of truth in another trial. In the Defence's view, failure to follow such good practice is likely to bring the administration of justice into disrepute and the Chamber should refuse the admission of such evidence as an abuse of process.[291]

110. The Chamber has discretionary power to assess the evidence brought before it and cannot be bound by the assessment of Witness GAC's credibility made in the *Kamuhanda* case. The Chamber, however, already found his testimony unreliable concerning the political meetings in Kayanga.[292] Moreover, Witness GAC's testimony on the alleged delivery of machetes to Kamanzi also appears to be tainted with major internal inconsistencies which seriously challenge his credibility (2.1.). This

[276] According to Witness GAC, André Rwamakuba asked Kamanzi: "You mean you are continuing to give treatment to the Tutsis?" (T. 4 July 2005, pp. 8-9 and 18).
[277] T. 4 July 2005, pp. 6, 7, 9, 11 and 18.
[278] Witness GAC explained that the Abakigas were Rwandan natives of Adukiga, located in Byumba and Ruhengeri, who had come from their own region, to flee the war that was being waged by the *Inkotanyi* (T. 4 July 2005, p. 12).
[279] T. 4 July 2005, pp. 11 and 58.
[280] T. 4 July 2005, pp. 18 and 58.
[281] T. 4 July 2005, p. 18.
[282] T. 4 July 2005, p. 12.
[283] T. 4 July 2005, pp. 15-16.
[284] T. 4 July 2005, p. 12.
[285] T. 4 July 2005, p. 12.
[286] T. 5 July 2005, p. 3.
[287] T. 4 July 2005, pp. 12 and 15.
[288] T. 4 July 2005, pp. 18 and 60.
[289] T. 4 July 2005, pp. 18-19.
[290] *Kamuhanda* Judgement, para. 287; Defence Closing Brief, pp. 191-193.
[291] Defence Closing Brief, pp. 192-193.
[292] See: Alleged Public Instigation in Gikomero from July 1993 through June 1994.

challenge is reinforced by the Defence evidence on the road access to Gikomero at the time of the event (2.2.).

(2.1.) Credibility Issues

111. Witness GAC's testimony is not consistent concerning the date when the alleged event took place. The witness first testified that the delivery of machetes by the Accused to Kamanzi took place "the day *following the death of Habyarimana*". Later in his testimony, he asserted that the event had taken place *a few days* after the President was killed, around 10 and 13 April 1994.[293] Similarly, the witness stated that a *conseiller*, who was his neighbour, informed him about the meeting in which Nyarwaya participated the day before the attacks in Nduba. Later in his testimony, he denied that this *conseiller* was a neighbour and added that he is no longer alive.[294]

112. The witness' account of the event is also subject to concerns. After Witness GAC saw the alleged distribution of machetes, he did not directly inform his family but continued on his way and went off for a drink in a bar.[295] Such behaviour is odd when considering the particular insecure context of threats against the Tutsi people as described by the witness himself. The witness' testimony as to his presence when the massacres started at the Rutunga Trading Centre on 13 April 1994 also seemed unlikely: he both affirmed that he was present on the spot when massacres started and that he fled Kayanga on the same day.[296]

113. In addition to these internal inconsistencies and unlikely behaviours and actions, Witness GAC's testimony substantially differed from his statement to the Prosecution on 8 November 2004.[297] In that statement, the witness declared that Kamanzi opened the bag of machetes which had been unloaded *on Rwamakuba's order*, but in the courtroom, he testified that it was Rwamakuba who had opened his car and was giving machetes to Kamanzi himself.[298] In the same statement, the witness specified that he clearly heard Rwamakuba *ask* Kamanzi to give Mukarulinda the machetes, while in his testimony the machetes were given to her *at her request*. In 2004, he also gave the name of three companions, including Alexis Karekezi, who were present when he saw Rwamakuba giving the machetes. According to his statement, these three persons were then killed at the Kayanga Health Centre. In court, the witness testified that *only* Alexis Karakezi was with him on that occasion and that there were *Interahamawe* who were not far away.[299] The witness' statement does not contain any information concerning the alleged attacks of the six Abakigas against Tutsi at the Rutunga Trading Centre, the meeting held the day before the attacks where instructions to kill Tutsi were issued, and the incident with Nyarwaya firing his gun in the air and telling the Abakigas to begin the attacks, all of which he testified extensively about in court. The witness also qualified Etienne Kamanzi as the Head of the Kayanga Health Centre in his 2004 statement,[300] but in court he referred to him as a nurse at the Kayanga Health Centre.[301]

114. These discrepancies cannot be justified by the time elapsed since the event or translation discrepancies. They are significant in the assessment of the credibility of this witness who omitted any reference to André Rwamakuba in his early statements to the Prosecution investigators. Witness GAC gave a statement in 1999 to the Prosecution and testified in the *Kamuhanda* case in 2002 about the activities of Kamuhanda and Kamanzi in the distribution of weapons in Kayanga between 8 and 12 April 1994. He testified on the occasions where he saw Kamanzi prior to the massacres. It was not

[293] T. 4 July 2005, pp. 50-53.
[294] T. 5 July 2005, p. 2.
[295] T. 4 July 2005, p. 62.
[296] T. 4 July 2005, pp.29-30.
[297] Exh. D. 34 A and B (under seal).
[298] T. 4 July 2005, pp. 9 and 58.
[299] T. 4 July 2005, pp. 59-60.
[300] Exh. D. 34.
[301] T. 4 July 2005, p. 7.

until he gave his statement in 2004 that he mentioned Rwamakuba for the first time. He explained the prior omission by the fact that he was not questioned about Rwamakuba at the time. Even if that were the case, the Chamber does not find this to be a satisfactory explanation, as the absence of certain questions would not preclude a witness, who wanted to give a credible picture of an event, from volunteering information.[302]

115. Witness GAC's demeanour in court supports the Chamber's conclusion that the witness cannot be found credible. Although the Chamber acknowledges that a witness' behaviour may be influenced by the fact that he or she is responding to the opposite party, in the present case, the witness was particularly reluctant or unwilling to respond to the Defence's questions in cross-examination.[303] He was also extremely disinclined to speak about or comment on his previous testimony in the *Kamuhanda* case.[304]

116. The defence evidence on the potential hazards of travel between Kigali and Gikomero *commune* at the time of the event reinforces the Chamber's doubts on GAC's credibility.

(2.2.) Road Access to Gikomero

117. Neither the Indictment nor the Prosecution's evidence seems to suggest that the delivery of machetes to Kamanzi's house took place on the same day as the alleged delivery of machetes at Muhire's place in Ndatemwa Trading Centre.[305] The Prosecution did not provide any chronology of the alleged four occasions when the Accused came to Gikomero over a period of five days. According to Witness GAC, André Rwamakuba met Kamanzi and decided to give him machetes by chance. There is no other explanation or account of that event. However, in the Chamber's view, the chronology of the facts was particularly relevant to the Prosecution case. As previously discussed, it was admitted that the Accused attended other activities in Kigali on 11 April 1994.[306] The Prosecution did not attempt to explain how the Accused moved from that town to deliver machetes in a location 30 kilometres apart or how he came over a period of two days to two different locations six kilometres apart,[307] whereas the Defence adduced evidence that it was hazardous to travel to and from Gikomero after 7 April 1994, that Rwamakuba never came to Gikomero *commune* in the days leading up to 13 April 1994 and that his name was never mentioned in relation to the massacres in the *commune* in April 1994.[308] The Chamber already found the Defence evidence consistent and objective enough to levy a reasonable doubt on the Prosecution's case.[309]

118. The lack of credibility of Witness GAC, the admitted presence of André Rwamakuba in other activities, the evidence on the potential hazards to travel, cumulatively contribute to reasonable doubt on the alleged presence of the Accused in Kayanga *secteur,* Gikomero *commune* between 10 and 13 April 1994. Since Witness GAC was the sole witness called and no additional evidence was adduced that between 10 and 11 April 1994, the Accused delivered bags of machetes to the home of Etienne Kamanzi, the Prosecution failed to prove this allegation.

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[302] It is interesting to note that GAC gave his first statement as a result of a visit to the United Nations office in Kigali. As he was requesting free medical assistance, an investigator asked him whether he had information about the crimes committed by a man named André Rwamakuba in Gikomero in April 1994 (T. 4 July 2005, pp. 32-33).
[303] See for e.g.: T. 4 July 2005, pp. 11, 27, 39-42 and 51.
[304] T. 4 July 2005, pp. 45-48.
[305] See above the testimonies of Prosecution Witnesses AVC, AVD and GII on the alleged delivery of machetes to Muhire's house.
[306] On 11 April 1994, André Rwamakuba participated in a governmental meeting held in Kigali at the *Hotel des Diplomates*. See: Statement of Admissions by the Parties and Other Matters not in Dispute, filed on 3 June 2005; Prosecution Witness GLM and Prosecution Expert Witness Des Forges.
[307] When he allegedly came to Ndatemwa Trading Centre to deliver machetes to Muhire's house (see above) and when he allegedly came to Kayanga to deliver machetes to Kamanzi's house.
[308] See paras 100-101.
[309] See para. 102.

II.1.3. Alleged Murder of Three Tutsi near Gikomero Secteur Office

119. At paragraph 12 of the Indictment, the Prosecution alleges that

> Between 10 and 20 April 1994, André Rwamakuba went to Gikomero *commune* where, during a rally near the *secteur* office, accompanied by Rutaganira, *bourgmestre* of the *commune*, Brigadier Nyarwaya, Mathias Kabanguka, accountant of the *commune*, and two men unknown but who were identified as policemen, he asked persons in the crowd why the massacres had not started. He then seized documents belonging to two unknown youths, but who were identified as Tutsi, tore the documents and ordered the crowd to seize the youths and kill them. Persons present in the crowd armed with firearms, machetes and clubs, including Ngiruwosanga, a *secteur* inhabitant, Ngarambe and Kayibanda, and two communal policemen, immediately seized the two young men that André Rwamakuba had designated, led them away to a wooded area and killed them as the *Accused*, who was not far, looked on. Thereafter, this same crowd stopped an unidentified man on a motorcycle claiming to flee the massacres in Rutongo *commune*. André Rwamakuba, while speaking to the crowd, stated that the motorcyclist could not be a Hutu since only Tutsi were fleeing, and decided that the youth should be killed. At the instigation of and following orders from André Rwamakuba, the same armed crowd led him away to a wooded area to kill him. The *Accused* then told the crowd that it had just started the killings and that it was a good start. The same day, in the afternoon, *Interahamwe* militiamen, elements of the Presidential Guard, with the assistance of members of the population, following such orders and instigations, began to massacre Tutsi refugees, in Gikomero *commune*, notably at Kayanga Health Center, Gikomero Protestant School and Gicaca. Thousands were massacred, including refugees from Remera, in Kigali town centre, refugees from the neighbouring *commune* of Gikoro and Kabuga *secteur*, Rubungo *commune*.

(1) Evidence Adduced

120. The Gikomero *secteur* office is approximately 25 kilometres northeast of Kigali town, where André Rwamakuba was living until 12 April 1994; 11 kilometres from Ndatemwa Trading Centre and five kilometres from Kayanga *secteur*. From Kigali town it is 53 kilometres southwest to Gitarama where Rwamakuba moved to on 12 April 1994.[310]

121. To support the allegation at paragraph 12 of the Indictment, the Prosecution only called Witness GIN, who claimed to have been present at this event. This witness also asserted that she was introduced to André Rwamakuba for the first time in 1992 at a wedding in the family of a man named Karuyonga who, according to the witness, seemed to be Rwamakuba's friend.[311] She saw the Accused again at Nyamirambo, Kigali-*ville*, in 1992 when he came to visit her family.[312] The witness testified that she saw Rwamakuba a third time in Gikomero *commune* between 10 and 14 of April 1994, between 10.00 a.m. and 11.00 a.m. He was in the company of *Bourgmestre* Rutaganira, the accountant Mathias Rubanguka, the brigadier Nyarwaya, two *commune* policemen, Ngarambe and Kayibanda, and other members of the population such as François-Xavier Kamanzi, Ngiruwosanga and Mivumbi.[313]

122. According to Witness GIN, when André Rwamakuba got to the centre, the inhabitants had stopped two young people and were asking them to show their identity cards. As these young people showed their certificates instead of their identity cards, Rwamakuba tore them up[314] and said that these

[310] Exh. P. 2.
[311] T. 29 June 2005, p. 9. The Chamber notes an interpretation discrepancy between the French ("Karuyonga") and English transcript ("Kayiranga").
[312] T. 29 June 2005, p. 10; T. 30 June 2005, pp. 27-29 and 32-33.
[313] T. 29 June 2005, p. 10.
[314] T. 29 June 2005, pp. 11-12.

young people were Tutsi because they had refused to show their identity cards.[315] He then ordered that they be arrested and killed. The two young men were taken off to a wooded area by the same group, which included Rwamakuba, Ngiruwosanga, Murekezi, Runyota, Ngarambe, Kayibanda, Rubanguka and Rutaganira.[316] They were armed with machetes, clubs, and some carried guns.[317] There was a distance of 70 to 100 meters between the entrance to the yard of GIN's house where she was standing and the place in the woods where the two men were taken. They stayed in the woods for about one and a half hours.[318] GIN heard the two young persons screaming as they were beaten up and she concluded that they were killed because the people who took them away returned alone.[319] GIN cannot confirm whether Rwamakuba went right to the spot where the people were killed, but she asserted that he was there and he saw what was happening.[320]

123. After the two young people were killed, André Rwamakuba allegedly encouraged and gave instructions to members of the population to continue the killings. He is also alleged to have thanked them for starting the killings in the *commune*.[321]

124. Then, still according to GIN, while André Rwamakuba was still there, a young man showed up on a motorcycle. He was stopped and was required to show his identification documents. GIN heard Rwamakuba say that only Tutsis were fleeing and he then gave orders for the motorcyclist to be killed.[322] The witness saw that the same armed group took the motorcyclist into the same woods as the two young people. This time, Rwamakuba allegedly remained with the *bourgmestre* in an open area,[323] as the motorcyclist was killed. GIN testified that he left shortly thereafter.[324]

(2) Assessment of the Evidence

125. In the Chamber's view, GIN's evidence is not consistent with the Prosecution's allegation set forth in the Indictment (2.1.). It is also highly improbable that the alleged killing of three people at the Gikomero *secteur* office between 10 and 14 April 1994 would have occurred as described by Witness GIN (2.2.).

(2.1.) Lack of Consistency between the Dates in the Indictment and the Evidence

126. In addition to GIN's testimony, evidence has also been adduced by both parties that in April 1994, Tutsi refugees from Mbandazi and from Rubungo *communes* were attacked and killed by *Interahamwe* at Gikomero Protestant School. GIN was not present at the location but was informed that this massacre took place between 8 and 12 April 1994. She asserted that André Rwamakuba was not involved in that massacre.[325] Defence Witnesses 2/18, 3/1,[326] 3/11, 9/31 who were present at the time and location of the event, were more specific and all affirmed that the Tutsi refugees were killed on 12 April 1994, between 1.00 p.m. and 2.00 p.m. This date was confirmed by Defence Witnesses 3/22, 4/12 and 7/3 following information they received from others.[327] Prosecution Witnesses GAB

[315] T. 29 June 2005, p. 12.
[316] T. 29 June 2005, p. 13.
[317] T. 29 June 2005, p. 14.
[318] T. 29 June 2005, p. 14.
[319] T. 29 June 2005, pp. 13, 16 and 28.
[320] Note omitted by the Tribunal.
[321] T. 29 June 2005, pp. 14-15.
[322] T. 29 June 2005, p. 15.
[323] T. 29 June 2005, p. 16.
[324] T. 29 June 2005, p. 16.
[325] T. 29 June 2005, p. 27.
[326] The witness stated that the victims at the Gikomero Protestant School included members of her family that came from Mbandazi (T. 10 November 2005, p. 7).
[327] T. 30 November 2005 (Witness 3/22); T. 22 November 2005, pp. 12-14 (Witness 4/12); T. 19 January 2006, p. 11 (Witness 7/3).

and GII also testified that on 12 April 1994, Tutsi refugees were killed at the Gishaka parish in Gikomero *commune*.[328] Both parties accepted that this massacre took place at that time.[329]

127. Consequently, the suggestion made by GIN that the killings at the Gikomero *secteur* office could have taken place after 12 April 1994, on 13 or 14 April 1994, is inconsistent with the Prosecution's allegation that the day of the killings of three people at the Gikomero *secteur* office, *after* Rwamakuba's departure, in the afternoon, *Interahamwe* militiamen, elements of the Presidential Guard, with the assistance from members of the population, began to kill Tutsi refugees, notably at the Gikomero Protestant School.

(2.2.) Credibility Issues

128. GIN's evidence includes major discrepancies between her prior statements and testimony, and is also seriously challenged by facts admitted by both parties and the evidence adduced by the Defence.

129. A comparison between her testimony regarding the identification of André Rwamakuba, and her prior statements and testimony in the *Kamuhanda* case reveals important discrepancies. In her first statement of 3 February 1998,[330] she stated that her husband told her that it was Rwamakuba who came to Gikomero in April 1994, and that she recognized him as well because she used to see him driving his car in Gikomero *commune*. GIN confirmed this information in the investigator's report dated 13 February 2004,[331] but two months later, she stated that she met Rwamakuba for the first time at a wedding between 1991 and 1992.[332] She then specified that the wedding took place at Karuyonga's house who was her mother's neighbour in Gicaca, and not Rwamakuba's friend, as she declared in court.[333] In the *Kamuhanda* case, in 2001, prior to her amended statement, the witness gave a different account of her knowledge of Rwamakuba: she testified that she saw him for the first time in front of her house in 1994.[334]

130. Witness GIN's physical description of André Rwamakuba was also extremely vague[335] and contradictory. In her earlier statements, she described him wearing clothes with the colours and emblem of the MRND party.[336] Despite giving several other statements,[337] it was not until April 2004 that she changed her statement and specified that Rwamakuba was not wearing the MRND colours.[338] During her testimony, when confronted with the obvious discrepancy because of Rwamakuba's membership in the opposing MDR party, the witness explained that the investigator made a mistake when taking notes of her description of Rwamakuba's attire. She maintained, however, that he was wearing a cap with the MRND colours and emblem.[339] This explanation and comment are not satisfactory and raises further doubts on her credibility.

131. The witness' account of the event is also radically different from her prior statements made with the Prosecution and her testimony in the *Kamuhanda* case. In court, she testified that André Rwamakuba arrived at the Gikomero *secteur* office between 10 and 14 April 1994 and that three Tutsi

[328] T. 23 June 2005, pp. 44-45 (Witness GII); T. 6 July 2005, p. 22 (Witness GAB).
[329] T. 5 July 2005, p. 52.
[330] Exh. D. 35 A and B (under seal).
[331] Exh. D. 38 (under seal).
[332] See: Notice of Additional Evidence Pursuant to Rule 67(D), Exh. D. 39 (under seal).
[333] Ibidem.
[334] *Prosecutor v. Jean de Dieu Kamuhanda*, Case N°ICTR-98-54A-T, T. 17 April 2001, p. 68 (Exh. D. 43).
[335] T. 30 June 2005, pp. 30-32. According to Witness GIN, André Rwamakuba was "not very tall, he was fat but not very fat. He was not obese. As for his colour, he was somewhere between dark and light; fair skinned." The witness further added that he "was a well built man. He was stout".
[336] Statement of 3 February 1998, Exh. D 35 (under seal).
[337] Witness GIN made a statement to Prosecution on 3 February 1998 (Exh. D. 35); and interview reports were taken on 27 March 2002 (Exh. D. 36); 27 May 2003 (Exh. D. 37) and 13 February 2004 (Exh. D. 38).
[338] See: Notice of Additional Evidence Pursuant to Rule 67 (D), Exh. D 39 (under seal), p. 2.
[339] T. 30 June 2005, pp. 32-33.

people were killed on that occasion. She also testified that massacres took place at the Gikomero Protestant School between 8 and 12 April 1994. In 1998, however, the witness explicitly affirmed that the killing of the three people at Gikomero *secteur* office took place on 12 April 1994, a date on which according to the witness' statement, the killings had not yet started in the *commune*. In the same statement, she stated that Rwamakuba came to launch the beginning of the massacre in the *commune* and that as soon as he left, in the afternoon, Tutsi refugees were killed at the Gikomero Protestant School. In that statement, she asserted that she did not see him again after that massacre. In 2001 in the *Kamuhanda* case, the witness testified that the killings at the Protestant School were the first killings in the *secteur*. Later, in 2003, the witness stated that she did not see Rwamakuba exactly on 12 April 1994 but between 12 and 20 April 1994.[340] This declaration was amended again a year later when she stated that she saw him, after the killings at the Gikomero Protestant School between 6 and 20 April 1994.[341] In this case, GIN testified that Rwamakuba came with the crowd to the wooden area where the two young people were killed, but in 2003 she requested the investigator to amend her prior statement and indicated that the Accused did not follow the crowd to the wooded area but stayed by his car in front of the *secteur* office, from where he was able to see the killings. The witness also gave an inconsistent account of her whereabouts in April 1994. She admitted that she had gone to Kibobo with her sister in law to seek refuge, but she was uncertain on the dates.[342] This is a major matter of concern considering that Defence witnesses testified that GIN was not in Gikomero at the time of the alleged murders.[343] The Defence challenged GIN on her prior statements and testimonies. The Chamber found her answers to be inconsistent and unconvincing.

132. These major inconsistencies between GIN's testimony and her prior statements cannot be explained by the time elapsed, translation discrepancies, the manner in which the statements were taken or the impact of trauma inflicted upon the witness. Neither can they be considered additional details provided to the witness' prior statements.

133. Several Defence witnesses also gave testimony to Witness GIN's personality. The Chamber has considered and weighed this information with great caution due to the personal relationship between GIN and some of the Defence witnesses. During the genocide, the witness lost her mother and one of her siblings.[344] According to Defence Witness 3/22 who has known GIN since she was very young, and Defence Witness 5/15, who also has a close relationship to GIN, she has been greatly affected by her experience in 1994 and had changed since then. Witness 3/22 described GIN as someone who is highly emotional, dishonest,[345] and not trustworthy.[346] Witness 7/14 submitted that GIN was plotting with other people to fabricate evidence against key figures of Gikomero.[347] Witness GIN's criminal record indicating a conviction in Rwanda for the murder of a colleague, was also raised by the Defence to undermine her credibility.[348]

134. Her credibility is further challenged by the admitted fact that on 11 April 1994 the Accused was in Kigali,[349] and the day after was moving from there to Gitarama.[350] The Indictment and the Prosecution evidence did not provide a chronological account of the Accused's alleged activities in Gikomero in April 1994. GIN's testimony seemed to require that the Accused made a separate or third

[340] Interview Report of 27 May 2003 (Exh. D. 37).
[341] Interview Report of 13 February 2004 (Exh. D. 38).
[342] T. 1 July 2005, pp. 14-15.
[343] See: Defence Witnesses 7/14 and 3/31 who personally knew GIN (T. 25 January 2006, p.22; T. 11 November 2005, p. 10).
[344] T. 29 June 2005, p. 42.
[345] T. 30 November 2005, p. 20.
[346] See: Defence Witness 3/1 (T. 10 November 2005, pp. 9 and 29).
[347] T. 25 January 2006, pp. 16-19; T. 03 February 2006, pp. 12-14 and 43.
[348] Exh. D. 213 (under seal).
[349] See: Prosecution Witness GLM; Prosecution Witness Des Forges; Prosecution Closing Brief, footnote 5; Defence Closing Brief.
[350] Statement of Admissions by the Parties and Other Matters not in Dispute, filed on 3 June 2005; see also: Prosecution Witness GLM and Prosecution Expert Witness Des Forges.

trip to the area in addition to the alleged delivery of machetes to Muhire and Kamanzi.[351] The evidence adduced by the Defence that travel between Kigali and Gikomero was difficult and hazardous at that time due to the presence of RPF troops reinforces the doubt on GIN's credibility.[352]

135. In view of the major inconsistencies in the witness' evidence, her particular personality and judicial record, the admitted presence of the Accused on other locations at the time of the alleged event, the potential hazards of access to the commune at the time of the event, Witness GIN cannot be found credible. Since no other evidence has been adduced to establish the allegation in the Indictment, the Chamber finds that the Prosecution failed to prove beyond reasonable doubt André Rwamakuba's involvement in the killings of three Tutsi people in Gikomero *commune* between 10 and 20 April 1994.

II.1.4. Alleged Participation of André Rwamakuba to the Massacre at Kayanga Health Centre

136. The Prosecution alleges at paragraph 13 of the Indictment that

> Between 13 and 15 April 1994, in the morning, André Rwamakuba, accompanied by local authorities, including Mathias Rubanguka, accountant of the *commune*, Callixte Kabarera, Inspector of Schools, Brigadier Nyarwaya, Rutaganira, *bourgmestre* of Gikomero *commune*, Thomas Mabango, *conseiller* of Kanyanga [sic],[353] and soldiers and *Interahamwe* militiamen, arrived at the Kayanga Health Center in Kayanga *secteur*, where many Tutsi fleeing the massacres that had started in their *secteurs* had sought refuge. At a man unknown but identified as the deputy director's request, they assembled in the courtyard of the Health Centre [sic][354]. Upon his arrival, André Rwamakuba stated that the killings had started everywhere else and that he realized that nothing had been done at the Health Centre. The *Accused*, stating that he was showing the example, then brandished a firearm, signaling the start of the massacres to soldiers and *Interahamwe* who began, in his presence, to attack and kill the Tutsi with firearms, machetes and clubs. Shortly after the beginning of the killings, while it was raining, André Rwamakuba, referring to the bodies of Tutsi, demanded that such filth be cleared. The *Accused* witnessed the killings until he left the Health Centre, while the soldiers and *Interahamwe* continued the killings for several hours. No one survived the massacre in which about a hundred people are alleged to have died. The bodies of the victims were thrown into a mass grave. These victims were mostly in-patients and Tutsi refugees fleeing the killings in the neighbouring *secteurs*, notably the killings in the Parishes of Gikomero and Gicaca.

(1) Evidence Adduced

137. Kayanga Health Centre is located in Kayanga *secteur*, Gikomero *commune*, which is approximately 80 kilometres from Gitarama where André Rwamakuba resided at the time of the event.[355]

138. There is no dispute in the present case that there were killings at Kayanga Health Centre in April 1994 and that the victims were murdered solely because they were Tutsi.[356] Both parties adduced evidence on this event. The alleged participation of the Accused, however, is disputed.

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[351] See above, para. 85 and seq.
[352] See above, paras. 100 and 102.
[353] The French version of the Indictment, which is the original language, reads as follows: "Kayanga".
[354] The French version of the Indictment reads as follows: "Ils étaient, à la demande d'un homme inconnu, mais identifié comme étant le Directeur-adjoint, rassemblés dans la cour du Centre."
[355] See: Exh. P. 2: the distance between Kigali and Kayanga is approximately 30 kilometres; and Gitarama is 53 kilometres southwest from Kigali.
[356] Defence Closing Brief, p. 167, para. 6; See: Prosecution Witnesses ALA, AVC, GAC, GIN and GAB; Defence Witnesses 3/1, 7/14, 6/10, 7/18.

139. Five Prosecution witnesses gave evidence on this massacre,[357] including Witness GAB who said that he was the sole survivor and eyewitness of the event.[358] On 13 April 1994, after the massacres had started in his *secteur*, Prosecution Witness GAB began to flee.[359] He testified that he arrived at Kayanga Health Centre between 13 and 15 April 1994.[360] He spent the night in the courtyard between the rooms, the open space at the Centre.[361] The morning after his arrival, around 8.00 a.m., the Deputy Director of the Centre, Etienne Kamanzi, arrived with *Interahamwe*. The witness and the people who were in the wards as well as refugees were taken out with the Tutsis and collected in the big courtyard in front of the Centre.[362] They were told to sit down and not to move. Around 10.00 a.m., four vehicles arrived, including a military truck. The witness saw the Accused, *Bourgmestre* Rutaganira, the *brigadier* Nyarwaya, the accountant and the school inspector.[363] When he saw them, the witness hid in a nearby sorghum field near the Centre.[364] From that place, he heard Rwamakuba say "[e]verywhere I have been, they have began to work - and "work" meant to kill – so what are you waiting for?"[365] The *brigadier* Nyarwaya replied that they did not start to kill because they did not have enough materials for the task.[366] The witness then saw Rwamakuba take out a pistol, wave it in the air, and say "Here is the pistol; the *Interahamwe* are present. The material is available; I don't see why you continue to raise that question while everything is ready."[367] After that, many people, mostly Tutsi, were shot or attacked with machetes, clubs and bludgeons.[368] The witness also heard the Accused stating that the Tutsis should be killed "so that in [the] future, a Hutu who is born asks what a Tutsi look[ed] like".[369] Rwamakuba allegedly left with the other vehicles in the direction of Gikomero, around midday when people had already been killed.[370] After his departure, the *Interahamwe* and the soldiers went on killing, until everybody was killed.[371] According to GAB, around one hundred persons died in this massacre.[372]

140. Prosecution Witness GIN testified that "about four or five days" after the killing of the three young people in Gikomero centre between 10 and 14 April 1994,[373] she saw André Rwamakuba arrive at the trading centre in a white station wagon.[374] He stopped for a few minutes and spoke to some inhabitants from his vehicle. Some of the people who were present at that time included one person named Callixte, Twagirayezu, Drocella Mukayiranga, Ngiruwosanga, Mirumbi, a policeman by the name of Ngarambe, Gihanga and Gatinseyi.[375] Then, Rwamakuba allegedly went on his way towards Kayanga.[376] Later, two vehicles, with Mathias Rubanguka,[377] Nzaramba, and the *brigadier* Nyarwaya aboard, came to collect *Interahamwe* as well as *communal* policemen. They were carrying firearms, guns and grenades.[378] One of the vehicles stopped in front of GIN's house and the other stopped in front of Karekezi's house.[379] GIN's husband, *Interahamwe* and other people got into the vehicles and

[357] Witnesses ALA, AVC, GAB, GAC and GIN.
[358] T. 5 July 2005, p. 35; see also: Prosecution Closing Brief, para. 62.
[359] T. 5 July 2005, p. 22.
[360] T. 6 July 2006, p. 8.
[361] T. 6 July 2006, p. 7.
[362] T. 6 July 2005, p. 7.
[363] T. 5 July 2005, p. 24.
[364] T. 5 July 2005, p. 24.
[365] T. 5 July 2005, p. 25.
[366] T. 5 July 2005, p. 26.
[367] T. 5 July 2005, p. 26.
[368] T. 5 July 2005, p. 26.
[369] T. 5 July 2005, p. 26.
[370] T. 5 July 2005, p. 27.
[371] T. 5 July 2005, p. 27.
[372] T. 5 July 2005, p. 28.
[373] See above.
[374] T. 29 June 2005, p. 21.
[375] T. 29 June 2005, p. 21.
[376] T. 29 June 2005, p. 22.
[377] T. 29 June 2005, p. 22. The Chamber notes an interpretation discrepancy between the French ("Rubanguka") and English transcript ("Rubaruka").
[378] T. 29 June 2005, p. 23.
[379] T. 29 June 2005, p. 23.

went off together to Kayanga. When GIN's husband came back from Kayanga, he told her that he had found Rwamakuba in the company of the person in charge of the Kayanga Health Centre, Kamanzi. He also told GIN that Rwamakuba ordered the massacre of the Tutsi people, that the massacre actually began and then Rwamakuba left Kayanga Health Centre.[380]

141. Prosecution Witnesses ALA and AVC were told that attacks against Tutsi people took place at Kayanga Health Centre.[381] ALA specified that the attack claimed about a hundred victims.[382] AVC said that this happened some time between May and June 1994.[383] He was told that people were killed there, including four of his brothers and other people who had sought refuge at Kayanga Health Centre.[384] Witness GAC testified that Tutsi patients of Kayanga Health Centre were killed after 13 April 1994 and until the end of the week by the *Interhamwe* from Gasabo.[385] He did not specify whether he was present at the time of the event.

142. Defence Witnesses 6/10, 7/18 and 7/3 testified that they were survivors of the Kayanga Health Centre massacre that, according to them, took place on 15 April 1994 and was led by the *brigadier* Nyarwaya.[386]

(2) Assessment of the Evidence

143. In the Chamber's view, the Prosecution's evidence is inconsistent with the allegation set forth in the Indictment (2.1.) and suffers major challenges as far as the witness' credibility is concerned (2.2.).

(2.1.) Lack of Consistency between the Indictment and the Prosecution Evidence

144. Witnesses ALA, AVC and GAC did not provide any evidence on the presence of the Accused at the Kayanga Health Centre massacre in April 1994. ALA and AVC gave hearsay evidence, and AVC's testimony that the massacre took place between May and June 1994 contradicts the other evidence adduced by both parties and does not support the charges against the Accused which place this event between 13 and 15 April 1994.

(2.2.) Credibility Issues

145. The Chamber has already found that Witness GIN was not a credible witness as far as her evidence concerned the alleged participation of the Accused in the murder of three Tutsi near the Gikomero *secteur* office.[387] For the present event, she provided hearsay evidence from her deceased husband. It is noteworthy that she mentioned the Kayanga Health Centre massacre of April 1994 and André Rwamakuba's participation in the massacre for the first time in April 2004,[388] in her fifth meeting with the Prosecution.[389] In particular, in her first statement dated 3 February 1998,[390] she asserted that she had not seen Rwamakuba after the killing of the three people at the Gikomero *secteur*

[380] T. 29 June 2005, p. 25.
[381] T. 14 June 2005, p. 53 (Witness ALA); T. 27 June 2005, p.67 (Witness AVC).
[382] T. 14 June 2005, p. 53.
[383] T. 27 June 2005, p 19.
[384] T. 27 June 2005, p 18.
[385] T. 4 July 2005, pp. 18-19.
[386] T. 19 January 2006, p. 14. Defence Witness 9/20 also learnt that people were killed at the Kayanga Health Centre on 15 April 1994.
[387] See above.
[388] Notice of Additional Evidence pursuant to Rule 67 (D), filed on 23 April 2004, Exh. D. 39.
[389] Witness GIN made statements to Prosecution on 3 February 1998 (Exh. D. 35); and interview reports were taken on 27 March 2002 (Exh. D. 36); 27 May 2003 (Exh. D. 37) and 13 February 2004 (Exh. D. 38).
[390] Exh. D 35.

office.[391] Such a major inconsistency seriously undermines GIN's credibility regarding her evidence of Rwamakuba's participation to the Kayanga Health Centre massacre.

146. Witness GAB is the only one who claims to be an eyewitness of the event. As already noted,[392] this Chamber is not bound by the prior finding made by the Trial Chamber in the *Kamuhanda* case where the witness was found not credible. However, after reviewing and assessing the evidence as a whole, this Chamber finds that there are serious doubts as to GAB's credibility in the present case.

147. The Chamber has already found that the identification of the Accused by the witness raises serious concerns.[393] In addition, his testimony contains several irreconcilable inconsistencies between his prior statement to the Prosecution, his testimony in the *Kamuhanda* case,[394] and also within his own testimony given in court.

148. GAB first testified that he arrived at Kayanga Health Centre in the night of 13 April 1994.[395] During cross-examination, however, he claimed that he did not give the exact date of his arrival at the Centre, but that he arrived between 13 and 15 April 1994.[396] In his statement of 4 November 2004, which was read into the record by the Defence Counsel, the witness provided a more specific date: he stated that he started fleeing on the night of 13 April 1994 towards Kayanga Health Centre, where he arrived in the morning.[397] A mere comparison of the witness' testimony and his prior statements shows other inconsistencies. In his 2004 statement, it is said that after 8.00 a.m., he, along with the other people at the Centre, was instructed to stay in the Centre's courtyard, and that prior to Rwamakuba's arrival, he lagged behind the rest of the people by creeping and was able to reach the rear of the building where he hid in an adjoining sorghum farm. In court, however, GAB testified that he hid *after* Rwamakuba's arrival at the Centre around 10.00 a.m. In his statement of 1999, which was read into the record by the Defence Counsel, the witness stated that a week after 13 April 1994, the RPF soldiers "*arrived and assembled and took [them]* to Rutare".[398] The witness gave a different account of this fact in court: he testified that he *went* to Rutare the night he left the Centre after hiding in the sorghum field, since Rutare was a secure place occupied by RPF.[399] This account also differs from GAB's evidence in the *Kamuhanda* case, where he said that he was moving from one hiding place to another, and around 15 April 1994, he surrendered to the attackers.[400]

149. Such inconsistencies in the chronology of facts cannot be explained by the time elapsed, translation discrepancies or considered as additional information provided by the witness. On the contrary, they directly challenge the truthfulness of his account. This challenge is reinforced by the disturbing similarities between GAB's testimony in this case and in the *Kamuhanda* case. In this trial, the witness described André Rwamakuba's behaviour and the account of the events in the same way as he described Kamuhanda's criminal acts when testifying as Prosecution witness in that case; he also attributed much of the same words to Kamuhanda and Rwamakuba.[401] GAB explained in court that he

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[391] Exh. D. 35 to 38.
[392] See above: Alleged Public Instigation in Gikomero from July 1993 through June 1994.
[393] See above: Alleged Public Instigation in Gikomero from July 1993 through June 1994.
[394] Exh. D. 33 A and B.
[395] T. 6 July 2005, p.23.
[396] T. 5 July 2005, p. 52; T. 6 July 2005, p. 5.
[397] T. 6 July 2005, p. 3.
[398] Statement of 24 June 1999, p. 4.
[399] T. 5 July 2005, p. 27.
[400] T. 6 July 2005, p.17.
[401] In the *Kamuhanda* case, Witness GAB said that when Jean de Dieu Kamuhanda arrived on 12 April, he said: "Everywhere I went, even in Kigali, the *Interahamwe* and CDR have been killing people. What are you doing?" Nyarwaya and Rubanguka who were present, then said: "What we are doing at this time is detailing them and when we get the necessary instruments to accomplish our task, we shall accomplish our task." (see Extract read by the Defence, T. 6 July 2005, p. 13).
In the present trial, Witness GAB testified that André Rwamakuba said: "Everywhere I have been, they have began to work – and "work" meant to kill – so what are you waiting for?" Then, the Brigadier Nyarwaya took the floor and replied that they did not start to kill because they had not material enough for the task. Then the witness saw Rwamakuba taking out a pistol, waving it in the air, and saying that "Here is the pistol; the *Interahamwe* are present. The material is available; I don't see why you continue to raise that question while everything is ready." (T. 5 July 2005, pp. 25-26).

was not able to recall the contents or the purport of his evidence in the *Kamuhanda* trial,[402] and further submitted that Kamuhanda and Rwamakuba used almost the same words because these were statements that held the same logic.[403]

150. This explanation is not persuasive, especially since the witness only mentioned André Rwamakuba's name for the first time in November 2004 after making a statement to the Prosecution in 1999 and testifying in the *Kamuhanda* case in 2001. He explained his failure to mention Rwamakuba's name at an earlier time by stating he was not previously questioned about the Accused. Although this is a fairly common explanation provided by both Prosecution and Defence Witnesses, this is not a satisfactory explanation considering the fact that the Kayanga Health Centre massacre is the only one that Witness GAB allegedly witnessed. The witness' obvious reluctance to answer questions from the Defence,[404] particularly in relation to his testimony in the *Kamuhanda* case, further contributes to challenge his overall credibility.[405]

151. The Defence's evidence reinforces the Chamber's doubt on the Prosecution's case. The Prosecution did not provide a chronology of Rwamakuba's movement to and from Gikomero area over the five days-period, during which it is alleged that he delivered machetes at two different locations, ordered the killing of three Tutsi people and went to Kayanga Health Centre. The parties agreed that after 12 April 1994, the Accused moved to Gitarama with his family, along with the Interim Government.[406] The present allegation would therefore have required that the Accused made a fourth trip there. Such theory was seriously challenged by the Defence evidence on the hazardousness and difficulties to move from and to Gikomero *commune* after 7 April 1994.[407] There were also testimonies that the Accused never went to Kayanga Health Centre during the massacre. Defence Witnesses 6/10 and 7/18 testified that they were present at Kayanga Health Centre on 15 April 1994 when the massacres against the Tutsi took place. While they were hiding in a room in the maternity ward of the Centre,[408] they saw refugees dragged out, beaten up, taken out of the Centre and finished off by the *brigadier* Nyarwaya, who was with Mathias Rubanguka, the *communal* policeman Kayibanda, and other *Interahamwe*.[409] Both witnesses knew Rwamakuba very well. Witness 6/10 denied any Rwamakuba's involvement in the 1994 killings in Gikomero *commune* and Witness 7/18 stated that the Accused never came to Gikomero during the genocide.[410] Defence Witness 7/3 who admitted to having played a direct role in the killings which took place at Kayanga Health Centre on 15 April 1994 and claimed to know Rwamakuba very well,[411] also testified that the attack was led by the *brigadier* Nyarwaya in the company of policemen. He asserted that Rwamakuba was not involved in these killings.[412] Defence Witness 3/1 was told that patients were killed at Kayanga Health Centre and that the *brigadier communal* and communal officers were the ones responsible. She asserted that no one ever mentioned Rwamakuba as playing a part in the killings at Kayanga Health Centre[413] Defence Witness 7/14, who knew Witness GIN very well, stated that GIN's husband stayed in Gikomero and never went to Kayanga Health Centre.[414] Due to their individual circumstances, the

[402] T. 6 July 2005, p. 13.
[403] T. 6 July 2005, p. 23.
[404] See for e.g.: about the distances between his house and the field, between his place and the Kayanga Health Centre (T. 5 July 2005, pp. 3-4); between the sorghum field and the Centre when he was hiding (T. 6 July 2005, p. 12); whether the date 13 April has been chosen for the reburial ceremony in 2004 because it was the date of the massacres (T. 6 July 2005, p. 14-15); about the exact date when the witness reached the RPF secured zones (T. 6 July 2005, p.15); about the details of the stone laying ceremony at the Rutunga School (T. 5 July 2005, pp. 41-42).
[405] See for e.g.: T. 5 July 2005, pp. 47-50.
[406] Prosecution Closing Brief, para. 68; Defence Closing Brief.
[407] See paras. 100 and 102.
[408] T. 24 November 2005, p. 2.
[409] T. 24 November 2005, pp. 3 and 35; T. 30 November 2005, pp. 55 and 57. According to Witness 7/18, one of the victims was called Rutembesa.
[410] T. 24 November 2005, p. 7; T. 1 December 2005, p. 33.
[411] T. 19 January 2006, p. 33. Defence Witness 7/3 claimed that he knew Rwamakuba very well as he hailed from their *commune* and was an intellectual present at *communal* meetings.
[412] T. 19 January 2006, pp. 8-10 and 18-19.
[413] T. 10 November 2005, p. 9.
[414] T. 25 January 2006, p. 16.

evidence of Defence Witnesses 6/10, 7/18, 7/3 and 7/14 was assessed with great caution.[415] The Chamber, however, found their accounts consistent and objective enough to challenge the Prosecution's evidence.

152. In the Chamber's view, the major inconsistencies in Prosecution Witnesses GAB and GIN testimonies cast serious doubt on their credibility. This doubt is supported by the Defence evidence on the improbable presence of the Accused at the scene of the crimes. In addition to testimonies on the potential hazards of road access to Gikomero *commune* in April 1994, there was detailed and consistent evidence from other witnesses which identified the *brigadier communal* Nyarwaya and other communal officers as the leaders of this massacre. They denied Rwamakuba's involvement. The other Prosecution witnesses who mentioned Kayanga Health Centre massacre in their testimonies never spoke of Rwamakuba as playing a role in it. Considering the evidence as a whole, the Chamber finds that the allegations of the Accused's participation in the massacre at Kayanga Health Centre in April 1994 have not been proved beyond reasonable doubt.

Conclusion on the Alleged Criminal Acts Committed by André Rwamakuba in Gikomero Commune

153. The Chamber first notes that there was no evidence adduced on certain allegations concerning the events in Gikomero *commune* and that some of the Prosecution witnesses' testimonies were inconsistent with the Indictment. Specifically, no evidence was given about the alleged meetings or public instigations in which André Rwamakuba allegedly participated in Gikomero, Rutunga, Gasabo and Gicaca *secteurs* or in Rutungo, Rubungo and Kanombe *communes*. There was also no evidence on the various statements made by Rwamakuba at various meetings and gatherings in Gikomero *commune* between March and June 1994.

154. Then, the Prosecution evidence on the sensitization campaigns allegedly conducted by the Accused in Gikomero *commune* between 1992 and March 1994 was unreliable in many instances, including the Prosecution witnesses' identification of Rwamakuba at the time and place of the events. This conclusion is supported by the Defence evidence indicating that the Accused participated in two events in his capacity as a doctor during the time in question. A reasonable probability has been shown that between 23 September 1993 and 10 March 1994, Rwamakuba attended a training course at the Institute of Tropical Medicine in Antwerp, Belgium, and that between 17 and 29 March 1994, he attended an international colloquium organized by the WHO in Egypt. The Chamber therefore finds that the Prosecution failed to prove beyond reasonable doubt the allegations set forth in paragraphs 3 to 5 of the Indictment.

155. Both parties adduced evidence that attacks and massacres took place against Tutsi in Gikomero *commune* in April 1994, including in Ndatemwa Trading Centre, at Gikomero Protestant School, Gishaka Parish and Kayanga Health Centre. The Prosecution called six witnesses to support its allegations that during a period of five days between 10 and 15 April 1994, André Rwamakuba went to four different locations in Gikomero *commune* to deliver machetes that were to be used in killings against the Tutsi, to encourage and give instructions to kill Tutsi, and to launch the beginning of the attacks against Tutsi in the *commune*.

156. The Prosecution witnesses' testimonies were tainted of major deficiencies which could not be justified by the time elapsed, translation discrepancies, the manner in which the prior statements were taken or the impact of trauma inflicted upon the witnesses. In the Chamber's view, these inconsistencies undermined the witnesses' credibility or reliability. Furthermore, the Defence disputed that the Accused could have been present in Gikomero *commune* at the time of the alleged event. The parties agreed and the Chamber accepted that André Rwamakuba was sworn in as a Minister of the

[415] Defence Witnesses 6/10 and 7/18 seemed close to André Rwamakuba's family; they are moreover relatives. Defence Witness 7/14 was Prosecution Witness GIN's relative and Defence Witness 7/3 has a criminal record related to the 1994 genocide.

Interim Government on 9 April 1994, attended a governmental meeting held in Kigali at the *Hotel des Diplomates* on 11 April 1994,[416] and was living in Kigali until 12 April 1994 when he went to Gitarama with the convoy of the Interim Government.[417] The admission of these facts had a major impact on the Prosecution's case since the Defence challenged the accessibilities from and to Gikomero *commune* in April 1994. The Prosecution did not provide a chronological account of the Accused's alleged activities in Gikomero in April 1994, and seemed to suggest that on each event alleged, the Accused commuted between Kigali or Gitarama and the various locations in Gikomero *commune*.[418] There was, however, reliable evidence on the potential hazards to travel to and from Gikomero *commune* after 7 April 1994. Reliable testimonies were also given that Rwamakuba's name was not mentioned before Rwandan local courts in relation to the crimes committed in Gikomero *commune* in April 1994 and that he was not present at the scene of the crimes. This evidence, however, was not satisfactorily rebutted by the Prosecution.

157. The absence of any reliable identification of André Rwamakuba at the time and location of the alleged events, the lack of credibility or reliability of the Prosecution witnesses, the admitted facts that the Accused participated in other activities during the period alleged in the Indictment, the potential hazards of travel to the locations of the alleged crimes, cumulatively contribute to raise a reasonable doubt on the Prosecution's case.

158. The Chamber therefore finds that the Prosecution failed to prove at all or beyond reasonable doubt the charges against the Accused in Gikomero *commune* as pleaded at paragraphs 3 to 5, 10 to 13, 23 and 26 of the Indictment. The Chamber will now address André Rwamakuba's alleged participation in the killings at Butare University Hospital in April 1994.

II.2. Alleged Participation of André Rwamakuba to killings at Butare University Hospital in April 1994

159. Butare University Hospital is located in Butare town, Butare *préfecture*, approximately 136 kilometres from Kigali in south west Rwanda.[419] The Hospital has barely changed since the events of April 1994.[420] The site is not very large and is composed of six main buildings.[421] During the trial, various pictures and sketches of the Hospital were admitted into evidence and the Chamber visited the building premises with the parties on 15 January 2005.[422]

160. At paragraphs 15 and 16 of the Indictment, the Prosecution alleges that

> 15. Between 18 and 25 April 1994, at Butare University Hospital, André Rwamakuba, along with Dr. Geoffroy Gatera, soldiers, militiamen and armed civilians, ordered, instigated, committed, or otherwise aided and abetted killings of Tutsi patients and displaced persons seeking refuge at Butare University Hospital with intent to destroy, in whole or in part, the Tutsi ethnic group. Thus, during an official delegation's visit to the Hospital, he asked a woman unknown but identified as the head of Doctors Without Borders not to treat Tutsi casualties, to get rid of them and not to admit any others. During the above-mentioned period, André Rwamakuba, armed with a small axe hung on his belt, and often accompanied by Dr. Gatera, armed soldiers, *Interahamwe* militiamen and civilians armed with machetes, axes and clubs, went around the hospital wards checking identity cards and identifying Tutsi refugees and patients, selecting them and putting them on board a vehicle manned by *Interahamwe* armed with clubs and machetes. The persons taken away were never seen again. During this period, in

[416] These are facts not disputed by the parties. See Prosecution Closing Brief, para. 68; Defence Closing Brief.
[417] Ibidem.
[418] See the Indictment, the Prosecution Pre-Trial Brief, the Opening Statement and the Prosecution Closing Brief.
[419] See: Exh. P. 2.
[420] See: Exh. P. 2; Defence Closing Brief, p. 282.
[421] Archives building, Clinic and ORL/ENT, Surgery, Paediatrics, Hospitalization and Maternity wards; see: Exh. P. 2 and D. 48.
[422] See: Exh. P. 2, P. 33, D. 48, D. 53, D. 78, D. 105, D. 106, D. 112 and D. 124; and Minutes for the Site Visit to Rwanda in the *Rwamakuba* case, 13-16 January 2005 (Annex B).

the morning or afternoon, during his rounds, André Rwamakuba regularly removed drips from patients, in particular, in a ward where sick women were admitted.

16. Concurrently with the events related above, André Rwamakuba directly caused the death of several persons identified as Tutsi. Thus, during his ward rounds, he caused the death of an unknown Tutsi patient by wounding him in the head with an axe. The militiamen subsequently took away the body of that person. Five of the patients referred to above as having been in the in-patients ward, and who were identified as Tutsi, died from axe wounds inflicted by André Rwamakuba. The *Accused* wounded Tutsi found in the corridors of the Hospital by striking them on the head with an axe. Some of them, including the persons called Rukara and Mutabazi, who suffered serious bodily harm caused by André Rwamakuba, were subsequently finished off by *Interahamwe*. As a result of such orders and instigation by the *Accused*, many Tutsi refugees and patients were massacred in Butare University Hospital. The victims included the persons known as Déogène, Placide and the parents of several survivors of the killings. The bodies of hundreds of victims of the massacres organized by André Rwamakuba at Butare University Hospital were gathered and buried in mass graves located behind the Hospital.

161. The Chamber will first provide a brief and general description of the evidence adduced on the Butare University Hospital massacre in April 1994 and the alleged involvement of the Accused (II.2.1.). The content of the evidence will then be more detailed in the second section when discussing the credibility and reliability of the witnesses (II.2.2).

II.2.1. Evidence Adduced

162. The existence of a massacre against Tutsi at Butare University Hospital in April 1994 was not a contentious matter and both parties adduced evidence on that event. The Defence, however, disputed any involvement of the Accused therein.

163. The Prosecution called six witnesses who asserted their presence at Butare University Hospital at the same time as André Rwamakuba allegedly committed the crimes outlined in the Indictment. Prosecution Witnesses ALV, ALW, GIO, HF and RJ placed the events on different dates between 21 and 25 April 1994, and Prosecution Witness XV, the only one who claimed to know Rwamakuba personally, testified that they took place in May 1994. The Prosecution witnesses generally stated that Rwamakuba came to Butare University Hospital at various times, during which he conducted the identification and injured some of the Tutsi patients with an axe, removed drips from Tutsi patients, which killed some of them, and gave orders to *Interahamwe* and soldiers to kill or take away to kill Tutsi patients in a pick-up truck. The witnesses specified that during those events, Rwamakuba was often in the company of Doctors Gatera, Twagirayezu and Jotham. In addition, Prosecution Witness XV testified that Rwamakuba took part in a government meeting at the Hospital on 15 May 1994, which was to assess whether the killings were being satisfactorily conducted in Butare. Prosecution expert witness Alison Des Forges also testified to reports of a massacre of about 170 patients and staff members at Butare University Hospital on 24 April 1994.[423] She did not give evidence on the presence of the Accused at the Hospital during the massacre, but commented on an extract from a Radio Rwanda news broadcast which said that "Doctor Rwamakuba refuse[d] the information that was being broadcast by a foreign radio station, talking about the massacres of 200 people by members of the national army who might have found the victims in the Butare Hospital".[424]

164. The Defence called six witnesses to testify on the same event. They confirmed that there were attacks on patients and meetings at Butare University Hospital,[425] and that criminal acts took place under the supervision of military and armed civilians or militiamen. They denied André Rwamakuba's presence or involvement in those acts.

[423] T. 14 July 2005, pp.70-71.
[424] T. 14 July 2005, pp. 72-73.
[425] See: Witnesses 5/7, 5/13, 5/15, 5/16, 9/17 and 9/29.

II.2.2. Assessment of the Evidence

165. After reviewing the evidence adduced as a whole, the Chamber is of the view that the Prosecution evidence is inconsistent with some of the allegations against the Accused (1). The identification of André Rwamakuba at the time and place of the alleged event also raises serious doubt (2) and the internal discrepancies in the Prosecution witnesses' testimonies, notably when considering their prior statements and testimonies in Rwandan proceedings, cast doubt on their credibility and reliability (3). The Defence evidence supports this conclusion since it tends to show that Rwamakuba was not present at the scene of the crimes (4).

(1) Lack of Consistency between the Indictment and the Prosecution Evidence

166. None of the Prosecution witnesses testified, as alleged at paragraph 15 of the Indictment, that "during an official delegation's visit to the Hospital, [Rwamakuba] asked a woman unknown but identified as the head of Doctors Without Borders not to treat Tutsi casualties, to get rid of them and not to admit others". No evidence either was adduced on the allegation at paragraph 16 of the Indictment that persons known as Rukara, Déogène, Placide were massacred in the Butare University Hospital.

167. Since Witness XV asserted that André Rwamakuba committed crimes at Butare University Hospital in May 1994, his testimony cannot support the allegation in the Indictment that these offences took place between 18 and 25 April 1994.[426]

168. This witness also testified that André Rwamakuba attended a government meeting at the Hospital on 15 May 1994.[427] While paragraph 18 of the Indictment does plead a meeting held by the Prime Minister Kambanda at the Faculty of Medicine of the Hospital on that day, it does not allege the presence of the Accused.[428]

(2) Identification of André Rwamakuba

169. Witness XV was the only witness to the Butare University Hospital events who claimed prior knowledge of André Rwamakuba. In the Chamber's view, the witness gave an unsatisfactory account of when he actually met him. The witness allegedly knew Rwamakuba when the latter attended the Faculty of Medicine at Butare "from 1974 until he went to do his internship that concluded his studies".[429] He said that doctors studied for six years and then the seventh year was devoted to an internship. When Rwamakuba began his internship, Witness XV had not yet began to work at the Hospital but was at the University. He declared that he lived near the Hospital and used to go to the students' residence to do their washing or to sell cigarettes.[430] He allegedly saw Rwamakuba more than ten times over a period of one or two years, but never actually spoke to him. The witness said that Rwamakuba was already doing his internship when he, himself, started to work at the Hospital in 1981. Witness XV also testified that around 1973 or 1974, he saw Rwamakuba at the University, actively participating in unrest where Tutsi were chased away from the University.[431] The witness saw

[426] Indictment, para. 15-16; Prosecution Pre-Trial Brief, paras. 30-38; Opening Statement, T. 9 June 2005, p. 10.
[427] T. 30 August 2005, pp. 52-54.
[428] Indictment, para. 18: "Massacres of Tutsi at Butare University Hospital continued and intensified through late May 1994, particularly after a meeting, held at the Faculty of Medicine on or about 15 May 1994, where Prime Minister Jean Kambanda addressed university authorities, encouraging them to "continue the fight until ultimate victory".
[429] T. 30 August 2005, p. 25. In his will-say statement dated 6 August 2005, XV also stated that he remembered André Rwamakuba from a strike at the University in around 1974 (Exh. D. 121 A and B, under seal).
[430] T. 30 August 2005, pp. 25-26. The Witness however did not do washing for Rwamakuba.
[431] T. 30 August 2005, p. 28.

Rwamakuba on two additional occasions before April 1994: towards the end of 1993 in a dancing bar in Butare, and in January 1994 during a rally organized at the Huye stadium.[432]

170. Witness XV testified to two occasions when he saw André Rwamakuba during the genocide. The first time was at a meeting of Government Ministers at the Faculty of Medicine at Butare University Hospital, and the second was at the maternity ward when Rwamakuba was giving instructions to some *Interahamwe* to get Tutsi people into the pick-up truck in order for them to be killed.[433] He claimed that, on that occasion, he was also put into the pick-up truck but was able to escape and went into hiding at the Hospital until he left on 6 June.[434] The witness asserted, on one hand, that he arrived at Butare University Hospital between 21 and 22 April 1994[435] and that the incident with the pick-up truck occurred two weeks after his arrival at the Hospital;[436] on the other hand, he testified that the meeting of Government Ministers was on 15 May 1994.[437] The witness' chronological account of the facts is mistaken and therefore unreliable because two weeks after 21 or 22 April – the alleged second occasion he saw Rwamakuba – would fall before 15 May 1994 – the alleged first occasion he saw the Accused.

171. Witness XV' identification of André Rwamakuba is contradicted by admitted facts and reliable Defence evidence. The parties agreed and the Chamber accepts that the Accused studied in Belgium between 1970 and 1974 and in Butare between 1975 and 1978.[438] Contrary to XV's assertion, Rwamakuba was not a student at the Faculty of Medicine of Butare University either before 1975 or after 1979. Further, the Chamber has already found that the Defence's evidence raised serious doubt that the Accused was in Rwanda between 23 September 1993 and 10 March 1994.[439] XV, therefore, could not have reasonably seen him chasing Tutsi students in 1973 or 1974, nor doing his internship after 1980, in a bar at the end of 1993 or at a meeting in Rwanda in the beginning of January 1994.

172. Witness XV's testimony in court was furthermore inconsistent with testimonies in other cases and prior statements. The witness testified in three cases in Rwanda between 1997 and 1999 where he never mentioned Rwamakuba's name. He was also interviewed by the Prosecution nine times between 1997 and 2005.[440] In his first statement in November 1997, XV gave a detailed statement about the events he witnessed at Butare University Hospital in 1994. In that statement, he referred to a man named Rwamakuba who was an *Interahamwe* leader, a native of Huye *commune* and who had also been a second lieutenant during the Kayibanda regime.[441] The description of that man was inconsistent with the Accused André Rwamakuba. In 2003, after six more signed statements which have no mention of Rwamakuba, in an interview to confirm his statements before his testimony in the first trial in this case, the witness specified that the mention of man named Rwamakuba in his 1997 statement was a mistake and that the right person was a man named Nkiramakuba. He then referred to meeting

[432] T. 30 August 2005, pp. 28, 30, 35 and 36.
[433] T. 30 August 2005, p. 36.
[434] T. 30 August 2005, pp. 36 and 64.
[435] T. 31 August 2005, p. 6.
[436] T. 30 August 2005, p. 39.
[437] T. 30 August 2005, p. 52.
[438] *Curriculum vitae* of André Rwamakuba (Exh. D. 184) and Prosecution Closing Brief at para. 6, footnote 3: "The Prosecutor does not dispute the periods and the studies undertaken by the Accused."
[439] See above at para. 70 and seq.
[440] See: Statement of 25 November 1997, Exh. D. 113 A and B (under seal); 7 December 2000, Exh. D. 114 A and B (under seal); 22 February 2001, Exh. D. 115 A and B (under seal); 19 April 2001, Exh. D. 116 A and B (under seal); 5 June 2001, Exh. D. 117 A and B (under seal); 28 June 2001, Exh. D. 118 A and B (under seal); 5 December 2001, Exh. D. 119 A and B (under seal). All these statements were signed by the witness. See also: "Witness Confirmation", 8 July 2003, Exh. D. 120 A and B (under seal); Will-Say Statement, 26 August 2005, Exh. D. 121 A and B (under seal). These documents were not signed by the witness but, following the usual practice, drafted by Prosecution's representative.
[441] In his statement dated 25 November 1997 (Ex. D. 113), XV stated: "I also recall a man named *Rwamakuba* coming to the university hospital from Sovu hospital in an ambulance which he had requisitioned to transport *Interahamwe*. I no longer recall the date. He was dressed in civilian clothing and the *Interahamwe* accompanying him were armed with hoes and clubs. I recognized him because he was a native of Huye *commune*. He was a second lieutenant during the Kayibanda regime and a driver for a DGB project until the war broke out. He was a member of MDR Power and was very active in the meetings. He had even become the *Interahamwe* leader when the war started." (para. 9, emphasis added).

Rwamakuba as a student at Butare University in 1982, and to the meeting of Government Ministers of 15 May 1994, but he did not refer to the incident with the red pick-up truck nor did he specify that he had been a victim of Rwamakuba's actions. There was no mention of the attempted abduction which was meant to lead to his death, as he testified in court. This traumatic event was mentioned to the Prosecution for the first time, less than one week before XV gave evidence in this trial.[442] In court, the witness corrected himself again and stated that the man mentioned in his 1997 statement was actually Emmanuel Rekeraho.[443] He asserted that he only knew one man named Rwamakuba, but realized that the person he used to call Rwamakuba was in fact Rekeraho.[444]

173. Witness XV explained that the absence of any reference to the Accused in seven of his prior statements was due to the fact that "[he] could only think of [Rwamakuba] when it was the time of his trial".[445] The Chamber notes that in 2003, XV was on the Prosecution's witness list for the first trial against André Rwamakuba, and his reconfirmation statement was made in Arusha in preparation for his testimony in that trial. This reconfirmation statement, however, did not mention major elements of the evidence that he gave in this trial.

174. Witness XV did not appear to know what André Rwamakuba looked like. First, as acknowledged by the witness, he confused Rwamakuba with one Rekeraho. Then, when shown a picture in court, he confused Rwamakuba with a priest.[446] He also testified that Rwamakuba wore glasses. This assertion was seriously challenged by the Defence which provided a letter from UNDF Commanding Officer, who stated that the Accused had "no spectacle in his possession upon his transfer to the UNDF",[447] and called witnesses who had personal knowledge of the Accused and denied that he wore glasses at that time.[448] In view of these circumstances and the major inconsistencies in Witness XV's testimony, the Chamber is of the view that his evidence is subject to serious doubt and cannot be relied upon.

175. Except for Witness XV, none of the other Prosecution witnesses had prior knowledge of André Rwamakuba. Their identification of Rwamakuba is based on untested hearsay evidence or on XV's evidence which has already been found unreliable.

176. Witnesses ALV and ALW said that André Rwamakuba was identified him to them by refugees and students when they were at Butare University Hospital.[449] These people, however, are now dead.[450] Witness RJ was made aware of who Rwamakuba was by two persons: first by a Hutu lady who helped the witness at the Hospital and then, by XV while the witness was in the corridor of the surgery unit.[451] It is important to note that RJ was not able to recognize in court a picture of the priest who helped her during the genocide and took her to the Hospital in April 1994.[452] Witness GIO testified that Rwamakuba was first identified her by Witness RJ and then some students told her that his first name was André.[453] It is noteworthy that during her evidence, Witness GIO identified, on the basis of a picture showed by the Defence, the man named Rekeraho as probably being André

[442] Will-Say Statement, 26 August 2005, Exh. D. 121.
[443] T. 31 August 2005, pp. 55-59; T. 1 September 1994, pp. 9-10.
[444] T. 31 August 2005, pp. 56-59.
[445] T. 30 August 2005, p. 63.
[446] T. 1 September 2005, pp. 21-22.
[447] Exh. D. 215.
[448] See: Edith Van Wynsberghe (T. 1 December 2005, p. 61); Witness 1/1 (T. 14 December 2005, p. 65); Witness 1/15 (T. 18 January 2006, p. 14) and Witness 9/1 (T. 29 November 2005, pp. 37 and 63-65).
[449] Witness ALV stated that other refugees who knew Rwamakuba because some of them worked in the Hospital or knew him from when he was a student and intern identified him to her (T. 6 July 2005, pp. 28 and 46). Witness ALW said that she learned the identity of André Rwamakuba by other refugees and students (T. 25 August 2005, pp. 13-14, 26; T. 26 August 2005, p. 15).
[450] T. 6 July 2005, p. 50. Witness ALW gave the name of the student who informed her but said that he was dead (T. 25 August 2005, p. 26; T. 30 August 2005, p. 16).
[451] T. 2 September 2005, pp. 24- 26; T. 5 September, pp. 2-3; Exh. P. 71 (under seal).
[452] See Exh. D. 143. Witness RJ even stated that she "[did] not know the person on the photograph." (T. 5 September 2005, p. 9).
[453] T. 24 August 2005, p. 9.

Rwamakuba. Witness HF testified that while in the presence of Witness RJ, Witness XV pointed out Rwamakuba to them.[454] The Chamber also notes that the description of the Accused provided by Witnesses ALV, HF and RJ was particularly vague.[455]

177. In view of these circumstances, the identity of the person who the Prosecution's witnesses claim to have seen committing the alleged crimes raises serious doubt. Other elements, as discussed below, also contribute to the Chamber's doubt on Rwamakuba's involvement in the massacres at Butare University Hospital as alleged in the Indictment.

(3) Internal Discrepancies

178. Apart from Prosecution Witness XV, Prosecution Witnesses ALV, ALW, GIO, HF and RJ testified that they saw André Rwamakuba committing crimes at Butare University Hospital at different times and places between 21 and 25 April 1994. As a preliminary matter, the Chamber can accept that if found reliable, these testimonies are not necessarily contradictory since it is reasonably acceptable that the Prosecution witnesses saw Rwamakuba on different times and rooms while at the Hospital.

179. The Chamber will discuss the evidence for each of the Prosecution witnesses. For a clearer assessment, the discussion will be preceded by a brief summary of the relevant part of their testimony.

180. Witness ALV was 16 years old in 1994. Fleeing from Ngoma with her father, she arrived at Butare University Hospital on 20 April 1994.[456] She saw André Rwamakuba on two occasions at the Hospital. She first saw him on the evening of 21 April 1994 when he was pulling out drips from some of the Tutsi patients in the intensive care unit while in the company of Doctor Gatera, Colonel Muvunyi, Sister Theopiste, and Doctor Jotham.[457] She next saw him on 22 April 1994, about 11 a.m. when he was with the same people, including some soldiers, and he took away her father from his hiding place in the kitchen.[458] She testified that, as she followed the group to see where her father was being taken, Rwamakuba hit her on the back.[459] Witness ALV's account of this fact was particularly confused. She first testified that she did not see who struck the blow, but was told later that it was Rwamakuba.[460] Then, she explained that she lost consciousness after the hit, but not really,[461] and after a few moments, she turned and saw that it was Rwamakuba who had hit her.[462] ALV then testified that the refugees were forced to leave the Hospital and go the *préfecture*, where she met her two sisters. They stayed for two days and then went to her grandmother's house where they stayed for about one hour before they had to flee from assailants. They then returned to the *préfecture* from where they were taken to a centre at Rango where they stayed for a month and a half.

181. Witness ALV evidence substantially differs from her prior statements to the Prosecution investigators which she verified and signed.[463] Her first statement contains a detailed account of the events she suffered in 1994, particularly at Butare University Hospital, without any mention of André Rwamakuba.[464] In that statement, she described the abduction of her father from the Hospital

[454] T. 11 July 2005, pp. 11, 13, 14; T. 12 July 2005, p. 11.
[455] Witness ALV described Rwamakuba as follows: "a medium-sized man, neither too big nor too short; colour of skin somewhere between light and dark, thick lips and a strong jaw; sort of nose which Hutus generally have." (T. 6 July 2005, p. 57). Witness HF said: "This is a man of average height, who has a nose like the nose of the Hutus. He has broad lips, with big cheeks." (T. 11 July 2005, p. 29). Witness RJ stated that Rwamakuba was "dark skinned with a large nose, of medium height, and he was somewhat quite corpulent, but not too fat (T. 2 September 2005, p. 25).
[456] T. 6 July 2005, p. 27.
[457] T. 6 July 2005, pp. 27-29 and 45.
[458] T. 6 July 2005, pp. 31-32, 50 and 63.
[459] T. 6 July 2005, p. 54.
[460] T. 6 July 2005, p.33.
[461] Witness ALV specified that she did not really lost consciousness, but that she was tremendously scared, and, however, maintained consciousness all the time. T. 6 July 2005, pp. 33 and 34.
[462] T. 6 July 2005, pp. 33 and 55.
[463] Witness ALV stated that she signed these statements as she was satisfied that everything contained therein reflected what she had said (T. 6 July 2005, pp. 26 and 43).
[464] Statement of 29 November 2000 (Exh. D. 49 A and B, under seal).

storeroom by Sister Theopiste and soldiers without any mention of the Accused, Doctor Gatera, Colonel Muvunyi, or Doctor Jotham being present or participating. She gave a detailed account of her stay at the Hospital for a week after that incident, and described how Doctor Jotham ordered the refugees to be removed from the *préfecture* as filth. In her second statement of 13 November 2003, she said she was forced to leave on the same day, under orders from Doctor Gatera and the soldiers just as in her testimony in court.[465] In her second statement, she also described with significant detail how she followed Rwamakuba and saw the atrocities he committed in the intensive care ward. She specified that he took away her father, and even hit her on the shoulder.[466] The statement described that she saw Rwamakuba and his entourage leave the ward where she stayed for another 20 minutes, in contradiction with her testimony in court when she claimed that she was in the unit for about 20 minutes and left *before* Rwamakuba.[467] Witness ALV's prior statements also present a different and irreconcilable account of the facts she presented of what happened after she had left Butare University Hospital. Specifically, in her first statement, the witness stated that after leaving the Hospital, she spent two weeks at the Butare *préfecture* office, giving details about her activities during that period, which included witnessing the murder of her brother by *Interahamwe*, but in her second statement and in her testimony, she said that she stayed there for only two days.[468] In the first statement she said that she was taken to Rango after two weeks at the *préfecture*. In the second statement, she stated that she left the *préfecture* and took refuge first in her grandmother's house, then with her aunt at Cyarwa, and asserted that they are both alive today and reside in Butare. There is no mention of going to Rango.

182. In view of these omissions and inconsistencies which cannot be explained by the passage of time, translation discrepancies or the way the statements were taken, the Chamber cannot find Witness ALV's evidence reliable, mainly when considering the witness' affirmation that "[André Rwamakuba's] image remained engraved in [her] memory" because he hit her at the Hospital.[469] The witness explained in court that she omitted his name from her first statement because she was suffering from "anterograde" amnesia. The Chamber is not satisfied by this explanation that is not supported by any medical or other report and that is inconsistent with a prior explanation she gave in her 2003 statement. In that statement, she stated that she did not mention Rwamakuba "because the investigators did not ask [her] any question about him".[470] In addition, were the witness' amnesia established, this would strengthen the Chamber's doubt on her reliability. ALV's testimony cannot support a conviction against the Accused in the present case.

183. Witness ALW arrived with her wounded aunt at Butare University Hospital on 21 April 1994.[471] About three days after her arrival, she saw André Rwamakuba for the first time when he was with Doctor Gatera; he was removing the drips from five Tutsi patients in the surgical ward and then striking them on the head with a small axe.[472] They were immediately removed and put on a red pick-up truck. On or around 27 April 1994, the witness also saw Rwamakuba strike two men named Mutabazi and Kazasumaho with the same axe.[473] He said that "there was no hiding place for snakes". The two men fell down from the blows and were immediately taken away by *Interahamwe* and put in a red pick-up tuck. During cross-examination, the witness confirmed that Rwamakuba in fact killed the seven people she saw him hit with an axe.[474]

184. Witness ALW's account of the event suffered from internal discrepancies,[475] and was mainly inconsistent with her evidence given in the *Gatera* case in Rwanda.[476] In that case, ALW testified

[465] Exh. D. 50 A and B (under seal).
[466] Statement of 13 November 2003 (Exh. D. 50 A and B, under seal).
[467] T. 6 July 2005, p. 49.
[468] T. 6 July 2005, pp.35 and 60.
[469] T. 6 July 2005, p. 34.
[470] Statement of 13 November 2003 (Exh. D. 50 A and B, under seal).
[471] T. 25 August 2005, p. 25.
[472] T. 29 August 2005, p. 12; T. 25 August 2005, p. 28.
[473] T. 25 August 2005, pp. 28-29 and 35; T. 29 August 2005, pp. 22-23; T. 30 August 2005, p. 18.
[474] T. 26 August 2005, p. 3.
[475] For instance, Witness ALW evidence was inconsistent on whether the five Tutsi patients hit by André Rwamakuba were actually killed by him, whether she saw that he killed them or blood on Rwamakuba's axe (T. 29 August 2005, p.17; T. 30

about the killing of Mutabazi and Kazasumaho. She said that Doctor Gatera, who was with soldiers, stabbed them with bayonets and beat them with a small club saying that their time had come. The soldiers then took them beside the medicine intern block in order to kill them. Rwamakuba is not mentioned as being present or participating. Before this Chamber, the witness explained that she did not mention Rwamakuba during the *Gatera* trial because she did not know where he was and because she was only asked about Gatera's participation.[477] She further asserted that her account was consistent because Rwamakuba was with Gatera and that they acted together.[478] In the present case, the witness did not mention Gatera's presence when Rwamakuba allegedly attacked Mutabazi and Kazasumaho, although she specifically testified that Gatera was with Rwamakuba when the latter was removing drips from Tutsi patients. Witness ALW's explanation of these contradictory accounts of the same event is not convincing. Evidence about the abduction of these two men, their female relative and a fourth man was given by Defence Witnesses 9/17 and 9/29, who are also Tutsi survivors and were present at Butare University Hospital in April 1994. Witness 9/17 explicitly denied any involvement of Rwamakuba in the attacks of Mutabazi and Kazasumaho,[479] and Witness 9/29 provided a complete description of the event with no mention of Rwamakuba's involvement at all.[480] The Chamber also notes that Witness ALW's evidence in this trial on when and how she left the Hospital differs from her testimony in the *Gatera* trial.[481] In the Chamber's view, the internal discrepancies in ALW's testimony and inconsistencies with her prior statements and testimonies cannot be explained by the time elapsed or translation discrepancies, and seriously undermine her credibility. ALW's evidence cannot support a conviction against the Accused in the present case.

185. On or about 22 or 23 April 1994, Witness GIO went to Butare University Hospital with her brother who was wounded.[482] The witness testified that two days after her arrival, André Rwamakuba, along with a group of five or six doctors and *Interahamwe*, was checking identity cards of the patients in the surgical ward, and identified that GIO's brother was Tutsi. Doctor Gatera then killed him by a blow on his head with an axe.[483] According to the witness, another patient was similarly attacked. Then, Rwamakuba, Doctor Gatera and some *Interahamwe* allegedly put those people they had killed in a pick-up truck that was parked near the maternity ward.[484]

186. Witness GIO gave substantially different accounts of the events at the Hospital both in her prior statements[485] and testimonies before both this Tribunal and Rwandan courts.[486] The core element of her evidence is the attack of her brother which description in court is the opposite of what she said

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August 2005, p. 7). Likewise, ALW's account of the attack of two men by Rwamakuba contains contrary information. For instance, the witness said that she knew the two men very well but was not able to give their first name; she also placed the pick-up once opposite to the maternity, and then behind; she said first that she met the two men in the corridor, but also said that at that moment, she was standing close to the tents where the other refugees were.

[476] Exh. D. 108 and D. 109.

[477] T. 30 August 2005, p. 6.

[478] T. 30 August 2005, p. 8.

[479] T. 12 December 2005, p. 13.

[480] T. 27 January 2006, pp. 12-13 and 6 February 2006, pp. 11-13: Witness 9/29 stated that stated that Mutabazi and Kazasumaho were taken away in a wooded area. She never saw them again.

[481] In court, the witness testified that the refugee's tents at the Hospital were removed towards the end of April, beginning of May, before she left the Hospital. On the contrary, in the *Gatera* trial, she testified that the tents had already been dismantled upon her arrival at the Hospital. The witness explained that she returned to the Hospital between May and June to find out whether her aunt was still alive and that at that time, she realized that the tents were dismantled. The witness also stated that her aunt was still alive when she left the Hospital, while in the *Gatera* trial she said that she left the Hospital *after her aunt was killed*, at the end of May. (See T. 29 August 2005, p. 30 and T. 30 August 2005, p. 19).

[482] T. 22 August 2005, p. 24.

[483] T. 22 August 2005, pp. 26-27.

[484] T. 22 August 2005, pp. 29-30 and 38.

[485] Statement of 5 May 1998 (Exh. D. 71 A, B and C, under seal); 19 May 1998 (Exh. D. 72, under seal); 7 May 1999 (Exh. D. 73 A, B and C, under seal); 7 February 2000 (Exh. D. 74, under seal); Transcripts of December 2003 (Exh. D. 76, under seal); 17 September 1997 (Exh. D. 75). On 7 July and 22 November 2003, she confirmed the content of her statement (Exh. D. 80, under seal).

[486] The Witness testified before Rwandan courts: *Gatera* case (Exh. D. 71 and D. 72), *Twagirayezu* case (Exh. D. 73) and *Mukabandora* case (Exh. D. 74) and in the prior joint trial in the case *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera, André Rwamakuba*, Case N°ICTR-98-44.

previously. In a statement signed by the witness in 1997, she stated that her brother had been taken away in a pick-up truck and that she never saw him again.[487] There was no mention of an attack with an axe or her brother being killed in her presence. During her testimony in December 2003 in the prior joint case involving André Rwamakuba and three other Accused, she added that Doctor Gatera put her brother in a pick-up truck. She testified that she never saw her brother being killed by an axe and that she never said that Doctor Gatera killed her brother.[488] In a statement taken in 1998, by Rwandan authorities, prior to her first testimony before this Tribunal,[489] Witness GIO gave a third different account of this event: Rwamakuba was not present, and Doctor Gatera, who was inspecting the wounded patients, immediately struck her brother on the head with a small axe saying that he was an *Inkotanyi*.[490] This version of the facts is again modified a year later in a statement given by the witness in another case in Rwanda: GIO stated that Doctor Gatera ordered a man named "Athanas" to kill her brother, which he did; she fails to mention Rwamakuba's name.[491] These major inconsistencies cannot be explained by the time elapsed or translation discrepancies. It must be noted that, in her will-say statement, GIO directly addressed these inconsistencies.[492] She stated that she could not remember a meeting with the Prosecution's investigators in 1997 or whether the document was read to her, even if she signed it. She even denied her signature on some other documents. In light of the above-mentioned inconsistencies, these explanations are not convincing and, conversely, support the conclusion that Witness GIO lacks credibility as far as her evidence in this case is concerned.

187. Witness HF arrived at Butare University Hospital on 18 April 1994 because her sister had gone there to give birth, and left on 29 April 1994 for the Butare *préfecture*.[493] After three days, she allegedly saw André Rwamakuba with Doctor Gatera in the maternity ward ordering Tutsi patients to get up and then delivered them to the *Interahamwe* who took them away in a pick-up truck.[494] She then saw Rwamakuba on the same day in the afternoon, in the surgical ward with Doctors Gatera and Twagirayezu and some *Interahamwe*. On that occasion, Rwamakuba allegedly hit the head of a Tutsi patient with an axe, woke up another patient and stepped on his neck, and then proceeded to give them to the *Interahamwe,* who subsequently put them in a pick-up truck.[495] Witness HF saw Rwamakuba for the third time, on the next day, in front of the paediatrics ward while he was selecting people to be taken away in a pick-up truck. The witness however also said that on this third occasion, she saw Rwamakuba in the maternity ward, when he took away the witness' sister. This account was not consistent. HF identified her elder sister, her brother and a nurse as victims of the massacres at the Hospital.

188. During her testimony, Witness HF denied important factual elements that she consistently mentioned in her three prior statements.[496] The different accounts of the events the witness gave in her three successive interviews with the Prosecution and in court are also critical in the assessment of her credibility.[497] In a statement taken in 1997, Witness HF affirmed that she went to the Hospital to "seek

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[487] Statement of 17 September 1997 (Exh. D XX).
[488] *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera, André Rwamakuba*, Case N°ICTR-98-44-T, T. 12 December 2003, 51-52. The witness said: "Yes. I'm saying that we are testifying because we saw Mr. Rwamakuba and Gatera, but I never said Gatera used an axe to kill my brother. I say that he put them into a vehicle, but I never said that Gatera used an axe to kill my brother. […] I never saw my brother being killed by an axe. I don't know where you're getting this information from."
[489] Statement of 5 May 1998 (Exh. D. 71).
[490] Exh. D. 71 A, B and C (under seal).
[491] Exh. D. 73 A, B and C (under seal).
[492] Exh. D. 79. The will-say statement is the results of two meetings between the witness and the Prosecution Counsel.
[493] T. 11 July 2005, p. 9.
[494] T. 11 July 2005, pp. 10 and 17; T. 12 July 2005, p. 38.
[495] T. 11 July 2005, pp. 10 and 17; T. 12 July 2005, pp. 38 and 47.
[496] Contrary to what she stated in 2001 and 2003 (see Exh, D. 55 and 54), in court she denied that she left the Butare University Hospital on 25 April 1994. As opposed to what she stated in 1997, 2001 and 2003 (see Exh. D. 56, 55 and 54) in court she denied that André Rwamakuba wore banana leaves and that he disembowelled a pregnant women.
[497] Witness HF gave a statement respectively on 11 September 1997, Exh. D. 56 A and B (under seal); on 6 and 8 February 2001, Exh. D. 55 A and B (under seal); and on 12 March 2003, Exh. D. 54 A and B (under seal). The witness also testified during the joint trial in the case the *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba* (Case N°ICTR-98-44) before the severance of André Rwamakuba in December 2003.

refuge"; there is no mention of her sister or brother and she then stated that she did not recall the names of any victim.[498] She stated that she saw André Rwamakuba dressed in banana leaves. In 2001, she declared that she went to the Hospital "to take care of [her] sister […] who was sick"; she also specified that this sister and her brother who had come to seek medication were killed and taken away in a pick-up truck.[499] She again said she saw Rwamakuba dressed in banana leaves and when he passed by, people whispered that he was an *Interahamwe* leader. In her testimony, she denied all this, along with other matters recorded in those statements. In 2003, she stated that she was at the Hospital helping her "sister who had given birth to a premature baby"; this sister, her baby and her brother were then killed while lying "in their hospital beds".[500] During her testimony, Witness HF provided a fourth account of the same event, saying that, on two different dates, her wounded brother and her sister with her baby were both taken away by the *Interahamwe* while lying in their beds respectively in the surgical and maternity wards of the Hospital.[501]

189. The Chamber notes that Witness HF's account of facts also differs from her evidence in Rwandan proceedings. In the *Gatera* case, the witness stated that she went to the Hospital to take care of her sister who was pregnant, but she gave a different name from the one provided in her statements and testimony in this case.[502] Doctor Gatera came into the ward selected the victims, including her sister and brother, and put them in a pick-up truck. There is no mention of André Rwamakuba being present. In another Rwandan case held in 1997, the witness testified that her sister was shot by a man named Rurangirwa in a specific *secteur* in Butare *préfecture*. The name of this sister was exactly the same Christian name as the one of her sister allegedly killed at Butare University Hospital.[503] In this trial, when confronted with the judgement in that case, the witness explained that she had twin sisters with the same Christian name. The Chamber is not convinced by this explanation. In that respect, it is noteworthy that the Rwandan court in the above-mentioned case denied the witness' claim against Rurangirwa for payment of pain and suffering because she could not provide any communal death certificate for the sister and brother who she said were abducted by Rwamakuba.[504] In December 2003, in the first trial in this case, the witness testified that she had never claimed that Rugangirwa had killed her sister and that she had never lodged any compensation claim nor was even aware of any claim being made in relation to her brother and sister.[505]

190. The Chamber is of the view that the above-mentioned inconsistencies in Witness HF's evidence cannot be explained by the time elapsed, translation discrepancies or mistakes in the way the statements were taken by Prosecution investigators. In addition to these major inconsistencies, the Chamber notes that Witness HF's evidence is contradicted by other Prosecution evidence. For example, the witness testified that after she left Butare University Hospital on 29 April 1994, she witnessed a massacre in the Kabakobwa. This evidence is in conflict with the testimony of Prosecution Expert Witness Alison des Forges, who placed the Kabakobwa massacre on 22 April 1994,[506] and also with the Prosecution's allegations in the Indictment against Joseph Kanyabashi, which plead that the Kabakobwa massacre took place on 21 or 22 April 1994.[507] If this massacre took place on 21 or 22 April 1994 and HF was there at that moment, she could not have been at Butare University Hospital to witness the events about which she testified. The Chamber also finds that the demeanour of Witness HF in court is relevant. She was extremely reluctant to answer questions on her prior statements and

[498] Statement of 11 September 1997, Exh. D. 56 A and B (under seal).
[499] Statement of 6 and 8 February 2001, Exh. D. 55 A and B (under seal).
[500] Statement of 12 March 2003, Exh. D. 54 A and B (under seal).
[501] T. 12 July 2005, p. 39.
[502] This statement was read to the witness in open court, see T. 12 July 2005, pp. 54-55.
[503] See: *Procès-Verbal* of the Public Hearing dated 17 November 1997 (Exh. D. 61 A, B and C); Judgement in the *Sahera* case, dated 23 March 1998 (Exh. D. 59 and D. 60 A and B). HF admitted that she was a witness in that case and accepted the Judgement exhibited (T. 13 July 2005, pp. 3 and 8; T. 12 July 2005, p. 66); she however denied her signature on the *Procès-Verbal* of the Public Hearing dated 17 November 1997 (T. 13 July 2005, p. 15).
[504] Judgement in the *Sahera* case, dated 23 March 1998 (Exh. D. 59 and D. 60 A and B).
[505] Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba, Case N°ICTR-98-44-T, T. 11 December 2003, pp. 13-14 (see: Exh. D. 76).
[506] Expert Report by Alison Des Forges prepared for the *Butare* case ICTR-98-42-T, 1 June 2001, Exh. D. 101.
[507] *Prosecutor v. Joseph Kanyabashi*, Case N°ICTR-96-15-I, Indictment, filed on 11 June 2001, Exh. D. 51.

testimonies. The witness was disinclined to admit having given a statement in the *Gatera* case and denied that what was read in court was that statement. She even alleged that the document which had been received from the Rwandan authorities was false.[508] There were similar denials in relation to information in the statements taken by Prosecution investigators. In view of these circumstances, the Chamber finds that Witness HF is not credible and her evidence cannot support a conviction against the Accused in the present case.

191. On 21 April 1994, Witness RJ arrived at Butare University Hospital where she was taken by a priest to receive medical assistance.[509] She testified that she saw André Rwamakuba three times at the Hospital in April 1994: at the tents, when a delegation of doctors, including Rwamakuba and some military inspected identification cards from the patients;[510] when Rwamakuba and Doctor Gatera came to the maternity ward; and when she saw Rwamakuba removing drips from patients in the surgical ward and ordering them to get onto a red pick-up truck. She allegedly saw him assault a man in plaster. She testified that her child was beaten by Doctor Gatera in the presence of Rwamakuba, but she could not remember whether this happened at the first, the second or the third instance when she saw him.[511] She fled from the Hospital and went to the *préfecture* office, and while she was there, she saw Rwamakuba and heard him say to the *préfet* that the Tutsi had to be killed.

192. Witness RJ's prior accounts of the events to which she testified were substantially different from her in-court testimony. In a statement taken by the Rwandan authorities in the *Gatera* case before her statement to the Prosecution in this case, she stated that Doctor Gatera was the person who ordered the soldiers to beat her and other Tutsi;[512] she did not mention André Rwamakuba.[513] Similarly, in a statement taken in June 1998 by the Rwandan authorities in the *Kageruka* case, Witness RJ failed to mention Rwamakuba in her recollection of the events that took place at the Hospital, and Doctors Gatera and Kageruka are described as the main perpetrators of the attacks. Particularly, she stated that Doctor Kageruka took identity cards of Tutsi patients and tore them up and together with Doctor Gatera, put the Tutsi patients in a vehicle and told them to "look at the world for the last time".[514] In a statement taken a year later in another Rwandan proceeding, Witness RJ presented Doctor Twagirayezu as the main perpetrator of the killings. She declared that Doctor Gatera was also present, but she did not mention Doctor Kageruka and described Rwamakuba as committing the same acts and saying the same words as were previously attributed to Doctor Kageruka in her *Kageruka* statement of 1998.[515] Witness RJ also made a statement in the *Misago* case in 1999 where she stated that she did not stay at Butare University Hospital at all because they refused to keep her there; she went then to Butare *préfecture*.[516] The same year, she also gave an interview published in a report by *African Rights*, where she described soldiers from the *Ecole des Sous-Officiers* (ESO) at the centre of the crimes committed at Butare University Hospital; she did not mention Rwamakuba; and she stated that the soldiers *threw them out of the Hospital* and *told them* to go to the office of the *préfecture*.[517]

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[508] T. 12 July 2005, pp. 49-53.
[509] T. 2 Sept. 2005, pp. 11-12.
[510] T. 2 September 2005, pp. 12-16.
[511] T. 5 September 2005, p. 5.
[512] Statement in *Gatera* case, 30 April 1997 (Exh. D. 137 A, B and C, under seal). In that statement, Witness RJ did not state that Dr. Gatera also had beaten her child.
[513] Exh. D. 137 A, B and C (under seal).
[514] Exh. D. 139 A, B and C (under seal).
[515] Statement in *Twagirayezu* case, 6 May 1999, Exh. D. 138 A, B and C (under seal). André Rwamakuba is described as arriving aboard a vehicle, where Tutsi patients were then put on and taken away. The witness stated that he told them "to look at the world for the last time". In the *Kageruka* statement, RJ said that her elder sister who had given birth to a *boy* at the Hospital was put on the vehicle by Dr. Gatera and Kageruka; but in 1999, she stated that her elder sister and her *two twins whom she had just given birth*, were taken away by Dr. Gatera and Twagirayezu.
[516] Statement in *Misago* case, 21 April 1994, Exh. D. 145 A, B and C (under seal). Witness RJ stated that when she arrived at Butare University Hospital, they refused to keep her there. She then went to the Butare *préfecture*.
[517] See Exh. D. 140 (under seal). In court, Witness RJ testified that she fled to a nearby sorghum field and then made her way to the *préfecture* office; in the *African Rights* Report, she stated: "the soldiers *threw us out of the hospital* and *told us* to go to the office of the prefecture" (emphasis added).

193. These various inconsistencies regarding the same events are not reconcilable and cannot be reasonably explained by the time elapsed or translations discrepancies. The Chamber notes that the witness was particularly reluctant to discuss her prior statements. She eventually denied the content of each of the Rwandan statements and of the *African Rights* Report, and she claimed that her words were distorted.[518] She even alleged that her signature must have been forged.[519] In view of these circumstances, the Chamber finds that Witness RJ lacks credibility.

194. The Chamber finds that the Prosecution witnesses on the alleged crimes committed by the Accused at Butare University Hospital lack credibility and reliability. This conclusion is supported by the alibi evidence.

(4) Alibi

195. It was also the Defence case that the Accused would not have been able to spend time in Butare to the extent suggested by the Prosecution witnesses because between 18 and 25 April 1994, the period during which André Rwamakuba is alleged to have committed crimes at Butare University Hospital, he was first staying in Gitarama and then, after 20 April 1994, in Gisenyi.[520]

196. The parties agreed and the Chamber accepted that on 12 April 1994, the Accused moved to Gitarama with the convoy of the Interim Government.[521] Prosecution investigator Upendra Baghel also gave evidence that the distance between Gitarama and Butare is approximately 83 kilometres and between Gisenyi and Butare 247 kilometres.[522] The Defence accepted these figures[523] and provided evidence that the Accused was not present at the scene of the crimes.

197. According to Defence Witnesses 1/1, André Rwamakuba was in Gitarama from 12 to 20 April 1994. During that period, the witness saw him each morning, at lunch, and again each evening starting from around 5.00 p.m. Defence Witnesses 1/1 and 9/1 testified to Rwamakuba's presence in Gisenyi from 20 April to 2 May 1994. They each gave an account of his daily activities including attempts to get air tickets for his family to leave Rwanda. Specifically, from 20 to 24 April 1994, they stated that Rwamakuba spent his days and nights at home with his wife and his family. Witness 1/15 also testified that he met with Rwamakuba in Gisenyi between 20 and 22 April 1994 as he assisted the witness to get a new passport and a visa to Zaïre.[524] Copies of that document were tendered into evidence by the Defence.[525]

198. The testimonies of Witnesses 1/1 and 9/1 are corroborated to a certain extent by Witnesses 5/16, 5/7, 9/17, 5/13, 5/15 and 9/29 who testified that they never saw André Rwamakuba at Butare University Hospital during the genocide in April and May 1994. Witnesses 5/16, 5/7, and 5/15 who were employees of Butare University Hospital in April and May 1994, said that they never saw Rwamakuba there and that they never heard any such allegation against him. They testified that they would come to work at the Hospital in the morning and find that people had been abducted and were told that the killings were done by soldiers during the night. Witness 5/13 was at Butare University Hospital in the surgical ward with his relative throughout the time Rwamakuba was alleged to have been there and confirmed that he did not see him. The witness stated that he was familiar with all of

[518] See for e.g.: T. 5 September 2005, p. 28.
[519] T. 5 September 2005, pp. 31 and 35; T. 6 September 2005, pp. 2 and 11.
[520] See Defence Witnesses 1/1, 9/1 and 1/15. Defence Witness 3/A gave a similar evidence. However, due to the particularly close relationship between the Accused and this witness, and the age of the witness at the time of the event, the Chamber will set aside this evidence.
[521] Ibidem.
[522] Exh. P. 2.
[523] Defence Closing Brief, p. 283.
[524] T. 18 January 2006, pp. 10-13 and 16-17.
[525] Exh. D. 198.

the doctors at the Hospital because they greeted each other as neighbours. He also never heard that a Minister was at the Hospital taking part in the genocide, except a woman named Nyiramasuhuko.

199. The Prosecution did not call any direct witness to rebut these testimonies. Only the Expert witness testified that on 19 April 1994, several members of the Government, including André Rwamakuba, went to Butare to publicly remove the Tutsi *préfet* who had attempted to stop the killings against the Tutsi.[526] A transcript of Prime Minister Kambanda's speech made on that date mentioning the presence of the Minister of Primary and Secondary Education was also admitted into evidence.[527] The Prosecution did not attempt to present a comprehensive chronology of the Accused's presence in Butare, particularly concerning his attendance at the government meeting of 19 April 1994 and then between 21 and 25 April 1994, as asserted by the Prosecution witnesses.

200. The Chamber assessed with particular caution the evidence given by Defence Witnesses 1/1 and 9/1 due to their close relationship with André Rwamakuba, but it should be acknowledged that these witnesses testified with great detail and answered questions on cross-examination in a steady demeanour. In addition, none of Witnesses 5/16, 5/7, 9/17, 5/13, 5/15 and 9/29 knew Rwamakuba personally. They did not appear to have any special interest in defending the Accused and their cross-examination by the Prosecution did not raise any convincing element to show that they were unbelievable or unreliable. In the Chamber's view, their testimonies were consistent and objective enough to levy an additional doubt on the Prosecution's case.

Conclusion on the Alleged Participation of André Rwamakuba to Crimes at Butare University Hospital

201. As discussed above, first, the Prosecution did not adduce evidence on some allegations at Butare University Hospital and adduced evidence inconsistent with some of the allegations in the Indictment.

202. Then, the identity of the person who the Prosecution witnesses saw committing the alleged crimes at Butare University Hospital in April 1994 raised doubt. Apart from Witness XV who claimed to have personally known André Rwamakuba, the identification of the Accused was either based on untested hearsay evidence or on Witness XV's identification. Specifically, Witness XV pointed out Rwamakuba to Witnesses HF and RJ, who in turn identified him to Witness GIO. In that respect, it is remarkable that Witness XV was confusing Rwamakuba with a man named Rekeraho. This confusion was also entertained by Witness GIO. As developed in detail above, Witness XV's evidence contained many inconsistencies that cannot be reasonably explained or reconciled. His personal knowledge and identification of Rwamakuba is therefore unreliable.

203. In addition to these identification issues, the credibility and reliability of the Prosecution witnesses also raised serious concerns. In the Chamber's view, the major inconsistencies between the witnesses' testimonies and their prior statements and testimonies in other cases cannot be explained by the time elapsed, translation discrepancies, the manner in which the prior statements were taken or the impact of trauma inflicted upon the witnesses. They undermine the credibility and reliability of the Prosecution witnesses. In addition, the Prosecution did not satisfactorily rebut the Defence evidence that Rwamakuba did not participate in the killings at Butare University Hospital or that, during the considered period, he was staying in Gitarama and Gisenyi, and could not have been in Butare to the extent suggested by the Prosecution witnesses.

204. The absence of any reliable identification of André Rwamakuba at the time and location of the event, the lack of credibility and reliability of the Prosecution witnesses and the Defence alibi evidence, cumulatively contribute to levy reasonable doubt on the Prosecution's case.

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[526] T. 14 July 2005, p. 40.
[527] Exh. P. 64.

205. Consequently, the Chamber finds that the Prosecution failed to prove at all or beyond a reasonable doubt the allegations against the Accused at the Butare University Hospital, as set forth in paragraphs 15 to 16, 23 second and third limbs and 26 second to fourth limbs of the Indictment. The Chamber will now address the other allegations in the Indictment.

II.3. Other Allegations in the Indictment

206. In addition to the charges pertaining to events in Gikomero and Butare events, the Indictment contains allegations regarding André Rwamakuba's political status and related political activities. It alleges that as the Minister of Primary and Secondary Education of the Interim Government of 8 April 1994, he took part in the conception and the implementation of the Government's policies to exterminate the Tutsi throughout Rwanda.[528] It is said that between 27 and 29 April 1994, he was spokesman for the Interim Government.[529] On 17 May 1994, he was allegedly assigned to the Civil Defence Forces (CDF) program with other ministers.[530] This program would have been used to identify, search out and kill the Tutsi population.[531] The Accused is also described as a member of the MDR extremist wing, MDR "Hutu Power", which would have been created on or about 26 July 1993 and which would have had a specific ideology of exterminating the Tutsi.[532] He is alleged to have mobilized the physical and logistical resources of the MDR "Hutu Power", the other parties allied with the *Mouvement Révolutionnaire National pour le Développement* (MRND) and "Hutu Power", the Interim Government Ministries controlled by those parties and the military to execute a campaign sought to kill or destroy the Tutsi as a group.[533]

207. It is noted that no evidence was adduced concerning what the Accused could or should have done as Minister or what he failed to do. The Prosecution also did not bring any evidence to prove its contentions regarding the structures of the MDR "Hutu Power", André Rwamakuba's alleged authority over local administrative officials, his alleged mobilization of the physical and logistical resources of the other parties that were allied with MRND and "Hutu Power", the Interim Government ministries controlled by these parties and the military to execute the campaign of destruction of the Tutsi throughout Rwanda. No direct evidence was adduced concerning the responsibilities of Rwamakuba with regard to the program of civilian self defence or how he might have used it to kill Tutsi. There was also no evidence that on or about 28 April 1994 he announced on Radio Rwanda that "security had been restored in Butare because the Inyenzi had been suppressed".

208. As discussed under Chapter I, André Rwamakuba was not alleged to be criminally responsible as a member of the Interim Government for failing to denounce the crimes committed against the Tutsi, for not dissociating himself from the Government or for failing to discharge his duties as Minister. In view of the charges against the Accused set forth in the Indictment and according to the clear and consistent notice given by the Prosecution, the above-mentioned allegations pertaining to Rwamakuba's political role and activities are considered as context or background from which inferences concerning his intent, disposition or other required elements of the crimes could be drawn.

209. Since the Prosecution failed to prove beyond reasonable doubt the charges against the Accused pertaining to Gikomero *commune* and Butare University Hospital as detailed above, the Chamber need not to discuss the allegations and evidence concerning his criminal intent or disposition in relation to these alleged incidents.

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[528] Indictment, paras. 7 and 19.
[529] Indictment, paras. 1 and 14.
[530] Indictment, para. 9.
[531] Indictment, para. 8.
[532] Indictment, para. 3. It is specifically said that André Rwamakuba was a member of the Executive Committee of MDR "Power" Political Party and was a member of that party's *comité préfectoral* in Kigali-Rural *préfecture* (see Indictment, para. 2).
[533] Indictment, para. 6.

Conclusion

210. That genocide against Tutsi and widespread or systematic attacks against a civilian population based on Tutsi ethnic identification occurred in Rwanda between April and July 1994 are notorious facts not subject to reasonable dispute,[534] and nor were they disputed by the Defence in the present case. This Tribunal was established to contribute to the process of reconciliation and to the restoration of peace and security in Rwanda.[535] The Tribunal's contribution in this area is by conducting impartial criminal proceedings where the burden of proving the guilt of an individual accused is on the Prosecution.

211. In the present case, André Rwamakuba was charged with specific acts committed in Gikomero *commune* and at Butare University Hospital between 6 and 30 April 1994. No charges were brought on the basis of his acts, omissions or duties as Minister of the Interim Government in 1994.

212. The Chamber heard 49 Prosecution and Defence witnesses, 94 Prosecution and 218 Defence exhibits were admitted into evidence over 78 trial days. The Prosecution case was largely circumstantial, and much evidence adduced was of hearsay character. Five of the 18 Prosecution witnesses claimed to have direct knowledge of André Rwamakuba. Two witnesses also gave uncorroborated evidence to support specific allegations in the Indictment. The Defence witnesses were mainly issued from different ranges of the Rwandan society, including victims of the genocide, they had both direct and indirect knowledge of Rwamakuba, and many of them claimed to have been eyewitnesses to events alleged in the Indictment.

213. The parties agreed that that Tutsi people were attacked and massacred in the Gikomero *commune* in April 1994, including at the Ndatewma Trading Centre, the Gikomero Protestant School, the Gishaka Parish and the Kayanga Health Centre, and at Butare University Hospital. Both the Prosecution and the Defence adduced substantial evidence on these massacres. The Defence, however, denied the Accused's involvement in any of them.

214. After assessing the evidence as a whole, the Chamber found that all of the Prosecution witnesses not to be credible or reliable. Their testimonies were either inconsistent with the Indictment or contained other discrepancies which could not be satisfactorily explained. The absence of any credible or reliable identification of André Rwamakuba at the time and place of the alleged crimes, the lack of credibility or reliability of the Prosecution witnesses, the participation of the Accused in other activities during periods alleged in the Indictment and the Defence alibi evidence, cumulatively raise a reasonable doubt regarding the Prosecution's case.

215. Consequently, in the Chamber's view, the Prosecution has failed to prove beyond reasonable doubt that André Rwamakuba participated in sensitization campaigns in Gikomero *commune* from June 1993 up to and including June 1994; that between 10 and 11 April 1994, Rwamakuba delivered machetes to Muhire's house in Ndatemwa Trading Centre; that around the same period, he delivered machetes to Kamanzi's house in Kayanga Centre; that between 10 and 20 April 1994, at the Gikomero *secteur* office, he ordered the killings of three Tutsi people and encouraged the beginning of the massacres against Tutsi in the commune; and that between 13 and 15 April 1994, he participated in the massacre at Kayanga Health Centre. The Prosecution also failed to prove beyond reasonable doubt that the Accused committed criminal acts against Tutsi people between 18 and 25 April 1994 at Butare University Hospital.

216. Before concluding on the verdict, the Chamber will address a particular issue concerning the violation of the rights of the Accused.

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[534] *Karemera et al.*, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC).
[535] UN S.C. Res. 955 (1994), 8 November 1994.

Chapter III – Rights of the Accused

217. In a Decision of 12 December 2000,[536] Trial Chamber II, composed of Judges Laïty Kama, presiding, William H. Sekule and Mehmet Güney, considered that the Tribunal had no jurisdiction over André Rwamakuba's conditions of detention by the Namibian authorities between 2 August 1995 and 7 February 1996 since he had not been arrested at the Tribunal's request. That same Chamber found that there was a violation of Rwamakuba's right to legal assistance during the first months of his detention at the UNDF, from 22 October 1998 until 10 March 1999, and that the delay in assigning him duty Counsel further caused a delay in his initial appearance.[537]

218. The Appeals Chamber held that "any violation of the accused's rights entails the provision of an effective remedy pursuant to Article 2 (3) (a) of the [International Covenant on Civil and Political Rights]."[538] The Appeals Chamber has previously ordered or decided the reduction of an accused's sentence where he was found guilty at trial.[539] In the *Barayagwiza* and *Semanza* cases, it also decided that "if the [accused] [was] not found guilty, he shall receive financial compensation."[540]

219. In the present case, the Appeals Chamber moreover considered that "it [was] open to [Rwamakuba] to invoke the issue of the alleged violation of his fundamental human rights by the Tribunal in order to seek reparation as the case may be, at the appropriate time".[541]

220. Since a violation of the Accused's right to legal assistance during the first months of his detention was found, André Rwamakuba is at liberty to file an application seeking an appropriate remedy after the time-limit to file an appeal against this Judgement has elapsed. The Prosecution and the Registry are also at liberty to file any related submissions.

Chapter V - Verdict

I. For the foregoing reasons, having considered all the evidence and the arguments of the parties, the Chamber FINDS André Rwamakuba, unanimously:

Count 1: Not Guilty of Genocide

Count 2: Not Guilty of Complicity in Genocide

Count 3: Not Guilty of Crimes against Humanity (Extermination)

Count 4: Not Guilty of Crimes against Humanity (Murder)

Accordingly, André Rwamakuba is ACQUITTED on all counts in the Indictment.

II. Pursuant to Rule 99 (A) of the Rules, the Chamber ORDERS the immediate release of André Rwamakuba from the Tribunal's Detention Facilities and REQUESTS the Registrar to make all necessary arrangements in the implementation of this decision. This order is without prejudice to any further order that may be made by the Chamber pursuant to Rule 99 (B) of the Rules.

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[536] *Rwamakuba*, Decision on the Defence Motion concerning the Illegal Arrest and Illegal Detention of the Accused (TC).
[537] Ibidem.
[538] See: *Barayagwiza*, Decision (Prosecutor's Request for Review or Reconsideration) (AC), paras. 74-75; *Kajelijeli* Appeal Judgement, paras. 255 and 322; *Semanza,* Decision of 31 May 2000 (AC), para. 125: "The Appeals Chamber nevertheless finds that any violation, even if it entails only a relative degree of prejudice, requires a proportionate remedy."
[539] Ibidem.
[540] *Barayagwiza*, Decision (Prosecutor's Request for Review or Reconsideration) (AC), para. 75; *Semanza,* Decision of 31 May 2000 (AC), disposition.
[541] *Rwamakuba*, Decision (Appeal Against Dismissal of Motion Concerning Illegal Arrest and Detention) (AC).

III. The Defence is at liberty to file any application seeking appropriate remedy to the violation of his right to legal assistance between 22 October 1998 and 10 March 1999 no later than 23 October 2006; the Prosecution and the Registry to file their respective submissions no later than 30 October 2006; and the Defence to file any reply thereto no later than 6 November 2006. This order is subject to any appeal to be filed within a 30 days time-limit as set out in Rule 108 of the Rules.

Arusha, delivered on 20 September 2006, done in English.

[Signed] : Dennis C. M. Byron; Karin Hökborg; Gberdao Gustave Kam

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Annex II – Chronology of the case

The main factual elements and decisions pertaining to the case are presented in chronological order under the present section.

- 1995

2 August 1995: André Rwamakuba is arrested at the initiative of the Namibian authorities.

- 1996

8 February 1996: André Rwamakuba is released by the Namibian authorities following the ICTR Prosecutor's notification that he did not possess evidence to request Rwamakuba's further detention.

- 1998

29 August 1998: Prosecutor files an Indictment against Augustin Bizimana, Félicien Kabuga, Juvénal Kajelijeli, Edouard Karemera, Mathieu Ngirumpaste, Callixte Nzabomimana, Joseph Nzirorera and André Rwamakuba.

29 August 1998: Judge Pillay confirms the Indictment and orders non-disclosure of the Indictment.

8 October 1998: Judge Pillay issued a warrant of arrest against André Rwamakuba and ordered for his transfer and detention.

21 October 1998: André Rwamakuba is arrested by the Namibian authorities in accordance with the Tribunal's warrant of arrest and transferred to the Tribunal.

- 1999

7 April 1999: Initial appearance of André Rwamakuba.

27 September 1999: Rescission of the Order for non disclosure of 29 August 1998.

- 2000

6 July 2000: Trial Chamber II grants the Defence motion for severance and separate trial of Juvénal Kajelijeli and orders the Prosecutor to file a separate indictment pertaining only to that accused.

12 December 2000: Trial Chamber II denies the Defence Motion seeking severance of André Rwamakuba from the Indictment.

22 September 2000: Trial Chamber II grants the Prosecutor's Motion for Protective Measures for Witnesses.

- 2001

25 April 2001: Trial Chamber II finds defects in the form of the Indictment and orders its amendment.

21 November 2001: Prosecutor files the Amended Indictment against Augustin Bizimana, Félicien Kabuga, Edouard Karemera, Mathieu Ngirumpaste, Callixte Nzabomimana, Joseph Nzirorera and André Rwamakuba.

- 2003

1 September 2003: Trial Chamber III grants the severance of Félicien Kabuga.

8 October 2003: Trial Chamber III grants the severance of Augustin Bizimana and Callixte Nzabonimana and grants in part the amendment of the Indictment.

27 November 2003: The trial starts before Trial Chamber III composed of Judges Andresia Vaz, presiding, Flavia Lattanzi and Florence Rita Arrey.

11 December 2003: End of the first trial session.

- 2004

13 February 2004: Trial Chamber III grants in part the Prosecution request for leave to amend the Indictment.

18 February 2004: Prosecutor files an Amended indictment against Edouard Karemera, Mathieu Ngirumpaste, Joseph Nzirorera and André Rwamakuba.

23 February 2004: Further Initial Appearance of Edouard Karemera, Mathieu Ngirumpaste, Joseph Nzirorera and André Rwamakuba.

14 May 2004: Judge Andresia Vaz withdraws from the case.

24 May 2004: The remaining Judges order the continuation of the proceedings with a substitute Judge.

21 June 2004: Appeals Chamber allows Joseph Nzirorera's appeal on the continuation of the proceedings, and remands the matter to the remaining Judges for reconsideration.

16 July 2004: The remaining Judges orders the continuation of the proceedings with a substitute Judge.

28 September 2004: Appeals Chamber quashes the Trial Chamber's Decision to continue the proceedings with a substitute Judge.

22 October 2004: Reasons for Appeals Chamber Decision of 28 September 2004 and Declaration of Judge Shahabudeen.

23 October 2004: Declaration of Judge Schomburg on the Appeals Chamber Decision of 28 September 2004.

- 2005

14 February 2005: Trial Chamber III, composed of Judges Dennis Byron, Presiding, Emile Francis Short and Gberdao Gustave Kam, grants severance of André Rwamakuba and leave to file an Amended Indictment.

15 February 2005: *Corrigendum* to the Decision on Severance.

23 February 2005: Prosecutor files the Amended Indictment against André Rwamakuba.

3 March 2005: Order directing the Prosecution to provide additional information on its Motion to renew and extend transfer of a Detained Prosecution Witness.

8 March 2005: Order to re-file the Amended Indictment.

21 March 2005: Further Initial Appearance of André Rwamakuba: a not guilty plea is entered for all charges.

24 March 2005: Status Conference and Scheduling Order (commencement of the Prosecution case).

6 May 2005: *Proprio Motu* Order requesting the Prosecution to file Additional Information for its Motion for Temporary Transfer of Witnesses.

23 May 2005: Decision granting the transfer of Witness GIQ.

26 May 2005: Decision on Defects in the Form of the Indictment and Decision granting extension of time to file any statement of admitted or contested facts and law.

27 May 2005: Judges Dennis C. M. Byron, Presiding, Karin Hökborg and Gberdao Gustave Kam are appointed to compose the Trial Chamber for the trial.

1 June 2005: Decision ordering transfer of detained Witness GIN under Rule 90 *bis* of the Rules. Prosecutor files the Amended Indictment in compliance with the Chamber's Decision of 26 May 2005.

3 June 2005: Decision denying Defence Motion for a stay of proceedings.

6 June 2005: Pre-Trial Conference.

8 June 2005: Prosecutor files a new Amended version of the Indictment in accordance with the Chamber oral Order of 6 June 2005.

9 June 2005: (TD1) Prosecution case starts with the Prosecutor's Opening Statements.

From 10 June to 15 July 2005: (TD 2 to 23) 14 witnesses testified, including Prosecution Investigator Upendra Baghel and Expert Witness Alison Des Forges.

10 June 2005: Prosecutor files a new Amended version of the Indictment in accordance with the Chamber oral Order of 9 June 2005.

14 June 2005: Decision on Prosecution Motion for Notice of Alibi and Reciprocal Inspection.

14 July 2005: Decision denying Defence Motion seeking directives from the Chamber to get signatures on will-say statements.

From 22 August to 6 September 2005: (TD 25 to 36) Continuation of the Prosecution's case: 5 witnesses testified, including continuation of the testimony of Expert Witness Alison Des Forges (teleconference).

7 September 2005: (TD 37) Hearing on the issue of the willingness of two Prosecution witnesses to testify in the case.

9 September 2005: (TD 38) Hearing on the issue of the willingness of two Prosecution witnesses to testify in the case.

13 September 2005: (TD 39) Hearing on the issue of the willingness of two Prosecution witnesses to testify in the case and the Chamber oral Decision denying the Prosecution's request for adjournment. End of the Prosecution case.

21 September 2005: Decision granting the Defence Motion for Protective Measures.

29 September 2005: Decision denying the Prosecution motion for Reconsideration or, in the alternative, Certification to the Appeal Chamber's Decision Denying Request for Adjournment.

4 October 2005: Decision granting the Prosecution motion for disclosure of the Defence Witness Statements.

7 October 2005: Status Conference.

10 October 2005: Scheduling Order (commencement of the Defence Case).

28 October 2005: Decision denying Defence motion for Judgment of acquittal.

1 November 2005: Pre-Defence Conference.

2 November 2005: Decision granting in part the Prosecution motion to modify the Decision on Protective measures for Defence witnesses.

From 7 November to 16 December 2005: (TD 40 to 64) Defence case starts with the Defence Opening Statements: 19 witnesses testified.

29 November 2005: (TD 55) Decision granting the Defence motion on protective measures regarding one Defence witness.

8 December 2005: Decision granting the Defence motion for the testimony of Defence Witness 1/15 to be taken by video-link.

16 December 2005: Decision requesting the Registry to prepare a subpoena addressed to Witnesses 5/16, 5/7, 5/15 and 4/4, ordering their appearance before the Chamber for the next trial scheduled in January 2006; Scheduling Order (Video-Link); Decision granting a site visit to Rwanda.

- 2006

9 January 2006: Decision ordering the transfer of detained Witnesses 7/3, 4/16 and 9/22 from Rwanda.

13-16 January 2006: Site Visit in Rwanda.

From 17 January to 9 February 2006: (TD 65-79) Continuation of the Defence's case: 12 witnesses testified.

20 January 2006: Decision requesting the Registry to enquire on the availability of Witnesses 9/22 and 4/18 to testify by video-transmission and report back; and dismissing the Defence motion to subpoena Witnesses 9/21 and 4/7.

17 February 2006: Scheduling Order (closing briefs and arguments).

5 April (but filed on 10 April) 2006: Decision denying the Defence request to take judicial notice, and ordering the admission into evidence of three documents.

21 April 2006: Closing Oral Arguments.

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Opinion individuelle du Juge Lattanzi

(Original : non spécifié)

1. Je regrette de ne pouvoir partager certains des arguments développés par la majorité des juges de la Chambre dans les paragraphes 21 à 35 du Jugement, à propos des différentes modalités par lesquelles les omissions peuvent engager la responsabilité de leurs auteurs selon les Statuts des deux Tribunaux pénaux internationaux. Je me limiterai ici à souligner seulement quelques arguments plus significatifs que je ne peux partager.

2. Les omissions engagent la responsabilité de leur auteur avant tout conformément aux articles 6 (3), 7 (3) desdits Statuts, où elles sont explicitement considérées pour ce qui concerne la responsabilité du supérieur au regard des agissements de leurs subordonnés. D'une telle forme de responsabilité forme de responsabilité n'est pas question dans la présente Affaire, comme la Chambre bien le souligne[1].

3. Comme il résulte clairement de la jurisprudence des Chambres de première instance[2] et d'appel[3], la responsabilité par omission peut être envisagée aussi selon les articles 6 (1), 7 (1), en particulier

[1] *Mpambara* Judgment (TC) 12 September 2006, p. 2, footnote 4.

[2] V. *Bagilishema*, TC Judgement, 7 June 2001, para 675, *Rutaganira* Jugement 1ère instance, 14 Mars 2005, p. 17, para. 68. La Chambre de 1ère instance dans *Blaskic* a affirmé que l'*actus reus* de l'aide ou encouragement peut bien être réalisé par une 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 » (citée dans *Blaskic* judgment (AC), 29 July 2004, para. 47. V. aussi *Kvocka* TC Judgment, 2 November 2001, para. 251. Une récente, très intéressante décision sur l'omission comme modalité de commission d'un crime selon le Statut du TPIY, est celle de la Chambre de 1ère instance dans *Blagojevic*, où on donne une illustration approfondie de la loi applicable à cet aspect : *Blagojevic* Judgment TC 17 January 2005, p. 261, para. 726.

[3] La jurisprudence de la Chambre d'appel soit confirme essentiellement l'approche des jugements rendus par les Chambres de première instance, admettant la responsabilité par omission dans le cadre de l'aide et de l'encouragement prévus par l'article 6 (1), 7 (1) des deux Statuts, soit envisage la responsabilité par omission directement en appel. C'est ainsi que la Chambre d'appel dans *Blaskic* a considéré spécifiquement l'affirmation de la Chambre de 1ère instance sur l'aide et l'encouragement par omission en laissant ouvert seulement l'aspect de la source de l'obligation (Judgement, 29 July 2004, para 47). Dans *Ntagerura* aussi on a eu l'occasion, en appel même, d'occuper de la responsabilité selon l'art. 6 (1), mais on s'est limité à

comme une forme d'assistance ou d'encouragement (voire d'incitation[4]) à la commission du crime par l'auteur principal. Les omissions peuvent également engager la responsabilité d'un individu dans le cadre d'une entreprise criminelle conjointe (ECC)[5]. Dans ce cas, l'individu serait responsable d'une commission[6].

Ce sont en l'espèce les deux formes de responsabilité par omission que plaide le Procureur.

4. Je ne vois pas que "liability for an omission may arise in a third, fundamentally different context: where the accused is charged with a duty to prevent or punish others from committing a crime", ni que "the culpability arises not by participating in the commission of a crime, but by allowing another person to commit a crime which the Accused has a duty to prevent or punish"[7] (sauf le contexte de la responsabilité du supérieur, à laquelle d'ailleurs la majorité de la Chambre n'entend pas se référer[8]).

5. A mon avis, l'expression *Failure of Duty to Prevent or Punish*, ne se référant pas à la disposition de l'art. 6 (3), ne vise pas un contexte différent par rapport aux contextes relatifs aux autres omissions plaidées, mais décrit des infractions particulières, toute omission coupable n'étant qu'un manquement au devoir d'agir. En effet, si les actions comportant une responsabilité pénale consistent dans la violation d'une règle juridique portant interdiction de faire, les omissions sources de responsabilité consistent toujours dans la violation d'une règle juridique portant obligation d'agir[9].

6. S'il est vrai que l'expression en question présente, surtout en ce qui concerne le manquement au devoir de punir**,** une certaine ambiguïté par rapport à la responsabilité selon l'Article 6 (3), par la charge plaidée on envisage la punition manquée des auteurs des crimes comme une facilitation, un encouragement à la commission de crimes ultérieurs pour lesquelles la responsabilité de l'Accusé

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faire état de l'accord des parties sur le fait « qu'un accusé /peut/ être tenu pénalement responsable d'une omission sur la base de l'art. 6 (1) du Statut » (par. 334). Dans *Blaskic*, encore, la Chambre d'appel a considéré l'accusé responsable de traitements inhumains pour des manquements à une obligation d'agir, excluant sa responsabilité pour des actes positifs se rapportant au même chef et qui avait été retenue par la Chambre de première instance. Pour économie du discours je ne me réfère pas à d'autres décisions et jugements, en 1ère instance et appel, où les omissions ont été bien considérées comme forme de responsabilité selon les articles 6 (1) et 7 (1) des Statuts. Je ne partage donc pas l'avis de la majorité de la Chambre qu'en plus des omissions en présence de l'accusé ou en stricte connexion avec des actes positifs, "*other examples of aiding and abetting through failure to act are not to be easily found in the annals of the* ad hoc *Tribunals*" (*Mpambara* Jugdment, para. 23).

[4] "Instigation can take many different forms; it can be expressed or implied, and entail both acts and omissions". Blaskic Judgement TC 3 March 2000, para 270.

[5] La Chambre d'appel dans l'affaire *Kvocka* a approfondi les distinctions à faire par rapport à la *mens rea* et à l'effet substantiel entre une omission comme simple forme d'aide et encouragement et une omission dans le contexte d'une ECC (Judgement AC, 28 February 2005, para. 90).

[6] Je ne vois pas que "*it is hard to imagine that total passivity could demonstrate the requisite intent for co-perpetratorship*" (pararagraph 24 du Jugement) : cela dépend seulement des circonstances concrètes. La « passivité » coupable représente l'*actus reus* (violation d'un devoir d'agir), la *mens rea* est un autre élément à prouver : et on peut bien partager la *mens rea* des autres participants à la ECC même en omettant simplement de remplir un devoir d'agir.

[7] *Mpambara* Judgment, TC 12 September 2006, p.13, para. 25.

[8] V. à ce propos note 1 ci-dessus. Mais le langage utilisé dans le passage cité semble justement évoquer la responsabilité du supérieur.

[9] Sur la source de l'obligation d'agir la jurisprudence des deux Tribunaux se divise. Il y a des Chambres qui, suivant la décision d'Appel *Tadic* dans laquelle pour la première fois on s'est occupée de cette question, voient cette source seulement dans le droit pénal, tandis que d'autres Chambres prennent en considération une « obligation légale d'agir quelconque ». La dernière approche, en tout cas suivie le plus souvent. Malheureusement la question n'a pas été abordée sinon indirectement par la Chambre d'Appel dans l'Affaire *Ntagerura*. Ici, se trouvant confrontée à une décision de 1ère instance qui reprenait sur le point l'approche qu'on trouve dans Tadic sur la source pénale de l'obligation d'agir, la Chambre d'appel a décidé de ne pas approfondir cet aspect et de se limiter à considérer la question de la capacité d'agir, qui avait été à la base de l'opinion individuelle d'un Juge de 1ère instance. La Chambre a donc conclu dans le sens que « 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 », en ajoutant que « 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 ». A mon avis, le droit pénal, interne ou international, peut prévoir des conséquences en termes de responsabilité individuelle pour violation d'obligations prévues par d'autres branches du droit, comme c'est le cas pour les obligations posées à la charge des agents d'Etats.

serait encore engagée. Et cela pourrait bien être le cas surtout dans une situation, comme dans la présente affaire, d'attaques continues qui ont eu une stricte connexion tant spatiale que temporelle et même personnelle entre eux (la même Commune, une période de temps très court, parfois les mêmes attaquants). On se trouverait donc toujours dans le contexte de l'aide et encouragement selon l'art. 6 (1)[10].

7. Je regrette encore de ne pas pouvoir partager l'avis de la majorité de la Chambre que parmi les omissions plaidées par le Procureur dans la présente affaire comme forme de participation de l'Accusé à une ECC de la première catégorie ou comme aide ou encouragement donnés aux auteurs des crimes et que la Chambre considère dans ses conclusions, on ne pourrait pas considérer[11] *Failure of Duty to Prevent or Punish,* parce que la défense n'aurait pas été adéquatement informée à temps de cette « particulière omission »[12].

8. A mon avis, si la défense n'a pas pu exercer ses droits pour ne pas avoir reçu une information adéquate du prétendu manquement par l'Accusé au *devoir d'empêcher les crimes et d'en punir les auteurs*, on doit retenir qu'elle n'a même pas reçu une telle information en ce qui concerne les autres omissions plaidées, pour lesquelles la majorité de la Chambre ne relève aucun défaut de l'Acte d'accusation. Mais, pourtant, toute omission doit être plaidée selon les éléments qui la caractérisent, y compris l'obligation dont la violation comporterait une omission coupable selon le Statut.

9. Si je partage pour l'essentiel, la reconstruction par la majorité de la Chambre des défauts que l'Acte d'accusation contre l'accusé Mpambara présentait et auxquels les successives écritures n'avaient pas réussi à remédier efficacement (mais cela par rapport à toute omission plaidée et non seulement au manquement au devoir de prévenir et punir), je suis toutefois de l'avis que l'Accusé n'a subit aucun préjudice à son droit de se défendre.

10. En effet, selon l'opinion de la Chambre d'appel, l'obligation qui est faite au Procureur d'informer l'accusé clairement et en détail des charges alléguées à son encontre, doit être considérée non de façon isolée, mais en fonction du droit de l'accusé à assurer sa défense. Dès lors, il est nécessaire d'évaluer si le Procureur en a donné une information adéquate par rapport à la compréhension qu'en a eu la Défense. En effet, s'il est vrai qu'« 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 », il n'en est pas moins vrai que la Chambre doit apprécier concrètement si l'accusé était ou non « *in a reasonable position to understand the charges against him or her* ». Encore, selon la Chambre d'appel, si la Chambre de 1ère instance « juge l'acte d'accusation

[10] En principe, le manquement à un devoir d'agir comme fondement de la responsabilité pénale selon les articles 6 (1) et 7 (1) des deux Statuts s'exprime par une conduite précédente à la commission du crime et non pas par une conduite successive, telle que le manquement au devoir de punir. En effet, cette dernière infraction acquiert une considération autonome exclusivement dans le contexte de la responsabilité du supérieur selon les articles 6 (3) et 7 (3). Cela n'exclut toutefois pas la possibilité de considérer le manquement par un accusé au devoir de punir l'auteur d'un crime, selon les circonstances du cas, sous la responsabilité pour aide ou encouragement. Le manquement à ce devoir peut bien représenter un manquement au devoir d'empêcher des crimes ultérieurs et donc à en aider ou encourager la commission. C'est ce qu'aussi la Chambre 1ère instance dans l'Affaire *Blaskic* envisage, implicitement confirmée dans son opinion par la Chambre d'appel : « the *failure to punish past crimes, which entails the commander's responsibility under Article 7 (3), may, pursuant to Article 7 (1) and subject to the fulfilment of the respective* mens rea *and* actus reus *requirements, also be the basis for his liability for either aiding and abetting or instigating the commission of future crimes*" (Judgement TC, 29 July 2004, para. 337).

[11] *Mpambara* Judgment (TC) 12 septembre 2006, p 13, para. 35: "*The Chamber will, however, consider the evidence of omissions adduced at trial to the extent that they may be probative of the accused's participation in a joint criminal* enterprise or having aided and abetted another in the commission of a crime". Mais, on verra qu'on a fini par considérer aussi la charge contestée par la majorité de la Chambre.

[12] "There is no mention of any duty to prevent or punish crimes. It bears repeating that the prosecution is permitted to bring potentially incompatible charges against the Accused. The defect here is not the incompatibility, but the failure to distinctly explain that the omissions alleged against the Accused constituted a breach of his duty to prevent or punish the crimes of others" (Mpambara Judgement (TC), paragraph 34).

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 »[13].

11. Une telle vérification doit donc se faire à la lumière des droits que la défense a concrètement exercé pendant le procès. Si, pour une raison ou une autre, ces droits ont été effectivement exercés malgré la faiblesse des informations fournies par le Procureur quant aux charges retenues contre l'accusé, il serait même contraire à l'intérêt de la justice que la Chambre décide de ne pas considérer ces charges. Ces charges doivent naturellement être considérées dans les limites de l'exercice concret des droits de la défense par rapport à chaque événement et à chaque fait matériel allégués dans l'Acte.

12. En l'espèce, à la lumière des preuves présentées par la Défense tout le long du procès (y compris le témoignage de l'accusé), je suis de l'avis qu'elle a effectivement exercé ses droits par rapport à toutes les omissions alléguées par le Procureur, y compris le « manquement de l'accusé au devoir tant d'empêcher que de punir » invoqué dans le cadre de la responsabilité pour participation à une ECC ou pour aide ou encouragement prévu à l'article 6 (1) du Statut[14].

13. D'ailleurs, dans le but de vérifier si l'accusé pouvait en être retenu responsable, la Chambre a pris soin de considérer toutes les omissions alléguées au cours du procès, y compris celle qui est contestée par la majorité de la Chambre pour manque d'information adéquate (*failure of duty to prevent and punish*).

14. La Chambre a donc conclu, pour chaque attaque et charge alléguées à l'encontre de l'accusé, que les omissions n'étaient pas prouvées au-delà de tout doute raisonnable, ou qu'elles ne démontraient ni la participation à une ECC ni une assistance ou un encouragement aux attaques, raison du fait que certains éléments de ces conduites n'avaient pas été prouvés au-delà de tout doute raisonnable. Et je partage entièrement ces conclusions.

[13] Jugement *Ntagerura* (CA) 7 juillet 2006, para. 28.

[14] La Chambre a entendu les témoins de la défense évoquer les appels par l'accusé à la pacification et les assemblées convoquées dans ce but, les secours apportés par l'accusé avec le Père Santos aux réfugiés. Ils ont parlé aussi des enquêtes menées par l'accusé pour trouver les auteurs des crimes et du fait qu'il n'ait pas été à même de les porter à bien pour manque de moyens. Tous les témoins de la défense ont parlé de la continue et inutile demande d'aide par l'accusé auprès du sous-préfet et donc de l'indisponibilité de moyens suffisants pour pouvoir contraster les attaques et en punir les auteurs sur un territoire communal très étendu, dont la sécurité était assurée seulement par 6/7 policiers. L'accusé même a déclaré que si ces policiers avaient été utilisés pour arrêter les criminels et garder leur prison au lieu d'être affectés par lui à la sécurité des réfugiés, encore si faible, tous les réfugiés auraient été tués, tandis qu'il avait réussi à épargner beaucoup de vies. On lui a entendu dire qu'arrêter les attaquants aurait représenté un « suicide ». Ce sont là seulement certains des arguments portés par la défense pour contester les charges. Je renvoie à ce propos à ces témoignages ainsi que rapportés dans le Jugement.

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Decision Granting Extension of Time to File Submissions (Rule 73 of the Rules of Procedure and Evidence) 31 October 2006 (ICTR-98-44C-T)

(Original : English)

Trial Chamber III

Judges : Dennis C.M. Byron, Presiding Judge

André Rwamakuba – Extension of time – Absence of delay in the proceedings, Interests of justice – Motion granted

1. On 20 September 2006, the Chamber rendered its Judgement in the present case. At Order III of the Judgement, the Chamber held that "the Defence [was] at liberty to file any application seeking appropriate remedy to the violation of his right to legal assistance between 22 October 1998 and 10 March 1999 no later than 23 October 2006; the Prosecution and the Registry to file their respective submissions no later than 30 October 2006; and the Defence to file any reply thereto no later than 6 November 2006."

2. On 25 October 2006, the Defence filed its submissions. The Registrar is now seeking an extension of time of two days to file its submissions.[1]

3. The Chamber is of the view that the extension of time sought will not delay any proceedings and is in the interests of justice.

THE CHAMBER HEREBY

I. GRANTS the Motion and;

II. AUTHORIZES the Registrar to file its submissions by 2 November 2006 and the Defence to file its reply thereto, if any, no later than 9 November 2006.

Arusha, 31 October 2006, done in English.

[Signed] : Dennis C.M. Byron

[1] Request for Extension of Time filed on 30 October 2006.

Le Procureur c. André Rwamakuba

Affaire N° ICTR-98-44C

Fiche technique

• Nom: RWAMAKUBA

• Prénom: André

• Date de naissance: 1950

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: Ministre de l'éducation

• Date de confirmation de l'acte d'accusation: 6 avril 1999

• Chefs d'accusation: génocide, entente en vue de commettre le génocide, complicité dans le génocide, incitation directe et publique à commettre le génocide, crime contre l'humanité et violations graves de l'article 3 commun aux conventions de Genève de 1949

• Date et lieu de l'arrestation : 21 octobre 1998, en Namibie

• Date du transfert: 23 octobre 1998

• Date de la comparution initiale: 26 octobre 2001

• Date de disjonction de l'acte d'accusation: 14 février 2005 (affaire N° ICTR-98-44C), (précédemment joint avec Karemera Edouard, Ngirumpatse Mathieu et Nzirorera Joseph, ICTR-98-44)

• Date du début du procès: 9 juin 2005

• Date et contenu du prononcé de la peine: 20 septembre 2006, acquittement

The Prosecutor v. Athanase SEROMBA

Case N° ICTR-2001-66

Case History

• Name: SEROMBA

• First Name: Athanase

• Date of Birth: unknown

• Sex: male

• Nationality: Rwandan

• Former Official Function: Catholic Priest, Nyange Parish, Kivumu *commune*

• Date of Indictment's Confirmation: 4 July 2001

• Counts: genocide, or in the alternative, complicity in genocide; conspiracy to commit genocide; crimes against humanity (extermination)

• Date and Place of Arrest: 6 February 2002, in Arusha, Tanzania

• Date of Transfer: 6 February 2002

• Date of Initial Appearance: 8 February 2002

• Date Trial began: 20 September 2004

• Date and content of the Sentence: 13 December 2006, sentenced to 15 years imprisonment

• Appeal: 12 March 2008, sentenced to life imprisonment

Decision on Prosecutor's Motion for Site Visits in Rwanda
Rule 73 of the Rules of Procedure and Evidence
29 March 2006 (ICTR-2001-66-T)

(Original : French)

Trial Chamber III

Judges : Andrésia Vaz, Presiding Judge; Karin Hökborg; Gberdao Gustave Kam

Athanase Seromba – Site Visits, Rwanda – Exercise of the functions away from the seat of the Tribunal, Authorization by the President, Interests of justice – Relevant sites, Site visits instrumental in the discovery of the truth – Limited duration – Absence of excessive costs for the Tribunal – Interests of justice – Motion granted

International Instrument Cited :

Rules of Procedure and Evidence, Rules 4 and 73

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Ignace Bagilishema, Judgement, 7 June 2001 (ICTR-95-1A) ; 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. Aloys Simba, Decision on Defence Renewed Request for Site Visits in Rwanda, 4 May 2005 (ICTR-2001-76) ; Trial Chamber, The Prosecutor v. André Rwamakuba, Decision on Defense Motion for a View Locus in Quo, 16 December 2005 (ICTR-98-44C)

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

SITTING as Trial Chamber III, composed of Judge Andrésia Vaz, presiding, Judges Karin Hökborg and Gberdao Gustave Kam (the "Chamber");

BEING SEIZED of The Prosecutor's Oral Motion for Site Visits in Rwanda, moved at the hearing of 23 March 2006;

CONSIDERING the positive response from the Defence;

CONSIDERING the Oral Decision of 24 March 2006;

CONSIDERING the lists of sites to be visited in Rwanda submitted by the parties;

HEREBY DECIDES, pursuant to Rule 73 of the Rules of Procedure and Evidence (the "Rules").

Introduction

1. The Accused, Athanase Seromba, is under trial for genocide, or alternatively for complicity in genocide, conspiracy to commit genocide and extermination as a crime against humanity, which

crimes are stipulated in Articles 2 and 3 of the Statute of the Tribunal. These charges are in connection with events that occurred in Nyange parish, located in Kivumu *commune*, Kibuye *préfecture*.

2. In his oral address, the Prosecutor moved the Chamber for leave to visit a number of sites in Rwanda, arguing that it would contribute to a better understanding of the facts of the present case. In this regard, the Prosecutor submits a list of sites to be visited in Rwanda. The Defence does not challenge the Prosecutor's request and also submits its own list.

Deliberations

3. Rule 4 of the Rules 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. The Tribunal's jurisprudence considers that the relevance of site visits must be tested against the particular circumstances of each case and their instrumentality in the discovery of the truth.[1] The number of sites to be visited as well as the related expenses to be borne by the Tribunal should be taken into account.

5. The Chamber finds that the sites to be visited, particularly those in Nyange, are relevant both to the charges against the Accused and to the witness statements. The Chamber is of the view that site visits will be instrumental in the discovery of the truth in the present case.

6. Furthermore, the Chamber notes that the visits, which have limited duration and cover a number of sites, will be carried out without excessive costs to the Tribunal. The Chamber therefore finds that the Prosecutor's request should be granted and that it is in the interests of justice.

FOR THESE REASONS, THE CHAMBER

- GRANTS the Prosecutor's Motion;

- ORDERS site visits in Rwanda;

- REQUESTS the President of the Tribunal to authorize the Chamber to exercise its functions away from the seat of the Tribunal from 8 to 11 April 2006;

- REQUESTS the Registrar to give effect to the President's authorization by facilitating implementation of the present decision.

Done at Arusha, on 29 March 2006.

[Signed] : Andrésia Vaz; Karin Hökborg; Gustave G. Kam

[1] *The Prosecutor v. André Rwamakuba,* Decision on Defence Motion fro a View *locus in quo,* N°ICTR-98-44C-T, 16 December 2005; *The Prosecutor v. Bagilishema,* Case N°ICTR-95-1A-T, Judgement (TC), 7 June 2001; *The Prosecutor v. Bagosora et al.,* Case N°ICTR-98-41-T, Decision on Prosecutor's Motion for Site Visits in the Republic of Rwanda (TC) 29 September 2004; *The Prosecutor v. Simba,* Case N°ICTR-01-76-T, Decision on the Defence Request for Site Visits in Rwanda (TC), 31 January 2005; *The Prosecutor v. Simba,* Case N°ICTR-01-76-T, Decision on the Defence Renewed Request for Site Visits in Rwanda (TC), 4 May 2005.

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Decision on the Defence Motion for Disclosure of Signed Witness Statements (Rule 73 ter (B) of the Rules of Procedure and Evidence) 7 April 2006 (ICTR-2001-66-T)

(Original : French)

Trial Chamber III

Judges : Andrésia Vaz, Presiding Judge; Karin Hökborg; Gberdao Gustave Kam

Athanase Seromba – Disclosure of signed witness statements of the Defence – Previous disclosure of unsigned witness statements, Incomplete disclosure – Motion granted

International Instrument Cited :

Rules of Procedure and Evidence, Rules 73 (A) and 73 ter (B) in fine

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. Athanase Seromba, Décision du relative à la requête du Procureur aux fins de communication des déclarations des témoins de la Défense, 13 April 2005 (ICTR-2001-66)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber III (the "Chamber") composed of Judges Andrésia Vaz, presiding, Karin Hökborg and Gberdao Gustave Kam;

BEING SEIZED of the "Prosecutor's Motion for Disclosure of Signed Witness Statements", filed with the Registry on 10 March 2006;

NOTING the Defence response entitled « Mémoire en réponse à la requête du Procureur tendant à voir ordonner la communication des déclarations signées des témoins de la Défense », filed at the Registry on 15 March 2006;

HEREBY decides the Motion pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the "Rules").

Submissions of the Parties

1. The Prosecutor submits that the witness statements disclosed to him by the Defence do not constitute "written statements" as defined by Rule 73 *ter* (B) in that they do not bear the signatures of the witnesses. He alleges that the original statements are available and that, by failing to disclose them, the Defence is in breach of the Decision of 13 April 2005.[1]

[1] The Prosecutor v. Athanase Seromba, Case N°ICTR-2001-66-T, « Décision relative à la requête du Procureur aux fins de communication des déclarations des témoins de la Défense », 13 April 2005.

2. The Prosecutor further argues that in the absence of the originals, the Trial Chamber is not in a position to assess the authenticity of the statements. He also emphasizes that, for his part, he disclosed the signed statements of his witnesses to the Defence and that failure to disclose the signed statement of Defence witnesses is a breach of the principle of equality of arms. He therefore prays the Trial Chamber to order the Defence to disclose the signed witness statements.

3. The Defence argues that the Prosecutor's request is unfounded, pointing out inter alia that Rule 73 *ter* (B) of the Rules does not require statements disclosed to the Prosecutor to bear the witnesses' signatures. The Defence further states that in *Nahimana,* the Judge recalled the Defence's obligation of disclosure without specifying that the copies of statements disclosed to the Prosecutor, be signed by the Defence witnesses.[2] Consequently, the Defence prays the Chamber to dismiss the Prosecutor's motion.

Deliberations

4. Under Rule 73 *ter in fine,* The Trial Chamber may order the Defence to provide the Prosecutor with copies of the statements of each witness whom the Defence intends to call to testify.

5. The Chamber recalls its Decision of 13 April 2005 ordering the Defence to disclose unredacted Defence witness statements to the Prosecutor prior to the commencement of its case.[3]

6. The Trial Chamber notes that in *Niyitegeka*, the Appeals Chamber held that the most appropriate format of a witness statement is that which bears the signature of the witness. In the same ruling, the Appeals Chamber further asserted that the signature is the act whereby the witness acknowledges that the statements attributed to him are correct.[4]

7. The Trial Chamber finds that in the instant case the Defence has disclosed to the Prosecutor only unsigned witness statements. It notes also that the Defence does not deny the existence of written statements signed by its witnesses. Accordingly, it considers the disclosure by the Defence to the Prosecutor to be incomplete. The Chamber is therefore of the view that there is reason to declare the Prosecutor's Motion for disclosure of signed Defence witness statements well-founded. Consequently, it believes that it is for the Defence to cure that defect by disclosing the signed Defence witness statements to the Prosecutor.

FOR THESE REASONS, THE TRIAL CHAMBER

- GRANTS the Prosecutor's Motion:

- ORDERS the Defence to disclose the signed witness statements to the Prosecutor.

Done in Arusha on 7 April 2006.

[Signed] : Andrésia Vaz; Karin Hökborg; Gustave G. Kam

[2] *The Prosecutor* v. *Ferdinand Nahimana,* Case N°ICTR-99-52-I, Decision on the Prosecutor's Motion to Compel the Defence's Compliance with Rules 73 *ter*, 67 (C) and 69 (C), 3 October 2002.
[3] See above, footnote 1.
[4] *The Prosecutor v. Eliezer Niyitegeka,* Case N°ICTR-96-14-A, Appeal Judgement, paras. 31 and 32.

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Order Assigning Judges to a Case Before the Appeals Chamber 2 May 2006 (ICTR-2001-66-AR)

(Original : not specified)

Appeals Chamber

Judge : Fausto Pocar, Presiding Judge

Athanase Seromba – Appeals Chamber – Judges – Composition

International Instruments Cited:

Document IT/242 of the International Criminal Tribunal for the former Yugoslavia ; Rules of Procedure and Evidence, Rules 15 and 107 ; 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 Motion for Disqualification of Judges" rendered by the Bureau of the International Tribunal on 25 April 2006;

NOTING the « Requête d'appel de la Défense contre la Décision du Bureau du Tribunal rendue le 25 avril 2006 relative à la récusation des Juges Vaz, Kam et Hokborg » filed on 26 April 2006;

CONSIDERING Articles 11 (3) and 13 (4) of the Statute of the International Tribunal and Rules 15 and 107 of the Rules of Procedure and Evidence;

CONSIDERING the composition of the Appeals Chamber of the International Tribunal as set out in document IT/242 issued on 17 November 2005;

HEREBY ORDER that the Bench in *The Prosecutor v. Athanase Seromba,* Case N°ICTR-2001-66-AR, 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 2nd day of May 2006, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

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Decision on Interlocutory Appeal of a Bureau Decision 22 May 2006 (ICTR-2001-66-AR)

(Original : not specified)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge; Mohamed Shahabuddeen; Mehmet Güney; Liu Daqun; Theodor Meron

Athanase Seromba – Interlocutory appeal of a decision taken by the Bureau – Procedure for a request for disqualification of a judge – Deprivation by the Accused himself of the review procedure envisioned by the Rule – Appeal denied

International Instrument Cited :

Rules of Procedure and Evidence, Rule 15 (B)

International Cases Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Jean-Paul Akayesu, Judgement, 1 June 2001 (ICTR-96-4) ; Appeals Chamber, The Prosecutor v. Eliezer Niyitegeka, Judgement, 9 July 2004 (ICTR-96-14) ; Appeals Chamber, The Prosecutor v. Edouard Karemera et al., Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 22 October 2004 (ICTR-98-44) ; Appeals Chamber, The Prosecutor v. Laurent Semanza, Judgement, 20 May 2005 (ICTR-97-20)

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Anto Furundžija, Judgement, 21 July 2000 (IT-95-17/1) ; Appeals Chamber, The Prosecutor v. Stanislav Galić, Decision on Appeal from Refusal of Application for Disqualification and Withdrawal of Judge, 13 March 2003 (IT-98-29) ; Trial Chamber, The Prosecutor v. Stanislav Galić, Decision on Galić's Application pursuant to Rule 15 (B), 28 March 2003 (IT-98-2)

75. 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 Athanase Seromba[1] against a decision of the Bureau of 25 April 2006, denying his request,

[1] The Prosecutor v. Athanase Seromba, Case N°ICTR-01-66-AR, Requête d'appel de la Défense contre la décision du Bureau du Tribunal rendue le 25 avril 2006 relative à la récusation des Juges Vaz, Kam et Hökborg, filed 26 April 2006 ("Seromba Appeal"). The Prosecution responded in The Prosecutor v. Athanase Seromba, Case N°ICTR-01-66-AR, Prosecutor's Response to Seromba's Appeal of the Decision of 26 April 2006 of the ICTR Bureau, filed 27 April 2006 ("Prosecution Response"). Mr. Seromba filed his reply in The Prosecutor v. Athanase Seromba, Case N°ICTR-01-66-AR, Mémoire complémentaire de la Défense, contenant réplique à la reponse du Procureur sur l'appel interjeté contre la décision du bureau en date du 25 avril 2006, filed 2 May 2006 ("Seromba Reply") and Bordereau de pièces jointes au Mémoire complémentaire de la Défense du père Seromba, filed 8 May 2006. The Appeals Chamber has disregarded the Prosecution's additional filing of 3 May 2006, entitled Prosecution's Supplementary Response to Seromba's Appeal of the Decision of 26 April of the ICTR Bureau. There is no right of sur-reply, and the submission is unnecessary to the disposition of the appeal.

pursuant to Rule 15 of the Tribunal's Rules of Procedure and Evidence ("Rules"), to disqualify the Trial Judges in his case for lack of impartiality.[2]

Background

76. On 24 April 2006, Mr. Seromba filed a request with the Tribunal's Bureau to disqualify the Trial Judges in his case.[3] He argued that the Judges had a "personal interest" in convicting him, as illustrated by several decisions rendered during the course of the trial which, in his view, were erroneous or resulted in an inequitable treatment between Prosecution and Defence witnesses.[4] The Bureau denied Mr. Seromba's request on 25 April 2006, after examining each instance allegedly reflecting a lack of impartiality.[5] On appeal, Mr. Seromba argues that the Bureau erred in law in according the Trial Judges a presumption of impartiality and points to the instances allegedly reflecting the Trial Chamber's bias.[6]

77. In its response, the Prosecution disputes the admissibility of this appeal, arguing that no right of appeal to the Appeals Chamber exists from a decision taken by the Bureau.[7] Mr. Seromba argues, however, that his appeal is admissible because the Bureau's decision has all the characteristics of a judicial decision.[8] He emphasizes the importance of the right of appeal, particularly in matters related to the impartiality of Judges.[9] He contends that Rule 15 does not expressly preclude appeal and, in any event, does not envision the Bureau's consideration to be both of first and last resort.[10] In Mr. Seromba's view, the Statute envisions the Appeals Chamber as the only body competent to consider an issue in the final instance.[11] He asks the Appeals Chamber to read Rule 15 broadly, as it has in construing the grounds of disqualification under the Rule, in order to admit his appeal.[12]

Discussion

78. The Statute and Rules of the Tribunal do not provide for an interlocutory appeal to the Appeals Chamber of a decision taken by the Bureau pursuant to Rule 15 (B).[13] Rather, the Appeals Chamber's consideration of whether a Trial Judge should have been disqualified is limited to an appeal against a conviction or where the issue properly arises in an interlocutory appeal certified by a Trial Chamber.[14]

79. Rule 15 (B) envisions a specific two-stage process of consideration for a request to disqualify a Judge. As the Rule clearly states, an application for disqualification is to be made to the Presiding Judge of the Chamber seized of the proceedings, which in this case is Judge Khan, the Presiding Judge

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[2] *The Prosecutor v. Athanase Seromba*, Case N°ICTR-01-66-T, Decision on Motion for Disqualification of Judges, 25 April 2006 ("Impugned Decision").
[3] Impugned Decision, para. 4.
[4] See generally Impugned Decision, paras. 5, 10, 13, 15-20.
[5] Impugned Decision, para. 22.
[6] Seromba Appeal, pp. 2-13.
[7] Prosecution Response, paras. 10-18.
[8] Seromba Appeal, p. 2; Seromba Reply, para. 9.
[9] Seromba Reply, paras. 9, 15-21.
[10] Seromba Appeal, p. 2; Seromba Reply, para. 9.
[11] Seromba Reply, para. 9.
[12] Seromba Reply, paras. 10-14.
[13] See generally *The Prosecutor v. Stanislav Galić*, Case N°IT-98-29-AR54, Decision on Appeal from Refusal of Application for Disqualification and Withdrawal of Judge, 13 March 2003, para. 8 ("*Galić* Appeals Chamber Decision"); *The Prosecutor v. Vidoje Blagojević et al.*, Case N°IT-02-60, Decision on Blagojević's Motion for Clarification, 27 March 2003, para. 4 (ICTY Bureau) ("*Blagojević* Decision").
[14] See *Galić* Appeals Chamber Decision, para. 8; *Blagojević* Decision, paras. 4, 5. For example, the Appeals Chamber has considered the impartiality of Trial Judges in *Laurent Semanza v. The Prosecutor*, Case N°ICTR 97-20-A, Judgement, 20 May 2005, paras. 12-58; *The Prosecutor v. Edouard Karemera et al.*, Case N°98-44-AR15*bis*.2, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 22 October 2004, paras. 62-68; *Eliézer Niyitegeka v. The Prosecutor*, Case N°ICTR 96-14-A, Judgement, 9 July 2004, paras. 43-46; *The Prosecutor v. Jean Paul Akayesu*, Case N°96-4-A, 1 June 2001, paras. 85-101. See also *The Prosecutor v. Anto Furundžija*, Case N°IT-95-17/1-A, Judgement, 21 July 2000, paras. 164-215.

of Trial Chamber III.[15] The Presiding Judge is then to confer with the Judge in question. If the party disputes the Presiding Judge's decision, the Bureau shall determine the matter in a *de novo* review.[16]

80. The Appeals Chamber observes that Mr. Seromba did not follow this procedure and filed his claim directly with the Bureau,[17] thereby depriving himself of the review procedure envisioned by the Rule. Although it would have been within the discretion of the Bureau to dismiss Mr. Seromba's request as improperly filed,[18] the Appeals Chamber cannot conclude that it erred in considering the matter in the first instance.

81. For the foregoing reasons, as there was no right of appeal in this instance, the Appeals Chamber DISMISSES this appeal.

Done in English and French, the English version being authoritative.

Done this 22nd day of May 2006, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

[15] See *The Prosecutor v. Vojislav Šešelj*, Case N°IT-03-67-PT, Decision on Disqualification of the Appeals Chamber, 9 December 2004, para. 3 (ICTY Bureau) ("*Šešelj* Decision"); *Galić* Appeals Chamber Decision, paras. 8, 9.
[16] *Šešelj*, Decision, para. 3; *Galić* Appeals Chamber Decision, paras. 8, 9; *The Prosecutor v. Stanislav Galić*, Case N°IT-98-29-T, Decision on Galić's Application pursuant to Rule 15 (B), 28 March 2003, para. 7.
[17] Impugned Decision, para. 4.
[18] *Šešelj* Decision, para. 3.

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Decision on the Defence Motions for Certification of Appeal Against the Oral Decisions rendered on 26 and 27 April 2006 Rule 73 (B) of the Rules of Procedure and Evidence 30 May 2006 (ICTR-2001-66-T)

(Original : French)

Trial Chamber III

Judges : Andrésia Vaz, Presiding Judge; Karin Hökborg; Gberdao Gustave Kam

Athanase Seromba – Certification to appeal – Joinder of the proceedings, Common objective of the two motions, Interests of a sound administration of justice – Recall of Prosecution witnesses for further cross-examination – Certification to appeal, Fair conduct of the proceedings and outcome of the proceedings not affected, Absence of material advancement in the proceedings by the immediate resolution of the objections – Motions denied

International Instrument Cited :

Rules of Procedure and Evidence, Rules 73, 73 (B), 85 (A) and 90 (F)

International Cases Cited :

I.C.T.R.: 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-01-76) ; 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) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Ntahobali's Strictly Confidential Motion to Recall Witnesses TN, QBQ, and QY, for Additional Cross-Examination, 3 March 2006 (ICTR-97-21-T and ICTR-98-42)

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

SITTING as Trial Chamber III (the "Chamber"), composed of Judges Andrésia Vaz, presiding, Karin Hökborg and Gberdao Gustave Kam;

SEIZED of the Defence Motion entitled "Defence Motion for Certification of Appeal Against the Oral Decisions Rendered by the Trial Chamber on 26 April 2006…", filed with the Registry of the Tribunal on 2 May 2006 (hereinafter the "first Motion");

Also SEIZED of the Defence Motion entitled "Defence Motion for Certification of Appeal Against the Order of 27 April 2006 Relating to the Filing of Closing Briefs and Closing Arguments of the Parties", filed with the Registry of the Tribunal on 2 May 2006 (hereinafter the "second Motion");

CONSIDERING the Prosecutor's Response, entitled "Prosecutor's Response to Seromba's Motions for Certification of Appeals", filed with the Registry on 3 May 2006 (hereinafter the "Response");

DECIDES as follows, on the basis of the Statute of the Tribunal (hereinafter the "Statute") and Rule 73 of the Rules of Procedure and Evidence (hereinafter the "Rules").

Introduction

1. The Accused Athanase Seromba is charged with genocide, or in the alternative, complicity in genocide, conspiracy to commit genocide and crimes against humanity for extermination.[1] His trial commenced on 20 September 2004.[2] The Prosecutor concluded the presentation of evidence on 25 January 2005.[3] The Defence, after numerous delays mainly due to its own action,[4] only commenced the presentation of its evidence on 31 October 2005.[5]

2. On 23 March 2006, the Chamber commenced a session on the presentation of evidence by the Defence with the last Defence witnesses. By an Oral Decision of 24 March 2006, the Chamber allowed the Defence to vary its list of witnesses, by adding notably Witness PS2.[6] On 20 April 2006, the Chamber ordered that the testimonies of Witness PS2 be presented via video-link, since the said witness was not in Arusha for administrative reasons.[7] During the hearing of 21 April 2006, the Chamber, in order to avoid an interruption in the hearings and in order to take account of the fact that the session was scheduled to end on 27 April 2006, decided to hear the testimony of the Accused before that of Witness PS2.[8] On 24 April 2006, the Defence filed a Motion for review of that Decision.[9] The Chamber, by an oral decision rendered that same day, denied this request.[10] Following this decision, the Defence seized the Bureau of the Tribunal of a motion for disqualification of the Judges.[11] The Chamber therefore adjourned the proceedings pending the decision of the Bureau.[12] By a Decision dated 25 April 2006, the Bureau dismissed the request for disqualification of the Judges.[13]

3. At the hearing of 26 April 2006, the Chamber decided to continue without the testimony of Witness PS2, considering that Defence Counsel's refusal to examine Witness PS2 was tantamount to waiving the right to hear the witness.[14]

4. Lastly, at its hearing of 27 April 2006, the Chamber noted the persistent refusa1 of the Accused to appear for trial for his testimony and interpreted this as waiver of his right to testify before the

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[1] Indictment of 9 July 2001
[2] T.20 September 2004.
[3] T.25 January 2005.
[4] Thus, from 25 January 2005: date when the Prosecution concluded its presentation of evidence, the Defence only started presenting its evidence on 31 October 2005, after the case had been successively adjourned on 1 March 2005, 5 April 2005, 10 May 2005 and 24 June 2005, owing to unpreparedness of the Defence (Cf. T.25 January 2005, T.1 March 2005, 5 April 2005, T.10 May 2005 and T.24 June 2005).
[5] T.31 October 2005.
[6] T.24 March 2006, pp. 39-40.
[7] *The Prosecutor v. Athanase Seromba,* Case N°ICTR-2001-66-T, Decision on the Defence Motion to Introduce the Testimonies of Witness PS2 via Video-Link, 20 April 2006.
[8] T.21 April 2006, p. 2. At the 18 April 2006 hearing, the Defence moreover recalled, unchallenged, that the session was scheduled to close on 27 April 2006 : "(...) We do not how what decision was taken when we parted Company; as you how the date of the 27th of April is the deadline for these proceedings" T. 18 April 2006, p. 6.
[9] Extremely Urgent Motion to Review the Decision of 21 April 2006 Regarding the Appearance in Court of the Accused as a Witness, 24 April 2006.
[10] T.24 April 2006, pp. 6-7. The Chamber's Decision was motivated as follows: "The Chamber, out of concern for judicial management of the trial and in the interest of justice, and taking into account technical problems connected with the hearing of the last witness PS2 scheduled for next Wednesday, merely reverted or varied the sequence of appearance of the said witness, in order to comply with the date set for the closing of the Defence case which is scheduled on the 27th of April 2006, as jointly agreed on by the parties and the Trial Chamber".
[11] Defence's Extremely Urgent Motion for Disqualification of Judges Andrésia Vaz, Gustave Kam and Karin Hökborg, 24 April 2006.
[12] T.24 April 2006, pp. 13-14.
[13] The Bureau, Decision on Motion for Disqualification of Judges, 25 April 2006. It should be recalled that the Appeals Chamber rendered a Decision on 22 May 2006, dismissing the appeal lodged by the Defence against the Decision of the Bureau (Decision on Interlocutory Appeal of a Bureau Decision, 22 May 2006).
[14] T.26 April 2006, p. 8.

chamber.[15] The Chamber then noted that, since the Defence had no further witnesses to hear, the defence evidence was now closed, and ordered the parties to present their Closing Arguments on 27 June 2006.[16] It is in this context that the Defence filed the two Motions for Certification of Appeal referred to above.

Submissions of the Parties

The Defence

5. In its first Motion, the Defence argued that it had not renounced the testimony of Witness PS2. It contended in particular that waiver was a voluntary act, "necessarily taken on the initiative of its author, which cannot be attributed to the latter either by a third person, or by a court".[17] It maintains that the Decision of 26 April 2006 deprives it of its right to present its evidence, as provided for under Rule 85 (A) of the Rules, while also denying the Accused the right to a fair trial guaranteed by Article 19 of the Statute. It further argues that Article 20 of the Statute, which gives the accused "the right to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her",[18] has been breached.

6. The Defence further submits that the Decision of 26 April 2006 has caused it "serious prejudice".[19] To support this allegation, it argues notably that the testimony of Witness PS2 was crucial, because it was intended to contradict the acts alleged in the Indictment, namely the Accused's direct involvement in the death of Anicet Gatare.[20]

7. From the foregoing, the Defence concludes that the Decision of 26 April 2006 involves an issue that may affect the fair conduct of the proceedings and the outcome of the trial and for which an immediate resolution by the Appeals Chamber could materially advance the proceedings. Consequently, the Defence prays the Chamber to certify the appeal against this decision pursuant to Rule 73 (B) of the Rules.[21]

8. In its second Motion, the Defence argues that the Order of 27 April 2006 failed to take account of the pending appeal by the Accused against the decision of the Bureau.[22] The Defence submits that, even though this appeal has no formal suspensive effect, the Chamber should have conformed with the practice in "all modern judicial systems", by refraining from continuing the proceedings until the Appeals Chamber had rendered its decision on the appeal.[23] It adds further that the Chamber, by considering that the Accused had renounced his right to testify in his own defence, had deprived the latter of his right to a fair trial and therefore violated Articles 19 and 20 of the Statute. On that issue, it argues particularly that waiver is "a voluntary act which must necessarily and expressly be articulated by the person concerned".[24] It further submits that the Order represents a particularly serious breach of the equality principle, since it has denied the Accused the opportunity to conclude his evidence on the same terms as the Prosecution had been able to do.[25]

9. The Defence further contends that the Order of 27 April 2006 flouts the Decision rendered on 29 September 2004, whereby the Chamber decided to disregard the objections raised by the Defence while at the same time reserving to the latter the right to recall for further cross-examination the

[15] T.27 April 2006, p. 5.
[16] Ibidem.
[17] *Ibidem*. First Motion, p. 2, para. 2.
[18] *Ibid.,* p. 3, para. 7.
[19] *Ibid.,* p. 4.
[20] Idem.
[21] *Ibid*., pp. 4, 5 and 6.
[22] See *supra,* para. 2.
[23] Second Motion, p. 3, para. 1.
[24] *Ibid.,* para. 2.
[25] *Ibid*., paras. 3-4.

Prosecution witnesses designated by the pseudonyms YAU, YAT, CBI and CBS.[26] It argues that, by "prematurely" concluding the presentation of Defence evidence and ordering the Defence to file its Closing Brief by 16 June 2006, the Order caused prejudice to the Defence. It thus submits that the Closing Brief can be filed only after the Defence has gathered all the exculpatory evidence by "the mechanisms" of examination and cross-exanimation.[27] The Defence therefore considers that it was not afforded full exercise of its right to present its case. It argues that the Order of 27 April 2006 involves "an issue that may affect the fair conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber will materially advance the proceedings".[28] Consequently, the Defence prays the Chamber to certify its appeal against the Order of 27 April 2006 pursuant to Rule 73 (B) of the Rules. Furthermore, it prays the Chamber to order that Prosecution Witnesses YAU, YAT, CBI and CBS should be recalled for further cross-examination at a date to be determined by the Chamber.[29]

The Prosecutor

10. The Prosecutor submits that the Defence voluntarily declined to examine Witness PS2.[30] He explains that Co-Counsel stated at the hearing of 26 April 2006 that he was not prepared to examine Witness PS2, despite the efforts and costs incurred by the Tribunal in organizing the hearing of the said witness. He considers that this attitude on the part of the Defence amounted to an implicit renunciation of Witness PS2's testimony, as part of the strategy adopted by the Defence despite the Chamber's ruling that no stay of proceedings was granted and of the fact that the wish of the Defence to see the Accused testify last had been satisfied.[31]

11. The Prosecutor submits, further, that the Defence should have examined Witness PS2 if the latter's testimony was as important as it claims. He also emphasizes that the importance of Witness PS2's testimony does not prove that the Defence failed to waive the examination of Witness PS2.[32]

12. The Prosecutor submits furthermore that the request for certification of appeal against the Order of 26 April 2006 fails to meet the requirements of Rule 73 (B) of the Rules for certification of appeal. In support of this contention, he submits that the issue of the waiver by the Defence of Witness PS2's testimony would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and that its immediate resolution would not materially advance the proceedings.[33]

13. Regarding the request for certification of appeal against the Order of 27 April 2006, the Prosecutor submits that the Defence argument that the Chamber had deprived the Accused of his right to testify in person is mistaken. He contends that the Defence voluntary declined to call and examine the Accused in full knowledge of its waiver of his right to testify.[34] He argues, citing the transcripts of the hearing,[35] that the Chamber simply noted this waiver.[36]

14. The Prosecutor submits that the Defence alternative request to recall for cross-examination Prosecution Witnesses YAU, YAT, CBI and CBS is dilatory. He contends that this request was not only submitted after the close of evidence but also that it was submitted late, since it was filed 19 months after the Chamber's referenced oral ruling of 29 September 2004.[37]

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[26] Second Motion, pp. 3-4.
[27] *Ibidem*, p. 4.
[28] Ibidem.
[29] *Ibid*., p. 5.
[30] Response, p. 1, para. 2.
[31] *Ibid*., p. 2, paras. 10-11.
[32] Response, p. 3, para. 13.
[33] *Ibidem*, para. 14.
[34] *Ibidem,* paras. 15-16.
[35] T.27 April 2006, p. 4.
[36] Response, p. 3, para. 16.
[37] *Ibid*., para. 18.

15. For the foregoing reasons, the Prosecutor emphasizes that the request for certification of appeal against the Order of 27 April 2006 fails to meet the requirements of Rule 73 (B) of the Rules. To that end, he submits that the issue of the Defence's refusal to examine the Accused as well as the Defence request to recall some Prosecution witnesses would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial nor would its immediate resolution by the Appeals Chamber materially advance the proceedings.

16. In conclusion, the Prosecutor asks the Trial Chamber to deny the two Defence motions, pointing out that dates have already been fixed for filing the parties Closing Briefs and Arguments.[38]

Deliberations

Findings of the Chamber on joinder of the proceedings

17. The Chamber notes that the two motions for certification of appeal filed by the Defence have a common objective, which is to challenge the final decision of the Chamber ruling the Defence evidence closed,[39] after having noted the failure of the Defence to examine Witness PS2 and the Accused. The Chamber is of the opinion that the two proceedings should be joined in the interests of the sound administration of justice.

The Trial Chamber's findings on the recall of Prosecution witnesses YAU, YAT, CBI and CBS for further cross-examination

18. The Chamber recalls that at its hearing of 29 September 2004 it decided to disregard the objection to disclosure raised by the Defence regarding the testimonies of certain Prosecution witnesses, while reserving the right for the Defence, if necessary, to seize the Chamber of a request to cross-examine the witnesses in question on the basis of the new documents disclosed by the Prosecutor.[40]

19. The Chamber further recalls that the case-law of the Tribunal only allows a witness to be recalled in the most compelling of circumstances[41] and on presentation of a good cause by the demanding party.[42] In the instant case, the Chamber notes that the Defence merely requested that Witnesses YAU, YAT, CBI and CBS should be recalled without giving any justification.

20. In light of the foregoing, the Chamber considers that it is necessary to rule that the Defence motion to recall the above-mentioned witnesses lacks merit.

The Chamber's findings on the requests for certification of appeal

21. The Chamber notes that pursuant to Rule 73 (B) of the Rules two requirements should be met for a certification of appeal to be granted: the applicant must demonstrate (i) that the impugned decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings, and (ii) that its immediate resolution by the Appeals Chamber may materially advance the proceedings.

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[38] Response, pp. 3-4.
[39] See *supra* para. 11.
[40] T.29 September 2004, p. 8.
[41] *The Prosecutor v. Théoneste Bagosora et al.*, Case N°ICTR-98-41-T ("*Bagosora et al.*"), Decision on the Prosecution Motion to Recall Witness Nyanjwa (TC), 29 September 2004, para. 6; *The Prosecutor v. Aloys Simba*, Case N°ICTR-01-76-T, Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination, 28 October 2004, para. 5; *Bagosora et al.*, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination (TC), 19 September 2005, para. 2
[42] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case N°ICTR-97-21-T, ICTR-98-42-T, Decision on Ntahobali's Strictly Confidential Motion to Recall Witnesses TN, QBQ, and QY, for Additional Cross-Examination (TC), 3 March 2006, para. 32.

22. The Chamber recalls that in the instant case the Defence was allowed considerable time to present its evidence. Also, contrary to the Defence claims, the Chamber is of the opinion that the Accused had had plenty of time to prepare its defence and present its evidence.[43] It notes further that Rule 85 (A) of the Rules empowers the Chamber to change the order of appearance of witnesses, even where the Accused decides to testify in his own defence, and that the Accused was in fact ultimately given the opportunity to testify last. The Chamber accordingly considers that the objections raised by the Defence in relation to the Oral Decision of 26 April 2006,[44] rendered by the Trial Chamber under its discretionary power, and to the Order of 7 April 2006[45] are merely dilatory. For that reason, the Chamber is of the opinion that the said objections would not affect the fair conduct of the proceedings or its outcome.

23. The Chamber also notes that Rule 90 (F) of the Rules gives broad powers to the Chamber, which exercises control over the mode and order of interrogating witnesses and presenting evidence as well as the order in which they shall intervene in order to avoid needless consumption of time, notably by using dilatory tactics. Thus, while al1 its witnesses had been called except for Witness PS2 and the Accused, the Defence, despite the efforts made by the Chamber, refused to conduct the examination-in-chief, leaving the Chamber with only one alternative, that of closing the Defence evidence.

24. Lastly, the Chamber recalls that the evidence closed on 27 April 2006, with the parties then being requested to present their Closing Briefs and Arguments at the hearing of 27 June 2006. The Chamber therefore cannot see how the immediate resolution by the Appeals Chamber of the objections raised by the Defence could materially advance the proceedings.

25. In light of the foregoing, the Chamber is of the opinion that the requirements for the certification of appeal have not been met in the instant case. Consequently, it considers that it is necessary to find that the requests for certification of appeal filed by the Defence lack merit.

FOR THE FOREGOING REASONS, THE CHAMBER

ORDERS the joinder of the proceedings relating to the requests for certification of appeal filed by the Defence on 2 May 2006,

DISMISSES the Defence request to recall Prosecution Witnesses YAU, YAT, CBI and CBS;

DISMISSES the request for certification of appeal against the Oral Decision of 26 April 2006;

DISMISSES the request for certification of appeal against the Order of 27 April 2006.

Arusha, 30 May 2006.

[Signed] : Andrésia Vaz; Karin Hökborg; Gustave G. Kam

[43] The Defence called 24 witnesses whereas the Prosecutor called 15.
[44] See *supra*, para. 9.
[45] See *supra*, para. 10.

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Judgement
13 December 2006 (ICTR-2001-66-I)

(Original : French)

Trial Chamber III

Judges : Andrésia Vaz, Presiding Judge; Karin Hökborg; Gberdao Gustave Kam

Athanase Seromba – Genocide, Alternatively complicity in genocide, Conspiracy to commit a genocide, Extermination as a crime against humanity – Defects in the Indictment – Credibility of witnesses, Establishment of facts – Individual criminal liability, Modes of participation in the crimes, Definition of the materiel and moral elements – Participation by aiding and abetting – Genocide, Aiding and abetting in the commission of murders and causing serious bodily or mental harm to the Tutsi ethnic group, Actus reus, Mens rea – Conspiracy to commit a genocide – Extermination as a crime against humanity, Actus reus, Mens rea, Standard of "widespread and systematic", Definition of 'civilian population', Attack directed against the Tutsi civilian population, Discriminatory grounds – Verdict – Sentence – Gravity of the offences – Individual circumstances of the Accused, Priest – Aggravating circumstances, Status of the Accused and betrayal of trust, passive behaviour, Flight of the Accused – Mitigating circumstances, Good reputation of the Accused prior to the events, Surrender, Young age – General practice regarding prison sentences in Rwanda – Multiple sentences – Credit for time served – Conviction of genocide and extermination as a crime against humanity, Single sentence, fifteen years imprisonment

International Instruments Cited :

Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May-26 July 1996, Official documents of the UN General Assembly, suppl. N°10, p. 90, (A/51/10) (1996) ; Rules of Procedure and Evidence, Rules 72, 101, 101 (B), 101 (C), 101 (D) and 103 ; Security Council, Resolution 955 (1994), 8 November 1994, S/RES/955 (1994) ; Statute, Art. 2, 2 (2), 2 (3) (a), 2 (3) (b), 2 (3) (e), 3, (3) (b), 4, 6 (1) and 23

National Instrument Cited :

Organic Law N°40/2000 of 26/01/2001 Setting up Gacaca Jurisdictions and Organizing Prosecutions for Offences Constituting Genocide or Crimes Against Humanity Committed between 1 October 1990 and 31 December 1994, Art. 51 and 68

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. 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) ; 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, 1 June 2000 (ICTR-97-32) ; Appeals Chamber, The Prosecutor v. Jean Kambanda, Judgement, 19 October 2000 (ICTR-97-23) ; Appeals Chamber, The Prosecutor v. Clément Kayishema and Obed Ruzindana, Judgement (Reasons), 1 June 2001 (ICTR-

95-1) ; Trial Chamber, The Prosecutor v. Ignace Bagilishema, Judgement, 7 June 2001 (ICTR-95-1A) ; Trial Chamber, The Prosecutor v. Athanase Seromba, Decision on the Prosecutor's Ex Parte Request for Search, Seizure, Arrest and Transfer, 4 July 2001 (ICTR-2001-66) ; Trial Chamber, The Prosecutor v. Athanase Seromba, Warrant of Arrest and Order for Transfer, 4 July 2001 (ICTR-2001-66) ; Appeals Chamber, The Prosecutor v. Alfred Musema, Judgement, 16 November 2001 (ICTR-96-13) ; 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. Laurent Semanza, Judgement and Sentence, 15 May 2003 (ICTR-97-20) ; Trial Chamber, The Prosecutor v. Eliezer Nyitegeka, Judgement, 16 May 2003 (ICTR-96-14) ; Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Judgement and Sentence, 3 December 2003 (ICTR-99-52) ; 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. 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-) ; Trial Chamber, The Prosecutor v. Athanase Seromba, Décision Relative à la Requête du Procureur aux Fins de Constat Judiciaire, 14 July 2005 (ICTR-2001-66) ; Trial Chamber, The Prosecutor v. Aloys Simba, Judgement, 13 December 2005 (ICTR-2001-76) ; Appeals Chamber, The Prosecutor v. Édouard Karemera et al., Decision on Prosecutor's Interlocutory Appeal on Judicial Notice, 16 June 2006 (ICTR-98-44) ; Appeals Chamber, The Prosecutor v. André Ntagerura, Appeal Judgement, 7 July 2006 (ICTR-96-10A)

I.C.T.Y.: Trial Chamber, The Prosecutor v. Zdravko Mucić, Judgement, 16 November 1996 (IT-96-21) ; Trial Chamber, The Prosecutor v. Dražen Erdemović, Judgement, 29 November 1996 (IT-96-22) ; Trial Chamber, The Prosecutor v. Duško Tadić, Judgement, 7 May 1997 (IT-94-1) ; Trial Chamber, The Prosecutor v. Anto Furundžija, Judgement, 10 December 1998 (IT-95-17/1) ; Trial Chamber, The Prosecutor v. Zoran Kupreškić et al., Decision on Evidence of the Good Character of the Accused and the Defence of Tu Quoque, 17 February 1999 (IT-95-16-T) ; Trial Chamber, The Prosecutor v. Zlatko Aleksovski, Judgement, 25 June 1999 (IT-95-14/1) ; Appeals Chamber, The Prosecutor v. Duško Tadić, Judgement, 15 July 1999 (IT-94-1) ; Trial Chamber, The Prosecutor v. Tihomir Blaškić, Judgement, 3 March 2000 (IT-95-14) ; Trial Chamber, The Prosecutor v. Radislav Krstić, Judgment, 2 August 2001 (IT-98-33) ; Trial Chamber, The Prosecutor v. Milorad Krnojelac, Judgement, 15 March 2002 (IT-97-25) ; Trial Chamber, The Prosecutor v. Biljana Plavšić, Judgement, 27 February 2003 (IT-00-39 and IT-00-40/1) ; Appeals Chamber, The Prosecutor v. Milorad Krnojelac, Judgment, 17 September 2003 (IT-97-25) ; Trial Chamber, The Prosecutor v. Blagoje Simić, Judgement, 17 October 2003 (IT-95-9) ; Appeals Chamber, The Prosecutor v. Radislav Krstić, Judgement, 19 April 2004 (IT-98-33) ; Trial Chamber, The Prosecutor v. Milan Babić, Judgement, 29 June 2004 (IT-02-65) ; Appeals Chamber, The Prosecutor v. Dario Kordić and Mario Čerkez, Judgement, 17 December 2004 (IT-95-14/2) ; Trial Chamber, The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Judgement, 17 January 2005 (IT-02-60)

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Chapter I : Introduction

1. This Judgement is rendered by Trial Chamber III (the "Chamber") of the International Criminal Tribunal for Rwanda (the "Tribunal"), composed of Judge Andrésia Vaz, presiding, Judge Karin Hökborg and Judge Gberdao Gustave Kam, in the case of the *Prosecutor v. Athanase Seromba*.

2. The Tribunal is governed by its Statute (the "Statute")[1] annexed to Security Council Resolution 955, and by its Rules of Procedure and Evidence (the "Rules").[2]

[1] United Nations Document S/RES/955 (1994), 8 November 1994.
[2] The Rules were adopted on 5 July 1995 by the Judges of the Tribunal and amended most recently on 7 June 2005. The Statute and the Rules are available on the Tribunal site: www.ictr.org.

3. The Tribunal has jurisdiction 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. Its jurisdiction is limited to acts of genocide, crimes against humanity and serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II,[3] committed between 1 January 1994 and 31 December 1994.[4]

4. The Chamber recalls that in the present case, it has already taken judicial notice of the fact that widespread killings occurred in Rwanda in 1994,[5] and that this fact is no longer subject to reasonable dispute. The Chamber further recalls that it has also taken judicial notice of the fact that during the events referred to in this Indictment, Tutsi, Hutu and Twa were identified as ethnic or racial groups.[6]

5. In addition, it notes that the Appeal Chamber recently stated in *Karemera* that the genocide perpetrated in Rwanda is a fact of common knowledge.[7] The Trial Chamber nevertheless emphasizes that taking judicial notice of facts of common knowledge does not relieve the Prosecution of its burden to prove that the Accused was criminally responsible for the specific events alleged in the Indictment.[8]

6. The Accused, Athanase Seromba, was born in 1963 in Rutziro *commune*, Kibuye *préfecture*, Rwanda. Trained at the Nyakibanda major seminary,[9] he was ordained a priest in July 1993.[10] In April 1994, he was a priest in Nyange parish, Kivumu *commune*.

7. In the Indictment dated 8 June 2001 (the "Indictment"), registered with the Tribunal Registry on 5 July 2001,[11] the Prosecutor preferred four charges against Athanase Seromba:

8. Count 1: Genocide:[12] The Prosecutor of the International Criminal Tribunal for Rwanda charges Athanase Seromba with genocide, a crime stipulated in Article 2 (3) (a) of the Statute, in that on or between 6 April 1994 and 20 April 1994, in Kivumu *commune*, Kibuye *préfecture*, Rwanda, Seromba was responsible for killing or causing serious bodily or mental harm to members of the Tutsi population, with intent to destroy, in whole or in part, a racial or ethnic group; and pursuant to 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.

9. Count 2: Complicity in genocide:[13] The Prosecutor of the International Criminal Tribunal for Rwanda charges Athanase Seromba of complicity in genocide, a crime stipulated in Article 2 (3) (e) of the Statute, in that on or between the dates of 6 April 1994 and 20 April 1994, in Kivumu *commune*, Kibuye *préfecture*, Rwanda, Athanase Seromba was an accomplice to the killing or causing serious bodily or mental harm to members of the Tutsi population, committed with intent to destroy, in whole or in part, a racial or ethnic group; and pursuant to 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.

10. Count 3: Conspiracy to commit genocide:[14] The Prosecutor of the International Criminal Tribunal for Rwanda charges Athanase Seromba of conspiracy to commit genocide, a crime stipulated

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[3] Articles 2, 3 and 4 of the Statute.
[4] Article 1 of the Statute.
[5] Decision on Prosecutor's Motion for Judicial Notice, 14 July 2005, p. 7.
[6] Idem.
[7] *The Prosecutor v. Édouard Karemera et al.*, ICTR-98-44-T, Decision on Prosecutor's Interlocutory Appeal on Judicial Notice (Appeal Chamber), 16 June 2006, para. 35.
[8] *Ibid*., para. 37.
[9] Transcript, 20 April 2006, p. 6 (closed session).
[10] Letter of the Accused to the Archbishop of Florence (Exhibit P-8).
[11] The French version of the Indictment was filed with the Registry of the Tribunal on 9 July 2001.
[12] Indictment, p. 2
[13] Indictment, p. 3.
[14] Indictment, p. 11

in Article 2 (3) (b) of the Statute, in that on or between 6 April 1994 and 20 April 1994, in Kivumu *commune*, Kibuye *préfecture*, Rwanda, Athanase Seromba, a priest responsible for Nyange Parish, did agree with Grégoire Ndahimana, *bourgmestre* of Kivumu *commune*, Fulgence Kayishema, a police inspector of Kivumu *commune*, Télesphore Ndungutse, Gaspard Kanyikuriga and other persons not known to the Prosecution, to kill or cause serious bodily or mental harm to members of the Tutsi population, with intent to destroy, in whole or in part, a racial or ethnic group; and pursuant to 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.

11. Count 4: Crimes against humanity (extermination):[15] The Prosecutor of the International Criminal Tribunal for Rwanda charges Athanase Seromba with extermination as crime against humanity as stipulated in Article 3 (b) of the Statute, in that on or between 7 April 1994 and 20 April 1994, in Kibuye *préfecture*, Rwanda, Athanase Seromba was responsible for killing persons, or causing persons to be killed, during mass killing events as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds; and pursuant to 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.

12. The full text of the Indictment is attached to this Judgement.[16]

13. The Accused, Athanase Seromba, who went into exile in Florence, Italy, surrendered to the authorities of the Tribunal on 6 February 2002 without the warrant of arrest[17] issued by the Tribunal against him being executed by the Italian authorities who had received notification thereof on 10 July 2001.[18] The Accused made his initial appearance before Justice Navanethem Pillay on 8 February 2002 and entered a plea of not guilty.[19] His trial started on 20 September 2004 and was ended on 27 June 2006.[20]

Chapter II : Factual findings

1. Preliminary matters

1.1. Defects in the Indictment

1.1.1. The Law applicable to motions on defects in the form of the Indictment

14. The Chamber notes that under Article 72 of the Rules of Procedure and Evidence, defects in the form of the Indictment must, in principle be raised during the pre-trial phase of the proceedings,[21] unless leave is granted by the Chamber to a party to do so at a later stage in the proceedings.

15. In the present case, the Chamber finds that the Defence failed to comply with the aforementioned procedural requirement by alleging defects in the Indictment in its final trial brief, i.e. after the close of hearing, rather than during the pre-trial phase. The Chamber further notes that until the close of hearing, the Defence neither sought nor obtained leave from the Trial Chamber to file an application alleging defects in the form of the Indictment.

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[15] Indictment, p. 15.
[16] See Annex III: Indictment.
[17] *Seromba*, Decision on the Prosecutor's Ex Parte Request for Search, Seizure, Arrest and Transfer, 3 July 2001; *Seromba*, Warrant of Arrest and Order for Transfer, 4 July 2001
[18] See letter of the Italian Justice Ministry dated 11 July 2001 addressed to the Registrar of the International Criminal Tribunal for Rwanda.
[19] Transcript, 8 February 2002, p. 16 (open session).
[20] See Annex I: History of proceedings
[21] *Simba*, Trial Judgement, 13 December 2005, para. 15.

16. The Chamber recalls that, as to whether a trial chamber may, after the close of hearing, rule that an indictment was defective, the Appeals Chamber stated in *Ntagerura* that it could not do so without first giving the parties the opportunity to be heard, which entails reopening the hearing.[22]

17. In view of the foregoing, the Chamber is of the opinion that an amendment of a defective indictment may be allowed even at the stage of deliberations of the Trial Chamber only if the Trial Chamber has first ordered a reopening of the hearing. Consequently, the Chamber considers that the issue here is to determine whether the Defence arguments submitted in support of its allegations of defects in the Indictment are such as would justify an amendment of the Indictment for the sake of fairness of the trial. In such a case, the Chamber would have to reopen the hearing.

18. In addressing this issue, the Chamber will examine in turn the arguments advanced by the Defence in its final trial brief,[23] even if that may appear redundant.

1.1.2. Examination of Defence arguments

The Defence allegations with respect to paragraph 5 of the Indictment

19. The Chamber notes the Defence submission that the Prosecutor merely states that Athanase Seromba, "a priest responsible for Nyange parish […] and others not unknown to the Prosecution", prepared and executed a plan of extermination of the Tutsi population, without specifying the nature of the said plan, the date and location of its conception, the persons who allegedly conceived it, the methods used to execute it, or the exact role allegedly played by the Accused in its conception, elaboration and execution.

20. The Chamber also notes the Defence allegation that, by merely stating that after the death of the Rwandan President on 6 April 1994 attacks were perpetrated against the Tutsi in Kivumu *commune*, causing the death of several of them, the Prosecutor does not provide sufficient information as to identify the perpetrators of the attacks, the planners of the attacks, the location where such attacks occurred, the manner in which they were executed or even as to whether Athanase Seromba participated in them.

21. The Chamber considers the aforementioned Defence allegations irrelevant, as the issues raised have been pleaded with sufficient particularity. The Court consequently finds that these allegations fail to prove the existence of defects in the Indictment.

The other Defence allegations

22. The Defence also alleged a lack of precision in paragraphs 7, 8, 11, 14, 15, 16 and 17 of the Indictment which alleged respectively that: the Accused drew up a list of refugees; several meetings were held, and the Accused attended them; the Accused expelled Tutsi employees from the parish; the doors of the church were closed; and a meeting was held on 14 April 1994. On these different points, the Chamber considers that the Defence allegations are unfounded, insofar as the material facts are set

[22] *Ntagerura*, Appeal Judgement, 7 July 2006, para. 55: "In the present matter, 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 advance 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 abovementionned parts of the Indictments defective until the rendering of the Trial Judgement."
[23] Defence Closing Argument, pp. 40-42.

forth both in the Indictment and in the Prosecutor's pre-trial brief which was disclosed to the Defence in a timely manner, to enable the Defence to prepare for trial.

1.1.3. Findings of the Chamber

23. In view of the foregoing, the Chamber considers that the arguments raised by the Defence do not permit the conclusion that the Indictment contains defects that might have warranted an amendment. The Chamber therefore dismisses the Defence allegations that the Indictment is defective and accordingly, finds that there are no grounds for reopening the hearing.

1.2. Evidence of the good character of the Accused

24. In its final trial brief, the Defence submitted that evidence of the good character of an accused may be relevant in determining whether the accused could have committed the crimes with which he is charged.[24] The Prosecution did not contest this point.

25. It is the Chamber's opinion that the evidence to be considered during deliberations, for determining probative value, is, in principle, the evidence which the parties presented at the hearing, in accordance with the provisions of Rules 89 to 98 *bis*.

26. The Chamber notes that evidence of the good character of the accused prior to the events for which he is indicted is, generally, of limited probative value in international criminal law.[25] Rather, evidence of prior good character is taken into consideration at the time of sentencing.[26] The Chamber, however, observes that such evidence may be relevant if it is shown to be particularly probative in relation to the charges against the accused.[27]

27. In the present case, the Chamber finds that the Defence only adduced evidence of the Accused's good character after the hearing had been declared closed, thus making of impossible for the Prosecution to present arguments on this point. Furthermore, the Chamber finds that by merely submitting that the Accused's conduct had "[…] had never been viewed with disfavour by the faithful of Nyange parish prior to the events of 6 April 1994 […]",[28] the Defence has failed to show that evidence of the Accused's good character is particularly probative to the charges against him.

28. In view of the foregoing, the Chamber will not accept evidence of the Accused's good character at this stage, but will possibly take it into consideration at the time of sentencing.

1.3. General allegations in the Indictment

29. The Chamber finds that judicial notice has already been taken of the facts alleged in paragraph 1 of the Indictment, namely, that the population of Rwanda was divided into three ethnic groups: Tutsi, Hutu and Twa.[29] The Chamber therefore, considers it to be a general allegation.

30. The Chamber finds that paragraph 24 of the Indictment only provides a general description of the attacks against refugees and the intentions of the attackers, without charging Accused Athanase Seromba with any specific act or event. Consequently, the Chamber considers this allegation to be general.

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[24] Defence Final Trial Brief, p. 6.
[25] *Kupreškic*, Decision on evidence of the good character of the accused and the Defence of *tu quoque* (Ch.), 17 February 1999, para. (i).
[26] *Kambanda*, Trial Judgement , 4 September 1998, para. 34.
[27] *Bagilishema*, Trial Judgement, 7 June 2001, para. 116.
[28] Defence Final Trial Brief, p. 7.
[29] Decision on the Prosecutor's Motion for Judicial Notice, 14 July 2005, p. 7.

31. The Chamber finds that the arrival of a bus, alleged in paragraph 18 of the Indictment, is of no relevance to the crimes charged against Accused Athanase Seromba. Consequently, the Chamber considers it to be a general allegation.

32. The Chamber finds that the allegations made in paragraphs 5, 33, 34, 35 and 45 of the Indictment allude to a plan of extermination involving the Accused, even though he is not charged with any specific act. Consequently, the Chamber considers them as general allegations.

33. The Chamber finds that the allegation in paragraph 32 of the Indictment that the Accused embezzled all the assets of the parish is not supported by evidence. Consequently, the Chamber considers it to be a general allegation.

34. The Chamber finds that the allegation contained in paragraph 50 of the Indictment falls within the general context of the events which occurred in Nyange in April 1994. Consequently, the Chamber considers it to be a general allegation.

35. In view of the foregoing, the Chamber does not deem it necessary to consider such allegations in its factual findings.

2. Kivumu *commune*, Nyange parish and the duties exercised by the accused

36. Kivumu *commune* is located in Kibuye *préfecture*, Republic of Rwanda.[30] In 1994, this *commune* had a population of about 53,000 inhabitants, including approximately 6,000 Tutsi.[31]

37. Nyange parish is located in Nyange *secteur*, Kivumu *commune*. The Nyange church measured 55 metres x 19 metres (55m x 19m).[32] The church had a seating capacity of at least 1,500.[33]

38. The Chamber notes that at the time of events referred to in the Indictment, Athanase Seromba was a priest in Nyange parish, where he had been assigned as a vicar.[34] Several witnesses testified that the parish priest of Nyange, Father Straton, had already left this parish at the time of the events which occurred during April 1994.[35] These same witnesses also testified that Seromba had assumed the daily management of the parish, while waiting to take up his duties in the parish of Crête Zaïre Nil, where he had been posted since 17 March 1994.[36] The Chamber further notes, in light of those testimonies and the factual findings made above, that Seromba acted in a number of ways which show that he was responsible for the daily management of Nyange parish during the April 1994 events.[37] Accordingly,

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[30] Transcript, 27 September 2004, ppF-6 (open session), *Preliminary report on identification of sites of the genocide and massacres that took place in Rwanda from April-July 1994* (P-4), pp. 138 and 165, Kibuye map (P-1) and annotated Kibuye map (P-1B).
[31] Witness FE56 testified that the population of Kivumu *commune* stood at 53,000 (Transcript, 4 April 2006, p. 28 (closed session)). Witness FE27 testified that during the 1993 census, 55,000 persons were resident in Kivumu, including approximately 6,000 Tutsi (Statement of Witness FE27 before Tribunal investigators on 14 September 2000 (P.-41), p. 3).
[32] Preliminary report on identification of sites of the genocide and massacres that took place in Rwanda from April-July 1994 (P-4), p. 166.
[33] The estimates of witnesses are: CBK: 3,000 (Transcript of 19 October 2004, p. 8 (closed session)); CNJ: 1,400 (Transcript, 25 January 2005, p. 31 (open session)); CBT: 2,000 (Transcript, 7 October 2004, p. 3 (closed session)); CF23: between 1,200 and 2,000 (Transcript, 3 April 2006, pp. 1-2 (open session)); FE32: between 1,500 and 2,000 persons (Transcript, 6 April 2006, p. 16 (open session)); FE27: 1,500 (Transcript, 23 March 2006, p. 64 (closed session)).
[34] See Letter of 17 March 1994 from the Bishop of Nyundo to Father Athanase Seromba (Exhibit D-5).
[35] See YAT: Transcript, 30 September 2004, pp. 19 and 21 (open session); CBI: Transcript, 4 October 2004, pp. 23 (open session); BZ4: Transcript, 1 November 2005, p. 56 (open session); CF23: Transcript, 3 April 2006, pp. 5 (open session); PA1: Transcript, 20 April 2006, p. 7 (closed session).
[36] See Exhibit D-5.
[37] See CDL: Transcript, 19 January 2005, pp. 8, 14 and 19 (open session); CBK: Transcript, 20 October 2004, p. 7 (closed session); CF23: Transcript, 31 March 2006, pp. 36-37 (closed session), Transcript, 3 April 2006, pp. 5-6 (open session); BZ4: Transcript, 1 November 2005, pp. 57 (open session). See findings of the Chamber in Section 4.3.2.

the Chamber is of the view that Accused Seromba was acting as Nyange parish priest during the April 1994 events.

3. Events from 6 to 10 April 1994 in Kivumu *commune*

3.1. The Indictment

39. The Indictment alleges as follows:

> "6. After the death of the Rwandan President, on 6 April 1994, attacks against the Tutsi began at Kivumu *commune*, causing the deaths of some Tutsi civilians, including Grégoire Ndakubana, Martin Karakezi and Thomas Mwendezi.
>
> 7. To escape the attacks directed against them, Tutsis from the different sectors of Kivumu *commune* fled their homes to seek refuge in public buildings and churches, including the Nyange church. The *Bourgmestre* and communal police gathered and transported the refugees from the different sectors of Kivumu *commune* to Nyange parish.
>
> 8. Athanase Seromba questioned the refugees transferred to the Parish about those not yet present, then noted the names of the remaining refugees on a list he gave to the *Bourgmestre* Grégoire Ndahimana for the purpose of looking for and bringing them to the Parish.
>
> 9. A Tutsi named Alexis Karake, his wife and his children (more than six) were brought from Gakoma cellule to Nyange church through that list.
>
> […]
>
> 39. On or about 12 April 1994, the *Bourgmestre* Grégoire Ndahimana ordered members of the communal police to search for Tutsi civilians from the list prepared by Athanase Seromba, as described above, and bring them to the church."

3.2. The allegation that attacks were perpetrated against the Tutsi in Kivumu commune, resulting in the death of certain Tutsi civilians, including Grégoire Ndakubana, Martin Karekezi and Thomas Mwendezi

3.2.1. The evidence

Prosecution witnesses

40. Witness CDL, a Hutu,[38] testified that in the night of 7 to 8 April 1994, an attack led by Ndungutse was launched against the Ndakubana Tutsi family.[39] CDL further testified that in the night of 9 to 10 April 1994 at Nyange centre, a trader and an agricultural monitor named Martin were killed.[40] Lastly the witness testified that communal authorities, namely the *Bourgmestre*, the IPJ (judicial police inspector) and other communal officials violated the very law that they were supposed to enforce.[41]

41. Witness CBJ, a Tutsi,[42] stated that the massacres which occurred in Murambi *cellule* where he resided, commenced on 7 April 1994. He also explained that in the night of 7 April 1994, members of the Rudakubana family were killed by a teacher named Télesphore Ndungutse. He further testified that

[38] Witness information sheet (P-19).
[39] Transcript, 19 January 2005, pp. 7-8 and 40 (open session).
[40] Transcript, 19 January 2005, p. 7 (open session).
[41] Transcript, 19 January 2005, pp. 45-47 (open session).
[42] Witness information sheet (P-15).

between 7 and 9 April 1994, Martin, a Tutsi who hailed from Ngobagoba *secteur*, Gasake *commune* was killed during an attack launched by a businessman, Gaspard Kanyarukiga.[43]

42. Witness CBN, a Tutsi,[44] testified that a certain Thomas was killed during the attacks against the Tutsi shortly after the death of the President.[45]

Defence witnesses

43. Witnesses FE31, FE13, FE56 and CF14 testified that Hutu assailants attacked the Ndakubana Tutsi family.[46] FE13 and CF14 stated *inter alia* that following this incident, insecurity increased throughout the *commune* in the night of 7 to 8 April 1994.[47] They further explained that during the same night, family members of Thomas Mwendezi, a Tutsi, were killed during an attack in Kigali *secteur*.[48]

3.2.2. Findings of the Chamber

44. The Chamber finds the testimonies of Witnesses CDL, CBJ and CBN to be credible with regard to the murder of Ndakubana. Not only are they consistent, they are also corroborated by the evidence of Defence witnesses. Consequently, the Chamber finds that it has been proven beyond a reasonable doubt that attacks were perpetrated against the Tutsi in Kivumu *commune*, resulting in the death of some of them, including Grégoire Ndakubana, Martin Karakezi and Thomas Mwendezi.

3.3. The allegation that Tutsi sought refuge in public buildings and churches, including the Nyange church.

3.3.1. The evidence

Prosecution witnesses

45. Witnesses YAU, a Tutsi woman,[49] and CBS, a Tutsi man,[50] testified that upon arriving at the church on 12 April 1994, they found other refugees there, the majority of whom were Tutsi.[51]

46. Witness CBI, a Tutsi,[52] testified that several persons arrived at the parish on board vehicles, including a white Toyota driven by a certain Yohana or Jean, also called Jigoma.[53] The witness also testified that some officials were involved in transporting refugees to the parish. Some of the officials he cited were Grégoire Ndahimana, Clément Kayishema, Gaspard Kanyarukiga and Télesphore Ndungutse.[54]

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[43] Transcript, 13 October 2004, p. 8 (open session).
[44] Witness information sheet (P-16).
[45] Transcript, 15 October 2004, p. 51 (open session).
[46] FE31: Transcript, 29 March 2006, p. 11 (closed session); FE13: Transcript, 7 April 2006, p. 17 (closed session); FE56: Transcript, 4 April 2006, p. 43 (open session); CF14: Transcript, 16 November 2005, p. 27 (close session).
[47] Transcript, 7 April 2006, p. 17 (closed session); Transcript, 16 November 2005, p. 27 (closed session).
[48] Transcript, 7 April 2006, p. 17 (closed session); Transcript, 16 November 2005, p. 27 (closed session).
[49] Witness information sheet (p-9).
[50] Witness information sheet (p-12).
[51] Transcript, 29 September 2004, p. 12 (open session); Transcript, 5 October 2004, pp. 8-9 (open session).
[52] Witness information sheet (p-11).
[53] Transcript, 4 October 2004, p. 28 (open session).
[54] Transcript, 1 October 2004, pp. 41-42 (open session).

47. Witness CBN, a Tutsi,[55] stated that he sought refuge in Nyange church as from 12 April 1994.[56] He added that several persons arrived at the parish on board a vehicle belonging to a certain Rwamasirabo.[57]

48. Witness CBJ[58] testified that he found Tutsi refugees at Nyange parish upon his arrival there on 10 April 1994. He further testified that in the evening of 10 April 1994, Athanase Seromba asked a night watchman named Canisius Habiyambere and the major seminarian, Apollinaire Hakizimana, to count the refugees who were going to spend the night there. Lastly, Witness CBJ testified that these were 48 of them.[59]

49. Witness CBK, a Hutu,[60] explained that Tutsi who were attacked by the Hutu sought refuge in Nyange parish, which they considered to be a "safe haven". He further stated that the first refugees arrived in the parish on or about 8 April 1994.[61]

50. Witness CDL, a Hutu,[62] testified that the Tutsi willingly sought refuge at the Nyange parish or at the communal office.[63]

Defence witnesses

51. Witness BZ3, a Hutu,[64] testified that he met refugees in Nyange church when she attended the morning mass on 11 April 1994.[65] The witness also stated that the refugees also attended the mass,[66] adding that they were not many.[67] According to the witness, the Tutsi sought refuge in the church because the Hutu were burning down their houses.[68] Witness BZ3 also testified that she saw refugees heading towards the communal office while returning home after mass.[69] She added that when they arrived there, they were directed towards the church.[70] Lastly the witness testified that she saw several persons being led to the communal office on board a vehicle belonging to Aloys Rwamasirabo and driven by Jigoma.[71]

52. Witness CF14, a Hutu,[72] testified that he saw no refugees at the communal office on 12 April 1994, but however did learn that the *bourgmestre* had "transported" other persons very early that morning to the parish. [73] http://www.ictr.org/ENGLISH/cases/Seromba/judgement/061213-judgement.htm - _ftn73#_ftn73

53. Witness FE32, a Hutu,[74] explained that Tutsi fled to the church as soon as they noticed that they were being persecuted.[75] He further explained that Tutsi sought refuge in Nyange church because they

[55] Witness information sheet (P-16).
[56] Transcript, 15 October 2004, p. 40 (open session).
[57] Transcript, 15 October 2004, p. 58 (open session).
[58] See Section 3.2.1.
[59] Transcript, 13 October 2004, p. 10 (open session).
[60] Transcript, 19 October 2004, p. 6 (closed session); Witness information sheet (P-17).
[61] Transcript, 19 October 2004, p. 73 (open session).
[62] See Section 3.2.1.
[63] Transcript, 19 January 2005, p. 47 (open session).
[64] Transcript, 8 November 2005, p. 29 (open session).
[65] Transcript, 31 October 2005, p. 44 (open session).
[66] Transcript, 8 November 2005, p. 27 (open session).
[67] Transcript, 31 October 2005, p. 45 (open session).
[68] Transcript, 31 October 2005, p. 45 (open session).
[69] Transcript, 31 October 2005, p. 45 (open session).
[70] Transcript, 31 October 2005, p. 45 (open session).
[71] Transcript, 8 November 2005, p. 22 (open session).
[72] See Section 3.2.1.
[73] Transcript, 16 November 2005, pp. 40 and 42 (closed session).
[74] See Section 3.2.1.
[75] Transcript, 29 March 2006, p. 8 (open session); Transcript, 29 March 2006, p. 163 (closed session).

believed that this location could secure them protection against attacks as in the past. Lastly, the witness testified that the Tutsi went to the church on their own volition.[76]

3.3.2. Findings of the Chamber

54. The Chamber finds that all the statements of both Prosecution and Defence witnesses are consistent with respect to the fact that Tutsi who lived in Kivumu *commune* voluntarily sought refuge in public buildings, such as the communal office, or in churches, including the Nyange parish church. The Chamber therefore considers that this fact has been established beyond all reasonable doubt.

3.4. The allegation that Athanase Seromba provided the Bourgmestre of the commune with a list of Tutsi for the purpose of looking for and bringing them to Nyange church

3.4.1. The evidence

Prosecution witness

55. Witness CBI[77] stated that he gave to Athanase Seromba, at his request, the names of several persons of the Tutsi ethnic group who lived in Nyange and who were not present at the parish. He also testified that the Accused prepared a list which he subsequently handed to Grégoire Ndahimana, the *bourgmestre* of the *commune*.[78] Some of the names Witness CBI testified to having disclosed to Seromba are Antoine Karake, Aloys Rwemera and those of his family members: Épimaque Ruratsire and Vénust Ryanyundo.[79] The witness further testified that on 13 April 1994, Antoine Karake arrived at Nyange church on board a vehicle that had been confiscated.[80]

56. During cross-examination, Witness CBI testified that he arrived at Nyange church on Tuesday, 12 April 1994 in the evening,[81] adding that he found approximately 1,000 persons there who had come to seek refuge. He also stated that he met Athanase Seromba the day following his arrival and that Athanase Seromba asked him if there were still persons remaining in certain *secteurs* of the *commune*. The witness stated that he answered in the affirmative, disclosing the names of certain persons.[82] Asked by Defence Counsel how the witness have determined that these persons were not in a crowd that he had himself estimated at around 1,000 persons, the witness responded that there was a difference between "counting people and recognising them", adding subsequently that he had noticed that these persons were absent simply because he knew them.[83]

Defence witnesses

57. Witness PA1, a Hutu,[84] testified that he arrived in Nyange parish on Sunday, 10 April 1994.[85] He stated that he had never heard about a list of persons of Tutsi origin.[86]

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[76] Transcript, 29 March 2006, p. 17 (closed session).
[77] See Section 3.3.1.
[78] Transcript, 4 October 2004, p. 7 (open session).
[79] Transcript, 4 October 2004, p. 7 (open session).
[80] Transcript, 1 October 2004, p. 46 (open session).
[81] Transcript, 4 October 2004, p. 27 (open session).
[82] Transcript, 4 October 2004, p. 30 (open session).
[83] Transcript, 4 October 2004, pp. 30-31 (open session).
[84] Transcript, 20 April 2006, p. 38 (closed session).
[85] Transcript, 20 April 2006, p. 7 (closed session).
[86] Transcript, 20 April 2006, p. 26 (closed session).

58. Witness FE32 is a Hutu who testified openly as Anastase Nkinamubanzi. He stated that during the events of April 1994, he was working for the Astaldi company, which was responsible for the construction of the Rubengera-Gisenyi road.[87] He also stated that the driver of the bulldozer which demolished Nyange church.[88] He testified that he was a Rwandan court sentenced him to life imprisonment for this act.[89] Finally, the witness testified that a Tutsi list never existed.[90]

59. Witness FE27, a Hutu,[91] testified that he was not aware of the existence of any list of persons prepared by Athanase Seromba, adding that if such a list existed he would have been informed of it.[92]

3.4.2. Findings of the Chamber

60. The Chamber notes that Witness CBI is the only Prosecution witness who testified that Athanase Seromba prepared a list of Tutsi which he allegedly handed to the *bourgmestre,* so that the Tutsi could be sought out and brought to Nyange parish. The Chamber finds implausible Witness CBI's testimony that upon arrival in Nyange parish on 12 April 1994, he could immediately determine the absence of 10 people from a crowd of 1,000 persons. In fact, the witness merely stated that he noticed the absence of these persons simply because he knew them, even however specifying the observations or reasons that must have led him to such a conclusion. The Chamber therefore finds that Witness CBI is not credible. Accordingly, the Chamber finds that the Prosecution has not established beyond a reasonable doubt that Athanase Seromba prepared a list which he handed to the *bourgmestre* in order to seek out the persons on the list and bring them to Nyange parish.

4. The events of 10 to 11 April 1994

4.1. The Indictment

61. The Indictment alleges as follows:

> "10. On or about 10 April 1994, several important meetings were held at the Parish of Nyange and the communal office. Athanase Seromba, Fulgence Kayishema, Gaspard Kanyatukiga and others not known to the Prosecutor attended these meetings.
>
> 11. During these said meetings, it was decided to request Kibuye *prefecture* for *gendarmes*, to gather all Tutsi civilians of Kivumu *commune* at Nyange church to exterminate them
>
> […]
>
> 36. On or about 10 April 1994, several important meetings were held at the Parish of Nyange and the communal office. Athanase Seromba, Fulgence Kayishema, Gaspard Kanyatukiga and others not known to the Prosecution attended these meetings.
>
> 37. During these said meetings, they decided to request Kibuye *prefecture* for *gendarmes*, to gather all Tutsi civilians of Kivumu *commune* at Nyange church to exterminate them."

4.2. The 10 April 1994 Meeting

4.2.1. The evidence

[87] Transcript, 28 March 2006, p. 25 (open session).
[88] Transcript, 28 March 2006, p. 35 (open session).
[89] Transcript, 5 April 2006, p. 30 (open session).
[90] Transcript, 28 March 2006, p. 55 (open session).
[91] Transcript, 23 March 2006, pp. 38 and 54 (closed session).
[92] Transcript, 23 March 2006, p. 27 (open session).

Prosecution witness

62. Witness YAT, a Tutsi,[93] testified that a parish council meeting was held at the presbytery on or about 10 April 1994,[94] which was attended by Athanase Seromba, Kabwana, *Bourgmestre* Ndahimana, Criminal Investigation Police Inspector, Fulgence Kayishema, Inspector Aloys Uwoyiremye and other members of the parish council.[95] He explained that it was an extraordinary meeting held to address the state of insecurity that prevailed in the *commune* following the death of President Habyarimana and the attacks being perpetrated against the Tutsi.[96] Witness YAT also testified that during the meeting Seromba stated his opinion that President Habyarimana had been killed by the *Inkotanyi* and that the issue of persons killed was a political problem which did not fall within the jurisdiction of the parish council as such.[97] The witness also stated that that parish council meeting was the last he attended.[98]

63. Witness YAT further stated that Fulgence Kayishema informed him on 11 April 1994 that a meeting was held on 10 April 1994 in Nyange parish during which the decision to kill Tutsi was taken. He added that Kanyarukiga, Athanase Seromba, *Bourgmestre* Ndahimana and Kayishema were present at the meeting.[99]

Defence witness

64. Witness FE27 testified that during the meeting of 11 April 1994, *Bourgmestre* Grégoire Ndahimana stated that he met with Athanase Seromba the day before this meeting and that Seromba had spoken to him of Tutsi who had sought refuge in Nyange church.http://www.ictr.org/ENGLISH/cases/Seromba/judgement/061213-judgement.htm_ftn100#_ftn100[100]

4.2.2. Findings of the Chamber

65. The Chamber notes that the Defence has not adduced any evidence to contradict Witness YAT's testimony that a parish council meeting was held in Nyange church on 10 April 1994. In fact, Defence Witness FE27 in no way contradicted Witness YAT when he testified to having heard the *bourgmestre* inform participants in the 11 April 1994 meeting that he had met with Athanase Seromba the previous day, i.e. 10 April 1994. The Chamber is of the view that such a meeting could been part of the 10 April 1994 parish council meeting referred to by Witness YAT, who testified that he was a member of the council, a point which was not challenged by the Defence. The Chamber also finds that details provided by Witness YAT about the meeting are consistent. The Chamber therefore considers his testimony that a parish council meeting was held on 10 April 1994 to be credible. However, Witness YAT's testimony that a second meeting was held on 10 April 1994 in Nyange parish cannot be deemed credible, as the information which was disclosed to him is not supported by any other evidence. Finally, as regards Witness FE27, who did not testify specifically about the parish council meeting of 10 April 1994, the Chamber nevertheless finds his testimony that a meeting was held at the parish on 10 April 1994 to be credible, as it is corroborated by that of Witness YAT.

66. In view of the foregoing, the Chamber finds that the Prosecution has established beyond a reasonable doubt that a parish council meeting was held on 10 April 1994 in Nyange parish in which Witness YAT, Athanase Seromba and other persons participated.

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[93] Witness information sheet (P-10)
[94] Transcript, 29 September 2004, p. 49 (open session).
[95] Transcript, 29 September 2004, p. 49 (open session).
[96] Transcript, 29 September 2004, p. 49 (open session).
[97] Transcript, 29 September 2004, pp. 48-49 (open session); Transcript, 30 September 2004, p. 22 (open session).
[98] Transcript, 30 September 2004, p. 22 (open session).
[99] Transcript, 29 September 2004, p. 49 (open session).
[100] Transcript, 23 March 2006, p. 22 (closed session).

4.3. The 11 April 1994 Meeting at the Communal Office

4.3.1. The evidence

Prosecution witnesses

67. Witness CNJ, a Hutu,[101] testified that his uncle informed him that a meeting was held at the communal office on 11 April 1994, during which decisions were taken, including the decision to assemble the Tutsi at the Nyange church.[102] He also testified that since he did not attend the meetings, he was not in a position to state precisely when the decision to destroy the church had been taken.[103]

68. Witness CDL, a Hutu,[104] explained that security committee meetings were held in the communal office or at the parish, adding that the meetings were held regularly at the instance of the *bourgmestre*.[105] He also stated that department heads and religious authorities were invited to participate in the meetings.[106] The witness finally stated that Athanase Seromba participated in the 11 April 1994 meeting of the security committee.[107]

Defence witnesses

69. Witness FE13 stated that the 11 April 1994 meeting was chaired by *Bourgmestre* Grégoire Ndahimana,[108] who informed those in attendance that the meeting would be dealing with security issues and the fate of Tutsi refugees.[109] He added that only an exceptional situation could justify the holding of any such meeting.[110] The witness further explained that, in general, meetings dealing with security issues were also attended by *conseillers de secteur*, who were to convey recommendations to the authorities,[111] the *IPJ* (Criminal Investigations Officer) in charge of security in the *commune* and the president of the *canton tribunal*.[112] He also mentioned that many Tutsi, including Charles Mugenzi, head of the Nyange health centre, Boniface Gatare, a youth counsellor in the *commune* and Lambert Gatare, a political party official, also attended the meeting.[113] Finally, Witness FE13 stated that decisions taken at the meeting include the decision to assemble Tutsi refugees at Nyange parish[114] and to make a request for military reinforcements from Kibuye *préfecture*.[115]

70. Witness FE27, a Hutu,[116] testified that he attended the meeting of 11 April 1994, held in the communal office. He indicated that this meeting, which usually dealt with problems related to the economic development of the *commune*, was transformed into a security committee meeting on the initiative of the *bourgmestre*.[117] The witness added that Athanase Seromba did not participate in this

[101] Transcript, 24 January 2005, p. 31 (open session); Witness information sheet *témoin* (P-24).
[102] Transcript, 24 January 2005, p. 27 (closed session).
[103] Transcript, 25 January 2005, p. 18 (open session).
[104] See Section 3.2.1.
[105] Transcript, 19 January 2005, p. 19 (closed session).
[106] Transcript, 19 January 2005, pp. 8-9 (closed session).
[107] Transcript, 19 January 2005, p. 51 (open session).
[108] Transcript, 12 April 2006, cross-examination, p. 19 (open session).
[109] Transcript, 7 April 2006, p. 21 (open session).
[110] Transcript, 7 April 2006, p. 18 (closed session).
[111] Idem.
[112] Idem.
[113] Transcript, 7 April 2006, pp. 19-20 (closed session).
[114] Idem.
[115] Transcript, 7 April 2006, p. 21 (open session).
[116] See Section 3.2.1.
[117] Transcript, 7 April 2006, p. 19 (closed session).

meeting.[118] He further stated that during the meeting *Bourgmestre* Ndahimana read out a letter sent to him by Seromba, in which the latter informed him that he would not attend, but would adhere to the decisions the meeting would take.

71. Witness CF23, a Hutu,[119] testified that the 11 April 1994 meeting was convened by the *bourgmestre* of the *commune*, Ndahimana. He added that the purpose of this meeting was to review the situation, to take all the necessary measures to stop the killings and lastly to discuss the organisation of receiving refugees into Nyange parish.[120] He indicated that Tutsi, including Charles Mugenzi and Boniface Gatare, actively participated in this meeting.[121] The witness emphasised that participants in this meeting were opposed to the killings. He also stated that Athanase Seromba did not attend the meeting, but had written a letter to the *bourgmestre* which was read out at the meeting.[122] In that letter, the witness continued, Seromba asked the *commune* authorities to ensure the protection of refugees, as well as their food supply, suggesting to the authorities that they solicit the assistance of the Caritas. Finally, Witness CF23 explained that at the end of the meeting, the *bourgmestre* requested gendarme reinforcement from Kibuye *préfecture* as had been recommended to him by those in attendance.[123]

4.3.2. Findings of the Chamber

72. The Chamber finds that the testimonies of CNJ and CDL are not reliable. It notes that CNJ's testimony is hearsay. As to CDL, the Chamber observes that nothing in his testimony shows that he personally attended the meeting of 11 April 1994. In fact, when Counsel for the Defence put a question to him with respect to the 13 April 1994 meeting, the witness stated as follows: "I think that I have already said in my testimony there are certain events which I heard and saw myself, [...] and other events that were reported to me; in particular, this meeting".[124] Furthermore, the witness was unable to state convincingly why he failed to mention the presence of the clergy in his prior statements, whereas he does so in his testimony before the Chamber. In fact, when asked by Counsel for the Defence why he did not mention, before the Rwandan courts, the names of the clergy when he was giving the names of participants in security meetings, the witness stated that when he began to testify in 1999, he was unable to "say everything in one go because at the time it was not easy to understand the reasons and to say the whole truth".[125]

73. Witnesses FE27 and CF23 cannot be considered credible on this point, as their testimonies are inconsistent with their prior statements. With respect to FE27, the Chamber notes that in his 25 January 2002 statement, he stated: "Father Seromba also attended the meeting for the issue of gathering of the refugees at the church to ensure their security was considered".[126] The witness confirmed that he signed the prior statement and made the statements therein.[127] On the other hand, he admitted that he lied to members of the "truth" committee "because they were telling me that if I were to say that Father Seromba was at the meeting I was going to be released".[128] As for CF23, the Chamber notes that in his 14 August 2002 pre-trial statement, this witness stated as follows: "[...] several persons attended that meeting, I remember recognising [...] Reverend Father Seromba [...]".[129] The witness testified that he had only signed the last page of his 14 August 2002 statement, even

[118] Transcript, 7 April 2006, p. 22 (open session).
[119] Transcript, 30 March 2006, pp. 9-10 (closed session); Witness information sheet (D-74).
[120] Transcript, 31 March 2006, (closed session), p. 3.
[121] Idem.
[122] Transcript, 31 March 2006, p. 5 (closed session).
[123] Transcript, 31 March 2006, p. 10 (open session).
[124] Transcript, 19 January 2005, p. 54 (open session).
[125] Transcript, 19 January 2005, pp. 53-54 (open session).
[126] Statement of Witness FE27 to the "truth" committee on 25 January 2002 (P-42), p. 2.
[127] Transcript, 24 March 2006, p. 17 (closed session).
[128] Transcript, 24 March 2006, p. 18 (closed session).
[129] Statement of Witness CF23 to investigators of the Tribunal on 14 August 2002 (P-49), p. 3.

though his signature appears on each of the pages of the statement.[130] The witness also challenged the validity of the statement, pointing out that the excerpts which were read out to him did not reflect what he had said and that he gave credence only to the documents he wrote himself, such as his confessional statements.[131] Finally, the witness stated at trial that he had referred to Seromba's letter in his statement to the investigators of the Tribunal. The Chamber notes, however, that such reference is not contained in the statements.[132]

74. The Chamber finds Witness FE13 credible because of the duties he performed at the *commune,*[133] his presence at the meeting and the account he gave of the meeting. Moreover, FE13's testimony concerning the reading of the letter from Athanase Seromba during the meeting has been corroborated by the testimonies of Witnesses FE27 and CF23.

75. In view of the foregoing, the Chamber finds that it has been proven beyond a reasonable doubt that a meeting known as "security meeting", was held in the communal office on 11 April 1994. It finds, however that it has not been established beyond a reasonable doubt that Athanase Seromba attended this meeting.

4.4. Arrival at Nyange church of gendarmes coming from Kibuye préfecture

4.4.1. The evidence

Prosecution witness

76. Witness CDL, a Hutu,[134] testified that he saw *gendarmes* on 10 or 11 April 1994. He stated that he was unaware of the circumstances surrounding the arrival of the *gendarmes*, who according to him, came together with the *bourgmestre*. The witness also testified that he did not know whether the *gendarmes* had come at the request of Athanase Seromba. He did, however, remark that a *gendarme* was constantly at Seromba's side during the April 1994 events.[135]

Defence witnesses

77. Witness FE55, a Hutu,[136] testified that during the 11 April 1994 meeting, the decision was taken to seek *gendarme* reinforcements from Kibuye *préfecture* to ensure the security of refugees in Nyange parish.[137]

78. Witness BZ1, a Hutu,[138] testified that there were about four armed *gendarmes* stationed at the parish. He further testified that the *gendarmes* arrived there on or about 13 April 1994, shortly before the situation worsened.[139]

79. Witness PA1[140] testified that four *gendarmes* arrived in Nyange parish on Tuesday, 12 April 1994.[141]

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[130] Transcript, 3 April 2006, p. 27 (closed session).
[131] Transcript, 3 April 2006, pp. 30-31 (closed session).
[132] Transcript, 3 April 2006, p. 12 (closed session).
[133] Transcript, 7 April 2006, p. 11 (closed session), p. 23 (open session), p. 35 (closed session); Witness information sheet (D-86).
[134] See Section 3.2.1.
[135] Transcript, 19 January 2005, p. 71 (open session).
[136] Statement of Witness FE55 to Tribunal investigators on 13 March 2003 (P-61), p. 1.
[137] Transcript, 12 April 2006, p. 42 (open session).
[138] Transcript, 10 November 2005, p. 30 (open session).
[139] Transcript, 2 November 2005, pp. 66-67 (open session).
[140] See Section 3.4.1.

4.4.2. Findings of the Chamber

80. The Chamber notes that the statements of Prosecution Witness CDL and Defence Witnesses FE55, BZ1 and PA1 are consistent with respect to the presence of *gendarmes* in Nyange parish at the time of the April 1994 events, although they differ slightly as to the date of arrival on the location. The Chamber further notes that Witness FE55 also stated that the arrival of the *gendarmes* was the result of a decision taken at the 11 April 1994 meeting, referred to as a "security meeting". This contention is corroborated by Witness FE13 and CF23 in their respective testimonies.[142]

81. In view of the foregoing, the Trial Chamber finds that CDL, FE55 and BZ1 are credible witnesses. Consequently, the Chamber considers that it has been established beyond a reasonable doubt that on 11 April 1994 *gendarmes* from Kibuye *préfecture* arrived at Nyange church.

5. Events of 12 to 14 April 1994 at Nyange Parish

5.1. The Indictment

82. The Indictment alleges as follows:

> "12. From about 12 April 1994, refugees were confined by the *gendarmes* and surrounded by the militiamen and *Interahamwe* armed with traditional and conventional weapons. Father Athanase Seromba did prevent the refugees from taking food and instructed the *gendarmes* to shoot any "*Inyenzi"* (reference to Tutsi) who tried to take some food from the *Presbytere* or the parish banana groves. He refused to celebrate mass for them and stressed that he didn't want to do that for the *Inyenzi*.
>
> 13. On or about 12 April 1994, Father Athanase Seromba expelled from the Parish four Tutsi employees (Alex, Félécien, Gasore and Patrice). He forced them to leave the parish, while *Interahamwe* and militiamen were beginning the attacks against refugees of the parish.
>
> 14. Father Athanase Seromba knew that removing the employees would cause their death. In fact, only one of them (Patrice) was able to return to the parish, seriously wounded, which did not prevent Athanase Seromba from preventing his access to the church. He was killed by the *Interahamwe* and the militiamen
>
> […]
>
> 38. On or about 12 April 1994, Father Seromba chaired a meeting in his parish office, with, among others, Grégoire Ndahimana and Fulgence Kayishema. Immediately after this meeting, Fulgence Kayishema said that Kayiranga (a prosperous Tutsi businessman) must be found and brought to the church.
>
> 40. The second step of the plan consisted of keeping the refugees inside the church, surrounding the Church with *Interahamwe* and militiamen and inflicting on the refugees conditions of life calculated to weaken them physically. The plan also included regular attacks by *Interahamwe* and militiamen of the refugees to defeat their endurance.
>
> 41. To this end, from about 12 April 1994, *gendarmes* confined the refugees at the Nyange church, which was surrounded by *Interahamwe* and the militiamen.
>
> 42. Athanase Seromba prevented the refugees from having access to sanitary places in the parish or from taking food, ordering gendarmes to shoot any *Inyenzi* who tried to take food from the Presbytere or the banana groves of the parish.

[141] Transcript, 20 April 2006, p. 16 (closed session).
[142] See Section 4.3.1.

43. On or about 12 April 1994, in the afternoon, Father Athanase Seromba chaired a meeting with Grégoire Ndahimana and Fulgence Kayishema. Soon after, the *bourgmestre* Ndahimana declared, "*We choose the richest to be killed, the others can go back to their houses*".

5.2. Encirclement of refugees by militia and Interahamwe armed with traditional and conventional weapons

5.2.1. The evidence

Prosecution witnesses

83. Witness CBS[143] testified that the church was surrounded by *gendarmes*.[144] Witness CBK[145] testified that the church was encircled by attackers.[146]

Defence witnesses

84. Witness PA1[147] testified that the evening of 11 April 1994, "a lot of people" surrounded the church where the refugees were.[148] Witness FE56, a Hutu,[149] testified that Kayishema had Nyange church surrounded by "people".[150] He further testified added that soldiers were positioned near the doors of the presbytery, in order to block the entrance.[151]

5.2.2. Findings of the Chamber

85. The Trial Chamber notes that, with the exception of Witness CBS who testified that only *gendarmes* surrounded the church, the fact that from 12 April 1994, militiamen and other *Interahamwe* surrounded Nyange church where the refugees were confined is corroborated both by Prosecution Witness CKB and Defence Witnesses PA1 and FE56. Consequently, the Chamber considers this fact established beyond a reasonable doubt.

5.3. Athanase Seromba's order prohibiting the refugees from seeking food in the banana plantation of the parish and his alleged order to gendarmes to shoot any "Inyenzi" who attempted to pick any bananas

5.3.1. The evidence

Prosecution witnesses

86. Witness CBS[152] stated on three occasions that Athanase Seromba prevented the refugees from getting food from the parish banana plantation.[153] He explained, *inter alia,* that on Wednesday, 13

[143] See Section 3.3.1.
[144] Transcript, 5 October 2004, p. 9 (open session).
[145] See Section 3.3.1.
[146] Transcript of 19 October 2004, pp. 19-20 (closed session).
[147] See Section 3.4.1.
[148] Transcript, 20 April 2006, p. 14 (closed session).
[149] See Section 3.2.1
[150] Transcript, 3 April 2006, p. 54 (closed session).
[151] Transcript, 3 April 2006, p. 54 (closed session).
[152] See Section 3.3.1.
[153] Transcript, 5 October 2004, pp. 10 and 18-19 (open session); Transcript of 6 October 2004, pp. 29-30 (open session).

April 1994, some teachers, who were among the Tutsi refugees, asked for food from Seromba, but Seromba refused to give it to them. Following this refusal, certain refugees went on their own initiative into the banana plantation of the parish to harvest bananas, which they roasted in the parish courtyard.[154] The witness further explained that upon seeing the refugees, Seromba prohibited them from returning to the banana plantation and also gave orders to the gendarmes to shoot at any refugee who ventured there, treating the refugees as *"Inyenzi"*. Finally the witness stated that he was near Seromba when the latter made these remarks.[155]

87. Witness CBJ[156] also testified that the refugees had asked Athanase Seromba for food and that Seromba refused to give it to them. He also explained that he, together with other refugees, went to harvest bananas in the parish banana plantation. When Seromba saw the bananas, he became angry and scolded them for not showing him respect by going into the banana plantation. Seromba then addressed the *gendarmes* in these terms: "Whoever goes back to the banana plantation to cut the bananas, you should shoot at the persons."[157]

88. Witness CBN, a Tutsi,[158] stated on two occasions that Athanase Seromba prohibited refugees from getting food from the banana plantation on 14 April 1994, adding that Seromba ordered the gendarmes to shoot at any refugee who returned there.[159]

Defence witness

89. Witness CF23[160] stated twice during his testimony that Athanase Seromba never prohibited refugees from entering the banana plantation and that he saw refugees in the banana plantation when he personally went there on 13 April 1994.[161] He also testified that, on the same date, he spotted refugees moving about freely in the churchyard and even going to cut bananas.[162] The witness finally stated that he was not present on the location on 14 April 1994.[163]

5.3.2. Findings of the Trial Chamber

90. The Trial Chamber considers Witness CBS' description of the location and the banana plantations to be reliable.[164] Furthermore, his testimony at cross-examination is consistent with his testimony-in-chief. Moreover, there are not any major inconsistencies between his prior statements and his testimony before the Trial Chamber.[165] In this regard, the Trial Chamber considers that the failure to mention the events in issue in his 14 February 1999 statement[166] cannot be perceived as an inconsistency, insofar as no question on the said events was put to him at the time he made the statement. Furthermore, the Trial Chamber notes that the witness was at the location at the time the

[154] Transcript, 6 October 2004, p. 30 (open session).
[155] Transcript, 5 October 2004, p. 19 (open session).
[156] See Section 3.3.1.
[157] Transcript, 11 October 2004, p. 54 (open session).
[158] See Section 3.3.1
[159] Transcript, 15 October 2004, p. 43 (open session); Transcript, 18 October 2004, p. 3 (open session).
[160] See Section 4.3.1.
[161] Transcript, 31 March 2006, p. 24 (open session).
[162] Transcript, 3 April 2006, p. 15 (closed session).
[163] Transcript, 3 April 2006, p. 15 (closed session).
[164] Transcript, 6 October 2004, p. 31 (open session).
[165] There is a minor inconsistency between the witness's testimony and his 17 August 2000 statement (Statement of witness CBS to Tribunal investigators on 17 August 2000 (Statement not tendered as Prosecution exhibit)), p. 3; read out to the witness: Transcript, 6 October 2004 p. 28 (open session). In his statement, the witness states that refugees had delegated a group of teachers to go and ask for food from Athanase Seromba, whereas in his testimony, the witness testified that it was the teachers who took the initiative to meet Seromba. During cross-examination, Counsel for the Defence asked the witness to explain this inconsistency, referring erroneously to the statement of 15 November 1995. The witness then explained that there was a transcription error, adding that the refugees had never sent a delegation and that the teachers themselves took the initiative to meet the priest (Transcript, 6 October 2004, pp. 27-29 (open session)).
[166] Statement of Witness CBS to the Rwandan judicial authorities on 14 October 1999 (D-19).

events occurred. From the foregoing, the Chamber finds Witness CBS reliable both with respect to the prohibition and the order that Seromba allegedly gave to the gendarmes.

91. The Chamber finds that Witness CBJ is also reliable on these two points. In fact, it finds no contradiction between the prior statements of the witness and his testimony before the Chamber. In this regard, that the events in issue are not mentioned in the statements the witness made on 23 March 1997[167] and 24 June 1997[168] can be explained by the fact that no question in relation thereto was put to him at the time he made the statements. The Chamber observes that only minor inconsistencies relating to the number of Hutu attackers,[169] the number of Tutsi refugees in the church[170] and the number of Tutsi in Kivumu *commune*[171] were noted, and are not such as would impugn the credibility of witness CBJ.

92. The Trial Chamber also considers that the contradictory testimony given by Witness FE36[172] does not impugn the credibility of Witness CBJ. No question was put to Witness CBJ on FE36's account of the events. The Chamber also notes that Witness FE36 is not credible, as he admits having lied before the Chamber.[173] In this connection, the Chamber notes, in particular, that Witness FE36 testified that CBJ stated that his entire family had been killed, whereas CBJ had, in fact, only stated that certain members of his family were dead.[174]

93. The Trial Chamber considers that the testimony of CBN is not reliable on this point. What the witness said during his examination contradicts a statement made on 17 August 2000.[175] In the statement, the witness on the contrary claimed that the prohibition against entering the banana plantation was made by a *gendarme* in the presence of Athanase Seromba. Furthermore, the discussion between Seromba and the *gendarmes* allegedly did not take place in front of the church but in the banana plantation. The witness testified that the true account was that given before the Trial Chamber, and that the earlier account is the result of a misunderstanding, as it was Seromba who gave the order not to go into the banana plantation, which order was subsequently repeated by the gendarme.[176]

94. With respect to Defence Witness CF23, the Chamber notes that he acknowledged not having been present at the location on 14 April 1994. Moreover, the Chamber finds the witness's testimony that the refugees could move freely between the churchyard and the banana plantation to be hardly consistent with reality, especially as on 13 April 1994, the day he alleges to have witnessed this event, the church was already surrounded by numerous militiamen and other *Interahamwe,* whose violent attacks on the previous days justified the choice of the church as a sanctuary for refugees. In the light of the foregoing observations, the Chamber finds that Witness CF23 is not credible.

95. In view of the foregoing, the Trial Chamber finds that it has been proven beyond a reasonable doubt that between 13 and 14 April 1994, Athanase Seromba prohibited refugees from going into the Parish banana plantation to get food, and that he also ordered *gendarmes* to shoot at any refugees who ventured there.

96. The Chamber finds on the other hand that the Prosecutor did not adduce evidence in support of the allegation that Seromba prohibited Tutsi refugees from getting food at the presbytery. The Chamber therefore finds that this fact was not proved beyond a reasonable doubt.

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[167] Statement of Witness CBJ to Tribunal investigators on 23 March 1997 (D-26).
[168] Statement of Witness CBJ to Tribunal investigators on 24 June 1997 (D-25).
[169] Transcript, 13 October 2004, pp. 31-32 (open session).
[170] Transcript, 13 October 2004, pp. 10, 12 and 15 (open session).
[171] Transcript, 13 October 2004, pp. 14-15 (open session).
[172] Transcript, 21 November 2005, pp. 17-19 (closed session).
[173] Transcript, 28 November 2005, pp. 4 and 6 (closed session). *Seromba*, Decision on Defence Motion for an Investigation into the Circumstances and Actual Causes Underlying Retracting by Witness FE36, 20 April 2006.
[174] FE36: Transcript, 28 November 2005, p. 7 (closed session); CBJ: Transcript, 15 October 2004, p. 48 (open session).
[175] Statement of Witness CBN to Tribunal investigators on 17 August 2000 (statement not submitted as Prosecution exhibit), p. 3; read out to the witness: Transcript, 18 October 2004, p. 3 (open session).
[176] Transcript, 18 October 2004, pp. 3-4 (open session).

5.4. Refusal of Athanase Seromba to celebrate mass for "Inyenzi"

5.4.1. The evidence

Prosecution witnesses

97. Witness CBN[177] testified that on 14 April 1994 Athanase Seromba was approached by several Tutsi refugees, including some teachers, namely Bonera, Ruteghesa and Rwakayiro, who asked him to celebrate a mass for them.[178] The witness further testified that Athanase Seromba refused to celebrate the mass, arguing that he couldn't "waste his time".[179] The witness also explained that such refusal went against the wishes of the refugees who wanted the mass to be said.[180] He further explained that a Tutsi refugee then announced to other refugees that they should pray together, as Seromba had refused to say a mass for them.[181] Finally, the witness stated that Seromba was in front of the church when he expressed his refusal.[182]

98. Witness CBI[183] testified that, on or about 13 April 1994, Athanase Seromba entered the church to remove chalices, which he took to the presbytery, "on the first floor of his residential quarters".[184]

99. Furthermore, Witness CBJ[185] testified that there was no mass celebrated in Nyange parish on Sunday, 10 April 1994, explaining that it was not possible to celebrate mass because the "situation was rather critical".[186] The witness also testified that on 14 April 1994, Athanase Seromba removed priests' cassocks and chalices filled with communion from the church. Finally, the witness stated that he learned subsequently that Seromba had taken the objects with him to the presbytery.[187]

100. Witness CBK[188] testified that masses were celebrated in the old meeting hall during the events which occurred in Nyange parish in April 1994.[189]

Defence witness

101. Witness PA1[190] testified that as of 11 April 1994, the decision was taken to no longer celebrate mass in Nyange church because of the huge number of refugees and the presence of animals there, adding that masses were celebrated in the oratory, located in the presbytery.[191]

102. When Counsel for the Defence asked if the removal by Athanase Seromba of Communion hosts and sacerdotal ornaments had met with resistance on the part of the refugees, Witness PA1 answered: "There were no problems whatsoever. We believe that the sacrament is something that is highly respected by Catholics, and the sacred vases could not have stayed there because of the respect

[177] See Section 3.3.1.
[178] Transcript, 15 October 2004, pp. 60-61 (open session).
[179] Transcript, 15 October 2004, p. 41 (open session).
[180] Transcript, 18 October 2004, p. 1 (open session).
[181] Transcript, 18 October 2004, p. 49 (closed session).
[182] Transcript, 15 October 2004, p. 60 (open session).
[183] See Section 3.3.1.
[184] Transcript, 1 October 2004, p. 42 (open session).
[185] See Section 3.2.1.
[186] Transcript, 13 October 2004, p. 15 (open session).
[187] Transcript, 12 October 2004, p. 3 (open session).
[188] See Section 3.3.1.
[189] Transcript, 20 October 2004, p. 45 (closed session).
[190] Transcript, 20 April 2006, p. 38 (closed session).
[191] Transcript, 20 April 2006, p.11 (closed session).

due to such ornaments. So there was no opposition. We believed it was our mission to have all our sacraments respected and put them in a safe place."[192]

5.4.2 Findings of the Chamber

103. The Chamber finds Witness CBN credible. There are only minor inconsistencies between his trial testimony and prior statements as to the exact location where Athanase Seromba expressed his refusal to celebrate the mass[193] and what he said on this occasion.[194] The Trial Chamber does not consider such inconsistencies to be crucial, given the lapse of time since the occurrence of the events, on the one hand, and the numerous references by witnesses to Seromba's refusal to celebrate mass for Tutsi refugees.[195]

104. Moreover, the Chamber notes that Witnesses CBI, CBJ and CBK testified that Athanase Seromba removed objects that are useful for celebrating mass between 10 and 13 April 1994.

105. The Chamber considers that the testimony of PA1, member of a religious order, clearly shows that from 11 April 1994, no mass was celebrated in Nyange church. On this point, Witness PA1 is corroborated by Witness CBI, as the Trial Chamber considers it in significance that CBI, unlike PA1, gave the date of the decision to no longer celebrate mass in church as being rather 10 April 1994. The Chamber considers, therefore, that these two witnesses are credible on this point. The Chamber is also of the view that Witness PA1 is credible with respect to the fact that sacred objects (Communion hosts and sacerdotal ornaments) were removed from the church.

106. That the refugees did not put up any resistance, as asserted by Witness PA1, to the removal by Seromba of sacred objects does not, in the opinion of the Chamber, exclude in any way the possibility that the refugees requested that a mass be said for them. In this regard, the Chamber is aware of the fact that Tutsi refugees in Nyange church knew that they were in constant danger of death during the events of April 1994, given that members of their ethnic group were being persecuted throughout the Rwandan territory. Under these circumstances, the Chamber considers it highly probable that the most fervent among them could have requested that Seromba celebrate a mass for them. The Chamber further considers that Seromba's removal of sacred objects could be interpreted as a denial of the refugees' request, particularly in view of the fact that he continued to celebrate mass in the oratory as from 11 April 1994. Consequently, the Chamber finds Witness CBN credible as to his testimony that refugees presented a mass request to Seromba which he turned down.

107. In view of the foregoing, the Trial Chamber finds that it has been established beyond a reasonable doubt that Athanase Seromba refused to celebrate mass for Tutsi refugees in Nyange church.

5.5. Dismissal of four Tutsi employees (Alex, Félécien, Gasore and Patrice) from the parish by Athanase Seromba and the death of Patrice who was refused access to the presbytery by Seromba

5.5.1. The evidence

Prosecution witness

[192] Transcript, 20 April 2006, p.11 (closed session).
[193] Transcript, 20 April 2006, p. 60 (open session).
[194] Transcript, 15 October 2004, pp. 61-62 (open session).
[195] Transcript, 18 October 2004, p. 3 (open session).

108. Witness CBK[196] testified that after the death of the Rwandan President, Alex, Félécien, Gasore and Patrice, all of whom were Tutsi and employees in Nyange parish, told him that they had been suspended from work by Athanase Seromba, whereupon they left the parish.[197]

109. Witness CBK explained that these employees returned to the parish on 13 April 1994, but were turned back by Athanase Seromba, who informed them that there was no refuge for them there.[198] The witness also observed that the security situation had worsened considerably, such that any Tutsi who went outside ran the risk of being killed.[199] He further testified that he saw Patrice in the rear courtyard of the presbytery, wounded in both the arms and the legs, adding that he approached Seromba and asked him to help Patrice. According to the witness, Seromba refused; rather, he asked Patrice to leave the premises. Noticing that Patrice delayed complying with his order, Seromba asked the gendarmes to forcefully expel him. Finally, the witness testified that he subsequently saw the lifeless body of Patrice in the rear courtyard of the presbytery.[200]

Defence witness

110. Witness NA1, born of Hutu and Tutsi parents,[201] testified that he arrived at Nyange church on 15 April 1994.[202] He also indicated that he had previously worked in Nyange parish between 1992 and 1993.[203] The witness explained that when he returned to this parish in April 1994, he observed that none of the employees of the parish had been dismissed. He added that he met Alexis on site, who even greeted him.[204]

111. During cross-examination, Witness NA1 explained, *inter alia*, that he had no idea which employees were to be found among the refugees. He also stated that he was not there to take a census of the parish,[205] nor was he in any position to know who was an employee of the parish and who was not.[206]

5.5.2. Findings of the Trial Chamber

112. The Trial Chamber finds Witness CBK credible. No contradiction exists between his testimony and his prior statements. The Chamber also considers witness CBK's account of how athanase Seromba turned back Tutsi employees to be consistent and plausible, particularly in view of the circumstances which prevailed in Nyange parish in April 1994.

113. Furthermore, the Chamber is of the view that NA1's is not reliable on this point. The Chamber notes that Witness NA1 only arrived in Nyange parish on 15 April 1994 and, therefore, could not properly testify on events he did not witness. Furthermore, it observes that the witness spoke in general terms, as his testimony focussed simply on staff changes which were made between the time he left Nyange in 1993 and when he returned in April 1994. Finally, as the witness himself admits, he was in no position to identify employees present at the time he arrived at the church, due to the very large number of refugees and attackers that were on the premises.[207]

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[196] See Section 3.3.1.
[197] Transcript, 19 October 2004, pp. 7, 14 and 15 (closed session).
[198] Transcript, 19 October 2004, p. 15 (closed session).
[199] Transcript, 19 October 2004, p. 15 (closed session).
[200] Transcript, 19 October 2004, pp. 15-16 (closed session).
[201] Transcript, 7 December 2005, p. 75 (closed session).
[202] Transcript, 7 December 2005, pp. 15-16 (closed session).
[203] Transcript, 7 December 2005, pp. 10-12 (closed session).
[204] Transcript, 7 December 2005, p. 19 (closed session).
[205] Transcript, 7 December 2005, p. 19 (closed session).
[206] Transcript, 7 December 2005, p. 10 (closed session).
[207] Transcript, 7 December 2005, p. 21 (closed session); Transcript, 8 December 2005, p. 13 (closed session).

114. In view of the foregoing, the Trial Chamber finds that it has been proved beyond a reasonable doubt that on 13 April 1994, art the time when the security situation in Kivumu *commune* had become precarious, Athanase Seromba dismissed four Tutsi employees from the parish, including a certain Patrice, who, upon returning the following day, was killed by attackers after having been turned back from the presbytery by Seromba.

5.6. The meeting in the parish office on 12 April 1994

5.6.1. The evidence

Prosecution witness

115. Witness CBJ[208] testified that on 12 April 1994, he saw Athanase Seromba engaged in discussion on the balcony of the "second floor" of the presbytery with Grégoire Ndahimana, Gaspard Kanyarukiga, Fulgence Kayishema and Télesphore Ndungutse.[209] He added that the discussion lasted between 15 and 20 minutes.[210] He finally stated that these persons did not go into any room or hall to hold discussions.[211]

5.6.2. Findings of the Chamber

116. The Chamber finds that CBJ's testimony is insufficient to prove that a meeting presided over by Seromba took place in the parish office on 12 April 1994. Accordingly, the Chamber finds that the Prosecution has not proved this fact beyond a reasonable doubt.

6. Events of 14 to 15 April 1994 in Nyange Parish

6.1. The Indictment

117. The Indictment alleges as follows:

> "15. On or about 13 April 1994, the *Interahamwe* and militiamen surrounding the parish, launched an attack against the refugees in the church. The refugees defended themselves by pushing the attackers out of the church, to a place named "*la statue de la Sainte Vierge*". The attackers in turn, threw a grenade causing many deaths between the refugees. The survivors quickly tried to return to the Church, but Father Athanase Seromba ordered that all doors be closed, leaving many refugees (about 30) outside to be killed.
>
> 16. On or about 14 April 1994, in the afternoon, Father Seromba met Fulgence Kayishema and Gaspard Kanyarukiga in his Parish office. Soon afterwards, Fulgence Kayishema went to bring some fuel, using one of the Kivumu *commune* official vehicles. That fuel was used by the *Interahamwe* and militiamen to burn down the church, while the *gendarmes* and members of the communal police threw grenades.
>
> 17. On that same day, Athanase Seromba chaired a meeting in his Parish Office with Fulgence Kayishema, Grégoire Ndahimana, Gaspard Kanyarukiga and others unknown to the Prosecution. Immediately after this meeting, following a request by refugees for protection, *bourgmestre* Grégoire Ndahimana replied that this war was caused by the *Inyenzi* who killed the President.

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[208] See Section 3.2.1.
[209] Transcript, 11 October 2004, p. 51 (open session).
[210] Transcript, 11 October 2004, p. 53 (open session).
[211] Transcript, 11 October 2004, p. 52 (open session).

18. On or about 15 April, a bus transporting armed *Interahamwe* and a priest named Kayirangwa, arrived in Nyange parish, from Kibuye *prefecture*. Soon thereafter, Father Seromba held a meeting with priest Kayirangwa, Fulgence Kayishema, Kanyarukiga and others unknown to the Prosecution.

19. After this meeting, Father Athanase Seromba ordered the *Interahamwe* and militiamen to launch attacks to kill the Tutsi, beginning with the intellectuals. Following his orders, an attack was launched against the refugees by the *Interahamwe*, militiamen, gendarmes and communal police officers, equipped with traditional weapons and firearms, causing the deaths of numerous refugees.

20. On or about 15 April, in the afternoon, the attacks intensified against the refugees of the Church. The *Interahamwe* and militiamen attacked with traditional arms, and poured fuel through the roof of the church, while *gendarmes* and communal police officers launched grenades and killed the refugees.

21. During these attacks, Father Seromba handed over to the *gendarmes* a Tutsi teacher named Gatare who was killed immediately. This act encouraged and motivated the attackers.

22. Again during these attacks, some refugees left the church for the Presbytere. Father Seromba found them and informed *gendarmes* about their hiding place. Immediately thereafter, they were attacked and killed. Among the victims were two Tutsi women (Alexia and Meriam).

[…]

25. During the attacks described above, Athanase Seromba, Grégoire Ndahimana, Fulgence Kayishema, Télesphore Ndungutse, Judge Joseph Habiyambere, assistant *bourgmestre* Védaste Mupende, and other authorities not known to the Prosecution, were supervising the massacres.

[…]

44. On or about 13 April 1994, the *Interahamwe* and militiamen surrounding the parish launched an attack against the refugees in the church, killing about 30 refugees.

[…]

46. The massive attack against the Tutsi refugees was conducted on or about 15 April 1994 under the supervision of Father Seromba, Fulgence Kayishema, Grégoire Ndahimana, Télesphore Ndungutse, Gaspard Kanyirukiga and others unknown to the Prosecution.

[…]

48. On or about 13 April, the *Interahamwe* and militiamen surrounding the parish launched an attack against the refugees in the church. The attackers having been pushed away and out of the church, to a placed named "*la statue de la Sainte Vierge*". The attackers threw a grenade causing many deaths among the refugees. The survivors quickly tried to return to the church, but Father Athanase Seromba ordered that all doors be closed, leaving many refugees outside (about 30) to be killed".

6.2 The attack against Nyange church followed by resistance from the refugees countered by the throwing of grenades by the attackers

6.2.1. The evidence

Prosecution witnesses

118. Witnesses CNJ,[212] CBR,[213] CBJ,[214] CDK,[215] CBS[216] and CDL[217] stated that a confrontation took place between the attackers and Tutsi refugees in the morning of 15 April 1994, near the Caritas

[212] See Section 3.3.1.

restaurant. They, *inter alia*, explained that the assailants attacked the refugees with stones and traditional weapons, and that the refugees managed to push them back right up to the Codecoki. The attackers only regained control when a reservist named Théophile Rukara climbed on the roof of a house and began throwing grenades, wounding and killing many Tutsi refugees. The refugees then retreated towards Nyange church in order to avoid fighting the attackers.[218] Witness CBR, in particular, added that communal officials, including Ndahimana, Fulgence Kayishema, Habiyambere, Védaste Muraginabugabo and Gaspard Kanyarukiga[219] were present at the scene of fighting and encouraged the attackers to attack the refugees.[220]

Defence witnesses

119. Witnesses FE31,[221] BZ14,[222] BZ1[223] and BZ4[224] stated that grenades were thrown at Tutsi refugees during the attack which occurred in the morning of 15 April 1994. They also mentioned that following the grenade attack, which left some of them dead, the refugees fell back and barricaded themselves inside the church to better protect themselves.[225]

6.2.2 Findings of the Chamber

120. The Trial Chamber notes that Prosecution and Defence witnesses alike confirmed that in the morning of 15 April 1994, an attack was launched against Tutsi refugees which met with stiff resistance, and that the attackers subsequently used grenades, causing the death of several refugees. The Chamber therefore finds that these facts have been proven beyond a reasonable doubt.

6.3. The order given by Athanase Seromba to shut the doors of the church, leaving about 30 refugees outside to be killed

6.3.1. The evidence

Prosecution witnesses

121. Witness CBJ[226] testified that in the evening of 14 April 1994, Athanase Seromba, accompanied by *gendarmes*, asked Tutsi refugees to go inside the church, and then locked them inside.[227] He also testified that the following morning, Seromba, still accompanied by *gendarmes*, returned to open the

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[213] Transcript, 20 January 2005, p. 45 (open session); Witness information sheet (P-23).
[214] See Section 3.2.1.
[215] Witness information sheet (P-14); Transcript, 7 October 2004, pp. 77-78 (closed session).
[216] See Section 3.3.1.
[217] See Section 3.2.1.
[218] CNJ: Transcript, 24 January 2005, p. 16 (open session); CBR: Transcript, 20 January 2005, p. 37 (open session); CBJ: Transcript, 12 October 2004, pp. 5-6 (open session); CDK: Transcript, 7 October 2004, pp. 60-61 (open session) and Transcript, 11 October 2004, p. 15 (open session); CBS: Transcript, 5 October 2004, p. 20 (open session); CDL: Transcript, 19 January 2005, p. 48 (open session).
[219] Transcript, 20 January 2005, p. 37 (open session).
[220] Transcript, 20 January 2005, p. 37 (open session).
[221] See Section 3.2.1.
[222] Transcript, 1 November 2005, p. 42 (open session).
[223] See Section 4.4.1.
[224] Transcript, 1 November 2005, pp. 52-54 (open session).
[225] FE31: Transcript, 29 March 2006, pp. 18-19 and 23 (closed session); Transcript, 29 March 2006, p. 48 (open session); BZ1: Transcript, 2 November 2005, pp. 57-58 (open session); BZ14: Transcript, 1 November 2005, p. 22 (open session) and Transcript, 1 November 2005, p. 28 (open session); BZ4: Transcript, 1 November 2005, pp. 58-60 (open session).
[226] See Section 3.2.1.
[227] Transcript, 12 October 2004, pp. 2-4 (open session); Transcript, 13 October 2004, pp. 36-37 (open session).

doors of the church.[228] Witness CBJ also explained that during the attacks of 15 April 1994, the Tutsi refugees themselves took the decision to barricade themselves inside, abandoning outside the church some people "who did not succeed to do so", and so they were killed.[229]

122. Witnesses CBK,[230] CDL[231] and CNJ testified that during the attack of 15 April 1994, the refugees barricaded themselves inside the church for protection.[232]

Defence witnesses

123. Witnesses BZ4,[233] FE56,[234] BZ14[235] and FE34[236] testified that following the attacks of 15 April 1994, the refugees retreated towards the church and barricaded themselves inside.[237]

6.3.2. Findings of the Chamber

124. The Chamber notes that both the Indictment and the Prosecutor's pre-trial brief contain the allegation that Athanase Seromba ordered that the church doors be locked, leaving about 30 refugees outside, who were then killed. The Chamber notes, however, that these two pleadings are inconsistent as to the date of the events. While the Indictment alleges that the events occurred on or about 13 April 1994, the pre-trial brief refers to 14 April 1994.

125. The Chamber, moreover, considers that although Witness CBJ alleges that Athanase Seromba locked the doors of the church in the evening of 14 April 1994 and opened them again in the morning of 15 April 1994, he does not blame Seromba for the death of the Tutsi refugees who were killed on account of the fact that they could not gain access to the inside of the closed church. The Chamber also notes that the same witness testified that on 15 April 1994, refugees who were already inside the church took the decision to barricade themselves, abandoning some of their own who were left outside at the mercy of the attackers. The Chamber finally notes that Prosecution and Defence witnesses alike confirm the fact that it was the refugees themselves who took the decision to barricade the doors of the church on 15 April 1994.

126. In the light of the foregoing, the Trial Chamber is of the view that the available evidence is consistent with respect to the dates of the events and the sequence thereof. The Chamber therefore finds that the Prosecution has not proved beyond a reasonable doubt that Athanase Seromba locked the doors of the church, leaving outside approximately 30 refugees who were subsequently killed.

6.4. That Athanase Seromba held meetings with communal authorities and other persons unknown to the Prosecutor

6.4.1. The evidence

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[228] Transcript, 12 October 2004, p. 10 (open session); Transcript, 13 October 2004, p. 41 (open session).
[229] Transcript, 13 October 2004, p. 42 (open session).
[230] See Section 3.3.1.
[231] See Section 3.2.1.
[232] CBK: Transcript, 19 October 2004, p. 24 (closed session); CDL: Transcript, 19 January 2005, p. 23 (open session); CNJ: Transcript, 24 January 2000, p. 41 (open session).
[233] See Section 6.2.1.
[234] See Section 3.2.1.
[235] See Section 6.2.1.
[236] Transcript, 30 March 2006, p. 7 (closed session).
[237] BZ4: Transcript, 1 November 2005, pp. 58-60 (open session); FE56: Transcript, 3 April 2006, p. 56 (closed session); BZ14: Transcript, 1 November 2005, pp. 22, 26 and 28 (open session); FE34: Transcript, 30 March 2006, p. 51 (open session).

Prosecution witnesses

127. Witness CBI[238] testified that several communal authorities, including Fulgence Kayishema, regularly came to the church while he was still there, adding that the authorities visited Athanase Seromba[239] to seek information on what was happening in the rear courtyard of the presbytery.[240] During cross-examination, Witness CBI stated that the meetings which planned the "killing" of Tutsi were also being held at Seromba's home.[241] Questioned by Defence Counsel as to what he meant by "meeting", the witness responded in these terms: "And you can conclude that it was a meeting when people are together."[242]

128. Witness CBJ[243] testified that the *gendarmes*, after discussing with Athanase Seromba, travelled to the Codecoki, in the centre of Nyange. He added that when Athanase Seromba returned to the presbytery after the Codecoki meeting, the *Interahamwe*, armed with spears, machetes, swords and bamboo pickets, began killing refugees.[244] He further testified that a meeting was held on 14 April 1994 in Nyange parish which was attended by Seromba, *Bourgmestre* Grégoire Ndahimana, Criminal Investigations Officer Fulgence Kayishema, Télesphore Ndungutse, the businessman Gaspard Kanyarukiga, Brigadier Christophe Mbakirirehe and other persons whom the witness stated he was unable to identify.[245] The witness explained that he observed the holding of this meeting from the church tower where he was with members of the charismatic group.[246] During cross-examination, Witness CBJ reiterated that participants in this meeting planned the killing of Tutsi.

129. Witness CDK[247] testified that he spotted Athanase Seromba in the vicinity of the church, in the company of Fulgence Kayishema, Grégoire Ndahimana, Gaspard Kanyarukiga and Télesphore Ndungutse.[248] The witness also stated that he saw them emerge at approximately 11 a.m. from the office of the Codecoki where they had just held a meeting. The witness testified that he did not participate in the meeting, adding that he was in front of Gaspard Kanyarukiga's pharmacy at the time of this event.[249] He finally stated that after the meeting, Athanase Seromba returned in the direction of the church, accompanied by Grégoire Ndahimana, Fulgence Kayishema and Télesphore Ndungutse, while Gaspard Kanyarukiga rejoined the population gathered near the statue where they were waiting for him.[250]

130. Witness CBK[251] testified that between 13 and 16 April 1994, Athanase Seromba organised several meetings in Nyange parish attended by Gaspard Kanyarukiga, Fulgence Kayishema, Grégoire Ndahimana, Ndungutse and Rushema. The witness also testified that the meetings were often held in a room located "on the upper floor of the presbytery building".[252]

131. Witness CBN[253] stated that he saw Athanase Seromba welcome several authorities including *Bourgmestre* Ndahimana, Kanyarukiga and Criminal Investigations Officer Kayishema.[254] Witness CBN also testified that he was informed that communal *conseillers* held meetings.[255]

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[238] See Section 3.3.1.
[239] Transcript, 4 October 2004, p. 14.
[240] Transcript, 4 October 2004, p. 16.
[241] Transcript, 4 October 2004, p. 65.
[242] Transcript, 4 October 2004, p. 65 (open session).
[243] See Section 3.2.1.
[244] Transcript, 12 October 2004, pp. 5-6 (open session).
[245] Transcript, 12 October 2004, p. 4 (open session).
[246] Transcript, 12 October 2004, p. 32 (closed session).
[247] See Section 6.2.1.
[248] Transcript, 11 October 2004, p. 11 (open session).
[249] Transcript, 11 October 2004, pp. 12-13 (open session).
[250] Transcript, 7 October 2004, pp. 60-61 (open session).
[251] See Section 3.3.1.
[252] Transcript, 19 October 2004, pp. 16-17 (closed session).
[253] See Section 3.3.1
[254] Transcript, 15 October 2004, pp. 44-45(open session).
[255] Transcript, 15 October 2004, p. 55 (open session).

132. Witness CBS[256] alleged that the authorities had come to Nyange parish to meet Athanase Seromba. Among them, the witness cited *Bourgmestre* Ndahimana, Criminal Investigations Officer Kayishema, Brigadier Mbakirirehe, a teacher, Télesphore Ndungutse, and a businessman, Kanyarukiga.[257]

Defence witnesses

133. Witness PA1[258] testified that no meeting was held at the presbytery by Athanase Seromba and the communal authorities for the purpose of exterminating the refugees.[259] He pointed out he, together with other religious persons, had asked Seromba to contact the *bourgmestre* so as to be apprised of the situation which prevailed in Nyange parish on Friday, 15 April 1994. On his return from this mission, Seromba explained to them that he could not meet the *bourgmestre*, as he was absent attending a burial.[260] Witness PA1 further testified that Grégoire Ndahimana and Fulgence Kayishema came to the parish in the evening. The witness stated that the clergymen asked the authorities to tell them what to do with the corpses strewn in the churchyard.[261] The *bourgmestre* then promised to send bulldozers the following day to bury the bodies.[262] The witness finally testified that it was not possible that Seromba could organise these meetings without him knowing about it, since they were always together.[263]

134. Witness BZ3[264] stated that there was no "relationship" between Athanase Seromba and the authorities.[265] He furthermore stated that he had never heard of any meetings between Seromba, Fulgence Kayishema, Grégoire Ndahimana and Télesphore Ndungutse prior to 16 April 1994.[266]

135. Witness CF23[267] testified that meetings of Nyange *commune* were always held at the communal office[268] and that he was always kept informed of them. He also added that no meeting of the communal authorities took place in Nyange parish. He furthermore indicated that no official meeting of the communal authorities had on its agenda the extermination of the Tutsi.[269]

6.4.2. Findings of the Chamber

136. The Chamber finds that the statements of Prosecution Witnesses CBI, CBJ, CBK, CDK and CBS are consistent with respect to the fact that Athanase Seromba held meetings or discussions with the communal authorities. In this regard, it notes that the testimony of Defence Witness PA1 corroborates the testimony of these witnesses when he states, *inter alia,* that Seromba had been asked to contact the *bourgmestre* to find a solution concerning the corpses that were strew all over the church courtyard. The Chamber, however, considers that the testimonies of CBI, CBJ, CBK, CDK and CBS do not lead to the conclusion that any meeting attended by Seromba or any discussion he may have had with the communal authorities was for the purpose of planning the extermination of the Tutsi. In fact, none of these witnesses participated in such meetings or discussions. Therefore, the

[256] See Section 3.3.1.
[257] Transcript, 5 October 2004, p. 19 (open session).
[258] See Section 3.4.1.
[259] Transcript, 20 April 2006, p. 18 (closed session).
[260] Transcript, 20 April 2006, p. 23 (closed session).
[261] Transcript, 20 April 2006, p. 24 (closed session).
[262] Transcript, 20 April 2006, p. 24 (closed session).
[263] Transcript, 20 April 2006, p. 31 (closed session).
[264] Transcript, 8 November 2005, p. 29 (open session).
[265] Transcript, 31 October 2005, p. 49 (open session).
[266] Transcript, 8 November 2005, p. 23 (open session)
[267] See Section 4.3.1.
[268] Transcript, 31 March 2006, p. 20 (open session).
[269] Transcript, 31 March 2006, p. 10 (open session).

Chamber considers that reference by some of them to an extermination plan is nothing more than a reflection of their own opinions.

137. The Chamber notes that Witness PA1 was heard on 8 October 2003 within the framework of a Letter Rogatory. At the hearing, the witness admitted that he was not always with Athanase Seromba at the presbytery, adding that it was highly probable that certain persons came to the presbytery without him being informed.[270] The Chamber finds this statement inconsistent with PA1's testimony that he was always alongside Seromba. The Chamber therefore concludes that this witness is not credible.

138. The Chamber is also of the view that the testimonies of BZ3 and CBN are not reliable, as they are hearsay.

139. The Chamber also considers that the evidence given by Witness CF23 is not probative, as he recounts that meetings were held by the communal authorities in the *commune* office, without any reference to the presence of Athanase Seromba at the meetings.

140. In view of the foregoing, the Trial Chamber finds that the Prosecution has established beyond a reasonable doubt that meetings or discussions were held between Athanase Seromba and *commune* authorities. On the other hand, the Chamber finds that it has not been established beyond a reasonable doubt that the purpose of the meetings or discussions was to plan the extermination of the Tutsi.

6.5. That Athanase Seromba ordered the Interahamwe and militia to attack refugees

6.5.1. The evidence

Prosecution witnesses

141. Witness CDK[271] testified that he saw Gaspard Kanyarukiga, Télesphore Ndungutse and Fulgence Kayishema give orders and instructions to the attackers on 15 April 1994.[272]

142. Witness CBR[273] testified that Athanase Seromba was not the one leading the attackers on 15 April 1994. However, he added that before the attackers received any instructions from the authorities, the latter first held discussions with Seromba. He stated however that he was not privy to the discussions.[274] The witness also testified that Fulgence Kayishema stated that it was necessary to attack the *Inyenzi* who were located in Nyange church.[275]

143 Witness CNJ[276] testified that when he arrived in Nyange parish with his group, Fulgence Kayishema and Grégoire Ndahimana welcomed them. They told them to cover themselves with banana leaves to distinguish themselves from the Tutsi. The witness further testified that Fulgence Kayishema directed them to a location where they were to assist others in fighting the Tutsi.[277] Witness CNJ admitted that they were pushed back as far as the pharmacy belonging to Kanyarukiga. Kayishema then told them to go back up and throw stones at the Tutsi.[278]

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[270] Statement, Witness PA1 as part of the Letter Rogatory on 8 October 2003 (D-90), p. 4.
[271] See Section 6.2.1.
[272] Transcript, 11 October 2004, p. 3 (open session).
[273] See Section 6.2.1.
[274] Transcript, 24 January 2005, p. 4 (open session).
[275] Transcript, 20 January 2005, pp. 36-37 (open session).
[276] See Section 3.3.1.
[277] Transcript, 24 January 2005, p. 15 (open session).
[278] Transcript, 24 January 2005, p. 16 (open session).

144. Witness YAU[279]testified that when the *Interahamwe* arrived in the courtyard of the church, Athanase Seromba told them not to attack the refugees immediately, as there were few of them.[280] Seromba allegedly told them to stop the fighting because, in his words, "you are in inadequate numbers".[281] The witness further testified that Seromba ordered the *Interahamwe* to start by killing the intellectuals.[282] Furthermore, he claimed that during the same day, Seromba addressed an *Interahamwe* woman, saying to her: "find all these people who are hiding in here and take them out and kill them!".[283]

Defence witnesses

145. Witness NA1[284] testified that during the 15 April 1994 attack, Athanase Seromba was always with him and other persons in the presbytery. He also stated that while they were in the living room of the presbytery, Kayiranga came to inform them about the massacre of refugees who remained outside the buildings.[285]

146. Witness BZ1[286] testified that, on 15 April 1994, the attackers were led by communal authorities, including the *bourgmestre*, the Criminal Investigations Officer and an MRND official, who worked in close collaboration with these authorities. He stated that he at no time saw Athanase Seromba or other clergymen on 15 April 1994.[287]

147. Witness FE31[288] testified that he arrived at Nyange church in the morning of 15 April 1994, between 10 a.m. and 10.30 a.m.[289] The witness stated that he saw Fulgence Kayishema, a communal police officer, a businessman, Anastase Rushema, Léonard Abayisenga, Théophile Rukura, Boniface Kabalisa, Ephrem Nzabigerageza and other persons holding a meeting, but did not hear what they discussed.[290] He, furthermore, indicated that these persons were leading the attack.[291] Witness FE31 also stated that Athanase Seromba was not present at this meeting,[292] as he did not see him at the location that day.[293] The witness stated, *inter alia,* as follows: "We were [*sic*] attacked because we were incited to do so by the authorities … [Seromba] could not be attacked and be leading the attack, whereas he was targeted by the assailants."[294]

148. Witness FE36[295] testified that Télesphore Ndungutse was behind the killings perpetrated in Nyange parish.[296]

149. Witness FE55[297] testified that on 15 April 1994, Gaspard Kanyarukiga solicited the recruitment of persons from Kibilira "to attack the church". He also allegedly stated that everything had to be done to kill the Tutsi, including destroying the church, if necessary.[298] The witness finally testified that on

[279] See Section 3.3.1.
[280] Transcript, 30 September 2004, p. 77 (closed session).
[281] Transcript, 29 September 2004, p. 17 (open session).
[282] Transcript, 1 October 2004, p. 2 (open session).
[283] Transcript, 29 September 2004, p. 21 (open session).
[284] See Section 5.5.1.
[285] Transcript, 7 December 2005, p. 22 (closed session).
[286] See Section 4.4.1.
[287] Transcript, 2 November 2005, p. 59 (open session).
[288] See Section 3.2.1.
[289] Transcript, 29 March 2006, p. 19 (closed session).
[290] Transcript, 29 March 2006, p. 48 (open session).
[291] Transcript, 29 March 2006, p. 23 (closed session).
[292] Transcript, 29 March 2006, p. 22 (closed session).
[293] Transcript, 29 March 2006, pp. 25 and 28 (open session).
[294] Transcript, 29 March 2006, p. 28 (open session).
[295] Transcript, 21 November 2005, p. 6 (closed session).
[296] Transcript, 21 November 2005, p. 21 (closed session).
[297] See Section 4.4.1.
[298] Transcript, 12 April 2006, pp. 41-43 (open session).

the same day he saw Fulgence Kayishema distributing whistles from his vehicle, inciting the Hutu to kill Tutsi refugees in Nyange parish.[299]

150. Witness FE56[300] explained that on 15 April 1994, Fulgence Kayishema wanted to expel the refugees from the church. The witness also stated that Télesphore Ndungutse gave him a watering can containing fuel and ordered him to spray it on the windows of the church.[301] According to the witness, the objective was to frighten the refugees, so that they would be forced to come out of the church, which was surrounded on the orders of Fulgence Kayishema.[302] The witness testified that Télesphore Ndungutse and Fulgence Kayishema supervised the attacks.[303] He explained that these persons went to negotiate with Astaldi company to obtain trucks for the transport of attackers from Kibilira to Nyange parish.[304] Witness FE56 finally testified that he did not see Athanase Seromba in Nyange parish on 15 April 1994.[305]

6.5.2. Findings of the Chamber

151. The Chamber notes that Witness YAU is the sole Prosecution witness who stated that Seromba ordered *Interahamwe* to start by killing Tutsi intellectuals on 15 April 1995. The Chamber observes, however, that the circumstances under which this witness may have heard Athanase Seromba give such an order do not clearly emerge from his testimony. Consequently, the Chamber finds that Witness YAU is not reliable.

152. The Chamber notes that the testimonies of CDK, CBR, CNJ, NA1, BZ1, FE31, FE36, FE55 and FE56 are consistent with respect to the fact that it was the communal authorities who led the attackers, made up of *Interahamwe* and militiamen, and gave them orders to attack the refugees.

153. In view of the foregoing, the Chamber finds that the Prosecution has not proved beyond a reasonable doubt that Athanase Seromba ordered the *Interahamwe* and militiamen to attack the refugees.

6.6. That the Interahamwe and militia, assisted by gendarmes and communal police officers, launched attacks against the refugees and attempted to burn down the Nyange church

6.6.1. The evidence

Prosecution witnesses

154. Witness CBI[306] testified that on 15 April 1994, most of the assailants were carrying traditional weapons, while their leaders were carrying guns.[307] He also testified that this attack caused numerous deaths among the refugees, leaving the church courtyard strewn with their dead bodies.[308]

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[299] Transcript, 12 April 2006, p. 50 (open session).
[300] See Section 3.2.1.
[301] Transcript, 3 April 2006, p. 54 (closed session).
[302] Transcript, 3 April 2006, p. 54 (closed session).
[303] Transcript, 3 April 2006, p. 55 (closed session); Transcript, 3 April 2006, p. 58 (closed session); Transcript, 4 April 2006, p. 6 (open session).
[304] Transcript, 3 April 2006, p. 57 (closed session).
[305] Transcript, 3 April 2006, p. 58 (closed session).
[306] See Section 3.3.1.
[307] Transcript, 4 October 2004, p. 11 (open session).
[308] Transcript, 4 October 2004, p. 12 (open session).

155. Witness CBR[309] testified that the attacks continued in the afternoon of 15 April 1994,[310] adding that the attackers attempted to burn down the church by spraying it with petrol and using banana leaves and "sticks of dynamite".[311]

156. Witness CDK[312] stated that another attack occurred during the afternoon of 15 April 1994, while the church was still surrounded by the attackers. He testified that communal police officers and *gendarmes* opened fire in the direction of the church and attempted to burn it down using gasoline and dynamite.[313] Finally, the witness estimated that more than 100 persons were killed in that attack.[314]

157. Witness CBK[315] testified that on 15 April 1994 there was a "large scale" attack against refugees in Nyange church. The witness stated that the attackers had increased in number and were armed with spears, machetes, small hoes and sharpened and wooden sticks. He added that the refugees defended themselves using stones and were forced to barricade themselves inside the church to protect themselves. The witness also testified that Fulgence Kayishema, Télesphore Ndungutse and Grégoire Ndahimana attempted to burn down the church by spraying petrol on it and throwing grenades against the doors.[316]

158. Witness CBT[317] testified that during the 15 April 1994 attack, Faustin sprayed petrol on the church, adding that the attackers climbed on the roof of the church from where a grenade was thrown.[318]

159. Witness CDL[319] testified that during the 15 April 1994 attack, the objective of the attackers was to enter the church. He explained, *inter alia,* that they initially attempted to break down the doors of the church using dynamite and that when they failed, they unsuccessfully tried to burn it down using gasoline.[320]

6.6.2. Findings of the Chamber

160. The Chamber finds that all the testimonies of Prosecution witnesses are consistent with respect to the fact that the attackers launched an attack against the refugees in Nyange church on 15 April 1994 and that they also attempted to burn down the church on the same day.

161. The Chamber notes that the Defence adduced no evidence to refute this allegation.

162. In view of the foregoing, the Trial Chamber finds that the Prosecutor has proved beyond a reasonable doubt that on 15 April 1994, the *Interahamwe* and militiamen, assisted by *gendarmes* and communal police officers, launched attacks against Tutsi refugees and attempted to burn down Nyange church.

6.7. Supervision of the attacks by Athanase Seromba

[309] See Section 6.2.1.
[310] Transcript, 20 January 2005, p. 38 (open session).
[311] Transcript, 20 January 2005, pp. 40-41 (open session).
[312] See Section 6.2.1.
[313] Transcript, 7 October 2004, pp. 62-63 (open session).
[314] Transcript, 7 October 2004, p. 63 (open session).
[315] See Section 3.3.1.
[316] Transcript, 19 October 2004, pp. 20-24 (closed session).
[317] Witness information sheet (P-13).
[318] Transcript, 6 October 2004, pp. 61-62 (open session).
[319] See Section 3.2.1.
[320] Transcript, 19 January 2005, pp. 23-24 (open session).

6.7.1. The evidence

Prosecution witnesses

163. Witness CDL[321] testified that Athanase Seromba was present at the 15 April 1994 attack and that he was standing in front of the parish secretariat.[322] The witness further testified added that he saw Seromba again later in the day when Seromba was standing in front of the priest's residence.[323] The witness also stated that Seromba advised the attackers to attack Tutsi who were inside the church rather than those who were inside the presbytery.[324] The witness furthermore stated that the *bourgmestre* and Ndungutse informed him that they had discussed with Seromba, who wanted them to bury the numerous bodies strewn all over the church courtyard. In fact, Witness CDL stated, *inter alia*, as follows: "So Father Seromba deemed it necessary to first bury the bodies and then to resume the killings afterwards."[325] The witness explained that Seromba did nothing to protect the refugees.[326]

164. Witness CBR[327] explained that during the 15 April 1994 attack, when there were no longer any refugees outside the church, the attackers wanted to attack the refugees hidden in the presbytery courtyard. He testified that Kayishema and Ndungutse led these attacks. He stated that Seromba and the gendarmes prevented the attackers from entering the presbytery courtyard. He explained that Kayishema and Ndungutse held a discussion with Seromba and subsequently told the attackers that Seromba had asked them to stop the killings and to "first" remove the bodies and debris lying on the ground. The witness alleged that Seromba made the following remarks: "Listen, look around, first of all, clear this filth." He also stated that Kayishema and Ndungutse uttered the following remarks: "Seromba did not even allow us to enter the courtyard of the presbytery before we removed the filth." The witness furthermore indicated that he was standing 10 metres away from Kayishema, Ndungutse and Seromba when they were discussing. He also stated that the numerous bodies were removed in less than an hour, using a bulldozer belonging to Astaldi company. He alleged that Seromba did nothing to protect the refugees or to oppose the attack.[328] During cross-examination, Witness CBR confirmed that he had personally heard Seromba refer to the bodies as filth.[329] The witness further testified that the attacks resumed after the bodies had been removed.[330] Finally, he testified that he never saw Seromba lead the attackers on 15 April 1994 or 16 April 1994, while indicating that "before the authorities gave us any instructions, whatsoever, they had to discuss with the pastor".[331]

165. Witness CNJ[332] stated that during the 15 April 1994 attack, the attackers pursued the refugees who were trying to hide in the presbytery and that Athanase Seromba prevented them, saying "first of all, remove the dead bodies that were in front of the secretariat". The witness stated that he personally heard Seromba utter these words,[333] and that the attacks resumed after the bodies had been removed. Witness CNJ stated as follows: "We removed the dead bodies, and afterwards we went into the back courtyard, the place where he was stopping us from entering before we removed the dead bodies."[334]

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[321] See Section 3.2.1.
[322] Transcript, 19 January 2005, pp. 18-19 (closed session).
[323] Transcript, 19 January 2005, p. 19 (closed session).
[324] Transcript, 19 January 2005, p. 65 (open session).
[325] Transcript, 19 January 2005, p. 65 (open session).
[326] Transcript, 19 January 2005, p. 19 (closed session).
[327] See Section 6.2.1.
[328] Transcript, 20 January 2005, pp. 38-39 and 52-54 (open session).
[329] Transcript, 24 January 2005, p. 3 (open session).
[330] Transcript, 20 January 2005, p. 40 (open session).
[331] Transcript, 24 January 2005, p. 4 (open session).
[332] See Section 3.3.1.
[333] Transcript, 24 January 2005, p. 17 (open session).
[334] Transcript, 24 January 2005, p. 18 (open session).

166. Witness CBJ[335] explained that following the 15 April 1994 attacks, Athanase Seromba congratulated some of the assailants by throwing down bottles of beer to them from the "second floor" of the presbytery. The witness testified that he saw Seromba later in the evening at the secretariat, holding a discussion with the *Interahamwe* and the gendarmes. Seromba allegedly asked them to bring a mechanical digger to remove the bodies strewn on the ground in front of the church.[336] Witness CBJ furthermore testified that when the killings began on 15 April 1994, he saw Seromba on the "second floor" of the presbytery, in the company of Édouard Nturiye, Emmanuel Kayiranga and the *grand séminariste* Apollinaire Hakizimana watching the massacres that were taking place.[337]

167. Witness CDK[338] testified that he saw Athanase Seromba in company with Kanyarukiga and Kayishema in Nyange parish towards 2 p.m. The witness explained that the three of them were standing in front of the office of the Parish secretariat and that he was at a short distance from them at that time.[339]

Defence witnesses

168. Witness BZ1[340] testified that he never saw Athanase Seromba at the time the attacks were perpetrated in the church up until the collapse of the bell tower.[341] He claimed to have seen Seromba for the last time during a mass celebration which took place on 11 April 1994.[342]

169. Witness BZ4[343] stated that he never saw Athanase Seromba in the company of the attackers.[344] The witness also testified that he did not see Seromba on 15 and 16 April 1994.[345]

170. Witness FE31[346] testified that he did not see Athanase Seromba at the locus of the 15 April 1994 attack.[347] The witness stated that the assailants attacked Seromba and that Seromba could not have led an attack, whereas he was himself being targeted by the assailants.[348]

171. Witness FE35[349] testified that he did not see the priest during the 15 April 1994 attack. He stated that he only saw employees of the *commune* and members of the general public.[350]

172. Witness PA1[351] stated that he did not come out of the presbytery following the attacks which occurred upon the arrival of the bus on 15 April 1994. The witness testified that Seromba came out outraged by the fact that "people" were being killed. He added that he did not remember the time during which Seromba remained outside the presbytery.[352] He explained that he witnessed a meeting between Seromba, Kariramba, Kayiranga, Nturiye, the *bourgmestre* and Kayishema during which the question of numerous bodies which were strewn on the ground in the parish courtyard was being addressed. The witness stated, *inter alia*, that the priest requested the *bourgmestre* "to do something"

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[335] See Section 3.2.1.
[336] Transcript, 12 October 2004, p. 6 (open session).
[337] Transcript, 13 October 2004, p. 45 (open session).
[338] See Section 6.2.1.
[339] Transcript, 7 October 2004, p. 62 (open session).
[340] Transcript, 10 November 2005, p. 30 (open session).
[341] Transcript, 2 November 2005, p. 64 (open session).
[342] Transcript, 2 November 2005, p. 64 (open session).
[343] See Section 6.2.1.
[344] Transcript, 1 November 2005, pp. 59 and 60 (open session).
[345] Transcript, 10 November 2005, p. 8 (open session).
[346] See Section 3.2.1.
[347] Transcript, 29 March 2006, pp. 25, 28 and 55 (open session).
[348] Transcript, 29 March 2006, pp. 28 and 31-32 (open session).
[349] Transcript, 22 November 2005, p. 29 (closed session).
[350] Transcript, 22 November 2005, p. 18 (closed session).
[351] Transcript, 20 April 2006, p. 38 (closed session).
[352] Transcript, 21 April 2006, p. 13 (closed session).

with a view to burying the bodies. The *bourgmestre* then told them that he would contact the person in charge of the site in order to obtain a bulldozer for that purpose.[353]

173. Witness YA1, a Hutu,[354] testified that he saw no clergymen on 15 April 1994.[355]

174. Witness NA1[356] explained that on 15 April 1994, at approximately 6 p.m., the priests met in the presbytery and asked Athanase Seromba to contact the *bourgmestre* of the *commune* and inform him of the progress of events. The witness stated that when Seromba returned to the presbytery, he explained that he was unable to meet the *bourgmestre*, as the latter had gone to attend a burial.[357] Witness NA1 furthermore stated that he learned later in the evening that the *bourgmestre* had come to the parish that same evening and that he had told the priest that on the following day he would take necessary measures to bury the bodies. The witness finally stated that he did not attend this meeting, and therefore, did not see the *bourgmestre* in the parish during the evening of 15 April 1994.[358]

6.7.2. Findings of the Chamber

175. The Chamber notes that the testimony of Witness CDL is hearsay. Consequently, his allegations that Athanase Seromba ordered assailants to attack the refugees inside the church and to remove the bodies prior to resuming the killings are not credible.

176. In view of the foregoing, the Chamber finds that the Prosecution has not proved beyond a reasonable doubt that Athanase Seromba supervised the 15 April 1994 attacks in Nyange parish.

177. The Chamber notes, furthermore, that three Prosecution witness, Witnesses CDL, CBR and CNJ stated in similar testimonies that, during the 15 April 1994 attack, Athanase Seromba prevented attackers from entering the courtyard of the presbytery where refugees were hiding. Witness CDL explained, *inter alia*, that Seromba held discussions with the *bourgmestre* and Ndungutse, while Witness CBR referred rather to a meeting between Seromba, Kayishema and Ndungutse. Witness CNJ claimed that Seromba personally addressed the attackers.

178. The Chamber notes that Witness CDL's evidence on the content of the meeting is hearsay, whereas Witnesses CBR and CNJ stated that they personally heard the remarks made by Athanase Seromba. Contrary to the first two witnesses, CNJ did not state that Seromba referred to the bodies as filth. Furthermore, Witnesses CBR and CNJ alleged that the massacres resumed after the bodies had been removed.

179. The Chamber considers Witness CBR to be credible. In fact, during cross-examination, Witness CBR confirmed what he had said in the examination-in-chief.[359] Counsel for the Defence challenged Witness CBR on his assertions that he heard Kayishema and Ndungutse say that Athanase Seromba had asked for the bodies to be removed and that he had personally heard Seromba say these words.[360] Witness CBR explained that there was no discrepancy between the two assertions. He stated that he heard the priest utter those words and that the authorities conveyed to the attackers what the priest had told them.[361]

[353] Transcript, 21 April 2006, p. 15 (closed session).
[354] See Section 6.2.1.
[355] Transcript, 14 November 2005, p. 37 (open session).
[356] See Section 5.5.1.
[357] Transcript, 7 December 2005, pp. 28-29 (closed session).
[358] Transcript, 7 December 2005, pp. 28-29 (closed session).
[359] Transcript, 24 January 2005, p. 2 (open session).
[360] Transcript, 24 January 2005, p. 2 (open session).
[361] Transcript, 24 January 2005, p. 3 (open session).

180. Witness CNJ gave a consistent account of the events which occurred on 15 April 1994, except with respect to the time of his arrival at the location[362]. The Chamber finds that no evidence casts doubt on the credibility of his factual evidence.

181. Witness CBJ also stated that Athanase Seromba requested that the bodies be removed, although he estimated this event as having occurred in the evening of 15 April 1994. No other evidence supports his own evidence that Seromba congratulated the assailants. The Chamber therefore declines to admit CBJ's evidence on this point.

182. The Chamber finds that the evidence given by CBR, CBJ, CBI and CDK is consistent with respect to the presence of Athanase Seromba on the site during the 15 April 1994 attacks.

183. The Chamber finds that BZ1's evidence on this point is not reliable. In fact, after first declaring in the examination-in-chief that he had not seen Athanase Seromba on 15 April 1994, the witness subsequently admitted during cross-examination the following: "At any rate, I am telling you that these people were speaking to him. I can't say that I certainly saw him, but when they were speaking to him, I could hear what they were saying. In fact, I could say I had a glance of him…"[363]

184. The Trial Chamber finds the testimony of BZ4 unreliable, as he testified that he did not stay in Nyange parish for a long time on 15 April 1994.[364]

185. The Chamber holds that Witness FE31 is not credible on this point. In fact, after first declaring that Athanase Seromba was not present during the 15 April 1994 attack, he subsequently stated that the assailants attacked Seromba. However no other witness stated that Seromba was attacked on 15 April 1994.

186. Furthermore, the Chamber notes that Witness F31 stated that he arrived at the church at approximately 10.30 a.m.,[365] went to the statue of the Virgin Mary, and then returned to the church courtyard, where he remained only for 10 minutes, without going inside the presbytery.[366] The Chamber points out that the witness claimed in his previous statements that he was not present in Nyange parish on 15 April 1994. In fact, during cross-examination, the Prosecutor read out Question 6, appearing on the statement made by the witness to the Rwandan authorities on 14 January 2000 as follows: "You are accused of having participated in the bloody attack on the church. That was in broad daylight, and many people saw you. What is your response?" The Chamber notes that the witness answered as follows: "It is a pure lie. I never went there."[367] The Prosecutor also read out the answer which the witness gave to Question 7 as follows: "I never went to the church. If I had gone there, people would have seen me."[368] The Prosecutor finally read out to Witness FE31 an excerpt from his statement to the Rwandan authorities on 19 November 1999: "What are your grounds of defence in respect of the acts for which you are accused by the legal officer?; Answer: I did not commit these offences. I stayed in the house. I did not go anywhere. I did not go to the church."[369] In view of the foregoing, the Chamber finds that Witness FE31's statements are inconsistent.[370]

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[362] Transcript, 24 January 2005, pp. 55-56 (open session).
[363] Transcript, 10 November 2005, p. 20 (open session).
[364] Transcript, 9 November 2005, pp. 48-49 (open session).
[365] Transcript, 29 March 2006, p. 47 (open session).
[366] Transcript, 29 March 2006, pp. 52-53 (open session).
[367] Statement of Witness FE31 to the Rwandan judicial authorities on 14 January 2000 (P-45), p. 1, read out to the witness: Transcript, 29 March 2006, p. 65 (open session).
[368] Statement of Witness FE31 to the Rwandan judicial authorities on 14 January 2000 (P-45), p. 2, read out to the witness: Transcript, 29 March 2006, p. 66 (open session).
[369] Statement of Witness FE31 to the Rwandan judicial authorities on 19 November 1999 (P-46), p. 1, read out to the witness: Transcript, 29 March 2006, p. 68 (open session).
[370] Transcript, 29 March 2006, pp. 65-68 (open session).

187. The Chamber also finds Witness FE35 unreliable, having stated that he did not see Athanase Seromba during the attacks. Incidentally, the Chamber notes that his evidence that he left the church sometime between 1 and 4 p.m. is vague.[371]

188. The Chamber considers PA1's evidence inconclusive. In fact, he testified on what Athanase Seromba did or said when he left the presbytery, even though he did not follow Seromba to personally ascertain his conduct. The Chamber therefore finds PA1's evidence unreliable.

189. The Chamber also considers NA1's evidence to be inconclusive, as he did not attend the meeting during which the *bourgmestre* allegedly promised the priests, in the evening of 15 April 1994, that he would bring in some bulldozers to remove the bodies.

190. The Chamber considers that Witness YA1 is not credible. In fact, his testimony is full of contradictions: at times he claims to have been present at the 15 April 1994 events, standing near the statue of the Virgin Mary. On other occasions, he states that he did not go to the parish on 15 April 1994.[372]

191. In view of the foregoing, the Trial Chamber finds that it has been proven beyond a reasonable doubt that on 15 April 1994, Athanase Seromba asked the assailants, who were preparing to attack the Tutsi in the presbytery courtyard, to stop the killings and to first remove the bodies. The Chamber also finds that the attacks against Tutsi refugees resumed after the bodies had been removed.

6.8. That numerous Tutsi refugees, including the teacher called Gatare, and two Tutsi female refugees, Alexia and Meriam, were killed

6.8.1. The evidence

Prosecution witnesses

192. Witness CBT[373] testified that around noon, on 15 April 1994, he saw Athanase Seromba on the staircase, in front of the secretariat, in the company of a teacher called Anicet Gatare.[374] The witness stated that Seromba accompanied Anicet Gatare up to the door of the secretariat where he handed him over to three *gendarmes* who were on duty. He further stated that the *gendarmes* took away Anicet Gatare and killed him with one bullet.[375] He explained that during this incident, Seromba was on the veranda of the parish secretariat.[376] He also testified that after handing over Anicet Gatare to the *gendarmes*, Seromba returned to the "inner courtyard".[377]

193. Witness CBJ[378] testified that he knew Meriam during his sojourn at Nyange church from 10 to 16 April 1994. He added that Meriam was among a group of privileged Tutsi to whom Athanase Seromba had provided accommodation inside the presbytery until 14 April 1994. The witness also pointed out that following the 14 April 1994 meeting, the purpose of which, in his view, was to plan the killing of Tutsi, all the persons to whom accommodation had been provided in the presbytery were sent away by Seromba.[379] He also testified that the refugees came out after the doors of the church were opened on the morning of 15 April 1994. Among other things, he recounted how Meriam

[371] Transcript, 23 November 2005, p. 28 (closed session).
[372] Transcript, 14 November 2005, p. 28 (open session).
[373] See Section 6.3.1.
[374] Transcript, 7 October 2004, p. 31 (open session).
[375] Transcript, 6 October 2004, pp. 58-59 (open session).
[376] Transcript, 6 October 2004, p. 59 (open session). Witness CBT identified Prosecution Exhibit P3-1 as being a photograph of the office in question.
[377] Transcript, 7 October 2004, p. 41 (open session).
[378] See Section 3.2.1.
[379] Transcript, 12 October 2004, pp. 9-10 (open session).

returned to the presbytery to avoid the *Interahamwe* who had started attacking the refugees. Witness CBJ furthermore explained that these attacks occurred between 1 p.m. and 3 p.m., and that Seromba, once again, sent away all the persons of Tutsi origin, including Meriam, who were in the rear courtyard of the presbytery. He further recounted how Meriam was "beaten up" in front of the secretariat and dragged on the ground up to the front of the church by Muringanyi while Fulgence Kayishema held her by the head and was banging it against the ground in the courtyard.[380] The witness stated that he personally saw the naked, mortal remains of Meriam.[381] He also stated that on the same day, at approximately 7 p.m., he heard Seromba call his night watchman, Canisius Habiyambere, and order him to search the rear courtyard of the presbytery to see whether any Tutsi were hidden there.[382] Finally, Witness CBJ testified that he saw a *gendarme* in front of the corridor near the ground floor shoot Anicet Gatare at point-blank range who, struck by a bullet in the chest, died thereafter.[383]

194. Witness CBK[384] testified that he saw numerous victims among whom he was able to identify Adrienne, a religious novice from Nyinawajambo *commune*, Anicet Gatare, a teacher, Boniface Gatare, a youth counsellor in Kivumu *commune* and Kanamugire, a *MINITRAP* employee.[385] The witness stated that Anicet Gatare was killed by *gendarmes* on 13 April 1994. He recounted how he learned from *gendarmes* that Anicet Gatare had offered them money so as to be killed by shooting, as he did not want to be killed with a machete.[386] Witness CBK also stated that Fulgence Kayishema killed Meriam by banging her head against bricks,[387] while Seromba, who was present on site, did nothing to prevent the killing.[388]

Defence witnesses

195. Witness BZ1[389] testified that when Anicet Gatare saw the attackers arriving, he asked a *gendarme* to kill him in order to avoid an atrocious death. He testified that the attackers accused Athanase Seromba of complicity with the *Inkotanyi* because he did not want to hand over persons found in the parish to the attackers.[390]

196. Witness BZ2[391] testified that he learned that many persons, including his friend, Meriam and a teacher named Anicet Gatare had died in Nyange parish.[392]

197. Witness FE31[393] testified that he was told that Anicet Gatare asked the *gendarmes* to shoot him, to avoid death by machete. The witness also stated that he was unaware that he had been handed over to the *gendarmes*, adding that the attackers found Anicet Gatare on site and killed him by striking him with a machete.[394]

198. Witness FE55[395] testified that Meriam and Anicet Gatare were killed on Friday, 15 April 1994.[396]

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[380] Transcript, 12 October 2004, pp. 10-11 (open session).
[381] Transcript, 12 October 2004, p. 10 (open session).
[382] Transcript, 12 October 2004, p. 12 (open session); Transcript, 13 October 2004, p. 46 (open session).
[383] Transcript, 12 October 2004, pp. 10-11 (open session).
[384] See Section 3.3.1.
[385] Transcript, 19 October 2004, p. 32 (closed session).
[386] Transcript, 19 October 2004, p. 33 (closed session).
[387] Transcript, 19 October 2004, p. 35 (closed session).
[388] Transcript, 19 October 2004, p. 35 (closed session).
[389] See Section 4.4.1.
[390] Transcript, 2 November 2005, p. 65 (open session).
[391] Transcript, 2 November 2005, pp. 79 and 81 (open session).
[392] Transcript, 7 November 2005, p. 7 (open session).
[393] See Section 3.2.1.
[394] Transcript, 12 April 2006, p. 43 (open session).
[395] See Section 4.4.1.
[396] Transcript, 29 March 2006, p. 26 (open session).

6.8.2. Findings of the Chamber

199. The Chamber notes that Witnesses CBT, CBJ, CBK, BZ2 and FE55 confirmed the death of Tutsi refugees Anicet Gatare and Meriam. The Chamber further notes that Witnesses BZ1 and FE31 only referred to the death of Anicet Gatare. The Trial Chamber finally observes that no witness in the present matter made reference to the death of Alexia. Consequently, the Chamber is of the view that the murders of Meriam and Anicet Gatare have been proved beyond a reasonable doubt.

200. With respect to the murder of Anicet Gatare, the Chamber notes that the statements of Witnesses CBT and CBJ are not consistent as to the circumstances of his death. The Trial Chamber, however, accepts the evidence of Witnesses CBK, BZ1 and FE31 that Anicet Gatare was killed by a *gendarme* who agreed to shoot him in exchange for a sum of money, so as to avoid being killed with a machete.

201. With respect to the murder of Meriam, the Chamber accepts CBJ's testimony that Athanase Seromba turned back several refugees from the presbytery, including Meriam, and that Meriam was subsequently killed by the attackers. The Chamber finds CBJ's testimony credible. The Chamber further observes that Witness CBK gave a consistent account of the circumstances surrounding the death of Meriam. The Chamber finds this witness credible.

202. In the light of the foregoing, the Trial Chamber finds that the Prosecution has not proven beyond a reasonable doubt that Athanase Seromba handed over Anicet Gatare to the *gendarmes*. The Trial Chamber is, however, of the view that it has been proved beyond a reasonable doubt that Seromba turned back several refugees, including Meriam, from the presbytery.

7. Events of 16 April 1994 In Nyange Parish

7.1. The Indictment

203. The Indictment alleges as follows:

> "23. Many refugees were killed during these attacks. A bulldozer was used by three employees of Astaldi company (Mitima, Maurice and Flanbeau) to remove the numerous corpses of the victims from the Church. Two additional drivers were requested from Fulgence Kayishema to complete the removal. One of them, Evarist Rwamasirabo, who had refused to participate, was killed immediately.
>
> […]
>
> 26. When the corpses of victims were removed from the church, Védaste Mupende ordered the driver (Athanase alias 2000) to demolish the Church. The latter refused since the church was the house of God.
>
> 27. Immediately thereafter, Védaste Mupende, Fulgence Kayishema and Grégoire Ndahimana requested the intervention of Athanase Seromba, who came and ordered Athanase alias 2000 to destroy the church, telling him that Hutu people were numerous and could build another one.
>
> 28. Athanase bulldozed the church and its roof collapsed, killing more than 2,000 Tutsi refugees gathered inside. The few survivors were attacked by the *Interahamwe,* anxious to finish them off.
>
> 29. On or about 16 April 1994, after the destruction of the church, the authorities held a meeting in the Parish. Soon after, Father Seromba ordered the *Interahamwe* to clean the "rubbish". The bodies of victims were placed into common graves.

30. The transfer of corpses into common graves took about two days, under the supervision of Athanase Seromba, Fulgence Kayishema, Grégoire Ndahimana and others unknown to the Prosecution.

[…]

47. After the complete destruction of the church, Father Athanase Seromba met with Fulgence Kayishema, Grégoire Ndahimana, Gaspard Kanyirukiga and the drivers of the caterpillar bulldozer and sat drinking beer together.

[…]

49. On or about 15 April 1994, Father Athanase Seromba ordered or planned, abetted and encouraged the destruction of the church with more than 2,000 Tutsi trapped inside, causing their deaths".

7.2. The presence of a bulldozer in the church courtyard

7.2.1. The evidence

Prosecution witnesses

204. Witnesses CBK,[397] CDK[398] and CBT[399] mentioned the presence of a bulldozer in Nyange parish.[400] Witnesses CBJ,[401] CBR[402] and CDL,[403] for their part, testified to the presence of two bulldozers.[404]

Defence witnesses

205. Witnesses BZ1,[405] BZ3,[406] BZ4,[407] BZ14,[408] CF14,[409] CF23,[410] FE27,[411] FE32,[412] PA1[413] and YA1[414] testified to the presence of a bulldozer at Nyange church.[415] Witnesses FE35,[416] FE34,[417] FE56[418] and NA1[419] rather testified that there were two bulldozers there.[420]

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[397] See Section 3.3.1.
[398] See Section 6.2.1.
[399] See Section 6.6.1.
[400] CBK: Transcript, 19 October 2004, p. 30 (closed session); CDK: Transcript, 7 October 2004, p. 63 (open session); CB: Transcript, 6 October 2004, p. 64 (open session).
[401] See Section 3.2.1.
[402] See Section 6.2.1.
[403] See Section 3.2.1.
[404] CBJ: Transcript, 12 October 2004, p. 11 (open session); CBR: Transcript, 20 January 2005, pp. 38-39 (open session); CDL: Transcript, 19 January 2005, p. 22 (closed session).
[405] See Section 4.4.1.
[406] See Section 4.4.1.
[407] See Section 6.2.1.
[408] See Section 6.2.1.
[409] See Section 3.2.1.
[410] See Section 4.3.1.
[411] See Section 3.4.1.
[412] See Section 3.4.1.
[413] See Section 3.4.1.
[414] See Section 6.2.1.
[415] BZ1: Transcript, 2 November 2005, p. 60 (open session); BZ3: Transcript, 31 October 2005, p. 55 (open session); BZ4: Transcript, 2 November 2005, pp. 4-5 (open session); BZ14: Transcript, 1 November 2005, pp. 31-32 (open session); CF14: Transcript, 17 November 2005, pp. 16-17 (closed session); CF23: Transcript, 31 March 2006, p. 24 (open session); FE27: Transcript, 23 March 2006, p. 28 (open session); FE32: Transcript, 5 April 2006, p. 15 (open session); PA1: Transcript, 21 April 2006, p. 16 (closed session); YA1: Transcript, 14 November 2005, p. 8 (closed session).
[416] See Section 6.7.1.
[417] See Section 6.3.1.
[418] See Section 3.2.1.

7.2.2. Findings of the Chamber

206. The Chamber notes that 13 witnesses testified to having seen a bulldozer at Nyange church, while 7 others mentioned the presence of two bulldozers. It is the Chamber's opinion that the discrepancy between the witness accounts is due to the difficulty they had in identifying the type of vehicles present at Nyange church. The Chamber therefore finds that the Prosecution has proved beyond a reasonable doubt that there was at least one bulldozer at Nyange church on 16 April 1994.

7.3. Murder of Driver Evarist Rwamasirabo

7.3.1. The evidence

Defence witnesses

207. Witness FE32, one of the drivers of the bulldozer that demolished Nyange church,[421] testified that on 16 April 1994, towards 9.30 a.m., Fulgence Kayishema visited him at his home.[422] He explained that Fulgence Kayishema was looking for drivers of Astaldi company and asked them why they were so reluctant to "help the others". The witness further recounted how they answered to him that they had not come to kill "people". He stated that Fulgence Kayishema harassed them and that they were forcefully led to the church by *gendarmes*.[423] The witness testified that Kayishema told them that they had to help the "others" to bury the bodies. The witness explained that following a quarrel, a *gendarme* shot Evariste Ntahomvukiye in the head, causing his death.[424] The witness explained that this murder occurred on the Gitarama main road leading up to the church, between the statue of the Virgin Mary and[425] the *Caritas* main office.[426]

7.3.2. Findings of the Chamber

208. The Chamber considers that Witness FE32 is not credible on this point. In fact, the Chamber notes that he is the only witness who made mention of this murder, whereas it occurred in a public place. Furthermore, the Chamber observes that the witness showed an inclination to use the alleged death of Evariste Ntahomvukiye to support the argument that he only demolished the church under duress.

209. In view of the foregoing, the Chamber considers that the Prosecution has not established the murder of Evarist Rwamasirabo.

7.4. The order given by Athanase Seromba to demolish the church

7.4.1. The evidence

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[419] See Section 5.5.1.
[420] FE35: Transcript, 22 November 2005, pp. 19, 20 and 24 (closed session); FE34: Transcript, 30 March 2006, p. 19 (open session); FE56: Transcript, 4 April 2006, p. 13 (open session); NA1: Transcript, 7 December 2005, p. 38 (closed session).
[421] See Section 3.4.1.
[422] Transcript, 28 March 2006, p. 28 (open session).
[423] Transcript, 28 March 2006, p. 29 (open session).
[424] Transcript, 28 March 2006, p. 31 (open session).
[425] Transcript, 6 April 2006, p. 1 (open session).
[426] Transcript, 6 April 2006, p. 2 (open session).

Prosecution witnesses

210. Witness CBJ[427] testified that a meeting was held at the Codekoki on 16 April 1994, attended by Athanase Seromba, Businessman Gaspard Kanyarukiga, Criminal Investigations Officer Fulgence Kayishema, a teacher, Télesphore Ndungutse, Judge Habyambere, Businessman François Gashugi and many others who worked with these persons. He explained that the attackers who stood close by the Codekoki building were waiting for the signal to launch attacks,[428] adding that he observed this meeting while he was in the church bell tower.[429] Witness CBJ stated that he saw Seromba in front of the office of the priest's secretariat at the time when the bulldozers started to move on 16 April 1994. He also testified that he saw *Interahamwe* and the bulldozer driver, Anastase, penetrate into the courtyard of the presbytery and re-emerge. He stated that he was witness to discussions between Anastase and Seromba, an account of which he gives as follows:

> "[…] he spoke to him saying, 'Really, father, do you accept that I should destroy this church?' I saw Father Athanase Seromba nod. The driver spoke to him again, to Father Seromba. And then for a third time, 'Father, do you accept that I should destroy this church', and Father Seromba answered in these words, 'Unless you, yourselves, are *Inyensi*, destroy it. All we want is to get rid of the *Inyenzi*. As for the rest of it, we the Hutus are many. If we get rid of the *Inyenzi*, we will build another church. We will build a new church'."[430]

211. Witness CBJ explained that following this meeting, he saw Athanase Seromba pull out an object from his pocket and hand it to the bulldozer driver. The driver then started demolishing the church.[431]

212. Witness CBK[432] testified that he saw Athanase Seromba, Kayishema, Ndahimana, Kanyarukiga and other persons holding a meeting at the secretariat in the morning of 16 April 1994. He testified that he heard Kayishema say that the church tower had to be destroyed because there were Tutsi intellectuals hiding there. He mentioned that he was at least three metres away from the place where the meeting was being held. He explained that after this conversation, Seromba and those persons climbed to the "upper floor of the building".[433]

213. Furthermore, Witness CBK stated that the bulldozer driver was called Anastase, and that Athanase Seromba was present when he arrived with the bulldozer. On four occasions, he related the following conversation between the driver and Seromba:

> "[…] he asked Father Seromba thrice: 'Should we destroy this church?' And then Father Seromba answered, 'Destroy the church. We, the Hutu, are many in number and, furthermore, in the house of God. Demons have gotten in there … that we, the Hutus, were many in number and that we were going to build another'".[434]
>
> "Anastase asked Seromba: 'Do you want me to destroy this church?' And he put the question to him three times. And he told him, 'Destroy it.' [...] Furthermore, he stated that: 'We, the Hutus, are many and we can build another church'."[435]
>
> "[…] the driver who came to destroy the church asked him on three occasions, three times, if he should destroy the church. Now, he said, 'Destroy it!'".[436]

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[427] See Section 3.2.1.
[428] Transcript, 12 October 2004, p. 14 (closed session).
[429] Transcript, 12 October 2004, p. 31 (closed session).
[430] Transcript, 12 October 2004, p. 18 (open session).
[431] Transcript, 12 October 2004, p. 18 (open session).
[432] See Section 3.3.1.
[433] Transcript, 19 October 2004, pp. 17-18 (closed session).
[434] Transcript, 19 October 2004, pp. 28-29 (closed session).
[435] Transcript, 20 October 2004, p. 17 (closed session).
[436] Transcript, 19 October 2004, p. 45 (closed session).

"It was Anastase who asked Father Seromba whether the church would be destroyed. and Seromba told him: 'you can destroy it. There are many of us. We can rebuild it. When there are demons in the church, it should be destroyed'."[437]

214. According to witness CBK, the ex-*bourgmestre* of Gisovu *commune*, the Criminal Investigations Officer of the *commune*, the deputies of the *bourgmestre* and the communal police officers of Kivumu *commune* were present during this conversation. The driver then began demolishing the church. The witness further stated that Athanase Seromba did nothing to prevent the demolition of the church. At the time when the church was being destroyed, the witness was with Seromba in front of the church secretariat. He testified that he told Seromba that he was afraid, and that Seromba reassured him by saying that only the Tutsi were targets of these killings.[438]

215. Furthermore, Witness CBK testified that it was Kayishema who gave the order to bring in the bulldozer.[439] The witness alleges that Athanase Seromba was responsible for the destruction of the church, considering the comments that he made to the bulldozer driver.[440] He stated that he saw Seromba watching the killings that continued after the collapse of the church tower.[441]

216. Witness CNJ[442] testified that Athanase Seromba collaborated with the attackers, although he did not give the order to destroy the church.[443] He also referred to the comments that the authorities made in relation to Seromba and the destruction of the church: "Seromba was coming, that was to decide as to whether the church was going to be totally destroyed or whether he had another solution, to enable people to get into the church".[444] He explained that after this conversation, Kayishema went to the rear of the church, close to the presbytery, and returned five minutes later accompanied by Seromba. According to the witness, Seromba approached the bulldozer and greeted the authorities who were standing close to it. The witness explained that Kayishema gave the bulldozer driver the order in the presence of Seromba, to start destroying the church. The witness specified that he was approximately two metres away from the scene. Seromba then said to the driver: "Watch out, make sure the wall doesn't fall on you." He stated that he was standing approximately four metres away from Seromba when Seromba said those words. He testified that these events occurred between 9 a.m. and 10 a.m.[445] The witness finally stated that on 16 April 1994, Seromba moved forward with the authorities to follow the movements of the bulldozers as they were destroying the church.[446]

217. Witness CDL[447] testified that he was witness to a discussion between the *bourgmestre* and Athanase Seromba in the morning of 16 April 1994, towards 7.30 a.m. He explained that after the discussion, the *bourgmestre* held conversations with other *commune* authorities, including Ndungutse, Habiyambere, Kayishema and police officers and reservists. He further explained that various authorities took the decision to use bulldozers to destroy the church, and that, subsequently, these authorities went to see Seromba who was standing in front of the secretariat and told him that they no longer had any means, other than the bulldozers, to destroy the church, so as to reach the refugees. Seromba then said to them: "If you have no other means, bring the bulldozers then, and destroy the church." The witness stated that he was not far from the place where Seromba said those words.[448] He explained that the decision to destroy the church had been taken by these authorities and that Seromba accepted the decision.[449]

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[437] Transcript, 20 October 2004, p. 19 (closed session).
[438] Transcript, 19 October 2004, pp. 28-29 (closed session).
[439] Transcript, 20 October 2004, p. 18 (closed session).
[440] Transcript, 19 October 2004, p. 45 (closed session).
[441] Transcript, 19 October 2004, p. 29 (closed session).
[442] See Section 3.3.1.
[443] Transcript, 24 January 2005, pp. 21-23 and 49-51 (open session).
[444] Transcript, 24 January 2005, p. 44 (open session).
[445] Transcript, 24 January 2005, pp. 21-23 (open session).
[446] Transcript, 24 January 2005, pp. 21-23 and 49-51 (open session).
[447] See Section 3.2.1.
[448] Transcript, 19 January 2005, pp. 25-27 (open session).
[449] Transcript, 19 January 2005, p. 28 (open session).

218. Witness CDL further testified that Athanase Seromba advised bulldozer drivers to start demolishing the church from the side of the sacristy.[450] The witness also reported the following: "As I have already said, he was showing the fragile or weak part that one needed to start in order to kill the Tutsis, and he was talking – they were talking with the father. Nothing was done without his consent. At least, he did not show any desire to come to the assistance of the refugees in question".[451]

219. Witness CBR[452] testified that on 16 April 1994 he saw Ndahimana, Kayishema, Kanyarukiga, Ndungutse, Habiyambere and Murangwabugabo, enter the courtyard of the presbytery and emerge from there several moments later in the company of Athanase Seromba.[453] The witness stated that Athanase Seromba was not the one leading the attackers on 16 April 1994, adding that: "[b]efore the authorities gave us any instructions, whatsoever, they had to discuss with the pastor. I couldn't tell you what they were saying because they were on one side. So our authorities, the leaders, before they gave us any instructions, they had to speak with the father, be it on the 15th or the 16th. Before we did anything whatsoever, the authorities had to speak with the father."[454]

Defence witnesses

220. Witness FE32, the bulldozer driver who demolished the Nyange church,[455] testified that Védaste Murangwabugabo and Anastase Rushema led the operations on 16 April 1994. He stated that it was Kayishema, and not Athanase Seromba, who forced him to demolish the church. He explained that he reiterated to Rushema on three occasions that it was forbidden to destroy a church. The witness explained that went ahead to demolish the church after having been threatened with death. He testified that when he had started destroying the church, Seromba actually ran up to complain to Rushema, saying: "I forbad you yesterday to kill people here and you have just demolished the church." The witness stated that he did not see Seromba again during the destruction of the church. According to him, Seromba was powerless in the face of such a situation.[456] The witness also mentioned that he was not informed of any meeting during which the decision to bring the bulldozers was taken, adding, finally, that he was a "mere driver", and could not be aware of the holding of any such meeting.[457]

221. Witness BZ1, a Hutu,[458] stated that he never saw Athanase Seromba from the moment when the attacks were perpetrated at the church up until the collapse of the bell tower.[459] He stated that he saw Seromba for the last time when Seromba said mass on 11 April 1994, and that he no longer saw him thereafter.[460]

222. Furthermore, Witness BZ1 stated that he arrived at the scene when the bulldozer was destroying the bell tower. According to him, the bulldozer had been brought to bury the bodies that were lying there. Subsequently, the objective of bringing the bulldozers was changed; it was, now, to demolish the church.[461] The witness claimed that it was the communal authorities, namely Kayishema, Ndungutse and Ndahimana who sent for a bulldozer on day the church was destroyed.[462] The witness testified to having heard the following: "the people said, '[t]here were people inside the church. We

[450] Transcript, 19 January 2005, p. 28 (open session).
[451] Transcript, 19 January 2005, p. 29 (open session).
[452] See Section 6.2.1.
[453] Transcript, 20 January 2005, p. 42 (open session).
[454] Transcript, 24 January 2005, p. 4 (open session).
[455] See Section 3.4.1.
[456] Transcript, 28 March 2006, pp. 34-35 (open session).
[457] Transcript, 28 March 2006, p. 49 (open session).
[458] Transcript, 10 November 2005, p. 30 (open session).
[459] Transcript, 2 November 2005, p. 64 (open session).
[460] Transcript, 2 November 2005, p. 64 (open session).
[461] Transcript, 10 November 2005, p. 30 (open session).
[462] Transcript, 10 November 2005, p. 29 (open session).

can get to them [*sic*]. So a decision was made to demolish the church. The order was given to the bulldozer driver to demolish the church'."[463]

223. Furthermore Witness BZ1 denies having joined the group of attackers during the attacks against the Tutsi and the destruction of the church. He testified that he went to the location to attend the tragic events which were occurring there.[464] He stated that he did not see Athanase Seromba on 15 and 16 April 1994.[465]

224. Witness BZ4[466] stated that he arrived at Nyange parish on the morning of 16 April 1994, more specifically at the Nyange commercial centre.[467] He testified that he heard that people held a discussion and thought that the bulldozer could be used for the destruction of the church. The witness further testified that Fulgence Kayishema was cited as the person who had asked the driver, Nteziryayo, to use the bulldozer to destroy the church where the refugees were hiding.[468]

225. Witness BZ4 stated that he saw neither Athanase Seromba nor any other cleric at the scene when the church was being destroyed, and that he never heard that it was Seromba who had ordered the destruction of the church.[469] He added that he left the location after the destruction of the church.[470] He also mentioned that he did not see Seromba on 15 and 16 April 1994.[471]

226. The witness further stated that he arrived at the scene during the morning, but could not give the exact time of his arrival, or that of the bulldozer at the church. The witness, however, added that he was present at the location when the bulldozer arrived.[472] He testified that he travelled to Nyange on the day the church was demolished in order to see how the situation was unfolding, adding that he did not participate in the attacks.[473]

227. Witness CF23[474] stated that the bulldozer was driven by Anastase Nkinamubanzi and other *Zaïrois* drivers.[475] He stated that Anastase Rushema and Ndungutse were co-ordinating the demolition activities.[476] The witness testified that by the time he arrived at the church its destruction was already underway, adding that he remained there for only a few minutes, before deciding to return home.[477]

228. Witness FE35, a Hutu,[478] testified that he had never heard that Athanase Seromba had met with communal authorities to plan the demolition of the church.[479] The witness further testified that the bulldozer drivers had been requisitioned by Anastase Kayishema, Télesphore Ndungutse and the police officers and that they were working under orders from them.[480] The witness pointed out that the "leaders" of the attackers did not act in concert with Athanase Seromba.[481] In the opinion of Witness FE35, Seromba did not order the destruction of the church and never supported the attackers who

[463] Transcript, 10 November 2005, p. 30 (open session).
[464] Transcript, 10 November 2005, p. 30 (open session).
[465] Transcript, 10 November 2005, p. 30 (open session).
[466] See Section 6.2.1.
[467] Transcript, 2 November 2005, pp. 4-5 (open session).
[468] Transcript, 2 November 2005, p. 6 (open session).
[469] Transcript, 2 November 2005, p. 6 (open session).
[470] Transcript, 2 November 2005, p. 6 (open session).
[471] Transcript, 10 November 2005, p. 8 (open session).
[472] Transcript, 10 November 2005, p. 3 (open session).
[473] Transcript, 10 November 2005, pp. 3-4 (open session).
[474] See Section 4.3.1.
[475] Transcript, 31 March 2006, p. 24 (open session).
[476] Transcript, 31 March 2006, p. 25 (open session).
[477] Transcript, 31 March 2006, p. 24 (open session); Transcript, 3 April 2006, p. 24 (closed session).
[478] Transcript, 22 November 2005, p. 29 (closed session).
[479] Transcript, 22 November 2005, p. 20 (closed session).
[480] Transcript, 22 November 2005, p. 20 (closed session).
[481] Transcript, 22 November 2005, p. 21 (closed session).

destroyed the church. The witness emphasized that Seromba did not play any role in the massacres perpetrated in Nyange[482] and that he never saw him at the church when it was being destroyed.[483]

229. Furthermore, Witness FE35 explained that Kayishema, Anastase Rushema and Ndahimana escorted the bulldozers and were at he scene supervising the destruction of the church.[484]

230. Witness PA1[485] explained that at the time destruction of the church had commenced, the priests, including Athanase Seromba were in the presbytery. He testified that the heard "a very loud noise" and subsequently realized that the church was being destroyed. He further explained that Seromba immediately came out of the presbytery, furious.[486] Witness PA1 finally stated that he did not see Seromba issue any order to destroy the church.[487]

231. Witness NA1[488] testified that on 16 April 1994, towards 8 a.m., he went to the refectory and noticed that there were attackers who had surrounded the church and a tractor that was removing the bodies. The witness also stated that later on, he heard a noise and saw dust rising. At that moment, curious to know what was going on, the priests went up to the upper floor. The witness added that the priests observed the destruction of the church without making any comments.[489]

232. Furthermore, Witness NA1 testified that the clergymen subsequently approached the gendarmes to ask them to salvage the situation. The *gendarmes* responded that they were not in sufficient numbers to confront the attackers and that they had no orders to shoot at people.[490]

7.4.2. Findings of the Chamber

233. The Trial Chamber considers Witness CBJ credible[491] on the point under discussion. In fact, there is no contradiction between his testimony and his prior statement. Furthermore, in his statement made before the Rwandan judicial authorities on 24 June 1997, the witness accused Anastase Rushema, but made no allusion either to Athanase Seromba or to the destruction of the church in an in-depth manner, merely stating that Seromba collaborated with Rushema in the attacks of 15 and 16 April 1994.[492] In another statement made before the Rwandan judicial authorities on 25 March 1997, Witness CBJ, in response to the question as to who perpetrated the killings and destroyed the church, stated that "Abbot Seromba … also played a role".[493]

234. The Chamber considers that Witness CBJ is also credible as to two alleged events namely that Seromba and other persons held a meeting on 16 April 1994 and that Seromba handed an object to the bulldozer driver. The Chamber, however, considers his testimony on the remarks Seromba made to the bulldozer driver not to be reliable, because of his location at the time the remarks were made. In fact, the Chamber finds that from the church tower, it was physically impossible to hear the conversation between Seromba and the bulldozer driver at the parish secretariat, given the distance separating the two locations.[494]

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[482] Transcript, 22 November 2005, p. 23 (closed session).
[483] Transcript, 22 November 2005, p. 23 (closed session).
[484] Transcript, 23 November 2005, p. 32 (closed session).
[485] See Section 3.4.1.
[486] Transcript, 20 April 2006, pp. 25-26 and 28 (closed session).
[487] Transcript, 20 April 2006, p. 29 (closed session).
[488] See Section 5.5.1.
[489] Transcript, 7 December 2005, pp. 26, 28 and 31 (closed session).
[490] Transcript, 7 December 2005, pp. 31-32 (closed session).
[491] For a discussion on the general credibility of Witness CBJ, see Section 5.3.2.
[492] Statement of Witness CBJ to Rwandan authorities on 24 June 1997 (D-25), pp. 1-2.
[493] Statement of Witness CBJ to Rwandan authorities on 25 March 1997 (D-26), p. 2.
[494] Investigator Rémy Sahiri stated that the distance separating the presbytery from the principal entrance to the Nyange church was 48 metres (Transcript, 27 September 2004, p. 12, open session). Although Witness Rémy Sahiri did not specify the distance between the secretariat and the church, the Trial Chamber is of the view, on the basis of Prosecution Exhibit P-

235. The Chamber finds Witness CBK credible, notwithstanding a discrepancy between his 15 August 2000 statement and his in-court testimony on the identity of the bulldozer driver. In fact, Witness CBK testified that the bulldozer was driven by Anastase.[495] However, when challenged by Counsel for the Defence on his 15 August 2000 statement wherein he alleged that Flambeau, a Zaïrois, was the "bulldozer driver",[496] the witness responded that he actually meant to say that "Flambeau oversaw the road construction", and that "it was Anastase who drove the bulldozer".[497] In the Chamber's view, the discrepancy concerning the identity of the victims does not discredit the evidence of the witness, particularly in the light of the testimonies of Witnesses FE32 and CF23 who referred to the presence of several Zaïrois drivers[498] and, more specifically, the testimony of Witness FE32 that he was replaced by another driver during the destruction of the church.[499] Finally, with respect to the allegations by the witness concerning Athanase Seromba, the witness consistently referred to Anastase as being the bulldozer driver.

236. The Chamber also considers Witness CBK to be credible as regards a meeting allegedly held on the morning of 16 April 1994 and attended by Athanase Seromba and other persons. During that meeting, Kayishema allegedly said that it was necessary to destroy the church tower in order to kill Tutsi intellectuals hiding inside. The Chamber also finds the witness credible with respect to the conversation between the bulldozer driver and Seromba in the course of which the driver asked Seromba three times whether he should destroy the church. Seromba allegedly responded in the affirmative. The testimony of the witness is plausible, given that he was very close to the persons in question when these events occurred.

237. The Trial Chamber considers that Witness CNJ is not credible. In fact, during cross-examination, Counsel for the Defence pointed out that in four different prior statements Witness CNJ declared that he arrived after the demolition of the church had begun. The witness provided no convincing explanation for these contradictions, merely claiming that the statements were occasionally false, occasionally incomplete or drafted under duress or with a view to financial compensation.[500]

238. The Chamber considers Witness CDL to be credible. In fact, it notes that there are no inconsistencies in his testimony. Furthermore, the Chamber has no doubt about the witness's presence at the discussions that he referred to in his testimony. The Chamber further notes that Counsel for the Defence raised only one omission – a trivial discrepancy between CDL's testimony and the letter he wrote to the Rwandan authorities on 16 April 1999.[501] Thus, Counsel for the Defence pointed out to the witness that in that letter, the witness made no mention of the fact that the *bourgmestre* had met with Athanase Seromba before giving the signal of the attacks. The witness responded that he did not provide all particulars in his prior statements, as he did not deem it necessary at the time.[502] In this same statement (letter), the witness however stated the following: "At about ten o'clock, the *bourgmestre*, the IPJ and the gendarmes agreed with Seromba to demolish the church".[503]

02, representing a layout of the premises, that the distance separating the secretariat from the church is approximately the same as that extending from the presbytery to the entrance to the parish.

[495] Transcript, 20 October 2004, p. 18 (closed session).

[496] Statement of Witness CBK to Tribunal investigators on 15 August 2000 (statement not filed as exhibit), p. 5, read to the witness: Transcript, 20 October 2004, p. 18 (closed session).

[497] Transcript, 20 October 2004, p. 19 (closed session).

[498] FE32: Transcript, 28 March 2006, pp. 30-31 (open session); CF23: Transcript, 31 March 2006, p. 24 (open session).

[499] Transcript, 28 March 2006, p. 38 (open session).

[500] Information supplement to the file concerning confession and guilty plea of 28 December 1998 (D-39), read back to the witness: Transcript, 24 January 2005, p. 58 (open session); Confession of guilt of the witness on 21 August 2000 (D-40B), read back to the witness: Transcript, 24 January 2005, pp. 2 and 62 (open session); 27 May 2001 witness statement (D-41), read back to the witness: Transcript, 25 January 2005, p. 15 (open session).

[501] Letter of Witness CDL to Rwandan authorities dated 16 April 1999 (statement not filed as exhibit), p. 3; read back to the witness: Transcript, 20 January 2005, p. 4 (open session).

[502] Transcript, 20 January 2005, p. 5 (open session).

[503] Letter of Witness CDL to Rwandan authorities dated 16 April 1999 (statement not filed as exhibit), p. 3; read back to the witness: Transcript, 20 January 2005, p. 4 (open session).

239. The Chamber considers that Witness CDL is also credible as to two other alleged events: first, the meeting held by Athanase Seromba, Kayishema, Ndahimana, Kanyarukiga, Habarugira and other persons, during which Seromba approved the decision to destroy the church, saying: "If you have no other means of doing it, bring these bulldozers and destroy the church", and secondly, the advice that Seromba gave to the drivers concerning the fragile side of the church.

240. The Chamber finds that Witness CBR is credible. Defence Counsel raised two points during cross-examination which are insufficient to impugn the credibility of the witness because of the explanations that he subsequently provided. More particularly, Defence Counsel challenged Witness CBR on the statement he made on 29 August 2000 in which he declared as follows: "After noticing that the attacks launched by the *bourgmestre* were not sufficiently efficient, the group with the *bourgmestre* went towards the presbytery to meet with Father Seromba: Ndahimana, Muraginabugabo, Kayishema, Ndungutse, Habarigira, Kanyarukiga, Habyambere."[504] Defence Counsel then put to the witness that he had previously stated that he saw Seromba only once on 16 April 1994. The witness explained that on 16 April 1994, the persons whose names he mentioned went to the presbytery and upon their return from there, they started shooting at the church.[505]

241. Counsel for the Defence then read out another part of Witness CBR's statement of 29 August 2000 wherein he stated as follows: "After the entire church had collapsed the authorities held a meeting with Father Seromba, after which I heard him ordering the removal of the rubbish in front of his house – by "rubbish", he meant the bodies of the refugees."[506] Defence Counsel then asked Witness CBR whether this statement did not mean that he saw Seromba after the church had been destroyed. The witness answered in the negative.[507] He stated that he saw Seromba on the morning of 16 April 1994 and did not see him thereafter. The witness recalled having returned home after the collapse of the church. He averred that Seromba uttered these remarks on "getting rid of the rubbish" on 15 April 1994 and that the meeting was held on 15 April 1994 and not 16 April 1994. Witness CBR claimed that there was a confusion of dates in the transcription of his statement made in Kinyarwanda.[508]

242. In view of the foregoing, the Chamber considers that Witness CBR is also credible with respect to another event: the discussions and meetings between Athanase Seromba and the authorities on 16 April 1994.

243. The Chamber finds that Defence Witness FE32 is not credible as to the events of 16 April 1994, due to the numerous contradictions in his testimony and prior statements on the one hand, as well as between his testimony and his prior statements on the other hand. Here, the Chamber will mention only the most serious contradictions.

244. In the African Rights Information Bulletin N°2, Witness FE32 stated:

> "Father Seromba who was in favour of that solution said the following: 'They should be destroyed so that we can get rid of the enemy. When the enemy was no longer there we can build another'.
>
> Anastase refused to bulldoze the church but he said Seromba made him afraid. Father Seromba said the following: 'There are many Christians abroad. That church - this church will be rebuilt in three days'."[509]

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[504] Statement of Witness CBR to Tribunal investigators on 29 August 2000, (statement not filed as exhibit), p. 4; read back to the witness: Transcript, 20 January 2005, p. 59 (open session).
[505] Transcript, 20 January 2005, p. 61 (open session).
[506] Statement of Witness CBR to Tribunal investigators on 29 August 2000, (statement not filed as exhibit), p. 4; read back to the witness: Transcript, 20 January 2005, p. 61 (open session).
[507] Transcript, 20 January 2005, p. 61 (open session).
[508] Transcript, 20 January 2005, pp. 62-63 open session).
[509] *Information bulletin N°2 of African Rights* (P-5), p. 15; read back to the witness: Transcript, 5 April 2006, p. 20 (open session).

245. Witness FE32 asserted that these statements were untrue, insisting that the Rwandan authorities refuse to admit that he was forced to bulldoze the church.[510]

246. In a statement to Rwandan authorities on 27 August 1996, Witness FE32 stated as follows:

> "They ordered me to destroy this church, and let me add that the priest of this parish, by the name Seromba, was there, and he said nothing with regard to the demolition of the church. I carried out the orders in order to save my life. Apart from those soldiers, IPJ Kayishema, as well as the priest of the said parish, Seromba – no one else was on the spot. I performed that duty over a three day period and he was watching over me so as to prevent me from escaping – they were watching so as to prevent me from escaping".[511]

247. Witness FE32 specified that he made this statement under duress to "save my skin".[512]

248. In a statement to Rwandan authorities on 19 April 1995, Witness FE32 identified "Seromba the parish priest of Nyange parish" as one of his collaborators. He stated that Athanase Seromba was present when Kayishema, the *bourgmestre*, and the presiding judge of the canton tribunal ordered him to bring in the bulldozer.[513] The witness did not contest the validity of this document and the information contained therein, except the entries related to Seromba. He explained that he made this statement under duress.[514]

249. In a statement to Rwandan authorities on 22 July 1997, Witness FE32 stated as follows: "When I asked Kayishema what was going to happen now that people had been killed in that church, that he went to rear courtyard of the presbyterian with Father Seromba: The priest asked me to destroy the church and added that they were going to build another one. I put the following question to him, 'Are we going to destroy the house of God?' And he replied, 'Destroy it. We will build another one'."[515] Witness FE32 explained that he made this statement "in order to please some people who wanted me to implicate Father Seromba".[516]

250. In a statement made to Tribunal investigators on 27 July 2000, Witness FE32 stated that he initially refused to demolish the church, that the authorities then went to the presbytery and returned accompanied by Athanase Seromba, who directly addressed him in the following terms: "It has been decided that indeed has to be destroyed. We shall build another one."[517] Commenting on this excerpt, Witness FE32 explained that the Tribunal investigators had their own objectives in relying solely on statements made to the Rwandan authorities which, he claimed, were obtained under duress.[518] Another excerpt from this statement was read to the witness, wherein the witness stated that after having demolished the right wall near the bell tower, Seromba approached him and said: "Destroy all those walls. Nothing must be left standing."[519]

251. Witness FE32 admitted to having signed the statement, but stated that Tribunal investigators did not first read it back to him and made that the interpreters were not trustworthy.[520] The statement the witness made to Tribunal investigators on 4 April 2002, which included his 27 July 2000

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[510] Transcript, 5 April 2006, p. 21 (open session).
[511] Statement of Witness FE32 to the Rwandan judicial authorities on 27 August 1996 (D-77), p. 2, read back to the witness: Transcript, 5 April 2006, p. 37 (open session).
[512] Transcript, 5 April 2006, p. 38 (open session).
[513] Statement of Witness FE32 to the Rwandan judicial authorities on 19 April 1995 (P-54), p. 1; read back to the witness: Transcript, 6 April 2006, p. 14 (open session).
[514] Transcript, 6 April 2006, p. 14 (open session).
[515] Statement of Witness FE32 to the Rwandan judicial authorities on 22 July 1997 (D-82), p. 5; read back to the witness: Transcript, 6 April 2006, p. 15 (open session).
[516] Transcript, 6 April 2006, p. 16 (open session).
[517] Statement of Witness FE32 to Tribunal investigators on 27 July 2000 (P-55), p. 5, read back to the witness: Transcript, 6 April 2006, p. 29 (open session).
[518] Transcript, 6 April 2006, pp. 29-30 (open session).
[519] Statement of Witness FE32 to Tribunal investigators on 27 July 2000 (P-55), p. 5, read back to the witness: Transcript, 6 April 2006, pp. 30-31 (open session).
[520] Transcript, 6 April 2006, pp. 21-24 (open session).

statement, was shown to him. The 4 April 2002 statement indicated that the 27 July 2000 statement of the witness was read back to him and that he made no changes to it.[521] The witness explained that Tribunal investigators had forced him to sign the statement and refused to allow him to make the slightest change.[522] A confirmation of his 4 April 2002 statement dated 11 February 2003,[523] which indicated that the investigators had read back to him his 4 April 2002 statement, to which he made a change which was recorded in the final version, was shown to him. This is acknowledged by the witness.[524] The Chamber notes that this negates the witness' allegations that Tribunal investigators refused to make any amendments to his statements.

252. In his letter to the Supreme Court of Rwanda, written on 7 November 2001,[525] Witness FE32 stated as follows:

> "The truth admitted before the court in which I still stand by up to today, is that I demolished the church with a bulldozer in execution of the order issued by the *commune* and church leaders at the time."[526]
>
> "On the 15th April 1994, they had me and my friend Everiste Ntahokiriye – Kigali, Byumba brought in order to destroy the church but we refused. Immediately they killed him, my friend, on the spot. Having witnessed that, I felt weak and carried out their orders. They just had Father Seromba brought in, and later informed us that that was the decision that had been taken."[527]
>
> "The Court did not pay any attention to the statements made by the Prosecution witness who testified that he saw IPJ, Kayishema, when he brought me and forced me to demolish the church. I refused to comply until the arrival of Father Seromba. After that the church was destroyed."[528]

253. The witness refused to comment on this letter, merely insisting that his request had been rejected by the Supreme Court of Rwanda.[529] He then stated that he wrote this letter with the assistance of another person, but that an error had slipped into it.[530]

254. Witness FE32 was unable to provide explanations as to the numerous contradictions between his testimony before the Chamber and the remarks he made before African Rights, on the one hand, and Rwandan authorities and Tribunal investigators on the other, over a period of 10 years. Nor could he provide any explanation for the contradictions which are still to be found in his letter to the Supreme Court of Rwanda.

255. With respect to Defence claims that the witness acted under duress, the Chamber recalls that it is up to the Defence to adduce evidence of duress.[531] In the present case, the Chamber considers that the Defence has not adduced any evidence to show that the prior statements of Witness FE32 were obtained under duress. The Chamber notes that the witness was inconsistent in his explanations on the occasions when he did not refuse to provide one. Furthermore, the Chamber notes that the witness had never previously stated that he had been tortured or that he gave any statements under duress, either before Tribunal investigators or those of the Defence. Finally, the Chamber notes that in the course of

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[521] Statement of Witness FE32 to Tribunal investigators on 4 April 2002 (D-80), p.3, read back to the witness: Transcript, 6 April 2006, p. 21 (open session).
[522] 6 April 2006 Transcripts, p. 24 (open session).
[523] Confirmation of Witness FE32 of his 4 April 2002 statement on 11 February 2003 (P-56); read back to the witness: Transcript, 6 April 2006, p. 25 (open session).
[524] Transcript, 6 April 2006, p. 26 (open session).
[525] A signed version of this letter was filed with the Trial Chamber as Exhibit C-1.
[526] Letter from Witness FE32 to the Supreme Court of Rwanda dated 7 November 2001 (P-57), p. 2, read back to the witness: Transcript, 6 April 2006, p. 35 (open session).
[527] Letter from Witness FE32 to the Supreme Court of Rwanda dated 7 November 2001 (P-57), p. 2, read back to the witness: Transcript, 6 April 2006, p. 38 (open session).
[528] Letter from Witness FE32 to the Supreme Court of Rwanda dated 7 November 2001 (P-57), pp. 3-4, read back to the witness: Transcript, 6 April 2006, p. 40 (open session).
[529] Transcript, 6 April 2006, pp. 35-36 (open session).
[530] Transcript, 6 April 2006, p. 38 (open session).
[531] *Bagosora,* Decision on Motion Concerning Alleged Witness Intimidation (TC), 28 December 2004, paras. 8-10.

his testimony, in response to a question from the Prosecution concerning the letter he sent to the Supreme Court of Rwanda, the witness stated: "Why does the Prosecutor continue to rely on this document? In my opinion – in my opinion this document has no value. You are coercing me – you are bringing pressure to bear on me. Just like when you appear before Rwandan courts, I believe there is also the form of coercion."[532] In view of the numerous contradictions in this witness' statements, the Trial Chamber holds that the excerpt is insufficient to establish that he may have suffered any form of duress.

256. The Chamber also notes that Witness FE32 appears to be a witness seeking to exculpate Athanase Seromba. Thus, to justify his decision to testify as a Defence witness and not as a Prosecution witness, as previously envisaged, Witness FE32 stated: "[...] Life is short on earth. And I didn't want to be on bad terms with my God."[533]

257. In view of the foregoing, the Chamber finds that the testimony of Witness FE32 concerning the events which occurred on 16 April 1994 is not credible.

258. The Chamber finds that Witness BZ1's evidence is not conclusive. He expressed himself in general terms, and his claim that he did not see Athanase Seromba on 15 and 16 April 1994 is insufficient to establish that Seromba was not present at the scenes of the events. Indeed, it is even possible that the witness did not see Seromba in the huge crowd at the church. Incidentally, the witness only arrived on site after the demolition of the church had begun. Finally, Witness BZ1's testimony about the persons who brought the bulldozer constitutes hearsay and, as such, is of little probative value.

259. The Chamber finds that the testimony of Witness BZ4 is not conclusive. In fact, the witness expressed himself in general terms, and his testimony lacks precision with respect to the sequence of the events. For instance, he was unable to give the exact time of his arrival or the arrival of the bulldozer at the church on 16 April 1994.[534] The assertion that he did not see Athanase Seromba on 15 or 16 April 1994 is insufficient to establish that Seromba was not present at the scene of the events. Indeed, it is even well possible that the witness did not spot Seromba in the huge crowd which had gathered at the church.[535] Finally, Witness BZ4's assertions about the persons who brought the bulldozer constitute hearsay and, as such, have little probative value.

260. The Chamber considers that Witness CF23 is not credible. The Chamber notes that when this witness arrived in the vicinity of the church, the destruction of the church was already underway. Consequently, the Chamber attaches no weight to his testimony concerning the events which occurred on 16 April 1994 at Nyange church.

261. The Chamber finds that the testimony of Witness FE35 is not credible. The Chamber notes that the witness expressed himself in general terms, and that there were many inconsistencies between his testimony and prior statements.[536]

262. The Trial Chamber finds that Witness PA1 is not credible. The Chamber notes that his testimony and prior statements as to the events of 16 April 1994 contain many contradictions. For example, in his statement to the Defence on 27 January 2005,[537] the witness did not mention the fact that Athanase Seromba was furious when he left the presbytery, whereas he made this assertion in his testimony.[538] The Prosecution read out to the witness an excerpt from his 27 January 2005 statement

[532] Transcript, 6 April 2006, p. 39 (open session).
[533] Transcript, 5 April 2006, p. 58 (open session).
[534] Transcript, 10 November 2005, p. 3 (open session).
[535] Transcript, 2 November 2005, p. 6 (open session).
[536] Transcript, 23 November 2005, pp. 12, 15-24 and 32-34 (closed session).
[537] Statement of Witness PA1 to Defence Counsel on 27 January 2005 (P-62).
[538] Transcript, 21 April 2006, p. 16 (closed session).

where the witness stated that the priests did not dare to approach the attackers.[539] The Prosecutor pointed out that this contradicted the testimony of the witness, who nevertheless asserted that Seromba went outside. To justify this omission, the witness merely stated that it was nothing more than an involuntary memory lapse,[540] adding that in the phrase "we did not dare approach", there is no reference to any particular moment, but was merely trying to describe the situation that prevailed. The witness, once again, referred to the powerlessness of the priests in the face of such a situation. He reiterated that Seromba emerged from the presbytery expressing his anger and incomprehension.[541]

263. Witness PA1 was also examined as to the content of his 8 October 2003 statement. Counsel for the Prosecution read out the following excerpt to the witness: "Question: 'What did the attackers do?' Answer: 'They entered the house of the priest and they asked Seromba why he kept me by his side. For they considered me to be a Tutsi because of my appearance but Seromba replied to them that I was a Hutu.'"[542] The witness confirmed that the content of the excerpt corresponded to what he had said before the Chamber.[543] Counsel for the Prosecution read out a second excerpt to the witness: "Each time the authorities came to the presbytery to find out the attitude to adopt in the face of these problems."[544] The witness stated that that statement was false.[545] Counsel read out a third excerpt to the witness: "Question: 'Are you in a position to confirm that those people never came to the presbytery without your knowledge?' Answer: 'It is possible that they came without my knowledge since I was hiding and I was not always outside the room to see what was happening.'"…[546] The witness stated that this was a summary of what he said and that his intention was to explain to the investigators that "It is as if we were linked by some umbrical cord. I wasn't really with him all times".[547] Counsel for the Prosecution read out a fourth excerpt to the witness: "Question: 'Was the *bourgmestre* physically present during the trench digging?' Answer: 'I do not know, since I did not see the machine. As far as I am concerned, I remained shut up in my room."'[548] The witness declared the statement to be false.[549] The Trial Chamber considers all of the witness' explanations to be implausible.

264. Finally, the Chamber notes that Witness PA1 admitted that he did not go out with Athanase Seromba and was not in direct contact with him at that time. Therefore, he could not have heard the remarks that Seromba made outside the presbytery at the time the church was being destroyed.[550]

265. The Chamber finds that Witness NA1 is not credible. His account of the events of 16 April 1994 contains many contradictions. For instance, in his 9 December 1996 statement, the witness stated: "It is Seromba who played a role in the killings. However, I do not accuse him of any particular offence, but I saw him moving about with the authorities."[551] Commenting on this portion of his statement, Witness NA1 merely stated that his answers were being oriented towards a particular goal and that, in any event, the Rwandan authorities wrote down whatever they wanted. He added that at the time he made this statement, he wanted to save his skin and that it was important not to forget the context in Rwanda in 1996.[552]

266. The Chamber notes contradictions in Witness NA1's testimony as to the order to bring in the bulldozer. In the course of his in-court testimony, the witness testified that Athanase Seromba never

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[539] Statement of Witness PA1 to Defence Counsel on 27 January 2005 (P-62), p. 4: read back to the witness: Transcript, 21 April 2006, p. 17 (closed session).
[540] Transcript, 21 April 2006, p. 17 (closed session).
[541] Transcript, 21 April 2006, pp. 17-19 (closed session).
[542] Statement of Witness PA1 to the Rogatory Commission on 8 October 2003 (D-90), p. 3.
[543] Transcript, 21 April 2006, p. 26 (closed session).
[544] Statement of Witness PA1 to the Rogatory Commission on 8 October 2003 (D-90), p. 5.
[545] Transcript, 21 April 2006, p. 27 (closed session).
[546] Statement of Witness PA1 to the Rogatory Commission on 8 October 2003 (D-90), p. 5.
[547] Transcript, 21 April 2006, p. 27 (closed session).
[548] Statement of Witness PA1 to the Rogatory Commission on 8 October 2003 (D-90), p. 5.
[549] Transcript, 21 April 2006, p. 30 (closed session).
[550] Transcript, 21 April 2006, p. 19 (closed session).
[551] Statement of Witness NA1 to the Rwandan judicial authorities on 9 December 1996 (P-37), p.1, read back to the witness: Transcript, 7 December 2005, p. 83 (closed session).
[552] Transcript, 7 December 2005, pp. 83-85 (closed session).

asked "people" to collect the bodies. The witness claimed to have learned that the bulldozer was there, and that the *bourgmestre* had said that he was going to send in a bulldozer to remove the bodies.[553] The Prosecutor challenged the witness on his 9 December 1996 statement in which he mentioned that the following day, Seromba asked people to collect the bodies, but that they refused, and that it was at that time that *bourgmestre* Ndahimana and Seromba ordered that a bulldozer be brought in to remove the bodies.[554] The witness responded that this statement should be understood in the context within which his trial was conducted. He furthermore stated that the document was poorly punctuated and that this shows that the person who examined him did so with a specific aim in mind.[555] The witness stated: "[…] Father Seromba asked the people to collect the bodies, but they refused. *Bourgmestre* Grégoire decided to bring in the bulldozer to evacuate the bodies. When I speak of Grégoire, they always insert Seromba because they wanted me to accuse Seromba".[556] The witness explained that he had actually stated that they asked Seromba to go and see the *bourgmestre*, but that he was not personally present when the decision to remove the bodies was being taken.[557]

267. In view of the foregoing, the Chamber finds that the Prosecution has not proved beyond a reasonable doubt that Athanase Seromba personally gave the order to destroy the church.

268. The Chamber, however, finds that the Prosecution has proved beyond a reasonable doubt that Athanase Seromba was informed by the authorities of their decision to destroy the church and that he accepted the decision.

269. The Chamber also finds that the Prosecution has established beyond a reasonable doubt that Athanase Seromba said such words to bulldozer driver FE32 as would encourage him to destroy the church. The Chamber notes that when bulldozer driver FE32 received the order from the authorities to destroy the church, he asked Seromba whether he should destroy the church. Seromba answered in the affirmative, assuring to the witness that Hutu would be able to build it again. Furthermore, the Trial Chamber finds that Seromba gave advice to the bulldozer drivers concerning the fragile side of the church.

7.5. Destruction of Nyange church using the bulldozer thus causing the death of at least 1,500 persons

7.5.1. The evidence

Prosecution witnesses

270. Witness CBR[558] testified that the destruction of Nyange church began at about 10 a.m. on 16 April 1994. He explained that the walls were demolished first, and that the tower eventually collapsed at about 5 p.m.[559]

271. Witness CBJ[560] testified that he was in the church tower on 16 April 1994. The witness also claimed that demolition of the church began at about 3 p.m. and lasted three hours.[561] He estimated the number of persons who perished in the demolition at more than 1,500.[562]

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[553] Transcript, 8 December 2005, p. 14 (closed session).
[554] Statement of Witness NA1 to the Rwandan authorities on 11 November 1996 (P-38), pp. 3-4, read back to the witness: Transcript, 8 December 2005, p. 16 (closed session).
[555] Transcript, 8 December 2005, p. 17 (closed session).
[556] Transcript, 8 December 2005, p. 17 (closed session).
[557] Transcript, 8 December 2005, pp. 17-18 (closed session).
[558] See Section 6.2.1.
[559] Transcript, 20 January 2005, p. 42 (open session).
[560] See Section 3.2.1.
[561] Transcript, 14 October 2004, pp. 26-27 (closed session).
[562] Transcript, 12 October 2004, p. 19 (open session).

272. Witness CBK[563] testified that he was in front of the secretariat when the church was being destroyed. He claimed that its destruction began at about 10 a.m. and that the tower was the last part of the building to collapse.[564]

273. Witness CDL[565] testified that he was on the site when the church was being destroyed. He claimed that he saw two bulldozers destroy the church and the tower at about 10 a.m. He also alleged that on 15 April 1994, there were between 1,500 and 2,000 refugees gathered in the parish[566] and estimated that approximately 1,500 persons were killed in the destruction of Nyange church.[567]

274. Witness CBI[568] estimated that approximately 2,000 refugees were at the church when he arrived there, adding that this number rose to 5,000 persons.[569]

275. Witness CBS[570] testified that when he arrived at Nyange church on 12 April 1994, there were approximately 2,000 persons on the site.[571]

276. Witness CNJ[572] estimated the number of persons killed at approximately 2,000.[573] He explained that between 15[574] and 16[575] April 1994 nearly 2,000 Tutsi were killed.[576]

277. Witness CBN[577] estimated the number of Tutsi refugees gathered at the church on 15 April 1994 to be 2,000.[578]

Defence witnesses

278. Witness FE32[579] testified that the destruction of the church began at about 10.30 a.m. on 16 April 1994 and ended at about 3 p.m. or 4 p.m.[580] He explained that there were no refugee survivors of the destruction of the church,[581] and that there were "fewer than" 2,000 persons inside the church at the time of its destruction.[582]

279. Witness BZ1[583] testified to having seen the bulldozer demolish the church and the bell tower. The witness added that the destruction of the church lasted between three and five hours and that the bell tower collapsed at about 3 p.m.[584] He also claimed that following the collapse of the bell tower, he left the site, adding that he did not see "any other refugees on the site".[585]

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[563] See Section 3.3.1.
[564] Transcript, 19 October 2004, pp. 28-29 (closed session).
[565] See Section 3.2.1.
[566] Transcript, 19 January 2005, p. 11 (open session).
[567] Transcript, 19 January 2005, p. 28 (open session).
[568] See Section 3.3.1.
[569] Transcript, 4 October 2004, p. 8 (open session).
[570] See Section 3.3.1.
[571] Transcript, 5 October 2004, p. 9 (open session).
[572] See Section 3.3.1.
[573] Transcript, 24 January 2005, p. 16 (open session).
[574] Transcript, 24 January 2005, p. 16 (open session).
[575] Transcript, 24 January 2005, p. 25 (open session).
[576] Transcript, 24 January 2005, p. 25 (open session).
[577] See Section 3.3.1.
[578] Transcript, 15 October 2004, p. 46 (open session).
[579] See Section 3.4.1.
[580] Transcript, 28 March 2006, pp. 37-38 (open session).
[581] Transcript, 28 March 2006, p. 40 (open session).
[582] Transcript, 28 March 2006, pp. 40-41 (open session).
[583] Transcript, 10 November 2005, p. 30 (open session).
[584] Transcript, 2 November 2005, pp. 62-64 (open session).
[585] Transcript, 2 November 2005, p. 67 (open session).

280. Witness BZ8[586] testified that in April 1994, he was living in Kivumu *commune*.[587] The witness claimed that he watched the destruction of the church from a distance. He explained that the machine arrived and began to destroy the rear walls of the church.[588] He further explained that the entire church building did not collapse immediately and that the bell tower was only destroyed the following day.[589] Finally, he stated that he was not sure about the dates.[590]

281. Witness FE35[591] testified that part of the wall of the church building was destroyed first, followed by the other part. He added that the bell tower collapsed at about noon.[592]

7.5.2. Findings of the Chamber

282. The Chamber notes that Witness Rémy Sahiri, an investigator with the Office of the Prosecutor,[593] prepared a report titled *Rapport préliminaire d'identification des sites du génocide et des massacres d'avril-juillet 1994 au Rwanda* [Preliminary report identifying the sites of Genocide and Massacres in April-July 1994 in Rwanda]. In the report, he stated that Nyange church was destroyed.[594] He also submitted to the Chamber an album of photographs showing the location of Nyange parish and the ruins of the former church.[595]

283. The Chamber finds both Prosecution and Defence witnesses to be credible. In fact, all of them gave consistent evidence with respect to the fact that Nyange church was destroyed on 16 April 1994, using a bulldozer.

284. In view of the foregoing, the Chamber finds that the Prosecution has proved beyond a reasonable doubt that Nyange church was destroyed on 16 April 1994, using a bulldozer.

285. The Chamber further notes that the body of evidence points to the fact that the destruction of the church resulted in the death of many Tutsi refugees who had sought refuge there, with some witnesses estimating the number of victims to be 1,500, while others put it at 2,000. In this regard, the Chamber recalls its findings that Nyange church had a holding capacity of at least 1,500 persons.[596] This leads to the conclusion that on 16 April 1994, the destruction of Nyange church resulted in the death of at least 1,500 refugees who had sought refuge there to flee from the attacks of the assailants.

7.6. The order given by Athanase Seromba to bury the bodies

7.6.1. The evidence

Defence witnesses

286. Witness FE35[597] testified that after the demolition of the church, Athanase Seromba did not hold any meeting in the parish with the communal authorities. He averred that after the destruction of Nyange church, trucks from ASTALDI company buried the bodies of the victims in a mass grave

[586] Transcript, 15 November 2005, p. 43 (open session).
[587] Transcript, 15 November 2005, p. 28 (open session).
[588] Transcript, 15 November 2005, p. 37 (open session).
[589] Transcript, 15 November 2005, p. 39 (open session).
[590] Transcript, 16 November 2005, p. 2 (open session).
[591] See Section 6.7.1.
[592] Transcript, 22 November 2005, pp. 20-21 (closed session).
[593] Transcript, 27 September 2004, p. 5 (open session).
[594] Preliminary report identifying the sites of genocide and massacres in April-July 1994 in Rwanda (P-4), p. 166.
[595] Exhibit P2-7.
[596] See Section 2.
[597] See Section 6.7.1.

which had been dug in the banana plantation owned by the priests.[598] The witness stated that it was not Seromba who gave the order to bury the bodies. He explained that Kayishema, in the company of Ndahimana, gave the order to the *Interahamwe*.[599]

287. Witness FE32[600] testified that he buried in a mass grave the bodies of persons killed when the church was destroyed.[601]

288. Witness FE34[602] testified that the graves were dug using a bulldozer which had been brought there for the purpose of burying the bodies of persons killed as a result of the destruction of Nyange church.[603] He asserted that it was the *bourgmestre* who gave the order to bury the bodies, although he admitted that he did not hear him give the order.[604]

289. Witness FE13[605] testified that a bulldozer that was on the site on 16 April 1994 was used to dig a grave in which the bodies of victims of the destruction of the church were buried.[606]

7.6.2. Findings of the Chamber

290. The Chamber notes that the Prosecution has not produced any evidence in support of the above allegation. The Chamber further notes that no Defence witness gave evidence to the effect that Athanase Seromba gave the order to bury the bodies after the destruction of the church.[607] In fact, the witnesses aver that this order came from the authorities. In the light of the foregoing, the Chamber considers that the Prosecution has not proved this fact beyond a reasonable doubt.

7.7. The meeting between Athanase Seromba and the authorities after the demolition of the church

7.7.1. The evidence

Prosecution witness

291. Witness CBK[608] stated that after the 16 April 1994 massacres, Athanase Seromba, Fulgence Kayishema, Colonel Nzapfakumunsi, Gaspard Kanyarukiga, Grégoire Ndahimana, Anastase Rushema and Télésphore Ndungutse met upstairs in the presbytery building to drink banana beer and wine.[609] The witness added that Seromba was standing on the "upper floor" of the presbytery building and was distributing beer to the attackers who were in the rear courtyard of the presbytery. He testified that there was a party atmosphere on this occasion and that all the persons there were satisfied with the massacre that had just been perpetrated.[610]

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[598] Transcript, 22 November 2005, p. 24 (closed session).
[599] Transcript, 22 November 2005, p. 24 (closed session).
[600] See Section 2.
[601] Transcript, 6 April 2006, pp. 10-12 (open session).
[602] See Section 6.3.1.
[603] Transcript, 30 March 2006, p. 17 (open session).
[604] Transcript, 30 March 2006, p. 50 (open session).
[605] See Section 3.2.1.
[606] Transcript, 7 April 2006, p. 29 (open session).
[607] CBR is the only Prosecution witness who claims to have heard Athanase Seromba order that the "rubbish" be removed from the church courtyard during a meeting held on 16 April 1994. However, during cross-examination, he stated that this meeting was held in the parish on 15 April and not on 16 April 1994 (Transcript, 20 January 2005, pp. 62-63 (open session)).
[608] See Section 3.3.1.
[609] Transcript, 19 October 2004, pp. 41-42 (closed session).
[610] Transcript, 19 October 2004, pp. 31-32 (closed session).

Defence witnesses

292. Witness FE32[611] testified that he neither saw Athanase Seromba drink nor rejoice at the destruction of the church, adding that he did not receive any beer from Seromba.[612]

293. Witness PA1[613] testified that it was impossible that Athanase Seromba rewarded those who demolished the church by giving them beer.[614] The witness stated that he did not see anyone come to thank Seromba for the destruction of the church, and considered it as inconceivable: "And the state in which he was, his frame of mind, I don't think anybody could dare approach him [...]."[615] He finally stated that the person who demolished the church did not receive any remuneration.[616]

7.7.2. Findings of the Chamber

294. The Chamber is of the view that the testimony of CBK is not reliable on this point. In fact, he is the only witness who claims that Athanase Seromba rejoiced at the destruction of the church. The Chamber considers that there subsists a reasonable doubt as to the veracity of the account given by Witness CBK.

295. The Chamber finds that Witnesses FE32 and PA1 are not credible. In fact, their testimonies are nothing but a reflection of their personal opinions.

296. In view of the foregoing, the Chamber finds that the Prosecution has not proved beyond a reasonable doubt that Athanase Seromba celebrated the destruction of the church in the company of other persons.

Chapter III : Legal Findings of the Trial Chamber

297. In setting out its legal findings, the Chamber will rely on the factual findings set forth in Chapter II above.

298. The Indictment contains four counts: genocide, complicity in genocide, conspiracy to commit genocide and crimes against humanity (extermination).

299. The first two counts of the Indictment, that is genocide and complicity in genocide, are alternative counts, whereas Counts 1, 3 and 4 are cumulative. Consequently, the Chamber will consider whether the Prosecution has adduced evidence of the Accused's liability under each of the counts.

1. Mode of participation in the crimes

1.1. The Indictment

300. The Indictment charges the Accused with criminal liability under Article 6 (1) of the Statute which provides as follows: "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."

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[611] See Section 3.4.1.
[612] Transcript, 28 March 2006, p. 48 (open session).
[613] See Section 3.4.1.
[614] Transcript, 20 April 2006, pp. 28-29 (closed session).
[615] Transcript, 20 April 2006, p. 29 (closed session).
[616] Transcript, 20 April 2006, p 30 (closed session).

1.2. Applicable law

301. The different modes of participation set forth in Article 6 (1) include a number of acts for which the Accused incurs individual criminal responsibility under the counts charged against him. The different modes of participation in an offence referred to in Article 6 (1) of the Statute are briefly set out below:

302. Participation by "committing" means the direct physical or personal participation of the accused in the perpetration of a crime or the culpable omission of an act that was mandated by a rule of criminal law.[617]

303. Participation by "planning" presupposes that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.[618] With respect to this mode of participation, the Prosecution must demonstrate that the level of participation of the accused was substantial[619] and that the planning was a material element in the commission of the crime.[620]

304. Participation by "instigating" implies urging or encouraging another person to commit a crime.[621] Proof of this mode of participation requires the Prosecution to establish that the instigation was a factor element substantially contributing to the conduct of another person committing the crime. It is, however, not mandatory to prove that the crime would not have been committed without the intervention of the accused.[622]

305. Participation by "ordering" presupposes that a person in a position of authority orders another person to commit an offence. This mode of participation implies the existence of a superior-subordinate relationship between the person who gives the order and the one who executes it.[623] A formal superior-subordinate relationship is, however, not required.[624] A superior-subordinate relationship is established by showing a formal or informal hierarchical relationship involving an accused's effective control over the direct perpetrators.[625]

306. The requisite *mens rea* for the four modes of responsibility referred to above is the direct intent of the perpetrator in relation to his own planning, instigating, or ordering.[626]

307. Participation by "aiding and abetting" refers to any act of assistance or support in the commission of the crime.[627] Such mode of participation may take the form of tangible assistance, or verbal statements. It may also consist in the mere presence of the accused at the scene of the crime, conceptualized in the theory of the "approving spectator".[628] Aiding and abetting must have a substantial effect on the commission of the crime, but does not necessarily constitute an indispensable

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[617] *Krstić*, Judgement (TC), 2 August 2001, para. 601; *Kayishema*, Judgement (AC), 1 June 2001, para. 187.
[618] *Akayesu*, Judgement (TC), 2 September 1998, para. 480.
[619] *Bagilishema*, Judgement (TC), 7 June 2001, para. 30: "The level of participation must be substantial, such as formulating a criminal plan or endorsing a plan proposed by another."
[620] *Krstić*, Case N°IT-98-33, Judgement (TC), 2 August 2001, para. 601.
[621] *Bagilishema*, Judgement (TC), 7 June 2001, para. 30; *Krstić*, Case N°IT-98-33, Judgement (TC), 2 August 2001, para. 601.
[622] *Bagilishema*, Judgement (TC), 7 June 2001, para. 30: "By urging or encouraging another person to commit a crime, the instigator may contribute substantially to the commission of the crime. Proof is required of a causal connection between the instigation and the *actus reus* of the crime." *Akayesu*, Judgement (TC), 2 September 1998, paras. 478-482.
[623] *Bagilishema*, Judgement (TC), 7 June 2001, para. 30; *Akayesu*, Judgement (TC), 2 September 1998, para. 483; *Rutaganda*, Judgement (TC), 6 December 1999, para. 39.
[624] *Kordić* Judgement (AC), 17 December 2004, para. 28.
[625] *Semanza* Judgement, para. 415.
[626] *Kordić* Judgement (AC), 17 December 2004, paras. 26-29.
[627] *Bagilishema* Judgement (TC), 7 June 2001, para. 33; *Akayesu* Judgement (TC), 2 September 1998, para. 484; *Kayishema* Judgement (AC), 1 June 2001, para. 186; *Kayishema* Judgement (TC), 21 May 1999, paras. 200-202.
[628] *Kayishema* Judgement (AC), 1 June 2001, paras. 201-202; *Kayishema*, Judgement (TC), 21 May 1999, para. 198.

element, i.e. a *conditio sine qua non,* of the crime.[629] Except in the case of the "approving spectator", assistance may be provided prior to or during the commission of the crime, and it is not necessary for the person providing assistance to be present during the commission of the crime.[630]

308. In the case of the "approving spectator", the mere presence of the accused at the scene of the crime is insufficient in itself to establish that he has aided and abetted the commission of the crime, unless it is shown to have a significant legitimizing or encouraging effect on the actions of the principal offender.[631] The criminal responsibility of the "approving spectator" is incurred only where he is actually present at the scene of the crime or, at the very least, in the immediate vicinity of the scene of the crime, such that his presence is interpreted by the principal perpetrator of the crime as an approval of his conduct.[632] The authority of the accused constitutes an important factor in assessing of the impact of the accused's presence.[633]

309. The *mens rea* of aiding and abetting requires that the accused be aware that his conduct would contribute substantially to the commission of the *actus reus* of the offence or that the perpetration of the crime would be the possible and foreseeable result of his conduct.[634] The accused must be aware of the essential elements of the crime, including the *mens rea* of the principal offender. It is not necessary, however, that the accused share the *mens rea* of the principal offender.[635]

310. The requisite *mens rea* in the more specific case of the "approving spectator" is for the accused to know that his presence would be seen by the perpetrator of the crime as encouragement or support.[636] The *mens rea* of the approving spectator may be deduced from the circumstances, and may include prior concomitant behaviour, for instance allowing crimes to go unpunished or providing verbal encouragement to commit such crimes.[637]

1.3. Findings of the Chamber as to the mode of participation of the Accused in the offences charged against him

The mode of participation of the Accused in the offences charged against him

311. On the basis of its factual findings, the Trial Chamber considers that Accused Athanase Seromba can incur criminal responsibility only for his participation by aiding and abetting in the offences for which he may be convicted.

312. The Chamber finds that the Prosecution has not proved beyond reasonable doubt that Seromba planned or committed the massacres of Tutsi refugees.[638] With respect to participation by instigating or by ordering, the Prosecution has not proved that Athanase Seromba had the specific genocidal intent or *dolus specialisis* to incur liability under these two modes of participation. More specifically, in

[629] *Bagilishema*, Judgement (TC), 7 June 2001, para. 33; *Furundžija*, Case N°IT-95-17/1-T, Judgement (TC), 10 December 1998, paras. 209-226.
[630] *Bagilishema*, Judgement (TC), 7 June 2001, para. 33; *Rutaganda*, Judgement (TC), 6 December 1999, para. 43; *Kayishema*, Judgement (TC), 21 May 1999, para. 200; *Akayesu*, Judgement (TC), 2 September 1998, para. 484.
[631] *Krnojelac*, Judgement (TC), 15 March 2002, para. 89; *Bagilishema*, Judgement (TC), 7 June 2001, para. 36.
[632] *Aleksovski*, Case N°IT-95-14/1, Judgement (TC), 25 June 1999, paras. 64 and 65.
[633] *Aleksovski*, Case N°IT-95-14/1, Judgement (TC), 25 June 1999, para. 65. See also the following cases: *Aleksovski*, Case N°IT-95-14/1, Judgement (TC), 25 June 1999, paras. 64-65; *Tadić*, Case N°IT-94-1, Judgement (TC), 7 May 1997, para. 690; *Akayesu*, Judgement (TC), 2 September 1998, para. 693 and *Furundžija*, Case N°IT-95-17/1-T, Judgement (TC), 10 December 1998, para. 274.
[634] *Bagilishema*, Judgement (TC), 7 June 2001, para. 32; *Furundžija*, Case N°IT-95-17/1-T, Judgement (TC), 10 December 1998, para. 246.
[635] *Krnojelac*, Judgement (TC), 15 March 2002, para. 90; *Krnojelac*, Judgement (AC), 17 September 2003, para. 52; *Ntakirutimana*, Case N°ICTR-96-10, Judgement (AC.), 13 December 2004, paras. 500-502; *Krstić*, Case N°IT-98-33, Judgement (AC), 19 April 2004, paras. 134-140.
[636] *Bagilishema*, Judgement (TC), 7 June 2001, para. 36.
[637] *Bagilishema*, Judgement (TC), 7 June 2001, para. 36.
[638] See Chapter II, Sections 3.4, 4.2, 4.3, 5.6, 6.3, 6.4, 6.5, 6.7 and 7.4. See also Chapter III, Section 4.2.

relation to ordering, the Chamber finds that the Prosecution has not established that Accused Athanase Seromba exercised effective control over the principal perpetrators of the crimes.

Exclusion of the theory of the approving spectator in the present case

313. The Chamber notes in the instant case that, in its Final Trial Brief, the Defence advanced arguments on the theory of the *approving spectator*.[639] The Chamber, however, notes that neither the Indictment nor the Prosecutor's Pre-Trial Brief refers to the theory of the *approving spectator*. It therefore deduces that the Prosecutor had no intention of arguing this form of participation in relation to the charges against Accused Athanase Seromba. Consequently, the Chamber will not consider the theory of the *approving spectator* in its findings.

2. Count 1 – Genocide

2.1. The Indictment

314. In the Indictment, the Prosecutor of the International Criminal Tribunal for Rwanda charges Athanase Seromba with genocide, pursuant to Article 2 (3) (a) of the Statute, in that on or between 6 April 1994 and 20 April 1994, in Kivumu *commune*, Kibuye *préfecture*, Rwanda, Athanase Seromba was responsible for killing or causing serious bodily or mental harm to members of the Tutsi population, committed with intent to destroy, in whole or in part, a racial or ethnic group.

2.2. Applicable law

315. Article 2 (2) of the Statute[640] provides that:

> 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 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.

316. The constituent elements of the crime of genocide are: first, that one of the acts listed under Article 2 (2) of the Statute was committed; secondly, that this act was committed against a specifically targeted national, ethnic, racial or religious group, as such, and thirdly, that the act was committed with intent to destroy, in whole or in part, the targeted group.

317. In the Indictment, the Prosecutor charges the Accused, *inter alia*, with acts of killing and causing serious bodily or mental harm to members of the group. In its analysis in relation to each of these acts, the Chamber will rely on the definition to be found in the relevant jurisprudence. Thus, in *Musema*, the Trial Chamber defined "killing" as "homicide committed with intent to cause death".[641] With respect to "causing serious bodily or mental harm", the Trial Chamber, in *Kayishema*, held that the phrase could be construed to include "harm that seriously injures the health, causes disfigurement

[639] Defence Final Brief, pp. 25-28.
[640] The definition of genocide, as given in Article 2 of the Statute of the Tribunal, is culled from Articles 2 and 3 of the Convention for the Prevention and Punishment of the Crime of Genocide. Rwanda signed this Convention but declared it was not bound by Article 9 of the Convention (on this point see the Legislative Decree of 12 February 1975, *Journal Officiel de la République Rwandaise*, 1975, p. 230).
[641] *Musema*, Judgement (TC), 27 January 2000, para. 155.

or causes any serious injury to the external, internal organs or senses".[642] "Serious mental harm" entails more than minor or temporary impairment to mental faculties.[643] It includes, but is not limited to, acts of bodily or mental torture, inhumane or degrading treatment, rape, sexual violence, and persecution.[644] It need not, however, entail permanent or irremediable harm.[645]

318. As for the notion of "members of the group" which represents belonging to a group, case-law considers this from a subjective standpoint, holding that the victim is perceived by the perpetrator of the crime as belonging to the group targeted for destruction.[646] The determination of the targeted group is to be made on a case-by-case basis.[647]

319. Genocide is distinct from other crimes because it requires a special intent: an accused may not be convicted for the crime of genocide unless it is established that he committed one of the acts listed in Article 2 (2) of the Statute with specific intent to destroy, in whole or in part, a particular protected group. The notion "destruction of the group" means "the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group".[648] There is no numeric threshold of victims necessary to establish genocide.[649] To establish specific genocidal intent, it is not necessary to prove that the perpetrator intended to achieve the complete annihilation of a group throughout the world,[650] but, at least, to destroy a substantial part thereof.[651]

320. In the light of the Tribunal's jurisprudence, the specific intent of genocide may be inferred from certain facts or indicia, including but not limited to (a) the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others, (b) the scale of atrocities committed, (c) their general nature, (d) their execution in a region or a country, (e) the fact that the victims were deliberately and systematically chosen on account of their membership of a particular group, (f) the exclusion, in this regard, of members of other groups, (g) the political doctrine which gave rise to the acts referred to, (h) the repetition of destructive and discriminatory acts and (i) the perpetration of acts which violate the very foundation of the group or considered as such by their perpetrators.[652]

2.3. Findings of the Chamber

321. Paragraphs 1 to 32 of the Indictment concisely set out the allegations relating to the charge of genocide. The Chamber has already discussed these allegations in Chapter II, Sections 3, 4, 5, 6 and 7 under its factual findings.

322. In the light of its factual findings, the Chamber considers that the Prosecution has not proved beyond a reasonable doubt that Athanase Seromba planned, instigated, ordered or committed massacres against Tutsi refugees in Nyange.[653] The Chamber, however, finds that Athanase Seromba, by his words and actions on 12, 14, 15 and 16 April 1994, aided and abetted in the commission of

[642] *Kayishema*, Judgement (TC), 21 May 1999, para. 109.
[643] *Kayishema*, Judgement (TC), 21 May 1999, para. 110.
[644] *Musema*, Judgement (TC), 27 January 2000, para. 156.
[645] *Musema*, Judgement (TC), 27 January 2000, para. 156.
[646] *Rutaganda*, Judgement (TC), 6 December 1999, para. 56; *Musema*, Judgement (TC), 27 January 2000, para. 155; *Semanza*, Judgement (TC), 15 May 2003, para. 317.
[647] *Semanza*, Judgement (TC), 15 May 2003, para. 317.
[648] Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May-26 July 1996, Official documents of the UN General Assembly, suppl. N°10, p. 90, (A/51/10) (1996). See *Semanza*, Judgement (TC), 15 May 2003, para. 315.
[649] *Semanza*, Judgement (TC), 15 May 2003, para. 316.
[650] *Kayishema*, Judgement (TC), 21 May 1999, para. 95.
[651] *Semanza*, Judgement (TC), 15 May 2003, para. 316.
[652] *Akayesu*, Judgement (TC), 2 September 1998, paras. 523-524; *Kayishema*, Judgement (TC), 21 May 1999, paras. 93-94; *Musema*, Judgement (TC), 27 January 2000, para. 166; *Rutaganda*, Judgement (TC), 6 December 1999, paras. 60-62; *Bagilishema*, Judgement (TC), 7 June 2001, paras. 62-63.
[653] See Chapter II, Sections 3.4, 4.2, 4.3, 5.6, 6.3, 6.4, 6.5, 6.7 and 7.4; see also Chapter III, Section 4.2.

murders and causing serious bodily or mental harm to the Tutsi who had sought refuge in Nyange church during the events covered in the Indictment.

2.3.1. Causing serious bodily or mental harm to members of the Tutsi ethnic group

The *actus reus* in relation to causing serious bodily or mental harm to the refugees in Nyange church

323. With respect to paragraph 12 of the Indictment, the Chamber finds that Athanase Seromba prohibited the refugees from getting food from the banana plantation belonging to the parish and that he ordered *gendarmes* to shoot at any refugees found there.[654] The Chamber further finds that Seromba refused to celebrate mass for the Tutsi in Nyange church.[655]

324. With respect to paragraphs 13 and 14 of the Indictment, the Chamber finds that on 13 April 1994, at a time when the security situation in Kivumu *commune* had become precarious, Athanase Seromba turned four Tutsi employees out of the parish, including a certain Patrice, who returned the next day and was killed by attackers after, once again, being turned back from the presbytery.[656]

325. With respect to paragraph 22 of the Indictment, the Chamber finds that Seromba turned out several refugees from the presbytery, including Meriam, who was subsequently killed by the attackers.[657]

326. It is the Chamber's opinion that Seromba's order prohibiting refugees from getting food from the banana plantation, his refusal to celebrate mass in Nyange church, and his decision to expel employees and Tutsi refugees from the parish and the presbytery facilitated the perpetration of acts causing serious mental harm to the Tutsi refugees in Nyange church. Indeed, the Chamber considers that when the Tutsi sought refuge in Nyange church, they were very vulnerable, having previously been the target of numerous attacks.[658] Furthermore, Nyange church, where the refugees had sought refuge and thought they could be protected from the attacks, had been surrounded by militiamen and *Interahamwe* since 12 April 1994.[659] It would therefore appear that the refugees in Nyange church lived in a constant state of anxiety, inasmuch as they knew that their lives, and those of relatives were under constant threat. The Chamber is convinced that by adopting such a line of conduct, Seromba contributed substantially to the commission of acts causing serious mental harm to Tutsi refugees in Nyange church.

327. The Chamber also finds that the order by Athanase Seromba prohibiting refugees from getting food from the banana plantation facilitated the perpetration of acts causing serious bodily harm to the refugees. Indeed, on 14 April 1994, the refugees lacked food and had very limited access to basic foodstuffs from the outside, due to the encirclement of the church. Under such circumstances, Seromba's refusal to allow the refugees to get food from the banana plantation substantially contributed to their physical weakening, as they were deprived of food. The Chamber is satisfied that by his conduct, Seromba substantially contributed towards the commission of acts causing serious bodily harm to the Tutsi refugees in Nyange church.

328. In the light of the foregoing, the Chamber finds that the *actus reus* of the assistance provided by the Accused in the commission of acts causing serious bodily or mental harm to refugees in Nyange church has been proved beyond a reasonable doubt.

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[654] See Chapter II, Section 5.3.
[655] See Chapter II, Section 5.5.
[656] See Chapter II, Section 5.5.
[657] See Chapter II, Section 6.8.
[658] See Chapter II, Section 3.2.
[659] See Chapter II, Section 5.2.

The *mens rea* of Accused Athanase Seromba in relation to causing serious bodily or mental harm to refugees in Nyange church

329. The Chamber is convinced that Athanase Seromba could not have been unaware that his prohibition of refugees from getting food from the banana plantation, his refusal to celebrate mass for them and the expulsion of employees and Tutsi refugees would certainly have a negative impact on the morale of the refugees who were faced with an extremely difficult situation related to the persecutions which they had been suffering during the events of April 1994.

330. The Chamber is also satisfied that Athanase Seromba knew that the refugees lacked food.[660] The Chamber therefore considers that he was fully aware that his refusal to allow the refugees to get food from the banana plantation would substantially contribute towards weakening them physically.

331. In view of the foregoing, the Chamber is satisfied that the Prosecution has proved beyond a reasonable doubt the *mens rea* of the Accused's assistance in the commission of acts causing serious bodily or mental harm to the refugees in Nyange church.

2.3.2. Killing members of the Tutsi group

The *actus reus* in relation to the killing of Tutsi refugees in Nyange church

332. With respect to paragraphs 13, 14 and 22 of the Indictment, discussed earlier, the Chamber found that Athanase Seromba turned employees and Tutsi refugees out of Nyange parish.[661] It is the Chamber's opinion that, by so acting, Seromba assisted in the killing of several Tutsi refugees, including Patrice and Meriam.

333. With respect to paragraphs 24 and 25 of the Indictment, the Chamber finds that on 15 April 1994, Athanase Seromba requested assailants, who were getting ready to attack the Tutsi refugees gathered in the presbytery courtyard, to stop the killings and collect the bodies that were strewn throughout the church yard. The Chamber also finds that the attacks against Tutsi refugees resumed after the bodies had been removed.[662] However, the Chamber finds that it has not been proved beyond reasonable doubt that this request constitutes aiding or abetting in the killing of Tutsi refugees.

334. With respect to paragraphs 26 and 27 of the Indictment, the Chamber finds that Athanase Seromba held discussions with the communal authorities and accepted their decision to destroy the church. The Chamber also concludes that Seromba spoke with the bulldozer driver and said certain words to him which encouraged him to destroy the church. Lastly, the Chamber finds that Seromba even gave advice to the bulldozer driver as to the fragile side of the church building.[663] The Chamber is satisfied that by adopting such a line of conduct, Seromba substantially contributed to the destruction of the Nyange church, causing the death of more than 1,500 Tutsi refugees.

335. In view of the foregoing, the Chamber is satisfied beyond a reasonable doubt that the Accused had committed the *actus reus* of aiding and abetting killing of refugees in Nyange church.

The *mens rea* of Accused Athanase Seromba in relation to the killing of Tutsi refugees in Nyange church

[660] See Chapter II, Section 5.3.
[661] See Chapter II, Sections 5.5 and 6.8.
[662] See Chapter II, Section 6.7.
[663] See Chapter II, Section 7.4.

336. The Chamber is satisfied that, given the security situation which prevailed in Nyange parish, Athanase Seromba could not have been unaware that by turning refugees out of the presbytery, he was substantially contributing to their being killed by the attackers.

337. Furthermore, the Chamber is of the view that Athanase Seromba could not have been unaware of the legitimising effect that his words would have on the actions of the communal authorities and the bulldozer driver. The Chamber is also of the view that Seromba knew perfectly well that his approval of the decision by the authorities to destroy Nyange church and his words of encouragement to the bulldozer driver would contribute substantially towards the destruction of the church and the death of the numerous refugees trapped inside.

338. In view of the foregoing, the Chamber is satisfied that the *mens rea* of the Accused in aiding and abetting the killing of refugees in Nyange church has been proved beyond reasonable doubt.

2.3.3. The constituent elements of genocide

339. The Chamber considers as established that the Tutsi constituted an ethnic group in Kivumu *commune* at the time of the events referred to in the Indictment[664] and that they were therefore a protected group within the meaning of Article 2 (2).

340. The Chamber also considers that it is beyond dispute that during the events of April 1994 in Nyange church, the attackers and other *Interahamwe* militiamen committed murders of Tutsi refugees in Nyange church and caused serious bodily or mental harm to them on ethnic grounds, with the intent to destroy them, in whole or in part, as an ethnic group.

341. The Chamber finds that, in his capacity as the priest in charge of Nyange parish during the events of April 1994, and given the situation which prevailed throughout Rwanda, the attacks he personally witnessed[665] and the words he heard or uttered,[666] Accused Athanase Seromba could not have been unaware of the intention of the attackers and other *Interahamwe* militiamen to commit acts of genocide against Tutsi refugees in Nyange parish.

342. Consequently, the Chamber finds it established that Accused Athanase Seromba aided and abetted the crime of genocide as alleged in Count 1 of the Indictment.

3. Count 2 – Complicity in genocide

343. Count 2 is alternative to Count 1 of the Indictment.[667] Hence, having already found the Accused guilty of genocide under Count 1 of the Indictment, the Chamber will not consider the count of complicity in genocide and therefore dismisses it.

4. Count 3 – Conspiracy to commit genocide

4.1. The Indictment

344. The Prosecutor of the International Criminal Tribunal for Rwanda charges Athanase Seromba with conspiracy to commit genocide pursuant to Article 2 (3) (b) of the Statute, in that on or between 6 and 20 April 1994, in Kivumu *préfecture*, Rwanda, Seromba did agree with Grégoire Ndahimana,

[664] Decision on Prosecution Motion for Judicial Notice, 14 July 2005.
[665] See Chapter II, Sections 6.7-6.8.
[666] See Chapter II, Section 7.4.
[667] *Akayesu*, Judgement (TC), 2 September 1998, para. 532.

bourgmestre of Kivumu *commune*, Fulgence Kayishema, police inspector of Kivumu *commune*, Télesphore Ndungutse, Gaspard Kanyarukiga and other persons not known to the Prosecutor, to kill or to cause serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, a racial or ethnic group.

4.2. Applicable law

345. The Chamber relies on the Tribunal's jurisprudence which defines conspiracy to commit genocide as "an agreement between two or more persons to commit the crime of genocide".[668] Thus, the essential element of the crime of conspiracy to commit genocide is "the act of conspiracy itself, in other words, the process ("*procédé*") of conspiracy […] and not its result".[669]

346. The Chamber also notes that in *Nahimana*, the Appeals Chamber held that conspiracy to commit genocide can be inferred from coordinated actions of individuals who have a common purpose and are acting within a unified framework.[670] Also in *Niyitegeka*, the Chamber inferred the existence of conspiracy to commit genocide from the participation by the Accused in meetings held for the purpose of planning the massacre of Tutsi, his words and the leadership he exercised during those meetings, his involvement in the planning of attacks against the Tutsi and his role in the distribution of weapons to the attackers.[671]

347. The *mens rea* of the crime of conspiracy to commit genocide is the same as the intent required for the crime of genocide, and rests on the specific intent to commit genocide.[672]

4.3. Findings of the Chamber

348. Paragraphs 33 to 47 of the Indictment set forth concise allegations relating to the count of conspiracy to commit genocide. The Chamber discussed the allegations mainly in sections 3, 4, 5, 6 and 7 of Chapter II dealing with its factual findings. This part of the Indictment describes the three-phase plan, drawn up for the extermination of the Tutsi in Kivumu *commune*. This part also alleges that Athanase Seromba prepared a list of Tutsi to be sought, that he prohibited the refugees from getting food from the presbytery or banana plantation, refused to celebrate mass and that he supervised the massacre of refugees.

349. The Trial Chamber held in its factual findings that the Prosecution has not established beyond a reasonable doubt that Athanase Seromba participated in meetings with the communal authorities on 11[673] and 12 April 1994.[674] The Chamber also found that it has not been established beyond a reasonable doubt that Accused Seromba held meetings with the communal authorities on 10,[675] 15[676] and 16[677] April 1994 for the purpose of planning the extermination of Tutsi refugees in Nyange parish.

350. Furthermore, the Chamber finds that the Prosecution has not established beyond a reasonable doubt that Athanase Seromba prepared a list of Tutsi sought after,[678] or that he ordered or supervised the attack against the refugees on 15 April 1994[679] or that he ordered the destruction of Nyange church on 16 April 1994.[680] As regards the facts established against Seromba, such as prohibiting the refugees

[668] *Musema*, Judgement (TC), 27 January 2000, para. 191.
[669] *Musema*, Judgement (TC), 27 January 2000, para. 193.
[670] *Nahimana*, Judgement (TC), 3 December 2003, para. 1047.
[671] *Niyitegeka*, Judgement (TC), 16 May 2003, paras. 427-248.
[672] *Musema*, Judgement (TC), 27 January 2000, para. 192.
[673] See Chapter II, Section 4.3.
[674] See Chapter II, Section 5.6.
[675] See Chapter II, Section 4.2.
[676] See Chapter II, Section 6.4.
[677] See Chapter II, Section 7.4.
[678] See Chapter II, Section 3.4.
[679] See Chapter II, Sections 6.5 and 6.7.
[680] See Chapter II, Section 7.4.

from getting food from the banana plantation, or refusing to celebrate mass, the Chamber is of the view that these facts, in and of themselves, are not sufficient to establish the existence of a conspiracy to commit genocide.

351. Consequently, the Chamber finds that the Prosecution thus has not proved beyond a reasonable doubt that Athanase Seromba conspired with other persons to commit genocide as alleged in Count 3 of the Indictment.

5. Count 4 – Crime against humanity (extermination)

5.1. The Indictment

352. The Prosecutor of the International Criminal Tribunal for Rwanda charges Athanase Seromba with Extermination as a crime against humanity, as stipulated in Article 3 (b) of the Statute, in that on or between the dates of 7 April 1994 and 20 April 1994, in Kibuye *préfecture*, Rwanda, Athanase Seromba was responsible for killing persons or causing persons to be killed during mass killing events as part of a widespread or systematic attack against the civilian population on political, ethnic or racial grounds.

5.2. Applicable law

353. Article 3 of the Statute provides that:

> 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.

354. Article 3 of the Statute, which deals with crimes against humanity, contains a general element that is applicable to all the acts listed therein: perpetration of any of those acts by an accused will constitute a crime against humanity only if it was committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.

355. The concept of attack, within the meaning of Article 3, refers to any unlawful act, or event or series of events, of the kind listed in Article 3 of the Statute.[681]

356. This attack must be widespread or systematic.[682] In practice, these two criteria tend to overlap.[683] "Widespread" may be defined as massive, frequent, large scale action, carried out

[681] *Semanza*, Judgement (TC), 15 May 2003, para. 327; *Musema*, Judgement (TC), 27 January 2000, para. 205; *Rutaganda*, Judgement (TC), 6 December 1999, para. 70; *Akayesu*, Judgement (TC), 2 September 1998, para. 581.
[682] *Akayesu*, Judgement (TC), 2 September 1998, para. 579.
[683] *Bagilishema*, Judgement (TC), 7 June 2001, para. 77.

collectively with considerable seriousness and directed against a multiplicity of victims.[684] "Systematic" may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources.[685] The existence of a policy or plan may be evidentially relevant, in that it may be useful in establishing that the attack in question was widespread or systematic, but it should not be considered as a separate element of the crime.[686]

357. It is in not a requirement that the criminal act must, in and of itself, be widespread or systematic. A single murder may constitute a crime against humanity if it is perpetrated within the context of a widespread or systematic attack.[687]

358. The attack must be directed against a civilian population, i.e. "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".[688] The presence of certain non-civilians in this group does not change its civilian character.[689]

359. The attack against a civilian population must have been committed with discriminatory intent. That is, it must have been committed against a population "on national, political, ethnic, racial or religious grounds". This qualifier characterises only the nature of the attack in general and not the criminal intent of the accused.[690]

360. There must be a nexus between the criminal act and the attack.[691] The accused must have acted with knowledge of the broader context of the attack and knowledge that his acts formed part of a widespread or systematic attack against a civilian population.[692]

361. In the Indictment, the Prosecutor charges the Accused with a crime listed under Article 3, namely "extermination". By its legal description, the crime of extermination requires proof that the accused participated in a widespread or systematic massacre, or in subjecting a widespread number of people to conditions of living that would inevitably lead to death.[693] Extermination differs from murder or killing in that it requires an element of mass destruction of life,[694] without, however, any suggestion of a numerical minimum.[695] The *mens rea* for extermination is intent to commit or participate in a mass killing.[696]

5.3. Findings of the Chamber

362. Paragraphs 48 to 50 of the Indictment set forth concise allegations relating to the count of crime against humanity. The Chamber has already discussed these allegations in Sections 5, 6 and 7 of Chapter II dealing with its factual findings.

363. With respect to paragraph 48 of the Indictment, the Chamber finds that the Prosecutor has failed to establish that Athanase Seromba ordered the closure of the church doors so as to expose the

[684] *Akayesu*, Judgement (TC), 2 September 1998, para. 580.
[685] *Akayesu*, Judgement (TC), 2 September 1998, para. 580.
[686] *Semanza*, Judgement (TC), 15 May 2003, para. 329.
[687] *Akayesu*, Judgement (TC), 2 September 1998, para. 580; *Tadić*, Case N°IT-94-1, Judgement (TC), 7 May 1997, para. 649.
[688] *Akayesu*, Judgement (TC), 2 September 1998, para. 582.
[689] *Bagilishema*, Judgement (TC), 7 June 2001, para. 79; *Tadić*, Case N°IT-94-1, Judgement (TC), 7 May 1997, para. 638.
[690] *Bagilishema*, Judgement (TC), 7 June 2001, para. 81; *Akayesu*, Judgement (TC), 2 September 1998, para. 469; *Kayishema*, Judgement (TC), 21 May 1999, paras. 133-134.
[691] *Tadić*, Case N°IT-94-1, Judgement (AC), 15 July 1999, para. 271.
[692] *Semanza*, Judgement (TC), 15 May 2003, para. 332.
[693] *Ntakirutimana*, Judgement (AC), 13 December 2004, para. 522; *Ndindabahizi*, Judgement (TC), 15 July 2004, para. 480.
[694] *Ntakirutimana*, Judgement (AC), 13 December 2004, para. 516; *Ndindabahizi*, Judgement (TC), 15 July 2004, para. 479; *Semanza*, Judgement (TC), 15 May 2003, para. 340.
[695] *Ntakirutimana*, Judgement (AC), 13 December 2004, para. 516.
[696] *Ntagerura*, Judgement (TC), 25 February 2004, para. 701; *Ntakirutimana*, Judgement (AC), 13 December 2004, para. 522.

Tutsi refugees inside Nyange church to death.[697] Consequently, the Chamber finds that Seromba incurs no responsibility for that act.

Actus reus in relation to the destruction of Nyange church

364. With respect to paragraph 49 of the Indictment, the Trial Chamber finds that Athanase Seromba held discussions with the authorities and accepted their decision to destroy the church. The Chamber further found that Seromba also discussed with the bulldozer driver and said words which encouraged him to destroy the church. The Chamber finally found that Seromba even gave advice to the bulldozer driver concerning the fragile side of the church.[698] The Chamber is satisfied that by his conduct, Seromba substantially contributed to the destruction of Nyange church.

365. The Chamber is of the view that the destruction of the church, which resulted in the death of 1,500 Tutsi refugees,[699] constitutes the crime of extermination within the meaning of Article 3 of the Statute.

366. In view of the foregoing, the Chamber is satisfied beyond reasonable doubt that the Accused aided and abetted the crime of extermination of the Tutsi refugees at Nyange church.

Mens rea of Athanase Seromba in relation to the destruction of Nyange church

367. The Chamber further finds that Athanase Seromba could not have been unaware of the legitimising effect his words would have on the actions of the communal authorities and the bulldozer driver. Furthermore, the Chamber finds that Seromba knew perfectly well that his approval of the authorities' decision to destroy Nyange church and his encouraging words to the bulldozer driver, would substantially contribute to the destruction of the church and the death of the numerous refugees inside.

368. In view of the foregoing, the Chamber finds that the Accused's *mens rea* in aiding and abetting the crime of extermination of Tutsi refugees at Nyange church has been proven beyond reasonable doubt.

The constituent elements of crime against humanity

369. The Chamber finds that the conditions required for the commission of crime against humanity have been satisfied in this case. Indeed, the Chamber is satisfied that there were attacks against the Tutsi in Kivumu *commune* in April 1994.[700] The attack which culminated in the destruction of Nyange church on 16 April 1994 was "widespread" in the sense that it was massive, carried out collectively and directed against a multiplicity of victims. The attack was also "systematic" inasmuch as the factual findings tend to show that it was thoroughly organized and followed a regular pattern, starting with the surrounding of the church on 12 April 1994 up to its destruction on 16 April 1994, coupled with the intensification of the attacks against the refugees on 14 and 15 April 1994. Lastly, the Chamber finds that the attack was directed against the Tutsi civilian population that had sought refuge in Nyange church on discriminatory grounds.

370. Furthermore, the Chamber finds that Accused Athanase Seromba had knowledge of the widespread and systematic nature of the attack and the underlying discriminatory grounds. The

[697] See Chapter II, Section 6.3.
[698] See Chapter II, Section 7.4.
[699] See Chapter II, Section 7.5.
[700] See Chapter II, Section 3.2.

Chamber is satisfied that Seromba also knew that the crime of extermination committed against the Tutsi refugees was part of that attack.

371. Accordingly, the Chamber considers that it has been proved beyond reasonable doubt that Accused Athanase Seromba committed a crime against humanity (extermination), as alleged in Count 4 of the Indictment.

Chapter IV: Verdict

372. For the reasons set out in this Judgement, the Chamber unanimously finds as follows:

Count 1: Genocide	GUILTY
Count 2: Complicity in genocide	DISMISSED
Count 3: Conspiracy to commit genocide	NOT GUILTY
Count 4: Crimes against humanity (extermination)	GUILTY

Chapter V: Sentence

1. Introduction

373. Having found Accused Athanase Seromba guilty of genocide and crime against humanity (extermination) by aiding and abetting, the Chamber now considers the appropriate sentence.

374. In its Final Trial Brief, the Prosecution requested the Chamber to sentence Athanase Seromba to concurrent life sentences for each of the counts of the Indictment where the Chamber found him guilty.[701] The Prosecution highlighted the gravity of the crimes and the aggravating circumstances that the Chamber should take into account in determining sentence.

375. In its final brief, the Defence made no submission with respect to sentence. It stated that the Accused had a good reputation and was respected by Hutu and Tutsi parishioners of Nyange prior to the events of 6 April 1994.[702]

2. Applicable Law

376. The Chamber has unfettered discretion in sentencing persons found guilty of crimes falling within its jurisdiction.[703] The Chamber recalls that the aims of sentencing are retribution, deterrence, reprobation, rehabilitation, national reconciliation, protection of society and restoration of peace.

377. In the determination of sentence the Chamber is governed by the following legal provisions: Article 23 of the Statute and Rule 101 of the Rules.

378. Under Article 23 of the Statute, the Chamber, in imposing sentence, shall have recourse to the general practice regarding prison sentences in the courts of Rwanda (Article 23 (1)) and take into account the gravity of the offence and the individual circumstances of the convicted person (Article 23

[701] Prosecutor's Final Trial Brief, para. 692.
[702] Conclusions finales de la Défense, p. 7.
[703] See *Ruggiu*, Judgement (TC), 1 June 2000, para. 52; *Kambanda*, ICTR-97-23-S, Judgement (TC), 4 September 1998, para. 11.

(2)). Pursuant to Rule 101 (B) of the Rules, the Chamber must also take into account the following factors:

> (i) Any aggravating circumstances;
>
> (ii) Any mitigating circumstances, including the substantial co-operation 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 a convicted person for the same act has already been served (…)

379. The Chamber considers that in imposing sentence, it may also take into account any other factor which fully reflects the circumstances of the case.[704]

3. Findings of the Chamber

3.1. Gravity of the offences

380. The Chamber notes that in its Final Trial Brief, the Prosecution argued that the crimes committed by Accused Athanase Seromba are serious.[705] In support of this argument, the Prosecution asserts that Athanase Seromba acted with premeditation,[706] and without constraint.[707]

381. The Chamber recalls that an evaluation of the gravity of offences is based on the crimes charged against the accused, that is, the individual circumstances under which the offences were committed, and not on a hierarchy of crimes.[708]

382. The Chamber notes that in this case the Prosecutor did not prove beyond a reasonable doubt that Accused Athanase Seromba either planned or ordered, as a principal, the commission of the offences for which he has been found guilty. Nor does the Trial Chamber accept the argument of premeditation advanced by the Prosecutor. Lastly, the Trial Chamber considers that the Accused did not act under duress when he approved that the church be destroyed using the bulldozer. Accordingly, the Trial Chamber concludes that the offences of genocide and crimes against humanity by aiding and abetting for which Accused Athanase Seromba has been found guilty are of the most extreme gravity.

3.2. Individual circumstances of the Accused

383. The Chamber recalls that the individual circumstances of the accused are perceived in the jurisprudence of the *ad hoc* tribunals as a factor for individualizing the penalty.[709] The Chamber further considers that individual circumstances should be understood to be any personal circumstance of the accused which may either aggravate or mitigate sentence.

384. The Chamber further notes that the Prosecution submitted in its Final Trial Brief that nothing in the individual circumstances of Athanase Seromba mitigates the gravity of the crimes charged against him.

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[704] See *Rutaganda*, Judgement (TC), 6 December 1999, para. 454.
[705] Prosecutor's Final Trial Brief, para. 651.
[706] Prosecutor's Final Trial Brief, paras. 672 (p. 138).
[707] Prosecutor's Final Trial Brief, para. 652.
[708] *Mucić*, Judgement (TC), 16 November 1996, para. 1226; *Kayishema*, Judgement (AC), 1 June 2001, para. 367.
[709] For a list of factors to take into account in the individualisation of the sentence, see: *Kambanda*, Judgement (TC), 4 September 1998, para. 29; *Erdemović*, Judgement (TC), 29 November 1996, para. 44.

385. The Chamber notes that Accused Athanase Seromba was ordained priest on 18 July 1993.[710] It is the Chamber's opinion that his training as a priest and his experience within the church should have enabled him to understand the reprehensible nature of his conduct during the events.

386. The Chamber notes, moreover, that Accused Athanase Seromba was present at Nyange church only at the end of the summer or early autumn 1993.[711] The Chamber further notes that Athanase Seromba was only a curate in Nyange parish during the April 1994 events, and was put in charge of the parish because there was no parish priest there.[712]

3.3. Aggravating circumstances

387. In its Final Trial Brief, the Prosecution cited several aggravating circumstances. The Prosecution cited the fact that Athanase Seromba was known in Nyange community,[713] that he was directly involved in the massacre of Tutsi.[714] The Prosecution also averred that the Accused betrayed the trust of his parishioners.[715] The Prosecution pointed out that the crimes committed during the events of April 1994 in Nyange parish were accompanied by excessive violence and the victims went through humiliation[716] and a lot of suffering before dying.[717]

388. The Chamber recalls that aggravating circumstances must be proved beyond a reasonable doubt.[718] A particular circumstance shall not be retained as aggravating if it is included as an element of the crime in question.[719]

389. The Chamber will, in this case, examine as aggravating circumstances the status of the Accused and betrayal of the trust placed in him by the Tutsi refugees,[720] as well as the flight of the Accused after the destruction of the church.

Status of the Accused and betrayal of trust

390. The Chamber recalls that Athanase Seromba, a Catholic priest, was in charge of Nyange parish at the time of the events referred to in the Indictment.[721] The Accused was known and respected in the Catholic community of Nyange. The Chamber recalls that it has been established that many Tutsi from Kivumu *commune* sought refuge in Nyange church in order to escape attack.[722] The Chamber considers as an aggravating circumstance the fact that the Accused took no concrete action whatsoever to earn the trust of those persons who believed they were safe by seeking refuge at Nyange parish. Consequently, the Chamber finds that the status of the Accused and betrayal of trust constitute aggravating circumstances.

Flight of the Accused after destruction of church

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[710] See letter dated 18 May 1993 from the Bishop of Nyundo to Athanase Seromba (D-10).
[711] See, *inter alia*, Witness CBK: Transcript, 19 October 2004, p. 8 (closed session); Witness CBJ: Transcript, 12 October 2004, pp. 26-27 (open session); Witness FE27: Transcript, 23 March 2006, p. 11 (closed session).
[712] See Section 2.
[713] Prosecutor's Final Trial Brief, para. 658.
[714] Prosecutor's Final Trial Brief, paras. 665-666.
[715] Prosecutor's Final Trial Brief, paras. 657-671.
[716] Prosecutor's Final Trial Brief, para 675.
[717] Prosecutor's Final Trial Brief, para. 676.
[718] Judgement (TC), para. 693; *Ndindabahizi*, Judgement (TC), 15 July 2004, para. 502.
[719] *Blagojević and Jokić*, Judgement (TC), 17 January 2005, para. 849; *Ndindabahizi*, Judgement (TC), 15 July 2004, para. 502; *Ntakirutimana,* Judgement (TC), 21 February 2003, para. 893.
[720] *Ndindabahizi*, Judgement (TC), 15 July 2004, para. 508; *Ntakirutimana,* Judgement (TC), 21 February 2003, paras. 899-902; *Nahimana*, Judgement (TC), 3 December 2003, para. 1099.
[721] See Chapter II, Section 2.
[722] See Chapter II, Section 3.3.

391. The Chamber notes that it is not in contention that the Accused used an identity other than his own to go into exile in Italy, as attested to by the passport issued to him by the then Zaïrian authorities.[723] The Chamber notes, however, that other priests who were with the Accused at Nyange church during the events of April 1994 did not adopt this stratagem. Furthermore, these priests who remained in Rwanda were even prosecuted, but all of them were acquitted.[724] Therefore, the Chamber finds that the flight of Athanase Seromba represents an aggravating circumstance.

3.4. Mitigating circumstances

392. In its Final Trial Brief, the Prosecution submitted that Athanase Seromba should not benefit from any mitigating circumstance, as his surrender was not "voluntary", and as he did not cooperate with the Prosecutor, but rather obstructed the proceedings throughout the trial. The Prosecution added that the Accused has shown no remorse for the role he played in the commission of the crimes charged. Finally, the Prosecutor stressed that no evidence of the Accused's good conduct before and after the crimes charged against him has been adduced.[725]

393. In its Final Trial Brief, the Defence submitted that the Accused had a good reputation and was respected by both Hutu and Tutsi parishioners of Nyange prior to the events of April 1994.[726]

394. The Chamber recalls that mitigating circumstances have to be proved on a balance of probabilities.[727] The weight to be attached to mitigating circumstances is a matter of discretion for the Trial Chamber.[728] In the instant case, the Chamber will discuss the following points: the good reputation of the Accused prior to the events, voluntary surrender of the Accused and the age of the Accused.

Athanase Seromba's good reputation prior to the events of April 1994 in Nyange parish

395. Evidence of Athanase Seromba's good reputation was provided by several Prosecution and Defence witnesses. Such witnesses include CBJ,[729] CBK,[730] BR1,[731] BZ1[732] and BZ4[733] who testified that, as a priest, Athanase Seromba was respected by the public. Accordingly, the Chamber finds that this fact constitutes a mitigating circumstance in determining the sentence to be imposed on the Accused.

Surrender of the Accused

396. The Prosecutor argues that Athanase Seromba's surrender cannot be considered as a mitigating circumstance, as it was not voluntary.[734] The Prosecutor contends that the Accused surrendered only once his arrest by the Italian authorities became imminent.[735] The Prosecutor further

[723] See the following exhibits: Italian immigration document of Athanase Sumba Bura (P-6) and Zaïrian passport of Athanase Sumba Bura (P-7).
[724] See Rwandan court files disclosed by the Prosecutor.
[725] Prosecutor's Final Trial Brief, paras. 682-685.
[726] Conclusions finales de la Défense, p. 7.
[727] See, e.g., *Niyitegeka*, Judgement (TC), 16 May 2003, para. 488; *Ntakirutimana*, Judgement (TC), 21 February 2003, para. 893.
[728] *Kambanda*, Judgement (AC), 19 October 2000, para. 124.
[729] Transcript, 12 October 2004, p. 23 (closed session).
[730] Transcript, 19 October 2004, p. 46 (closed session).
[731] Transcript, 25 November 2005, p. 36 (open session).
[732] Transcript, 2 November 2005, p. 71 (open session).
[733] Transcript, 2 November 2005, p. 7 (open session).
[734] Prosecutor's Final Trial Brief, paras. 677-683; Transcript, 28 June 2006, p. 42 (open session).
[735] Prosecutor's Final Trial Brief, paras. 682-683.

submits that if indeed the Accused surrendered, his surrender does not constitute a mitigating circumstance, because it does not meet the criteria set forth in the *Babić* Judgement.[736]

397. The Chamber notes that voluntary surrender of an accused may constitute a mitigating circumstance.[737] The Chamber considers that the circumstances and time frames surrounding the surrender of the accused must be assessed on a case by case basis. Thus, for example, in *Blaškić*, the fact that the accused surrendered only after having prepared his defence, [738]and in *Simić*, the fact that the accused surrendered three years after the surrender of other individuals in the same circumstances, limited the mitigating effect of those surrenders.[739] The Chamber notes, on the contrary, that in *Babić*, the voluntary surrender of the accused was considered as a mitigating circumstance because it happened "soon after the confirmation of an indictment against him",[740] while in *Plavšić*, the voluntary surrender of the accused to the Tribunal's authorities 20 days after having learned about the Indictment, was considered as a mitigating circumstance.[741]

398. In this case, the Chamber notes that Accused Athanase Seromba surrendered to the authorities of the Tribunal on 6 February 2002, without the arrest warrant issued against him being executed by the Italian authorities.[742] The Chamber finds this to be a voluntary surrender and, therefore, considers the voluntary surrender of the Accused as a mitigating circumstance in determining the sentence.

The young age of the Accused

399. The Chamber notes the relatively young age of Accused Athanase Seromba, who was 31 years old at the time of the events,[743] and the possibility of his rehabilitation.

3.5. Sentence

The general practice regarding prison sentences in Rwanda

400. The Chamber notes that the Rwandan law of 26 January 2001[744] classifies persons prosecuted for aiding and abetting the genocide and crime against humanity in category 1 (b): "(b) Persons who acted in positions of authority at the national, provincial or district level, in political parties, the army, religious organizations or the militiamen, and who committed or encouraged others to commit such crimes".

401. The Chamber also notes that Rwanda, like other countries that have incorporated genocide or crimes against humanity in their domestic law, has provided very severe penalties for these crimes.[745]

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[736] *Babić*, Judgement (TC), 29 June 2004, paras. 85-86.
[737] *Serushago*, Judgement (TC), 6 April 2000, para. 24.
[738] *Blaškić*, Judgement (TC), 3 March 2000, para. 776.
[739] *Simić*, Judgement (TC), 17 October 2003, para. 1086.
[740] *Babić*, Judgement (TC), 29 June 2004, para. 86.
[741] *Plavšić*, Judgement (TC), 27 February 2003, paras. 82 to 84.
[742] *Seromba*, Decision on the Prosecutor's Ex-Parte Request for Search, Seizure, Arrest and Transfer, 3 July 2001; *Seromba*, Warrant of Arrest and Order for Transfer, 4 July 2001; see letter dated 11 July 2001 from the Italian Justice Ministry to the Registrar of the International Criminal Tribunal for Rwanda.
[743] See the following exhibits: Italian immigration document for Athanase Sumba Bura (P-6) and Zaïrian passport for Athanase Sumba Bura (P-7) which certify that the Accused was born in 1963.
[744] Article 51 of Organic Law N°40/2000 of 26/01/2001 Setting up Gacaca Jurisdictions and Organizing Prosecutions for Offences Constituting Genocide or Crimes Against Humanity Committed between 1 October 1990 and 31 December 1994.
[745] "Defendants coming within the first category who did not want to have recourse to the confession and guilt plea procedure within conditions set in Article 56 of this organic law or whose confession and guilt plea have been rejected, incur a death penalty or life imprisonment. Defendants who have made recourse to the confession and guild plea procedure within conditions provided for in Article 56 of this organic law are sentenced to imprisonment ranging from 25 years to life imprisonment". Article 68 of Organic Law N°40/2000 of 26/01/2001 setting up Gacaca

402. The Trial Chamber recalls, however, that Rwandan law and sentences passed by the Rwandan courts are to be used only as a reference,[746] since such reference is but one of the factors that must be taken into account in determining sentence.[747] In fact, the Tribunal can only impose on the Accused a sentence of imprisonment for the remainder of his life and not the death sentence, which is applied in Rwanda.[748]

403. Furthermore, the Chamber notes that direct participation of an accused in crimes committed generally attracts a higher sentence than criminal participation by way of aiding and abetting the commission of the crimes.[749] Thus, a sentence of life imprisonment is generally imposed upon persons who directly planned or ordered the criminal acts, particularly those who clearly had authority and influence at the time the crimes were committed, as well as those who participated in those crimes with particular zeal or sadism.[750]

Multiple sentences

404. Under Rule 101 (C) of the Rules, the Chamber has discretion to determine whether the sentences it has passed are to be served consecutively or concurrently.[751] In this regard, the Chamber recalls that the Appeals Chamber held that "nothing in the Statute or Rules expressly states that a Chamber must impose a separate sentence for each count on which an accused is convicted".[752] The Chamber further notes that in *Blaškić*, the Appeals Chamber held *inter alia* as follows: "The crimes ascribed to the accused have been characterised in several distinct ways but form part of a single set of crimes committed in a given geographic region during a relatively extended time-span… In light of this overall consistency, the Trial Chamber finds that there is reason to impose a single sentence for all the crimes of which the accused has been found guilty".[753]

Credit for time served

405. Accused Athanase Seromba surrendered to the Tribunal's authorities on 6 February 2002. Consequently, the Chamber will grant him credit for the period spent in custody from the date of his arrest to the date of this Judgement, pursuant to Article 101 (D) of the Rules of Procedure and Evidence.

Chapter VI: Disposition

FOR THE FOREGOING REASONS, the Trial Chamber, delivering this judgement in public, inter parties and in the first instance, pursuant to the Statute and the Rules of Procedure and Evidence;

HAVING CONSIDERED all of the evidence and arguments of the parties;

HAVING FOUND Athanase Seromba GUILTY of the crime of genocide and crime against humanity (extermination);

SENTENCES Athanase Seromba to a single sentence of fifteen (15) years imprisonment;

Jurisdictions and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed between October 1, 1990 and December 31, 1994.

[746] Article 23 (1) of the Statute and Article 101 (B) (iii) of the Rules.

[747] *Kambanda*, Judgement (TC), 4 September 1998, para. 23.

[748] The Chamber notes in this regard that Rwanda is currently considering abolishing the death penalty.

[749] See *Semanza*, Judgement (AC), 20 May 2005, para. 388.

[750] *Muhimana*, Judgement (TC), 28 April 2005, paras. 604-616; *Musema*, Judgement (AC), 16 November 2001, para. 383.

[751] *Kambanda*, Judgement (AC), 19 October 2000, para. 102.

[752] *Kambanda*, Judgement (AC), 19 October 2000, para. 102.

[753] *Ibid*., paras. 109-10.

RULES that this sentence shall be enforced immediately;

RULES that pursuant to Rule 101 (D) of the Rules, the time that Athanase Seromba spent in custody, calculated from the date of his surrender on 6 February 2002, and any additional period spent in custody, pending a decision to appeal, shall be deducted from this sentence;

RULES that pursuant to Rule 103 of the Rules, Athanase Seromba shall remain in the custody of the Tribunal until the necessary arrangements have been made for his transfer to the State where he shall serve his sentence.

Done at Arusha, this Wednesday, 13 December 2006.

[Signed] : Andrésia Vaz; Karin Hökborg; Gustave G. Kam

Annex I : Procedural Background

1. Pre-trial phase

1. The Indictment against Athanase Seromba was filed by the Prosecutor on 8 June 2001 and confirmed on 3 July 2001 by Judge Lloyd Williams, subject to the correction of grammatical and typographical errors.[1] Following a request by the Prosecutor, the Presiding Judge also ordered the non-disclosure to the public, the media or to the suspect of the names of the witnesses and suspects identified in the supporting materials that accompagnied the Indictment or any other information that might permit their identification.

2. On 4 July 2001, Judge Lloyd Williams issued a warrant of arrest against the Accused.[2] On 10 July 2001, in execution of the order for transfer issued by the said Judge, the Registrar of the Tribunal transmitted the warrant of arrest and the Indictment to the Italian Minister of Justice.

3. On 6 February 2002, the Accused surrendered to the authorities of the Tribunal and was placed in detention. The Accused made his initial appearance before Judge Navanethem Pillay on 8 February 2002 and entered a plea of not guilty to each of the counts in the Indictment.[3] On 12 February 2002, the Prosecutor served a first request for interview on the Accused.

4. On 14 May 2002, the Prosecutor filed a motion for protective measures for witnesses.

5. In a motion filed on 3 June 2002, the Prosecutor requested the President of the Tribunal to authorize the Trial Chamber to exercise its functions away from the seat of the Tribunal and to hold the trial of the Accused in Rwanda.[4] On 20 June 2002, Judge Navanethem Pillay postponed making a decision on the matter until the Registrar assigned a Defence Counsel for the Accused.[5]

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[1] *Seromba*, "Decision on the Prosecutor's Ex Parte Request for Search, Seizure, Arrest and Transfer", 4 July 2001 (Judge Lloyd G. Williams asked the Prosecutor to correct paragraphs 2, 5, 8, 11, 17, 19, 25, 28, 32, 33, 35, 38, 39, 40, 43, 48 and Count 4 of the Indictment).
[2] *Seromba*, Warrant of Arrest and Order for Transfer, 4 July 2001.
[3] Transcript, 8 February 2002, p. 16 (open session).
[4] *Seromba*, Office of the Prosecutor, "Prosecutor's Motion for Trial in Rwanda", 3 June 2002.
[5] *Seromba*, Interoffice *Memorandum* from Judge Navanethem Pillay to Prosecutor Carla Del Ponte, 20 June 2002.

6. On 10 September 2002, the Prosecutor filed an *addendum* to his motion for witness protection measures.

7. On 3 March 2003, the Registrar assigned Mr. Alfred Pognon as Lead Counsel for the Defence.

8. On 17 April 2003, the Prosecutor wrote a letter to the Defence inviting the Accused to review the evidence.

9. On 2 May 2003, the Defence filed a motion to annul or withdraw the Indictment, on the grounds that the Prosecutor's failure to question the suspect before issuing an indictment against him amounted to a procedural defect invalidating the Indictment.

10. On 30 June 2003, Judge Erik Møse granted the Prosecutor's motion for protective measures for victims and witnesses, ordering the Prosecution to disclose any unredacted witness statements 21 days prior to resumption of the trial.[6]

11. On 8 January 2004, the Prosecutor withdrew his motion for trial in Rwanda.[7]

12. On 13 January 2004, the Trial Chamber, sitting in the person of Judge Erik Møse, dismissed the Defence motion to annul or withdraw the Indictment,[8] and ruled that neither the Statute nor the Rules required the Prosecution to interview a suspect prior to indicting.

13. A status conference to assess progress of the preparation for commencement of the trial was also held on 13 January 2004. The Chamber invited the Prosecution to file its Pre-Trial Brief.[9] The Defence submitted that it would be ready only in September 2004.[10]

14. On 14 January 2004, Judge Erik Møse granted the Prosecutor's request to withdraw its motion for trial in Rwanda.[11]

15. On 20 January 2004, the Prosecutor filed the initial version of his Pre-Trial Brief.

16. On 20 August 2004, the Prosecution disclosed its list of exhibits to the Defence.

17. On 27 August 2004, the Prosecutor filed the final version of the Pre-Trial Brief. Exhibits were filed on 30 August 2004. A *corrigendum* to the Pre-Trial Brief was filed on 7 September 2004. On 15 September 2004, other exhibits were filed, as well as the order of appearance of Prosecution witnesses.

18. A pre-trial conference was held on 20 September 2004. The Chamber noted the absence of the Accused at that conference.[12] The Prosecution stated that it had fully discharged its pre-trial obligations, in particular with respect to disclosure of materials to the Defence.[13] The Defence requested that the Prosecution disclose to it the witness statements referred to in decisions of the Rwandan courts and filed by the Prosecution.[14]

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[6] *Seromba*, "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses", 30 June 2003.
[7] *Seromba*, Office of the Prosecutor, "Request by the Prosecutor to Withdraw Motion for Trial in Rwanda", 8 January 2004.
[8] *Seromba*, "Decision on the Defence Motions to Annul or Withdraw the Indictment", 13 January 2004.
[9] Transcript, 13 January 2004, p. 21 (closed session).
[10] *Ibid*., p. 26 (closed session).
[11] *Seromba*, Decision on the "Prosecution Request to Withdraw its Motion for Trial in Rwanda", 14 January 2004.
[12] Transcript, 20 September 2004, Pre-Trial Conference, p. 2 (open session).
[13] *Ibid*., pp. 3-4 (open session).
[14] *Ibid*., p. 8 (open session).

2. Trial phase

19. The trial of the Accused commenced on 20 September 2004. The Accused participated in a strike action called by some accused persons of the Tribunal and so did not attend the first three days of the trial. Defence Counsel, Messrs. Pognon and Monthé, explained that their client had asked them not to represent him during the strike.[15] The Chamber ruled that the Accused's instructions did not amount to a termination of the Defence Counsel's assignment to represent the Accused and ordered them to continue to represent the Accused for as long as he refused to appear before the Chamber.[16] After stating that they could not represent the Accused without his authorization, the Defence Counsel left the court room, thus compelling the Chamber to adjourn the trial until 27 September, that date on which they returned.

20. In letters dated 24 September 2004 and 27 September 2004 respectively, Defence Counsel and the Accused, as well as the *Association des avocats de la défense* (*ADAD*), in an application to appear as *amicus curiae*, requested the Chamber to reconsider its Oral Decision of 21 September 2004. The Chamber dismissed this first motion, having concluded that the warning of 21 September 2004 did not constitute a sanction,[17] and that the decision to warn Counsel was well-founded in law, falling within its inherent powers to direct and control the proceedings and, therefore, is not open to any challenge, even in the face of special circumstances.[18] With respect to the *ADAD* application, the Chamber refused to authorize the association to appear as *amicus curiae*, having found that the Brief submitted by *ADAD* raised no such relevant issues as would enlighten the Chamber.[19]

21. The Chamber heard 15 Prosecution witnesses: 12 witnesses from 27 September to 22 October 2004 and 3 witnesses from 19 January to 25 January 2005, the date the Prosecution closed its case.

22. On 20 January 2005, the Defence filed a motion for protective measures for witnesses.

23. A status conference was held on 25 January 2005. The Chamber requested the Defence to file its list of witnesses as quickly as possible and ordered that the trial resume on 1 March 2005.[20]

24. On 31 January 2005, the Chamber rendered a decision authorizing protective measures for the Defence witnesses and ordered the Defence to disclose unredacted statements of its witnesses 21 days prior to the resumption of trial.[21]

25. On 9 February 2005, the Defence filed a motion for extension of the time-limit for disclosing the unredacted statements of its witnesses, and another motion for the same purpose on 17 February 2005. On 1 March 2005, the Chamber ordered the Defence to file, no later than 14 March 2005, its Pre-Defence Brief, the complete and precise list of witnesses which it intended to call to testify, a summary of facts and the estimated length of the testimony of each witness.[22] The Chamber adjourned the trial to 4 April 2005 for the commencement of the Defence case.[23]

26. On 11 March 2005, the Defence filed a new motion for further extensions. During a status conference held on 5 April 2005, the Trial Chamber postponed resumption of the trial to 10 May 2005

[15] Transcript, 20 September 2004, Trial, p. 2 (open session); *Seromba*, Transcript, 21 September 2004, p. 1 (open session).
[16] Transcript, 21 September 2004, p. 3 (open session).
[17] Seromba, Décision sur les requêtes en annulation de sanction et en intervention en qualité d'amicus curiae, 22 October 2004, para. 14.
[18] *Ibid*., para. 18.
[19] *Ibid*., para. 21.
[20] Transcript, 25 January 2004, Status Conference, p. 13 (open session).
[21] Seromba, Décision relative à la requête aux fins de prescription de mesures de protection des témoins de la Défense, 31 January 2005.
[22] Seromba, Décision relative à la requête de la Défense aux fins de délai, 1 March 2005, para. 21.
[23] *Ibid*., para. 20.

and ordered the Defence to file its Pre-Defence Brief, the summaries and the statements of its witnesses within the prescribed time-limit, so that the trial could resume on 10 May 2005.[24]

27. On 9 April 2005, the Accused sent a letter to his Lead Counsel, Mr. Pognon, stating that he no longer wanted to be represented by him because he had lost confidence in him.

28. On 13 April 2005, the Chamber ordered the Defence to disclose to the Prosecution the unredacted statements of its witnesses no later than 21 days prior to resumption of trial.[25]

29. On 15 April 2005, the Accused wrote to the Registrar requesting the withdrawal of the assignment of his Lead Counsel, Mr. Pognon. On 18 April 2005, Mr. Pognon agreed to step down and to withdraw immediately.

30. On 19 April 2005, the Defence filed a Pre-Defence Brief, but did not comply with the orders for disclosure of unredacted Defence witness statements.

31. On 10 May 2005, given the withdrawal of Mr. Pognon and the absence of Mr. Monthé, the Chamber decided to adjourn the trial *sine die*.[26]

32. On 19 May 2005, the Chamber directed the Registrar to respond, no later than 27 May 2005, to the Accused's Motion of 15 April 2005 concerning the assignment of a new counsel.[27] On 20 May 2005, the Registrar withdrew the assignment of the Lead Counsel,[28] and on 8 June 2005, assigned Mr. Monthé in his place.

33. On 23 June 2005, the Defence filed a motion to withdraw the Pre-Defence Brief filed by the previous Lead Counsel.

34. During the status conference held on 24 June 2005, the Chamber granted the Defence's request for adjournment and set the date of 31 October 2005 for resumption of trial.[29]

35. In a 7 July 2005 Decision,[30] the Chamber authorized the Defence to file a new Pre-Defence Brief and ruled that the Defence motion for withdrawal of the 19 April 2005 Preliminary Brief was without merit. The Chamber also authorized the Prosecution to inspect the exhibits that the Defence intended to rely on, at least 21 days prior to the commencement of the Defence case. The Chamber ordered the Defence to disclose its new Preliminary Brief and the unredacted statements of its witnesses to the Prosecution at least 21 days prior to the resumption of trial, as well as the redacted and unredacted statements of Defence witnesses at least 60 days and 21 days respectively prior to the resumption of the trial.

36. On 10 October 2005, the Defence filed a new Pre-Defence Brief, which was subsequently amended on 19 October 2005. On 25 and 27 October 2005, the Defence filed the statements of its witnesses without disclosing their identity. On 28 October 2005, the Defence filed the order of appearance of the Defence witnesses, without disclosing their identity.

37. On 31 October 2005, the Defence opened its case.

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[24] Transcript, 5 April 2005, Pre-Trial Conference, p. 19.
[25] Seromba, Décision relative à la requête du Procureur aux fins de communication des déclarations des témoins de la Défense, 13 April 2005.
[26] Transcript, 10 May 2005, p. 22 (open session).
[27] *Seromba*, Order, 19 May 2005, p. 19.
[28] *Seromba*, Registrar, Decision to withdraw the assignment of Mr. Alfred Pognon as Counsel for Athanase Seromba, 20 May 2005.
[29] Transcript, 24 June 2005, Status Conference, p. 8.
[30] Seromba, Décision relative à la fixation d'une date de reprise du procès, 7 July 2005.

38. On 16 December 2005, the Chamber rendered five decisions: a decision setting 13 February 2006 as the date of resumption of the trial;[31] a decision ordering the transfer of detained witnesses to Arusha;[32] a decision ordering the opening of an investigation into the retraction of testimony by Witness FE36;[33] a decision ordering the opening of an investigation into the request for long-term protection measures for Witnesses FE36, FE35 and CF14;[34] and a decision ordering the Prosecution to disclose to the Defence, through the Witnesses and Victims Support Section, the identity and addresses of certain witnesses whom it no longer intended to call and authorising the Defence to enter into contact with some of those witnesses.[35]

39. In a *memorandum* dated 7 February 2006, the President of the Tribunal postponed the date of resumption of the trial to 23 March 2006.

40. On 7 March 2006, the Defence filed a motion to add Witnesses PS1 and PS2 to its witness list and to drop witnesses CF3 and FE25.

41. The Defence resumed presentation of its evidence on 23 March 2006.

42. On 24 March 2006, the Chamber granted the motion to add Witnesses PS1 and PS2 to the list of Defence witnesses.[36]

43. On 29 March 2006, the Chamber granted the Prosecution's motion for sites visit in Rwanda.[37] From 8 to 11 April 2006, the Chamber, the Defence, the Prosecutor and the Registrar visited sites in Kivumu, Rwanda.

44. On 12 April 2006, the Defence dropped Witnesses CF4 and CF13 from its list of witnesses and modified the order of appearance of Witnesses PA1, PS1, PS2 and the Accused. The Chamber adjourned the trial to 18 April 2006.[38]

45. On 18 April 2006, the Defence dropped PS1 from its witness list and informed the Chamber that Witness PS2 could not testify in Arusha before May 2006.[39]

46. On 20 April 2006, the Chamber granted the Defence motion for the deposition of witness PS2 to be taken by means of a video-conference.[40]

47. On 21 April 2006, the Chamber ordered the Accused to testify on 24 April 2006[41] and authorized the parties to send representatives to South Africa for the deposition of Witness PS2 by video-link.[42]

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[31] Seromba, Décision portant fixation de la date de reprise du procès au 13 février 2006, 16 December 2005.
[32] Seromba, Ordonnance relative à la requête de la Défense aux fins du transfert des témoins détenus, 16 December 2005.
[33] Seromba, Décision relative à la requête de la Défense aux fins de voir ordonner l'ouverture d'une enquête sur les circonstances et les causes réelles de rétraction du témoin portant le pseudonyme FE36, 16 December 2005.
[34] Seromba, Décision relative à la requête de la Défense aux fins de voir ordonner des mesures de protection à long terme à l'égard des témoins de la Défense portant les pseudonyme CF14, FE35 et FE36, 16 December 2005.
[35] Seromba, Décision relative à la Requête aux fins d'obtenir la divulgation de l'identité et de l'adresse des témoins de l'accusation CAN, CNY, CBW, CNV, CBX, CNP, CNE, CNI, CNO, […] non retenus sur la liste finale du Procureur et l'autorisation de prendre contact avec ces derniers, 16 December 2005.
[36] Transcript, 24 March 2006, p. 39 (open session).
[37] *Seromba*, Decision on the "Prosecutor's Motion for Site Visits in Rwanda", 29 March 2006.
[38] Transcript, 12 April 2006, pp. 55-57 (open session).
[39] Transcript, 18 April 2006, p. 1 (open session).
[40] *Seromba*, Decision on the "Defence Motion for the Deposition of Witness PS2 to be Taken by Video-Conference", 20 April 2006.
[41] Transcript, 21 April 2006, p. 1 (closed session).
[42] *Ibid*., p. 42 (closed session).

48. On 21 April 2006, the Defence argued that the Accused could not testify before Witness PS2's deposition is given and requested the Chamber to reconsider its Oral Decision of 21 April 2006.[43] The Chamber dismissed the Defence request, given that its 21 April 2006 Decision violated neither Article 20 of the Statute nor Rule 85 of the Rules, and that it had not forced the Accused to testify against his will, but had simply reversed the order of appearance of Witness PS2 and the Accused in order to meet the deadline for the close of the Defence case.[44] The Chamber also dismissed the Defence's request for certification for appeal of that Decision.[45]

49. The Defence, subsequently, filed a motion with the Bureau of the Tribunal for disqualification of the Judges of the Trial Chamber. On 25 April 2006, the Bureau dismissed the Defence motion.[46]

50. The trial resumed on 26 April 2006. The Defence disclosed that it was appealing the decision of the Bureau and asked that the trial be adjourned pending a decision by the Appeal Chamber.[47] The Chamber dismissed the Defence motion to adjourn the proceedings.[48] With the Defence having refused to examine Witness PS2, the Chamber held that it had waived its right to examine the witness.[49] The Chamber adjourned the proceedings to the following day to enable the Accused to be present at the hearing.[50]

51. On 27 April 2006, the Defence declared that the Accused had decided not to attend the proceedings until the Appeal Chamber ruled on the Defence appeal against the Bureau's decision on the disqualification motion.[51] The Trial Chamber concluded that the Defence had waived its right to examine the Accused and, therefore there was no other witness to be heard, and that the Defence had closed its case. The Chamber ordered that the Prosecutor's Final Brief be filed no later than 26 May 2006, that of the Defence no later than 16 June 2006, and that the parties should present their closing arguments on 27 June 2006.[52]

52. On 22 May 2006, the Appeal Chamber dismissed the Defence appeal against the decision of the Bureau of the Tribunal on the motion for disqualification.[53]

53. On 5 June 2006, the Defence filed a motion for extension of the time-limit for the filing of its Closing Brief on 22 June 2006. The Chamber granted that motion on 8 June 2006.[54]

54. The Prosecution filed its Closing Brief on 26 May 2006, while the Defence filed its own Brief on 22 June 2006. The Defence also filed a *corrigendum* to its Closing Brief on 26 June 2006.

55. The parties presented their closing arguments on 27 and 28 June 2006.

56. On 28 June 2006, the Chamber granted the Prosecutor's motion to exclude as out of time the *corrigendum* to the Defence Final Trial Brief and ordered its exclusion from the proceedings.[55]

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[43] Transcript, 24 April 2006, pp. 1-2 (open session).
[44] *Ibid*., pp. 6-7 (open session).
[45] *Ibid*., p. 7 (open session).
[46] *Seromba*, Decision on Motion for Disqualification of Judges, 25 April 2006.
[47] Transcript, 26 April 2006, p. 4 (open session).
[48] *Ibid*., p. 7 (open session).
[49] *Ibid*., p. 8 (open session).
[50] *Ibid*., p. 20 (open session).
[51] Transcript, 27 April 2006, p. 3 (open session).
[52] *Ibid*., p. 5 (open session).
[53] *Seromba*, Decision on Interlocutory Appeal of a Bureau Decision, 22 May 2006.
[54] *Seromba*, Decision on "Defence Motion for an Extension [of Time] to file the Final Trial Brief", 8 June 2006.
[55] *Seromba*, Decision on "Prosecutor's Extremely Urgent Motion to Exclude as Out of Time the *Corrigendum* to the Defence Final Trial Brief (Reasons for the Oral Decision of 27 June 2006)", 28 June 2006.

Le Procureur c. Athanase SEROMBA

Affaire N° ICTR-2001-66

Fiche technique

• Nom: SEROMBA

• Prénom: Athanase

• Date de naissance: inconnue

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: prêtre catholique de la paroisse de Nyange, Commune de Kivumu

• Date de confirmation de l'acte d'accusation: 4 juillet 2001

• Chefs d'accusation: génocide, ou subsidiairement complicité dans le génocide, entente en vue de commettre le génocide, crimes contre l'humanité (extermination)

• Date et lieu de l'arrestation: 6 février 2002, à Arusha, en Tanzanie

• Date du transfert: 6 février 2002

• Date de la comparution initiale: 8 février 2002

• Date du début du procès: 20 septembre 2004

• Date et contenu du prononcé de la peine en première instance: 13 décembre 2006, condamné à 15 ans d'emprisonnement

• Appel: 12 mars 2008, condamné à la prison à vie

Décision relative à la requête du Procureur pour une visite de sites au Rwanda (Article 73 du Règlement de procédure et de preuve) 29 mars 2006 (ICTR-2001-66-T)

(Original : Français)

Chambre de première instance III

Juges : Andrésia Vaz, Présidente; Karin Hökborg; Gberdao Gustave Kam

Athanase Seromba – Visite de sites, Rwanda – Exercice des fonctions hors du siège du Tribunal, Autorisation du Président, Intérêt de la justice – Sites pertinents, Visite nécessaire à la manifestation de la vérité – Durée limitée – Absence de frais excessifs pour le Tribunal – Intérêt de la justice – Requête acceptée

Instrument international cité :

Règlement de procédure et de preuve, art. 4 et 73

Jurisprudence internationale citée :

T.P.I.R.: Chambre de première instance, Le Procureur c. Ignace Bagilishema, Jugement, 7 juin 2001 (ICTR-95-1A) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et al., Decision on Prosecutor's Motion for Site Visits in the Republic of Rwanda, 29 septembre 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Aloys Simba, Decision on the Defence Request for Site Visits in Rwanda, 31 janvier 2005 (ICTR-2001-76) ; Chambre de première instance, Le Procureur c. Aloys Simba, Decision on Defence Renewed Request for Site Visits in Rwanda, 4 mai 2005 (ICTR-2001-76) ; Chambre de première instance, Le Procureur c. André Rwamakuba, Decision on Defense Motion for a View Locus in Quo, 16 Décembre 2005 (ICTR-98-44C)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance III (la « Chambre »), composée des Juges Andrésia Vaz, Présidente, Karin Hökborg et Gberdao Gustave Kam ;

SAISI d'une requête orale du Procureur aux fins de voir ordonner une visite de sites au Rwanda, présentée à l'audience du 23 mars 2006 ;

CONSIDÉRANT la réponse positive donnée par la Défense ;

CONSIDÉRANT la décision orale en date du 24 mars 2006;

CONSIDÉRANT les listes soumises par les parties quant aux sites à visiter au Rwanda;

STATUE comme suit, conformément à l'article 73 du Règlement de procédure et de preuve (« le Règlement ») ;

Introduction

1. L'accusé Athanase Seromba est poursuivi pour génocide, ou subsidiairement pour complicité de génocide, entente en vue de commettre le génocide et crimes contre l'humanité (extermination), crimes prévus et punis par les articles 2 et 3 du Statut du Tribunal. Ces accusations sont portées

relativement aux événements qui se sont produits dans la paroisse de Nyange, située dans la commune de Kivumu, en préfecture de Kibuye.

2. Dans sa requête orale, le Procureur demande à la Chambre de se rendre au Rwanda afin d'y visiter un certain nombre de sites qu'il juge importants pour une meilleure compréhension des faits de l'espèce. A cet effet, il soumet une liste de lieux à visiter au Rwanda. La Défense ne s'oppose à la demande du Procureur et soumet également sa propre liste.

Délibérations

3. L'article 4 du Règlement dispose qu'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.

4. La jurisprudence de ce Tribunal considère que l'intérêt d'une visite sur les lieux doit être apprécié au regard des circonstances particulières de chaque affaire et de son importance pour la manifestation de la vérité[56]. Il convient également de tenir compte du nombre de sites à visiter ainsi que des frais à supporter par le Tribunal.

5. La Chambre relève qu'en l'espèce les sites de visite, en particulier ceux situés à Nyange, sont pertinents par rapport aux charges retenues contre l'accusé, d'une part, et aux dépositions des témoins, d'autre part. Elle est d'avis qu'une visite de ces lieux est nécessaire à la manifestation de la vérité dans la présente affaire.

6. La Chambre note, en outre, que cette visite, d'une durée limitée et qui porte sur un certain nombre de sites, s'effectuera sans frais excessifs pour le Tribunal. Elle considère, en conséquence, qu'il y a lieu déclarer bien fondée la demande du Procureur, et ce dans l'intérêt de la justice.

PAR CES MOTIFS, LA CHAMBRE :

- FAIT droit à la requête du Procureur ;

- ORDONNE une visite de sites au Rwanda ;

- DEMANDE au Président du Tribunal d'autoriser la Chambre à exercer ses fonctions hors du siège du Tribunal du 8 au 11 avril 2006 ;

- DEMANDE au Greffe de prendre, sur la base de l'autorisation du Président, toutes les dispositions nécessaires afin de faciliter l'application de la présente décision.

Fait à Arusha, le 29 mars 2006.

[Signé] : Andrésia Vaz, Présidente; Karin Hökborg; Gberdao Gustave Kam

[56] *Prosecutor v. André Rwamakuba*, Decision on Defense Motion for a View *locus in quo*, N°ICTR-98-44C-T, 16 December 2005; *Prosecutor v. Bagilishema*, Case N°ICTR-95-1A-T, Judgement (TC), 7 June 2001; *Prosecutor v. Bagosora et al*, Case N°ICTR-98-41-T, Decision on Prosecutor's Motion for Site Visits in the Republic of Rwanda (TC), 29 September 2004; *Prosecutor v. Simba,* Case N°ICTR-01-76-T, Decision on the Defense Request for Site Visits in Rwanda (TC), 31 January 2005; *Prosecutor v. Simba,* Case N°ICTR-01-76-T, Decision on the Defense Renewed Request for Site Visits in Rwanda (TC), 4 May 2005.

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Décision relative à la requête du Procureur aux fins de communication des déclarations signées des témoins de la Défense Article 73 ter (B) du Règlement de procédure et de preuve 7 avril 2006 (ICTR-2001-66-T)

(Original : Français)

Chambre de première instance III

Juges : Andrésia Vaz, Présidente; Karin Hökborg; Gberdao Gustave Kam

Athanase Seromba – Communication des déclarations signées de témoins de la Défense – Communication antérieure des déclarations non signées de ses témoins, Communication incomplète – Requête acceptée

Instrument international cité :

Règlement de procédure et de preuve, art. 73 (A) et 73 ter (B) in fine

Jurisprudence internationale citée :

T.P.I.R.: Chambre d'appel, Le Procureur c. Eliezer Niyitegeka, Jugement, 9 juillet 2004 (ICTR-96-14) ; Chambre de première instance, Le Procureur c. Athanase Seromba, Décision du relative à la requête du Procureur aux fins de communication des déclarations des témoins de la Défense, 13 avril 2005 (ICTR-2001-66)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance III (la « Chambre »), composée des Juges Andrésia Vaz, Présidente, Karin Hökborg et Gberdao Gustave Kam ;

SAISI d'une requête du Procureur aux fins de communication des déclarations signées des témoins de la Défense, intitulée « *Prosecutor's Motion for Disclosure of Signed Defence Witness Statements* », déposée au Greffe le 10 mars 2006 ;

CONSIDÉRANT la réponse de la Défense intitulée « Mémoire en réponse à la requête du Procureur tendant à voir ordonner la communication des déclarations signées des témoins de la Défense », déposée au Greffe le 15 mars 2006 ;

STATUE comme suit, conformément aux dispositions de l'article 73 (A) du Règlement de procédure et de preuve (« le Règlement ») ;

Arguments des parties

1. Le Procureur soutient que les déclarations des témoins de la Défense qui lui ont été communiquées par la Défense ne constituent pas des « déclarations écrites » au sens de l'article 73 *ter* (B) du Règlement au motif qu'elles ne portent aucune signature de témoins. Il allègue que les

originaux de ces déclarations sont disponibles et que la Défense, en ne les lui communiquant pas, n'a pas respecté la décision du 13 avril 2005.[1]

2. Le Procureur fait valoir, en outre, que l'absence des originaux des déclarations des témoins de la Défense ne permet pas à la Chambre d'en évaluer l'authenticité. Il souligne également avoir, pour sa part, divulgué à la Défense les déclarations signées de ses témoins. Il ajoute que le défaut de communication des déclarations signées des témoins de la Défense est une violation du principe de l'égalité des armes. Il demande, en conséquence, à la Chambre d'ordonner à la Défense de lui communiquer les déclarations signées de ses témoins.

3. La Défense soutient, de son côté, que la demande du Procureur n'est pas fondée. Elle fait valoir notamment que l'article 73 *ter* (B) du Règlement n'exige pas que les déclarations communiquées au Procureur soient revêtues de la signature des témoins. Elle ajoute que le juge, dans l'affaire *Nahimana,* a rappelé l'obligation de communication de la Défense sans préciser que les copies des déclarations communiquées au Procureur soient signées par les témoins de la Défense.[2] En conséquence, la Défense demande à la Chambre de rejeter la requête du Procureur.

Délibérations

4. Aux termes de l'article 73 *ter* (B) *in fine* du Règlement, la Chambre peut inviter la Défense à communiquer au Procureur les copies des déclarations de chacun des témoins qu'elle entend appeler à la barre.

5. La Chambre rappelle sa décision du 13 avril 2005 dans laquelle elle a ordonné à la Défense de communiquer au Procureur les déclarations non caviardées de ses témoins avant le début de la présentation des moyens de preuve à décharge.[3]

6. La Chambre relève que la Chambre d'appel, dans l'affaire *Niyitegeka,* a considéré que la forme la plus appropriée d'une déclaration de témoin est celle qui comporte la signature dudit témoin. Dans la même décision, la Chambre d'appel a également affirmé que la signature est l'acte par lequel le témoin reconnaît l'exactitude des déclarations qui lui sont attribuées.[4]

7. La Chambre constate qu'en l'espèce, la Défense n'a communiqué au Procureur que les déclarations non signées de ses témoins. Elle note également que la Défense ne conteste pas l'existence de déclarations écrites signées par ses témoins. Aussi, estime-t-elle que la communication faite par la Défense au Procureur est incomplète. La Chambre est donc d'avis qu'il y a lieu de déclarer bien-fondée la demande du Procureur aux fins de communication des déclarations signées des témoins de la Défense. En conséquence, elle estime qu'il appartient à la Défense de réparer cette défaillance en communiquant au Procureur les déclarations signées des témoins de la Défense.

PAR CES MOTIFS, LA CHAMBRE :

- FAIT droit à la requête du Procureur ;

- ORDONNE à la Défense de communiquer au Procureur les déclarations signées des témoins de la Défense.

Fait à Arusha, le 7 avril 2006.

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[1] *Le Procureur c. Athanase Seromba,* Affaire N°ICTR-2001-66-T Décision relative à la requête du Procureur aux fins de communication des déclarations des témoins de la Défense, 13 avril 2005.
[2] Le Procureur c. Ferdinand Nahimana, Case N°ICTR-99-52-1, Decision on The Prosecutor's Motion to Compel the Defence's Compliance with Rules 73 ter, 67 (C) and 69 (C), 3 octobre 2002.
[3] Voir *supra* note 1.
[4] *Le Procureur c. Eliezer Niyitegeka,* Affaire N°ICTR-96-14-A, jugement d'appel, para. 31 et 32.

[Signé] : Andrésia Vaz, Présidente; Karin Hökborg; Gberdao Gustave Kam

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Décision relative à la requête de la Défense aux fins de recueillir les dépositions du témoin PS2 par voie de vidéoconférence (Articles 71 et 90 (A) du Règlement de procédure et de preuve) 20 avril 2006 (ICTR-2001-66-T)

(Original : Français)

Chambre de première instance III

Juges : Andrésia Vaz, Présidente; Karin Hökborg; Gberdao Gustave Kam

Athanase Seromba – Déposition d'un témoin par vidéoconférence – Déposition en personne impossible, Fin de la présentation des moyens de preuve de la Défense, Raisons indépendantes de la volonté du témoin – Intérêt de la justice – Requête acceptée

Instrument international cité :

Règlement de procédure et de preuve, art. 71, 73 et 90 (A)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance III (la « Chambre »), composée des Juges Andrésia Vaz, Présidente, Karin Hökborg et Gberdao Gustave Kam ;

SAISI de la requête de la Défense intitulée « Requête de la Défense aux fins de voir ordonner que les dépositions du témoin PS2 soient recueillies en vue du procès, sur le fondement des dispositions des articles 71 et 90 du Règlement de procédure et de preuve », déposée au Greffe du Tribunal le 19 avril 2006 ;

CONSIDERANT que le Procureur a déjà fait valoir ses arguments lors de l'audience du 18 avril 2006 ;

CONSIDÉRANT qu'à la même audience, la Section d'assistance et de protection des témoins et victimes (la « S.A.T.V. ») a fourni des explications sur la situation du témoin PS2 ;

STATUE comme suit, sur la base de l'article 73 du Règlement de procédure et de preuve (le « Règlement »).

Introduction

1. La Défense soutient que le témoin PS2 est dans l'impossibilité de venir témoigner en personne avant la fin de la présente session, en raison du fait que les autorités de l'Afrique du Sud n'entendent lui octroyer un visa de sortie qu'au mois de mai 2006. Elle sollicite donc que la Chambre ordonne que les dépositions du témoin PS2 soient recueillies par vidéoconférence ou à défaut par toute personne que la Chambre mandatera à cet effet. A l'appui de sa demande, la Défense invoque les dispositions des articles 71 et 90 du Règlement.

Délibérations

2. La Chambre rappelle qu'elle a autorisé la Défense à faire comparaître le témoin PS2 comme témoin de la Défense par décision orale en date du 24 mars 2006.[1]

3. La Chambre note qu'à son audience du 18 avril 2006, la Défense l'avait déjà informée que le témoin PS2 ne pourrait pas se présenter à Arusha avant la fin de la présente session où la Défense est censée clore la présentation de ses moyens de preuves à décharge.[2]

4. Elle relève, en outre, que lors de cette audience, le Procureur a soutenu qu'il s'opposerait à tout report de la clôture de la présentation de la preuve de la Défense.[3]

5. Interpellé sur la situation du témoin PS2, le représentant de la S.A.T.V. a expliqué à la Chambre que les autorités sud-africaines ont insisté sur le fait qu'elles ne pourront délivrer une autorisation de sortie au témoin PS2 qu'au mois de mai 2006.[4]

6. La Chambre rappelle les dispositions de l'article 90 (A) du Règlement :

> 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.

7. La Chambre rappelle également que l'article 71 du Règlement prévoit que la déposition d'un témoin peut aussi être recueillie par voie de vidéoconférence.

8. De ce qui précède, la Chambre constate que le témoin PS2, pour des raisons indépendantes de sa volonté, ne pourra pas venir à Arusha pour témoigner avant le mois de mai 2006. Elle estime pourtant qu'il est de l'intérêt de la justice de permettre à la Défense d'achever la présentation de ses moyens de preuve au cours de la présente session qui prend fin le 27 avril 2006. Dans ces conditions, la Chambre est d'avis qu'il convient de recueillir les dépositions du témoin PS2 par vidéoconférence. En conséquence, elle considère qu'il y a lieu de déclarer bien-fondée la requête de la Défense.

PAR CES MOTIFS, LA CHAMBRE :

ORDONNE que les dépositions du témoin PS2 soient recueillies par vidéoconférence;

ORDONNE, en conséquence, au Greffe de prendre toutes les mesures nécessaires en vue du témoignage par vidéoconférence du témoin PS2 avant la fin de la présente session prévue pour le 27 avril 2006.

Arusha, le 20 avril 2006.

[Signé] : Andrésia Vaz, Présidente; Karin Hökborg; Gberdao Gustave Kam

[1] Transcriptions de l'audience du 24 mars 2006, page 39.
[2] Transcriptions de l'audience du 18 avril 2006, pages 1, 2 et 3.
[3] Transcriptions de l'audience du 18 avril 2006, page 2.
[4] Transcriptions de l'audience du 18 avril 2006, pages 5 et 6.

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Décision relative aux requêtes de la Défense aux fins de certification d'appel contre les décisions orales rendues les 26 et 27 avril 2006 (Article 73 (B) du Règlement de procédure et de preuve 30 mai 2006 (ICTR-2001-66-T)

(Original : Français)

Chambre de première instance III

Juges : Andrésia Vaz, Présidente; Karin Hökborg; Gberdao Gustave Kam

Athanase Seromba – Certification d'appel – Jonction des procédures, Objectif commun aux deux requêtes, Bonne administration de la justice – Rappel des témoins de l'accusation pour contre-interrogatoire supplémentaire – Certification d'appel, Equité du procès ou issue du procès non susceptible d'être remise en cause, Absence de progrès de la procédure par le règlement immédiat des contestations soulevées – Requêtes rejetées

Instrument international cité :

Règlement de procédure et de preuve, art. 73, 73 (B), 85 (A) et 90 (F)

Jurisprudence internationale citée :

T.P.I.R.: Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on the Prosecution Motion to Recall Witness Nyanjwa, 29 septembre 2004 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Aloys Simba, Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination, 28 octobre 2004 (ICTR-2001-76) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination, 19 Septembre 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Pauline Nyiramasuhuko et consorts, Decision on Ntahobali's Strictly Confidential Motion to Recall Witnesses TN, QBQ, and QY, for Additional Cross-Examination, 3 mars 2006 (ICTR-97-21 et ICTR-98-42)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance III (la « Chambre »), composée des Juges Andrésia Vaz, Présidente, Karin Hökborg et Gberdao Gustave Kam ;

SAISI de la requête de la Défense intitulée « Requête de la Défense aux fins de certification d'appel contre les décisions orales rendues par la Chambre en date du 26 avril 2006 … », déposée au Greffe du Tribunal le 2 mai 2006 (ci-après désignée la « première Requête ») ;

SAISI également de la requête de la Défense intitulée « Requête de la Défense aux fins de certification contre l'ordonnance du 27 avril 2006 portant sur le dépôt des dernières conclusions des parties et sur les plaidoiries et réquisitions… », déposée au Greffe du Tribunal le 2 mai 2006 (ci-après désignée la « deuxième Requête ») ;

CONSIDÉRANT la réponse du Procureur, intitulée « *Prosecutor's Response to Seromba's Motions for Certification of Appeals* », déposée au Greffe le 3 mai 2006 (ci-après désignée la « Réponse »);

STATUE comme suit, sur la base du Statut du Tribunal (ci-après désigné le « Statut ») et de l'article 73 du Règlement de procédure et de preuve (ci-après désigné le « Règlement »).

Introduction

1. L'accusé Athanase Seromba est poursuivi pour génocide, ou subsidiairement, complicité de génocide, entente en vue de commettre le génocide et crime contre l'humanité par extermination[1]. Son procès a débuté le 20 septembre 2004[2]. Le Procureur a conclu la présentation de ses moyens de preuve le 25 janvier 2005[3]. La Défense, après de multiples retards dus pour l'essentiel à son fait[4], n'a débuté la présentation de ses moyens de preuve que le 31 octobre 2005[5].

2. Le 23 mars 2006, la Chambre a ouvert une session consacrée à la présentation par la Défense des derniers témoins à décharge. Par décision orale du 24 mars 2006, la Chambre a autorisé la Défense à modifier sa liste de témoins, en y ajoutant notamment le témoin PS2[6]. Le 20 avril 2006, la Chambre a ordonné que les dépositions du témoin PS2 soient recueillies par vidéoconférence, ledit témoin n'étant pas présent à Arusha pour des raisons administratives[7]. Au cours de l'audience du 21 avril 2006, la Chambre, afin d'éviter une interruption des audiences et pour tenir compte de la fin de la session prévue pour le 27 avril 2006, a décidé d'entendre le témoignage de l'accusé avant celui du témoin PS2[8]. Le 24 avril 2006, la Défense a introduit une requête en reconsidération de cette décision[9]. La Chambre a, par décision orale rendue le même jour, rejeté cette requête[10]. A la suite de cette décision, la Défense a saisi le Bureau du Tribunal d'une requête en récusation des juges[11]. La Chambre a alors suspendu les débats dans l'attente de la décision du Bureau[12]. Par décision en date du 25 avril 2006, le Bureau a rejeté la demande en récusation des juges[13].

3. Au cours de l'audience du 26 avril 2006, la Chambre a décidé de passer outre le témoignage du témoin PS2, considérant que le refus du conseil de la Défense de procéder à l'interrogatoire du témoin PS2 équivaut à une renonciation au témoignage de ce dernier[14].

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[1] Acte d'accusation du 9 juillet 2001.
[2] Transcriptions de l'audience du 20 septembre 2004.
[3] Transcriptions de l'audience du 25 janvier 2005.
[4] Ainsi pour compter du 25 janvier 2005, date de la fin de la présentation des moyens de preuve à charge, la présentation des preuves à décharge n'a pu commencer que le 31 octobre 2005, après que l'affaire a subi des renvois successifs le 1er mars 2005, le 05 avril 2005, le 10 mai 2005 et enfin le 24 juin 2005, et ce du fait de l'impréparation de la Défense (Cf. les transcriptions des audiences du 25 janvier 2005, du 1er mars 2005, du 05 avril 2005, du 10 mai 2005 et du 24 juin 2005).
[5] Transcriptions de l'audience du 31octobre 2005.
[6] Transcriptions de l'audience du 24 mars 2006, pages 39 et 40.
[7] *Le Procureur c. Athanase Seromba*, Affaire N°ICTR-2001-66-T, Décision relative à la requête de la Défense aux fins de recueillir les dépositions du témoin PS2 par voie de vidéoconférence, 20 avril 2006.
[8] Transcriptions de l'audience du 21 avril 2006, page 2. A l'audience du 18 avril 2006, la Défense a d'ailleurs rappelé, sans contestation de sa part, que de la clôture de la session était prévue le 27 avril 2006 : « (…) Nous ignorons le sort de ce qui a été décidé au moment où nous allons nous séparer puisque la date limite, vous le rappeliez, est celle du 27 avril. » Transcriptions de l'audience du 18 avril 2006, p. 10.
[9] Requête en extrême urgence aux fins de reconsidération de la décision du 21 avril 2006 concernant la comparution de l'accusé en qualité de témoin, 24 avril 2006.
[10] Transcriptions de l'audience du 24 avril 2006, pages 6 et 7. La décision de la Chambre est ainsi motivée: « La Chambre, dans un souci de gestion et dans l'intérêt de la justice, en tenant compte des problèmes techniques liés à l'audition du dernier témoin de la Défense PS2, prévue pour mercredi prochain, a simplement interverti l'ordre de comparution dudit témoin et de l'accusé pour respecter la date de clôture de présentation de la preuve à décharge prévue le 27 avril 2006, d'un commun accord par les parties et la Chambre ».
[11] Requête en extrême urgence de la Défense aux fins de récusation des juges Andrésia Vaz, Gustave Kam et Karin Hökborg, 24 avril 2006.
[12] Transcriptions de l'audience du 24 avril 2006, pages 13 et 14.
[13] *The Bureau*, *Decision on Motion for Disqualification of Judges*, 25 avril 2006. Il est bon de rappeler qu'une décision a été rendue par la Chambre d'Appel le 22 mai 2006 rejetant l'appel interjeté par la Défense contre la décision du Bureau (*Decision on Interlocutory Appeal of a Bureau Decision, 22 May 2006*).
[14] Transcriptions de l'audience du 26 avril 2006, page 8.

4. Enfin, à son audience du 27 avril 2006, la Chambre a constaté le refus persistant de l'accusé de se présenter à l'audience pour son témoignage et l'a interprété comme une renonciation à déposer devant la Chambre[15]. Elle a ensuite relevé que, la Défense n'ayant fait comparaître aucun autre témoin, la présentation de ses moyens de preuve était close et a renvoyé les parties à la date du 27 juin 2006 pour la présentation de leurs réquisitions et plaidoiries[16]. C'est dans ce contexte que la Défense a introduit les deux requêtes en certification d'appel ci-dessus visées.

Arguments des parties

La Défense

5. Dans sa première Requête, la Défense soutient qu'elle n'a pas renoncé au témoignage du témoin PS2. Elle allègue notamment que la renonciation est un acte volontaire, « nécessairement pris à l'initiative de son auteur, et qui ne peut être prêté à ce dernier ni par une tierce personne, ni par une juridiction »[17]. Elle estime que la décision du 26 avril 2006 la prive de son droit de présenter sa preuve, tel que prévu à l'article 85 (A) du Règlement, tout en déniant également à l'accusé le droit à un procès équitable garanti par l'article 19 du Statut. Elle invoque, en outre, une violation de l'article 20 du Statut qui reconnaît à l'accusé « le droit d'obtenir la comparution et l'interrogatoire des témoins à décharge dans les mêmes conditions que les témoins à charge »[18].

6. La Défense soutient, par ailleurs, que la décision du 26 avril 2006 lui cause un « préjudice considérable »[19]. A l'appui de cette allégation, elle fait valoir notamment que les dépositions du témoin PS2 sont indispensables parce que censées contredire des faits allégués dans l'acte d'accusation, à savoir l'implication directe de l'accusé dans la mort d'Anicet Gatare[20].

7. De ce qui précède, la Défense conclut que la décision du 26 avril 2006 touche une question susceptible de compromettre l'équité et l'issue du procès et dont le règlement immédiat par la Chambre d'appel pourrait concrètement faire avancer la procédure. En conséquence, elle demande à la Chambre de lui certifier l'appel contre cette décision, et ce conformément aux dispositions de l'article 73 (B) du Règlement[21].

8. Dans sa deuxième Requête, la Défense soutient que l'ordonnance du 27 avril 2006 a été prise en méconnaissance de l'appel interjeté par l'accusé contre la décision du Bureau[22]. Elle affirme que même si cet appel n'est pas formellement suspensif, il appartenait à la Chambre, en s'inspirant des usages que consacrent « toutes les traditions judiciaires modernes », de s'abstenir de poursuivre le procès jusqu'à ce que la Chambre d'appel ait statué sur le recours[23]. Elle ajoute, en outre, que la Chambre, en considérant que l'accusé a renoncé à son droit de comparaître comme témoin, a privé ce dernier de son droit à un procès équitable et violé ainsi les articles 19 et 20 du Statut. Sur ce point, elle indique notamment que la renonciation est « un acte volontaire qui doit nécessairement et expressément être notifié par celui qui l'exprime »[24]. Elle soutient également que l'ordonnance susvisée porte particulièrement atteinte au principe d'égalité des armes, en ce qu'elle empêche l'accusé de présenter ses moyens de preuve comme a pu le faire le Procureur qui a conduit à son terme la présentation des moyens de preuve à charge[25].

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[15] Transcriptions de l'audience du 27 avril 2006, page 5.
[16] Ibidem.
[17] Ibidem.
[18] Première Requête, page 3.
[19] Première Requête, page 4.
[20] Ibidem.
[21] Première Requête, pages 4, 5 et 6.
[22] Voir *supra,* n°8.
[23] Deuxième Requête n°2, page 3.
[24] Ibidem.
[25] Ibidem.

9. La Défense soutient, par ailleurs, que l'ordonnance du 27 avril 2006 méconnaît la décision rendue le 29 septembre 2004 aux termes de laquelle la Chambre a décidé de passer outre les objections de la Défense tout en réservant à celle-ci le droit de rappeler, pour les contre-interroger à nouveau, les témoins de l'accusation connus sous les pseudonymes de YAU, YAT, CBI et CBS[26]. Elle estime qu'en mettant « prématurément » fin à la présentation de la preuve à décharge et en lui ordonnant de déposer son mémoire écrit au plus tard le 16 juin 2006, l'ordonnance susvisée porte préjudice à la Défense. Elle allègue, en effet, que le dépôt d'un tel mémoire ne peut se faire qu'après que la Défense a pu réunir l'ensemble de la preuve à décharge par « les mécanismes » de l'interrogatoire et du contre-interrogatoire[27]. La Défense estime ainsi qu'elle n'a pas pleinement exercé son droit de présenter ses moyens de preuve. Elle en déduit que l'ordonnance du 27 avril 2006 porte sur « une question susceptible de compromettre l'équité ou l'issue du procès et dont le règlement immédiat par la Chambre d'appel s'impose pour faire concrètement progresser la procédure »[28]. En conséquence, la Défense sollicite de la Chambre la certification de son appel contre l'ordonnance du 27 avril 2006 conformément à l'article 73 (B) du Règlement. En outre, elle demande que la Chambre ordonne la comparution des témoins à charge YAU, YAT, CBI et CBS pour un nouveau contre-interrogatoire, à la date qu'elle voudra bien fixer[29].

Le Procureur

10. Le Procureur soutient que la Défense a volontairement refusé d'interroger le témoin PS2[30]. Il explique, en effet, que le co-conseil a déclaré au cours de l'audience du 26 avril 2006 ne pas être prêt à interroger le témoin PS2, en dépit des efforts et dépenses consentis par le Tribunal pour l'audition dudit témoin. Il estime qu'une telle attitude de la Défense est une renonciation implicite au témoignage du témoin PS2, résultat de la stratégie adoptée par la Défense malgré le rappel fait par la Chambre qu'il n'y avait aucun sursis à statuer en l'espèce et en dépit également de la satisfaction, après coup, du souhait de la Défense de voir l'accusé témoigner en dernier[31].

11. Le Procureur fait valoir, en outre, que la Défense aurait dû interroger le témoin PS2 si le témoignage de ce dernier était aussi important qu'elle le prétend. Il souligne également que l'importance du témoignage de PS2 ne saurait remettre en question le constat que la Défense a renoncé à l'interroger[32].

12. Le Procureur estime, par ailleurs, que la demande de certification d'appel contre l'ordonnance du 26 avril 2006 ne remplit pas les conditions de la certification d'appel de l'article 73 (B) du Règlement. A l'appui de cette allégation, il fait valoir que la question de la renonciation par la Défense au témoignage du témoin PS2 n'est pas susceptible de compromettre sensiblement l'équité, la rapidité ou l'issue du procès et que son règlement immédiat ne fera pas concrètement avancer la procédure[33].

13. En ce qui concerne la demande de certification d'appel contre l'ordonnance du 27 avril 2006, le Procureur soutient que l'argument de la Défense consistant à faire croire que la Chambre a privé l'accusé de son droit de témoigner en personne ne peut prospérer en l'espèce. Il fait valoir, en effet, que la Défense a volontairement refusé d'appeler l'accusé à la barre tout en sachant qu'elle lui faisait ainsi renoncer à son droit de comparaître comme témoin[34]. Il estime, en se référant aux transcriptions d'audience[35], que la Chambre n'a fait que constater cette renonciation[36].

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[26] Deuxième Requête, page 4.
[27] Ibidem.
[28] Ibidem.
[29] Deuxième Requête, page 5.
[30] Réponse, page 1.
[31] Réponse, page 2.
[32] Réponse, page 3.
[33] Ibidem.
[34] Ibidem.
[35] Transcriptions de l'audience du 27 avril 2006, page 4.
[36] Réponse, page 3.

14. Le Procureur soutient également que la demande subsidiaire de la Défense aux fins de voir rappeler, pour contre-interrogatoire, les témoins de l'accusation YAU, YAT, CBI et CBS relève du dilatoire. Il considère que cette demande est non seulement présentée au lendemain de la clôture de la présentation des éléments de preuve mais qu'elle est aussi tardive parce qu'introduite 19 mois après le prononcé par la Chambre de la décision orale du 29 septembre 2004[37].

15. Au regard de ce qui précède, le Procureur souligne que la demande de certification d'appel contre l'ordonnance du 27 avril 2006 ne remplit pas les conditions de l'article 73 (B) du Règlement. A cet effet, il estime que la question relative au refus par la Défense d'interroger l'accusé de même que celle relative à la demande de la Défense en rappel de certains témoins de l'accusation ne sont pas susceptibles de compromettre l'équité, la rapidité, ou l'issue du procès et que son règlement immédiat par la Chambre d'appel ne peut faire concrètement avancer la procédure.

16. En conclusion, le Procureur fait valoir également en rejet des deux requêtes de la Défense, que des dates ont déjà été arrêtées pour le dépôt des dernières conclusions écrites des parties ainsi que de leurs réquisitions et plaidoiries[38].

Délibérations

Conclusions de la Chambre sur la jonction des procédures

17. La Chambre constate que les deux requêtes de certification d'appel présentées par la Défense ont un objectif commun qui est de contester la décision finale prise par la Chambre de déclarer close la présentation des moyens de preuve à décharge[39], après avoir constaté les défaillances de la Défense pour l'audition du témoin PS2 et de l'accusé. Elle est d'avis qu'il y a lieu de joindre les deux procédures dans l'intérêt d'une bonne administration de la justice.

Conclusions de la Chambre sur la demande en rappel des témoins de l'accusation YAU, YAT, CBI et CBS pour contre-interrogatoire supplémentaire

18. La Chambre rappelle qu'en son audience du 29 septembre 2004, elle a décidé de passer outre l'exception de communication de pièces soulevée par la Défense en relation avec les dépositions de certains témoins de l'accusation, tout en réservant le droit pour la Défense de saisir, s'il y a lieu, la Chambre d'une demande aux fins de contre-interroger les témoins en question sur la base des nouveaux documents communiqués par le Procureur[40].

19. Au surplus, la Chambre rappelle que la jurisprudence du Tribunal n'autorise le rappel de témoins que dans des circonstances exceptionnelles[41] et sur présentation, par la partie qui le requiert, d'un motif valable[42]. En l'espèce, elle constate que la Défense se borne à solliciter le rappel des témoins YAU, YAT, CBI et CBS sans en fournir les raisons.

20. En conséquence de ce qui précède, la Chambre considère qu'il y a lieu de déclarer la Défense mal fondée dans sa demande en rappel des témoins susvisés.

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[37] Réponse, page 3.
[38] Réponse, pages 3 et 4.
[39] Voir *supra* n°11.
[40] Transcriptions de l'audience du 29 septembre 2004, page 8.
[41] The Prosecutor v. Théoneste Bagosora et al., Affaire N°ICTR-98-41-T ("Bagosora et al."), Decision on the Prosecution Motion to Recall Witness Nyanjwa (TC), 29 September 2004, para. 6; The Prosecutor v. Aloys Simba, Affaire N°ICTR-01-76-T, Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination, 28 October 2004, para. 5; Bagosora et al., Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination (TC), 19 September 2005, para. 2.
[42] The Prosecutor v. Pauline Nyiramasuhuko et al, Affaire N°ICTR-97-21-T, ICTR-98-42-T, Decision on Ntahobali's Strictly Confidential Motion to Recall Witnesses TN, QBQ, and QY, for Additional Cross-Examination (TC), 3 March 2006, para. 32.

Conclusions de la Chambre sur les demandes de certification d'appel

21. La Chambre note qu'aux termes des dispositions de l'article 73 (B) du Règlement, deux conditions doivent être réunies pour qu'une certification d'appel soit accordée : le requérant doit démontrer (i) que la décision contestée touche une question à même de compromettre l'équité, la rapidité ou l'issue du procès, (ii) et que son règlement immédiat par la Chambre d'appel peut faire avancer la procédure.

22. La Chambre rappelle qu'en l'espèce, des délais importants ont été consentis à la Défense pour la présentation de ses moyens de preuve à décharge. Aussi, contrairement aux allégations de la Défense, la Chambre est d'avis que l'accusé a eu tout le temps pour préparer sa défense et présenter ses moyens de preuve[43]. Elle relève, au surplus, que l'article 85 (A) du Règlement lui reconnaît le pouvoir d'intervertir l'ordre de comparution des témoins, même dans l'hypothèse où l'accusé décide de témoigner pour sa propre défense, et qu'en fait la possibilité avait été offerte finalement à l'accusé de témoigner en dernier. Elle estime, dès lors, que les contestations soulevées par la Défense par rapport à la décision orale du 26 avril 2006[44], rendue par la Chambre sur la base de son pouvoir discrétionnaire, et à l'ordonnance du 27 avril 2006[45] ne relèvent que du dilatoire. Pour cette raison, la Chambre est d'avis que lesdites contestations ne sont pas susceptibles de remettre en cause l'équité du procès ou son issue.

23. Elle note également que l'article 90 (F) du Règlement donne de larges pouvoirs à la Chambre qui exerce un contrôle sur les modalités de l'interrogatoire des témoins et de la présentation des éléments de preuve ainsi que sur l'ordre dans lequel ils interviennent de manière à éviter toute perte de temps injustifiée, notamment en usant de manœuvres dilatoires. Ainsi, alors que tous ses témoins avaient été entendus à l'exclusion de PS2 et de l'accusé, la Défense, malgré les efforts de la Chambre, a refusé de procéder à ces interrogatoires, ne laissant à la Chambre qu'une seule alternative, celle de clôturer la présentation des éléments de preuve à décharge.

24. La Chambre rappelle enfin que la présentation des moyens de preuve a été clôturée le 27 avril 2006, les parties ayant été invitées, par ailleurs, à développer leurs réquisitions et plaidoiries à l'audience du 27 juin 2006. Aussi ne voit-elle pas en quoi le règlement immédiat par la Chambre d'appel des contestations soulevées par la Défense pourrait concrètement faire progresser la procédure.

25. Au regard de ce qui précède, la Chambre est d'avis que les conditions pour la certification d'appel ne sont pas remplies en l'espèce. Elle considère, en conséquence, qu'il y a lieu de déclarer mal fondées les demandes de certification d'appel présentées par la Défense.

PAR CES MOTIFS, LA CHAMBRE :

ORDONNE la jonction des procédures liées aux requêtes de certification d'appel, présentées par la Défense le 2 mai 2006 ;

REJETTE la demande de la Défense en rappel des témoins de l'accusation YAU, YAT, CBI et CBS ;

REJETTE la demande de certification d'appel contre la décision orale du 26 avril 2006 ;

REJETTE la demande de certification d'appel contre l'ordonnance du 27 avril 2006.

Arusha, le 30 mai 2006.

[43] La Défense a présenté 24 témoins tandis que le Procureur en a présenté 15.
[44] Voir *supra* n°9.
[45] Voir *supra* n°10.

[Signé] : Andrésia Vaz, Présidente; Karin Hökborg; Gberdao Gustave Kam

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Décision relative à la requête de la Défense aux fins de report de la date du dépôt de ses dernières conclusions (Articles 31 du Statut, 3 (E) et 86 (B) du Règlement de procédure et de preuve) 8 juin 2001 (ICTR-2001-66-T)

(Original : Français)

Chambre de première instance III

Juges : Andrésia Vaz, Présidente; Karin Hökborg; Gberdao Gustave Kam

Athanase Seromba – Report de la date de dépôt de pièces – Traduction de pièces – Langues de travail du Tribunal – Requête en partie acceptée

Instrument international cité :

Règlement de procédure et de preuve, art. 3 (E), 73 (A) et 86 (B)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance III (la « Chambre »), composée des Juges Andrésia Vaz, Présidente, Karin Hökborg et Gberdao Gustave Kam ;

SAISI de la requête de la Défense intitulée « Requête aux fins d'obtenir une prorogation du dépôt du mémoire en défense de l'Accusé Athanase Seromba du 16 au 22 juin 2006 […] » déposée au Greffe le 5 juin 2006 (la « Requête ») ;

CONSIDÉRANT la réponse du Procureur, intitulée « *Prosecutor's Response to Seromba's motion for an extension to file his final trial brief* », déposée au Greffe le 6 juin 2006 (la « Réponse »);

CONSIDÉRANT que le mémoire final (les « dernières conclusions ») du Procureur a été traduit en français par le Greffe et communiqué aux parties le 7 juin 2006 ;

VU le Statut du Tribunal (le « Statut ») et le Règlement de procédure et de preuve (le « Règlement ») ;

STATUE comme suit, sur la base des mémoires déposés par les parties conformément à l'article 73 (A) du Règlement.

Arguments des parties

Arguments de la Défense

1. La Défense soutient que le 27 avril 2006, la Chambre a rendu une ordonnance fixant la date du 27 juin 2006 pour les réquisitions et plaidoiries des parties, tout en leur enjoignant également de déposer leurs dernières conclusions le 26 mai 2006 pour le Procureur et le 16 juin 2006 pour la Défense[1].

2. La Défense explique que le Procureur a déposé son mémoire final de 142 pages rédigées en anglais au Bureau du Conseil de la Défense au siège du Tribunal sans lui en faire une copie à son lieu de résidence à Douala, au Cameroun. Elle ajoute qu'elle n'a pas encore reçu ledit mémoire et qu'elle n'est donc pas en mesure de respecter le délai du 16 juin 2006 qui lui a été imparti pour le dépôt de son mémoire final. Elle sollicite donc de la Chambre le report du dépôt dudit mémoire au 22 juin 2006, et ce conformément aux dispositions de l'article 86 (B) du Règlement.

3. La Défense fait valoir également qu'aux termes de l'article 20 (4) (a) du Statut, l'accusé a le droit d'être informé des charges retenues contre lui dans une langue qu'il comprend. Elle ajoute qu'en l'espèce, cette disposition légale a été violée par le Procureur.

4. La Défense soutient, enfin, que le mémoire final est une pièce essentielle du procès. A cet égard, elle souligne que la langue de travail de la Défense est le français, et sollicite en conséquence que la Chambre ordonne la traduction dans cette langue du mémoire final du Procureur.

Arguments du Procureur

5. Le Procureur soutient que la Défense a eu communication du mémoire final de l'accusation par l'intermédiaire de son assistante qui en a accusé réception le 29 mai 2006, au bureau du Conseil de la Défense situé dans les locaux du Tribunal, à Arusha. Il ajoute que la traduction de ce mémoire en français sera disponible le 6 juin 2006 et ne s'oppose pas au report, au 22 juin 2006, de la date du dépôt du mémoire final de la Défense.

Délibérations

6. La Chambre rappelle que l'article 31 du Statut stipule que les langues de travail du Tribunal sont l'anglais et le français. Elle relève, par ailleurs, qu'aux termes de l'article 3 (E) du Règlement, il incombe au Greffier de prendre toutes les dispositions nécessaires pour assurer la traduction et l'interprétation dans les langues de travail.

7. La Chambre rappelle, en outre, sa décision du 27 avril 2006 aux termes de laquelle elle a ordonné au Procureur de communiquer son mémoire final le 26 mai 2006 et à la Défense de communiquer le sien le 16 juin 2006[2]. Elle constate qu'à la date du 26 mai 2006, le Procureur a effectivement déposé au Greffe son mémoire final, rédigé en anglais. Elle note également que ce mémoire, comme en atteste la pièce annexée à la présente décision, a été régulièrement communiqué à la Défense le 29 mai 2006, en la personne de son clerc qui en a reçu copie au siège du Tribunal.

8. La Chambre s'appuie enfin sur l'article 86 (B) du Règlement :

> 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.

9. Elle note qu'en l'espèce, la demande de la Défense aux fins de renvoi au 22 juin 2006 de la date du dépôt de son mémoire final s'inscrit dans la limite du délai de 5 jours prévu à l'article précité, les réquisitions et plaidoiries des parties ayant été fixées au 27 juin 2006. Elle considère en conséquence qu'il y a lieu de faire droit à la demande de la Défense.

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[1] *Le Procureur c. Athanase Seromba,* Affaire N°TPIR-2001-66-T, Décision orale portant sur le dépôt des dernières conclusions des parties et la présentation des réquisitions et plaidoiries, T. 27 avril 2006, page 5.
[2] Cf. supra, note **Erreur ! Signet non défini.**.

10. La Chambre constate, enfin, que le mémoire final du Procureur a été traduit en français et communiqué à la Défense le 7 juin 2006. Aussi, elle considère que la demande de la Défense aux fins de traduction en français dudit document est sans objet.

PAR CES MOTIFS, LA CHAMBRE :

FAIT DROIT à la demande de la Défense aux fins de report de la date du dépôt de ses dernières conclusions;

FIXE la date du dépôt desdites conclusions au 22 juin 2006;

REJETTE toutes les autres demandes de la Défense.

Arusha, le 8 juin 2006.

[Signé] : Andrésia Vaz, Présidente; Karin Hökborg; Gberdao Gustave Kam

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Décision relative à la requête en extrême urgence du Procureur aux fins de non-admission du corrigendum au mémoire final de la Défense (Motifs de la décision orale du 27 juin 2006) (Article 86 (B) du Règlement de procédure et de preuve) 28 juin 2001 (ICTR-2001-66-T)

(Original : Français)

Chambre de première instance III

Juges : Andrésia Vaz, Présidente; Karin Hökborg; Gberdao Gustave Kam

Athanase Seromba – Non-admission du corrigendum au mémoire final de la Défense – Dépôt du corrigendum au-delà du délai de 5 jours, Nouveaux arguments développés, Modification substantielle aux écritures initiales – Requête acceptée

Instrument international cité :

Règlement de procédure et de preuve, art. 73 (A) et 86 (B)

Jurisprudence internationale citée :

T.P.I.R.: Chambre de première instance, The Prosecutor v. Tharcisse Muvunyi, Decision on Muvunyi's motion for substitution of final trial brief, 20 juin 2006 (ICTR-2000-55A)

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIEGEANT en la Chambre de première instance III (la « Chambre »), composée des Juges Andrésia Vaz, Présidente, Karin Hökborg et Gberdao Gustave Kam ;

SAISI d'une requête du Procureur intitulée « *Prosecutor's extremely urgent motion to exclude as out of time Seromba's* Corrigendum » déposée le 26 juin 2006 ;

CONSIDERANT les arguments oraux développés par les parties à l'audience publique du 27 juin 2006 ;

CONSIDERANT le mémoire final de la Défense déposé au Greffe du Tribunal le 22 juin 2006 (« le mémoire final ou dernières conclusions de la Défense ») ;

CONSIDERANT le *Corrigendum* de la Défense déposé au Greffe le 26 juin 2006 (« le *Corrigendum* »);

STATUE comme suit, conformément aux dispositions de l'Article 73 (A) du Règlement de procédure et de preuve (« le Règlement »).

Arguments des parties

1. Le Procureur soutient que le *Corrigendum* de la Défense a été déposé en violation du délai limite de dépôt de 5 jours prescrit par l'article 86 (B) du Règlement. Il ajoute que ce délai est péremptoire et ne peut donc être modifié.

2. Le Procureur fait valoir, en outre, que le document en cause n'a de *corrigendum* que le nom. Il allègue, à cet effet, qu'il contient 40 pages de plus que le mémoire final de la Défense. Il ajoute que ce document ne contient aucune information sur les corrections apportées audit mémoire final. Il en déduit que le *Corrigendum* n'est en fait qu'un nouveau mémoire final présenté par la Défense en violation du délai de 5 jours ci-dessus indiqué.

3. Le Procureur souligne, enfin, qu'il subirait un préjudice si le *Corrigendum* était admis au dossier car il n'en a pas tenu compte dans la préparation de son réquisitoire. Il explique, en effet, que la présentation de son réquisitoire était prévue pour le 27 juin 2006 alors que le *Corrigendum* ne lui a été communiqué que le 26 juin 2006.

4. En conséquence, le Procureur sollicite de la Chambre la non admission de ce *Corrigendum* comme pièce du dossier dans la présente procédure.

5. La Défense soutient que le délai de 5 jours prescrit par 1'Article 86 (B) du Règlement n'est imposé aux parties que pour le dépôt du mémoire final. Il souligne que la Défense s'est conformée à ce délai en déposant son mémoire final le 22 juin 2006. Il explique que le *Corrigendum* se justifie par le fait que ce mémoire final « était truffé de défauts, de fautes, d'erreurs, et même de parties entières de document qui ne s'y trouvaient pas ».[1] Il ajoute enfin que le Procureur ne peut alléguer d'un préjudice du seul fait qu'il n'aurait pas disposé du temps nécessaire pour prendre connaissance du *Corrigendum*.

Délibérations

6. La Chambre rappelle les dispositions de l'article 86 (B) du Règlement :

> 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.

7. La Chambre rappelle également que dans l'affaire *Muvunyi,* la Chambre de première instance du Tribunal n'a autorisé la Défense à déposer un *corrigendum* à son mémoire final au-delà du délai prévu par l'article 86 (B) du Règlement qu'après avoir été saisie d'une demande dans ce sens et constaté que

[1] Transcriptions de l'audience publique du 27 juin 2006, page 3.

le *Corrigendum* n'apportait aucune modification substantielle aux écritures initiales et qu'aucun nouveau argument n'y était développé.[2]

8. En l'espèce, la Chambre constate que le *Corrigendum* de la Défense a été déposé au-delà du délai de 5 jours indiqué ci-dessus. Elle note, en outre, que le *Corrigendum* contient 40 pages de plus que le mémoire final. Elle constate notamment que la Défense y développe des arguments nouveaux qui modifient la substance dudit mémoire final.

9. La Chambre considère dès lors qu'il y a lieu de déclarer bien fondée la requête du Procureur aux fins de non admission du *Corrigendum* de la Défense.

PAR CES MOTIFS, LA CHAMBRE,

FAIT DROIT à la requête du Procureur aux fins de non admission du *Corrigendum* de la Défense déposée au Greffe du Tribunal le 26 juin 2006 ;

ORDONNE le retrait dudit *Corrigendum* des pièces constituant le dossier de la procédure ;

INVITE le Greffier à prendre toutes les dispositions nécessaires aux fins de l'exécution de la présente décision.

Arusha, le 28 juin 2006.

[Signé] : Andrésia Vaz, Présidente; Karin Hökborg; Gberdao Gustave Kam

[2] The Prosecutor v. Tharcisse Muvunyi, ICTR-2000-55A-T, Decision on Muvunyi's motion for substitution of final trial brief, 20 June 2006, page 2.

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Jugement
13 décembre 2006 (ICTR-2001-66-I)

(Original : Français)

Chambre de première instance III

Juges : Andrésia Vaz, Présidente; Karin Hökborg; Gberdao Gustave Kam

Athanase Seromba – Génocide, alternativement complicité dans le génocide, Entente en vue de commettre le génocide, Extermination comme crime contre l'humanité – Vices de l'acte d'accusation – Crédibilité des témoins, Etablissement des faits – Responsabilité pénale individuelle, Modes de participation aux crimes, Définition des éléments matériel et moral – Participation par aide et encouragement – Génocide, Aide et encouragement à la commission de meurtres et d'atteintes graves à l'intégrité physique et mentale du groupe ethnique tutsi, Actus reus, mens rea – Entente en vue de commettre le génocide – Extermination comme crime contre l'humanité, Actus reus, Mens rea, Caractère généralisé ou systématique, Définition de la population civile, Attaque dirigée contre la population civile tutsie, Motifs discriminatoires – Verdict – Détermination de la peine – Gravité des infractions – Situation personnelle de l'accusé, Prêtre – Circonstances aggravantes, Statut de l'accusé et abus de confiance, comportement passif, Fuite de l'accusé – Circonstances atténuantes, Bonne réputation dont jouissait l'accusé avant les événements, Reddition volontaire, Jeune âge – Grille générale des peines d'emprisonnement appliquée au Rwanda – Multiplicité des peines – Déduction de la durée de la détention préventive – Condamnation pour génocide et extermination comme crime contre l'humanité, Peine unique, quinze ans d'emprisonnement

Instruments internationaux cités :

Conseil de sécurité, Résolution 955 (1994), 8 novembre 1994, S/RES/955 (1994) ; Rapport de la Commission du droit international à l'Assemblée générale sur les travaux de sa quarante-huitième session, 6 mai-26 juillet 1996, Documents officiels de l'Assemblée générale, suppl. n°10, p. 90, (A/51/10) (1996) ; Règlement de procédure et de preuve, art. 72, 101, 101 (B), 101 (C), 101 (D) et 103 ; Statut, art. 2, 2 (2), 2 (3) (a), 2 (3) (b), 2 (3) (e), 3, (3) (b), 4, 6 (1) et 23

Instrument national cité :

Loi organique n°40/2000 du 26/01/2001 portant création des Juridictions Gacaca et organisation des poursuites à des infractions constitutives du crime de génocide ou de crimes contre l'humanité, commises entre le 1 octobre 1990 et le 31 décembre 1994, art. 51 et 68

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. 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 d'appel, Le Procureur c. Omar Serushago, Motifs du jugement, 6 avril 2000 (ICTR-98-39) ; Chambre de première instance, Le Procureur c. Georges Ruggiu, Jugement et sentence, 1 juin 2000 (ICTR-97-32) ; Chambre d'appel, Le Procureur c. Jean Kambanda,

Arrêt, 19 octobre 2000 (ICTR-97-23) ; Chambre d'appel, Le Procureur c. Clément Kayishema et Obed Ruzindana, Motifs de l'arrêt, 1 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. Athanase Seromba, Décision relative à la requête unilatérale du Procureur aux fins de perquisition, de saisie, d'arrestation et de transfèrement, 4 juillet 2001 (ICTR-2001-66) ; Chambre de première instance, Le Procureur c. Athanase Seromba, Ordonnance aux fins d'exécution du mandat d'arrêt et de transfert, 4 juillet 2001 (ICTR-2001-66) ; Chambre d'appel, Le Procureur c. Alfred Musema, Jugement, 16 novembre 2001 (ICTR-96-13) ; 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. Laurent Semanza, Jugement et sentence, 15 mai 2003 (ICTR-97-20) ; Chambre de première instance, Le Procureur c. Eliezer Niyitegeka, Jugement, 16 mai 2003 (ICTR-96-14) ; Chambre de première instance, Le Procureur c. Ferdinand Nahimana et consorts, Jugement et sentence, 3 décembre 2003 (ICTR-99-52) ; 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, Arrêt, 13 décembre 2004 (ICTR-96-10 et ICTR-96-17) ; 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 de première instance, Le Procureur c. Athanase Seromba, Décision Relative à la Requête du Procureur aux Fins de Constat Judiciaire, 14 juillet 2005 (ICTR-2001-66) ; Chambre de première instance, Le Procureur c. Aloys Simba, Jugement, 13 décembre 2005 (ICTR-2001-76) ; Chambre d'appel, Le Procureur c. Edouard Karemera et consorts, Décision faisant suite à l'appel interlocutoire interjeté par le Procureur de la décision relative au constat judiciaire, 16 juin 2006 (ICTR-98-44) ; Chambre d'appel, Le Procureur c. André Ntagerura, Arrêt, 7 juillet 2006 (ICTR-96-10A)

T.P.I.Y.: Chambre de première instance, Le Procureur c. Zdravko Mucić, Jugement, 16 novembre 1996 (IT-96-21) ; Chambre de première instance, Le Procureur c. Dražen Erdemović, Jugement, 29 novembre 1996 (IT-96-22) ; Chambre de première instance, Le Procureur c. Duško Tadić, Jugement, 7 mai 1997 (IT-94-1) ; Chambre de première instance, Le Procureur c. Anto Furundžija, Jugement, 10 décembre 1998 (IT-95-17/1) ; Chambre de première instance, Le Procureur c. Zoran Kupreškić et consorts, Décision relative aux éléments de preuve portant sur la moralité de l'accusé et le moyen de défense de tu quoque, 17 février 1999 (IT-95-16) ; Chambre de première instance, Le Procureur c. Zlatko Aleksovski, Jugement, 25 juin 1999 (IT-95-14/1) ; Chambre d'appel, Le Procureur c. Duško Tadić, Arrêt, 15 juillet 1999 (IT-94-1) ; Chambre de première instance, Le Procureur c. Tihomir Blaškić, Jugement, 3 mars 2000 (IT-95-14) ; Chambre de première instance, Le Procureur c. Radislav Krstić, Jugement, 2 août 2001 (IT-98-33) ; Chambre de première instance, Le Procureur c. Milorad Krnojelac, Jugement, 15 mars 2002 (IT-97-25) ; Chambre de première instance, Le Procureur c. Biljana Plavšić, Jugement, 27 février 2003 (IT-00-39 et IT-00-40/1) ; Chambre d'appel, Le Procureur c. Milorad Krnojelac, Jugement, 17 septembre 2003 (IT-97-25) ; Chambre de première instance, Le Procureur c. Blagoje Simić, Jugement, 17 octobre 2003 (IT-95-9) ; Chambre d'appel, Le Procureur c. Radislav Krstić, Jugement, 19 avril 2004 (IT-98-33) ; Chambre de première instance, Le Procureur c. Milan Babić, Jugement, 29 juin 2004 (IT-02-65) ; Chambre d'appel, Le Procureur c. Dario Kordić et Mario Čerkez, Arrêt, 17 décembre 2004 (IT-95-14/2) ; Chambre de première instance, Le Procureur c. Vidoje Blagojević and Dragan Jokić, Jugement, 17 janvier 2005 (IT-2002-60)

Table des matières

Chapitre I : Introduction

1. Le présent jugement est rendu en l'affaire *Le Procureur c. Athanase Seromba* par la Chambre de première instance III (la « Chambre ») du Tribunal pénal international pour le Rwanda (le « Tribunal ») composée des juges Andrésia Vaz, Présidente, Karin Hökborg et Gberdao Gustave Kam.

2. Le Tribunal est régi par le Statut annexé à la résolution 955 du Conseil de sécurité de l'ONU (le « Statut »)[1] et par le Règlement de procédure et de preuve du Tribunal (le « Règlement »)[2].

3. Le Tribunal est habilité à juger les personnes accusées de violations graves du droit international humanitaire commises sur le territoire du Rwanda ainsi que les citoyens rwandais présumés responsables de telles violations commises sur le territoire d'États voisins. Sa compétence est limitée aux actes de génocide, aux crimes contre l'humanité et aux violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II[3], commis entre le 1er janvier et le 31 décembre 1994[4].

4. La Chambre rappelle que dans la présente instance, elle a déjà dressé le constat judiciaire du fait qu'il ne peut être raisonnablement contesté que des tueries à grande échelle aient été perpétrées au Rwanda en 1994[5]. La Chambre rappelle, en outre, qu'elle a également dressé le constat judiciaire du fait que lors des événements visés dans le présent acte d'accusation, Tutsis, Hutus et Twas étaient identifiés comme des groupes ethniques ou raciaux[6].

5. Elle note, par ailleurs, que la Chambre d'appel a récemment rappelé, dans l'affaire *Karemera*, que le génocide perpétré au Rwanda est un fait de notoriété publique[7]. Elle souligne toutefois que le constat judiciaire de faits de notoriété publique ne dispense pas le Procureur de son obligation de prouver l'imputabilité à l'accusé des faits spécifiques allégués dans l'Acte d'accusation[8].

6. L'accusé Athanase Seromba est né en 1963 dans la commune de Rutziro, dans la préfecture de Kibuye, au Rwanda. Formé au grand séminaire de Nyakibanda[9], il a été ordonné prêtre en juillet 1993[10]. En avril 1994, il était prêtre à la paroisse de Nyange, dans la commune de Kivumu.

7. Dans l'Acte d'accusation en date du 8 juin 2001 (l'« Acte d'accusation ») enregistré au Greffe du Tribunal le 5 juillet 2001[11], le Procureur retient quatre chefs contre Athanase Seromba :

8. Chef 1 : Génocide[12] : Le Procureur du Tribunal pénal international pour le Rwanda accuse Athanase Seromba de génocide, sous l'empire de l'Article 2 (3) (a) du Statut, en ce que, entre le 6 avril 1994 et le 20 avril 1994 ou à ces dates, dans la commune de Kivumu, préfecture de Kibuye au Rwanda, Seromba a été responsable de meurtres ou d'atteintes graves à l'intégrité physique ou mentale de membres de la population tutsie, commis dans l'intention de détruire, en tout ou en partie, un groupe racial ou ethnique; et en vertu de l'Article 6 (1) du Statut : par ses actes positifs, en ce que l'accusé a planifié, incité à commettre, ordonné de commettre, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter l'infraction retenue contre lui.

9. Chef 2 : Complicité dans le génocide[13] : Le Procureur du Tribunal pénal international pour le Rwanda accuse Athanase Seromba de complicité dans le génocide, sous l'empire de l'Article 2 (3) (e) du Statut, en ce que, entre le 6 avril 1994 et le 20 avril 1994 ou à ces dates, dans la commune de Kivumu, préfecture de Kibuye au Rwanda, Seromba s'est rendu coupable de complicité de meurtres

[1] Document ONU S/RES/955 (1994), 8 novembre 1994.
[2] Le Règlement a été adopté le 5 juillet 1995 par le Juges du Tribunal et modifié pour la dernière fois le 7 juin 2005. Le Statut et le Règlement sont disponibles sur le site du Tribunal : www.ictr.org.
[3] Art. 2, 3 et 4 du Statut.
[4] Art. 1 du Statut.
[5] Décision relative à la requête du Procureur aux fins de constat judiciaire, 14 juillet 2005, page 7.
[6] Ibid.
[7] *Le Procureur c. Edouard Karemera et autres,* ICTR-98-44-T, Décision faisant suite à l'appel interlocutoire interjeté par le Procureur de la décision relative au constat judiciaire (Chambre d'appel), 16 juin 2006, para. 35.
[8] *Ibid*., para. 37.
[9] Transcriptions du 20 avril 2006, p. 6 (huis clos).
[10] Lettre de l'accusé à l'archevêque de Florence (P-8).
[11] La version française de l'acte d'accusation a été enregistrée au Greffe du Tribunal le 9 juillet 2001.
[12] Acte d'accusation, p. 2.
[13] Acte d'accusation, p. 3.

ou d'atteintes graves à l'intégrité physique ou mentale de membres de la population tutsie, commis dans l'intention de détruire, en tout ou en partie, un groupe racial ou ethnique; et en vertu de l'Article 6 (1) du Statut : par ses actes positifs, en ce que l'accusé a planifié, incité à commettre, ordonné de commettre, commis et aidé et encouragé à planifier, préparer et exécuter l'infraction retenue contre lui.

10. Chef 3 : Entente en vue de commettre le génocide[14] : Le Procureur du Tribunal pénal international pour le Rwanda accuse Athanase Seromba d'entente en vue de commettre le génocide, sous l'empire de l'Article 2 (3) (b) du Statut, en ce que, entre les 6 et 20 avril 1994 ou à ces dates, dans la préfecture de Kivumu au Rwanda, Seromba, prêtre responsable de la paroisse de Nyange, s'est effectivement entendu avec Grégoire Ndahimana, bourgmestre de la commune de Kivumu, Fulgence Kayishema, inspecteur de police de la commune de Kivumu, Télesphore Ndungutse, Gaspard Kanyarukiga et d'autres personnes inconnues du Procureur, pour tuer des membres de la population tutsie ou porter des atteintes graves à leur intégrité physique ou mentale, dans l'intention de détruire, en tout ou en partie, un groupe racial ou ethnique; et en vertu de l'Article 6 (1) du Statut : par ses actes positifs, en ce que l'accusé a planifié, incité à commettre, ordonné de commettre, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter l'infraction retenue contre lui.

11. Chef 4 : Crime contre l'humanité (extermination)[15] : Le Procureur du Tribunal pénal international pour le Rwanda accuse Athanase Seromba de crime contre l'humanité (extermination) sous l'empire de l'Article 2 (3) (b) du Statut, en ce que, entre les 7 et 20 avril 1994 ou à ces dates, dans la préfecture de Kibuye (Rwanda), Seromba a tué ou fait tuer des personnes lors de massacres perpétrés dans le cadre d'une attaque généralisée ou systématique dirigée contre une population civile en raison de son appartenance politique, ethnique ou raciale; et en vertu de l'Article 6 (1) du Statut : par ses actes positifs, en ce que l'accusé a planifié de commettre, incité à commettre, ordonné de commettre, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter l'infraction retenue contre lui.

12. Le texte intégral de l'Acte d'accusation est annexé au présent jugement[16].

13. L'accusé Athanase Seromba qui s'était exilé à Florence, en Italie, s'est livré aux autorités du Tribunal le 6 février 2002 sans que le mandat d'arrêt[17] délivré par le Tribunal à son encontre n'ait été exécuté par les autorités italiennes qui en avaient reçu notification le 10 juillet 2001[18]. L'accusé a comparu pour la première fois devant la Juge Navanethem Pillay le 8 février 2002 et a plaidé non coupable[19]. Son procès a débuté le 20 septembre 2004 et a pris fin le 27 juin 2006[20].

Chapitre III : Conclusions factuelles

1. Questions préliminaires

1.1. Des vices de l'Acte d'accusation

1.1.1. Le Droit applicable aux recours en constatation des vices de l'Acte d'accusation

[14] Acte d'accusation, p. 11.
[15] Acte d'accusation, p. 15.
[16] Voir Annexe III : L'Acte d'accusation.
[17] *Seromba*, Décision relative à la requête unilatérale du Procureur aux fins de perquisition, de saisie, d'arrestation et de transfèrement, 3 juillet 2001 ; *Seromba*, Ordonnance aux fins d'exécution du mandat d'arrêt et de transfert, 4 juillet 2001.
[18] Voir la lettre du ministère de la justice italien en date du 11 juillet 2001 adressée au Greffier du Tribunal Pénal International pour le Rwanda.
[19] Transcriptions du 8 février 2002, p. 16 (audience publique).
[20] Voir Annexe I : Historique de la procédure.

14. La Chambre note que conformément à l'article 72 du Règlement de procédure et de preuve, les vices de l'Acte d'accusation doivent, en principe, être soulevés dans la phase préalable au procès[21] sauf dérogation accordée par la Chambre à toute partie de le faire à tout autre stade de la procédure.

15. En l'espèce, la Chambre constate que la demande de la Défense en constatation de vices de l'Acte d'accusation ne respecte pas, dans la forme, les prescriptions énoncées ci-dessus en ce qu'elle n'a pas été présentée en phase préalable au procès mais plutôt dans ses conclusions finales, c'est-à-dire après la clôture des débats. Elle relève, en outre, que jusqu'à la clôture des débats, la Défense n'a sollicité ni obtenu de dérogation de la Chambre à l'effet d'introduire toute demande en constatation de vices de l'Acte d'accusation.

16. La Chambre rappelle qu'appelée à se prononcer sur la question de savoir si une Chambre de première instance pouvait, après la clôture des débats, conclure qu'un acte d'accusation était entaché de vices, la Chambre d'appel, dans l'affaire *Ntagerura*, a indiqué qu'elle ne pouvait pas le faire sans donner au préalable aux parties l'opportunité d'être entendues, ce que seule une réouverture des débats lui aurait permis d'atteindre[22].

17. De ce qui précède, la Chambre est d'avis que toute modification de l'Acte d'accusation pour vices peut intervenir même au stade du délibéré de la Chambre à la seule condition que la Chambre ait au préalable ordonné la réouverture des débats. Dès lors, elle considère que la question qui se pose en l'espèce est de savoir si les arguments présentés par la Défense, à l'appui de sa demande en constatation de vices de l'Acte d'accusation, sont de nature à justifier une éventuelle modification de l'Acte d'accusation dans un souci d'équité du procès. Dans une telle hypothèse, la réouverture des débats s'imposerait à la Chambre.

18. Pour répondre à cette question, la Chambre examinera successivement les arguments développés par la Défense dans ses conclusions finales[23], même si cela peut paraître surabondant.

1.1.2. L'examen des arguments de la Défense

Les allégations de la Défense visant le paragraphe 5 de l'Acte d'accusation

19. La Chambre note que la Défense a soutenu que le Procureur se contente d'affirmer qu'Athanase Seromba, « prêtre responsable de la paroisse de Nyange et d'autres personnes inconnues du Procureur », a préparé et exécuté un plan d'extermination de la population tutsie sans toutefois préciser la nature dudit plan, ni la date et le lieu de sa conception, les personnes qui l'auraient conçu, les moyens mis en œuvre pour l'exécuter ou encore le rôle exact que l'accusé aurait eu dans la conception, l'élaboration et l'exécution de ce plan.

20. La Chambre note, en outre, que la Défense a allégué qu'en se bornant seulement à dire que suite à la mort du Président rwandais le 6 avril 1994, des attaques ont été perpétrées contre les Tutsis dans la commune de Kivumu entraînant la mort de plusieurs d'entre eux, le Procureur ne permet pas de savoir l'identité des auteurs de ces attaques, ni celle de leurs concepteurs, ni le lieu où ces attaques

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[21] *Simba*, Jugement (Ch.), 13 décembre 2005, para. 15.

[22] *Ntagerura*, Arrêt, 7 juillet 2006, para. 55 : « 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 ».

[23] Conclusions finales de la Défense, pp. 40-42.

se sont déroulées, ni la manière dont elles ont été exécutées ou encore si Athanase Seromba y avait participé.

21. La Chambre considère que les allégations de la Défense ci-dessus ne sont pas pertinentes dans la mesure où des détails suffisants sont donnés dans l'Acte d'accusation sur les différents points contestés. Elle considère en conséquence que ces allégations ne font pas la preuve de l'existence de vices dans l'Acte d'accusation.

Les autres allégations de la Défense

22. La Défense a allégué également du manque de précisions des paragraphes 7, 8, 11, 14, 15, 16 et 17 de l'Acte d'accusation qui se rapportent respectivement aux faits d'élaboration d'une liste de réfugiés par l'accusé, de la tenue de réunions auxquelles l'accusé aurait participé, au refoulement par l'accusé des employés tutsis de la paroisse, à la fermeture des portes de l'église et à la tenue d'une réunion le 14 avril 1994. Sur ces différents points, la Chambre considère que les allégations de la Défense sont mal fondées dans la mesure où des détails essentiels sont fournis aussi bien dans l'Acte d'accusation que dans le mémoire préalable du Procureur qui a été communiqué à la Défense dans des délais raisonnables pour lui permettre de se préparer pour le procès.

1.1.3. Conclusions de la Chambre

23. Au regard de ce qui précède, la Chambre est d'avis que les arguments présentés par la Défense ne permettent pas d'établir que l'Acte d'accusation contient de vices qui auraient nécessité sa modification éventuelle. Elle rejette donc en l'état toutes les prétentions de la Défense en constatation des vices de l'Acte d'accusation et considère, en conséquence, qu'il n'y a pas lieu de procéder à la réouverture des débats.

1.2. De la preuve du bon caractère de l'accusé

24. Dans ses conclusions finales, la Défense a soutenu que le bon caractère d'un accusé peut constituer un élément de preuve pertinent dans l'évaluation de la probabilité que cet accusé a pu commettre les crimes mis à sa charge[24]. Le Procureur n'a pas présenté d'argument sur ce point.

25. La Chambre considère que les éléments de preuve dont elle doit évaluer la valeur probante au stade du délibéré sont en principe ceux que les parties ont fait valoir lors de la présentation de leurs moyens de preuve, conformément aux dispositions des articles 89 à 98 *bis* du Règlement.

26. La Chambre note que la valeur probante du bon caractère de l'accusé avant les faits qui lui sont reprochés est généralement limitée en droit pénal international[25]. Elle relève que la preuve du bon caractère de l'accusé est plutôt prise en considération au moment de la détermination de la peine[26]. Elle observe toutefois que le bon caractère de l'accusé excipé comme moyen de preuve n'est pas totalement dénué de toute pertinence toutes les fois qu'il en est établi le caractère particulièrement probant charges retenues contre l'accusé[27].

27. En l'espèce, la Chambre constate que la Défense n'a allégué la preuve du bon caractère de l'accusé qu'après la clôture des débats, mettant ainsi le Procureur dans l'impossibilité de présenter des arguments sur ce point. En outre, elle constate qu'en se bornant à soutenir que l'accusé ne s'est «…jamais défavorablement fait connaître par ses ouailles de la paroisse de Nyange avant les

[24] Conclusions finales de la Défense, p. 6.
[25] *Kupreškic*, Décision relative aux éléments de preuve portant sur la moralité de l'accusé et le moyen de défense *tu quoque* (Ch.), 17 février 1999, para. (i).
[26] *Kambanda*, Jugement (Ch.), 4 septembre 1998, para. 34.
[27] *Bagilishema*, Jugement (Ch.), 7 juin 2001, para. 116.

événements du 6 avril 1994…»[28], la Défense ne montre pas le caractère particulièrement probant du bon caractère de l'accusé au regard des charges retenues contre lui.

28. Au regard de ce qui précède, la Chambre ne retiendra pas le bon caractère de l'accusé comme élment de preuve au dossier, mais le prendra éventuellement en considération dans ses discussions sur la détermination de la peine.

1.3. Des allégations à caractère général dans l'Acte d'accusation

29. La Chambre constate qu'il a été déjà dressé constat judiciaire du fait visé au paragraphe 1 de l'Acte d'accusation, à savoir que le Rwanda était divisé en trois groupes ethniques : Tutsis, Hutus et Twas[29]. Dès lors, elle considère que cette allégation est d'ordre général.

30. La Chambre constate que le paragraphe 24 de l'Acte d'accusation ne donne qu'une description générale des attaques contre les réfugiés et des intentions des assaillants, sans mettre à la charge de l'accusé Athanase Seromba tout acte ou fait spécifique. En conséquence, elle considère que cette allégation à un caractère général.

31. La Chambre relève que le fait relatif à l'arrivée d'un autobus, visé au paragraphe 18 de l'Acte d'accusation, ne présente aucun intérêt par rapport aux faits reprochés à l'accusé Athanase Seromba. Elle considère, en conséquence, que cette allégation a un caractère général.

32. La Chambre observe que les allégations visées aux paragraphes 5, 33, 34, 35 et 45 de l'Acte d'accusation évoquent sommairement un plan d'extermination impliquant l'accusé, sans qu'aucun fait spécifique ne soit mis à la charge de l'accusé. Elle considère donc que ces allégations ont un caractère général.

33. La Chambre note que l'allégation de détournement de biens de la paroisse par l'accusé visée au paragraphe 32 de l'Acte d'accusation n'a été soutenue par aucun élément de preuve. Elle en déduit donc que cette allégation a un caractère général.

34. La Chambre relève que l'allégation contenue au paragraphe 50 de l'Acte d'accusation entre dans le cadre du contexte général des événements survenus à Nyange en avril 1994. Elle la considère, en conséquence, comme une allégation à caractère général.

35. Au regard de ce qui précède, la Chambre considère qu'il n'y a pas lieu de traiter de ces allégations à caractère général dans ses conclusions factuelles.

2. De la commune de kivumu, de la paroisse de nyange et des fonctions par l'accuse

36. La Commune de Kivumu est située dans la préfecture de Kibuye, en République du Rwanda[30]. En 1994, la population de cette commune était estimée au moins 53000 habitants dont environ 6000 Tutsis[31].

[28] Conclusions finales de la Défense, p. 7.
[29] Décision relative à la requête du Procureur aux fins de constat judiciaire, 14 juillet 2005, page 7.
[30] Transcriptions du 27 septembre 2004, p. 7 (audience publique), *Rapport préliminaire d'identification des sites du génocide et des massacres d'avril-juillet 1994 au Rwanda* (P-4), pp. 138 et 165, Carte de Kibuye (P-1) et Carte de Kibuye annotée (P-1B).
[31] Le témoin FE56 soutient que la population de la commune de Kivumu s'élevait à 53000 habitants (Transcriptions du 4 avril 2006, p. 28 (huis clos)). Le témoin FE27 soutient que lors du recensement de 1993, 55000 personnes habitaient à Kivumu, parmi lesquelles figuraient environ 6000 Tutsis (Déclaration du témoin FE27 aux enquêteurs du Tribunal du 14 septembre 2000 (P-41), p. 3).

37. La paroisse de Nyange se trouvait dans le secteur de Nyange situé dans la commune de Kivumu. L'église de Nyange mesurait 55 mètres de long sur 19 mètres de large[32]. Cette église avait une capacité d'accueil d'au moins 1500 personnes[33].

38. La Chambre note qu'au moment des faits visés dans l'Acte d'accusation, Athanase Seromba était prêtre à la paroisse de Nyange où il avait été affecté en qualité de vicaire[34]. Plusieurs témoignages établissent que le curé de la paroisse de Nyange l'Abbé Straton avait déjà quitté cette paroisse au moment des événements qui s'y sont déroulés au mois d'avril 1994[35]. Ces mêmes témoignages établissent également que Seromba avait alors hérité de la gestion quotidienne de la paroisse, en attendant de rejoindre son nouveau poste à la paroisse de la Crête Zaïre Nil où il avait été affecté depuis le 17 mars 1994[36]. La Chambre observe, en outre, à la lumière de ces témoignages ainsi que des conclusions factuelles ci-dessus développées, que Seromba a posé plusieurs actes qui démontrent qu'il avait la charge de la gestion quotidienne de la paroisse de Nyange au moment des événements d'avril 1994[37]. Dès lors, elle est d'avis que l'accusé Seromba a agi comme responsable de la paroisse de Nyange au moment des événements qui s'y sont déroulés au mois d'avril 1994.

3. Des evenements du 6 au 10 avril 1994 dans la commune de Kivumu

3.1. L'Acte d'accusation

39. L'Acte d'accusation allègue ce qui suit:

> « 6. Suite à la mort du Président rwandais, le 6 avril 1994, des attaques ont commencé à être perpétrées contre les Tutsis dans la commune de Kivumu, causant la mort de certains civils tutsis, dont Grégoire Ndakubana, Martin Karakezi et Thomas Mwendezi.
>
> 7. Afin d'échapper aux attaques dont ils étaient la cible, les Tutsis des différents secteurs de la commune de Kivumu ont quitté leurs foyers pour se réfugier dans les bâtiments publics et les églises, y compris l'église de Nyange. Le bourgmestre et les policiers communaux ont rassemblé les réfugiés des différents secteurs de la commune de Kivumu et les ont transportés à la paroisse de Nyange.
>
> 8. Athanase Seromba a posé des questions aux réfugiés transférés à la paroisse sur ceux qui n'étaient pas encore arrivés ; puis, il a noté les noms des réfugiés qui manquaient sur une liste qu'il a remise au bourgmestre Grégoire Ndahimana aux fins qu'ils soient cherchés et conduits à la paroisse.
>
> 9. C'est sur la base de cette liste qu'un Tutsi du nom d'Alexis Karake, sa femme et ses enfants (plus de six) ont été conduits de la cellule de Gakoma à l'église de Nyange.
>
> […]

[32] Rapport préliminaire d'identification des sites du génocide et des massacres d'avril-juillet 1994 au Rwanda (P-4), p. 166.
[33] Les estimations des témoins sont: CBK : 3000 (Transcriptions du 19 octobre 2004 p. 10 (huis clos)) ; CNJ : 1400 (Transcriptions du 25 janvier 2005 p. 31 (audience publique)); CBT : 2000 (Transcriptions du 7 octobre 2004, p. 3 (huis clos)) ; CF23 : entre 1200 et 2000 (Transcriptions du 03 avril 2006, p. 2 (audience publique).); FE32 : entre 1500 et 2000 personnes (Transcriptions du 6 avril 2006, p. 16 (audience publique)); FE27 : 1500 (Transcriptions du 23 mars 2006, p. 64 (huis clos)).
[34] Voir la lettre du 17 mars 1994 adressée par l'Evêque de Nyundo à l'abbé Athanase Seromba (pièce à conviction D-5).
[35] Voir YAT : Transcriptions du 30 septembre 2004, pp. 19 et 21 (audience publique); CBI : Transcriptions du 4 octobre 2004, p. 23 (audience publique); BZ4 : Transcriptions du 1 novembre 2005, p. 56 (audience publique); CF23 : Transcriptions du 3 avril 2006, p. 5 (audience publique); PA1 : (Transcriptions du 20 avril 2006, p. 7 (huis clos).
[36] Voir la pièce à conviction D-5.
[37] Voir CDL : Transcriptions du 19 janvier 2005, pp. 8, 14 et 19 (audience publique); CBK : Transcriptions du 20 octobre 2004, p. 71 (huis clos) ; CF23 : Transcriptions du 31 mars 2006, pp. 36-37 (huis clos), Transcriptions du 3 avril 2006, pp. 5-6 (audience publique) ; BZ4 : Transcriptions du 1 novembre 2005, p. 57 (audience publique). Voir les conclusions de la chambre dans la section 4.3.2.

39. Vers le 12 avril 1994 ou à cette date, le bourgmestre Grégoire Ndahimana a donné l'ordre aux policiers communaux de rechercher les civils tutsis inscrits sur la liste élaborée par Athanase Seromba, tel qu'indiqué *supra*, et de les conduire à l'église. »

3.2. Des attaques perpétrées contre les Tutsis dans la commune de Kivumu causant la mort de certains civils tutsis dont Grégoire Ndakubana, Martin Karekezi et Thomas Mwendezi

3.2.1. La preuve

Les témoins du Procureur

40. Le témoin CDL, un Hutu[38], a déclaré que le soir du 7 au 8 avril 1994, une attaque dirigée par Ndungutse a été lancée contre la famille tutsie Ndakubana[39]. CDL a, en outre, soutenu que dans la nuit du 9 au 10 avril 1994, au centre de Nyange, un commerçant et un moniteur agricole du nom de Martin ont été tués[40]. Le témoin a enfin déclaré que les autorités, à savoir le bourgmestre, l'inspecteur de police judiciaire et d'autres autorités communales violaient la loi qu'ils étaient censés pourtant faire respecter[41].

41. Le témoin CBJ, un Tutsi[42], a indiqué que les massacres dans la cellule de Murambi qu'il habitait, ont commencé le 7 avril 1994. Il a expliqué, en outre, que dans la nuit du 7 avril 1994, les membres de la famille Rudakubana ont été tués par un enseignant nommé Télesphore Ndungutse. Il a ajouté également qu'entre le 7 et le 9 avril 1994, Martin, un Tutsi originaire du secteur de Ngobagoba, dans la localité de Gasake, a été tué lors d'une attaque lancée par l'homme d'affaires Gaspard Kanyarukiga[43].

42. Le témoin CBN, un Tutsi[44], a affirmé qu'un certain Thomas avait été tué lors des attaques contre les Tutsis peu après la mort du Président[45].

Les témoins de la Défense

43. Les témoins FE31, FE13, FE56 et CF14 ont soutenu que des assaillants hutus ont mené une attaque contre la famille tutsie Ndakubana[46]. FE13 et CF14 ont notamment déclaré que suite à cet incident, l'insécurité s'est accrue au niveau communal dans la nuit du 7 au 8 avril 1994[47]. Ils ont, en outre, expliqué qu'au cours de la même nuit, la famille de Thomas Mwendezi, d'ethnie tutsie, a été tuée lors d'une attaque dans le secteur de Kigali[48].

3.2.2.* Conclusions de la Chambre

44. La Chambre estime que les témoins CDL, CBJ et CBN sont crédibles lorsqu'ils parlent du meurtre de Ndakubana. En effet, leurs déclarations ne se contredisent pas, d'une part, et sont toutes corroborées par celles des témoins de la Défense, d'autre part. Elle considère, en conséquence, qu'il

[38] Fiche d'identification du témoin (P-19).
[39] Transcriptions du 19 janvier 2005, pp. 7-8 et 45 (audience publique).
[40] Transcriptions du 19 janvier 2005, p. 7 (audience publique).
[41] Transcriptions du 19 janvier 2005, pp. 45-47 (audience publique).
[42] Fiche d'identification du témoin (P-15).
[43] Transcriptions du 13 octobre 2004, p. 8 (audience publique).
[44] Fiche d'identification du témoin (P-16).
[45] Transcriptions du 15 octobre 2004, p. 51 (audience publique).
[46] FE31 : Transcriptions du 29 mars 2006, p. 11 (huis clos); FE13 : Transcriptions du 7 avril 2006, p. 17 (huis clos); FE56 : Transcriptions du 4 avril 2006, p. 43 (audience publique); CF14 : Transcriptions du 16 novembre 2005, p. 27 (huis clos).
[47] Transcriptions du 7 avril 2006, p. 17 (huis clos); Transcriptions du 16 novembre 2005, p. 27 (huis clos).
[48] Transcriptions du 7 avril 2006, p. 17 (huis clos); Transcriptions du 16 novembre 2005, p. 27 (huis clos).

est établi au-delà de tout doute raisonnable que des attaques ont été perpétrées contre les Tutsis dans la commune de Kivumu causant la mort de certains d'entre eux dont Grégoire Ndakubana, Martin Karakezi et Thomas Mwendezi.

3.3. De la recherche de refuge par les Tutsis dans des bâtiments publics et des églises dont celle de Nyange

3.3.1. La preuve

Les témoins du Procureur

45. Les témoins YAU, une Tutsie[49], et CBS, un Tutsi[50], ont déclaré avoir trouvé, à leur arrivée à l'église le 12 avril 1994, d'autres réfugiés en majorité d'ethnie tutsie[51].

46. Le témoin CBI, un Tutsi[52], a affirmé que plusieurs personnes sont arrivées à la paroisse à bord de voitures, dont l'une de marque Toyota et de couleur blanche conduite par un certain Yohana ou Jean surnommé également Jigoma[53]. Le témoin a également soutenu que des autorités étaient impliquées dans le transport des réfugiés à la paroisse. Parmi ces dernières, il a cité Grégoire Ndahimana, Clément Kayishema, Gaspard Kanyarukiga et Télesphore Ndungutse[54].

47. Le témoin CBN, un Tutsi[55], a déclaré avoir cherché refuge à l'église de Nyange à partir du 12 avril 1994[56]. Il a affirmé, en outre, que plusieurs personnes affluaient à la paroisse à bord d'un véhicule appartenant à un certain Rwamasirabo[57].

48. Le témoin CBJ[58] a déclaré qu'il a trouvé des réfugiés Tutsis à son arrivée à la paroisse de Nyange le 10 avril 1994. Il a également soutenu que dans la soirée du 10 avril 1994, Athanase Seromba avait demandé au veilleur de nuit du nom de Canisius Habiyambere et au grand séminariste Apollinaire Hakizimana de compter les réfugiés qui y passeraient la nuit. Le témoin CBJ a ajouté, enfin, que le décompte effectué indiquait le nombre de 48 réfugiés[59].

49. Le témoin CBK, un Hutu[60], a rapporté que les Tutsis attaqués par les Hutus ont choisi de se réfugier à la paroisse de Nyange qu'ils considéraient comme un « lieu sûr ». Il a souligné, en outre, que les premiers réfugiés sont arrivés à la paroisse vers le 8 avril 1994[61].

50. Le témoin CDL, un Hutu[62], a déclaré que des Tutsis se sont réfugiés de leur propre gré à la paroisse de Nyange ou au Bureau communal[63].

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* Suite à une erreur du Tribunal, la numérotation a dû être réorganisée.
[49] Fiche d'identification du témoin (P-9).
[50] Fiche d'identification du témoin (P-12).
[51] Transcriptions du 29 septembre 2004, p. 14 (audience publique); Transcriptions du 5 octobre 2004, pp. 8-9 (audience publique).
[52] Fiche d'identification du témoin (P-11).
[53] Transcriptions du 4 octobre 2004 p. 28 (audience publique).
[54] Transcriptions du 1 octobre 2004, pp. 41-42 (audience publique)
[55] Fiche d'identification du témoin (P-16).
[56] Transcriptions du 15 octobre 2004, p. 40 (audience publique).
[57] Transcriptions du 15 octobre 2004, p. 58 (audience publique).
[58] Voir la section 3.2.1.
[59] Transcriptions du 13 octobre 2004, p. 10 (audience publique).
[60] Transcriptions du 19 octobre 2004, p. 6 (huis clos); Fiche d'identification du témoin (P-17).
[61] Transcriptions du 19 octobre 2004, p. 73 (audience publique).
[62] Voir la section 3.2.1.
[63] Transcriptions du 19 janvier 2005, p. 47 (audience publique).

Les témoins de la Défense

51. Le témoin BZ3, qui est d'ethnie Hutu[64], a déclaré avoir constaté la présence de réfugiés à l'église de Nyange en participant à la messe du matin, le 11 avril 1994[65]. Le témoin a, en outre, indiqué que ces réfugiés ont également assisté à la messe[66]. Il a, par ailleurs, précisé que ces derniers n'étaient pas nombreux[67]. Selon le témoin, les Tutsis se réfugiaient à l'église parce que les Hutus incendiaient leurs maisons[68]. Le témoin BZ3 a également soutenu avoir vu des réfugiés se diriger vers le Bureau communal pendant qu'elle retournait chez elle après la messe[69]. Elle a ajouté que lorsque ces derniers y parvenaient, ils étaient ensuite réorientés vers l'église[70]. Le témoin a indiqué enfin avoir vu plusieurs personnes être conduites au Bureau communal à bord du véhicule appartenant à Aloys Rwamasirabo et conduit par Jigoma[71].

52. Le témoin CF14, un Hutu[72], a affirmé ne pas avoir vu de réfugiés au Bureau communal le 12 avril 1994, mais qu'il a toutefois appris que le bourgmestre avait fait « embarquer » des personnes très tôt le matin pour la paroisse[73].

53. Le témoin FE32, un Hutu[74], a expliqué que les Tutsis ont pris la fuite pour l'église dès qu'ils ont constaté qu'ils étaient en danger du fait des persécutions ayant cours[75]. Il a également indiqué que les Tutsis ont cherché refuge à l'église de Nyange en croyant que ce lieu pouvait leur garantir une protection contre les attaques, comme dans le passé. Le témoin a ajouté, enfin, que les Tutsis se sont rendus à l'église de leur propre gré[76].

3.3.2. Conclusions de la Chambre

54. La Chambre constate que toutes les déclarations des témoins aussi bien ceux de l'accusation que ceux de la Défense sont concordantes sur le fait que des Tutsis habitant la commune de Kivumu ont volontairement cherché refuge dans des bâtiments publics comme le Bureau communal ou dans des églises dont celle de Nyange. Elle considère donc que ce fait est établi au-delà de tout doute raisonnable.

3.4. De la remise par Athanase Seromba au Bourgmestre de la commune d'une liste de Tutsis devant être recherchés et conduits à l'église de Nyange

3.4.1. La preuve

Le témoin du Procureur

55. Le témoin CBI[77] a déclaré avoir donné à Athanase Seromba, qui lui en avait fait la demande, les noms de plusieurs personnes d'origine tutsie habitant Nyange et qui n'étaient pas présentes à la paroisse. Il a ajouté que l'accusé en a dressé une liste qu'il a ensuite transmise à Grégoire Ndahimana,

[64] Transcriptions du 8 novembre 2005, p. 29 (audience publique).
[65] Transcriptions du 31 octobre 2005, p. 44 (audience publique).
[66] Transcriptions du 8 novembre 2005, p. 27 (audience publique).
[67] Transcriptions du 31 octobre 2005, p. 45 (audience publique).
[68] Transcriptions du 31 octobre 2005, p. 45 (audience publique).
[69] Transcriptions du 31 octobre 2005, p. 45 (audience publique).
[70] Transcriptions du 31 octobre 2005, p. 45 (audience publique).
[71] Transcriptions du 8 novembre 2005, p. 22 (audience publique).
[72] Voir la section 3.2.1.
[73] Transcriptions du 16 novembre 2005, p. 40 et 42 (huis clos).
[74] Voir la section 3.2.1.
[75] Transcriptions du 29 mars 2006, p. 8 (audience publique); Transcriptions du 29 mars 2006, p. 16 (huis clos).
[76] Transcriptions du 29 mars 2006, p. 17 (huis clos).
[77] Voir la section 3.3.1.

le bourgmestre de la Commune[78]. Parmi les noms que le témoin CBI dit avoir communiqués à Seromba figurent notamment ceux d'Antoine Karake, d'Aloys Rwemera et de ceux des membres de sa famille, d'Épimaque Ruratsire et de Vénust Ryanyundo[79]. Le témoin a affirmé, en outre, que le 13 avril 1994, Antoine Karake est arrivé à l'église de Nyange à bord d'un véhicule confisqué[80].

56. Au cours du contre-interrogatoire, le témoin CBI a déclaré qu'il est arrivé à l'église de Nyange dans la soirée du mardi 12 avril 1994[81]. Il a ajouté qu'il y a trouvé environ un millier de personnes venues s'y réfugier. Il a en outre précisé, avoir rencontré Athanase Seromba le lendemain de son arrivée et que ce dernier lui aurait demandé s'il y avait encore des personnes restées dans certains secteurs de la commune. Le témoin a indiqué avoir répondu par l'affirmative en communiquant les noms de certaines personnes[82]. A la question du conseil de la Défense de savoir comment le témoin a pu constater l'absence de ces personnes dans une foule qu'il a lui-même estimée à environ 1000 personnes, ce dernier a répondu qu'il y avait une différence entre « dénombrer les personnes et les reconnaître » avant d'ajouter, plus loin, qu'il avait remarqué que ces personnes étaient absentes simplement parce qu'il les connaissait[83].

Les témoins de la Défense

57. Le témoin PA1, un Hutu[84], a affirmé être arrivé à la paroisse de Nyange le dimanche 10 avril 1994[85]. Il a déclaré n'avoir jamais entendu parler d'une liste de personnes d'origine tutsie[86].

58. Le témoin FE32 est un Hutu qui a témoigné à visage découvert sous le nom d'Anastase Nkinamubanzi. Il a déclaré que lors des événements d'avril 1994, il travaillait pour la société Astaldi qui avait la charge du chantier de construction de la route Rubengera-Gisenyi[87]. Il a, en outre, affirmé être le conducteur du bulldozer qui a détruit l'église de Nyange[88]. Il a ajouté avoir été condamné à la prison à vie par un tribunal rwandais pour ce fait[89]. Le témoin a enfin soutenu qu'il n'y a jamais eu de liste de Tutsis[90].

59. Le témoin FE27, un Hutu[91], a déclaré ne pas avoir eu connaissance de l'existence d'une liste de personnes établie par Athanase Seromba. Il a, en outre, souligné qu'il en aurait été informé[92].

3.4.2. Conclusions de la Chambre

60. La Chambre note que le témoin CBI est le seul témoin du Procureur qui a soutenu qu'Athanase Seromba a établi une liste de personnes d'origine tutsie qu'il aurait ensuite remise au bourgmestre afin que ces personnes soient recherchées et conduites à la paroisse de Nyange. Elle n'est pas convaincue par les affirmations du témoin CBI sur les possibilités qu'il avait, une fois arrivée à la paroisse de Nyange le 12 avril 1994, de se rendre immédiatement compte de l'absence d'une dizaine de personnes dans une foule de 1000 personnes. En effet, le témoin s'est contenté de dire qu'il a constaté l'absence de ces personnes par le seul fait qu'il les connaissait sans toutefois préciser les observations qu'il

[78] Transcriptions du 4 octobre 2004, p. 7 (audience publique).
[79] Transcriptions du 4 octobre 2004, p. 7 (audience publique).
[80] Transcriptions du 1 octobre 2004, p. 46 (audience publique).
[81] Transcriptions du 4 octobre 2004, p. 27 (audience publique).
[82] Transcriptions du 4 octobre 2004, p. 30 (audience publique).
[83] Transcriptions du 4 octobre 2004, pp. 30 et 31 (audience publique).
[84] Transcriptions du 20 avril 2006, p. 38 (huis clos).
[85] Transcriptions du 20 avril 2006, p. 7 (huis clos).
[86] Transcriptions du 20 avril 2006, p. 26 (huis clos).
[87] Transcriptions du 28 mars 2006, p. 25 (audience publique).
[88] Transcriptions du 28 mars 2006, p. 35 (audience publique).
[89] Transcriptions du 5 avril 2006, p. 30 (audience publique).
[90] Transcriptions du 28 mars 2006 p. 55 (audience publique).
[91] Transcriptions du 23 mars 2006, pp. 38 et 54 (huis clos).
[92] Transcriptions du 23 mars 2006 p. 27 (audience publique).

aurait faites ou les moyens qu'il aurait utilisés pour s'en rendre compte. Elle estime, en conséquence, que le témoin CBI n'est pas crédible. Elle en conclut que le Procureur n'a pas établi au-delà de tout doute raisonnable qu'Athanase Seromba a dressé une liste de personnes qu'il aurait remise au bourgmestre pour les rechercher et les conduire à la paroisse de Nyange.

4. Des evenements du 10 AU 11 avril 1994

4.1. L'Acte d'accusation

61. L'Acte d'accusation allègue ce qui suit :

> « 10. Vers le 10 avril 1994 ou à cette date, plusieurs réunions importantes ont été tenues à la paroisse de Nyange et au bureau communal. Athanase Seromba, Fulgence Kayishema, Gaspard Kanyarukiga et d'autres personnes inconnues du Procureur ont assisté à ces réunions. »
>
> 11. Lors de ces réunions, il a été décidé de demander des gendarmes à la préfecture de Kibuye, afin de rassembler dans l'église de Nyange tous les civils tutsis de la commune de Kivumu dans le but de les exterminer.
>
> […]
>
> 36. Vers le 10 avril ou à cette date, plusieurs réunions importantes ont été tenues à la paroisse de Nyange et au bureau communal. Athanase Seromba, Fulgence Kayishema, Gaspard Kanyirukiga et d'autres personnes inconnues du Procureur ont participé à ces réunions.
>
> 37. Lors desdites réunions, ils ont décidé de demander à la préfecture de Kibuye de leur envoyer des gendarmes, de rassembler tous les civils tutsis de la commune de Kivumu dans l'église de Nyange et de les exterminer. »

4.2. De la réunion du 10 avril 1994

4.2.1. La preuve

Le témoin du Procureur

62. Le témoin YAT, un Tutsi[93], a déclaré qu'une réunion du conseil paroissial s'est tenue dans les bâtiments des prêtres vers le 10 avril 1994 »[94] à laquelle il a participé ainsi qu'Athanase Seromba, Kabwana, le bourgmestre Ndahimana, l'inspecteur de police judiciaire Fulgence Kayishema, l'inspecteur Aloys Uwoyiremye et d'autres membres du conseil paroissial[95]. Il a expliqué qu'il s'agissait d'une réunion extraordinaire dont l'ordre du jour était lié à l'insécurité qui régnait dans la commune suite à la mort du Président Habyarimana et aux attaques perpétrées contre les Tutsis[96]. Le témoin YAT a, en outre, indiqué que lors de cette réunion, Seromba aurait affirmé que le président Habyarimana avait été tué par les *Inkotanyi* et a estimé que la question des personnes tuées était un problème d'ordre politique qui ne relevait pas en tant que tel de la compétence du conseil paroissial[97]. Le témoin a également souligné que cette réunion du comité paroissial était la dernière à laquelle il a participé[98].

[93] Fiche d'identification du témoin (P-10).
[94] Transcriptions du 29 septembre 2004, p. 49 (audience publique).
[95] Transcriptions du 29 septembre 2004, p. 49 (audience publique).
[96] Transcriptions du 29 septembre 2004, p. 49 (audience publique).
[97] Transcriptions du 29 septembre 2004, pp. 48-49 (audience publique); Transcriptions du 30 septembre 2004, p. 22 (audience publique).
[98] Transcriptions du 30 septembre 2004, p. 22 (audience publique).

63. Le témoin YAT a, par ailleurs, déclaré que Fulgence Kayishema lui aurait dit le 11 avril 1994 qu'une réunion aurait eu lieu le 10 avril 1994 à la paroisse de Nyange au cours de laquelle la décision de tuer les Tutsis a été prise. Il a ajouté que Kanyarukiga, Athanase Seromba, le bourgmestre Ndahimana et Kayishema étaient présents à cette réunion[99].

Le témoin de la Défense

64. Le témoin FE27 a affirmé que lors de la réunion du 11 avril 1994, le bourgmestre Grégoire Ndahimana a déclaré avoir rencontré Athanase Seromba la veille de cette réunion et que ce dernier lui aurait parlé des Tutsis qui s'étaient réfugiés à l'église de Nyange[100].

4.2.2. Conclusions de la Chambre

65. La Chambre note que la Défense ne produit aucune preuve de nature à contredire le témoignage du témoin de YAT sur la tenue d'une réunion du conseil paroissial à l'église de Nyange le 10 avril 1994. En effet, le témoin de la Défense FE27 ne contredit nullement le témoin YAT lorsqu'il dit avoir entendu le bourgmestre informer les participants à la réunion du 11 avril 1994 de la rencontre qu'il avait eue avec Athanase Seromba la veille, c'est-à-dire le 10 avril 1994. La Chambre estime qu'une telle rencontre a bien pu s'inscrire dans le cadre de la réunion du conseil paroissial du 10 avril 1994 qu'évoque le témoin YAT qui a affirmé être membre dudit conseil, ce qui n'a pas été contesté par la Défense. Elle est également d'avis que les détails fournis par le témoin YAT sur la tenue de cette réunion sont cohérents. La Chambre considère, en conséquence, qu'il est crédible sur la tenue de la réunion du conseil paroissial du 10 avril 1994. Elle estime toutefois que le témoin YAT ne peut être considéré crédible sur la tenue d'une deuxième réunion le 10 avril 1994 à la paroisse de Nyange dans la mesure où cette information qui lui a été rapportée n'est soutenue par aucun autre témoignage. S'agissant enfin du témoin FE27 qui n'a pas spécifiquement déposé sur la réunion du conseil paroissial du 10 avril 1994, la Chambre estime qu'il n'en demeure pas moins crédible sur la tenue d'une réunion à la paroisse le 10 avril 1994, son témoignage étant renforcé par le récit du témoin YAT.

66. Au regard de ce qui précède, la Chambre conclut que le Procureur a établi au-delà de tout doute raisonnable qu'une réunion du conseil paroissial a eu lieu le 10 avril 1994 à la paroisse de Nyange et à laquelle ont notamment participé le témoin YAT, Athanase Seromba et d'autres personnes.

4.3. De la réunion du 11 avril 1994 au Bureau communal

4.3.1. La preuve

Les témoins du Procureur

67. Le témoin CNJ, un Hutu[101], a déclaré que son oncle l'a informé qu'une réunion s'est tenue au Bureau communal le 11 avril 1994 au cours de laquelle des décisions ont été prises dont notamment celle de regrouper les Tutsis à l'église de Nyange[102]. Il a, en outre, affirmé que n'ayant pas participé aux réunions, il n'était pas en mesure de dire exactement quand la décision de détruire l'église avait été prise[103].

[99] Transcriptions du 29 septembre 2004, p. 49 (audience publique).
[100] Transcriptions du 23 mars 2006, p. 22 (huis clos).
[101] Transcriptions du 24 janvier 2005, p. 31 (audience publique); Fiche d'identification du témoin (P-24).
[102] Transcriptions du 24 janvier 2005, p. 33 (huis clos).
[103] Transcriptions du 25 janvier 2005, p. 18 (audience publique).

68 Le témoin CDL, un Hutu[104], a expliqué que les réunions du comité de sécurité se tenaient au Bureau communal ou à la paroisse. Il a ajouté que ces réunions se tenaient régulièrement à l'initiative du bourgmestre[105]. Il a également précisé que les chefs de service et les autorités religieuses étaient invités à participer à ces réunions[106] Le témoin a soutenu enfin qu'Athanase Seromba a participé à la réunion du 11 avril 1994 du comité de sécurité[107].

Les témoins de la Défense

69. Le témoin FE13 a déclaré que la réunion du 11 avril 1994 était présidée par le bourgmestre Grégoire Ndahimana [108] qui aurait informé l'assistance que l'ordre du jour porterait sur des questions de sécurité et le sort des réfugiés tutsis[109]. Il a ajouté que seule une situation exceptionnelle justifiait la tenue d'une telle réunion[110]. Le témoin a, en outre, expliqué qu'en général, toute réunion traitant des questions de sécurité impliquait également la présence des conseillers de secteur qui faisaient des recommandations aux autorités[111] ainsi que celle de l'inspecteur de police judiciaire en charge des questions sécuritaires dans la commune et du président du tribunal de canton[112]. Il a par ailleurs indiqué que participaient également à cette réunion de nombreux Tutsis parmi lesquels Charles Mugenzi, responsable du centre de santé de Nyange, Boniface Gatare, encadreur de la jeunesse de la commune et Lambert Gatare, responsable politique[113]. Le témoin FE13 a enfin déclaré que des décisions ont été arrêtées à l'issue de la réunion dont notamment le regroupement des Tutsis à la paroisse de Nyange[114] et la demande de renfort militaire à la préfecture de Kibuye[115].

70. Le témoin FE27**,** un Hutu[116], a déclaré qu'il était présent à la réunion du 11 avril 1994 qui s'est tenue au bureau communal. Il a indiqué que cette réunion qui portait d'ordinaire sur les problèmes liés au développement économique de la commune, s'est transformée en réunion de comité sécurité à l'initiative du bourgmestre[117]. Le témoin a ajouté qu'Athanase Seromba n'a pas participé à cette réunion[118]. Il a, par ailleurs, déclaré qu'au cours de cette réunion, le bourgmestre Ndahimana a lu une lettre que lui a adressée Seromba et aux termes de laquelle ce dernier l'informait de sa décision de ne pas y participer tout en restant solidaire des décisions qui en sortiraient.

71. Le témoin CF23, un Hutu[119], a déclaré que la réunion du 11 avril 1994 a été convoquée par le bourgmestre de la commune, Ndahimana. Il a ajouté que cette réunion avait pour objectif de faire la mise au point de la situation, de prendre toutes les mesures nécessaires pour faire cesser les tueries et enfin de discuter de l'organisation de l'accueil des réfugiés à la paroisse de Nyange[120]. Il a indiqué que des Tutsis dont notamment Charles Mugenzi et Boniface Gatare ont participé activement participé à cette réunion[121]. Le témoin a, par ailleurs, souligné que les participants à cette réunion étaient contre les tueries. Il a, en outre, déclaré qu'Athanase Seromba n'était pas présent à cette réunion mais qu'il avait écrit une lettre au bourgmestre qui a été lue au cours de la réunion[122]. Dans cette lettre, a

[104] Voir la section 3.2.1.
[105] Transcriptions du 19 janvier 2005, p. 19 (huis clos).
[106] Transcriptions du 19 janvier 2005, pp. 8 et 9 (huis clos).
[107] Transcriptions du 19 janvier 2005, pp. 51 (audience publique).
[108] Transcriptions du 12 avril 2006, contre-interrogatoire, p. 19 (audience publique).
[109] Transcriptions du 7 avril 2006, p. 21 (audience publique).
[110] Transcriptions du 7 avril 2006, p. 18 (huis clos).
[111] Ibid.
[112] Ibid.
[113] Transcriptions du 7 avril 2006, pp. 19-20 (huis clos).
[114] Ibid.
[115] Transcriptions du 7 avril 2006, p. 21 (audience publique).
[116] Voir la section 3.2.1.
[117] Transcriptions du 7 avril 2006, p. 19 (huis clos).
[118] Transcriptions du 7 avril 2006, p. 22 (audience publique).
[119] Transcriptions du 30 mars 2006, pp. 9-10 (huis clos); Fiche d'identification du témoin (D-74).
[120] Transcriptions du 31 mars 2006 (huis clos), p. 3.
[121] Ibid.
[122] Transcriptions du 31 mars 2006, p. 5 (huis clos).

poursuivi le témoin, Seromba demandait à la commune d'assurer la protection des réfugiés ainsi que leur approvisionnement en nourriture en suggérant aux autorités de solliciter l'aide de la Caritas. Le témoin CF23 a expliqué, enfin, qu'à l'issue de cette réunion, le bourgmestre a demandé du renfort de gendarmes de la préfecture de Kibuye, comme le lui avaient recommandé les participants[123].

4.3.2. Conclusions de la Chambre

72. La Chambre considère que les témoignages de CNJ et CDL ne sont pas fiables. Elle note, en effet, que le premier a témoigné par ouï-dire. Quant au second témoin, la Chambre observe que rien dans son témoignage n'établit qu'il aurait lui-même assisté à la réunion du 11 avril 1994. En effet, suite à une question du conseil de la Défense portant sur la réunion du 13 avril 1994, le témoin a dit ce qui suit : « Je crois que j'ai bien dit que, de par mon témoignage, il y a des faits dont j'ai été témoin oculaire […] et les autres qui m'ont été rapportés – notamment ces réunions»[124]. Par ailleurs, le témoin n'a pas pu justifier de façon convaincante le fait qu'il ait omis de mentionner la présence des religieux dans ses déclarations antérieures alors qu'il le fait dans son témoignage devant la Chambre. En effet, à la question du conseil de la Défense de savoir pourquoi, devant les tribunaux rwandais, il n'a pas mentionné les religieux, au moment où il donnait les noms des participants aux réunions du comité de sécurité, le témoin a répondu que quand il a commencé à témoigner en 1999, il ne pouvait pas « tout dire d'un seul coup parce qu'à l'époque, ce n'était pas clair de comprendre la raison de dire tout sur la vérité »[125].

73. Les témoins FE27 et CF23 ne peuvent pas être considérés comme crédibles sur ce fait en raison des contradictions qui existent entre leurs témoignages et leurs déclarations antérieures. En ce qui concerne FE27, la Chambre note que dans sa déclaration du 25 janvier 2002, ce témoin a déclaré ce qui suit: « L'abbé Seromba participait aussi à cette réunion car on examinait le problème de rassembler les réfugiés à l'église pour assurer leur sécurité »[126]. Le témoin confirme avoir signé cette déclaration et avoir tenu ces propos[127]. Par contre, il a dit avoir menti aux membres du comité « vérité » « puisqu'ils disaient que si je déclarais que Seromba était à la réunion, j'allais être libéré »[128]. S'agissant de CF23, la Chambre relève que dans sa déclaration du 14 août 2002, ce témoin a déclaré ce qui suit : « […] plusieurs personnes ont assisté à cette réunion, je me rappelle avoir reconnu […] le Père Seromba […] »[129]. Le témoin a soutenu n'avoir signé que sur la dernière page de sa déclaration du 14 août 2002 quoique sa signature apparaisse sur chacune des pages composant ladite déclaration[130]. Le témoin a également contesté la validité de cette déclaration et déclaré que les extraits qui lui ont été lus ne reflétaient pas ses propos, et qu'il n'accordait de valeur qu'aux documents écrits de sa propre main, notamment celui contenant ses aveux[131]. Enfin, le témoin a soutenu devant la Chambre qu'il avait fait mention de la lettre de Seromba dans la déclaration qu'il a faite aux enquêteurs du Tribunal. La Chambre constate toutefois que cette mention n'y figure pas[132].

74. La Chambre considère que le témoin FE13 est crédible en raison des fonctions qu'il exerçait au sein de la commune[133], de sa présence à la réunion et du récit qu'il en donne. Par ailleurs, les informations fournies par le témoin FE13 concernant la lecture de la lettre d'Athanase Seromba au cours de cette réunion ont été corroborées par les témoins FE27 et CF23.

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[123] Transcriptions du 31 mars 2006, p. 10 (audience publique).
[124] Transcriptions du 19 janvier 2005, p. 54 (audience publique).
[125] Transcriptions du 19 janvier 2005, pp. 53-54 (audience publique).
[126] Déclaration du témoin FE27 au comité « vérité » du 25 janvier 2002 (P-42), p. 2.
[127] Transcriptions du 24 mars 2006, p. 17 (huis clos).
[128] Transcriptions du 24 mars 2006, p. 18 (huis clos).
[129] Déclaration du témoin CF23 aux enquêteurs du Tribunal du 14 août 2002 (P-49), p. 3.
[130] Transcriptions du 3 avril 2006, p. 27 (huis clos).
[131] Transcriptions du 3 avril 2006, pp. 30-31 (huis clos).
[132] Transcriptions du 3 avril 2006, p. 12 (huis clos).
[133] Transcriptions du 7 avril 2006, p. 11 (huis clos), p. 23 (audience publique), p. 35 (huis clos); Fiche d'identification du témoin (D-86).

75. Au regard de ce qui précède, la Chambre considère qu'il est établi au-delà de tout doute raisonnable qu'une réunion dite « réunion de sécurité » s'est tenue au Bureau communal le 11 avril 1994. Elle considère toutefois qu'il n'est pas établi au-delà de tout doute raisonnable qu'Athanase Seromba a participé à cette réunion.

4.4. De l'arrivée à l'église de Nyange de gendarmes en provenance de la préfecture de Kibuye

4.4.1. La preuve

Le témoin du Procureur

76. Le témoin CDL, un Hutu[134], a déclaré avoir vu des gendarmes le 10 ou le 11 avril 1994. Il a indiqué ignorer les circonstances de l'arrivée de ces gendarmes qui, selon lui, étaient accompagnés par le bourgmestre. Le témoin a également affirmé ignorer si les gendarmes étaient arrivés à la demande d'Athanase Seromba. Il a toutefois fait remarquer qu'un gendarme se tenait toujours aux côtés de Seromba durant les événements d'avril 1994[135].

Les témoins de la Défense

77. Le témoin FE55, un Hutu[136], a affirmé qu'au cours de la réunion du 11 avril 1994, la décision avait été prise de demander un renfort de gendarmes de la préfecture Kibuye pour assurer la sécurité des réfugiés de la paroisse de Nyange[137].

78. Le témoin BZ1, qui est d'ethnie Hutu[138], a déclaré qu'il y avait environ quatre gendarmes armés qui étaient présents à la paroisse. Selon le témoin, ces gendarmes seraient arrivés vers le 13 avril 1994, peu avant que la situation ne se détériore[139].

79. Le témoin PA1[140], a soutenu que quatre gendarmes sont arrivés à la paroisse de Nyange le mardi 12 avril 1994[141].

4.4.2. Conclusions de la Chambre

80. La Chambre note que les déclarations du témoin du Procureur CDL et des témoins de la Défense FE55, BZ1 et PA1 sont concordantes sur la présence de gendarmes à la paroisse de Nyange au moment des événements d'avril 1994, même s'ils divergent légèrement sur la date de leur arrivée sur les lieux. Elle observe, en outre, que le témoin FE55 a soutenu en plus que l'arrivée des gendarmes est la mise en œuvre d'une décision prise au cours de la réunion du 11 avril 1994 dite « réunion de sécurité ». La Chambre constate également que cette thèse est corroborée par les témoins FE13 et CF23 dans leur témoignage respectif[142].

81. Au regard de ce qui précède, la Chambre estime que les témoins CDL, FE55 et BZ1 sont crédibles. Elle considère, en conséquence, qu'il est établi au-delà de tout doute raisonnable que le 11 avril 1994, des gendarmes sont arrivés à l'église de Nyange en provenance de la préfecture de Kibuye.

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[134] Voir la section 3.2.1.
[135] Transcriptions du 19 janvier 2005, p. 71 (audience publique).
[136] Déclaration du témoin FE55 aux enquêteurs du Tribunal du 13 mars 2003 (P-61), p. 1.
[137] Transcriptions du 12 avril 2006, p. 42 (audience publique).
[138] Transcriptions du 10 novembre 2005, p. 30 (audience publique).
[139] Transcriptions du 2 novembre 2005, pp. 66-67 (audience publique).
[140] Voir la section 3.4.1.
[141] Transcriptions du 20 avril 2006, p. 16 (huis clos).
[142] Voir la section 4.3.1.

5. Des évenements du 12 au 14 avril 1994 à la paroisse de Nyange

5.1. L'Acte d'accusation

82. L'Acte d'accusation allègue ce qui suit :

> 12. À partir du 12 avril 1994 ou vers cette date, les réfugiés ont été placés en détention par les gendarmes et encerclés par des miliciens et des *Interahamwe* munis d'armes de type traditionnel et classique. Le père Athanase Seromba a effectivement empêché les réfugiés de s'alimenter et ordonné aux gendarmes de tirer sur tout *Inyenzi* (c'est-à-dire Tutsi) qui essaierait de se procurer de quoi manger au presbytère ou dans la bananeraie de la paroisse. Il a refusé de célébrer la messe pour eux et a souligné qu'il se refusait d'officier pour des *Inyenzi*.
>
> 13. Vers le 12 avril 1994 ou à cette date, Athanase Seromba a renvoyé de la paroisse quatre employés tutsis (Alex, Félécien, Gasore et Patrice). Il les a obligés à quitter la paroisse au moment même où les *Interahamwe* et les miliciens commençaient à attaquer les personnes réfugiées dans la paroisse.
>
> 14. Le père Seromba savait que le fait de renvoyer ces employés concourrait à leur mort. En fait, un seul d'entre eux (Patrice) a pu retourner à la paroisse, grièvement blessé, ce qui n'a pas empêché Athanase Seromba de lui interdire l'accès de l'église. Il a été tué par les *Interahamwe* et les miliciens.
>
> […]
>
> 38. Vers le 12 avril 1994 ou cette date, le père Seromba a présidé une réunion tenue dans le bureau de sa paroisse, réunion à laquelle ont participé entre autres personnes, Grégoire Ndahimana et Fulgence Kayishema. Immédiatement après cette réunion, Fulgence Kayishema a déclaré que Kayiranga (riche homme d'affaires tutsi) devait être trouvé et conduit à l'église.
>
> 40. La deuxième phase du plan consistait à maintenir les réfugiés à l'intérieur de l'église en la faisant encercler par les *Interahamwe* et les miliciens. [...]
>
> 41. C'est à ces fins que vers le 12 avril 1994, les gendarmes ont emprisonné les réfugiés dans l'église de Nyange, laquelle était encerclée par les *Interahamwe* et les miliciens.
>
> 42. Athanase Seromba a empêché les réfugiés d'avoir accès aux sanitaires de la paroisse, et de s'alimenter en ordonnant aux gendarmes de tirer sur tout *Inyenzi* qui tenterait de se procurer de la nourriture au Presbytère ou dans la bananeraie de la paroisse.
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> 43. Vers le 12 avril 1994 ou à cette date, le père Athanase Seromba a présidé dans l'après-midi une réunion tenue avec Grégoire Ndahimana et Fulgence Kayishema. Peu après, le bourgmestre Ndahimana a déclaré, « *Nous avons décidé que les plus riches seront tués, les autres peuvent rentrer chez eux* ».

5.2. De l'encerclement des réfugiés par des miliciens et Interahamwe munis d'armes de type traditionnel et classique

5.2.1. La preuve

Les témoins du Procureur

83. Le témoin CBS[143] a déclaré que l'église était encerclée par des gendarmes[144]. Quant au témoin CBK[145], il a soutenu que l'église était encerclée par des assaillants[146].

[143] Voir la section 3.3.1.

Les témoins de la Défense

84. Le témoin PA1[147] a déclaré que dans la soirée du 11 avril 1994, « beaucoup de gens » ont encerclé l'église où se trouvaient les réfugiés[148]. Quant au témoin FE56, un Hutu[149], il a indiqué que Kayishema avait fait encercler l'église de Nyange par des « gens »[150]. Il a, en outre, ajouté que des militaires étaient positionnés près des portes du presbytère afin d'en bloquer l'entrée[151].

5.2.2. Conclusions de la Chambre

85. La Chambre note qu'à l'exception du témoin CBS qui parle de l'encerclement de l'église par les gendarmes seulement, le fait qu'à partir du 12 avril 1994, des miliciens et autres *Interahamwe* ont encerclé l'église de Nyange où se trouvaient les réfugiés, est corroboré aussi bien par le témoin du Procureur CBK que par les témoins de la Défense PA1 et FE56. En conséquence, elle considère que ce fait est établi au-delà de tout doute raisonnable.

5.3. De l'interdiction faite par Athanase Seromba aux réfugiés de s'alimenter dans la bananeraie de la paroisse et de l'ordre qu'il aurait donné aux gendarmes de tirer sur tout « Inyenzi » qui essaierait de s'y procurer des bananes

5.3.1. La preuve

Les témoins du Procureur

86. Le témoin CBS[152] a déclaré à trois reprises qu'Athanase Seromba aurait empêché les réfugiés de s'alimenter dans la bananeraie de la paroisse[153]. Il a expliqué notamment que le mercredi 13 avril 1994, des enseignants, qui se trouvaient parmi les réfugiés tutsis, ont demandé de la nourriture à Seromba qui aurait refusé de leur en donner. Suite à ce refus, certains réfugiés se seraient alors de leur propre chef rendus dans la bananeraie de la paroisse pour y couper des bananes qu'ils ont grillées dans la cour de la paroisse[154]. Ayant découvert ces réfugiés, Seromba leur aurait interdit de retourner dans la bananeraie et aurait également donné l'ordre aux gendarmes de tirer sur tout réfugié qui s'y aventurerait, en traitant les réfugiés d'« *Inyenzi* ». Enfin le témoin a souligné qu'il se trouvait près de Seromba lorsque ce dernier a tenu ces propos[155].

87. Le témoin CBJ[156] a soutenu également que les réfugiés avaient demandé de la nourriture à Athanase Seromba et que ce dernier leur avait opposé un refus. Il a également expliqué qu'en compagnie d'autres réfugiés, ils seraient alors allés couper des bananes dans la bananeraie de la paroisse. A la vue de ces bananes, Seromba se serait mis en colère et leur aurait fait remarquer qu'il lui

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[144] Transcriptions du 5 octobre 2004, p. 9 (audience publique).
[145] Voir la section 3.3.1.
[146] Transcriptions du 19 octobre 2004, pp. 19-20 (huis clos).
[147] Voir la section 3.4.1.
[148] Transcriptions du 20 avril 2006, p. 14 (huis clos).
[149] Voir la section 3.2.1.
[150] Transcriptions du 3 avril 2006, p. 54 (huis clos).
[151] Transcriptions du 3 avril 2006, p. 54 (huis clos).
[152] Voir la section 3.3.1.
[153] Transcriptions du 5 octobre 2004, pp. 10 et 18-19 (audience publique); Transcriptions du 6 octobre 2004, pp. 29-30 (audience publique).
[154] Transcriptions du 6 octobre 2004, p. 30 (audience publique).
[155] Transcriptions du 5 octobre 2004, p. 19 (audience publique).
[156] Voir la section 3.3.1.

avait manqué de respect en se rendant dans la bananeraie. Seromba se serait alors adressé aux gendarmes en ces termes : « Quiconque retourne au champ de bananes pour y couper des régimes de bananes, vous devriez tirer sur cette personne. »[157]

88. Le témoin CBN, un Tutsi[158], a déclaré à deux reprises, qu'Athanase Seromba a interdit aux réfugiés de s'alimenter dans la bananeraie le 14 avril 1994. Il a ajouté que Seromba a ensuite ordonné aux gendarmes de tirer sur tout réfugié qui y retournerait[159].

Le témoin de la Défense

89. Le témoin CF23[160] a déclaré, à deux reprises, qu'Athanase Seromba n'a jamais interdit aux réfugiés de se rendre à la bananeraie et qu'il a vu des réfugiés dans la bananeraie lorsqu'il s'y est personnellement rendu le 13 avril 1994[161]. Il a, en outre, déclaré qu'à la même date, il a aperçu des réfugiés se promenant librement dans la cour de l'église et allant même couper des bananes[162]. Le témoin a enfin indiqué qu'il n'était pas présent sur les lieux le 14 avril 1994[163].

5.3.2 Conclusions de la Chambre

90. La Chambre estime que le témoin CBS est un témoin fiable dans la description qu'il donne des lieux et de l'emplacement des bananeraies[164]. En outre, les ses déclarations lors du contre-interrogatoire concordent avec celles qu'il a faites au cours de l'interrogatoire principal. Il n'y a pas non plus de contradictions majeures entre les déclarations antérieures du témoin CBS et son témoignage devant la Chambre[165]. A ce propos, la Chambre estime que le fait que les événements discutés ne soient pas mentionnés dans sa déclaration du 14 février 1999[166] ne peut pas être perçu comme une contradiction dans la mesure où aucune question sur cet événement ne lui avait été posée au moment où il faisait cette déclaration. Par ailleurs, la Chambre note que le témoin était présent sur les lieux au moment du déroulement des faits. De ce qui précède, la Chambre considère que le témoin CBS est crédible tant sur l'interdiction que sur l'ordre que Seromba aurait donné aux gendarmes.

91. La Chambre estime que le témoin CBJ est également crédible sur ces deux points. En effet, elle ne constate pas de contradiction entre les déclarations antérieures du témoin et son témoignage devant la Chambre. A cet égard, elle estime que si les événements discutés ne figurent pas dans les déclarations du témoin du 23 mars 1997[167] et du 24 juin 1997[168], cela s'explique par le fait qu'aucune question y relative ne lui a été posée au moment où il faisait ces déclarations. Elle observe que seules

[157] Transcriptions du 11 octobre 2004, p. 54 (audience publique).
[158] Voir la section 3.3.1.
[159] Transcriptions du 15 octobre 2004, p. 43 (audience publique); Transcriptions du 18 octobre 2004, p. 3 (audience publique).
[160] Voir la section 4.3.1.
[161] Transcriptions du 31 mars 2006, p. 24 (audience publique).
[162] Transcriptions du 3 avril 2006, p. 15 (huis clos).
[163] Transcriptions du 3 avril 2006, p. 15 (huis clos).
[164] Transcriptions du 6 octobre 2004, p. 31 (audience publique).
[165] Il y a une contradiction mineure entre les propos du témoin lors de son témoignage et sa déclaration du 17 août 2000 (Déclaration du témoin CBS aux enquêteurs du Tribunal du 17 août 2000 (déclaration non soumise comme pièce à conviction), p. 3; cité au témoin : Transcriptions du 6 octobre 2004, p. 28 (audience publique). Dans cette déclaration, le témoin affirme que les réfugiés avaient délégué un groupe d'enseignants pour aller demander de la nourriture à Athanase Seromba alors que dans son témoignage, le témoin soutient que ce sont les enseignants qui ont pris l'initiative de rencontrer Seromba. Lors du contre-interrogatoire, le conseil de la Défense a demandé au témoin de commenter cette contradiction, faisant référence, de manière erronée, à la déclaration du 15 novembre 1995. Le témoin a alors expliqué qu'il y avait eu une erreur de transcription, ajoutant que les réfugiés n'avaient jamais envoyé de délégation et que les enseignants ont pris eux-mêmes l'initiative de s'adresser au prêtre (Transcriptions du 6 octobre 2004, pp. 27-29 (audience publique).
[166] Déclaration du témoin CBS aux autorités judiciaires rwandaises du 14 octobre 1999 (D-19).
[167] Déclaration du témoin CBJ aux enquêteurs du Tribunal du 23 mars 1997 (D-26).
[168] Déclaration du témoin CBJ aux enquêteurs du Tribunal du 24 juin 1997 (D-25).

des contradictions mineures ont été relevées portant sur le nombre d'assaillants hutus[169], le nombre de réfugiés tutsis dans l'église[170] et le nombre de tutsis dans la commune de Kivumu[171] et qui n'étaient pas de nature à remettre en cause la crédibilité du témoin CBJ.

92. La Chambre considère par ailleurs que le témoignage contradictoire qu'a livré le témoin FE36[172] n'entache pas la crédibilité du témoin CBJ. Aucune question n'a été posée au témoin CBJ sur la version des événements donnée par FE36. Elle note également que le témoin FE36 n'est pas un témoin crédible puisqu'il a admis avoir menti devant la Chambre[173]. A cet égard, la Chambre note en particulier que le témoin FE36 a affirmé que CBJ a dit que toute sa famille a été tuée alors que CBJ n'a en réalité déclaré que seulement certains membres de sa famille sont morts[174].

93. La Chambre considère que le témoignage de CBN n'est pas fiable sur ce point. Il y a contradiction entre les propos tenus par le témoin lors de son interrogatoire et ceux qu'il a tenus dans une déclaration faite le 17 août 2000[175]. Dans cette dernière, le témoin a au contraire affirmé que l'interdiction d'entrer dans la bananeraie avait été prononcée par un gendarme en présence d'Athanase Seromba. De plus cette discussion entre Seromba et les gendarmes n'aurait pas eu lieu devant l'église mais dans la bananeraie. Le témoin a affirmé que la vraie version est celle donnée devant la Chambre et que la précédente version est le fruit d'un malentendu, l'interdiction émanant de Seromba et répétée plus tard par le gendarme[176].

94. S'agissant du témoin de la Défense CF23, la Chambre note qu'il a reconnu qu'il n'était pas présent sur les lieux le 14 avril 1994. Elle estime, par ailleurs, très peu conformes à la réalité, les affirmations du témoin selon lesquelles les réfugiés avaient la liberté de mouvement entre l'église et la bananeraie alors justement qu'à la date du 13 avril 1994 où il dit avoir constaté ce fait, l'église était déjà encerclée par nombre de miliciens et autres *Interahamwe* dont les attaques violentes des précédents jours ont justifié le choix de l'église par les réfugiés comme sanctuaire de protection. A la lumière des constatations qui précèdent, la Chambre considère que le témoin CF23 n'est pas crédible.

95. Au regard de ce qui précède, la Chambre considère qu'il est établi au-delà de tout doute raisonnable qu'entre 13 et le 14 avril 1994, Athanase Seromba a interdit aux réfugiés de s'alimenter dans la bananeraie de la paroisse et qu'il a ordonné, en outre, aux gendarmes de tirer sur les réfugiés qui s'y rendraient.

96. La Chambre constate par contre que le Procureur n'a pas présenté d'éléments de preuve pour appuyer l'allégation selon laquelle Seromba a interdit aux réfugiés tutsis de s'alimenter dans le presbytère. La Chambre considère donc que ce fait n'est pas établi au-delà de tout doute raisonnable.

5.4. Du refus d'Athanase Seromba de célébrer la messe pour des « Inyenzi »

[169] Transcriptions du 13 octobre 2004, pp. 31-32 (audience publique).
[170] Transcriptions du 13 octobre 2004, pp. 10, 12 et 15 (audience publique).
[171] Transcriptions du 13 octobre 2004, pp. 14-15 (audience publique).
[172] Transcriptions du 21 novembre 2005, pp. 17-19 (huis clos).
[173] Transcriptions du 28 novembre 2005, pp. 4 et 6 (huis clos). *Seromba*, Décision relative à la requête de la Défense aux fins de voir ordonner l'ouverture d'une enquête de les circonstances et les causes réelles de rétractation du témoin portant le pseudonyme FE36, 20 avril 2006.
[174] FE36: Transcriptions du 28 novembre 2005, p. 7 (huis clos); CBJ : Transcriptions du 15 octobre 2004, p. 48 (audience publique.
[175] Déclaration du témoin CBN aux enquêteurs du Tribunal du 17 août 2000 (déclaration non soumise comme pièce à conviction), p. 3; cité au témoin : Transcriptions du 18 octobre 2004, p. 3 (audience publique).
[176] Transcriptions du 18 octobre 2004, pp. 3-4 (audience publique).

5.4.1. La preuve

Les témoins du Procureur

97. Le témoin CBN[177] a déclaré que le 14 avril 1994, Athanase Seromba a été approché par plusieurs réfugiés tutsis dont les enseignants Bonera, Ruteghesa et Rwakayiro qui lui auraient demandé de célébrer une messe en leur faveur[178]. Le témoin a ajouté qu'Athanase Seromba aurait refusé de célébrer cette messe en arguant du fait qu'il n'avait pas de « temps à perdre »[179]. Le témoin a, en outre, expliqué que ce refus allait à l'encontre de la volonté des réfugiés qui souhaitaient cette messe[180]. Il a également expliqué qu'un réfugié tutsi aurait alors annoncé aux autres réfugiés qu'il leur fallait prier ensemble compte tenu du refus de Seromba de célébrer une messe à leur intention[181]. Le témoin a, enfin, précisé que Seromba se trouvait devant l'église lorsqu'il a exprimé son refus[182].

98. Le témoin CBI[183] a déclaré que vers le 13 avril 1994, Athanase Seromba est entré dans l'église pour enlever les calices qu'il a emportés avec lui au « niveau supérieur de son logement »[184].

99. Le témoin CBJ[185] a, en outre, déclaré qu'il n'y a pas eu de messe à la paroisse de Nyange dimanche 10 avril 1994. Il a ajouté qu'il n'était pas possible de célébrer la messe parce que la « situation était critique »[186]. Le témoin a également soutenu que le 14 avril 1994, Athanase Seromba a enlevé de l'église les soutanes des prêtres ainsi que les calices chargés d'hosties. Le témoin a enfin souligné qu'il a appris plus tard que Seromba avait emporté avec lui ces objets au presbytère[187].

100. Le témoin CBK[188] a déclaré que des messes avaient été célébrées dans l'ancienne salle des réunions pendant les événements survenus à la paroisse de Nyange en avril 1994[189].

Le témoin de la Défense

101. Le témoin PA1[190] a affirmé qu'à partir du 11 avril 1994, la décision avait été prise de ne plus célébrer de messe dans l'église de Nyange en raison du fait que les réfugiés y étaient trop nombreux et de la présence d'animaux à cet endroit. Il a, en outre, ajouté que c'est à l'oratoire situé au presbytère que les messes étaient célébrées[191].

102. A la question du conseil de la Défense de savoir si les réfugiés avaient opposé une résistance au retrait par Athanase Seromba des hosties et des ornements sacerdotaux, le témoin PA1 a donné la réponse suivante : « il n'y a pas eu de problème… Nous, ce qu'on a pensé, on a dit… le saint sacrément, c'est quelque chose de très respecté pour les catholiques. Et les ornements sacrés dans de telles circonstances, on ne pouvait pas les laisser, par question de respect. Alors, il n'y a pas eu

[177] Voir la section 3.3.1.
[178] Transcriptions du 15 octobre 2004, pp.60-61 (audience publique).
[179] Transcriptions du 15 octobre 2004, p. 41 (audience publique).
[180] Transcriptions du 18 octobre 2004, p. 1 (audience publique).
[181] Transcriptions du 18 octobre 2004, p. 49 (huis clos).
[182] Transcriptions du 15 octobre 2004, p. 60 (audience publique).
[183] Voir la section 3.3.1.
[184] Transcriptions du 1 octobre 2004, p.42 (audience publique).
[185] Voir la section 3.2.1.
[186] Transcriptions du 13 octobre 2004, p. 15 (audience publique).
[187] Transcriptions du 12 octobre 2004, p. 3 (audience publique).
[188] Voir la section 3.3.1.
[189] Transcriptions du 20 octobre 2004, p. 45 (huis clos).
[190] Transcriptions du 20 avril 2006, p. 38 (huis clos).
[191] Transcriptions du 20 avril 2006, p.11 (huis clos).

d'opposition… c'était notre mission de faire respecter le saint sacrément et de mettre le saint sacrément à un endroit approprié »[192].

5.4.2. Conclusions de la Chambre

103. La Chambre considère le témoin CBN est crédible. Il n'existe que des contradictions mineures entre son témoignage et ses déclarations antérieures ayant trait à l'endroit exact où Athanase Seromba a exprimé son refus de célébrer la messe[193] ainsi que les propos qu'il a tenus à cette occasion[194]. La Chambre ne considère pas ces contradictions ne sont pas déterminantes compte tenu du temps qui s'est écoulé depuis les événements, d'une part, et des références constantes du témoin au refus de Seromba de célébrer une messe en faveur des réfugiés tutsis[195].

104. De plus, la Chambre constate que les témoins CBI, CBJ et CBK ont rapporté qu'Athanase Seromba a retiré les éléments nécessaires à la célébration de la messe entre le 10 et le 13 avril 1994.

105. La Chambre estime que le témoignage de PA1, religieux de son état, ne laisse aucun doute sur le fait qu'à partir du 11 avril 1994, aucune messe n'a été célébrée dans l'église de Nyange. En cela, le témoin PA1 est corroboré par le témoin CBI, la Chambre estimant en effet peu substantielle le fait que ce dernier, à la différence de PA1, fasse remonter la décision de ne plus célébrer la messe dans l'église plutôt au 10 avril 1994. Elle considère donc que ces deux témoins sont crédibles sur ce point. La Chambre est également d'avis que le témoin PA1 est crédible sur le fait que des objets sacrés (hosties consacrées et ornements sacerdotaux) ont été retirés de l'église.

106. La Chambre estime que le fait que les réfugiés n'aient opposé aucune résistance, comme le dit le témoin PA1, au retrait par Seromba des objets sacrés n'écarte pas du tout l'éventualité qu'une demande a été par les réfugiés pour voir célébrer de une messe en leur faveur. A cet égard, la Chambre est consciente du fait que les réfugiés tutsis de l'église de Nyange se savaient en permanence en danger de mort au moment des événements d'avril 1994, et ce eu égard aux persécutions ayant cours contre leur groupe ethnique sur tout le territoire du Rwanda. Dans ces circonstances, la Chambre estime fort probable que les plus fervents d'entre eux aient pu solliciter auprès de Seromba la célébration d'une messe. Pour la même raison, elle est d'avis que le fait par Seromba de retirer des objets sacrés peut être interprété comme un refus à la demande des réfugiés alors surtout qu'il a continué à célébrer la messe dans l'oratoire à partir du 11 avril 1994. Elle considère, en conséquence, que le témoin CBN est crédible quand il soutient que des réfugiés ont présenté à Seromba une demande de messe à laquelle ce dernier a refusé d'accéder.

107. Au regard de ce qui précède, la Chambre considère qu'il est établi au-delà de tout doute raisonnable qu'Athanase Seromba a refusé de célébrer la messe pour les réfugiés tutsis dans l'église de Nyange.

5.5. Du refoulement par Athanase Seromba de quatre employés tutsis (Alex, Félécien, Gasore et Patrice) de la paroisse et de la mort de Patrice à qui Seromba aurait refusé l'accès au presbytère

5.5.1. La preuve

Le témoin du Procureur

[192] Transcriptions du 20 avril 2006, p.11 (huis clos).
[193] Transcriptions du 15 octobre 2004, p. 60 (audience publique).
[194] Transcriptions du 15 octobre 2004, pp. 61-62 (audience publique).
[195] Transcriptions du 18 octobre 2004, p. 3 (audience publique).

108. Le témoin CBK[196] a déclaré qu'après la mort du président rwandais, Alex, Félécien, Gasore et Patrice, tous d'ethnie tutsie et employés de la paroisse de Nyange, lui ont dit qu'ils avaient été suspendus par Athanase Seromba. Le témoin a ajouté que ces derniers ont alors quitté la paroisse[197].

109. Le témoin CBK a, par ailleurs, expliqué que ces employés seraient revenus à la paroisse le 13 avril 1994, mais qu'ils en auraient été refoulés par Athanase Seromba qui leur aurait dit qu'il n'y avait pas de refuge pour eux dans cet endroit[198]. Le témoin a, en outre, fait remarquer que la situation sécuritaire s'était beaucoup dégradée de sorte que tout Tutsi qui s'aventurait dehors courait le risque de se faire tuer[199] Il a ensuite déclaré avoir revu, dans la cour arrière du presbytère, Patrice qui était blessé au niveau des bras et des jambes. Le témoin serait alors intervenu auprès de Seromba pour qu'il vienne en aide à ce dernier. Seromba aurait refusé et aurait plutôt demandé à Patrice de quitter les lieux. Ayant constaté que ce dernier tardait à s'exécuter, Seromba aurait alors demandé aux gendarmes de le faire partir de force. Le témoin a, enfin, ajouté qu'il a par la suite vu le corps sans vie de Patrice dans la cour arrière du presbytère[200].

Le témoin de la Défense

110. Le témoin NA1, né de parents hutu et tutsi[201], a déclaré être arrivé à l'église de Nyange le 15 avril 1994[202]. Il a, en outre, indiqué avoir précédemment travaillé à la paroisse de Nyange entre 1992 et 1993[203]. Le témoin a, par ailleurs, expliqué qu'à son retour dans cette paroisse en avril 1994, il avait pu constater qu'aucun des employés de ladite paroisse n'avait été licencié. Il a ajouté avoir rencontré sur place Alexis qui l'aurait même salué[204].

111. Au cours du contre-interrogatoire, le témoin NA1 a notamment expliqué qu'il n'avait aucune idée des employés qui se trouvaient parmi les réfugiés. Il a, en outre fait remarquer qu'il n'était pas là pour recenser les employés de la paroisse[205] et qu'il n'était pas non plus en mesure de savoir qui était employé de la paroisse et qui ne l'était pas[206].

5.5.2. Conclusions de la chambre

112. La Chambre estime que le témoin CBK est crédible. Aucune contradiction n'existe entre les propos qu'il a tenus lors de son témoignage et ses déclarations antérieures. Elle considère par ailleurs que le récit du témoin CBK sur le refoulement des employés d'ethnie tutsie par Athanase Seromba est cohérent et vraisemblable, eu égard notamment aux circonstances qui prévalaient à la paroisse de Nyange en avril 1994.

113. Par ailleurs, la Chambre estime que le témoignage de NA1 n'est pas fiable sur ce point. En effet, elle note que le témoin NA1 n'est arrivé à la paroisse de Nyange que le 15 avril 1994 et ne saurait donc valablement témoigner sur des faits auxquels il n'a pas assisté. Elle observe, en outre, que le témoin s'exprime en des termes généraux, son témoignage ne portant que sur la question des changements opérés dans la composition du personnel entre son départ de Nyange en 1993 et son retour en avril 1994. Enfin, et comme le témoin l'a lui-même admis, il n'était pas en mesure

[196] Voir la section 3.3.1.
[197] Transcriptions du 19 octobre 2004, pp. 7, 14 et15 (huis clos).
[198] Transcriptions du 19 octobre 2004, p. 15 (huis clos).
[199] Transcriptions du 19 octobre 2004, p. 15 (huis clos).
[200] Transcriptions du 19 octobre 2004, pp. 15-16 (huis clos).
[201] Transcriptions du 7 décembre 2005, p. 75 (huis clos).
[202] Transcriptions du 7 décembre 2005, pp. 15-16 (huis clos).
[203] Transcriptions du 7 décembre 2005, pp. 10-12 (huis clos).
[204] Transcriptions du 7 décembre 2005, p. 19 (huis clos).
[205] Transcriptions du 7 décembre 2005, p. 19 (huis clos).
[206] Transcriptions du 7 décembre 2005, p. 10 (huis clos).

d'identifier les employés présents au moment de son arrivée à l'église, et ce compte tenu du nombre très important de réfugiés et d'assaillants présents sur les lieux[207].

114. Au regard de ce qui précède, la Chambre considère qu'il est établi au-delà de tout doute raisonnable que le 13 avril 1994, au moment où la situation sécuritaire dans la commune de Kivumu était devenue précaire, Athanase Seromba a refoulé quatre employés tutsis de la paroisse dont l'un d'eux nommé Patrice, revenu le lendemain, a été tué par les assaillants après avoir été de refoulé du presbytère par Seromba.

5.6. De la tenue d'une réunion au bureau de la paroisse le 12 avril 1994

5.6.1. La preuve

Le témoin du Procureur

115. Le témoin CBJ[208] a déclaré que le 12 avril 1994, il a vu Athanase Seromba s'entretenir au balcon du « deuxième étage » du presbytère avec Grégoire Ndahimana, Gaspard Kanyarukiga, Fulgence Kayishema et Télesphore Ndungutse[209]. Il a ajouté que cet entretien a duré entre 15 et 20 minutes[210]. Il a enfin indiqué que ces personnes ne sont pas entrées dans une chambre ou une salle quelconque pour s'entretenir[211].

5.6.2. Conclusions de la Chambre

116. La Chambre constate que le témoignage de CBJ ne suffit pas à rapporter la preuve qu'une réunion présidée par Seromba a eu lieu au bureau de la paroisse le 12 avril 1994. En conséquence, elle considère que le Procureur n'a pas établi ce fait au-delà de tout doute raisonnable.

6. Des evenements du 14 au 15 avril 1994 a la paroisse de Nyange

6.1. L'Acte d'accusation

117. L'Acte d'accusation allègue ce qui suit :

> « 15. Vers le 13 avril 1994 ou à cette date, les *Interahamwe* et les miliciens ont encerclé la paroisse et attaqué les réfugiés qui se trouvaient à l'intérieur de l'église. Ceux-ci se sont défendus en repoussant les assaillants hors de l'église, et en les faisant reculer jusqu'à un lieu appelé « la statue de la Sainte Vierge ». Les assaillants ont alors lancé une grenade qui a fait de nombreuses victimes parmi les réfugiés. Les survivants ont rapidement essayé de retourner dans l'église, mais le père Athanase Seromba a ordonné de fermer toutes les portes, laissant ainsi dehors de nombreux réfugiés (une trentaine) aux fins qu'ils soient tués.
>
> 16. Vers le 14 avril 1994 ou à cette date, dans l'après-midi, le père Seromba s'est réuni avec Fulgence Kayishema et Gaspard Kanyarukiga au bureau de la paroisse. Peu après, Fulgence Kayishema est allé chercher du carburant à bord d'un des véhicules officiels de la commune de

[207] Transcriptions du 7 décembre 2005, p. 21 (huis clos); Transcriptions du 8 décembre 2005, p. 13 (huis clos).
[208] Voir la section 3.2.1.
[209] Transcriptions du 11 octobre 2004, p. 51 (audience publique).
[210] Transcriptions du 11 octobre 2004, p. 53 (audience publique).
[211] Transcriptions du 11 octobre 2004, p. 52 (audience publique).

Kivumu. Ce carburant a été utilisé par les *Interahamwe* et les miliciens pour incendier l'église, tandis que les gendarmes et les policiers communaux lançaient des grenades.

17. Le même jour, Athanase Seromba a présidé une réunion dans le bureau de sa paroisse, en présence de Fulgence Kayishema, Grégoire Ndahimana, Gaspard Kanyarukira et d'autres personnes inconnues du Procureur. Immédiatement après cette réunion, suite à une demande formulée par les réfugiés aux fins que leur protection soit assurée, le bourgmestre Grégoire Ndahimana a répondu que les *Inyenzi* étaient la cause de cette guerre pour avoir tué le Président.

18. Le 15 avril 1994 ou vers cette date, un bus transportant des *Interahamwe* armés et un prêtre dénommé Kayirangwa est arrivé à la paroisse de Nyange, en provenance de la préfecture de Kibuye. Peu après, le père Seromba s'est réuni avec le prêtre Kayirangwa, Fulgence Kayishema, Kanyarukiga et d'autres personnes inconnues du Procureur.

19. Après cette réunion, le père Athanase Seromba a ordonné aux *Interahamwe* et aux miliciens de s'attaquer aux Tutsis aux fins de les tuer, en commençant par les intellectuels. Suite à ces ordres, les *Interahamwe*, les miliciens, les gendarmes et les policiers communaux, munis d'armes traditionnelles et d'armes à feu, ont lancé une attaque qui a coûté la vie à de nombreux réfugiés.

20. Vers le 15 avril ou à cette date, dans l'après-midi, les attaques lancées contre les personnes réfugiées à l'église se sont intensifiées. Les *Interahamwe* et les miliciens ont attaqué à l'arme traditionnelle et versé du carburant par le toit de l'église, tandis que les gendarmes et les policiers communaux lançaient des grenades et tuaient les réfugiés.

21. Durant ces attaques, le père Seromba a livré aux gendarmes un enseignant tutsi du nom de Gatare qui s'était réfugié dans l'église et qui a été tué sur-le-champ. Ce fait a encouragé et galvanisé les assaillants.

22. Durant ces mêmes attaques, des réfugiés ont quitté l'église pour le presbytère. Le père Seromba les a trouvés et a informé les gendarmes du lieu où ils se cachaient. Tout de suite après, ils ont été attaqués et tués. Parmi les victimes se trouvaient deux femmes tutsies (Alexia et Meriam).

[…]

25. Lors des attaques décrites supra, les massacres reprochés ont été perpétrés sous la supervision d'Athanase Seromba, de Grégoire Ndahimana, de Fulgence Kayishema, de Télesphore Ndungutse, du Juge Joseph Habiyambere, de l'assistant bourgmestre Védaste Mupende et d'autres autorités inconnues du Procureur.

[…]

44. Vers le 13 avril 1994 ou à cette date, les *Interahamwe* et les miliciens encerclant la paroisse ont lancé une attaque contre les réfugiés présents dans l'église, tuant environ 30 d'entre eux.

[…]

46. L'attaque massive perpétrée contre les réfugiés tutsis a eu lieu le 15 avril 1994 ou vers cette date, sous la supervision du père Seromba, de Fulgence Kayishema, Grégoire Ndahimana, Télesphore Ndungutse, Gaspard Kanyirukiga et d'autres personnes inconnues du Procureur.

[…]

48. Vers le 13 avril 1994 ou à cette date, les *lnterahamwe* et les miliciens encerclant la paroisse ont lancé une attaque contre les personnes réfugiées dans l'église. Les assaillants ont été repoussés hors de l'église jusqu'à un endroit dénommé « la statue de la Sainte Vierge ». Ils ont alors lancé une grenade qui a fait de nombreuses victimes parmi les réfugiés. Les survivants se sont empressés de retourner dans l'église, mais le père Athanase Seromba a ordonné d'en fermer toutes les portes laissant ainsi à l'extérieur un grand nombre de réfugiés (environ 30) aux fins qu'ils soient tués. »

6.2. De l'attaque contre l'église de Nyange suivie d'une résistance des réfugiés contrecarrée par des jets de grenades lancées par les assaillants

6.2.1. La preuve

Les témoins du Procureur

118. Les témoins CNJ[212], CBR[213], CBJ[214], CDK[215], CBS[216] et CDL[217] ont relaté qu'un affrontement a eu lieu entre les assaillants et les réfugiés tutsis dans la matinée du 15 avril 1994 à proximité du restaurant de la Caritas. Ils ont notamment expliqué que les assaillants ont attaqué les réfugiés avec des pierres et des armes traditionnelles. Les réfugiés seraient parvenus à les repousser jusqu'au niveau de la Codecoki. Les assaillants n'auraient alors pris le dessus que lorsqu'un réserviste du nom de Théophile Rukara est monté sur le toit d'une maison pour lancer des grenades, blessant et tuant de nombreux réfugiés tutsis. Ces derniers se seraient alors repliés vers l'église de Nyange pour échapper aux assaillants[218]. Le témoin CBR a, en particulier, ajouté que des responsables communaux dont Ndahimana, Fulgence Kayishema, Habiyambere, Védaste Muraginabugabo et Gaspard Kanyarukiga[219] se trouvaient sur les lieux de l'affrontement et ont encouragé les assaillants à s'attaquer aux réfugiés[220].

Les témoins de la Défense

119. Les témoins FE31[221], BZ14[222], BZ1[223] et BZ4[224] ont affirmé que des grenades avaient été lancées contre les réfugiés tutsis au cours de l'attaque qui a eu lieu dans la matinée du 15 avril 1994. Ils ont, en outre, indiqué que suite au jet de grenades ayant entraîné la mort de certains d'entre eux, les réfugiés se seraient retranchés à l'intérieur de l'église en fermant les portes pour mieux se protéger[225].

6.2.2. Conclusions de la Chambre

120. La Chambre constate que les témoins du Procureur tout comme ceux de la Défense ont confirmé que dans la matinée du 15 avril 1994, une attaque a été lancée contre les réfugiés tutsis et contre laquelle ces derniers ont opposé une résistance; que par la suite, les assaillants ont fait usage de grenades qui ont causé la mort de plusieurs réfugiés. Elle considère, en conséquence, que ces faits sont établis au-delà de tout doute raisonnable.

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[212] Voir la section 3.3.1.
[213] Transcriptions du 20 janvier 2005, p. 45 (audience publique); Fiche d'identification du témoin (P-23).
[214] Voir la section 3.2.1.
[215] Fiche d'identification du témoin (P-14); Transcriptions du 7 octobre 2004, pp. 77-78 (huis clos).
[216] Voir la section 3.3.1.
[217] Voir la section 3.2.1.
[218] CNJ : Transcriptions du 24 janvier 2005, p. 16 (audience publique); CBR : Transcriptions du 20 janvier 2005, p. 37 (audience publique); CBJ : Transcriptions du 12 octobre 2004, pp. 5-6 (audience publique); CDK : Transcriptions du 7 octobre 2004, pp. 60-61 (audience publique) et Transcriptions du 11 octobre 2004, p. 15 (audience publique); CBS : Transcriptions du 5 octobre 2004, p. 20 (audience publique); CDL : Transcriptions du 19 janvier 2005, p. 48 (audience publique).
[219] Transcriptions du 20 janvier 2005, p. 37 (audience publique).
[220] Transcriptions du 20 janvier 2005, p. 37 (audience publique).
[221] Voir la section 3.2.1.
[222] Transcriptions du 1 novembre 2005, p. 42 (audience publique).
[223] Voir la section 4.4.1.
[224] Transcriptions du 1 novembre 2005, pp. 52-54 (audience publique).
[225] FE31 : Transcriptions du 29 mars 2006, pp. 18-19 et 23 (huis clos); Transcriptions du 29 mars 2006, p. 48 (audience publique); BZ1 : Transcriptions du 2 novembre 2005, pp. 57-58 (audience publique); BZ14 : Transcriptions du 1 novembre 2005, p. 22 (audience publique) et Transcriptions du 1 novembre 2005, p. 28 (audience publique); BZ4 : Transcriptions du 1 novembre 2005, pp. 58-60 (audience publique).

6.3. De l'ordre donné par Athanase Seromba de fermer les portes de l'église, laissant dehors une trentaine de réfugiés qui auraient été tués

6.3.1. La preuve

Les témoins du Procureur

121. Le témoin CBJ[226] a déclaré que le soir du 14 avril 1994, Athanase Seromba, accompagné de gendarmes, a demandé aux réfugiés tutsis de rentrer dans l'église et les a enfermés à l'intérieur[227]. Il a, en outre, ajouté que le lendemain matin, Seromba, toujours accompagné de gendarmes, est revenu ouvrir les portes de l'église[228]. Le témoin CBJ a, par ailleurs, expliqué qu'au cours des attaques du 15 avril 1994, les réfugiés tutsis ont eux-mêmes pris la décision de s'enfermer, abandonnant à l'extérieur de l'église « les moins chanceux d'entre eux » qui auraient alors été tués[229].

122. Les témoins CBK[230], CDL[231] et CNJ ont affirmé que lors de l'attaque du 15 avril 1994, les réfugiés se sont barricadés dans l'église pour se protéger[232].

Les témoins de la Défense

123. Les témoins BZ4[233], FE56[234], BZ14[235] et FE34[236] ont soutenu qu'à la suite des attaques du 15 avril 1994, les réfugiés ont battu en retraite vers l'église et s'y sont barricadés[237].

6.3.2. Conclusions de la Chambre

124. La Chambre relève que l'Acte d'accusation et le mémoire préalable du Procureur contiennent chacun l'allégation selon laquelle Athanase Seromba aurait ordonné la fermeture des portes en laissant dehors une trentaine de réfugiés qui auraient ensuite été tués. Elle note toutefois que ces deux documents divergent sur la date de ces événements. Ainsi, alors que l'Acte d'accusation situe ces faits vers le 13 avril 1994 ou à cette date, le mémoire préalable au procès retient plutôt la date du 14 avril 1994.

125. La Chambre constate, par ailleurs, que si le témoin CBJ soutient qu'Athanase Seromba a fermé les portes de l'église le soir du 14 avril 1994 et les a rouvertes le matin du 15 avril 1994, il n'impute pas à ce dernier la mort de réfugiés tutsis, tués parce qu'ils ne pouvaient plus accéder à l'intérieur de l'église fermée Elle note également que le même témoin a déclaré que le 15 avril 1994,

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[226] Voir la section 3.2.1.
[227] Transcriptions du 12 octobre 2004, pp. 2-4 (audience publique); Transcriptions du 13 octobre 2004, pp. 36-37 (audience publique).
[228] Transcriptions du 12 octobre 2004, p. 10 (audience publique); Transcriptions du 13 octobre 2004, p. 41 (audience publique).
[229] Transcriptions du 13 octobre 2004, p. 42 (audience publique).
[230] Voir la section 3.3.1.
[231] Voir la section 3.2.1.
[232] CBK : Transcriptions du 19 octobre 2004, p. 24 (huis clos); CDL : Transcriptions du 19 janvier 2005, p. 23 (audience publique); CNJ : Transcriptions du 24 janvier 2000, p. 41 (audience publique).
[233] Voir la section 6.2.1.
[234] Voir la section 3.2.1.
[235] Voir la section 6.2.1.
[236] Transcriptions du 30 mars 2006, p. 7 (huis clos).
[237] BZ4 : Transcriptions du 1 novembre 2005, pp. 58-60 (audience publique); FE56 : Transcriptions du 3 avril 2006, p. 56 (huis clos); BZ14 : Transcriptions du 1 novembre 2005, pp. 22, 26 et 28 (audience publique); FE34 : Transcriptions du 30 mars 2006, p. 51 (audience publique).

des réfugiés qui se trouvaient déjà dans l'église ont pris la décision de se barricader, abandonnant ainsi certains des leurs, restés dehors à la merci des assaillants. Elle constate, enfin, que les témoins du Procureur comme ceux de la Défense confirment le fait que des réfugiés aient pris eux-mêmes la décision de fermer les portes de l'église le 15 avril 1994.

126. Au regard de ce qui précède, la Chambre estime que les informations à sa disposition sont concordantes tant en ce qui concerne les dates de ces événements que de leur déroulement. Elle en déduit donc que le Procureure n'a pas établi au-delà de tout doute raisonnable qu'Athanase Seromba ait fermé les portes de l'église en laissant dehors une trentaine de réfugiés qui auraient été tués par la suite.

6.4. Des réunions entre Athanase Seromba, des autorités communales et d'autres personnes inconnues du Procureur

6.4.1. La preuve

Les témoins du Procureur

127. Le témoin CBI[238] a déclaré que plusieurs autorités parmi lesquelles se trouvait Fulgence Kayishema venaient régulièrement à l'église pendant qu'il s'y trouvait encore. Il a ajouté que ces autorités se rendaient chez Athanase Seromba[239] pour s'informer de ce qui se passait dans la cour arrière du presbytère[240]. Lors du contre-interrogatoire, le témoin CBI a soutenu que les réunions qui préparaient la « mise à mort » des Tutsis se tenaient également chez Seromba[241]. A la question du conseil de la Défense de savoir ce qu'il entendait par « réunion », le témoin a répondu en ces termes : « vous pouvez conclure qu'il s'agit d'une réunion lorsque des gens se trouvent ensemble »[242].

128. Le témoin CBJ[243] a affirmé que les gendarmes, après s'être entretenus avec Athanase Seromba, se sont rendus à la Codecoki, dans le centre de Nyange. Il a, en outre, souligné qu'au retour d'Athanase Seromba au presbytère après la réunion à la Codecoki, les *Interahamwe*, armés de lances, de machettes, d'épées et de pieux de bambou, ont commencé à tuer les réfugiés[244]. Il a également déclaré qu'une réunion a eu lieu le 14 avril 1994 à la paroisse de Nyange à laquelle auraient participé Seromba, le bourgmestre Grégoire Ndahimana, l'inspecteur de police judiciaire Fulgence Kayishema, Télesphore Ndungutse, l'homme d'affaires Gaspard Kanyarukiga, le brigadier Christophe Mbakirirehe ainsi que bien d'autres personnes que le témoin dit ne pas avoir pu identifier[245]. Le témoin a expliqué avoir constaté la tenue de cette réunion à partir de la tour de l'église où il se trouvait avec les membres du groupe charismatique[246]. Au cours du contre-interrogatoire, le témoin CBJ a réitéré que les participants à cette réunion ont planifié les tueries contre les Tutsis.

129. Le témoin CDK[247] a affirmé avoir aperçu Athanase Seromba aux alentours de l'église en compagnie de Fulgence Kayishema, Grégoire Ndahimana, Gaspard Kanyarukiga et Télesphore Ndungutse[248]. Le témoin a également précisé les avoir vu sortir aux environs de 11h00 du bureau de la Codecoki où ils venaient de tenir une réunion. Le témoin a déclaré qu'il n'a pas participé à cette réunion. Il a ajouté qu'il se trouvait en face de la pharmacie de Gaspard Kanyarukiga au moment où il

[238] Voir la section 3.3.1.
[239] Transcriptions du 4 octobre 2004, p. 14.
[240] Transcriptions du 4 octobre 2004, p. 16.
[241] Transcriptions du 4 octobre 2004, p. 65.
[242] Transcriptions du 4 octobre 2004, p.65 (audience publique).
[243] Voir la section 3.2.1.
[244] Transcriptions du 12 octobre 2004, pp. 5-6 (audience publique).
[245] Transcriptions du 12 octobre 2004, p. 4 (audience publique).
[246] Transcriptions du 12 octobre 2004, p. 32 (huis clos).
[247] Voir la section 6.2.1.
[248] Transcriptions du 11 octobre 2004, p. 11 (audience publique).

a assisté à cet événement[249]. Il a enfin déclaré qu'à la fin de la réunion, Athanase Seromba est remonté en direction de l'église en compagnie de Grégoire Ndahimana, Fulgence Kayishema et de Télesphore Ndungutse tandis que Gaspard Kanyarukiga rejoignait la population rassemblée près de la statue et qui l'attendait[250].

130. Le témoin CBK[251] a déclaré qu'entre le 13 et le 16 avril 1994, Athanase Seromba a organisé à la paroisse de Nyange plusieurs réunions auxquelles avaient participé Gaspard Kanyarukiga, Fulgence Kayishema, Grégoire Ndahimana, Ndungutse et Rushema. Le témoin a ajouté que ces réunions se tenaient souvent dans une salle située « au niveau supérieur du presbytère »[252].

131. Le témoin CBN[253] a déclaré avoir vu Athanase Seromba accueillir plusieurs autorités dont le Bourgmestre Ndahimana, Kanyarukiga et l'inspecteur de police judiciaire Kayishema[254]. Le témoin CBN a également indiqué avoir été informé de l'existence de réunions tenues par les conseillers communaux[255].

132. Le témoin CBS[256] a soutenu que des autorités se rendaient à la paroisse de Nyange pour rencontrer Athanase Seromba. Parmi ces autorités, le témoin a cité le bourgmestre Ndahimana, l'inspecteur de police judiciaire Kayishema, le brigadier Mbakirirehe, l'enseignant Télesphore Ndungutse et le commerçant Kanyarukiga[257].

Les témoins de la Défense

133. Le témoin PA1[258] a déclaré qu'il n'y a pas eu de réunion au presbytère entre Athanase Seromba et les autorités communales visant à exterminer les réfugiés[259]. Il a fait observer qu'en compagnie d'autres religieux, ils avaient chargé Seromba de contacter le bourgmestre pour lui rendre compte de la situation qui prévalait à la paroisse de Nyange, le vendredi 15 avril 1994. De retour de cette mission, Seromba leur aurait expliqué ne pas avoir pu rencontrer le bourgmestre, celui-ci s'étant rendu à un enterrement[260]. Le témoin PA1 a ajouté que Grégoire Ndahimana et Fulgence Kayishema sont venus à la paroisse dans la soirée. Le témoin a indiqué que les religieux auraient demandé aux autorités ce qu'elles pouvaient faire relativement aux cadavres présents dans la cour de l'église[261]. Le bourgmestre aurait alors promis d'envoyer des bulldozers le lendemain pour enterrer ces personnes[262]. Le témoin a enfin soutenu qu'il n'était pas possible que Seromba ait pu organiser des réunions à son insu parce qu'ils étaient toujours ensemble[263].

134. Le témoin BZ3[264] a affirmé qu'il n'y avait pas de « relations particulières » entre Athanase Seromba et les autorités[265]. Il a, en outre, déclaré ne jamais avoir entendu parler de rencontres qui auraient eu lieu entre Seromba, Fulgence Kayishema, Grégoire Ndahimana et Télesphore Ndungutse avant la date du 16 avril 1994[266].

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[249] Transcriptions du 11 octobre 2004, pp. 12-13 (audience publique).
[250] Transcriptions du 7 octobre 2004, pp. 60-61 (audience publique).
[251] Voir la section 3.3.1.
[252] Transcriptions du 19 octobre 2004, pp. 16-17 (huis clos).
[253] Voir la section 3.3.1.
[254] Transcriptions du 15 octobre 2004, pp. 44-45(audience publique).
[255] Transcriptions du 15 octobre 2004, p. 55 (audience publique).
[256] Voir la section 3.3.1.
[257] Transcriptions du 5 octobre 2004, p. 19 (audience publique).
[258] Voir la section 3.4.1.
[259] Transcriptions du 20 avril 2006, p. 18 (huis clos).
[260] Transcriptions du 20 avril 2006, p. 23 (huis clos).
[261] Transcriptions du 20 avril 2006, p. 24 (huis clos).
[262] Transcriptions du 20 avril 2006, p. 24 (huis clos).
[263] Transcriptions du 20 avril 2006, p. 31 (huis clos).
[264] Transcriptions du 8 novembre 2005, p. 29 (audience publique).
[265] Transcriptions du 31 octobre 2005, p. 49 (audience publique).
[266] Transcriptions du 8 novembre 2005, p. 23 (audience publique).

135. Le témoin CF23[267] a déclaré que toutes les réunions de la commune de Nyange avaient toujours lieu au Bureau communal[268] et qu'il en était toujours informé. Il a en outre ajouté qu'aucune réunion des autorités communales n'avait eu lieu à la paroisse de Nyange. Il a également indiqué qu'aucune réunion officielle des autorités communales n'a eu pour ordre du jour l'extermination des Tutsis[269].

6.4.2. Conclusions de la Chambre

136. La Chambre constate que les déclarations des témoins du Procureur CBI, CBJ, CBK, CDK et CBS sont concordantes sur le fait qu'Athanase Seromba a tenu des réunions ou eu des entretiens avec les autorités communales. A ce propos, elle note que le témoignage du témoin de la Défense PA1 conforte les témoignages de ces derniers lorsqu'il dit notamment qu'une mission a été confiée à Seromba pour contacter le bourgmestre afin de trouver une solution au sort des cadavres qui jonchaient la cour de l'église. Elle estime toutefois que les témoignages de CBI, CBJ, CBK, CDK et CBS ne permettent pas de conclure que toute réunion à laquelle Seromba aurait participé ou tout entretien qu'il aurait eu avec les autorités de la commune ait eu pour objet l'extermination des Tutsis. En effet, aucun de ces témoins n'a participé à ces réunions ou entretiens. Aussi, la Chambre considère-t-elle que l'évocation que font certains d'entre eux d'un plan d'extermination ne reflètent que leurs propres opinions.

137. La Chambre relève que le témoin PA1 a été auditionné dans le cadre d'une commission rogatoire le 8 octobre 2003. Elle note qu'au cours de son audition, le témoin a admis qu'il n'était pas toujours en compagnie d'Athanase Seromba au presbytère et qu'il est fort probable que certaines personnes soient venues au presbytère sans qu'il n'en soit informé[270]. La Chambre constate que cette déclaration contredit le témoignage de PA1 dans lequel il a plutôt soutenu avoir toujours été aux côtés de Seromba. Elle en déduit que le témoin n'est pas crédible.

138. La Chambre estime également que les témoignages de BZ3 et CBN ne sont pas fiables vu qu'ils s'expriment par ouï-dire.

139. S'agissant du témoin CF23, la Chambre estime que son témoignage n'est pas déterminant dans la mesure où il ne rend compte que des réunions tenues par les autorités communales au Bureau de la commune, sans évoquer la présence d'Athanase Seromba à ces réunions.

140. Au regard de ce qui précède, la Chambre considère que le Procureur a établi au-delà de tout doute raisonnable que des réunions ou entretiens ont eu lieu entre Athanase Seromba et les autorités de la commune. Par contre, elle estime qu'il n'est pas établi au-delà de tout doute raisonnable que l'objet de ces réunions ou de ces entretiens ait été de planifier l'extermination des Tutsis.

6.5. De l'ordre donné par Athanase Seromba aux Interahamwe et miliciens de s'attaquer aux réfugiés

6.5.1. La preuve

Les témoins du Procureur

[267] Voir la section 4.3.1.
[268] Transcriptions du 31 mars 2006, p. 20 (audience publique).
[269] Transcriptions du 31 mars 2006, p. 10 (audience publique).
[270] Déclaration du témoin PA1 à la commission rogatoire du 8 octobre 2003 (D-90), p. 4.

141. Le témoin CDK[271] a déclaré qu'il a vu Gaspard Kanyarukiga, Télesphore Ndungutse et Fulgence Kayishema donner des ordres et des instructions aux assaillants le 15 avril 1994[272].

142. Le témoin CBR[273] a affirmé qu'Athanase Seromba ne dirigeait pas les assaillants le 15 avril 1994. Cependant, il a ajouté qu'avant que les autorités ne leur donnent des instructions, ceux-ci s'entretenaient d'abord avec Seromba. Il a indiqué toutefois qu'il n'était pas au courant des propos qu'ils échangeaient entre eux[274]. Le témoin a en outre indiqué que Fulgence Kayishema a dit qu'il fallait attaquer les *Inyenzi* qui se trouvaient à l'église de Nyange[275].

143. Le témoin CNJ[276] a déclaré que lorsqu'il est arrivé à la paroisse de Nyange avec son groupe, Fulgence Kayishema et Grégoire Ndahimana les ont accueillis. Ils leur auraient dit de se couvrir de feuilles de bananiers pour se distinguer des Tutsis. Le témoin a ajouté que Fulgence Kayishema leur a indiqué l'endroit où ils devaient se rendre pour aider les autres à combattre les Tutsis[277]. Le témoin CNJ a admis qu'ils ont été repoussés jusqu'à la pharmacie appartenant à Kanyarukiga. Kayishema leur aurait alors demandé de remonter et de lancer des pierres contre les Tutsis[278].

144. Le témoin YAU[279] a déclaré que lorsque les *Interahamwe* sont arrivés dans la cour de l'église, Athanase Seromba leur a demandé de ne pas attaquer les réfugiés dans l'immédiat, vu qu'ils étaient peu nombreux[280]. Seromba se serait notamment adressé à eux en tenant les propos suivants : « Cessez les combats parce que vous êtes encore en nombre insuffisant, en petit nombre ! »[281]. Le témoin a, en outre, affirmé que Seromba a ordonné aux *Interahamwe* de commencer par tuer les intellectuels[282]. Par ailleurs, il a soutenu qu'au cours de la même journée, Seromba s'est adressé à une femme *Interahamwe* et lui aurait dit : « Recherchez toutes les personnes qui sont à l'intérieur des pièces, mettez-les dehors et tuez-les ! »[283].

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145. Le témoin NA1[284] a déclaré qu'au cours de l'attaque du 15 avril 1994, Athanase Seromba était toujours avec lui et d'autres personnes dans le presbytère. Il a également affirmé qu'alors qu'ils se trouvaient dans le salon du presbytère, Kayiranga est venu les informer des massacres des réfugiés qui étaient à l'extérieur des bâtiments[285].

146. Le témoin BZ1[286] a déclaré que, le 15 avril 1994, les assaillants étaient dirigés par les autorités communales dont le bourgmestre, l'inspecteur de police judiciaire, ainsi que le responsable du MRND, qui était en étroite collaboration avec ces autorités. Il a affirmé n'avoir vu ni Athanase Seromba ni d'autres religieux le 15 avril 1994[287].

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[271] Voir la section 6.2.1.
[272] Transcriptions du 11 octobre 2004, p. 3 (audience publique).
[273] Voir la section 6.2.1.
[274] Transcriptions du 24 janvier 2005, p. 4 (audience publique).
[275] Transcriptions du 20 janvier 2005, pp. 36-37 (audience publique).
[276] Voir la section 3.3.1.
[277] Transcriptions du 24 janvier 2005, p. 15 (audience publique).
[278] Transcriptions du 24 janvier 2005, p. 16 (audience publique).
[279] Voir la section 3.3.1.
[280] Transcriptions du 30 septembre 2004, p. 77 (huis clos).
[281] Transcriptions du 29 septembre 2004, p. 17 (audience publique).
[282] Transcriptions du 1 octobre 2004, p. 2 (audience publique).
[283] Transcriptions du 29 septembre 2004, p. 21 (audience publique).
[284] Voir la section 5.5.1.
[285] Transcriptions du 7 décembre 2005, p. 22 (huis clos).
[286] Voir la section 4.4.1.
[287] Transcriptions du 2 novembre 2005, p. 59 (audience publique).

147. Le témoin FE31[288] a déclaré être arrivé à l'église de Nyange dans la matinée du 15 avril 1994, entre 10h et 10h30[289]. Le témoin a affirmé avoir observé une rencontre entre Fulgence Kayishema, un policier communal, un homme d'affaires, Anastase Rushema, Léonard Abayisenga, Théophile Rukura, Boniface Kabalisa, Ephrem Nzabigerageza et d'autres personnes, sans avoir entendu les propos qu'ils se sont tenus[290]. Il a, en outre, indiqué que ces personnes dirigeaient l'attaque[291]. Le témoin FE31 a également précisé qu'Athanase Seromba n'était pas présent à cette rencontre[292], car ne l'ayant pas vu sur les lieux ce jour[293]. Le témoin a notamment déclaré ce qui suit : « Nous l'avons plutôt attaqué sur l'incitation des autorités… [Seromba] ne pouvait pas être attaqué et mener en même temps l'attaque alors qu'il était visé par les assaillants »[294].

148. Le témoin FE36[295] a déclaré que Télesphore Ndungutse était à l'origine des tueries perpétrées à la paroisse de Nyange[296].

149. Le témoin FE55[297] a déclaré que le 15 avril 1994, Gaspard Kanyarukiga a sollicité le recrutement de personnes de Kibilira « afin de garder l'église ». Il aurait également déclaré qu'il fallait tout mettre en oeuvre pour tuer les Tutsis, en détruisant l'église au besoin[298]. Le témoin a enfin déclaré avoir vu le même jour Fulgence Kayishema distribuer des sifflets et à bord de son véhicule, inciter les Hutus à tuer les Tutsis réfugiés à la paroisse de Nyange[299].

150. Le témoin FE56[300] a expliqué que le 15 avril 1994, Fulgence Kayishema voulait faire sortir les réfugiés de l'église. Le témoin a également déclaré que Télesphore Ndungutse lui a remis une pompe arrosoir contenant du carburant et a exigé qu'il en asperge les fenêtres de l'église[301]. Selon le témoin, l'objectif visé était de faire peur aux réfugiés pour les obliger à sortir de l'église encerclée sur ordre de Fulgence Kayishema[302]. Le témoin a en outre soutenu que Télesphore Ndungutse et Fulgence Kayishema ont supervisé les attaques[303]. Il a expliqué que pour le transport des assaillants de Kibilira à la paroisse de Nyange, ces derniers sont allés négocier des camions avec la société Astaldi[304]. Le témoin FE56 a enfin déclaré ne pas avoir vu Athanase Seromba à la paroisse de Nyange le 15 avril 1994[305].

6.5.2 Conclusions de la Chambre

151. La Chambre note que YAU est le seul témoin du Procureur à avoir dit que Seromba a ordonné aux *Interahamwe* de commencer par tuer les intellectuels tutsis le 15 avril 1994. Elle observe toutefois que les circonstances dans lesquelles ce témoin a pu entendre Athanase Seromba donner un tel ordre ne ressortent pas clairement de son témoignage. Dès lors, elle estime que le témoin YAU n'est pas crédible.

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[288] Voir la section 3.2.1.
[289] Transcriptions du 29 mars 2006, p. 19 (huis clos).
[290] Transcriptions du 29 mars 2006, p. 48 (audience publique).
[291] Transcriptions du 29 mars 2006, p. 23 (huis clos).
[292] Transcriptions du 29 mars 2006, p. 22 (huis clos).
[293] Transcriptions du 29 mars 2006, pp. 25 et 28 (audience publique).
[294] Transcriptions du 29 mars 2006, p. 28 (audience publique).
[295] Transcriptions du 21 novembre 2005, p. 6 (huis clos).
[296] Transcriptions du 21 novembre 2005, p. 21 (huis clos).
[297] Voir la section 4.4.1.
[298] Transcriptions du 12 avril 2006, pp. 41-43 (audience publique).
[299] Transcriptions du 12 avril 2006, p. 50 (audience publique).
[300] Voir la section 3.2.1.
[301] Transcriptions du 3 avril 2006, p. 54 (huis clos).
[302] Transcriptions du 3 avril 2006, p. 54 (huis clos).
[303] Transcriptions du 3 avril 2006, p. 55 (huis clos) ; Transcriptions du 3 avril 2006, p. 58 (huis clos) ; Transcriptions du 4 avril 2006, p. 6 (audience publique).
[304] Transcriptions du 3 avril 2006, p. 57 (huis clos).
[305] Transcriptions du 3 avril 2006, p. 58 (huis clos).

152. La Chambre note que les témoignages de CDK, CBR, CNJ, NA1, BZ1, FE31, FE36, FE55 et FE56 sont tous concordants sur le fait que ce sont plutôt les autorités communales qui dirigeaient les assaillants composés d'*Interahamwe* et miliciens et qui leur donnaient l'ordre de s'attaquer aux réfugiés.

153. Au regard de ce qui précède, la Chambre conclut que le Procureur n'a pas établi au-delà de tout doute raisonnable qu'Athanase Seromba a ordonné aux *Interahamwe* et aux miliciens de s'attaquer aux réfugiés.

6.6. Des attaques lancées contre les réfugiés par les Interahamwe et miliciens aidés de gendarmes et policiers communaux et la tentative d'incendie de l'église de Nyange

6.6.1. La preuve

Les témoins du Procureur

154. Le témoin CBI[306] a déclaré que le 15 avril 1994, la majorité des assaillants portaient des armes traditionnelles tandis que leurs leaders étaient armés de fusils[307]. Il a en outre souligné que cette attaque a fait de nombreux morts parmi les réfugiés dont les corps gisaient dans la cour de l'église[308].

155. Le témoin CBR[309] a déclaré que les attaques se sont poursuivies dans l'après-midi du 15 avril 1994[310]. Le témoin a ajouté également que les assaillants ont essayé d'incendier l'église en l'aspergeant d'essence et en utilisant des feuilles de bananier et « des mèches de dynamite »[311].

156. Le témoin CDK[312] a affirmé qu'une autre attaque a eu lieu dans l'après-midi du 15 avril 1994 alors que l'église était toujours encerclée par des assaillants. Il a, en outre, déclaré que des policiers communaux et des gendarmes ont ouvert le feu en direction de l'église et ont essayé de l'incendier à l'aide d'essence et de dynamite[313]. Le témoin a enfin estimé à plus de 100 le nombre de personnes tuées au cours de cette attaque[314].

157. Le témoin CBK[315] a déclaré que la journée du 15 avril 1994 a été marquée par une attaque de « grande envergure » contre les réfugiés de l'église de Nyange. Le témoin a affirmé que les assaillants étaient plus nombreux et armés de lances, de machettes, de petites houes et de bois pointus. Il a ajouté que les réfugiés se sont défendus à l'aide de pierres et ont dû se barricader dans l'église pour se protéger. Le témoin a également rapporté que Fulgence Kayishema, Télesphore Ndungutse et Grégoire Ndahimana ont essayé de mettre le feu à l'église en l'aspergeant d'essence et en lançant des grenades contre les portes de celle-ci[316].

158. Le témoin CBT[317] a déclaré que lors de l'attaque du 15 avril 1994, Faustin a aspergé l'église d'essence. Il a également ajouté que des assaillants sont montés sur le toit de l'église d'où une grenade a été lancée[318].

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[306] Voir la section 3.3.1.
[307] Transcriptions du 4 octobre 2004, p. 11 (audience publique).
[308] Transcriptions du 4 octobre 2004, p. 12 (audience publique).
[309] Voir la section 6.2.1.
[310] Transcriptions du 20 janvier 2005, p. 38 (audience publique).
[311] Transcriptions du 20 janvier 2005, pp. 40-41 (audience publique).
[312] Voir la section 6.2.1.
[313] Transcriptions du 7 octobre 2004, pp. 62-63 (audience publique).
[314] Transcriptions du 7 octobre 2004, p. 63 (audience publique).
[315] Voir la section 3.3.1.
[316] Transcriptions du 19 octobre 2004, pp. 20-24 (huis clos).
[317] Fiche d'identification du témoin (P-13).
[318] Transcriptions du 6 octobre 2004, pp. 61-62 (audience publique).

159. Le témoin CDL[319] a affirmé que lors de l'attaque du 15 avril 1994, l'objectif des assaillants était d'entrer à l'intérieur de l'église. Il a expliqué notamment qu'ils ont d'abord essayé de défoncer les portes de l'église à la dynamite et que n'y parvenant pas, ils ont alors tenté en vain d'y mettre le feu à l'aide d'essence[320].

6.6.2. Conclusions de la Chambre

160. La Chambre note que toutes les déclarations des témoins du Procureur sont concordantes sur le fait que les assaillants ont mené une attaque contre les réfugiés de l'église de Nyange le 15 avril 1994, qu'ils ont également tenté d'incendier le même jour.

161. La Chambre relève que la Défense n'a pas présenté de preuve à l'encontre de cette allégation.

162. De ce qui précède, la Chambre conclut que le Procureur a établi au-delà de tout doute raisonnable que le 15 avril 1994, les *Interahamwe* et miliciens, aidés de gendarmes et policiers communaux, ont lancé des attaques contre les réfugiés tutsis et ont tenté d'incendier l'église de Nyange.

6.7. De la supervision des attaques par Athanase Seromba

6.7.1. La preuve

Les témoins du Procureur

163. Le témoin CDL[321] a déclaré qu'Athanase Seromba était présent lors de l'attaque du 15 avril 1994 et qu'il se tenait debout devant le secrétariat de la paroisse[322]. Le témoin a en outre ajouté avoir revu Seromba plus tard dans la journée alors que ce dernier se tenait devant le logement des prêtres[323]. Le témoin a également soutenu que Seromba a conseillé aux assaillants d'attaquer les Tutsis qui étaient à l'intérieur de l'église plutôt que ceux qui se trouvaient dans le presbytère[324]. Le témoin a en outre affirmé que le bourgmestre et Ndungutse lui ont dit qu'ils s'étaient entretenus avec Seromba qui souhaitait que l'on enterre les nombreux cadavres qui jonchaient la cour de l'église. Le témoin CDL a notamment déclaré ce qui suit : « L'abbé Seromba a jugé bon de leur dire d'enterrer les corps d'abord et de reprendre les tueries par la suite. »[325] Le témoin a expliqué que Seromba n'a rien fait pour protéger les réfugiés[326].

164. Le témoin CBR[327] a expliqué que lors de l'attaque du 15 avril 1994, alors qu'il n'y a avait plus de réfugiés à l'extérieur de l'église, les assaillants ont voulu s'attaquer aux réfugiés cachés dans la cour du presbytère. Il a précisé que Kayishema et Ndungutse dirigeaient ces attaques. Il a rapporté qu'Athanase Seromba et les gendarmes ont empêché les assaillants d'entrer dans la cour du presbytère. Il a affirmé que Kayishema et Ndungutse se sont entretenus avec Seromba et qu'ils ont ensuite dit aux assaillants que Seromba leur avaient demandés d'arrêter les tueries et de débarrasser « d'abord » les cadavres et les débris jonchant le sol. Le témoin a soutenu que Seromba aurait tenu les propos suivants : « Voyez ! Regardez ! Enlevez, d'abord, ces saletés ». Il a en outre déclaré que Kayishema et

[319] Voir la section 3.2.1.
[320] Transcriptions du 19 janvier 2005, pp. 23-24 (audience publique).
[321] Voir la section 3.2.1.
[322] Transcriptions du 19 janvier 2005, pp. 18-19 (huis clos).
[323] Transcriptions du 19 janvier 2005, p. 19 (huis clos).
[324] Transcriptions du 19 janvier 2005, p. 65 (audience publique).
[325] Transcriptions du 19 janvier 2005, p. 65 (audience publique).
[326] Transcriptions du 19 janvier 2005, p. 19 (huis clos).
[327] Voir la section 6.2.1.

Ndungutse ont tenu les propos suivants : « Seromba ne peut même pas nous accorder la permission d'entrer dans leur cour, dans la cour du presbytère avant que nous ne dégagions ces saletés ». Le témoin a, par ailleurs, indiqué qu'il se trouvait à dix mètres de Kayishema, Ndungutse et Seromba lorsque ces derniers s'entretenaient. Il a ajouté que les nombreux cadavres ont été enlevés en moins d'une heure, à l'aide d'un bulldozer appartenait à la société Astaldi. Il a souligné que Seromba n'a rien fait pour protéger les réfugiés ou pour s'opposer à cette attaque[328]. Lors du contre-interrogatoire, le témoin CBR a confirmé qu'il a lui-même entendu Seromba qualifier les cadavres de saletés[329]. Le témoin a en outre affirmé que les attaques ont repris après que les cadavres aient été ramassés[330]. Il a enfin déclaré ne jamais avoir vu Seromba diriger les assaillants le 15 avril 1994 ou le 16 avril 1994 tout en indiquant ce qui suit : « Avant que les autorités ne nous donnent une quelconque instruction, ils devaient d'abord s'entretenir avec le prêtre »[331].

165. Le témoin CNJ[332] a déclaré que pendant l'attaque du 15 avril 1994, les assaillants poursuivaient les réfugiés qui cherchaient à se cacher dans le presbytère et qu'Athanase Seromba les en a empêché en leur « demandant d'enlever d'abord les cadavres qui se trouvaient devant le secrétariat ». Le témoin a dit avoir lui-même entendu Seromba tenir ces propos[333]. Il a, en outre, déclaré que les attaques ont repris après que les cadavres aient été ramassés. Le témoin CNJ s'est ainsi exprimé : « Nous avons dégagé ces corps et après nous sommes entrés dans la cour arrière, l'endroit où il nous empêchait d'entrer avant que nous n'ayons débarrassé ces cadavres. »[334]

166. Le témoin CBJ[335] a rapporté qu'après les attaques du 15 avril 1994, Athanase Seromba a félicité certains assaillants en leur lançant des bouteilles de bière à partir du « deuxième étage » du presbytère. Le témoin a également déclaré avoir vu Seromba, plus tard dans la soirée au secrétariat, s'entretenant avec les *Interahamwe* et les gendarmes. Il aurait demandé à ces derniers d'amener une pelle mécanique pour enlever les cadavres qui jonchaient le sol devant l'église[336]. Le témoin CBJ a, par ailleurs, déclaré que dès le début des tueries du 15 avril 1994, il a aperçu au « deuxième étage » du presbytère Seromba en compagnie d'Édouard Nturiye, Emmanuel Kayiranga et du grand séminariste Apollinaire Hakizimana observer les massacres qui se déroulaient[337].

167. Le témoin CDK[338] a déclaré avoir vu Athanase Seromba en compagnie de Kanyarukiga et de Kayishema à la paroisse de Nyange vers 14 heures. Le témoin a expliqué que tous les trois se tenaient debout devant le bureau du secrétariat de la paroisse et qu'il se trouvait à une courte distance de ces derniers à ce moment[339].

Les témoins de la Défense

168. Le témoin BZ1[340] a déclaré ne jamais avoir vu Athanase Seromba du moment où les attaques ont été perpétrées à l'église jusqu'à l'effondrement du clocher[341]. Il a affirmé avoir vu Seromba pour la dernière fois lors de la célébration de la messe le 11 avril 1994[342].

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[328] Transcriptions du 20 janvier 2005, pp. 38-39 et 52-54 (audience publique).
[329] Transcriptions du 24 janvier 2005, p. 3 (audience publique).
[330] Transcriptions du 20 janvier 2005, p. 40 (audience publique).
[331] Transcriptions du 24 janvier 2005, p. 4 (audience publique).
[332] Voir la section 3.3.1.
[333] Transcriptions du 24 janvier 2005, p. 17 (audience publique).
[334] Transcriptions du 24 janvier 2005, p. 18 (audience publique).
[335] Voir la section 3.2.1.
[336] Transcriptions du 12 octobre 2004, p. 6 (audience publique).
[337] Transcriptions du 13 octobre 2004, p. 45 (audience publique).
[338] Voir la section 6.2.1.
[339] Transcriptions du 7 octobre 2004, p. 62 (audience publique).
[340] Transcriptions du 10 novembre 2005, p. 30 (audience publique).
[341] Transcriptions du 2 novembre 2005, p. 64 (audience publique).
[342] Transcriptions du 2 novembre 2005, p. 64 (audience publique).

169. Le témoin BZ4[343] a indiqué qu'il n'a jamais vu Athanase Seromba en compagnie des assaillants[344]. Le témoin a en outre soutenu qu'il n'a pas vu Seromba les 15 et 16 avril 1994[345].

170. Le témoin FE31[346] a déclaré qu'il n'a pas vu Athanase Seromba sur les lieux le jour de l'attaque du 15 avril 1994[347]. Le témoin a affirmé que les assaillants ont attaqué Seromba et que ce dernier ne pouvait pas mener d'attaque alors qu'il était lui-même visé par les assaillants[348].

171. Le témoin FE35[349] a déclaré ne pas avoir vu de prêtre au cours de l'attaque du 15 avril 1994. Il a déclaré n'avoir vu que les employés de la commune et la population[350].

172. Le témoin PA1[351] a dit ne pas être sorti du presbytère à la suite des attaques qui ont suivi l'arrivée de l'autobus le 15 avril 1994. Le témoin a en outre déclaré que Seromba était sorti pour s'indigner du fait qu'on tuait « des gens ». Il a par ailleurs précisé qu'il ne se souvenait pas du temps durant lequel Seromba est resté en dehors du presbytère[352]. Il a également expliqué avoir été témoin d'un entretien entre Seromba, Kariramba, Kayiranga, Nturiye, le bourgmestre et Kayishema au cours duquel la question des nombreux cadavres qui jonchaient le sol de la paroisse a été abordée. Le témoin a notamment affirmé que les prêtres ont demandé au bourgmestre « de faire quelque chose » en vue de l'ensevelissement des corps. Ce dernier leur aurait répondu qu'il contacterait le responsable du chantier pour obtenir un bulldozer à cet effet[353].

173. Le témoin YA1, un Hutu[354], a déclaré ne pas avoir vu de religieux le 15 avril 1994[355].

174. Le témoin NA1[356] a expliqué que le 15 avril 1994, vers 18 heures, les prêtres se sont réunis au presbytère et ont mandaté Athanase Seromba pour aller informer le bourgmestre de la commune du déroulement des événements. Le témoin a déclaré que de retour au presbytère, Seromba a expliqué qu'il n'avait pas pu rencontrer le bourgmestre, ce dernier étant allé assister à un enterrement[357]. Le témoin NA1 a en outre affirmé avoir appris tard dans la soirée que le bourgmestre était venu à la paroisse ce même soir et qu'il avait dit au prêtre que le lendemain, il prendrait les mesures nécessaires pour ensevelir les cadavres. Le témoin a enfin précisé qu'il n'a pas assisté à cet entretien et qu'il n'a donc pas vu le bourgmestre à la paroisse le soir du 15 avril 1994[358].

6.7.2. Conclusions de la Chambre

175. La Chambre note que le témoignage de CDL est un ouï-dire et que, par conséquent, ses affirmations selon lesquelles Athanase Seromba aurait conseillé aux assaillants d'attaquer les réfugiés dans l'église et leur aurait également dit de ramasser les cadavres avant de reprendre les tueries ne sont pas fiables.

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[343] Voir la section 6.2.1.
[344] Transcriptions du 1 novembre 2005, pp. 59 et 60 (audience publique).
[345] Transcriptions du 10 novembre 2005, p. 8 (audience publique).
[346] Voir la section 3.2.1.
[347] Transcriptions du 29 mars 2006, pp. 25, 28 et 55 (audience publique).
[348] Transcriptions du 29 mars 2006, pp. 28 et 31-32 (audience publique).
[349] Transcriptions du 22 novembre 2005, p. 29 (huis clos).
[350] Transcriptions du 22 novembre 2005, p. 18 (huis clos).
[351] Transcriptions du 20 avril 2006, p. 38 (huis clos).
[352] Transcriptions du 21 avril 2006, p. 13 (huis clos).
[353] Transcriptions du 21 avril 2006, p. 15 (huis clos).
[354] Voir la section 6.2.1.
[355] Transcriptions du 14 novembre 2005, p. 37 (audience publique).
[356] Voir la section 5.5.1.
[357] Transcriptions du 7 décembre 2005, pp. 28-29 (huis clos).
[358] Transcriptions du 7 décembre 2005, pp. 28-29 (huis clos).

176. Au regard de ce qui précède, la Chambre estime que le Procureur n'a pas établi au-delà de tout doute raisonnable qu'Athanase Seromba a supervisé les attaques du 15 avril 1994 à la paroisse de Nyange.

177. La Chambre relève, par ailleurs, que trois témoins de l'accusation, CDL, CBR et CNJ, ont affirmé dans un récit similaire que lors de l'attaque du 15 avril 1994, Athanase Seromba a empêché les assaillants d'entrer dans la cour du presbytère où des réfugiés s'étaient cachés. Le témoin CDL a notamment rapporté que Seromba se serait entretenu avec le bourgmestre et Ndungutse, quand le témoin CBR évoquait plutôt un entretien entre Seromba, Kayishema et Ndungutse. Quant au témoin CNJ, il a soutenu que Seromba se serait directement adressé aux assaillants.

178. La Chambre note que le témoignage de CDL sur le contenu de l'entretien est un ouï-dire tandis que les témoins CBR et CNJ ont précisé avoir eux-mêmes entendu les propos tenus par Athanase Seromba. Contrairement aux deux premiers témoins, CNJ n'a pas affirmé pas que Seromba a qualifié les cadavres de saletés. Les témoins CBR et CNJ ont, par ailleurs, affirmé que les massacres ont repris après le ramassage des cadavres.

179. La Chambre considère que le témoin CBR est crédible. En effet, lors du contre-interrogatoire, le témoin CBR a confirmé les propos qu'il a tenus lors de l'interrogatoire principal[359]. Le conseil de la Défense a interpellé le témoin CBR sur le fait qu'il ait entendu Kayishema et Ndungutse rapporter qu'Athanase Seromba avait demandé de ramasser les cadavres et qu'il ait lui-même entendu Seromba tenir ces propos[360]. Le témoin CBR a expliqué qu'il n'y avait aucune divergence dans ces deux affirmations. Il a dit qu'il a entendu le prêtre tenir ces propos et que les autorités ont rapporté aux assaillants ce que le prêtre leur avait dit[361].

180. Le témoin CNJ a rapporté une version constante des faits en date du 15 avril 1994, sauf en ce qui concerne l'heure de son arrivée sur les lieux[362]. La Chambre note qu'aucun élément ne permet de douter de la crédibilité de son témoignage sur les faits.

181. Le témoin CBJ a également affirmé qu'Athanase Seromba a demandé que les cadavres soient ramassés, bien qu'il ait situé cet événement dans la soirée du 15 avril 1994. Quant à son témoignage concernant le fait que Seromba aurait félicité les assaillants, aucun autre témoignage n'en fait mention. La Chambre ne retient donc pas le témoignage de CBJ sur ce point.

182. La Chambre retient que les témoignages de CBR, CBJ, CBI et CDK sont concordants quant à la présence d'Athanase Seromba sur les lieux lors des attaques du 15 avril 1994.

183. La Chambre considère que le témoignage de BZ1 n'est pas fiable sur ce point. En effet, ayant d'abord déclaré au cours de l'interrogatoire principal qu'il n'avait pas vu Athanase Seromba le 15 avril 1994, le témoin a admis au cours du contre-interrogatoire ce qui suit : « En tout état de cause, je vous dis que ces gens s'adressaient à [Seromba], mais je ne peux pas dire que je l'ai vu clairement. Mais lorsqu'ils s'adressaient à lui, j'entendais leurs propos. Au fait, je dirais que je l'ai aperçu. »[363]

184. La Chambre considère que le témoignage de BZ4 n'est pas fiable dans la mesure où il a déclaré qu'il n'est pas resté longtemps à la paroisse de Nyange en cette journée du 15 avril 1994[364].

185. La Chambre estime que le témoin FE31 n'est pas crédible sur ce point. En effet, ayant tout d'abord déclaré qu'Athanase Seromba n'était pas présent lors l'attaque du 15 avril 1994, il a par la

[359] Transcriptions du 24 janvier 2005, p. 2 (audience publique).
[360] Transcriptions du 24 janvier 2005, p. 2 (audience publique).
[361] Transcriptions du 24 janvier 2005, p. 3 (audience publique).
[362] Transcriptions du 24 janvier 2005, pp. 55-56 (audience publique).
[363] Transcriptions du 10 novembre 2005, p. 20 (audience publique).
[364] Transcriptions du 9 novembre 2005, pp. 48 et 49 (audience publique)

suite déclaré que les assaillants ont attaqué Seromba. Or aucun autre témoin ne relate que Seromba a été attaqué le 15 avril 1994.

186. Par ailleurs, la Chambre note que, le témoin F31 a déclaré être arrivé à l'église vers 10h30[365], s'être rendu au niveau de la statue de la Vierge, avant de remontre dans la cour de l'église et n'y être resté que 10 minutes sans pénétrer dans le presbytère[366]. Elle constate que le témoin a soutenu dans ses déclarations antérieures, ne pas avoir été présent à la paroisse de Nyange le 15 avril 1994. En effet, lors du contre-interrogatoire, le Procureur a donné lecture de la question 6 figurant sur la déclaration faite par le témoin aux autorités rwandaises le 14 janvier 2000 et ainsi libellée : « Vous êtes accusé d'avoir participé à l'attaque meurtrière qui a été lancée à l'église, c'était en pleine journée et plusieurs personnes vous ont vu, qu'en dites-vous ? ». La Chambre note que la réponse du témoin a été la suivante : « C'est un pur mensonge, je n'y suis jamais allé. »[367]. Le Procureur a également lu la réponse que le témoin a donné à la question 7 et qui est la suivante : « Je ne me suis jamais rendu à l'église, si je m'y étais rendu, les gens m'auraient vu »[368]. Le Procureur a enfin lu au témoin FE31 un extrait de sa déclaration aux autorités rwandaises en date du 19 novembre 1999 : « Quels sont vos moyens de défense relativement aux faits qui vous sont reprochés par le Ministère public; Réponse : Je n'ai jamais commis ces infractions. Je suis resté à la maison. Je ne suis allé nulle part. Je ne suis pas non plus allé à l'église »[369]. Au regard de ce qui précède, la Chambre constate que les déclarations du témoin FE31 sont contradictoires[370].

187. La Chambre considère le témoin FE35 n'est pas non plus crédible pour avoir témoigné qu'il n'a pas vu Athanase Seromba lors des attaques. Au demeurant, elle constate que son témoignage reste vague lorsqu'il déclare avoir quitté l'église entre 13 heures et 16 heures[371].

188. La Chambre considère que le témoignage de PA1 n'est pas déterminant. En effet, elle note qu'il a témoigné sur les faits et gestes d'Athanase Seromba à sa sortie du presbytère quoique n'ayant pas suivi pour constater de visu le comportement de ce dernier. Elle estime donc que le témoignage de PA1 n'est pas fiable.

189. La Chambre considère que le témoignage de NA1 n'est pas non plus déterminant, ce dernier n'ayant pas assisté à l'entretien au cours duquel le bourgmestre, dans la soirée du 15 avril 1994, aurait promis aux prêtres de faire venir des bulldozers pour ramasser les cadavres.

190. La Chambre considère que le témoin YA1 n'est pas crédible. En effet, son témoignage recèle des contradictions : tantôt il affirme avoir assisté aux événements du 15 avril 1994 en se tenant près de la statue de la vierge Marie, tantôt il indique ne pas être allé à la paroisse le 15 avril 1994[372].

191. Au regard de ce qui précède, la Chambre conclut qu'il est établi au-delà de tout doute raisonnable que le 15 avril 1994, Athanase Seromba a demandé aux assaillants, qui s'apprêtaient à attaquer les Tutsis dans la cour du presbytère, d'arrêter les tueries et de ramasser d'abord les cadavres. Elle conclut également que les attaques contre les réfugiés tutsis ont repris après le ramassage des corps.

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[365] Transcriptions du 29 mars 2006, p. 47 (audience publique).
[366] Transcriptions du 29 mars 2006, pp. 52-53 (audience publique).
[367] Déclaration du témoin FE31 aux autorités judiciaires rwandaises du 14 janvier 2000 (P-45), p. 1, cité au témoin: Transcriptions du 29 mars 2006, p. 65 (audience publique).
[368] Déclaration du témoin FE31 aux autorités judiciaires rwandaises du 14 janvier 2000 (P-45), p. 2, cite au témoin: Transcriptions du 29 mars 2006, p. 66 (audience publique).
[369] Déclaration du témoin FE31 aux autorités judiciaires rwandaises du 19 novembre 1999 (P-46), p. 1, cité au témoin : Transcriptions du 29 mars 2006, p. 68 (audience publique).
[370] Transcriptions du 29 mars 2006, pp. 65-68 (audience publique).
[371] Transcriptions du 23 novembre 2005, p. 28 (huis clos).
[372] Transcriptions du 14 novembre 2005, p. 28 (audience publique).

6.8. De la mort de nombreux réfugiés tutsis parmi lesquels se trouvaient l'enseignant Gatare ainsi qu'Alexia et Meriam, deux femmes tutsies réfugiées

6.8.1. La preuve

Les témoins du Procureur

192. Le témoin CBT[373] a déclaré avoir vu le 15 avril 1994, aux environs de midi, Athanase Seromba sur l'escalier devant le secrétariat en compagnie de l'enseignant Anicet Gatare[374]. Le témoin a affirmé que Seromba a accompagné Anicet Gatare jusqu'à la porte du secrétariat où il l'a livré aux trois gendarmes qui y étaient de faction. Il a déclaré que ces derniers ont emmené Anicet Gatare et l'ont abattu d'une balle[375]. Il a expliqué que lors de cet incident, Seromba se trouvait sur la véranda du secrétariat de la paroisse[376]. Il a affirmé également qu'après avoir livré Anicet Gatare aux gendarmes, Seromba est retourné dans la « cour intérieure »[377].

193. Le témoin CBJ[378] a déclaré avoir connu Meriam pendant son séjour à l'église de Nyange, du 10 au 16 avril 1994. Il a ajouté que cette dernière faisait partie d'un groupe de privilégiés Tutsis qu'Athanase Seromba avait accueillis au presbytère jusqu'au 14 avril 1994. Le témoin a en outre fait remarquer qu'à la suite de la réunion du 14 avril 1994 dont le but, à son avis, était de tuer les Tutsis, toutes les personnes hébergées au presbytère ont été refoulées par Seromba[379]. Il a également témoigné du fait que les réfugiés sont sortis après l'ouverture des portes de l'église, le matin du 15 avril 1994. Il a déclaré notamment que Meriam est retournée au presbytère pour échapper aux *Interahamwe* qui avaient commencé leurs attaques contre les réfugiés. Le témoin CBJ a par ailleurs souligné que ces attaques ont eu lieu entre 13 heures et 15 heures et a fait observer que Seromba a une fois de plus refoulé toutes les personnes d'origine tutsie, dont Meriam, qui se trouvaient dans la cour arrière du presbytère. Il a notamment expliqué que Meriam a été « tabassée » devant le secrétariat et traînée jusqu'à l'église par Muringanyi pendant que Fulgence Kayishema la tenait par la tête qu'il cognait contre le sol dans la cour[380]. Le témoin a également affirmé avoir vu la dépouille mortelle de Meriam dénudée[381]. Il a par ailleurs déclaré que le même jour, aux environs 19 heures, il a entendu Seromba appeler son veilleur, Canisius Habiyambere et lui ordonner de fouiller dans la cour arrière du presbytère pour voir s'il n'y avait pas de Tutsis qui s'y étaient cachés[382]. Le témoin CBJ a enfin déclaré avoir vu un gendarme devant le couloir, près du premier étage, tirer à bout portant sur Anicet Gatare qui, atteint d'une balle dans la poitrine, est décédé par la suite[383].

194. Le témoin CBK[384] a déclaré avoir vu de nombreuses victimes parmi lesquelles il a pu identifier Adrienne, une aspirante religieuse venant de la commune de Nyinawajambo, Anicet Gatare, un enseignant, Boniface Gatare, l'encadreur de la jeunesse dans la commune de Kivumu et Kanamugire, employé au MINITRAP[385]. Le témoin a indiqué qu'Anicet Gatare a été tué par des gendarmes le 13 avril 1994. Il a en outre indiqué avoir appris des gendarmes qu'Anicet Gatare leur

[373] Voir la section 6.3.1.
[374] Transcriptions du 7 octobre 2004, p. 31 (audience publique).
[375] Transcriptions du 6 octobre 2004, pp. 58-59 (audience publique).
[376] Transcriptions du 6 octobre 2004, p. 59 (audience publique). Le témoin CBT a identifié la pièce à conviction P3-1 comme étant une photographie du bureau en question.
[377] Transcriptions du 7 octobre 2004, p. 41 (audience publique).
[378] Voir la section 3.2.1.
[379] Transcriptions du 12 octobre 2004, pp. 9-10 (audience publique).
[380] Transcriptions du 12 octobre 2004, pp. 10-11 (audience publique).
[381] Transcriptions du 12 octobre 2004, p. 10 (audience publique).
[382] Transcriptions du 12 octobre 2004, p. 12 (audience publique); Transcriptions du 13 octobre 2004, p. 46 (audience publique).
[383] Transcriptions du 12 octobre 2004, pp. 10-11 (audience publique).
[384] Voir la section 3.3.1.
[385] Transcriptions du 19 octobre 2004, p. 32 (huis clos).

avait offert de l'argent pour qu'ils le tuent par balle car ne souhaitant mourir à coups de machette[386]. Le témoin CBK a par ailleurs affirmé que Fulgence Kayishema a tué Meriam en cognant sa tête contre des briques[387] pendant que Seromba, présent sur les lieux, n'a rien fait pour l'en empêcher[388].

Les témoins de la Défense

195. Le témoin BZ1[389] a déclaré qu'Anicet Gatare a demandé à un gendarme de le tuer pour éviter une mort atroce lorsqu'il a vu les assaillants arriver. Il a déclaré que les assaillants qualifiaient Athanase Seromba de complice des *Inkotanyi* parce qu'il ne voulait pas livrer aux assaillants les personnes qui se trouvaient à la paroisse[390].

196. Le témoin BZ2[391] a déclaré avoir appris que plusieurs personnes avaient succombé à la paroisse de Nyange dont son amie Meriam et un enseignant nommé Anicet Gatare[392].

197. Le témoin FE31[393] a déclaré qu'on lui a rapporté qu'Anicet Gatare aurait dit aux gendarmes de tirer sur lui pour éviter une mort à la machette. Le témoin a en outre affirmé ignorer qu'il ait été livré aux gendarmes. Il a enfin ajouté que les assaillants ont trouvé Anicet Gatare sur place et l'ont tué à coups de machette[394].

198. Le témoin FE55[395] a affirmé que Meriam et Anicet Gatare ont été tués le vendredi 15 avril 1994[396].

6.8.2. Conclusions de la Chambre

199. La Chambre note que les témoins CBT, CBJ, CBK, BZ2 et FE55 ont confirmé la mort des réfugiés tutsis Anicet Gatare et Meriam. Elle relève que les témoins BZ1 et FE31 n'évoquent que la mort d'Anicet Gatare. La Chambre constate enfin qu'aucun témoin en l'espèce ne fait référence à la mort d'Alexia. En conséquence, la Chambre estime que sont établis au-delà de tout doute raisonnable les meurtres de Meriam et d'Anicet Gatare.

200. En ce qui concerne le meurtre d'Anicet Gatare, la Chambre relève que les déclarations des témoins CBT et CBJ ne sont pas concordantes quant aux circonstances de la mort de ce dernier. La Chambre retient plutôt les témoignages des témoins CBK, BZ1 et FE31 selon lesquels Anicet Gatare aurait été tué par un gendarme moyennant une somme d'argent pour mourir par balle et non à coups de machette.

201. S'agissant du meurtre de Meriam, la Chambre retient le témoignage de CBJ selon lequel Athanase Seromba a refoulé plusieurs réfugiés du presbytère, dont Meriam, et que cette dernière a, par la suite, été tuée par les assaillants. La Chambre considère le témoignage de CBJ crédible. Elle observe, en outre, que le témoin CBK livre des détails concordants sur les circonstances entourant la mort de Meriam. Elle estime que ce témoin est crédible.

202. Au regard de ce qui précède, la Chambre conclut que le Procureur n'a pas établi au-delà de tout doute raisonnable qu'Athanase Seromba a livré Anicet Gatare aux gendarmes. La Chambre estime

[386] Transcriptions du 19 octobre 2004, p. 33 (huis clos).
[387] Transcriptions du 19 octobre 2004, p. 35 (huis clos).
[388] Transcriptions du 19 octobre 2004, p. 35 (huis clos).
[389] Voir la section 4.4.1.
[390] Transcriptions du 2 novembre 2005, p. 65 (audience publique).
[391] Transcriptions du 2 novembre 2005, pp. 79 et 81 (audience publique).
[392] Transcriptions du 7 novembre 2005, p. 7 (audience publique).
[393] Voir la section 3.2.1.
[394] Transcriptions du 12 avril 2006, p. 43 (audience publique).
[395] Voir la section 4.4.1.
[396] Transcriptions du 29 mars 2006, p. 26 (audience publique).

par contre qu'il est établi au-delà de tout doute raisonnable que Seromba a refoulé plusieurs réfugiés du presbytère, dont Meriam.

7. Des évenements du 16 avril 1994 à la paroisse de Nyange

7.1. L'Acte d'accusation

203. L'Acte d'accusation allègue ce qui suit :

> « 23. De nombreux réfugiés ont été tués lors de ces attaques. Un bulldozer a été utilisé par trois employés de la société Astaldi (Mitima, Mauricet Flambeau) pour débarrasser [sic] l'église des nombreux cadavres des victimes qui la recouvraient. Fulgence Kayishema a été invité à fournir deux chauffeurs supplémentaires pour achever ce travail. L'un d'eux, Evarist Rwamasirabo, qui avait refusé d'y prendre part, a été tué sur-le-champ.
>
> […]
>
> 26. Quand les cadavres des victimes ont été enlevés de l'église, Védaste Mupende a ordonné au chauffeur (Athanase alias 2000) de démolir celle-ci. Ce dernier a refusé au motif que l'église était la maison de Dieu.
>
> 27. Immédiatement après, Védaste Mupende, Fulgence Kayishema et Grégoire Ndahimana ont demandé à Athanase Seromba d'intervenir, suite à quoi il est venu et a ordonné à Athanase alias 2000 de détruire l'église, en lui disant que les Hutus étaient nombreux et qu'ils pourraient en reconstruire une autre.
>
> 28. À l'aide d'un bulldozer, Athanase a démoli l'église dont le toit s'est effondré tuant du même coup plus de 2000 réfugiés tutsis regroupés en son sein. Les quelques survivants qu'il y avait ont été attaqués par les *Interahamwe* qui tenaient à les achever.
>
> 29. Le ou vers le 16 avril 1994, après la destruction de l'église, les autorités ont tenu une réunion dans la paroisse. Peu après, le père Seromba a ordonné aux *Interahamwe* de nettoyer la « saleté ». Les cadavres des victimes ont été ensevelis dans des fosses communes.
>
> 30. Le transfert des cadavres dans les fosses communes a duré environ deux jours, sous la supervision d'Athanase Seromba, Fulgence Kayishema, Grégoire Ndahimana et d'autres personnes inconnues du Procureur.
>
> […]
>
> 47. Après la complète destruction de l'église, le père Athanase Seromba a rencontré Fulgence Kayishema, Grégoire Ndahimana, Gaspard Kanyirukiga et les conducteurs du bulldozer et s'est assis pour boire de la bière avec eux.
>
> […]
>
> 49. Vers le 15 avril 1994 ou à cette date, le père Athanase Seromba a ordonné ou planifié la destruction de l'église où plus de 2000 Tutsis se trouvaient pris au piège, provoquant ainsi leur mort, ou aidé et encouragé la destruction de ladite église. »

7.2. De la présence d'un bulldozer dans la cour de l'église

7.2.1. La preuve

Les témoins du Procureur

204. Les témoins CBK[397], CDK[398] et CBT[399] ont fait état de la présence d'un bulldozer à la paroisse de Nyange[400]. Quant aux témoins CBJ[401], CBR[402] et CDL[403], ils ont évoqué la présence de deux bulldozers[404].

Les témoins de la Défense

205. Les témoins BZ1[405], BZ3[406], BZ4[407], BZ14[408], CF14[409], CF23[410], FE27[411], FE32[412], PA1[413] et YA1[414] ont évoqué la présence d'un bulldozer à l'église de Nyange[415]. Les témoins FE35[416], FE34[417], FE56[418] et NA1[419] ont plutôt parlé de deux bulldozers sur les lieux[420].

7.2.2. Conclusions de la Chambre

206. La Chambre note que treize témoins ont déclaré avoir vu un bulldozer à l'église de Nyange tandis que sept autres font état de la présence de deux bulldozers. La Chambre est d'avis que la divergence entre les témoins est due à la difficulté qu'ils avaient à identifier la nature des engins présents à l'église de Nyange. Elle considère donc que le Procureur a établi au-delà de tout doute raisonnable qu'au moins un bulldozer était présent à l'église de Nyange le 16 avril 1994.

7.3. Du meurtre du chauffeur nommé Evarist Rwamasirabo

7.3.1. La preuve

[397] Voir la section 3.3.1.
[398] Voir la section 6.2.1.
[399] Voir la section 6.6.1.
[400] CBK : Transcriptions du 19 octobre 2004, p. 30 (huis clos); CDK : Transcriptions du 7 octobre 2004, p. 63 (audience publique) ; CBT : Transcriptions du 6 octobre 2004, p. 64 (audience publique).
[401] Voir la section 3.2.1.
[402] Voir la section 6.2.1.
[403] Voir la section 3.2.1.
[404] CBJ : Transcriptions du 12 octobre 2004, p. 11 (audience publique); CBR : Transcriptions du 20 janvier 2005, pp. 38-39 (audience publique) ; CDL : Transcriptions du 19 janvier 2005, p. 22 (huis clos).
[405] Voir la section 4.4.1.
[406] Voir la section 4.4.1.
[407] Voir la section 6.2.1.
[408] Voir la section 6.2.1.
[409] Voir la section 3.2.1.
[410] Voir la section 4.3.1.
[411] Voir la section 3.4.1.
[412] Voir la section 3.4.1.
[413] Voir la section 3.4.1.
[414] Voir la section 6.2.1.
[415] BZ1: Transcriptions du 2 novembre 2005, p. 60 (audience publique); BZ3 : Transcriptions du 31 octobre 2005, p. 55 (audience publique); BZ4 : Transcriptions du 2 novembre 2005, pp. 4-5 (audience publique); BZ14 : Transcriptions du 1 novembre 2005, pp. 31-32 (audience publique); CF14 : Transcriptions du 17 novembre 2005, pp. 16-17 (huis clos); CF23 : Transcriptions du 31 mars 2006, p. 24 (audience publique); FE27 : Transcriptions du 23 mars 2006, p. 28 (audience publique) ; FE32 : Transcriptions du 5 avril 2006, p. 15 (audience publique); PA1 : Transcriptions du 21 avril 2006, p. 16 (huis clos); YA1 : Transcriptions du 14 novembre 2005, p. 8 (huis clos).
[416] Voir la section 6.7.1.
[417] Voir la section 6.3.1.
[418] Voir la section 3.2.1.
[419] Voir la section 5.5.1.
[420] FE35 : Transcriptions du 22 novembre 2005, pp. 19, 20 et 24 (huis clos) ; FE34 : Transcriptions du 30 mars 2006, p. 19 (audience publique); FE56 : Transcriptions du 4 avril 2006, p. 13 (audience publique); NA1 : Transcriptions du 7 décembre 2005, p. 38 (huis clos).

Les témoins de la Défense

207. Le témoin FE32, un des conducteurs du bulldozer qui a détruit l'église de Nyange[421], a déclaré que le 16 avril 1994, vers 9h30, Fulgence Kayishema est allé le voir à son domicile[422]. Il a expliqué que ce dernier cherchait les chauffeurs de la société Astaldi et leur a demandé les raisons de leur réticence à « aider les autres ». Le témoin a expliqué qu'ils lui ont répondu ne pas être venus pour tuer des « gens ». Il a affirmé que Fulgence Kayishema les a harcelés et qu'ils ont été conduits de force à l'église par les gendarmes[423]. Le témoin a déclaré que Kayishema leur a dit qu'ils devaient aider les « autres » à enterrer les cadavres. Le témoin a expliqué qu'à la suite d'une querelle, un gendarme a tiré une balle dans la tête d'Evariste Ntahomvukiye qui en est mort[424]. Le témoin a indiqué que ce meurtre a eu lieu sur la route principale de Gitarama qui mène vers l'église, entre la statue de la Vierge Marie[425] et la maison Caritas[426].

7.3.2. Conclusions de la Chambre

208. La Chambre considère que le témoin FE32 n'est pas crédible sur ce point. En effet, elle constate qu'il est le seul témoin à rapporter ce meurtre alors que ce fait a eu lieu dans un lieu public. En outre, elle observe la tendance du témoin à utiliser le prétendu décès d'Evariste Ntahomvukiye pour appuyer la thèse selon laquelle il aurait détruit l'église sous la contrainte.

209. Au regard de ce qui précède, la Chambre considère que le meurtre d'Evarist Rwamasirabo n'a pas été établi par le Procureur.

7.4. De l'ordre donné par Athanase Seromba de détruire l'église

7.4.1. La preuve

Les Témoins du Procureur

210. Le témoin CBJ[427] a affirmé qu'une réunion s'est tenue à la Codekoki le 16 avril 1994, à laquelle ont participé Athanase Seromba, l'homme d'affaires Gaspard Kanyarukiga, l'inspecteur de police judiciaire Fulgence Kayishema, l'enseignant Télesphore Ndungutse, le juge Habyambere, l'homme d'affaires François Gashugi et bien d'autres qui travaillaient avec ces personnes. Il a expliqué que des assaillants qui se tenaient près du bâtiment de la Codecoki attendaient qu'on leur donne le signal pour lancer les attaques[428]. Il a expliqué que lorsqu'il a vu cette réunion, il était dans la tour de l'église[429]. Le témoin CBJ a dit avoir vu Seromba devant le bureau du secrétariat des prêtres au moment où les bulldozers se sont mis en marche le 16 avril 1994. Il a dit avoir également vu des *Interahamwe* et le chauffeur du bulldozer Anastase pénétrer dans la cour du presbytère et en ressortir. Il a déclaré avoir été témoin d'un entretien entre ce dernier et Seromba, qu'il rapporte comme suit :

> « J'ai entendu un chauffeur s'adresser à lui en ces termes : « Vraiment, Monsieur l'Abbé, vous acceptez que je démolisse l'église ? » J'ai vu l'abbé Seromba Athanase hocher la tête. Le chauffeur s'est adressé encore une fois à l'abbé Seromba et il s'est adressé à lui pour la troisième fois : « Monsieur l'abbé, acceptez-vous que je démolisse l'église ? » Et l'abbé

[421] Voir la section 3.4.1.
[422] Transcriptions du 28 mars 2006, p. 28 (audience publique).
[423] Transcriptions du 28 mars 2006, p. 29 (audience publique).
[424] Transcriptions du 28 mars 2006, p. 31 (audience publique).
[425] Transcriptions du 6 avril 2006, p. 1 (audience publique).
[426] Transcriptions du 6 avril 2006, p. 2 (audience publique).
[427] Voir la section 3.2.1.
[428] Transcriptions du 12 octobre 2004, p. 14 (huis clos).
[429] Transcriptions du 12 octobre 2004, p. 31 (huis clos).

> Athanase Seromba a répondu en ces termes : « À moins que vous autres, vous aussi, vous êtes un Inyenzi, détruisez-là. Tout ce que nous voulons, c'est nous défaire des *Inyenzi*. Pour le reste, les Hutus… nous, les Hutus, nous sommes nombreux. Si nous arrivons à nous défaire des *Inyenzi*, nous allons construire une nouvelle église. »[430]

211. Le témoin CBJ a expliqué que suite à cet entretien, il a vu Athanase Seromba retirer un objet de sa poche et le remettre au chauffeur du bulldozer. Ce dernier aurait alors commencé à détruire l'église[431].

212. Le témoin CBK[432] a déclaré avoir vu Athanase Seromba, Kayishema, Ndahimana, Kanyarukiga et d'autres personnes se réunir au secrétariat le matin du 16 avril 1994. Il affirmé avoir entendu Kayishema dire qu'il fallait démolir la tour de l'église parce qu'il y avait des intellectuels tutsis qui s'y cachaient. Il a indiqué qu'il était à moins de trois mètres de l'endroit où se tenait cette réunion. Il a expliqué qu'à la suite de cette conversation, Seromba et ces personnes sont montés au « niveau supérieur du secrétariat »[433].

213. Le témoin CBK a, par ailleurs, soutenu que le chauffeur du bulldozer s'appelait Anastase. Il a affirmé qu'Athanase Seromba était présent lorsque ce dernier est arrivé avec le bulldozer. Il a relaté, à quatre reprises, l'entretien suivant entre le chauffeur et Seromba :

> « […] il a demandé à l'abbé Seromba, il a demandé trois fois à l'abbé Seromba : « Est-ce que nous devons détruire cette église ? ». Alors, il a répondu : « Détruisez l'église. Nous, les Hutus, nous sommes assez nombreux et, de plus, dans la maison de Dieu, il est arrivé des démons… que nous, les Hutus, nous sommes nombreux, nous allons en construire une autre » »[434].
>
> « Anastase a demandé à Seromba : « Est-ce qu'il faut que je détruise cette église ? » Il lui a posé la question à trois reprises, et il lui a dit : « Détruisez-là. » […] Et en plus, il a dit : « Les Hutus, nous sommes nombreux, nous allons construire une autre église » »[435].
>
> « […] c'est que ce chauffeur qui est venu détruire l'église lui a demandé trois fois, à trois reprises, s'il devait détruire l'église. Alors, il a dit: « Détruisez-la ! » »[436].
>
> « C'est Anastase qui a demandé au père Seromba s'il fallait détruire l'église, et Seromba lui a dit : « Écoutez, vous pouvez la détruire. Nous sommes nombreux, nous allons rebâtir l'église. Lorsqu'il y a des démons dans l'église, il faut la détruire. »[437]

214. Selon le témoin CBK, l'ex-bourgmestre de la commune de Gisovu, l'IPJ de la commune, les assistants du bourgmestre, et les policiers communaux de la commune de Kivumu étaient présents lors de cet entretien. Le chauffeur se serait alors mis à démolir l'église. Le témoin a en outre précisé qu'Athanase Seromba n'a rien fait pour empêcher la démolition de l'église. Au moment de la destruction de l'église, le témoin se serait trouvé avec Seromba devant le secrétariat de l'église. Il a déclaré avoir dit à Seromba qu'il avait peur et que ce dernier l'aurait alors rassuré en lui disant que seuls les Tutsis étaient les cibles de ces tueries[438].

215. Le témoin CBK a, par ailleurs, indiqué que c'est Kayishema qui a donné l'ordre d'aller chercher le bulldozer[439]. Le témoin tient Athanase Seromba pour responsable de la destruction de

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[430] Transcriptions du 12 octobre 2004, p. 18 (audience publique).
[431] Transcriptions du 12 octobre 2004, p. 18 (audience publique).
[432] Voir la section 3.3.1.
[433] Transcriptions du 19 octobre 2004, pp. 17-18 (huis clos).
[434] Transcriptions du 19 octobre 2004, pp. 28-29 (huis clos).
[435] Transcriptions du 20 octobre 2004, p. 17 (huis clos).
[436] Transcriptions du 19 octobre 2004, p. 45 (huis clos).
[437] Transcriptions du 20 octobre 2004, p. 19 (huis clos).
[438] Transcriptions du 19 octobre 2004, pp. 28-29 (huis clos).
[439] Transcriptions du 20 octobre 2004, p. 18 (huis clos).

l'église en raison des propos qu'il a tenus au chauffeur du bulldozer[440]. Il a déclaré avoir vu Seromba observer les tueries qui se sont poursuivies après l'effondrement du clocher de l'église[441].

216. Le témoin CNJ[442] a affirmé qu'Athanase Seromba collaborait avec les assaillants, quoi qu'il n'ait pas donné l'ordre de détruire l'église[443]. Il a également rapporté les propos que les autorités ont tenu par rapport à Seromba et à la destruction de l'église : « Lorsque Seromba arrivera, c'est lui qui va prendre la décision si toute l'église doit être carrément détruite ou s'il avait une alternative, si les gens pouvaient entrer à l'intérieur pour avoir accès à l'église »[444]. Il a expliqué qu'après cet entretien, Kayishema s'est dirigé vers l'arrière de l'église et près du presbytère, pour en revenir cinq minutes plus tard en compagnie de Seromba. Ce dernier serait arrivé près du bulldozer et aurait salué les autorités qui se tenaient à proximité de cet engin. Le témoin a expliqué que Kayishema a donné l'ordre au chauffeur du bulldozer, en présence de Seromba, de commencer la destruction de l'église. Le témoin a précisé qu'il se trouvait à environ deux mètres de la scène. Seromba aurait alors dit au chauffeur : « Fais attention, il ne faut pas que le mur tombe sur toi ». Il a indiqué qu'il se tenait à quatre mètres environ de Seromba lorsque celui-ci tenait ces propos. Il a précisé que ces faits se sont déroulés entre 9 heures et 10 heures[445]. Le témoin a enfin déclaré que le 16 avril 1994, Seromba se déplaçait avec les autorités pour suivre les mouvements des bulldozers qui étaient en train de détruire l'église[446].

217. Le témoin CDL[447] a déclaré avoir assisté à un entretien entre le bourgmestre et Athanase Seromba le matin du 16 avril 1994, vers 7h30. Il a expliqué qu'après cet entretien, le bourgmestre s'est entretenu avec d'autres autorités de la commune dont Ndungutse, Habiyambere, Kayishema ainsi que des policiers et réservistes. Selon le témoin, ces différentes autorités ont pris la décision d'utiliser des bulldozers pour détruire l'église. Il a ensuite rapporté que ces dernières se sont rendues alors auprès de Seromba qui se tenait debout devant le secrétariat et lui ont dit qu'ils n'avaient plus d'autres moyens à part les bulldozers pour détruire l'église et atteindre les réfugiés. Seromba leur aurait dit : « Si vous n'avez plus d'autres moyens, amenez ces bulldozers et détruisez l'église». Le témoin a précisé qu'il ne se trouvait pas loin du lieu où Seromba a tenu ces propos[448]. Il a expliqué que la décision de détruire l'église a été prise par ces autorités et que Seromba a accepté cette décision[449].

218. Le témoin CDL a, par ailleurs, affirmé qu'Athanase Seromba a conseillé aux chauffeurs des bulldozers de commencer la destruction de l'église du côté de la sacristie[450]. Il a en outre affirmé ce qui suit : « Comme je l'ai dit, il montrait l'endroit fragile où l'on devait commencer pour tuer les Tutsis. Et chaque fois, quand les décisions étaient prises, il venait toujours de s'entretenir avec le bourgmestre. Aucune chose ne se faisait sans son assentiment. En tout cas, il n'a pas manifesté la volonté de venir au secours de ces réfugiés »[451].

219. Le témoin CBR[452] a déclaré avoir vu, le 16 avril 1994, Ndahimana, Kayishema, Kanyarukiga, Ndungutse, Habiyambere et Murangwabugabo, entrer dans la cour du presbytère et en ressortir quelques instants plus tard en compagnie d'Athanase Seromba[453]. Le témoin a affirmé qu'Athanase Seromba ne dirigeait pas les assaillants le 16 avril 1994. Il a notamment ajouté ce qui suit : « Avant que les autorités ne nous donnent une quelconque instruction, ils devaient d'abord s'entretenir avec le

[440] Transcriptions du 19 octobre 2004, p. 45 (huis clos).
[441] Transcriptions du 19 octobre 2004, p. 29 (huis clos).
[442] Voir la section 3.3.1.
[443] Transcriptions du 24 janvier 2005, pp. 21-23 et 49-51 (audience publique).
[444] Transcriptions du 24 janvier 2005, p. 44 (audience publique).
[445] Transcriptions du 24 janvier 2005, pp. 21-23 (audience publique).
[446] Transcriptions du 24 janvier 2005, pp. 21-23 et 49-51 (audience publique).
[447] Voir la section 3.2.1.
[448] Transcriptions du 19 janvier 2005, pp. 25-27 (audience publique).
[449] Transcriptions du 19 janvier 2005, p. 28 (audience publique).
[450] Transcriptions du 19 janvier 2005, p. 28 (audience publique).
[451] Transcriptions du 19 janvier 2005, p. 29 (audience publique).
[452] Voir la section 6.2.1.
[453] Transcriptions du 20 janvier 2005, p. 42 (audience publique).

prêtre. Mais je ne saurais vous dire ce qui se disait parce qu'ils s'entretenaient à part. Nos autorités, donc les leaders, avant qu'ils nous donnent une quelconque instruction, ils devaient s'entretenir avec le prêtre, que ce soit le 15… et que ce soit le 15 ou le 16 ; avant que nous fassions quoi que ce soit, ces autorités devaient s'entretenir avec le prêtre »[454].

Les témoins de la Défense

220. Le témoin FE32, le conducteur du bulldozer qui a détruit l'église de Nyange[455], a affirmé que Védaste Murangwabugabo et Anastase Rushema dirigeaient les activités le 16 avril 1994. Il a précisé que c'est que Kayishema qui l'a obligé à détruire l'église et non Athanase Seromba. Il a expliqué avoir répété à trois reprises à Rushema qu'il était interdit de détruire une église. Le témoin a expliqué qu'il a procédé à la destruction de l'église après avoir été l'objet de menaces de mort. Il a affirmé qu'alors qu'il avait commencé à détruire l'église, Seromba est en fait accouru s'en plaindre à Rushema et lui aurait dit: « Je vous ai interdit, hier, de tuer des gens ici sur place et vous venez aussi de démolir l'église. » Le témoin a affirmé ne pas avoir revu Seromba durant la destruction de l'église. Selon lui, Seromba était impuissant face à cette situation[456]. Le témoin a également indiqué ne pas avoir été informé d'une réunion au cours de laquelle la décision de faire venir les bulldozers a été prise. Le témoin a enfin affirmé qu'étant « simple chauffeur », il ne pouvait pas être au courant de la tenue d'une telle réunion[457].

221. Le témoin BZ1, un Hutu[458], a déclaré ne jamais avoir vu Athanase Seromba du moment où les attaques ont été perpétrées à l'église jusqu'à l'effondrement du clocher[459]. Il a affirmé avoir vu Seromba pour la dernière fois au moment où celui-ci a dit la messe le 11 avril 1994 et qu'il ne l'a plus revu par la suite[460].

222. Le témoin BZ1 a par ailleurs affirmé qu'il est arrivé sur les lieux quand le bulldozer détruisait le clocher. Selon lui, le bulldozer avait été amené pour enterrer les cadavres qui se trouvaient sur les lieux. Par la suite, l'objectif aurait été détourné en vue de la démolition de l'église[461]. Le témoin soutient que ce sont les autorités communales à savoir Kayishema, Ndungutse et Ndahimana qui ont fait venir le bulldozer le jour de la démolition de l'église[462]. Le témoin a notamment déclaré ce qui suit : « les gens disaient qu'il y avait des gens à l'intérieur de l'église qu'on ne pouvait pas atteindre et on a pris, donc, la décision de démolir l'église. On a donné l'ordre à celui qui conduisait ce bulldozer de démolir l'église »[463].

223. Le témoin BZ1 a, par ailleurs, nié s'être joint au groupe des assaillants lors des attaques contre les Tutsis et de la destruction de l'église. Il a déclaré s'être rendu sur les lieux pour assister aux événements tragiques qui s'y déroulaient[464]. Il a affirmé ne pas avoir vu Athanase Seromba les 15 et 16 avril 1994[465].

224. Le témoin BZ4[466] a déclaré s'être rendu près de la paroisse de Nyange le matin du 16 avril 1994, plus précisément au centre commercial de Nyange[467]. Il a en outre indiqué avoir appris que des

[454] Transcriptions du 24 janvier 2005, p. 4 (audience publique).
[455] Voir la section 3.4.1.
[456] Transcriptions du 28 mars 2006, pp. 34-35 (audience publique).
[457] Transcriptions du 28 mars 2006, p. 49 (audience publique).
[458] Transcriptions du 10 novembre 2005, p. 30 (audience publique).
[459] Transcriptions du 2 novembre 2005, p. 64 (audience publique).
[460] Transcriptions du 2 novembre 2005, p. 64 (audience publique).
[461] Transcriptions du 10 novembre 2005, p. 30 (audience publique).
[462] Transcriptions du 10 novembre 2005, p. 29 (audience publique).
[463] Transcriptions du 10 novembre 2005, p. 30 (audience publique).
[464] Transcriptions du 10 novembre 2005, p. 30 (audience publique).
[465] Transcriptions du 10 novembre 2005, p. 30 (audience publique).
[466] Voir la section 6.2.1.
[467] Transcriptions du 2 novembre 2005, pp. 4 et 5 (audience publique).

gens s'étaient concertés et avaient pensé que le bulldozer pouvait servir à la destruction de l'église. Le témoin a également ajouté que Fulgence Kayishema a été cité comme celui ayant demandé au chauffeur Nteziryayo d'utiliser le bulldozer pour détruire l'église où s'étaient retranchés les réfugiés[468].

225. Le témoin BZ4 a par ailleurs soutenu qu'il n'a vu ni Athanase Seromba ni aucun autre religieux sur les lieux au moment de la destruction de l'église et qu'il n'a jamais entendu dire que c'est Seromba qui avait ordonné la destruction de l'église[469]. Il a ajouté avoir quitté les lieux après la destruction de l'église[470]. Il a, en outre, indiqué ne pas avoir vu Seromba les 15 et 16 avril 1994[471].

226. Le témoin a, par ailleurs, indiqué qu'il est arrivé sur les lieux dans la matinée, sans pouvoir préciser l'heure exacte de son arrivée, ni celle du bulldozer à l'église. Le témoin a ajouté cependant qu'il était présent sur les lieux quand le bulldozer est arrivé[472]. Il a déclaré qu'il s'est rendu à Nyange le jour de la destruction de l'église afin de pouvoir suivre l'évolution de la situation et a soutenu qu'il n'a pas participé aux attaques[473].

227. Le témoin CF23[474] a affirmé que le bulldozer était conduit par Anastase Nkinamubanzi ainsi que par d'autres chauffeurs zaïrois[475]. Il a déclaré qu'Anastase Rushema et Ndungutse étaient les coordinateurs des activités de destruction[476]. Le témoin a déclaré qu'il est arrivé à l'Église au moment où la destruction était déjà entamée et qu'il n'y est resté que quelques minutes, ayant ensuite décidé de repartir chez lui[477].

228. Le témoin FE35, un Hutu[478], a affirmé n'avoir jamais entendu dire qu'Athanase Seromba s'était réuni avec les autorités communales pour planifier la démolition de l'église[479]. Le témoin a en outre affirmé que les chauffeurs des bulldozers avaient été réquisitionnés par Anastase Kayishema, Télesphore Ndungutse et les policiers et qu'ils travaillaient sous leurs ordres[480]. Le témoin a soutenu que les « leaders » des assaillants n'ont pas agi de concert avec Athanase Seromba[481]. De l'avis du témoin FE35, Seromba n'a pas ordonné la destruction de l'église et n'a jamais soutenu les assaillants qui ont détruit l'église. Le témoin a insisté sur le fait que Seromba n'a joué aucun rôle dans les massacres perpétrés à Nyange[482] et qu'il ne l'a jamais vu à l'église au cours de sa destruction[483].

229. Le témoin FE35 a, par ailleurs, affirmé que Kayishema, Anastase Rushema et Ndahimana escortaient les bulldozers et supervisaient la destruction de l'église sur les lieux[484].

230. Le témoin PA1[485] a rapporté que lorsque la destruction de l'église a commencé, les prêtres dont Athanase Seromba se trouvaient dans le presbytère. Il aurait entendu « un bruit inqualifiable » avant de réaliser que l'église était en train d'être détruite. Il a expliqué que Seromba est

[468] Transcriptions du 2 novembre 2005, p. 6 (audience publique).
[469] Transcriptions du 2 novembre 2005, p. 6 (audience publique).
[470] Transcriptions du 2 novembre 2005, p. 6 (audience publique).
[471] Transcriptions du 10 novembre 2005, p. 8 (audience publique).
[472] Transcriptions du 10 novembre 2005, p. 3 (audience publique).
[473] Transcriptions du 10 novembre 2005, pp. 3 et 4 (audience publique).
[474] Voir la section 4.3.1.
[475] Transcriptions du 31 mars 2006, p. 24 (audience publique).
[476] Transcriptions du 31 mars 2006, p. 25 (audience Publique).
[477] Transcriptions du 31 mars 2006, p. 24 (audience publique); Transcriptions du 3 avril 2006, p. 24 (huis clos).
[478] Transcriptions du 22 novembre 2005, p. 29 (huis clos).
[479] Transcriptions du 22 novembre 2005, p. 20 (huis clos).
[480] Transcriptions du 22 novembre 2005, p. 20 (huis clos).
[481] Transcriptions du 22 novembre 2005, p. 21 (huis clos).
[482] Transcriptions du 22 novembre 2005, p. 23 (huis clos).
[483] Transcriptions du 22 novembre 2005, p. 23 (huis clos).
[484] Transcriptions du 23 novembre 2005, p.32 (huis clos).
[485] Voir la section 3.4.1.

immédiatement sorti du presbytère, tout furieux[486]. Le témoin PA1 a expliqué enfin qu'il n'a pas vu Seromba donner l'ordre de détruire l'église[487].

231. Le témoin NA1[488] a déclaré que le 16 avril 1994, vers 8 heures, il est passé au réfectoire et a aperçu les assaillants qui encerclaient l'église et un tracteur qui évacuait les cadavres. Le témoin a également rapporté que plus tard, il a entendu du bruit et vu de la poussière monter. A ce moment, curieux de savoir ce qui se passait, les prêtres seraient montés à l'étage. Le témoin a ajouté que les prêtres ont observé la destruction de l'église sans faire de commentaire[489].

232. Le témoin NA1 a, par ailleurs, affirmé que les religieux se sont par la suite approchés des gendarmes pour leur demander de sauver la situation. Ces derniers leur auraient répondu qu'ils étaient en nombre insuffisant pour affronter les assaillants et qu'ils n'avaient pas pour mission de tirer sur les gens[490].

7.4.2. Conclusions de la Chambre

233. La Chambre considère que le témoin CBJ est crédible[491] sur le point en discussion. En effet, il n'existe aucune contradiction entre son témoignage et ses déclarations antérieures. En outre, dans son procès-verbal devant les autorités judicaires rwandaises en date du 24 juin 1997, le témoin porte plainte contre Anastase Rushema et ne fait allusion ni à Athanase Seromba ni à la destruction de l'église de manière approfondie, se contentant d'affirmer que Seromba a collaboré avec Rushema dans les attaques du 15 et du 16 avril 1994[492]. Dans un autre procès-verbal devant les autorités judiciaires rwandaises en date du 25 mars 1997, à la question à savoir quels étaient les auteurs des tueries et de la destruction de l'église, le témoin CBJ a répondu que « l'abbé Seromba … a également joué un rôle.»[493].

234. La Chambre considère que le témoin CBJ est également crédible sur deux faits : la tenue d'une réunion le 16 avril 1994 entre Seromba et d'autres personnes et la remise par Seromba d'un objet au conducteur du bulldozer. Par contre, elle est d'avis que son témoignage ne peut être considéré comme fiable sur les propos que Seromba aurait tenus au conducteur du bulldozer, et ce en raison de l'endroit où il se trouvait. En effet, la Chambre constate que de la tour de l'église où il était, il lui était matériellement impossible d'entendre les propos échangés entre Seromba et le conducteur du bulldozer au niveau du secrétariat de la paroisse en raison de la distance séparant ces deux endroits[494].

235. La Chambre estime que témoin CBK est crédible, et ce malgré une variation entre sa déclaration du 15 août 2000 et son témoignage devant la Chambre au sujet de l'identité du conducteur du bulldozer. En effet, lors de son témoignage, le témoin CBK a indiqué que le bulldozer était conduit par Anastase[495]. Interpellé toutefois par le conseil de la Défense sur sa déclaration du 15 août 2000 dans laquelle il a affirmé que Flambeau, un zaïrois, était « l'opérateur du bulldozer »[496], le témoin a

[486] Transcriptions du 20 avril 2006, pp. 25-26 et 28 (huis clos).
[487] Transcriptions du 20 avril 2006, p. 29 (huis clos).
[488] Voir la section 5.5.1.
[489] Transcriptions du 7 décembre 2005, pp. 26, 28 et 31 (huis clos).
[490] Transcriptions du 7 décembre 2005, pp. 31-32 (huis clos).
[491] Pour une discussion de la crédibilité générale du témoin CBJ, voir la section 5.3.2.
[492] Déclaration du témoin CBJ aux autorités rwandaises du 24 juin 1997 (D-25), pp. 1-2.
[493] Déclaration du témoin CBJ aux autorités rwandaises du 25 mars 1997 (D-26), p. 2.
[494] L'enquêteur Rémy Sahiri a déclaré que la distance séparant le presbytère de la porte d'entrée principale de l'église de Nyange, est de 48 mètres (Transcriptions du 27 septembre 2004, p. 12,-audience publique). Bien que le témoin Rémy Sahiri n'ait pas spécifié la distance entre le secrétariat et l'église ; la Chambre estime, sur la base de la pièce à conviction P-02 représentant un croquis des lieux, que la distance séparant le secrétariat de l'église est à peu près la même que celle dépassant le presbytère de la porte d'entrée de la paroisse.
[495] Transcriptions du 20 octobre 2004, p. 18 (huis clos).
[496] Déclaration du témoin CBK aux enquêteurs du Tribunal du 15 août 2000 (déclaration non soumise comme pièce à conviction), p. 5, cité au témoin : Transcriptions du 20 octobre 2004, p. 18 (huis clos).

répondu qu'il a voulu plutôt dire que « Flambeau surveillait les travaux alors qu'Anastase conduisait le bulldozer »[497]. De l'avis de la Chambre, cette variation sur l'identité des victimes n'entache pas la crédibilité du témoin compte tenu notamment des témoignages de FE32 et de CF23 qui évoquent la présence de plusieurs chauffeurs zaïrois[498] et plus particulièrement le témoignage de FE32 quant au fait qu'il ait été remplacé par un autre conducteur au cours de la destruction de l'église[499]. Enfin, en ce qui concerne les faits allégués par le témoin concernant Athanase Seromba, le témoin a toujours fait référence à Anastase comme étant le chauffeur du bulldozer.

236. La Chambre considère que le témoin CBK est également crédible, d'une part, sur la tenue d'une réunion le matin du 16 avril 1994 à laquelle ont participé Athanase Seromba et d'autres personnes. Au cours de cette réunion, Kayishema aurait dit qu'il fallait détruire la tour de église pour y tuer les intellectuels Tutsis qui s'y trouvaient, et d'autre part, sur la conversation entre le conducteur du bulldozer et Seromba au cours de laquelle le premier a demandé à trois reprises au second s'il devait détruire l'église. Seromba lui aurait alors répondu par l'affirmative. Le témoignage du témoin est fiable étant donné qu'il se trouvait tout près des intéressés lorsque ces faits se sont produits.

237. La Chambre considère que le témoin CNJ n'est pas crédible. En effet, lors du contre-interrogatoire, le conseil de la Défense a relevé dans quatre déclarations antérieures différentes que le témoin CNJ a déclaré être arrivé après le début de la destruction de l'église. Le témoin n'a fourni aucune explication convaincante pour justifier ces contradictions, se contentant plutôt d'affirmer que ces déclarations sont tantôt fausses, tantôt incomplètes ou encore rédigées sous la contrainte ou en vue d'une compensation financière[500].

238. La Chambre considère que le témoin CDL est crédible. En effet, elle note qu'aucune contradiction n'a été relevée dans son témoignage. Elle estime, en outre, qu'il n'y a aucun doute sur le fait que le témoin a était présent lors des entretiens qu'il a évoqué dans son témoignage. La Chambre constate, par ailleurs, que le conseil de la Défense n'a relevé qu'une omission sans importance entre le témoignage de CDL et la lettre que ce dernier a adressé aux autorités rwandaises du 16 avril 1999[501]. En effet, le conseil de la Défense a fait noter au témoin que dans cette déclaration, le témoin n'a pas fait mention du fait que le bourgmestre se serait entretenu avec Athanase Seromba avant de donner le coup d'envoi des attaques. Le témoin a répondu qu'il n'avait pas livré tous les détails lors de ses déclarations antérieures ne l'estimant pas nécessaire à l'époque[502]. Dans cette même déclaration, le témoin a cependant mentionné ce qui suit : « Vers 10 heures, le bourgmestre, l'IPJ et le gendarme se sont convenus avec Seromba de démolir l'église. »[503]

239. La Chambre considère le témoin CDL est également crédible sur deux faits : l'entretien entre Athanase Seromba, Kayishema, Ndahimana, Kanyarukiga, Habarugira et d'autres personnes et au cours de laquelle Seromba aurait accepté la décision de détruire l'église et aurait dit : « Si vous n'avez plus d'autres moyens, amenez ces bulldozers et détruisez l'église », d'une part, et les indications données par Seromba aux conducteurs sur le côté fragile de l'église, d'autre part.

240. La Chambre considère que le témoin CBR est crédible. Le conseil de la Défense a abordé deux points lors du contre interrogatoire qui ne sont pas de nature à entacher la crédibilité du témoin

[497] Transcriptions du 20 octobre 2004, p. 19 (huis clos).
[498] FE32 : Transcriptions du 28 mars 2006, pp. 30-31 (audience publique) ; CF23 : Transcriptions du 31 mars 2006, p. 24 (audience publique).
[499] Transcriptions du 28 mars 2006, p. 38 (audience publique).
[500] Supplément d'information au dossier d'aveu et de plaidoyer de culpabilité du 28 décembre 1998 (D-39), cité au témoin : Transcriptions du 24 janvier 2005, p. 58 (audience publique); L'aveu de culpabilité du témoin du 21 août 2000 (D-40B), cité au témoin : Transcriptions du 24 janvier 2005, pp. 2 et 62 (audience publique); Déclaration du témoin du 27 mai 2001 (D-41), citée au témoin : Transcriptions du 25 janvier 2005, p. 15 (audience publique).
[501] Lettre du témoin CDL aux autorités rwandaises du 16 avril 1999 (déclaration non soumise comme pièce à conviction), p. 3; citée au témoin : Transcriptions du 20 janvier 2005, p. 4 (audience publique).
[502] Transcriptions du 20 janvier 2005, p. 5 (audience publique).
[503] Lettre du témoin CDL aux autorités rwandaises du 16 avril 1999 (déclaration non soumise comme pièce à conviction), p. 3; citée au témoin : Transcriptions du 20 janvier 2005, p. 4 (audience publique).

en raison des explications qu'il a fournies. En effet, le conseil de la Défense a interpellé le témoin CBR sur la déclaration qu'il a faite le 29 août 2000 et dans laquelle il aurait déclaré ce qui suit : « Après avoir constaté que les attaques menées… à la façon du bourgmestre n'étaient pas efficaces, le groupe qui accompagnait le bourgmestre s'est dirigé vers le presbytère pour se réunir avec Seromba : Ndahimana, Muraginabugabo, Kayishema, Ndungutse, Habarigira, Kanyarukiga, Habyambere »[504]. Le conseil de la Défense a ensuite interrogé le témoin sur le fait qu'il avait auparavant dit n'avoir vu Seromba qu'une seule fois en date du 16 avril 1994, celui-ci a expliqué qu'en date du 16 avril 1994, les personnes dont il a mentionné les noms se sont rendues au presbytère et que dès leur retour du presbytère, on a tiré sur l'église[505].

241. Le conseil de la Défense a ensuite lu une autre partie de la déclaration du 29 août 2000 du témoin CBR dans laquelle celui-ci dit ce qui suit : « Après que tout se soit effondré, les autorités se sont réunies avec Athanase Seromba, et c'est après cette réunion que j'ai… je l'ai entendu dire de débarrasser les saletés qui se trouvent devant sa maison. Lorsqu'il parlait de saleté, il voulait nous expliquer de déplacer les cadavres »[506]. Le conseil de la Défense a alors demandé au témoin CBR si cette déclaration ne signifiait pas que le témoin a vu Seromba après la destruction de l'église. Le témoin a répondu par la négative[507]. Il a précisé avoir vu Seromba le matin du 16 avril 1994 et ne pas l'avoir revu après. Le témoin a rappelé être retourné à son domicile après l'effondrement de l'église. Il a indiqué que Seromba a tenu ses propos sur le « débarrassage de la saleté » le 15 avril 1994 et que la réunion s'est tenue le 15 avril 1994 et non le 16 avril 1994. Le témoin CBR a soutenu qu'il y a une confusion de dates dans la consignation de sa déclaration faite en kinyarwanda[508].

242. Au regard de ce qui précède, la Chambre considère que le témoin CBR est encore crédible sur autre fait : les entretiens et rencontres entre Athanase Seromba et les autorités le 16 avril 1994.

243. La Chambre considère que le témoin de la Défense FE32 n'est pas crédible sur les événements du 16 avril 1994, et ce en raison des nombreuses contradictions qui existent entre son témoignage, d'une part, et dans ses déclarations antérieures d'autre part. La Chambre ne relèvera ici que les contradictions les plus importantes.

244. Dans le bulletin d'accusation no 2 d'African Rights, le témoin FE32 a dit :

> « L'abbé Seromba, qui était en faveur de cette solution a dit: « Elle doit être détruite afin que nous puissions nous débarrasser de l'ennemi. Dès que l'ennemi ne sera plus là, nous en reconstruirons une autre.
>
> Anastase rechignait à passer l'église au bulldozer, mais il a dit que Seromba apaisa ses craintes. L'abbé Seromba a dit : « Il y a beaucoup de chrétiens à l'étranger, cette église sera reconstruite en trois jours »[509].

245. Le témoin FE32 a affirmé que ces déclarations sont mensongères et insiste sur le fait que les autorités rwandaises ne veulent pas reconnaître qu'il a été forcé de détruire l'église[510].

246. Dans une déclaration aux autorités rwandaises le 27 août 1996, le témoin FE32 a dit ce qui suit :

> « Ils m'ont ordonné de détruire cette église. J'ajoute que le curé de cette paroisse répondant au nom de Seromba était présent et il n'a rien dit au sujet de la destruction de l'église. J'ai exécuté

[504] Déclaration du témoin CBR aux enquêteurs du Tribunal du 29 août 2000, (déclaration non soumise comme pièce à conviction), p. 4; citée au témoin : Transcriptions du 20 janvier 2005, p. 59 (audience publique).
[505] Transcriptions du 20 janvier 2005, p. 61 (audience publique).
[506] Déclaration du témoin CBR aux enquêteurs du Tribunal du 29 août 2000, (déclaration non soumise comme pièce à conviction), p. 4; citée au témoin : Transcriptions du 20 janvier 2005, p. 61 (audience publique).
[507] Transcriptions du 20 janvier 2005, p. 61 (audience publique).
[508] Transcriptions du 20 janvier 2005, pp. 62-63 (audience publique).
[509] Bulletin d'accusation no 2 d'African Rights (P-5), p. 15; cité au témoin : Transcriptions du 5 avril 2006, p. 20 (audience publique).
[510] Transcriptions du 5 avril 2006, p. 21 (audience publique).

les ordres pour sauver ma vie. À part ces militaires, l'IPJ Kayishema ainsi que le curé de ladite paroisse – Seromba – personne d'autre n'était sur place. Je me suis acquitté de cette tâche durant trois jours et ils me surveillaient pour m'empêcher de m'échapper »[511].

247. Le témoin FE32 a précisé qu'il a fait cette déclaration sous la contrainte pour « sauver sa peau »[512].

248. Dans une déclaration aux autorités rwandaises le 19 avril 1995, le témoin FE32 a identifié « Seromba le curé de la paroisse de Nyange » comme l'un de ses collaborateurs. Il a indiqué qu'Athanase Seromba était présent lorsque Kayishema, le bourgmestre, et le juge-président du tribunal de canton l'ont ordonné d'amener le bulldozer[513]. Le témoin n'a pas contesté la validité de ce document et les informations qui y sont contenues à l'exception des mentions relatives à Seromba. Il a expliqué, en outre, avoir donné cette déclaration sous la contrainte[514].

249. Dans une déclaration aux autorités rwandaises le 22 juillet 1997, le témoin FE32 a dit ce qui suit : « Lorsque j'ai demandé à Kayishema ce qui allait se passer vu qu'on y avait tué des gens, il est allé à la cour arrière du presbytère et est revenu en compagnie d'Athanase Seromba. Celui-ci m'a dit de détruire l'église et a ajouté qu'ils allaient en construire une autre. Je lui ai demandé : « Allons-nous détruire l'église de Dieu ? » Il m'a répondu : « Détruisez-la, nous en construirons une autre »[515]. Le témoin FE32 a expliqué qu'il a fait cette déclaration « pour faire plaisir à ces gens qui voulaient que j'impute certaines allégations au prêtre Seromba »[516].

250. Dans une déclaration faite aux enquêteurs du Tribunal le 27 juillet 2000, le témoin FE32 a déclaré qu'il avait d'abord refusé de démolir l'église, que les autorités étaient alors allées au presbytère et étaient revenues accompagnées d'Athanase Seromba, qui s'est adressé directement à lui en ces termes : « il a été décidé, il faut bien la détruire, nous en construirons une autre »[517]. Le témoin FE32 commente ce passage en affirmant que les enquêteurs du Tribunal avaient leurs propres objectifs en se fiant uniquement sur les déclarations aux autorités rwandaises, lesquelles, soutient-il, ont été obtenues sous la contrainte[518]. Un autre passage de cette déclaration est lu au témoin, dans lequel le témoin affirmait qu'après avoir démoli le mur droit près du clocher, Seromba était allé vers lui et lui a dit : « détruisez tous ces murs, rien ne doit être laissé debout »[519].

251. Le témoin FE32 reconnaît avoir signé cette déclaration en précisant toutefois que les enquêteurs du Tribunal ne lui en avaient pas donné lecture au préalable et qu'en outre, les interprètes n'étaient pas dignes de confiance[520]. La déclaration du témoin aux enquêteurs du Tribunal du 4 avril 2002, qui comprenait sa déclaration du 27 juillet 2000, lui a été présentée. La déclaration du 4 avril 2002 indiquait que lecture avait été donnée au témoin de sa déclaration du 27 juillet 2000 et qu'il n'y avait apporté aucun changement[521]. Le témoin commente ce fait en disant que les enquêteurs du Tribunal l'avaient obligé à signer la déclaration et avaient refusé d'y apporter le moindre

[511] Déclaration du témoin FE32 aux autorités judiciaires rwandaises du 27 août 1996 (D-77), p. 2, citée au témoin : Transcriptions du 5 avril 2006, p. 37 (audience publique).
[512] Transcriptions du 5 avril 2006, p. 38 (audience publique).
[513] Déclaration du témoin FE32 aux autorités judiciaires rwandaises du 19 avril 1995 (P-54), p. 1; citée au témoin : Transcriptions du 6 avril 2006, p. 14 (audience publique).
[514] Transcriptions du 6 avril 2006, p. 14 (audience publique).
[515] Déclaration du témoin FE32 aux autorités judiciaires rwandaises du 22 juillet 1997 (D-82), p. 5; citée au témoin : Transcriptions du 6 avril 2006, p. 15 (audience publique).
[516] Transcriptions du 6 avril 2006, p. 16 (audience publique).
[517] Déclaration du témoin FE32 aux enquêteurs du Tribunal du 27 juillet 2000 (P-55), p. 5, citée au témoin : Transcriptions du 6 avril 2006, p. 29 (audience publique).
[518] Transcriptions du 6 avril 2006, pp. 29-30 (audience publique).
[519] Déclaration du témoin FE32 aux enquêteurs du Tribunal du 27 juillet 2000 (P-55), p. 5, citée au témoin : Transcriptions du 6 avril 2006, pp. 30-31 (audience publique).
[520] Transcriptions du 6 avril 2006, pp. 21-24 (audience publique).
[521] Déclaration du témoin FE32 aux enquêteurs du Tribunal du 4 avril 2002 (D-80), p.3, citée au témoin : Transcriptions du 6 avril 2006, p. 21 (audience publique).

changement[522]. Une confirmation de sa déclaration du 4 avril 2002 datée du 11 février 2003[523] lui a été présentée, qui indiquait que les enquêteurs lui avaient donné lecture de sa déclaration du 4 avril 2002, à laquelle il avait apporté une modification, laquelle avait été consignée dans la version finale, ce qu'il a lui-même reconnu[524]. La Chambre note que cela dément les allégations du témoin selon lesquelles les enquêteurs du Tribunal avaient refusé d'apporter des modifications aux déclarations.

252. Dans une lettre que le témoin a adressée à la Cour suprême du Rwanda le 7 novembre 2001[525], le témoin FE32 a dit ce qui suit:

> « Le fait est que j'ai reconnu devant le Tribunal et que je persiste à le reconnaître aujourd'hui que j'ai détruit l'église à l'aide d'un Caterpillar sous l'ordre des autorités communales et ecclésiastiques de l'époque »[526].
>
> « C'est le jour suivant, le 15/4/94, qu'ils m'ont amené en compagnie d'un camarade du nom d'Évariste Ntahonkiriye (Kibali-Byumba), puis, ils nous ont sommé de détruire l'église, ce que nous avons refusé. Ils l'ont (mon camarade) tué sur place et toute résistance m'a alors abandonné si bien que j'ai obéi à ce qu'ils m'ordonnaient ; d'ailleurs, on venait de faire venir le père Seromba qui a dit que cette décision avait été prise. »[527]
>
> « Le Tribunal a négligé les déclarations du témoin de l'Accusation. Celui-ci a déclaré qu'il avait vu l'IPJ au moment où Kayishema me faisait venir en me forçant de détruire l'église, chose à laquelle je me suis refusé jusqu'à ce qu'il fasse venir le père Seromba ; après cela, l'église a été détruite. »[528]

253. Le témoin a refusé de commenter cette lettre, se contentant d'indiquer que sa requête n'a pas été reçue par la Cour suprême du Rwanda[529]. Il a précisé ensuite qu'il a écrit cette lettre avec l'aide d'une autre personne mais qu'une erreur s'y était glissée[530].

254. Le témoin FE32 a été incapable de fournir des explications sur les nombreuses contradictions existant entre son témoignage devant la Chambre et les propos qu'il a tenus devant African Rights, d'une part, les autorités Rwandaises et les enquêteurs du Tribunal, d'autre part, et ce pendant sur une période de dix ans. Il n'a pas été capable non plus d'expliquer les contradictions qui subsistent dans la lettre qu'il a écrite à la Cour suprême du Rwanda.

255. Quant aux prétentions de la Défense selon lesquelles le témoin aurait agi sous la contrainte, la Chambre rappelle qu'il lui appartient de rapporter la preuve de la contrainte[531]. En l'espèce, elle estime que la Défense n'a pas produit aucune preuve de ce que les déclarations antérieures du témoin FE32 auraient été obtenues sous la contrainte. Elle note, en effet, que le témoin a constamment varié dans ses explications quand il ne refusait pas d'en donner aucune. Elle constate, en outre, que témoin n'a jamais déclaré avoir été torturé ou donné des déclarations sous la contrainte ni devant les enquêteurs du Tribunal, ni devant ceux de la Défense. Elle constate, enfin, que lors de son témoignage, en réponse à une question du Procureur sur la lettre qu'il a adressée à la Cour suprême du Rwanda, le témoin a notamment déclaré ce qui suit: « Pourquoi est-ce qu'ils continuent à se fonder sur un tel document ? À mon sens, ce document n'a pas de valeur. Vous êtes en train de me contraindre. Il s'agit d'une

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[522] Transcriptions du 6 avril 2006, p. 24 (audience publique).
[523] Confirmation du témoin FE32 de sa déclaration du 4 avril 2002 du 11 février 2003 (P-56); citée au témoin : Transcriptions du 6 avril 2006, p. 25 (audience publique).
[524] Transcriptions du 6 avril 2006, p. 26 (audience publique).
[525] Une version signée de cette lettre a été admise par la Chambre sous la cote C-1.
[526] Lettre du témoin FE32 à la Cour suprême du Rwanda du 7 novembre 2001 (P-57), p. 2, citée au témoin : Transcriptions du 6 avril 2006, p. 35 (audience publique).
[527] Lettre du témoin FE32 à la Cour suprême du Rwanda du 7 novembre 2001 (P-57), p. 2, citée au témoin : Transcriptions du 6 avril 2006, p. 38 (audience publique).
[528] Lettre du témoin FE32 à la Cour suprême du Rwanda du 7 novembre 2001 (P-57), pp. 3-4, citée au témoin : Transcriptions du 6 avril 2006, p. 40 (audience publique).
[529] Transcriptions du 6 avril 2006, pp. 35-36 (audience publique).
[530] Transcriptions du 6 avril 2006, p. 38 (audience publique).
[531] *Bagosora,* Decision on Motion Concerning Alleged Witness Intimidation (Ch.), 28 décembre 2004, paras. 8-10.

pression que vous me mettez dessus, tout comme on se présentait devant les juridictions rwandaises, on vous obligeait à dire un certain nombre de choses. Je crois qu'il s'agit là d'une contrainte également »[532]. Eu égard aux nombreuses contradictions décelées dans les déclarations du témoin, la Chambre est d'avis que ce passage ne suffit pas à établir qu'il aurait subi une quelconque contrainte.

256. La Chambre note également que le témoin FE32 apparaît comme un témoin cherchant à disculper Athanase Seromba. En effet, pour justifier la décision qu'il a prise de témoigner comme témoin à décharge et non plus comme témoin à charge comme précédemment envisagé, le témoin FE32 a déclaré ceci : « […] la vie sur terre est courte, et je n'ai pas voulu me mettre dans les mauvais termes avec Dieu»[533].

257. Au regard de ce qui précède, la Chambre considère que le témoin FE32 n'est pas crédible sur les faits qui se sont produits le 16 avril 1994.

258. La Chambre considère que le témoignage de BZ1 n'est pas déterminant. Il s'est exprimé en des termes généraux et son affirmation selon laquelle il n'a pas vu Athanase Seromba les 15 et 16 avril 1994 ne suffit pas à établir que Seromba n'était pas présent sur les lieux. Il est, en effet, bien possible que le témoin n'ait pas vu Seromba dans la foule nombreuse qui se trouvait à l'église. Au demeurant, le témoin n'est arrivé à l'église qu'après le commencement la destruction de l'église. Enfin, les affirmations du témoin sur les individus qui ont amené le bulldozer relèvent du ouï-dire et comme telles ont peu de valeur probante.

259. La Chambre considère que le témoignage de BZ4 n'est pas déterminant. En effet, le témoin s'exprime en des termes généraux et son témoignage manque de précision sur le déroulement des événements. Il a été notamment il est incapable de préciser l'heure de son arrivée ainsi que l'heure de l'arrivée du bulldozer à l'église le 16 avril 1994[534]. L'affirmation selon laquelle il n'aurait pas vu Athanase Seromba pendant les 15 et 16 avril 1994 ne suffit pas à établir que Seromba n'était pas présent sur les lieux. En effet, il est bien possible que le témoin n'ait pas vu Seromba dans la foule nombreuse qui se trouvait à l'église[535]. Enfin, les affirmations du témoin sur les individus qui ont amené le bulldozer relèvent du ouï-dire et comme telles ont peu de valeur probante.

260. La Chambre considère que le témoin CF23 n'est pas crédible. En effet, elle note que quand ce témoin arrivait dans les environs de l'église, la destruction de l'église avait été déjà entamée. Elle conséquence, elle ne saurait accorder de valeur à son témoignage sur les événements qui se sont déroulés le 16 avril 1994 à l'église de Nyange.

261. La Chambre estime que le témoignage de FE35 n'est pas crédible. En effet, elle note qu'il s'exprime en des termes généraux. Elle relève également de nombreuses contradictions entre son témoignage et ses déclarations antérieures[536].

262. La Chambre considère que le témoin PA1 n'est pas crédible. En effet, elle note de nombreuses contradictions dans son témoignage et ses déclarations antérieures au sujet des événements du 16 avril 1994. Ainsi dans sa déclaration à la Défense du 27 janvier 2005[537], le témoin n'a pas fait mention du fait qu'Athanase Seromba serait sorti furieux du presbytère alors qu'il a soutenu ce fait dans son témoignage »[538]. Le Procureur a lu au témoin un passage de sa déclaration du 27 janvier 2005 dans lequel le témoin a indiqué que les prêtres n'osaient pas s'approcher des assaillants[539]. Le Procureur a

[532] Transcriptions du 6 avril 2006, p. 39 (audience publique).
[533] Transcriptions du 5 avril 2006, p. 58 (audience publique).
[534] Transcriptions du 10 novembre 2005, p. 3 (audience publique).
[535] Transcriptions du 2 novembre 2005, p. 6 (audience publique).
[536] Transcriptions du 23 novembre 2005, pp. 12, 15-24 et 32-34 (huis clos).
[537] Déclaration du témoin PA1 à la Défense du 27 janvier 2005 (P-62).
[538] Transcriptions du 21 avril 2006, p. 16 (huis clos).
[539] Déclaration du témoin PA1 à la Défense du 27 janvier 2005 (P-62), p. 4 : cité au témoin : Transcriptions du 21 avril 2006, p. 17 (huis clos).

relevé qu'il y a une contradiction avec le témoignage du témoin, qui a pourtant affirmé que Seromba est sorti. Pour justifier cette omission, le témoin s'est contenté de dire qu'il s'agissait simplement d'un oubli involontaire[540]. Il ajoute en outre que dans la proposition « nous n'osions pas nous approcher », on ne fait pas référence à un moment précis, mais on décrit simplement la situation qui prévalait. Le témoin fait état une nouvelle fois de l'impuissance des prêtres face à la situation. Il a précisé encore que Seromba est sorti du presbytère en exprimant sa colère et son incompréhension[541].

263. Le témoin PA1 a été également interrogé quant au contenu de sa déclaration du 8 octobre 2003. Le Procureur a lu au témoin l'extrait suivant : « Question : « Que faisaient ces assaillants ? » Réponse : « Ils rentraient dans la maison des prêtres, et ils demandaient à Seromba pourquoi ils me gardaient à ses côtés car ils me prenaient pour un Tutsi de par mon physique mais Seromba leur répondait que j'étais Hutu » »[542]. Le témoin a confirmé que cela correspondait à ce qu'il avait dit devant la Cour[543]. Le Procureur a lu un deuxième extrait au témoin : « À chaque fois les autorités sont venues au presbytère pour savoir l'attitude à adopter face à ces problèmes »[544]. Le témoin a dit que cette phrase est fausse[545]. Le Procureur a lu un troisième extrait au témoin : « Question : « Est-ce que vous êtes en mesure de confirmer que ces personnes ne sont jamais venues au presbytère, en dehors de votre connaissance personnelle ? » Réponse : « C'est possible qu'elles soient venues à mon insu car je me cachais et je n'étais pas toujours à l'extérieur de la Chambre pour voir ce qui se passait » »[546]. Le témoin a précisé qu'il s'agit d'un résumé de ce qu'il a dit, et que son intention était d'expliquer aux enquêteurs « qu'il n'était peut-être pas toujours comme lié à Seromba par une corde, qu'il était avec lui mais pas chaque minute »[547]. Le Procureur a lu un quatrième extrait au témoin : « Question : « Est-ce que le bourgmestre ou – plutôt – lors du creusement de la tranchée, le bourgmestre était-il présent sur les lieux ? » Réponse : « Je ne sais pas car je ne voyais l'engin. Pour ma part, j'étais cloîtré dans pas Chambre » »[548] Le témoin a indiqué que cette phrase était fausse[549]. La Chambre considère toutes les explications du témoin comme invraisemblables.

264. La Chambre observe, enfin, que le témoin PA1 a admis ne pas être sorti avec Athanase Seromba et ne pas avoir directement été avec lui à ce moment. Il ne pouvait donc pas savoir les propos que Seromba a tenus à l'extérieur du presbytère au moment de la destruction de l'église[550].

265. La Chambre considère que le témoin NA1 n'est pas crédible. Elle note, en effet, qu'il existe de nombreuses contradictions dans le récit qu'il donne des événements du 16 avril 1994. Ainsi, dans sa déclaration du 9 décembre 1996, le témoin a dit ceci : « c'est Seromba qui a joué un rôle dans les tueries. Toutefois, je ne l'accuse de rien de concret mais je le voyais circuler avec les autorités »[551]. Commentant cette mention de sa déclaration, le témoin NA1 s'est contenté de dire qu'on a voulu orienter ses réponses vers un but précis, d'une part, et que les autorités rwandaises écrivaient ce qu'elles voulaient, d'autre part. Il a en outre ajouté qu'en faisant cette déclaration à l'époque, il voulait sauver sa peau et qu'il ne fallait pas oublier le contexte du Rwanda en 1996[552].

266. La Chambre relève également des contradictions dans le témoignage de NA1 quant à l'ordre de faire venir le bulldozer. Devant la Chambre, le témoin a affirmé qu'Athanase Seromba n'a jamais demandé « aux gens » d'aller évacuer les cadavres. Le témoin a soutenu avoir appris que le bulldozer

[540] Transcriptions du 21 avril 2006, p. 17 (huis clos).
[541] Transcriptions du 21 avril 2006, pp. 17-19 (huis clos).
[542] Déclaration du témoin PA1 à la commission rogatoire du 8 octobre 2003 (D-90), p. 3.
[543] Transcriptions du 21 avril 2006, p. 26 (huis clos).
[544] Déclaration du témoin PA1 à la commission rogatoire du 8 octobre 2003 (D-90), p. 5.
[545] Transcriptions du 21 avril 2006, p. 27 (huis clos).
[546] Déclaration du témoin PA1 à la commission rogatoire du 8 octobre 2003 (D-90), p. 5.
[547] Transcriptions du 21 avril 2006, p. 27 (huis clos).
[548] Déclaration du témoin PA1 à la commission rogatoire du 8 octobre 2003 (D-90), p. 5.
[549] Transcriptions du 21 avril 2006, p. 30 (huis clos).
[550] Transcriptions du 21 avril 2006, p. 19 (huis clos).
[551] Déclaration du témoin NA1 aux autorités judiciaires rwandaises du 9 décembre 1996 (P-37), p.1, cité au témoin : Transcriptions du 7 décembre 2005, p. 83 (huis clos).
[552] Transcriptions du 7 décembre 2005, pp. 83-85 (huis clos).

était là et que le bourgmestre avait dit qu'il allait envoyer un bulldozer pour évacuer les cadavres[553]. Le Procureur a interpellé le témoin par rapport à une déclaration qu'il avait faite le 9 décembre 1996 et dans laquelle il avait indiqué que le lendemain, Seromba avait demandé aux gens de dégager les corps mais qu'ils avaient refusé et que c'est à ce moment-là que le bourgmestre Ndahimana et Seromba ont fait venir une pelle mécanique pour enlever ces cadavres[554]. Le témoin a répondu que cette déclaration devait être située dans le contexte dans lequel son procès a été conduit. Il a précisé par ailleurs que dans ce document, il n'y avait pas de ponctuation et que cela montrait que celui qui l'avait interrogé avait un objectif à atteindre[555]. Le témoin a dit : « Oui, le lendemain, le père Seromba a demandé aux gens de dégager les corps mais ils ont refusé, mais le bourgmestre Grégoire a décidé de… de faire venir un bulldozer pour évacuer ces cadavres. Moi quand je parle de Grégoire, chaque fois, on ajoutait Seromba. Alors… parce qu'on voulait que j'accuse Seromba »[556]. Le témoin a précisé qu'il a bel et bien dit qu'ils ont mandaté Seromba pour aller voir le bourgmestre mais qu'il n'avait pas lui-même assisté personnellement à la prise de décision d'évacuer les cadavres[557].

267. Au regard de ce qui précède, la Chambre estime que le Procureur n'a pas établi au-delà de tout doute raisonnable qu'Athanase Seromba a directement donné l'ordre de détruire l'église.

268. La Chambre estime toutefois que le Procureur a établi au-delà de tout doute raisonnable qu'Athanase Seromba a été informé par les autorités de leur décision de détruire l'église et qu'il a accepté cette décision.

269. La Chambre estime également que le Procureur a établi au-delà de tout doute raisonnable qu'Athanase Seromba a tenu des propos au conducteur du bulldozer FE32 de manière à encourager celui-ci à détruire l'église. La Chambre conclut qu'ayant reçu l'ordre des autorités de détruire l'église, le chauffeur du bulldozer FE32 a demandé à Seromba s'il devait détruire l'église et que Seromba a répondu par l'affirmative en indiquant au témoin que les Hutus seraient en mesure de la reconstruire. Par ailleurs, la Chambre conclut que Seromba a donné des indications aux conducteurs des bulldozers sur le côté fragile de l'église.

7.5. De la destruction de l'église de Nyange à l'aide du bulldozer entraînant la mort d'au moins 1 500 personnes

7.5.1. La Preuve

Les témoins du Procureur

270. Le témoin CBR[558] a affirmé que la destruction de l'église de Nyange a commencé vers 10 heures le matin du 16 avril 1994. Il a expliqué que les murs ont été détruits en premier, la tour ne s'étant effondrée que vers 17 heures[559].

271. Le témoin CBJ[560] a déclaré qu'il était présent dans la tour de l'église le 16 avril 1994. Le témoin a affirmé, en outre, que la démolition de l'église a commencé vers 15 heures et a duré trois heures d'horloge[561]. Il a estimé le nombre de victimes de cette destruction à plus de 1500 personnes[562].

[553] Transcriptions du 8 décembre 2005, p. 14 (huis clos).
[554] Déclaration du témoin NA1 aux autorités rwandaises du 11 novembre 1996 (P-38), pp. 3-4, cité au témoin : Transcriptions du 8 décembre 2005, p. 16 (huis clos).
[555] Transcriptions du 8 décembre 2005, p. 17 (huis clos).
[556] Transcriptions du 8 décembre 2005, p. 17 (huis clos).
[557] Transcriptions du 8 décembre 2005, pp. 17-18 (huis clos).
[558] Voir la section 6.2.1.
[559] Transcriptions du 20 janvier 2005, p. 42 (audience publique).
[560] Voir la section 3.2.1.
[561] Transcriptions du 14 octobre 2004, pp. 26-27 (huis clos).
[562] Transcriptions du 12 octobre 2004, p. 19 (audience publique).

272. Le témoin CBK[563] a affirmé qu'il était devant le secrétariat lorsque l'église a été détruite. Il a soutenu que cette destruction a débuté vers 10 heures et que la tour a été la dernière partie de l'édifice à s'effondrer[564].

273. Le témoin CDL[565] a déclaré qu'il était présent sur les lieux lors de la destruction de l'église. Il a affirmé avoir vu deux bulldozers vers 10 heures détruire l'église et la tour. Il a ajouté que le 15 avril 1994, il y avait entre 1500 et 2000 réfugiés rassemblés à la paroisse[566] et a estimé qu'environ 1500 personnes ont été tuées lors de la destruction de l'église de Nyange[567].

274. Le témoin CBI[568] a estimé le nombre de réfugiés présents lors de son arrivée à l'église à 2000. Il a ajouté que ce nombre a augmenté pour atteindre le chiffre de 5000 personnes[569].

275. Le témoin CBS[570] a déclaré qu'à son arrivée à l'église de Nyange le 12 avril 1994, il y avait approximativement 2000 personnes sur les lieux[571].

276. Le témoin CNJ[572] a estimé le nombre de personnes tuées à près de 2000[573]. Il a expliqué qu'entre le 15[574] et le 16[575] avril 1994 près de 2000 Tutsis ont été tués[576].

277. Le témoin CBN[577] a estimé le nombre de réfugiés tutsis rassemblés à l'église le 15 avril 1994 à 2000 personnes[578].

Les témoins de la Défense

278. Le témoin FE32[579] a déclaré que la destruction de l'église a commencé vers 10h30 le 16 avril 1994 et s'est terminée vers 15 ou 16 heures[580]. Il a ajouté qu'il n'a pas eu de survivants parmi les réfugiés à la suite de la destruction de l'église[581]. Il a indiqué, en outre, qu'il y avait « moins » de 2 000 personnes à l'intérieur de l'église au moment de sa destruction[582].

279. Le témoin BZ1[583] a déclaré qu'il a vu le bulldozer démolir l'église et le clocher. Le témoin a ajouté que la destruction de l'église a duré entre trois et cinq heures et que le clocher s'est écroulé vers 15 heures[584]. Il a également affirmé qu'après la chute du clocher, il a quitté les lieux après avoir noté « l'absence de réfugiés »[585].

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563 Voir la section 3.3.1.
564 Transcriptions du 19 octobre 2004, pp. 28 et 29 (huis clos).
565 Voir la section 3.2.1.
566 Transcriptions du 19 janvier 2005, p. 11 (audience publique).
567 Transcriptions du 19 janvier 2005, p. 28 (audience publique).
568 Voir la section 3.3.1.
569 Transcriptions du 4 octobre 2004, p. 8 (audience publique).
570 Voir la section 3.3.1.
571 Transcriptions du 5 octobre 2004, p. 9 (audience publique).
572 Voir la section 3.3.1.
573 Transcriptions du 24 janvier 2005 p. 16 (audience publique).
574 Transcriptions du 24 janvier 2005, p. 16 (audience publique).
575 Transcriptions du 24 janvier 2005, p. 25 (audience publique).
576 Transcriptions du 24 janvier 2005, p. 25 (audience publique).
577 Voir la section 3.3.1.
578 Transcriptions du 15 octobre 2004, p. 46 (audience publique).
579 Voir la section 3.4.1.
580 Transcriptions du 28 mars 2006, pp. 37 et 38 (audience publique).
581 Transcriptions du 28 mars 2006, p. 40 (audience publique).
582 Transcriptions du 28 mars 2006, pp. 40-41 (audience publique).
583 Transcriptions du 10 novembre 2005, p. 30 (audience publique).
584 Transcriptions du 2 novembre 2005 pp. 62-64 (audience publique).
585 Transcriptions du 2 novembre 2005, p. 67 (audience publique).

280. Le témoin BZ8[586] a déclaré qu'en avril 1994, il vivait dans la commune de Kivumu[587]. Le témoin a soutenu qu'il a observé à distance la destruction de l'église. Il a explique que l'engin est arrivé et a commencé à détruire les murs arrières de l'église[588]. Il a, en outre, affirmé que toute l'église ne s'est pas effondrée tout de suite et que le clocher n'a été détruit que le jour suivant[589]. Il a précisé enfin qu'il n'était pas sûr des dates[590].

281. Le témoin FE35[591] a déclaré qu'une partie du mur de l'église a d'abord détruite avant que l'autre ne suive. Il a ajoute que le clocher s'est effondré vers midi[592].

7.5.2. Conclusions de la Chambre

282. La Chambre relève que le témoin Rémy Sahiri, un enquêteur du Bureau du Procureur[593] a rédigé un rapport intitulé *Rapport préliminaire d'identification des sites du génocide et des massacres d'avril-juillet 1994 au Rwanda* dans lequel il a indiqué que l'église de Nyange avait été détruite[594]. Il a par ailleurs présenté à la Chambre un document photographique indiquant l'emplacement de la paroisse de Nyange et où figurent les ruines de l'ancienne église[595].

283. La Chambre note que les témoins du Procureur aussi bien que ceux de la Défense sont crédibles. En effet, leurs témoignages sont tous concordants sur le fait que l'église de Nyange a été détruite le 16 avril 1994 à l'aide d'un bulldozer

284. Au regard de ce qui précède, la Chambre considère que le Procureur a établi au-delà de tout doute raisonnable que l'église de Nyange a été détruite le 16 avril 1994 à l'aide d'un bulldozer.

285. La Chambre note, par ailleurs, que les témoignages sont concordants sur le fait que la destruction de l'église a entraîné la mort de nombreux réfugiés tutsis qui s'y étaient retranchés, certains témoins estimant le nombre de victimes à 1500 tandis que d'autres avancent le chiffre de 2000. A cet égard, la Chambre rappelle ses conclusions dans lesquelles elle a établi que l'église de Nyange avait une capacité d'accueil d'au moins 1500 personnes[596]. Elle en déduit que le 16 avril 1994, la destruction de l'église de Nyange a provoqué la mort d'au moins 1500 réfugiés qui s'y était abrités pour fuir les attaques des assaillants.

7.6. De l'ordre donné par Athanase Seromba d'ensevelir les cadavres

7.6.1. La Preuve

Les témoins de la Défense

286. Le témoin FE35[597] a déclaré qu'après la démolition de l'église, Athanase Seromba n'a pas tenu de réunion à la paroisse avec les autorités communales. Il a relevé qu'après la destruction de l'église de Nyange, des camions de la compagnie ASTALDI ont enterré les corps des victimes dans

[586] Transcriptions du 15 novembre 2005, p. 43 (audience publique).
[587] Transcriptions du 15 novembre 2005, p. 28 (audience publique).
[588] Transcriptions du 15 novembre 2005, p. 37 (audience publique).
[589] Transcriptions du 15 novembre 2005, p. 39 (audience publique).
[590] Transcriptions du 16 novembre 2005, p. 2 (audience publique)
[591] Voir la section 6.7.1.
[592] Transcriptions du 22 novembre 2005, pp. 20 et 21 (huis clos).
[593] Transcriptions du 27 septembre 2004, p. 5 (audience publique).
[594] Rapport préliminaire d'identification des sites du génocide et des massacres d'avril-juillet 1994 au Rwanda (P-4), p. 166.
[595] Pièce à conviction P2-7.
[596] Voir la section 2.
[597] Voir la section 6.7.1.

une fosse commune creusée dans la bananeraie des prêtres[598]. Le témoin a affirmé que Seromba n'a pas donné l'ordre d'enterrer les corps. Il a soutenu que Kayishema accompagné de Ndahimana aurait donné un tel ordre aux *Interahamwe*[599].

287. Le témoin FE32[600] a déclaré qu'il a enterré les cadavres dans une fosse commune suite à la destruction de l'église[601].

288. Le témoin FE34[602] a déclaré que des fosses ont été creusées à l'aide d'un bulldozer présent en vue de l'ensevelissement des victimes de la destruction de l'église de Nyange[603]. Il a indiqué que c'est le bourgmestre a donné l'ordre d'inhumer les corps tout en admettant ne pas l'avoir entendu donner cet ordre[604].

289. Le témoin FE13[605] a déclaré qu'un bulldozer présent sur les lieux le 16 avril 1994 a creusé la fosse dans laquelle les corps des victimes de la destruction de l'église ont été enterrés[606].

7.6.2. Conclusions de la Chambre

290. La Chambre note que le Procureur n'a produit aucune preuve pour soutenir allégation discutée. Au surplus, elle constate qu'aucun témoin de la Défense ne soutient qu'Athanase Seromba ait donné l'ordre d'ensevelir les cadavres après la destruction de l'église[607]. En effet, ces derniers affirment que cet ordre serait plutôt venu des autorités. De ce qui précède, la Chambre considère que le Procureur n'a pas établi ce fait au-delà de tout doute raisonnable.

7.7. Des retrouvailles entre Athanase Seromba et des autorités après la destruction de l'église

7.7.1. La Preuve

Le témoin du Procureur

291. Le témoin CBK[608] a déclaré qu'après les massacres du 16 avril 1994, Athanase Seromba, Fulgence Kayishema, le colonel Nzapfakumunsi, Gaspard Kanyarukiga, Grégoire Ndahimana, Anastase Rushema et Télésphore Ndungutse se sont réunis à l'étage supérieur du bâtiment du presbytère pour boire de la bière de banane et du vin[609]. Le témoin a ajouté que Seromba se tenait au « niveau supérieur » du bâtiment du presbytère et qu'il distribuait la bière aux assaillants qui se trouvaient dans la cour arrière du presbytère. Il a affirmé, en outre, qu'il y avait une ambiance de fête à cette occasion et que toutes ces personnes étaient satisfaites du massacre qui venait d'être perpétré[610].

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[598] Transcriptions du 22 novembre 2005, p. 24 (huis clos).
[599] Transcriptions du 22 novembre 2005, p. 24 (huis clos).
[600] Voir la section 2.
[601] Transcriptions du 6 avril 2006, pp. 10- 12 (audience publique).
[602] Voir la section 6.3.1.
[603] Transcriptions du 30 mars 2006, p. 17 (audience publique).
[604] Transcriptions du 30 mars 2006, p. 50 (audience publique)
[605] Voir la section 3.2.1.
[606] Transcriptions du 7 avril 2006, p. 29 (audience publique).
[607] CBR est le seul témoin du Procureur qui soutient avoir entendu Athanase Seromba exiger qu'on débarrasse la « saleté » de la cour de l'église lors d'une réunion tenue le 16 avril 1994. Cependant, au cours du contre-interrogatoire, il a précisé que cette réunion s'est tenue à la paroisse le 15 avril et non le 16 avril 1994 (Transcriptions du 20 janvier 2005, pp. 62 et 63 (audience publique)).
[608] Voir la section 3.3.1.
[609] Transcriptions du 19 octobre 2004, pp. 41-42 (huis clos).
[610] Transcriptions du 19 octobre 2004, pp. 31-32 (huis clos).

Les témoins de la Défense

292. Le témoin FE32[611] a déclaré ne pas avoir vu Athanase Seromba ni boire ni se réjouir de la destruction de l'église. Il a ajouté qu'il n'a pas reçu de la bière de la part de Seromba[612].

293. Le témoin PA1[613] a déclaré qu'il est impossible qu'Athanase Seromba ait récompensé les destructeurs de l'église en leur distribuant de la bière[614]. Le témoin a ajouté qu'il n'a vu personne remercier Seromba pour la destruction de l'église et a considéré cela comme impensable : « Déjà, l'état dans lequel il était, je ne sais pas s'il y avait personne qui osait l'approcher parce que, pour voir cette église qui était détruite […] »[615]. Il a indiqué enfin que les destructeurs de l'église n'ont reçu aucune rémunération[616].

7.7.2. Conclusions de la Chambre

294. La Chambre estime que le témoignage de CBK n'est pas fiable sur ce point. En effet, il est le seul témoin à affirmer qu'Athanase Seromba ait adopté se serait réjoui de la destruction de l'église. La Chambre considère qu'un doute raisonnable subsiste quant à la véracité du récit livré par le témoin CBK.

295. S'agissant des témoins FE32 et PA1, la Chambre considère qu'ils ne sont pas crédibles. En effet, leurs témoignages ne sont que le reflet de leurs opinions personnelles.

296. Au regard de ce qui précède, la Chambre conclut que le Procureur n'a pas établi au-delà de tout doute raisonnable le fait qu'Athanase Seromba aurait célébré la destruction de l'église en compagnie d'autres personnes.

Chapitre III : Conclusions juridiques de la Chambre

297. La Chambre dégagera ses conclusions juridiques en se fondant sur les conclusions factuelles qu'elle a tirées au chapitre II ci-dessus.

298. L'Acte d'accusation comporte quatre chefs d'accusation : génocide, complicité dans le génocide, entente en vue de commettre le génocide et crimes contre l'humanité (extermination).

299. Les deux premiers chefs d'accusation mis à la charge de l'accusé, génocide et complicité dans le génocide, sont alternatifs alors que les chefs d'accusation 1, 3 et 4 sont cumulatifs. En conséquence, la Chambre examinera si le Procureur a rapporté la preuve de la responsabilité de l'accusé au regard de chacun de ces chefs d'accusation.

1. Mode de participation aux crimes

1.1. L'Acte d'accusation

300. Dans l'Acte d'accusation, la responsabilité pénale de l'accusé est engagée sur la base de l'article 6 (1) du Statut qui dispose comme suit : « 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 ».

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[611] Voir la section 3.4.1.
[612] Transcriptions du 28 mars 2006, p. 48 (audience publique).
[613] Voir la section 3.4.1.
[614] Transcriptions du 20 avril 2006, pp. 28-29 (huis clos).
[615] Transcriptions du 20 avril 2006, p. 29 (huis clos).
[616] Transcriptions du 20 avril 2006, p 30 (huis clos).

1.2. Droit applicable

301. Les différents modes de participation qui sont énoncés à l'article 6 (1) recouvrent un certain nombre d'actes propres à engager la responsabilité de l'accusé au titre des chefs d'accusation retenus contre lui. Les différents modes de participation à une infraction envisagés à l'article 6 (1) du Statut sont présentés de façon succincte ci-dessous :

302. La participation par « commission » s'entend de la participation directe physique ou personnelle de l'accusé à la perpétration d'un crime ou d'une omission coupable d'un acte requis en vertu d'une règle de droit pénal[617].

303. La participation par « planification » suppose qu'une ou plusieurs personnes envisagent de programmer la commission d'un crime, aussi bien dans ses phases de préparation que d'exécution[618]. En ce qui concerne ce mode de participation, le Procureur doit démontrer que le degré de participation de l'accusé a été substantiel[619] et que la planification a été un élément déterminant dans la commission du crime[620].

304. La participation par « incitation » implique d'inciter ou d'encourager autrui à commettre un crime[621]. Pour que ce mode de participation soit retenu, le Procureur doit établir que l'incitation a été un élément déterminant du comportement d'une autre personne qui a commis le crime. Il n'est toutefois n'est pas obligé de prouver que le crime n'aurait pas été commis sans l'intervention de l'accusé[622].

305. La participation par le fait d'« ordonner » suppose qu'une personne en position d'autorité donne à une autre l'ordre de commettre une infraction. Ce mode de participation implique l'existence d'une relation de subordination entre celui qui donne l'ordre et celui qui l'exécute[623]. Il n'est toutefois pas nécessaire que cette relation revête un caractère officiel[624]. Un tel lien de subordination s'établit en démontrant l'existence d'un rapport hiérarchique officiel ou non dans le cadre duquel l'accusé exerçait un contrôle effectif sur les auteurs principaux de l'infraction[625].

306. L'élément moral requis pour établir les quatre modes de participation énoncés ci-dessus est l'intention directe de celui qui a commis, planifié, incité à commettre ou ordonné le crime[626].

307. La participation par « aide et encouragement » renvoie à tout acte d'assistance et de soutien à la commission du crime[627]. Ce mode de participation peut prendre la forme d'une aide matérielle, de déclarations verbales. Il peut aussi consister dans la simple présence de l'accusé sur le lieu de commission du crime conceptualisée par la théorie du « spectateur approbateur »[628]. L'aide ou l'encouragement doit avoir un effet important sur la commission du crime, mais ne doit pas

[617] *Krstić*, Jugement (Ch.), 2 août 2001, para. 601; *Kayishema*, Arrêt (App.), 1 juin 2001, para. 187.
[618] *Akayesu*, Jugement (Ch.), 2 septembre 1998, para. 480.
[619] *Bagilishema*, Jugement (Ch.), 7 juin 2001, para. 30 : « Le degré de cette participation doit être substantiel; il peut notamment [consister] à arrêter un plan criminel ou à souscrire à un plan criminel proposé par autrui ».
[620] *Krstić*, Affaire IT-98-33, Jugement (Ch.), 2 août 2001, para. 601.
[621] *Bagilishema*, Jugement (Ch.), 7 juin 2001, para. 30 ; *Krstić*, Affaire IT-98-33, Jugement (Ch.), 2 août 2001, para. 601.
[622] *Bagilishema*, Jugement (Ch.), 7 juin 2001, para. 30 : « En incitant ou en encourageant autrui à commettre un crime, l'instigateur peut contribuer de façon substantielle à la commission de ce crime. L'existence d'une relation causale entre l'incitation et l'*actus reus* du crime doit être prouvée ». *Akayesu*, Jugement (Ch.), 2 septembre 1998, paras. 478-482.
[623] *Bagilishema*, Jugement (Ch.), 7 juin 2001, para. 30 ; *Akayesu*, Jugement (Ch.), 2 septembre 1998, para. 483; *Rutaganda*, Jugement (Ch.), 6 décembre 1999, para. 39.
[624] *Kordić*, Arrêt (App.), 17 décembre 2004, para. 28.
[625] Jugement *Semanza*, para. 415.
[626] *Kordić*, Arrêt (App.), 17 décembre 2004, paras. 26-29.
[627] *Bagilishema*, Jugement (Ch.), 7 juin 2001, para. 33 ; *Akayesu*, Jugement (Ch.), 2 septembre 1998, para. 484; *Kayishema*, Arrêt (App.), 1 juin 2001, para. 186; *Kayishema*, Jugement (Ch.), 21 mai 1999, paras. 200-202.
[628] *Kayishema*, Arrêt (App.), 1 juin 2001, paras. 201 et 202; *Kayishema*, Jugement (Ch.), 21 mai 1999, para. 198;

nécessairement constituer un élément indispensable, une condition sine qua non de ce crime[629]. Sauf dans le cas du « spectateur approbateur », l'assistance peut être fournie avant ou pendant la commission du crime et il n'est pas nécessaire que l'accusé soit présent au moment des faits incriminés[630].

308. Dans le cas du « spectateur approbateur », la seule présence de l'accusé sur les lieux ne suffit pas par elle-même à établir que ce dernier a aidé et encouragé à commettre le crime, à moins qu'il ne soit démontré qu'elle a eu pour effet de légitimer ou d'encourager sensiblement les agissements de l'auteur principal[631]. La responsabilité pénale du « spectateur approbateur » n'est engagée que s'il est effectivement présent sur le lieu du crime ou, tout au moins, à proximité de celui-ci, et que sa présence est interprétée par l'auteur principal du crime comme une approbation de sa conduite[632]. L'autorité de l'accusé constitue un facteur important dans l'évaluation de l'effet de la présence de l'accusé[633].

309. L'élément moral dans l'hypothèse de la participation par aide et encouragement exige que l'accusé ait conscience que son comportement contribuerait de façon substantielle à la réalisation de l'élément matériel de cette infraction ou qu'il ait conscience que la perpétration du crime résulterait vraisemblablement de sa conduite[634]. L'accusé doit avoir connaissance des éléments essentiels du crime, y compris de l'intention de l'auteur principal. Il n'est toutefois pas nécessaire que l'accusé partage cette intention[635].

310. Pour ce qui est de l'élément moral requis dans le cas plus spécifique du « spectateur approbateur », l'accusé doit savoir que sa présence sera interprétée par l'auteur principal de l'infraction comme un encouragement ou un appui[636]. La *mens rea* du spectateur-approbateur peut se déduire des circonstances et même s'étendre à sa conduite antérieure : s'il a, par exemple, permis que des crimes soient commis en toute impunité ou s'il en a verbalement encouragé la commission[637].

1.3. Conclusions de la Chambre sur la forme de participation de l'accusé aux infractions retenues contre lui

Le mode participation de l'accusé aux infractions qui lui sont reprochées

311. Sur la base de ses conclusions factuelles, la Chambre considère que la responsabilité pénale de l'accusé Athanase Seromba ne peut être envisagée que pour sa participation par aide et encouragement pour les infractions dont il sera éventuellement déclaré coupable.

312. La Chambre est d'avis que le Procureur n'a pas établi au-delà de tout doute raisonnable que Seromba a planifié ou commis les massacres des réfugiés tutsis[638]. S'agissant de la participation par incitation ou par le fait d'ordonner, le Procureur n'a pas établi qu'Athanase Seromba avait l'intention

[629] *Bagilishema*, Jugement (Ch.), 7 juin 2001, para. 33 ; *Furundžija*, Affaire IT-95-17/1-T, Jugement (Ch.), 10 décembre 1998, paras. 209-226.
[630] *Bagilishema*, Jugement (Ch.), 7 juin 2001, para. 33; *Rutaganda*, Jugement (Ch.), 6 décembre 1999, para. 43 ; *Kayishema*, Jugement (Ch.), 21 mai 1999, para. 200; *Akayesu*, Jugement (Ch.), 2 septembre 1998, para. 484.
[631] *Krnojelac*, Jugement (Ch.), 15 mars 2002, para. 89 ; *Bagilishema*, Jugement (Ch.), 7 juin 2001, para. 36.
[632] *Aleksovski*, Affaire IT-95-14/1, Jugement (Ch.), 25 juin 1999, paras. 64 et 65.
[633] *Aleksovski*, Affaire IT-95-14/1, Jugement (Ch.), 25 juin 1999, para. 65. Voir également les affaires suivantes : *Aleksovski*, Affaire IT-95-14/1, Jugement (Ch.), 25 juin ; 1999, paras. 64 et 65 ; *Tadić*, Affaire IT-94-1, Jugement (Ch.), 7 mai 1997, para. 690 ; *Akayesu*, Jugement (Ch.), 2 septembre 1998, para. 693 et *Furundžija*, Affaire IT-95-17/1-T, Jugement (Ch.), 10 décembre 1998, para. 274.
[634] *Bagilishema*, Jugement (Ch.), 7 juin 2001, para. 32 ; *Furundžija*, Affaire IT-95-17/1-T, Jugement (Ch.), 10 décembre 1998, para. 246.
[635] *Krnojelac*, Jugement (Ch.), 15 mars 2002, para. 90 ; *Krnojelac*, Arrêt (App.), 17 septembre 2003, para. 52 ; *Ntakirutimana*, Affaire ICTR-96-10, Arrêt (App.), 13 décembre 2004, paras. 500-502; *Krstić*, Affaire IT-98-33, Arrêt (App.), 19 avril 2004, paras. 134-140.
[636] *Bagilishema*, Jugement (Ch.), 7 juin 2001, para. 36.
[637] *Bagilishema*, Jugement (Ch.), 7 juin 2001, para. 36.
[638] Voir Chapitre II, sections 3.4, 4.2, 4.3, 5.6, 6.3, 6.4, 6.5, 6.7 et 7.4. Voir également Chapitre III, section 4.2.

génocidaire, c'est-à-dire le *dolus specialisis*, requise pour engager ces deux modes de participation à son encontre. Plus spécifiquement par rapport au fait d'ordonner, la Chambre estime que le Procureur n'a pas établi que l'accusé Athanase Seromba exerçait un contrôle effectif sur les auteurs principaux des crimes.

L'exclusion de la théorie du spectateur-approbateur dans le cas d'espèce

313. La Chambre note en l'espèce que dans ses conclusions finales, la Défense a présenté des arguments sur l'hypothèse du *spectateur-approbateur*[639]. Elle constate toutefois que ni l'Acte d'accusation ni le mémoire préalable du Procureur ne font allusion à la théorie du *spectateur-approbateur*. Elle en déduit que le Procureur n'a pas entendu plaider cette forme de participation par rapport aux charges retenues contre l'accusé Athanase Seromba. En conséquence, la Chambre n'examinera pas l'hypothèse du *spectateur-approbateur* dans ses conclusions.

2. Chef d'accusation 1 – Génocide

2.1. L'Acte d'accusation

314. Dans l'Acte d'accusation sous considération, le Procureur du Tribunal pénal international pour le Rwanda accuse Athanase Seromba de génocide, sous l'empire de l'article 2 (3) (a) du Statut, en ce que, entre le 6 avril 1994 et le 20 avril 1994 ou à ces dates, dans la commune de Kivumu, préfecture de Kibuye au Rwanda, Athanase Seromba a été responsable de meurtre ou d'atteintes graves à l'intégrité physique ou mentale de membres de la population tutsie, commis dans l'intention de détruire, en tout ou en partie, un groupe racial ou ethnique.

2.2. Droit applicable

315. L'article 2 (2) du Statut[640] dispose que :

> 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 physique totale ou partielle;
>
> (d) mesures visant à entraver les naissances au sein du groupe;
>
> (e) transfert forcé d'enfants du groupe à un autre groupe.

316. Les éléments constitutifs du crime de génocide sont : premièrement, la perpétration d'un des actes énumérés à l'article 2 (2) du Statut; deuxièmement, la commission de cet acte à l'encontre d'un groupe national, ethnique, racial ou religieux, spécifiquement ciblé en tant que tel; et troisièmement, la commission de cet acte dans l'intention de détruire, en tout ou en partie, le groupe ciblé.

317. Dans l'Acte d'accusation, le Procureur met notamment à la charge de l'accusé les actes de meurtre et d'atteintes graves à l'intégrité physique ou mentale de membres du groupe. Dans son

[639] Conclusions finales de la Défense, pp. 25-28.
[640] La définition du génocide donnée à l'article 2 du Statut du Tribunal est une reprise des articles 2 et 3 de la Convention pour la prévention et la répression du crime de génocide. Le Rwanda a adhéré à cette convention mais a déclaré ne pas être lié par l'article 9 de ladite convention (Sur ce point, voir le Décret-loi du 12 février 1975, Journal Officiel de la République Rwandaise, 1975, page 230).

approche par rapport à chacun de ces actes, la Chambre s'appuiera sur la définition qu'en donne jurisprudence. Ainsi, dans l'affaire *Musema*, la Chambre de première instance a défini le meurtre comme un « homicide commis avec l'intention de donner la mort »[641]. S'agissant de l'atteinte grave à l'intégrité physique ou mentale, la même Chambre, dans l'affaire *Kayishema*, a considéré que cette notion vise tout « acte qui porte gravement atteinte à la santé de la victime ou qui a pour effet de la défigurer ou de provoquer des altérations graves de ses organes externes, internes ou sensoriels »[642]. La notion d'atteinte grave à l'intégrité mentale vise des actes aux conséquences plus graves qu'une simple atteinte mineure ou temporaire aux facultés mentales de la victime[643] et au nombre desquels figurent de manière non exhaustive, les actes de torture physique ou de torture mentale, les traitements inhumains ou dégradants, le viol, les violences sexuelles et la persécution[644]. Il n'est toutefois pas nécessaire que les effets d'une atteinte grave soient permanents ou irrémédiables[645].

318. Quant à la notion de « membres du groupe » qui symbolise l'appartenance à un groupe, la jurisprudence la considère de façon subjective en exigeant que la victime soit perçue par l'auteur du crime comme appartenant au groupe dont la destruction est visée[646] et que la détermination du groupe visé devrait être faite au cas par cas[647].

319. Le génocide se distingue d'autres crimes en ce qu'il comporte un dol spécial : un accusé ne peut être reconnu coupable du crime de génocide que s'il est établi qu'il a commis l'un des actes énumérés à l'article 2 (2) du Statut dans l'intention spécifique d'obtenir comme résultat la destruction totale ou partielle d'un groupe protégé. La notion de destruction du groupe s'entend de « la destruction matérielle d'un groupe déterminé par des moyens soit physiques, soit biologiques, et non pas [de] la destruction de l'identité nationale, linguistique, religieuse, culturelle ou autre de ce groupe »[648]. Aucun nombre minimal de victimes n'est requis pour établir le génocide[649]. Pour prouver l'élément intentionnel du génocide, il n'est pas nécessaire d'établir que l'auteur entendait procéder à l'anéantissement complet d'un groupe dans le monde entier[650], mais seulement qu'il avait l'intention d'en détruire une partie substantielle[651].

320. Au regard de la jurisprudence du Tribunal de céans, l'élément intentionnel du génocide peut se déduire de certains faits ou indices, notamment (a) du contexte général de perpétration d'autres actes répréhensibles systématiquement dirigés contre le même groupe, que ces autres actes aient été commis par l'accusé ou par d'autres, (b) de l'échelle des atrocités commises, (c) de leur caractère général, (d) de leur exécution dans une région ou un pays, (e) du fait que les victimes ont été délibérément et systématiquement choisies en raison de leur appartenance à un groupe particulier, (f) de l'exclusion, à cet égard, des membres d'autres groupes, (g) de la doctrine politique qui a inspiré les actes visés, (h) de la répétition d'actes de destruction discriminatoires et (i) de la perpétration d'actes portant atteinte au fondement du groupe ou considérés comme tels par leurs auteurs[652].

2.3. Conclusions de la Chambre

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[641] *Musema*, Jugement (Ch.), 27 janvier 2000, para. 155.
[642] *Kayishema*, Jugement (Ch.), 21 mai 1999, para. 109.
[643] *Kayishema*, Jugement (Ch.), 21 mai 1999, para. 110.
[644] *Musema*, Jugement (Ch.), 27 janvier 2000, para. 156.
[645] *Musema*, Jugement (Ch.), 27 janvier 2000, para. 156.
[646] *Rutaganda*, Jugement (Ch.), 6 décembre 1999, para. 56 ; *Musema*, Jugement (Ch.), 27 janvier 2000, para. 155; *Semanza*, Jugement (Ch.), 15 mai 2003, para. 317.
[647] *Semanza*, Jugement (Ch.), 15 mai 2003, para. 317.
[648] Rapport de la Commission du droit international à l'Assemblée générale sur les travaux de sa quarante-huitième session, 6 mai-26 juillet 1996, Documents officiels de l'Assemblée générale,
suppl. N°10, p. 90, (A/51/10) (1996). Voir *Semanza*, Jugement (Ch.), 15 mai 2003, para. 315.
[649] *Semanza*, Jugement (Ch.), 15 mai 2003, para. 316.
[650] *Kayishema*, Jugement (Ch.), 21 mai 1999, para. 95.
[651] *Semanza*, Jugement (Ch.), 15 mai 2003, para. 316.
[652] *Akayesu*, Jugement (Ch.), 2 septembre 1998, paras. 523-524; *Kayishema*, Jugement (Ch.), 21 mai 1999, para. 93-94; *Musema*, Jugement (Ch.), 27 janvier 2000, para. 166; *Rutaganda*, Jugement (Ch.), 6 décembre 1999, paras. 60-62; *Bagilishema*, Jugement (Ch.), 7 juin 2001, paras. 62 et 63.

321. Les paragraphes 1 à 32 de l'Acte d'accusation étayent de manière détaillée les allégations ayant trait au chef d'accusation du génocide. La Chambre a déjà discuté de ces allégations dans les sections 3, 4, 5, 6 et 7 du chapitre II portant sur les conclusions factuelles.

322. Au regard de ses conclusions factuelles, la Chambre considère que le Procureur n'a pas établi au-delà de tout doute raisonnable qu'Athanase Seromba a planifié, incité à commettre, ordonné ou commis les massacres contre les réfugiés tutsis de Nyange[653]. La Chambre conclut cependant que ce dernier a par ses faits et gestes les 12, 14, 15 et 16 avril 1994 aidé et encouragé la commission de meurtres et d'atteintes graves à l'intégrité physique et mentale des Tutsis qui s'étaient réfugiés à l'église de Nyange lors des événements visés dans l'Acte d'accusation.

2.3.1. Des atteintes graves à l'intégrité physique ou mentale de membres du groupe ethnique tutsi

L'*actus reus* par rapport aux faits d'atteintes graves à l'intégrité physique et mentale des réfugiés de l'église de Nyange

323. Au regard du paragraphe 12 de l'Acte d'accusation, la Chambre a conclu qu'Athanase Seromba a interdit aux réfugiés de s'alimenter dans la bananeraie de la paroisse et qu'il a ordonné aux gendarmes de tirer sur les réfugiés qui s'y rendraient[654]. La Chambre a en outre conclu que Seromba a refusé de célébrer la messe pour les Tutsis dans l'église de Nyange[655].

324. Au regard des paragraphes 13 et 14 de l'Acte d'accusation, la Chambre a conclu que le 13 avril 1994, au moment où la situation sécuritaire dans la commune de Kivumu était devenue précaire, Athanase Seromba a refoulé quatre employés tutsis de la paroisse dont l'un d'eux Patrice, revenu le lendemain, a été tué par les assaillants après avoir été de nouveau refoulé du presbytère[656].

325. Au regard du paragraphe 22 de l'Acte d'accusation, la Chambre a conclu que Seromba a refoulé plusieurs réfugiés du presbytère dont Meriam qui a par la suite été tuée par les assaillants[657].

326. La Chambre est d'avis que l'interdiction faite par Seromba aux réfugiés de s'alimenter dans la bananeraie, son refus de célébrer la messe dans l'église de Nyange, sa décision de refouler les employés et les réfugiés tutsis de la paroisse et du presbytère ont aidé à la perpétration d'actes portant gravement atteinte à l'intégrité mentale des réfugiés tutsis de l'église de Nyange. Elle estime, en effet, que lorsqu'ils se sont réfugiés dans l'église de Nyange, les Tutsis étaient dans une position très vulnérable pour avoir été auparavant la cible de nombreuses attaques[658]. À cela s'ajoute le fait que le lieu de refuge que constituait l'église de Nyange et où ils pensaient pouvoir se protéger de ces attaques était encerclé par des miliciens et *Interahamwe* à partir 12 avril 1994[659]. Il apparaît ainsi que ces réfugiés de l'église de Nyange ont vécu dans une angoisse constante dans la mesure où ils savaient que leur vie ainsi que celle de leurs proches étaient en danger à tout moment. La Chambre est convaincue qu'en adoptant un tel comportement, Seromba a contribué de manière substantielle à la commission d'actes portant gravement atteinte à l'intégrité mentale des réfugiés tutsis de l'église de Nyange.

327. La Chambre conclut également que l'interdiction faite par Athanase Seromba aux réfugiés de s'alimenter dans la bananeraie a aidé à la perpétration d'actes portant gravement atteinte à l'intégrité physique des réfugiés. En effet, en date du 14 avril 1994, les réfugiés étaient en manque de nourriture

[653] Voir Chapitre II, sections 3.4, 4.2, 4.3, 5.6, 6.3, 6.4, 6.5, 6.7 et 7.4; Voir également Chapitre III, section 4.2.
[654] Voir Chapitre II, section 5.3.
[655] Voir Chapitre II, section 5.5.
[656] Voir Chapitre II, section 5.5.
[657] Voir Chapitre II, section 6.8.
[658] Voir Chapitre II, section 3.2.
[659] Voir Chapitre II, section 5.2.

et avaient un accès très limité à des vivres de l'extérieur en raison de l'encerclement de l'église. Dans de telles circonstances, le refus de Seromba de laisser les réfugiés s'alimenter dans la bananeraie a contribué de manière substantielle à physiquement affaiblir les réfugiés qui étaient privés de nourriture. La Chambre est convaincue qu'en adoptant un tel comportement, Seromba a contribué de manière substantielle à la commission d'actes portant gravement atteinte à l'intégrité physique des réfugiés tutsis de l'église de Nyange.

328. De ce qui précède, la Chambre considère comme établi au-delà de tout doute raisonnable à l'égard de l'accusé l'*actus reus* de l'aide à la commission d'actes d'atteintes graves à l'intégrité physique et mentale contre les réfugiés de l'église de Nyange.

La *mens rea* de l'accusé Athanase Seromba par rapport aux faits d'atteintes graves à l'intégrité physique et mentale des réfugiés de l'église de Nyange

329. La Chambre est convaincue qu'Athanase Seromba ne pouvait ignorer que l'interdiction qu'il a faite aux réfugiés de s'alimenter dans la bananeraie, son refus de célébrer une messe en leur faveur et le refoulement d'employés et de réfugiés tutsis auraient un impact négatif certain sur le moral des réfugiés qui faisaient face à une situation très difficile, liée aux persécutions dont ils étaient l'objet pendant les événements d'avril 1994.

330. La Chambre est également convaincue qu'Athanase Seromba savait que les réfugiés étaient en manque de nourriture[660]. Elle considère donc qu'il avait la pleine connaissance que son refus de laisser les réfugiés s'alimenter dans la bananeraie contribuerait de manière substantielle à les affaiblir physiquement.

331. De ce qui précède, la Chambre considère comme établie au-delà de tout doute raisonnable à l'égard de l'accusé la *mens rea* de l'aide à la commission d'atteintes graves à l'intégrité physique et mentale contre les réfugiés de l'église de Nyange.

2.3.2. Des meurtres de membres du groupe tutsi

L'*actus reus* par rapport aux faits de meurtres des réfugiés tutsis de l'église de Nyange

332. Au regard des paragraphes 13, 14 et 22 de l'Acte d'accusation, discutés plus haut, la Chambre a conclu qu'Athanase Seromba a refoulé des employés et réfugiés tutsis de la paroisse de Nyange[661]. De l'avis de la Chambre, en agissant ainsi, Seromba a aidé à la commission des meurtres de plusieurs réfugiés tutsis, dont notamment Patrice et Meriam.

333. Au regard des paragraphes 24 et 25 de l'Acte d'accusation, la Chambre a conclu que le 15 avril 1994, Athanase Seromba a demandé aux assaillants, qui s'apprêtaient à attaquer les Tutsis qui s'étaient réfugiés dans la cour du presbytère, d'arrêter les tueries et de ramasser les cadavres qui jonchaient la cour de l'église. La Chambre a également conclu que les attaques contre les réfugiés tutsis ont repris après le dégagement des corps[662]. La Chambre conclut cependant qu'il n'est pas établi au-delà de tout doute raisonnable que cette demande ait constitué une aide ou un encouragement à la commission de meurtres des réfugiés tutsis.

334. Au regard des paragraphes 26 et 27 de l'Acte d'accusation, la Chambre a conclu qu'Athanase Seromba s'est entretenu avec les autorités et a accepté la décision prise par celles-ci de détruire

[660] Voir Chapitre II, section 5.3.
[661] Voir Chapitre II, sections 5.5 et 6.8.
[662] Voir Chapitre II, section 6.7.

l'église. Elle a en outre conclu que Seromba s'est également adressé au conducteur du bulldozer en lui tenant notamment des propos qui l'ont encouragé à détruire l'église. La Chambre a enfin conclu que Seromba a même donné des indications au conducteur du bulldozer sur le côté fragile de l'église[663]. La Chambre est convaincue qu'en adoptant un tel comportement, Seromba a contribué de manière substantielle à la destruction de l'église de Nyange, laquelle destruction a entraîné la mort de plus de 1500 réfugiés tutsis.

335. De ce qui précède, la Chambre considère comme établi au-delà de tout doute raisonnable à l'égard de l'accusé l'*actus reus* de l'aide et l'encouragement à la commission de meurtres des réfugiés de l'église de Nyange.

La *mens rea* de l'accusé Athanase Seromba par rapport aux faits de meurtres des réfugiés tutsis de l'église de Nyange

336. La Chambre est convaincue qu'en raison de la situation sécuritaire qui prévalait dans la paroisse de Nyange, Athanase Seromba ne pouvait ignorer qu'en refoulant des réfugiés du presbytère, il contribuerait de manière substantielle à leurs meurtres par les assaillants.

337. La Chambre est par ailleurs d'avis qu'Athanase Seromba ne pouvait ignorer l'effet légitimateur que ses propos auraient sur les actions des autorités de la commune et le conducteur du bulldozer. La Chambre estime, en outre, que Seromba avait une parfaite connaissance du fait que son approbation de la décision de détruire l'église de Nyange prise par les autorités ainsi que les paroles d'encouragement qu'il a eues pour le conducteur du bulldozer auraient pour effet de contribuer de manière substantielle à la destruction de l'église et à la mort de nombreux réfugiés qui s'y étaient retranchés.

338. De ce qui précède, la Chambre considère comme établie au-delà de tout doute raisonnable à l'égard de l'accusé la *mens rea* de l'aide et l'encouragement à la commission de meurtres des réfugiés de l'église de Nyange.

2.3.3. Les éléments constitutifs du génocide

339. La Chambre considère qu'il est établi que les Tutsis constituaient un groupe ethnique dans la commune de Kivumu au moment des faits visés dans l'Acte d'accusation[664] et qu'ils constituaient donc un groupe protégé au sens de l'article 2 (2).

340. La Chambre considère également qu'il ne peut être contesté que pendant les événements d'avril 1994 à l'église de Nyange, des assaillants et autres miliciens *interahamwe* ont commis des meurtres contre les réfugiés tutsis de l'église de Nyange et ont gravement porté atteinte à leur intégrité physique et mentale en raison de leur appartenance ethnique, et ce dans l'intention de les détruire, en tout ou en partie, en tant que groupe ethnique.

341. La Chambre conclut qu'en raison de sa qualité de responsable de la paroisse de Nyange pendant les événements d'avril 1994, de la situation qui prévalait sur l'ensemble du territoire rwandais, des attaques dont il a été témoin[665] et des paroles qu'il a entendues ou prononcées[666], l'accusé Athanase Seromba ne pouvait ignorer l'intention des assaillants et autres miliciens *interahamwe* de commettre des actes de génocide à l'encontre des réfugiés tutsis de la paroisse de Nyange.

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[663] Voir Chapitre II, section 7.4.
[664] Décision relative à la requête du Procureur en constat judiciaire, 14 juillet 2005.
[665] Voir Chapitre II, sections 6.7 et 6.8.
[666] Voir Chapitre II, section 7.4.

342. En conséquence, la Chambre considère comme établi à l'encontre de l'accusé Athanase Seromba le crime de génocide par aide et encouragement visé au chef d'accusation 1.

3. Chef d'accusation 2 – Complicité dans le génocide

343. Le chef d'accusation 2 est alternatif au chef d'accusation 1[667]. Aussi, ayant déjà déclaré l'accusé coupable de génocide au premier chef d'accusation, la Chambre ne retiendra pas le chef de complicité dans le génocide et le rejette en conséquence.

4. Chef d'accusation 3 – Entente en vue de commettre le génocide

4.1. L'Acte d'accusation

344. Le Procureur du Tribunal pénal international pour le Rwanda accuse Athanase Seromba d'entente en vue de commettre le génocide, sous l'empire de l'article 2 (3) (b) du Statut, en ce que, entre les 6 et 20 avril 1994 ou à ces dates, dans la préfecture de Kivumu au Rwanda, Seromba s'est effectivement entendu avec Grégoire Ndahimana, bourgmestre de la commune de Kivumu, Fulgence Kayishema, inspecteur de police de la commune de Kivumu, Télesphore Ndungutse, Gaspard Kanyarukiga et d'autres personnes inconnues du Procureur, pour tuer des membres de la population tutsie ou porter des atteintes graves à leur intégrité physique ou mentale, dans l'intention de détruire, en tout ou en partie, un groupe racial ou ethnique.

4.2. Droit applicable

345. La Chambre s'appuie sur la jurisprudence du Tribunal qui définit l'entente en vue de commettre le génocide comme « une résolution d'agir sur laquelle au moins deux personnes se sont accordées, en vue de commettre le génocide »[668]. Ainsi, l'élément essentiel de l'infraction d'entente en vue de commettre le génocide est constitué par « l'acte d'entente *per se*, autrement dit le 'procédé' de l'entente' […] et non pas son résultat »[669].

346. La Chambre prend également acte du fait que dans l'affaire *Nahimana*, la Chambre d'appel a conclu que l'entente en vue de commettre le génocide pouvait être déduite des actions coordonnées d'individus ayant un objectif commun et agissant dans un cadre uni[670]. Pour sa part, la Chambre de première instance, dans l'affaire *Niyitegeka*, a déduit l'existence d'une entente en vue de commettre le génocide de par la participation de l'accusé à des rencontres dont l'objet était le massacre de Tutsis, ses paroles et le leadership qu'il a exercé lors de ces rencontres, son implication dans la planification d'attaques contre des Tutsis et son rôle dans la distribution d'armes aux assaillants[671].

347. L'élément moral de l'infraction d'entente en vue de commettre le génocide est identique à celui qui est requis pour l'infraction de génocide et réside dans l'intention spécifique de commettre le génocide[672].

4.3. Conclusions de la Chambre

348. Les paragraphes 33 à 47 de l'Acte d'accusation étayent de manière détaillée les allégations ayant trait au chef d'accusation de l'entente en vue de commettre le génocide. La Chambre a

[667] *Akayesu*, Jugement (Ch.), 2 septembre 1998, paras. 532.
[668] *Musema*, Jugement (Ch.), 27 janvier 2000, para. 191.
[669] *Musema*, Jugement (Ch.), 27 janvier 2000, para. 193.
[670] *Nahimana*, Jugement (Ch.), 3 décembre 2003, para. 1047.
[671] *Niyitegeka*, Jugement (Ch.), 16 mai 2003, paras. 427-248.
[672] *Musema*, Jugement (Ch.), 27 janvier 2000, para. 192.

principalement discuté de ces allégations dans les sections 3, 4, 5, 6 et 7 du chapitre II portant sur les conclusions factuelles. Cette partie de l'Acte d'accusation fait état de l'élaboration d'un plan, en trois phases, visant l'extermination des Tutsis dans la commune de Kivumu. Cette partie met également à la charge d'Athanase Seromba l'élaboration d'une liste de Tutsis à rechercher, l'interdiction faite aux réfugiés de s'alimenter dans le presbytère ou la bananeraie, le refus de célébrer la messe et la supervision de massacres de réfugiés.

349. Dans ses conclusions factuelles, la Chambre a conclu que le Procureur n'a pas établi au-delà de tout doute raisonnable qu'Athanase Seromba a participé à des réunions avec les autorités communales les 11[673] et 12 avril 1994[674]. La Chambre a également conclu qu'il n'est pas établi au-delà de tout doute raisonnable que l'accusé Seromba a tenu des réunions avec les autorités communales les 10[675], 15[676] et 16[677] avril 1994 et dont l'objet aurait été de planifier l'extermination des réfugiés tutsis de la paroisse de Nyange.

350. Par ailleurs, la Chambre estime que le Procureur n'a pas établi au-delà de tout doute raisonnable qu'Athanase Seromba a élaboré une liste de Tutsis devant être recherchés[678], qu'il aurait ordonné ou supervisé l'attaque contre les réfugiés le 15 avril 1994[679] et qu'il aurait ordonné la destruction de l'église de Nyange le 16 avril 1994[680]. En ce qui concerne des faits établis contre Seromba comme l'interdiction faite aux réfugiés de s'alimenter dans la bananeraie ou encore son refus de célébrer la messe, la Chambre considère qu'ils ne suffisent pas, à eux seuls, à établir l'existence d'une entente en vue de commettre le génocide.

351. La Chambre conclut que le Procureur n'a donc pas prouvé au-delà de tout doute raisonnable qu'Athanase Seromba s'est entendu avec d'autres personnes pour commettre le génocide tel que visé au chef d'accusation 3 de l'Acte d'accusation.

5. Chef d'accusation 4 – Crime contre l'humanité (extermination)

5.1. L'Acte d'accusation

352. Le Procureur du Tribunal pénal international pour le Rwanda accuse Athanase Seromba de crime contre l'humanité (extermination) sous l'empire de l'Article (3) (b) du Statut, en ce que, entre les 7 et 20 avril 1994 ou à ces dates, dans la préfecture de Kibuye (Rwanda), Seromba a tué ou fait tuer des personnes lors de massacres perpétrés dans le cadre d'une attaque généralisée ou systématique ou dirigée contre une population civile en raison de son appartenance politique, ethnique ou raciale.

5.2. Droit applicable

353. L'article 3 du Statut dispose que :

> 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 ;

[673] Voir Chapitre II, section 4.3.
[674] Voir Chapitre II, section 5.6.
[675] Voir Chapitre II, section 4.2.
[676] Voir Chapitre II, sections 6.4.
[677] Voir Chapitre II, section 7.4.
[678] Voir Chapitre II, section 3.4.
[679] Voir Chapitre II, sections 6.5 et 6.7.
[680] Voir Chapitre II, section 7.4.

(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.

354. L'article 3 du Statut relatif aux crimes contre l'humanité comporte un élément général applicable à tous les actes qui y sont énumérés : la perpétration de l'un quelconque de ces actes par un accusé ne sera constitutif d'un crime contre l'humanité que s'il a été commis dans le cadre d'une attaque généralisée ou systématique dirigée contre une population civile en raison de son appartenance nationale, politique, ethnique, raciale ou religieuse.

355. La notion d'attaque, au sens de l'article 3, s'entend de tout acte ou fait ou toute série de faits contraires à la loi, du type de ceux énumérés à l'article 3 du Statut[681].

356. Cette attaque doit être généralisée ou systématique[682]. Dans la pratique, ces deux critères tendent à se chevaucher[683]. Le caractère « généralisé » suppose une attaque massive, fréquente, à grande échelle ou menée collectivement, revêtant une gravité considérable et dirigée contre une multitude de victimes[684]. Le caractère « systématique » suppose que l'attaque a été soigneusement organisée selon un modèle régulier en exécution d'une politique concertée mettant en œuvre des moyens publics ou privés considérables[685]. L'existence d'une politique ou d'un plan peut être pertinente quant à la preuve, en ce qu'elle peut servir à établir que l'attaque en cause était généralisée ou systématique, mais elle ne saurait être considérée en soi comme un élément constitutif distinct du crime[686].

357. Il n'est nullement exigé que l'acte criminel soit en lui-même généralisé ou systématique, un seul meurtre pouvant constituer un crime contre l'humanité s'il s'inscrit dans le cadre d'une attaque généralisée ou systématique[687].

358. L'attaque doit être dirigée contre une population civile c'est-à-dire « des 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, ou pour toute autre cause »[688]. La présence de certaines personnes qui ne sont pas des civils ne prive pas cette population de sa qualification en tant que population civile[689].

359. L'attaque contre une population civile doit avoir été inspirée par des motifs discriminatoires c'est-à-dire qu'elle doit avoir été commise contre une population en raison de « son appartenance nationale, politique, ethnique, raciale ou religieuse ». Ce qualificatif caractérise uniquement la nature de l'attaque en générale et non la volonté criminelle de l'accusé[690].

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[681] *Semanza*, Jugement (Ch.), 15 mai 2003, para. 327 ; *Musema*, Jugement (Ch.), 27 janvier 2000, para. 205 ; *Rutaganda*, Jugement (Ch.), 6 décembre 1999, para. 70 ; *Akayesu*, Jugement (Ch.), 2 septembre 1998, para. 581.
[682] *Akayesu*, Jugement (Ch.), 2 septembre 1998, para. 579.
[683] *Bagilishema*, Jugement (Ch.), 7 juin 2001, para. 77.
[684] *Akayesu*, Jugement (Ch.), 2 septembre 1998, para. 580.
[685] *Akayesu*, Jugement (Ch.), 2 septembre 1998, para. 580.
[686] *Semanza*, Jugement (Ch.), 15 mai 2003, para. 329.
[687] *Akayesu*, Jugement (Ch.), 2 septembre 1998, para. 580; *Tadić*, Affaire IT-94-1, Jugement (Ch.), 7 mai 1997, para. 649.
[688] *Akayesu*, Jugement (Ch.), 2 septembre 1998, para. 582.
[689] *Bagilishema*, Jugement (Ch.), 7 juin 2001, para. 79; *Tadić*, Affaire IT-94-1, Jugement (Ch.), 7 mai 1997, para. 638.
[690] *Bagilishema*, Jugement (Ch.), 7 juin 2001, para. 81; *Akayesu*, Jugement (Ch.), 2 septembre 1998, para. 469; *Kayishema*, Jugement (Ch.), 21 mai 1999, paras. 133 et 134.

360. Il doit y avoir un lien entre l'acte criminel et l'attaque[691]. L'accusé doit avoir la connaissance objective ou raisonnée du contexte général dans lequel s'inscrit l'attaque et savoir que ses actes font partie intégrante d'une attaque généralisée ou systématique dirigée contre une population civile[692].

361. Dans l'Acte d'accusation, le Procureur met à la charge de l'accusé un acte énuméré à l'article 3 : l'« extermination ». La qualification d'extermination exige la preuve que l'accusé a pris part à un grand massacre généralisé ou systématique, ou qu'il a contribué à l'imposition à un grand nombre de personnes, c'est-à-dire de façon généralisée, ou à un certain nombre de personnes, mais de façon systématique, de conditions de vie devant inévitablement entraîner la mort[693]. L'extermination se distingue de l'assassinat ou du meurtre en ce qu'elle vise précisément la mort d'un nombre important de personnes[694], sans que ce nombre doive pour autant atteindre un minimum donné[695]. L'élément moral de l'extermination réside quant à lui dans l'intention de commettre un massacre ou d'y participer[696].

5.3. Conclusions de la Chambre

362. Les paragraphes 48 à 50 de l'Acte d'accusation étayent de manière détaillée les allégations ayant trait au chef d'accusation du crime contre l'humanité. La Chambre a déjà discuté de ces allégations dans les sections 5, 6 et 7 du Chapitre II portant sur les conclusions factuelles.

363. Au regard du paragraphe 48 de l'Acte d'accusation, la Chambre a conclu que le Procureur n'a pas établi qu'Athanase Seromba aurait ordonné la fermeture des portes de l'église aux fins de causer la mort des réfugiés tutsis à l'église de Nyange[697]. Ainsi, la Chambre ne retient aucune responsabilité individuelle de Seromba sur ce fait.

L'*actus reus* par rapport à la destruction de l'église de Nyange

364. Au regard du paragraphe 49 de l'Acte d'accusation, la Chambre a conclu qu'Athanase Seromba s'est entretenu avec les autorités et a accepté la décision prise par celles-ci de détruire l'église. Elle a en outre conclu que Seromba s'est également adressé au conducteur du bulldozer en lui tenant notamment des propos qui l'ont encouragé à détruire l'église. La Chambre a enfin conclu que Seromba a même donné des indications au conducteur du bulldozer sur le côté fragile de l'église[698]. La Chambre est convaincue qu'en adoptant un tel comportement, Seromba a contribué de manière substantielle à la destruction de l'église de Nyange.

365. La Chambre est d'avis que la destruction de l'église, ayant entraîné la mort de 1500 réfugiés tutsis[699], a constitué l'infraction de l'extermination dans le sens de l'article 3 du Statut.

366. De ce qui précède, la Chambre considère comme établi au-delà de tout doute raisonnable à l'égard de l'accusé l'*actus reus* de l'aide et l'encouragement à la commission du crime d'extermination des réfugiés tutsis de l'église de Nyange.

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[691] *Tadić*, Affaire IT-94-1, Arrêt (App.), 15 juillet 1999, para. 271.
[692] *Semanza*, Jugement (Ch.), 15 mai 2003, para. 332.
[693] *Ntakirutimana*, Arrêt (App.), 13 décembre 2004, para. 522 ; *Ndindabahizi*, Jugement (Ch.), 15 juillet 2004, para. 480.
[694] *Ntakirutimana*, Arrêt (App.), 13 décembre 2004, para. 516 ; *Ndindabahizi*, Jugement (Ch.), 15 juillet 2004, para. 479 ; *Semanza*, Jugement (Ch.), 15 mai 2003, para. 340.
[695] *Ntakirutimana*, Arrêt (App.), 13 décembre 2004, para. 516.
[696] *Ntagerura*, Jugement (Ch.), 25 février 2004, para. 701 ; *Ntakirutimana*, Arrêt (App.), 13 décembre 2004, para. 522.
[697] Voir Chapitre II, section 6.3.
[698] Voir Chapitre II, section 7.4.
[699] Voir Chapitre II, section 7.5.

La *mens rea* d'Athanase Seromba par rapport à la destruction de l'église de Nyange

367. La Chambre est par ailleurs d'avis qu'Athanase Seromba ne pouvait ignorer l'effet légitimateur que ses propos auraient sur les actions des autorités de la commune et le conducteur du bulldozer. La Chambre estime, en outre, que Seromba avait une parfaite connaissance du fait que son approbation de la décision de détruire l'église de Nyange prise par les autorités ainsi que les paroles d'encouragement qu'il a eues pour le conducteur du bulldozer auraient pour effet de contribuer de manière substantielle à la destruction de l'église et à la mort de nombreux réfugiés qui s'y étaient retranchés.

368. De ce qui précède, la Chambre considère comme établie au-delà de tout doute raisonnable à l'égard de l'accusé la *mens rea* de l'aide et l'encouragement à la commission du crime d'extermination des réfugiés tutsis de l'église de Nyange.

Les éléments constitutifs du crime contre l'humanité

369. La Chambre considère que les conditions requises pour la commission du crime contre l'humanité sont réunies en l'espèce. La Chambre a en effet conclu qu'il est établi qu'en avril 1994, dans la commune de Kivumu, des attaques avaient été dirigées contre les Tutsis[700]. L'attaque qui s'est terminée par la destruction de l'église de Nyange, le 16 avril 1994, était « généralisée » en ce sens qu'elle était massive, menée collectivement et dirigée contre une multitude de victimes. Cette attaque avait également un caractère « systématique » dans la mesure où les conclusions factuelles tendent à montrer qu'elle a été soigneusement organisée selon un modèle régulier, allant de l'encerclement de l'église le 12 avril 1994 à sa destruction le 16 avril 1994, en passant par l'intensification des attaques contre les réfugiés les 14 et 15 avril 1994. Enfin, la Chambre est d'avis que cette attaque était dirigée contre la population civile tutsie réfugiée à l'église de Nyange pour des motifs discriminatoires.

370. Par ailleurs, la Chambre estime que l'accusé Athanase Seromba avait connaissance du caractère généralisé et systématique de cette attaque ainsi que des motifs discriminatoires qui la sous-tendaient. Elle est en outre convaincue qu'il savait également que le crime d'extermination commis à l'encontre des réfugiés tutsis s'inscrivait dans le contexte de cette attaque.

371. En conséquence, la Chambre considère comme établi au-delà de tout doute raisonnable à l'encontre de l'accusé Athanase Seromba le crime d'extermination constitutif de crime contre l'humanité visé au chef d'accusation 4.

Chapitre IV : Verdict

372. Par ces motifs, la Chambre statue à l'unanimité comme suit :

Chef d'accusation 1 : Génocide	COUPABLE
Chef d'accusation 2 : Complicité dans le génocide	CHEF REJETÉ
Chef d'accusation 3 : Entente en vue de commettre le génocide	NON COUPABLE
Chef d'accusation 4 : Crimes contre l'humanité (extermination)	COUPABLE

Chapitre V : Détermination de la peine

[700] Voir Chapitre II, section 3.2.

1. Introduction

373. Ayant jugé l'accusé Athanase Seromba coupable de génocide et de crime contre l'humanité (extermination) par aide et encouragement, la Chambre en vient maintenant à la question de la détermination de la peine à lui imposer.

374. Dans ses conclusions finales, le Procureur a prié la Chambre de condamner Athanase Seromba à des peines concurrentes d'emprisonnement à vie pour chacun des chefs d'accusation dont la Chambre l'a déclaré coupable[701]. Il a notamment mis l'accent sur la gravité des crimes et les circonstances aggravantes que la Chambre devrait prendre en compte pour déterminer la peine.

375. Dans ses conclusions finales, la Défense n'a fait valoir aucun argument quant à la sentence. Elle a affirmé que l'accusé jouissait d'une bonne réputation et qu'il était respecté par les paroissiens hutus et tutsis de Nyange avant les événements du 6 avril 1994[702].

2. Droit applicable

376. La Chambre dispose d'un large pouvoir discrétionnaire de condamner les personnes reconnues coupables de crimes relevant de sa compétence[703]. La Chambre rappelle que la sentence doit viser la rétribution, la dissuasion, la réprobation, la réinsertion sociale, la réconciliation nationale, la protection de la société et le rétablissement de la paix.

377. La détermination de la peine par la Chambre est encadrée par les dispositions juridiques suivantes : l'article 23 du Statut ainsi que l'article 101 du Règlement.

378. Aux termes de l'article 23 du Statut, en imposant toute peine, la Chambre doit avoir recours à la grille générale des peines d'emprisonnement appliquée par les tribunaux du Rwanda (alinéa 1) et tenir compte de la gravité de l'infraction et la situation personnelle du condamné (alinéa 2). En vertu de l'article 101 (B) du Règlement, la Chambre doit également tenir compte des facteurs suivants :

> (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 (…)

379. La Chambre estime qu'elle peut également considérer tout autre facteur lui permettant de déterminer une peine qui reflète totalement les circonstances de l'affaire[704].

3. Conclusions de la chambre

3.1. La gravité des infractions

380. La Chambre note que dans ses conclusions finales, le Procureur a soutenu que les crimes commis par l'accusé Athanase Seromba sont graves[705]. A l'appui de son allégation, il invoque le fait que ce dernier aurait agi avec préméditation[706], et sans contrainte[707].

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[701] Conclusions finales du Procureur, para. 692.
[702] Conclusions finales de la Défense, p. 7.
[703] Voir, *Ruggiu*, Jugement (Ch.), 1 juin 2000, para. 52; *Kambanda*, Affaire ICTR-97-23-S, Jugement (Ch.), 4 septembre 1998, para. 11.
[704] Voir *Rutaganda*, Jugement (Ch.), 6 décembre 1999, para. 454.

381. La Chambre rappelle que la gravité des infractions est mesurée en fonction des faits reprochés à l'accusé, c'est-à-dire les circonstances particulières qui entourent la commission des infractions et non en fonction d'une hiérarchie des crimes[708].

382. La Chambre constate qu'en l'espèce, le Procureur n'a pas établi au-delà de tout doute raisonnable que l'accusé Athanase Seromba a planifié ou ordonné à titre principal les infractions dont il a été reconnu coupable. Elle ne retient pas non plus à son encontre la thèse de la préméditation avancée par le Procureur. Enfin, la Chambre considère que l'accusé n'a pas agi sous la contrainte lorsqu'il a approuvé la destruction de l'église à l'aide du bulldozer. En cela, la Chambre conclut que les infractions de génocide et de crimes contre l'humanité par aide et encouragement dont l'accusé Athanase Seromba a été reconnu coupable revêtent une gravité particulière.

3.2. La situation personnelle de l'accusé

383. La Chambre rappelle que la situation personnelle de l'accusé est perçue dans la jurisprudence des tribunaux ad hoc comme un facteur d'individualisation de la peine[709]. Elle estime, en outre, que par situation personnelle, il faut entendre toute circonstance propre à l'accusé pouvant conduire à une aggravation ou une atténuation de la peine.

384. La Chambre note, par ailleurs, que dans ses conclusions finales, le Procureur a soutenu que rien dans la situation personnelle d'Athanase Seromba n'atténue la gravité des crimes retenus à son encontre.

385. La Chambre note que l'accusé Athanase Seromba a été ordonné prêtre le 18 juillet 1993[710]. Elle est d'avis qu'à ce titre sa formation et son expérience au sein de l'église devaient lui permettre de comprendre le caractère répréhensible de son comportement lors des événements.

386. Elle relève par ailleurs que l'accusé Athanase Seromba n'était présent à l'église de Nyange que depuis la fin de l'été ou le début de l'automne 1993[711]. Elle constate qu'il n'était que vicaire à la paroisse de Nyange au moment des événements d'avril 1994, n'ayant été amené à assumer les fonctions de responsable de ladite paroisse que parce qu'aucun curé n'y était en fonction[712].

3.3. Les circonstances aggravantes

387. Dans ses conclusions finales, le Procureur a fait valoir l'existence de plusieurs circonstances aggravantes. Le Procureur a mis en avant le fait qu'Athanase Seromba était connu dans la communauté de Nyange[713] et qu'il est directement intervenu dans les massacres de Tutsis[714]. Il a soutenu également que l'accusé a abusé de la confiance de ses paroissiens en tant que prêtre[715]. Il a fait par ailleurs observer que les crimes commis lors des événements d'avril 1994 à la paroisse de Nyange

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[705] Conclusions finales du Procureur, para. 651.
[706] Conclusions finales du Procureur, paras. 672 (p. 165).
[707] Conclusions finales du Procureur, para. 652.
[708] *Mucic*, Jugement (Ch.), 16 novembre 1996, para. 1226; *Kayishema*, Arrêt (App.), 1 juin 2001, para. 367.
[709] Pour une liste des facteurs à prendre en compte dans l'individualisation de la peine, voir : *Kambanda*, Jugement (Ch.), 4 septembre 1998, para. 29 ; *Erdemovic*, Jugement (Ch.), 29 novembre 1996, para. 44.
[710] Voir la lettre en date du 18 mai 1993 adressée par l'évêque de Nyundo à Athanase Seromba (D-10).
[711] Voir notamment Témoin CBK : Transcriptions du 19 octobre 2004, p. 8 (huis clos). ; Témoin CBJ : Transcriptions du 12 octobre 2004, pp. 26-27 (audience publique). ; Témoin FE27 : Transcriptions du 23 mars 2006, p. 11 (huis clos).
[712] Voir la section 2.
[713] Conclusions finales du Procureur, para. 658.
[714] Conclusions finales du Procureur, paras. 665-666.
[715] Conclusions finales du Procureur, paras. 657-671.

s'accompagnaient d'une violence excessive et revêtaient un caractère humiliant pour les victimes[716] qui ont subi de grandes souffrances avant de mourir[717].

388. La Chambre rappelle que l'existence des circonstances aggravantes doit être prouvée au-delà de tout doute raisonnable[718]. Une circonstance aggravante ne peut s'assimiler aux circonstances ayant donné lieu à la commission d'un élément constitutif pour lesquels l'accusé a été déclaré coupable[719].

389. Au titre des circonstances aggravantes, la Chambre examinera en l'espèce le statut de l'accusé et l'abus de confiance dont il s'est rendu responsable à l'égard des réfugiés tutsis[720] ainsi que la fuite de l'accusé après la destruction de l'église.

Statut de l'accusé et abus de confiance

390. La Chambre rappelle qu'Athanase Seromba, prêtre catholique, était responsable de la paroisse de Nyange au moment des faits visés dans l'Acte d'accusation[721]. L'accusé était connu et respecté dans la communauté catholique de Nyange. Elle rappelle qu'il est établi que de nombreux Tutsis de la commune de Kivumu se sont réfugiés dans l'église de Nyange afin d'échapper aux attaques[722]. La Chambre considère comme une circonstance aggravante le fait que l'accusé n'ait absolument rien entrepris de visible pour mériter la confiance de ces personnes qui croyaient avoir la vie sauve en cherchant refuge à la paroisse de Nyange. En conséquence, la Chambre retiendra le statut de l'accusé et l'abus de confiance comme des circonstances aggravantes.

De la fuite de l'accusé après la destruction de l'église

391. La Chambre note qu'il n'est pas contesté que l'accusé a utilisé une identité autre que la sienne pour s'exiler en Italie comme en atteste le passeport qui lui a été délivré par les autorités zaïroises de l'époque[723]. Elle observe pourtant que d'autres prêtres qui ont vécu les événements d'avril 1994 à l'église de Nyange en compagnie de l'accusé n'ont pas eu recours à ce stratagème. Au surplus, elle rappelle que ces prêtres restés au Rwanda ont même fait l'objet de poursuites judiciaires au terme de laquelle ils ont tous été acquittés[724]. Dès lors, la Chambre considère qu'il y a lieu de considérer la fuite d'Athanase Seromba au titre des circonstances aggravantes.

3.4. Les circonstances atténuantes

392. Dans ses conclusions finales, le Procureur a soutenu qu'Athanase Seromba ne saurait bénéficier d'aucune circonstance atténuante aux motifs que sa reddition n'était pas « réellement volontaire », d'une part, et que l'accusé n'avait pas coopéré avec le Procureur tout en faisant obstruction à des pans entiers de son procès. Il a ajouté également que l'accusé n'a manifesté aucun remords pour le rôle qu'il a joué dans la commission des crimes considérés. Enfin, le Procureur a souligné que la preuve du bon comportement de l'accusé avant et après la commission des crimes qui lui sont reprochés n'a pas été rapportée[725].

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[716] Conclusions finales du Procureur, para 675.
[717] Conclusions finales du Procureur, para. 676.
[718] Jugement (Ch.), para. 693; *Ndindabahazi*, Jugement (Ch.), 15 juillet 2004, para. 502.
[719] *Blagojevic et Jokic*, Jugement (Ch.), 17 janvier 2005, para. 849; *Ndindabahazi*, Jugement (Ch.), 15 juillet 2004, para. 502; *Ntakirutimana,* Jugement (Ch.), 21 février 2003, para. 893.
[720] *Ndindabahazi*, Jugement (Ch.), 15 juillet 2004, para. 508 ; *Ntakirutimana,* Jugement (Ch.), 21 février 2003, paras. 899-902; *Nahimana*, Jugement (Ch.), 3 décembre 2003, para. 1099.
[721] Voir Chapitre II, section 2.
[722] Voir Chapitre II, section 3.3.
[723] Voir les pièces à conviction suivantes : Document d'immigration italien d'Athanase Sumba Bura (P-6) et Passeport zaïrois d'Athanase Sumba Bura (P-7).
[724] Voir dossiers judiciaires du Rwanda communiqués par le Procureur.
[725] Conclusions finales du Procureur, paras. 682-685.

393. Dans ses conclusions finales, la Défense a soutenu que l'accusé jouissait d'une bonne réputation et qu'il était respecté par les paroissiens hutus et tutsis de Nyange avant les événements d'avril 1994[726].

394. La Chambre rappelle que les circonstances atténuantes doivent être prouvées sur la base d'hypothèses vraisemblables[727]. Le poids qu'il y a lieu d'accorder aux circonstances atténuantes relève du pouvoir discrétionnaire de la Chambre[728]. En l'espèce, la Chambre discutera des points suivants : la bonne réputation de l'accusé avant les faits, la reddition volontaire de l'accusé et l'âge de l'accusé.

De la bonne réputation dont jouissait Athanase Seromba avant les événements d'avril 1994 à la paroisse de Nyange

395. La preuve de la bonne considération dont bénéficiait Athanase Seromba a été rapportée par plusieurs témoins du Procureur et de la Défense. Parmi ces derniers, CBJ[729], CBK[730], BR1[731], BZ1[732] et BZ4[733] ont affirmé qu'Athanase Seromba en tant que prêtre était respecté des populations. Sur la base de ces informations, la Chambre considère qu'il y a lieu de retenir cet élément comme circonstance atténuante de la peine à infliger à l'accusé.

De la reddition de l'accusé

396. Le Procureur a soutenu que la reddition d'Athanase Seromba ne saurait constituer une circonstance atténuante vu qu'elle n'a pas été réellement volontaire[734]. Il fait observer que l'accusé ne s'est constitué prisonnier qu'une fois son arrestation devenue imminente par les autorités italiennes[735]. Le Procureur a soutenu, en outre, que si reddition il y a, celle-ci ne saurait pour autant constituer une circonstance atténuante puisqu'elle ne coïncide pas avec les critères retenus dans le jugement *Babic*[736].

397. La Chambre note que la reddition volontaire de l'accusé peut constituer une circonstance atténuante[737]. Elle est d'avis que les circonstances et les délais entourant une reddition de l'accusé doivent être évalués au cas par cas. Ainsi, la Chambre constate que dans l'affaire *Blaskic*, le fait que l'accusé se soit rendu seulement après avoir préparé sa défense[738], et dans l'affaire Simic, le fait que la reddition de l'accusé ait eu lieu trois ans après la reddition d'autres individus se trouvant dans les mêmes circonstances ont limité l'effet atténuateur de ces redditions[739]. Elle observe, à l'opposé, que dans l'affaire *Babic*, la reddition volontaire de l'accusé a été retenue comme une circonstance atténuante parce qu'elle est intervenue « peu après la confirmation de l'Acte d'accusation établi à son encontre »[740] tandis que dans l'affaire *Plavsic*, la circonstance atténuante de reddition a été accordée à l'accusé pour s'être volontairement livré aux autorités du Tribunal 20 jours après avoir eu connaissance de l'Acte d'accusation[741].

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[726] Conclusions finales de la Défense, p. 7.
[727] Voir, e.g., *Niyitegeka*, Jugement (Ch.), 16 mai 2003, para. 488; *Ntakirutimana*, Jugement (Ch.), 21 février 2003, para. 893.
[728] *Kambanda*, Arrêt (App.), 19 octobre 2000, para. 124.
[729] Transcriptions du 12 octobre 21004, p. 23 (huis clos).
[730] Transcriptions du 19 octobre 2004, p. 46 (huis clos).
[731] Transcriptions du 25 novembre 2005, p. 36 (audience publique).
[732] Transcriptions du 2 novembre 2005, p. 71 (audience publique).
[733] Transcriptions du 2 novembre 2005, p. 7 (audience publique).
[734] Conclusions finales du Procureur, para. 677-683. Transcriptions du 28 juin 2006, p. 42 (audience publique).
[735] Conclusions finales du Procureur, paras. 682-683.
[736] *Babić*, Jugement (Ch.), 29 juin 2004, paras. 85-86.
[737] *Serushago*, Jugement (Ch.), 6 avril 2000, para. 24.
[738] *Blaskic*, Jugement (Ch.), 3 mars 2000, para. 776.
[739] *Simic*, Jugement (Ch.), 17 octobre 2002, para. 1086.
[740] *Babić*, Jugement (Ch.), 29 juin 2004, para. 86.
[741] *Plavsic*, Jugement (Ch.), 27 février 2003, paras. 82 à 84.

398. En l'espèce, la Chambre note que l'accusé Athanase Seromba s'est livré aux autorités du Tribunal le 6 février 2002, sans que le mandat d'arrêt pris à son encontre n'ait eu à être exécuté par les autorités italiennes[742]. La Chambre considère qu'il s'agit d'une reddition volontaire. Dans ces conditions, la Chambre retient la reddition volontaire de l'accusé comme une circonstance atténuante dans la détermination de la peine.

Du jeune âge de l'accusé

399. La Chambre prend note de l'âge relativement jeune de l'accusé Athanase Seromba, qui avait 31 ans au moment des faits[743], et de la possibilité de sa réhabilitation éventuelle.

3.5. La fixation de la peine

La Grille générale des peines d'emprisonnement appliquée au Rwanda

400. La Chambre note que la loi rwandaise du 26 janvier 2001[744] classe les personnes poursuivies pour aide et encouragement au génocide et au crime contre l'humanité dans la catégorie 1 (b) : « b. La personne qui, agissant en position d'autorité au niveau national, provincial ou du district, au sein des partis politiques, de l'armée, des confessions religieuses ou des milices, a commis des infractions ou encouragé les autres à les commettre ».

401. Elle note également que le Rwanda, à l'instar d'autres pays qui ont incorporé le génocide ou le crime contre l'humanité dans leur législation interne a prévu pour ces crimes les peines les plus lourdes de sa législation pénale[745].

402. La Chambre rappelle toutefois que la loi rwandaise et les sanctions prononcées par les Tribunaux rwandais ne revêtent qu'un caractère indicatif[746], ne constituant qu'un des facteurs parmi d'autres qu'elle se doit de prendre en compte dans la détermination des peines[747]. En effet, le Tribunal ne peut imposer que des peines d'emprisonnement allant jusqu'à l'emprisonnement à vie, à l'exclusion de la peine de mort appliquée au Rwanda[748].

403. La Chambre note, par ailleurs, que la participation directe d'un accusé aux infractions commises est généralement plus sévèrement punie qu'une participation criminelle pour l'aide et l'encouragement qu'il apporte dans la commission de ces dernières[749]. Ainsi, la peine d'emprisonnement à vie est généralement prononcée à l'encontre des personnes qui ont directement

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[742] *Seromba*, Décision relative à la requête unilatérale du Procureur aux fins de perquisition, de saisie, d'arrestation et de transfèrement, 3 juillet 2001 ; *Seromba*, Ordonnance aux fins d'exécution du mandat d'arrêt et de transfert, 4 juillet 2001 ; Voir la lettre du ministère de la justice italien en date du 11 juillet 2001 adressée au Greffier du Tribunal Pénal International pour le Rwanda.

[743] Voir les pièces à conviction suivantes : Document d'immigration italien d'Athanase Sumba Bura (P-6) et Passeport zaïrois d'Athanase Sumba Bura (P-7) qui établissent que l'accusé est né en 1963.

[744] Article 51 de la Loi organique n°40/2000 du 26/01/2001 portant création des Juridictions Gacaca et organisation des poursuites à des infractions constitutives du crime de génocide ou de crimes contre l'humanité, commises entre le 1 octobre 1990 et le 31 décembre 1994.

[745] « Les prévenus relevant de la première catégorie qui n'ont pas voulu recourir à la procédure d'aveu et de plaidoyer de culpabilité dans les conditions fixées à l'article 56 de la présente loi organique ou dont l'aveu et le plaidoyer de culpabilité ont été rejetés encourent la peine de mort ou d'emprisonnement à perpétuité. Les prévenus de la première catégorie qui ont recouru à la procédure d'aveu et de plaidoyer de culpabilité dans les conditions prévues à l'article 56 de la présente loi organique encourent la peine d'emprisonnement de 25 ans ou l'emprisonnement à perpétuité ». Article 68 de la Loi organique n°40/2000 du 26/01/2001 portant création des Juridictions Gacaca et organisation des poursuites à des infractions constitutives du crime de génocide ou, de crimes contre l'humanité, commises entre le 1 octobre 1990 et le 31 décembre 1994.

[746] Article 23 (1) du Statut et Article 101 (B) (iii) du Règlement.

[747] *Kambanda*, Jugement (Ch.), 4 septembre 1998, para. 23

[748] La Chambre note à cet égard que le Rwanda considère actuellement l'abolition de la peine de mort.

[749] Voir *Semanza*, Arrêt (App.), 20 mai 2005, para. 388.

planifié ou ordonné les actes incriminés, en particulier ceux qui disposaient d'une autorité et d'une influence certaines au moment des faits incriminés, ainsi que pour celles qui ont participé à ces actes avec un zèle ou un sadisme particulier[750].

Multiplicité des peines

404. Conformément aux dispositions de l'article 101 (C) du Règlement, la Chambre dispose d'un pouvoir discrétionnaire pour déterminer si les peines qu'elle prononce doivent être purgées de façon consécutive ou si elles doivent être confondues[751]. A cet égard, la Chambre rappelle que la Chambre d'appel a constaté « qu'aucune disposition du Statut ou du Règlement n'oblige expressément une Chambre de première instance à imposer des peines distinctes à raison de chaque chef d'accusation dont un accusé est reconnu coupable »[752]. Elle note, en outre, que dans l'affaire *Blaskic*, la Chambre d'appel a notamment déclaré ce qui suit : « lorsque les crimes imputés à un accusé, quelle que soit leur qualification, font partie d'un ensemble unique de faits criminels commis sur un territoire et au cours d'une période déterminée, il y a lieu d'infliger une peine unique pour l'ensemble des chefs dont l'accusé a été reconnu coupable, si la Chambre de première instance le décide ainsi »[753].

Déduction de la durée de la détention préventive

405. L'accusé Athanase Seromba s'est livré aux autorités du Tribunal le 6 février 2002. Aussi, la Chambre déduira de la durée de la peine prononcée contre Seromba le temps écoulé depuis sa détention provisoire jusqu'au présent jugement, et ce conformément à l'article 101 (D) du Règlement de procédure et de preuve.

Chapitre VI : Dispositif

PAR CES MOTIFS, la Chambre de première instance, statuant publiquement, contradictoirement et en premier ressort, conformément au Statut et au Règlement de procédure et de preuve ;

APRES AVOIR EXAMINE tous les éléments de preuve ainsi que les arguments des parties ;

APRES AVOIR DECLARE COUPABLE Athanase Seromba du crime de génocide et du crime contre l'humanité (extermination);

CONDAMNE Athanase Seromba à la peine unique de quinze (15) ans d'emprisonnement ;

DÉCIDE que cette peine est immédiatement exécutoire ;

DIT qu'en application de l'article 101 (D) du Règlement, Athanase Seromba a droit à ce que la période passée en détention préventive, calculée à compter de la date de sa reddition le 6 février 2002, ainsi que toute période supplémentaire qu'il passera en détention dans l'attente d'une décision en appel, soient décomptées de la durée de la peine.

DIT qu'en vertu de l'article 103 du Règlement, Athanase Seromba restera sous la garde du Tribunal jusqu'à ce que soient arrêtées les dispositions nécessaires à son transfert vers l'Etat dans lequel il purgera sa peine.

Fait à Arusha, le mercredi 13 décembre 2006.

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[750] *Muhimana*, Jugement (Ch.), 28 avril 2005, paras. 604-616; *Musema*, Arrêt (App.), 16 novembre 2001, para. 383.
[751] *Kambanda*, Arrêt (App.), 19 octobre 2000, para. 102.
[752] *Kambanda*, Arrêt (App.), 19 octobre 2000, para. 102.
[753] *Ibid*., paras. 109-10.

[Signé] : Andrésia Vaz ; Karin Hökborg ; Gustave G. Kam

Annexe I : Historique de la Procédure

1. Phase préalable au procès

1. L'Acte d'accusation dressé contre Athanase Seromba a été déposé par le Procureur le 8 juin 2001 et confirmé le 3 juillet 2001 par le Juge Lloyd Williams, sous réserve de la correction de fautes grammaticales et typographiques[1]. Suite à une demande du Procureur, le juge confirmateur a également ordonné la non divulgation au public, aux médias et au suspect des noms de témoins et suspects visés dans les éléments justificatifs de l'Acte d'accusation ainsi que d'autres renseignements permettant de les identifier.

2. Le 4 juillet 2001, le Juge Lloyd Williams a émis un mandat d'arrêt à l'encontre de l'Accusé[2]. Le 10 juillet 2001, en exécution de l'ordonnance de transfert rendu par ledit juge, le Greffier du Tribunal a notifié le mandat d'arrêt et l'Acte d'accusation établie contre l'Accusé au Ministre italien de la justice.

3. Le 6 février 2002, l'Accusé s'est livré aux autorités du Tribunal et a été placé en détention. L'Accusé a comparu pour la première fois devant le Juge Navanethem Pillay le 8 février 2002 et a plaidé non coupable au regard de chacun des chefs d'accusation portés contre lui[3]. Le 12 février 2002, le Procureur a adressé à l'Accusé une première demande d'entretien.

4. Le Procureur a déposé une requête en prescription de mesures de protection des témoins le 14 mai 2002.

5. Dans une requête déposée le 3 juin 2002, le Procureur a prié le Président du Tribunal d'autoriser la Chambre de première instance à exercer ses fonctions hors du siège du Tribunal et à tenir le procès de l'Accusé au Rwanda[4]. Le 20 juin 2002, le Juge Navanethem Pillay a décidé du report d'une décision y relative jusqu'à ce que le Greffier ait attribué à l'Accusé un conseil pour sa défense[5].

6. Le 10 septembre 2002, le Procureur a introduit un additif à sa requête en mesures de protection des témoins.

7. Le 3 mars 2003, le Greffier a nommé Maître Alfred Pognon Conseil principal de la Défense.

8. Le 17 avril 2003, dans une lettre adressée à la Défense, le Procureur a invité l'Accusé à examiner les éléments de preuve.

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[1] *Seromba*, Décision relative à la requête unilatérale du Procureur aux fins de perquisition, de saisie, d'arrestation et de transfèrement, 4 juillet 2001 (le Juge Lloyd G. Williams a demandé au Procureur d'apporter des corrections aux paragraphes 2, 5, 8, 11, 17, 19, 25, 28, 32, 33, 35, 38, 39, 40, 43, 48 et le chef 4 de l'Acte d'accusation).
[2] *Seromba*, Mandat d'arrêt et ordonnance de transfert, 4 juillet 2001.
[3] Transcriptions du 8 février 2002, p. 16 (audience publique).
[4] *Seromba*, Bureau du Procureur, Requête du Procureur aux fins de la tenue d'un procès au Rwanda, 3 juin 2002.
[5] Seromba, Interoffice Memorandum from Judge Navanethem Pillay to Prosecutor Carla Del Ponte, 20 juin 2002.

9. Le 2 mai 2003, la Défense a déposé une requête aux fins d'annulation de l'Acte d'accusation, selon laquelle le défaut du Procureur d'interroger le suspect avant sa mise en accusation constituait un vice de procédure entraînant la nullité de l'Acte d'accusation.

10. Le 30 juin 2003, le Juge Erik Møse a fait droit à la requête du Procureur en mesures de protection des victimes et des témoins, lui ordonnant de communiquer ses déclarations de témoins non caviardées 21 jours avant la reprise du procès[6].

11. Le 8 janvier 2004, le Procureur a retiré sa requête aux fins de la tenue d'un procès au Rwanda[7].

12. Le 13 janvier 2004, la Chambre de première instance, siégeant en la personne du Juge Erik Møse, a rejeté la requête de la Défense aux fins d'annulation de l'Acte d'accusation[8], en affirmant que ni le Statut ni le Règlement n'obligent le Procureur à interroger un suspect avant sa mise en accusation.

13. Une conférence de mise en état en vue de déterminer l'état de préparation du procès s'est également tenue le 13 janvier 2004. La Chambre a invité le Procureur à déposer le mémoire préalable au procès[9]. La Défense a indiqué qu'elle ne pourra être prête qu'en septembre 2004[10].

14. Le 14 janvier 2004, le Juge Erik Møse a autorisé le Procureur à retirer sa requête aux fins de la tenue d'un procès au Rwanda[11].

15. Le 20 janvier 2004, le Procureur a déposé la version initiale de son mémoire préalable au procès.

16. Le Procureur a communiqué à la Défense la liste de pièces à conviction le 20 août 2004.

17. Le 27 août 2004, le Procureur a déposé la version définitive du mémoire préalable au procès. Les pièces à conviction ont été déposées le 30 août 2004. Un rectificatif au mémoire préalable au procès a été déposé le 7 septembre 2004. Le 15 septembre 2004, d'autres pièces à conviction ont été déposées, ainsi que l'ordre de comparution des témoins du Procureur.

18. Une conférence préalable au procès s'est tenue le 20 septembre 2004. La Chambre a noté l'absence de l'Accusé à cette conférence[12]. Le Procureur a déclaré avoir complètement remplis ses obligations préalables au procès, notamment en ce qui a trait à la communication des pièces à la Défense[13]. La Défense a demandé que le Procureur lui remette les déclarations des témoins auxquelles font référence les décisions des Tribunaux rwandais déposées par le Procureur[14].

2. Phase du procès

19. Le procès de l'Accusé a débuté le 20 septembre 2004. L'accusé a participé à un mouvement de grève déclenché par certains accusés du Tribunal et s'est absenté pendant les trois premiers jours du procès. Les conseils de la Défense, Maîtres Pognon et Monthé, ont expliqué que leur client leur avait

[6] *Seromba*, Décision relative à la requête du Procureur en prescription de mesures de protection des victimes et des témoins, 30 juin 2003.
[7] Seromba, Bureau du Procureur, Request by the Prosecutor to withdraw motion for trial in Rwanda, 8 janvier 2004.
[8] *Seromba*, Décision relative aux requêtes de la Défense en annulation ou en retrait de l'Acte d'accusation, 13 janvier 2004.
[9] Transcriptions du 13 janvier 2004, p. 21 (huis clos).
[10] *Ibid*., p. 26 (huis clos).
[11] *Seromba*, Décision relative à la requête du Procureur en retrait de sa requête aux fins de la tenue d'un procès au Rwanda, 14 janvier 2004.
[12] Transcriptions du 20 septembre 2004, Conférence préalable au procès, p. 2 (audience publique).
[13] *Ibid*., pp. 3-4 (audience publique).
[14] *Ibid*., p. 8 (audience publique).

demandé de ne pas le représenter durant cette grève[15]. La Chambre a décidé que les instructions données par l'Accusé ne pouvaient pas être considérées comme ayant mis fin au mandat de représentation des conseils de la Défense et a ordonné à ces derniers de continuer à représenter l'Accusé aussi longtemps qu'il persisterait dans son refus de se présenter devant la Chambre[16]. Après avoir indiqué qu'ils ne pouvaient représenter l'Accusé sans son autorisation, les conseils de la Défense ont quitté la salle d'audience obligeant la Chambre à suspendre les débats jusqu'au 27 septembre, date de leur retour.

20. Dans des lettres datées respectivement du 24 septembre 2004 et du 27 septembre 2004, les conseils de la Défense et l'Accusé, ainsi que l'Association des Avocats de la Défense (ADAD), dans une requête aux fins d'intervention comme *amicus curiae*, ont prié la Chambre de revenir sur sa décision orale du 21 septembre 2004. La Chambre a rejeté cette première requête, ayant conclu que l'avertissement du 21 septembre 2004 ne constituait pas une sanction professionnelle[17] et que la décision d'avertissement était juridiquement fondée, en ce qu'elle rentrait dans le domaine de son pouvoir inhérent de direction et de contrôle des débats à l'audience, et donc qu'elle ne saurait souffrir d'une quelconque contestation, même en présence de circonstances particulières[18]. En ce qui concerne la requête de l'ADAD, la Chambre a décidé de ne pas l'autoriser à intervenir comme *amicus curiae*, ayant constaté que le mémoire présenté par celle-ci ne soulevait pas de question pertinente de nature à éclairer la Chambre[19].

21. La Chambre a entendu 15 témoins à charge, 12 témoins du 27 septembre au 22 octobre 2004 et 3 témoins du 19 janvier au 25 janvier 2005, date de clôture de la présentation des moyens de preuve à charge par le Procureur.

22. Le 20 janvier 2005, la Défense a déposé une requête aux fins de prescription de mesures de protection des témoins.

23. Une conférence de mise en état s'est tenue le 25 janvier 2005. La Chambre a demandé à la Défense de déposer la liste de témoins à décharge le plus tôt possible et a ordonné la reprise du procès pour le 1er mars 2005[20].

24. La Chambre a rendu une décision portant protection des témoins de la Défense le 31 janvier 2005 et a ordonné à la Défense de communiquer ses déclarations de témoins non caviardées 21 jours avant la reprise du procès[21].

25. Le 9 février 2005, la Défense a déposé une requête aux fins de prolongation du délai pour la communication de ses déclarations de témoins non caviardées et une autre requête aux mêmes fins le 17 février 2005. Le 1er mars 2005, la Chambre a ordonné à la Défense de déposer, au plus tard le 14 mars 2005, son mémoire préalable au procès, la liste complète et précise des témoins qu'elle entendait citer, le résumé des faits et la durée probable de chaque déposition[22]. La Chambre a ajourné le procès au 4 avril 2005 pour la présentation par la Défense de ses moyens de preuve à décharge[23].

26. Le 11 mars 2005, la Défense a déposé une nouvelle requête aux fins d'octroi de délais supplémentaires. Lors d'une conférence de mise en état tenue le 5 avril 2005, la Chambre a reporté la

[15] Transcriptions du 20 septembre 2004, Procès, p. 2 (audience publique); *Seromba*, Transcriptions du 21 septembre 2004, p. 1 (audience publique).
[16] Transcriptions du 21 septembre 2004, p. 3 (audience publique).
[17] *Seromba*, Décision sur les requêtes en annulation de sanction et en intervention en qualité d'*amicus curiae*, 22 octobre 2004, para. 14.
[18] *Ibid*., para. 18.
[19] *Ibid*., para. 21.
[20] Transcriptions du 25 janvier 2004, Conférence de mise en état, p. 13 (audience publique).
[21] *Seromba*, Décision relative à la requête aux fins de prescription de mesures de protection des témoins de la Défense, 31 janvier 2005.
[22] *Seromba*, Décision relative à la requête de la Défense aux fins de délai, 1 mars 2005, para. 21.
[23] *Ibid*., para. 20.

reprise du procès au 10 mai 2005 et a ordonné à la Défense de remettre son mémoire préalable, le résumé et les déclarations de témoins dans le délai prescrit pour que le procès puisse reprendre le 10 mai 2005[24].

27. Le 9 avril 2005, l'Accusé a adressé une lettre à son conseil principal, Me Pognon, dans laquelle il déclarait ne plus vouloir que celui-ci le représente parce qu'il n'avait plus confiance en lui.

28. Le 13 avril 2005, la Chambre a ordonné à la Défense de communiquer au Procureur les déclarations non caviardées de ses témoins au plus tard 21 jours avant la reprise du procès[25].

29. Le 15 avril 2005, l'accusé a écrit au Greffier pour lui demander de retirer la commission d'office de Maître Pognon, son conseil principal. Le 18 avril 2005, Maître Pognon a accepté de ne plus représenter l'accusé et de se retirer immédiatement.

30. Le 19 avril 2005, la Défense a déposé une déclaration préliminaire à la présentation des moyens à décharge, mais n'a pas respecté les ordonnances aux fins de communication des déclarations non caviardées des témoins à décharge.

31. Le 10 mai 2005, étant donné le retrait de Me Pognon et l'absence de Maître Monthé, la Chambre a décidé d'ajourner le procès *sine die*[26].

32. Le 19 mai 2005, la Chambre a ordonné au Greffier de répondre au plus tard le 27 mai 2005 à la demande de l'Accusé du 15 avril 2005 concernant la commission d'office d'un nouveau conseil[27]. Le 20 mai 2005, le Greffier a retiré la commission d'office du conseil principal[28] et le 8 juin 2005, a commis d'office Maître Monthé en qualité de conseil principal de l'Accusé.

33. Le 23 juin 2005, la Défense a déposé une requête aux fins de retrait de la déclaration liminaire à la présentation des moyens à décharge déposée par l'ancien conseil principal.

34. Lors de la Conférence de mise en état tenue le 24 juin 2005, la Chambre a fait droit à la demande d'ajournement de la Défense et a fixé la date de reprise du procès au 31 octobre 2005[29].

35. Dans une décision du 7 juillet 2005[30], la Chambre a autorisé la Défense à déposer une nouvelle déclaration préalable à la présentation de ses moyens à décharge et a déclaré que la demande de la Défense en retrait de la déclaration liminaire du 19 avril 2005 était sans objet. La Chambre a également autorisé le Procureur à examiner les pièces à conviction dont la Défense entendait se prévaloir, au moins 21 jours avant le début de la présentation des moyens à décharge. La Chambre a ordonné à la Défense de communiquer au Procureur la nouvelle déclaration liminaire et les déclarations non caviardées des témoins à décharge au moins 21 jours avant la date de reprise du procès et les déclarations caviardées et non caviardées des témoins à décharge respectivement au moins 60 jours et 21 jours avant la date de reprise du procès.

36. La Défense a déposé un nouveau mémoire préalable communiqué le 10 octobre 2005, qu'elle a fait suivre d'un rectificatif le 19 octobre 2005. Elle a déposé les déclarations de témoins à décharge, sans communiquer leur identité, les 25 et 27 octobre 2005. Le 28 octobre 2005, la Défense a déposé l'ordre de comparution des témoins à décharge, sans communiquer leur identité.

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[24] Transcriptions du 5 avril 2005, Conférence de mise en état, p. 19.
[25] *Seromba*, Décision relative à la requête du Procureur aux fins de communication des déclarations des témoins de la Défense, 13 avril 2005.
[26] Transcriptions du 10 mai 2005, p. 22 (audience publique).
[27] *Seromba*, Ordonnance, 19 mai 2005, p. 19.
[28] *Seromba*, Greffier, Décision de retrait de la commission d'office de Maître Alfred Pognon conseil de M. Athanase Seromba, 20 mai 2005.
[29] Transcriptions du 24 juin 2005, Conférence de mise en état, p. 8.
[30] *Seromba*, Décision relative à la fixation de la date de reprise du procès, 7 juillet 2005.

37. Le 31 octobre 2005, la Défense a commencé la présentation des moyens de preuve à décharge.

38. Le 16 décembre 2005, la Chambre a rendu cinq décisions : une décision fixant la date de reprise du procès au 13 février 2006[31]; une décision ordonnant le transfert à Arusha de témoins détenus[32]; une décision ordonnant l'ouverture d'une enquête sur la rétraction du témoin FE36[33]; une décision ordonnant l'ouverture d'une enquête sur la demande des mesures de protection à long terme des témoins FE36, FE35 et CF14[34]; et une décision ordonnant au Procureur de communiquer à la Défense l'identité et les adresses de certains témoins qu'il n'a pas retenus par le canal de la Section d'aide aux victimes et aux témoins et autorisant la Défense à prendre contact avec certains d'entre eux[35].

39. Dans un mémorandum en date du 7 février 2006, le Président du Tribunal a reporté la date de reprise du procès au 23 mars 2006.

40. Le 7 mars 2006, la Défense a déposé une requête aux fins d'ajouter les témoins PS1 et PS2, et de ne pas retenir les témoins CF3 et FE25, dans la liste de témoins à décharge.

41. La Défense a effectivement repris la présentation des moyens de preuve à décharge le 23 mars 2006

42. Le 24 mars 2006, la Chambre a fait droit à la requête tendant à ajouter PS1 et PS2 à la liste des témoins de la Défense[36].

43. Le 29 mars 2006, la Chambre a fait droit à la requête du Procureur pour une visite des sites au Rwanda[37]. Du 8 au 11 avril 2006, la Chambre, la Défense, le Procureur et le Greffier ont visité des sites à Kivumu, au Rwanda.

44. Le 12 avril 2006, la Défense a écarté CF4 et CF13 de sa liste de témoins et a modifié l'ordre de comparution des témoins PA1, PS1, PS2 et de l'Accusé. La Chambre a décidé d'ajourner le procès au 18 avril 2006[38].

45. Le 18 avril 2006, la Défense a écarté PS1 de sa liste de témoins et a déclaré que le témoin PS2 ne pouvait pas venir déposer à Arusha avant mai 2006[39].

46. Le 20 avril 2006, la Chambre a fait droit à la requête de la Défense aux fins de recueillir les dépositions du témoin PS2 par voie de vidéoconférence[40].

47. Le 21 avril 2006, la Chambre a ordonné à l'Accusé de faire sa déposition le 24 avril 2006[41] et a autorisé les parties à envoyer des représentants en Afrique du Sud pour la déposition du témoin PS2 par voie de vidéoconférence[42].

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[31] *Seromba*, Décision portant fixation de la date de reprise du procès au 13 février 2006, 16 décembre 2005.
[32] *Seromba*, Ordonnance relative à la requête de la Défense aux fins du transfert des témoins détenus, 16 décembre 2005.
[33] *Seromba*, Décision relative à la requête de la Défense aux fins de voir ordonner l'ouverture d'une enquête sur les circonstances et les causes réelles de rétraction du témoin portant le pseudonyme FE36, 16 décembre 2005.
[34] *Seromba*, Décision relative à la requête de la Défense aux fins de voir ordonner des mesures de protection à long terme à l'égard des témoins de la Défense portant les pseudonymes CF14, FE35 et FE36, 16 décembre 2005.
[35] *Seromba*, Décision relative à la requête de la Défense aux fins d'obtenir la divulgation de l'identité et de l'adresse des témoins de l'accusation CAN, CNY, CBW, CNV, CBX, CNP, CNE, CNI, CNO non retenus sur la liste finale du Procureur et l'autorisation de prendre contact avec ces derniers, 16 décembre 2005.
[36] Transcriptions du 24 mars 2006, p. 39 (audience publique).
[37] *Seromba*, Décision relative à la requête du Procureur pour une visite des sites au Rwanda, 29 mars 2006.
[38] Transcriptions du 12 avril 2006, pp. 55-57 (audience publique).
[39] Transcriptions du 18 avril 2006, p. 1 (audience publique).
[40] *Seromba*, Décision relative à la requête de la Défense aux fins de recueillir les dépositions du témoin PS2 par voie de vidéoconférence, 20 avril 2006.
[41] Transcriptions du 21 avril 2006, p. 1 (huis clos).

48. Le 24 avril 2006, la Défense a déclaré que l'Accusé ne pouvait pas déposer avant le témoignage du témoin PS2 et a demandé à la Chambre de reconsidérer sa décision orale du 21 avril 2006[43]. La Chambre a rejeté la demande de la Défense, considérant que sa décision du 21 avril 2006 ne violait ni les dispositions de l'Article 20 du Statut, ni celles de l'Article 85 du Règlement et qu'elle n'avait pas contraint l'Accusé de témoigner contre son gré, mais qu'elle avait simplement interverti l'ordre de comparution du témoin PS2 et de l'Accusé pour respecter la date de clôture de présentation de la preuve à décharge[44]. La Chambre a également rejeté la demande en certification d'appel de cette décision soumise par la Défense[45].

49. La Défense a par la suite présenté au Bureau du Tribunal une requête aux fins de récusation de la Chambre. Le 25 avril 2006, le Bureau a rejeté la requête de la Défense[46].

50. Le procès a repris le 26 avril 2006. La Défense a indiqué qu'elle interjetait appel de la décision du Bureau et a demandé que le procès soit suspendu en attendant une décision de la Chambre d'appel[47]. La Chambre a rejeté la demande en suspension de procédure présentée par la Défense[48]. La Défense ayant refusé d'interroger le témoin PS2, la Chambre a considéré qu'elle avait renoncé à interroger ce témoin[49]. La Chambre a suspendu ses travaux pour ajourner les débats au lendemain pour permettre à l'accusé de se présenter à l'audience[50].

51. Le 27 avril 2006, la Défense a déclaré que l'Accusé avait décidé de ne comparaître qu'après que la Chambre d'appel ait vidé sa saisine sur l'appel initié contre la décision du Bureau en récusation[51]. La Chambre a conclu que la Défense avait renoncé au droit d'interroger l'Accusé, qu'elle n'avait donc plus de témoin à entendre et que la présentation de la preuve à décharge était arrivée à sa fin. La Chambre a ordonné que les dernières conclusions écrites du Procureur soient déposées au plus tard le 26 mai 2006, celles de la Défense au plus tard le 16 juin 2006 et que les parties présentent leurs réquisitions et plaidoiries finales le 27 juin 2006[52].

52. Le 22 mai 2006, la Chambre d'appel a rejeté l'appel de la Défense interjeté contre la décision du Bureau du Tribunal sur la requête aux fins de récusation[53].

53. Le 5 juin 2006, la Défense a déposé une requête aux fins d'obtenir une prorogation du délai de dépôt de son mémoire final au 22 juin 2006. La Chambre y a fait droit le 8 juin 2006[54].

54. Le Procureur a déposé son mémoire final le 26 mai 2006 et la Défense a fait de même le 22 juin 2006. La Défense a également déposé un Corrigendum à son mémoire final le 26 juin 2006.

55. Les parties ont présenté leurs plaidoiries et réquisitions finales les 27 et 28 juin 2006.

56. Le 28 juin 2006, la Chambre a fait droit à la requête du Procureur aux fins de non admission du *Corrigendum* du mémoire final de la Défense et a ordonné son retrait des pièces constituant le dossier de la procédure[55].

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[42] *Ibid*., p. 42 (huis clos).
[43] Transcriptions du 24 avril 2006, pp. 1-2 (audience publique).
[44] *Ibid*., pp. 6-7 (audience publique).
[45] *Ibid*., p. 7 (audience publique).
[46] *Seromba*, Decision on Motion for Disqualification of Judges, 25 avril 2006.
[47] Transcriptions du 26 avril 2006, p. 4 (audience publique).
[48] *Ibid*., p. 7 (audience publique).
[49] *Ibid*., p. 8 (audience publique).
[50] *Ibid*., p. 20 (audience publique).
[51] Transcriptions du 27 avril 2006, p. 3 (audience publique).
[52] *Ibid*., p. 5 (audience publique).
[53] Seromba, Decision on Interlocutory Appeal of a Bureau Decision, 22 mai 2006.
[54] *Seromba*, Décision relative à la requête de la Défense aux fins de report de la date du dépôt de ses dernières conclusions, 8 juin 2006.

[55] *Seromba*, Décision relative à la requête en extrême urgence du Procureur aux fins de non admission du Corrigendum au mémoire final de la Défense (motifs de la décision orale du 27 juin 2006), 28 juin 2006.

The Prosecutor v. Joseph SERUGENDO

Case N° ICTR-2005-84

Case History

- Name: SERUGENDO
- First Name: Joseph
- Date of birth: May 1953
- Sex: male
- Nationality: Rwandan
- Former Official Function: Member of the *Comité d'Initiative*, the steering committee of RTLM, Member of the National Committee of the *Interahamwe*
- Date of Indictment's Confirmation: 22 July 2005
- Counts: genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, complicity in genocide, persecution as 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: 16 September 2005, at Freetown, Gabon
- Date of Transfer: 23 September 2005
- Date of Initial Appearance: 30 September 2005
- Pleading: not guilty, then guilty at his judgment
- Date Trial Began: 15 March 2006
- Date and content of the Sentence: 2 June 2006, sentenced to 6 years imprisonment
- Died on 22 August 2006, at Nairobi Hospital, Kenya

Decision on Motion for Protection of Witnesses
1 June 2006 (ICTR-2005-84-I)

(Original : not specified)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

Joseph Serugendo – Protection of witnesses – Real and objective fears – Trial fairness – Motion granted – Measures: confidentiality, possibility for the Prosecution to contact the witnesses

International Instruments Cited :

Rules of Procedure and Evidence, Rules 69, 69 (C) and 75 ; Statute, Art. 21

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Ferdinand Nahimana, Decision on the Defendant's Motion for Witness Protection, 25 February 2000 (ICTR-96-11) ; Trial Chamber, The Prosecutor v. Georges Ruggiu, Decision on the Defence's Motion for Witness Protection, 9 May 2000 (ICTR-97-32) ; Trial Chamber, The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Decision on Witness Protection, 22 August 2000 (ICTR-96-17) ; Trial Chamber, The Prosecutor v. Laurent Semanza, Decision on the Defence Motion for Protection of Witnesses (Rule 75), 24 May 2001 (ICTR-97-20) ; Trial Chamber, The Prosecutor v. Eliezer Niyitegeka, Decision (Defence Motion for Protective Measures for Defence Witnesses), 14 August 2002 (ICTR-96-14) ; Trial Chamber, The Prosecutor v. Sylvestre Gacumbitsi, Decision on Defence Motion for Protective Measures for Defence Witnesses, 25 August 2003 (ICTR-2001-64) ; 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)

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 "Defence Motion for Protection of Witnesses under Article 21 of the Statute, Rules 69 and 75 of the Rules of Procedure and Evidence", which was filed on 29 May 2006;

NOTING that the Prosecution does not oppose the motion;

HEREBY DECIDES the motion.

1. This motion for measures to protect the identity of witnesses to be called on behalf of the Serugendo Defence is brought under Article 21 of the Statute and Rule 75 of the Rules of Procedure and Evidence ("the Rules"). Article 21 of the Statute obliges the Tribunal to provide in its Rules 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 victim's identity. Rule 75 of the Rules elaborates several specific witness protection measures that may be ordered, including sealing or expunging names and other identifying information that may otherwise appear in the

Tribunal's public records, assignment of a pseudonym to a witness, and permitting witness testimony in closed session. Subject to these measures, Rule 69 (C) requires the identity of witnesses to be disclosed to the Prosecution in adequate time for preparation.

2. Measures for the protection of witnesses are granted on a case by case basis. The jurisprudence of this Tribunal and of the International Criminal Tribunal for the Former Yugoslavia requires that the witnesses for whom protective measures are sought must have a real fear for the safety of the witness or his or her family, and there must be an objective justification for this fear. These fears may be expressed by persons other than the witnesses themselves. A further consideration is trial fairness, which favours similar or identical protection measures for Defence and Prosecution witnesses.[6160]

3. The Serugendo Defence submits that the witnesses for whom protection is sought have legitimate fears for their safety due to a combination of the following factors: their close relationship to the Accused, pre-existing vulnerabilities which have already created a need for their relocation to third countries and other well-founded fears of reprisals. Based on the information provided, the Chamber follows previous decisions regarding protection for Defence witnesses and accepts the existence of these fears amongst Defence witnesses, and their objective justification.[6161] Accordingly, the Chamber finds that the conditions for ordering witness protection measures are satisfied.

FOR THE ABOVE REASONS, THE CHAMBER

HEREBY ORDERS that:

1. The Serugendo Defence shall be permitted to designate pseudonyms for each of the witnesses for whom it claims the benefits of this Order, for use in trial proceedings, and during discussions between the Parties in proceedings.

2. The names, addresses, whereabouts, and other identifying information concerning the protected witnesses shall be sealed by the Registry and not included in any non-confidential Tribunal records, or otherwise disclosed to the public.

3. In cases where the names, addresses, locations and other identifying information of the protected witnesses appear in the Tribunal's public records, this information shall be expunged from the said records.

4. The names and identities of the protected witnesses shall be forwarded by the Serugendo Defence to the Registry in confidence.

5. No person shall make audio or video recordings or broadcastings and shall not take photographs or make sketches of the protected witnesses, without leave of the Chamber or the witness.

[6160] *Prosecutor v. Bagosora, Kabiligi, Ntabakuze, and Nsengiyumva*, Decision on Bagosora Motion for Protection of Witnesses, 1 September 2003, p. 2; *Prosecutor v. Bagosora, Kabiligi, Ntabakuze, and Nsengiyumva*, Decision on Kabiligi Motion for Protection of Witnesses, 1 September 2003, p. 2; *Prosecutor v. Eliézer Niyitegeka*, Decision (Defence Motion for Protective Measures for Defence Witnesses), 14 August 2002, p. 4; *Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana*, Decision on Witness Protection, 22 August 2000, pp. 2-4.

[6161] *Prosecutor v. Bagosora, Kabiligi, Ntabakuze, and Nsengiyumva*, Decision on Bagosora Motion for Protection of Witnesses, 1 September 2003, p. 2; Prosecutor v. Bagosora, Kabiligi, Ntabakuze, and Nsengiyumva, Decision on Kabiligi Motion for Protection of Witnesses, 1 September 2003, p. 2; *Prosecutor v. Eliézer Niyitegeka*, Decision (Defence Motion for Protective Measures), 14 August 2002, p. 4; *Prosecutor v. Laurent Semanza*, Decision on the Defence Motion for Protection of Witnesses (Rule 75), 24 May 2001, p. 3; *Prosecutor v. Ferdinand Nahimana*, Decision on the Defendant's Motion for Witness Protection, 25 February 2000, p. 3; *Prosecutor v. Georges Ruggiu*, Decision on the Defence's Motion for Witness Protection, 9 May 2000, p. 3. Such measures have not been granted where, unlike the present motion, no evidence of the security situation of witnesses has been submitted to the Chamber. *Prosecutor v. Gacumbitsi*, Décision relative à la requête de la défense aux fins de mesures de protection en faveur des témoins à décharge, 25 August 2003, pp. 2-3.

6. The Prosecution and any representative acting on its behalf, shall notify the Serugendo Defence in writing prior to any contact with any of its witnesses and, if the witness consents, the Serugendo Defence shall facilitate such contact.

7. The Prosecution shall keep confidential to itself all information identifying any witness subject to this order, and shall not, directly or indirectly, disclose, discuss or reveal any such information.

Arusha, 1 June 2006.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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Decision on Defence Motion for the Admission of Written Witness Statements under Rule 92 bis
1 June 2006 (ICTR-2005-84-I)

(Original : not specified)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

Joseph Serugendo – Admission of written statements – Admissibility of evidence, Requirements of relevance and probative value – Discretion of the Chamber, Fair trial – Subject of the statements, Good character and professional competence of the Accused – Admission without cross-examination – Motion granted

International Instruments Cited :

Rules of Procedure and Evidence, Rules 89 (C), 92 bis, 92 bis (A), 92 bis (A) (i) (e) and 92 bis (B) ; Statute, Art. 19 and 20

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Elie Ndayambaje et al., 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, 22 January 2003 (ICTR-98-42) ; 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 2003 (ICTR-99-54A)

I.C.T.Y.: Trial chamber, The Prosecutor v. Duško Sikirica et al., Decision on Prosecution's Application to Admit Transcripts Under Rule 92 bis, 23 May 2001 (IT-95-8) ; Trial Chamber, The Prosecutor v. Slobodan Milošević, Decision on Prosecution's Request to have Written Statements Admitted Under Rule 92 bis, 21 March 2002 (IT-02-54) ; 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 "Defence Motion for Admission of Written Statements" etc. under Rule 92 *bis* of the Rules of Procedure and Evidence ("the Rules)", filed on 29 May 2006;

NOTING that the Prosecution does not oppose the motion;

HEREBY DECIDES the motion.

Introduction

1. The Defence seeks to admit into evidence the written statements of four witnesses (FG, JF, CN and BN) in lieu of oral testimony, pursuant to Rule 92 *bis* of the Rules. It is argued that all statements confirm to the requirements of that provision. The Defence also contends that the admission of these statements will save judicial time and resources, as well as minimise disruption to the witnesses' lives and risks to their safety. The Prosecution does not oppose the admission of the statements and has waived its right to require the witnesses to be called for cross-examination.

Deliberations

2. The relevant parts of Rule 92 *bis* read 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 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.

[…]

(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.

3. Rule 92 *bis* was adopted from the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia. The Appeals Chamber has described Rule 92 *bis* as "*lex specialis* which takes the admissibility of written statements of prospective witnesses and transcripts of evidence out of the scope of the *lex generalis* of Rule 89 (C), although the general propositions which are implicit in Rule 89 (C) – that evidence is admissible only if it is relevant and that it is relevant only if it has probative value – remain applicable to Rule 92 *bis*".[1] Therefore, 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).

4. Rule 92 *bis* (A) specifically prohibits the admission of evidence going to the acts and conduct of the Accused as charged in the Indictment.[2] By contrast, one of the factors in favour of admitting statements is that the evidence sought relates to issues of the character of the Accused. The Defence cites this factor in arguing for the admission of the statements.

5. Even if a statement fulfils all these requirements, the Chamber must decide whether or not to exercise its discretion to admit, bearing in mind the overarching necessity of ensuring a fair trial as provided for in Articles 19 and 20 of the Statute. If, in exercising its discretion, the Chamber permits the admission of the statement, it must also decide whether or not to require cross-examination of the witness. Again, a relevant factor is the need to ensure a fair trial.[3]

6. The Chamber observes that the four witness statements tendered for admission do not go to proof of the Accused's acts and conduct as charged but attest to his good character and professional competence prior to the events mentioned in the Indictment; a factor in favour of admission under Rule 92 *bis* (A) (i) (e). The statements are relevant and probative as factors in mitigation of sentence. Furthermore, the formal requirements of admission of a written statement under Rule 92 *bis* (B) have been met by way of attestations attached to all the four written statements. Having considered the statements as a whole, the Chamber finds that fair trial requirements do not require their admission with cross-examination, bearing in mind the uncontested nature of their contents and the waiver of this right by the Prosecution.

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[1] *Galić*, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (AC), 7 June 2002, para. 31; *Ndayambaje et al*., 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 (TC), 22 January 2003, para. 20; *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 (TC), 20 May 2003, para. 22.

[2] *Galić*, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C) (AC), 7 June 2002, paras. 8-11; *Milosevic*, Decision on Prosecution's Request to have Written Statements Admitted Under Rule 92 *bis* (TC), 21 March 2002, para. 22.

[3] *Milosevic*, Decision on Prosecution's Request to have Written Statements Admitted Under Rule 92 *bis* (TC), 21 March 2002, paras. 24-25; *Sikirica et al*., Decision on Prosecution's Application to Admit Transcripts Under Rule 92 *bis* (TC), 23 May 2001, para. 4.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion and admits the written statements of Witnesses FG, JF, CN and BN.

Arusha, 1 June 2006.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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Decision on Urgent Motion for the Deposition of Joseph Serugendo 8 June 2006 (ICTR-2005-84-I)

(Original : not specified)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

Joseph Serugendo – Deposition of the Accused – Exceptional circumstances, Interests of justice – Deteriorating health, Terminal illness, Poor prognosis – Importance of the testimony – Right of the Defence to be present during the deposition and to cross-examine the Accused – Information provided in the motion, Vague and insufficiently precise to constitute a statement of the matters for examination – Exceptional circumstances, Condition of further particularization provided by the Prosecution – Motion granted

International Instruments Cited :

Rules of Procedure and Evidence, Rules 71, 71 (A) and 71 (B) ; Statute, Art. 19 and 20

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Defence Motion for Reconsideration of the Decisions rendered on 29 November 2001 and 5 December 2001 and for Declaration of Lack of Jurisdiction, 28 March 2002 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Ferdinand Nahimana, Hassan Ngeze and Jean Bosco Barayagwiza, Decision on the Defence Request to Hear the Evidence of Witness Y by Deposition, 10 April 2003 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. Tharcisse Muvunyi, Decision on the Prosecutor's Extremely Urgent Motion for the Deposition of Witness QX, 11 November 2003 (ICTR-2000-55) ; Trial Chamber, The Prosecutor v. Aloys Simba, Decision on Defence's Urgent Motion for a Deposition , 11 March 2004 (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 "Prosecutor's Extremely Urgent Motion for the Deposition of Joseph Serugendo", of 2 June 2006;

NOTING the Defence response, which was filed on 5 June 2006;

HEREBY DECIDES the motion.

Introduction

1. The Prosecution seeks the deposition of Joseph Serugendo on the basis that Serugendo is in extremely poor health. A medical report filed before the Tribunal in the context of Serugendo's sentencing hearing on 1 June 2006 states that he suffers from a terminal illness.[1] Serugendo's current state of health is fragile and deteriorating, and his prognosis is poor.[2] The Prosecution fears that the medical condition of Serugendo may soon deteriorate to the point that he may be unable to testify.[3] Deposition is accordingly sought to preserve, for use in future proceedings, the testimony of Serugendo contained in approximately 200 pages of debriefing provided by him to the Prosecution.[4] The Prosecution intends to use the deposition in various ongoing and future trials. As Serugendo's state of health may not permit him to await the outcome of various decisions, and in order to save time and judicial resources, this Motion is a consolidated request to introduce the deposition in all such future proceedings. In so doing, the Prosecution acknowledges its obligation to provide notice to each Accused person against whom the deposition may be used and his counsel of the time of the deposition so as to accord them an opportunity to cross-examine Serugendo.[5] It further acknowledges that the decision as to the admissibility of the deposition as Prosecution evidence in any future proceeding is reserved to the Trial Chambers in which the Prosecution may seek to introduce the deposition.[6]

2. The Defence does not oppose the motion.

Deliberations

3. Rule 71 (A) of the Rules of Procedure and Evidence ("the Rules") provides the Chamber with the discretion to grant the taking of depositions where exceptional circumstances exist and where it would be in the interests of justice. In addition, Rule 71 (B) stipulates certain requirements with which the request for deposition must comply.[7]

4. The rapidly deteriorating health of Serugendo, as attested to by the Prosecution and the above-mentioned medical report, constitutes an exceptional circumstance within the meaning of Rule 71.[8] Although to date, most depositions have been taken in the context of ongoing trials, the Chamber takes note of Serugendo's terminal illness and poor prognosis, as well as the Prosecution's submissions on the extensive and significant character of his testimony and its likely relevance to many current and

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[1] *Prosecutor v. Serugendo,* Case N°ICTR-2005-84-I, Defence Exhibit D13 (under seal). On 2 June 2006, Joseph Serugendo was sentenced to a term of imprisonment of six years, having previously pleaded guilty to one count of direct and public incitement to commit genocide and to one count of persecution as a crime against humanity. His substantial cooperation with the Prosecution and his terminal illness were determined by the Trial Chamber to be significant factors in mitigation of punishment (*Serugendo,* Judgement and Sentence (TC), 8 June 2006, paras. 62, 74). His state of health was acknowledged by the Chamber to require a modified regime of detention and hospitalization. (*Id.,* para. 74, disposition).
[2] *Id.,* Defence Exhibit D13 (under seal).
[3] Motion, para. 6.
[4] *Id.,* para. 7.
[5] *Id.,* para. 8 (d).
[6] *Id.,* para. 8 (e).
[7] Rule 72 (B) stipulates that the motion for the taking of a deposition "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."
[8] See eg. *Simba,* Decision on Defence's Urgent Motion for a Deposition (TC), 11 March 2004, para. 7; *Nahimana, Ngeze and Barayagwiza*, Decision on the Defence Request to Hear the Evidence of Witness Y by Deposition (TC), 10 April 2003, para. 8; *Muvunyi,* Decision on the Prosecutor's Extremely Urgent Motion for the Deposition of Witness QX (TC), 11 November 2003, para. 10; *Bagosora et al.*, Decision on Prosecutor's Motion for Deposition of Witness OW (TC), 5 December 2001, para. 12.

future proceedings.[9] The Chamber accordingly finds it to be in the interests of justice to permit his deposition to be taken in order to preserve this evidence for future use. The decision as to the admissibility of the deposition in any future proceeding is ultimately a matter for the Trial Chambers before which the Prosecution may seek to introduce the deposition as evidence.

5. The Chamber recalls the right of the Defence to be present during the deposition, and to cross-examine Serugendo if they so wish.[10] In the present circumstances, this right extends to Counsel of all Accused against whom the Prosecution intends to use the deposition.[11]

6. Rule 71 (B) requires that a motion should include "a statement of the matters on which the person is to be examined". In the motion, the Prosecution states that the witness "has given an extensive statement on what he knows regarding the genocide in Rwanda in 1994" and that it "bears important prosecution evidence in a number of trials both on-going and yet to be started".[12] Although the Prosecution undertakes to disclose Serugendo's statement to all Defence parties,[13] the information provided in the motion is vague and insufficiently precise to constitute a statement of the matters for examination.[14]

7. Given the exceptional circumstances of the present case, the Chamber does not deny the motion on this basis, on the condition that further particularization is provided by the Prosecution forthwith. The Chamber further requests that the Prosecution specify the date and place at which the deposition is to be taken, following consultation with the Registry and all Defence parties, as soon as reasonably practicable.

FOR THE AFOREMENTIONED REASONS, THE CHAMBER

I. GRANTS the Prosecutor's Extremely Urgent Motion for the Deposition of Joseph Serugendo, and ORDERS that the deposition be recorded on videotape, and placed under seal;

II. ORDERS that the deposition be taken at a place to be chosen by the Registry at the earliest practicable date to be agreed between the Prosecution and all Defence parties, and that this date be communicated to the Chamber as soon as practicable;

III. ORDERS the Prosecution to immediately provide a statement of the matters on which Serugendo is to be examined to the Chamber and all Defence parties;

IV. ORDERS the Prosecution to disclose the statement of Joseph Serugendo to all Defence parties as soon as practicable, but no less than one week prior to the agreed date of the deposition, so as to allow adequate time for preparation of the Defence;

V. ORDERS the Registrar to appoint a Presiding Officer for the taking of the deposition of Joseph Serugendo and to make all necessary arrangements to facilitate the taking of the deposition.

Arusha, 8 June 2006.

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[9] Motion, paras. 2-6, 8 (b), 11.
[10] Rule 71 (C) of the Rules.
[11] Hereinafter "all Defence Parties." Should the Prosecution seek to use the deposition as evidence against other Accused in the future, but where it has not at this stage identified these Accused, the decision as to the admissibility of the deposition in such proceedings will also be a matter for the Trial Chamber in question to decide.
[12] Motion, paras. 11-12.
[13] *Id*., para. 18.
[14] See *Simba,* Decision on Defence's Urgent Motion for a Deposition (TC), 11 March 2004, para. 8: "The other party, in deposition applications in particular, is entitled to know what the witness will testify to, given that deposition is an exceptional measure."

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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Judgement and Sentence
12 June 2006 (ICTR-2005-84-I)

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

Joseph Serugendo – Plea Agreement, Direct and public incitement to commit genocide and persecution as a crime against humanity – Radio Television Libre des Mille Collines ("RTLM") – Interahamwe za MRND – Sentencing factors – General practice regarding prison sentences in the courts of Rwanda – Rwandan law, Gacaca Jurisdictions, Guilty pleas – Determination of the sentence – Gravity of the offence, Role of the Accused within the RTLM – Individual circumstances of the Accused, Guilty plea – Aggravating circumstances found, Position of the Accused within the RTLM, Number of victims – Mitigating circumstances found, Guilty plea, Co-operation with the Prosecution, Remorse, Ill health, Reduced life expectancy, Quality of life – Credit for time served, 270 days – Single sentence, 6 years imprisonment – Adequate medical treatment

International Instruments Cited :

Rules of Procedure and Evidence, Rules 62 (B), 62 bis, 62 bis (B), 101 and 101 (D) ; Statute, Art. 2, 2 (3) (c), 3, 3 (h), 6 (1), 23 and 23 (2)

National Instrument Cited :

Rwandan Penal Code, Art. 83

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) ; 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, 1 June 2000 (ICTR-97-32) ; Appeals Chamber, The Prosecutor v. Jean-Paul Akayesu, Judgement, 1 June 2001 (ICTR-96-4) ; Appeals Chamber, The Prosecutor v. Clément Kayishema and Obed Ruzindana, Judgement (Reasons), 1 June 2001 (ICTR-95-1) ; Trial Chamber, The Prosecutor v. Ignace Bagilishema, Judgement, 7 June 2001 (ICTR-95-1A) ; Appeals Chamber, The Prosecutor v. Alfred Musema, Judgement, 16 November 2001 (ICTR-96-13) ; Trial Chamber, The Prosecutor v. Gérard et Elizaphan Ntakirutimana, Judgement, 21 February 2003 (ICTR-96-10 and 96-17) ; Trial Chamber, The Prosecutor v. Laurent Semanza, Judgement and Sentence, 15 May 2003 (ICTR-97-20) ; Trial Chamber, The Prosecutor v. Eliezer Nyitegeka, Judgement, 16 May 2003 (ICTR-96-14) ; Trial Chamber, The Prosecutor v. Juvénal Kajelijeli,

Judgment and sentence, 1 December 2003 (ICTR-98-44A) ; Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Judgement and Sentence, 3 December 2003 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. Jean de Dieu Kamuhanda, Judgement, 22 January 2004 (ICTR-99-54-T) ; Trial Chamber, The Prosecutor v. Sylvestre Gacumbitsi, Judgement, 17 June 2004 (ICTR-2001-64) ; 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 96-17) ; Trial Chamber, The Prosecutor v. Vincent Rutaganira, Judgment, 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) ; Trial Chamber, The Prosecutor v. Paul Bisengimana, Judgment, 13 April 2006 (ICTR-2000-60)

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Duško Tadić, Judgement in Sentencing, 26 January 2000 (IT-94-1) ; Appeals Chamber, The Prosecutor v. Zlatko Aleksovski, Judgement, 24 March 2000 (IT-95-14/1) ; Appeals Chamber, The Prosecutor v. Anto Furundžija, Judgement, 21 July 2000 (IT-95-17/1) ; Appeals Chamber, The Prosecutor v. Zdravko Mucić et al., Judgment, 20 February 2001 (IT-96-21) ; 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. Milorad Krnojelac, Judgement, 15 March 2002 (IT-97-25) ; Appeals Chamber, The Prosecutor v. Dragoljub Kunarac, Judgement, 12 June 2002 (IT-96-23 and IT-96-23/1) ; Trial Chamber, The Prosecutor v Momir Talić, Decision on the Motion for Provisional Release of the Accused Momir Talić, 20 September 2002 (IT-99-36/1) ; Trial Chamber, The Prosecutor v. Biljana Plavšić, Judgement, 27 February 2003 (IT-2000-39 and IT-2000-40/1) ; Trial Chamber, The Prosecutor v. Momir Talić, Order Terminating Proceedings Against Momir Talić, 12 June 2003 (IT-99-36/1) ; 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-2002-65/1) ; Trial Chamber, The Prosecutor v. Miodrag Jokić, Judgement (TC), 18 March 2004 (IT-2001-42/1) ; Trial Chamber, The Prosecutor v. Pavle Strugar, Judgement, 31 January 2005 (IT-2001-42) ; Appeals Chamber, The Prosecutor v. Dragan Nikolić, Judgement, 4 February 2005 (IT-94-2) ; Appeals Chamber, The Prosecutor v. Miroslav Kvočka, Judgement, 28 February 2005 (IT-98-30/1)*

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I. Procedural History and Plea Agreement

1. Joseph Serugendo was charged by the Office of the Prosecutor of the International Criminal Tribunal for Rwanda with conspiracy to commit genocide, genocide, complicity in genocide, direct and public incitement to commit genocide and persecution as a crime against humanity in an Indictment confirmed by Judge Sergei Alekseevich Egorov on 22 July 2005.

2 On 16 September 2005, Serugendo was arrested and on 23 September 2005 transferred to the Tribunal. He made his initial appearance on 30 September 2005, and entered a plea of not guilty to all five counts of the Indictment. Serugendo immediately commenced discussions with the Prosecution with the view to full co-operation and an eventual guilty plea.

3. A joint motion for consideration of a plea agreement between Joseph Serugendo and the Prosecution was filed on 12 January 2006.[1] On the same date, the Prosecution also requested leave to amend the Indictment.[2] The proposed Amended Indictment sought to withdraw five charges[3] and to retain two counts.[4]

4. The plea agreement was filed jointly on 16 February 2006. Serugendo agreed to plead guilty to Counts 1 and 2 of the proposed Amended Indictment, alleging direct and public incitement to commit genocide pursuant to Articles 2 (3) (c) and 6 (1) of the Statute of the Tribunal, and persecution as a crime against humanity, pursuant to Article 3 (h) and Article 6 (1) of the Statute.

5. At a Plea Hearing of 15 March 2005, pursuant to Rule 62 *bis* of the Rules of Procedure and Evidence ("the Rules"), the Chamber granted the Prosecution motion to amend the Indictment.[5] During the same hearing, Serugendo pleaded guilty to the Amended Indictment. This Amended Indictment and Plea Agreement comprised the commonly agreed basis for the guilty plea and for the present Judgement and Sentence.

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[1] "Joint Motion for Consideration of Plea Agreement Between Joseph Serugendo and the Office of the Prosecutor", filed confidentially on 12 January 2006.
[2] "Prosecutor's Request for Leave to Amend an Indictment Pursuant to Rules 72, 73, 50 and 51 of the Rules of Procedure and Evidence", filed confidentially on 12 January 2006.
[3] Count 1: conspiracy to commit genocide – Article 6 (1); Count 2: genocide – Article 6 (1) and Article 6 (3); Count 3: complicity in genocide – Article 6 (1) and Article 6 (3); Count 4: direct and public incitement to commit genocide – Articles 6 (1) and 6 (3) and Count 5: persecution as a crime against humanity – Articles 6 (1) and 6 (3).
[4] Count 1: direct and public incitement to commit genocide – Article 6 (1) and Count 2: persecution as a crime against humanity – Article 6 (1).
[5] Plea Hearing, T. 15 March 2006, p. 4.

6. The Plea Agreement states that Serugendo intends to enter a plea of guilty to the two above-mentioned counts.[6] It emphasises that he is "aware of both the consequences and scope of the offences he committed in 1994 while in Rwanda".[7] Through the provision of complete and truthful information regarding these events and his own involvement therein, the Plea Agreement records Serugendo's desire "to contribute to the necessary process of national reconciliation in Rwanda".[8]

7. The Plea Agreement acknowledges that Serugendo agreed to plead guilty "freely and voluntarily".[9] He also understands that, by entering into the Plea Agreement, he has given up the rights related to the presumption of innocence and to a full trial.[10] The undertakings contained in the Plea Agreement include Serugendo's co-operation with the Prosecution.[11]

8. In exchange for Serugendo's guilty plea, his genuine co-operation with the Prosecution, and the fulfillment of all his obligations under the Plea Agreement, the Prosecution agreed to recommend to the Chamber the imposition of a term of imprisonment in the range of six to fourteen years.[12] A Chamber is not bound by any agreement reached between the parties on the preferred sentence.[13]

9. Both counts retained in the Amended Indictment refer to crimes under Articles 2 and 3 of the Statute. The elements of the offence of direct and public incitement to commit genocide under Article 2 (3) (c) of the Statute are described in both the Plea Agreement and the Tribunal jurisprudence as:

- that the accused incited others to commit genocide;
- that the incitement was direct;
- that the incitement was public; and
- that the accused had the specific intent to commit genocide, that is, destroying in whole or in part a national, ethnic, racial or religious group.[14]

10. The elements of the crime against humanity of persecution under Article 3 (h) of the Statute are described in both the Plea Agreement and the Tribunal jurisprudence as:

- the accused committed specific violations of basic or fundamental rights;
- the specific crimes were committed due to political or racial discrimination;
- the accused had real or constructive knowledge of the general context in which the offences were committed;
- the crimes were committed as part of widespread or systematic attacks against a civilian population; and
- the attacks were carried out on political, ethnic, racial or religious grounds.[15]

11. At the Plea Hearing on 15 March 2006, the Chamber confirmed that the plea was based on sufficient facts to establish the crimes and Serugendo's participation in their commission.[16] Following

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[6] Plea Agreement, para. 2.
[7] *Ibid*., para. 4.
[8] *Ibid*., para. 12.
[9] *Ibid*., para. 66. See also Plea Hearing, T. 15 March 2006, p. 5.
[10] These rights include: the right to plead not guilty and require the Prosecution to prove charges in the Amended Indictment beyond a reasonable doubt at a fair equitable public trial; the right to prepare and put forward a defence to the charges at such a trial, and the right to examine at trial, or have examined, witnesses against him and to obtain the attendance and examination of witnesses on his behalf at trial under the same conditions as witnesses against him (Plea Agreement, para. 65).
[11] *Ibid*., paras. 51-53.
[12] *Ibid*., para. 59. This range was subsequently revised. See Prosecution Final Pre-Sentencing Brief, para. 5, and *infra*.
[13] Rule 62 *bis* (B) of the Rules.
[14] Plea Agreement, para. 24. See e.g. *Nahimana et al*., Judgement (TC), paras. 1071-1072, 1080; *Kajelijeli,* Judgment (TC), paras. 850-854; *Semanza,* Judgement (TC), paras. 347-350; *Ruggiu,* Judgement (TC), paras. 21-22.
[15] Plea Agreement, para. 26. See e.g. *Krnojelac,* Judgement (AC), paras. 181-188; *Nahimana et al*., Judgement (TC), paras. 1001, 1012-1017; 1069-1072; *Niyitegeka,* Judgement (TC), para. 431; *Akayesu,* Judgement (TC), paras. 559-562.

its conclusion that the plea was voluntary, informed and unequivocal, in conformity with Rule 62 (B) of the Rules, the Chamber entered a finding of guilt for each count to which Serugendo pleaded guilty.[17]

12. The Chamber received the Prosecution Sentencing Brief on 3 May 2006 and the Defence Sentencing Brief on 18 May 2006.

13. The Sentencing Hearing was held on 1 June 2006. In the course of this hearing, the Defence called two witnesses who gave evidence of the good character of the Accused prior to the crisis in Rwanda and of assistance rendered to a Tutsi individual during the genocide.[18] Additionally, the Chamber admitted into evidence written statements of four Defence witnesses. All addressed the previous good character and professional competence of the Accused.[19]

14. Finally, Serugendo made a brief oral statement and tendered into evidence two statements prepared by him expressing his genuine remorse and conveying an apology to the people of Rwanda.[20] On the following day, Friday 2 June 2006, the Chamber rendered its judgment orally by reading out a summary.

II. Factual Basis

15. Joseph Serugendo was born in Kipushi, Democratic Republic of Congo on 24 August 1953.[21]

16. At all times material to the Amended Indictment, Serugendo was a member of the *Comité d'Initiative,* the governing board of *Radio Television Libre des Mille Collines* ("the RTLM"); the adviser on technical matters to the RTLM radio station; Chief of the Maintenance Section of Radio Rwanda in the *Office Rwandais d'Information* ["ORINFOR"] and a member of the enlarged National Committee of the *Interahamwe za MRND* that exercised authority over the *Interahamwe* of Kigali.[22]

17. The Chamber will now review the facts specific to each of the counts in the Amended Indictment. It is recalled that the Chamber is bound by the assessment contained in the Plea Agreement and the factual basis underlying that agreement. The Accused has admitted the veracity of each of these facts.

18. The Amended Indictment alleges that during the course of 1994, and in particular between 6 April 1994 and 17 July 1994, the minority Rwandan ethnic or racial group known as Tutsi was attacked by soldiers, *Interahamwe* militia and armed civilians on the basis that they were Tutsi, with the intent to destroy the Tutsi population in Rwanda in whole or in part.[23] Hundreds of thousands of civilians were killed as a result of these attacks.[24]

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[16] Plea Hearing, T. 15 March 2006, p. 7. The parties further agreed that, if the Prosecution were to proceed with adducing evidence at trial on the facts set forth in the Plea Agreement, the facts thus proven would support a finding of guilt as to all counts contained in the Amended Indictment (Plea Agreement, paras. 30, 49).

[17] Plea Hearing, T. 15 March 2006, p. 7. Rule 62 (B) of the Rules provides that: "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."

[18] Witness AX testified that the Accused had rescued him from attackers during the genocide (T. 1 June 2006, pp. 5-8). Witness BG testified to the Accused's positive relationships with persons from all ethnic groups and the medical condition of his family members (*id*., pp. 9-20).

[19] These statements were admitted following the Chamber's "Decision on Defence Motion for the Admission of Written Witness Statements under Rule 92 *bis*", 1 June 2006.

[20] Defence Exhibits 11 and 12.

[21] Prosecution Sentencing Brief, para 23.

[22] *Id*., para 24.

[23] Amended Indictment, paras. 5-6.

[24] Id.

19. The Plea Agreement acknowledges that in 1994, widespread and systematic attacks against a civilian population, notably Tutsi and moderate Hutu, occurred on political and ethnic grounds, resulting in the death of hundreds of persons, mainly civilians, throughout Rwanda. This is evidenced by the indiscriminate nature of the killings, which targeted unarmed women, children, young persons and the aged alike, who were massacred at roadblocks or places where they sought refuge.[25]

20. The charges against Serugendo concern the *Interahamwe* and the killing campaign, RTLM broadcasts, and RTLM re-installation and operation in July 1994. With regard to the first of these issues, Serugendo, as a member of the *Interahamwe,* is alleged to have planned with other leaders of the MRND between 1992 and 17 July 1994 political meetings and rallies in order to indoctrinate, sensitize, and incite members of the *Interahamwe* to kill or cause serious bodily or mental harm to members of the Tutsi population, with the aim of destroying the Tutsi ethnic group.[26]

21. Serugendo acknowledges that from early 1992 through 1994, as a member of the *Interahamwe,* he planned with other leaders of the MRND, and the *Interahamwe* militias, political meetings and rallies aimed at inciting members of the *Interahamwe* to kill or cause serious harm to members of the Tutsi population with the goal of destroying the Tutsi ethnic group.[27]

22. He is further alleged from 8 April 1993 through July 1994 to have planned, in concert with others, the establishment, funding and operation of the RTLM as a radio station to disseminate an anti-Tutsi message and to further ethnic hatred between Hutu and Tutsi. This had the objective of killing or causing serious harm to members of the Tutsi population, with the aim of destroying the Tutsi ethnic group.[28] Serugendo admits that during this period, he and others planned to establish, fund and operate the RTLM as a radio station which disseminated an anti-Tutsi message, intended to foment racial hatred and ultimately to destroy the Tutsi ethnic group.[29]

23. According to the Indictment, the RTLM broadcasted from Kigali and disseminated an anti-Tutsi message from 8 April 1993 until 4 July 1994.[30] Between April and July 1994, the RTLM, as a leading source of information to the population of Rwanda, broadcasted information identifying the location of Tutsi and inciting members of the Rwandan population to find and kill all Tutsi.[31] During this period, RTLM broadcasted messages that incited the killing of hundreds of thousands of civilian Tutsi throughout Rwanda.[32] Serugendo admits that during 1993 and 1994, the RTLM broadcasted messages aimed at disseminating an anti-Tutsi message and that such broadcasts in fact incited the killing of hundreds of thousands of civilian Tutsi throughout Rwanda.[33]

24. As a member of the *Comité d'Initiative,* and as adviser on technical matters, Serugendo is alleged to have aided and abetted these broadcasts by RTLM employees during the period when it was on air from 8 July 1993 to 17 July 1994.[34] In particular, he is alleged to have gone to the RTLM studios between 6 April 1994 and 12 April 1994, accompanied by armed militia, to offer technical assistance and moral encouragement to ensure that RTLM broadcasting continued uninterrupted.[35] Serugendo admits to having provided these forms of technical assistance and moral support which facilitated RTLM broadcasts during this period.[36]

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[25] Plea Agreement, paras. 31-32. The Accused admits that between 7 April and mid-July 1994, the massacre of the civilian population was aimed largely at the Tutsi in Rwanda (para. 32).
[26] Amended Indictment, para. 8.
[27] Plea Agreement, para. 33.
[28] Amended Indictment, para. 9.
[29] Plea Agreement, para. 34.
[30] Amended Indictment, para. 11.
[31] *Id*., para. 13.
[32] *Id*., para. 14.
[33] Plea Agreement, paras. 36, 39.
[34] Amended Indictment, para. 10.
[35] *Id*., para. 12.
[36] Plea Agreement, para. 37.

25. Following the destruction by RPF forces of the RTLM transmitter located in Kigali on or around 4 July 1994, which rendered the RTLM unable to broadcast, Serugendo is alleged to have met with important RTLM personnel at the *Hotel Méridien* in Gisenyi in order to plan the setting up of a new studio and transmission facility in Gisenyi.[37] He admits to having attended this meeting in order to enable RTLM broadcasts to continue.[38]

26. Between 5 July 1994 and 14 July 1994, RTLM technicians under the authority of Serugendo are alleged to have taken the RTLM equipment salvaged from Kigali to the top of Mount Muhe near Gisenyi and to have used the transmission equipment installed previously on Mount Muhe to create a makeshift studio, thus allowing RTLM broadcasts to resume. These broadcasts continued to disseminate the call to exterminate the Tutsi ethnic group and incited the killing and injuring of civilian Tutsi throughout Rwanda. In the same period, the Accused is further alleged to have provided technical expertise that enabled RTLM journalists to record programs calling for the extermination of Tutsi on tapes which were then broadcast over the RTLM from Mount Muhe.[39]

27. Serugendo admits to having provided this expertise. By successfully establishing a makeshift transmitter on Mount Muhe and restoring the RTLM's broadcast capability, he admits to having aided and abetted the killing of members of the Tutsi ethnic group.[40]

28. Serugendo is alleged to be criminally responsible for these acts by virtue of his position of authority as a member of the *Comité d'Initiative,* and his supervisory and managerial functions associated with this role. In consequence of his position, he is alleged to have exercised authority over subordinates, including RTLM technicians and other support personnel.[41] As a member of the National Committee of the *Interahamwe,* Serugendo is further alleged to have exercised authority over the members of the *Interahamwe* militias.[42] Specifically, he is alleged to have ordered those over whom he had authority as a result of the positions he held, and instigated and aided and abetted those over whom he did not have such control.[43]

29. Serugendo admits that, as a member of the *Comité d'Initiative,* the governing board of the RTLM, and as adviser on technical matters, he exercised authority over RTLM technical employees and other support staff in this manner.[44] He further acknowledges that he was at all material times aware of the persecution of some persons on political grounds and of mass discrimination against the Tutsi.[45] He admits that, despite this knowledge, he nevertheless continued to work with the RTLM and to discharge his functions.[46]

30. The Chamber accordingly finds that both the *actus reus* and *mens rea* of the crimes to which the Accused has pleaded guilty have been established.

III. Applicable Law and Sentencing

A. General Considerations

[37] Amended Indictment, paras. 15, 27.
[38] Plea Agreement, para. 40.
[39] Amended Indictment, paras. 17, 18.
[40] Plea Agreement, para. 41.
[41] Amended Indictment, para. 3.
[42] *Id*., para. 4.
[43] *Id*., paras. 7, 19. The Accused is further alleged to have participated in a joint criminal enterprise whose object, purpose and foreseeable outcome was the direct and public incitement to commit genocide against the Tutsi racial or ethnic group throughout Rwanda (*id*., para. 4).
[44] Plea Agreement, para. 35.
[45] *Id*., paras. 46-47.
[46] *Id*., para. 48.

31. This Tribunal was established with the objective of prosecuting and punishing the perpetrators of the atrocities in Rwanda with a view to ending impunity and thereby promoting national reconstruction and reconciliation.[47] As an entity established under Chapter VII of the Charter of the United Nations, the Tribunal was also established to contribute to the restoration and maintenance of international peace and security.[48]

32. A guilty plea indicates that an accused is admitting the veracity of the charges contained in an indictment. This also means that the accused acknowledges responsibility for his actions, which tends to further a process of reconciliation.[49] A guilty plea protects victims from having to relive their experiences and re-open old wounds. As a side-effect, albeit not really a significant mitigating factor, it also saves the Tribunal's resources.[50]

33. Fundamental principles taken into consideration when imposing a sentence in the jurisprudence of the *ad hoc* Tribunals are deterrence[51] and retribution.[52] Rehabilitation has also been acknowledged as one of the purposes of punishment in the Tribunal jurisprudence.[53]

34. The Chamber is of the opinion that, when an accused pleads guilty, he or she takes an important step in these processes.[54] 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.[55]

B. Article 23 of the statute and Rule 101 of the Rules

35. Article 23 of the Statute provides a non-exhaustive list of the factors to be taken into account by the Trial Chamber in determining the sentence and reads in its relevant parts:

> 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. […]

36. Rule 101 of the Rules further states in its relevant parts:

> (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 co-operation with the Prosecutor by the convicted person before or after conviction;
>
> (iii) The general practice regarding prison sentences in the courts of Rwanda; […]

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[47] *Rutaganda,* Judgement (TC), para. 454; *Kayishema and Ruzindana,* Judgement (TC), para. 1; *Serushago,* Judgement (TC), para. 19.
[48] S.C. Res. 955, U.N. Doc. S/Res/955 (1994), 8 November 1994.
[49] *Rutaganira,* Judgment (TC), para. 146; *Kambanda,* Judgement (TC), para. 50.
[50] *Bisengimana,* Judgment (TC), para. 131; *Rutaganira,* Judgment (TC), para. 146.
[51] *Rutaganira,* Judgment (TC), paras. 110-112; *Rutaganda,* Judgement (TC), para. 455; *Kayishema and Ruzindana,* Judgement (TC), para. 2; *Serushago,* Judgement (TC), para. 20; *Tadić,* Judgement (AC), para. 48; *Mucić et al.,* Judgement (AC), para. 806.
[52] *Rutaganira,* Judgment (TC), paras. 108-109; *Kayishema and Ruzindana,* Judgement (TC), para. 2; *Serushago,* Judgement (TC), para. 20; *Aleksovski,* Judgement (AC), para. 185.
[53] *Kayishema and Ruzindana,* Judgement (TC), para. 2; *Mucić et al.,* Judgement (AC), para. 806.
[54] *Rutaganira,* Judgment (TC), para. 114; *Nikolić,* Judgement (TC), para. 93.
[55] *Bisengimana,* Judgment (TC), para. 129; *Kambanda,* Judgement (TC), para. 53.

37. Neither the Statute nor the Rules specify a concrete range of penalties for offences under the Tribunal's jurisdiction. Determination of the appropriate sentence is left to the discretion of each Trial Chamber, although guidance as to which factors should be taken into account is provided by both the Statute and the Rules.[56]

IV. Sentencing Factors

38. The Prosecution submits that in determining the sentence of an accused, the Chamber should be guided by "the objectives of criminal law, which include the confirmation of the rule of law, which is a condition of a peaceful society, through a just sentence, which reflects the standard of proportionality between the gravity of the offence, the degree of responsibility of the offender, deterrence of the accused and future perpetrators, retribution, and the need to encourage others to come to terms with their respective roles in the 1994 genocide and accept responsibility for their actions".[57] The Defence invites the Chamber to fully consider the Plea Agreement, embodying the Accused's admission of guilt and acceptance of full responsibility, in determining sentence.[58]

39. The gravity of the offence is a factor of primary importance in determining an appropriate sentence.[59] It is necessary to consider the nature of the crime and "the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime" in order to determine the gravity of the crime.[60] A sentence must reflect "the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender".[61] The Chamber also understands its obligation to ensure that the sentence is commensurate with the individual circumstances of the offender.[62]

40. In determining the sentence, the Chamber is obliged to take into account any aggravating and mitigating circumstances, but the weight to be given to such circumstances is within the discretion of the Chamber.[63] The aggravating circumstances should be proven beyond reasonable doubt,[64] while the standard to be met for mitigating factors is the balance of probabilities.[65]

41. The Rules specify only substantial co-operation with the Prosecutor as a mitigating factor. Other factors often taken into account by this Tribunal in mitigating a sentence are, *inter alia*, a guilty plea,[66] co-operation with the Prosecution,[67] expression of genuine remorse,[68] assistance given to the victims by an accused,[69] absence of previous criminal record,[70] ill health,[71] and the accused's family

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[56] *Bisengimana,* Judgment (TC), para. 109.
[57] Prosecution Sentencing Brief, para. 21.
[58] Defence Sentencing Brief, paras. 18-19.
[59] *Rutaganda,* Judgement (TC), para. 449; *Kayishema and Ruzindana,* Judgement (TC), para. 8; *Serushago,* Judgement (TC), para. 21; *Kambanda,* Judgement (TC), para. 57; *Jelisić,* Judgement (AC), para. 101; *Mucić et al.,* Judgement (AC), para. 731; *Furundžija,* Judgement (AC), para. 249; *Aleksovski*, Judgement (AC), para. 182.
[60] *Jelisić,* Judgement (AC), para. 10; *Mucić et al.,* Judgement (AC), para. 731; *Aleksovski*, Judgement (AC), para. 182.
[61] *Kambanda,* Judgement (TC), para. 58; *Akayesu,* Judgement (TC), para. 40; *id*., Judgement (AC), para. 414.
[62] *Bisengimana,* Judgment (TC), para. 110; *Muhimana,* Judgement (TC), para. 594; *Mucić*, Judgement (AC), paras. 717-719.
[63] *Mucić et al.,* Judgement (AC), para. 777.
[64] *Bisengimana,* Judgment (TC), para. 111; *Mucić et al.,* Judgement (AC), para. 763.
[65] *Bisengimana,* Judgment (TC), para. 111.
[66] *Bisengimana,* Judgment (TC), para. 140; *Rutaganira,* Judgment (TC), paras. 150-151; *Ruggiu,* Judgement (TC), paras. 53-54; *Serushago,* Judgement (TC), para. 35; *Kambanda,* Judgement (TC), paras. 52-53.
[67] *Ruggiu,* Judgement (TC), paras. 56-58; *Serushago,* Judgement (TC), paras. 31-33; *Kambanda,* Judgement (TC), paras. 46-50.
[68] *Ruggiu,* Judgement (TC), paras. 69-72; *Serushago,* Judgement (TC), para. 40; *Mucić et al.,* Judgement (AC), para. 788.
[69] *Bisengimana,* Judgment (TC), para. 159 (rejected on the facts of this case); *Rutaganda,* Judgement (TC), para. 470; *Serushago,* Judgement (AC), para. 38; *Mucić et al.,* Judgement (AC), paras. 775-776.
[70] *Bisengimana,* Judgment (TC), para. 165; *Rutaganira,* Judgment (TC), para. 129; *Ruggiu,* Judgement (TC), para. 59.
[71] *Bisengimana,* Judgment (TC), para. 175; *Rutaganira,* Judgment (TC), para. 136; *Ntakirutimana,* Judgement (TC), para. 898; *Rutaganda,* Judgement (TC), para. 471.

and social situation.[72] Mitigating circumstances may also include those not directly related to the offence.[73]

A. Aggravating Circumstances

(i) Submissions

42. The Prosecution submits that the innate gravity and the absolute prohibition against direct and public incitement to commit genocide and persecution render their commission inherently aggravating.[74]

43. Additionally, by virtue of his position and authority as a member of the *Comité d'Initiative,* and technical adviser to RTLM, the Prosecution submits that Serugendo exercised authority over subordinates, including RTLM technicians and other support personnel.[75]

44. Joseph Serugendo's actions helped ensure that the RTLM broadcasting continued uninterrupted during this period, and comprised oversight of the radio station equipment, technical assistance, and moral encouragement to staff when he personally visited the RTLM studios between 6 and 12 April 1994.[76] His actions therefore contributed to the dissemination by the RTLM, a leading source of information to the population of Rwanda, of information identifying the location of the Tutsi population and inciting the Rwandan population to find and kill all Tutsi, resulting in the killing of hundreds of thousands of civilian Tutsi.[77]

45. The Defence agrees that the offences to which the Accused pleaded guilty are by their nature grave, but that this factor has been reflected in the sentencing range stipulated in the Plea Agreement.[78]

(ii) Findings

Gravity of the crimes and the authority exercised by the Accused

46. The Chamber observes that the seriousness of the crimes and the extent of the involvement of Serugendo in their commission are factors to be considered in assessing aggravating circumstances. Genocide and crimes against humanity are inherently aggravating offences because they are heinous in nature and shock the collective conscience.[79]

47. Account must be taken of the particular circumstances of the case, including the form and the degree of the participation of an accused in the crimes.[80] The Chamber finds that Serugendo's position as a member of the managerial staff of the RTLM, the authority he therefore exercised over the personnel of the radio station, and his active role in ensuring the proper functioning of the radio station are indeed aggravating factors.

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[72] *Bisengimana,* Judgment (TC), paras. 143-144; *Rutaganira,* Judgment (TC), para. 121; *Serushago,* Judgement (TC), para. 36; *Kunarac,* Judgement (AC), para. 408.
[73] *Jokić,* Judgement (TC), para. 100; *Stakić,* Judgement (TC), para. 920.
[74] Prosecution Sentencing Brief, para. 31.
[75] Prosecution Sentencing Brief, para. 32.
[76] Id.
[77] *Id.,* para. 36.
[78] Defence Sentencing Brief, paras. 22, 23.
[79] *Ruggiu*, Judgement (TC), para. 48.
[80] *Kayishema and Ruzindana,* Judgement (TC), para. 18; *Serushago,* Judgement (TC), paras. 28-28; *Kambanda,* Judgement (TC), para. 469; *Kupreskić et al*., Judgement (AC), para. 852; *Mucić et al.,* Judgement (AC), para. 731.

48. Accordingly, Serugendo's position of authority qualifies as an aggravating circumstance, in accordance with the case law of the Tribunal, due to the far-reaching consequences of his improper exercise of his or her authority and power.[81]

49. However, the Chamber notes that Serugendo was not a particularly high-ranking or influential personality in Rwanda during 1994.[82] Nor did he personally make anti-Tutsi or inflammatory statements over the RTLM or commit any violent acts during the massacres in Rwanda.

B. Mitigating Circumstances

(i) Submissions

50. The Prosecution and Defence both point to significant mitigating circumstances in the instant case.[83] They rely principally upon Serugendo's timely guilty plea, his ill health, and substantial co-operation with the Prosecution as factors in mitigation.[84]

51. Both parties also acknowledge that Serugendo was a person of previous good character, with no history of extremism prior to the events of 1994, and with no previous criminal record.[85] Finally, it is jointly noted that Serugendo has shown remorse for the crimes for which he has pleaded guilty.[86]

(ii) Findings

(a) Guilty plea

52. The Chamber agrees with the parties that Serugendo's guilty plea will assist in the administration of justice and in the process of national reconciliation in Rwanda. It will also spare victims from coming to testify before the Tribunal.[87]

53. Further, by pleading guilty, Serugendo may be seen as setting an example that may encourage others to acknowledge their personal involvement in the massacres committed in Rwanda in 1994.[88]

54. The Prosecution submits that Serugendo deserves credit for not delaying his guilty plea until the last minute so as to secure a tactical advantage. By this timely plea, he has therefore saved the Tribunal considerable expense and time. He has assisted the Tribunal and the international community in making substantial savings in terms of time, human and financial resources.[89] The Defence adds that the Accused's decision to plead guilty from the outset reflects his genuine remorse, and that this plea has been entered at great personal risk to both the Accused himself and his family.[90]

55. The jurisprudence of the Tribunal has accepted that a guilty plea may go to the mitigation of sentence because, according to the circumstances, it may: demonstrate repentance, honesty, and readiness to take responsibility;[91] help establish the truth;[92] contribute to peace and reconciliation;[93] set

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[81] *Serushago,* Judgement (TC), paras. 28-28; *Kambanda,* Judgement (TC), para. 468.
[82] According to his counsel, the Accused's substantive post at the time within the RTLM was a relatively junior post below that of a Departmental Head (Defence Sentencing Brief, para. 26).
[83] Prosecution Sentencing Brief, para. 40.
[84] Prosecution Sentencing Brief, paras. 41-44; Defence Setencing Brief, paras. 39-53.
[85] Prosecution Sentencing Brief, para. 45; Defence Sentencing Brief, para. 29.
[86] Prosecution Sentencing Brief, para. 47; Defence Sentencing Brief, para. 28.
[87] Prosecution Sentencing Brief, para. 41; Defence Sentencing Brief, para. 32.
[88] Prosecution Sentencing Brief, para. 41; Defence Sentencing Brief, para. 36.
[89] Prosecution Sentencing Brief, para. 42.
[90] Defence Sentencing Brief, paras. 33-34.
[91] *Bisengimana,* Judgment (TC), para. 139; *Ruggiu,* Judgement (TC), paras. 54-55; *Kambanda,* Judgement (TC), paras. 52-53.

an example to other persons guilty of committing crimes;[94] relieve witnesses from giving evidence in court; and save the Tribunal's time and resources.[95] The timing of a guilty plea is also a factor.[96]

56. The Chamber observes that in the Plea Agreement, Serugendo states that by pleading guilty, he indicates his desire to tell the truth and thus genuinely contribute to the search for truth by revealing the knowledge and information in his possession.[97]

57. The Chamber concurs with previous decisions of this Tribunal that some form of consideration should be given to those who have confessed their crimes in order to encourage others to come forward.[98] Moreover, the Chamber is of the view that the guilty plea of the Accused may contribute to the process of national reconciliation in Rwanda.[99] Further, by pleading guilty prior to the commencement of the trial, the Accused relieved the victims of the need to open old wounds.

58. The Chamber finds that Serugendo's change of plea to one of guilty is a mitigating circumstance.[100] The plea was accompanied by a publicly expressed acknowledgement of his responsibility.[101] Further, the timely nature of the guilty plea facilitates the administration of justice and saves the Tribunal's resources.[102]

59. Therefore, the Chamber recognises the importance of Serugendo's guilty plea as an expression of his readiness to take responsibility, and as a contribution to reconciliation in Rwanda.

60. The Chamber concludes that Joseph Serugendo's guilty plea is an important factor going to the mitigation of sentence.

(b) Co-operation with the Prosecution

61. Both the Prosecution and Defence concur that Serugendo has provided substantial co-operation to the Prosecution.[103] This co-operation is described as wide-ranging, leading to the clarification of many areas of investigative doubt, in relation also to crimes previously unknown by the Prosecution.[104] Consequently, he can be seen as setting an example that may encourage others to acknowledge their personal involvement in the massacres that occurred in Rwanda in 1994.

62. Based on the submissions of the parties, it is clear that Serugendo's co-operation with the Prosecution has been substantial. The Chamber finds this factor to be a significant mitigating circumstance.

(c) Remorse

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[92] *Rutaganira,* Judgment (TC), para. 150.
[93] *Rutaganira,* Judgment (TC), para. 146; *Kambanda,* Judgement (TC), para. 50.
[94] *Bisengimana,* Judgment (TC), para. 129; *Kambanda,* Judgement (TC), para. 53.
[95] *Rutaganira,* Judgment (TC), para. 151; *Ruggiu,* Judgement (TC), para. 53; *Serushago,* Judgement (TC), para. 35.
[96] *Bisengimana,* Judgment (TC), para. 131.
[97] Plea Agreement, para. 5.
[98] *Ruggiu,* Judgement (TC), para. 55.
[99] *Rutaganira,* Judgment (TC), para. 146; *Kambanda,* Judgement (TC), para. 50.
[100] *Ruggiu*, Judgement (TC), para. 54.
[101] Sentencing Hearing, T. 1 June 2006, p. 23; Defence Exhibits 11 and 12.
[102] *Ruggiu,* Judgement (TC), para. 53.
[103] Prosecution Sentencing Brief, para. 44 (noting debriefings which resulted in more than 120 pages of information relevant to other cases currently before the Tribunal); Defence Sentencing Brief, paras. 41, 42, 45 (referring to "firm and resolute" as well as intense and ongoing co-operation with the Prosecution). See also Prosecution Final Pre-Sentencing Brief, para. 5; Sentencing Hearing, T. 1 June 2006, pp. 26, 28-30.
[104] Defence Sentencing Brief, para. 44.

63. An accused's remorse may be treated as a mitigating circumstance, provided that it is sincere.[105] Both in the Plea Agreement and during the Sentencing Hearing, Serugendo publicly expressed regret and remorse for his crimes.[106] The Chamber accepts that this remorse is genuine.

64. The Chamber therefore finds that his expression of remorse is one mitigating factor among others.

(d) Good character

65. Both parties note that as far as is known, Serugendo was of good character and had no record of extremism before 1994.[107] The Accused has no previous criminal record, a factor to be taken into account for mitigation.

(e) Personal and family circumstances

66. The jurisprudence of the Tribunal has taken into consideration various personal circumstances as mitigating factors, such as the advanced age of an accused,[108] and his family situation.[109] However, the Tribunal has generally attached only limited importance to these factors.[110]

67. The Chamber notes that Serugendo is married and that he is 53 years old. It considers that these factors taken together amount to personal circumstances of a kind which may be accorded some, although very limited, weight in mitigation.

(f) Assistance given to certain victims

68. During the Sentencing Hearing, the Defence called Witness AX, a Tutsi, who testified that on 10 or 11 April 1994, he was chased by armed attackers. Serugendo rescued the witness by transporting him in his car and refusing to relinquish him to the angry mob.[111] This evidence was uncontested by the Prosecution.

69. The Chamber accepts that Serugendo saved the life of Witness AX during the genocide as a factor in mitigation.

(g) Ill health

70. Serugendo has been recently diagnosed with a terminal illness.[112] Both parties concur that his fragile health and poor prognosis must be taken into account in determining a fair sentence.[113]

71. The Chamber has noted the content of the confidential Medical Report which was tendered by the Accused into evidence during the Sentencing Hearing on 1 June 2006. This Report suggests that the Accused is suffering from an incurable and inoperable condition and that his life expectancy is accordingly reduced. Further, he is likely to require intensive ongoing medical treatment and palliative care.[114]

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[105] *Rutaganira,* Judgment (TC), paras. 157-158; *Ruggiu,* Judgement (TC), para. 70; *Serushago,* Judgement (TC), para. 41.
[106] Plea Agreement, para. 21; Sentencing Hearing, T. 1 June 2006, p. 23.
[107] Prosecution Sentencing Brief, para. 46; Defence Sentencing Brief, para. 29.
[108] *Bisengimana,* Judgment (TC), para. 175; *Rutaganira,* Judgment (TC), para. 136; *Ntakirutimana,* Judgement (TC), para. 898.
[109] *Bisengimana,* Judgment (TC), para. 146; *Rutaganira,* Judgment (TC), para. 120; *Kunarac,* Judgement (AC), para. 366.
[110] As noted by the ICTY, "many accused share these personal factors" (*Banović*, Judgement (TC), para. 75).
[111] Sentencing Hearing, T. 1 June 2006, pp. 5-7.
[112] Sentencing Hearing, T. 1 June 2006, p. 26.
[113] *Id.,* pp. 26-27, 30.
[114] Defence Exhibit 13 (under seal).

72. Ill health has been considered as a mitigating factor in sentencing by both this Tribunal[115] and the ICTY.[116] The weight it has been accorded has varied. There is no case law concerning the significance of terminal illness.[117] The Chamber shares the view of the ICTY that when the medical condition of an accused is such as to become incompatible with a state of continued detention, it is the duty of the Tribunal to provide the necessary remedies.[118]

73. Although both parties view Serugendo's state of health as a significant mitigating factor, they do not seek medical care as an alternative to confinement.[119] They submit, however, that irrespective of the sentence to be imposed, the Accused must continue to be provided with medical treatment, including referral to appropriate facilities where necessary.[120]

74. The Chamber considers that the Accused's current state of health, as established by the Medical Report, constitutes a significant mitigating circumstance in sentencing. Further, the palliative care and ongoing treatment necessary to treat his condition requires a modified regime of detention.

C. Sentencing Practice in the Courts of Rwanda

75. Although neither party places particular reliance on the sentencing practice in the courts of Rwanda, the Chamber recalls Article 23 of the Statute and Rule 101 of the Rules, which oblige the Tribunal to take into account the general practice regarding prison sentences in the courts of Rwanda. The Tribunal is not bound by the sentencing practice of Rwanda.[121]

76. Under Rwandan law, genocide and crimes against humanity carry the possible penalties of death or life imprisonment, depending on the nature of the accused's participation.[122]

77. Previous jurisprudence has noted that the Rwandan Organic Law setting up *Gacaca* Jurisdictions[123] and the Organic Law modifying and completing it[124] may be of relevance to guilty pleas

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[115] *Bisengimana,* Judgment (TC), para. 175; *Rutaganira,* Judgment (TC), para. 136; *Ntakirutimana,* Judgement (TC), para. 898; *Rutaganda,* Judgement (TC), para. 471.
[116] *Strugar,* Judgement (TC), para. 469; *Plavšić,* Judgement (TC), para. 106.
[117] The ICTY has on one occasion considered the impact of terminal illness on Tribunal proceedings, albeit in the context of an ongoing trial rather than at sentencing. (Decision on the Motion for Provisional Release of the Accused Momir Talić, 20 September 2002). Given Talić's incurable condition, inability to stand trial, and the incompatibility of his medical treatment with any regime of detention, he was granted provisional release and placed under a supervised regime of house arrest and hospitalization. Talić subsequently died on 28 May 2003 (Order Terminating Proceedings Against Momir Talić, 12 June 2003).
[118] The ICTY found that it would be extremely damaging to the institutional authority of the Tribunal were the Chamber to disregard the stark reality of Talic's medical condition and ignore the fact that it is a Tribunal created to assert, defend and apply humanitarian law (Decision on the Motion for Provisional Release of the Accused Momir Talić, 20 September 2002, p. 6).
[119] Sentencing Hearing, T. 1 June 2006, p. 32 (concession by Prosecution that ill health may justify an additional reduction in sentence but that given the gravity of the crimes, the sentence should not be diminished to an extremely short period); *id*., p. 26 (Defence Counsel): "What the Accused now desperately needs is not a sentence of confinement. He needs proper health care and attention. … It would serve no useful purpose confining him." His submissions are, however, toward a proposed *reduction* in sentence in consequence of his client's state of health (e.g. *id*., "It is for this reason that I implore the Honourable Chamber to consider the medical condition of the Accused, which is of a terminal nature, as a serious mitigating factor, calling upon the Chamber to go way below the range proposed.")
[120] Sentencing Hearing, T. 1 June 2006, p. 32.
[121] *Semanza*, Judgement (AC), para. 377 ("The command for Trial Chambers to 'have recourse to the general practice regarding prison sentences in the courts of Rwanda' does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice."); *Rutaganira,* Judgment (TC), para. 164; *Serushago*, Judgement (AC), para. 30; *Nikolić*, Judgement (AC), para. 69.
[122] Rwandan Organic Law N°8/96, on the Organization of Prosecutions for Offences constituting Genocide or Crimes Against Humanity committed since 1 October 1990, published in the Gazette of the Republic of Rwanda, 35th year. N°17, 1 September 1996.
[123] 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, 15 March 2001 ("Organic Law of 26 January 2001").
[124] 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

before the Tribunal 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,[125] who has encouraged others to commit a crime against humanity, may, after pleading guilty and under certain conditions,[126] be sentenced to a term of imprisonment ranging from twenty-five years to life.[127]

78. 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 sentence of life imprisonment shall be replaced by a sentence of no less than two years imprisonment; and a sentence of imprisonment of five to twenty years or more than twenty years may be reduced to a sentence of one year's imprisonment.[128]

D. Sentencing Recommendations of the Parties

79. In the Plea Agreement, the Prosecution undertook to recommend a sentence of between six and fourteen years imprisonment.[129] At the Sentencing Hearing, the Prosecution revised this range and instead proposed a sentencing range of six to ten years given the substantial nature of the co-operation received from Joseph Serugendo to date.[130]

80. Although both parties acknowledge that, pursuant to Rule 62 *bis* (B), the Chamber is not bound by the recommendations of the parties, the Appeals Chamber has nevertheless emphasised that Trial Chambers shall give due consideration to the recommendation of the parties and, should the sentence diverge substantially from that recommendation, give reasons for the departure.[131]

V. Determination of Sentence

A. Gravity of the Offences

81. All crimes under the Tribunal's Statute are serious violations of international humanitarian law.[132] When determining a sentence, a Trial Chamber has considerable, though not unlimited, discretion on account of its obligation to individualize penalties to fit the individual circumstances of an accused and to reflect the gravity of the crimes for which the accused has been convicted.[133]

82. In determining an appropriate sentence, the Appeals Chamber has stated that sentences of like individuals in like cases should be comparable. However, it has also noted the inherent limits to this approach because "any given case contains a multitude of variables, ranging from the number and type of crimes committed to the personal circumstances of the individual".[134]

83. The Chamber has found Serugendo guilty of genocide and persecution as a crime against humanity for his managerial role in the RTLM under Article 6 (1) of the Statute. In the Tribunal's

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October 1, 1990 and December 31, 1994, Official Gazette of the Republic of Rwanda, Year 40, n°14, 15 July 2001 ("Organic Law Modifying and Completing the Organic Law of 26 January 2001").

[125] 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.

[126] Article 56 of the Organic Law of 26 January 2001.

[127] *Id*., Article 68.

[128] *Bisengimana,* Judgement (TC), para. 195, citing Code Pénal Rwandais, Décret-Loi n°21/77, 18 August 1977.

[129] Plea Agreement, para. 59. The Prosecution also undertook to make specific recommendations for a sentence within this range conditional upon the Accused's substantial co-operation with the Prosecutor (*id*., para. 60).

[130] See Prosecution Final Pre-Sentencing Brief, para. 5.

[131] *Nikolić,* Judgement (AC), para. 89: "Those reasons, combined with the Trial Chamber's obligation pursuant to Article 23 (2) of the Statute to render a Judgement 'accompanied by a reasoned decision in writing', will facilitate a meaningful exercise of the convicted person's right to appeal and allow the Appeals Chamber 'to understand and review the findings of the Trial Chamber'."

[132] *Kayishema and Ruzindana*, Judgment (Reasons) (AC), para. 367.

[133] *Kajelijeli,* Judgment (AC), para. 291.

[134] *Kvočka,* Judgement (AC), para. 681.

jurisprudence, principal perpetration generally warrants a higher sentence than aiding and abetting.[135] However, this alone does not mean that a life sentence is the only appropriate sentence for a principal perpetrator of genocide and crimes against humanity.[136] In this Tribunal, a sentence of life imprisonment is generally reserved those who planned or ordered atrocities and those who participate in the crimes with particular zeal or sadism.[137] Offenders receiving the most severe sentences also tend to be senior authorities.[138]

84. At all relevant times, Serugendo had no formal position within the government, military, or political structures of Rwanda. In addition, Serugendo did not personally broadcast any anti-Tutsi messages during the relevant period. However, his technical and managerial role was important to the ability of the RTLM to continue to transmit such messages.

85. Although Serugendo's crimes are grave, the Chamber is not satisfied that he is deserving of the most serious sanction available under the Statute. The Chamber finds some guidance from cases that include convictions for direct participation in genocide and crimes against humanity that did not result in life sentences.

86. In *Semanza*, the Appeals Chamber determined twenty-five years' imprisonment to be the appropriate sentence for the direct perpetration of genocide and extermination at a massacre site.[139] Semanza was a former *bourgmestre* and a newly appointed parliamentarian who exercised influence in the locality where his crimes were committed.[140] In *Gacumbitsi*, the Trial Chamber decided that a single sentence of thirty years' imprisonment for the Accused sufficiently reflected the Tribunal's sentencing goals for genocide and extermination as a crime against humanity.[141] In reaching this conclusion, the Trial Chamber noted that the Accused, a *bourgmestre* at the time of his involvement, was not involved in the long term planning of the events in his commune. In *Ruzindana*, the Appeals Chamber affirmed the Accused's sentence of twenty-five years' imprisonment for genocide, based on his participation in a common purpose or design, which included mutilating and humiliating his victim.[142]

87. On examination of the sentencing practice of this Tribunal and the ICTY, the Chamber notes that principal or co-perpetrators convicted of the crime against humanity of persecution have received

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[135] *Semanza*, Judgement (AC), para. 388.
[136] See, e.g., *Ntakirutimana*, Judgement (TC), paras. 791-793, 832-834, 908-909, 924 (imposing twenty-five years' imprisonment for personal participation).
[137] *Muhimana*, Judgement (TC), paras. 604-616 (*conseiller*, but recounting the particularly atrocious manner in which the accused personally raped, killed, mutilated, and humiliated his victims); *Niyitegeka*, Judgement (TC), para. 486; *Musema*, Judgement (AC), para. 383 (noting that the leaders and planners of a particular conflict should bear heavier responsibility, with the qualification that the gravity of the offence is the primary consideration in imposing a sentence).
[138] Life sentences have been imposed against senior government authorities in: *Ndindabahizi*, Judgement (TC), paras. 505, 508, 511 (Minister of Finance); *Niyitegeka*, Judgement (TC), paras. 499, 502 (Minister of Information); *Kamuhanda,* Judgment (TC), paras. 6, 764, 770 (Minister of Higher Education and Scientific Research) and *Kambanda*, Judgement (TC), paras. 44, 61-62 (Prime Minister). In addition, life sentences have been imposed on lower level officials, as well as those who did not hold government positions. See, e.g., *Musema*, Judgement (TC), paras. 999-1008 (influential director of a tea factory who exercised control over killers); *Rutaganda*, Judgement (TC), paras. 466-473 (second vice-president of *Interahamwe* at national level).
[139] *Semanza*, Judgement (AC), para. 388-389.
[140] *Semanza*, Judgement (TC), paras. 303-304, 573.
[141] *Gacumbitsi*, Judgment (TC), paras 334, 345, 352-353, 356. The accused in *Gacumbitsi* was also convicted of rape and the Trial Chamber determined that the "particularly atrocious" manner in which some rapes were carried out constituted an aggravating factor (*id*., at para. 345).
[142] *Kayishema and Ruzindana*, Judgment (Reasons) (AC), paras. 191, 194, 352; *Kayishema and Ruzindana*, Judgement (TC), para. 26. The aggravating factors included Ruzindana cutting off the breasts of a victim and the tearing open of her stomach, while he openly mocked her. The Trial Chamber relied on his relatively young age and the goal of rehabilitation as one of the justifications for providing a sentence less than life.

sentences ranging from five years to life imprisonment.[143] Persons convicted of secondary forms of participation have generally received lower sentences.[144]

B. Individual, Aggravating and Mitigating Circumstances

88. The Chamber will consider the individual circumstances of Serugendo, including aggravating and mitigating factors.

89. In general, the Chamber agrees with the Prosecution that the maximum sentence should be reserved for the most serious examples of its kind, and that it should have regard to the range of cases which is actually encountered in practice.[145] Further, the maximum sentence should in general not be imposed where an accused has pleaded guilty. The Chamber reiterates that some form of consideration should be given to those who have confessed their crimes in order to encourage others to come forward. Moreover, Serugendo's guilty plea may contribute to the process of national reconciliation in Rwanda.[146]

90. Among the aggravating factors, the Chamber notes Serugendo's managerial position within the RTLM. The influence he derived from this status made it likely that other employees would follow his example.[147] The number of victims which resulted from the incitement to genocide and persecutions is indeed an aggravating factor. Serugendo played an active role in ensuring the proper functioning of the radio station.

91. Despite the gravity of the Accused's crimes and his official position, the Chamber nevertheless finds that significant mitigation is warranted in view of his guilty plea with publicly expressed remorse and his substantial co-operation with the Prosecution. His family situation, his good character prior to these events, his lack of prior criminal convictions and his age, while factors in mitigation, are of substantially less weight.

92. By contrast, the Chamber finds Serugendo's ill health, and consequently reduced life expectancy and quality of life, to be a significant factor in mitigation.

93. It is noted that the Plea Agreement and its recommendation as to sentence was filed jointly, with the Prosecution subsequently recommending a lower sentencing range in view of Serugendo's substantial co-operation.[148] While the Chamber is not bound by such a recommendation, it is nonetheless of assistance when deciding the range of sentence to be imposed.[149] It finds that he should be given a sentence at the lower end of the recommended range.

94. This said, it is clear that Serugendo is not in a position to serve a sentence under normal prison conditions. He has recently been diagnosed with a terminal illness, has very fragile health and a poor prognosis. The Tribunal must continue to ensure that he receives adequate medical treatment, including hospitalization to the extent needed. This should be reflected in the disposition of this Judgement.

C. Credit for Time Served

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[143] *Nahimana et al.,* Judgement (TC), paras. 1106, 1108; *Ruggiu,* Judgement (TC); *Kvočka,* Judgement (AC), para. 757.
[144] Vincent Rutaganira was sentenced to six years' imprisonment for his complicity by omission in extermination as a crime against humanity (*Rutaganira*, Judgment (TC), para. 40); Elizaphan Ntakirutimana was sentenced to ten years' imprisonment for aiding and abetting genocide (*Ntakirutimana,* Judgement (TC), paras. 790, 921; upheld by the Appeals Chamber (*Ntakirutimana,* Judgement (AC), para. 570)) and 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).
[145] Prosecution Sentencing Brief, para. 19.
[146] *Rutaganira,* Judgment (TC), para. 146; *Kambanda,* Judgement (TC), para. 50.
[147] *Semanza,* Judgement (AC), para. 336.
[148] See Prosecution Final Pre-Sentencing Brief, para. 5.
[149] *Nikolić,* Judgement (Sentence) (AC), para. 89.

95. Serugendo was arrested on 16 September 2005. He has since then remained in the custody of the Tribunal. Pursuant to Rule 101 (D) of the Rules, he is entitled to credit for the time spent in detention, namely 270 days in total as of the date of delivery of this written judgement.[150]

VI. DISPOSITION

96. For the foregoing reasons, having considered the evidence and the arguments presented by the parties, the CHAMBER

SENTENCES Joseph Serugendo to a single sentence of

SIX (6) YEARS IMPRISONMENT

INSTRUCTS the Registry to ensure that Joseph Serugendo shall continue to receive adequate medical treatment, including hospitalization to the extent needed.

Pursuant to Rule 101 (D) of the Rules, Serugendo shall receive credit for his time served, which the Chamber has calculated as 270 days.

Arusha, 12 June 2006.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

[150] *Kajelijeli*, Judgement (AC), para. 290.

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Decision on Motion for Partial Enforcement of Sentence 22 June 2006 (ICTR-2005-84-I)

(Original : English)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

Joseph Serugendo – Partial enforcement of the sentence, Transfer to a medical facility in France – Measure provided by the judgement, Adequate medical treatment – Ongoing palliative care, Air evacuation to Nairobi Hospital – Motion denied

International Instrument Cited :

Rules of Procedure and Evidence, Rule 33 (B)

International Case Cited :

I.C.T.R.: Trial Chamber I, The Prosecutor v. Joseph Serugendo, Judgement and Sentence, 12 June 2006 (ICTR-2005-84)

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 Defence "Extremely Urgent Motion for Partial Enforcement of Sentence under Article 26 of the Statute and Rule 104 of the Rules", filed on 12 June 2006;

NOTING the Prosecution's response and the Registrar's submissions, both filed on 19 June 2006;

HEREBY DECIDES the motion.

Introduction

1. On 12 June 2006, following Joseph Serugendo's earlier guilty plea, the Trial Chamber sentenced him to a term of six years imprisonment.[1] In light of his very fragile health and poor prognosis, the Chamber noted the need for a modified regime of detention and accordingly instructed the Registry to ensure that Serugendo continued to receive adequate medical treatment, including hospitalization to the extent needed.[2]

Submissions

2. The Defence requests that Serugendo be immediately transferred to a specialized treatment facility in France "or any other suitable institution to save his life".[3] It also contends that the ICTR medical personnel responsible for his care are "in neglect of their professional duty and obligation"

[1] *Prosecutor v. Joseph Serugendo*, Case N°ICTR-2005-84-I, Judgement and Sentence (TC), 12 June 2006.
[2] *Id.*, paras. 70-74, 94, Section VI (disposition).
[3] Motion, para. 20.

and "in contempt of the specific directives" of the Chamber regarding Serugendo's modified regime of detention.[4] It is further requested that his wife should be with him in light of his condition.[5]

3. In response, the Prosecution notes that on 14 June 2006, Serugendo was evacuated to Nairobi for further medical follow up, "leaving open the argument that this response is now moot".[6] It observes that as enforcement of sentence is a Registry competence under the Tribunal's Rules of Procedure and Evidence ("the Rules"), the Registry is competent to deal with this matter.[7] As grave allegations are made in the motion, with no factual basis provided in support of the alleged acts of contempt of a court decision or dereliction of duty on the part of Tribunal medical officials, the Prosecution submits that the Registry must be heard on the matter before a decision is reached.[8] The Prosecution continues to support all measures that are necessary and feasible in the current circumstances regarding the enforcement of Serugendo's sentence.[9]

4. The Registrar has provided submissions to the Chamber under Rule 33 (B) of the Rules, describing the medical treatment provided to Serugendo under the Registry's supervision. According to information contained in a confidential report from the ICTR Chief Medical Officer, Serugendo's condition has deteriorated. The Chief Medical Officer's opinion is that the only medical care that can be administered to him at this stage of his illness is of a palliative nature.[10]

5. It follows from the Registrar's submissions that at the time of filing of the motion, Serugendo remained at the AICC Hospital in Arusha where he was provided with the required medical care for his condition. As a result of a sudden deterioration in his condition, he was evacuated to the Nairobi Hospital in the Republic of Kenya on 14 June 2006. Serugendo is being treated by a specialist there. It is envisaged that he will remain under the care of Nairobi Hospital until such time as the hospital sees fit to release him.[11] The Registrar notes that no grounds are specified in the motion for why Serugendo, who is terminally ill, would benefit from better care and medical treatment at the suggested medical facility in France than at the AICC Hospital in Arusha or the Nairobi Hospital. Measures have been taken by the Registry to enable Mrs. Serugendo to be with her husband.[12]

6. The Registrar undertakes to continue to abide by the advice of the medical professionals entrusted with Serugendo's care in providing appropriate medical care and support measures to him, in accordance with the Chamber's instructions.[13]

Deliberations

7. In its judgement, the Chamber instructed the Registry to ensure that Serugendo continued to receive adequate medical treatment, including hospitalization to the extent required. To date, the Registrar has placed him under the care of the ICTR Chief Medical Officer and a medical specialist. The Registry has further provided all measures indicated by these medical professionals as necessary for Serugendo's ongoing palliative care. This has included his emergency air evacuation to Nairobi Hospital when this was adjudged to have been medically necessary by the ICTR Chief Medical Officer. The medical professionals entrusted with Serugendo's care have not indicated that medical evacuation to France is likely to benefit him, given the latter's current medical condition and prognosis.

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[4] *Id*., paras. 16-17.
[5] *Id*., para. 21.
[6] Response, preliminary statement.
[7] *Id*., para. 2.
[8] *Id*., para. 3.
[9] *Id*., para. 5.
[10] Registrar's Submissions, para. 1.
[11] *Id*.
[12] Registrar's Submissions, para. 1 (v).
[13] *Id*., para. 3.

8. The assessment of the medical professionals responsible for Serugendo's ongoing care is that his present condition and prognosis are inherent consequences of the terminal illness with which he has been diagnosed. The Chamber has been provided with no basis which would cause it to depart from this assessment. The Defence allegations appear to be unsubstantiated.

9. The Chamber observes that the Registry is presently making all efforts to facilitate Mrs. Serugendo's travel to Nairobi in the Republic of Kenya so that she may rejoin her husband there before the end of the present week.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence request that Serugendo be transferred to a medical facility in France;

INSTRUCTS the Registry to continue its efforts to facilitate the transfer of Mrs. Serugendo to Nairobi with all expeditiousness.

Arusha, 22 June 2006.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

Le Procureur c. Joseph SERUGENDO

Affaire N° ICTR-2005-84

Fiche technique

• Nom: SERUGENDO

• Prénom: Joseph

• Date de naissance: mai 1953

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: Membre du *Comité d'Initiative*, Conseil d'administration de la RTLM; Membre du Comité National des *Interahamwe*

• Date de confirmation de l'acte d'accusation: 22 juillet 2005

• Chefs d'accusation: génocide, incitation directe et publique à commettre le génocide, entente en vue de commettre le génocide, complicité dans le génocide, persécution en tant que crime contre l'humanité et violations graves de l'article 3 commun aux conventions de Genève de 1949

• Date et lieu de l'arrestation : 16 septembre 2005, à Freetown, Gabon

• Date du transfert: 23 septembre 2005

• Date de la comparution initiale: 30 septembre 2005

• Précision sur le plaidoyer: non coupable, puis coupable au jugement

• Date du début du procès: 15 mars 2006

• Date et contenu du prononcé de la peine: 12 juin 2006, condamné à 6 ans d'emprisonnement

• Décédé le 22 août 2006, à Nairobi, Kenya

Jugement portant condamnation
12 juin 2006 (ICTR-2005-84

(Original : Anglais)

Chambre de première instance I

Juges : Erik Møse, Président; Jai Ram Reddy; Sergei Alekseevich Egorov

Joseph Serugendo – Accord de reconnaissance de culpabilité, Incitation directe et publique à commettre le génocide et persécution constitutive de crime contre l'humanité – Radio télévision libre des mille collines (RTLM) – Interahamwe za MRND – Eléments à prendre en compte pour la détermination de la peine – Grille générale des peines d'emprisonnement appliquée par les tribunaux du Rwanda – Droit rwandais, Juridictions Gacaca, Reconnaissance de culpabilité – Détermination de la peine – Gravité de l'infraction, Rôle de l'accusé au sein de la RTLM – Situation personnelle de l'accusé, Reconnaissance de culpabilité – Circonstances aggravantes retenues, Fonction de l'accusé au sein de la RTLM, Nombre des victimes – Circonstances atténuantes retenues, Reconnaissance de culpabilité, Coopération avec le Procureur, Remords, Mauvais état de santé, Diminution de son espérance de vie, Détérioration de la qualité de vie – Déduction du temps passé en détention, 270 jours – Peine unique, 6 ans d'emprisonnement – Soins médicaux appropriés

Instruments internationaux cités :

Règle de procédure et de preuve, art. 62 (B), 62 bis, 62 bis (B), 101 et 101 (D) ; Statut, art. 2, 2 (3) (c), 3, 3 (h), 6 (1), 23 et 23 (2)

Instrument national cité :

Code pénal rwandais, art. 83

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 d'appel, Le Procureur c. Omar Serushago, Motifs du jugement, 6 avril 2000 (ICTR-98-39) ; Chambre de première instance, Le Procureur c. Georges Ruggiu, Jugement et sentence, 1 juin 2000 (ICTR-97-32) ; Chambre d'appel, Le Procureur c. Jean-Paul Akayesu, Arrêt, 1 juin 2001 (ICTR-96-4) ; Chambre d'appel, Le Procureur c. Clément Kayishema et Obed Ruzindana, Motifs de l'arrêt, 1 juin 2001 (ICTR-95-1) ; Chambre de première instance, Le Procureur c. Ignace Bagilishema, Jugement, 7 juin 2001 (ICTR-95-1A) ; Chambre d'appel, Le Procureur c. Alfred Musema, Jugement, 16 novembre 2001 (ICTR-96-13) ; 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. Laurent Semanza, Jugement et sentence, 15 mai 2003 (ICTR-97-20) ; Chambre de première instance, Le Procureur c. Eliezer Niyitegeka, Jugement, 16 mai 2003 (ICTR-96-14) ; Chambre de première instance, Le Procureur c. Juvénal Kajelijeli, Jugement et sentence, 1 décembre 2003 (ICTR-

98-44A) ; Chambre de première instance, Le Procureur c. Ferdinand Nahimana et consorts, Jugement et sentence, 3 décembre 2003 (ICTR-99-52) ; 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. Sylvestre Gacumbitsi, Jugement, 17 juin 2004 (ICTR-2001-64) ; 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 de première instance, Le Procureur c. Paul Bisengimana, Jugement, 13 avril 2006 (ICTR-2000-60)

T.P.I.Y.: Chambre d'appel, Le Procureur c. Duško Tadić, Arrêt concernant les jugements relatifs à la sentence, 26 janvier 2000 (IT-94-1) ; Chambre d'appel, Le Procureur c. Zlatko Aleksovski, Arrêt, 24 mars 2000 (IT-95-14/1) ; Chambre d'appel, Le Procureur c. Anto Furundžija, Arrêt, 21 juillet 2000 (IT-95-17/1) ; Chambre d'appel, Le Procureur c. Zdravko Mucić et consorts, Arrêt, 20 février 2001 (IT-96-21) ; Chambre d'appel, Le Procureur c. Goran Jelisić, Arrêt, 5 juillet 2001 (IT-95-10) ; Chambre d'appel, Le Procureur c. Zoran Kupreškić, Arrêt, 23 octobre 2001 (IT-95-16) ; Chambre de première instance, Le Procureur c. Milorad Krnojelac, Jugement, 15 mars 2002 (IT-97-25) ; Chambre d'appel, Le Procureur c. Dragoljub Kunarac, Arrêt, 12 juin 2002 (IT-96-23 et IT-96-23/1) ; Chambre de première instance, Le Procureur c. Momir Talić, Décision relative à la requête aux fins de mise en liberté provisoire de l'accusé Momir Talić, 20 septembre 2002 (IT-99-36/1) ; 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. Momir Talić, Order Terminating Proceedings Against Momir Talić, 12 juin 2003 (IT-99-36/1) ; 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. Miodrag Jokić, Jugement, 18 mars 2004 (IT-01-42/1) ; Chambre de première instance, Le Procureur c. Pavle Strugar, Jugement, 31 janvier 2005 (IT-01-42) ; Chambre d'appel, Le Procureur c. Dragan Nikolić, Arrêt, 4 février 2005 (IT-94-2) ; Chambre d'appel, Le Procureur c. Miroslav Kvočka, Arrêt, 28 février 2005 (IT-98-30/1)*

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I. Rappel de la procédure et accord de reconnaissance de culpabilité

1. Le Bureau du Procureur du Tribunal pénal international pour le Rwanda a accusé Joseph Serugendo d'entente en vue de commettre le génocide, de génocide, de complicité dans le génocide, d'incitation directe et publique à commettre le génocide et de persécution constitutive de crime contre l'humanité dans un acte d'accusation confirmé le 22 juillet 2005 par le juge Sergei Alekseevich Egorov.

2. Serugendo a été arrêté le 16 septembre 2005 et transféré au Tribunal le 23 septembre 2005. Le 30 septembre 2005, il a fait sa comparution initiale et a plaidé non coupable des cinq chefs retenus dans l'acte d'accusation. Immédiatement, il a entamé des discussions avec le Bureau du Procureur dans le but de lui apporter une coopération sans réserve et de plaider finalement coupable.

3. Le 12 janvier 2006, une Requête commune tendant à l'examen d'un accord de reconnaissance de culpabilité conclu entre Joseph Serugendo et le Bureau du Procureur a été déposée[1]. Le même jour, le Procureur a également sollicité l'autorisation de modifier l'acte d'accusation[2]. Dans le projet d'acte d'accusation modifié, il a abandonné cinq chefs d'accusation[3] et en a retenu deux[4].

4. L'accord de reconnaissance de culpabilité a été déposé par les deux parties le 16 février 2006. Serugendo y a accepté de plaider coupable des chefs 1 et 2 du projet d'acte d'accusation modifié, à savoir l'incitation directe et publique à commettre le génocide que le Procureur lui imputait en application des articles 2 (3) (c) et 6 (1) du Statut du Tribunal et la persécution constitutive de crime contre l'humanité qu'il lui imputait en application des articles 3 (h) et 6 (1) dudit Statut.

5. Au cours d'une audience tenue le 15 mars 2005 en application de l'article 62 *bis* du Règlement de procédure et de preuve (le « Règlement ») pour entendre la position de Serugendo sur les

[1] Requête commune tendant à l'examen d'un accord de reconnaissance de culpabilité conclu entre Joseph Serugendo et le Bureau du Procureur, déposée à titre confidentiel le 12 janvier 2006.
[2] Requête formée par le Procureur en vertu des articles 72, 73, 50 et 51 du Règlement de procédure et de preuve aux fins de modification de l'acte d'accusation, déposée confidentiellement le 12 janvier 2006.
[3] Chef 1: entente en vue de commettre le génocide (paragraphe 1 de l'article 6 du Statut), chef 2 : génocide (paragraphes 1 et 3 de l'article 6 du Statut), chef 3 : complicité dans le génocide (paragraphes 1 et 3 de l'article 6 du Statut, chef 4 : incitation directe et publique à commettre le génocide (paragraphe 1 et 3 de l'article 6 du Statut), chef 5 : persécution constitutive de crime contre l'humanité (paragraphe 3 de l'article 6 du Statut).
[4] Chef 1 : incitation directe et publique à commettre le génocide (paragraphe 1 de l'article 6 du Statut), chef 2 : Persécution constitutive de crime contre l'humanité (paragraphe 1 de l'article 6 du Statut).

accusations portées contre lui, la Chambre a fait droit à la requête du Procureur tendant à modifier l'acte d'accusation[5]. Lors de la même audience, Serugendo a plaidé coupable des chefs retenus dans l'acte d'accusation modifié. L'acte d'accusation modifié et l'accord de reconnaissance de culpabilité ont été adoptés d'un commun accord comme base de son aveu de culpabilité et du présent Jugement portant condamnation.

6. Dans l'accord de reconnaissance de culpabilité, Serugendo déclare qu'il entend plaider coupable des deux chefs d'accusation susmentionnés[6]. Il souligne qu'il a « pris la […] mesure des conséquences et de l'ampleur des infractions qu'il avait commises au Rwanda en 1994 »[7]. Par les informations complètes et véridiques que l'accusé a fournies sur les événements qui s'étaient produits au Rwanda en 1994 et sur sa participation personnelle à ces événements, l'accord de reconnaissance de culpabilité illustre la volonté « de concourir à l'impérieux processus de réconciliation nationale dans ce pays »[8] dont Serugendo est animé.

7. L'accord de reconnaissance de culpabilité précise que Serugendo a accepté de plaider coupable « librement et volontairement »[9]. En outre, il est conscient que la conclusion de cet accord emporte abandon de ses droits liés à la présomption d'innocence et de ceux qu'il aurait exercés dans le cadre d'un procès complet[10]. Dans l'accord, Serugendo s'engage, entre autres, à coopérer avec le Procureur[11].

8. En échange de l'aveu de culpabilité de Serugendo, de sa franche coopération avec le Bureau du Procureur et de l'exécution de toutes les obligations mises à sa charge par l'accord de reconnaissance de culpabilité, le Procureur a accepté de recommander à la Chambre de lui infliger une peine d'emprisonnement se situant dans une fourchette de 6 à 14 ans[12]. La Chambre n'est liée par aucun accord conclu entre les parties relativement au quantum de la peine[13].

9. Les deux chefs retenus dans l'acte d'accusation modifié sont des crimes visés aux articles 2 et 3 du Statut. Les éléments constitutifs du crime d'incitation directe et publique à commettre le génocide prévu par l'article 2 (3) (c) du Statut sont énoncés dans l'accord de reconnaissance de culpabilité et dans la jurisprudence du Tribunal comme suit :

- L'accusé a incité des gens à commettre le génocide ;
- L'incitation était directe ;
- L'incitation était publique ;
- L'accusé était animé de l'intention précise de commettre le génocide, c'est-à-dire de détruire en tout ou en partie un groupe national, ethnique, racial ou religieux[14].

10. Les éléments de l'infraction de persécution constitutive de crime contre l'humanité prévue par l'article 3 (h) du Statut sont énoncés dans l'accord de reconnaissance de culpabilité et dans la jurisprudence du Tribunal comme suit :

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[5] Compte rendu de l'audience de prise de position sur les accusations tenue le 15 mars 2006, p. 5.
[6] Accord de reconnaissance de culpabilité, par. 2.
[7] *Ibid*., par. 4.
[8] *Ibid*., par. 12.
[9] *Ibid*., par. 66. Voir également le compte rendu de l'audience du 15 mars 2006, p. 6.
[10] Ces droits sont : le droit de plaider non coupable et d'exiger que le Procureur établisse au-delà de tout doute raisonnable les faits qu'il lui reproche dans l'acte d'accusation modifié lors d'un procès juste, équitable et public ; le droit de préparer ses moyens de défense et de les présenter dans le cadre d'un tel procès ; le droit d'interroger ou de faire interroger les témoins à charge lors de son procès et d'obtenir la comparution et l'interrogatoire des témoins à décharge dans les mêmes conditions que pour les témoins à charge (accord de reconnaissance de culpabilité, par. 65).
[11] *Ibid*., par. 51 à 53.
[12] *Ibid*., par. 59. Cette fourchette a été révisée par la suite. Voir le mémoire du Procureur intitulé *The Prosecutor's Final Pre-Sentencing Brief* , par. 5, et *infra*.
[13] Article 62 *bis* (B) du Règlement.
[14] Accord de reconnaissance de culpabilité, par. 24. S'agissant de la jurisprudence, voir par exemple, les jugements suivants : jugement *Nahimana et consorts*, par. 1071 et 1072 ainsi que 1080 ; Jugement *Kajelijeli*, par. 850 à 854 ; Jugement *Semanza*, par. 347 à 350 ; Jugement *Ruggiu*, par. 21 et 22.

- L'accusé a commis certaines violations des droits élémentaires ou fondamentaux de l'homme ;
- Les crimes considérés ont été commis pour des raisons discriminatoires d'ordre politique ou racial ;
- L'accusé connaissait effectivement ou avait des raisons de connaître le contexte général dans lequel il a commis ces infractions ;
- Les crimes visés ont été commis dans le cadre d'attaques généralisées ou systématiques dirigées contre une population civile ;
- Ces attaques ont été perpétrées en raison de l'appartenance politique, ethnique, raciale ou religieuse des victimes[15].

11. Lors de l'audience du 15 mars 2006, la Chambre s'est assurée que l'aveu de culpabilité était fondé sur des faits suffisants pour établir les crimes retenus et la participation de Serugendo à leur commission[16]. Ayant conclu que cet aveu avait été fait volontairement et en connaissance de cause, et était sans équivoque, conformément aux dispositions de l'article 62 (B) du Règlement, elle a prononcé une déclaration de culpabilité pour chacun des chefs dont Serugendo avait plaidé coupable[17].

12. Les 3 et 18 mai 2006, la Chambre a été saisie des mémoires préalables à la détermination de la peine produits respectivement par le Procureur et la Défense.

13. L'audience de détermination de la peine a été tenue le 1er juin 2006. Au cours de cette audience, la Défense a appelé à la barre deux témoins qui ont parlé de la bonne moralité de l'accusé avant la crise du Rwanda et de l'aide qu'il avait apportée à un Tutsi pendant le génocide[18]. De plus, la Chambre a admis en preuve les déclarations écrites de quatre témoins à décharge. Toutes ces déclarations portaient sur la bonne moralité antérieure de l'accusé et sa compétence professionnelle[19].

14. Enfin, Serugendo a fait une brève déclaration orale et versé au dossier deux déclarations écrites qu'il avait établies pour exprimer son remords sincère et présenter des excuses au peuple rwandais[20]. Le lendemain, vendredi 2 juin 2006, la Chambre a rendu son jugement oralement en donnant lecture d'un résumé dudit jugement.

II. Faits incriminés

[15] Accord de reconnaissance de culpabilité, par. 26. S'agissant de la jurisprudence, voir, par exemple, l'arrêt *Krnojelac*, par. 181 à 188 ; le jugement *Nahimana et consorts,* par. 1001, 1012 à 1017 et 1069 à 1072 ; le jugement *Niyitegeka,* par. 431 ; et le jugement *Akayesu,* par. 559 à 562.

[16] Compte rendu de l'audience de prise de position sur les accusations tenue le 15 mars 2006, p. 8 et 9. En outre, les parties s'accordent à reconnaître que si le Procureur avait l'occasion de produire les éléments de preuve disponibles lors d'un procès pour établir les faits énoncés dans l'accord de reconnaissance de culpabilité, les faits ainsi établis autoriseraient à déclarer l'accusé coupable de tous les chefs retenus dans l'acte d'accusation modifié (accord de reconnaissance de culpabilité, par. 30 et 49).

[17] Compte rendu de l'audience de prise de position sur les accusations tenue le 15 mars 2006, p. 8 et 9. L'article 62 (B) du Règlement est ainsi libellé : « 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 ».

[18] Selon le témoin AX, l'accusé l'a délivré des mains des assaillants pendant le génocide (compte rendu de l'audience du 1er juin 2006, p. 5 à 9). Le témoin BG a parlé des bonnes relations que l'accusé entretenait avec les membres de tous les groupes ethniques et de l'état de santé des membres de sa famille (*ibid*., p. 9 à 20).

[19] Ces déclarations ont été versées au dossier à la suite de la décision de la Chambre intitulée *Decision on Defence Motion for the Admission of Written Witness Statements under Rule 92* bis, datée du 1er juin 2006.

[20] Pièces à conviction n°11 et 12 de la Défense.

15. Joseph Serugendo est né le 24 août 1953 à Kipushi (République démocratique du Congo)[21].

16. À l'époque de tous les faits visés dans l'acte d'accusation modifié, Serugendo était membre du Comité d'initiative (conseil d'administration) et conseiller technique de la Radio télévision libre des mille collines (la « RTLM »), Chef de la section Maintenance de Radio Rwanda à l'Office rwandais d'information (« ORINFOR ») et membre du Comité national élargi de la milice *Interahamwe za* MRND qui avait autorité sur les *Interahamwe* de Kigali[22].

17. La Chambre va à présent examiner les faits se rapportant à chacun des chefs retenus dans l'acte d'accusation modifié. Elle rappelle qu'elle est tenue de prendre en compte l'analyse faite dans l'accord de reconnaissance de culpabilité et les faits sur lesquels repose cet accord. L'accusé a reconnu l'exactitude de chacun de ces faits.

18. Le Procureur allègue dans l'acte d'accusation modifié qu'en 1994, particulièrement entre le 6 avril et le 17 juillet, des militaires, des miliciens *Interahamwe* et des civils armés ont attaqué les membres de la minorité ethnique ou raciale rwandaise connue sous la dénomination de « groupe tutsi » parce qu'ils étaient tutsis, dans l'intention de détruire en tout ou en partie la population tutsie du Rwanda[23]. Ces attaques se sont soldées par la mort de centaines de milliers de civils[24].

19. L'accord de reconnaissance de culpabilité reconnaît que le Rwanda a été le théâtre d'attaques généralisées et systématiques dirigées contre une population civile – notamment les Tutsis et les Hutus modérés – en raison de l'appartenance politique et ethnique de celle-ci en 1994 et que ces attaques se sont soldées par la mort de centaines de personnes, la plupart étant des civils, dans tout le pays. La preuve en est que ce massacre a été commis sans distinction, les victimes étant des personnes sans armes de toutes catégories – femmes, enfants, jeunes et vieillards – qui ont été massacrées à des barrages routiers ou dans des lieux où elles avaient trouvé refuge[25].

20. Les accusations retenues contre Serugendo portent sur les *Interahamwe* et la campagne de massacres, les émissions de la RTLM ainsi que la remise en service et l'exploitation de la RTLM en juillet 1994. En ce qui concerne la première de ces questions, en sa qualité de membre de la milice *Interahamwe*, Serugendo aurait organisé avec d'autres responsables du MRND entre 1992 et le 17 juillet 1994 des réunions et meetings politiques en vue d'endoctriner les *Interahamwe*, de les sensibiliser et de les inciter à tuer les membres de la population tutsie ou à porter gravement atteinte à leur intégrité physique ou mentale dans le but de détruire le groupe ethnique tutsi[26].

21. Serugendo reconnaît que du début de l'année 1992 jusqu'en 1994, en sa qualité de membre de la milice *Interahamwe*, il a organisé avec d'autres dirigeants du MRND et de la milice *Interahamwe* des réunions et meetings politiques pour inciter les *Interahamwe* à tuer les membres de la population tutsie ou à porter gravement atteinte à leur intégrité physique ou mentale dans le but de détruire le groupe ethnique tutsi[27].

22. En outre, du 8 avril 1993 à juillet 1994, Serugendo, de concert avec d'autres personnes, aurait pris les dispositions nécessaires pour créer, financer et exploiter le volet radio de la RTLM afin de propager un message antitutsi et de favoriser la haine ethnique entre les Hutus et les Tutsis. Il voulait par ce moyen faire tuer les membres de la population tutsie ou porter gravement atteinte à leur

[21] *The Prosecutor's Preliminary Pre-Sentencing Brief* (ci-après dénommé le « Mémoire du Procureur relatif à la détermination de la peine »), par. 23.
[22] *Ibid.,* par 24.
[23] Acte d'accusation modifié, par. 5 et 6.
[24] Id.
[25] Accord de reconnaissance de culpabilité, par. 31 et 32. L'accusé reconnaît qu'entre le 7 avril et la mi-juillet 1994, le massacre de la population civile a visé principalement les Tutsis présents sur le territoire rwandais, (par. 32).
[26] Acte d'accusation modifié, par. 8.
[27] Accord de reconnaissance de culpabilité, par. 33.

intégrité physique ou mentale dans le but de détruire le groupe ethnique tutsi[28]. Serugendo reconnaît avoir pris durant cette période, avec d'autres personnes, les dispositions nécessaires pour créer, financer et exploiter le volet radio de la RTLM qui a propagé un message antitutsi dans l'intention de favoriser la haine raciale et, en fin de compte, de détruire le groupe ethnique tutsi[29].

23. Il ressort de l'acte d'accusation que du 8 [juillet] 1993 au 4 juillet 1994, la RTLM a émis de Kigali et propagé un message antitutsi[30]. Entre avril et juillet 1994, la RTLM qui était l'une des principales sources d'information des Rwandais a diffusé des informations tendant à indiquer les endroits où se trouvaient les Tutsis et à inciter les membres de la population rwandaise à traquer tous les Tutsis pour les tuer[31]. Au cours de cette période, elle a diffusé des messages qui ont provoqué le massacre de centaines de milliers de civils tutsis sur toute l'étendue du territoire rwandais[32]. Serugendo reconnaît qu'en 1993 et 1994, la RTLM a diffusé des émissions visant à propager un message antitutsi et que ces émissions ont effectivement provoqué le massacre de centaines de milliers de civils tutsis sur toute l'étendue du territoire rwandais[33].

24. En sa qualité de membre du Comité d'initiative et de conseiller technique de la RTLM, Serugendo aurait aidé et encouragé les employés de la RTLM à diffuser ces émissions pendant la période d'activité de cette station radio qui a duré du 8 juillet 1993 au 17 juillet 1994[34]. En particulier, il se serait rendu dans les studios de la RTLM entre le 6 et le 12 avril 1994, accompagné de miliciens armés, pour prêter une assistance technique et encourager moralement son personnel afin que les émissions de la RTLM se poursuivent sans interruption[35]. Serugendo reconnaît avoir apporté ces formes d'assistance technique et de soutien moral qui ont facilité les émissions de la RTLM pendant la période considérée[36].

25. Le 4 juillet 1994 ou vers cette date, les forces du FPR ont détruit l'émetteur de la RTLM qui se trouvait à Kigali, mettant celle-ci dans l'impossibilité de diffuser ses programmes. Après cela, Serugendo se serait entretenu avec des employés importants de la RTLM à l'hôtel Méridien de Gisenyi pour élaborer le projet de mise en place d'un nouveau studio et d'un nouveau dispositif de transmission à Gisenyi[37]. Il reconnaît avoir participé à cette réunion pour permettre à la RTLM de poursuivre ses émissions[38].

26. Entre le 5 et le 14 juillet 1994, des techniciens de la RTLM placés sous l'autorité de Serugendo auraient apporté le matériel de la RTLM sauvé à Kigali au sommet du mont Muhe sis près de Gisenyi et mis à profit le dispositif de transmission qui y avait été installé pour créer un studio de fortune et permettre ainsi à la RTLM de reprendre ses émissions. Ces émissions ont continué à propager l'appel à l'extermination du groupe ethnique tutsi et incité à tuer des civils tutsis et à en blesser d'autres sur toute l'étendue du territoire rwandais. Pendant la même période, l'accusé aurait fourni une assistance technique qui a permis à des journalistes de la RTLM d'enregistrer sur cassette des émissions préconisant l'extermination des Tutsis qui ont été par la suite diffusées sur les antennes de la RTLM à partir du mont Muhe[39].

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[28] Acte d'accusation modifié, par. 9.
[29] Accord de reconnaissance de culpabilité, par. 34.
[30] Acte d'accusation modifié, par. 11.
[31] *Ibid*., par. 13
[32] *Ibid*., par. 14
[33] Accord de reconnaissance de culpabilité, par. 36 et 39.
[34] Acte d'accusation modifié, par. 10.
[35] *Ibid*., par. 12.
[36] Accord de reconnaissance de culpabilité, par. 37.
[37] Acte d'accusation modifié, par. 15 et 27.
[38] Accord de reconnaissance de culpabilité, par. 40.
[39] Acte d'accusation modifié, par. 17 et 18.

27. Serugendo reconnaît avoir fourni cette assistance technique. Il reconnaît que pour avoir réussi à installer un émetteur de fortune sur le mont Muhe et à redonner à la RTLM les moyens d'émettre, il a aidé et encouragé autrui à massacrer des membres du groupe ethnique tutsi[40].

28. Selon le Procureur, Serugendo est pénalement responsable des actes susvisés en raison du pouvoir que lui conférait sa qualité de membre du Comité d'initiative et des fonctions de supervision et de gestion qu'il exerçait à ce titre. En vertu de ses attributions, il aurait eu autorité sur ses subordonnés, notamment sur les techniciens et les autres membres du personnel d'appui de la RTLM[41]. En sa qualité de membre du Comité national de la milice *Interahamwe*, Serugendo aurait également eu autorité sur les miliciens *Interahamwe*[42]. En particulier, il aurait donné aux personnes placées sous son autorité en raison de ses fonctions, l'ordre de commettre les actes susvisés et incité, aidé et encouragé les gens qui n'étaient pas sous son contrôle à agir de la sorte[43].

29. Serugendo reconnaît qu'en sa qualité de membre du Comité d'initiative (conseil d'administration) et de conseiller technique de la RTLM, il avait autorité sur les techniciens et les autres membres du personnel d'appui de la RTLM comme il a été dit plus haut[44]. Il reconnaît en outre qu'à l'époque de tous les faits considérés, il savait que certaines personnes étaient persécutées en raison de leur appartenance politique et que les Tutsis étaient victimes de discrimination sur une grande échelle[45]. Il reconnaît avoir continué de travailler à la RTLM malgré le fait qu'il était au courant de cette situation[46].

30. En conséquence, la Chambre conclut que l'élément matériel et l'élément moral des crimes dont l'accusé a plaidé coupable ont été établis.

III. Droit applicable en matière de détermination de la peine

A. Généralités

31. Le Tribunal a été créé dans le but de poursuivre et de châtier les auteurs d'atrocités commises au Rwanda pour mettre un terme à l'impunité et favoriser ainsi la reconstruction et la réconciliation nationales[47]. En tant qu'institution créée en vertu du chapitre VII de la Charte des Nations Unies, il a également pour mission de contribuer au rétablissement et au maintien de la paix et de la sécurité internationales[48].

32. L'existence d'une reconnaissance de culpabilité signifie que l'accusé reconnaît l'exactitude des faits qui lui sont reprochés dans l'acte d'accusation et qu'il assume la responsabilité de ses actes, ce qui tend à accélérer le processus de réconciliation[49]. Elle permet aux victimes de ne pas se remémorer les événements qu'elles ont vécus pour rouvrir leurs plaies. Comme conséquence indirecte, elle permet au Tribunal d'économiser ses ressources, même si ce fait ne constitue pas à proprement parler une circonstance atténuante importante[50].

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[40] Accord de reconnaissance de culpabilité, par. 41.
[41] Acte d'accusation modifié, par. 3.
[42] *Ibid*., par. 4.
[43] *Ibid*., par. 7 et 19. En outre, l'accusé aurait participé à une entreprise criminelle commune dont l'objet, le but et la conséquence prévisible étaient l'incitation directe et publique à commettre le génocide du groupe racial ou ethnique tutsi sur toute l'étendue du territoire rwandais (*ibid*., par. [7]). (*Ibid*., par. 4).
[44] Accord de reconnaissance de culpabilité, par. 35.
[45] *Ibid*., par. 46 et 47.
[46] *Ibid*., par. 48.
[47] Jugement *Rutaganda*, par. 454 ; jugement *Kayishema et Ruzindana*, par. 1 ; jugement *Serushago*, par. 19.
[48] Résolution 955 du Conseil de sécurité de l'Organisation des Nations Unies, document S/Res/955 (1994), 8 novembre 1994.
[49] Jugement *Rutaganira,* par. 146 ; jugement *Kambanda,* par. 50.
[50] Jugement *Bisengimana*, par. 131 ; jugement *Rutaganira, par*. 146.

33. Dans la jurisprudence du TPIR et celle du TPIY, les principes fondamentaux retenus pour infliger une peine sont la prévention[51] et la rétribution[52]. L'amendement est également reconnu comme l'un des buts de la peine dans la jurisprudence du Tribunal[53].

34. La Chambre estime que lorsqu'un accusé plaide coupable, il fait un pas important vers ces processus[54]. En l'espèce, il y a lieu de considérer que par sa reconnaissance de culpabilité, l'accusé donne un exemple susceptible d'encourager d'autres individus à reconnaître leur participation personnelle aux massacres commis au Rwanda en 1994[55].

B. Article 23 du Statut et article 101 du Règlement

35. L'article 23 du Statut fournit une liste non exhaustive d'éléments que la Chambre de première instance doit prendre en considération lors de la détermination de la peine. Ses dispositions pertinentes se lisent comme suit :

> 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. […]

36. Dans ses dispositions pertinentes, l'article 101 du Règlement ajoute ce qui suit :

> (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 ; [...]

37. Ni le Statut ni le Règlement ne précisent concrètement la grille des peines applicables aux infractions relevant de la compétence du Tribunal. La détermination de la peine appropriée est laissée à l'appréciation souveraine de chaque Chambre de première instance. Toutefois le Statut et le Règlement indiquent les éléments à prendre en compte[56].

IV. Eléments à prendre en compte lors de la détermination de la peine

38. Le Procureur fait valoir que pour déterminer la peine de tout accusé, la Chambre devrait s'inspirer « des buts du droit pénal dont l'un réside dans la consolidation de l'État de droit – condition de l'existence d'une société paisible – par des peines justes, cadrant avec le principe qui veut que soient proportionnés la gravité de l'infraction, le degré de responsabilité du délinquant, l'intimidation des personnes poursuivies et de délinquants éventuels, la rétribution et la nécessité d'encourager d'autres personnes à accepter les divers rôles qu'elles ont joués dans le génocide de 1994 et à assumer

[51] Jugement *Rutaganira*, par. 110 à 112 ; jugement *Rutaganda,* par. 455 ; jugement *Kayishema et Ruzindana,* par. 2 ; jugement *Serushago,* par. 20 ; arrêt *Tadić*, par. 48 ; arrêt *Mucić et consorts*, par. 806.
[52] Jugement *Rutaganira*, par. 108 et 109 ; jugement *Kayishema et Ruzindana*, par. 2 ; jugement *Serushago,* par. 20 ; arrêt *Aleksovski*, par. 185.
[53] Jugement *Kayishema et Ruzindana*, par. 2 ; arrêt *Mucić et consorts*, par. 806.
[54] Jugement *Rutaganira,* par. 114 ; jugement *Nikolić,* par. 93.
[55] Jugement *Bisengimana,* par. 129 ; jugement *Kambanda,* par. 53.
[56] Jugement *Bisengimana,* par. 109.

la responsabilité de leurs actes »[57] [traduction]. La Défense invite la Chambre à tenir pleinement compte de l'accord de reconnaissance de culpabilité, dans lequel l'accusé reconnaît sa culpabilité et accepte d'assumer l'entière responsabilité de ses actes, pour déterminer sa peine[58].

39. La gravité de l'infraction est un élément qui joue un rôle primordial dans la détermination de la peine appropriée[59]. Pour déterminer la gravité d'une infraction, il est nécessaire de tenir compte de sa nature et « des circonstances particulières de l'espèce, ainsi que de la forme et du degré de participation des accusés à ladite infraction »[60]. La peine doit refléter « le principe bien connu de proportionnalité entre la gravité de l'infraction et le degré de responsabilité de son auteur »[61]. Au demeurant, la Chambre est consciente qu'elle est tenue de veiller à ce que la peine soit proportionnée à la situation personnelle du délinquant[62].

40. Pour déterminer la peine, la Chambre doit prendre en considération toutes les circonstances aggravantes et atténuantes de l'espèce, mais le poids à accorder à chacune d'elles est laissé à son appréciation souveraine[63]. L'existence des circonstances aggravantes doit être établie au-delà de tout doute raisonnable[64], tandis que les circonstances atténuantes peuvent être retenues dès lors qu'elles semblent plus réelles que fausses[65].

41. La seule circonstance atténuante prévue dans le Règlement est l'existence d'une coopération substantielle apportée au Procureur. Toutefois le Tribunal considère comme circonstances atténuantes la reconnaissance de culpabilité[66], la coopération avec le Procureur[67], l'expression de remords sincères[68], l'assistance apportée par l'accusé à des victimes[69], l'absence de passé criminel[70], le mauvais état de santé[71] ainsi que la situation sociale et familiale de l'accusé[72], pour ne citer que celles-là. Certaines circonstances atténuantes peuvent ne pas être directement liées à l'infraction considérée[73].

A. Circonstances aggravantes

(i) Arguments des parties

42. Le Procureur fait valoir que l'incitation directe et publique à commettre le génocide et la persécution étant des actes par essence graves et formellement condamnés, leur perpétration constitue une circonstance fondamentalement aggravante[74].

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[57] Mémoire du Procureur relatif à la détermination de la peine, par. 21.
[58] *Defence Pre-Sentence Brief under Rule 100 of the Rules of Procedure and Evidence* (ci-après dénommé « Mémoire de la Défense relatif à la détermination de la peine »), par. 18 et 19.
[59] Jugement *Rutaganda,* par. 449 ; jugement *Kayishema et Ruzindana*, par. 8 ; jugement *Serushago,* par. 21 ; jugement *Kambanda,* par. 57 ; arrêt *Jelisić,* par. 101 ; arrêt *Mucić et consorts,* par. 731 ; arrêt *Furundžija,* par. 249 ; arrêt *Aleksovski*, par. 182.
[60] Arrêt *Jelisić*, par. 101 ; arrêt *Mucić et consorts*, par. 731 ; arrêt *Aleksovski*, par. 182.
[61] Jugement *Kambanda*, par. 58 ; jugement *Akayesu*, par. 40 ; arrêt *Akayesu*, par. 414.
[62] Jugement *Bisengimana,* par. 110 ; jugement *Muhimana,* par. 594 ; arrêt *Mucić et consorts*, par. 717 à 719.
[63] Arrêt Mucić et consorts, par. 777.
[64] Jugement *Bisengimana,* par. 111 ; arrêt *Mucić et consorts ,* par. 763.
[65] Jugement *Bisengimana,* par. 111.
[66] Jugement *Bisengimana,* par. 140 ; jugement, *Rutaganira,* par. 150 et 151 ; jugement *Ruggiu*, par. 53 et 54 ; jugement *Serushago*, par. 35 ; jugement *Kambanda,* par. 52 et 53.
[67] Jugement *Ruggiu,* par. 56 à 58 ; jugement *Serushago*, par. 31 à 33 ; jugement *Kambanda,* par. 46 à 50.
[68] Jugement *Ruggiu,* par. 69 à 72 ; jugement *Serushago*, par. 40 ; arrêt *Mucić et consorts,* par. 788.
[69] Jugement *Bisengimana*, par. 159 (circonstance rejetée en raison des faits de l'espèce) ; jugement *Rutaganda,* par. 470 ; arrêt *Serushago,* par. 38 ; arrêt *Mucić,* par. 775 et 776.
[70] Jugement *Bisengimana,* par. 165 ; jugement *Rutaganira,* par. 129 ; jugement *Ruggiu,* par. 59.
[71] Jugement *Bisengimana,* par. 175 ; jugement *Rutaganira,* par. 136 ; jugement *Ntakirutimana,* par. 898 ; jugement *Rutaganda,* par. 471.
[72] Jugement *Bisengimana,* par. 143 et 144 ; jugement *Rutaganira,* par. 121 ; jugement *Serushago,* par. 36 ; arrêt *Kunarac,* par. 408.
[73] Jugement *Jokić,* par. 100 ; jugement *Stakić*, par. 920.
[74] Mémoire du Procureur relatif à la détermination de la peine par. 31.

43. Il fait valoir en outre qu'en vertu de sa qualité de membre du Comité d'initiative et de conseiller technique de la RTLM ainsi que du pouvoir que lui conférait cette qualité, Serugendo avait une autorité sur ses subordonnés, notamment les techniciens et les autres membres du personnel d'appui de la RTLM[75].

44. Par ses actes, Joseph Serugendo a permis à la RTLM d'émettre sans interruption durant la période considérée. Commis lorsqu'il s'est personnellement rendu dans les studios de la RTLM entre le 6 et le 12 avril 1994, ces actes consistaient à contrôler le matériel de la station de radio, prêter l'assistance technique nécessaire et encourager moralement le personnel[76]. Ses actes ont par conséquent aidé la RTLM, l'une des principales sources d'information de la population rwandaise, à diffuser des informations indiquant les lieux où se trouvaient les Tutsis et incitant la population rwandaise à rechercher tous les Tutsis pour les tuer, ce qui a abouti au massacre de centaines de milliers de civils tutsis[77].

45. La Défense reconnaît que les infractions dont l'accusé s'est déclaré coupable sont par essence graves, mais souligne que cette circonstance a été prise en considération pour arrêter la fourchette de peines prévue dans l'accord de reconnaissance de culpabilité[78].

(ii) Conclusions

Gravité des crimes et autorité exercée par l'accusé

46. La Chambre relève que la gravité des crimes retenus et l'ampleur de la participation de Serugendo à leur commission constituent des éléments à prendre en considération dans l'analyse des circonstances aggravantes. Le génocide et les crimes contre l'humanité sont par leur nature même des infractions graves, puisqu'ils sont foncièrement odieux et choquent la conscience de l'humanité[79].

47. Les circonstances particulières de l'espèce, notamment la forme et le degré de la participation de l'accusé à la commission des crimes retenus, doivent être prises en considération[80]. La Chambre estime que la qualité de membre du personnel d'encadrement de la RTLM que Serugendo avait, l'autorité qu'il exerçait de ce fait sur les agents de la station de radio et le rôle actif qu'il a joué pour assurer le bon fonctionnement de celle-ci constituent en fait des circonstances aggravantes.

48. Ainsi, compte tenu des conséquences extrêmement graves de son abus d'autorité et de pouvoir, la position d'autorité qu'occupait Serugendo remplit les conditions prévues par la jurisprudence du Tribunal, pour être considérée comme une circonstance aggravante[81].

49. La Chambre relève toutefois qu'en 1994[82], Serugendo n'était pas une personnalité particulièrement haut placée ou influente au Rwanda. Il n'a pas non plus personnellement fait de déclarations incendiaires ou antitutsies sur les antennes de la RTLM ni commis d'actes de violence pendant les massacres perpétrés au Rwanda.

B. Circonstances atténuantes

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[75] *Ibid*., par. 32
[76] Id.
[77] *Ibid*., par. 36.
[78] Mémoire de la Défense relative à la détermination de la peine, par. 22 et 23.
[79] Jugement *Ruggiu*, par. 48.
[80] Jugement *Kayishema et Ruzindana,* par. 18 ; jugement *Serushago*, par. 28 et 29 ; jugement *Kambanda,* par. 469 ; arrêt *Kupreškić et consorts*, par. 852 ; arrêt *Mucić et consorts*, par. 731.
[81] Jugement *Serushago,* par. 28 et 29 ; jugement *Kambanda,* par. 468.
[82] D'après son conseil, le poste qu'occupait l'accusé à la RTLM à l'époque était un poste de cadre moyen, moins important que celui d'un directeur (Mémoire de la Défense relatif à la détermination de la peine, par. 26).

(i) Arguments des parties

50. Le Procureur et la Défense relèvent l'existence d'importantes circonstances atténuantes en l'espèce[83]. Ils invoquent principalement le fait que Serugendo a plaidé coupable en temps utile, qu'il est malade et qu'il a beaucoup coopéré avec le Procureur[84].

51. Les deux parties reconnaissant également qu'avant les faits survenus en 1994, Serugendo était une personne de bonne moralité, sans passé d'extrémiste ni antécédents judiciaires[85]. Enfin, elles soulignent que l'accusé a exprimé des remords pour les crimes dont il a plaidé coupable[86].

(ii) Conclusions

(a) Reconnaissance de culpabilité

52. La Chambre souscrit à l'opinion des parties selon laquelle la reconnaissance de culpabilité de Serugendo contribuera à la bonne administration de la justice, favorisera le processus de réconciliation nationale au Rwanda et épargnera aux victimes la peine de venir témoigner devant le Tribunal[87].

53. De plus, on peut considérer que par sa reconnaissance de culpabilité, Serugendo donne un exemple susceptible d'encourager d'autres individus à reconnaître leur participation personnelle aux massacres perpétrés au Rwanda en 1994[88].

54. Selon le Procureur, il faut mettre au crédit de Serugendo le fait qu'il n'a pas attendu la dernière minute pour reconnaître sa culpabilité afin de se procurer un avantage tactique. En plaidant coupable en temps utile, il a permis au Tribunal d'économiser beaucoup d'argent et de temps. Il a aidé le Tribunal et la communauté internationale à réaliser de substantielles économies sur le plan du temps et des ressources humaines et financières[89]. La Défense ajoute que l'accusé a décidé de plaider coupable d'emblée parce qu'il éprouvait des remords sincères et que ses aveux font peser une lourde menace sur sa vie et celle des membres de sa famille[90].

55. La jurisprudence du Tribunal reconnaît que le fait de plaider coupable peut être pris en considération pour réduire la peine d'un accusé car il peut selon les circonstances, être la preuve de son repentir, de son honnêteté et de sa volonté d'assumer ses responsabilités[91], favoriser la manifestation de la vérité[92], contribuer au maintien de la paix et à la réconciliation[93], servir d'exemple à d'autres auteurs de crimes[94], épargner aux témoins la peine de venir déposer à l'audience et aider le Tribunal à économiser du temps et des ressources[95]. Le moment choisi pour plaider coupable entre aussi en ligne de compte[96].

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[83] Mémoire du Procureur relatif à la détermination de la peine, par. 40.
[84] *Ibid*., par. 41 à 44 ; Mémoire de la Défense relatif à la détermination de la peine, par. 39 à 53.
[85] Mémoire du Procureur relatif à la détermination de la peine, par. 45 ; Mémoire de la Défense relatif à la détermination de la peine, par. 29.
[86] Mémoire du Procureur relatif à la détermination de la peine, par. 47 ; Mémoire de la Défense relatif à la détermination de la peine, par. 28.
[87] Mémoire du Procureur relatif à la détermination de la peine, par. 41 ; Mémoire de la Défense relatif à la détermination de la peine, par. 32.
[88] Mémoire du Procureur relatif à la détermination de la peine, par. 41 ; Mémoire de la Défense relatif à la détermination de la peine, par. 36.
[89] Mémoire du Procureur relatif à la détermination de la peine, par. 42.
[90] Mémoire de la Défense relatif à la détermination de la peine, par. 33 et 34.
[91] Jugement *Bisengimana,* par. 139 ; jugement *Ruggiu,* par. 54 et 55 ; jugement *Kambanda*, par. 52 et 53.
[92] Jugement *Rutaganira,* par. 150.
[93] Jugement *Rutaganira,* par. 146 ; jugement *Kambanda*, par. 50.
[94] Jugement *Bisengimana,* par. 129 ; jugement *Kambanda*, par. 53.
[95] Jugement *Rutaganira,* par. 151 ; jugement *Ruggiu,* par. 53 ; jugement *Serushago*, par. 35.
[96] Jugement *Bisengimana, par*. 131.

56. La Chambre relève que Serugendo déclare dans l'accord de reconnaissance de culpabilité que par ses aveux, il exprime son désir de dire la vérité pour contribuer effectivement à la recherche de la vérité en révélant ce qu'il sait et ce qu'il a appris[97].

57. La Chambre fait siennes les décisions antérieures du Tribunal jugeant qu'une certaine contrepartie doit être accordée aux personnes qui ont avoué leurs crimes pour encourager d'autres à se manifester[98]. De plus, elle pense que la reconnaissance de culpabilité de l'accusé peut contribuer à la réconciliation nationale au Rwanda[99]. Au demeurant, en plaidant coupable avant le début du procès, l'accusé a épargné aux victimes la peine de rouvrir leurs plaies.

58. Selon la Chambre, le fait que Serugendo est revenu sur ses dénégations pour plaider coupable constitue une circonstance atténuante[100]. En plus de ses aveux, l'accusé a publiquement reconnu sa responsabilité[101]. En outre, le fait qu'il a plaidé coupable en temps opportun facilite l'administration de la justice et permet au Tribunal d'économiser ses ressources[102].

59. Cela étant, la Chambre convient que la reconnaissance de culpabilité de Serugendo est importante en ce qu'elle constitue l'expression de sa volonté d'assumer la responsabilité de ses actes et contribuera à la réconciliation au Rwanda.

60. La Chambre conclut que la reconnaissance de culpabilité de Joseph Serugendo est un élément important de nature à faire réduire sa peine.

(b) Coopération avec le Procureur

61. Le Procureur et la Défense s'accordent à reconnaître que Serugendo a sensiblement coopéré avec le Procureur[103]. Ils précisent que le champ de cette coopération était très large, que celle-ci a permis d'éclaircir de nombreuses zones d'ombre dans les enquêtes du Procureur, et qu'elle a porté aussi sur des crimes que le Procureur ne connaît pas encore[104]. On peut donc considérer que Serugendo donne un exemple susceptible d'encourager d'autres individus à reconnaître leur participation personnelle aux massacres perpétrés au Rwanda en 1994.

62. Il ressort clairement des arguments des parties que la coopération fournie par Serugendo au Procureur a été substantielle. La Chambre estime que ce fait constitue une circonstance atténuante importante.

(c) Remords

63. Les remords d'un accusé peuvent être considérés comme une circonstance atténuante s'ils sont sincères[105]. Dans l'accord de reconnaissance de culpabilité et lors de l'audience de détermination de la

[97] Accord de reconnaissance de culpabilité, par. 5.
[98] Jugement *Ruggiu,* par. 55.
[99] Jugement *Rutaganira,* par. 146 ; jugement *Kambanda,* par. 50.
[100] Jugement *Ruggiu*, par. 54
[101] Compte rendu de l'audience de détermination de la peine, tenue le 1er juin 2006, p. 22 et 23 ; Pièces à conviction n°11 et 12 de la Défense.
[102] Jugement *Ruggiu,* par. 53.
[103] Mémoire du Procureur relatif à la détermination de la peine, par. 44 (faisant état d'interrogatoires qui ont produit plus de 120 pages d'informations relatives à d'autres affaires pendantes devant le Tribunal) ; Mémoire de la Défense relatif à la détermination de la peine, par. 41, 42 et 45 (qui précisent que la coopération avec le Procureur était non seulement « ferme et résolue » mais aussi intense et permanente). Voir également Mémoire du Procureur intituled *The Prosecutor's Final Pre-Sentencing Brief*, par. 5, et le compte rendu de l'audience de détermination de la peine tenue le 1er juin 2006, p. 25 et 26 ainsi que 28 à 30.
[104] Mémoire de la Défense relatif à la détermination de la peine, par. 44.
[105] Jugement *Rutaganira*, par. 157 et 158 ; jugement *Ruggiu*, par. 70 ; Jugement *Serushago,* par. 41.

peine, Serugendo a publiquement exprimé des regrets et des remords pour les crimes qu'il avait commis[106]. La Chambre convient que ces remords sont sincères.

64. La Chambre conclut par conséquent que l'expression des remords de Serugendo est une circonstance atténuante.

(d) Bonne moralité

65. Les deux parties relèvent qu'à leur connaissance, Serugendo était une personne de bonne moralité et n'avait pas de passé d'extrémiste avant 1994[107]. Le casier judiciaire de l'accusé est vierge, ce qui est un élément à prendre en considération pour réduire sa peine.

(e) Situation personnelle et familiale

66. La jurisprudence du Tribunal considère diverses circonstances personnelles, dont l'âge avancé[108] et la situation familiale[109] de l'accusé, comme des circonstances atténuantes, mais le Tribunal ne leur accorde généralement que peu de valeur[110].

67. La Chambre relève que Serugendo est marié et qu'il est âgé de 53 ans. Elle considère que pris ensemble, ces faits constituent des circonstances personnelles dont on pourrait tenir compte, bien que dans une très faible mesure, pour réduire la peine de l'accusé.

(f) Assistance apportée à certaines victimes

68. Lors de l'audience de détermination de la peine, la Défense a appelé le témoin AX – un Tutsi – qui a déclaré que le 10 ou le 11 avril 1994, alors qu'il était pourchassé par des assaillants, Serugendo l'a sauvé en le transportant dans son véhicule et en refusant de le livrer à la foule en colère[111]. Cette déposition n'a pas été contestée par le Procureur.

69. La Chambre tient pour constant que Serugendo a sauvé la vie au témoin AX lors du génocide et considère ce fait comme une circonstance atténuante.

(g) Mauvais état de santé

70. Selon un diagnostic établi récemment, Serugendo souffre d'une maladie incurable[112]. Les deux parties s'accordent à reconnaître que la fragilité de sa santé et le pronostic pessimiste de son médecin doivent être pris en compte lors de la détermination d'une peine juste[113].

71. La Chambre a pris acte du contenu du rapport médical confidentiel versé au dossier par l'accusé le 1er juin 2006 au cours de l'audience consacrée à la détermination de la peine. D'après ce rapport, l'accusé souffre d'une maladie incurable et ne peut être opéré ; son espérance de vie est donc réduite. En outre, il aura probablement besoin de soins médicaux et palliatifs intensifs de manière suivie[114].

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[106] Accord de reconnaissance de culpabilité, par. 21 ; compte rendu de l'audience de détermination de la peine tenue le 1er juin 2006, p. 22 et 23.
[107] Mémoire du Procureur relatif à la détermination de la peine, par. 46 ; Mémoire de la Défense relatif à la détermination de la peine, par. 29.
[108] Jugement *Bisengimana,* par. 175 ; jugement *Rutaganira,* par. 136 ; jugement *Ntakirutimana*, par. 898.
[109] Jugement *Bisengimana,* par. 146 ; jugement *Rutaganira,* par. 120 ; arrêt *Kunarac*, par. 366.
[110] Comme l'a relevé le TPIY, « ces éléments liés à la situation personnelle [sont] communs à de nombreux accusés » (jugement *Banović*, par. 75).
[111] Compte rendu de l'audience de détermination de la peine tenue le 1er juin 2006, p. 5 à 8.
[112] *Ibid*., p. 25 et 26.
[113] *Ibid*., p. 25 à 27 ainsi que 29 et 30.
[114] Pièce à conviction n°13 de la Défense (sous scellés).

72. Le TPIR[115] et le TPIY[116] considèrent le mauvais état de santé comme une circonstance atténuante au moment de la détermination de la peine mais le poids qui lui est accordé varie. La jurisprudence n'a pas encore traité la question de l'importance des maladies mortelles[117]. La Chambre épouse le point de vue du TPIY qui estime que lorsque l'état de santé d'un accusé devient incompatible avec la poursuite de sa détention, il est du devoir du Tribunal d'adopter les solutions nécessaires[118].

73. Les deux parties considèrent l'état de santé de Serugendo comme une circonstance atténuante majeure, mais elles ne demandent pas que des soins médicaux soient prescrits en lieu et place de son maintien en détention[119]. Elles disent toutefois que quelle que soit la peine qui lui sera infligée, il faudra continuer de lui prodiguer des soins médicaux, voire le transférer dans un établissement approprié si nécessaire[120].

74. La Chambre estime que l'état de santé actuel de l'accusé, tel qu'il est décrit dans le rapport médical, constitue une circonstance atténuante majeure. Par ailleurs, les soins palliatifs et le traitement permanent dont il a besoin commandent la modification de son régime de détention.

C. Usages suivis par les juridictions rwandaises en matière de détermination des peines

75. Aucune des parties n'attache une importance particulière aux usages suivis par les juridictions rwandaises en matière de détermination des peines, mais la Chambre rappelle les articles 23 du Statut et 101 du Règlement qui font obligation au Tribunal de tenir compte de la grille générale des peines d'emprisonnement appliquée par les tribunaux du Rwanda. Le Tribunal n'est pas tenu de se conformer aux usages suivis par le Rwanda en matière de détermination des peines[121].

76. En droit rwandais, le génocide et les crimes contre l'humanité peuvent être punis de la peine de mort ou de l'emprisonnement à perpétuité selon la nature de la participation de l'accusé[122].

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[115] Jugement *Bisengimana,* par. 175 ; jugement *Rutaganira*, par. 136 ; jugement *Ntakirutimana*, par. 898 ; jugement *Rutaganda*, par. 471.

[116] Jugement *Strugar*, par. 469 ; jugement *Plavšić*, par. 106.

[117] Le TPIY a examiné une fois l'effet des maladies incurables sur les affaires dont il est saisi, même si c'était dans le cadre d'un procès en cours et non pas au moment de la détermination de la peine, (*Décision relative à la requête aux fins de mise en liberté provisoire de l'accusé, Momir Talić*, 20 septembre 2002). Étant donné la maladie incurable dont souffrait *Talić*, le fait qu'il n'était pas en mesure de passer en jugement et l'incompatibilité de son traitement médical avec tout régime de détention, le Tribunal lui a accordé la liberté provisoire et l'a placé sous un régime de résidence et d'hospitalisation surveillées. Par la suite, *Talić* est décédé le 28 mai 2003 (*Order Terminating Proceedings Against Momir Talić*, 12 juin 2003).

[118] Le TPIY a jugé qu'il porterait gravement atteinte à son autorité institutionnelle s'il faisait abstraction de la dure réalité de l'état de santé de *Talić* et méconnaissait le fait qu'il a été créé pour proclamer, défendre et appliquer le droit humanitaire (Décision relative à la requête aux fins de mise en liberté provisoire de l'accusé Momir Talić, 20 septembre 2002, p. 11).

[119] Compte rendu de l'audience de détermination de la peine tenue le 1er juin 2006, p. 31 et 32 (le Procureur reconnaît que le mauvais état de santé de l'accusé peut autoriser une plus forte réduction de sa peine, mais précise que vu la gravité des crimes retenus, la durée de la peine ne doit pas être trop courte. À la page 26, le conseil de la Défense dit ce qui suit : « […] ce dont l'Accusé a essentiellement besoin maintenant, ce n'est pas une peine d'emprisonnement ; il a besoin de soins de santé, de soins médicaux […] Et une peine d'emprisonnement n'aurait aucune signification réelle. » Cela étant, ses arguments tendent à faire *réduire* la peine de son client en raison de l'état de santé de celui-ci (voir par exemple à la même page les propos suivants : « Et c'est la raison pour laquelle j'implore la Chambre de première instance d'envisager ou de tenir compte de l'état de santé de l'Accusé, qui est extrêmement grave, et de considérer qu'il s'agit là d'une circonstance atténuante majeure. Et j'aimerais demander à la Chambre de première instance d'envisager une sentence beaucoup plus faible, ou plus légère, que celle qui avait été proposée. »)

[120] Compte rendu de l'audience de détermination de la peine tenue le 1er juin 2006, p. 32

[121] Arrêt *Semanza*, par. 377 : « L'obligation faite aux Chambres de première instance d'avoir "recours à la grille générale des peines d'emprisonnement appliquée par les tribunaux du Rwanda" n'emporte pas celle de se conformer à cette grille ; la règle ne prescrit aux Chambres de première instance que de tenir compte de la grille » [traduction]) ; jugement *Rutaganira,* par. 164 ; arrêt *Serushago*, par. 30 ; arrêt *Nikolić*, par. 69.

[122] Loi organique rwandaise no 8/96 sur l'Organisation des poursuites des infractions constitutives du crime de génocide ou de crimes contre l'humanité, commises à partir du 1er octobre 1990, publiée au *Journal Officiel* de la République rwandaise, 35e année. n°17, 1er septembre 1996.

77. La jurisprudence relève que la loi organique rwandaise portant création des juridictions *Gacaca*[123] et celle qui la modifie et la complète[124] peuvent présenter un intérêt en cas de reconnaissance de culpabilité devant le Tribunal, car elles régissent la procédure applicable aux personnes ayant plaidé coupable de crimes contre l'humanité. Toute personne qui, agissant en position d'autorité au niveau municipal[125], a encouragé d'autres à commettre un crime contre l'humanité peut, à certaines conditions[126], être condamnée à une peine d'emprisonnement d'une durée supérieure ou égale à 25 ans pouvant aller jusqu'à l'emprisonnement à perpétuité si elle plaide coupable[127].

78. La Chambre ne perd pas aussi de vue l'article 83 du Code pénal rwandais qui dispose que lorsqu'il existe des circonstances atténuantes, les peines doivent être 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 et la peine d'emprisonnement d'une durée comprise entre cinq et vingt ans ou même supérieure à vingt ans peut être remplacée par une peine d'emprisonnement d'un an[128].

D. Peine recommandée par les parties

79. Dans l'accord de reconnaissance de culpabilité, le Procureur s'était engagé à recommander une peine se situant dans une fourchette de 6 à 14 ans d'emprisonnement[129]. Lors de l'audience consacrée à la détermination de la peine, il a modifié cette fourchette et proposé que la peine de Joseph Serugendo soit plutôt comprise entre 6 et 10 ans, compte tenu de la coopération substantielle que celui-ci lui avait apportée jusque-là[130].

80. Les deux parties reconnaissent qu'aux termes de l'article 62 *bis* (B) du Règlement, la Chambre de première instance n'est pas liée par les recommandations des parties, mais la Chambre d'appel a déjà souligné que les Chambres de première instance doivent dûment tenir compte de la recommandation des parties et motiver leur décision si la peine infligée diffère sensiblement de celle qui a été recommandée[131].

V. Détermination de la peine

A. Gravité des infractions

81. Tous les crimes prévus par le Statut du Tribunal constituent de graves violations du droit international humanitaire[132]. La Chambre de première instance jouit d'une grande liberté d'appréciation lors de la détermination de la peine, quoique cette liberté ne soit pas non illimitée,

[123] Loi organique n°40/2000 du 26 janvier 2001 portant création des « Juridictions *Gacaca* » et organisation de 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 rwandaise, 40e année, n°6, 15 mars 2001 (« ci-après dénommée la Loi organique du 26 janvier 2001 »).

[124] Loi organique modifiant et complétant la loi organique no 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 rwandaise, 40e année, n°14, 15 juillet 2001 (« ci-après dénommée la Loi organique modifiant et complétant la loi organique du 26 janvier 2001 »).

[125] Article 51 de la Loi organique du 26 janvier 2001 et article premier de la Loi organique modifiant et compétant la loi organique du 26 janvier 2001.

[126] Article 56 de la Loi organique du 26 janvier 2001.

[127] *Ibid*., article 68

[128] Jugement *Bisengimana,* par. 195, citant le Code pénal rwandais, (décret-loi n°21/77 du 18 août 1977).

[129] Accord de reconnaissance de culpabilité, par. 59. Le Procureur s'était aussi engagé à recommander expressément une peine comprise dans cette fourchette si l'accusé coopère de façon substantielle avec lui (*ibid*., par. 60).

[130] Voir le mémoire du Procureur intitulé *The Prosecutor's Final Pre-Sentencing Brief*, par. 5.

[131] Arrêt *Nikolić*, par. 89 : « L'exposé de ces motifs et le respect par la Chambre de première instance de l'obligation que lui impose l'article 23 2) du Statut de motiver par écrit ses décisions permettent tant à la personne déclarée coupable d'exercer effectivement son droit de recours qu'à la Chambre d'appel de "comprendre et [...] évaluer les constatations de la Chambre de première instance" ».

[132] Affaire Kayishema et Ruzindana, Motifs de l'arrêt, par. 367.

puisqu'elle est tenue d'individualiser les peines pour qu'elles correspondent à la situation personnelle de chaque accusé et reflète la gravité des crimes dont l'accusé a été reconnu coupable[133].

82. Statuant sur la question de la peine appropriée, la Chambre d'appel a déclaré que lorsque des personnes semblables se trouvent dans des situations semblables, il faut leur infliger des peines comparables. Elle a cependant aussi relevé que ce principe comportait par essence des limites, car « [i]l existe dans chaque affaire un grand nombre de variables allant du nombre et de la gravité des crimes à la situation de l'accusé »[134].

83. En vertu de l'article 6 (1) du Statut, la Chambre a déclaré Serugendo coupable de génocide et de persécution constitutive de crime contre l'humanité à raison du rôle d'encadreur qu'il avait joué au sein de la RTLM. Dans la jurisprudence du Tribunal, l'auteur principal d'un crime encourt généralement une peine plus sévère que celle du complice[135]. Toutefois cela ne revient pas à dire que l'emprisonnement à vie est la seule peine qu'il y a lieu d'infliger aux auteurs principaux du crime de génocide et de crimes contre l'humanité[136]. Le Tribunal réserve généralement, la peine d'emprisonnement à vie aux personnes qui ont planifié ou ordonné des atrocités et à celles qui ont participé à la perpétration des crimes considérés avec un zèle ou un sadisme particuliers[137]. Au demeurant, les délinquants condamnés aux peines les plus sévères sont presque toujours de hauts responsables[138].

84. À l'époque de tous les faits considérés, Serugendo n'exerçait aucune fonction officielle au sein de l'Administration publique, de l'armée ou des formations politiques rwandaises. En outre, il n'a personnellement diffusé aucun message antitutsi au cours de la période visée. Cependant, ses fonctions techniques et son rôle d'encadreur étaient des éléments nécessaires pour que la RTLM puisse continuer à diffuser des messages de cette nature.

85. Malgré la gravité des crimes de Serugendo, la Chambre n'est pas convaincue qu'il mérite la peine la plus sévère prévue par le Statut. La Chambre s'inspire à cet égard de certaines affaires dans lesquelles des accusés reconnus coupables de participation directe au génocide et à des crimes contre l'humanité n'ont pas été condamnés à des peines d'emprisonnement à vie.

86. Dans l'affaire *Semanza*, la Chambre d'appel a jugé que l'accusé méritait une peine d'emprisonnement de 25 ans pour avoir directement perpétré le génocide et l'extermination dans un lieu de massacre[139]. Ancien bourgmestre, Semanza était un député nouvellement désigné qui avait de l'influence dans la localité où ses crimes ont été commis[140]. Dans l'affaire *Gacumbtsi*, la Chambre de première instance a estimé que si elle condamnait l'accusé à une peine unique de 30 ans d'emprisonnement, celle-ci mettrait suffisamment en évidence les buts que le Tribunal assigne à la

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[133] Arrêt *Kajelijeli*, par. 291.
[134] Arrêt *Kvočka*, par. 681.
[135] Arrêt *Semanza*, par. 388
[136] Voir, par exemple, le jugement *Ntakirutimana*, par. 791 à 793, 832 à 834, 908 et 909 ainsi que 924 (où l'accusé est condamné à une peine d'emprisonnement de 25 ans pour avoir personnellement participé à la perpétration de ces crimes).
[137] Jugement *Muhimana*, par. 604 à 616 (l'accusé n'était que conseiller, mais la Chambre y relate la manière particulièrement atroce dont il a personnellement violé, tué, mutilé et humilié ses victimes) ; jugement *Niyitegeka*, par. 486 ; arrêt *Musema*, par. 383 (qui relève que les meneurs et les organisateurs d'un conflit donné doivent encourir une plus grande responsabilité, sous réserve du fait que la gravité de l'infraction est le principal élément à prendre en considération à l'occasion du choix d'une peine).
[138] Des peines d'emprisonnement à vie ont été infligées à de hauts responsables de l'Administration publique dans le jugement : *Ndindabahazi*, par. 505, 508 et 511 (Ministre des finances) ; le jugement *Niyitegeka*, par. 499 et 502 (Ministre de l'information) ; le jugement *Kamuhanda*, par. 6, 764 et 770 (Ministre de l'enseignement supérieur et de la recherche scientifique) et le jugement *Kambanda*, par. 44, 61 et 62 (Premier Ministre). Des peines d'emprisonnement à vie ont aussi été infligées à des responsables de rang inférieur ainsi qu'à des personnes qui n'occupaient pas de poste dans l'appareil de l'État. Voir, par exemple, le jugement *Musema*, par. 999 à 1008 (influent directeur d'une usine de thé qui exerçait un contrôle sur des tueurs) ; et le jugement *Rutaganda*, par. 466 à 473 (deuxième vice-président national des *Interahamwe*).
[139] Arrêt *Semanza*, par. 388 et 389.
[140] Jugement Semanza, par. 303, 304 et 573.

peine en matière de génocide et d'extermination constitutive de crime contre l'humanité[141]. Pour tirer cette conclusion, la Chambre de première instance a relevé que l'accusé, bourgmestre à l'époque des faits qui lui étaient imputés, n'avait pas participé pendant longtemps à l'organisation des faits survenus dans sa commune. Dans l'affaire *Ruzindana*, la Chambre d'appel a confirmé la peine de 25 ans d'emprisonnement infligée à l'accusé pour génocide, au motif qu'il avait contribué à la réalisation d'un but ou dessein commun, notamment en mutilant et en humiliant sa victime[142].

87. Ayant examiné les usages suivis par le Tribunal et le TPIY en matière de détermination de la peine, la Chambre constate que les auteurs matériels ou les coauteurs reconnus coupables de persécution constitutive de crime contre l'humanité ont jusqu'à présent été condamnés à des peines allant de cinq ans d'emprisonnement à l'emprisonnement à vie[143]. Les personnes reconnues coupables de formes secondaires de participation sont généralement condamnées à des peines moins sévères[144].

B. Situation personnelle et circonstances aggravantes et atténuantes

88. La Chambre tiendra compte de la situation personnelle de Serugendo ainsi que des circonstances aggravantes et atténuantes.

89. Dans l'ensemble, la Chambre convient avec le Procureur que la peine maximale doit être réservée aux cas les plus graves dans chaque espèce de crime et qu'elle doit prendre en considération la gamme de cas effectivement rencontrée dans la pratique[145]. En outre, il convient en général de ne pas retenir la peine maximale lorsqu'un accusé a plaidé coupable. La Chambre souligne à nouveau qu'une contrepartie doit être accordée aux personnes qui ont avoué leurs crimes pour encourager d'autres individus à se manifester. Par ailleurs, la reconnaissance de culpabilité de Serugendo peut contribuer à la réconciliation nationale au Rwanda[146].

90. Parmi les circonstances aggravantes, la Chambre relève la fonction d'encadreur que Serugendo exerçait au sein de la RTLM. En raison de l'influence que lui procurait cette fonction, les autres employés suivaient probablement son exemple[147]. Il va de soi que le nombre des victimes de la campagne d'incitation au génocide et de persécution menée à l'époque constitue une autre circonstance aggravante. Serugendo a joué un rôle actif en ce qu'il veillait au bon fonctionnement de la station de radio.

91. Malgré la gravité des crimes commis par l'accusé et sa fonction officielle, la Chambre estime qu'il convient de réduire sensiblement sa peine, compte tenu de sa reconnaissance de culpabilité assortie de remords publiquement exprimés et de la coopération substantielle qu'il a fournie au Procureur. Sa situation familiale, la bonne moralité qu'il avait avant les faits incriminés, le fait que son casier judiciaire est vierge et son âge sont aussi des circonstances atténuantes, mais revêtent une importance beaucoup plus faible.

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[141] Jugement *Gacumbitsi*, par. 334, 345, 352, 353 et 356. L'accusé *Gacumbitsi* a été aussi reconnu coupable de viol et la Chambre de première instance a déclaré que la manière « particulièrement atroce » dont certains des viols considérés avaient été commis constituait une circonstance aggravante (*ibid*., par. 345).

[142] Affaire *Kayishema et Ruzindana*, Motifs de l'arrêt, par. 191, 194 et 352 ; jugement *Kayishema et Ruzindana*, par. 26. Comme circonstances aggravantes, Ruzindana a coupé les seins d'une de ses victimes et l'a éventrée tout en se moquant ouvertement d'elle. Parmi les éléments dont la Chambre de première instance a tenu compte pour lui infliger une peine inférieure à l'emprisonnement à vie figurent le fait qu'il était assez jeune et le but d'amendement assigné à toute peine.

[143] Jugement *Nahimana et consorts*, par. 1106 et 1108 ; jugement *Ruggiu* ; arrêt *Kvočka,* par. 757.

[144] Vincent Rutaganira a été condamné à six ans de prison pour avoir été par omission complice d'extermination constitutive de crime contre l'humanité (jugement *Rutaganira*, par. 40) ; Élizaphan Ntakirutimana a été condamné à une peine d'emprisonnement de dix ans pour avoir aidé et encouragé à commettre le génocide [jugement *Ntakirutimana*, par. 790 et 921 ; cette peine a été confirmée par la Chambre d'appel (arrêt *Ntakirutimana*, par. 570)] et Laurent Semanza a été condamné à huit ans d'emprisonnement pour incitation à l'assassinat de six personnes,
constitutif de crime contre l'humanité *(*jugement *Semanza,* par. 588).

[145] Mémoire du Procureur relatif à la détermination de la peine, par. 19.

[146] Jugement *Rutaganira,* par. 146 ; jugement *Kambanda*, par. 50.

[147] Arrêt *Semanza*, par. 336.

92. En revanche, la Chambre juge que le mauvais état de santé de Serugendo, ainsi que la diminution de son espérance de vie et la détérioration de la qualité de vie qui en résultent constituent des circonstances atténuantes importantes.

93. Elle relève que l'accord de reconnaissance de culpabilité assorti de la recommandation formulée au sujet de la peine a été déposé par les deux parties et que le Procureur a recommandé par la suite une fourchette de peines plus faible, compte tenu de la coopération substantielle fournie par Serugendo[148]. La Chambre n'est pas tenue de se conformer à cette recommandation, mais celle-ci l'aide à décider du quantum de la peine à retenir[149]. Elle conclut que l'accusé doit être condamné à la peine la plus douce prévue dans la fourchette recommandée.

94. Cela dit, il est évident que Serugendo n'est pas en mesure de purger sa peine dans les conditions normales de détention. Selon un diagnostic établi récemment, il souffre d'une maladie incurable ; sa santé est très fragile et le pronostic de son médecin est pessimiste. Le Tribunal doit continuer de veiller à ce qu'il reçoive des soins médicaux appropriés, notamment le faire hospitaliser aussi longtemps que nécessaire. Cette obligation doit être consignée dans le dispositif du présent jugement.

C. Déduction du temps passé en détention

95*. Arrêté le 16 septembre 2005, Serugendo est détenu par le Tribunal depuis cette date. En application de l'article 101 (D) du Règlement, il a droit à ce que soit déduit de la durée de sa peine, le temps qu'il a déjà passé en détention qui est de 270 jours au total à la date de publication du présent jugement écrit[150].

VI. Dispositif

96. Par ces motifs, après avoir examiné les éléments de preuve et les arguments présentés par les parties, la CHAMBRE CONDAMNE Joseph Serugendo à une peine unique de

SIX ANS D'EMPRISONNEMENT ;

ORDONNE au Greffe de veiller à ce que Joseph Serugendo continue de recevoir des soins médicaux appropriés, notamment de le faire hospitaliser aussi longtemps que nécessaire.

En application de l'article 101 (D) du Règlement, le temps que Serugendo a déjà passé en détention sera déduit de la durée de sa peine. D'après les calculs de la Chambre, ce temps est de 270 jours.

Arusha, le 12 juin 2006.

[Signé] : Erik Møse; Jai Ram Reddy Sergei; Alekseevich Egorov

[148] Voir le mémoire du Procureur intitulé *The Prosecutor's Final Pre-Sentencing Brief*, par. 5.
[149] Arrêt Nikolić, (Arrêt relatif à la sentence), par. 89.
* Suite à une erreur du Tribunal, la numérotation a dû être réorganisée.
[150] Arrêt *Kajelijeli,* par. 290.

The Prosecutor v. Aloys SIMBA

Case N° ICTR-2001-76

Case History

• Name: SIMBA

• First Name: Aloys

• Date of Birth: 1942

• Sex: male

• Nationality: Rwandan

• Former Official Function: *Député* in the *Conseil national* and president of MRND in Gikongoro *préfecture*

• Date of Indictment's Confirmation: 8 January 2002

• Date of Indictment's Amendment: 10 May 2004

• Counts: genocide or in the alternative, complicity in genocide, crimes against humanity (extermination, murder)

• Date and Place of Arrest: 27 November 2001, in Senegal

• Date of Transfer: 11 March 2002

• Date of Initial Appearance: 18 March 2002

• Date Trial Began: 30 August 2004

• Date and content of the Sentence: 13 December 2005, sentenced to 25 years imprisonment.

• Appeal: 27 November 2007, dismissed

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Order Appointing a Pre-Appeal Judge
24 January 2006 (ICTR-2001-76-A)

(Original: not specified)

Appeals Chamber

Judge : Fausto Pocar, Presiding Judge

Aloys Simba – Appointment of a pre-appeal judge

International Instruments Cited :

Document IT/242 of the International Criminal Tribunal for the former Yugoslavia ; Rules of Procedure and Evidence, Rule 108 bis

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 1994 and 31 December 1994 ("International Tribunal"),

NOTING the "Order of the Presiding Judge Assigning Judges to an Appel Before the Appeals Chamber" issued on 16 December 2005;

NOTING the "Prosecutor's Notice of Appeals" filed on 12 January, 2006;

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;

CONSIDERING that pursuant to Rule 108 *bis* of the Rules of the International Tribunal, as Presiding Judge, I shall designate a Pre-Appeal Judge responsible for pre-hearing proceedings in this case;

HEREBY DESIGNATE Judge Liu Daqun as Pre-Appeal Judge in this case.

Done in French and English, the English text being authoritative.

Done this 24th day of January 2006, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

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Decision on Registrar's Request for Extension of Time for filing an Official Translation of the Trial Judgement 25 January 2006 (ICTR-2001-76-A)

(Original: Not specified)

Appeals Chamber

Pre-Appeal Judge : Liu Daqun

Aloys Simba – Extension of time, Official translation of the trial judgement – Voluminous documents in the process of being translated, Accurate translation – Extension of time for the Appellant to file his notice of appeal – Motion granted

International Instrument Cited :

Rules of Procedure and Evidence, Rule 108 bis

International Cases Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Aloys Simba, Decision on Motion for Extension of Time for Filing of Notice of Appeal, 16 December 2005 (ICTR-2001-76) ; Appeals Chamber, The Prosecutor v. Aloys Simba, Order Appointing a Pre-Appeal Judge, 24 January 2006 (ICTR-2001-76)

I, LIU DAQUN, 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]

NOTING that on 13 December 2005, Trial Chamber I of the International Tribunal pronounced judgement against Aloys Simba ("Appellant") and issued its reasoned opinion in English ("Trial Judgement");

NOTING the decision delivered by the Appeals Chamber's President on 16 December 2005 ("Decision") granting to the Appellant an extension of time to file his Notice of Appeal and directing the Registrar to provide the French translation of the Trial Judgement to the Appellant and his Counsel within sixty days; [2]

RECALLING that, pursuant to Rule 108 *bis* (B) of the Tribunal's Rules of Procedure and Evidence ("Rules"), the Pre-Appeal Judge "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";

BEING SEIZED OF the "Observations du Greffier relatives à la seconde ordonnance de la décision relative à la requête visant à obtenir un report de délai pour le dépôt de l'acte d'appel rendue par la Chambre d'Appel le 16 décembre 2005", filed by the Registrar on 21 December 2005; ("Observations"), in which the Registrar requests an extension of time until 15 May 2006 to file an official translation in French of the Trial Judgement;

[1] Order Appointing a Pre-Appeal Judge, 24 January 2006.
[2] Decision on Motion for Extension of Time for Filing of Notice of Appeal, 16 December 2005.

NOTING that the Parties did not object to the Registrar's request;

CONSIDERING that in support of his request the Registrar mentions: the current workload of the French group of the Language Support Section of the Registry (LSS); the limited resources available and the risk of lowering the quality of the translation if constrained by the time-limit allowed in the Decision;

CONSIDERING that voluminous documents filed with anteriority in other pending cases before the Appeals Chamber are currently in the process of being translated;

CONSIDERING that it is in the interest of justice that the Appellant be provided with an accurate translation of the Judgement in a reasonable time;

FINDING therefore that the second order of the Decision should be amended as indicated in the following disposition;

FOR THE FOREGOING REASONS:

DIRECT the Registrar to provide the French translation of the Trial Judgement to the Appellant and his Counsel on by 15 May 2006, at the latest;

AND ORDER the Appellant to file his Notice of Appeal no more than thirty days from the date of the filing of the French translation of the Trial Judgement.

Done in English and French, the English text being authoritative.

Done this 25th day of January 2006, at The Hague, The Netherlands.

[Signed] : Liu Daqun

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Decision on Respondent's Motion for Extension of Time 13 April 2006 (ICTR-2001-76-A)

(Original: English)

Appeals Chamber

Pre-Appeal Judge : Liu Daqun

Aloys Simba – Extension of time – Filing of the motion confidentially, Interests of justice, Public filing – Language understood by the Respondent and his Counsel – Full response to the Prosecution's submissions – Interests of justice and fairness – Good cause – Motion granted

International Instruments Cited :

Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal ; Rules of Procedure and Evidence, Rules 108 bis (B), 112 and 116 (A)

International Cases Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Aloys Simba, Decision on Motion for Extension of Time for Filing of Notice of Appeal, 16 December 2005 (ICTR-2001-76) ; Appeals Chamber, The Prosecutor v. Aloys Simba, Order Appointing a Pre-Appeal Judge, 24 January 2006 (ICTR-2001-76) ; Appeals Chamber, The Prosecutor v. Aloys Simba, Decision on Registrar's Request for an Extension of Time for Filing an Official Translation of the Trial Judgement, 25 January 2006 (ICTR-2001-76)

I, LIU DAQUN, 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 ("Tribunal") and Pre-Appeal Judge in this case;[1]

BEING SEIZED OF "Requête en extrême urgence de la Défense en vue d'obtenir un report de délai pour répondre à la Requête du Procureur en modification de son Acte d'appel et déposer son Mémoire en réponse au Mémoire du Procureur (Articles 116 (B)) et 112 du RPP", confidentially filed on 6 April 2006 ("Motion for Extension of Time"), by Aloys Simba ("Respondent"), in which the Respondent requests an extension of the time limit for filing his Respondent's brief and his response to the Prosecutor's Motion for Variation of Notice of Appeal, pursuant to Rule 108, filed on 27 March 2006 ("Motion for Variation"), pending the translation of this motion and the Prosecutor's Appellant's Brief filed on 27 March 2006 ("Appellant's Brief");[2]

RECALLING that, pursuant to Rule 108 *bis* (B) of the Tribunal's Rules of Procedure and Evidence ("Rules"), the Pre-Appeal Judge "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";

NOTING that the Prosecution does not oppose the Motion for Extension of Time;[3]

CONSIDERING that the Respondent does not indicate why the Motion for Extension of Time was filed confidentially and that it is in the interests of justice that it be filed publicly;

CONSIDERING that the Appellant's Brief and the Motion for Variation were filed by the Prosecution solely in English;

CONSIDERING that according to Rule 112 of the Rules a respondent's brief of argument and authorities shall be filed within forty days of the filing of the appellant's brief;

CONSIDERING that, pursuant to paragraph 11 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal ("Practice Direction"), during Appeals from Judgement, a response to a motion shall be filed within ten days of the motion;

CONSIDERING that Rule 116 (A) of the Rules provides that a motion to extend a time limit may be granted upon a showing of good cause;

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[1] See Order Appointing a Pre-Appeal Judge, 24 January 2006.
[2] On the 28 March 2006, the Prosecutor also filed a *Corrigendum* to Prosecutor's Appellant's Brief ("*Corrigendum*").
[3] Prosecutor's Response to "Requête en extrême urgence de la défense en vue d'obtenir un report de délai pour répondre à la Requête du procureur en modification de son acte d'appel et déposer son Mémoire en réponse au Mémoire du procureur (Articles 116 (B) et 112 du RPP)", 7 April 2006.

CONSIDERING that the language understood and spoken by the Respondent and his Counsel is French[4] and that, in order to be able to make a full response to the Prosecution's submissions, he needs the French translations of these documents;

CONSIDERING that the interests of justice and fairness warrant an extension of time pending the translation of the Prosecution's submissions, and that accordingly the Appellant has established good cause within the meaning of Rule 116 (A) of the Rules;

RECALLING that the Registrar is under direction to provide a French translation of the Trial Chamber Judgement, delivered on 13 December 2005 ("Trial Judgement"), to the Respondent and his Counsel by 15 May 2006, at the latest;[5]

CONSIDERING that, pursuant to paragraph 16 of the Practice Direction,[6] the Pre-Appeal Judge may vary any time-limit prescribed under this Practice Direction and that it is in the interests of justice to extend the time-limits prescribed in the present decision until the Respondent and his Counsel are served with the translation of the Trial Judgement;

FOR THE FOREGOING REASONS:

HEREBY GRANT the Motion for Extension of Time and:

DIRECT the Registrar to provide the French translations of the Motion for Variation and its Annex; the Appellant's Brief and the Corrigendum to the Respondent without undue delay; [7]

ALLOW the Respondent to file a response to the Motion for Variation within ten days of the date of receipt of the French translation of that motion or within ten days of receipt of the French translation of the Trial Judgement, whichever is the later;

ALLOW the Respondent to file a response to the Appelant's brief within forty days of the date of receipt of the French translation of the Appellant's Brief and the *Corrigendum*;

AND DIRECTS the Registrar to inform the Appeals Chamber and the Prosecution when the French translations of the Trial Judgement, the Prosecutor's Appellant's Brief, the *Corrigendum* and the Prosecutor's Motion for Variation have been served on the Appellant;

ORDER the Registry to lift the confidentiality of the Motion for Extension of Time;

Done in English and French, the English text being authoritative.

Done this 13th day of April 2006, at The Hague, The Netherlands.

[Signed] : Liu Daqun

[4] Decision on Motion for Extension of Time for Filing of Notice of Appeal, 16 December 2005, p. 2.
[5] Decision on Registrar's Request for an Extension of Time for Filing an Official Translation of the Trial Judgement, 25 January 2006, p. 3.
[6] Dated 16 September 2002.
[7] The Registry has informed the Pre-Appeal Judge that the translation of the Motion for Variation, on one hand, and the translation of the Appellant's Brief and the Corrigendum, on the other, will have been completed, by 21 April 2006 and 31 May 2006 respectively.

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Notice on Prosecutor's Motion Withdrawing Motion Regarding Confidential Filings 17 May 2006 (ICTR-2001-76-A)

(Original: not specified)

Appeals Chamber

Pre-Appeal Judge : Liu Daqun

Aloys Simba – Withdrawal of a motion

International Instrument Cited :

Rules of Procedure and Evidence, Rule 108 bis *(B)*

International Case Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Aloys Simba, Order Appointing a Pre-Appeal Judge, 24 January 2006 (ICTR-2001-76)

I, LIU DAQUN, 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 ("Tribunal") and Pre-Appeal Judge in this case;[1]

NOTING the Prosecutor's Motion Regarding Confidential Filings, filed by the Office of the Prosecutor on 13 April 2006 ("Prosecution" and "Motion Regarding Confidential Filings", respectively), in which the Prosecution requests: (i) the Appeals Chamber to lift the confidentiality of a request filed by Aloys Simba on 7 April 2006;[2] and (ii) the Appeals Chamber to issue an order directing the parties to file on a confidential basis only when a confidential filing serves the interests of justice;[3]

NOTING that by the Prosecutor's Motion Withdrawing Motion Regarding Confidential Filings filed on 10 May 2006, the Prosecution withdraws the Motion Regarding Confidential Filings;

NOTING the Practice Direction on Withdrawal of Pleadings of 24 April 2001 ("Practice Direction") which states as follows:

> A party seeking to withdraw a motion, counter motion, or a response to a motion, shall do so by filing a notice of withdrawal with the Registry or, if the matter is before the Trial Chamber, by an oral communication to the Chamber. It shall not be necessary for the party to file a further motion requesting leave of the Trial Chamber for the withdrawal.

[1] See Order Appointing a Pre-Appeal Judge, 24 January 2006.
[2] See Requête en extrême urgence de la Défense en vue d'obtenir un report de délai pour répondre à la Requête du Procureur en modification de son Acte d'appel et déposer son Mémoire en réponse au Mémoire du Procureur (Articles 116 (B) et 112 du RPP, confidentially filed on 6 April 2006, by Aloys Simba. The confidentiality of this Motion was lifted in the Decision on Respondent's Motion for Extension of Time, filed on 13 April 2006.
[3] Motion Regarding Confidential Filings, para. 4.

RECALLING that pursuant to Rule 108 *bis* (B) the Pre-Appeal Judge shall ensure that the proceedings are not unduly delayed and shall take any measures related to procedural matters;

HEREBY RECOGNISE the Motion Regarding Confidential Filings as withdrawn.

Done in English and French, the English text being authoritative.

Done this 17th day of May 2006, at The Hague, The Netherlands.

[Signed] : Liu Daqun

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Decision on Defence Motion for Extension of Time to Respond to the Prosecutor's Appellant Brief
20 June 2006 (ICTR-2001-76-A)

(Original: English)

Appeals Chamber

Pre-Appeal Judge : Liu Daqun

Aloys Simba – Extension of time – Extensions of time previously granted, French translation – Outcome of a pending motion that could have a bearing on the substance of the Respondent's response – Good cause – Motion granted in part

International Instruments Cited :

Rules of Procedure and Evidence, Rules 108, 111, 112 and 116 ; Statute, Art. 20

International Cases Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Eliézer Niyitegeka, Decision on Appellant's Motion for Adjournment, 1 April 2004 (ICTR-96-14) ; Appeals Chamber, The Prosecutor v. Aloys Simba, Decision on Motion for Extension of Time for Filing of Notice of Appeal, 16 December 2005 (ICTR-2001-76) ; Appeals Chamber, The Prosecutor v. Aloys Simba, Order Appointing a Pre-Appeal Judge, 24 January 2006 (ICTR-2001-76) ; Appeals Chamber, The Prosecutor v. Aloys Simba, Decision on Registrar's Request for Extension of Time for Filing an Official Translation of the Trial Judgement, 25 January 2006 (ICTR-2001-76) ; Appeals Chamber, The Prosecutor v. Aloys Simba, Decision on Respondent's Motion for Extension of Time, 13 April 2006 (ICTR-2001-76)

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Stanislav Galić, Decision on Prosecution's Requests for Extensions of Time and of Page Limit for the Response, 21 February 2005 (IT-98-29)

I, LIU DAQUN, 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 ("Tribunal") and Pre-Appeal Judge in this case,[1]

BEING SEIZED OF "*Requête en extrême urgence de la défense en vue d'obtenir un report de délai pour répondre au mémoire en appel du procureur*" filed on 12 June 2006, in which Aloys Simba ("Respondent") requests that the time-limit to respond to the Prosecutor's Appellant's Brief filed on 27 March 2006 ("Prosecution Appeal Brief"), be extended until 40 days after the Respondent files his Appeal Brief;

NOTING that the Prosecution has no objection to the Request;[2]

NOTING that so far the Respondent has been granted several extensions of time to file his submissions on appeal on the ground that he is entitled to receive French translations of various documents;[3]

NOTING that according to these previous decisions,[4] the Respondent is allowed to file:

(i) his Notice of Appeal no later than 30 days after the filing of the French translation of the Trial Judgement;[5]

(ii) his response to the Prosecution Appeal Brief within 40 days of the date of receipt of the French translation of the Prosecution Appeal Brief and its Corrigendum;[6]

NOTING that the Respondent was also granted an extension of time to file his response to the "Prosecutor's Motion for Variation of Notice of Appeal, pursuant to Rule 108", filed by the Prosecution in English on 27 March 2006 ("Motion for Variation");[7]

NOTING that the French translation of the Motion for Variation was filed on the 19 April 2006, but was only served to the Respondent on the 11 June 2006,[8] and that the Respondent filed his Response to this Motion for Variation on 14 June 2006;[9]

NOTING that the late service of the French translation of the Motion for Variation has delayed the decision relating to the Motion for Variation;

RECALLING that pursuant to Rule 111 of the Rules an appellant shall file his Appeal Brief within 75 days of the filing of his Notice of Appeal;

RECALLING that pursuant to Rule 112 of the Rules the Respondent has 40 days to respond to the Prosecution Appeal Brief;

CONSIDERING that according to Rule 116 an extension of time limit may be granted upon a showing of good cause;

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[1] See Order Appointing a Pre-Appeal Judge, 24 January 2006.

[2] Prosecutor's Response to "Requête en extrême urgence de la défense en vue d'obtenir un report de délai pour répondre au mémoire en appel du procureur", 13 June 2006, para. 8.

[3] Decision on Respondent's Motion for Extension of Time, 13 April 2006 ("Second Decision on Extension of Time); Decision on Registrar's Request for Extension of Time for Filing an Official Translation of the Trial Judgement, 25 January 2006 ("Decision on the Registrar's Request"); see also Decision on Motion for Extension of Time for Filing of Notice of Appeal, 16 December 2005 ("First Decision on Extension of Time").

[4] Ibid.

[5] Decision on the Registrar's Request, p. 3.

[6] Second Decision on Extension of Time, p. 3. The French translation of the Trial Judgement was filed on 15 May 2006 and served to the Respondent on 23 May 2006. Also, the French translation of the Prosecution Appeal Brief was filed on 31 May 2006 and served to the Respondent on 8 June 2006.

[7] Second Decision on Extension of Time, p. 3.

[8] The Pre-Appeal Judge has been informed by the Registry that the French translation of the Motion for Variation was served to the Respondent on 10 June 2006, who acknowledged receipt on 11 June 2006.

[9] "*Réponse de la Défense à la Requête du Procureur en modification de l'Acte d'appel conformément a l'article 108 du Règlement de Procédure et de Preuve*".

CONSIDERING that the Respondent submits that strict compliance with these time limits would cause overlaps which would make it impossible for the defence to avail itself of the respective time limits of 75 days and 40 days within which to accomplish each of the two tasks referred to above and that this overlap will undermine the rights of the Respondent as guaranteed by Article 20 of the Statute of the Tribunal;

CONSIDERING that the said deadlines were extended pursuant to the Respondent's request;[10]

CONSIDERING FURTHER that arguments regarding workload do not by themselves constitute good cause,[11] since this workload is common to any counsel's office;

CONSIDERING however that the outcome of the pending Motion for Variation may have a bearing on the substance of the response to the Prosecution Appeal Brief;

FINDING therefore that good cause exists justifying a further extension of time limit;

FOR THE FOREGOING REASONS,

GRANT the Request in part, and allow the Respondent to file the Response to the Prosecution Appeal Brief no later than 40 days from the date of service to the Respondent of the French translation of the decision on the Motion for Variation;

AND REMIND the Respondent of the time-limits for the filing of the Respondent's submissions:

(a) The Respondent's Notice of Appeal to be filed no later than 30 days from the date of service to the Respondent of the French translation of the Trial Judgement;

(b) The Respondent's Appeal Brief to be filed no later than 75 days from the date of filing of his Notice of Appeal.

Done in English and French, the English text being authoritative.

Done this 20th day of June 2006, At The Hague, The Netherlands.

[Signed] : Liu Daqun

[10] First Decision on Extension of Time, p. 3; Decision on Registrar's Request for Extension of Time for Filing an Official Translation of the Trial Judgement, 25 January 2006, p. 3.

[11] *Prosecutor v. Stanislav Galić*, Case N°IT-98-29-A, Decision on Prosecution's Requests for Extensions of Time and of Page Limit for the Response, 21 February 2005; see also *Eliézer Niyitegeka v. Prosecutor*, Case N°ICTR-96-14-A, Decision on Appellant's Motion for Adjournment, 1 April 2004, para. 18, where the Appeals Chamber held that the fact that counsel carried a heavy workload was an insufficient reason for the adjournment of an appeal hearing.

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Scheduling Order
15 August 2006 (ICTR-2001-76-A)

(Original: English)

Appeals Chamber

Pre-Appeal Judge : Liu Daqun

Aloys Simba – Scheduling order – Continuation of the pre-appeal proceedings

International Instrument Cited :

Rules of Procedure and Evidence, Rules 111 and 123

International Case Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Aloys Simba, Order Appointing a Pre-Appeal Judge, 24 January 2006 (ICTR-2001-76)

I, LIU DAQUN, 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 ("Tribunal") and Pre-Appeal Judge in this case,[1]

NOTING the "*Requête de la défense en vue de la suspension de tous les délais de la procédure en appel en cours*", filed by Counsel for Aloys Simba on 22 July 2006 ("Motion" and "Applicant" respectively), in which the Applicant requests a stay of appeal proceedings in this case and further that the case be returned to the Trial Chamber for the purposes of a review pursuant to Rule 123 of the Rules of Procedure and Evidence ("Rules");

NOTING that the filings relevant to the Motion are not yet complete;

NOTING that the Applicant filed a Notice of Appeal on 22 June 2006;

RECALLING the Decision on Defence Motion for Extension of Time to Respond to the Prosecutor's Appellant's Brief, 20 June 2006, in which the Pre-Appeal Judge reminded the Applicant of the time-limits for filing his Notice of Appeal and Appeal Brief;

HEREBY CONFIRM the continuation of the pre-appeal proceedings in this case;

AND FURTHER CONFIRM that pursuant to Rule 111 of the Rules the Applicant's Appellant's Brief is due no later than 5 September 2006.

Done in English and French, the English text being authoritative.

[1] See Order Appointing a Pre-Appeal Judge, 24 January 2006.

Done this 15th day of August 2006, at The Hague, The Netherlands.

[Signed] : Liu Daqun

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Decision on "Prosecutor's Motion for Variation of Notice of Appeal Pursuant to Rule 108" 17 August 2006 (ICTR-2001-76-A)

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge; Mehmet Güney; Liu Daqun; Theodor Meron; Wolfgang Schomburg

Aloys Simba – Variation of the notice of appeal – Good cause – Omissions in the notice of appeal that become apparent during the drafting of the Appellant's brief, Familiarity with the case – Clarification to the two grounds in the notice of appeal, Substantive amendments affecting the content of the notice of appeal – Absence of material prejudice for the Defence – Catch-all phrases – Motion denied – Absence of consideration of some paragraphs of the Appellant's brief

International Instrument Cited :

Rules of Procedure and Evidence, Rule 108

International Cases Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Georges Rutaganda, Decision (on Motion to Amend the Appellant's Notice of Appeal), 5 April 2001 (ICTR-96-3) ; Appeals Chamber, The Prosecutor v. Elizaphan and Gérard Ntakirutimana, Décision sur les Demandes en Modification des Moyen d'Appel et les Requêtes aux Fins d'Outrepasser la Limite de Pages Dans le Mémoire de l'Appelant, 21 July 2003 (ICTR-96-10 and ICTR-96-17) ; Appeals Chamber, The Prosecutor v. Eliézer Niyitegeka, Decision on Defence Motion for Variation of the Notice of Appeal, 29 January 2004 (ICTR-96-14) ; Trial Chamber, The Prosecutor v. Aloys Simba, Judgement, 13 December 2005 (ICTR-2001-76) ; Trial Chamber, The Prosecutor v. Aloys Simba, Decision on Defence Motion for Extension of Time to Respond to the Prosecutor's Appellant's Brief, 20 June 2006 (ICTR-2001-76)

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Goran Jelisić, Judgment, 5 July 2001 (IT-95-10) ; 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. Blagoje Simić, Decision on Motion of Blagoje Simić to Amend Notice of Appeal, 16 September 2004 (IT-95-9) ; Appeals Chamber, The Prosecutor v. Momir Nikolić, Decision on Appellant's Motion to Amend Notice of Appeal, 21 October 2004 (IT-02-60/1) ; Appeals Chamber, The Prosecutor v. Momir Nikolić, Decision on Appellant's Requests to Withdraw Previous Motions, to Revise Appellant's Brief and to Amend Notice of Appeal, 19 July 2005 (IT-02-60/1) ; Appeals Chamber, The Prosecutor v. Vidoje Blagojević et Dragan Jokić, Decision on Prosecution's Request for Leave to Amend Notice of Appeal in Relation to Vidoje Blagojević, 20 July 2005 (IT-95-9) ; Appeals Chamber, The Prosecutor v. Vidoje Blagojević et Dragan Jokić, Decision on Motions Related

82. 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 the Prosecutor's Motion for Variation of Notice of Appeal Pursuant to Rule 108 ("Motion for Variation"), filed on 27 March 2006.[1] The Prosecutor seeks leave to amend its Notice of Appeal in accordance with Rule 108 of the Rules of Procedure and Evidence of the Tribunal ("the Rules").

83. The Trial Chamber judgement in the case against Aloys Simba was issued on 13 December 2005.[2] The Prosecutor filed its original Notice of Appeal ("Notice of Appeal") on 12 January 2006, which contained two grounds of appeal.[3] Under Ground 1, the Prosecutor argues that the Trial Chamber erred in fact and in law by failing to find the Appellant criminally responsible for his participation in the Cyanika Parish Massacre.[4] According to the Prosecutor, the Trial Chamber erred in holding that it was necessary to prove the Appellant was physically present at Cyanika Parish in order to hold him responsible for this massacre "by virtue of his participation in a Joint Criminal Enterprise with a common purpose to kill Tutsi at [three] massacres sites, namely, Murambi Technical School, Kaduha Parish, and Cyanika Parish".[5] Ground 2 states that the Trial Chamber erred in law by imposing a sentence of 25 years, which the Prosecutor argues is "manifestly unfit" and should be increased to life imprisonment given various factors such as the gravity of the crimes and the individual circumstances.[6]

Arguments of the Parties

84. The Motion for Variation seeks to amend both Grounds 1 and 2.[7] In relation to Ground 1, the Prosecutor seeks to provide "clarification and better notice by identifying as a distinct error of law" the Trial Chamber's alleged misapplication of the *mens rea* standard for the first category of joint criminal enterprise.[8] The Prosecutor states that the Trial Chamber required proof that Aloys Simba "shared the common purpose" whereas the requisite standard according to the Prosecutor is "the intent to further the common purpose, this being the shared intent on the part of all co-perpetrators, which is different from sharing the common purpose."[9] The Prosecutor submits that this additional error of law was identified only upon the preparation of its Appellant's brief and "is influenced by and derives from the original errors of facts and law listed" in the Notice of Appeal.[10] In relation to Ground 2, the Prosecutor asserts, again, that the proposed variation provides clarification and better notice, this time in relation to the alleged errors of the Trial Chamber in determining the sentence, by specifying that the Trial Chamber "erred by not considering Rwanda's sentencing practice".[11] The Prosecutor argues that the Notice of Appeal, by using the term "*inter alia*" listed "without exhaustion the errors

[1] *The Prosecutor v. Aloys Simba*, Case N°ICTR-01-76-A, Prosecutor's Motion for Variation of the Notice of Appeal Pursuant to Rule 108, 27 March 2006 and its Attachment A: Prosecutor's Amended Notice of Appeal ("Amended Notice of Appeal").
[2] *The Prosecutor v. Aloys Simba*, Case N°ICTR-01-76-T, Trial Judgement, 13 December 2005 ("Judgement").
[3] *The Prosecutor v. Aloys Simba*, Case N°ICTR-01-76-A, Prosecutor's Notice of Appeal, 12 January 2006. The Prosecutor's Notice of Appeal was filed within the 30 days limit from judgement prescribed in Rule 108 of the Rules.
[4] Notice of Appeal, para. 1
[5] Notice of Appeal, paras 2-3, which refers to paragraphs 122-132, 399-402 and 407 of the Judgement.
[6] Notice of Appeal, paras 8-10.
[7] Motion for Variation, para. 1; Amended Notice of Appeal, paras 2, 4 and 12.
[8] Motion for Variation, para. 4.
[9] Motion for Variation, para. 8.
[10] Motion for Variation, para. 4.
[11] Motion for Variation, para. 9 and Amended Notice of Appeal, para. 12.

committed by the Trial Chamber" in this respect.[12] The Prosecutor points out that it anticipated the need to make amendments to the Notice of Appeal by referring to "[s]uch other grounds of appeal as this Chamber may authorize […]".[13]

85. On 12 June 2006, Aloys Simba filed his Response.[14] He opposes the Motion for Variation, arguing that, pursuant to Rule 108 of the Rules, it should have filed within thirty days from the issuing of the Judgement. In its Reply,[15] the Prosecutor argues that the Respondent misread Rule 108 and that the Motion for Variation was timely as it was filed on the same day as the Appellant's Brief.

Discussion

86. Rule 108 of the Rules reads as follows:

> 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 filling, 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.

87. As a preliminary matter, the Appeals Chamber notes that contrary to the Defence assertion,[16] a proposed variation to the Notice of Appeal is not bound by the thirty day time-limit which applies to the filing of the Notice of Appeal,[17] although the lateness of a motion for variation of Notice of Appeal can weigh against the appellant, particularly considering the need to avoid delays in the proceedings and prejudice to the other party in the case.[18]

88. The Appeals Chamber may grant a motion to vary the Notice of Appeal upon the showing of "good cause". The concept of "good cause" applies to both good reason for including new or amended grounds in the Notice of Appeal and good reason for failing to include grounds or correctly phrase them in the initial filing of the Notice of Appeal.[19] The assessment of "good cause" is made on a case by case basis[20] and various factors can be taken into account.[21] Most recently, the Appeals Chamber has summarized some of these factors as follows:

> "These have included the fact that the variation is so minor that it does not affect the content of the notice of appeal; the fact that the opposing party would not be prejudiced by the variation or has not objected to it; and the fact that the variation would bring the notice of appeal into

[12] Motion for Variation, paras 1, 9.
[13] Motion for Variation, para. 10.
[14] The Prosecutor v. Aloys Simba, Case N°ICTR-01-76-T, Réponse de la Défense à la Requête du Procureur en Modification de l'Acte d'Appel Conformément a l'Article 108 du Règlement de Procédure et de Preuve (RPP), 27 March 2006, paras 5-6 ("Response"). As allowed by the Pre-Appeal Judge in the Decision on Respondent Motion for Extension of Time, 13 April 2006, this Response was filed within 10 days of the service of the French translation of the Motion for Variation.
[15] The Prosecutor v. Aloys Simba, Case N°ICTR-01-76-T, Prosecutor's Reply to "Réponse de la Défense a la Requête du Procureur en Modification de l'Acte d'Appel Conformément à l'Article 108 du Règlement de Procédure et de Preuve (RPP)", 19 June 2006 paras 4-5 and 8. ("Reply")
[16] Response, para. 5.
[17] The Appeals Chamber has granted amendments to the Notice of Appeal made relatively late in the appeals process, such as during the oral hearing, see *The Prosecutor v. Jelisić*, Case N°IT-95-14/2-A, Appeal Judgement, 5 July 2001, para. 18; and over 12 months after the filing of the initial Appellant's Brief, see *The Prosecutor v. Nikolić*, Case N°IT-02-60/1-A, Decision on Appellant's Requests to Withdraw Previous Motions, to Revise Appellant's Brief and to Amend Notice of Appeal, 19 July 2005, pp. 3-4.
[18] *The Prosecutor v. Blagojević and 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. 8.
[19] *The Prosecutor v. Blagojević and 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. 7.
[20] *The Prosecutor v. Kordić and 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.
[21] *The Prosecutor v. Blagojević and Jokić*, Case N°IT-02-60-A, Decision on Motions Related to the Pleadings in Dragan Jokić's Appeal, 24 November 2005, para. 7; *The Prosecutor v. Kordić and Čerkez*, Case N°IT-95-14/2-A, Decision Granting Leave to Dario Kordić to Amend his Grounds of Appeal, 9 May 2002, para. 7.

conformity with the appeal brief. Where the appellant seeks a substantive amendment broadening the scope of the appeal, "good cause" might also, under some circumstances, be established. The Appeals Chamber notes that it has never established a cumulative list of requirements that must be met each time a substantive amendment is to be granted".[22]

8. In the Motion for Variation, the Prosecutor submits that good cause exists for the Appeals Chamber to accept the two proposed amendments. The Prosecutor makes three arguments common to both proposed amendments, namely that the omissions to the Notice were only discovered during the preparation of the Appellant's Brief; that the proposed amendments are mere clarifications; and that there is no material prejudice as the amendment puts the Notice in conformity with the Appellant's Brief.

9. First, the Prosecutor argues that the omissions in its Notice of Appeal only became apparent during the drafting of its Appellant's Brief.[23] The Appeals Chamber notes that this, in and of itself, cannot constitute good cause. As previously stated by the Appeals Chamber:

> "Obviously, any amendment sought to any notice of appeal is the result of further analysis having been undertaken over the course of time; this fact cannot constitute good case for an amendment taken alone".[24]

Under Rule 108 of the Rules, the parties have the obligation to file a Notice of Appeal setting forth their grounds of appeal not more than thirty days from the date of the Trial Judgement.[25] They are therefore expected to have conducted a comprehensive review of the Judgement within this timeframe. Allowing the Prosecutor to amend its Notice of Appeal simply because it has gained more familiarity with the case in drafting its Appellant's Brief essentially would allow the parties to "restart the appeal process at will."[26]

10. Secondly, the Prosecutor contends that good cause exists to introduce the two new proposed amendments to the Notice of Appeal because they do not seek to provide entirely new grounds of appeal. Rather, according to the Prosecutor, they simply provide clarification to the two grounds in the Notice of Appeal and are necessary "in order to furnish better notice to both the Respondent and the Appeals Chamber of the issues involved."[27] The Appeals Chamber does not agree. Such a justification can only apply to a narrow set of circumstances, such as minor formal modifications.[28] Both amendments go beyond being minor variations that provide mere clarification and are substantive amendments affecting the content of the Notice of Appeal, broadening its scope and, in fact, alleging additional grounds of appeal. The first proposed amendment adds an entire paragraph to the first ground of appeal alleging an additional error of the Trial Chamber, i.e. a legal error in the assessment of *mens rea* for the first form of joint criminal enterprise. The second proposed amendment invites the Appeals Chamber to consider the sentencing practice of Rwanda, an exercise which could involve a substantial review of the procedures in Rwanda and thus, cannot be considered mere clarification of the initial arguments on sentencing.

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[22] *The Prosecutor v. Blagojević and 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. 7.
[23] Motion for Variation, paras 1 and 8.
[24] *The Prosecutor v. Blagojević and Jokić*, Case N°IT-02-60-A, Decision on Motions Related to the Pleadings in Dragan Jokić's Appeal, 24 November 2005, para. 10.
[25] Rule 108 of the Rules.
[26] *The Prosecutor v. Blagojević and 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. 8.
[27] Motion for Variation, para. 4.
[28] The Prosecutor v. Ntakirutimana, Case N°ICTR-96-10-A and ICTR-96-17-A, Décision sur les Demandes en Modification des Moyen d'Appel et les Requêtes aux Fins d'Outrepasser la Limite de Pages Dans le Mémoire de l'Appelant, 21 July 2003, p. 3; The Prosecutor v. Nikolić, Case N°IT-02-60/1-A, Decision on Appellant's Motion to Amend Notice of Appeal, 21 October 2004, p. 3. This may also arise when the opposing party concedes that the proposed amendment was already included in the Original Notice, see The Prosecutor v. Rutaganda, Case N°ICTR-96-3-A, Decision (on Motion to Amend the Appellant's Notice of Appeal), 5 April 2001, p. 6. Cf. The Prosecutor v. Niyitegeka, Case N°ICTR-96-14-A, Decision on Defence Motion for Variation of the Notice of Appeal, 29 January 2004, p. 3.

11. Thirdly, the Prosecutor suggests that the Defence has suffered no material prejudice because the Motion for Variation and the Amended Notice of Appeal were filed on the same day as the Appellant's Brief.[29] While the absence of prejudice for the opposing party is an important factor to be taken into account by the Appeals Chamber when assessing a request to vary grounds of appeal, the Appeals Chamber does not consider that it constitutes good cause in and of itself. The mere fact that an appellant files proposed amendments before or the same day that the appellant's brief is filed is not sufficient to justify a variation of the notice of appeal, in particular when the variation sought consists of the addition of an entirely new error, as in the present case. In this respect, the Appeals Chamber notes that it has previously accepted amendments, which put the notice of appeal in conformity with the appellant's brief only because other factors or specific circumstances existed.[30] In this case, the Prosecutor has identified no such special circumstances. Granting leave to amend a notice of appeal just because the amendment would cause no prejudice would circumvent Rule 108 of the Rules, the time-limits it imposes, and the "good cause" requirement.

12. In the Motion for Variation, the Prosecutor also provides a specific argument for each proposed amendment. Under Ground 1, the Prosecutor argues that the question of the correct *mens rea* under the first category of joint criminal enterprise falls within the ambit of the original Notice of Appeal which referred to the acquittal of the Accused for the events at Cyanika Parish as he was found not to have been present during the massacres.[31] The original Notice of Appeal referred to paragraph 402 of the Trial Judgement which indeed mentioned the *mens rea* formula which the Prosecutor disputes,[32] but the Trial Judgement itself does not state that it is citing a *mens rea* standard.[33] This vague reference in the original Notice of Appeal to a paragraph of the Trial Judgement does not suffice in itself to show that the legal error alleged in the Amended Notice falls within the ambit of the original Ground 1. The Prosecutor has therefore not demonstrated how the paragraph in the Amended Notice is articulating a point allegedly implicit in the original Notice of Appeal.[34]

13. Under the second ground in the Amended Notice concerning the appeal on the sentence, the Prosecutor seeks to include an appeal on the Trial Chamber's alleged failure to consider the sentencing practices in Rwanda.[35] The Prosecutor states that the original Notice of Appeal was not exhaustive of its discussion of the alleged errors of the Trial Chamber, as reflected by the use of the terms "*inter alia*".[36] The Prosecutor argues that therefore it is permitted to include a reference to sentencing practices in Rwanda in the Amended Notice. However, simply inserting catch-all phrases such as "*inter alia*" or "[s]uch other grounds of appeal as this Chamber may authorize […]"[37] to provide for any amendments to the Notice of Appeal that an appellant may later seek, does not establish good cause for the Appeals Chamber to authorize those amendments under Rule 108 of the Rules.

Disposition

14. For the foregoing reasons, the Appeals Chamber DISMISSES the Prosecutor's Motion for Variation in its entirety; INFORMS the parties that paragraphs 65 to 74 of the Prosecutor's Appellant's Brief – relating to the intent to further the common purpose – and paragraphs 108 to 114 of that brief – relating to the Rwandan sentencing practice – will be disregarded; FINDS that there is

[29] Motion for Variation, para. 1; see also Response, para. 8.
[30] *The Prosecutor v. Nikolić*, Case N°IT-02-60/1-A, Decision on Appellant's Motion to Amend Notice of Appeal, 21 October 2004, p. 3; *The Prosecutor v. Simić*, Case N°IT-95-9-A, Decision on Motion of Blagoje Simić to Amend Notice of Appeal, 16 September 2004, pp. 4-5; *The Prosecutor v. Blagojević and 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, pp. 3-4.
[31] Motion for Variation, para. 4.
[32] Notice of Appeal, para. 2.
[33] Judgement, para. 402.
[34] *The Prosecutor v. Blagojević and 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, pp. 3-4.
[35] Motion for Variation, para. 9.
[36] Motion for Variation, para. 9.
[37] Motion for Variation, para. 10.

no need for the Prosecutor to re-file his Appellant's Brief; and AFFIRMS the time-limits for briefing set by the Pre-Appeal Judge.[38]

Done in English and French, the English text being authoritative.

Done this 17th day of August 2006, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

[38] *The Prosecutor v. Aloys Simba*, Case N°ICTR-01-76-T, Decision on Defence Motion for Extension of Time to Respond to the Prosecutor's Appellant's Brief, 20 June 2006.

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Order Allowing an Extension of Time for the Respondent's Filings 11 September 2006 (ICTR-2001-76-A)

(Original: English)

Appeals Chamber

Pre-Appeal Judge : Liu Daqun

Aloys Simba – Extension of time – Language understood by the Respondent and his Counsel – Full response to the Prosecution's submissions – Interests of justice and fairness

International Instrument Cited :

Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, 16 September 2002

International Cases Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Aloys Simba, Decision on Motion for Extension of Time for Filing of Notice of Appeal, 16 December 2005 (ICTR-2001-76) ; Appeals Chamber, The Prosecutor v. Aloys Simba, Order Appointing a Pre-Appeal Judge, 24 January 2006 (ICTR-2001-76) ; Appeals Chamber, The Prosecutor v. Aloys Simba, Decision on Registrar's Request for an Extension of Time for Filing an Official Translation of the Trial Judgement, 25 January 2006 (ICTR-2001-76) ; Appeals Chamber, The Prosecutor v. Aloys Simba, Decision on Respondent's Motion for Extension of Time, 13 April 2006 (ICTR-2001-76) ; Trial Chamber, The Prosecutor v. Aloys Simba, Decision on Defence Motion for Extension of Time to Respond to the Prosecutor's Appellant's Brief, 20 June 2006 (ICTR-2001-76)

I, LIU DAQUN, 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 ("Tribunal") and Pre-Appeal Judge in this case;[1]

NOTING the "Prosecutor's Urgent Motion Objecting to '*Mémoire de la Défense*'", filed on 8 September 2006 ("Motion"), in English, by the Office of the Prosecutor ("Prosecution");

RECALLING that pursuant to Paragraph 11 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, of 16 September 2002, Counsel for Aloys Simba ("Respondent") has 10 days to respond to the Motion;

CONSIDERING that the language understood and spoken by the Respondent and his Counsel is French and that, in order to be able to make a full response to the Prosecution's submissions, the Respondent needs the French translation of the Motion;

[1] See Order Appointing a Pre-Appeal Judge, 24 January 2006.

CONSIDERING FURTHER that the Respondent has consistently argued that its ability to make full answer to Prosecution filings depends on their availability in French;[2]

CONSIDERING that the interests of justice and fairness warrant an extension of time pending the translation of the Motion;

FOR THE FOREGOING REASONS,

ALLOW the Respondent to file a response, if any, to the Motion no later than 10 days from the date of service to the Respondent of its French translation;

AND ALLOW the Respondent a suspension of time limits for the filing of a response or reply to documents filed by the Prosecution in English until the date of service of the French translations of those documents.

Done in English and French, the English text being authoritative.

Done this 11th day of September 2006, at The Hague, The Netherlands.

[Signed] : Liu Daqun

[2] Decision on Respondent's Motion for Extension of Time, 13 April 2006 ("Second Decision on Extension of Time); Decision on Registrar's Request for Extension of Time for Filing an Official Translation of the Trial Judgement, 25 January 2006 ("Decision on the Registrar's Request"); see also Decision on Motion for Extension of Time for Filing of Notice of Appeal, 16 December 2005 ("First Decision on Extension of Time"); Decision on Defence Motion for Extension of Time to Respond to the Prosecutor's Appellant's Brief, 20 June 2006.

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Decision on Defence Motion for Extension of Time to Reply to the Prosecutor's Response to a Motion for Review 18 September 2006 (ICTR-2001-76-A)

(Original: not specified)

Appeals Chamber

Pre-Appeal Judge : Liu Daqun

Aloys Simba – Extension of time – Motion moot – Motion denied

International Instrument Cited :

Rules of Procedure and Evidence, Rule 116

International Case Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Aloys Simba, Order Appointing a Pre-Appeal Judge, 24 January 2006 (ICTR-2001-76)

I, LIU DAQUN, 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 ("Tribunal") and Pre-Appeal Judge in this case;[1]

NOTING the Prosecutor's Response to "Requête en extrême urgence de la défense en vue de la révision du Jugement de la Chambre de première instance du TPIR en date du 13 décembre 2005 pour cause de faits nouveaux (art. 25 du Statut du TPIR, 120 et 121 du RPP)" filed by the Prosecution in English on 10 August 2006 ("Prosecution Response to the Review Motion");

BEING SEIZED OF "Requête en extrême urgence de la défense en vue d'obtenir un report de délai pour répliquer a la réponse du procureur suite à « La requête en extrême urgence de la défense en vue de la révision du jugement en date du 13 décembre 2005 pour cause de faits nouveaux (Article 25 du Statut du TPIR, 120 and 121 du RPP) » (Articles 20 du Statut et 73 du RPP)" filed on 23 August 2006 ("Request "), in which the Defence requests that the time-limit to reply to the Prosecution Response to the Review Motion pursuant to Rule 116 of the Rules of Procedure and Evidence be extended until 4 days after it is translated into French;

NOTING that the Prosecution Response to the Review Motion was withdrawn on 31 August 2006;[2]

FINDING therefore that the Request is moot;

FOR THE FOREGOING REASONS,

DISMISS the Request.

[1] See Order Appointing a Pre-Appeal Judge, 24 January 2006
[2] Prosecutor's Notice of Withdrawal of Pleadings, 31 August 2006.

Done in English and French, the English text being authoritative.

Done this 18th day of September 2006, at The Hague, The Netherlands.

[Signed] : Liu Daqun

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Order Concerning Aloys Simba's Appellant's Brief 29 September 2006 (ICTR-2001-76-A)

(Original: not specified)

Appeals Chamber

Pre-Appeal Judge : Liu Daqun

Aloys Simba – Appellant's brief – Electronic version and hard copy – Length – Absence of motion requesting an authorization to extend the page, Absence of good cause – Abuse of process, Denial of fees associated with improper filings – Rejection of both versions of the Appellant's brief – Re-filing of the Appellant's Brief

International Instruments Cited :

Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, 16 September 2002 ; Rules of Procedure and Evidence, Rules 73 (F) and 108 bis (B)

I, LIU DAQUN, 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 ("Tribunal") and the Pre-Appeal Judge in this case;

NOTING the "*Mémoire d'appel de la Défense*", transmitted electronically to the Registry on 5 September 2006 ("Electronic Version of the Appellant's Brief") and filed confidentially on 6 September 2006 by Counsel for Aloys Simba ("Defence");

NOTING the original hard copy of the "*Mémoire d'appel de la Défense*", received by the Registry on 18 September 2006 and filed on 21 September 2006 ("Hard Copy of Appellant's Brief");

NOTING the "Prosecutor's Urgent Motion Objecting to '*Mémoire d'appel de la Défense*'" filed on 8 September 2006 ("Prosecutor's First Motion");

NOTING the "Prosecutor's Urgent Motion Objecting to '*Mémoire d'appel de la Défense*' and Annexes, as filed on 21 September 2006 and 18 September 2006, Respectively" filed on 27 September 2006 ("Prosecutor's Second Motion");

RECALLING that by virtue of Rule 108 *bis* (B) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), a 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";

RECALLING that, pursuant to the Practice Direction on the Length of Briefs and Motions on Appeal ("Practice Direction"), "[t]he brief of an appellant on appeal from a final judgement of a Trial Chamber will not exceed 100 pages or 30,000 words, whichever is greater" and that "an average page should contain fewer than 300 words";[1]

RECALLING ALSO that, pursuant to paragraph 5 of the Practice Direction, "A party must seek authorization in advance from the Appeals Chamber […] or the Pre-Appeal Judge to exceed the page limits in this Practice Direction and must provide an explanation of the exceptional circumstances that necessitate the oversized filing";

CONSIDERING that the Electronic Version of the Appellant's Brief consists of 125 pages, not including the table of contents, list of sources, glossary and annexes, while the Hard Copy of Appellant's Brief is 100 pages long;

CONSIDERING that each of the documents contains a total of more than 40,000 words, and that the average number of words contained in each page of the Hard Copy of Appellant's Brief is greater than 400;

CONSIDERING that the Defence has not filed a motion requesting the Appeals Chamber or the Pre-Appeal Judge to extend the page limit for its Appellant's Brief nor has it demonstrated good cause for such an extension;

CONSIDERING further that the Defence has not given any justification for filing confidentially the Electronic Version of the Appellant's Brief and the Hard Copy of Appellant's Brief and their respective annexes;

FINDING that the Electronic Version of the Appellant's Brief and the Hard Copy of Appellant's Brief have not been filed in compliance with the Practice Direction and that they are therefore invalid;

CONSIDERING that the Defence will not be prejudiced by the present order;

FINDING that the filing by the Defence of two different versions of the Appellant's Brief which exceed the prescribed length constitutes an abuse of process to be sanctioned, pursuant to Rule 73 (F) of the Rules, by the denial of fees associated with these improper filings;

FOR THE FOREGOING REASONS,

REJECT the filings of the Electronic Version of the Appellant's Brief and the Hard Copy of Appellant's Brief;

ORDER the Defence to re-file the Appellant's Brief with the Registry no later than 6 October 2006;

ORDER the Defence to strictly comply with the page and word limits set out in the Practice Direction;

ALLOW the Defence, upon showing that it would serve the interests of justice, to file simultaneously a confidential version and a public redacted version of its Appellant's Brief;

[1] Practice Direction on the Length of Briefs and Motions on Appeal, 16 September 2002, as amended.

DIRECT the Prosecution to file its Respondent's brief, if any, 40 days after the Defence re-files the Appellant's Brief;

DECLARE the Prosecutor's First Motion and Prosecutor's Second Motion moot; and

DIRECT the Registrar to withhold the payment of fees, if claimed, associated with the rejected filings.

Done in English and French, the English text being authoritative.

Done this 29th day of September 2006, at The Hague, The Netherlands.

[Signed] : Liu Daqun

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Decision on Aloys Simba's Motion to File his Appellant's Brief 4 October 2006 (ICTR-2001-76-A)

(Original: English)

Appeals Chamber

Pre-Appeal Judge : Liu Daqun

Aloys Simba – Filing of the Appellant's brief – Lifting of a sanction, Repetition in a second request of a request already made in a previous one that is still pending – Length limitations of an Appellant's brief – Exceptional leave to exceed the limit of words per page, Vagueness of the motion – Sending of the Appellant's Brief by express mail exclusively, Dispatch note to the mail agent being proof of the date of dispatch, Sending of the electronic copy of the Appellant's brief – Motion granted in part

International Instrument Cited :

Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, 16 September 2002

International Case Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Simba, Order concerning Aloys Simba's Appellant's Brief, 29 September 2006 (ICTR-2001-76)

1. The Pre-Appeal Judge is, in the present case, being seized of a motion by Aloys Simba (hereinafter the "Appellant") entitled *"Requête en extrême urgence de la défense en vue de solliciter exceptionnellement l'interprétation du paragraphe C (1) (a) de la Directive relative à la longueur des mémoires et des requêtes en appel et l'autorisation de dépasser le nombre de mots limité et de transmettre le mémoire d'appel uniquement par courrier express (article 73 du RPP)"*, filed on 3 October 2006 (hereinafter "3 October 2006 Motion" and "Practice Direction", respectively). On the same day, the Prosecutor filed a Response to this Motion.[1]

[1] Prosecutor's Response to the "Requête en extrême urgence de la défense en vue de solliciter exceptionnellement l'interprétation du paragraphe C (1) (a) de la Directive relative à la longueur des mémoires et des requêtes en appel et

2. On 29 September 2006, the Pre-Appeal Judge issued an order[2] mainly (i) rejecting both the electronic versions and hard copies of the Appellant's Brief filed respectively on 6 and 21 September 2006; (ii) instructing the Appellant to re-file his Appellant's Brief with the Registry of the Tribunal no later than 6 October 2006, in strict compliance with the page and word limits set out in the Practice Direction; (iii) requesting the Registrar to withhold the payment of fees, if claimed, associated with the rejected filings.

3. On 2 October 2006, the Appellant filed his "Extremely Urgent Defence Motion Seeking Review of the Order Concerning Aloys Simba's Appellant's Brief (Rule 73 of the Rules)" ("2 October 2006 Motion"), pending before the Pre-Appeal Judge.

4. In the operative paragraph of the 3 October 2006 Motion, the Appellant requests (i) interpretation of the provisions of Article C (1) (a) of the Practice Direction, in order to specify if the length limitations of an appellant's brief, that is, 100 pages or 30,000 words, must be interpreted as "optional and not cumulative"[3] (hereinafter "First Request"); (ii) exceptional leave to exceed, if necessary, the limit of 300 words per page (hereinafter "Second Request"); (iii) leave to send the Appellant's Brief and its annexes by express mail exclusively, with the dispatch note to the mail agent being proof of the date of dispatch (hereinafter "Third Request"); and (iv) lifting of the sanction imposed by the Order of 29 September 2006 (hereinafter "Fourth Request").

5. There will be no ruling on the Fourth Request, since an identical measure had earlier been requested in the 2 October 2006 Motion pending before the Pre-Appeal Judge. The Appellant's practice of repeating in a second Request a request already made in a previous one that is still pending, is likely to complicate the work of the Appeals Chamber unnecessarily and could, if it were repeated, be considered as an abuse of process necessitating appropriate sanctions.

6. Regarding the First Request, the 29 September 2006 Order has already reiterated the relevant provisions of the Practice Direction on the page and word limits imposed on an appellant's brief.[4] Article C (1) (a) of the Practice Direction which states that "[t]he brief of an appellant on appeal from a final judgement of a Trial Chamber will not exceed 100 pages or 30,000 words" must be read jointly with Articles (A) and (B). Article (A) determines the format for submitting the appellant's brief and Article (B) specifies that "[a]n average page should contain fewer than 300 words".[5] Hence, a reading of the relevant provisions shows that an appellant's brief which contains more than 30,000 words exceeds the authorized limit.[6] Furthermore, the Appellant, enlightened upon reading the Order of 29 September 2006, seems to have quite grasped its exact scope.[7]

7. Regarding the Second Request seeking exceptional leave to exceed "the limit of 300 words per page",[8] the Pre-Appeal Judge reiterates that this is an average number, the relevant limit being 30,000 words. Hence, the Appellant's request must be interpreted as a request to exceed the limit of 30,000 words. The Appellant substantiates this request by raising: his inability to verify the number of words in his fi1ings;[9] the importance of footnotes, a drastic reduction of which could reduce the effectiveness

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l'autorisation de dépasser le nombre de mots limité et de transmettre le mémoire d'appel uniquement par courrier express (article 73 du RPP)" , déposée le 3 octobre 2006 ("Response").

[2] *The Prosecutor v. Simba,* Case N°ICTR-01-76-A, Order concerning Aloys Simba's Appellant's Brief, 29 September 2006 (hereinafter "29 September 2006 Order").

[3] Motion, p. 4.

[4] Order, 29 September 2006, p. 2.

[5] Practice Direction on the Length of Briefs and Motions on Appeal, 16 September 2002. Paragraph 4 of this Direction indicates materials excluded or not from page and word limits.

[6] On the other hand, a brief containing more than 100 pages could be ruled valid if the party concerned establishes that it contains less than 30,000 words.

[7] Motion, paras. 6 and 13.

[8] *Ibid,* para. 13.

[9] *Ibid*., para. 9.

of the Appellant's Brief;[10] the need to comply with Article 4 of the Practice Direction on formal requirements for appeals from judgement (hereinafter "Practice Direction on formal requirements");[11] and his numerous grounds of appeal.[12]

8. The Pre-Appeal Judge reiterates that under paragraph 5 of the Practice Direction, "[a] party must seek authorization in advance from the Appeals Chamber [...] or the Pre-Appeal Judge to exceed the page limits in this Practice Direction and must provide an explanation of the exceptional circumstances that necessitate the oversized filing". The request to exceed page limits filed by the Appellant must, accordingly, be dismissed without any further consideration because of its vagueness, the Appellant having failed to explain how the materials mentioned would constitute exceptional circumstances necessitating an unfettered leave to exceed the word limit authorized by the Practice Direction. Simply asserting that the Appellant must comply with paragraph 4 of the Practice Direction on Formal Requirements and that the Notice of Appeal contains more than 100 grounds is not sufficient to explain such exceptional circumstances.

9. The Third Request is vague. However, the Pre-Appeal Judge understands that the Appellant is seeking leave to prove that he has met his obligation to re-file his Appellant's Brief no later than 6 October 2006, pursuant to the Order of 29 September 2006, by producing a dispatch note showing that these documents were handed on 6 October 2006 to an express mail agent to send to the Registry of the Tribunal in Arusha, Tanzania. The Pre-Appeal Judge is of the opinion that, given the circumstances described in the Motion,[13] this request is reasonable. However, the Appellant must send to the Registry of the Tribunal an electronic copy of the Appellant's Brief, which is useful in the word count and in facilitating the work of the translation service. The Appellant is requested to send this electronic copy to the Registry of the Tribunal through the usual channel.

FOR THE FOREGOING REASONS,

THE APPEALS CHAMBER:

REITERATES the relevant provisions of the Order of 29 September 2006;

ORDERS the Appellant to file, pursuant to the modalities defined above, an Appellant's Brief not exceeding 30,000 words;

GRANTS LEAVE to the Appellant to establish that he has complied with the Order of 29 September 2006 by producing the dispatch note showing that he had handed, no later than October 2006, the signed version of the Appellant's Brief and its annexes to the express mail agent to send to the Registry of the Tribunal in Arusha, Tanzania. The Appellant must lake the necessary measures to ensure that the above-mentioned documents reach the Registry of the Tribunal in Arusha, no later than 13 October 2006.

DIRECTS the Prosecutor to file his Respondent's Brief, if necessary, within 40 days from the date on which the Registry of the Tribunal recorded the filing of the signed version of the Appellant's Brief.

Done in French and English, the French text being authoritative.

Done on 4 October 2006, at The Hague (The Netherlands).

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[10] *Ibid*., para. 10.
[11] Adopted on 4 July 2005, Motion, para. 11.
[12] *Ibid*., p. 3, footnote 2.
[13] *Ibid*., para. 14.

[Signed] : Liu Daqun

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Decision on the Appellant's Request for Reconsideration of the Order Concerning Aloys Simba's Appellant's Brief 8 November2006 (ICTR-2001-76-A)

(Original: English)

Appeals Chamber

Pre-Appeal Judge : Liu Daqun

Aloys Simba – Reconsideration of a previous order – Jurisdiction – Standard for reconsideration – Payment of fees associated with the rejected filing – Motion denied

International Cases Cited:

I.C.T.R.: Appeals Chamber, The Prosecutor v. Eliézer Niyitegeka, Decision on Request for Reconsideration of the Decision on Request for Review, 27 September 2006 (ICTR-96-14)

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Zoran Žigić, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005", 26 June 2006 (IT-98-30/1)

I, LIU DAQUN, 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 ("Tribunal") and the Pre-Appeal Judge in this case;

NOTING the "Order Concerning Aloys Simba's Appellant's Brief" filed on 29 September 2006 ("Order") which: (i) instructed the Appellant to re-file his Appellant's Brief in strict compliance with the page and word limits set out in the Practice Direction on the Length of Briefs and Motions on Appeal ("Practice Direction");[1] and (ii) directed the Registrar to withhold the payment of fees, if claimed, associated with the rejected filing;[2]

BEING SEIZED OF the "Requête en extrême urgence de la Défense en vue de solliciter le réexamen de l''Ordonnance Relative au Mémoire d'Appel de Simba' (Article 73 du RPP)", filed on 2 October 2006 by Counsel for Aloys Simba ("Motion" and "Defence" respectively), which requests the Pre-Appeal Judge for reconsideration of that part of the Order that directed the withholding of fees associated with the rejected filing if claimed;[3]

[1] Practice Direction on the Length of Briefs and Motions on Appeal, 16 September 2002.
[2] *The Prosecutor v. Aloys Simba*, Case N°ICTR-01-76A, Order Concerning Aloys Simba's Appellant's Brief, 29 September 2006.
[3] The Prosecutor v. Aloys Simba, Case N°ICTR-01-76A, Requête en extrême urgence de la Défense en vue de solliciter le réexamen de l''Ordonnance Relative au Mémoire d'Appel de Simba' (Article 73 du RPP), 2 October 2006.

NOTING the "Prosecutor's Response to 'Requête en extrême urgence de la Défense en vue de solliciter le réexamen de l''Ordonnance Relative au Mémoire d'Appel de Simba' (Article 73 du RPP)'" filed on 2 October 2006;

NOTING the "*Memoire d'Appel d'Aloys Simba*" which was re-filed on 16 October 2006 in accordance with the requirements of the Order that the Appellant's Brief be re-filed in compliance with the Practice Direction;

CONSIDERING that the Appeals Chamber has an inherent discretionary power to reconsider its own previous decisions other than a final judgement if the existence of a clear error of reasoning has been demonstrated or if it is necessary in order to prevent an injustice and that, as a Judge of the Appeals Chamber, I may exercise that power to reconsider decisions issued in my capacity as Pre-Appeal Judge;[4]

CONSIDERING that the explanation proffered in the Motion, that the Appellant's Brief took two months to prepare and that any violation was based upon a misunderstanding of the relevant sections of the Practice Direction,[5] does not meet the standard for reconsideration;

CONSIDERING that the Order only denied the payment of fees associated with the preparation of the rejected filing and does not prevent the Defence from submitting claims for remuneration for work done in the preparation of the validly-filed Appellant's Brief;

FOR THE FOREGOING REASONS,

REJECTS the Motion.

Done in English and French, the English text being authoritative.

Done this 8th day of November 2006, at The Hague, The Netherlands.

[Signed] : Liu Daqun

[4] *Eliézer Niyitegeka v. The Prosecutor*, Case N°ICTR-96-14-R, Decision on Request for Reconsideration of the Decision on Request for Review, 27 September 2006, p. 2; *Prosecutor v. Žigić*, Case N°IT-98-30/1-A, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005", 26 June 2006, para. 5.
[5] Motion, p. 2.

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Order Concerning the Prosecution's Respondent's Brief 30 November 2006 (ICTR-2001-76-A)

(Original: not specified)

Appeals Chamber

Pre-Appeal Judge : Liu Daqun

Aloys Simba – Respondent's brief – Length – Absence of motion requesting an authorization to extend the page, Absence of exceptional circumstances – Rejection of the Respondent's brief – Re-filing of the Respondent's Brief

International Instrument Cited :

Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, 16 September 2002 ; Rules of Procedure and Evidence of the Tribunal, Rule 108 bis (B)

International Case Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Aloys Simba, Order Appointing a Pre-Appeal Judge, 24 January 2006 (ICTR-2001-76)

I, LIU DAQUN, 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 ("Tribunal") and the Pre-Appeal Judge in this case;[1]

NOTING the Prosecutor's Respondent's Brief, filed on 24 November 2006 ("Respondent's Brief"), by the Office of the Prosecutor ("Prosecution");

RECALLING that by virtue of Rule 108 *bis* (B) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), a 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";

RECALLING that, pursuant to paragraph (B) and (C) (1) (b) of the Practice Direction on the Length of Briefs and Motions on Appeal ("Practice Direction"), a respondent's brief "on an appeal from a final judgement of a Trial Chamber will not exceed 100 pages or 30,000 words, whichever is greater" and "an average page should contain fewer than 300 words";[2]

RECALLING ALSO that, pursuant to paragraph (C) (5) of the Practice Direction, "A party must seek authorisation in advance from the Appeals Chamber […] or the Pre-Appeal Judge to exceed the page limits in this Practice Direction and must provide an explanation of the exceptional circumstances that necessitate the oversized filing";

[1] See Order Appointing a Pre-Appeal Judge, 24 January 2006.

[2] Practice Direction on the Length of Briefs and Motions on Appeal, 16 September 2002, as amended. See also *Prosecutor v. Aloys Simba*, ICTR-01-76-A, Order Concerning Aloys Simba's Appellant's Brief, 29 September 2006.

CONSIDERING that the Respondent's Brief consists of 99 pages, excluding the table of contents and list of authorities, but has more than 40,000 words, including the footnotes;[3]

CONSIDERING further that the average page length of the Respondent's Brief is greater than 300 words;

CONSIDERING that the Prosecution has not filed a motion requesting the Appeals Chamber or the Pre-Appeal Judge to extend the page or word limit for its Respondent's Brief nor has it demonstrated exceptional circumstances for such an extension;

FINDING that the Respondent's Brief has not been filed in compliance with the Practice Direction and is therefore invalid;

REMINDING the Prosecution that it is required to act in full compliance with the Rules and the practice directions when filing its submissions.

FOR THE FOREGOING REASONS,

REJECT the Respondent's Brief;

ORDER the Prosecution to re-file its Respondent's Brief with the Registry no later than 7 December 2006;

ORDER the Prosecution to strictly comply with the page and word limits set out in the Practice Direction;

DIRECT the Defence to file its brief in reply, if any, 15 days after being served with the French version of the re-filed Respondent's Brief;

Done in English and French, the English text being authoritative.

Done this 30th day of November 2006, at The Hague, The Netherlands.

[Signed] : Liu Daqun

[3] Pursuant to para. (C) (4) of the Practice Direction, "[h]eadings, footnotes and quotations count towards the […] word and page limitation".

Le Procureur c. Aloys SIMBA

Affaire N° ICTR-2001-76

Fiche technique

• Nom: SIMBA

• Prénom: Aloys

• Date de naissance: 1942

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: député au Conseil national et président du MRND de la préfecture de Gikongoro

• Date de confirmation de l'acte d'accusation: 8 janvier 2002

• Date de modification de l'acte d'accusation: 10 mai 2004

• Chefs d'accusation: génocide ou, à titre subsidiaire, complicité dans le génocide, crimes contre l'humanité (extermination, assassinat)

• Date de confirmation de l'acte d'accusation: 8 janvier 2002

• Date et lieu de l'arrestation : 27 novembre 2001, au Sénégal

• Date du transfert: 11 mars 2002

• Date de la comparution initiale: 18 mars 2002

• Date du début du procès: 30 août 2004

• Date et contenu du prononcé de la peine : 13 décembre 2005, condamné à 25 ans d'emprisonnement

• Appel: 27 novembre 2007, rejeté

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Décision relative à la requête de l'intimé en vue d'obtenir un report de délai 13 avril 2006 (ICTR-2001-76-A)

(Original : Anglais)

Chambre d'appel

Juge de la mise en état en appel : Liu Daqun

Aloys Simba – Report de délai – Dépôt de la requête sous le sceau de la confidentialité, Intérêt de la justice, Dépôt public – Langue comprise par l'intimé et son conseil, Réponse pleine et entière aux arguments du Procureur – Intérêt de la justice et équité – Motifs valables – Requête acceptée

Instruments internationaux cités :

Directive pratique relative à la procédure de dépôt d'écritures en appel devant le Tribunal ; Règlement de procédure et de preuve, art. 108 bis (B), 112 et 116 (A)

Jurisprudence internationale citée :

T.P.I.R. : Chambre d'appel, Le Procureur c. Aloys Simba, Décision relative à la Requête visant à obtenir un report de délai pour le dépôt de l'acte *d'appel,* 16 décembre 2005 (ICTR-2001-76) ; Chambre d'appel, Le Procureur c. Aloys Simba, Order Appointing a Pre-Appeal Judge, 24 janvier 2006 (ICTR-2001-76) ; Chambre d'appel, Le Procureur c. Aloys Simba, Décision relative à la demande du Greffier de proroger le délai de dépôt de la traduction officielle du jugement, 25 janvier 2006 (ICTR-2001-76)

NOUS, LIU DAQUN, 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'États voisins entre le 1er janvier et le 31 décembre 1994 (respectivement la « Chambre d'appel » et le « Tribunal »), et juge de la mise en état en appel en l'espèce[1],

SAISI de la Requête en extrême urgence de la Défense en vue d'obtenir un report de délai, pour répondre à la requête du Procureur en modification de son acte d'appel et déposer son mémoire en réponse au Mémoire du Procureur (articles 116 (B) et 112 du RPP), déposée sous le sceau de la confidentialité le 6 avril 2006 (la « Requête aux fins de report de délai ») par Aloys Simba (l'« intimé »), dans laquelle l'intimé demande le report du délai de dépôt de son mémoire de l'intimé et de sa réponse à la requête du Procureur intitulée Motion for Variation of Notice of Appeal pursuant to Rule 108, déposée le 27 mars 2006 (la « Requête en modification »), en attendant la traduction de cette requête et du Mémoire de l'appelant du Procureur, déposé le 27 mars 2006 (le « Mémoire de l'appelant »)[2] ;

RAPPELANT qu'aux termes de l'article 108 *bis* (B) du *Règlement de procédure et de preuve* du Tribunal (le « Règlement »), le juge de la mise en état en appel « prend toutes les mesures relatives

[1] Voir le document intitulé *Order Appointing a Pre-Appeal Judge*, 24 janvier 2006.
[2] Le 28 mars 2006, le Procureur a également déposé un Rectificatif au Mémoire d'appel du Procureur (le « Rectificatif »).

aux questions de procédure, y compris des décisions, ordonnances et directives, afin que l'affaire soit en état pour une procédure équitable et rapide » ;

ATTENDU que le Procureur ne s'oppose pas à la Requête aux fins de report de délai[3];

ATTENDU que l'intimé n'indique pas pourquoi la requête aux fins de report de délai a été déposée sous le sceau de la confidentialité et que l'intérêt de la justice commande qu'elle soit déposée publiquement ;

ATTENDU que le Procureur a déposé le Mémoire de l'appelant et la Requête en modification uniquement en anglais ;

ATTENDU qu'aux termes de l'article 112 du Règlement, le mémoire de l'intimé, comportant tous les éléments de droit et fait, est déposé dans un délai de quarante jours à compter du dépôt du mémoire de l'appelant ;

ATTENDU qu'aux termes du paragraphe 11 de la *Directive pratique relative à la procédure de dépôt d'écritures en appel devant le Tribunal* (la « Directive pratique »), dans le cadre de la procédure d'appel d'un jugement, la partie adverse dépose une réponse dans les dix jours suivants le dépôt de la requête ;

ATTENDU qu'aux termes de l'article 116 (A) du Règlement, la Chambre d'appel peut faire droit à une demande de report de délais si elle considère que des motifs valables le justifient ;

CONSIDERANT que la langue que comprennent et parlent l'intimé et son conseil est le français[4] et que pour être en mesure d'apporter une réponse pleine et entière aux arguments du Procureur, il a besoin de la traduction en français de ces pièces ;

CONSIDERANT que l'intérêt de la justice et l'équité commandent que les délais soient reportés en attendant la traduction des écritures du Procureur, et que donc l'appelant a établi l'existence de motifs valables au sens de l'article 116 (A) du Règlement ;

RAPPELANT que le Greffier a été chargé de communiquer à l'intimé et à son conseil, le 15 mai 2006 au plus tard, la traduction en français du jugement de première instance rendu le 13 décembre 2005 (le « Jugement »)[5] ;

ATTENDU qu'en application du paragraphe 16 de la Directive pratique[6], le juge de la mise en état en appel peut modifier tout délai, fixé aux termes de la Directive et que l'intérêt de la justice commande un report des délais prescrits dans la présente décision jusqu'à ce que l'intimé et son conseil aient reçu communication de la traduction du Jugement ;

PAR CES MOTIFS,

FAISONS DROIT à la Requête aux fins de report de délai ;

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[3] Réponse du Procureur à la Requête en extrême urgence de la Défense en vue d'obtenir un report de délai pour répondre à la requête du Procureur en modification de son acte d'appel et déposer son mémoire en réponse au mémoire du procureur (Articles 116 (B) et 112 du RPP), 7 avril 2006.
[4] Décision relative à la Requête visant à obtenir un report de délai pour le dépôt de l'acte d'appel, 16 décembre 2005, p. 2.
[5] Décision relative à la demande du Greffier de proroger le délai de dépôt de la traduction officielle du jugement, 25 janvier 2006 ; p. 3.
[6] Datée du 16 septembre 2002.

CHARGEONS le Greffier de communiquer à l'intimé la traduction de la Requête en modification et de ses annexes, du Mémoire de l'appelant et du Rectificatif dans les meilleurs délais[7] ;

AUTORISONS l'intimé à déposer une réponse à la Requête en modification dans les dix jours suivant la réception de la traduction en français de cette requête ou dans les dix jours suivant la réception de la traduction en français du Jugement, si cette dernière intervient plus tard ;

AUTORISONS l'intimé à déposer une réponse au Mémoire de l'appelant dans les quarante jours à compter de la date de réception de la traduction en français du Mémoire de l'appelant et du Rectificatif ;

ET CHARGEONS le Greffier d'informer la Chambre d'appel et le Procureur une fois que les traductions en français du Jugement, du Mémoire de l'appelant du Procureur, du Rectificatif et de la Requête en modification auront été communiquées à l'appelant ;

ORDONNONS au Greffe de lever la confidentialité de la Requête aux fins de report de délai ;

Fait en français et en anglais, le texte en anglais faisant foi.

Fait le 13 avril 2006, à La Haye Pays-Bas).

[Signé] : Liu Daqun

[7] Le Greffe a informé le juge de la mise en état en appel que la traduction de la Requête en modification, d'un côté, et celle du Mémoire de l'appelant et du Rectificatif, d'un autre côté, seraient achevées au plus tard le 21 avril 2006 ct le 31 mai 2006 respectivement.

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Décision relative à la requête de la Défense en vue d'obtenir un report de délai pour répondre au mémoire en appel du Procureur
20 juin 2006 (ICTR-2001-76-A)

(Original : non spécifié)

Chambre d'appel

Juge de la mise en état en appel : Liu Daqun

Aloys Simba – Report de délai – Reports de délais antérieurement accordés, Traduction française – Issue d'une requête toujours pendante pouvant avoir une incidence sur le fond de la réponse de l'intimé – Motif valable – Requête en partie acceptée

Instruments internationaux cités :

Règlement de procédure et de preuve, art. 108, 111, 112 et 116 ; Statut, art. 20

Jurisprudence internationale citée :

T.P.I.R.: Chambre d'appel, Le Procureur c. Eliézer Niyitegeka, Decision on Appellant's Motion for Adjournment, 1 avril 2004 (ICTR-96-14) ; Chambre d'appel, Le Procureur c. Aloys Simba, Décision relative à la Requête visant à obtenir un report de délai pour le dépôt de l'acte d'appel, 16 décembre 2005 (ICTR-2001-76) ; Chambre d'appel, Le Procureur c. Aloys Simba, Order Appointing a Pre-Appeal Judge, 24 janvier 2006 (ICTR-2001-76) ; Chambre d'appel, Le Procureur c. Aloys Simba, Décision relative à la demande du Greffier de proroger le délai de dépôt de la traduction officielle du jugement, 25 janvier 2006 (ICTR-2001-76) ; Chambre d'appel, Le Procureur c. Aloys Simba, Décision relative à la requête de l'intimé en vue d'obtenir un report de délai, 13 avril 2006 (ICTR-2001-76)

T.P.I.Y.: Chambre d'appel, Le Procureur c. Stanislas Galić, Décision relative aux demandes de prorogation de délai et d'autorisation de dépasser le nombre de pages prescrit pour la réponse, présentées par l'Accusation, 21 février 2005 (IT-98-29)

NOUS, LIU DAQUN, 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'États voisins entre le 1er janvier et le 31 décembre 1994 (respectivement la « Chambre d'appel » et le « Tribunal »), et juge de la mise en état en appel en l'espèce[1],

VU la *Requête en extrême urgence de la Défense en vue d'obtenir un report de délai pour répondre au mémoire en appel du Procureur,* déposée le 12 juin 2006, dans laquelle Aloys Simba (« l'intimé ») demande que le délai imparti pour répondre au mémoire en appel que le Procureur a déposé le 27 mars 2006 (« Mémoire en appel du Procureur ») soit étendu jusqu'à 40 jours après le dépôt de son Mémoire d'appel,

[1] Voir le document intitulé *Order Appointing a Pre-Appeal Judge*, 24 janvier 2006.

ATTENDU que le Procureur ne s'oppose pas à la Requête[2],

ATTENDU qu'à ce jour l'intimé s'est vu accorder plusieurs reports de délais pour déposer ses écritures en appel au motif qu'il a le droit de recevoir les versions françaises des différents documents[3],

ATTENDU que, conformément à ces décisions antérieures[4], l'intimé est autorisé à déposer :

(i) son acte d'appel au plus tard 30 jours après le dépôt de la version française du jugement[5];

(ii) sa réponse au Mémoire d'appel du Procureur dans les 40 jours suivant la date de réception de la version française du dit Mémoire et de son rectificatif[6];

ATTENDU qu'un délai supplémentaire avait été également accordé à l'intimé pour déposer sa réponse à la Requête du Procureur en modification de l'acte d'appel conformément à l'article 108 du Règlement de procédure et de preuve, déposée par le Procureur, en version anglaise, le 27 mars 2006 (« Requête en modification »)[7];

ATTENDU que la version française de la Requête en modification a été déposée le 19 avril 2006, mais n'a été communiquée à l'intimé que le 11 juin 2006[8], et que celui-ci a déposé sa réponse à ladite requête le 14 juin 2006[9],

ATTENDU que la notification tardive de la version française de la Requête en modification a retardé la décision y relative,

RAPPELANT qu'aux termes de l'article 111 du Règlement de procédure et de preuve, le mémoire de l'appelant est déposé dans un délai de 75 jours à compter du dépôt de l'acte d'appel,

RAPPELANT qu'aux termes de l'article 112 du Règlement, le mémoire de l'intimé est déposé dans un délai de 40 jours à compter du dépôt du mémoire de l'appelant,

ATTENDU qu'aux termes de l'article 116 du Règlement, la Chambre d'appel peut faire droit à une demande de report de délais si elle considère que des motifs valables le justifient,

ATTENDU que l'intimé soutient que le respect scrupuleux de ces délais risquerait de causer des chevauchements qui ne permettraient pas à la Défense de tirer parti des délais de 75 et 40 jours, respectivement, dans lesquels elle doit s'acquitter de chacune des deux tâches visées ci-dessus et que ces chevauchements nuiraient aux droits de l'intimé tels que garantis par l'article 20 du Statut du Tribunal;

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[2] Réponse du Procureur à la « Requête en extrême urgence de la Défense en vue d'obtenir un report de délai pour répondre au Mémoire en appel du Procureur », 13 juin 2006, par. 8.

[3] Décision relative à la requête de l'intimé en vue d'obtenir un report de délai, 13 avril 2006 («Deuxième décision relative au report de délai ») ; Décision relative à la demande du Greffier de proroger le délai de dépôt de la traduction officielle du jugement, 25 janvier 2006 (« Décision relative à la demande du Greffier ») ; voir aussi la Décision relative à la requête visant à obtenir un report de délai pour le dépôt de l'acte d'appel, 16 décembre 2005 (« Première décision relative à un report de délai »).

[4] *Id*.

[5] Décision relative à la demande du Greffier, p. 3.

[6] Deuxième décision relative au report de délai, p. 3. La traduction française du jugement a été déposée le 15 mai 2006 et communiquée à l'intimé le 23 mai 2006. De même, la version française du Mémoire d'appel du Procureur a été déposée le 31 mai 2006 et communiquée à l'intimé le 8 juin 2006.

[7] Deuxième décision relative au report de délai, p. 3.

[8] Le juge de la mise en état en appel a été informé par le Greffe que la traduction de la Requête en modification a été communiquée l'intimé le 10 juin 2006 et que celui-ci en a accusé réception le 11 juin 2006.

[9] Réponse de la Défense à la Requête du Procureur en modification de l'acte d'appel conformément à l'article 108 du Règlement de procédure et de preuve,

ATTENDU que lesdits délais ont été repoussés conformément à la demande de l'intimé[10],

ATTENDU EN OUTRE que les arguments avancés concernant la charge de travail ne constituent pas en eux-mêmes un motif valable[11], puisqu'il est fréquent pour un conseil d'avoir un tel volume de travail,

ATTENDU toutefois que l'issue de la Requête en modification, toujours pendante, pourrait avoir une incidence sur le fond de la réponse au mémoire d'appel du Procureur.

CONSTATANT que dans ces conditions il existe un motif valable justifiant un nouveau report de délai,

PAR CES MOTIFS.

FAISONS DROIT en partie à la demande, et autorisons l'intimé à déposer la réponse au Mémoire d'appel du Procureur au plus tard dans les 40 jours à compter de la date de notification à l'intimé de la version française de la décision relative à la Requête en modification ;

ET RAPPELONS à l'intimé les délais prescrits pour le dépôt de ses écritures

(a) L'acte d'appel de l'intimé doit être déposé au plus tard dans les 30 jours à compter de la date de notification à l'intimé de la version française du jugement ;

(b) Le mémoire d'appel de l'intimé doit être déposé dans les 75 jours à compter de la date de dépôt de son acte d'appel.

Fait en anglais et en français, le texte anglais faisant foi.

Fait à La Haye (Pays-Bas) le 20 juin 2006.

[Signé] : Liu Daqun

[10] Première décision relative à un report de délai, p. 3 ; Décision relative à la demande du Greffier de proroger le délai de dépôt de la traduction officielle du jugement, 25 janvier 2006, p. 3,

[11] *Le Procureur c. Stanislas Galić,* affaire N°IT-98-29-A, Décision relative aux demandes de prorogation de délai et d'autorisation de dépasser le nombre de pages prescrit pour la réponse, présentées par l'Accusation, 21 février 2005 ; voir également *Eliézer Niyitegeka c. Le Procureur*, affaire N°ICTR-96-14-A, *Decision on Appellant's Motion for Adjournment*, 1er avril 2004, par. 18, où la Chambre d'appel a déclaré que le fait que le conseil doive faire face à une lourde charge de travail ne constituait pas une raison suffisante pour ajourner une audience en appel.

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Ordonnance portant calendrier
15 août 2006 (ICTR-2001-76-A)

(Original : Anglais)

Chambre d'appel

Juge de la mise en état en appel : Liu Daqun

Aloys Simba – Ordonnance portant calendrier – Continuation de la procédure de mise en état en appel

Instrument international cité :

Règlement de procédure et de preuve, art. 111 et 123

Jurisprudence internationale citée :

T.P.I.R.: Chambre d'appel, Le Procureur c. Aloys Simba, Order Appointing a Pre-Appeal Judge, 24 janvier 2006 (ICTR-2001-76)

NOUS, LIU DAQUN, 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'États voisins entre le 1er janvier et le 31 décembre 1994 (le « Tribunal ») et juge de la mise en état en appel en l'espèce[1],

VU la *Requête de la défense en vue de la suspension de tous les délais de la procédure en appel en cours*, déposée par le conseil d'Aloys Simba le 22 juillet 2006 (la « Requête » et le «requérant» respectivement), par laquelle le requérant sollicite la suspension de tous les délais de la procédure en appel en cours et que l'affaire soit renvoyée devant la Chambre de première instance en vue d'une révision conformément à l'article 123 du *Règlement de procédure et de preuve* (le « Règlement ») ;

CONSTATANT que le dépôt des écritures liées à la Requête n'est pas encore terminé ;

CONSTATANT que le requérant a déposé un acte d'appel le 22 juin 2006 ;

RAPPELANT la *Décision relative à la Requête de la Défense en vue d'obtenir un report de délai pour répondre au mémoire en appel du Procureur*, rendue le 20 juin 2006, dans laquelle le juge de la mise en état en appel avait rappelé au requérant les délais prescrits pour le dépôt de son acte d'appel et de son mémoire de l'appelant ;

CONFIRME la continuation de la procédure de mise en état en appel en l'espèce ;

ET CONFIRME EN OUTRE que, conformément à l'article 111 du Règlement, le requérant doit déposer son mémoire de l'appelant au plus tard le 5 septembre 2006.

Fait en anglais et en français, la version en anglais faisant foi.

[1] Voir l'ordonnance intitulée *Order Appointing a Pre-Appeal Judge*, 24 janvier 2006.

Fait le 15 août 2006, à La Haye (Pays-Bas).

[Signé] : Liu Daqun

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Décision relative à la requête du Procureur en modification de l'acte d'appel conformément à l'article 108 du Règlement de procédure et de preuve 17 août 2006 (ICTR-2001-76-A)

(Original : Anglais)

Chambre d'appel

Juges : Fausto Pocar, Président; Mehmet Güney; Liu Daqun; Theodor Meron; Wolfgang Schomburg

Aloys Simba – Modification de l'acte d'appel – Motifs valables – Eléments omis dans l'acte d'appel découverts lors de la rédaction du mémoire d'appel, Maîtrise du dossier – Eclaircissements sur les deux moyens exposés dans de l'acte d'appel, Modifications de fond qui altèrent le contenu de l'Acte d'appel – Absence de préjudice important pour la Défense – Expressions fourre-tout – Requête rejetée – Absence de prise en compte de certains paragraphes du mémoire d'appel

Instrument international cité :

Règlement de procédure et de preuve, art. 108

Jurisprudence internationale citée :

T.P.I.R.: Chambre d'appel, Le Procureur c. Georges Rutaganda, Arrêt (Motion to Amend the Appellant's Notice of Appeal), 5 avril 2001 (ICTR-96-3) ; Chambre d'appel, Le Procureur c. Elizaphan and Gérard Ntakirutimana, Décision sur les demandes en modification des moyens d'appel et les requêtes aux fins d'outrepasser la limite de pages dans le Mémoire de l'appelant, 21 juillet 2003 (ICTR-96-10 et ICTR-96-17) ; Chambre d'appel, Le Procureur c. Eliézer Niyitegeka, Decision on Defence Motion for Variation of the Notice of Appeal, 29 janvier 2004 (ICTR-96-14) ; Chambre de première instance, Le Procureur c. Aloys Simba, Jugement, 13 décembre 2005 (ICTR-2001-76) ; Chambre de première instance, Le Procureur c. Aloys Simba, Décision relative à la requête de la Défense en vue d'obtenir un report de délai pour répondre au mémoire en appel du Procureur, 20 juin 2006 (ICTR-2001-76)

T.P.I.Y.: Chambre d'appel, Le Procureur c. Goran Jelisić, Arrêt, 5 juillet 2001 (IT-95-10) ; Chambre d'appel, Le Procureur c. Dario Kordić and Mario Čerkez, Décision autorisant Dario Kordić à modifier ses moyens d'appel, 9 mai 2002 (IT-95-14/2) ; Chambre d'appel, Le Procureur c. Blagoje Simić, Décision relative à la requête de Blagoje Simić aux fins de modification de son acte d'appel, 16 septembre 2004 (IT-95-9) ; Chambre d'appel, Le Procureur c. Momir Nikolić, Décision relative à la requête de l'appelant aux fins de modification de l'acte d'appel, 21 octobre 2004 (IT-02-60/1) ; Chambre d'appel, Le Procureur c. Momir Nikolić, Decision on Appellant's Requests to Withdraw Previous Motions, to Revise Appellant's Brief and to Amend Notice of Appeal, 19 juillet 2005 (IT-02-60/1) ; Chambre d'appel, Le Procureur c. Vidoje Blagojević et Dragan Jokić, Décision relative à la requête de l'Accusation aux fins d'obtenir l'autorisation de modifier l'acte d'appel relatif à Vidoje

Blagojević, 20 juillet 2005 (IT-02-60) ; Chambre d'appel, Le Procureur c. Vidoje Blagojević et Dragan Jokić, Decision on Motions Related to the Pleadings in Dragan Jokić's Appeal, 24 novembre 2005 (IT-02-60) ; Chambre d'appel, Le Procureur c. Vidoje Blagojević et Dragan Jokić, Decision on Motion of Dragan Jokić for Leave to File Third Amended Notice of Appeal Amended Appellate Brief, 26 juin 2006 (IT-02-60)

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'États voisins entre le 1er janvier et le 31 décembre 1994 (la « Chambre d'appel » et le « Tribunal » respectivement) est saisie d'une « Requête du Procureur en modification de l'acte d'appel conformément à l'article 108 du Règlement de procédure et de preuve » (la « Requête en modification »), déposée le 27 mars 2006[1]. Le Procureur y demande l'autorisation de modifier son acte d'appel en vertu de l'article 108 du Règlement de procédure et de preuve du Tribunal (le « Règlement »).

2. La Chambre de première instance a rendu son jugement en l'affaire *Simba* le 13 décembre 2005[2]. Le 12 janvier 2006, le Procureur a déposé un acte d'appel initial (l'« Acte d'appel ») contenant deux moyens d'appel[3]. Comme premier moyen, il fait valoir que la Chambre de première instance a commis une erreur de fait et de droit en ce qu'elle n'a pas déclaré l'accusé pénalement responsable à raison de sa participation au massacre perpétré à la paroisse de Cyanika[4]. Selon lui, la Chambre de première instance a eu tort de juger que la preuve de la présence physique de l'accusé à la paroisse de Cyanika était une condition nécessaire pour le déclarer responsable de ce massacre à raison de « sa participation à une entreprise criminelle commune ayant pour but commun de tuer les Tutsis aux trois lieux de massacre, à savoir, l'école technique de Murambi, la paroisse de Kaduha et la paroisse de Cyanika »[5]. Selon le deuxième moyen, la Chambre de première instance a commis une erreur de droit en ce qu'elle a prononcé une peine d'emprisonnement de 25 ans qui, estime le Procureur, est « manifestement inappropriée » et devrait être portée à l'emprisonnement à vie compte tenu de diverses circonstances de la cause telles que la gravité des crimes retenus et la situation personnelle de l'accusé[6].

1. Arguments des parties

3. Dans sa requête, le Procureur sollicite l'autorisation de modifier les deux moyens d'appel[7]. S'agissant du premier moyen, il entend donner des précisions sur ses griefs et mieux les cerner en retenant comme erreur de droit distincte le fait que la Chambre de première instance aurait mal appliqué la règle définissant l'élément moral de la première forme d'entreprise criminelle commune[8]. Il reproche à la Chambre de première instance d'avoir exigé la preuve qu'Aloys Simba avait « partagé […] le dessein commun » alors que l'élément moral requis selon lui est « l'intention de favoriser le projet commun, cette intention étant partagée par l'ensemble des coauteurs, et non celle de partager le dessein commun »[9]. Pour le Procureur, cette erreur de droit supplémentaire qui n'a été découverte que lors de l'élaboration de son mémoire d'appel « découle des erreurs de fait et de droit initiales

[1] *Le Procureur c. Aloys Simba*, affaire N°ICTR-01-76-A, Requête du Procureur en modification de l'acte d'appel conformément à l'article 108 du Règlement de procédure et de preuve, 27 mars 2006, et son annexe A intitulée « Acte d'appel modifié du Procureur (l' « Acte d'appel modifié »).
[2] *Le Procureur c. Aloys Simba*, affaire N°ICTR-01-76-T, Jugement, 13 décembre 2005 (le « Jugement »).
[3] *Le Procureur c. Aloys Simba*, affaire N°ICTR-01-76-A, Acte d'appel du Procureur, 12 janvier 2006. Le Procureur a déposé son acte d'appel dans le délai de 30 jours suivant le jugement prescrit par l'article 108 du Règlement.
[4] Acte d'appel, par. 1.
[5] *Ibid*., par. 2 et 3, visant les paragraphes 122 à 132, 399 à 402 et 407 du Jugement.
[6] *Ibid*., par. 8 à 10.
[7] Requête en modification, par. 1 ; Acte d'appel modifié, par. 2, 4 et 12.
[8] *Ibid*., par. 4.
[9] *Ibid*., par. 8.

énumérées » dans l'acte d'appel[10]. S'agissant du deuxième moyen, le Procureur dit encore que la modification envisagée fournit des précisions sur ses griefs et les cerne mieux en ce qui concerne les erreurs qu'aurait commises la Chambre de première instance lors de la détermination de la peine. À ce propos, il précise que la Chambre de première instance « a commis une erreur en ne tenant pas compte de la grille des peines en vigueur au Rwanda »[11]. Le Procureur fait valoir que l'emploi de l'expression « entre autres » dans l'acte d'appel indique qu'il n'y a pas cité toutes les erreurs commises par la Chambre de première instance dans ce domaine[12]. Il souligne qu'il a envisagé la nécessité de modifier l'acte d'appel en y précisant qu'il invoquerait « [t]out autre moyen d'appel que la Chambre pourrait autoriser […][13] ».

4. Le 12 juin 2006, Aloys Simba a déposé sa réponse[14]. Il s'oppose à la Requête en modification au motif que l'article 108 du Règlement faisait obligation au Procureur de la déposer dans les 30 jours suivant le prononcé du Jugement. Dans sa réplique[15], le Procureur fait valoir que l'intimé a mal interprété l'article 108 et que la Requête en modification n'est pas tardive, ayant été déposée le même jour que son mémoire d'appel.

2. Discussion

5. L'article 108 du Règlement est ainsi libellé :

> 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.

6. Avant d'entrer dans le vif du sujet, la Chambre d'appel fait observer que contrairement aux affirmations de la Défense[16], une partie qui envisage de modifier son acte d'appel n'est pas tenue de le faire dans le délai de 30 jours prescrit pour le dépôt de l'acte d'appel[17], bien que tout retard dans le dépôt de sa requête en modification puisse jouer contre l'appelant, vu en particulier la nécessité de veiller à ce qu'il n'y ait pas de retards dans la procédure et que la partie adverse ne subisse aucun préjudice[18].

7. La Chambre d'appel peut faire droit à une requête en modification de l'acte d'appel si l'appelant invoque des « motifs valables ». L'expression « motifs valables » s'applique non seulement aux raisons qui autorisent l'appelant à inclure de nouveaux moyens dans l'acte d'appel ou à modifier ceux qu'il y a énoncés, mais aussi aux raisons valables qui l'ont empêché au départ d'y inclure certains

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[10] *Ibid*., par. 4.
[11] *Ibid*., par. 9, et Acte d'appel modifié, par. 12.
[12] Requête en modification, par. 1 et 9.
[13] *Ibid*., par. 10.
[14] *Le Procureur c. Aloys Simba*, affaire N°ICTR-01-76-T, Réponse de la Défense à la requête du Procureur en modification de l'acte d'appel conformément a l'article 108 du Règlement de procédure et de preuve (RPP), 27 mars 2006, par. 5 et 6 (la « Réponse »). Comme l'avait autorisé le juge de la mise en état en appel dans la « Décision relative à la requête de l'intimé en vue d'obtenir un report de délai » rendue le 13 avril 2006, cette réponse a été déposée dans les dix jours suivant la réception de la traduction française de la Requête en modification.
[15] Le Procureur c. Aloys Simba, affaire N°ICTR-01-76-T, Prosecutor's Reply to "Réponse de la Défense à la Requête du Procureur en modification de l'acte d'appel conformément à l'article 108 du Règlement de procédure et de preuve (RPP)", 19 juin 2006, par. 4, 5 et 8 (la « Réplique »).
[16] Réponse, par. 5.
[17] La Chambre a admis des modifications apportées à l'acte d'appel à un stade assez avancé de la procédure, notamment lors de l'audience contradictoire (voir *Le Procureur c. Jelisić*, affaire N°IT-95-14/2-A, Arrêt, 5 juillet 2001, par. 18), et plus d'un an après le dépôt de la version initiale du mémoire de l'appelant (voir *Le Procureur c. Nikolić*, affaire N°IT-02-60/1-A, *Decision on Appellant's Requests to Withdraw Previous Motions, to Revise Appellant's Brief and to Amend Notice of Appeal,* 19 juillet 2005, p. 3 et 4).
[18] *Le Procureur c. Blagojević et Jokić,* affaire n° IT-02-60-A, Decision on Motion of Dragan Jokić for Leave to File Third Amended Notice of Appeal Amended Appellate Brief, 26 juin 2006, par. 8.

moyens ou de bien libeller les moyens retenus[19]. C'est au cas par cas que la Chambre détermine si elle est en présence de « motifs valables »[20] et divers éléments d'appréciation peuvent entrer en ligne de compte[21]. La Chambre d'appel a récemment résumé certains de ces éléments comme suit :

> « Parmi ces éléments figurent le fait que la modification envisagée est si minime qu'elle n'altère pas le contenu de l'acte d'appel, le fait que la partie adverse n'en pâtirait pas ou ne s'y est pas opposée et le fait que la modification permettrait d'aligner l'acte d'appel sur le mémoire d'appel. Lorsque l'appelant veut apporter une modification de fond tendant à élargir le champ de son recours, on peut aussi considérer dans certaines circonstances que l'existence de « motifs valables » a été établie. La Chambre d'appel relève qu'elle n'a jamais dressé une liste récapitulative des conditions qui doivent être remplies dans chaque cas pour qu'elle accueille une modification de fond[22] [traduction] ».

8. Dans la Requête en modification, le Procureur fait valoir qu'il existe des motifs valables autorisant la Chambre d'appel à accepter les deux modifications envisagées. Il présente trois arguments communs à celles-ci, à savoir que les éléments omis dans l'Acte d'appel n'ont été découverts que lors de l'élaboration de son mémoire d'appel, que les modifications envisagées sont de simples éclaircissements et qu'elles ne causent aucun préjudice important à l'intimé, puisqu'elles permettent d'aligner l'Acte d'appel sur le mémoire d'appel.

9. Premièrement, le Procureur fait valoir que les éléments omis dans son Acte d'appel n'ont été découverts que lors de la rédaction de son mémoire d'appel[23]. La Chambre d'appel relève que ce fait ne saurait constituer en soi un motif valable. À ce propos, elle a déjà déclaré ce qui suit :

> « À n'en pas douter, toute modification qu'une partie souhaite apporter à son acte d'appel est le fruit d'une analyse plus approfondie menée au fil du temps ; pris isolément, ce fait ne saurait constituer un motif valable de nature à légitimer une modification[24] [traduction]. »

L'article 108 du Règlement fait l'obligation aux parties de déposer un acte d'appel exposant leurs moyens d'appel dans les trente jours suivant le prononcé du jugement[25]. Elles sont par conséquent censées avoir étudié tout le jugement pendant cette période. Autoriser le Procureur à modifier son acte d'appel tout simplement parce que sa maîtrise du dossier s'est améliorée lors de la rédaction de son mémoire d'appel reviendrait essentiellement à autoriser les parties à « recommencer la procédure d'appel à volontéhttp://www.ictr.org/FRENCH/cases/Simba/decisions/170806.htm - _ftn26#_ftn26 »[26] [traduction].

10. Deuxièmement, le Procureur fait valoir qu'il existe des motifs valables permettent d'inclure dans l'acte d'appel les deux modifications nouvelles envisagées puisque loin de vouloir donner lieu à des moyens d'appel entièrement nouveaux, elles se bornent, selon le Procureur, à apporter des éclaircissements sur les deux moyens exposés dans de l'acte d'appel et sont nécessaires pour « mieux renseigner l'intimé et la Chambre d'appel sur les questions concernées »[27]. La Chambre d'appel ne partage pas cet avis. L'explication fournie par le Procureur n'est valable que dans quelques cas, par

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[19] Le Procureur c. Blagojević et Jokić, affaire N°IT-02-60-A, ibid., par. 7.
[20] *Le Procureur c. Kordić et Čerkez*, affaire N°IT-95-14/2-A, Décision autorisant Dario Kordić à modifier ses moyens d'appel, 9 mai 2002, par. 5.
[21] *Le Procureur c. Blagojević et Jokić*, affaire N°IT-02-60-A, Decision on Motions Related to the Pleadings in Dragan Jokić's Appeal, 24 novembre 2005, par. 7 ; *Le Procureur c. Kordić et Čerkez*, affaire N°IT-95-14/2-A, Décision autorisant Dario Kordić à modifier ses moyens d'appel, 9 mai 2002, par. 7.
[22] *Le Procureur c. Blagojević et Jokić*, affaire 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 juin 2006, par. 7.
[23] Requête en modification, par. 1 et 8.
[24] *Le Procureur c. Blagojević et Jokić*, affaire N°IT-02-60-A, Decision on Motions Related to the Pleadings in Dragan Jokić's Appeal, 24 novembre 2005, par. 10.
[25] Article 108 du Règlement.
[26] *Le Procureur c. Blagojević et Jokić,* affaire 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 juin 2006, par. 8.
[27] Requête en modification, par. 4.

exemple lorsqu'il est question d'apporter des modifications mineures à la forme de l'Acte d'appel[28]. Les deux modifications envisagées sont plus que des retouches mineures tendant à apporter de simples éclaircissements. En réalité, il s'agit de modifications de fond qui altèrent le contenu de l'Acte d'appel, en élargissent le champ et, en fait, contiennent des moyens d'appel supplémentaires. La première ajoute au premier moyen d'appel un paragraphe entier qui reproche une erreur supplémentaire à la Chambre de première instance, à savoir une erreur de droit commise lors de la détermination de l'élément moral de la première forme d'entreprise criminelle commune. La seconde invite la Chambre d'appel à tenir compte de la grille des peines en vigueur au Rwanda, ce qui pourrait entraîner un examen approfondi des règles en vigueur dans ce pays et ne saurait donc être considéré comme de simples éclaircissements sur les arguments initialement avancés au sujet de la détermination de la peine.

11. Troisièmement, le Procureur déclare que la Défense n'a subi aucun préjudice important, la Requête en modification et l'Acte d'appel modifié ayant été déposés le même jour que son mémoire d'appel[29]. Certes, l'absence de préjudice pour la partie adverse est un des éléments importants dont la Chambre d'appel doit tenir compte lors de l'examen d'une demande en modification de moyens d'appel, mais la Chambre n'estime pas que cette absence constitue en soi un motif valable. Le simple fait qu'un appelant ait produit un projet de modification avant le jour où il a déposé son mémoire d'appel ou le même jour ne suffit pas à justifier une modification de l'acte d'appel, surtout lorsque la modification voulue consiste, comme en l'espèce, à ajouter à l'acte d'appel une erreur entièrement nouvelle. La Chambre d'appel relève à cet égard que si elle a déjà accepté des modifications tendant à aligner l'Acte d'appel sur le mémoire d'appel, ce n'était qu'en raison de l'existence d'autres éléments d'appréciation ou de certaines circonstances particulières[30]. En l'espèce, le Procureur n'a invoqué aucune circonstance particulière de cette nature. Autoriser la modification d'un acte d'appel tout simplement parce que celle-ci ne causerait aucun préjudice reviendrait à contourner l'article 108 du Règlement, le délai qu'il prescrit et l'obligation de présenter des « motifs valables ».

12. Dans la Requête en modification, le Procureur présente également un argument spécifique à l'appui de chaque modification envisagée. S'agissant du premier moyen, il soutient que la question de l'élément moral de la première forme d'entreprise criminelle commune s'inscrit dans le champ de l'acte d'appel initial qui a invoqué le fait que l'accusé avait été acquitté des crimes commis à la paroisse de Cyanika, la Chambre de première instance ayant conclu que celui-ci ne s'y trouvait pas pendant les massacres[31]. L'acte d'appel initial fait état du paragraphe 402 du Jugement qui mentionne effectivement l'élément moral mis en question par le Procureur[32], mais le Jugement ne dit pas qu'il s'appuie sur telle ou telle règle définissant l'élément moral de l'infraction[33]. Cette vague allusion à un paragraphe du Jugement dans l'acte d'appel initial ne suffit pas en soi pour établir que l'erreur de droit alléguée dans l'Acte d'appel modifié rentre dans le champ du premier moyen d'appel initial. Il s'ensuit

[28] *Le Procureur c. Ntakirutimana*, affaires N°ICTR-96-101-A et ICTR-96-17-A, Décision sur les demandes en modification des moyens d'appel et les requêtes aux fins d'outrepasser la limite de pages dans le Mémoire de l'appelant, 21 juillet 2003, p. 3 ; *Le Procureur c. Nikolić*, affaire N°IT-02-60/1-A, Décision relative à la requête de l'appelant aux fins de modification de l'acte d'appel, 21 octobre 2004, p. 3. La Chambre peut également faire droit à la demande de l'appelant si la partie adverse concède que l'acte d'appel initial contenait déjà l'allégation dont la modification est envisagée. Voir *Le Procureur c. Rutaganda*, affaire N°ICTR-96-3-A, Arrêt (*Motion to Amend the Appellant's Notice of Appeal*), 5 avril 2001, p. 6. Voir aussi *Le Procureur c. Niyitegeka*, affaire N°ICTR-96-14-A, *Decision on Defence Motion for Variation of the Notice of Appeal*, 29 janvier 2004, p. 3.

[29] Requête en modification, par. 1 ; voir également la Réponse, par. 8.

[30] *Le Procureur c. Nikolić*, affaire N°IT-02-60/1-A, Décision relative à la requête de l'appelant aux fins de modification de l'acte d'appel, 21 octobre 2004, p. 3 ; *Le Procureur c. Simić*, affaire N°IT-95-9-A, Décision relative à la requête de Blagoje Simić aux fins de modification de son acte d'appel, 16 septembre 2004, p. 4 et 5 ; *Le Procureur c. Blagojević et Jokić*, affaire N°IT-02-60-A, Décision relative à la requête de l'Accusation aux fins d'obtenir l'autorisation de modifier l'acte d'appel relatif à Vidoje Blagojević, 20 juillet 2005, p. 3 et 4.

[31] Requête en modification, par. 4.

[32] Acte d'appel, par. 2.

[33] Jugement, par. 402.

que le Procureur n'a pas démontré en quoi le paragraphe de l'Acte d'appel modifié susvisé expose un point qu'il aurait présenté de manière implicite dans l'acte d'appel initial[34].

13. Dans le cadre du deuxième moyen exposé dans l'Acte d'appel modifié qui porte sur la peine, le Procureur entend attaquer le fait que la Chambre de première instance n'aurait pas tenu compte de la grille des peines en vigueur au Rwanda[35]. Il déclare n'avoir pas examiné exhaustivement dans l'acte d'appel initial les erreurs qu'aurait commises la Chambre de première instance, comme le prouve l'emploi de l'expression « entre autres »[36]. Cela étant, il estime avoir le droit d'invoquer dans l'Acte d'appel modifié la grille des peines en vigueur au Rwanda. Quoi qu'il en soit, le simple fait d'avoir employé des expressions fourre-tout telles que « entre autres » ou « [t]out autre moyen d'appel que la Chambre pourrait autoriser »[37] pour ménager la possibilité de solliciter plus tard l'autorisation d'apporter des modifications à l'acte d'appel ne constitue pas un motif valable permettant à la Chambre d'appel d'autoriser ces modifications sur le fondement de l'article 108 du Règlement.

3. Dispositifs

14. Par ces motifs, la Chambre d'appel REJETTE la Requête en modification dans sa totalité, INFORME les parties qu'elle ne tiendra pas compte des paragraphes 65 à 74 du mémoire d'appel du Procureur (relatifs à l'intention de favoriser la réalisation du dessein commun) ni des paragraphes 108 à 114 dudit mémoire (relatifs à la grille des peines en vigueur au Rwanda), DIT qu'il n'est pas nécessaire que le Procureur dépose un nouveau mémoire d'appel et CONFIRME les délais de dépôt des écritures fixés par le juge de la mise en état en appel[38].

Fait en français et en anglais, le texte anglais faisant foi.

La Haye (Pays-Bas), le 17 août 2006.

[Signé] : Fausto Pocar

[34] *Le Procureur c. Blagojević et Jokić*, affaire N°IT-02-60-A, Décision relative à la requête de l'Accusation aux fins d'obtenir l'autorisation de modifier l'acte d'appel relatif à Vidoje Blagojević, 20 juillet 2005, p. 3 et 4.
[35] Requête en modification, par. 9.
[36] Id.
[37] *Ibid*., par. 10.
[38] *Le Procureur c. Aloys Simba*, affaire N°ICTR-01-76-T, Décision relative à la requête de la Défense en vue d'obtenir un report de délai pour répondre au mémoire en appel du Procureur, 20 juin 2006.

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Ordonnance autorisant la prorogation du délai de dépôt des écritures de l'intimé 11 septembre 2006 (ICTR-2001-76-A)

(Original : Anglais)

Chambre d'appel

Juge de la mise en état en appel : Liu Daqun

Aloys Simba – Prorogation de délai – Langue comprise par l'intimé et son conseil, Réponse pleine et entière aux arguments du Procureur – Intérêt de la justice et équité

Instrument international cité :

Directive pratique relative à la procédure de dépôt des écritures en appel devant le Tribunal, 16 septembre 2002

Jurisprudence internationale citée :

T.P.I.R.: Chambre d'appel, Le Procureur c. Aloys Simba, Décision relative à la Requête visant à obtenir un report de délai pour le dépôt de l'acte d'appel, 16 décembre 2005 (ICTR-2001-76) ; Chambre d'appel, Le Procureur c. Aloys Simba, Order Appointing a Pre-Appeal Judge, 24 janvier 2006 (ICTR-2001-76) ; Chambre d'appel, Le Procureur c. Aloys Simba, Décision relative à la demande du Greffier de proroger le délai de dépôt de la traduction officielle du jugement, 25 janvier 2006 (ICTR-2001-76) ; Chambre d'appel, Le Procureur c. Aloys Simba, Décision relative à la requête de l'intimé en vue d'obtenir un report de délai, 13 avril 2006 (ICTR-2001-76) ; Chambre de première instance, Le Procureur c. Aloys Simba, Décision relative à la requête de la Défense en vue d'obtenir un report de délai pour répondre au mémoire en appel du Procureur, 20 juin 2006 (ICTR-01-76)

NOUS, LIU DAQUN, 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 (« Tribunal »), et juge de la mise en état en appel dans la présente affaire[1],

VU la requête intitulée *Prosecutor's Urgent Motion Objecting to "Mémoire de la Défense"*, (la « Requête ») déposée en anglais par le Bureau du Procureur (le « Procureur ») le 8 septembre 2006,

RAPPELANT que, conformément au paragraphe 11 de la Directive pratique relative à la procédure de dépôt des écritures en appel devant le Tribunal, datée du 16 septembre 2002, les conseils d'Aloys Simba (« l'intimé ») avaient 10 jours pour répondre à la Requête,

CONSIDERANT que la langue que comprennent et parlent l'intimé et ses conseils est le français et que pour être en mesure d'apporter une réponse pleine et entière aux arguments du Procureur, l'intimé a besoin de la traduction de la Requête,

[1] Voir l'ordonnance intitulée *Order Appointing a Pre-Appeal Judge*, 24 janvier 2006.

CONSIDERANT EN OUTRE que l'intimé a toujours fait valoir que son aptitude à répondre comme il se doit aux écritures du Procureur dépend de la disponibilité desdites écritures en français[2],

CONSIDERANT que l'intérêt de la justice et l'équité justifient une prorogation du délai de dépôt jusqu'à ce que la version française de la Requête soit disponible,

PAR CES MOTIFS,

AUTORISONS l'intimé à déposer une réponse à la Requête du Procureur au plus tard dans les 10 jours à compter de la date à laquelle la traduction de ladite Requête lui sera communiquée ;

ACCORDONS EGALEMENT à l'intimé la suspension du délai de dépôt de toute réponse ou duplique aux documents déposés par le Procureur en anglais jusqu'à la date à laquelle la traduction française desdits documents sera communiquée à l'intimé.

FAIT en anglais et en français, la version anglaise faisant foi.

Fait à La Haye (Pays-Bas), le 11 septembre 2006.

[Signé] : Liu Daqun

[2] Décision relative à la Requête de l'intimé en vue d'obtenir un report de délai, 13 avril 2006 (« Deuxième décision relative un report de délai ») ; Décision relative à la demande du Greffier de proroger le délai de dépôt de la traduction officielle du jugement; 25 janvier 2006 (« Décision relative à la demande du Greffier ») ; voir aussi la Décision relative à la requête visant à obtenir un report de délai pour le dépôt de l'acte d'appel, 16 décembre 2005 (« Première décision relative au report de délai ») ; Décision relative à la requête de la Défense en vue d'obtenir un report de délai pour répondre au mémoire en appel du Procureur, 20 juin 2006.

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Ordonnance relative au mémoire d'appel de Simba 29 septembre 2006 (ICTR-2001-76-A)

(Original : non spécifié)

Chambre d'appel

Juge de la mise en état en appel : Liu Daqun

Aloys Simba – Mémoire d'appel – Versions papier et électronique différentes – Longueur – Absence de requête relative à l'autorisation d'outrepasser le nombre limite de pages, Absence de motifs valables – Abus de procédure, Non paiement des honoraires relatifs aux écritures déposées abusivement – Rejet des deux versions du mémoire d'appel – Dépôt de nouveau du mémoire d'appel

Instruments internationaux cités :

Directive pratique relative à la procédure de dépôt des écritures en appel devant le Tribunal, 16 septembre 2002 ; Règlement de procédure et de preuve, art. 73 (F) et 108 bis (B)

NOUS, LIU DAQUN, 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'États voisins entre le 1er janvier et le 31 décembre 1994 (le « Tribunal ») et juge de la mise en état en appel dans la présente affaire;

VU le Mémoire d'appel de la Défense, communiqué électroniquement au Greffe le 5 septembre 2006 (« Version électronique du Mémoire d'appel ») et déposé sous le sceau de la confidentialité le 6 septembre 2006 par le conseil d'Aloys Simba (la « Défense »);

VU la version papier originale du Mémoire d'appel de la Défense, reçue par le Greffe le 18 septembre 2006 et déposée le 21 septembre 2006 (la « Version papier du Mémoire d'appel »);

VU la Requête urgente du Procureur tendant à faire rejeter le Mémoire d'appel de la Défense, déposée le 8 septembre 2006 (la « première requête du Procureur »);

VU la requête du Procureur intitulée « Prosecutor's Urgent Motion Objecting to 'Mémoire d'appel de la Défense' and Annexes, as filed on 21 September 2006 and 18 September 2006, Respectively », déposée le 27 septembre 2006 (la « seconde requête du Procureur »);

RAPPELANT qu'aux termes de l'article 108 *bis* (B) du Règlement de procédure et de preuve du Tribunal (le « Règlement »), 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 »;

RAPPELANT qu'aux termes de la Directive pratique relative à la longueur des mémoires et des requêtes en appel (la « Directive pratique »), « [l]e mémoire d'un appelant, dans le cadre de l'appel

contre le jugement final d'une Chambre de première instance, n'excède pas 100 pages ou 30 000 mots » et « une page moyenne ne doit pas dépasser 300 mots » [1] ;

RAPPELANT EGALEMENT qu'aux termes du paragraphe 5 de la Directive pratique, « Une partie doit demander l'autorisation de la Chambre d'appel […] ou du Juge de la mise en état en appel d'outrepasser les limites fixées dans la présente Directive pratique et expliquer les circonstances exceptionnelles qui justifient le dépôt d'une écriture plus longue »;

ATTENDU que la version électronique du Mémoire d'appel comporte 125 pages, à l'exclusion de la table des matières, de la liste des sources, du glossaire et des annexes, tandis que la version papier du Mémoire d'appel est de 100 pages;

ATTENDU que chacune des écritures excède au total 40 000 mots, et que chacune des pages de la version papier du Mémoire d'appel dépasse en moyenne 400 mots;

ATTENDU que la Défense n'a pas déposé de requête tendant à obtenir l'autorisation de la Chambre d'appel ou du juge de la mise en état en appel d'outrepasser le nombre de pages limite pour son Mémoire d'appel et n'a invoqué aucun motif valable justifiant le dépôt d'une écriture aussi longue;

ATTENDU de surcroît que la Défense n'a donné aucune explication justifiant le dépôt sous le sceau de la confidentialité des versions électronique et papier du Mémoire d'appel et de leurs annexes respectives;

CONSTATANT que les versions électronique et papier du Mémoire d'appel n'ont pas été déposées en conformité avec la Directive pratique et qu'elles sont donc invalides;

CONSIDÉRANT que la présente ordonnance ne portera nullement préjudice à la Défense;

CONSTATANT que le dépôt par la Défense de deux versions différentes du Mémoire d'appel, qui dépassent la longueur prescrite, constitue un abus de procédure devant être sanctionné, en application de l'article 73 (F) du Règlement, par le non paiement des honoraires relatifs aux écritures déposées abusivement;

PAR CES MOTIFS,

REJETTONS la version électronique du Mémoire d'appel et la version papier du Mémoire d'appel;

ORDONNONS à la Défense de déposer de nouveau son Mémoire d'appel auprès du Greffe le 6 octobre 2006 au plus tard;

ORDONNONS à la Défense de se conformer rigoureusement aux nombres de pages et de mots limites que prescrit la Directive pratique;

AUTORISONS la Défense, si elle établit que l'intérêt de la justice le commande, à déposer simultanément une version confidentielle et une version publique caviardée de son Mémoire d'appel;

ENJOIGNONS au Procureur de déposer son Mémoire de l'intimé, le cas échéant, dans les 40 jours suivant le nouveau dépôt par la Défense de son Mémoire d'appel;

DÉCLARONS sans objet les première et seconde requêtes du Procureur; et

[1] Directive pratique relative à la longueur des mémoires et des requêtes en appel, 16 septembre 2002.

ENJOIGNONS au Greffier de refuser le paiement des honoraires qui seraient réclamés au titre des écritures rejetées.

Fait en anglais et en français, le texte anglais faisant foi.

Fait le 29 septembre, à La Haye (Pays-Bas).

[Signé] : Liu Daqun

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Décision relative à la requête d'Aloys Simba relative au dépôt de son mémoire d'appel
4 octobre 2006 (ICTR-2001-76-A)

(Original : non spécifié)

Chambre d'appel

Juge de la mise en état en appel : Liu Daqun

Aloys Simba – Dépôt du mémoire d'appel – Levée d'une sanction, Réitération dans une seconde requête d'une demande déjà formulée dans une requête précédente et toujours pendante – Limites fixées pour la longueur d'un mémoire de l'appelant – Autorisation exceptionnelles de dépasser la limite de mots par page, Caractère vague de la demande – Transmission du mémoire d'appel par courrier express uniquement, Bordereau de remise du courrier à l'opérateur devant faire foi de la date d'envoi, Transmission du mémoire d'appel électronique en version électronique – Requête acceptée en partie

Instrument international cité :

Directive pratique relative à la procédure de dépôt des écritures en appel devant le Tribunal, 16 septembre 2006 ; Règlement de procédure et de preuve, art.

Jurisprudence international citée :

T.P.I.R. : Chambre d'appel, Le Procureur c. Aloys Simba, Ordonnance relative au Mémoire d'appel de Simba, 29 Septembre 2006 (ICTR-01-76)

89. Le Juge de la mise en état en appel dans la présente affaire est saisi d'une requête d'Aloys Simba (« l'Appelant ») intitulée « Requête en extrême urgence de la défense en vue de solliciter exceptionnellement l'interprétation du paragraphe C (1) (a) de la Directive relative à la longueur des mémoires et des requêtes en appel et l'autorisation de dépasser le nombre de mots limite et de transmettre le mémoire d'appel uniquement par courrier express (article 73 du RPP) », déposée le 3 octobre 2006 (« Requête du 3 octobre 2006» et « Directive pratique », respectivement). Le même jour, le Procureur a déposé une réponse à cette requête. [1]

[1] Prosecutor's Response to « Requête en extrême urgence de la défense en vue de solliciter exceptionnellement l'interprétation du paragraphe (C) (1) (a) de la Directive relative à la longueur des mémoires et des requêtes en appel et

90. Le 29 Septembre 2006, le Juge de la mise en état en appel délivrait une ordonnance[2] par laquelle, principalement, il (i) rejetait les versions électronique et papier du Mémoire d'appel de l'Appelant déposées respectivement les 6 et 21 septembre 2006 ; (ii) ordonnait à l'Appelant de déposer, à nouveau, son Mémoire d'appel auprès du Greffe du Tribunal le 6 octobre 2006, au plus tard, tout en se conformant strictement aux limites de pages et de mots fixées dans la Directive pratique ; (iii) enjoignait au Greffier de refuser le paiement des honoraires qui seraient réclamés au titre des écritures rejetées.

91. Le 2 octobre 2006, l'Appelant déposait une « Requête en extrême urgence de la défense en vue de solliciter le réexamen de l'Ordonnance relative au Mémoire d'appel de Simba (Article 73 du RPP) » (« Requête du 2 octobre 2006 »), actuellement pendante devant le Juge de la mise en état en appel.

92. Aux termes du dispositif de la Requête du 3 octobre 2006, l'Appelant sollicite (i) l'interprétation des termes de l'article C (1) (a) de la Directive pratique, afin de préciser si les limites fixées pour la longueur d'un mémoire de l'appelant, soit 100 pages ou 30.000 mots, doivent se lire « cumulativement ou alternativement »[3] (« Première demande »); (ii) l'autorisation exceptionnelle de dépasser, au besoin, la limite de 300 mots par page (« Deuxième demande ») ; (iii) l'autorisation de transmettre le mémoire d'appel et ses annexes par courrier express uniquement, le bordereau de remise du courrier à l'opérateur chargé de l'expédition devant faire foi de la date d'envoi (« Troisième demande »); et (iv) la levée de la sanction imposée par l'Ordonnance du 29 septembre 2006 (« Quatrième demande »).

93. Il ne sera pas statué sur la Quatrième demande, une mesure identique ayant été auparavant sollicitée dans la Requête du 2 octobre 2006 qui est actuellement pendante devant le Juge de la mise en état en appel. La pratique consistant, pour l'Appelant, à réitérer dans une seconde requête une demande déjà formulée dans une requête précédente et qui est toujours pendante, est de nature à compliquer inutilement le travail de la Chambre d'appel et pourrait, si elle devait se renouveler, être considérée comme un abus de procédure appelant des sanctions appropriées.

94. S'agissant de la Première demande, l'Ordonnance du 29 septembre 2006 a déjà rappelé les dispositions pertinentes de la Directive pratique concernant les limites de pages et de mots imposées pour le mémoire d'un appelant[4]. L'article C (1) (a) de la Directive pratique, qui fixe que « [l]e mémoire d'un appelant, dans le cadre de l'appel contre le jugement final d'une Chambre de première instance, n'excède pas 100 pages ou 30.000 mots » doit se lire conjointement avec les articles A et B. L'article A détermine le format de présentation du mémoire de l'appelant et l'article B précise qu'« une page moyenne ne doit pas dépasser 300 mots »[5]. Dès lors, la simple lecture des dispositions pertinentes suffit à indiquer qu'un mémoire de l'appelant comportant plus de 30.000 mots excède la limite autorisée[6]. D'ailleurs, l'Appelant, éclairé selon ses propres dires par la lecture de l'Ordonnance du 29 septembre 2006, semble bien en avoir saisi la portée exacte[7].

95. S'agissant de la Deuxième demande visant à obtenir l'autorisation exceptionnelle de dépasser « la limite de 300 mots par page »[8], le Juge de la mise en état en appel rappelle que ce nombre se réfère

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l'autorisation de dépasser le nombre de mots limite et de transmettre le mémoire d'appel uniquement par courrier express (article 73 du RPP) », deposée le 3 octobre 2006 (« Réponse »).

[2] *Le Procureur c. Simba*, affaire N°ICTR-01-76-A, Ordonnance relative au Mémoire d'appel de Simba, 29 Septembre 2006 (« Ordonnance du 29 septembre 2006»).

[3] Requête, p. 4

[4] Ordonnance du 29 septembre 2006, p. 2.

[5] Directive pratique relative à la longueur des mémoires et des requêtes en appel, 16 septembre 2002. Le paragraphe 4 de cette directive indique les éléments qui entrent ou non dans le calcul du nombre de pages et mots.

[6] Par contre, un mémoire comportant plus de 100 pages mais dont il serait établi par la partie concernée qu'il contient moins de 30.000 mots pourrait être jugé valide.

[7] Requête, par. 6 et 13.

[8] Requête, par. 13.

à une moyenne, la limite pertinente étant celle de 30.000 mots. La demande de l'Appelant doit dés lors s'interpréter comme une demande de dépassement du nombre limite de 30.000 mots. L'Appelant justifie cette demande en évoquant : l'impossibilité dans laquelle il se trouverait de vérifier le nombre de mots de ses écritures[9] ; l'importance des notes de bas pages dont la « réduction drastique » pourrait réduire « l'efficacité » du Mémoire d'appel[10] ; la nécessité de se conformer à l'article 4 de la Directive pratique relative aux conditions formelles applicables au recours en appel contre un jugement (« Directive pratique relative aux conditions formelles »)[11] ; et le nombre élevé de ses moyens d'appel[12].

96. Le Juge de la mise en état en appel rappelle qu'aux termes du paragraphe 5 de la Directive pratique, « [u]ne partie doit demander l'autorisation de la Chambre d'appel […] ou du Juge de la mise en état en appel d'outrepasser les limites fixées dans la présente Directive pratique et expliquer les circonstances exceptionnelles qui justifient le dépôt d'une écriture plus longue ». La demande de dépassement formulée par l'Appelant doit dés lors être rejetée sans examen approfondi en raison de son caractère vague, l'Appelant restant en défaut d'expliquer en quoi les éléments invoqués constitueraient des circonstances exceptionnelles justifiant une autorisation de dépassement illimitée du nombre de mots autorisés par la Directive pratique. La simple affirmation qu'il est nécessaire pour l'Appelant de se conformer au paragraphe 4 de la Directive pratique relative aux conditions formelles et que l'Acte d'appel contient plus de 100 moyens ne pouvant suffire à justifier de telles circonstances exceptionnelles.

97. La Troisième demande manque de clarté. Toutefois, le Juge de la mise en état en appel comprend que l'Appelant souhaite être autorisé à prouver qu'il s'est conformé à son obligation de déposer à nouveau son Mémoire d'appel pour le 6 octobre 2006 au plus tard, comme le prévoit l'Ordonnance du 29 septembre 2006, en produisant un bordereau établissant la remise de ces documents, à la date du 6 octobre 2006, à un opérateur de courrier express chargé de le faire parvenir au Greffe du Tribunal à Arusha (Tanzanie). Le Juge de la mise en état en appel estime, au vu des circonstances décrites dans la Requête[13], que cette demande est raisonnable. Toutefois, il ne convient pas de dispenser l'Appelant d'envoyer au Greffe du Tribunal, le fichier électronique de logiciel de traitement de texte du Mémoire d'appel, ce fichier étant utile tant pour le comptage des mots que pour faciliter le travail du service de traduction. L'Appelant est prié de faire parvenir ce fichier électronique au Greffe du Tribunal selon la procédure habituelle.

PAR CES MOTIFS,

REITERE les dispositions pertinentes de l'Ordonnance du 29 septembre 2006 ;

ORDONNE à l'Appelant de déposer, selon les modalités définies ci-dessous, un Mémoire d'appel n'excédant pas 30.000 mots ;

AUTORISE l'Appelant à établir qu'il s'est conformé à l'Ordonnance du 29 septembre 2006 en produisant le bordereau établissant la remise le 6 octobre 2006, au plus tard, de la version signée du Mémoire d'appel et de ses annexes à l'opérateur de courrier express chargé de les acheminer au Greffe du Tribunal à Arusha (Tanzanie). L'Appelant doit prendre les dispositions qui s'imposent afin que les documents précités parviennent au Greffe du Tribunal à Arusha au plus tard le 13 octobre 2006.

ENJOINT au Procureur de déposer son Mémoire de l'intimé, le cas échéant, dans les 40 jours suivant la date d'enregistrement par le Greffe du Tribunal du dépôt de la version signée du Mémoire d'appel de l'Appelant.

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[9] Requête, par. 9.
[10] Requête, par. 10.
[11] Adoptée le 4 juillet 2005. Requête, par. 11.
[12] Requête, page 3, note de bas de page 2.
[13] Requête, par. 14.

Fait en français et en anglais, le texte français faisant foi.

Fait le 4 octobre 2006, à La Haye (Pays-Bas).

[Signé] : Liu Daqun

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Décision sur la requête de l'appelant en vue de solliciter le réexamen de l'ordonnance relative au mémoire d'appel de Simba 8 novembre 2006 (ICTR-2001-76-A)

(Original : Anglais)

Chambre d'appel

Juge de la mise en état en appel : Liu Daqun

Aloys Simba – Réexamen d'une ordonnance antérieure – Compétence – Critère de réexamen – Honoraires relatifs aux écritures rejetées – Requête rejetée

Jurisprudence international citée :

T.P.I.R.: Chambre d'appel, Le Procureur c. Eliézer Niyitegeka, Decision on Request for Reconsideration of the Decision on Request for Review, 27 septembre 2006 (ICTR-96-14)

T.P.I.Y.: Chambre d'appel, Le Procureur c. Zoran Žigić, Décision relative à la demande faite par Zoran Žigić de réexaminer l'arrêt rendu par la Chambre d'appel le 28 février 2005 dans l'affaire N°IT-98-30/1-A, 26 juin 2006 (IT-98-30/1)

NOUS, LIU DAQUN, 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'États voisins entre le 1er janvier et le 31 décembre 1994 (le « Tribunal ») et juge de la mise en état en appel dans la présente affaire,

VU l'Ordonnance relative au mémoire d'appel de Simba, rendue le 29 septembre 2006 (l'« Ordonnance ») qui : (i) ordonne à l'appelant de déposer de nouveau son Mémoire d'appel en se conformant rigoureusement aux limites fixées pour le nombre de pages et de mots par la Directive pratique relative à la longueur des mémoires et des requêtes en appel (la « Directive pratique »)[1], et (ii) enjoint au Greffier de refuser le paiement des honoraires qui seraient réclamés au titre des écritures rejetées[2],

SAISI de la Requête en extrême urgence de la Défense en vue de solliciter le réexamen de l'ordonnance relative au Mémoire d'appel de Simba (Article 73 du RPP), déposée le 2 octobre 2006 par le conseil d'Aloys Simba (respectivement la « Requête » et la « Défense »), qui demande au juge

[1] Directive pratique relative à la longueur des mémoires et des requêtes en appel, 16 septembre 2002.
[2] *Le Procureur c. Aloys Simba*, affaire N°ICTR-01-76-A, Ordonnance relative au mémoire d'appel de Simba, 29 septembre 2006

de la mise en état en appel de réexaminer la partie de l'Ordonnance qui enjoint au Greffier de refuser le paiement des honoraires qui seraient réclamés au titre des écritures rejetées[3],

VU la réponse du Procureur intitulée « Prosecutor's Response to 'Requête en extrême urgence de la Défense en vue de solliciter le réexamen de l'ordonnance Relative au Mémoire d'Appel de Simba' (Article 73 du RPP) » déposée le 2 octobre 2006,

VU le Mémoire d'appel d'Aloys Simba qui a été déposé de nouveau le 16 octobre 2006 en exécution de l'Ordonnance intimant que le Mémoire d'appel soit déposé de nouveau, dans le respect de la Directive pratique,

ATTENDU que la Chambre d'appel a le pouvoir inhérent de réexaminer ses propres décisions autres qu'un arrêt dès lors qu'une erreur manifeste de raisonnement a été mise en évidence ou que cela se révèle nécessaire pour éviter une injustice, et qu'en notre qualité de juge siégeant à la Chambre d'appel, nous pouvons user de ce pouvoir pour réexaminer des décisions que nous avons rendues en notre qualité de juge de la mise en état en appel[4],

ATTENDU que l'explication fournie dans la Requête, selon laquelle il a fallu deux mois pour préparer le Mémoire d'appel et tout abus serait fondé sur une erreur d'interprétation des dispositions pertinentes de la Directive pratique[5], ne satisfait pas au critère de réexamen,

ATTENDU que l'injonction de refuser le paiement ne concernait que les honoraires qui seraient réclamés au titre des écritures rejetées et n'empêche pas la Défense de soumettre de nouveau une demande de rémunération au titre du travail effectué dans le cadre de la préparation du Mémoire d'appel déposé dans les règles,

PAR CES MOTIFS.

REJETTONS la Requête

Fait en anglais et en français, la version en anglais faisant foi

Fait le 4 octobre 2006, à La Haye (Pays-Bas).

[Signé] : Liu Daqun

[3] *Le Procureur c. Aloys Simba,* affaire N°ICTR-01-76-A, Requête en extrême urgence de la Défense en vue de solliciter le réexamen de l'ordonnance Relative au Mémoire d'Appel de Simba (Article 73 du RPP), 2 octobre 2006.
[4] Eliézer Niyitegeka c. Le Procureur, affaire **N°**ICTR-96-14-R, Decision on Request for Reconsideration of the Decision on Request for Review, 27 septembre 2006, p. 2 ; Le Procureur c. Žigić, affaire N°IT-98-30/1-A, Décision relative à la demande faite par Zoran Žigić de réexaminer l'arrêt rendu par la Chambre d'appel le 28 février 2005 dans l'affaire N°IT-98-30/1-A, 26 juin 2006, par. 5.
[5] Requête, p. 2.

The Prosecutor v. Protais ZIGIRANYIRAZO

Case N° ICTR-2001-73

Case History

- Name: ZIGIRANYIRAZO
- First Name: Protais
- Date of Birth: 1938
- Sex: male
- Nationality: Rwandan
- Former Official Function: Businessman
- Date of Indictment's Confirmation: 20 July 2001
- Date of Indictment's Amendment: 7 March 2005
- Counts: conspiracy to commit genocide, genocide, or alternatively complicity in genocide, crimes against humanity (extermination or alternatively murder)
- Date and Place of Arrest: 26 July 2001, in Brussels, Belgium
- Date of Transfer: 3 October 2001
- Date of Initial Appearance: 10 October 2001
- Date Trial Began: 3 October 2005
- Date and content of the Sentence: 18 December 2008, sentenced to 20 years imprisonment
- Appeal: 16 November 2009, acquitted and released

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Decision on the Defence Motions for the Cooperation of the Government of Rwanda in Relation with Prosecution Witnesses AVY and SGO (Article 28 of the Statute of the Tribunal) 17 January 2006 (ICTR-2001-73-T)

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Cooperation of a State, Rwanda, Witnesses – Importance of judicial records of a witness – Disclosure of records previously requested – Some elements of the judicial records of witnesses still missing – Cooperation of the Government of Rwanda – 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 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. Aloys Simba, Decision on Matters Related to Witness KDD's Judicial Dossier, 1 November 2004 (ICTR-2001-76) ; Trial Chamber, The Prosecutor v. Protais Zigiranyirazo, Scheduling Order, 6 May 2005 (ICTR-2001-73) ; Trial Chamber, The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera, Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records, 14 September 2005 (ICTR-98-44)

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

SITTING as Trial Chamber III, composed of Judges Inés Mónica Weinberg de Roca, Presiding, Khalida Rachid Khan, and Lee Gacuiga Muthoga ("Chamber");

BEING SEIZED of the Defence's "Urgent Motion to Request the Cooperation of the Government of Rwanda Re Judicial Documents Re Witness AVY" filed on 31 October 2005 ("AVY Motion") and the Defence's "Urgent Motion to Request the Cooperation of the Government of Rwanda Re Judicial Documents Re Witness SGO" filed on 7 November 2005 ("SGO Motion");

CONSIDERING that the Prosecutor did not file any response within the timeframe provided by the Rules of Procedure and Evidence;

CONSIDERING the Statute of the Tribunal ("Statute") particularly Article 28, and the Rules of Procedure and Evidence ("Rules") particularly Rule 54;

RECALLING that it is settled jurisprudence that the judicial records of a witness are material for his/her cross-examination, and are therefore necessary for the opposing party;[1]

RECALLING FURTHER that in the present case the Chamber has requested the Prosecutor disclose all criminal records of his detained witnesses;[2]

CONSIDERING that some elements of the judicial records of Prosecution Witnesses AVY and SGO are still missing, and that the Government of Rwanda has agreed to cooperate if the Chamber so requests;

THE CHAMBER

I. GRANTS the Motions;

II. REQUESTS the cooperation of the Government of Rwanda in providing the Defence with the judicial records of Prosecution Witnesses AVY and SGO before the judicial and the Gacaca courts;

III. ORDERS the Registrar to serve this Decision on the Government, to follow up on its implementation and to report back to the Chamber;

Arusha, 17 January 2006, done in English.

[Signed] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

[1] *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case N°ICTR-98-44-PT, Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records, 14 September 2005; *The Prosecutor v. Aloys Simba*, Case N°ICTR-2001-76-T, Decision on Matters Related to Witness KDD's Judicial Dossier (TC), 1 November 2004; *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Case N°ICTR-98-41-T, Decision on the Request for Documents Arising From Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003.
[2] Scheduling Order (Para. VI), 6 May 2005.

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Decision on the Prosecutor's Motion for the Transfer of Detained Witnesses AVY and ATN (Rule 90 bis *of the Rules of Procedure and Evidence) 17 January 2006 (ICTR-2001-73-T)*

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Transfer of detained witnesses – Rwanda – Issue of postponement of the hearing premature – Conditions satisfied – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, Rules 90 bis *and 90* bis *(B)*

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

SITTING as Trial Chamber III, composed of Judges Inés Mónica Weinberg de Roca, Presiding, Khalida Rachid Khan, and Lee Gacuiga Muthoga ("Chamber");

BEING SEIZED of the "Prosecutor's Urgent Motion for the Transfer of Detained Witnesses: AVY and ATN" filed on 15 December 2005 ("Motion");

CONSIDERING the Defence Response filed on 20 December 2005 in which the Defence did not oppose the Motion but requested that the Chamber postpone the hearing of Witnesses AVY and ATN to one week after the disclosure requested in its two earlier motions;[1]

CONSIDERING that the issue of postponement of the hearing is premature because the Defence has not demonstrated any prejudice or risk of prejudice to the Accused;

RECALLING its "Decision on the Transfer of Detained Witnesses of 22 September 2005", and reiterating the reasoning therein;

CONSIDERING that the requirements of Rule 90 *bis* of the Rules are met in the present case, as the Government of Rwanda responded on 9 December 2005 to the Prosecutor's letter and confirmed that the witnesses are not required in any criminal proceedings in Rwanda and that their stay in Arusha (United-Republic of Tanzania) will not extend their detention in Rwanda;

THE CHAMBER

I. GRANTS the Prosecutor's Motion;

II. DENIES the Defence request for postponement of the hearing of the two witnesses;

[1] Urgent Motion to Request the Cooperation of the Government of Rwanda Re Judicial Documents Re Witness AVY, 31 October 2005; and Requête pour la communication des éléments exculpatoires Re Dossier *Prosecutor v. Ephrem Setako* et le *Procureur v. Théoneste Bagosora et al.*, 7 December 2005.

III. ORDERS, pursuant to Rule 90 *bis* (B) of the Rules, that Prosecution Witnesses AVY and ATN be transferred to Arusha for their hearing;

IV. REQUESTS the Governments of the Republic of Rwanda and of the United-Republic of Tanzania, to cooperate with the Prosecutor and the Registrar and the Witnesses and Victims Support Section of the Tribunal, to take the necessary measures to implement the present decision.

Arusha, 17 January 2006, done in English.

[Signed] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Decision on the Prosecutor's Motion to Vary his Witness List (Rule 73 bis *(E) of the Rules of Procedure and Evidence) 19 January 2006 (ICTR-2001-73-T)*

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Variation of the witness list – Testimony of a witness before the Belgian Authorities – Unwillingness to further testify – Another witness being able to testify on the same events – Absence of prejudice to the rights of the Accused – Motion granted

International Instrument Cited :

Rules of Procedure and Evidence, Rule 73 bis *(E)*

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

SITTING as Trial Chamber III, composed of Judges Inés Mónica Weinberg de Roca, Presiding, Khalida Rachid Khan, and Lee Gacuiga Muthoga ("Chamber");

BEING SEIZED of the "Prosecutor's Motion for Varying the Witness List" filed on 22 December 2005 ("Motion");

CONSIDERING the Defence Response to Prosecutor's Motion for Varying the Witness List, filed on 28 December 2005, in which the Defence opposes the Motion for lack of diligence with regard to Witness BIY and for late disclosure with regard to Witness BPP, and the Prosecutor's Reply thereto filed on 4 January 2006;

CONSIDERING the extract of Witness BIY's testimony before Belgian Authorities dated 25 November 2005 indicating that the witness does not have special knowledge about the Accused which

was not already disclosed to the Belgian Authorities, that others know more about the Accused, and that the witness is not willing to suffer mentally by responding to further questions;[1]

CONSIDERING the Rules of Procedure and Evidence ("Rules") particularly Rule 73 *bis* (E) of the Rules;

CONSIDERING that Witness BIY is the witness to testify as to the events at the Kanombe State House and is not willing to further testify;

CONSIDERING that the Prosecutor has another witness, Witness BPP, who can testify to the same events and that his statements were already disclosed to the Defence;

CONSIDERING that the withdrawal of Witness BIY and the sole inclusion of Witness BPP will not prejudice the rights of the Accused;

CONSIDERING FURTHER that it is in the interests of justice to allow the parties to present their cases and to bring the best evidence available;

THE CHAMBER

GRANTS the Motion, and ALLOWS the variation of the Prosecution Witness List as proposed in the Motion.

Arusha, 19 January 2006, done in English.

[Signed] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

[1] The witness said: « Je ne sais rien de spécial au sujet de Mr. Z ; il y en a d'autres qui en savent beaucoup plus. Je ne sais pas dire plus que ce que j'ai dit ici. Je ne veux plus souffrir mentalement avec des questions et je veux vivre tranquillement ».

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Scheduling Order – in Camera Hearing on Prosecutor's Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and his Family (Rules 66 (C) and 68 (D) of the Rules of Procedure and Evidence) 19 January 2006 (ICTR-2001-73-T)

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Scheduling order – Limited disclosure of information, Payments and benefits provided to a witness and his family – Prosecutor, In camera and ex parte

International Instrument Cited:

Rules of Procedure and Evidence, Rules 66 (C) and 68 (D)

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

SITTING as Trial Chamber III, composed of Judges Inés Mónica Weinberg de Roca, Presiding, Khalida Rachid Khan, and Lee Gacuiga Muthoga ("Chamber");

BEING SEIZED of the "Prosecutor's Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and his Family" filed as confidential and *inter partes* on 12 December 2005; and the "Prosecutor's Supplemental Information to the Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and His Family" filed as confidential and *inter partes* on 15 December 2005;

CONSIDERING the Defence "*Réponse à la requête du Procureur* 'to permit limited disclosure of information regarding payments en benefits provided to witness ADE en his family'" filed on 20 December 2005; and the "Prosecutor's Rejoinder to Defence Reply Regarding Disclosure of Information of Payments and Benefits Provided to Witness ADE and His Family and to Defence Reply to Allow Limited Disclosure of Information" filed as confidential and *inter partes* on 22 December 2005;

RECALLING that the trial is scheduled to resume on 23 January 2006;

CONSIDERING the Statute of the Tribunal ("Statute") and the Rules of Procedure and Evidence ("Rules") particularly Rules 66 (C) and 68 (D);

CONSIDERING the Prosecutor's request to submit to the Chamber, *in camera* according to Rules 66 (C) and 68 (D), the unredacted budget detailing the specific payments and benefits to Witness ADE that was not included in the disclosure to the Defence;

CONSIDERING FURTHER that the Defence asks that the Prosecutor comply with the conditions set out in Rule 68 (D), in that the Prosecutor will provide the Chamber, sitting *in camera* and *ex parte*, with all relevant information concerning the payments and benefits for Witness ADE and his family;

THE CHAMBER HEREBY

ORDERS the Prosecution, after the trial resumes but before the first witness is called, to appear *in camera* and *ex parte* on Monday 23 January 2006 to provide the Chamber with all information, materials, and documents, related to the payments and benefits given to Witness ADE and his family, including the unredacted budget, and to be prepared to discuss the aforementioned with the Chamber.

Arusha, 19 January 2006, done in English.

[Signed] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Decision on the Defence Motion for Disclosure of Exculpatory Evidence from Ephrem Setako and Théoneste Bagosora et al. Cases (Rule 68 of the Rules of Procedure and Evidence) 25 January 2006 (ICTR-2001- 73-T)

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Disclosure of exculpatory evidence – Setako and Bagosora – Information requested not exculpatory – Motion denied

International Instrument Cited:

Rules of Procedure and Evidence, Rules 68 and 73 (A)

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

SITTING as Trial Chamber III, composed of Judges Inés Mónica Weinberg de Roca, Presiding, Khalida Rachid Khan, and Lee Gacuiga Muthoga ("Chamber");

BEING SEIZED of the Defence "Requête pour la communication des éléments exculpatoires Re Dossier *Prosecutor v. Ephrem Setako* et le *Procureur v. Théoneste Bagosora et al.*" filed on 7 December 2005 ("Motion");

CONSIDERING the Prosecutor's Response filed on 12 December 2005; and the Defence Reply filed on 13 December 2005;

CONSIDERING the Statute of the Tribunal ("Statute") and the Rules of Procedure and Evidence ("Rules") particularly Rule 68 of the Rules of Procedure and Evidence;

NOW DECIDES the matters based solely on the written briefs of the Parties pursuant to Rule 73 (A) of Rules.

1. The Defence requests the disclosure of statements, including either those statements disclosed as supporting material in an unredacted form, or the testimony proving that Ephrem Setako and Théoneste Bagosora were not at Nyundo in Gisenyi *préfecture* on 7 and 8 April 1994. The Defence further requests that such disclosure is made before 20 December 2005, and that it receive authorization to meet with al1 witnesses in the *Ephrem Setako* case before the hearing of Witness ATN.

2. The Defence argues that in accordance with Rule 68 of the Rules, it must provide *prima facie* evidence that the information requested is potentially exculpatory and that it is in the possession of the Prosecutor. The Defence asserts that it has met these two criteria.

3. The Defence submits that such statements or testimony are exculpatory because they contradict Prosecution Witness ATN's statement that Ephrem Setako and Théoneste Bagosora were at Nyundo on 7 and 8 April 1994 attending a meeting at a football field in the presence of the Accused. According to the Defence, the Prosecutor alleged in the Indictment against Ephrem Setako that the Accused was at Ruhengeri on the same dates, while it is common knowledge that Théoneste Bagosora was in Kigali on 7 and 8 April 1994 because of the ongoing war. With regard to the *Ephrem Setako* case, the Defence adds that Defence counsel for Ephrem Setako has informed it that evidence supporting the allegation of Setako being at Ruhengeri on 7 and 8 April 1994 has been disclosed. Despite having since requested such evidence, the Defence has not yet heard from the Prosecutor.

4. The Prosecutor responds that Witness ATN does not remember the exact date in April 1994, and therefore that any evidence intended to prove that Ephrem Setako and Théoneste Bagosora were not or could not be at Nyundo on 7 and 8 April 1994 cannot be considered exculpatory. The Prosecutor submits that determining what was said can best be explored through cross-examination.

5. The Defence replies reiterating its original arguments.

6. The Chamber notes that Witness ATN expressly said that he could not remember the exact date of the meeting at the football field at Nyundo, Gisenyi *préfecture*. Since the fact that the meeting took place on 7 or 8 April 1994 is not accurately portrayed in the witness statement, the information requested is not therefore exculpatory. Consequently, the Defence Motion shall be dismissed, and the Chamber need not to consider whether the criteria provided for in Rule 68 are met.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion for disclosure.

Arusha, 25 January 2006, done in English.

[Signed] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Decision on Prosecutor's Motion for Reconsideration of the Oral Decision Excluding Evidence on the Meeting of 22 November 1992, or for Certification to Appeal the Same (Rules 73 (A) and (B) of the Rules of Procedure and Evidence) 31 January 2006 (ICTR-2001-73-T)

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Reconsideration of a decision or certification to appeal it – 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. 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) ; Appeals Chamber, The Prosecutor v. Eliézer Niyitegeka, Decision on Defence Extremely Urgent Motion for Reconsideration of Decision dated 16 December 2003, 19 December 2003 (ICTR-96-14) ; Appeals Chamber, The Prosecutor v. Eliézer Niyitegeka, Decision on Eliezer Niyitegeka's Urgent Motion for Reconsideration of Appeals Chamber Decision dated 3 December 2003, 4 February 2004 (ICTR-96-14) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora et al., Decision on Reconsideration of Order to reduce Witness List and on Motion for Contempt for Violation of that order, 1 March 2004 (ICTR-98-41) ; Appeals Chamber, The Prosecutor v. Hassan Ngeze et al., Decision on Ngeze's Motion for Reconsideration of the Decision Denying an Extension of Page Limits His Appellant Brief, 11 March 2004 (ICTR-99-52) ; Appeals Chamber, The Prosecutor v. Laurent Semanza, Decision on Application for Reconsideration of Amicus Curiae Application of Paul Bisengimana, 19 May 2004 (ICTR-97-20) ; 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 ; 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)

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Zdravko Mucić et al., Judgement and Sentence Appeal, 8 April 2003 (IT-96-21)

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

SITTING as Trial Chamber III, composed of Judges Inés Mónica Weinberg de Roca, Presiding, Khalida Rachid Khan, and Lee Gacuiga Muthoga ("Chamber");

BEING SEIZED of the "Prosecutor's Motion for Reconsideration of a Decision, or for Certification of Appeal, in the Alternative" filed on 25 October 2005 ("Motion");

CONSIDERING the Defence "Reply to Prosecutor's Motion for Reconsideration of a Decision, or for Certification of Appeal, in the Alternative"; filed on 31 October 2005; and the Prosecutor's Rejoinder filed on 31 October 2005;

RECALLING the Oral Decisions made by the Chamber during the hearings on 5 and 18 October 2005;[1]

[1] T. 5 October 2005, pp. 42-58. T. 18 October 2005, p. 40.

NOW DECIDES the matters solely based on the written briefs of the Parties pursuant to Rule 73 (A) of the Rules of Procedure and Evidence ("Rules").

Introduction and Parties' Arguments

1. On 5 October 2005, Witness APJ testified about two meetings which took place in Giciye in 1992. The Accused was allegedly invited to the first one and took the floor to say that the population had to fight the enemy ("First Meeting"). The second meeting was between the *bourgmestre* and the *conseillers* as a follow-up to the First Meeting ("Second Meeting"). The Defence objected to the meetings being admitted into evidence. In the Oral Decision of 5 October 2005, the Chamber allowed evidence only on the First Meeting, where the Accused is alleged to have made a speech, because there is a general allegation in the Amended Indictment, the pre-trial brief, and the witness statement, of meetings that took place in 1994.[2] The Chamber chose to allow evidence from the First Meeting as it is alleged that the Accused was present.

2. On 18 October 2005, Witness SGP testified about a well-known meeting convened by Léon Mugesera which took place on 22 November 1992. The Defence raised an objection which was granted ("Oral Decision of 18 October 2005") ("Impugned Decision") because this meeting was well-known and material to the case and should have been pleaded in the Indictment which the Prosecutor had adequate opportunity to amend at different occasions. The Chamber agreed with the Defence, as the Prosecutor was aware of the existence of this meeting since at least 2001.[3]

3. The Prosecutor now seeks reconsideration of the Chamber's Oral Decision of 18 October 2005 on the ground that this later decision is not consistent with the one of 5 October 2005 and with the jurisprudence of the Tribunal, based on Rule 89 (C) of the Rules. In the alternative, the Prosecutor seeks certification to appeal the Oral Decision of 18 October 2005.

4. The Defence objects to the Motion in its two alternatives.

Deliberations

5. According to the jurisprudence of the Tribunal, a Chamber can reconsider its own Decision (i) when a new fact has been discovered that was not previously known to the Chamber;[4] (ii) where new circumstances have arisen since the filing of the impugned decision that affect the premise of the impugned decision;[5] or (iii) where a party has successfully shown an error of law or that the Chamber has abused its discretion,[6] and an injustice has been occasioned.[7] In the present case, none of those requirements have been met by the Prosecutor in his arguments. As such, the Chamber will not reconsider the Oral Decision of 18 October 2005.

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[2] T. 5 October 2005, pp. 42-58.
[3] T. 18 October 2005, p. 40.
[4] *Nyiramasuhuko*, Decision on Nyiramasuhuko Motion for reconsideration of the "Decision on Defence Motion for Certificate to Appeal the 'Decision on Defence Motion for a Stay of Proceedings and Abuse of Process'" (TC), 20 May 2004.
[5] *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; *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v. The Prosecutor*, Case N°ICTR-99-52-A, Decision on Ngeze's Motion for reconsideration of the Decision Denying an Extension of Page Limits His Appellant Brief (AC), 11 March 2004, p. 2.
[6] *Eliézer Niyitegeka v. The Prosecutor*, Case N°ICTR-96-14-A, Decision on Defence Extremely Urgent Motion for Reconsideration of Decision dated 16 December 2003 (AC), 19 December 2003; *Niyitegeka,* Decision on Eliézer Niyitegeka's Urgent Motion for Reconsideration of Appeals Chamber Decision dated 3 December 2003 (AC), 4 February 2004; *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.
[7] *Mucic et. al*., Judgment on Sentence Appeal (AC), 8 April 2003, para. 49; *Laurent Semanza v. The Prosecutor*, Case N°ICTR-97-20-A, Decision on Application for Reconsideration of *Amicus Curiae* Application of Paul Bisengimana (AC), 19 May 2004; *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)" (TC), 15 June 2004, para. 15.

6. Rule 73 (B) of the Rules provides for certification to appeal when (i) 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 and (ii) for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

7. The Chamber, having considered the arguments of the Prosecutor, found that none of those requirements in Rule 73 (B) have been met, and consequently the Motion shall be dismissed.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Prosecutor's Motion in all respects.

Arusha, 31 January 2006, done in English.

[Signed] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Decision on Defence and Prosecution Motions Related to Witness ADE (Rules 46, 66, 68, 73, and 75 of the Rules of Procedure and Evidence) 31 January 2006 (ICTR-2001-73-T)

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Communication of exculpatory elements – Disclosure of information, Payments and benefits provided to the witness and his family – Withdrawal of protective measures for the witness – Testimony of the witness via video-link – Joinder of motions – Protective measures still applicable – Dissemination of the redacted statement of the witness, Violation of the protective measures, Filing of a motion as a public document, Absence of sanctions, Due care of parties when filing documents with confidential information – Disclosure of information related to the witness, Payments and benefits, Payments directly from the Tribunal, Interests of transparency and justice, Scale of the payment – Testimony via video-link, Importance of the testimony, inability or unwillingness of the witness to attend, and a good reason adduced for the inability or unwillingness to attend – One motion granted in part, Other motions denied

International Instrument Cited :

Rules of Procedure and Evidence, Rules 46, 66, 66 (C), 68, 68 (D), 73 (A), 73 (F), 75 (A), 75 (B) 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. 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. 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. 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. Aloys Simba, Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link, 4 February 2004 (ICTR-2001-76) ; 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 on the Defence Request for Taking the Evidence of Witness FMP1 by Deposition, 9 February 2005 (ICTR-2001-76) ; 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 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, Scheduling Order – In Camera Hearing on Prosecutor's Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and His Family, 19 January 2006 (ICTR-2001-73)

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. Zejnil Delalić et al.,* Decision to allow witnesses K.L. and M to give their testimony by means of video-link conference, 28 May 1997 (IT-96-21*)*

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

SITTING as Trial Chamber III, composed of Judges Inés Mónica Weinberg de Roca, Presiding, Khalida Rachid Khan, and Lee Gacuiga Muthoga ("Chamber");

BEING SEIZED of the Defence "Requête pour la communication des éléments exculpatoires Re Témoin ADE et d'éléments visés par l'Article 66 (Déclarations d'un témoin du Procureur)" filed on 6 December 2005 ("Defence Motion for Disclosure"); and CONSIDERING the Prosecution Response filed as confidential and inter partes on 12 December 2005[1] and the Defence Reply filed on 20 December 2005;[2]

BEING FURTHER SEIZED of the "Prosecutor's Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and his Family" filed as confidential and *inter partes* on 12 December 2005 ("Rule 66 (C) Motion") and the "Prosecutor's Supplemental Information to the Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and His Family" filed as confidential and *inter partes* on 15 December 2005; and CONSIDERING the Defence Response filed on 20 December 2005[3] and the Prosecution Reply filed as confidential and *inter partes* on 22 December 2005;[4]

[1] "Prosecutor's Response to Defence Motion for Disclosure of Payments and Benefits to Witness ADE and His Family".
[2] "Réplique à la réponse du procureur a la requête pour la communication des éléments exculpatoires re témoin ADE et d'éléments visées par l'article 66 (déclarations d'un témoin du procureur)".
[3] "*Réponse à la requête du Procureur* 'to permit limited disclosure of information regarding payments en benefits provided to witness ADE en his family'".
[4] "Prosecutor's Rejoinder to Defence Reply Regarding Disclosure of Information of Payments and Benefits Provided to Witness ADE and His Family and to Defence Reply to Allow Limited Disclosure of Information".

BEING FURTHER SEIZED of the "Prosecutor's Motion for Sanctions Against Defence Counsel" filed as confidential and *inter partes* on 12 December 2005 ("Motion for Sanctions"); and CONSIDERING the Defence Response filed on 20 December 2005;[5]

BEING FURTHER SEIZED of the Defence "*Requête pour soustraire le témoin ADE des mesures de protection*" filed on 20 December 2005 ("Motion for Withdrawal of Protection"); and CONSIDERING that the Prosecution has not responded to it;

BEING FURTHER SEIZED of the "Prosecutor's Confidential Request to Allow Witness ADE to Give Testimony via Video-Link" filed on 21 December 2005 ("Video-Link Motion"); and CONSIDERING the Defence Response filed on 28 December 2005[6] and the Prosecution Reply filed on 13 January 2006;[7]

AND BEING FINALLY SEIZED of the "Defence Motion to the Chamber for Adjudication of Pending Motions" filed on 28 December 2005 ("Motion for Adjudication"); and CONSIDERING that the Prosecution has not responded to it;

RECALLING the Scheduling Order made on 19 January 2006 requesting the Prosecution to disclose to the Chamber, *in camera* and *ex parte* "all information and materials, including all documents, related to the payments and benefits given to Witness ADE and his family, including the unredacted budget";[8]

RECALLING the Decision of 25 February 2003 granting protective measures for Prosecution Witnesses ("Protective Order");[9]

CONSIDERING the Statute of the Tribunal ("Statute") and the Rules of Procedure and Evidence ("Rules") particularly Rules 46, 66, 68 (D), 73 (F), 75 (A) and 75 (B);

NOW DECIDES the motions based solely on the written briefs of the Parties pursuant to Rule 73 (A) of the Rules.

A. Joinder of the Motions

1. The Chamber is of the view that these motions are interrelated and should be decided together. The Chamber will rule on the motions in the following order: Motion for Withdrawal of Protection, Motion for Sanctions, Defence Motion for Disclosure and Rule 66 (C) Motion, Video-Link Motion, and Motion for Adjudication.

B. Motion for Withdrawal of Protection

2. The Defence requests the Chamber to declare that its Protective Order is no longer applicable to Witness ADE. The Defence argues that although the Tribunal previously prohibited the disclosure of Witness ADE's identity to the public, his name has since been made public due to the negligence of either the Prosecutor, Witness ADE himself or his family, or other sources.

3. The Protective Order shall remain in force. The Chamber is not satisfied that the Defence has shown a change in circumstances which would justify lifting the Protective Order.

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[5] "Réponse à la requête du procureur pour sanctions contre le conseil de la défense".
[6] "Defence Response to Prosecutor's Confidential Request to Allow Witness ADE to Give Testimony Via Videolink".
[7] "Prosecutor's Reply to the Defence Response to the Prosecutor's Confidential Request to Allow Witness ADE to Give Testimony Via Videolink".
[8] Scheduling Order – *In Camera* Hearing on Prosecutor's Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and His Family, (TC), 19 January 2006.
[9] Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 25 February 2003.

C. Motion for Sanctions

4. The Prosecutor submits that the redacted statement taken from Witness ADE was disseminated to parties and posted on the Internet, in violation of the Protective Order. Further, the Defence Motion for Disclosure was filed by the Defence on 6 December 2005 as a public document when it should have been filed as confidential or strictly confidential, since the annexes contained information which identified Witness ADE.

5. The Prosecutor argues that these actions were unnecessary, and served only to identify Witness ADE to the public. The Prosecutor warns that these actions are likely to both compromise their efforts to obtain Witness ADE's testimony and to discourage the cooperation of future witnesses, thus creating the impression that the Tribunal is incapable of protecting witnesses and victims.

6. The Prosecutor requests that the Chamber directs the Defence to change the Defence Motion for Disclosure classification level from "public" to "confidential", to find the unnecessary appendage of the photographs to the Defence Motion for Disclosure an abuse of process, to order the non-payment of fees in relation to the thirty-one (31) pages of appendices, and to warn Defence Counsel that further such acts could result in sanctions as provided for under Rule 46.

7. The Defence replies that the Prosecutor's request for sanctions against it should be dismissed. The Defence argues that the Prosecutor has not identified Defence counsel as being responsible for disclosure of the information on Witness ADE, nor has counsel committed an error that warrants sanctions. The Defence did not ask for sanctions against the Prosecutor for his failure to properly redact some of the statements disclosed.

8. The Chamber deplores the dissemination of Witness ADE's redacted statement to parties in violation of the Protective Order, and the filing of the Defence Motion for Disclosure as a public document when it should have been filed as confidential or strictly confidential. In order to limit disclosure of the sensitive information, the Chamber will order the Registrar to reclassify the filing as confidential. The Chamber will not impose sanctions on Defence counsel, but wishes to remind both parties to exercise due care when filing documents that contain confidential information.

D. Defence Motion for Disclosure and Rule 66 (C) Motion

9. The Defence requests the Chamber to order the disclosure of all benefits obtained by Witness ADE since 1995, and all new information from Witness ADE that was obtained in November 2005.

10. The Defence submits Witness ADE has received various benefits from the Prosecutor. Two requests from the Defence to transmit information concerning these benefits remain unanswered. Given the latter could affect the credibility of Prosecution evidence as envisaged in Rule 68 (A), the Defence requests the disclosure of all benefits and payments rendered to Witness ADE.[10]

11. The Prosecutor responds by referring to its arguments in the Rule 66 (C) Motion filed after the Defence Motion for Disclosure, which requests the Chamber denies such motion. In his motion, the Prosecutor requests that the Chamber grants permission under Rules 66 (C) and 68 (D) not to disclose to the Defence certain information regarding the provision of payments and benefits that he acknowledges having provided for Witness ADE and his family. He is of the view that the aforementioned information does not fall under Rule 68 as being potentially exculpatory. While the Prosecutor agrees that information or material concerning benefits or promises made to witnesses and victims beyond that which is reasonably required should be disclosed as evidence possibly affecting the credibility of the witnesses, the Prosecutor cites case law to support his contention that certain expenditures, such as transportation connected to investigations and hearings, do not fall within Rule

[10] *The Prosecutor v. Edouard Karemera et al.*, Case N°ICTR-98-44-I, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, para. 16.

68.[11] The Prosecutor submits that all such payments and benefits were reasonably required: (1) to make it possible to interview Witness ADE on a full-time basis for an extended period and to compensate him for foregoing income to support his family; (2) to provide the family with resources to permit their relocation, security, and societal re-insertion in a new country; and (3) to provide Witness ADE with credit to make telephone calls to assist in further investigations. In other words, all such benefits and payments were provided to Witness ADE and his family to put him in the position he would have been in had he not assisted the Office of the Prosecutor.

12. The Prosecutor further submits that ADE is an insider witness who assumes greater risks by cooperation as he can be viewed as a traitor and can be subject to retribution. This could lead to the witness refusing to testify or withdrawing his cooperation with the Prosecutor.

13. The Prosecutor asserts that, because of the improper filing referred to in the Motion for Sanctions, he is making disclosure to the Accused in a manner that complies with the standards as set forth in the *Karemera* Decision on Paid Witnesses: the Prosecutor has provided a sworn declaration of an investigator setting forth the subsistence payments, the telephone credits, and notes that funds were expended for one-way travel for members of his family, without including specific amounts or dates, made to Witness ADE. The Prosecutor puts forth that he has also provided the approved budget for the costs of relocation of Witness ADE's family, in conformity with another decision in the *Karemera* case, which held that the money value of the expenditures for the relocation of a witness and his family were not necessary for determining his credibility.[12] The Prosecutor is also concerned that the disclosure of the amounts could reveal the place of relocation as well. The Prosecutor states that he is ready to hand-deliver to the Judges the unredacted budget when so requested. The Prosecutor further undertakes to submit to the Judges *in camera* all the details not included in the disclosure to the Defence according to Rules 66 (C) and 68 (D) if the Chamber so directs.

14. In response, the Defence refers to the conditions set out in Rule 68 (D), which, have not been fulfilled in the present case. Specifically, the Prosecutor has not provided the Chamber, sitting *in camera*, with all the relevant information, as should have been done. Therefore, the Defence submits that the Motion is without legal foundation and should be dismissed.

15. The Prosecutor replies that he has undertaken a thorough search of his records and has provided the Defence with all documents in his possession regarding payments to Witness ADE. The Prosecutor insists that there are no new statements or additional information, nor does it have in its possession any records of phone calls made by Witness ADE. The only exception to this is a record regarding the purchase of phone cards, which should be available to the Judges only.

16. The Prosecutor warns that the recent death of Juvénal Uwilingiyimana, a former senior public official in Rwanda, who was being interviewed by the Prosecutor, underlines the risks faced by cooperating insiders. The Prosecutor alleges that members of Witness ADE's family have been contacted in a manner designed to discourage Witness ADE's testimony.

17. In its reply, the Defence alleges that the information given in the "Prosecutor's Supplemental Information"[13] filed as confidential and *inter partes* on 15 December 2005 is incomplete. The Defence provides some examples as to what other information it seeks from the Prosecutor.[14] The Defence is of

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[11] *The Prosecutor v. Edouard Karemera et al.*, Case N°ICTR-98-44-PT, Decision on motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, 23 August 2005, para. 7 ("*Karemera* Decision on Paid Witnesses").

[12] *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, paras. 4-10.

[13] "Prosecutor's Supplemental Information to the Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and His Family" filed as confidential and *inter partes* on 15 December 2005.

[14] "Requête pour la communication des éléments exculpatoires Re Témoin ADE et d'éléments visées par l'Article 66 (Déclarations d'un témoin du Procureur)" filed on 6 December 2005, para. 12

the view that the enormous benefits received by Witness ADE constitute, in and of themselves, a reason to lie and that it is therefore important to determine the payments and benefits in their entirety.

18. The Chamber recalls that, pursuant to Rules 66 (C) and 68 (D), the Prosecutor can be relieved from disclosing such information and materials 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."

19. The Defence requests the disclosure of two main categories of information. First, the Defence asks that the Prosecutor divulges all information on payments and benefits that Witness ADE has received since 1995. Second, the Defence asks for more detail including all documents, all information on the transfer of the witness's family, all records of telephone calls made by the witness, and other information.

20. The Chamber is of the view that the disclosure of the payments and benefits should be made in the interests of justice. However, the Chamber is also aware that Witness ADE is an insider witness, and thus assumes greater risks by cooperation.

21. The Prosecutor claims that the redacted budget was submitted in conformity with a decision in the aforementioned *Karemera* case.[15] The Prosecution has provided the Chamber, *in camera* and *ex parte*, with an unredacted and comprehensive budget pertaining to Witness ADE.

22. The Chamber wishes to distinguish the circumstances at issue surrounding the payment of benefits from the above *Karemera* decision. In *Karemera*, the witness was not receiving payments directly from the Tribunal, but through a witness protection program of a specific State. In other words, the benefits were funded by the Tribunal but paid out and monitored by national authorities.

23. Taking into account all of the information available to it, the Chamber is of the view that the total cost of payments and benefits ought to be disclosed to the Defence in the interests of transparency and justice, because of its quantum, even though "the money value, in any given currency, of the expenditures of the respective government depends on the cost of living in the respective country, on exchange rates and various other external economic factors".[16] Without revealing the location of Witness ADE's family, and without stating the individual costs of services and goods provided and further details, which might undermine the protective measures currently in effect, the Chamber has been made aware that the total cost of all payments and benefits over a two-year period is budgeted at approximately Two Hundred Thousand Dollars ($ 200,000). Consequently, the Prosecutor has to certify this figure considering the amount which has been spent and is expected to be spent. The Chamber highlights, however, that it is the sum total of monies expended and to be expended which needs to be verified and confirmed by the Prosecutor. This verification should not comprise a list of inventory of expenses pertaining to the witness.

24. The Chamber now turns to the remaining issues, such as disclosure of all documents, all information on the transfer of the witness's family, and all records of telephone calls made by the witness. The Chamber recalls that the Defence bears the onus of proof as the party alleging that a violation of Rule 68 has occurred.[17] As stipulated in paragraph 23 above, the Chamber does not consider it necessary for any further documents pertaining to benefits and payments to be disclosed to the Defence.

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[15] *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, paras. 9-10.
[16] *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, para. 9.
[17] "*Karemera* Decision on Paid Witnesses", paras. 7-8.

E. Video-Link Motion

25. The Prosecutor requests that the testimony of Witness ADE be given via video-link. The second Trial session started on 23 January 2006, and Witness ADE is expected to give evidence from 27 February 2006 to 3 March 2006. Relying on Rules 75 (A) and 75 (B), the Prosecutor asserts that hearing the testimony via video-link is necessary to guarantee the safety of Witness ADE.

26. Relying on the jurisprudence of the Tribunal,[18] the Prosecutor submits that Witness ADE's circumstances satisfy the criteria established to allow testimony via video-link. First, the expected testimony is sufficiently important in that Witness ADE will be adducing evidence on all five counts of the Indictment. Second, taking the testimony via video-link is in the interests of justice, as Witness ADE is the only witness able to provide evidence on both the alleged *Akazu* conspiracy, and on the Accused's actions before and after 6 April 1994. Third, the Prosecutor states that Witness ADE is unwilling to travel to Arusha due to fears for his safety stemming from his position as an *Akazu* insider witness. Recent events, including the publishing of one of his statements on the Internet, the probable murder of Juvénal Uwilingiyimana, and threats received by his family, have all contributed to his sense of vulnerability. To this end, Witness ADE has signed an agreement with the Prosecutor that he will only testify in ICTR trials on the condition that he will not be required to appear in Arusha. Lastly, the Prosecutor submits that the Accused's right to a fair trial will not be compromised should the request be granted, in that the Prosecutor will undertake to fulfil the criteria established for testimony via video-link.[19]

27. The Defence responds with a different interpretation of the law regarding granting video-link testimony. The Defence sets forth three primary considerations for determining whether a request for testimony to be given via video-link should be granted: 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. Moreover, whether granting the video-link would be in the interests of justice is to be evaluated in the context of the above criteria.

28. The Defence nonetheless provides arguments on each of the Prosecutor's four listed criteria. First, the Defence submits that Witness ADE's testimony will not prove to be important as it is mostly hearsay evidence and that much of his evidence will be inadmissible. Second, regarding the unwillingness of Witness ADE to travel to Arusha, the Defence submits that the agreement made between Witness ADE and the Prosecutor is irregular in that it usurps the role of the Chamber when it purports to assure Witness ADE that his testimony will be taken via video-link. The Defence states that this has the potential to bring the administration of justice into disrepute. The Defence denies that Witness ADE's statement was posted on the Internet, and notes that in any event, Prosecution witnesses who have travelled to Arusha have never been harmed. Third, Defence submits that the right to confront an accuser is a fundamental principle of law, and that the Accused will suffer considerable prejudice if he is unable to confront the witness in open court. Lastly, the Defence characterises the interests of justice as relating to Rwandans' need to heal, a process which requires open debate through testimony in person.

29. The Defence strongly contests the Prosecutor's interpretation of the circumstances surrounding the death of Juvénal Uwilingiyimana, suggesting that the death of this potential witness was not a murder to prevent testimony, but may have been a suicide. The Defence submits that Juvénal Uwilingiyimana was pressured by the Prosecutor to lie and further accuses the Prosecutor of fabricating evidence.

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[18] See the "Prosecutor's Confidential Request to Allow Witness ADE to Give Testimony Via Video-Link", filed on 21 December 2005, footnote 2.

[19] The Prosecutor refers to the criteria established in *Prosecutor v. Duško Tadić* (IT-94-1-T), Decision on the Defence Motion to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link ("*Tadić* Decision re Video-Link"), 25 June 1996, para. 22, which has been approved in subsequent cases including *Prosecutor v. Delalić et al.*, Decision to allow Witnesses K, L and M to give their testimony by means of video-link conference, 28 May 1997.

30. In reply, the Prosecutor maintains that the death of Juvénal Uwilingiyimana supports the Prosecutor's request by highlighting the risk faced by insiders who agree to testify. The Prosecutor adds that testimony via video-link would not prevent the Accused from confronting the accuser, but would merely change the medium of communication.

31. The standard for authorizing testimony by video-link was extensively discussed in the *Decision on Prosecution Request for Testimony of Witness BT Via Video-Link*.[20] Video-link testimony should be ordered when it is in the interests of justice, as elaborated in the jurisprudence of this Tribunal. In particular, the Chamber will consider the importance of the testimony; the inability or unwillingness of the witness to attend; and whether a good reason has been adduced for the inability or unwillingness to attend.[21]

32. The Chamber appreciates the potential importance of Witness ADE's testimony to the Prosecution's case. The Chamber is also satisfied with the Prosecution's arguments that there may be an increased risk to this witness should he travel to Arusha to give his testimony. However, the Chamber also bears in mind that the Defence wishes to confront this witness in person and indeed has the right to confront his accuser. For its part, the Chamber is also concerned as to whether or not it is possible to effectively and accurately assess the testimony and demeanour of a witness who is testifying via video-link. In light of the stated importance of this witness to the Prosecution's case, the Chamber wishes to hear this witness uninterrupted and in person.

33. The Chamber emphasizes that it is a general principle, articulated in Rule 90 (A), that "witnesses shall, in principle, be heard directly by the Chambers". As stated in the *Tadić* Decision re Video-Link, "the evidentiary value of testimony provided by video-link … is not as weighty as testimony given in the courtroom. Hearing of witnesses by video-link should therefore be avoided as far as possible."[22] The Chamber also notes that, as articulated in the *Bagosora* Decision re Video-Link, "the testimony of witnesses heard through electronic media runs the risk of being less weighty than that of in-court testimony if the quality of the transmission impairs the Chamber's assessment of the witness."[23] Given the Chamber's desire to prevent poor transmission impairing the testimony of such an important witness, the Chamber is of the opinion that it will benefit from the physical presence of the witness at trial.

34. Consequently, the Chamber finds that it is in the interests of justice to order that all the necessary arrangements to be made for the testimony of Witness ADE to be heard in The Hague, with all parties present, at a date to be determined by the Tribunal, pursuant to Rule 4.

F. Motion for Adjudication

35. The Defence, in its Motion for Adjudication, asks the Chamber to rule on all pending motions before it. As the Chamber has addressed all outstanding motions regarding Witness ADE, there is no need to address this motion.

FOR THE ABOVE REASONS, THE CHAMBER

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[20] *The Prosecutor v. Théoneste Bagosora et al*., Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC) ("*Bagosora* Decision re Video-Link"), 8 October 2004.

[21] See also *The Prosecutor v. Aloys Simba*, Decision on the Defence Request for Taking the Evidence of Witness FMP1 by Deposition (TC), 9 February 2005; Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link (TC), 4 February 2004, para. 4; *The Prosecutor v. Théoneste Bagosora et al.*, Decision on Testimony by Video-Conference (TC), 20 December 2004. Video-conference testimony may also be authorized for witness protection purposes: see *The Prosecutor v. Théoneste Bagosora et al.*, Decision on Prosecution Motion for Special Protective Measures for Witnesses A and BY (TC), 3 October 2003; 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; *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 (TC), 14 September 2001.

[22] *Tadić* Decision re Video-Link, para. 21.

[23] *Bagosora* Decision re Video-Link, para. 15.

I. DENIES the Motion for Withdrawal of Protection;

II. DENIES the Motion for Sanctions and DIRECTS the Registrar to reclassify the Defence Motion for Disclosure as confidential;

III. GRANTS in part the Defence Motion for Disclosure, and ORDERS the Prosecutor to disclose to the Defence the total amount of all payments and benefits referred to above, in a certified form;

IV. DENIES the Prosecutor's Video-Link Motion;

V. REQUESTS pursuant to Rule 4 the President of the Tribunal to authorize the Chamber to sit in The Hague, at a date to be determined in consultation with the Parties and the Registry, in order to hear the testimony of Witness ADE.

Arusha, 31 January 2006, done in English.

[Signed] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Decision on the Prosecution Motion for Dismissal of the Defence Notice due to Failure to Meet the Time Limit (Rule 94 bis *(B) of the Rules of Procedure and Evidence) 24 February 2006 (ICTR-2001-73-T)*

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Dismissal of the Defence notice – Notice filed after the deadline – Vital importance of cross-examination to the fairness of the proceedings – Absence of prejudice caused to either party by the late filing – Motion denied

International Instrument Cited :

Rules of Procedure and Evidence, Rule 94 bis *(B)*

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

SITTING as Trial Chamber III, composed of Judges Inés Mónica Weinberg de Roca, presiding, Khalida Rachid Khan, and Lee Gacuiga Muthoga (the "Chamber");

BEING SEIZED of the "Prosecutor's Reply to Defence Letter/Motion/Application on Dr. Alison Des Forges' Report and Qualifications (Under Rule 73 *bis* (E) of the Rules of Evidence and Procedure)" filed on 27 January 2006 (the "Motion");

CONSIDERING the "Avis Re Rapport d'Expert: Alison Des Forges" filed on 26 January 2006 (the "Defence Notice"), and the Defence Response to the Motion filed on 31 January 2006;

NOW DECIDES the matters solely based on the written briefs of the parties, pursuant to Rule 73 (A) of the Rules of Procedure and Evidence.

Submissions

1. On 26 January 2006, the Defence filed a Notice before the Trial Chamber, pursuant to Rule 94 *bis* (B) of the Rules, stating that on 19 January 2006 it had received from the ICTR Court Management Section the French version of the report of Expert Witness Dr. Alison Des Forges and that:

(i) The Defence does not accept the qualification of the witness as an expert;
(ii) The Defence does not accept the contents of the report of the expert witness;
(iii) The Defence wishes to cross-examine the expert witness.

2. The Prosecution submits that the Defence Notice has been filed outside of the 14-day time limit prescribed by Rule 94 *bis* (B) of the Rules and, therefore, should be dismissed by the Chamber. According to the Prosecution, the French version of the Expert Report was disclosed on 11 October 2005, and not on 19 January 2006, as claimed by the Defence. Thus, the Defence Notice, filed on 26 January 2006, falls outside of the time limit. Furthermore, the Prosecution contends that disclosure in either of the two working languages of the Tribunal provides sufficient notification for the purposes of Rule 94 *bis* (A) of the Rules, and since the English version of the Expert Report was disclosed on 15 August 2005, the Defence Notice is out of time.

3. The Defence responds that the 14-day disclosure period runs from the date of filing of the Expert Report in the language of the Accused. The Defence further affirms that the report was filed in French on 19 January 2006 and that its Notice, dated 26 January 2006, was filed within the prescribed time limits. The Defence asserts that the Prosecution Motion is therefore ill-founded. Additionally, the Defence argues, should the Chamber find that the Defence did not meet the prescribed deadline, the Prosecution has not proved any prejudice for the late notice and such lateness cannot preclude the Accused from cross-examining the expert witness. The Defence also maintains that denial of cross-examination of the witness, challenging her expertise, will prejudice the rights of the Accused.

Deliberations

4. After verifying the official record, the Chamber observes that the Expert Report was disclosed to the Defence on 15 August 2005 in English and on 11 October 2005 in French. Considering either date of disclosure, the Chamber notes that the Defence Notice, filed on 26 January 2006, did not meet the time deadline under Rule 94 *bis* (B) of the Rules. As such, the basis of the Defence claim that disclosure was made in French on 19 January 2006 is not clear.

5. Nonetheless, in light of the vital importance of cross-examination to the fairness of the proceedings, the Chamber is not prepared to consider the Defence failure to file a timely Notice as a waiver of the Accused's rights to cross-examine the expert witness on her qualifications and report. Both parties have had sufficient time to prepare for the examination-in-chief and the cross-examination, respectively, of the expert witness, Dr. Des Forges, and no prejudice has been caused to either party by the late filing.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Prosecution Motion in all respects.

Arusha, 24 February 2006.

[Signed] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Request for the Cooperation of the Netherlands (Article 28 of the Statute) 15 March 2006 (ICTR-2001-73-A28)

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Cooperation of a State, The Netherlands – Hearing of a Prosecution witness in The Hague, presence of the Accused – Cooperation of The Netherlands requested

International Instrument Cited :

Statute, Art. 28 (2) (b)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber III composed of Judges Inés Mónica Weinberg de Roca, Presiding, Khalida Rachid Khan and Lee Gacuiga Muthoga pursuant to Article 28 of the Statute of the Tribunal;

RECALLING the Decision on Defence and Prosecution Motions Related to Witness ADE of 31 January 2006 where the Chamber decided to hear Prosecution Witness ADE in The Hague (The Netherlands); and CONSIDERING that it would be appropriate for the Accused to be present at such a hearing;

RECALLING that during the Hearing of 7 March 2006, the next session was scheduled to begin on 5 June 2006 in The Hague;

CONSIDERING that the cooperation of the government of The Netherlands is necessary for the implementation of the Decision of 31 January 2006;

CONSIDERING that Article 28 (2) (b) obliges States to "comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to […] [t]he taking of testimony and the production of evidence";

THE CHAMBER, HEREBY

I. REQUESTS the cooperation of the government of The Netherlands in the implementation of the Decision of 31 January 2006;

II. DIRECTS the Registrar to serve this request for cooperation on the representative of The Netherlands, together with copy of the Decision of 31 January 2006;

III. AUTHORIZES the Registrar to share with the representative of The Netherlands any protected information necessary in the course of the implementation of this Request and the Decision of 31 January 2006.

Arusha, 15 March 2006, done in English.

[Signed] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Decision on the Prosecution Motion for Witness BPP to Testify by Video-Link 27 March 2006 (ICTR-2001-73-T)

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Testimony of a witness by video-link – Belgium – Counter-motion, Stay of the proceedings, Counter-motion denied – Testimony by video-link, Exceptional measure – Bases for protective measures for video-link testimony, Importance of the testimony, inability or unwillingness of the witness to attend, and equitable balance between the interests of justice and the lack of prejudice to the Accused – Rights of the Accused – Cooperation of the Belgian authorities – Admission of a written statement of a witness – Motion granted in part

International Instruments Cited :

Rules of Procedure and Evidence, Rules 58, 73 (A), 89 (C) and 92 bis *; Security Council, Resolution 955 (1994), 8 November 1994, S/RES/955 (1994) ; Statute, Art. 28 (2)*

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. 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. Aloys Simba, Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link, 4 February 2004 (ICTR-2001-76) ; 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 on the Defence Request for Taking the Evidence of Witness FMP1 by Deposition, 9 February 2005 (ICTR-2001-76) ; Trial Chamber, The Prosecutor v. Protais Zigiranyirazo, Decision on the Prosecutor's Motion to Vary his Witness List, 19 January 2006 (ICTR-2001-73)

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. Zejnil Delalić et al., Decision to allow witnesses K.L. and M to give their testimony by means of video-link conference, 28 May 1997 (IT-96-21)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber III, composed of Judges Inés Mónica Weinberg de Roca, presiding, Khalida Rachid Khan, and Lee Gacuiga Muthoga;

BEING SEIZED of the Prosecutor's Urgent Video-Link and Other Reliefs Motion for Witness BPP, filed on 15 March 2006;

CONSIDERING the Interlocutory Defence Response and Interlocutory Defence Motion to Temporarily Suspend the Prosecution Motion, filed on 20 March 2006; the Prosecution Response to the Defence Interlocutory Motion, filed on the same date; the Amended Defence Response and Interlocutory Motion, filed on 21 March 2006; and the Prosecution Reply, filed on 22 March 2006;

RECALLING the Decision of the Chamber allowing the Prosecution to withdraw witnesses and to add Witness BPP to its witness list;[1]

NOW DECIDES the Motion on the basis of the written briefs of the parties pursuant to Rule 73 (A).

Introduction

1. The trial of Protais Zigiranyirazo began on 3 October 2005. In the two sessions of the Prosecution case,[2] the Chamber heard 19 Prosecution witnesses, including one expert witness. The next and final session for the Prosecution case is scheduled for 5 June 2006.[3] On 19 January 2006, the Chamber granted leave for the Prosecution to amend its witness list to add Witness BPP and to remove other witnesses. The Prosecution now requests the Chamber to authorize that the testimony of Witness BPP be taken via video-link from some locations in Belgium and to seek the cooperation of the Belgian authorities to compel Witness BPP to provide such testimony. Alternatively, the Prosecution requests the Chamber to admit into evidence the written statement of Witness BPP in lieu of her oral testimony pursuant to Rule 92 *bis*.

2. In response, the Defence requests a stay of proceedings with regard to the Motion maintaining that the Prosecution failed to disclose confidential annexes which are required in order to be fully respond to the arguments. The Prosecution replies that the annexes were sent to the Defence by fax and attaches the proof of service. The Defence subsequently acknowledges receipt of the annexes but maintains that the Prosecution has not substantiated its assertion that the witness is not willing to testify in Arusha. The Defence therefore reiterates its counter-motion for a stay of proceedings until such time as the Prosecution provides further evidence.

[1] Decision on the Prosecutor's Motion to Vary his Witness List (TC), 19 January 2006.
[2] The first session started on 3 October 2005 and ended on 20 October 2005. The second session lasted from 23 January to 7 March 2006.
[3] T. 7 March 2006 (closed session), p. 14.

3. Accordingly, the Chamber will first consider the Defence Counter-Motion and will then address the Prosecution Motion.

A. Counter-Motion for a Stay of Proceedings

4. The Defence requests that the Prosecution provide proof of Witness BPP's refusal to testify in Arusha. The Defence also requests disclosure of the *procès verbal* to which the Prosecution referred during the closed session on 7 March 2006. In its reply, the Prosecution states that the *procès verbal* is the *pro justitia* statement, dated 17 February 2006, which has been already disclosed to the Defence.

5. The Chamber recalls that counsels appearing in court are under ethical duties, giving rise to a presumption that counsel to perform and to represent matters truthfully. The Chamber also recalls that Witness BPP, in the Statement, dated 25 November 2005, indicated unwillingness to testify in Arusha. The Prosecution asserts that it has unsuccessfully attempted to secure Witness BPP's testimony in Arusha because of the witness' security concerns over the recent death of a Prosecution witness in Belgium. Under these circumstances, the Chamber will rely on the Prosecution's representation, unless evidence to the contrary is provided. The Counter-Motion therefore falls to be denied, and the Chamber will consider the two alternative forms of relief requested by the Prosecution.

B. Testimony by Video-link

6. The Prosecution submits that the testimony of the witness be heard via video-link, as an exceptional measure under Rule 75 (A). According to the Prosecution, the expected evidence of Witness BPP is that, on 7 April 1994, early in the morning, she was in the Presidential residence in Kanombe, known as Kanombe State House, at the same time that the Accused was also present.

7. The Prosecution also asserts that the witness will testify by video-link from Belgium if she is ordered to do so by the Belgian authorities. The Prosecution accordingly submits that, pursuant to Article 28 (2) of the Statute and Rule 58, read in conjunction with United Nations Security Council Resolution 955 (1994), and Belgian law, the Tribunal has the authority to request the Belgian government to assist the Tribunal in the taking of testimony and the production of evidence, by summoning the witness to appear for the video-link testimony.

8. The Defence has not responded to this argument because it claims not to have information regarding the witness' refusal to testify in Arusha.

9. According to established jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and of this Tribunal, protective measures for video-link testimony must be based on the importance of the witness's expected testimony, the inability or the unwillingness of the witness to testify at the courtroom site, and the equitable balance between the interests of justice and the lack of prejudice to the Accused. In *Tadic* Decision of 25 June 1996, the Trial Chamber recalled the general rule providing for a witness to appear in person, and stated that video-link testimony will be granted only under exceptional circumstances when certain criteria are met.[4] In *Delalic et al*. Decision of 28 May 1997, another Trial Chamber has adopted the same reason adding the interest of justice and the absence of prejudice to the Accused.[5] This jurisprudence has been followed in Decisions of the Tribunal in several cases.[6]

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[4] *Prosecutor v. Duško Tadić*, Case N°IT-94-1-T, Decision on the Defence Motion to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link (TC), 25 June 1996. "19. It cannot be stressed too strongly that the general rule is that a witness must physically be present at the seat of the International Tribunal. The Trial Chamber will, therefore, only allow video-link testimony if certain criteria are met, namely that the testimony of a witness is shown to be sufficiently important to make it unfair to proceed without it and that the witness is unable or unwilling to come to the International Tribunal. […]".

[5] *Prosecutor v. Delalić et al*., Decision to allow Witnesses K, L and M to give their testimony by means of video-link conference (TC), 28 May 1997. "15. It is important to re-emphasise the general rule requiring the physical presence of the

10. In the present case, testimony about the alleged presence of the Accused at Kanombe State House represents important evidence in the case, which is directly related to allegations pleaded in the Indictment. The unwillingness of the witness to testify in Arusha has also been reported by the Prosecution.

11. Considering the allegation that the Accused was present at the Kanombe State House and the Accused's possible alibi defence, it is in the interests of justice that the witness be heard in relation to these events. It is the Chamber's view that this testimony will not prejudice the rights of the Accused because he will have the opportunity to cross-examine the witness and to challenge the evidence.

12. Consequently, the Chamber finds that the Motion for a video-link testimony should be granted. And, accordingly, the Chamber will request the cooperation of the Belgian authorities in securing the appearance of the witness and in providing any technical assistance for a video-link testimony from their country.

C. Admission of Statement of Witness BPP, Pursuant to Rule 92 *bis*

13. The Prosecution, relying on the Appeals Chamber decision in the *Galić* case, submits that Witness BPP's written statement: (i) does not go to proving the acts and conduct of the Accused, as charged in the Indictment; (ii) is relevant under Rule 89 (C), as it relates to crimes charged in the Indictment; and (iii) provides critical evidence in relation to the acts and conduct of others at a particular period which is relevant to establishing the state of mind of the Accused. The Prosecution states that the written statement also provides evidence against the anticipated alibi of the Accused in relation to the events at Kanombe State House. The Prosecution further submits that not only does a written statement save judicial time and resources, notably when the witness is not required to appear for cross-examination, but that it causes less disruption to the witness' life than oral testimony.

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witness. This is intended to ensure confrontation between the witness and the accused and to enable the Judges to observe the demeanour of the witness when giving evidence. It is, however, well known that video-conferences not only allow the Chambers to hear the testimony of a witness who is unable or unwilling to present their evidence before the Trial Chamber at The Hague, but also allows the Judges to observe the demeanour of the witness whilst giving evidence. Furthermore, and importantly, counsel for the accused can cross-examine the witness and the Judges can put questions to clarify evidence given during testimony. Video-conferencing is, in actual fact, merely an extension of the Trial Chamber to the location of the witness. The accused is therefore neither denied his right to confront the witness, nor does he lose materially from the fact of the physical absence of the witness. It cannot, therefore, be said with any justification that testimony given by video-link conferencing is a violation of the right of the accused to confront the witness. Article 21 (4) (e) is in no sense violated." "17. Testimony by video-link conference is an exception to the general rule. Accordingly, the Trial Chamber will protect against abuse of the grant of the expedient. The Trial Chamber (composed of Judge McDonald, Presiding, with Judges Stephen and Vohrah) has, in the *Tadic* Decision, stated that testimony by video-link will be allowed only if (a) the testimony of the witness is shown to be sufficiently important to make it unfair to proceed without it, and (b) the witness is unable or unwilling for good reasons to come to the International Tribunal at The Hague (at para. 19). The present Trial Chamber agrees with the findings of that decision and reiterates the position that, because of the particular circumstances of the International Tribunal, 'it is in the interest of justice for the Trial Chamber to be flexible and endeavour to provide the Parties with the opportunity to give evidence by video-link.' (*Tadic Decision*, at para. 18) The Trial Chamber considers it appropriate to add the additional condition, (c) that the accused will not thereby be prejudiced in the exercise of his right to confront the witness."

[6] See: *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 (TC), 14 September 2001 (Para. 35. "It follows from case law, with which the Chamber agrees, that certain conditions must be fulfilled for the video solution to be utilized in the present case. The Chamber is of the opinion that the testimony is sufficiently important, that it will be in the interests of justice to brant the application for a video link solution, and that the Accused will not be prejudiced in the exercise of his right to confront the witness. The crucial question is whether the Witness is unable or unwilling to come to the Tribunal." See also: *The Prosecutor v. Théoneste Bagosora et al.*, Case N ICTR-98-42?, 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; Decision on Prosecution Motion for Special Protective Measures for Witnesses A and BY (TC), 3 October 2003; Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC), 8 October 2004; and Decision on Testimony by Video-Conference (TC), 20 December 2004; *The Prosecutor v. Aloys Simba*, Decision on the Defence Request for Taking the Evidence of Witness FMP1 by Deposition (TC), 9 February 2005; Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link (TC), 4 February 2004.

14. The Defence objects to the admission of the written statement of Witness BPP and claims that the testimony relates directly to the acts of the Accused.

15. Having found that the video-link request should be granted, the Chamber is of the view that there is no need to deliberate on the admission of the written statement.

FOR THE ABOVE REASONS, THE CHAMBER

I. DENIES the Counter-Motion for stay of proceedings;

II. GRANTS the Motion for Witness BPP to testify by video-link from Belgium;

III. REQUESTS the cooperation of the Belgian authorities in the appearance of Witness BPP by video-link from Belgium;

IV. REQUESTS the Registrar (i) to serve this Decision on the Belgian authorities, (ii) to cooperate with the Belgium authorities in its implementation of this Decision, taking into account the overall scheduling for the next and final session of the Prosecution case, and (iii) make the appropriate arrangements for the video-link testimony to be taken at a convenient time during the next trial session.

Arusha, 27 March 2006.

[Signed] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Decision on the Defence Motion Concerning a Meeting with Witness BPP 6 April 2006 (ICTR-2001-73-T)

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Meeting with a witness – Prosecution's assurance, Witness, Communication of the Defence request for a meeting in Brussels – Facilitation of the meeting, Consent of the witness – Issue moot – Motion denied

International Cases Cited :

I.C.T.R.: 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. Protais Zigiranyirazo, Decision on the Prosecution Motion for Witness BPP to Testify by Video-Link, 27 March 2006 (ICTR-2001-73)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber III, composed of Judges Inés Mónica Weinberg de Roca, presiding, Khalida Rachid Khan, and Lee Gacuiga Muthoga;

BEING SEIZED of the "Defense Motion Concerning a Meeting with Witness BPP", filed on 30 March 2006 ("Defence Motion");

CONSIDERING the "Prosecutor's Response to Defence Motion Concerning a Meeting with Witness BPP", filed on 3 April 2006 ("Prosecution Response");

NOTING the Defence request that the Chamber order the Prosecution to respect the Chamber's Decision of 25 February 2003;

RECALLING the Chamber's Decision of 25 February 2003, ordering that:

> "the Accused, or his Defence Counsel, notify the Prosecution in writing and on reasonable notice of their wish to contact any person hereby protected. 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".[1]

RECALLING the Chamber's Decision of 27 March 2006, granting the Prosecution's Request for Witness BPP to testify by video-link;[2]

CONSIDERING the Prosecution's assurance that it has communicated to Witness BPP the Defence request for a meeting in Brussels, on 3 or 4 May 2005, and that it will facilitate this meeting with Defence Counsel, if and when the witness provides her consent;

FURTHER CONSIDERING that the issue is moot;

FOR THE ABOVE REASONS, THE CHAMBER DISMISSES THE DEFENCE MOTION.

Arusha, 6 April 2006.

[Signed] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

[1] *The Prosecutor v. Protais Zigiranyirazo*, "Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses" (TC), 25 February 2003, para. IX.
[2] *The Prosecutor v. Protais Zigiranyirazo*, "Decision on the Prosecution Motion for Witness BPP to Testify by Video-Link" (TC), 27 March 2006, paras. 6-12.

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Decision on Prosecution Motion for Conditional Disclosure of Witness Statements (Rules 39, 68 and 75 of the Rules of Procedure and Evidence) 7 April 2006 (ICTR-2001-73-T)

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Disclosure of witness statements – Protective measures of witnesses – Protection afforded by the Prosecutor during the conduct of investigations, Protective measures afforded to witnesses by a Chamber, Disclosure of statements – Diligence of the Prosecutor, Duty of the Prosecutor to disclose and to seek protection of his witnesses – Interest of justice – Extension of the protective measures to additional witnesses whose statements will be disclosed – Disclosure of all the unredacted witness statements relating to a particular witness – Granted

International Instrument Cited :

Rules of Procedure and Evidence, Rules 39, 68, 73 (A), 75, 75 (F) and 75 (F) (ii)

International Cases Cited :

I.C.T.R.: 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. Pauline Nyiramasuhuko et al., Decision on the Prosecutor's ex-parte and Extremely Urgent Motion to Access Closed Session Transcripts in Case N°ICTR-96-3-A to Disclose to Case N°ICTR-98-42-T, 23 September 2004 (ICTR-98-42) ; Trial Chamber, The Prosecutor v. Vincent Rutaganira, Décision Relative A La Protection Des Témoins A Charge, 24 November 2004 (ICTR-95-1C)

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

SITTING as Trial Chamber III, composed of Judges Inés Mónica Weinberg de Roca, presiding, Khalida Rachid Khan, and Lee Gacuiga Muthoga ("Chamber");

BEING SEIZED of the Prosecution Urgent and Confidential Application Pursuant to Rules 39, 68 and 75 for an Order for Conditional Disclosure of Witness Statements, filed on 23 March 2006;

CONSIDERING the Defence Response, filed on 28 March 2006;

CONSIDERING the Statute of the Tribunal and the Rules of Procedure and Evidence particularly Rules 39, 68 and 75;

NOW DECIDES the Motion on the basis of the written briefs of the parties pursuant to Rule 73 (A) of the Rules.

Submissions

1. By way of the present application, the Prosecution is requesting protective measures for witnesses whose statements allege the criminal involvement of Witness ADE in the events of 1994. The Prosecutor intends to disclose these statements, unredacted, to the Defence, pursuant to Rule 68 (A). The Prosecution argues that some of these witnesses are protected in other cases before the Tribunal while some others are protected by the Prosecution pursuant to Rule 39.

2. The Prosecution requests two specific protective orders: that the Defence shall (i) notify the Prosecutor of its intent to contact such witnesses or make a written request to the Trial Chamber to contact such witnesses; and (ii) to keep the statements confidential to itself and not to reveal the identities of the witnesses to any person outside of the Defence team, except for the Accused himself who should be directed not to reveal the identities to any other person. The Prosecution also requests to be granted any other or further relief that meets the ends of justice. The Prosecution attaches an *affidavit* of its Commander of Investigations to support the allegation of risks faced by the witnesses.

3. The Defence, in its response, argues that late disclosure is of little use given the time it actually takes to conduct serious investigations, particularly given that statements with regard to the witness in question were completed in January 2005. The Defence requests the Chamber to reserve the Defence recourse to apply for a remedy due to late disclosure.

4. In order to be able to make proper use of this disclosure, the Defence requests the Chamber to order the Prosecutor to make disclosure to all members of the Defence in their various locations.

5. The Defence further requests that the following be made possible:

(a) that the Defence investigator in Kigali be authorised to meet with the witnesses in question immediately upon recommendation of lead counsel, and before the latter comes to Arusha on 5 May 2006.

(b) that DCDMS be apprised so that sufficient notice is this work programme is provided to the Section and for it to be included in it's consideration of the Defence team's work programme.

(c) that the Chamber's Decision of 25 February 2003 on Protective Measures be extended to apply to the witnesses who are the subject of the instant Motion.

Deliberations

5.* Rule 75 (F) reads as follows:

> (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.

5.* Given the terms set out in Rule 75 (F) (ii), particularly the reference to "any disclosure obligation under the Rules," it is incumbent upon the Prosecutor to fulfil his disclosure obligations under the Rules notwithstanding applicable protective orders, and that upon such disclosure, the party receiving the materials is then bound *mutatis mutandis* by the terms of the applicable protective

measures in accordance with the provisions of Rule 75 (F). The Chamber recalls that according to the jurisprudence of the Tribunal,[1] Rule 75 (F) is intended to create a mechanism for the routine disclosure of closed session testimony.

6. With regard to Rule 39, which deals specifically with protection afforded by the Prosecutor during the conduct of investigations, the Chamber wishes to point out that the measures stipulated in that Rule cannot be equated with the protective measures that are afforded to witnesses by a Chamber. The Prosecutor cannot therefore redact statements to be disclosed to the Defence on the basis of Rule 39 protection.[2]

7. The Chamber is concerned that an application for the protection of these witnesses has been left to this late stage of the proceedings, particularly given how long these statements have actually been in the possession of the Prosecutor. The Prosecutor should have been diligent in its effort to satisfy both its duty to disclose, and to seek protection of its witnesses, earlier.

8. Be that as it may, in the interests of protecting the witnesses in question, and in the interests of justice as a whole, the Chamber deems it appropriate to extend the Protective Measures ordered on 25 February 2003 in this case to these additional witnesses.

9. Considering the imminent testimony of Witness ADE, the documents which are the subject of the present application must be disclosed to the Defence, in keeping with the established practice on the service of confidential documents, and the Accused forthwith.

FOR THE ABOVE REASONS, THE CHAMBER

EXTENDS the Protection Order of 25 February 2003 to all witnesses whose statements will be disclosed in accordance with this Decision, and who are not subject to any protective order before the Tribunal.

ORDERS the immediate disclosure of all the unredacted witness statements relating to Witness ADE.

Arusha, 7 April 2006.

[Signed] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

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* The wrong numeration is the fact of the Tribunal.

[1] *Prosecutor v. Nahimana et. al.* Case N°ICTR-99-52-T "Decision on Disclosure of Transcripts and exhibits of Witness X" (TC) 3 June 2004 paras. 4 and 5; *Prosecutor v. Nyiramasuhuko et al.* Case N°ICTR-98-42-T, "Decision on the Prosecutor's ex-parte and Extremely Urgent Motion to Access Closed Session Transcripts in Case N°ICTR-96-3-A to Disclose to Case N°ICTR-98-42-T" (TC) of 23 September 2004

[2] *Prosecutor v. Rutaganira*, ICTR-95-1C-PT "Decision Relative A La Protection Des Temoins A Charge", 24 November 2004.

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Decision on Defence Motion to Exclude the Testimony of Witness SGM (Rule 89 (C) of the Rules of Procedure and Evidence) 7 April 2006 (ICTR-2001-73-T)

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Exclusion of the testimony of a witness – Anticipated evidence of the witness, Issue clearly arisen in the indictment – Disclosure of documents – Frivolous Motion, Abuse of process, First occasion to reprimand the Defence, Absence of sanction – Motion denied

International Instrument Cited :

Rules of Procedure and Evidence, Rules 46 (A), 66 (A) (ii), 73 (A) and 73 (F)

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

SITTING as Trial Chamber III, composed of Judges Inés Mónica Weinberg de Roca, presiding, Khalida Rachid Khan, and Lee Gacuiga Muthoga ("Chamber");

BEING SEIZED of the Defence Confidential Motion to Exclude the Testimony of Witness SGM, filed on 24 March 2006 ("Defence Motion");

CONSIDERING the Prosecution Response filed on 27 March 2006 ("Response"); the Defence Reply filed on 30 March 2006 ("Reply"); the Prosecution Rejoinder filed on the same date ("Rejoinder"); and the Second Defence Reply filed on 5 April 2006 ("Second Reply");

NOW DECIDES the Motion on the basis of the written briefs of the parties pursuant to Rule 73 (A) of the Rules.

Submissions

Defence Motion

1. Relying on Rule 89 (C), the Defence requests the Chamber to disallow the testimony of Witness SGM on the basis of irrelevance and incomplete and imprecise disclosure.

2. The Defence alleges that the evidence which Witness SGM is expected to present is irrelevant because it relates to events that occurred outside the Tribunal's temporal jurisdiction and does not directly relate the Accused to any facts alleged in the Indictment.

3. The Defence also argues that disclosure provided by the Prosecution is incomplete and vague, making it impossible for the Defence to adequately prepare its case. While acknowledging that postponement of the hearing is a preferred remedy, the Defence asserts that this is unrealistic, in light of the scheduling for the final phase of the Prosecution case, which begins on 5 June 2006.

Consequently, according to the Defence, the only available remedy at this stage of the proceedings is for the Chamber to disallow the testimony of Witness SGM.

Response

4. In its Response, the Prosecution asserts that the expected testimony of Witness SGM will provide evidence in support of several paragraphs of the Indictment, as indicated in the annex to its pre-trial brief. The Prosecution submits that it has made full and complete disclosure to the Defence.

5. The Prosecution also argues that the Defence has filed unnecessary annexes to its Motion. Invoking Rule 73 (F), the Prosecution requests that the Chamber sanction the Defence for wasting the Tribunal's resources.

Reply

6. The Defence reiterates the arguments in its Motion. In regard to the issue of sanctions, the Defence argues that a Motion should be complete. Therefore, it has filed *inter partes* correspondence to demonstrate due diligence in its efforts to obtain disclosure, before seizing the Chamber of the issue.

Rejoinder

7. The Prosecution reiterates its call for sanctions under Rule 73 (F) and maintains that the testimony of Witness SGM is relevant to the factual allegations in the Indictment. The Prosecution asserts that the limited temporal jurisdiction of the Tribunal does not bar evidence of entering into a conspiracy before 1994.

Second Reply

8. The Defence replies that material facts relating to events before 1994, which have not been alleged in the Indictment and are unknown to the Defence, should not be admitted into evidence. The Defence reiterates that the disclosed statements of Witness SGM do not relate to allegations in the Indictment concerning events that occurred prior to 1994.

Deliberations

9. The Chamber recalls that in the Prosecution's pre-trial brief, the anticipated evidence of Witness SGM was summarized by the Prosecution as follows: "[SGM] [w]ill testify as the Accused's participation in Rouseau [*sic*!] Zero ('Zero Network') and as a member of the Akazu." Because this issue is clearly raised in the Indictment, the Chamber finds that the anticipated evidence to be presented by Witness SGM is relevant to the case. In regard to the presentation of evidence, the Chamber reminds the Parties that it is the Prosecution's responsibility to determine how it will prove the counts charged against the Accused in the Indictment.

10. With regard to the issue of disclosure, the Chamber is of the view that the Defence has not specifically indicated in what respects the disclosure is imprecise or incomplete. Consequently, the Chamber does not find that the Prosecution has failed to make full disclosure, pursuant to Rule 66 (A) (ii).

11. The Chamber agrees with the Prosecution that it is unnecessary and is a waste of time and resources to file documents that are already part of the case file. The Chamber disapproves of this practice.

12. Rule 46 (A) provides for a Chamber "after a warning, [to] 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". The Chamber finds that, in addition to including unnecessary documents in the filing, the Defence Motion itself is frivolous and constitutes an abuse of process under Rule 73 (F). However, since this is the first occasion for the Chamber to reprimand the Defence on this matter, the Chamber will not impose sanctions.

FOR THE ABOVE REASONS, THE CHAMBER DENIES THE MOTION IN ITS ENTIRETY.

Arusha, 7 April 2006.

[Signed] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Decision on the Defence Motion for Disclosure of Voir-Dire Evidence 27 April 2006 (ICTR-2001-73-T)

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Disclosure of Voir-Dire Evidence – Specific identification of requested materials, Possession of the evidence by the addressee of the request – Disclosure obligations of the parties – Rights of suspects during investigation, Conditions of applicability – Motion denied

International Instrument Cited:

Rules of Procedure and Evidence, Rules 42 and 73 (A)

International Cases Cited:

I.C.T.R.: 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)

I.C.T.Y.: Trial Chamber, The Prosecutor v. Dario Kordić and Mario Čerkez, Order on Pasko Ljubicic's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the Kordić and Čerkez Case, 19 July 2002 (IT-95-14/2) ; Appeals Chamber, The Prosecutor v. Tihomir Blaškić, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2006 (IT-95-14)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber III, composed of Judges Inés Mónica Weinberg de Roca, presiding, Khalida Rachid Khan, and Lee Gacuiga Muthoga;

BEING SEIZED of the "Defence Motion for Disclosure of *Voir Dire* Evidence", filed on 23 March 2006;

CONSIDERING the "Prosecutor's Response to Defence Motion for Disclosure of *Voir Dire* Evidence", filed on 28 March 2006, and the Defence "Reply to Prosecutor's Response to Defence Motion for Disclosure of *Voir Dire* Evidence", filed on 30 March 2006;

NOW DECIDES the Motion on the basis of the written briefs of the parties pursuant to Rule 73 (A).

Introduction: Procedural History of the Accused's Curriculum Vitae

1. The present Motion relates to a *voir dire* hearing to be held on the admissibility of a hand-written document prepared by the Accused, which is entitled *Curriculum Vitae* ("CV"). This document was included in a number of records which, on 3 October 2005, the Prosecution tendered as Exhibit P2.[1] On 2 March 2006, the Defence formally raised an objection to the admissibility of the CV. According to the Defence, the CV, being a statement by the Accused, is not admissible in evidence unless certain procedural safeguards have been satisfied – which, the Defence alleges, have not been met.[2] The Prosecution contends that this document, having already been entered into evidence as Exhibit P2, may be referred to by Prosecution witnesses and does not need to be further admitted. Following these exchanges by the parties, the Chamber decided to provisionally admit the document as part of Exhibit P42 and allow reference to it pending a determination of its final status. The Chamber held that a determination on the admissibility of this document will be made following a *voir dire* hearing.[3]

Submissions of the Parties

Defence Motion

2. The Defence for Protais Zigiranyirazo, in preparation for the *voir dire* proceedings on the non-admissibility of the entitled *Curriculum Vitae*, requests the Chamber to order the Prosecution to disclose of the following information:

a. A detailed statement of the evidence to be provided by all *voir dire* witnesses, in either a written or a signed declaration or a detailed will-say;

b. The dates of all meetings between the Accused and members of the Office of the Prosecutor (OTP) or between the Accused and any intermediary acting between the accused and the OTP;

c. The names of all members of the OTP who met Mr. Zigiranyirazo and all intermediaries acting between the Accused and the OTP;

d. Copies of all notes taken with all times of questioning;

e. Copies of all questions put to the Accused and answers by the Accused;

f. Copies of all documents signed by the Accused.

3. The Defence argues that the information sought is central to the *voir dire* proceedings and should be provided, under Rule 66 (A) (ii), no later than 60 days prior to trial. However, insofar as the trial has already commenced, the Defence requests the Prosecution to furnish the materials immediately in order to conduct investigations prior to the hearing.

Prosecution Response

4. The Prosecution argues that a *voir dire* examination is an interlocutory proceeding, to which disclosure obligations, under Rule 66 (A), do not apply. Nevertheless, the Prosecution affirms that it

[1] T. 3 October 2005 p. 26.
[2] T. 2 March 2006 pp. 37-38.
[3] T. 2 March 2006 p. 45.

will disclose a summary of the anticipated testimony of the witnesses to be called, as requested by the Defence in paragraph 2 (a) of its Motion cited above.

5. The Prosecution asserts that the other information requested by the Defence, in paragraph 2 (b) through (f) above, is extraneous to the *voir dire* proceedings on the admissibility of the Accused's CV. The Prosecution also argues that the Defence "chose not to" raise issues, in relation to the other requested information, during cross-examination of the witness, Mr. Zuhdi Janbek, who tendered the Accused's CV as part of the Prosecution Exhibit P2.[4] The Prosecution maintains that no evidence will be led during the *voir dire* hearing regarding matters raised in paragraphs 2 (b) through (f) above of the Defence Motion and that this hearing is not an appropriate forum for their re-litigation.

6. According to the Prosecution, the provisions of Rule 42 do not apply because the Accused was not a suspect when he "voluntarily prepared and offered his CV to the Prosecutor".[5] The Prosecution also argues that copies of any notes taken by representatives of the OTP, during discussions with the Accused when he was not a suspect, are internal documents which, under Rule 70, are not subject to disclosure.

Defence Reply

7. In its Reply, the Defence argues that, under Rule 66 (A) (ii), disclosure applies to all witnesses that the Prosecution intends to call, whether on direct or *voir dire* examination.

8. The Defence also argues that the Prosecution has erred in suggesting that the Defence chose not to cross-examine the investigator, Mr. Janbek, about the circumstances under which the OTP received the Accused's hand-written CV. The transcript reveals that, on 4 October 2005, the Defence raised an objection about the introduction of the statement during the testimony of Mr. Janbek, who was not employed by the OTP when the CV was written or received by the Evidence Unit and has no direct knowledge of the document.

Deliberations

Specific Identification of Requested Materials

9. According to established case law, a request for production of documents must be sufficiently specific concerning the nature of the evidence sought and its being in the possession of the addressee of the request.[6] The Chamber considers that identification of the material requested in paragraph 2 (a) of the Defence Motion, in relation to the witnesses to be called, meets these requirements. Although of a general nature, the information sought has been precisely defined, and the Prosecution has affirmed that it will disclose summaries of anticipated witness testimonies.[7] The Chamber therefore considers it unnecessary to order disclosure of item (a): "a detailed statement of the evidence to be provided by all *voir dire* witnesses".

10. However, the Chamber observes that the Defence has knowledge of the information sought in paragraphs 2 (b) through (f) of its Motion and that this material therefore cannot be subject to disclosure.

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[4] Prosecution Response, para. 6.
[5] Prosecution Response, para. 8.
[6] *Prosecutor v. Blaškić*, Appeals Chamber Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2006, para. 40; *Prosecutor v. Bagosora et al.*, Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses, 27 September 2005, para. 3; *Prosecutor v. Kordić and Čerkez*, Order on Pasko Ljubicic's Motion for Access to Confidential Supporting Material, Transcripts, and Exhibits in the Kordić and Čerkez Case, 19 July 2002.
[7] Prosecution Response, para. 5.

11. The Chamber observes that disclosure is a tool for ensuring fair trial proceedings and that both parties in the present case have disclosure obligations to assist the Chamber in assessing the admissibility of the CV. Accordingly, the Chamber expects that the Defence will demonstrate any circumstances for the non-admissibility of the document and that the Prosecution will show the chain of custody leading to its receipt of the document.

Rights of Suspects During Investigation

12. In order for the procedural safeguards guaranteed under Rule 42 to be applicable in the present case, the Applicant must show that he was a suspect and that, while such a suspect, he was questioned by the Prosecutor, following which the statement entitled CV was written, and which the Applicant was induced to offer, contrary to his wishes.[8]

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion in its entirety;

NOTIFIES the parties that the *voir dire* hearing on the admissibility of the Accused's CV will be scheduled directly following the hearing of Prosecution Witnesses ADE, SGM, and BPP.

Arusha, 27 April 2006.

[Signed] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

[8] Rule 42 (A) of the Rules of Procedure and Evidence.

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Decision on Request for Authorisation to Hold Trial Session Away from the Seat of the Tribunal
12 May 2006 (ICTR-01-73-T)

(Original : English)

Office of the President

Judge : Erik Møse, President

Protais Zigiranyirazo – Trial session away from the Tribunal, Hearing the testimony of a witness, Video-link – Authorization of the President in the interests of justice – Security risks if the witness testifies in Arusha, Crucial witness – Sufficient funds – Exceptional basis – Difficulties to envisage a similar operation, Budgetary constraints – Motion granted

International Instrument Cited :

Rules of Procedure and Evidence, Rule 33 (B)

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. 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 DK52 to Give Testimony by Video-Conference, 22 February 2005 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Tharcisse Muvunyi, Decision on Decision on Prosecutor's extremely urgent Motion Pursuant to TC II Directive of 23 May 2005 for Preliminary measures to Facilitate the use of Closed Video-link Facilities, 20 June 2005 (ICTR-2000-55A) ; 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 Prosecutor's Confidential Motion for Special Protective Measures for Witness ADE, 3 May 2006 (ICTR-98-44)*

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 PRESIDENT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

BEING SEIZED OF a request by Trial Chamber III, in its "Decision on Defence and Prosecution Motions Related to Witness ADE" of 31 January 2006, to authorize the Chamber to sit in The Hague in order to hear the testimony of this witness;

CONSIDERING the Registrar's submissions pursuant Rule 33 (B) of the Rules of Procedure and Evidence ("the Rules"), filed on 17 February 2006, as well as the Trial Chamber's memorandum of 21 February 2006;

NOTING the Registrar's further submissions pursuant to Rule 33 (B), filed on 24 April 2006;

HEREBY DECIDES THE REQUEST.

Introduction

1. On 31 January 2006, the Trial Chamber denied the Prosecution request that the testimony of Witness ADE be given via video-link, finding it to be in the interests of justice to instead order that all necessary arrangements be made for the testimony of this witness to be heard in The Hague, with all parties present. The Chamber consequently requested the President, pursuant to Rule 4 of the Rules, to authorize the Chamber to sit in The Hague, at a date to be determined in consultation with the Parties and the Registry, in order to hear the testimony of the witness.[1]

2. In submissions of 17 February 2006 to the President, the ICTR Registrar indicated that the Registrar of the International Criminal Tribunal for the former Yugoslavia ("ICTY") had advised that that Tribunal would be unable to accommodate this request due to a lack of courtroom capacity there. The ICTR Registrar also submitted that initial estimates of costs associated with a hearing in The Hague would be prohibitive and involve budgetary problems for the ICTR.

3. Thereafter, the Registry seized the Registrar of the International Criminal Court ("ICC") with a request for the use of a courtroom and related facilities there. The ICC Registrar subsequently agreed to place a courtroom and detention facilities at the disposal of the Tribunal for a period of five days between 5 June and 9 June 2006 for the purposes of hearing the testimony of Witness ADE, on a cost-reimbursement basis. In his submissions of 24 April 2006, the ICTR Registrar estimated the total cost of the ICTR in connection with the hearing in The Hague to be between USD 80,000 and USD 120,000. He also stated that he had made arrangements to identify the necessary budgetary resources to support this operation.

Deliberations

4. Rule 4 states 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.

5. The Chamber's request under Rule 4 was based on doubts as to the adequacy and quality of video-link testimony as well as concerns that such testimony is incompatible with the right of an accused to confront his accuser.[2]http://www.ictr.org/ENGLISH/cases/Zigiranyirazo/decisions/120506.htm - _ftn2#_ftn2 It is correct that video-link previously risked being less weighty than that of in-court testimony. [3] http://www.ictr.org/ENGLISH/cases/Zigiranyirazo/decisions/120506.htm - _ftn3#_ftn3 However, more recently, many decisions have allowed testimony by video-link, including several important and sensitive witnesses.[4] Experience has shown that electronic transmission can provide a

[1] *Zigiranyirazo*, Decision on Defence and Prosecution Motions Related to Witness ADE, 31 January 2006 (TC), in particular para. 34

[2] See e.g. Decision, paras. 32-33.

[3] See e.g. *Prosecutor v. Tadić*, Decision on the Defence Motion to Summon and Protect Witnesses, and on the Giving of Evidence by Video-Link, 25 June 1996, para. 21 ("the evidentiary value of testimony provided by video-link … is not as weighty as testimony given in the courtroom.") See, subsequently, *Bagosora*, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (TC), 8 October 2004, para. 15: "the testimony of witnesses heard through electronic media runs the risk of being less weighty than that of in-court testimony if the quality of the transmission impairs the Chamber's assessment of the witness" (emphasis added).

[4] See *inter alia Prosecutor v. Simba*, Decision Authorising the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link (TC), 4 February 2005; *ibid*., Decision on the Defence Request for Taking the Evidence of Witness FMP1 by

very clear audio and visual image of the witness to the judges and parties in the courtroom and that the ability of the Chamber to assess credibility was not impaired.[5] Video-link therefore remains an important, necessary and reliable resource for the Tribunal.

6. In the present case, the Trial Chamber stressed the increased security risks to Witness ADE in testifying in Arusha and the crucial significance of this witness to the Prosecution case as underlying its wish to hear this witness uninterrupted and in person.[6] In view of this assessment by the Trial Chamber, and the Registrar's conclusion that sufficient funds are currently available, the request for authorization under Rule 4 is granted on an exceptional basis. However, the Registrar also observed that these estimated additional costs are unanticipated and that later in the year there may have to be some restrictions on the budgeted activities of the Tribunal, concluding that it would be difficult to envisage another such operation within present budgetary constraints.[7] http://www.ictr.org/ENGLISH/cases/Zigiranyirazo/decisions/120506.htm - _ftn7#_ftn7 The Chamber is consequently invited to undertake further consultations with the Registry with a view to reducing the fiscal burdens of this authorization to the extent possible.[8]

FOR THE ABOVE REASONS, THE PRESIDENT

GRANTS the request.

Arusha, 12 May 2006.

[Signed] : Erik Møse

Deposition (TC), 9 February 2005 (authorising testimony by video-link); *Prosecutor v. Bagosora et al*., Decision on Prosecution Request for Testimony of Witness BT via Video-Link, 8 October 2004, para. 7; *ibid*., Decision on Testimony by Video-Conference (TC), 20 December 2004; *ibid*., Decision on Ntabakuze Motion to Allow Witness DK52 to Give Testimony by Video-Conference (TC), 22 February 2005; *Prosecutor v. Muvunyi*, Decision on Prosecutor's Extremely Urgent Motion Pursuant to Trial Chamber II Directive of 23 May for Preliminary Measures to Facilitate the Use of Closed Video-Link Facilities (TC), 20 June 2005, para. 17.

[5] *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, para. 35 (noting that where the video link solution is adopted, the Accused is not thereby prejudiced in the exercise of his right to confront the witness) and *Prosecutor v. Karemera et al*., Decision on Prosecutor's Confidential Motion for Special Protective Measures for Witness ADE, 3 May 2006, para. 6 ("this Chamber is of the view that the taking of Witness ADE's testimony by video-link will neither impair the Chamber's assessment of his credibility nor infringe the Accused's rights under Article 20 (4) (e) of the Statute of the Tribunal."). See also, at the ICTY, *Kupreškić et al*., Decision on Appeal by Dragan Papić Against Ruling to Proceed by Deposition (Separate Opinion of Judge Hunt), 15 July 1999, paras. 29-30: "It is, of course, of the utmost importance that any tribunal of fact should have the opportunity of seeing the demeanour of the witnesses and of observing the way in which various questions put to them in cross-examination are answered. This is particularly so where the witnesses are vital to the determination of significant factual issues … Such is the geography of the courtrooms used by the Tribunal that the view of the witness and of the witness's demeanour on the television screens provided throughout the courtroom is usually better than that from across the room."

[6] Decision, para. 33.

[7] Registrar's Further Submissions of 24 April 2006, para. 21.

[8] See, for instance, *id*., Appendix III, which suggests possibilities for cost-saving in relation to travel costs, daily subsistence allowance and furnished office space.

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Decision on Zigiranyirazo Motion for Disclosure of Closed Session Testimony of DM-190
16 May 2006 (ICTR-98-41-T)

(Original : not specified)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

Protais Zigiranyirazo – Disclosure of closed session testimony – Bagosora – Variation of the witness protection – Jurisdiction of the Chamber – Purpose, Seal, Closed session – Trial fairness – Access to protected information, Office of the Prosecutor – Obligations for the Defence, Witness protection – Motion granted

International Instruments Cited :

Rules of Procedure and Evidence, Rules 75 and 75 (G) ; Statute, Art. 19 and 21

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Ferdinand Nahimana et al., Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal, 5 June 2003 (ICTR-99-52) ; Trial Chamber, The Prosecutor v. Eliezer Niyitegeka, Decision on the Defence Motion for Release of Closed Session Transcript of Witness KJ, 23 June 2003 (ICTR-96-14) ; 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) ; Trial Chamber, The Prosecutor v. Pauline Nyiramasuhuko et al., Decision on Aloys Simba's Motion for Disclosure of Closed Session Transcripts and Unredacted Statements of Witness FA1 in the Nyiramasuhuko et al. Trial, 27 May 2004 (ICTR-97-21) ; 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. 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. Théoneste Bagosora et al., Decision on Disclosure of Confidential Material Requested By Defence for Ntahobali, 24 September 2004 (ICTR-98-41) ; Trial Chamber, The Prosecutor v. Théoneste Bagosora 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 on Ntabakuze Motion for Protective Measures of Witnesses, 21 September 2005 (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 Bagasora 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)

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 Closed Session Transcripts and Exhibits under Seal with Respect to Protected Witness DM-190", filed by the Zigiranyirazo Defence on 11 April 2006;

CONSIDERING the Prosecution Response, filed on 19 April 2006; and the Defence Reply, filed on 21 April 2006;

HEREBY DECIDES the motion

Introduction

1. The Defence of Protais Zigiranyirazo, currently being tried before Trial Chamber III, requests disclosure of the closed session transcripts of, and the sealed exhibits associated with, the testimony of Witness DM-190, who appeared as a Defence witness in the *Bagosora et al*. trial on 3 and 4 May 2005. The Defence avers that it has met with Witness DM-190 on numerous occasions, that he is willing to testify, and that he is likely to be called.[1] The closed session transcripts, it is said, will assist the Defence in deciding whether to call the witness.

2. The Prosecution opposes the motion, arguing that the Defence has not shown the relevance of the material to the trial of the Accused Zigiranyirazo.

Deliberations

3. The Zigiranyirazo Defence has correctly applied to this Trial Chamber seeking variation of the witness protection orders applicable to the closed session testimony of Witness DM-190 in the trial of *Bagosora et al*. Rule 75 (G) of the Rules of Procedure and Evidence ("the Rules") provides that a party to other proceedings before this Tribunal must apply for variation of witness protection measures to "any Chamber, however constituted, remaining seised of the first proceedings". Accordingly, whether the closed session transcripts and related exhibits of this trial may be released to the Zigiranyirazo Defence is properly a matter for this Trial Chamber.[2]

4. Article 19 of the Statute prescribes that hearings of the Tribunal shall be public unless otherwise ordered in accordance with the Rules. Acting under Article 21 of the Statute and Rule 75 of the Rules, this Chamber issued a witness protection order for the benefit of Ntabakuze witnesses which, among other things, authorizes non-disclosure to the public of any information which could be used to identify them.[3] The purpose of placing exhibits under seal and hearing testimony in closed session is to conceal the identity of the protected witness from the public at large.

5. The Zigiranyirazo Defence submits that the witness has disclosed that he testified on behalf of the Accused Ntabakuze. Accordingly, no witness protection purpose would be served by denying the Zigiranyirazo Defence access to the Tribunal's records of the witness's testimony. Such disclosure also enhances trial fairness. The Appeals Chamber has held that any person within the Office of the Prosecutor may be designated to have access to protected information in any case before this Tribunal[4]

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[1] Motion, para. 4; Reply, paras. 4-5.

[2] The Chamber has an inherent power to reconsider and modify its own decisions. *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)" (TC), 15 June 2004, para. 7 ("[A]lthough the Rules do not explicitly provide for it, the Chamber has an inherent power to reconsider its own decisions"). This inherent power has been codified in respect of witness protection orders, in particular, by virtue of Rules 75 (G), (H) and (I).

[3] *Bagosora et al*., Decision on Ntabakuze Motion for Protective Measures of Witnesses (TC), 21 September 2005 ("Defence Witness Protection Order"), para. 2. The order was subsequently amended in respects not material to the present application by: *Bagosora et al*., Decision on Motion to Harmonize and Amend Witness Protection Orders (TC), 1 June 2005; *Bagosora et al*., Decision Amending Defence Witness Protection Orders (TC), 2 December 2005.

[4] *Bagosora el al*,. Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005, paras. 44-45.

Denying the same access to the Defence in respect a witness who has revealed his status would be unfair.[5]

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

ORDERS the Registry to disclose the closed session transcripts and sealed exhibits of Witness DM-190 to the Zigiranyirazo Defence;

DECLARES that the Zigiranyirazo Defence, including the Accused, are bound by the terms of the Ntabakuze Defence Witness Protection Order in respect of Witness DM-190.

Arusha, 16 May 2006.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

[5] Requests in similar circumstances have been routinely granted on numerous occasions: *Rwamakuba,* Decision on Bagosora Motion for Disclosure of Closed Session Testimony of Defence Witness 3/13 (TC), 24 February 2006, para. 5; *Bagosora et al,* Decision on Disclosure of Confidential Material Requested By Defence for Ntahobali (TC), 24 September 2004; *Nahimana et al*., Decision on Disclosure of Transcripts and Exhibits of Witness X (TC), 3 June 2004; *Nyiramasuhuko et al*., Decision on Aloys Simba's Motion for Disclosure of Closed Session Transcripts and Unredacted Statements of Witness FA1 in the *Nyiramasuhuko et al*. Trial (TC), 27 May 2004; *Bagosora et al*., Decision on Motion by Nzirorera for Disclosure of Closed Session Testimony of Witness ZF (TC), 11 November 2003; *Niyitegeka,* Decision on the Defence Motion for Release of Closed Session Transcript of Witness KJ (TC), 23 June 2003; *Nahimana et al,* Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal (TC), 5 June 2003.

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Decision on Disclosure of Sealed Exhibits of Witness DM-12 25 May 2006 (ICTR-99-52-T)

(Original : not specified)

Trial Chamber I

Judges : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

Protais Zigiranyirazo – Disclosure of sealed exhibits of a witness – Barayagwiza – Jurisdiction, Pending appeal from the judgement, Chamber still seized of the case, Issues of disclosure as simply a continuation of the proceedings at the trial level – Purpose, Seal, Closed session – Previous disclosure – Trial fairness – Order subject to a seven-day delay, Comment and reaction of the Prosecution – Motion granted

International Instruments Cited :

Rules of Procedure and Evidence, Rules 75 (A) and 75 (G) ; Statute, Art. 19 and 21

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Hassan Ngeze, Decision on the Prosecutor's Motion for Witness Protection, 23 November 1999 (ICTR-97-27) ; Trial Chamber, The Prosecutor v. Ferdinand Nahimana, Decision on the Defendant's Motion for Witness Protection, 25 February 2000 (ICTR-96-11) ; 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) ; 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 Zigiranyirazo Motion for Disclosure of Closed Session Testimony of DM-190, 16 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 Zigiranyirazo "Motion Requesting Closed Session Exhibits under Seal with Respect to Protected Witness DM-12", etc., filed on 20 April 2006;

CONSIDERING the Prosecution Response, filed on 25 April 2006;

HEREBY DECIDES the motion.

Introduction

1. The Defence of Protais Zigiranyirazo, currently being tried before Trial Chamber III, requests disclosure of the sealed exhibits associated with the testimony of Witness DM-12, who appeared as a Prosecution witness in the *Nahimana et al.* trial. The Defence avers that it has met with Witness DM-

12 on numerous occasions, that he is willing to testify, and that he is likely to be called.[1] The sealed exhibits, it is said, are material to the Defence case. Both the Accused and his Defence team agree to be bound by the witness protection orders applicable to witness DM-12.[2]

2. The Prosecution opposes the motion, arguing that the Chamber has no jurisdiction over the request, as it is now the Appeals Chamber which is seized of the case.

Deliberations

(i) Jurisdiction

3. 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.

4. Notwithstanding the pending appeal from the Judgement, this Chamber does, in the present context, "remain seised" of the *Nahimana et al.* case. The word "remaining" suggests a continuation of proceedings that could refer only to the Trial Chamber. An appeal from a Judgement is based on enumerated grounds; matters not related to these grounds, or the hearing of evidence related thereto, are not within the jurisdiction of the Appeals Chamber. Issues of disclosure of testimony and exhibits before the original Trial Chamber have no link with the appeals proceedings; they are simply a continuation of the proceedings at the trial level.

6.* For the above reasons, the Chamber finds that it "remains seised" of the *Nahimana et al.* case and that, accordingly, it is the proper forum for the present request.

(ii) Merits

8.* Article 19 of the Statute prescribes that hearings of the Tribunal shall be public unless otherwise ordered in accordance with the Rules. Acting under Article 21 of the Statute and Rule 75 (A) of the Rules, this Chamber issued a witness protection order for the benefit of *Nahimana et al.* witnesses which, among other things, authorizes non-disclosure to the public of any information which could be used to identify them.[3]

9. The purpose of placing exhibits under seal and hearing testimony in closed session is to conceal the identity of the protected witness from the public at large. Former Prosecution witness DM-12 has already disclosed to the Defence that he testified as a protected witness in *Nahimana et al.* Little if any witness protection purpose would therefore be served by denying the Zigiranyirazo Defence access to the sealed exhibits. Such disclosure also enhances trial fairness, in light of the Prosecution's access to the same material.[4]

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[1] Motion, paras. 5, 6 and 9.
[2] Motion, para. 10.
* The wrong numeration is the fact of the Tribunal.
[3] *Ngeze*, Decision on the Prosecutor's Motion for Witness Protection (TC), 23 November 1999; *Nahimana et al.*, Oral Decision on the Prosecutor's Oral Motion for Witness Protection (TC), 2 July 2001; *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; *Nahimana et al.*, Decision on the Defence's Motion for Witness Protection (TC), 25 February 2000.
[4] *Bagosora et al.*, Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005, paras. 44-46; *Bagosora et al.*, Decision on Zigiranyirazo Motion for Disclosure of Closed Session Testimony of DM-190 (TC), 16 May 2006, para. 5.

10. In the absence of submissions from the Prosecution concerning the content of the exhibits, the present order will be subject to a seven-day delay to give the Prosecution an opportunity to comment on whether any of the documents are susceptible of identifying any other protected witness, and to request a stay of the present order should that be the case.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

ORDERS the Registry to disclose the sealed exhibits of Witness DM-12 to the Zigiranyirazo Defence on the seventh day from the date of this Decision;

DECLARES that the Zigiranyirazo Defence, including the Accused, is bound *mutatis mutandis* by the terms of the *Nahimana et al.* witness protection orders upon receipt of the confidential material.

Arusha, 25 May 2006.

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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Scheduling Order
(Rule 54 of the Rules of Procedure and Evidence)
26 May 2006 (ICTR-2001-73-T)

(Original : English)

Trial Chamber III

Judge : Inés Mónica Weinberg de Roca, Presiding Judge

Protais Zigiranyirazo – Scheduling order – Session in The Hague – Inability of the Accused to travel to The Hague – Hearing of a witness in a courtroom in The Hague, Access to the proceedings for the Accused by video-link at the Tribunal in Arusha – Postponement of the hearing of the witness due to the availability of video-link facilities at the Tribunal in The Hague

International Instrument Cited :

Rules of Procedure and Evidence, Rule 54

International Case Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Protais Zigiranyirazo, Decision on Defence and Prosecution Motions Related to Witness ADE, 31 January 2006 (ICTR-2001-73)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber III composed of Judge Inés Mónica Weinberg de Roca, presiding, pursuant to Rule 54 of the Rules of Procedure and Evidence;

RECALLING the "Decision on Defence and Prosecution Motions Related to Witness ADE" of 31 January 2006, where the Chamber decided to hear the testimony of Prosecution Witness ADE in The Hague (The Netherlands), for the reasons established therein;[1]

RECALLING that, during the hearing of 7 March 2006, the Chamber scheduled the next session to begin on 5 June 2006 in The Hague;[2]

RECALLING the "Request for the Cooperation of The Netherlands" of 15 March 2006, under Article 28, where the Chamber requested the cooperation of the government of The Netherlands in the implementation of its Decision of 31 January 2006;[3]

CONSIDERING that the Chamber has been informed that the Accused will not be able to travel to The Netherlands for the hearings in June 2006;

CONSIDERING that, in light of this development, the Chamber must determine how to proceed with hearing the testimony of Witness ADE;

CONSIDERING that the Registrar has arranged for the hearing to take place in a courtroom in The Netherlands, and the Accused will have access to the proceedings by video-link at the Tribunal in Arusha;

CONSIDERING that, to support these hearings, the Chamber will have to sit in The Netherlands in the week commencing 12 June 2006, instead of, as originally scheduled, in the week commencing 5 June 2006, due to availability of video-link facilities at the Tribunal;

FURTHER CONSIDERING that, based upon the information above, it is not in the interests of justice to further postpone the hearing of Witness ADE;

THE CHAMBER HEREBY

ORDERS that the hearings will take place the week commencing Monday, 12 June 2006, in The Netherlands, at a location to be determined by the Registrar, at 9:00am;

ORDERS the Registrar to ensure that the Accused is present at the Tribunal in Arusha, on Monday, 12 June 2006, to participate in the proceedings, ensuing from The Netherlands;

ORDERS the Registrar to take all measures necessary to facilitate communication between the Accused and his Counsel during the proceedings in The Netherlands.

Arusha, 26 May 2006, in English.

[Signed] : Inés Mónica Weinberg de Roca

[1] "Decision on Defence and Prosecution Motions Related to Witness ADE" (TC), 31 January 2006.
[2] Status Conference, T. 7 March 2006, p. 12.
[3] Request for the Cooperation of The Netherlands, 15 March 2006.

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Order Assigning Judges to a Case Before the Appeals Chamber 21 June 2006 (ICTR-2001-73-AR73)

(Original : not specified)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge

Protais Zigiranyirazo – Appeals Chamber – Judges – Composition

International Instruments Cited :

Document IT/245 of the International Criminal Tribunal for the former Yugoslavia ; 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 Serious Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal"),

RECALLING the "Extremely Confidential Decision on Defence Motion concerning the Hearing of Witness ADE" and the Oral Decision on the "Application for Certification to Appeal against the Extremely Confidential Decision on Defence Motion Concerning the Hearing of Witness ADE" rendered by Trial Chamber III respectively on 5 June 2006 and 13 June 2006;

NOTING the "Appeal from the Extremely Confidential Decision on Defence Motion Concerning the Hearing of Witness ADE" filed on 19 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 issue on 12 May 2006;

HEREBY ORDER that the Bench in *The Prosecutor v. Protais Zigiranyirazo,* Case N°ICTR-2001-73-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 21st day of June 2006, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

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Decision on Request for Extension of Time to File a Reply 3 July 2006 (ICTR-2001-73-AR73)

(Original : not specified)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge; Mohamed Shahabuddeen; Mehmet Güney; Liu Daqun; Theodor Meron

Protais Zigiranyirazo – Extension of time – Filing of the response brief for interlocutory appeals – Good cause – Motion granted

International Instruments Cited :

Practice Direction on the Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal ; Rules of Procedure and Evidence, Rule 116

International Case Cited:

I.C.T.R.: Trial Chamber, The Prosecutor v. Protais Zigiranyirazo, Extremely Confidential Decision on Defence Motion Concerning the Hearing of Witness ADE, 5 June 2006 (ICTR-2001-73)

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 with an interlocutory appeal filed by Protais Zigiranyirazo[1] against a decision of Trial Chamber III.[2]

2. In connection with this interlocutory appeal, the Appeals Chamber is seized with a request by Counsel for Mr. Zigiranyirazo for a brief extension of time to file Mr. Zigiranyirazo's reply brief.[3] The Prosecution filed its Response to Mr. Zigiranyirazo's appeal on 29 June 2006 at 5.25 p.m. In his submissions, Counsel for Mr. Zigiranyirazo explains that he received the Prosecution's response brief on 30 June 2006. He adds that on 1 July 2006, he departs Arusha, Tanzania, in order to return to Canada and will not have access to his office until 4 July 2006. Counsel seeks an extension of time until 6 July 2006 to file the reply. He notes that the Prosecution indicated to him orally that it did not oppose this request.[4] The Prosecution has confirmed the same with the Appeals Chamber and that it does not intend to file a response to the Request for Extension of Time.

[1] Protais Zigiranyirazo Appeal from the Extremely Confidential Decision on Defense Motion Concerning the Hearing of Witness ADE, 18 June 2006. The Prosecution responded in Prosecutor's Response to "Protais Zigiranyirazo Appeal from the Extremely Confidential Decision on Defense Motion Concerning the Hearing of Witness ADE, 29 June 2006" ("Response").
[2] *The Prosecutor v. Protais Zigiranyirazo,* Case N°ICTR-2001-73-T, Extremely Confidential Decision on Defence Motion Concerning the Hearing of Witness ADE. 5 June 2006 ("Impugned Decision").
[3] Urgent Motion to Suspend Time in Appeal From the Extremely Confidential Decision on Defence Motion Concerning the Hearing of Witness ADE, 3 July 2006 (the Appeals Chamber notes that the motion was transmitted to the Registry on 30 June 2006) ("Request for Extension of Time").
[4] Request for Extension of Time, paras. 3-6.

3. The Appeals Chamber observes that its Practice Direction generally provides for the filing of a reply brief within four days from the filing of the response brief for interlocutory appeals.[5] In other words, Mr. Zigiranyirazo's reply brief should normally be filed no later than 3 July 2006. Rule 116 of the Rules of Procedure and Evidence of the Tribunal, however, allows for extensions of time upon a showing of good cause. In the circumstances of this case, as described by Counsel, and given the nature of the interlocutory appeal, the Appeals Chamber finds good cause and will grant the limited extension of time.

4. For the foregoing reasons, the Request for Extension of Time is GRANTED. Counsel for Mr. Zigiranyirazo will be permitted until 6 July 2006 to file Mr. Zigiranyirazo's reply brief.

Done in English and French, the English version being authoritative.

Done this 3rd day of July 2006, at The Hague, The Netherlands.

[Signed] : Fausto Pocar

[5] See Practice Direction on the Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, 16 September 2002.

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Decision on the Defence Motion for Disclosure of Exculpatory Information with Respect to Prior Statements of Prosecution Witnesses 6 July 2006 (ICTR-2001-73-T)

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Disclosure of exculpatory information – Witnesses – Absence of legal basis to test the credibility of a witness or cast doubt on the integrity of the process, Party calling the recorder of the witness's statement – Presumption, Statement of a witness recorded pursuant to the Rules – Challenge to the integrity of the statement-taking process – Two elements required prima facie to justify an inquiry, Proof of the material affectation of the case by the alleged inaccurate recording, Guilt or innocence of the Accused hinging on the wrongly recorded statement, Serious prejudice, Proof of malice on the part of the recorder – Result if elements met – Time to challenge such a statement – Alternative remedy presented by the Defence – Frivolous application, Absence of sanction – Motion denied

International Instrument Cited :

Rules of Procedure and Evidence, Rules 66, 67, 68, 73 (A) and 73 (F)

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. Protais Zigiranyirazo, Decision On Defence Motion To Exclude The Testimony Of Witness SGM, 27 April 2006 (ICTR-2001-73)

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

SITTING as Trial Chamber III, composed of Judges Inés Mónica Weinberg de Roca, presiding, Khalida Rachid Khan and Lee Gacuiga Muthoga ("Chamber");

BEING SEISED of the "Defence Motion for Disclosure of Exculpatory Information with Respect to Prior Statements of Prosecution Witnesses" filed on 20 April 2006 ("Defence Motion");

CONSIDERING the "Prosecutor's Response to the Defence Motion for Disclosure of Exculpatory Information with Respect to Prior Statements" filed 24 April 2006 ("Prosecution's Response");

CONSIDERING the "Reply to Prosecutor's Response to Defence Motion for Disclosure of Exculpatory Information with Respect to Prior Statements of Prosecution Witnesses" filed on 27 April 2006 ("Defence Reply");

CONSIDERING the "Prosecutor's Rejoinder to the Defence Reply to the Prosecutor's Response to the Defence Motion for Disclosure of Exculpatory Information with Respect to Prior Statements of Prosecution Witnesses" filed on 2 May 2006 ("Prosecution's Rejoinder");

CONSIDERING the "Second Reply to Prosecutor's Rejoinder to the Defence Reply to The Prosecutor's Response to Defense Motion for Disclosure of Exculpatory Information with Respect to Prior Statements of Prosecution Witnesses" filed on 8 May 2006 ("Defence's Second Reply");

NOW DECIDES the Motion on the basis of the written briefs of the parties pursuant to Rule 73 (A) of the Rules.

Submissions

The Defence Motion

1. Pursuant to Rule 68 (A) of the Rules, the Defence requests the Chamber to order the Prosecution to provide names and addresses of members of its staff who may be interviewed and called as defence witnesses. The Defence asserts that the requested Order is necessary to inquire into witness-taking procedures and to challenge the credibility of several Prosecution witnesses whose testimonies are markedly different from their written statements given to Prosecution investigators. In the alternative, the Defence requests the Prosecution to make a "from-the-Bar" declaration, affirming the integrity of the statement-recording process and reaffirming that the contents of each witness statement accords with the information given to Prosecution investigators. According to the Defence, the suggested declaration by the Prosecution should be followed by another declaration issued by the Chamber that it is satisfied with the Prosecution's affirmations concerning the integrity of the statement-taking process. The application is premised on the disclosure obligations of the Prosecution, pursuant to Rules 66, 67 and 68.

2. The Defence asserts that the integrity of the statement-taking process is in question insofar as Prosecution witnesses have frequently explained discrepancies between their oral testimonies and their written statements as the result of inaccurate recording of information. The Defence contends that, by interviewing the Prosecution interviewers, it will be able to test the credibility of the witnesses in question and to ascertain the propriety of the statement-taking process.

The Prosecution's Response

3. The Prosecution requests the Chamber to dismiss the Defence Motion in its entirety. The Prosecution avers that the disclosure sought is not properly pegged by the Defence upon Rule 68, and contends that the assessment of witness credibility is a process that is properly conducted by the Chamber in its final deliberations.

4. The Prosecution argues that the Defence has exhausted its opportunity to challenge the credibility of the witnesses because: (1) the Defence has already been afforded the opportunity to challenge the credibility of the witnesses during extended cross examinations; (2) the Chamber had an opportunity to observe the witnesses in court; (3) both parties could have referred to the testimonies of the witnesses in their closing briefs; and (4) over the course of the present trial, the Prosecutor has disclosed its "Mission Reports" to the Defence containing the names and addresses of the personnel who have dealt with the witnesses referred to in the Defence motion. The Prosecution therefore submits that it has already disclosed to the Defence all relevant material pertaining to each witness, pursuant to Rule 66 and Rule 68.

5. The Prosecution further argues that the Rules do not impose a duty upon the Prosecution to conduct joint investigations with the Defence on all allegations of an exculpatory nature.

The Defence Reply

6. The Defence reiterates that, by its request to interview Prosecution staff members, it is seeking a convenient way to resolve the problem of contradictory or inconsistent witness statements, short of calling a large number of witnesses. Because the issue at bar is the integrity of the Prosecution's

statement-taking process, the Defence argues that the Prosecution should formally affirm the integrity of this process. Alternatively, the Defence avers that the Chamber should indicate whether further evidence is necessary to establish the integrity of the statement-taking process.

The Prosecution Rejoinder

7. Noting two letters received from the Defence, both dated 26 April 2006, the Prosecution expresses its disapproval of requested interviews of more than forty Prosecution staff members. The Prosecution avers that its staff is a party to the proceedings and therefore that the Defence must meet a high threshold to justify calling them as witnesses, pursuant to Rule 54 of the Rules. The Prosecution argues that the Defence has not met this threshold, insofar as it has not presented empirical evidence of exceptional circumstances necessitating that the Prosecution staff give statements or testify before the Chamber. The Prosecution further argues that submissions made by Prosecution witnesses have already been disclosed to the Defence, pursuant to Rule 67 (D), and that the Chamber will evaluate any inconsistencies between these written submission and in-court testimonies in its Judgement of the case.

8. The Prosecution argues that the Defence has not established any prejudice the Accused may suffer if Prosecution staff members are not called to give evidence on the statement-taking process. The Prosecution also asserts that, according to established jurisprudence, merely raising doubt as to the credibility of a witness is not sufficient to establish that a witness knowingly gave false testimony.[1]

9. The Prosecution also cites the standards set forth by the United Nations to interview UN staff and asserts that the Defence has failed to provide information to meet those standards.[2]

The Defence Second Reply to the Prosecution Rejoinder

10. The Defence submits that the purpose of its Motion relates only to disclosure and does not relate to the right to conduct interviews of members of the Prosecution staff. The Defence asserts that the proposed interviews will be limited and clearly related to the denials of particular witnesses referenced in the Defence Motion.[3] The Defence also argues that, contrary to the Prosecution's assertions, there is no Rule 54 issue of *subpoena* in the present case.

Deliberations

11. By way of the present application, the Chamber is being moved to order the Prosecution to provide names and addresses of members of its staff so that they can be interviewed and eventually called as defence witnesses primarily in order to challenge the credibility of the several Prosecution witnesses who have given testimony which, in the Defence view, contradict statements given to investigators. In the alternative, the Defence suggests that the Prosecution make a "from-the-Bar" declaration affirming the integrity of the statement recording process, and re-affirm that the contents of each statement accords with the information given to the investigators. According to the Defence, this declaration by the Prosecutor should be followed by a declaration by the Chamber stating that it is satisfied with the Prosecutor's affirmations on the integrity of the process. The application is premised on the disclosure obligations of the Prosecution, under Rules 66, 67 and 68.

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[1] *Prosecutor v. Akayesu,* Case N°ICTR-96-4-T, Judgement, 2 September 1998, para. 20.

[2] UN Standards for Interviewing Current and Former UN Staff:
(i) breach of duty or perpetration of fraud in the performance of their duties;
(ii) identifying with a reasonable degree of specificity the information that is being sought from the individuals to be interviewed, and
(iii) setting out the reasons why that information is relevant to the proper conduct of the Defence of an Accused person and necessary for a fair determination of the charges against an accused.

[3] *Prosecutor v. Protais Zigiranyirazo*, Defence Motion for Disclosure of Exculpatory Information with Respect to Prior Statements of Prosecution Witnesses, 19 April 2006, par 12 ("Defence Motion").

12. The Defence contends that an Order by the Chamber, of the kind being requested, is necessary to allow the Defence to interview members of the Prosecution to test the credibility of Prosecution witnesses whose testimony in court was markedly different from their written statements. The Defence also contends that the integrity of the process is in question, because witnesses frequently explained the discrepancies between their written statements and oral testimonies in court as being the result of poor recording by the interviewers. By interviewing the interviewers, therefore, the Defence asserts that it would able to both test the credibility of the witnesses in question and ascertain the propriety and integrity of the statement-taking process.

13. The Chamber considers the application of the Defence to be misconceived in law. There is no legal basis upon which a party, by calling the recorder of a witness's statement, can test the credibility of this witness or cast doubt on the integrity of the process.

14. Where a witness has signed a statement, accompanied by a declaration that the contents thereof are true and correct, there is a presumption flowing from such declaration – as well as declarations made by recorders or interviewers – that the statement was recorded pursuant to the Rules. This presumption can be challenged by evidence that shows failure to comply with the Rules.

15. Any challenge to the integrity of the statement-taking process should be underpinned by a *prima facie* showing of misfeasance. A witness's denial of the contents of a statement or the assertion that the witness said something different from what is recorded in the statement, cannot, in and of itself, provide justification for allowing the challenging party to interview and/or summon to testify the recorder or interviewer.

16. On the facts of the present application, two elements need to be satisfied, *prima facie*, to justify an inquiry. Firstly, the Defence must show that the alleged inaccurate recording of the statement materially affects its case in that the guilt or innocence of the Accused hinges on the wrongly recorded statement so that serious prejudice has been caused. Secondly, the Defence must show that there was malice on the part of the recorder in so doing.

17. The Defence submissions do not contain the slightest suggestion or showing that any misfeasance existed or that there was an error in the taking of the statements which are the subject of the challenge.

18. Had there been such a showing, it would have been appropriate to request a *voir dire* to try the conduct of the interviewers in the statement-taking process so as to establish any resultant inaccuracy or impropriety. It is important to note that proof of such impropriety would result in the exclusion of the impugned statement. Such proof of misfeasance in the statement-making process would not serve to challenge the credibility of the witness. A statement once recorded stands as a statement. If alleged to be untrue, a determination as to the credibility of the witness would ultimately be a matter for the Chamber to decide. Where a statement has been shown to be tainted, the Chamber will have to assess the witness's credibility without the advantage of a corroborative or contradictory prior written statement.

19. The Chamber is of the view that the time to challenge the accuracy of a statement, or to impugn the process of recording a statement, is when the statement is tendered in evidence. At this time, a challenge to the admissibility of a statement may be made, as can the process of determining its admissibility. The impugned statement must then be exhibited in the proceedings.

20. Finally, the Chamber considers that the Defence's alternative remedy deserves comment. In the event that the Chamber was not inclined to make the requested Order for the production of names and contact details of the relevant OTP staff, the Defence had suggested a two part remedy – (i) a declaration from the Prosecutor as to the integrity of the process, and (ii) a statement from the Chamber that it is satisfied with the said declaration, which would suffice. The Chamber is perplexed by the suggested alternative. The Chamber does not agree that such an affirmation by the Prosecutor

can be legitimately made. As a matter of law, the Chamber takes the view that any submission from the Prosecution would not, in and of itself, serve to authenticate the statement-taking process nor would it serve to test a witness's credibility.

21. With regard to the second part of the suggested remedy, the Defence does not advance the legal basis upon which a Chamber could be called to make such a determination at this *interim* stage of the proceedings. The Chamber is not minded to, and will not, make any declaration or pronouncement of its view on any aspect of the testimony, or credibility, of witnesses testifying before it at this stage of the proceedings. It is clear and settled practice that such determinations are made at the end of the trial when the Chamber comes to deliberate on the totality of the evidence before it.

22. For the reasons stated above, the present application is dismissed. The Chamber wishes to record its concern at the very nature of the application, which it considers to be frivolous and possibly vexatious. The Chamber is also concerned that this is the second occasion in which it considers an application of the Defence to be frivolous.[4] The Chamber recalls that the Defence was warned that sanctions could attach if a similarly frivolous application was to be brought. For the purposes of the present application, however, the Chamber will not impose any of the stipulated sanctions; but reiterates its warning that frivolous applications will, in future, meet with the full force of sanctions as stipulated in Rule 73 (F) of the Rules.

FOR THE ABOVE REASONS, THE CHAMBER

DISMISSES the Motion in its entirety;

Arusha, 6 July 2006.

[Signed] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

[4] See *Prosecutor v. Zigiranyirazo*, 'Decision On Defence Motion To Exclude The Testimony Of Witness SGM', 27 April 2006.

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Order for Filing Submissions on the Prosecution's Motion for a View of the Locus in Quo (Rule 54 of the Rules of Procedure and Evidence) 3 October 2006 (ICTR-2001-73-T)

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Deposition of submissions – Locus in quo, Rwanda – Sites presented by the Prosecution, List of the sites that the Defence may wish to add to the itinerary

International Instrument Cited :

Rules of Procedure and Evidence, Rules 4 and 54

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. André Rwamakuba, Decision on Defense Motion for a View Locus in Quo, 16 December 2005 (ICTR-98-44C) ; Trial Chamber, The Prosecutor v. Athanase Seromba, Décision écrite relative à la requête du Procureur pour une visite de sites au Rwanda, 24 March 2006 (ICTR-2001-66)

Introduction

1. Having closed its case against the Accused on 28 June 2006, the Prosecution, pursuant to Rules 4, 54, 73, and 89 (b) and (c) of the Rules of Procedure and Evidence (the "Rules"), now requests that the Chamber conduct a site visit in the Republic of Rwanda. The sites requested are listed in the Prosecution Motion, Annex A.[1]

2. The Defence stresses that it has no objection in principle to an eventual site visit but submits that the Prosecution Motion is premature as the Defence case will narrow the issues for which a site visit may be essential to determine the truth. It therefore requests that the Chamber suspend its decision until the Defence case is well advanced and the issues in the case have been clarified.[2] Once its case proceeds, the Defence will have additional submissions concerning the sites to be visited.[3]

Deliberations

3. Rule 4 of the Rules 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".

[1] "Prosecution Motion for a View of the *Locus in Quo*", filed on 17 August 2006 (the "Prosecution Motion").
[2] "Response to the Prosecution Motion for a View of the Locus in Quo", filed on 21 August 2006 (the "Defence Response").
[3] The Defence Response, para. 13.

4. In accordance with the jurisprudence of the Tribunal, the need for a site visit must be assessed in view of the particular circumstances of this case. A request to carry out a site visit should be granted when the visit will be instrumental to the discovery of the truth and determination of the matter before the Chamber.[4] Chambers of this Tribunal have granted site visits at different stages of the proceedings, such as at the end of the Prosecution and Defence cases, and during the presentation of evidence by the Defence.[5]

5. In view of the circumstances of this case, the Chamber does not consider that the Prosecution Motion is premature. To assist it in ruling on the matter, the Chamber orders the Defence to provide it with any submission it intends to make on the sites presented by the Prosecution, as well as listing sites that the Defence may wish to add to the itinerary. Upon receipt of these submissions, the Chamber will decide the Prosecution Motion.

FOR THE ABOVE REASONS, THE CHAMBER ORDERS the Defence to make submissions on the sites presented in the Prosecution Motion and sites that the Defence may wish to add to the itinerary not later than 30 October 2006.

Arusha, 3 October 2006, in English.

[Signed] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

[4] *Prosecutor v. Bagosora et al*, Decision on Prosecutor's Motion for Site Visits in the Republic of Rwanda, 29 September 2004, para. 4; *Prosecutor v. Rwamakuba*, Decision on Defense Motion for a View *Locus in Quo*, 16 December 2005, para. 6 (the "*Rwamakuba* Decision").

[5] See the Rwamakuba Decision; see *Prosecutor v. Athanase Seromba*, Décision écrite relative à la requête du Procureur pour une visite de sites au Rwanda, 24 March 2006.

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Decision on the Prosecution Motion for Severance and Exclusion of Parts of the Pre-Defence Brief
13 October 2006 (ICTR-2001-73-T)

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Severance – Exclusion of Parts of the Pre-Defence Brief – Scope of the Pre-Defence Brief, Absence of a prejudice for the Prosecution or a hindrance of the functions of the Chamber – Removal of certain Office of the Prosecutor staff from the list of witnesses, Absence of consideration of some paragraphs of the Pre-Defence Brief – Motion granted in part

International Instrument Cited :

Rules of Procedure and Evidence, Rule 73 ter

International Case Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Protais Zigiranyirazo, Decision on the Defence Motion for Disclosure of Exculpatory Information with Respect to Prior Statements of Prosecution Witnesses, 6 July 2006 (ICTR-2001-73)

Introduction

1. The Prosecution's case against the Accused closed on 28 June 2006. The Defence will start the presentation of its case on 30 October 2006. On 1 September 2006 the Defence filed a Pre-Defence Brief (the "Pre-Defence Brief") pursuant to Rule 73 *ter* of the Rules of Procedure and Evidence (the "Rules").

2. The Prosecution moves the Chamber to sever and exclude parts of the Pre-Defence Brief as outside the scope of Rule 73 *ter* of the Rules[1] and as contravening the Chamber's Decision of July 2006.[2] The Defence Response was filed on 7 September 2006.[3] The Prosecution Reply followed on 8 September 2006.[4]

Submissions

[1] "Prosecutor's Motion for Severance and Exclusion of Parts of the Defence Brief Filed Under Rule 73 *ter* of the Rules of Procedure and Evidence" filed on 4 September 2006 (the "Prosecution Motion").
[2] "Decision on the Defence Motion for Disclosure of Exculpatory Information with Respect to Prior Statements of Prosecution Witnesses", filed on 6 July 2006 (the "Decision of July 2006").
[3] "Defence Reply to Prosecutor's Motion for Severance and Exclusion of Parts of Defence Brief", filed on 7 September 2006 (the "Defence Response").
[4] "Prosecutor's Response to the Defense Reply to the Prosecutor's Motion for Severance and Exclusion of Parts of the Defense Brief Filed Under Rule 73 *ter* of the Rules of Procedure and Evidence", filed on 8 September 2006 (the "Prosecution Reply").

3. The Prosecution requests that the Chamber sever and exclude paragraphs 55-62 of the Pre-Defence Brief on the grounds that these paragraphs are arguments and have no relevance under Rule 73 *ter* of the Rules. The Prosecution further requests that paragraphs 63-66 be severed and excluded, and that certain Office of the Prosecutor ("OTP") staff be removed from the list of Defence witnesses, because they relate to issues determined in the Chamber's Decision of July 2006. The Prosecution argues that the Defence is attempting to re-argue a motion that has already been decided and calls for sanctions under Rules 73 and 46 of the Rules.

4. To enable it to adequately prepare for trial, the Prosecution also asks that the Chamber order the Defence to file a final witness list and list of exhibits, as well as a summary of the proposed testimony of the Accused.

5. The Defence replies that paragraphs 55-62 of the Pre-Defence Brief inform the Chamber of the status of its trial preparation. Paragraphs 63-66 and witnesses 48-53 are necessary to preserve its right to appeal the Decision of July 2006.

6. The Defence submits that it will be prepared to furnish a list of potential witnesses by 10 October 2006. The Defence states that a summary of the Accused's testimony will only be submitted if a final decision for him to testify is made. Finally, the Defence submits that during the Status Conference of 30 June 2006 the Prosecution accepted the fact that only the Defence exhibits which were ready would be filed.

7. The Prosecution adds that absent of a showing of malfeasance or other irregularities, the Chamber has held that parties to the proceeding may not call as witnesses members of the other party to the proceeding. The Prosecution submits that even if the Accused chooses not to testify he will suffer no harm by filing a summary of his proposed testimony pursuant to Rule 73 *ter* (B) (iii).

Deliberations

8. The Pre-Defence Brief is relevant only so far as it provides details outlining the Defence's theory of its case. Facts and arguments which are outside that scope are irrelevant to the Chamber, even if they remain within the Pre-Defence Brief. The Chamber, therefore, finds no reason to sever and exclude paragraphs 55-62 of the Pre-Defence Brief, which in no way prejudice the Prosecution or hinder the functions of the Chamber.

9. In its Decision of July 2006, the Chamber found that the Defence had not shown any malice or misfeasance by OTP staff in recording witness statements, and that, therefore, the Defence was not entitled to call them as witnesses.[5] In paragraphs 63-66 of its Pre-Defence Brief, the Defence revives the arguments already rejected by the Chamber. The Defence also lists six OTP staff as witnesses 48-53 in Appendix A. The Defence has not made any showing that these witnesses are relevant to matters other than those previously determined in the Decision of July 2006. Because the inclusion of these witnesses contravenes the Decision of July 2006, the Chamber orders the Defence to remove witnesses 48-53 from its witness list. Moreover, the Chamber will not consider paragraphs 63-66 of the Pre-Defence Brief.

10. The Chamber notes that the Defence filed a final witness list on 9 October 2006.[6] The Prosecution's arguments related to this list are, therefore, now moot.

11. The Prosecution filed many exhibits that were not annexed to its Pre-Trial Brief. The Chamber notes that during the Status Conference, the Prosecution acknowledged that only those exhibits which

[5] The Decision of July 2006, paras. 13-17.
[6] Les témoins en défense, résumes des sujets de leurs témoignages et exposé sommaire additionnelle quant aux témoins en défense, filed on 9 October 2006.

were ready would be filed with the Pre-Defense Brief.[7] The Chamber, therefore, denies the Prosecution's request regarding Defence exhibits.

12. The Chamber will not require the Accused to provide a summary of his proposed testimony.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Prosecution Motion in part;

ORDERS the Defence to remove witnesses numbered (48) "Me (sic) Stephen Rapp", (49) "Zudhi Janbek", (50) "Rapp's Interpreter", (51) "Gina Butler", (52) "Butler Z Janbek's investigator", and (53) "Butler's interpreter" from the Defence witness list;

DENIES the Prosecution Motion in all other respects.

Arusha, 13 October 2006, in English.

[Signed] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

[7] Status Conference, T. 30 June 2006, p. 6.

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Decision on the Defence Motion Pursuant to Rule 98 bis *(Rule 98* bis *of the Rules of Procedure and Evidence) 17 October 2006 (ICTR-2001-73-T)*

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Trial Chamber, Evidence to sustain a conviction on one or more counts charged in the Indictment – Test, Whether a reasonable trier of fact could arrive at a conviction if the Prosecution evidence was accepted – Absence of a paragraph by paragraph analysis of the Indictment – Murder as a crime against humanity, Conditions to qualify the offences as a crime against humanity, Conviction of a reasonable trier of fact – Conspiracy to commit genocide, Genocide, Complicity in Genocide and Extermination as a crime against humanity, Not well founded motion – Prosecution concessions regarding lack of evidence on allegations contained in some paragraphs on the indictment – Motion denied

International Instruments Cited :

Rules of Procedure and Evidence, Rule 98 bis ; Statute, Art. 2 and 3

International Cases Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Laurent Semanza, Decision on the Defence Motion for a Judgement of Acquittal in respect of Laurent Semanza after Quashing the Counts Contained in the third Amended Indictment, 27 September 2001 (ICTR-97-20) ; Trial Chamber, The Prosecutor v. Emmanuel Ndindabahizi, Judgement, 15 July 2004 (ICTR-2001-71) ; Trial Chamber, The Prosecutor v. Protais Zigiranyirazo, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment, 15 July 2004 (ICTR 2001-72) ; 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 Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 bis, 13 October 2005 (ICTR-2000-55A) ; Trial Chamber, The Prosecutor v. Jean Mpambara, Decision on the Defence's Motion for Judgement of Acquittal, 21 October 2005 (ICTR-2001-65) ; Trial Chamber, The Prosecutor v. André Rwamakuba, Decision on Defense Motion for Judgment of Acquittal, 28 October 2005 (ICTR-98-44C)

I.C.T.Y.: Appeals Chamber, The Prosecutor v. Zejnil Delalić, Judgment, 30 February 2001 (IT-96-21) ; Appeals Chamber, The Prosecutor v. Goran Jelisić, Judgment, 5 July 2001 (IT-95-10)

Introduction

1. Protais Zigiranyirazo (the "Accused") is charged with genocide or in the alternative complicity in genocide and conspiracy to commit genocide pursuant to Article 2 of the Statute of the Tribunal (the "Statute"), and extermination and murder, as crimes against humanity, pursuant to Article 3 of the Statute.

2. After calling twenty-five witnesses, including four investigators and one expert witness, and entering 75 exhibits during a 46 trial day period, the Prosecution closed its case on 28 June 2006. The Chamber granted the Defence request for extension of time to file its motion for acquittal pursuant to Rule 98 *bis*. The Prosecutor was likewise granted a similar extension to respond. The Defence Motion was filed on 13 July 2006.[1] The Prosecution Response was filed on 31 July 2006.[2] The Defence Reply was filed on 2 August 2006,[3] and the Prosecution Rejoinder was filed on 7 August 2006.[4]

Deliberations

3. Rule 98 *bis* provides:

> 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 Prosecution'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.

4. In the Tribunal's jurisprudence, the test under the Rule is whether a reasonable trier of fact *could* arrive at a conviction if the Prosecution evidence is accepted.[5] Accordingly, where some evidence was adduced and that evidence, if believed, could be sufficient for a reasonable trier of fact to sustain, beyond reasonable doubt, a conviction on the particular count, a motion for a judgement of acquittal shall be denied. Conversely, where no evidence was adduced in relation to a count, such motion shall be granted.[6] The Chamber stresses that Rule 98 *bis* requires it to consider *counts*; the Chamber need not engage in a paragraph by paragraph analysis of the Indictment.[7] The Chamber does not assess the credibility and reliability of the evidence unless the Prosecution case "has completely broken down, either on its own presentation, or as a result of such fundamental questions being raised through cross-examination as to the reliability and credibility of witnesses that the Prosecution is left without a case".[8] The Prosecution's evidence should be evaluated as a whole, looking to "the totality of the evidence" and making any reasonably possible inferences.[9] A decision at the Rule 98 *bis* stage to accept the Prosecution's evidence does not preclude the Chamber from ultimately finding that the Prosecution evidence fails to establish the Accused's guilt beyond a reasonable doubt.[10]

5. The Defence has made two types of submissions on the nature of the Prosecutor's evidence, namely: on the sufficiency of the evidence in relation to the crimes alleged in the counts of the Indictment,[11] and on the sufficiency of the evidence in relation to individual paragraphs of the Indictment.

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[1] "Defense Motion Pursuant to Rule 98 *Bis* RPP", filed on 13 July 2006 (the "Defense Motion").
[2] "Prosecutor's Response to Defence Motion Pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence", filed on 31 July 2006 (the "Prosecution Response").
[3] "Reply to Prosecutor's Response to Defence Motion Pursuant to Rule 98 *bis* RPP", filed on 2 August 2006 (the "Defence Reply").
[4] "Prosecutor's Rejoinder to the Defence Reply to the Prosecutor's Response to the Defence Motion (Pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence)", filed on 7 August 2006 (the "Prosecutor's Rejoinder").
[5] *Prosecutor v. Bagosora et al*, Decision on Motions for Judgement of Acquittal (TC), 2 February 2005, paras. 3, 6 (the "*Bagosora* 98 *bis* Decision"); *Prosecutor v. Muvunyi*, Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 *bis* (TC), 13 October 2005, paras. 35-36 (the "*Muvunyi* 98 *bis* Decision"); *Prosecutor v. Semanza*, Decision on Defence Motion for a Judgement of Acquittal in Respect of Laurent Semanza After Quashing the Counts Contained in the Third Amended Indictment (TC), 27 September 2001, para. 15 (the "*Semanza* 98 *bis* Decision"). See also *Prosecutor v. Jelisić*, Judgement (AC), 5 July 2001, para. 37; *Prosecutor v. Delalić*, Judgement (AC), 30 February 2001, para. 434.
[6] *Prosecutor v. Rwamakuba*, Decision on Defense Motion for Judgment of Acquittal (TC), 28 October 2005, para. 6.
[7] *Bagosora* 98 *bis* Decision, para. 8.
[8] *Semanza* 98 *bis* Decision, para. 17.
[9] *Bagosora* 98 *bis* Decision, para. 11; *Muvunyi* 98 *bis* Decision, para. 40.
[10] *Bagosora* 98 *bis* Decision, para. 6. See also *Muvunyi* 98 *bis* Decision, para. 40.
[11] Amended Indictment of 8 March 2005 (the "Indictment").

6. The Defence requests an acquittal on Count 5 (murder as a crime against humanity). For the remaining counts of the Indictment, the Defence requests the Chamber to take a paragraph by paragraph approach with a view to striking out those paragraphs of the Indictment for which insufficient evidence has been adduced. The Chamber will therefore begin its analysis of the sufficiency of the Prosecution evidence with Count 5.

Count 5: Murder as a Crime Against Humanity

7. The Defence contends that there is insufficient evidence to prove any of the acts alleged and charged under Count 5. The Defence recognizes that, if proven, each of the murder allegations in the Indictment[12] could sustain a conviction on this count.[13] Therefore, if the Chamber finds that there is sufficient evidence of any of the murders, the Defence requests that the Chamber either acquit the Accused for the remaining murders; or, "in the alternative, find that the Accused has no case to answer on the remaining murders and strike out or indicate that the Chamber will not consider those allegations during final deliberations."[14]

8. The Indictment charges the Accused with the killings of the three *gendarmes*, Stanislas Sinibagiwe ("Sinibagiwe"), and the killings of members of two Tutsi families.[15] The Prosecution concedes that no evidence has been adduced in respect of the murder of the Sekimonyo and the Bahoma families,[16] but contends that there is sufficient evidence on the record to prove the killing of the three *gendarmes* and Stanislas Sinibagiwe ("Sinibagiwe").[17]

9. Murder is the intentional killing of a person, or the intentional infliction of grievous bodily harm in the knowledge that such harm will likely cause the victim's death or with recklessness as to whether death will result, without lawful justification or excuse.[18]

10. In order to qualify as a crime against humanity, these offences must satisfy two conditions under the Statute: the crime must be committed as "part of a widespread or systematic attack"; and, the attack must be against "any civilian population on national, political, ethnic, racial or religious grounds".

11. "Widespread" is defined as massive or large-scale, involving many victims; "systematic" refers to an organized pattern of conduct, as distinguished from random or unconnected acts committed by independent actors.[19] These requirements inform the *mens rea* element unique to crimes against humanity: the perpetrator must, at a minimum, know that his action is part of a widespread or systematic attack against civilians on discriminatory grounds, though he or she need not necessarily share that discriminatory intent.[20]

12. The Chamber reiterates that *counts* are the proper focus for an enquiry under Rule 98 *bis* and therefore will not enquire whether evidence has been adduced in support of each paragraph of the Indictment. If there is any Prosecution evidence regarding any of the alleged killings that could sustain the count, then a judgement of acquittal is not appropriate.

13. The Defence asserts that the sufficiency of the evidence adduced from the witness testimonies does not support the charge that the Accused is responsible for the alleged murder of Sinibagiwe, nor

[12] Indictment, paras. 43, 46, 48-49
[13] Defence Motion, para. 77.
[14] Defence Motion, para. 78.
[15] Indictment, paras. 43, 46, 48-49
[16] Prosecution Response, para. 17; Indictment, paras. 20, 25, and 26.
[17] Prosecution Response, para. 42.
[18] *Bagosora* 98 *bis* Decision, para. 25; *Prosecutor v. Ndindabahizi*, Judgement (TC), 15 July 2004, para. 487 (the "*Ndindabahizi* Judgement").
[19] *Bagosora* 98 *bis* Decision, para. 24; *Ndindabahizi* Judgement, para. 477.
[20] *Bagosora* 98 *bis* Decision, para. 24; *Ndindabahizi* Judgement, paras. 477, 484.

does it support the contention that the killing of Sinibagiwe was a crime against humanity, as it was not part of a widespread or systematic attack against the civilian population, on ethnic or racial grounds,[21] nor on political grounds.[22] The Defence therefore argues that Sinibagiwe's murder was an aborted extortion attempt.[23]

14. The Prosecution submits that Sinibagiwe was targeted because he was considered an accomplice of the enemy – Sinibagiwe was considered a Hutu who was opposed to the government then in power – and was therefore killed.[24] The Prosecution refers to Witness AVY to show that there is ample evidence, both direct and circumstantial, from which the Chamber can conclude that the Accused was fully involved in the murder of Sinibagiwe.[25]

15. There is evidence of the Accused being present and participating at a meeting where it was decided that Sinibagiwe would not be allowed to cross *La Petite Barrière* border post[26] because the latter was believed to be an accomplice of the enemy, which was defined as the Tutsi.[27] After the meeting, Sinibagiwe was detained at *La Petite Barrière* border post until Omar Serushago, who was allegedly at the meeting with the Accused, retrieved Sinibagiwe from *La Petite Barrière* border post and drove him in the direction of the *Commune Rouge*, a local cemetery in Gisenyi. There is also evidence that shots were heard shortly thereafter from the *Commune Rouge*. The witness later learned that Sinibagiwe had been killed.[28]

16. The Chamber has carefully examined the record and is convinced that there is sufficient evidence, which, if believed, could lead a reasonable trier of fact to conclude that this killing was part of a widespread, if not also systematic, attack against civilians on the basis of one or more of the enumerated grounds of Article 3 of the Statute.

17. The Chamber is of the view that, if believed, the evidence described above could lead a reasonable trier of fact to conclude that the Accused is guilty of murder as a crime against humanity for aiding and abetting the murder of Sinibagiwe.

Count 1: Conspiracy to Commit Genocide, Count 2: Genocide, Count 3: Complicity in Genocide, and Court 4: Extermination as a Crime Against Humanity

18. The Accused is also charged with conspiracy to commit genocide (Count 1 of the Indictment); genocide (Count 2); complicity in genocide (Count 3), all of which are stipulated under Article 2 (3) (b) of the Statute; and extermination as a crime against humanity (Count 4), which is stipulated under Article 3 (a) of the Statute.

19. Rule 98 *bis* requires the Chamber to determine whether the evidence is insufficient to sustain a conviction. The Chamber is not mandated to consider alleged defects in the Indictment or the sufficiency of notice to the Accused.[29] The Chamber, therefore, will not consider the party's submissions concerning compliance with the Chamber's 15 July 2004 decision requiring modifications to the Indictment.[30]

20. The Chamber declines the Defence's invitation to take a paragraph by paragraph approach regarding the remaining counts of the Indictment. As the Chamber noted above, it will not take a

[21] Defence Motion, para. 66.
[22] Defence Motion, para. 70.
[23] Defence Motion, paras. 53, 69.
[24] Prosecution Response, paras. 62-63; Prosecutor's Rejoinder, para. 3 (x).
[25] Prosecution Response, para. 61.
[26] T. 19 October 2005, pp. 9-11; T. 8 February 2006, pp. 44-49 (Witness AVY).
[27] T. 8 February 2006, pp. 44, 46 (Witness AVY).
[28] T. 19 October 2005, pp. 12-15 (Witness AVY).
[29] *Bagosora* 98 *bis* Decision, para. 7.
[30] See "Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment", 15 July 2004; Defence Motion, paras. 80, 84, 86; Defence Reply, para. 48.

paragraph by paragraph approach because Rule 98 *bis* requires it to consider the Prosecution evidence as it relates to *counts*. The Defence does not suggest that the lack of evidence in support of the disputed paragraphs should result in acquittal on any of the remaining counts. On the contrary, it acknowledges that some evidence has been adduced in support of these counts. Therefore, the Defence Motion as it pertains to Counts 1 through 4 of the Indictment is not well founded and must be denied.[31]

Prosecution Concessions Regarding Lack of Evidence on Allegations Contained in Paragraphs 20, 25, 26, 37, 48, 49 and 50

21. The Prosecution concedes that it has led no evidence related to the allegations in paragraphs 20, 25, 26, 37, 48, 49 and 50, of the Indictment. These paragraphs concern the alternative counts of genocide and complicity in genocide, and the counts of extermination and murder as crimes against humanity. The Chamber has examined the Indictment and notes that these paragraphs concern, respectively, the Accused's role in ordering the digging of a mass grave known as "the pit" behind his home; the Accused's role in the deaths of some 30 members of the Sekimonyo clan, a Tutsi family; and the Accused's role in the deaths of some 18 members of the Bahoma clan, another Tutsi family. The Chamber accepts the Prosecutor's admission that no evidence has been tendered in support of these allegations and accordingly finds that the Accused has no case to answer in respect of the allegations contained in these paragraphs.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion.

Arusha, 17 October 2006, in English.

[Signed] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

[31] See *Prosecutor v. Mpambara*, Decision on the Defence's Motion for Judgement of Acquittal (TC), 21 October 2005, para. 6.

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Decision on Interlocutory Appeal
30 October 2006 (ICTR-2001-73-AR73)

(Original : not specified)

Appeals Chamber

Judges : Fausto Pocar, Presiding Judge; Mohamed Shahabuddeen; Mehmet Güney; Liu Daqun; Theodor Meron

Protais Zigiranyirazo – Interlocutory appeal – Right of the Accused to be tried in his or her presence – Testimony of a witness in person in The Netherlands, Participation of the Accused in the proceedings only by video-link from Arusha – General conduct of trial proceedings, Conditions to reverse the Trial Chamber's exercise of discretion – Right of the Accused to be tried in his or her presence, Meaning of presence, Physical presence in court – Fair criminal trial, Language and practical import of the Statute – Participation via video-link not considered as a presence – Possibility of restrictions on the right to be physically present at trial – Discretion of the Trial Chamber, Security of the witness, Assessment of the credibility of the witness, Alternative solutions – Test of proportionality – Discernible error of the Trial Chamber – Exclusion of the testimony – Discretion of the Trial Chamber allowing the witness to testify again in a manner consistent with the Appellant's fair trial rights – Impugned decision reversed

International Instruments Cited :

Rules of Procedure and Evidence of the I.C.T.R., Rule 80 (B) ; Rules of Procedure and Evidence of the I.C.T.Y., Rule 65 bis ; Statute, Art. 20 (4) (d)

International Cases Cited :

I.C.T.R.: 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. Michel Bagaragaza, Order for Special Detention Measures, 13 August 2005 (ICTR-2005-86) ; Appeals Chamber, The Prosecutor v. Jean de Dieu Kamuhanda, Variation of a Scheduling Order, 19 August 2005 (ICTR-99-54A) ; 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) ; Trial Chamber, The Prosecutor v. Protais Zigiranyirazo, Prosecution's Confidential Request to Allow Witness ADE to Give Testimony Via Video-Link, 21 December 2005 (ICTR-2001-73) ; 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. 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) ; Trial Chamber, The Prosecutor v. Protais Zigiranyirazo, Scheduling Order, 26 May 2006 (ICTR-2001-73) ; Appeals chamber, The Prosecutor v. Tharcisse Muvunyi, Decision on Interlocutory Appeal, 29 May 2006 (ICTR-2000-55A) ; Trial Chamber, The Prosecutor v. Protais Zigiranyirazo, Extremely Confidential Decision on Defence Motion Concerning the Hearing of Witness ADE, 5 June 2006 (ICTR-2001-73) ; Appeals Chamber, The Prosecutor v. Théoneste Bagosora et al., 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)

I.C.T.Y.: Trial Chamber, The Prosecutor v. Milan Simić, Sentencing Judgment, 17 October 2002 (IT-95-9/2) ; 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)

Committee on Civil and Political Rights, Communication N°289/1988, Panama 8 April 1992, CCPR/C/44/289/1988

E.C.H.R.: Chamber, Colozza v. Italy, Judgement, 12 February 1985, n°9024/80 ; Third section, Michael Edward Cooke v. Austria, Judgement, 8 February 2000, n°25878/94 ; First section, Stoichkov v. Bulgaria, Judgement, 24 March 2005, n°9808/02 ; Grand Chamber, Sejdovic v. Italy, Judgement, 1 March 2006, n°56581/00

National Cases Cited :

Kings Bench, R. v. Lee Kun, 1916, (1916) 1 Kings Bench Reports 337, at 341

Supreme Court of the Unites States : Illinois v. Allen, 31 March 1970, 397 U.S. 337, 338 (1970) ; Riggins v. Nevada, 18 May 1992, 504 U.S. 127, 142 (1992)

United States Court of Appeals, Fifth Circuit, United States v. Navarro, 11 January 2002, 169 F.3d 228, 234-239 (5th Cir. 1999)

United States Court of Appeals for the Armed Forces, United States v. Reynolds, 1996, 44 M.J. 726, 729 (United States Army Court of Criminal Appeals 1996)

98. 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 by Protais Zigiranyirazo ("Appellant"), against a decision of Trial Chamber III.[2]

Background

99. The Appellant submits that the Trial Chamber violated his fundamental right to be tried in his presence, as guaranteed by Article 20 (4) (d) of the Statute of the Tribunal. The Appellant argues that this violation resulted from the decision of the Trial Chamber to hear Michel Bagaragaza[3] testify in person in The Netherlands[4] with the Appellant participating in the proceedings only by video-link

[1] Protais Zigiranyirazo Appeal from the Extremely Confidential Decision on Defense Motion Concerning the Hearing of Witness ADE, 19 June 2006 ("Zigiranyirazo Appeal"). The Prosecution responded in "Prosecutor's Response to Appeal from the Extremely Confidential Decision on Defence Motion Concerning the Hearing of Witness ADE", 29 June 2006 ("Prosecution Response"). Mr. Zigiranyirazo replied in "Reply Brief: Appeal from the Extremely Confidential Decision on Defense Motion Concerning the Hearing of Witness ADE", 6 July 2006 ("Zigiranyirazo Reply").

[2] *The Prosecutor v. Protais Zigiranyirazo,* Case N°ICTR-2001-73-T, Extremely Confidential Decision on Defence Motion Concerning the Hearing of Witness ADE, 5 June 2006 ("Impugned Decision"). The Appeals Chamber notes that Mr. Bagaragaza is Witness ADE. Mr. Bagaragaza waived the use of a pseudonym at the outset of his testimony. See *The Prosecutor v. Protais Zigiranyirazo,* Case N°ICTR-2001-73-T, T. 13 June 2006 pp. 4-5.

[3] Mr. Bagaragaza is an accused person before this Tribunal who is detained exceptionally in the detention facility for the International Tribunal for the Former Yugoslavia ("ICTY") in The Netherlands. Impugned Decision, para. 13. See also *The Prosecutor v. Michel Bagaragaza*, Case N°ICTR-2005-86-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 (ICTR President); *The Prosecutor v. Michel Bagaragaza*, Case N°ICTR-2005-86-I, Order for the Continued Detention of Michel Bagaragaza at the ICTY Detention Unit in The Hague, The Netherlands, 17 August 2006 (ICTR President).

[4] Zigiranyirazo Appeal, paras. 3, 20-26.

from Arusha.[5] He contends that the right to be present at trial cannot be satisfied by video-link and instead requires physical presence.[6] The Appellant requests the Appeals Chamber to quash the Trial Chamber's decision of 5 June 2006, which permitted his participation by video-link, and to strike from the record Mr. Bagaragaza's testimony of 13 through 15 June 2006.[7]

100. The present dispute has its origin in the Prosecution's request to have Mr. Bagaragaza testify in this case by video-link from The Netherlands.[8] Both the Trial Chamber and the Prosecution have described him as a key witness.[9] The Appellant opposed the Prosecution's request to hear Mr. Bagaragaza's testimony by video-link because he wished to confront this witness in person.[10] In addition, the Appellant challenged Mr. Bagaragaza's inability to travel to Arusha, in particular, by disputing the basis of his security concerns and by noting that his agreement with the Prosecution to be heard only by video-link usurped the role of the Trial Chamber in making such decisions.[11]

101. On 31 January 2006, the Trial Chamber denied the Prosecution's request to hear Mr. Bagaragaza's testimony by video-link.[12] In its decision, the Trial Chamber stated that the Appellant had a right to confront this witness in person.[13] In addition, the Trial Chamber expressed concern about its ability "to effectively and accurately assess the testimony and demeanour" of Mr. Bagaragaza if he testified by video-link.[14] The Trial Chamber recognized the potential importance of Mr. Bagaragaza's testimony.[15] In addition, the Trial Chamber accepted the Prosecution's submissions that Mr. Bagaragaza faced increased risk to his security if he travelled to Arusha.[16] Consequently, the Trial Chamber decided to hear Mr. Bagaragaza's testimony in person in The Netherlands in the presence of the parties.[17]

102. However, shortly before the anticipated trial session, the Trial Chamber was informed that the Appellant would not be permitted to enter The Netherlands in the foreseeable future.[18] The Trial Chamber does not explain the reason for this, citing only "external variables", though the Registry's submissions point to the absence of a "treaty basis" for the temporary transfer.[19] Consequently, the Trial Chamber modified its arrangements for the hearing of Mr. Bagaragaza's testimony in a Scheduling Order of 26 May 2006.[20] In that Order, the Trial Chamber decided to proceed to hear Mr. Bagaragaza's testimony in person in The Netherlands, beginning 12 June 2006, in the physical absence of the Appellant, who would participate by video-link from Arusha.[21] The Appellant challenged this decision on the grounds that it violated his right to be present at trial and to personally confront the witness.[22]

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[5] Zigiranyirazo Appeal, paras. 3, 9, 16, 20.
[6] Zigiranyirazo Appeal, paras. 21-31.
[7] Zigiranyirazo Appeal, para. 56.
[8] Impugned Decision, para. 13. See also *The Prosecutor v. Protais Zigiranyirazo*, Case N°ICTR-2001-73-T, Decision on Defence and Prosecution Motions Related to Witness ADE, 31 January 2006, paras. 25-34 ("Decision on Prosecution's Request for Video-Link").
[9] Impugned Decision, paras. 6, 16; Decision on Prosecution's Request for Video-Link, paras. 26, 32.
[10] Decision on Prosecution's Request for Video-Link, para. 32.
[11] Decision on Prosecution's Request for Video-Link, para. 28.
[12] Decision on Prosecution's Request for Video-Link, p. 10.
[13] Decision on Prosecution's Request for Video-Link, para. 32.
[14] Decision on Prosecution's Request for Video-Link, para. 32.
[15] Decision on Prosecution's Request for Video-Link, para. 32.
[16] Decision on Prosecution's Request for Video-Link, para. 32. These submissions, as recounted by the Trial Chamber, included Mr. Bagaragaza's fears for his safety stemming from his position as an "insider" witness, the publishing of one of his statements on the internet, the probable murder of Juvénal Uwilingiyimana, and threats to his family, which all contributed to his "sense of vulnerability". *Id.*, para. 26.
[17] Decision on Prosecution's Request for Video-Link, para. 33.
[18] Impugned Decision, paras. 2, 8, 14.
[19] Impugned decision, paras. 8, 14.
[20] *The Prosecutor v. Protais Zigiranyirazo*, Case N°ICTR-2001-73-T, Scheduling Order, 26 May 2006 ("Scheduling Order").
[21] Scheduling Order, pp. 2-3. See also Impugned Decision, para. 2.
[22] Impugned Decision, para. 3.

103. On 5 June 2006, the Trial Chamber addressed this matter and, after considering various factors, decided that it was in the interests of a fair and expeditious trial to maintain the arrangement for hearing Mr. Bagaragaza's testimony as set forth in the Scheduling Order of 26 May 2006.[23] The Trial Chamber reiterated that its decision to hear Mr. Bagaragaza in person was based primarily on its concern as to its ability to effectively and accurately assess his testimony and demeanour through a video-link.[24] The Trial Chamber decided that the Appellant, however, would be able to follow the proceedings by video-link along with one of his counsel in Arusha.[25] The Trial Chamber's decision also envisioned both parties being represented by counsel in court in The Netherlands.[26] To maintain "procedural equality of arms" between the parties, the Trial Chamber decided that the examination and cross-examination of Mr. Bagaragaza by both parties would be primarily conducted from Arusha via video-link.[27] However, it noted that counsel for both the Prosecution and the Appellant, present in The Netherlands, would also be able to intervene in the proceedings.[28]

104. Following the issuance of the Impugned Decision, the Appellant sought certification to appeal, which the Trial Chamber granted immediately prior to hearing Mr. Bagaragaza's testimony.[29] The Trial Chamber, however, declined to stay the proceedings pending the outcome of the appeal.[30] Accordingly, Mr. Bagaragaza testified from 13 through 15 June 2006. The Prosecution's case closed on 28 June 2006, and the Defence case is set to begin on 30 October 2006.

Discussion

105. Article 20 (4) (d) of the Statute provides that an accused has a right "to be tried in his or her presence." This right has been equated with other "indispensable cornerstone[s] of justice", such as the right to counsel, the right to remain silent, the right to confront witnesses against them, and the right to a speedy trial.[31] The Trial Chamber concluded that, in the circumstances of this case, the Appellant's presence at his own trial, even during the hearing of a key witness, could be facilitated through the use of video-link technology.[32] In the present decision, the Appeals Chamber considers whether the Trial Chamber erred in adopting the procedure for hearing the testimony of Mr. Bagaragaza in person in The Netherlands while the accused, Mr. Zigiranyirazo, participated via video-link from Arusha. In the course of this analysis, the Appeals Chamber confronts three principal questions: (1) whether "presence" within the meaning of Article 20 (4) (d) refers to physical presence in court before the Trial Judges; (2) if so, whether the right to be physically present in court is categorically inviolable; and (3) if the right may be limited in certain situations, whether the Trial Chamber's restrictions were justified under the present circumstances.

A.. Standard of Review

106. Decisions relating to the general conduct of trial proceedings are matters within the discretion of the Trial Chamber.[33] A Trial Chamber's exercise of discretion will be reversed only if the

[23] Impugned Decision, para. 15.
[24] Impugned Decision, paras. 16, 19.
[25] Impugned Decision, paras. 15, 18.
[26] Impugned Decision, paras. 17, 18.
[27] Impugned Decision, para. 18.
[28] Impugned Decision, para. 18.
[29] *The Prosecutor v. Protais Zigiranyirazo*, Case N°ICTR-2001-73-T, Oral Decision, T. 13 June 2006 pp. 53-54 ("Certification Decision").
[30] Certification Decision, pp. 53-54.
[31] *Slobodan Milošević v. The Prosecutor*, Case N°IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, paras. 11, 13 ("*Milošević* Appeal Decision").
[32] Impugned Decision, para. 15 ("The Chamber considers that the presence and the involvement of the Accused in the testimony of [Mr. Bagaragaza] can be facilitated via video-link, which provides an audio and visual image of the witness and the proceedings.").
[33] *The Prosecutor v. Théoneste Bagosora et al.*, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence, Case N°ICTR-98-41-AR73, 25 September 2006, para. 6 ("*Bagosora* Appeal Decision"); *Tharcisse Muvunyi v. The Prosecutor*, Case N°ICTR-2000-55A-AR73(C), Decision on Interlocutory Appeal, 29 May 2006, para. 5 ("*Muvunyi* Appeal Decision").

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.[34]

B. Article 20 (4) (d) Provides for Physical Presence at Trial

107. In the Impugned Decision, the Trial Chamber did not directly consider the issue as to what was meant by the term "presence" within the meaning of Article 20 (4) (d). On Appeal, the parties dispute whether the term "presence" refers to physical presence in court. The Appellant argues that this language provides him with the right to be physically present at his trial, before the court and the witnesses testifying against him.[35] The Prosecution counters that Article 20 (4) (d) does not impose such a "stringent" requirement as physical presence.[36] The Prosecution urges a broader reading of the provision, suggesting that it is simply a "compendious subsection" preventing trial only where an accused is unaware that the proceedings are being conducted against him and is therefore unable to mount a defence.[37]

108. The Appeals Chamber considers that the physical presence of an accused before the court, as a general rule, is one of the most basic and common precepts of a fair criminal trial. The language and practical import of Article 20 (4) (d) of the Statute are clear. First, as a matter of ordinary English, the term "presence" implies physical proximity.[38] A review of the French version of the Statute leads to the same conclusion, in particular in the context of the phrase *être présente au procès*,[39] conveying unambiguously that Article 20 (4) (d) refers to physical presence *at the trial*.[40]

109. Both the Tribunal's legal framework and practice as well as that of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") further reflect that Article 20 (4) (d) provides for the physical presence of an accused at trial, as opposed to his facilitated presence via video-link. Initially, the Appeals Chamber observes that such a procedure, over an accused's objection, is unprecedented before the Tribunal and before the ICTY.[41] It is not surprising, therefore, that there are no express provisions in the Statute and Rules of this Tribunal or of the ICTY for the participation of an accused by video-link in his or her own trial.[42] Indeed, Rule 65 *bis* of the ICTY Rules of Procedure and

[34] *Bagosora* Appeal Decision, para 6; *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 Decision on Witness Protection Orders, 6 October 2005, para. 3.
[35] Zigiranyirazo Appeal, para. 42.
[36] Prosecution Response, paras. 2, 5-10.
[37] Prosecution Response, paras. 2, 5-10.
[38] See, e.g., The Oxford English Dictionary, Second Edition, Volume XII, p. 393 (for the definition of "presence": "The fact or condition of being present; the state of being before, in front of, or in the same place with a person or thing; being there; attendance, company, society, association. Usually with *of* or possessive indicating the person or thing that is present."), p. 395 (for the definition of "present": "An adjective of relation; expressing a local or temporal relation to a person or thing which is the point of reference […] Being before, beside, with, or in the same place as the person to whom the word has relation; being in the place considered or mentioned; that is here (or there) […]"); Black's Law Dictionary, Eighth Edition, (for the relevant definition of "presence": "The state or fact of being in a particular place and time […]. Close physical proximity coupled with awareness […]"). See also *United States v. Navarro*, 169 F.3d 228, 234-239 (5th Cir. 1999) (interpreting the plain meaning of "presence" as requiring the physical presence of a defendant in court).
[39] Emphasis added.
[40] Le Nouveau Petit Robert, p. 1768 (for the definition of "présente" : "Qui est dans le lieu, le groupe se trouve la personne qui parle ou de laquelle on parle"); Gerard Cornu, Vocabulaire Juridique, p. 664 ("Qui se trouve ou se trouvait à un moment donné en un lieu déterminé. […] Qui concourt en personne l'accomplissement d'un acte ou au déroulement de la procédure. […]").
[41] In the case of Milan Simić before the ICTY, the accused participated in his sentencing hearing towards the end of the trial process via video link because of his health condition. The Trial Chamber expressly noted, however, that during this period Mr. Simic filed a total of twenty-five waivers of his right to be present in court. See *The Prosecutor v. Milan Simić*, Sentencing Judgement, Case N°IT 95-9/2-S, 17 October 2002, para. 8.
[42] The Tribunal's Rules and jurisprudence only contemplate the use of video-link technology in order to transmit the testimony of a witness to the court, if justified in narrow circumstances for witness protection concerns, or otherwise in the interests of justice. Rule 75 provides in pertinent part (emphasis added): "(A) A Judge or a Chamber may […] order appropriate measures to safeguard the privacy and security of victims and witness, 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)

Evidence illustrates very clearly that participation via video-link is not considered presence.[43] The same distinction between actual presence and constructive presence via video-link, which is evident in Rule 65 *bis* of the ICTY Rules, also appears in the Statute of the International Criminal Court[44] and the Rules of Procedure and Evidence of the Special Court for Sierra Leone.[45] The Appeals Chamber further observes that other international,[46] regional,[47] and national[48] systems also share the view that the right to be present at trial implies physical presence.

[…] (c) giving of testimony through […] closed circuit television […] (iii) Appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television." In addition to specific witness protection concerns, the Tribunal's jurisprudence also allows the hearing of a witness by video-link if it is otherwise in the interests of justice. See, e.g., The Prosecutor v. Théoneste Bagosora et al., Case N°ICTR-98-41-T, Decision on Testimony by Video-Conference, 20 December 2004, para. 4 ("Video-conference testimony should be ordered where it is in the interests of justice, as that standard has been elaborated in ICTR and ICTY jurisprudence."). The Rules of Procedure and Evidence of the ICTY authorize this explicitly in Rule 71 *bis* ("At the request of either party, a Trial Chamber may, in the interests of justice, order that testimony be received via video-conference link.").

[43] Rule 65 *bis* (C) of the ICTY Rules provides in pertinent part: "With the written consent of the accused, given after receiving advice from his counsel, a status conference under this Rule may be conducted: (i) in his presence, but with his counsel participating either via tele-conference or video-conference; or (ii) in Chambers in his absence, but with his participation via tele-conference if he so wishes and/or participation of his counsel via tele-conference or video-conference."

[44] See Statute of the International Criminal Court, Article 63 ("(1) The accused shall be present during the trial. (2) If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.").

[45] The Appeals Chamber notes that Article 17 (4) (d) of the Statute of the Special Court for Sierra Leone is identical to Article 20 (4) (d) of the Tribunal's Statute. Notably, similar to the International Criminal Court, Rule 80 (B) of the Rules of Procedure and Evidence for the Special Court in Sierra Leone envisions an accused's participation in his or her trial by video-link only after he or she has been removed for persistently disruptive conduct. This Rule provides in pertinent part: "In the event of removal, where possible, provision should be made for the accused to follow the proceeding by video-link."

[46] See *supra* notes 44, 45 (discussing the International Criminal Court and the Special Court for Sierra Leone). The Appeals Chamber further observes that the language of Article 20 (4) (d) of the Statute tracks Article 14 of the International Covenant on Civil and Political Rights. Under this provision, the Human Rights Committee has referred to an accused's personal attendance at the proceedings as a component of a fair trial. See *Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights*, Communication N°289/1988: Panama 8 April 1992, CCPR/C/44/289/1988 (Jurisprudence), para. 6.6 ("The Committee recalls that the concept of a 'fair trial' within the meaning of article 14, paragraph I, must be interpreted as requiring a number of conditions, such as equality of arms and respect for the principle of adversary proceedings. These requirements are not respected where, as in the present case, the accused is denied the opportunity *to personally attend the proceedings*, or where he is unable to properly instruct his legal representative.") (Emphasis added).

[47] The European Convention on the Protection of Human Rights and Fundamental Freedoms refers in Article 6 (3) (c) to an accused's right "to defend himself in person […]". For the European Court of Human Rights, this implies the personal attendance of a defendant at trial as well as in certain procedures on appeal requiring the court to have personal impression of the defendant. See, e.g., Case of *Stoichkov v. Bulgaria*, Application N°9808/02, Judgment, 24 March 2005, para. 56 ("It may thus be considered that the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial after he or she emerges – ranks as one of the essential requirements of Article 6 and is deeply entrenched in that provision."); Case of *Sejdovic v. Italy*, Application N°56581/00, Judgment, 1 March 2006, para. 84; *Case of Michael Edward Cooke v. Austria*, Application N°25878/94, Judgement, 8 February 2000, paras. 35, 42, 43. ("The Court recalls that a person charged with a criminal offence should, as a general principle based on the notion of a fair trial, be entitled to be present at the first-instance hearing. However, the personal attendance of the defendant does not necessarily take on the same significance for an appeal hearing."); Case of *Colozza v. Italy*, Application N°9024/80, Judgment, 12 February 1985, para. 27 ("Although this is not expressly mentioned in paragraph 1 of Article 6 (art. 6-1), the object and purpose of the Article taken as a whole show that a person 'charged with a criminal offence' is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 (art. 6-3-c, art. 6-3-d, art. 6-3-e) guarantee to 'everyone charged with a criminal offence' the right 'to defend himself in person', 'to examine or have examined witnesses' and 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court', and it is difficult to see how he could exercise these rights without being present."). See also Stefan Trechsel, Human Rights in Criminal Proceedings, pp. 252-253 (2006).

[48] Presence is also equated with physical presence in criminal trials in the United States. See, e.g., Federal Rule of Criminal Procedure 43 (a). Federal Rules of Criminal Procedure 5 and 10 envision video-conferencing only, with the defendant's consent, at the initial appearance and arraignment. See also *Illinois v. Allen,* 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial"); *United States v. Navarro,* 169 F.3d 228, 234-239 (5th Cir. 1999) (holding that an accused's participation in his sentencing hearing by video-conference violated his right to be present at trial); *United States v. Reynolds*, 44 M.J. 726, 729 (United States Army Court of Criminal Appeals 1996)("Consequently, the statutory and [Rules for Court Martial] provisions cited above appear to require that the military judge, accused, and counsel all to be at one location for the purpose of a court-

110. The Appeals Chamber, therefore, confirms that an accused's right to be tried in his or her presence implies a right to be physically present at trial. Applying the foregoing to the present case leads the Appeals Chamber to conclude that by proceeding as it did, the Trial Chamber restricted the Appellant's right to be present at his trial. However, this does not end the necessary inquiry.

C. The Right To Be Physically Present at Trial Is Not Absolute

111. The parties acknowledge that an accused's right to be tried in his or her presence is not absolute.[49] The ICTY Appeals Chamber has observed as much,[50] and this Appeals Chamber agrees. An accused person can waive or forfeit the right to be present at trial. For example, Rule 80 (B) of the Rules allows a Trial Chamber to remove a persistently disruptive accused. Referring to the equivalent provision in the ICTY Rules, the ICTY Appeals Chamber observed that an accused's right to be present for his or her trial can be restricted "on the basis of substantial trial disruptions".[51] In assessing a particular limitation on a statutory guarantee, the Appeals Chamber bears in mind 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.[52] The explicit exception provided by Rule 80 (B) and the ICTY Appeals Chamber's reference to "substantial trial disruptions" provide a useful measure by which to assess other restrictions on the right to be present at trial.

D. The Present Circumstances Do Not Warrant any Restriction on the Appellant's Right

112. The primary question for the Appeals Chamber is whether the Trial Chamber properly exercised its discretion in its restriction of the Appellant's right to be present at his trial. Because both parties acknowledge that this right is not absolute, the Appeals Chamber does not consider that the Trial Chamber's failure to examine the accused's right to be tried in his presence is of significant consequence. Instead, the primary question for the Appeals Chamber is whether the Trial Chamber properly exercised its discretion in its restriction of the Appellant's right to be present at his trial. The Appeals Chamber recalls that the Trial Chamber's decision was predicated on Mr. Bagaragaza's

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martial. This interpretation not only comports with custom and tradition, but also is the one that best guarantees justice. For these reasons, we are satisfied that the telephonic procedures utilized in this case, when based on the meager justification of saving time and travel funds between two installations approximately 150 miles apart, did not comport with any reasonable concept of 'presence' anticipated by the [Uniform Code of Military Justice] and [Rules for Court Martial].")(internal citations omitted); *Riggins v. Nevada*, 504 U.S. 127, 142 (1992)(Kennedy, J., concurring)("It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table. This assumption derives from the right to be present at trial, which in turn derives from the right to testify and rights under the Confrontation Clause. […] At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial. If the defendant takes the stand, as Riggins did, his demeanor can have a great bearing on his credibility and persuasiveness, and on the degree to which he evokes sympathy. The defendant's demeanor may also be relevant to his confrontation rights […]") (internal citations omitted).

In addition, in England and Wales, the right of an accused to be present in court at his or her trial is a matter of common law. See *R. v. Lee Kun* (1916) 1 Kings Bench Reports 337, at 341 ("There must be very exceptional circumstances to justify proceeding with the trial in the absence of the accused. The reason why the accused should be present at the trial is that he may hear the case made against him and have the opportunity […] of answering it. The presence of the accused means not only that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings.").

In Canada, an accused also has the right to be present in court during the trial. The Canadian Criminal Code envisions the possibility of an accused participating in his or her trial by video-link, but not for the hearing of evidence, unless he or she consents. See Canadian Criminal Code, Title XX, Section 650.

[49] Zigiranyirazo Appeal, para. 44; Prosecution Response, para. 11.

[50] *Milošević* Appeal Decision, para. 13 ("If a defendant's right to be present for his trial – which, to reiterate, is listed in the same string of rights and indeed in the same *clause* as the right to self-representation – may thus be restricted on the basis of substantial trial disruption, the Appeals Chamber sees no reason to treat the right to self-representation any differently.").

[51] *Milošević* Appeal Decision, para. 13.

[52] *Milošević* Appeal Decision, para. 17. The Appeals Chamber further notes that the situation envisioned under Rule 15 *bis*, allowing *inter alia* proceedings to continue for a limited period in the absence of one of the judges, does not inform the present dispute which concerns the absence of the accused.

security concerns, the impact of video-link on the assessment of the witness, and logistical concerns preventing the Appellant from traveling to The Netherlands to attend the proceedings.

113. The Appellant contends that the Trial Chamber failed to apply properly the proportionality principle.[53] He disputes that security concerns in fact prevented Mr. Bagaragaza from testifying in Arusha or that the administrative concerns preventing him from traveling to The Netherlands were insurmountable.[54] The Appellant further takes issue with the procedure for hearing Mr. Bagaragaza's testimony, pointing to the inherent difficulties in following the evidence and visually interacting with the Judges.[55] As a result of these arrangements, the Appellant claims that his participation by video-link meant that neither he nor his lead counsel, who remained with him in Arusha, could observe or hear either the judges or the witness unless the camera was pointed on them.[56] In the Appellant's view, this denied them normal visual interaction with the proceedings.[57] The Prosecution submits that the procedure adopted by the Trial Chamber was consistent with a fair trial and that Mr. Zigiranyirazo has not demonstrated any prejudice.[58]

114. The Appeals Chamber agrees that the objectives advanced by the Trial Chamber are of general importance: witness protection, the proper assessment of an important prosecution witness, and the need to ensure a reasonably expeditious trial. Nonetheless, the Appeals Chamber is not satisfied that, in the present circumstances, the Trial Chamber properly exercised its discretion in deciding to impose limitations on the Appellant's right to be present at his trial.

115. First, the Appeals Chamber accepts that, by agreeing to cooperate with the Prosecution, Mr. Bagaragaza could be exposed to an increased risk to his security. However, the record does not reflect that the security concern, alluded to by the Trial Chamber,[59] is in fact related to the location of his testimony, or that injury could only be avoided by having Mr. Bagaragaza testify in The Netherlands.[60] In addition, the record does not show that the Trial Chamber examined the possibility that additional security measures might allay any security threat were Mr. Bagaragaza brought to Arusha to testify.

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[53] Zigiranyirazo Appeal, para. 47.
[54] Zigiranyirazo Appeal, paras. 48, 49.
[55] See generally Zigiranyirazo Appeal, para. 50; Zigiranyirazo Reply, para. 25.
[56] Zigiranyirazo Appeal, para. 50; Zigiranyirazo Reply, para. 25.
[57] Zigiranyirazo Reply, para. 25. The Appellant notes that he "'saw' the proceedings through the selective eyes of a camera operated by a third party." He adds: "The experience was dizzying and could have been conducted properly if he and his lead counsel had been able to see his judges. He and his attorney could not speak directly to the judges, gauge their reactions, and adjust the arguments and tenor of pleadings as if they were in open court with the members of the bench." Further, the Appellant claims that the arrangements placed his lead counsel, who conducted the cross-examination, in the difficult position of having to choose to either remain in Arusha and receive direct instruction, or travel to the Netherlands and participate in person, but where communication with the accused would be limited to breaks during the proceedings.
[58] Prosecution Response, paras. 2, 13-23. The Prosecution agrees that there was no visual interaction between the bench and the accused unless the camera was pointed at them, but notes that Mr. Zigiranyirazo confirmed each day that he could follow the proceedings. Prosecution Response, paras. 19, 20. Mr. Zigiranyirazo notes, however, that he complained at the beginning of the proceedings and vowed to do his best out of respect for the court. Zigiranyirazo Reply, para. 25.
[59] The Appeals Chamber notes that security concerns presented by the Prosecution to the Trial Chamber involved the witness's general feelings of insecurity due to agreeing to cooperate with the Prosecution. The Prosecution also pointed to threats made to Mr. Bagaragaza's family and the death of another individual, not in the custody of the Tribunal, who was contemplating cooperating with the Prosecution. The Prosecution explained that this led Mr. Bagaragaza to agree to cooperate if he were not brought to Arusha. See generally Impugned Decision, para. 13; Decision on Prosecution's Request for Video-Link, paras. 26, 30, 32. See also *The Prosecutor v. Protais Zigiranyirazo,* Case N°ICTR-2001-73-T, Prosecution's Confidential Request to Allow Witness ADE to Give Testimony Via Video-Link, 21 December 2005. The Appeals Chamber observes that the agreement between Mr. Bagaragaza and the Prosecution that he not be brought to Arusha is not binding on the Trial Chamber.
[60] The Appeals Chamber considers that the Trial Chamber is best placed to make the assessment concerning the security of witnesses appearing before it. However, in making a determination that impacts a fundamental right of an accused, a Trial Chamber must do more than simply accept the averments of Prosecution counsel. Rather it must, in accord with Rule 75, undertake an independent inquiry, at a minimum for example by conferring with the relevant sections of the Registry concerned with security and protection of witnesses. The Trial Chamber does not appear to have done this. Moreover, the Appeals Chamber notes that reliance on the President's decision to extraordinarily detain Mr. Bagaragaza in The Hague also does not satisfy this duty. Indeed, there is a significant difference in protecting Mr. Bagaragaza, as an accused, during a lengthy period of pre-trial detention and in ensuring his security when he appears as a witness during three days of testimony before the Tribunal.

116. Second, the Appeals Chamber also accepts that the Trial Chamber's general concern over its ability to assess the credibility of a key witness is an important interest. However, the Appeals Chamber considers that if the Trial Chamber had misgivings about its ability to adequately follow the testimony of a key witness through the use of video-link then these same misgivings, if valid, must apply with equal force to the ability of the accused and his counsel to follow the evidence and proceedings.

117. Third, the Appeals Chamber further observes that none of the "external variables,"[61] alluded to by the Trial Chamber, preventing the Appellant's personal attendance at his own trial, resulted from any action on his part. In addition, there is no indication that the Trial Chamber explored an alternative venue for hearing the testimony, other than The Netherlands. A careful consideration of the feasibility of moving the trial to The Netherlands at the earliest opportunity might have identified the logistical barriers that prevented the Appellant from attending his trial in The Netherlands and allowed the Trial Chamber either to overcome the obstacles or to explore alternative venues or solutions, avoiding the present situation.[62]

118. The Appeals Chamber notes that the Trial Chamber endeavored to ensure that the Appellant had legal representation physically present during the proceedings in The Netherlands. In addition, in an effort to give effect to the principle of equality of arms, the Trial Chamber ordered that the Prosecution also to examine the witness from Arusha. However, the Trial Chamber's attempts to give full respect to both the right to counsel and the principle of equality of arms do not compensate for the failure to accord the accused what is a separate and distinct minimum guarantee: the right to be present at his own trial. Although one of the Appellant's counsel was in the courtroom with the Judges and the witness, the Appellant himself was thousands of kilometres away, connected to the proceedings only by means of audio-visual equipment. The Appellant's sense of being wronged in such circumstances is well-understandable. As the Prosecution and Trial Chamber noted, Mr. Bagaragaza's testimony does not cover simply background information or a matter other than the acts and conduct of the accused. According to the Prosecution's own statement and the Trial Chamber's consideration, Mr. Bagaragaza was a key Prosecution witness against the Appellant.[63]

119. Based on the foregoing, the Trial Chamber's restrictions on the Appellant's fair trial rights were unwarranted and excessive in the circumstances and thus fail the test of proportionality. Accordingly, the Trial Chamber committed a discernible error.

E. Conclusion

120. After a careful consideration of the circumstances under consideration in this appeal and giving due regard to the accused's right to be present at his or her trial, the Appeals Chamber finds that the Trial Chamber erred in law in holding that the Appellant's right to be present at his trial during the testimony of an apparently key witness against him could be met by video-link. The Appeals Chamber observes that, after certifying its decision for appeal, the Trial Chamber decided not to stay the proceedings and instead proceeded to hear Mr. Bagaragaza's testimony.[64]

121. The precise consequences of the Trial Chamber's error cannot be determined at this stage. However, it cannot be held that the violation of the Appellant's right to be present constitutes harmless error given the length and purported significance of the testimony to the charges against him. Prejudice therefore can only be presumed, as any attempt to prove or disprove actual prejudice from the record in an ongoing trial before any factual findings have been made would be purely speculative.

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[61] Impugned Decision, paras. 8, 14.
[62] The Appeals Chamber observes that other accused persons have previously attended Tribunal proceedings in The Netherlands in connection with appellate proceedings. See, e.g., *Jean De Dieu Kamuhanda v. The Prosecutor*, Case N°99-54A-A, Variation of a Scheduling Order, 19 August 2005, p. 2.
[63] Impugned Decision, paras. 6, 16; Decision on Prosecution's Request for Video-Link, paras. 26, 32.
[64] Certification Decision, pp. 53-54.

In the view of the Appeals Chamber, allowing the testimony of Mr. Bagaragaza to remain on the record would seriously damage the integrity of the proceedings. In such circumstances, Rule 95 of the Rules plainly requires the exclusion of such testimony. This, however, does not prevent the Trial Chamber from exercising its discretion and allowing Mr. Bagaragaza to testify again in a manner consistent with the Appellant's fair trial rights.[65]

Disposition

122. For the foregoing reasons, the Trial Chamber's decision to hear Mr. Bagaragaza's testimony in person in The Netherlands while Mr. Zigiranyirazo participated by video-link from Arusha is REVERSED and the testimony of Mr. Bagaragaza given in such a manner is EXCLUDED.

Done in English and French, the English version being authoritative.

[Signed] : Fausto Pocar

[65] The Appellant acknowledges that the Prosecution could seek to reopen its case in the interests of justice pursuant to Rule 85 or alternatively that the Trial Chamber could call the witness *proprio motu* under Rule 98. See *Zigiranyirazo* Reply, paras. 26-27.

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Decision Granting Extension of Time to File Submissions (Rule 73 of the Rules of Procedure and Evidence) 2 November 2006 (ICTR-2001-73-T)

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Extension of time – Absence of prejudice for the Accused – Interest of justice – Filing of submissions by the Prosecutor – Motion granted

International Instrument Cited :

Rules of Procedure and Evidence, Rule 73

1. On 1 November 2006, the Prosecution undertook to file its motion regarding the reopening of the Prosecution case and the recalling of witness Michel Bagaragaza by the end of the day. Following from the undertaking by the Prosecution, the Chamber ordered the Defence to file its submissions in response on 2 November 2006.[1]

2. The Prosecution is now seeking an extension of time until 6 November 2006 to file its submissions.[2] The Defence opposes the Motion for Extension of Time, and submits that the Prosecution should file its motion at the latest 2 November 2006, with a Defence response by 3 November 2006.[3]

3. The Chamber is of the view that an extension of time sought will not prejudice the Accused and is in the interests of justice, and the Prosecution is hereby directed to file its submissions by 9:00AM on Monday 6 November 2006.

THE CHAMBER HEREBY

I. GRANTS the Motion for Extension of Time;

II. AUTHORIZES the Prosecution to file its submissions by 9:00AM, on 6 November 2006 and the Defence to file its response thereto, if any, within 24 hours of service of the Prosecution's filing.

Arusha, 2 November 2006, in English.

[Signed] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

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[1] T. 1 November 2006, pp. 2-4.

[2] "Prosecutor's Motion for Extension of Time Within Which to File Motions for Re-Opening of Prosecution Case and Motion for Video Link in Respect of Michel Bagaragaza (made under Rules 73 (A), 54 and other enabling provisions of law and practice)", filed on 1 November 2006 ("Motion for Extension of Time").

[3] "Response for Prosecutor's Motion for Extension of Time Within Which to File Motions for Re-Opening of Prosecution Case and Motion for Video Link in Respect of Michel Bagaragaza", filed on 1 November 2006, paras. 6-7.

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Request for Submissions Pursuant to Rule 33 (B) 9 November 2006 (ICTR-2001-73-T)

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Submissions of the Registrar – Sufficient security measures, possibility for a witness to testify in Arusha

International Instrument Cited :

Rules of Procedure and Evidence, Rule 33 (B)

International Case Cited :

I.C.T.R.: Appeals Chamber, The Prosecutor v. Protais Zigiranyirazo, Decision on Interlocutory Appeal rendered by the Appeals Chamber, 30 October 2006 (ICTR-2001-73)

1. The Prosecution closed its case on 28 June 2006. The Defence commenced the presentation of its case on 30 October 2006. On 31 October 2006, following receipt of the Appeals Chamber ruling excluding the testimony of Mr. Michel Bagaragaza in its entirety,[1] the Parties moved for an adjournment in order to consider their respective courses of action. The Prosecution filed its Motion to re-open its case and for the re-hearing of Mr. Michel Bagaragaza.[2] The Defence Response has been filed.[3]

2. The Prosecution submits in its Motion that Mr. Michel Bagaragaza's security concerns have not changed since its original motion.[4]

3. The Chamber directs the Registrar to make written submissions regarding the possibility of adopting sufficient security measures to make it possible for Mr. Michel Bagaragaza to testify in Arusha, to be filed confidentially and *ex parte*.

THE CHAMBER HEREBY DIRECTS the Registrar to file the submissions pursuant to Rule 33 (B) as soon as possible.

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[1] "Decision on Interlocutory Appeal rendered by the Appeals Chamber", 30 October 2006.
[2] "Prosecutor's Joint Motion for Re-opening of the Prosecution Case (made under Rules 54, 73 and 85 of the Rules of Procedure and Evidence and Appeals Chamber Decision dated 30 October 2006) and Requests for Reconsideration of the Trial Chamber Decision dated 31 January 2006 on the Hearing of Witness Michel Bagaragaza via Video Conference (made pursuant to Rule 73 *bis* (E) of the Rules of Procedure and Evidence)", filed on 6 November 2006 (the "Motion").
[3] "Response to Prosecutor's Joint Motion for Re-opening of the Prosecution Case (made under Rules 54, 73 and 85 of the Rules of Procedure and Evidence and Appeals Chamber Decision dated 30 October 2006) and Requests for Reconsideration of the Trial Chamber Decision dated 31 January 2006 on the Hearing of Witness Michel Bagaragaza via Video Conference (made pursuant to Rule 73 *bis* (E) of the Rules of Procedure and Evidence) and Motion to Continue Trial", filed on 7 November 2006 (the "Response").
[4] Motion, para. 29.

Arusha, 9 November 2006, in English.

[Signed] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Decision on the Prosecution Joint Motion for Re-Opening its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Michel Bagaragaza via Video-Link (Rules 54, 73, 73 bis *(E), and 85 of the Rules of Procedure and Evidence) 16 November 2006 (ICTR-2001-73-T)*

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Re-opening of the case by the Prosecution – Reconsideration of a previous decision – Re-opening of a case by either party, Silence of the texts – Jurisdiction of the Trial Chamber to permit a party to re-open its case in the interests of justice – New evidence after the closure of the case – Factors highly relevant to the fairness to the Accused of admission of fresh evidence – Evidence previously available, Exclusion of evidence to avoid any damage to the integrity of the proceedings – Discretion of the Trial Chamber, Interest of justice, Opposing party not unfairly prejudiced – Reconsideration of the decision denying the Prosecution's original motion to hear a witness by video-link – Conditions for a Chamber to reconsider its own decision – Security of the Witness to testify in Arusha – First motion granted – Second motion denied

International Instruments Cited :

Rules of Procedure and Evidence, Rules 54, 73, 73 bis *(E) and 85 ; Statute, Art. 20 (4) (d)*

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. Edouard Karemera et al., Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005 (ICTR-98-44) ; Trial Chamber, The Prosecutor v. Edouard Karemera, Decision on Joseph Nzirorera's Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting With Defence Witness, 11 October 2005 (ICTR-98-44)

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 et al., Judgment, 20 February 2001 (IT-96-21) ; Trial Chamber, The Prosecutor v. Vidoje Blagojević and Dragan Jokić, Decision on Prosecution's Motion to Admit Evidence in Rebuttal and Incorporated Motion to Admit Evidence Under Rule 92 bis in its Case on Rebuttal and to Re-Open its Case for a Limited Purpose, 13 September 2004 (IT-02-60) ; Trial

Chamber, The Prosecutor v. Enver Hadžihasanović and Amir Kubura, Decision on the Prosecution's Application to Re-Open Its Case, 1 June 2005 (IT-01-47) ; Trial Chamber, The Prosecutor v. Slobodan Milošević, Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex, 13 December 2005 (IT-02-54)

Special Court for Sierra Leone: Trial Chamber, The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, Decision on Confidential Prosecution Motion to Reopen the Prosecution Case to Present an Additional Prosecution Witness, 28 September 2006 (SCSL-04-16)

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

SITTING as Trial Chamber III, composed of Judges Inés Mónica Weinberg de Roca, Presiding, Khalida Rachid Khan, and Lee Gacuiga Muthoga ("Chamber");

BEING SEIZED of the "Prosecutor's Joint Motion for Re-opening of the Prosecution Case (made under Rules 54, 73 and 85 of the Rules of Procedure and Evidence and Appeals Chamber Decision dated 30 October 2006) and Requests for Reconsideration of the Trial Chamber Decision dated 31 January 2006 on the Hearing of Witness Michel Bagaragaza via Video Conference (made pursuant to Rule 73 *bis* (E) of the Rules of Procedure and Evidence)", filed on 6 November 2006 ("Motions", or "Motion for the Re-opening of the Prosecution Case" and "Motion for Reconsideration of the Decision of 31 January 2006", respectively);

CONSIDERING the Defence "Response to Prosecutor's Joint Motion for Re-opening of the Prosecution Case (made under Rules 54, 73 and 85 of the Rules of Procedure and Evidence and Appeals Chamber Decision dated 30 October 2006) and Requests for Reconsideration of the Trial Chamber Decision dated 31 January 2006 on the Hearing of Witness Michel Bagaragaza via Video Conference (made pursuant to Rule 73 *bis* (E) of the Rules of Procedure and Evidence) and Motion to Continue Trial", filed on 7 November 2006 (the "Response");

RECALLING the events leading to the present applications and the Chamber's previous Decisions in respect of Mr. Bagaragaza:

1. Decision on Defence and Prosecution Motions Related to Witness ADE, 31 January 2006 ("Decision of 31 January 2006");

2. Extremely Confidential Decision on Defence Motion Concerning the Hearing of Witness ADE, 5 June 2006 ("Decision of 5 June 2006");

3. Oral Decision on Protais Zigiranyirazo's Application for Certification to Appeal the Extremely Confidential Decision on Defence Motion Concerning the Hearing of Witness ADE ("Oral Decision on Application for Certification to Appeal");[1]

CONSIDERING the Decision on Interlocutory Appeal of the Appeals Chamber, 30 October 2006 ("Appeals Chamber Decision");

CONSIDERING Article 20 (4) (d) of the Statute of the Tribunal (the "Statute") and Rules 54, 73, 73 *bis* (E) and 85 of the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the matter based solely on the briefs of the Parties pursuant to Rule 73 (A) of the Rules.

Background

1. On 30 October 2006 the Appeals Chamber excluded the testimony of Mr. Bagaragaza in its entirety. The Appeals Chamber held that the Statute affords the Accused with the minimum guarantee

[1] T. 13 June 2006 pp. 53-54.

of the right to be tried in his presence; fulfilment of this right required the "physical presence" of the Accused in proceedings against him.[2] In so stating, the Appeals Chamber held that the Chamber had erred in hearing Mr. Bagaragaza's testimony in the Netherlands with the Accused and his lead counsel participating from Arusha via video-link. His "attendance" via video-link was insufficient to constitute the presence guaranteed by the Statute. In excluding the testimony of Mr. Bagaragaza, the Appeals Chamber affirmed that the Trial Chamber remains free to have the witness recalled to testify "in a manner consistent with the Appellant's fair trial rights."[3]

2. The Prosecution closed its case on 28 June 2006 and the Defence commenced the presentation of its case on 30 October 2006. On 31 October 2006, in the course of hearing the second defence witness, the parties, having seen the ruling of the Appeals Chamber moved for an adjournment in order that they may have time to consider the import of the Appeals Chamber Decision on their respective cases and to consider the appropriate action in consequence of it.

Submissions

The Prosecution Motions

3. The Prosecution submits that, in light of the importance of the testimony of Mr. Bagaragaza, serious prejudice will be caused if the Prosecution is not allowed to re-open its case to receive the testimony. The Prosecution therefore prays that the Chamber allow the re-opening of its case so that Mr. Bagaragaza can be called to testify.

4. Should the Chamber be inclined to grant the Motion for the Re-opening of the Prosecution Case the Prosecution moves, secondly, for the Chamber to reconsider its Decision of 31 January 2006 and allow the Mr. Bagaragaza to be heard via video-link.

5. The Prosecution contends that the criteria for reconsideration are met in the instant situation.[4] The Prosecution argues that the Appeals Chamber's finding of error on the part of the Chamber, and the resultant exclusion of Mr. Bagaragaza's testimony, meet the "high criteria set for the Trial Chamber to reconsider their decision."

6. The Prosecution urges the Chamber to reconsider its reservations on hearing Mr. Bagaragaza via video-link, and raises many of the arguments in favour of video-link that it raised in its original motion. Specifically, the Prosecution argues that (i) Mr. Bagaragaza is important to the Prosecution case and severe prejudice will result if the Chamber does not re-hear his testimony; (ii) his security concerns remain unchanged, and (iii) the Accused will suffer no prejudice as a result of hearing Mr. Bagaragaza's testimony via video-link. The Prosecution also argues that whereas the use of video-link testimony was previously considered to be less weighty than in-court testimony, technological developments have improved the quality of video-link testimony, allowing judges to assess credibility without impairment. Moreover, video-link testimony is a permissible exception under Rule 75, and it has been utilized and considered adequate in the jurisprudence of both the *ad hoc* Tribunals, even for important and sensitive witnesses.[5]

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[2] See generally Appeals Chamber Decision.

[3] The Chamber notes that the present application by the Prosecutor stems from the Appeals Chamber's holding that the exclusion of witness Michel Bagaragaza's testimony pursuant to Rule 95 "does not prevent the Trial Chamber from exercising its discretion and allowing [the witness] to testify again in a manner consistent with the Appellant's fair trial rights." Appeals Chamber Decision, para. 24. In its footnote to this statement, the Appeal Chamber notes that the Defence acknowledged "that the Prosecution could seek to re-open its case in the interests of justice pursuant to Rule 85 or alternatively that the Trial Chamber could call the witness *proprio motu* under Rule 98." Appeals Chamber Decision, para. 24, fn 65.

[4] Motions, para. 17. According to the Prosecution, a Trial Chamber may reconsider its own prior decision (i) when a fact has been discovered that was not previously known to the Chamber; (ii) where new circumstances have arisen since the filing of the impugned decision that affect the premise of the impugned decision; or, (iii) where a party shows an error of law or the Chamber abused its discretion, and an injustice has been occasioned.

[5] Motions, paras. 22, 26.

7. Finally, the Prosecution adds that the "security and legal impediments and concerns of the witness and his counsel are currently being reviewed" and it undertakes to inform the Chamber of any new developments which may entail a change in the modalities surrounding Mr. Bagaragaza's anticipated testimony in this case.

The Defence Response

8. The Defence opposes the reopening of the Prosecution's case and the request for the taking of the testimony of Mr. Bagaragaza by video-link. The Defence argues that the relevant test to determine if a case should be re-opened depends upon the availability of the material sought to be introduced. If the material, through due diligence, could have been obtained, then the case should not be re-opened. If the evidence could not have been obtained through due diligence, then the Chamber must consider: (i) the stage of the trial at the time the application is made; (ii) the delay likely to be caused by re-opening the case; (iii) the probative value of the evidence must be such that it outweighs prejudice to the Accused; and (iv) the effect of re-opening on any co-accused.[6]

9. According to the Defence, the requirements for the Chamber to reconsider a decision have not been met.[7]

10. The Defence submits that the Prosecution has not met the four-part test for authorizing video-link testimony. Although the Defence agrees that the testimony of Mr. Bagaragaza is sufficiently important, it does not agree that taking the evidence by video-link is in the interests of justice; that Mr. Bagaragaza has given sufficient justification for his inability to come to the Tribunal; or that the rights of the Accused will not be prejudiced.

11. The Defence argues that the rights of the Accused will be severely prejudiced by the re-opening of the Prosecution case and the taking of Mr. Bagaragaza's testimony by video-link. The Defence has already (i) presented the testimony of two witnesses, one of whom commented on Mr. Bagaragaza's original evidence; and (ii) filed its pre-trial brief, witness list, and numerous witness statements. Allowing the Prosecution to lead a key witness after the Defence has revealed so much of its case is unfair and prejudicial to the Accused. Moreover, the Prosecution Motions should be denied due to the potentially lengthy delay it may cause in the case.[8]

Deliberations

Motion for the Re-opening of the Prosecution Case

12. The Chamber notes that neither the Statute nor the Rules of this Tribunal or of the International Criminal Tribunal for the former Yugoslavia ("ICTY") provide for the re-opening of a case by either party. Rule 85, which governs the order of presentation of evidence in trial proceedings does not envisage the re-opening of a case by either party to the proceedings and is therefore silent as to a relevant procedure.[9]

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[6] Response, paras. 6-9.
[7] Response, para. 17.
[8] Response, paras. 40-43.
[9] Rule 85 on the Presentation of Evidence reads as follows:
(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.

13. While an application for the re-opening of the Prosecution's case has never been brought before a Trial Chamber at this Tribunal, under the jurisprudence of the ICTY a Trial Chamber may grant leave to the Prosecution to re-open its case "in order to present new evidence not previously available to it".[10] This view has recently been adopted by a Trial Chamber of the Special Court for Sierra Leone (SCSL).[11]

14. In their submissions, the Defence and the Prosecution implicitly accept that in a proper case a Trial Chamber would have jurisdiction to permit a party to re-open its case in the interests of justice.

15. The jurisprudence of both the ICTY and the SCSL require the Prosecution to meet a high threshold should it seek to present new evidence after its case is closed. In the *Milošević* case, the Trial Chamber held that:

> "Trial Chambers retain a general discretion under Rule 89 (D) to deny re-opening if the probative value of the proposed evidence is substantially outweighed by the need to ensure a fair trial. With respect to this weighing exercise, the Tribunal's jurisprudence clearly establishes that "it is only in exceptional circumstances where the justice of the case so demands" that a Trial Chamber should exercise its discretion to allow the Prosecution to adduce 'fresh' evidence after the parties to a criminal trial have closed their case". [*Footnotes Omitted*][12]

16. Guided by the *Celebici* Trial Decision and *Celebici* Appeal Judgement, three factors have been identified as being "highly relevant to the fairness to the accused of admission of fresh evidence":[13]

> (1) the stage of the trial at which the evidence is sought to be adduced;
>
> (2) the potential delay in the trial that admission of the evidence could cause, including the appropriateness of a possible adjournment in the overall context of the trial; and
>
> (3) the effect of bringing new evidence against one accused in a multi-defendant case.

17. The Chamber notes that in this case, only the first two factors apply. With regard to the first factor, the tendency has been that "the later in the trial that the application is made the less likely the Trial Chamber is to accede to the request".[14]

18. Having reviewed the relevant jurisprudence, the Chamber finds the instant situation distinguishable on the facts. Whereas the jurisprudence refers to "new evidence not previously available" to the calling party, the Chamber is here confronted with a situation of evidence previously available, but excluded to avoid any "damage [to the] integrity of the proceedings".[15] Protecting the integrity of the proceedings means ensuring fairness in the conduct of the case as far as *both* Parties

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(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.

[10] *Prosecutor v. Delalić et al.*, Case N°IT-96-21-T, Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, 19 August 1998, para. 26 ("*Celebici* Trial Decision"); see also *Prosecutor v. Delalić et al.*, Case N°IT-96-21-A, Judgement (AC), 20 February 2001, para. 279 ("*Celebici* Appeal Judgement"); *Prosecutor v. Blagojević and Jokić*, Case N°IT-02-60-T, Decision on Prosecution's Motion to Admit Evidence in Rebuttal and Incorporated Motion to Admit Evidence Under Rule 92 *bis* in its Case on Rebuttal and to Re-Open its Case for a Limited Purpose, 13 September 2004, para. 7 ("*Blagojević and Jokić* Trial Decision").

[11] *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Case N°SCSL-04-16-T, Decision on Confidential Prosecution Motion to Reopen the Prosecution Case to Present an Additional Prosecution Witness, 28 September 2006, at para. 17.

[12] *Prosecutor v. Milosević*, Case N°IT-02-54-T, Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex, 13 December 2005, para. 12.

[13] See *Celebici* Trial Decision, para. 27; *Celebici* Appeal Judgement, para. 290; *Blagojević and Jokić* Trial Decision, paras. 10–11.

[14] See *Celebici* Trial Decision, para. 27; quoted in *Celebici* Appeal Judgement, para. 280; *Blagojević and Jokić* Trial Decision, para. 10; *Prosecutor v. Hadžihasanović and Kubura*, Case N°IT-01-47-T, Decision on the Prosecution's Application to Re-Open Its Case, 1 June 2005, para. 45.

[15] Appeals Chamber Decision, at para. 24.

are concerned. While the Chamber must be diligent in ensuring that the Accused is not deprived of his rights, the Prosecution must also not be unduly hampered in the presentation of its case.

19. The Chamber acknowledges that the discretion to re-open a case is to be exercised only in the interest of justice. Re-opening must never be used as an opportunity for one party to take an unfair advantage over its opponent. Where re-opening is permitted, a Trial Chamber should conduct the proceedings in a manner that ensures that the opposing party is not unfairly prejudiced. In the instant case the Chamber notes that the Defence has already served its Pre-Defence Brief, and a number of defence witness statements and that two witnesses have already testified; thus providing the Prosecution with information it ought not to have before it closes its case. The Chamber will be mindful of this during the taking of the evidence of Mr. Bagaragaza, and in its assessment of his testimony at the conclusion of the case. Given the putative importance of Mr. Bagaragaza's evidence to the Prosecution's case, the circumstances in which his testimony was excluded and the Chamber's ability to ensure that the Accused is not unduly prejudiced, the Chamber finds that this application is in the interests of justice and therefore grants the Motion for the Re-opening of the Prosecution Case.

Motion for Reconsideration of the Decision of 31 January 2006

20. Having granted the Prosecution's application to re-open its case, the Chamber must now consider the Prosecution's request that the Chamber *reconsider* its Decision of 31 January 2006, which denied the Prosecution's original motion to hear Mr. Bagaragaza's testimony by video-link.

21. According to the jurisprudence of the Tribunal, a Chamber can reconsider its own Decision (i) when a new fact has been discovered that was not previously known to the Chamber; (ii) where new circumstances have arisen since the filing of the impugned decision that affect the premise of the impugned decision; or (iii) where a party has successfully shown an error of law or that the Chamber has abused its discretion, and this led to an injustice.[16]

22. In its Decision of 31 January 2006, the Chamber stated that it wished to hear Mr. Bagaragaza "uninterrupted and in person." The Chamber expressed concern as to its ability to effectively and accurately assess the testimony and demeanour of a witness via video-link.

23. The Prosecution suggests that the Appeals Chamber Decision is either a new fact or a new circumstance authorizing reconsideration. The Chamber disagrees. Even if the Appeals Chamber Decision excluding Mr. Bagaragaza's testimony could be considered a new fact or circumstance for the purpose of reconsideration, nothing in the Prosecution's submissions has persuaded the Chamber to re-examine its position. Moreover, the Appeals Chamber Decision does not question the Chamber's exercise of discretion denying the original motion to hear Mr. Bagaragaza via video-link. To the contrary, the following excerpts from the Appeals Chamber Decision acknowledge the legitimacy of the Chamber's concerns:

> 17. The Appeals Chamber agrees that the objectives advanced by the Trial Chamber are of general importance: witness protection, the proper assessment of an important prosecution witness, and the need to ensure a reasonably expeditious trial…
>
> 19. Secondly, the Appeals Chamber also accepts that the Trial Chamber's general concern over its ability to assess the credibility of a key witness is an important interest.[17]

24. Mindful of the general preference that witnesses testify before the Tribunal in Arusha,[18] the Trial Chamber requested the Registrar to submit on whether additional security measures might allow

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[16] See, e.g., Decision on the Prosecutor's Motion for Reconsideration of the Oral Decision Excluding Evidence on the Meeting of 22 November 1992, or for Certification to Appeal the Same, 31 January 2006, para. 5; *Prosecutor v. Karemera et al.*, Decision on Joseph Nzirorera's Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting with Defence Witness, 11 October 2005, para. 8; *Prosecutor v. Karemera et al.*, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8.
[17] Appeals Chamber Decision, paras. 17, 19.

Mr. Bagaragaza to testify in Arusha.[19] Having reviewed the security threat to Mr. Bagaragaza, the Registrar has submitted that it will be possible to provide a sufficiently high level of security to ensure his safety in Arusha.[20] Based on the Registrar's Confidential and *Ex Parte* Submissions, the Chamber is satisfied that Mr. Bagaragaza's presence in Arusha could be adequately secured so that it is feasible to bring him to Arusha to testify.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Prosecution Motion for the Re-opening of the Prosecution case for the re-call of Mr. Bagaragaza;

DENIES the Motion for Reconsideration of the Decision of 31 January 2006 for Mr. Bagaragaza to be heard by video-link and DIRECTS that the witness be heard in Arusha;

ORDERS the transfer of Mr. Bagaragaza from the Detention Centre in The Hague to the Detention Facility in Arusha for hearings at the Tribunal the week beginning 27 November 2006;

REQUESTS the Governments of The Netherlands and of the United-Republic of Tanzania, to cooperate with the Prosecutor and the Registrar and the Witnesses and Victims Support Section of the Tribunal, to take the necessary measures to implement the present decision.

ADJOURNS the proceedings until 27 November 2006.

Arusha, 16 November 2006, done in English.

[Signed] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

[18] See, e.g., *Prosecutor v. 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, para. 36.
[19] Request for Submissions Pursuant to Rule 33 (B), 9 November 2006.
[20] "The Registrar's [Confidential and *Ex Parte*] Submissions in Respect of Trial Chamber III's 'Request for Submissions Pursuant to Rule 33 (B)'", filed 14 November 2006 ("Registrar's Confidential and *Ex Parte* Submissions").

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Decision on the Voir Dire Hearing of the Accused's Curriculum Vitae (Rules 2, 42 and 95 of the Rules of Procedure and Evidence) 29 November 2006 (ICTR-2001-73-T)

(Original : English)

Trial Chamber III

Judges : Inés Mónica Weinberg de Roca, Presiding Judge; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Voir dire hearing – Admissibility of a hand-written document prepared by the Accused, Curriculum vitae – Rights of Suspects – Treatment of the Accused as a suspect during the meetings with Prosecution investigators – Absence of respect of the procedural safeguards guaranteed to suspects, Right of the Accused to the assistance of a counsel – Serious damage to the integrity of the proceedings – Removal of the documents

International Instrument Cited :

Rules of Procedure and Evidence, Rules 2, 42, 42 (A), 42 (B) and 95

International Case Cited :

I.C.T.R.: Trial Chamber, The Prosecutor v. Casimir Bizimungu, 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. Casimir Bizimungu et al., Decision on Casimir Bizimungu, Justin Mugenzi and Jerome 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)

I.C.T.Y.: Trial Chamber, The Prosecutor v. Zejnil Delalić et al., Decision on Zdravko Mucić's Motion For the Exclusion of Evidence, 2 September 1997 (IT-96-21) ; Trial Chamber, The Prosecutor v. Radoslav Brđanin and Momir Talić, Decision on the Defence Objection to Intercept Evidence, 3 October 2003 (IT-99-36)

Introduction

1. On 27 and 28 June 2006, the Chamber held a *voir dire* hearing on the admissibility of a hand-written document entitled *Curriculum Vitae* ("CV") prepared by the Accused.[1] This document was included in a group of records that was tendered by the Prosecution on 3 October 2005 as Exhibit P2.[2] The CV was subsequently referred to during the Prosecution case. On 2 March 2006, the Defence formally raised an objection to the admissibility of the CV when it was referred to by witness Alison des Forges. According to the Defence, the CV, being a statement by the Accused, is not admissible into evidence because certain procedural safeguards have not been met.[3] The Defence does not contest that the Accused is the author of the document, but contend that it was improperly obtained.[4] The Prosecution contends that this document is already in evidence as Exhibit P2, and may therefore be

[1]The Prosecution does not have the original CV, just a photocopy. T. 27 February 2006, p. 19.
[2] T. 3 October 2005 p. 26.
[3] T. 2 March 2006 pp. 37-38.
[4] T. 27 June 2006, p. 20.

referred to by Prosecution witnesses. Following these oral submissions, the Chamber decided to provisionally admit the document as part of Exhibit P42 and allow reference to it pending a determination of its final status. The Chamber held that a determination as to the admissibility of this document would be made following a *voir dire* hearing.[5]

Deliberations

Evidence from the Voir Dire Hearing

2. In January of 1998, investigators from the Prosecution received a call from a source, Mr. Pheneas Ruhumuliza, second vice-president of the national committee of the *Interahamwe*, informing them that the Accused had contacted him with a view to arranging a meeting because he wished to collaborate and shed light on the events surrounding the genocide in Rwanda.[6]

3. The investigators met with the Accused for the first time on the 6 or 7 of February 1998. At that initial meeting, the Accused stated he wanted to clear his name with the ICTR.[7] The Accused further claimed that he was wanted by the Rwandan Government. The investigators asked the Accused to prepare a document of what he knew and what he had done before, during and after the genocide.[8]

4. The investigators next met with the Accused around 12 February 1998, where he turned over the first 14 hand-written pages of the document requested by the investigators, now known as the CV. The Accused presented the completed CV, totaling 36 pages, at a third meeting in March 1998.[9]

5. At the last meeting, which occurred on 26 or 27 March 1998, the Accused requested money to repair his "*matatu*" bus. The investigators then informed the Accused that the Office of the Prosecutor had analysed the CV and had decided that they were not interested in working with the Accused as there were several contradictions and matters that remained unclear in the CV. The Prosecution was therefore not in a position to assist the Accused.[10]

6. The Prosecution maintains that at the time of the first meeting the Accused was not a suspect or a target. As far as the investigators were concerned, he was the brother of Agathe Kanziga who was the wife of the late President Habyarimana.[11] The investigators testified that the Accused was not on the list of individuals against whom the Prosecution had issued arrest warrants for Operation NAKI (Nairobi-Kigali) which was carried out in Nairobi and in the various regions.[12]

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[5] T. 2 March 2006 p. 45.
[6] T. 27 June 2006, pp. 5-6; T. 28 June 2006, p. 3 (they consulted others at the ICTR before proceeding with the meeting).
[7] T. 28 June 2006, p. 3.
[8] T. 27 June 2006, pp. 6-7; T. 28 June 2006, p. 4.
[9] T. 27 June 2006, pp. 9-11.; T. 28 June 2006, pp. 4-5.
[10] T. 27 June 2006, pp. 13-14; T. 28 June 2006, p. 5. The witness testified that the Accused's statements were discredited by statements made by Kambanda after his arrest during Operation NAKI in July 1997, which was a statement given prior to the investigators first meeting with the Accused. T. 28 June 2006, p. 24. In return for the CV and the meetings, the Prosecution maintains that no offers, threats or inducements were made to the Accused, but the Accused did indicate that he wanted the Prosecution "to shed light on the genocide that took place in Rwanda in 1994, to clarify the conditions under which it arose. And he wanted [the Prosecution] to intervene with the Canadian authorities with regard to the document which led to his expulsion when he was in university - when he was in Canada trying to complete his university studies." T. 27 June 2006, pp. 11-13; T. 28 June 2006, pp. 6, 19-20. One investigator stated that the Accused did not ask for the investigator's assistance with the Canadian government, but that he only informed them that he had been deported from Canada. T. 28 June 2006, p. 23. The investigator's 7 February 1998 report states, as read into the transcript, "[i]n this regard, we inform Mr. Z that it is premature to envisage protection for himself, as well as for members of his family, before the disclosed information is the subject of a - an exhaustive analysis by the authorities of the Tribunal. It is at that moment that we shall be able to envisage various scenarios concerning his implication, his security, and his possible relocation, contingent upon an official, signed deposition made by himself." T. 28 June 2006, p. 22.
[11] T. 27 June 2006, pp. 5-6; T. 28 June 2006, pp. 3, 8.
[12] T. 27 June 2006, p. 21; T. 28 June 2006, p. 9.

7. The Prosecution was investigating the RTLM, however, and was in possession of information that the Accused contributed to its establishment.[13] A Prosecution report of 19 January 1998 described the Accused as "allegedly a member of the Death Squad" and a founder of the RTLM, and reported his exile in April of 1994 with members of the Habyarimana family.[14] Moreover, the name of the Accused appears on a 7 March 1997 tracking list,[15] and on the list of the first category of genocide suspects put out by the Rwandan Government, dated 30 August 1996.[16] Further, Witness SFH, who was interviewed by the Prosecution on 11-12 February 1998, stated that the Accused was involved in the killing of "Stanislaus Libakiwe".[17] He was also allegedly implicated in the murder of "Diana (sic) Fossey" and the growing of cannabis in the Nyurgwe (phonetic) region."[18] After each of the meetings with the Accused, the investigators prepared a report.[19] In the investigators report of 17 February 1998, the Accused is referred to as a "suspect".[20]

The Rights of Suspects

8. Rule 42 of the Rules of Procedure and Evidence (the "Rules"), entitled "Rights of Suspects During Investigation", stipulates that:

> (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.[21]

Rule 42 (B) governs the questioning of a suspect in the absence of counsel, and provides for the possibility of a waiver of the right by the suspect:

> (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.

9. In order to qualify for the procedural safeguards guaranteed under Rule 42 of the Rules of Procedure and Evidence (the "Rules"), the Accused would have to have been a "suspect" at the time of his meetings with the Prosecution investigators. Rule 2 of the Rules defines a suspect as "[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". While the evidence presented during the *voir dire* is not conclusive, there is evidence that the Prosecution possessed information that the Accused had committed crimes over which the Tribunal has jurisdiction. Given this uncertainty and

[13] T. 27 June 2006, pp. 27, 34-35.
[14] T. 28 June 2006, pp. 13-15.
[15] T. 27 June 2006, pp. 39-40.
[16] T. 27 June 2006, pp. 40-43 (on the list as number 381).
[17] T. 27 June 2006, pp. 45-47. The Indictment charges the Accused with the murder of Stanislas Sinibagiwe, also known as Stanislas Simbizi. See Amended Indictment, 8 March 2005, para. 46. It is not clear if Witness SFH was referring to the same person.
[18] T. 28 June 2006, pp. 12-14.
[19] T. 28 June 2006, p. 6.
[20] T. 27 June 2006, p. 20.
[21] In addition, Article 17 (3) of the Statute, "Investigation and Preparation of the Indictment", provides: "[i]f questioned, the suspect shall be entitled to be assisted by Counsel of his or her own choice". Article 20 (4) (g) confers on any Accused the right "[n]ot to be compelled to testify against himself or herself or to confess guilt".

mindful of the rights of the Accused, the Chamber finds that the Accused should have been treated as a suspect during the meetings with Prosecution investigators.

10. The Chamber will now determine whether the Rule 42 procedural safeguards have been met. The Prosecution did not advise the Accused of his rights as enumerated in Rule 42 (A) during any of the meetings. Nor do the circumstances suggest that the Accused's behaviour amounted to a knowing and voluntary waiver of these rights as contemplated in Rule 42 (B).

11. The Chamber is of the view that the procedural safeguards of Rule 42 have not been met. Relying on the principles enumerated above, the Chamber is also of the view that the Prosecution has not discharged its burden of showing that the Accused voluntarily waived his right to the assistance of counsel, as required by Rule 42 (B). The Chamber will now decide on the appropriate remedy.

12. Rule 95 requires the exclusion of evidence "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".

13. The Chamber notes that Rule 95 does not require automatic exclusion of all unlawfully obtained evidence.[22] 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".[23] As stated by the ICTY Chamber in *Delalić et al*., it is difficult to imagine a statement taken in violation of the fundamental right to the assistance of counsel which would not require its exclusion under Rule 95 as being "antithetical to, and would seriously damage, the integrity of the proceedings".[24]

14. The Chamber finds that keeping the CV of the Accused on the record would seriously damage the integrity of the proceedings.

FOR THE ABOVE REASONS, THE CHAMBER EXPUNGES the CV of the Accused.

Arusha, 29 November 2006, done in English.

[Signed] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

[22] *Prosecutor v. Bizimungu et al*., Decision on Casimir Bizimungu, Justin Mugenzi and Jerome 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) (TC), 1 November 2006, para. 12 ("*Bizimungu* Decision"); *Prosecutor v. Brdanin*, Case N°IT-99-36-T, Decision on the Defence "Objection to Intercept Evidence" (TC), 3 October 2003, para. 54 ("*Brdanin* Decision").

[23] *Bizimungu* Decision, para. 12; *Prosecutor v. Bizimungu et al*., Decision on Prosper Mugirnaeza's Renewed Motion to Exclude His Custodial Statements from Evidence (TC), 4 December 2003, para. 29; *Brdanin* Decision, para. 61.

[24] *Prosecutor v. Delalić et al*., Case N°IT-96-21-T, Decision on Zdravko Mucić's Motion For the Exclusion of Evidence (TC), 2 September 1997, para. 43; see also *Bagosora* Decision, para. 21.

Le Procureur c. Protais ZIGIRANYIRAZO

Affaire N° ICTR-2001-73

Fiche technique

• Nom: ZIGIRANYIRAZO

• Prénom: Protais

• Date de naissance: 1938

• Sexe: masculin

• Nationalité: rwandaise

• Fonction occupée au moment des faits incriminés: homme d'affaires

• Date de confirmation de l'acte d'accusation: 20 juillet 2001

• Date de modification de l'acte d'accusation: 7 mars 2005

• Chefs d'accusation: entente en vue de commettre le génocide, génocide ou, à titre subsidiaire, complicité dans le génocide, crimes contre l'humanité (extermination, assassinat)

• Date et lieu de l'arrestation: 26 juillet 2001, à Bruxelles, en Belgique

• Date du transfert: 3 octobre 2001

• Date de la comparution initiale: 10 octobre 2001

• Date du début du procès: 3 octobre 2005

• Date et contenu du prononcé: 18 décembre 2008, condamné à 20 ans d'emprisonnement

• Appel: 16 novembre 2009, acquitté et libéré

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Décision relative aux requêtes de la Défense aux fins de coopération du gouvernement Rwandais au sujet des témoins à charge AVY et SGO (Article 28 du Statut du Tribunal) 17 janvier 2006 (ICTR-2001-73-T)

(Original : Anglais)

Chambre de première instance III

Juges : Inés Mónica Weinberg de Roca, Président; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Coopération d'un Etat, Rwanda, Témoins – Utilité des dossiers judiciaires d'un témoin – Communication de tous les casiers judiciaires antérieurement demandée – Certains éléments des dossiers des témoins toujours introuvables – Coopération du Gouvernement du Rwanda – 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 Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses, 16 décembre 2003 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Aloys Simba, Décision de la Chambre de première instance relative à des points se rapportant au dossier judiciaire du témoin KDD, 1 novembre 2004 (ICTR-2001-76) ; Chambre de première instance, Le Procureur c. Protais Zigiranyirazo, Scheduling Order, 6 mai 2005 (ICTR-2001-73) ; Chambre de première instance, Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera, Décision relative aux requêtes de la Défense tendant à contraindre le Procureur à permettre l'examen de pièces et à s'acquitter de son obligation de communication et à demander aux témoins de fournir leurs dossiers judiciaires et d'immigration, 14 septembre 2005 (ICTR-98-44)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance III, composée des juges Inés Mónica Weinberg de Roca, Président, Khalida Rachid Khan et Lee Gacuiga Muthoga (la « Chambre »),

SAISI de la Requête en extrême urgence de la Défense aux fins de coopération du Gouvernement rwandais au sujet des documents judiciaires relatifs au témoin AVY, déposée le 31 octobre 2005 (la « Requête AVY ») et de la Requête urgente de la Défense tendant à solliciter la coopération du Gouvernement rwandais en vue d'obtenir des documents judiciaires concernant le témoin SGO, déposée le 7 novembre 2005 (la « Requête SGO »),

ATTENDU que le Procureur n'a pas répondu dans les délais prescrits par le Règlement de procédure et de preuve (le « Règlement »),

VU le Statut du Tribunal (le « Statut »), plus particulièrement son article 28, et le Règlement, plus particulièrement son article 54,

RAPPELANT qu'il est de jurisprudence constante que les dossiers judiciaires d'un témoin sont des pièces utiles pour son contre-interrogatoire et sont donc nécessaires à la partie adverse[1],

RAPPELANT EN OUTRE qu'en l'espèce la Chambre a demandé au Procureur de communiquer tous les casiers judiciaires de ses témoins détenus[2],

VU que certains éléments des dossiers judiciaires des témoins à charge AVY et SGO sont toujours introuvables et que le Gouvernement rwandais a accepté de coopérer si la Chambre le lui demande,

LA CHAMBRE

I. FAIT DROIT aux Requêtes ;

II. SOLLICITE la coopération du Gouvernement rwandais en le priant de fournir à la Défense les dossiers judiciaires des témoins à charge AVY et SGO dans les procédures dont ils font l'objet devant les tribunaux et les juridictions *Gacaca*;

III. ENJOINT au Greffier de notifier la présente Décision au Gouvernement, de suivre son exécution et de lui en référer.

Fait à Arusha, le 17 janvier 2006.

[Signé] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

[1] *Le Procureur c. Édouard Karemera, Mathieu Ngirumpatse et Joseph Nzirorera*, affaire N°ICTR-98-44-PT, Décision relative aux requêtes de la Défense tendant à contraindre le Procureur à permettre l'examen de pièces et à s'acquitter de son obligation de communication et à demander aux témoins de fournir leurs dossiers judiciaires et d'immigration, 14 septembre 2005 ; *Le Procureur c. Aloys Simba*, affaire N°ICTR-2001-76-T, Décision relative à des points se rapportant au dossier judiciaire du témoin KDD (Chambre de première instance), 1er novembre 2004 ; *Le Procureur c. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze et Anatole Nsengiyumva*, affaire N°ICTR-98-41-T, *Decision on the Request for Documents Arising From Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses* (Chambre de première instance), 16 décembre 2003.

[2] Scheduling Order (par. VI), 6 mai 2005.

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Décision relative à la requête du Procureur intitulée « Prosecutor's Motion to Vary his Witness List »
(Article 73 **bis** *(E) du Règlement de procédure et de preuve)*
19 janvier 2006 (ICTR-2001-73-T)

(Original : Anglais)

Chambre de première instance III

Juges : Inés Mónica Weinberg de Roca, Président; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Modification de la liste des témoins – Témoignage d'un témoin devant les autorités belges – Refus du témoin de témoigner encore – Autre témoin pouvant déposer sur les mêmes événements – Absence de préjudice aux droits de l'accusé – Requête acceptée

Instrument international cité :

Règlement de procédure et de preuve, art. 73 bis *(E)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance III, composée des juges Inés Mónica Weinberg de Roca, Président, Khalida Rachid Khan et Lee Gacuiga Muthoga (la « Chambre »),

SAISI de la Requête du Procureur intitulée « *Prosecutor's Motion for Varying the Witness List* », déposée le 22 décembre 2005 (la « Requête »),

VU la réponse de la Défense à la Requête du Procureur, déposée le 28 décembre 2005, dans laquelle la Défense s'oppose à la Requête en raison du défaut de diligence en ce qui concerne le témoin BIY et de la communication tardive de pièces en ce qui concerne le témoin BPP, et la duplique du Procureur à ladite réponse, déposée le 4 janvier 2006,

VU l'extrait de la déposition du témoin BIY recueillie devant les autorités belges, en date du 25 novembre 2005, indiquant que le témoin ne sait rien de spécia1 au sujet de l'accusé qui n'ait pas encore été communiqué aux autorités belges, que d'autres en savent plus sur lui, et que le témoin ne veut plus souffrir mentalement en répondant à d'autres questions[1],

VU le Règlement de procédure et de preuve (le « Règlement »), notamment son article 71 *bis* (E),

VU que le témoin BIY est celui qui doit déposer au sujet des événements survenus à la résidence officielle du Président à Kanombe, et qu'il ne souhaite plus le faire,

VU que le Procureur a un autre témoin, le témoin BPP, qui peut déposer sur les mêmes événements et que ses déclarations ont déjà été communiquées à la Défense,

VU que le fait de retirer le témoin BIY et d'inclure le témoin BPP ne portera pas atteinte aux droits de l'accusé,

[1] Le témoin a déclaré : «Je ne sais rien de spécial au sujet de M. Z ; il y en a d'autres qui en savent beaucoup plus. Je ne sais pas dire plus que ce que j'ai dit ici. Je ne veux plus souffrir mentalement avec des questions et je veux vivre tranquillement ».

VU en outre qu'il est dans l'intérêt de la justice de permettre aux parties de présenter leurs moyens et de produire la meilleure preuve disponible,

LA CHAMBRE

FAIT DROIT à la Requête et AUTORISE le Procureur à revoir la composition de sa liste, comme proposé dans la Requête.

Arusha, le 19 janvier 2006.

[Signé] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Ordonnance portant tenue d'une audience à huis clos consacrée à la requête du Procureur demandant à être dispensé de communiquer à la Défense certaines informations relatives aux paiements et avantages accordés au témoin ADE et aux membres de sa famille
(Articles 66 (C) et 68 (D) du Règlement de procédure et de preuve)
19 janvier 2006 (ICTR-2001-73-T)

(Original : Anglais)

Chambre de première instance III

Juges : Inés Mónica Weinberg de Roca, Président; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Ordonnance portant calendrier – Communication d'information limitée, Paiements et avantages accordés à un témoin et à sa famille – Procureur, Seul et à huis clos

Instrument international cité :

Règlement de procédure et de preuve, art. 66 (C) et 68 (D)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance III, composée des juges Inés Mónica Weinberg de Roca, Présidente de Chambre, Khalida Rachid Khan et Lee Gacuiga Muthoga (la « Chambre »),

SAISI de la requête du Procureur intitulée « Prosecutor's Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and his Family », déposée confidentiellement et contradictoirement le 12 décembre 2005, et du complément d'information du Procureur intitulé « Prosecutor's Supplemental Information to the Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and His Family », déposé confidentiellement et contradictoirement le 15 décembre 2005.

VU la Réponse à la requête du Procureur « *to Permit Limited Disclosure of Information Regarding Payments [and] Benefits Provided to Witness ADE [and] his Family* », déposée par la Défense le 20 décembre 2005, et la réplique du Procureur intitulée « *Prosecutor's Rejoinder to Defence Reply Regarding Disclosure of Information of Payments and Benefits Provided to Witness ADE and His Family and to Defence Reply to Allow Limited Disclosure of Information* », déposée confidentiellement et contradictoirement le 22 décembre 2005,

RAPPELANT que le procès doit reprendre le 23 janvier 2006,

VU le *Statut du Tribunal* (le « Statut ») et son *Règlement de procédure et de preuve* (le « Règlement »), en particulier ses articles 66 (C) et 68 (D),

CONSIDÉRANT que le Procureur demande à fournir à la seule Chambre, dans le cadre de l'audience à huis clos prévue par les articles 66 (C) et 68 (D) du Règlement, le relevé détaillé non caviardé des paiements et avantages accordés au témoin ADE, ce document ayant été exclu des pièces communiquées à la Défense,

CONSIDÉRANT PAR AILLEURS que la Défense demande que le Procureur se conforme aux prescriptions de l'article 68 (D) du Règlement, à savoir qu'il comparaisse seul et à huis clos pour fournir à la Chambre toutes les informations pertinentes relatives aux paiements et avantages accordés au témoin ADE et aux membres de sa famille,

PAR CES MOTIFS,

ORDONNE au Procureur de comparaître seul et à huis clos, le 23 janvier 2006, après la reprise du procès, mais avant l'audition du premier témoin, à l'effet de fournir à la Chambre toutes informations et pièces relatives aux paiements et avantages octroyés au témoin ADE et aux membres de sa famille, notamment le relevé non caviardé des dépenses consenties à cette fin, et de s'entretenir avec elle de la question à l'examen.

Fait en anglais, à Arusha, le 19 janvier 2006.

[Signé] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Décision relative à la requête formée par la Défense aux fins d'obtenir communication d'éléments de preuve à décharge versés au dossier dans les affaires le Procureur c. Ephrem Setako et le Procureur c. Théoneste Bagosora et consorts (Article 68 du Règlement de procédure et de preuve) 25 janvier 2006 (ICTR-2001-73-T)

(Original : Anglais)

Chambre de première instance III

Juges : Inés Mónica Weinberg de Roca, Président; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Communication d'éléments de preuve à décharge – Setako et Bagosora – Informations demandées pas de nature à disculper l'accusé – Requête rejetée

Instrument international cité :

Règlement de procédure et de preuve, art. 68 et 73 (A)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance III, composée des juges Inés Mónica Weinberg de Roca, Président, Khalida Rachid Khan et Lee Gacuiga Muthoga (la « Chambre »),

SAISI de la Requête pour la communication des éléments exculpatoires Re Dossier *Le Procureur c. Ephrem Setako* et *Le Procureur c. Théoneste Bagosora et consorts* déposée par la Défense le 7 décembre 2005 (la « Requête »),

VU la réponse du Procureur déposée le 12 décembre 2005 et la réplique de la Défense déposée le 13 décembre 2005,

VU le Statut du Tribunal (le « Statut ») et le *Règlement de procédure et de preuve* (le « Règlement »), notamment l'article 68 du Règlement,

STATUE sur la requête sur la seule base des écritures des parties, en vertu de l'article 73 (A) du Règlement.

1. La Défense demande que lui soit communiquées les déclarations de témoin, notamment la version non caviardée de celles produites comme pièces justificatives, ou les dépositions faites dans l'affaire *Setako* et l'affaire *Bagosora et consorts* qui tendent à établir qu'Ephrem Setako et Théoneste Bagosora ne se trouvaient pas à Nyundo (préfecture de Gisenyi) les 7 et 8 avril 1994. Elle demande en outre que ces documents lui soient communiqués avant le 20 décembre 2005 et sollicite l'autorisation d'avoir des entrevues avec tous les témoins cités dans l'affaire *Le Procureur c. Ephrem Setako* avant l'audition du témoin ATN.

2. Rappelant que selon les dispositions de l'article 68 du Règlement elle doit fournir des éléments suffisants à première vue, pour établir que les informations demandées seraient de nature à disculper l'accusé et qu'elles sont en la possession du Procureur, la Défense affirme que ces deux conditions sont remplies en l'occurrence.

3. La Défense fait valoir que les déclarations de témoin ou les dépositions visées sont de nature à disculper l'accusé en ce qu'elles contredisent la déclaration du témoin à charge ATN selon laquelle les 7 et 8 avril 1994, Ephrem Setako et Théoneste Bagosora étaient à Nyundo où ils ont assisté, en présence de l'accusé, à une réunion qui s'est tenue sur un terrain de football. Selon la Défense, le Procureur a allégué dans l'acte d'accusation établi contre Ephrem Setako que l'accusé se trouvait à Ruhengeri aux mêmes dates, tandis que tout le monde sait que Théoneste Bagosora était à l'époque à Kigali en raison de la guerre. En ce qui concerne l'affaire *Setako,* la Défense ajoute que le conseil d'Ephrem Setako lui a dit que des éléments de preuve confirmant que celui-ci se trouvait à Ruhengeri les 7 et 8 avril 1994 avaient été communiqués au conseil. La Défense a alors demandé au Procureur de lui fournir ces éléments de preuve, mais le Procureur n'a pas encore répondu à sa demande.

4. Le Procureur répond que le témoin ATN ne se souvient pas de la date exacte à laquelle a réunion s'est tenue en avril 1994 et qu'on ne saurait dès lors considérer qu'un élément de preuve tendant à établir qu'Ephrem Setako et Théoneste Bagosora ne se trouvaient pas ou ne pouvaient pas se trouver à Nyundo les 7 et 8 avril 1994 est de nature à disculper l'accusé. Selon lui, le contre-interrogatoire du témoin est le meilleur moyen de déterminer ce qu'il a dit.

5. Dans sa réplique, la Défense réitère les arguments présentés dans sa requête.

6. La Chambre relève que le témoin ATN a clairement indiqué qu'il ne se souvenait pas de la date exacte de la réunion qui s'était tenue sur le terrain de football de Nyundo sis dans la préfecture de Gisenyi. Comme il n'a pas exactement dit dans sa déclaration que cette réunion avait eu lieu le 7 ou le 8 avril 1994, les informations demandées ne sont pas de nature à disculper l'accusé. Par conséquent, la requête de la Défense doit être rejetée et il n'est pas nécessaire que la Chambre vérifie si les critères prévus à l'article 68 du Règlement sont remplis.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête de la Défense.

Fait à Arusha, le 25 janvier 2006.

[Signé] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Décision relative à la requête formée par le Procureur aux fins d'obtenir soit le réexamen de la décision orale interdisant de présenter des éléments de preuve au sujet de la réunion du 22 novembre 1992, soit l'autorisation d'interjeter appel de ladite décision
(Article 73 (A) et (B) du Règlement de procédure et de preuve)
31 janvier 2006 (ICTR-2001-73-T)

(Original : Anglais)

Chambre de première instance III

Juges : Inés Mónica Weinberg de Roca, Président; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Réexamen d'une décision ou autorisation d'interjeter appel de celle-ci – Requête rejetée

Instrument international cité :

Règlement de procédure et de preuve, art. 73 (A) et 73 (B)

Jurisprudence internationale citée :

T.P.I.R.: Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001, 18 juillet 2003 (ICTR-98-41) ; Chambre d'appel, Le Procureur c. Eliézer Niyitegeka, Decision on Defence Extremely Urgent Motion for Reconsideration of Decision dated 16 December 2003, 19 décembre 2003 (ICTR-96-14) ; Chambre d'appel, Le Procureur c. Eliézer Niyitegeka, Decision on Eliezer Niyitegeka's Urgent Motion for Reconsideration of Appeals Chamber Decision dated 3 December 2003, 4 février 2004 (ICTR-96-14) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, Decision on Reconsideration of Order to reduce Witness List and

on Motion for Contempt for Violation of that order, 1 mars 2004 (ICTR-98-41) ; Chambre d'appel, Le Procureur c. Hassan Ngeze et al., Decision on Ngeze's Motion for Reconsideration of the Decision Denying an Extension of Page Limits His Appellant Brief, 11 mars 2004 (ICTR-99-52) ; Chambre d'appel, Le Procureur c. Laurent Semanza, Decision on Application for Reconsideration of Amicus Curiae Application of Paul Bisengimana, 19 mai 2004 (ICTR-97-20) ; Chambre de première instance, Le Procureur c. Pauline Nyiramasuhuko et consorts, Décision relative à la requête de Nyiramasuhuko aux fins de réexamen de la « Décision relative a la requête de la Défense en certification d'appel de la Décision sur la requête de la Défense relative à l'arrêt des procédures et à l'abus de procédure », 20 mai 2004 (ICTR-98-42) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et consorts, 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 juin 2004 (ICTR-98-41)

T.P.I.Y.: Chambre d'appel, Le Procureur c. Zdravko Mucić et consorts, Arrêt relatif à la sentence, 8 avril 2003 (IT-96-21)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance III, composée des juges Inés Mónica Weinberg de Roca, Président, Khalida Rachid Khan et Lee Gacuiga Muthoga (la « Chambre »),

SAISI de la requête du Procureur intitulée Prosecutor's Motion for Reconsideration of a Decision, or for Certification of Appeal, in the Alternative, déposée le 25 octobre 2005 (la « requête »),

VU la réponse de la Défense intitulée *Reply to Prosecutor's Motion for Reconsideration of a Decision, or for Certification of Appeal, in the Alternative*, déposée le 31 octobre 2005, et la réplique du Procureur, déposée le 31 octobre 2005,

RAPPELANT les décisions orales rendues par la Chambre lors des audiences des 5 et 18 octobre 2005[1],

STATUE sur la requête sur la seule base des mémoires des parties, en vertu de l'article 73 (A) du Règlement de procédure et de preuve (le « Règlement »).

Introduction et arguments des parties

1. Le 5 octobre 2005, dans sa déposition, le témoin APJ a évoqué deux réunions qui s'étaient tenues à Giciye en 1992. L'accusé aurait été invité à la première au cours de laquelle il aurait pris la parole pour déclarer que la population devait combattre l'ennemi (la « première réunion »). Tenue entre le bourgmestre et les conseillers, la seconde s'inscrivait dans le prolongement de la première (la « seconde réunion »). La Défense s'est opposée à ce que ces deux réunions soient admises en preuve. Dans sa décision orale du 5 octobre 2005, la Chambre n'a autorisé que la présentation des éléments de preuve relatifs à la première réunion, celle au cours de laquelle l'accusé aurait prononcé un discours, au motif que l'acte d'accusation modifié, le mémoire préalable au procès et la déclaration du témoin ne comportaient qu'une allégation générale faisant état de réunions tenues en 1994[2]. Elle a décidé d'autoriser la présentation des éléments de preuve relatifs à la première réunion parce qu'il était allégué que l'accusé y avait participé.

2. Le 18 octobre 2005, dans sa déposition, le témoin SGP a parlé d'une réunion bien connue convoquée par Léon Mugesera qui s'était tenue le 22 novembre 1992. La Défense a fait une objection qui a été retenue par la Chambre (la « décision orale du 18 octobre 2005 » ou « décision attaquée »),

[1] Compte rendu des audiences du 5 octobre 2005, p. 37 à 50, et du 18 octobre 2005, p. 41.
[2] Compte rendu de l'audience du 5 octobre 2005, p. 37 à 50.

au motif que la réunion en question était bien connue, présentait un intérêt pour la cause et aurait dû être mentionnée dans l'acte d'accusation que le Procureur avait dûment eu l'occasion de modifier plusieurs fois. La Chambre a donné raison à la Défense, le Procureur ayant eu connaissance de l'existence de cette réunion depuis au moins 2001[3].

3. Le Procureur demande à présent à la Chambre de réexaminer la décision orale du 18 octobre 2005, au motif que celle-ci ne cadre ni avec la décision du 5 octobre 2005 ni avec la jurisprudence du Tribunal fondées sur l'article 89 (C) du Règlement. Dans le cas contraire, il sollicite l'autorisation de faire appel de la décision orale du 18 octobre 2005.

4. La Défense s'oppose aux deux solutions proposées dans la requête.

Délibération

5. Selon la jurisprudence du Tribunal, une Chambre peut réexaminer sa décision (i) s'il apparaît un fait nouveau dont elle n'avait pas déjà connaissance[4], (ii) s'il y a eu après la décision attaquée des circonstances nouvelles qui en invalident la motivation[5] ou, (iii) si une partie a réussi à établir que la Chambre avait commis une erreur de droit ou abusé de son pouvoir d'appréciation[6] et il en est résulté une injustice[7]. En l'espèce, il ne ressort pas de l'argumentation du Procureur que l'une des ces conditions est remplie. En conséquence, la Chambre ne réexaminera pas la décision orale du 18 octobre 2005.

6. Aux termes de l'article 73 (B) du Règlement, la Chambre peut accorder l'autorisation d'interjeter appel si (i) la décision contestée touche une question susceptible de compromettre sensiblement (a) l'équité et la rapidité du procès ou (b) son issue, et (ii) son règlement immédiat par la Chambre d'appel pourrait, de l'avis de la Chambre de première instance, concrètement faire progresser la procédure.

7. Ayant examiné les arguments du Procureur, la Chambre estime qu'aucune des conditions fixées à l'article 73 (B) n'a été remplie. En conséquence, elle doit rejeter la requête.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête du Procureur dans son intégralité.

Arusha, le 31 janvier 2006.

[Signé] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

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[3] Compte rendu de l'audience du 18 octobre 2005, p. 41.

[4] Affaire *Nyiramasuhuko*, Chambre de première instance, Décision relative à la requête de Nyiramasuhuko aux fins de réexamen de la « Décision relative à la requête de la Défense en certification d'appel de la décision sur la requête de la Défense relative à l'arrêt des procédures et à l'abus de procédure », 20 mai 2004.

[5] Affaire Bagosora et consorts, Chambre de première instance, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001, 18 juillet 2003 ; Ferdinand Nahimana, Jean-Bosco Barayagwiza et Hassan Ngeze c. Le Procureur, affaire N°ICTR-99-52-A, Chambre d'appel, Decision on Ngeze's Motion for Reconsideration of the Decision Denying an Extension of Page Limits His Appellant Brief , 11 mars 2004, p. 2.

[6] Eliézer Niyitegeka c. Le Procureur, affaire N°ICTR-96-14-A, Chambre d'appel, Decision on Defence Extremely Urgent Motion for Reconsideration of Decision Dated 16 December 2003, 19 décembre 2003 ; affaire Niyitegeka, Chambre d'appel, Decision on Eliézer Niyitegeka's Urgent Motion for Reconsideration of Appeals Chamber Decision dated 3 December 2003, 4 février 2004 ; affaire Bagosora et consorts, Chambre de première instance, Decision on Reconsideration of Order to Reduce Witness List and on Motion for Contempt for Violation of that Order, 1er mars 2004, par. 11.

[7] Affaire *Mucić et consorts*, Chambre d'appel, Arrêt relatif à la sentence, 8 avril 2003, par. 49 ; *Laurent Semanza c. Le Procureur*, affaire N°ICTR-97-20-A, Chambre d'appel, *Decision on Application for Reconsideration of* Amicus Curiae *Application of Paul Bisengimana*, 19 mai 2004 ; affaire *Bagosora et consorts*, Chambre de première instance, *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 juin 2004, par. 15.

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Décision relative aux requêtes déposées par la Défense et par le Procureur concernant le témoin ADE (Articles 46, 66, 68, 73 et 75 du Règlement de procédure et de preuve) 31 janvier 2006 (ICTR-2001-73-T)

(Original : Anglais)

Chambre de première instance III

Juges : Inés Mónica Weinberg de Roca, Président; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Communication d'éléments exculpatoires – Communication d'informations, paiement et avantages fournis au témoin et à sa famille – Retrait des mesures de protection du témoin – Déposition du témoin par vidéoconférence – Jonction des requêtes – Mesures de protection toujours applicables – Révélation de la déclaration caviardée du témoin, Violation des mesures de protection, Dépôt d'une requête comme document public, Absence de sanctions, Diligence des parties relative au dépôt des documents avec des information confidentielles – Communication d'informations relatives au témoin, Paiements et les avantages perçus, Paiements directement du Tribunal, Intérêt de la justice et de la transparence, Ampleur des décaissements – Déposition via vidéoconférence, Importance de la déposition, de l'incapacité ou du refus du témoin de se présenter à l'audience et de la validité des motifs invoqués pour justifier cette incapacité ou ce refus – Une requête acceptée en partie, Autres requêtes rejetées

Instrument international cité :

Règlement de procédure et de preuve, art. 4, 46, 66, 66 (C), 68, 68 (D), 73 (A), 73 (F), 75 (A), 75 (B) 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. Protais Zigiranyirazo, Décision sur la requête du procureur en prescription de mesures de protection des victimes et des témoins de crimes allégués dans l'acte d'accusation, 25 février 2003 (ICTR-2001-73) ; Chambre de première instance, Le Procureur c. Thénoneste Bagosora et consorts, Décision relative à la requête du Procureur en prescription de mesures spéciales de protection des témoins A et BY, 3 octobre 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. Aloys Simba, Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link, 4 février 2004 (ICTR-2001-76) ; Chambre de première instance, Le Procureur c. 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 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. 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. Édouard Karemera et consorts, Decision on Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, 23 août 2005 (ICTR-98-44) ; Chambre de première instance, Le Procureur c. Protais Zigiranyirazo, Ordonnance portant calendrier – In Camera Hearing on Prosecutor's Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and His Family, 19 janvier 2006 (ICTR-2001-73)

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. Zejnil Delalić et al., http://www.icty.org/x/cases/mucic/tdec/fr/70528vl2.htm*Décision Relative à la Requête aux Fins de Permettre aux Témoins K, L et M de Témoigner par Voie de Vidéoconférence, 28 mai 1997 (IT-96-21)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance III, composée des juges Inés Mónica Weinberg de Roca, Président, Khalida Rachid Khan et Lee Gacuiga Muthoga (la « Chambre »),

SAISI de la Requête pour la communication des éléments exculpatoires Re Témoin ADE et d'éléments visés par l'article 66 (Déclarations d'un témoin du Procureur), déposée par la Défense le 6 décembre 2005 (la « Requête en communication de la Défense »), et

PRENANT EN CONSIDÉRATION la réponse déposée à titre confidentiel et *inter partes* par le Procureur le 12 décembre 2005[1] et la réplique de la Défense, déposée le 20 décembre 2005[2],

ÉTANT SAISI PAR AILLEURS de la requête du Procureur intitulée « Prosecutor's Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and his Family », déposée à titre confidentiel et inter partes le 12 décembre 2005 (la « Requête fondée sur l'article 66 (C) du Règlement ») et la communication du Procureur intitulée « Prosecutor's Supplemental Information to the Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and His Family », déposée à titre confidentiel et inter partes le 15 décembre 2005, et

CONSIDÉRANT la réponse de la Défense déposée le 20 décembre 2005[3] et la réplique du Procureur, déposée à titre confidentiel et *inter partes* le 22 décembre 2005[4],

ÉTANT EN OUTRE SAISI de la Requête du Procureur pour sanctions contre le conseil de la Défense, déposée à titre confidentiel et *inter partes* le 12 décembre 2005 (la « Requête pour sanctions »), et CONSIDÉRANT la réponse de la Défense, déposée le 20 décembre 2005[5],

[1] Prosecutor's Response to Defence Motion for Disclosure of Payments and Benefits to Witness ADE and His Family.
[2] Réplique à la réponse du Procureur à la Requête pour la communication des éléments exculpatoires re témoin ADE et d'éléments visés par l'article 66 (Déclarations d'un témoin du Procureur).
[3] Réponse à la requête du Procureur « to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and his Family ».
[4] Prosecutor's Rejoinder to Defence Reply Regarding Disclosure of Information of Payments and Benefits Provided to Witness ADE and His Family and to Defence Reply to Allow Limited Disclosure of Information.
[5] Réponse à la requête du Procureur pour sanctions contre le conseil de la Défense.

ÉTANT ÉGALEMENT SAISI de la Requête pour soustraire le témoin ADE des mesures de protection, déposée par la Défense le 20 décembre 2005 (la « Requête en retrait des mesures de protection »), et CONSIDÉRANT que le Procureur n'y a pas encore répondu,

SAISI ENCORE de la requête du Procureur intitulée « *Prosecutor's Confidential Request to Allow Witness ADE to Give Testimony via Video-Link* », déposée le 21 décembre 2005 (la « Requête en vue d'une déposition par vidéoconférence »), et PRENANT EN CONSIDÉRATION la réponse de la Défense, déposée le 28 décembre 2005[6], et la réplique du Procureur, déposée le 13 janvier 2006[7],

ÉTANT ENFIN SAISI de la requête de la Défense intitulée « *Defence Motion to the Chamber for Adjudication of Pending Motions* », déposée le 28 décembre 2005 (la « Requête demandant à la Chambre de statuer sur les requêtes pendantes »), et CONSIDÉRANT que le Procureur n'y a pas répondu,

RAPPELANT l'ordonnance portant calendrier rendue le 19 janvier 2006, invitant le Procureur à communiquer à la Chambre, en audience à huis clos et unilatéralement, toutes les informations et pièces, y compris tous les documents concernant les paiements et avantages dont ont bénéficié le témoin ADE et sa famille, y compris le budget, en version non caviardée[8],

RAPPELANT la décision du 25 février 2003 prescrivant des mesures de protection en faveur de témoins à décharge (l'« Ordonnance prescrivant des mesures de protection »)[9],

VU le Statut du Tribunal (le « Statut ») et le Règlement de procédure et de preuve (le « Règlement »), et plus particulièrement ses articles 46, 66, 68 (D), 73 (F), 75 (A) et 75 (B),

STATUE à présent sur les requêtes, uniquement sur la seule base des mémoires déposés par les parties, conformément à l'article 73 (A) du Règlement.

A. Jonction des requêtes

1. La Chambre est d'avis que ces requêtes sont liées et qu'il convient de les examiner ensemble. Elle statuera sur elles dans l'ordre suivant : requête en retrait des mesures de protection, requête pour sanctions, requête en communication de la Défense et Requête fondée sur l'article 66 (C) du Règlement, requête en vue d'une déposition par vidéoconférence et Requête demandant à la Chambre de statuer sur les requêtes pendantes.

B. Requête en retrait des mesures de protection

2. La Défense prie la Chambre de déclarer que son ordonnance prescrivant des mesures de protection n'est plus applicable au témoin ADE. À l'appui de sa demande, elle fait valoir que malgré l'interdiction faite par le Tribunal de divulguer l'identité du témoin ADE, son nom a été révélé au public, par la négligence, soit du Procureur, soit du témoin lui-même, soit de sa famille, soit d'autres personnes.

[6] Defence Response to Prosecutor's Confidential Request to Allow Witness ADE to Give Testimony Via Videolink.
[7] Prosecutor's Reply to the Defence Response to the Prosecutor's Confidential Request to Allow Witness ADE to Give Testimony Via Videolink.
[8] Ordonnance portant calendrier – In Camera Hearing on Prosecutor's Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and His Family, (Chambre de première instance), 19 janvier 2006.
[9] Décision sur la requête du Procureur en prescription de mesures de protection des victimes et des témoins de crimes allégués dans l'acte d'accusation (Chambre de première instance), 25 février 2003.

3. L'ordonnance prescrivant des mesures de protection demeurera en vigueur, la Chambre n'étant pas convaincue que la Défense a démontré que la situation a évolué au point de justifier la révocation de ladite ordonnance.

C. Requête pour sanctions

4. Le Procureur fait valoir que la déclaration caviardée du témoin ADE a été communiquée à des parties et diffusée sur Internet en violation des mesures de protection ordonnées par la Chambre. Par ailleurs, la Défense a déposé sa Requête en communication comme document public le 6 décembre 2005 alors qu'elle aurait dû être déposée à titre confidentiel ou strictement confidentiel, étant donné que ses annexes contenaient des éléments d'information identifiant le témoin ADE.

5. De l'avis du Procureur, ces initiatives ne se justifiaient pas, elles n'ont servi qu'à révéler l'identité du témoin ADE au public. Le Procureur prévient en outre que ces actions risquent à la fois de compromettre les efforts qu'il a déployés pour obtenir que vienne déposer le témoin ADE et de dissuader les témoins potentiels de coopérer, car elles créent l'impression que le Tribunal est incapable de protéger les témoins ou les victimes.

6. Le Procureur demande à la Chambre d'enjoindre à la Défense d'attribuer à sa Requête en communication le statut de « document confidentiel » et non plus celui de « document public », de dire que l'ajout injustifié des photographies à cette requête constitue un abus de procédure, d'ordonner le non-paiement des honoraires relatifs aux trente et une pages d'annexes et d'avertir le conseil de la Défense que des actes similaires pourraient à l'avenir entraîner les sanctions prévues à l'article 46 du Règlement.

7. En réponse, la Défense soutient que la Requête pour sanctions du Procureur devrait être rejetée, celui-ci n'ayant pas établi que le conseil de la Défense était responsable de la divulgation des informations relatives au témoin ADE et le conseil n'ayant pas commis d'erreur pouvant justifier des sanctions. La Défense précise qu'elle n'avait pas exigé de sanctions contre le Procureur, responsable, selon elle, de ne pas avoir correctement caviardé certaines des déclarations communiquées.

8. La Chambre déplore que la déclaration caviardée du témoin ADE ait été révélée à des parties en violation de l'ordonnance prescrivant des mesures de protection et que la Défense ait déposé sa Requête en communication comme document public alors que celle-ci aurait dû être déposée à titre confidentiel ou strictement confidentiel. Dans le but de limiter la diffusion de ces informations confidentielles, la Chambre invitera le Greffier à attribuer à cette écriture le statut de document confidentiel. Elle n'imposera pas de sanctions à l'encontre du conseil de la Défense, mais elle tient à rappeler aux deux parties qu'elles doivent faire preuve de la diligence voulue lorsqu'elles déposent des documents contenant des éléments d'information confidentiels.

D. Requête de la Défense en communication et requête fondée sur l'article 66 (C) du Règlement

9. La Défense demande à la Chambre d'ordonner la communication de tous les avantages dont a bénéficié le témoin ADE depuis 1995, de même que toutes les nouvelles informations fournies par celui-ci en novembre 2005.

10. La Défense fait valoir que le témoin ADE a bénéficié de nombreux avantages de la part du Procureur. Deux demandes de la Défense pour obtenir des informations à ce sujet sont restées sans réponse. Étant donné que ces avantages pourraient porter atteinte à la crédibilité des éléments de preuve à charge ainsi qu'il est dit à l'article 68 (A) du Règlement, la Défense demande la communication de tous les avantages et paiements dont a bénéficié le témoin ADE[10].

[10] *Le Procureur c. Édouard Karemera et consorts*, affaire N°ICTR-98-44-I, Décision sur la requête de la Défense en communication de moyens de preuve à décharge, 7 octobre 2003, par. 16.

11. En réponse, le Procureur se réfère aux arguments avancés dans sa Requête fondée sur l'article 66 (C) du Règlement, qu'il a déposée après la Requête en communication de la Défense et dans laquelle il demande à la Chambre de rejeter cette dernière requête. Il y demande aussi à la Chambre de le dispenser, en vertu des articles 66 (C) et 68 (D) du Règlement, de communiquer à la Défense certaines informations relatives aux paiements et avantages qu'il reconnaît avoir accordés au témoin ADE et à sa famille. De l'avis du Procureur, ces informations ne sont pas visées par l'article 68 du Règlement car elles ne sont pas de nature à disculper l'accusé. Tout en admettant que les informations ou les pièces relatives aux avantages consentis ou promesses faites aux témoins ou aux victimes au-delà de ce qui est raisonnablement nécessaire devraient être communiquées en ce qu'ils pourraient porter atteinte à la crédibilité des témoins, le Procureur invoque la jurisprudence pour soutenir que certains défraiements, comme pour les déplacements liés aux enquêtes et aux auditions, ne tombent pas sous le coup de l'article 68[11]. Selon le Procureur, tous les paiements et avantages consentis au témoin étaient raisonnablement nécessaires : d'abord pour pouvoir l'interroger à temps plein pendant une longue période et compenser la perte de revenus dont il avait pourtant besoin pour faire vivre sa famille. Il fallait ensuite procurer à la famille les ressources nécessaires pour permettre sa réinstallation, pour assurer sa sécurité et pour contribuer à sa réinsertion sociale dans un nouveau pays. Enfin, il fallait avancer au témoin ADE les fonds nécessaires pour passer les appels téléphoniques nécessaires à la poursuite des enquêtes. En bref, tous ces avantages et paiements lui ont été consentis ainsi qu'à sa famille afin de le replacer dans la situation qui aurait été la sienne s'il n'avait pas aidé le Procureur à s'acquitter de sa mission.

12. Toujours selon le Procureur, ADE est un témoin disposant d'informations privilégiées qui, du fait de sa coopération, assume un risque accru : celui d'être considéré comme traître et de s'exposer à des représailles. Il pourrait donc être amené à refuser de témoigner ou à cesser sa coopération avec le Bureau du Procureur.

13. Le Procureur soutient encore que, des informations ayant été communiquées irrégulièrement comme il l'a relevé dans sa Requête pour sanctions, il communique à la Défense des informations respectant les normes énoncées dans la décision *Karemera* relative aux témoins rémunérés : il a ainsi communiqué le texte d'une déclaration sous serment d'un enquêteur, où sont indiquées les indemnités de subsistance versées et les crédits d'appel avancés au témoin ADE. Il fait également observer que des fonds ont été engagés pour des billets aller simple en faveur de la famille du témoin, mais sans en indiquer les montants ni les dates. Le Procureur précise qu'il a aussi fourni le budget approuvé pour la réinstallation de la famille du témoin ADE, en conformité avec une autre décision rendue en l'affaire *Karemera*, où la Chambre avait indiqué qu'il n'était pas nécessaire de connaître les montants dépensés pour la réinstallation d'un témoin et de sa famille pour décider de la crédibilité de celui-ci[12]. Le Procureur craint également que leur lieu de réinstallation puisse être identifié par la révélation des montants engagés. Il affirme qu'il est prêt à remettre aux juges, en mains propres, le budget approuvé, dans sa version non caviardée si on le lui demande. Il s'engage en outre à fournir, à huis clos, conformément aux articles 66 (C) et 68 (D) du Règlement, tous les détails non communiqués à la Défense, si la Chambre le souhaite.

14. En réponse, la Défense rappelle les conditions énoncées à l'article 68 (D) du Règlement, qui ne sont pas remplies en l'espèce. En particulier, le Procureur n'a pas fourni à la Chambre, siégeant à huis clos, toutes les informations pertinentes, comme il aurait dû le faire. Par conséquent, la requête n'a pas de fondement en droit et devrait être rejetée.

15. Le Procureur réplique qu'il a effectué des recherches approfondies dans tous ses dossiers et qu'il a fourni à la Défense tous les documents en sa possession concernant les sommes versées au

[11] *Le Procureur c. Édouard Karemera et consorts*, affaire N°ICTR-98-44-PT, Decision on Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, 23 août 2005, par. 7 « Décision Karemera relative aux témoins rémunérés ».
[12] *Le Procureur c. Édouard Karemera et consorts*, affaire N°ICTR-98-44-PT, Décision relative à la requête de Joseph Nzirorera aux fins de solliciter la coopération d'un gouvernement, 19 avril 2005, par. 4 à 10.

témoin ADE. Il maintient qu'il n'existe pas d'autres décomptes ou de nouvelles informations et qu'il n'a pas en sa possession de nouveaux relevés d'appels téléphoniques passés par le témoin ADE, la seule exception étant l'achat de cartes téléphoniques dont les détails ne seront fournis qu'aux seuls juges.

16. Le Procureur prévient que la mort récente de Juvénal Uwilingiyimana, ancien haut cadre rwandais avec qui des entretiens avaient débuté, montre à suffisance les risques qu'encourent les témoins disposant d'informations privilégiées qui coopèrent avec le Tribunal. Le Procureur affirme que des membres de la famille du témoin ADE ont été contactés en vue de décourager celui-ci de venir témoigner.

17. La Défense rétorque que les informations communiquées dans le document intitulé « *Prosecutor's Supplemental Information* »[13], déposé à titre confidentiel et *inter partes* le 15 décembre 2005, sont incomplètes. Elle fournit des exemples du type d'informations complémentaires qu'elle cherche à obtenir du Procureur[14]. Elle précise qu'à son avis, les avantages énormes consentis au témoin ADE fournissent, de par eux-mêmes, une bonne incitation à mentir et qu'il est donc important de déterminer la totalité des paiements et avantages en jeu.

18. La Chambre rappelle qu'en application des articles 66 (C) et 68 (D) du Règlement, le Procureur peut être dispensé de l'obligation de communiquer des informations ou des pièces si une telle 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 ».

19. La Défense demande que lui soient communiquées deux principales catégories d'informations. En premier lieu, elle demande à connaître tous les paiements et avantages dont a bénéficié le témoin ADE depuis 1995. Deuxièmement, elle cherche à obtenir davantage de détails, notamment tous les documents et autres éléments d'information concernant la réinstallation de la famille du témoin, tous les relevés des appels téléphoniques effectués par le témoin, ainsi que d'autres renseignements.

20. La Chambre estime que les détails concernant les paiements et les avantages perçus devraient être communiqués, dans l'intérêt de la justice. Cependant, elle garde aussi à l'esprit que le témoin ADE est un proche des milieux du pouvoir et qu'il encourt de plus grands risques en acceptant de coopérer.

21. Le Procureur affirme qu'en communiquant le budget caviardé comme il l'a fait, il s'est conformé à une décision rendue en l'affaire *Karemera* citée plus haut[15]. Le Procureur a fourni à la Chambre, en audience à huis clos et sans débat contradictoire, un document complet et non caviardé du budget consacré au témoin ADE.

22. La Chambre tient à distinguer les circonstances de l'espèce de celles de l'affaire *Karemera*. Dans cette dernière affaire, le bénéficiaire ne recevait pas les paiements directement du Tribunal mais par le biais d'un programme de protection de témoins, géré par un État donné. En d'autres termes, le Tribunal prenait à sa charge les prestations mais celles-ci étaient versées et contrôlées par les autorités nationales.

23. Compte tenu de toutes les informations dont elle dispose, la Chambre considère que, dans l'intérêt de la justice et de la transparence et vu l'ampleur des décaissements, le montant total des paiements et des avantages devrait être communiqué à la Défense, même si « la valeur monétaire libellée, en quelque monnaie que ce soit, des dépenses effectuées par le Gouvernement intéressé,

[13] Prosecutor's Supplemental Information to the Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and His Family, déposé à titre confidentiel et inter partes le 15 décembre 2005.
[14] Requête pour la communication des éléments exculpatoires Re Témoin ADE et d'éléments visés par l'article 66 (Déclarations d'un témoin du Procureur), déposée le 6 décembre 2005, par. 12.
[15] *Le Procureur c. Édouard Karemera et consorts*, affaire N°ICTR-98-44-PT, Décision relative à la requête de Joseph Nzirorera aux fins de solliciter la coopération d'un gouvernement, 19 avril 2005, par. 9 et 10.

dépend du coût de la vie dans le pays en question, du taux de change et de divers autres facteurs économiques exogènes[16] ». Sans révéler le lieu où se trouve la famille du témoin ADE et sans indiquer le coût de chacun des services et des biens fournis ou tous autres détails qui pourraient compromettre les mesures de protection en vigueur, la Chambre a pu apprendre que le montant total des paiements et des avantages prévus au budget s'élève à deux cent mille dollars des États-Unis. En conséquence, le Procureur doit certifier ce montant, en prenant en considération les sommes déjà décaissées et les dépenses à venir. La Chambre souligne cependant que le Procureur ne doit vérifier et certifier que le montant total des dépenses déjà effectuées et à venir. Il ne s'agit pas de dresser l'inventaire des dépenses engagées en faveur du témoin.

24. La Chambre aborde maintenant les autres questions, notamment la communication de tous les documents, de tous les détails concernant la réinstallation de la famille du témoin ainsi que de tous les relevés des appels téléphoniques faits par ce dernier. La Chambre rappelle que la charge de la preuve incombe à la Défense, celle-ci étant la partie qui allègue une violation de l'article du Règlement[17]. Comme elle l'a indiqué au paragraphe 23 plus haut, la Chambre considère qu'il n'est pas nécessaire de communiquer à la Défense d'autres documents en rapport avec les paiements et les avantages dont a bénéficié le témoin.

E. Requête en vue d'une déposition par vidéoconférence

25. Le Procureur demande que la déposition du témoin ADE soit recueillie par vidéoconférence. La deuxième session du procès a débuté le 23 janvier 2006 et il est prévu que le témoin ADE soit appelé à la barre du 27 février au 3 mars 2006. Se fondant sur les articles 75 (A) et 75 (B) du Règlement, le Procureur soutient que les impératifs de sécurité commandent que la déposition du témoin ADE soit entendue par vidéoconférence.

26. Le Procureur invoque la jurisprudence du Tribunal en la matière[18] pour affirmer que les circonstances de l'espèce satisfont aux critères établis pour autoriser une déposition par vidéoconférence. Tout d'abord, celle-ci est suffisamment importante car le témoin ADE témoignera sur les cinq chefs de l'acte d'accusation. En deuxième lieu, cette mesure est dans l'intérêt de la justice étant donné que le témoin ADE est le seul qui soit en mesure de révéler des éléments de preuve à la fois sur la conspiration de l'*Akazu* et sur les agissements de l'accusé avant et après le 6 avril 1994. En troisième lieu, le Procureur indique que le témoin ne souhaite pas se rendre à Arusha par crainte pour sa sécurité, compte tenu de son appartenance au cercle fermé de l'*Akazu*. Des événements récents, notamment la publication sur Internet d'une de ses déclarations, le fait que Juvénal Uwilingiyimana ait été probablement assassiné et les menaces reçues par la famille du témoin ont exacerbé son sentiment de vulnérabilité. C'est pourquoi il a signé un accord avec le Procureur dans lequel il précise qu'il n'acceptera de déposer devant le Tribunal qu'à condition qu'il ne soit pas obligé de se rendre à Arusha. Enfin, le Procureur fait valoir que le droit de l'accusé à un procès équitable ne sera compromis en aucune manière si la demande est acceptée, car il s'engage à se conformer aux critères établis en matière de déposition par vidéoconférence[19].

27. La Défense oppose une différente interprétation du droit en la matière. Elle avance trois exigences essentielles pour qu'une déposition par vidéoconférence soit autorisée : l'importance de la déposition, l'incapacité ou le refus du témoin de se présenter à l'audience et la question de savoir si des raisons valables ont été fournies pour justifier cette incapacité ou ce refus. De plus, c'est à l'aune

[16] *Ibid*., par. 9.
[17] Décision *Karemera* relative aux témoins rémunérés, par. 7 et 8.
[18] Voir la Demande confidentielle du Procureur tendant à faire recueillir par liaison vidéo la déposition du témoin ADE, déposée le 21 décembre 2005, note en bas de page 2.
[19] Le Procureur se réfère aux critères établis dans *Le Procureur c. Duško Tadić*, affaire N°IT-94-1-T, 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 (« Décision *Tadić* relative au recueil de témoignages par vidéoconférence »), 25 juin 1996, par. 22, décision qui a été approuvée dans des affaires ultérieures, notamment dans *Le Procureur c. Delalić et consorts,* Décision relative à la requête aux fins de permettre aux témoins K, et M de témoigner par voie de vidéoconférence, 28 mai 1997.

de ces mêmes critères que doit s'apprécier la question de savoir si une telle autorisation serait dans l'intérêt de la justice.

28. Cela étant, la Défense réplique à chacun des quatre critères énoncés par le Procureur. Premièrement, la déposition du témoin ADE sera sans importance étant donné qu'il s'agit principalement de témoignages de seconde main qui seront pour la plupart inadmissibles. Deuxièmement, en ce qui concerne le refus du témoin de se rendre à Arusha, la Défense soutient que l'accord conclu entre lui et le Procureur n'est pas valable dans la mesure où celui-ci usurpe le rôle de la Chambre lorsqu'il prétend garantir au témoin que sa déposition sera entendue par vidéoconférence. Selon la Défense, cela risque de discréditer l'administration de la justice. La Défense nie également que la déposition du témoin ADE ait été diffusée sur Internet. Elle relève par ailleurs qu'aucun des témoins à charge s'étant rendu à Arusha n'a été inquiété. Troisièmement, elle fait valoir que le droit de confronter directement l'accusateur est un principe fondamental en droit et que l'accusé subira un préjudice considérable s'il n'a pas l'occasion de confronter le témoin en audience publique. Enfin, la Défense considère l'intérêt de la justice comme indissociable de la nécessité pour les Rwandais de panser leurs plaies, ce qui exige un débat public où les témoins sont présents en personne.

29. La Défense conteste énergiquement l'interprétation que fait le Procureur des circonstances du décès de Juvénal Uwilingiyimana, elle laisse entendre que ce témoin potentiel n'a pas été assassiné pour l'empêcher de témoigner, mais qu'il pourrait s'agir d'un suicide. Toujours selon la Défense, Juvénal Uwilingiyimana a subi des pressions de la part du Procureur en vue de l'amener à mentir et elle accuse en outre le Procureur d'avoir fabriqué des preuves.

30. En réponse, le Procureur soutient que la mort de Juvénal Uwilingiyimana tend à confirmer le bien-fondé de sa requête en faisant ressortir les risques que courent les personnes disposant d'informations privilégiées qui acceptent de témoigner. Il ajoute que la vidéoconférence n'empêchera nullement l'accusé de confronter l'accusateur, seul changera le moyen de communication utilisé.

31. La norme applicable pour autoriser les dépositions par vidéoconférence a été examinée de manière approfondie dans la décision intitulée *Decision on Prosecution Request for Testimony of Witness BT Via Video-Link*[20]. Il y a lieu d'ordonner le recours à la vidéoconférence lorsque celle-ci est dans l'intérêt de la justice comme l'a précisé la jurisprudence du Tribunal. La Chambre tiendra compte en particulier de l'importance de la déposition, de l'incapacité ou du refus du témoin de se présenter à l'audience et de la validité des motifs invoqués pour justifier cette incapacité ou ce refus[21].

32. La Chambre est consciente de l'importance que pourrait revêtir la déposition du témoin ADE pour la cause du Procureur. Elle est également convaincue par les arguments de celui-ci selon lesquels le témoin encourrait un risque accru s'il devait se rendre à Arusha pour y être entendu. Cependant, elle garde aussi à l'esprit que la Défense tient à confronter ce témoin en personne et qu'elle a parfaitement le droit de confronter l'accusateur. Pour sa part, la Chambre se préoccupe de savoir s'il est possible ou non d'évaluer réellement et correctement la déposition et l'attitude d'un témoin entendu par voie de

[20] *Le Procureur c. Théoneste Bagosora et consorts*, Decision on Prosecution Request for Testimony of Witness BT Via Video-Link (Chambre de première instance), (« Décision Bagosora relative au recueil d'un témoignage par vidéoconférence »), 8 octobre 2004.

[21] Voir aussi *Le Procureur c. Aloys Simba*, Décision relative à la requête de la Défense tendant à faire recueillir la déposition du témoin FMPI (Chambre de première instance), 9 février 2005 ; Décision autorisant les dépositions des témoins IMG, ISG et BJK1 par vidéoconférence (Chambre de première instance), 4 février 2004, par. 4 : *Le Procureur c. Théoneste Bagosora et consorts*, *Decision on Testimony by Video-Conference*, (Chambre de première instance), 20 décembre 2004. Le témoignage par vidéoconférence peut aussi être autorisé comme mesure de protection de témoins : voir *Le Procureur c. Théoneste Bagosora et consorts,* Décision relative à la requête du Procureur en prescription de mesures spéciales de protection des témoins A et BY (Chambre de première instance), 3 octobre 2003 ; Décision sur la requête du Procureur aux fins d'obtenir des mesures exceptionnelles de protection du témoin A en vertu des articles 66 (C), 69 (A) et 75 du Règlement de procédure et de preuve (Chambre de première instance), 5 juin 2002 ; *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, (Chambre de première instance), 14 septembre 2001.

vidéoconférence. Compte tenu de l'importance que revêt la déposition de ce témoin pour la cause du Procureur, la Chambre tient à l'entendre en personne et sans interruption.

33. Elle souligne que l'article 90 (A) du Règlement qui dit qu'« [e]n principe, les Chambres entendent les témoins en personne » énonce un principe général. Ainsi qu'il a été indiqué dans la Décision *Tadić* relative au recueil de témoignages par vidéoconférence, « …un témoignage présenté par voie de vidéoconférence… est moins probant qu'un témoignage présenté dans le prétoire. Les témoignages par voie de vidéoconférence doivent, par conséquent, être évités autant que possible »[22]. La Chambre fait également observer, ainsi qu'il a été dit dans la Décision *Bagosora* relative au recueil d'un témoignage par vidéoconférence que « les témoignages recueillis par des moyens électroniques risquaient d'être moins probants que ceux qui sont présentés dans le prétoire si la qualité de la transmission gêne la Chambre dans son appréciation de la déposition du témoin[23] » [traduction]. Étant donné que le souci de la Chambre est d'éviter qu'une transmission de mauvaise qualité ne vienne perturber la déposition d'un témoin aussi important, elle estime qu'il est de son intérêt de bénéficier de la présence physique du témoin au procès.

34. C'est pourquoi la Chambre conclut qu'il convient d'ordonner dans l'intérêt de la justice que toutes les dispositions utiles soient prises pour que le témoin ADE soit entendu à La Haye, en présence de toutes les parties, à la date que fixera le Tribunal en application de l'article 4 du Règlement.

F. Requête demandant à la Chambre de statuer sur les requêtes pendantes

35. Dans cette requête, la Défense demande à la Chambre de statuer sur toutes les requêtes pendantes devant elle. Point n'est besoin de l'examiner puisque la Chambre a statué sur toutes les requêtes concernant le témoin ADE.

PAR CES MOTIFS, LA CHAMBRE

I. REJETTE la Requête en retrait des mesures de protection ;

II. REJETTE la requête pour sanctions et INVITE le Greffier à redonner à la Requête en communication de la Défense la classification « confidentiel » ;

III. FAIT DROIT en partie à la Requête en communication de la Défense et INVITE le Procureur à communiquer à la Défense le montant total certifié de tous les paiements et avantages visés plus haut ;

IV. REJETTE la Requête en vue d'une déposition par vidéoconférence présentée par le Procureur ;

V. INVITE le Président du Tribunal, en application de l'article 4 du Règlement, à autoriser la Chambre à siéger à La Haye, à la date qui sera fixée en consultation avec les parties et le Greffe, pour entendre la déposition du témoin ADE.

Fait à Arusha, le 31 janvier 2006.

[Signé] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

[22] Décision *Tadić* relative au recueil de témoignages par vidéoconférence, par. 21.
[23] Décision *Bagosora* relative au recueil d'un témoignage par vidéoconférence, par. 15.

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Décision relative à la requête du Procureur tendant à ce que le témoin BPP dépose par liaison vidéo
27 mars 2006 (ICTR-2001-73-T)

(Original : Anglais)

Chambre de première instance III

Juges : Inés Mónica Weinberg de Roca, Président ; Khalida Rachid Khan ; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Témoignage d'un témoin par vidéoconférence – Belgique – Contre-requête, Suspension de la procédure, Contre-requête rejetée – Témoignage par vidéoconférence, Mesure exceptionnelle – Bases pour une déposition par liaison vidéo comme mesure de protection – Importance du témoignage, de l'incapacité ou du refus du témoin de se présenter à la barre et du juste équilibre entre l'intérêt de la justice et les droits de l'accusé – Droits de l'accusé – Coopération des autorités belges – Admission d'une déclaration écrite d'un témoin – Requête acceptée en partie

Instruments internationaux cités :

Conseil de sécurité, Résolution 955 (1994), 8 novembre 1994, S/RES/955 (1994) ; Règlement de procédure et de preuve, art. 58, 73 (A), 89 (C) et 92 bis ; Statut, art. 28 (2)

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. Thénoneste Bagosora et consorts, Décision relative à la requête du Procureur en prescription de mesures spéciales de protection des témoins A et BY, 3 octobre 2003 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Aloys Simba, Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link, 4 février 2004 (ICTR-2001-76) ; Chambre de première instance, Le Procureur c. 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 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. Protais Zigiranyirazo, Ordonnance portant calendrier – In Camera Hearing on Prosecutor's Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and His Family, 19 janvier 2006 (ICTR-2001-73) ; Chambre de première instance, Le Procureur c. Protais Zigiranyirazo, Decision on the Prosecutor's Motion to Vary his Witness List, 19 janvier 2006 (ICTR-2001-73)

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. Zejnil Delalić et al., http://www.icty.org/x/cases/mucic/tdec/fr/70528vl2.htm*Décision*

Relative à la Requête aux Fins de Permettre aux Témoins K, L et M de Témoigner par Voie de Vidéoconférence, 28 mai 1997 (IT-96-21)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance III, composée des juges Inés Mónica Weinberg de Roca, Présidente de Chambre, Khalida Rachid Khan et Lee Gacuiga Muthoga (la « Chambre »),

SAISI de la requête du Procureur intitulée Prosecutor's Urgent Video Link and other Reliefs Motion for Witness BPP (made under Rules 58, 73, 75 and 92 bis of the Rules of Evidence and Procedure and Article 28 of the Statute of the Tribunal), déposée le 15 mars 2006,

VU les actes de procédure suivants : la réponse et la contre-requête de la Défense intitulées Interlocutory Defense Response to Prosecutor's Public Urgent Video Link and other Relief Motion for Witness BPP - Interlocutory Motion to Suspend the Prosecution Motion Temporarily, déposées le 20 mars 2006 ; la réplique du Procureur, intitulée Prosecutor's Response to Defence Interlocutory Motion, déposée le même jour ; la réponse et la contre-requête modifiées de la Défense, intitulées Amended Interlocutory Defense Response to Prosecutor's Public Urgent Video Link and other Relief Motion for Witness BPP - Interlocutory Motion to Suspend the Prosecution Motion Temporarily, déposées le 21 mars 2006 ; la réplique du Procureur intitulée Prosecutor's Reply to Defence Amended Interlocutory Motion, déposée le 22 mars 2006,

RAPPELANT la décision de la Chambre autorisant le Procureur à retirer certains témoins de sa liste et à y ajouter le témoin BPP[1],

STATUANT sur la base des conclusions écrites des parties comme l'y autorise l'article 73 (A) du Règlement.

Introduction

1. Le procès de Protais Zigiranyirazo s'est ouvert le 3 octobre 2005. Au cours des deux premières sessions consacrées à la présentation des moyens à charge[2], la Chambre a entendu 19 témoins à charge, dont un témoin expert. La troisième et dernière session du procès consacrée aux moyens du Procureur doit s'ouvrir le 5 juin 2006[3]. Le 19 janvier 2006, la Chambre a accordé au Procureur l'autorisation de modifier la liste de ses témoins en y ajoutant le témoin BPP et en en retirant certains autres. Le Procureur demande à présent à la Chambre d'autoriser le recueil de la déposition du témoin BPP par liaison vidéo depuis la Belgique et de solliciter la coopération des autorités belges à l'effet de contraindre le témoin à déposer selon cette formule. A titre subsidiaire, le Procureur demande à la Chambre que la déclaration écrite du témoin BPP soit versée au dossier au lieu de son témoignage oral, comme le prévoit l'article 92 *bis* du Règlement.

2. En réponse, la Défense sollicite une suspension de la procédure pour ce qui concerne la requête du Procureur, au motif que celui-ci n'a pas communiqué certaines annexes confidentielles dont elle a besoin pour répondre pleinement à la requête. Le Procureur réplique que les annexes visées ont été envoyées à la Défense par télécopie et il joint la preuve de notification. Accusant ensuite réception des annexes, mais maintenant que le refus du témoin BPP de comparaître à Arusha n'a pas été établi par le Procureur, la Défense réitère sa contre-requête en suspension de la procédure jusqu'à ce que le Procureur fournisse les éléments qu'elle réclame.

[1] Chambre de première instance, Decision on the Prosecutor's Motion to Vary his Witness List, 19 janvier 2006
[2] La première session a débuté le 3 octobre 2005 et s'est terminée le 20 octobre 2005, la seconde s'est tenue du 23 janvier au 7 mars 2006.
[3] Compte rendu de l'audience à huis clos du 7 mars 2006, p. 14.

3. La Chambre procédera à l'examen de la contre-requête de la Défense avant de passer à celui de la requête du Procureur.

A. Contre-requête aux fins de suspension de la procédure

4. La Défense attend du Procureur la preuve que BPP refuse de comparaître à Arusha. Elle demande également que lui soit communiqué le procès-verbal auquel le Procureur a fait référence à l'audience à huis clos du 7 mars 2006. Dans sa réplique, le Procureur précise que le procès-verbal en question n'est autre que le *« pro justitia »* daté du 17 février 2006, lequel a déjà été communiqué à la Défense.

5. La Chambre rappelle que, compte tenu des règles déontologiques auxquelles ils sont tenus, les conseils qui comparaissent devant elle sont réputés agir de bonne foi et présenter véridiquement les faits. La Chambre rappelle également que, dans sa déclaration du 25 novembre 2005, BPP a indiqué qu'elle n'était pas disposée à déposer à Arusha. Le Procureur dit avoir tenté en vain d'obtenir de celle-ci qu'elle vienne à la barre. Le témoin craint pour sa sécurité après la mort récente d'un témoin à charge en Belgique. Dans ces circonstances, la Chambre retient les circonstances présentées par le Procureur, sauf à modifier sa position en cas de preuve contraire. La contre-requête ne saurait donc être accueillie. La Chambre examine à présent les mesures alternatives sollicitées par le Procureur.

B. Déposition par liaison vidéo

6. S'appuyant sur l'article 75 (A) du Règlement, le Procureur demande, à titre de mesure exceptionnelle, que BPP dépose par liaison vidéo. Selon lui, elle devrait déclarer qu'au petit matin du 7 avril 1994, elle se trouvait dans la résidence présidentielle à Kanombe en même temps que l'accusé.

7. Le Procureur affirme par ailleurs que BPP déposera depuis la Belgique, par liaison vidéo, si les autorités belges lui en donnent l'ordre. Il fait valoir qu'en application de l'article 28 (2) du Statut et de l'article 58 du Règlement, considérés à la lumière de la résolution 955 (1994) du Conseil de sécurité de l'ONU et de la législation belge, le Tribunal est habilité, pour obtenir des témoignages et des éléments de preuve, à solliciter l'assistance du Gouvernement belge et à lui demander, en l'occurrence, de délivrer à l'intéressée une injonction à comparaître aux fins de ladite déposition.

8. La Défense n'a pas répondu à cet argument, déclarant ne pas disposer d'informations quant au refus du témoin de se présenter devant la Chambre à Arusha.

9. Conformément à la jurisprudence établie du Tribunal pénal international pour l'ex-Yougoslavie et du Tribunal de céans, la déposition par liaison vidéo est une mesure de protection qui est prescrite compte tenu de l'importance du témoignage prévu, de l'incapacité ou du refus du témoin de se présenter à la barre et du juste équilibre à réaliser entre l'intérêt de la justice et les droits de l'accusé. Dans une décision rendue en la matière le 25 juin 1996, la Chambre de première instance saisie de l'affaire *Tadić* a rappelé la règle générale selon laquelle le témoin devait comparaître en personne, la déposition par liaison vidéo ne se justifiant que dans des circonstances exceptionnelles, lorsque certains critères étaient remplis[4]. Une autre Chambre de première instance, statuant le 28 mai 1997 en l'affaire *Delalić et consorts,* a réitéré la règle en y ajoutant la nécessité de tenir compte de l'intérêt de la justice et des droits de l'accusé[5]. Le Tribunal a suivi ces précédents dans plusieurs affaires[6].

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[4] *Le Procureur c. Duško Tadić,* affaire N°IT-94-1-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. « 19. On ne saurait trop souligner que le principe est qu'un témoin doit être physiquement présent au siège du Tribunal. Par conséquent, la Chambre de première instance n'autorisera le témoignage par voie de vidéoconférence que si certains critères sont observés, à savoir la démonstration que le témoignage d'un témoin est suffisamment important pour que son absence entache les poursuites d'iniquité et que le témoin n'est pas en mesure ou refuse de venir au Tribunal international ».

[5] *Le Procureur c. Delalić et consorts*, Chambre de première instance, Décision relative à la requête aux fins de permettre aux témoins K. L et M de témoigner par voie de vidéoconférence, 28 mai 1997. « 15. Nous devons souligner ici de nouveau

10. En l'espèce, le témoignage visé est important puisqu'il porte sur la présence alléguée de l'accusé à la résidence présidentielle de Kanombe, c'est-à-dire sur un fait directement lié aux allégations portées dans l'acte d'accusation. Le Procureur a également fait état du refus du témoin de comparaître à Arusha.

11. Comme il est question de la présence de l'accusé à la résidence présidentielle de Kanombe et qu'il est possible que l'accusé plaide l'alibi, l'intérêt de la justice commande que le témoin soit entendu à ce sujet. La Chambre est d'avis que la déposition sollicitée ne portera pas atteinte aux droits de l'accusé puisque celui-ci aura la possibilité de contre-examiner le témoin et de contester les éléments de preuve qu'il présentera.

12. Pour ces raisons, la Chambre conclut que la requête tendant à ce que BPP dépose par liaison vidéo doit être accueillie. A cet égard, elle sollicitera la coopération des autorités belges pour ce qui est d'assurer la comparution du témoin et de fournir une assistance technique aux fins de sa déposition depuis la Belgique.

C. Admission de la déclaration écrite de BPP en application de l'article 92 *bis* du Règlement

13. Le Procureur, se fondant sur la décision rendue en la matière par la Chambre d'appel en l'affaire *Galić,* fait valoir que la déclaration écrite de BPP répond aux conditions suivantes: (i) elle ne tend pas à établir les actes et le comportement reprochés à l'accusé dans l'acte d'accusation, (ii) elle tombe sous le coup de l'article 89 (C) puisqu'elle se rapporte aux crimes imputés dans l'acte d'accusation, et (iii) elle fournit des éléments de preuve qui portent sur les actes et le comportement

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l'importance de la règle générale exigeant la présence du témoin au prétoire, destinée à garantir la confrontation entre témoin et accusé et à permettre aux Juges d'observer l'attitude du témoin durant son audition. Cependant, chacun sait que les vidéoconférences ne permettent pas seulement aux Chambres d'entendre les personnes se trouvant dans l'impossibilité de venir témoigner devant la Chambre de première instance à La Haye ou ne le souhaitant pas; ce moyen permet aussi aux juges d'observer l'attitude du témoin à la barre. De plus, point important, il convient de souligner que le Conseil de la Défense peut ainsi mener son contre-interrogatoire du témoin et que les Juges ont tout loisir de poser des questions pour clarifier les faits sur lesquels porte le témoignage. En fait, une vidéoconférence n'est que l'extension de la Chambre de première instance au lieu où se trouve le témoin. Donc, ce moyen ne prive pas l'accusé du droit de confronter le témoin, et il ne perd rien de substantiel du fait de l'absence physique de celui-ci. En fin de compte, on ne saurait soutenir que les dépositions par vidéoconférence lèsent le droit de l'accusé de confronter le témoin. L'article 21 (4) (e) n'est enfreint d'aucune manière ». 17. Le recueil d'un témoignage par vidéoconférence constitue une exception à la règle générale. La Chambre de première instance aura donc soin d'éviter tout recours abusif à cet expédient. La Chambre de première instance (composée de son Président, Mme le Juge McDonald, et des juges Stephen et Vohrah) a déclaré, dans la Décision Tadić, que le témoignage par liaison vidéo ne sera autorisé que si (a) ladite déposition est suffisamment importante pour que son absence entache les poursuites d'iniquité, et (b) le témoin n'est pas en mesure ou refuse, pour de bonnes raisons, de venir au Tribunal international à La Haye (paragraphe 19). La présente Chambre retient les conclusions de cette Décision et rappelle que, étant donné les circonstances particulières entourant ce Tribunal international, « il est dans l'intérêt de la justice que la Chambre de première instance fasse preuve de souplesse et s'efforce de fournir aux parties la possibilité de présenter des témoignages par liaison vidéo » (Décision Tadić, paragraphe 18). La Chambre de première instance estime opportune d'ajouter une troisième condition, à savoir : (c) le droit de l'accusé de confronter le témoin ne sera pas lésé de ce fait ».

[6] Voir *Le Procureur c. 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 (par. 35. « Il ressort de précédents jurisprudentiels auxquels la Chambre adhère, que certaines conditions doivent être remplies pour que la déposition par vidéoconférence puisse être utilisée en l'espèce. La Chambre est d'avis que le témoignage recherché est tellement important qu'il serait dans l'intérêt de la justice de faire droit à la demande tendant à utiliser un système de vidéoconférence et qu'il ne sera nullement porté atteinte au droit de l'Accusé d'affronter le témoin. La question cruciale à laquelle on doit répondre consiste à savoir si le témoin acceptera ou non de venir devant le Tribunal ». Voir aussi *Le Procureur c. Bagosora et consorts,* affaire N°ICTR-98-42, Chambre de première instance, Décision sur la requête du Procureur aux fins d'obtenir des mesures exceptionnelles de protection du témoin A en vertu des articles 66 (C), 69 (A) et 75 du Règlement de procédure et de preuve, 5 juin 2002 ; Décision relative à la requête du Procureur en prescription de mesures spéciales de protection des témoins A et BY, 3 octobre 2003 ; Decision on Prosecution Request for Testimony of Witness BT Via Video-Link, 8 octobre 2004 ; Decision on Testimony by Video-Conference, 20 décembre 2004 ; *Le Procureur c. Simba,* Chambre de première instance, Décision relative à la requête de la Défense tendant à faire recueillir la déposition du témoin FMP1, 9 février 2005 ; Décision autorisant les dépositions des témoins ZMG, ISG et BJKl par vidéoconférence, 4 février 2004.

d'autres personnes à un moment précis et sont utiles à l'établissement de l'état d'esprit de l'accusé. Le Procureur affirme que la déclaration écrite permettrait également de contrer l'alibi annoncé par l'accusé relativement aux faits qui se sont produits à la résidence présidentielle. Le Procureur fait également valoir que l'admission de la déclaration permettrait d'économiser le temps et les ressources du Tribunal, surtout si le témoin n'est pas tenu de comparaître aux fins de son contre-interrogatoire ; et de plus, elle épargnerait au témoin les perturbations propres à un témoignage oral.

14. La Défense s'oppose à l'admission de la déclaration de BPP au motif qu'elle porte directement sur les actes de l'accusé.

15. Dès lors qu'elle a décidé d'autoriser BPP à déposer par liaison vidéo, la Chambre estime ne pas devoir délibérer de l'opportunité d'admettre la déclaration écrite de ce témoin.

PAR CES MOTIFS.

I. REJETTE la contre-requête en suspension de la procédure ;

II. FAIT DROIT à la requête tendant à ce que BPP dépose par liaison vidéo depuis la Belgique ;

III. SOLLICITE la coopération des autorités belges aux fins de la comparution de BPP par liaison vidéo depuis la Belgique ;

IV. INVITE le Greffier (i) à communiquer la présente décision aux autorités belges, (ii) à coopérer avec lesdites autorités en vue de la mise en œuvre de la mesure prescrite, compte tenu du calendrier de la prochaine et dernière session du procès consacrée à la présentation des moyens à charge, et (iii) à prendre les dispositions nécessaires pour que la déposition par liaison vidéo puisse avoir lieu à un moment opportun au cours de la prochaine session du procès.

Arusha, le 27 mars 2006.

[Signé] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

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Décision relative à la requête aux fins de la tenue d'une session hors du siège du Tribunal
12 mai 2006 (ICTR-2001-73-T)

(Original: Anglais)

Cabinet du Président

Judge : Erik Møse, Président

Protais Zigiranyirazo – Tenue d'une session hors du siège du Tribunal, Audition d'un témoin, Vidéoconférence – Autorisation du Président dans l'intérêt de la justice – Risques exposés si le témoin témoignait à Arusha, Importance du témoin – Fonds suffisants – Demande exceptionnellement acceptée – Difficultés d'envisager une opération similaire, Contraintes budgétaires – Requête acceptée

Instrument international cité :

Règlement de procédure et de preuve, art. 33 (B)

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. 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, Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJKl by Video-Link, 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, Decision on Ntabakuze Motion to Allow Witness DK52 to Give Testimony by Video-Conference, 22 février 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Tharcisse Muvunyi, Decision on Decision on Prosecutor's extremely urgent Motion Pursuant to TC II Directive of 23 May 2005 for Preliminary measures to Facilitate the use of Closed Video-link Facilities, 20 juin 2005 (ICTR-2000-55A) ; Chambre de première instance, Le Procureur c. Protais Zigiranyirazo, Décision relative aux requêtes déposées par la Défense et par le Procureur concernant le témoin ADE (articles 46, 66, 68, 73 et 75 du Règlement de procédure et de preuve), 31 janvier 2006 (ICTR-2001-73) ; Chambre de première instance, Le Procureur c. Edouard Karemera et consorts, *Decision on Prosecutor's Confidential Motion for Special Protective Measures for Witness ADE, 3 mai 2006 (ICTR-98-44)*

LE PRESIDENT DU TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA,

SAISI DE la requête de la Chambre de première instance III, dans sa décision relative aux requêtes de la Défense et du Procureur concernant le témoin ADE, en date du 31 janvier 2006, tendant à ce qu'il autorise la Chambre à siéger à La Haye pour recueillir la déposition dudit témoin,

CONSIDÉRANT les observations déposées par le Greffier en vertu de l'article 33 (B) du Règlement de procédure et de preuve (le « Règlement »), le 17 février 2006 ainsi que le mémorandum de la Chambre du 21 février 2006,

CONSIDÉRANT les observations supplémentaires produites par le Greffier en vertu de l'article 33 (B) du Règlement, le 24 avril 2006,

DECIDE DE CE QUI SUIT :

Introduction

1. Le 31 janvier 2006, la Chambre de première instance a rejeté la requête du Procureur tendant à autoriser le témoin ADE à déposer par voie de vidéoconférence, estimant que l'intérêt de la justice commandait plutôt de prendre toutes dispositions nécessaires pour entendre le témoin à La Haye en présence de toutes les parties. La Chambre a par conséquent en application de l'article 4 du Règlement, demandé au Président du Tribunal de l'autoriser à siéger à La Haye à cette fin, à une date à arrêter en consultation avec les parties et le Greffe[1]

[1] Affaire *Zigiranyirazo,* Décision relative aux requêtes de la Défense et du Procureur concernant le témoin ADE, 31 janvier 2006 (Chambre de première instance) en particulier le par. 34.

2. Le 17 février 2006, le Greffier du TPIR a, dans ses observations au Président du Tribunal, indiqué que le Greffier du Tribunal pénal international pour l'Ex-Yougoslavie («TPIY») avait fait savoir que le TPIY ne serait pas en mesure de donner suite à la demande de la Chambre de première instance du TPIR du fait de l'indisponibilité d'une salle d'audience. Le Greffier du TPIR a aussi fait valoir que le coût estimatif initial d'une audience serait prohibitif et obérerait les finances du TPIR.

3. Par la suite, le Greffier du TPIR saisira son homologue de la Cour pénale internationale (« CPI »), pour qu'il mette une salle d'audience de la CPI et d'autres moyens connexes à la disposition de la Chambre. Le Greffier de la CPI acceptera de mettre à la disposition du TPIR une salle d'audience et des moyens de détention moyennant remboursement pour une période de cinq jours, soit entre le 5 et le 9 juin 2006 aux fins de l'audition du témoin ADE. Dans ses observations du 24 avril 2006, le Greffier du TPIR a estimé que le coût total que l'opération occasionnerait au TPIR serait de l'ordre de 80 000 à 120 000 dollars des Etats-Unis d'Amérique, indiquant qu'il avait entrepris de dégager les ressources budgétaires nécessaires à cette fin.

Délibérations

4. Aux termes de l'article 4 du Règlement 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.

5. La Chambre s'est prévalu de l'article 4 du Règlement parce qu'elle doutait de l'adéquation et de la qualité de la déposition par voie de vidéoconférence et aussi parce qu'elle estimait que ce type de déposition était incompatible avec le droit de l'accusé à confronter son accusateur[2]. Il est vrai que, les précédentes dépositions par vidéoconférence étaient refondées comme moins probantes que le témoignage fait dans le prétoire[3]. Plus récemment cependant, les Chambres ont, dans plusieurs décisions, autorisé notamment plusieurs témoins importants et sensibles[4] à déposer par voie de vidéoconférence. L'expérience a montré que la transmission électronique peut fournir aux juges et aux parties qui sont dans le prétoire une image très claire du témoin ainsi qu'une transmission sonore de sa déposition de très bonne qualité et que l'aptitude de la Chambre à statuer sur la crédibilité du témoin ne l'en pas trouvée entamée[5]. Le témoignage par voie de vidéoconférence est donc un outil important, nécessaire et fiable pour le Tribunal.

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[2] Voir par exemple la Décision par. 32 et 33.

[3] Voir par exemple *Le Procureur c. Tadić*, 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. 21 («un témoignage présenté par voie de vidéoconférence ... est moins probant qu'un témoignage présenté dans le prétoire. ») Voir par la suite, affaire *Bagosora*, *Decision on Prosecution Request for Testimony of Witness BT Via Video-Link* (Chambre de première instance), 8 octobre 2004, par. 15 : «Une déposition effectuée par voie de vidéoconférence risque d'être moins probante que celle recueillie dans le prétoire si la qualité de la transmission nuit à l'évaluation du témoin par la Chambre » [traduction] (non souligné dans l'original).

[4] Voir notamment le *Procureur c. Simba*, Décision autorisant les dépositions des témoins IMG, ISG et BK1 par vidéoconférence (Chambre de première instance), 4 février 2005 ; *ibid*., Décision relative à la requête de la Défense tendant à faire recueillir la déposition du témoin FMPl (Chambre de première instance), 9 février 2005 (autorisant la déposition par vidéoconférence) ; *Le Procureur c. Bagosora et consorts*, *Decision on Prosecution Request for Testimony of Wihess BT via Video-Link,* 8 octobre 2004, par. 7 ; *ibid*., *Decision on Testimony by Video-Conference* (Chambre de première instance), 20 décembre 2004 ; *Ibid*., Decision on Ntabakuze Motion ta Allow Witness DK52 to Give Testimony by Video-Conference (Chambre de première instance), 22 février 2005 ; *Le Procureur c. Muvunyi, Decision on Prosecutor's Extremely Urgent Motion Pursuant to Trial Chamber II Directive of 23 May 2005 for Preliminary Measures to Facilitate the Use of Closed Video-Link Facilities* (Chambre de première instance), 20 juin 2005, par. 17.

[5] 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, par. 35 (prenant note du fait que lorsque la solution de la déposition par voie de vidéoconférence est adoptée, cela n'empêche nullement l'accusé de confronter l'accusateur) et le *Procureur c. Karemera et consorts*, *Decision on Prosecutor's Confidential Motion for Special Protective Measures for Witness ADE*, 3 mai 2006, par. 6 («la Chambre de céans est d'avis que le fait de recueillir la déposition du témoin ADE par voie de vidéoconférence n'entamera pas la faculté de la Chambre d'évaluer la crédibilité et ne portera pas atteinte aux droits de l'accusé tel que le prévoit l'article 20 (4) (e) du Statut du Tribunal ») [traduction]. Voir aussi, l'arrêt du TPIY relatif à l'appel interjeté par Dragan Papić contre la décision de procéder par déposition dans l'affaire *Kupreškić et consorts*, (opinion séparée du juge Hunt), 15 juillet 1999, par. 29 et 30 : « Il est manifestement de la plus haute

6. En l'espèce, la Chambre de première instance souligne les risques accrus auxquels le témoin ADE s'exposerait s'il venait témoigner à Arusha et l'importance que le Procureur attache à la déposition de ce témoin, qui expliquerait qu'elle veuille l'entendre en personne et sans interruption[6]. Au regard de cette appréciation de la Chambre de première instance et des conclusions du Greffier selon lesquelles des fonds suffisants sont disponibles à ce stade, le Président du Tribunal fait exceptionnellement droit à la requête formée par la Chambre de première instance, en application de l'article 4 du Règlement. Le Greffier a cependant fait observer qu'il s'agit là de dépenses additionnelles imprévues et de nature à gêner dans le courant de l'année des activités déjà budgétisées du Tribunal, concluant qu'il serait difficile d'envisager une autre opération de cette nature du fait des contraintes budgétaires actuelles[7]. Le Président invite donc la Chambre à poursuivre ses consultations avec le Greffe afin de réduire autant que possible les dépenses occasionnées par la présente autorisation[8].

PAR CES MOTIFS, LE PRESIDENT

FAIT DROIT à la requête de la Chambre.

Arusha, le 12 mai 2006.

[Signé] : Erik Møse

importance que la Cour statuant sur ces faits ait la possibilité d'observer le comportement des témoins et la façon dont ils répondent aux différentes questions qui leur sont posées lors du contre-interrogatoire, surtout lorsque ces témoins sont d'une importance capitale pour l'établissement des faits… Les salles d'audience du Tribunal sont ainsi faites que l'on voit mieux l'accusé et son comportement sur les écrans de télévision disposés dans la salle que depuis l'autre bout du prétoire ».

[6] Décision, par. 33.

[7] Observations additionnelles du Greffe du 24 avril 2006, par. 21.

[8] *Ibid*., voir par exemple annexe III qui propose des solutions de réduction des dépenses relativement aux frais de voyage, à l'indemnité journalière de séjour et à la location de bureaux équipés.

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Décision relative à la requête du Procureur tendant à faire exclure certains passages du Mémoire de la Défense
13 octobre 2006 (ICTR-2001-73-T)

(Original : Anglais)

Chambre de première instance III

Juges : Inés Mónica Weinberg de Roca, Président; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Exclusion de certains passages du Mémoire de la Défense – Portée du Mémoire de la Défense, Absence de préjudice pour le Procureur ou d'empêchement pour la Chambre d'exercer ses fonctions – Retrait de certains membres du Bureau du Procureur de la liste des témoins, Absence de prise en compte de certains paragraphes du Mémoire de la Défense – Requête acceptée en partie

Instrument international cité :

Règlement de procédure et de preuve, art. 73 ter

Jurisprudence internationale citée :

T.P.I.R.: Chambre de première instance, Le Procureur c. Protais Zigiranyirazo, Décision relative à la requête de la Défense intitulée « Decision on the Defence Motion for Disclosure of Exculpatory Information with Respect to Prior Statements of Prosecution Witnesses », 6 juillet 2006 (ICTR-2001-73)

Introduction

1. Le Procureur a conclu la présentation de ses moyens le 28 juin 2006. La Défense présentera les siens à partir du 30 octobre 2006. Le 1er septembre 2006, elle avait déposé un mémoire préalable à la présentation des moyens à décharge (le « Mémoire de la Défense »), en application de l'article 73 *ter* du Règlement de procédure et de preuve (le « Règlement »).

2. Le Procureur prie la Chambre d'exclure certains passages du Mémoire de la Défense, au motif que ceux-ci n'entrent pas dans le champ d'application de l'article 73 *ter* du Règlement[1] et vont à l'encontre de la décision rendue par la Chambre en juillet 2006[2].La Défense a déposé sa réponse le 7 septembre 2006[3]. Le Procureur a déposé sa réplique le 8 septembre 2006[4].

Arguments des parties

[1] Requête du Procureur tendant à faire exclure certains passages du mémoire de la Défense déposé en application de l'article 73 *ter* du Règlement de procédure et de preuve, déposée le 4 septembre 2006 (la « Requête du Procureur »).
[2] Décision relative à la requête de la Défense intitulée Decision on the Defence Motion for Disclosure of Exculpatory Information with Respect to Prior Statements of Prosecution Witnesses, rendue le 6 juillet 2006 (la « Décision de juillet 2006 »).
[3] Réponse de la Défense à la requête du Procureur tendant à faire exclure certains passages du mémoire de la Défense, déposée le 7 septembre 2006 (la « Réponse de la Défense »).
[4] Réplique du Procureur à la réponse de la Défense concernant la requête du Procureur tendant à faire exclure certains passages du mémoire de la Défense déposé en application de l'article 73 *ter* du Règlement de procédure et de preuve, déposée le 8 septembre 2006 (la « Réplique du Procureur »).

3. Le Procureur prie la Chambre d'exclure les paragraphes 55 à 62 du Mémoire de la Défense, car ils ne comportent que des arguments et n'ont aucun rapport avec les dispositions de l'article 73 *ter* du Règlement. Il demande que les paragraphes 63 à 66 soient également exclus et que certains membres du Bureau du Procureur figurant sur la liste des témoins à décharge en soient écartés, les questions ainsi évoquées ayant été tranchées dans la Décision de juillet 2006. Il soutient que la Défense cherche à faire valoir de nouveau les arguments d'une requête qui a déjà fait l'objet d'une décision. II demande que soient appliquées les sanctions prévues aux articles 73 et 46 du Règlement.

4. Pour lui permettre de bien préparer le procès, le Procureur prie également la Chambre d'inviter la Défense à déposer une liste définitive de ses témoins, une liste de pièces à conviction et un résumé de la déposition que doit faire l'accusé.

5. La Défense répond que les paragraphes 55 à 62 de son mémoire visent à informer la Chambre de l'état d'avancement de sa préparation au procès. Quant aux paragraphes 63 à 66 et aux témoins 48 à 53, ils doivent lui permettre de préserver son droit d'interjeter appel de la Décision de juillet 2006.

6. La Défense dit qu'elle sera prête à fournir une liste de témoins potentiels d'ici au 10 octobre 2006. Elle déclare aussi qu'un résumé de la déposition attendue de l'accusé ne sera fourni que si celui-ci décide de déposer. Elle fait valoir enfin qu'à la conférence de mise en état, le 30 juin 2006, le Procureur avait accepté que la Défense ne dépose que les pièces à conviction qui étaient prêtes.

7. Dans sa réplique, le Procureur ajoute que, selon la Décision de la Chambre, faute d'établir une infraction aux règles en vigueur ou d'autres irrégularités, les parties au procès ne peuvent citer à la barre les membres de la partie adverse. Il affirme que même si l'accusé choisissait de ne pas déposer, il ne subirait aucun préjudice en fournissant un résumé de la déposition attendue de lui, en application de l'article *73 ter* (B) (iii) du Règlement.

8. Le Mémoire de la Défense n'est pertinent que dans la mesure où il définit les grandes lignes de la thèse de la Défense. Les faits et arguments qui sortent de ce cadre sont sans intérêt pour la Chambre, même s'ils sont maintenus dans ledit mémoire. La Chambre estime donc que rien ne justifie d'exclure du Mémoire de la Défense les paragraphes 55 à 62, qui ne portent en aucune façon préjudice au Procureur ni n'empêchent la Chambre d'exercer ses fonctions.

9. Dans sa Décision de juillet 2006, la Chambre a estimé que, la Défense n'ayant pas établi que des membres du Bureau du Procureur avaient commis une infraction aux règles en vigueur ni qu'ils étaient animés de l'intention de nuire à autrui lorsqu'ils avaient recueilli les déclarations des témoins, elle n'était donc pas fondée à appeler ces fonctionnaires à la barre[5]. Aux paragraphes 63 à 66 de son mémoire, la Défense reprend des arguments que la Chambre avait déjà rejetés. À l'annexe A dudit mémoire figurent également les noms de six membres du Bureau du Procureur présentés comme étant les témoins 48 à 53. La Défense n'a en rien établi que ces témoins présentaient un intérêt pour des questions autres que celles qui ont déjà été tranchées dans la Décision de juillet 2006. L'inscription desdits membres sur la liste des témoins à décharge allant à l'encontre de la décision susmentionnée, la Chambre ordonne à la Défense d'écarter les témoins 48 à 53 de ladite liste. En outre, la Chambre ne tiendra pas compte des paragraphes 63 à 66 du Mémoire de la Défense.

10. La Chambre relève que la Défense a déposé une liste définitive de témoins le 9 octobre 2006[6]. Les arguments du Procureur à ce sujet sont donc désormais sans objet.

11. Le Procureur, pour sa part, a déposé plusieurs pièces à conviction qu'il n'avait pas annexées à son mémoire préalable au procès. La Chambre relève qu'à la conférence de mise en état, le Procureur avait accepté que seules les pièces à conviction déjà prêtes seraient déposées avec le Mémoire de la

[5] Décision de juillet 2006, par. 13 à 17.
[6] Les témoins en défense, résumés des sujets de leurs témoignages et exposé sommaire additionnelle *(sic)* quant aux témoins en défense *(sic)*, document déposé le 9 octobre 2006.

Défense[7]. En conséquence, elle rejette la demande du Procureur relative aux pièces à conviction à décharge.

12. La Chambre n'exigera pas de l'accusé qu'il fournisse un résumé de la déposition attendue de lui.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT en partie à la requête du Procureur ;

ORDONNE à la Défense d'écarter de la liste des témoins à décharge les témoins apparaissant aux numéros 48) « Me (*sic*) Stephen Rapp », 49) « Zudhi Janbek », 50) « Interprète de [...] Rapp », 51) « Gina Butler », 52) « Enquêteur de [...] Butler Z. Janbek » et 53) « Interprète de [...] Butler ».

REJETTE la requête du Procureur pour le surplus.

Fait à Arusha, le 13 octobre 2006.

[Signé] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

[7] Compte rendu de la conférence de mise en état du 30 juin 2006, p. 6.

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Décision relative à la requête formée par la Défense en vertu de l'article 98 bis *du Règlement de procédure et de preuve*
17 octobre 2006 (ICTR-2001-73-T)

(Original : Anglais)

Chambre de première instance III

Juges : Inés Mónica Weinberg de Roca, Président; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – Chambre de première instance, Moyens de preuve pour justifier une condamnation pour un ou plusieurs des chefs visés dans l'acte d'accusation – Test, Si un juge des faits raisonnable pourrait prononcer une déclaration de culpabilité au cas où les éléments de preuve produits par le Procureur seraient retenus – Absence d'analyse de chacun des paragraphes de l'acte d'accusation – Assassinat constitutif de crime contre l'humanité, Conditions pour qualifier des infractions de crimes contre l'humanité, Conclusion d'un juge des faits raisonnable – Entente en vue de commettre le génocide, Génocide, Complicité dans le génocide Extermination constitutive de crime contre l'humanité, Requête pas bien fondée – Concessions du Procureur relatives au défaut d'éléments de preuve tendant à établir les allégations figurant dans certains paragraphes de l'acte d'accusation – Requête rejetée

Instrument international cité :

Règlement de procédure et de preuve, art. 98 bis *; Statut, art. 2 et 3*

Jurisprudence internationale citée :

T.P.I.R.: Chambre de première instance, Le Procureur c. Laurent Semanza, Decision on the Defence Motion for a Judgement of Acquittal in respect of Laurent Semanza after Quashing the Counts Contained in the third Amended Indictment, 27 septembre 2001 (ICTR-97-20) ; Chambre de première instance, Le Procureur c. Emmanuel Ndindabahizi, Jugement, 15 juillet 2004 (ICTR-2001-71) ; Chambre de première instance, Le Procureur c. Protais Zigiranyirazo, Décision relative à l'exception préjudicielle tirée par la Défense de vices de formes de l'acte d'accusation modifié, 15 juillet 2004 (ICTR-2001-73) ; Chambre de première instance, Le Procureur c. Théoneste Bagosora et al., Decision on Motions for Judgement of Acquittal, 2 février 2005 (ICTR-98-41) ; Chambre de première instance, Le Procureur c. Tharcisse Muvunyi, Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 bis, 13 octobre 2005 (ICTR-2000-55) ; Chambre de première instance, Le Procureur c. Jean Mpambara, *Decision on the Defence's Motion for Judgement of Acquittal, 21 octobre 2005 (ICTR-2001-65) ; Chambre de première instance, Le Procureur c. André Rwamakuba, Decision on Defence Motion for Judgement of Acquitta1, 28 octobre 2005 (ICTR-98-44C)*

T.P.I.Y.: Chambre d'appel, Le Procureur c. Zejnil Delalić, arrêt, 30 février 2001 (IT-96-21) ; Chambre d'appel, Le Procureur c. Goran Jelisić, Arrêt, 5 juillet 2001 (IT-95-10)

Introduction

1. Protais Zigiranyirazo (l'« accusé ») est accusé de génocide, ou subsidiairement de complicité dans le génocide, et d'entente en vue de commettre le génocide, en application de l'article 2 du Statut

du Tribunal (le « Statut »), ainsi que d'extermination et d'assassinat constitutifs de crimes contre l'humanité en application de l'article 3 du Statut.

2. Après avoir appelé à la barre 25 témoins, dont quatre enquêteurs et un témoin expert, et versé 75 pièces à conviction au dossier en 46 jours d'audience, le Procureur a achevé la présentation de ses moyens le 28 juin 2006. La Chambre a fait droit à la demande formée par la Défense aux fins d'obtenir la prorogation du délai dont elle disposait pour déposer sa requête en acquittement en vertu de l'article 98 *bis* du Règlement. Le Procureur a également obtenu la prorogation du délai de réponse imparti. La requête de la Défense a été déposée le 13 juillet 2006[1], la réponse du Procureur, le 31 juillet 2006[2], la réplique de la Défense le 2 août 2006[3] et la duplique du Procureur le 7 août 2006[4].

Délibérations

3. L'article 98 *bis* du Règlement se lit comme suit :

> 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.

4. Pour appliquer cet article, la jurisprudence du Tribunal recherche si un juge des faits raisonnable pourrait prononcer une déclaration de culpabilité au cas où les éléments de preuve produits par le Procureur seraient retenus[5]. Il s'ensuit que si une Chambre est saisie d'éléments de preuve pouvant autoriser un juge des faits raisonnable qui y ajoute foi à prononcer une déclaration de culpabilité pour le chef d'accusation considéré sans laisser subsister le moindre doute raisonnable dans son esprit, toute demande d'acquittement doit être rejetée. En revanche, si aucun élément de preuve n'a pas été produit à l'appui d'un chef d'accusation, la demande doit être accueillie[6]. La Chambre souligne que l'article 98 *bis* lui fait obligation d'examiner les chefs d'accusation ; il n'est pas nécessaire qu'elle analyse chacun des paragraphes de l'acte d'accusation[7]. Elle n'apprécie la crédibilité et la fiabilité des témoignages que « lorsque la cause de l'Accusation s'est totalement effondrée, soit lorsqu'elle interrogeait ses propres témoins, soit à l'issue d'un contre-interrogatoire ayant soulevé des questions si fondamentales sur la fiabilité et la crédibilité des témoins que l'Accusation se retrouve privée d'arguments »[8]. Il convient d'apprécier les éléments de preuve à charge dans leur ensemble, en s'appuyant sur « la totalité des témoignages » et en faisant toute déduction raisonnablement possible[9]. Si la Chambre décide au stade visé par l'article 98 *bis* d'admettre les éléments de preuve produits par

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[1] Requête en vertu de l'article 98 *bis* du Règlement de procédure et de preuve, déposée le 13 juillet 2006 (la « requête de la Défense »).

[2] Prosecutor's Response to Defence Motion Pursuant to Rule 98 bis of the Rules of Procedure and Evidence, déposée le 31 juillet 2006 (la (« réponse du Procureur »).

[3] Reply to Prosecutor's Response to Defence Motion Pursuant to Rule 98 bis RPP, déposée le 2 août 2006 (la « réplique de la Défense »).

[4] Duplique du Procureur relative à la requête formée par la Défense (en vertu de l'article 98 *bis* du Règlement de procédure et de preuve), déposée le 7 août 2006 (la « duplique du Procureur »).

[5] *Le Procureur c. Bagosora et consorts,* Décision relative aux requêtes de la Défense demandant l'acquittement des accusés (Chambre de première instance), 2 février 2005, par. 3 et 6 (la « décision *Bagosora* relative à l'article 98 *bis* ») ; *Le Procureur c. Muvunyi, Decision on Tharcisse Muvunyi's Motion for Judgement of Acquitta1 Pursuant to Rule 98* bis (Chambre de première instance), 13 octobre 2005, par. 35 et 36 (la « décision *Muvunyi* relative à l'article 98 *bis* ») ; *Le Procureur c. Semanza, Decision on Defence Motion for a Judgement of Acquittal in Respect of Laurent Semanza After Quashing the Counts Contained in the Third Amended Indictment* (Chambre de première instance), 27 septembre 2001, par. 15 (la « décision *Semanza* relative à l'article 98 *bis* »). Voir aussi *Le Procureur c. Jelisić,* arrêt, 5 juillet 2001, par. 37, et *Le Procureur c. Delalić,* arrêt, 30 février 2001, par. 434.

[6] Le Procureur c. Rwamakuba, Decision on Defence Motion for Judgement ofAcquitta1 (Chambre de première instance), 28 octobre 2005, par. 6.

[7] Décision *Bagosora* relative à l'article 98 *bis,* par. 8.

[8] Décision *Semanza* relative à l'article 98 *bis,* par. 17.

[9] Décision *Bagosora* relative à l'article 98 *bis*, par. 11 ; décision *Muvunyi* relative à l'article 98 *bis*, par. 40.

le Procureur, rien ne lui interdit de conclure à la fin que ces éléments ne permettent pas d'établir la culpabilité de l'accusé au-delà de tout doute raisonnable[10].

5. La Défense a présenté deux types d'arguments sur la valeur des éléments de preuve à charge, les uns concernant l'administration de la preuve des divers chefs retenus dans l'acte d'accusation[11] et les autres celle de la preuve des faits énoncés dans chacun des paragraphes de l'acte d'accusation.

6. Elle demande que l'accusé soit acquitté du chef 5 (assassinat constitutif de crime contre l'humanité). S'agissant des autres chefs, elle demande à la Chambre d'analyser les paragraphes de l'acte d'accusation l'un après l'autre pour écarter ceux qui ont été étayés par des éléments de preuve insuffisants. Pour rechercher si les éléments de preuve à charge dont elle a été saisie sont suffisants, la Chambre commencera donc par le chef 5.

Chef 5 : Assassinat constitutif de crime contre l'humanité

7. Selon la Défense, aucun des actes incriminés allégués au chef 5 n'a été dûment établi. La Défense reconnaît que si chacune des allégations de meurtre figurant dans l'acte d'accusation était établie[12], elle serait suffisante pour déclarer l'accusé coupable de ce chef[13]. Cela étant, au cas où la Chambre estimerait que la preuve de l'un des meurtres allégués a été dûment apportée, la Défense lui demande soit d'acquitter l'accusé des autres meurtres, soit de conclure qu'il n'a pas à répondre de ceux-ci et les supprimer ou préciser qu'elle n'en tiendra pas compte dans ses délibérations finales[14].

8. Dans l'acte d'accusation, il est reproché à l'accusé d'avoir tué trois gendarmes, Stanislas Sinibagiwe (« Sinibagiwe ») et des membres de deux familles tutsies[15]. Le Procureur reconnaît qu'aucun élément de preuve n'a été produit à propos du meurtre des membres des familles Sekimonyo et Bahoma[16], mais soutient qu'il en existe suffisamment dans le dossier pour prouver le meurtre des trois gendarmes et de Stanislas Sinibagiwe[17].

9. Le meurtre est le fait de donner volontairement la mort à une personne ou de porter volontairement une atteinte grave à son intégrité physique en sachant que cette atteinte est de nature à entraîner la mort de la victime ou en faisant peu de cas de ce que sa mort pourrait en résulter, sans faits justificatifs ni excuse[18].

10. Selon le Statut, ces infractions doivent remplir deux conditions pour être qualifiées de crimes contre l'humanité : le crime doit s'inscrire « dans le cadre d'une attaque généralisée ou systématique » et l'attaque doit être dirigée « contre une population civile quelle qu'elle soit, en raison de son appartenance nationale, politique, ethnique, raciale ou religieuse ».

11. Une attaque est « généralisée » lorsqu'elle est de grande envergure ou est perpétrée sur une grande échelle et se solde par un grand nombre de victimes ; elle est « systématique » lorsqu'elle constitue une ligne de conduite organisée, par opposition à des actes fortuits ou sans aucun rapport entre eux commis par des acteurs indépendants[19]. Ces conditions que l'attaque doit remplir caractérisent l'élément moral propres aux crimes contre l'humanité : l'auteur doit, au minimum, savoir

[10] Décision *Bagosora* relative à l'article 98 *bis*, par. 6. Voir aussi la décision Muvunyi relative à l'article 98 *bis*, par. 40.
[11] Acte d'accusation modifié du 8 mars 2005 (l' « acte d'accusation »).
[12] Acte d'accusation, par. 43, 46, 48 et 49.
[13] Requête de la Défense, par. 77.
[14] *Ibid,* par. 78.
[15] Acte d'accusation, par. 43, 46, 48 et 49.
[16] Réponse du Procureur, par. 17 ; acte d'accusation, par. 20, 25 et 26.
[17] Réponse du Procureur, par. 42.
[18] Décision *Bagosora* relative à l'article 98 *bis,* par. 25 ; *Le Procureur c. Ndindabahizi,* jugement, 15 juillet 2004, par. 487 (le (« jugement *Ndindabahizi* »).
[19] Décision *Bagosora* relative à l'article 98 *bis,* par. 24 ; jugement *Ndindabahizi,* par. 477.

que son acte s'inscrit dans le cadre d'une attaque généralisée ou systématique dirigée contre des civils pour des motifs discriminatoires, qu'il partage cette intention discriminatoire ou non[20].

12. La Chambre souligne à nouveau que tout examen qu'il convient de faire pour statuer sur une requête formée en vertu de l'article 98 *bis* ne doit normalement porter que sur les *chefs d'accusation*. En conséquence, elle ne recherchera pas si des éléments de preuve ont été présentés à l'appui de chacun des paragraphes de l'acte d'accusation. S'il existe des éléments de preuve à charge tendant à établir l'un des meurtres allégués qui pourraient étayer le chef d'accusation, il n'y a pas lieu de prononcer l'acquittement.

13. Selon la Défense, les informations fournies par les témoins dans leurs dépositions ne suffisent ni pour conclure que l'accusé est responsable du meurtre de Sinibagiwe ni pour soutenir que ce meurtre était un crime contre l'humanité, puisqu'il n'a pas été commis dans le cadre d'une attaque généralisée ou systématique dirigée contre la population civile en raison de son appartenance ethnique ou raciale[21] ou des motifs d'ordre politique[22]. Dans ces circonstances, la Défense estime que le meurtre de Sinibagiwe est une tentative d'extorsion de fonds qui a mal tourné[23].

14. Le Procureur répond que Sinibagiwe était visé parce qu'il était considéré comme un complice de l'ennemi – il passait pour être un Hutu opposé au gouvernement de l'époque – et que c'est pour cette raison qu'il a été tué[24]. Le Procureur rappelle la déposition du témoin AVY pour montrer qu'il y a suffisamment d'éléments de preuve, tant directs qu'indirects, permettant à la Chambre de conclure que l'accusé a pleinement participé au meurtre de Sinibagiwe[25].

15. Il est établi que l'accusé a assisté et participé à une réunion lors de laquelle il a été décidé que Sinibagiwe ne serait pas autorisé à franchir le poste-frontière de la Petite barrière[26], Sinibagiwe étant considéré comme un complice de l'ennemi et l'ennemi étant le Tutsi[27]. Après la réunion, Sinibagiwe a été retenu au poste-frontière de la Petite barrière jusqu'à ce qu'Omar Serushago, qui aurait assisté à la réunion avec l'accusé, l'en retire et le conduise en voiture en direction de la commune rouge, un cimetière local de Gisenyi. Il est aussi établi que peu de temps après, on a entendu tirer des coups de feu à la commune rouge. Par la suite, le témoin a appris que Sinibagiwe avait été tué[28].

16. Ayant minutieusement examiné le dossier, la Chambre est convaincue qu'elle a été saisie d'éléments de preuve qui, si on y ajoute foi, pourraient conduire un juge des faits raisonnable à conclure que ce meurtre s'inscrivait dans le cadre d'une attaque généralisée, voire systématique, dirigée contre des civils pour un ou plusieurs des motifs énumérés à l'article 3 du Statut.

17. Elle estime que les éléments de preuve susvisés, pourraient conduire un juge des faits raisonnable qui y ajoute foi à conclure que l'accusé est coupable d'assassinat constitutif de crime contre l'humanité pour avoir aidé et encouragé à tuer Sinibagiwe.

Chef 1 : Entente en vue de commettre le génocide, chef 2 : génocide, chef 3 : complicité dans le génocide et chef 4 : extermination constitutive de crime contre l'humanité

18. Le Procureur a également retenu contre l'accusé les chefs d'entente en vue de commettre le génocide (chef 1 de l'acte d'accusation), de génocide (chef 2) et de complicité dans le génocide (chef

[20] Décision *Bagosora* relative à l'article 98 *bis,* para. 24 ; jugement *Ndindabahizi,* par. 477 et 484.
[21] Requête de la Défense, par. 66
[22] *Ibid*., par. 70.
[23] *Ibid*., par. 53 et 69
[24] Réponse du Procureur, par. 62 et 63 ; duplique du Procureur, par. 3 (x).
[25] Réponse du Procureur, par. 61.
[26] Compte rendu de l'audience du 19 octobre 2005, p. 10 à 13, et de celle du 8 février 2006, p. 42 à 47 témoin AVY).
[27] Compte rendu de l'audience du 8 février 2006, p. 42, 43, 44 et 45 (témoin AVY).
[28] Compte rendu du 19 octobre 2005, p. 13 à 16 (témoin AVY).

3) prévus à l'article 2 (3) du Statut, ainsi que celui d'extermination constitutive de crime contre l'humanité (chef 4), prévu à l'article 3 (b) du Statut.

19. L'article 98 *bis* du Règlement fait obligation à la Chambre de rechercher si les éléments de preuve versés au dossier ne suffisent pas à justifier une condamnation. Il ne lui demande pas d'examiner les vices de l'acte d'accusation ni de vérifier si l'accusé a été suffisamment informé des faits qui lui sont reprochés[29]. Par conséquent, la Chambre ne tiendra pas compte des arguments de la Défense concernant le respect de sa décision du 15 juillet 2004 qui prescrit de modifier l'acte d'accusation[30].

20. La Chambre refuse de faire droit à la demande de la Défense qui l'a invitée à analyser paragraphe par paragraphe le reste des chefs retenus dans l'acte d'accusation. Comme elle l'a souligné plus haut, elle n'adoptera pas cette démarche parce que l'article 98 *bis* lui demande d'examiner les éléments de preuve à charge qui se rapportent aux *chefs d'accusation*. La Défense n'a nullement dit que le défaut de preuves étayant les paragraphes mis en question doit conduire la Chambre à acquitter l'accusé de l'un des chefs restants. Au contraire, elle reconnaît que des éléments de preuve ont été présentés à l'appui de ces chefs. Il s'ensuit que le volet de la requête relatif aux chefs 1 à 4 de l'acte d'accusation n'est pas bien fondé et doit être rejeté[31].

Concessions du Procureur relatives au défaut d'éléments de preuve tendant à établir les allégations figurant aux paragraphes 20, 25, 26, 37, 48, 49 et 50

21. Le Procureur reconnaît qu'il n'a pas produit d'élément de preuve tendant à établir les allégations figurant aux paragraphes 20, 25, 26, 37, 48, 49 et 50 de l'acte d'accusation. Ces paragraphes concernent les chefs alternatifs de génocide et de complicité dans le génocide, ainsi que les chefs d'extermination et d'assassinat constitutifs de crimes contre l'humanité. Il ressort de l'examen de l'acte d'accusation qu'ils portent respectivement sur le fait que l'accusé a donné l'ordre de creuser un charnier appelé la « Fosse » derrière sa maison ainsi que sur son rôle dans la mort d'une trentaine de membres du clan des Sekimonyo, une famille tutsie, et dans celle de quelque 18 membres du clan des Bahoma, une autre famille tutsie. La Chambre admet la concession du Procureur selon laquelle aucun élément de preuve n'a été présenté à l'appui de ces allégations et en conclut que l'accusé n'a pas à répondre des faits qui lui sont reprochés dans les paragraphes visés.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête de la Défense.

Arusha, le 17 octobre 2006.

[Signé] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

[29] Décision *Bagosora* relative à l'article 98 *bis*, par. 7.
[30] Voir la Décision relative à l'exception préjudicielle tirée par la Défense de vices de forme de l'acte d'accusation modifié, 15 juillet 2004, la requête de la Défense, par. 80, 84 et 86, et la réplique de la Défense, par. 48.
[31] Voir *Le Procureur c. Mpambara*, *Decision on the Defence's Motion for Judgement of Acquittal* (Chambre de première instance), 21 octobre 2005, par. 6.

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Décision portant prorogation d'un délai de dépôt d'écritures Article 73 du Règlement de procédure et de preuve 2 novembre 2006 (ICTR-2001-73-T)

(Original : Anglais)

Chambre de première instance III

Juges : Inés Mónica Weinberg de Roca, Président; Khalida Rachid Khan; Lee Gacuiga Muthoga

Protais Zigiranyirazo – prorogation d'un délai – Absence de préjudice pour l'accusé – Intérêt de la justice – Dépôt d'écritures par le Procureur – Requête acceptée

Instrument international cité :

Règlement de procédure et de preuve, art. 73

1. Le 1er novembre 2006, le Procureur s'est engagé à déposer avant la fin de la journée sa requête en réouverture de la présentation des moyens à charge et en rappel du témoin Michel Bagaragaza. À la suite de cet engagement, la Chambre a ordonné à la Défense de produire ses conclusions en réponse le 2 novembre 2006[1].

2. Le Procureur sollicite à présent une prorogation de délai allant jusqu'au 6 novembre 2006 pour déposer sa requête[2]. La Défense s'oppose à la requête en prorogation de délai, estimant que le Procureur doit déposer sa requête tendant à faire rouvrir la présentation des moyens à charge et rappeler le témoin le 2 novembre 2006 au plus tard et la Défense sa réponse le 3 novembre 2006 au plus tard[3].

3. La Chambre juge que la prorogation de délai sollicitée ne portera pas préjudice à l'accusé et sert l'intérêt de la justice. Cela étant, elle invite le Procureur à déposer ses écritures d'ici le lundi 6 novembre 2006 à 9 heures.

PAR CES MOTIFS, LA CHAMBRE

I. FAIT DROIT à la requête en prorogation de délai ;

II. AUTORISE le Procureur à déposer ses écritures le 6 novembre 2006 à 9 heures au plus tard et la Défense à y répondre, s'il y a lieu, dans les vingt-quatre heures suivant la notification desdites écritures.

Fait à Arusha, le 2 novembre 2006.

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[1] Compte rendu de l'audience du 1er novembre 2006, p. 2 à 4.

[2] Voir la requête du Procureur intitulée Prosecutor's Motion for Extension of Time Within Which to File Motions for Re-Opening of Prosecution Case and Motion for Video Link in Respect of Michel Bagaragaza (made under Rules 73 (A), 54 and other enabling provisions of law and practice), déposée le 1er novembre 2006 (« requête en prorogation de délai »).

[3] Voir la réponse de la Défense intitulée Response for Prosecutor's Motion for Extension of Time Within Which to File Motions for Re-Opening of Prosecution Case and Motion for Video Link in Respect of Michel Bagaragaza, déposée le 1er novembre 2006, par. 6 et **7**.

[Signé] : Inés Mónica Weinberg de Roca; Khalida Rachid Khan; Lee Gacuiga Muthoga

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The select bibliography reproduced below brings together the titles of articles and books devoted, in whole or in part, to the ICTR or to its jurisprudence. The list was compiled by searching the decisions of the Chambers, the *Bibliographie trimestrielle du TPIR* (*ICTR Quarterly Bibliography)* prepared by the Tribunal's library service, as well as *Public International Law* and the *Index to Foreign Legal Periodicals*. Only articles and books published prior to 2006 are included in the list, with the exception of articles given over to commentaries on decisions published in the previous *Reports*. The latter are mentioned, regardless of their date of publication, at the beginning of the respective files. It is also worth drawing attention to the initiative of the organisation *Avocats sans Frontières*, which ensures the circulation of certain judgments handed down by the Rwandan courts and tribunals regarding persons accused of participation in the genocide. These judgments and cases are available, in French only, and for the most part in pdf format, from the ASF website, at http://www.asf.be/AssisesRwanda 2/fr/ justice.htm.

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Les éléments de bibliographie reproduits ci-dessous reprennent les titres d'articles et d'ouvrages consacrés en tout ou en partie au TPIR ou à sa jurisprudence. Cette liste a été établie sur la base du dépouillement des décisions du tribunal, de la *Bibliographie trimestrielle du TPIR* (*ICTR Quarterly Bibliography)* préparée par les services de la bibliothèque du Tribunal, ainsi que de *Public International Law* et de l'*Index to Foreign Legal Periodicals*. Seuls les articles et ouvrages antérieurs à 2006 sont repris dans cette liste, à l'exception des articles consacrés à des commentaires de décisions publiées dans les éditions précédentes du *Recueil*. Ces derniers sont mentionnés, indépendamment de leur date de publication, au début des dossiers concernés. Par ailleurs, il convient également de signaler l'initiative de l'organisation Avocats sans Frontières, qui assure la diffusion de certaines décisions rendues par les cours et tribunaux rwandais à l'encontre de personnes accusées d'avoir participé au génocide. Ces jugements et arrêts sont disponibles, en français seulement, et pour la plupart en format pdf, sur le site internet d'ASF, à l'adresse suivante : http://www.asf.be/AssisesRwanda2/fr/ justice.htm.

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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 Request for a Subpoena for Major Jacques Biot, 14 July 2006 (ICTR-98-41)

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 I, *The Prosecutor v. Siméon Nchamihigo*, Decision on Request for Leave to Amend the Indictment, 14 July 2006 (ICTR-2001-63-I, Rep. 2006, p. **XXX**)

Trial Chamber II, *The Prosecutor v. Alphonse Nteziryayo*, Decision on Alphonse Nteziryayo's Motion to Modify His Witness List, 14 July 2006 (ICTR-98-42)

Appeals Chamber, *The Prosecutor v. Mikaeli Muhimana*, Decision on Prosecutor's Motion Requesting the Appellant to File a Non Confidential Appeal Brief, 14 August 2006 (ICTR-95-B1-A, Rep. 2006, p. **XXX**)

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)

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. 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)

Trial Chamber **XXX**, *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-T, Rep. 2006, p. XXX)

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)

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 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 Nsengiyumva Motion for Witness Higaniro to Testify by Video-Conference, 29 August 2006 (ICTR98-41)

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)

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 Defence Motion for Additional Disclosure, 1 September 2006 (ICTR-98-41)

Trial Chamber, *The Prosecutor v. François Karera*, Decision on Defence Motion for Additional Disclosure, 1 September 2006 (ICTR-01-74)

Trial Chamber, *The Prosecutor v. Théoneste Bagosora et al.*, Decision on Kabiligi Motion for Exclusion of Evidence, 4 September 2006 (ICTR-98-41)

Trial Chamber II, *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-T)

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)

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 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)

Appeals Chamber, *The Prosecutor v. Mikaeli Muhimana*, Decision on the Appellant's Motion to Note the Failure to File the Respondent's Brief within the Prescribed Time Limit, 11 September 2006 (ICTR-95-B1-A, Rep. 2006, p. **XXX**)

Trial Chamber, *The Prosecutor v. Edouard Karemera et al.*, Order for the Transfer of Prosecution Witnesses From Rwanda, 13 September 2006 (ICTR-98-44)

Trial Chamber, *The Prosecutor v. Edouard Karemera et al.*, Décision accordant une prorogation de délai de réponse à deux requêtes du Procureur et ordonnant la communication de documents certifiés conformes, 13 September 2006 (ICTR-98-44)

Trial Chamber, *The Prosecutor v. Théoneste Bagosora et al.*, Decision on Nsengiyumva Motion for Exclusion of Evidence Outside the Scope of the Indictment, 15 September 2006 (ICTR-98-41)

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)

Trial Chamber, *The Prosecutor v. Théoneste Bagosora et al.*, Modalities for Presentation of a Witness, 20 September 2006 (ICTR-98-41)

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)

Trial Chamber, *The Prosecutor v. Casimir Bizimungu et al.*, Decision on Prosecutor's Motion for Judicial Notice, 22 September 2006 (ICTR-99-50)

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)

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)

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)

Trial Chamber III, *The Prosecutor v. Siméon Nchamihigo*, Decision on Defence Motion on Defects in the Form of the Indictment, 27 September 2006 (ICTR-2001-63-R50**,** Rep. 2006, p. **XXX**)

Appeals Chamber, *The Prosecutor v. Eliezer Niyitegeka,* Decision on Request for Reconsideration of the Decision on Request for Review, 27 September 2006 (ICTR-96-14-R, Rep. 2006, p. **XXX**)

Chambre d'appel, *Le Procureur c. Aloys Simba*, Order Concerning Aloys Simba's Appellant's Brief, 29 Septembre 2006 (ICTR-01-76-A, Rec. 2006, p. **XXX**)

Trial Chamber, *The Prosecutor v. Édouard Karemera et al.*, Decision on Prosecutor's Motion to Vary its Witness List, 2 October 2006 (ICTR-98-44)

Trial Chamber, *The Prosecutor v. Édouard Karemera et al.*, Decision on Defence Motion to Report Government of Rwanda to United Nations Security Council, 2 October 2006 (ICTR-98-44)

Appeals Chamber, *Aloys Ntabakuze v. The Prosecutor*, Decision on Motion for Reconsideration, 4 October 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 Ntabakuze Motion for Information from the UNHCR and a Meeting With One of Its Officials, 6 October 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)

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)

Trial Chamber, *The Prosecutor v. Théoneste Bagosora et al.*, Decision on Requests to Hear Testimony in Closed Session, 18 October 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)

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 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. Edouard Karemera et al.,* Decision on Defence Oral Motions for Exclusion of XBM's Testimony, for Sanctions Against the Prosecution and Exclusion of Evidence Outside the Scope of the Indictment, 19 October 2006 (ICTR-98-44)

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. 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)

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)

Trial Chamber, *The Prosecutor v. Edouard Karemera et al.,* Decision on Reconsideration of Protective Measures for Prosecution Witnesses, 30 October 2006 (ICTR-98-44)

Appeals Chamber, *The Prosecutor v. Ferdinand Nahimana et al.*, 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-A, Rep. 2006, p. **XXX**)

Appeals Chamber, *The Prosecutor v. Protais Zigiranyirazo*, Decision on Interlocutory Appeal, 30 October 2006 (ICTR-2001-73)

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)

Trial Chamber **XXX**, *The Prosecutor v. Casimir Bizimungu et al.*, Decision on Casimir Bizimungu, Justin Mugenzi and Jerome 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-**XXX,** Rep. 2006, p. **XXX**)

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)

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)

Trial Chamber, *The Prosecutor v. Edouard Karemera et al.,* Decision on Admission of UNAMIR Documents, 21 November 2006 (ICTR-98-44)

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)

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)

Appeals Chamber, *Karemera et al. v. The Prosecutor,* Decision on Motions for Reconsideration, 1 December 2006 (ICTR-98-44)

Appeals Chamber, *The Prosecutor v. 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 December 2006 (ICTR-99-52)

Trial Chamber, *The Prosecutor v. Edouard Karemera et al.,* Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 *bis* of the Rules; and Order for Reduction of Prosecution Witness List, by this Chamber on 11 December 2006 (ICTR-98-44)

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)

Trial Chamber, *The Prosecution v. Sam Hinga Norman et al.*, Decision on motions by the First and Second Accused for leave to appeal the Chamber's decision on their motions for the issuance of a subpoena to the President of the Republic of Sierra Leone., 28 June 2006 (SCSL-04-14)

Trial Chamber, *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Decision on Confidential Prosecution Motion to Reopen the Prosecution Case to Present an Additional Prosecution Witness, 28 September 2006 (SCSL-04-16)

United States Military Tribunal, Nuremberg

United States of America v. Josef Altstoetter et al. (*Justice* Case), 4 December 1947

United States of America v. Ulrich Greifelt et al. (*Rasse und Siedlungshauptamt/ RuSHA* case), 10 March 1948

ICTR Activities
From 1 January to 31 December 2006

Judges:

Appeals Chamber: Liu Daqun (China), Mehmet Güney (Turkey), Theodor Meron (United States of America), Fausto Pocar (Italy), Wolgang Schomburg (Allemagne), Mohammed Shahabuddeen (Guyana) and Andrésia Vaz (Senegal)

Trial Chamber: Dennis Charles Michael Byron (Saint-Kitts-et-Nevis), Serguei Alekseevich Egorov (Russian Federation), Khalida Rachid Khan (Pakistan), Erik Møse (Norway), Arlette Ramaroson (Madagascar), Jai Ram Reddy (Fiji), William Hussein Sekule (Tanzania), Asoka J. N. de Silva (Sri Lanka) and Inès Weinberg de Roca (Argentine)

***Ad litem* judges**: Florence Rita Arrey (Cameroon), Solomy Balungi Bossa (Uganda), Robert Fremr (Czech Republic), Taghrid Hikmet (Jordan), Karin Hökborg (Sweden), Gberdao Gustave Kam (Burkina Faso), Seon Ki Park (Republic of Korea), Flavia Lattanzi (Italy), Lee Gacuiga Muthoga (Kenya) and Emile Francis Short (Ghana)

Registar: Adama Dieng (Senegal)

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A. Amended Indictments or New Indictments in 2006
1. Amended or Redacted Indictments in 2006

Case n°	Accused	Date on which the Indictment was amended or redacted	Original Counts	Amended or redacted part
ICTR-97-31	Tharcisse Renzaho	16 February 2006	Genocide or alternatively Complicity in Genocide ; Crime against Humanity (Murder and Rape) ; Serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II	- deletion of some paragraphs - precision of factual allegations
ICTR-2001-70	Emmanuel Rukundo	6 October 2006	Genocide; Crimes against Humanity (Murder and Extermination)	- precision of factual allegations - deletion of a factual allegation - precision of the nature of the criminal liability

ICTR-2001-63	Siméon Nchamihigo	18 July 2006 (English version) 25 July 2006 (French version)	Genocide, or in the alternative Complicity in Genocide; Crimes against Humanity (Extermination, or in the alternative Murder; Violations of article 3 common to the Geneva Conventions and Additional Protocol II)	- distinction between the charges of murder and extermination (previously, the murder charge was alternative to the extermination charge) - removal of the counts complicity in genocide and violations of article 3 common to the Geneva Conventions and Additional Protocol II - addition of the count of crime against humanity (other inhumane acts) - incorporation of new allegations to support the count crime against humanity (other inhumane acts) - precision on the forms and nature of participation of the Accused ("extended" joint criminal enterprise) - precision of factual allegations (dates, locations, names of victims and co-perpetrators, numbers of victims) - addition of material facts
		29 September 2006 (English version) (No French version)		- precision of factual allegations (dates, locations, names of victims and co-perpetrators)

		11 December 2006		- precision of factual allegations (dates, locations, names of victims and co-perpetrators) - incorporation of new allegations to support the count genocide

B. Final Judgements on First Instance or Appeals pronounced by the Tribunal in 2006

Case n°	Accused	Judgment	Content of the decision	Appeals Judgment	Content of the Decision and Place of detention
ICTR -99-46	Emmanuel Bagambiki	25 February 2004	Acquitted	7 July 2006	Acquitted
	Samuel Imanishimwe		27 years of imprisonment : Guilty of Genocide ; Extermination as a crime against Humanity ; Murder, Imprisonment and Torture as a crime against Humanity ; Murder, Imprisonment and Torture as Serious Violations of Article 3 Common to the Geneva Conventions and to the Additional Protocol II		Sentence reduced to 12 years of imprisonment, Accused detained in Mali since the 6th December 2008
	André Ntagerura		Acquitted		Acquitted
ICTR -2000-60	Paul Bisengimana	13 April 2006	Guilty of Extermination as a Crime against Humanity ; Sentenced to 15 years of Imprisonment	The Accused pleaded guilty during the Trial.	Accused detained in Mali since the 6th December 2008
ICTR -2001-64	Sylvestre Gacumbitsi	17 June 2004	Guilty of Genocide; Extermination as a Crime against Humanity ;	7 July 2006	Sentence increased to life imprisonment. Accused detained at

			Rape as a Crime against Humanity. Sentenced to 30 years imprisonment		the United Nations Detention Facility (Arusha)
ICTR -2005-84	Joseph Serugendo	2 June 2006	Guilty of Direct and public incitement to commit Genocide and Persecution as a crime against Humanity. Sentenced to 6 years of imprisonment	No Appeal, the Accused having pleaded guilty in first instance	Accused died on 22 August 2006 at Nairobi, Kenya
ICTR -2001-65	Jean Mpambara	11 September 2006	Acquitted	[redacted]	
ICTR -2000-55A	Tharcisse Muvunyi	12 September 2006	Guilty of Genocide, Direct and public incitement to commit Genocide and Other inhumane acts as a crime against Humanity. Sentenced to 25 years imprisonment	29 August 2008 Conviction and sentence quashed by the Appeals Chamber and case to be retried on one count (Direct and public incitement to commit Genocide)	U.N. Detention Facility
ICTR -98-44C	André Rwamakuba	20 September 2006	Acquitted	[redacted]	Accused released
ICTR -2001-66	Athanase Seromba	13 December 2006	Guilty of Genocide and Extermination as a crime against Humanity. Sentenced to 15 years imprisonment	12 March 2008 Appeals upheld conviction. Sentenced to imprisonment for the remainder of his life	Accused transferred to Benin 27 June 2009

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Some Statistical figures on the International Criminal Tribunal on the 31st December 2006

- Budget granted by the United Nations General Assembly to the ICTR (A/60/241, 15 February 2006): 123 445, 000 $ net
- Number of files in progress : 39 concerning 60 Accused
- Number of detainees at the ICTR Detention Facility Unit (on 31 December 2006) : 63

- Number of Decisions pronounced by the Tribunal (including scheduling orders, decisions on the assignment of judges, etc.): 559 different decisions (319 solely in English, 24 solely in French and 108 available in both languages)
- Number of sentencing judgement : 6
- Number of final sentencing judgement : 2

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Activités du TPIR
du 1er janvier au 31 décembre 2006

Juges:

Chambre d'appel: Liu Daqun (Chine), Mehmet Güney (Turquie), Theodor Meron (Etats-Unis d'Amérique), Fausto Pocar (Italie), Wolgang Schomburg (Allemagne), Mohammed Shahabuddeen (Guyana) et Andrésia Vaz (Sénégal)

Chambres de première instance: Dennis Charles Michael Byron (Saint-Kitts-et-Nevis), Serguei Alekseevich Egorov (Fédération de Russie), Khalida Rachid Khan (Pakistan), Erik Møse (Norvège), Arlette Ramaroson (Madagascar), Jai Ram Reddy (Fiji), William Hussein Sekule (Tanzanie), Asoka J. N. de Silva (Sri Lanka) et Inès Weinberg de Roca (Argentine)

Juges *ad litem*: Florence Rita Arrey (Cameroun), Solomy Balungi Bossa (Ouganda), Robert Fremr (République tchèque), Taghrid Hikmet (Jordanie), Karin Hökborg (Suède), Gberdao Gustave Kam (Burkina Faso), Seon Ki Park (République de Corée), Flavia Lattanzi (Italie), Lee Gacuiga Muthoga (Kenya) et Emile Francis Short (Ghana)

Greffier: Adama Dieng (Sénégal)

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A. Actes d'accusation modifiés ou émis par le Procureur en 2006

1. Actes d'accusation modifiés ou caviardés en 2006

N° de l'affaire	Accusé(s)	Date à laquelle l'acte d'accusation a été modifié ou caviardé	Chefs d'accusation initiaux	Contenu de la modification ou du caviardage
ICTR-97-31	Tharcisse Renzaho	16 février 2006	Génocide ou, à titre subsidiaire, Complicité dans le génocide ; Crimes contre l'Humanité (assassinat et viol) ; Violations graves de l'article 3 commun aux conventions de Genève de 1949 et du Protocole additionnel II	- suppression de paragraphes - précision d'allégations factuelles
ICTR-2001-70	Emmanuel Rukundo	6 octobre 2006	Génocide ; Crimes contre l'Humanité (assassinat et extermination)	- précision d'allégations factuelles - suppression d'une allégation factuelle - précision du mode de responsabilité pénale
ICTR-2001-63	Siméon Nchamihigo	18 juillet 2006 (version anglaise) 25 juillet 2006 (version française)	Génocide, ou à titre subsidiaire, Complicité dans le Génocide, Crimes contre l'Humanité (extermination ou à titre subsidiaire, assassinat); Violations de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II)	- distinction des chefs de meurtre et d'extermination (précédemment, l'accusation de meurtre était alternative à celle d'extermination) - retrait des chefs d'accusation de complicité dans le génocide et de Violations de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II - ajout du chef de crime contre l'humanité (autres actes inhumains) - introduction de nouvelles allégations pour étoffer le chef de crime contre l'humanité (autres actes inhumains) - précision des formes et de la nature de la participation de l'accusé (entreprise criminelle

				commune « élargie ») - précision d'allégations factuelles (dates, lieux, noms des victimes et des co-auteurs, nombre de victimes) - ajout de faits matériels
		29 septembre 2006 (version anglaise) Pas de version française		- précision d'allégations factuelles (dates, lieux, noms des victimes et des co-auteurs)
		11 décembre 2006		- précision d'allégations factuelles (dates, lieux, noms des victimes et des co-auteurs) - introduction de nouvelles allégations pour étoffer le chef de génocide

B. Jugements ou appels relatifs à un jugement rendus par le Tribunal en 2006

N° de l'affaire	Accusé	Jugement portant condamnation	Contenu de la décision	Décision rendue en appel	Contenu de la décision et Lieu de détention
ICTR-99-46	Emmanuel Bagambiki	25 février 2004	Acquittement	7 juillet 2006	Acquittement confirmé
	Samuel Imanishimwe		27 ans d'emprisonnement : Coupable de génocide ; d'extermination comme crime contre l'humanité ; Meurtre, emprisonnement et torture comme crime contre l'humanité ; Meurtre, emprisonnement et torture comme violations graves de l'article 3 Commun aux Conventions de Genève et Protocole Additionnel II		Peine réduite à 12 ans d'emprisonnement. L'accusé est détenu au Mali depuis le 6 décembre 2008.
	André Ntagerura		Acquittement		Acquittement confirmé
ICTR-2000-60	Paul Bisengimana	13 avril 2006	Coupable d' extermination constitutive de crime contre l'humanité ; Peine de 15 ans d'emprisonnement	L'accusé a plaidé coupable en 1ère instance.	L'accusé est détenu au Mali depuis le 6 décembre 2008.
ICTR-2001-64	Sylvestre Gacumbitsi	17 juin 2004	Coupable de génocide ; Extermination constitutive de crime contre l'humanité ; Viol constitutif de crime contre l'humanité. Condamné à 30 ans d'emprisonnement	7 juillet 2006	Peine augmentée à l'emprisonnement à vie. L'accusé est détenu au Centre de détention du Tribunal (Arusha).
ICTR-2005-	Joseph Serugendo	2 juin 2006	Coupable d'incitation directe et publique à commettre le génocide et	Pas d'appel, l'accusé	Accusé décédé le 22 août 2006 à Nairobi au Kenya

84			de persécution constitutive de crime contre l'humanité. Condamné à 6 ans d'emprisonnement	ayant plaidé coupable en 1ère instance	
ICTR-2001-65	Jean Mpambara	11 septembre 2006	Acquitté		
ICTR-2000-55A	Tharcisse Muvunyi	12 septembre 2006	Coupable de génocide, d'incitation directe et publique à commettre le génocide et d'autres actes inhumains constitutive de crime contre l'humanité. Condamné à 25 ans d'emprisonnement	29 août 2009 Culpabilité et condamnation annulées par la Chambre d'appel et affaire retournée en première instance pour nouveau jugement sur un chef d'accusation (incitation directe et publique à commettre le génocide)	L'accusé est détenu au Centre de détention du Tribunal (Arusha)
ICTR-98-44C	André Rwamakuba	20 septembre 2006	Acquitté		Accusé libéré
ICTR-2001-66	Athanase Seromba	13 décembre 2006	Coupable de génocide et d'extermination constitutive de crime contre l'humanité. Condamné à 15 ans d'emprisonnement	12 mars 2008 Confirmation de la sentence par la Chambre d'appel, condamné à la prison à vie pour le restant de ses jours	Accusé transféré au Benin le 27 juin 2009

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Le Tribunal pénal international en quelques chiffres au 31 décembre 2006

- Budget alloué par l'Assemblée Générale des Nations Unies (A/60/241, 15 février 2006) : 123 445, 000 $ net
- Nombre de dossiers en cours : 39 concernant 60 accusés

- Nombre d'accusés détenus au Quartier pénitentiaire du TPIR (au 31 décembre 2006) : 63
- Nombre de décisions rendues par le Tribunal (y compris les décisions portant calendrier, assignation de juges à une chambre, ...) : 559 décisions différentes (319 uniquement en anglais, 24 uniquement en français et 108 disponibles dans les deux langues)
- Nombre de jugements portant condamnation : 6
- Nombre de décisions définitives : 2