

PART FIVE: ANALYSIS OF THE PARAGRAPHS OF THE INDICTMENT WHICH PURPORTEDLY SUPPORT THE COUNTS

I. THE CHARGES

2332. The Accused is charged pursuant to Articles 6 (1) and 6 (3) of the Statute of the ICTR of counts 1 to 5 (Conspiracy to Commit Genocide, Genocide, Complicity in Genocide, Crime against Humanity/Murder, Crime against Humanity/Extermination) and of the counts 7 to 9 (Crime against Humanity/Persecution, Crime against Humanity/Inhumane acts and Violation of Geneva Convention/Killing and Causing Violence) for the acts or omissions described in the following paragraphs:

Paragraphs 4.6 to 4.8, 5.1, 5.5, 5.8, 5.10, 5.16, 5.17, 5.22, 6.7, 6.8, 6.18, 6.24, 6.27 to 6.31, 6.46, 6.49 to 6.51 pursuant to Article 6 (1) and

Paragraphs 5.33 to 5.36, 6.8, 6.15, 6.16, 6.18, 6.19, 6.32 to 6.39, 6.41, 6.44, 6.45, 6.47, 6.51 pursuant to Article 6 (3).

He is also charged pursuant to Article 6 (3) of the Statute of the ICTR of counts 6 and 10 (Crime against Humanity/Rape and Violation of Geneva Convention/Outrages) for the acts or omissions described in the following paragraphs: 4.6 to 4.8, 5.36, 6.8, 6.42, 6.47

2333. Thus it can be seen that counts 1 to 5 and 7 to 9 are all supported by *exactly the same sets of paragraphs* and that counts 6 and 10 are also both supported by *exactly the same sets of paragraphs* (which differ from the sets of paragraphs for the other counts). That all of these diverse and varied charges (Counts) are described by *identical* sets of material facts, has led to a set of charges that are singularly lacking in particularity, and precision, a situation which is a source of confusion due to vagueness.

2334. For each of counts 1 to 5 and 7 to 9, the indictment indicates that the Accused is charged pursuant to Articles 6 (1) and 6 (3). Thus, in so framing the indictment, the Prosecution apparently intended to rely on all modes of responsibility in Articles 6 (1) and 6 (3). But contrary to constant jurisprudence before the ICTR and the ICTY the Prosecution failed to plead in the indictment material facts relevant to each of those modes of responsibility.²⁴⁶⁶

²⁴⁶⁶ See for example AC judgment against Kvočka et alii on 28/02/2005, para 29

2335. Rule 47(C) provides that “the indictment shall set forth the name and particulars of the suspect and *a concise statement of the facts of the case and of the crime* with which the suspect is charged”. The Rule thus envisages a distinction between the facts of the case and those of the crime. The phrase “a concise statement of the facts of the crime” relates to the material facts constituting elements of a crime within the subject matter jurisdiction of the Tribunal.²⁴⁶⁷

2336. In the *Ntagerura et al* Trial Judgement, Judge Pavel Dolenc, in his separate opinion, highlights the distinction, between “a concise statement of facts of the case” and “a concise statement of the facts of the crime” and identifies questions that must be answered to know the material facts of the crime:

20. The phrase “a concise statement of facts of the case” refers to other important information that offers a more complete picture of the surrounding circumstances of the crime including: historical, contextual, or background facts; or facts relating to sentencing. Because “facts of the case” do not directly constitute any elements of a crime, they do not need to be described with the same degree of specificity as the “facts of a crime”. [Footnote omitted]

21. In practical terms, the material facts of the crime answer the following seven questions, which guide any criminal investigation, prosecution, and judgment: Who (is alleged perpetrator); Where; When; What (was committed or omitted); Whom to (victim); What means; and Why (motive). Answers to these seven questions are necessary in order to individualize the accused, the alleged crime, the mode of the Accused’s participation, and the form of his criminal responsibility. Although each case must be considered on its merits, it is possible to generalize that an indictment which does not provide sufficient and precise information to answer each of these questions is more likely to be defective.

22. These seven questions are applicable regardless of the form (conspiracy, planning, preparation, attempt), mode (act or omission), or type (principal perpetrator, accomplice, joint criminal enterprise, superior responsibility) of participation. When a crime is allegedly committed by omission then the answer to the question ‘What’ shall set forth a description of the omitted act and a specific indication of the legal basis for a duty to act. The concise statement of facts of a charge for superior responsibility pursuant to Article 6(3) of the Statute should clearly and precisely allege, in case of failure to prevent a crime: (i) sufficient particulars of the underlying crime so that it may be identified without any ambiguity; (ii) particulars of the subordinate perpetrator(s); (iii) the legal or factual basis for establishing a superior-subordinate relationship between the accused and the principal perpetrators; (iv) a description of the necessary and reasonable measures, within the accused’s authority, duty, and disposal which the accused failed to take; (v) a statement that the accused had knowledge, or sufficient information to conclude, that his subordinates were about to commit a crime; and (vi) an allegation that these measures, if applied, may have prevented the subordinate from committing the crime. In case of failure to punish a subordinate perpetrator, an indictment charging Article 6(3) liability should also set forth the necessary, reasonable, and available measures within the accused’s authority that it is alleged he failed to take. [Footnotes omitted]

2337. It is submitted, and will be further argued in specific instances *infra* when appropriate, that in virtue of its vagueness and imprecision, the present indictment has failed to meet the standard outlined by Judge Dolenc *supra*, and that the indictment is thus defective in this regard.

²⁴⁶⁷ TC Judgment concerning André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe, on 25/02/2005, Separate opinion of Judge Pavel Dolenc, para 19.

II. ANALYSIS OF THE RELEVANT PARAGRAPHS OF THE INDICTMENT

2338. In order to be able to properly prepare his defence, the Accused would have needed to know, *ab initio* and with precision, who did what, to whom, when, where, with what and why. In the following detailed paragraph-by-paragraph analysis (of the paragraphs which purportedly contain the material facts, as identified by the Prosecutor in the Indictment itself, that support the Counts), we will argue that the Prosecution failed to comply with the applicable law, discussed *supra*, regarding indictments.
2339. In particular, the paragraphs of the indictment supporting the counts failed to answer the seven questions and failed to plead the specific mode of participation or responsibility of the Accused Ntabakuze. We shall also discuss those paragraphs of the indictment against Ntabakuze which were not proven and those that fall outside the temporal jurisdiction of the International Criminal Tribunal for Rwanda, and the implications of such. As a matter of fact, this analysis contains responses to paragraphs concerning Major Ntabakuze in “Chapter VIII” of the Prosecution Final Trial Brief (VIII. Evidence on Various Paragaraphs [of the indictment]).

A. PARAGRAPHS OF THE INDICTMENT PURPORTEDLY SUPPORTING COUNTS 1 TO 5 AND 7 TO 9 PURSUANT TO ARTICLE 6 (1)

Paragraph 4.6 of the Indictment:

During the events referred to in this indictment, Aloys Ntabakuze exercised the functions of Commander of the Para-Commando Battalion in the Rwandan Army.

2340. The Ntabakuze Defense does not challenge the fact contained in paragraph 4.6 of the Indictment

Paragraph 4.7 of the Indictment:

Aloys Ntabakuze obtained a “B” commando certificate on 31 July 1976 and a paratrooper’s certificate on 12 August 1978. He obtained an “A” commando certificate on 28 June 1978. On the same date, he graduated from Rwanda’s Ecole Supérieure Militaire (ESM) with the rank of 2nd

lieutenant. He was subsequently promoted to the rank of lieutenant on 4 February 1982. On 30 June 1984, he graduated from the Direction centrale de la sécurité militaire, of the Peoples' Democratic Republic of Algeria, after a training course in security, specializing in "Presidential Protection". He obtained an "A" paratrooper certificate on 2 August 1991. He served in the Presidential Guard before being promoted to the position of Commander of the Para-commando Battalion in the Rwandan Army in 1992.

2341. Paragraph 4.7 of the Indictment contains many errors of fact, which were corrected by Major Ntabakuze during his testimony in September 2006. He stated for example that he was appointed commander of the Para Commando Battalion in June 1988 upon his graduation from the United States Army Command and General Staff College, at Leavenworth, Kansas. He confirmed that he held that position until 2 July 1994.

Paragraph 4.8 of the Indictment:

In his capacity as a Commander of the Para Commando Battalion of the Rwandan Army, Aloys Ntabakuze exercised authority over the units of the Battalion.

2342. The Ntabakuze Defense does not challenge the basic fact contained in paragraph 4.8 of the Indictment, but notes and emphasizes that Major Ntabakuze did *not* exercise authority over units that had been temporarily transferred to other Battalions during the period of that transfer.

Paragraph 5.1 of the Indictment:

From late 1990 until July 1994, Gratién Kabiligi, Aloys Ntabakuze, Théoneste Bagosora, Augustin Ndindiliyimana, Augustin Bizimungu, Aloys Ntiwiragabo, Protais Mpiranya, François-Xavier Nzuwonemeye, Anatole Nsengiyumva, Augustin Bizimana, Tharcisse Renzaho and Samuel Imanishimwe conspired among themselves and with others to work out a plan with the intent to exterminate the civilian Tutsi population and eliminate members of the opposition, so that they could remain in power. The components of this plan consisted of, among other things, recourse to hatred and ethnic violence, the training of and distribution of weapons to militiamen as well as the preparation of lists of people to be eliminated. In executing the plan, they organized, ordered and participated in the massacres perpetrated against the Tutsi population and of moderate Hutu.

2343. Paragraph 5.1 of the Indictment does not indicate where, when and how the Accused Major Aloys Ntabakuze allegedly conspired with others to work out a plan with the intent to exterminate Tutsi population and members of the opposition. The term "others" used in this paragraph is extremely vague.²⁴⁶⁸ This paragraph does not indicate the Major Ntabakuze's

²⁴⁶⁸ See, for example, *Prosecutor v. Blaskic*, 'Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/lack of Adequate Notice of Charges)' of 4 April 1997, at paras. 22-24; see also *The Prosecutor v. Casimir Bizimungu et al.*, 'Decision on Motion from Casimir Bizimungu Opposing to the

alleged mode of participation in the alleged conspiracy and planning. This paragraph is fatally vague and can be seen as nothing more than a general introductory paragraph on the subject of a “plan” and conspiracy, the details of which would be expected to follow. Since these details, being the essential material facts which define the charge, do *not*, in fact, follow, the Accused was not informed promptly and *in detail* of the nature and cause of the charge against him, in violation of Article 20 (4) (a) of the Statute.

2344. The Prosecution failed to adduce any conclusive proof of this specific Major Ntabakuze’s alleged intent to exterminate Tutsi and members of the opposition; nor did they adduce any evidence about the allegation that Major Aloys Ntabakuze was “in power” or that he wanted to maintain that power; nor did they adduce any evidence about the alleged agreement involving the persons mentioned in the paragraph with the common objective to commit genocide or evidence about the participation of the Accused Ntabakuze in any such alleged agreement.
2345. Prosecution witnesses ZF and DBQ are the only Prosecution witnesses who even talked about meetings²⁴⁶⁹. Whatever the case may be with respect to their credibility, their testimony did not directly support any allegations of criminal conduct of this Accused as may be found in paragraph 5.1 of the indictment. In its decision on June 29, 2006, this Chamber held that the testimony about meetings alleged by Prosecution witnesses ZF and DBQ respectively at Butotori and in camp Kanombe while related to paragraph 5.1 was such that “*No specific criminal conduct of the Accused is alleged*”²⁴⁷⁰. Furthermore, as has been argued more fully *supra*, in the discussions of specific allegations against Major Ntabakuze, it is submitted that these Prosecution witnesses are simply not credible, and their testimony should be disregarded in its entirety.²⁴⁷¹

Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA’ (TC) of 23 January 2004, at para. 14, upheld at Appeal in *Bizimungu et al.*, ‘Decision on Prosecution’s Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence’ (AC), of 25 June 2004.

²⁴⁶⁹ See the discussion about *ALLEGATIONS ABOUT CONSPIRACY AT A BUTOTORI MEETING AND OTHER MEETINGS BEFORE 06 APRIL 1994*, *supra*.

²⁴⁷⁰ TC Decision on 29 June 2006, para 59

²⁴⁷¹ Witnesses XAM, XXQ, Des Forges, Dallaire, Beardsley, XBH, ABQ, DO, Kambanda, DK-11, DY, Exhibits P442C and Exhibits P38 mentioned in paragraph 1987 of the Prosecution Final Trial Brief under paragraph 5.1 of the indictment have nothing to do with Major Ntabakuze because none of them brought evidence against him with respect to this allegation. The Prosecution attempt to read the three indictments as joint document against all the four Accused violated Rule 82 (A) and contradicted established jurisprudence before the ICTR and ICTY as underlined *supra* under “Part Two: The Law”, in paragraph 18. Even in the case of the joint indictment against Kabiligi and Ntabakuze, each Accused is accorded the same rights as if they were tried separately according to Rule 82 (A). Moreover, the mention of Witness DCH is inappropriate since his allegation about meetings at Kabuga was excluded by the Trial Chamber decision of 29 June 2006.

2346. The Chamber has found that a reference in paragraph 5.1 of the Indictment to Ntabakuze being part of a group of persons who devised a plan that included “the preparation of lists of people to be eliminated” had provided notice of the allegation that he had used lists to arrest people in October 1990.²⁴⁷²
2347. As we have argued elsewhere²⁴⁷³, and *supra*, notice that the Accused was allegedly involved in *planning*, in the context of which lists of people to be *eliminated* were *prepared*, is simply not the same allegation as that the Accused was involved in the *use* of lists to *arrest* people in October 1990. It is submitted that these are clearly different acts with different characters.
2348. The Indictment must spell out the accusations against the Accused with specificity. Some *other* similar act mentioned in the Indictment does not constitute clear notice of the material facts supporting the charges against the Accused, and evidence, even proof of that *other* act, does *not* provide proof of the act described in the Indictment.
2349. As demonstrated in the discussions of specific allegations, *supra*, the Prosecution has failed to prove a single allegation beyond a reasonable doubt that might in any way be related to this paragraph. Thus paragraph 5.1 of the indictment can not lead to a conviction against Major Ntabakuze, and should ultimately be disregarded concerning him.

Paragraph 5.5 of the Indictment:

On 4 December 1991, President Juvénal Habyarimana set up a military commission. The commission was given the task of finding an answer to the following question: "What do we need to do in order to defeat the enemy militarily, in the media and politically?" Major Aloys Ntabakuze, Lt. Col. Anatole Nsengiyumva and Colonel Théoneste Bagosora were members of this commission.

2350. The events described in Paragraph 5.5 of the indictment fall outside the temporal jurisdiction of the Tribunal and, in virtue of this, were they to be criminal acts (which, it is submitted, they are not) they could not be the basis of a conviction of the Accused. The Defence argument in this respect is in accordance with the Appeals Chamber decision of 13 November 2000,²⁴⁷⁴ in the case of *Prosecutor v. Ntabakuze* (ICTR-97-34), which states that

²⁴⁷² *Bagosora et al.*, Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006, at paragraph 16.

²⁴⁷³ *Bagosora et al.*, Ntabakuze Submissions Regarding the Application of the Appeals Chamber’s 18 September 2006 Decision on Questions of Law Related to the Exclusion of Evidence, 15 October 2006, at paragraphs 55-56

²⁴⁷⁴ *Aloys Ntabakuze c. Le Procureur* (ICTR-97-34-A), Arrêt sur l’appel interlocutoire de la décision du 13 avril 2000 de la chambre de première instance III, 13 novembre 2000, at page 5: “... la présente Chambre a conclu qu’un acte

crimes committed before 1 January 1994 cannot be attributed to an accused and that references to such crimes in the indictment are necessarily there for clarification only. Inasmuch as this paragraph of the Indictment does not describe any criminal conduct of the Major Ntabakuze, it can not support any count for which Major Ntabakuze has been charged, and should be ultimately disregarded in the deliberations on his guilt or innocence. (See the analysis of this allegation in Allegation 2 “The Definition of the Enemy” *supra*)

Paragraph 5.8 of the Indictment:

As from 1993, Aloys Ntabakuze and Colonel Théoneste Bagosora made statements wherein they identified the enemy as the Tutsi, and their sympathizers as the Hutu in the opposition.

2351. The events in Paragraph 5.8 of the Indictment fall outside the temporal jurisdiction of the Tribunal and, it is submitted, do not represent criminal conduct *per se*. Should the Chamber consider that these events *do* represent criminal conduct, the Chamber should bear in mind the Appeals Chamber Decision of 13 November 2000 on the Ntabakuze Defense appeal that any reference in the indictment to allegations of crimes falling outside the temporal jurisdiction should be seen as being there only for clarification.
2352. In other respects, the paragraph does not indicate where, when and to whom the statements were addressed, with what means they were made (speech or written statements) and why. Thus, the paragraph is fatally vague. Furthermore, the Prosecution did not adduce any specific evidence of any such acts by Ntabakuze. While Prosecution witnesses DBY, DP, XAP, LN and XAI²⁴⁷⁵, talked about discrimination, they did not make any allusion to the statements alleged in paragraph 5.8 of the Indictment.²⁴⁷⁶
2353. As can be plainly seen from the extensive and detailed discussions in our sections *supra* on all of the various allegations against Major Ntabakuze, not one of them has been proved beyond a reasonable doubt. Thus, nothing in this fatally vague paragraph has been proved beyond a reasonable doubt. Therefore paragraph 5.8 of the Indictment is essentially irrelevant to the deliberations in the case of Major Ntabakuze.

d'accusation ne peut imputer à un accuse une infraction commise avant le 1er janvier 1994, mais que, par contre, un acte d'accusation peut, à titre introductive, se référer à des infractions et des faits seraient survenus avant 1994;”

²⁴⁷⁵ (whose evidence is more fully discussed in the section *supra* on ALLEGATIONS REGARDING DISCRIMINATION, AND THE ‘DEFINITION OF THE ENEMY’)

²⁴⁷⁶ The Prosecutor failed to indicate specifically in paragraph 1988 of his Final Trial Brief under paragraph 5.8 of the indictment, witnesses that supported this allegation. Instead he merely referred to paragraphs 5.10 and 5.12 of the indictment which are about different allegations.

Paragraph 5.10 of the Indictment:

At the time of the negotiation of the Arusha Accords, several meetings of Army officers including Major Aloys Ntabakuze Colonel Théoneste Bagosora and Lt. Col. Anatole Nsengiyumva were held notably at Kanombe military camp. During the same period, Aloys Ntabakuze and Théoneste Bagosora urged the military to reject and show their disapproval of the Arusha Accords. In August 1993, Aloys Ntabakuze even ordered his men to abduct the Prime Minister and bring her to Kanombe Camp. The operation was cancelled while it was under way on the orders of the Chief of Staff, General Déogratias Nsabimana.

2354. The evidence about the alleged abduction of the Prime Minister was declared inadmissible by the Chamber in its decision of 3 November 2003, by virtue of it falling outside the temporal jurisdiction of the Tribunal, and this portion of the paragraph should, thus, be ignored.
2355. The allegation about opposition to the Arusha Accords gives no clear indication as to when the alleged meetings supposedly took place, and the expression “*several meetings*” is simply too vague to be meaningful. The paragraph does not indicate the Major Ntabakuze’s alleged mode of participation in these alleged meetings. It does not indicate the criminal conduct of Major Aloys Ntabakuze in respect to meetings. The paragraph does not indicate where, when and how the Accused Aloys Ntabakuze urged the military to reject and show disapproval of the Arusha Accords, nor does it indicate which soldiers would have been concerned. Besides, this allegation does not describe any criminal conduct of the Accused.
2356. In finding this paragraph to have some relationship to the matters discussed in our section on *ALLEGATIONS ABOUT CONSPIRACY AT A BUTOTORI MEETING AND OTHER MEETINGS BEFORE 06 APRIL 1994, supra*, the Chamber also found that: “*No specific criminal conduct of the Accused is alleged.*”²⁴⁷⁷
2357. As well, while this paragraph of the Indictment does indicate Major Ntabakuze’s alleged opposition to the Arusha Accords, as can be seen in our discussion of the *ALLEGATION OF MAJOR NTABAKUZE’S OPPOSITION TO THE ARUSHA ACCORDS, supra*, none of the specifics that actually emerged in the testimony are, in fact, outlined in the [paragraph itself (or in the next, similar paragraph of the Indictment)]. Thus, the evidence in the trial may be said, at best, to be *related* to these paragraphs, but it was not specifically described in the Indictment.

²⁴⁷⁷ *Bagosora et al.*, Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006, at paragraph 58.

Evidence, or even proof, of facts merely *related to* but *not actually mentioned* in a paragraph of the Indictment, does not make proof of the related facts which are actually mentioned in the that paragraph of the Indictment. (This is however one of the very few examples of *any* correspondence *at all* between the Indictment and the evidence in this trial, as imprecise as that correspondence may be.)²⁴⁷⁸

2358. The alleged facts appearing in this paragraph having not appeared in the evidence, clearly, the paragraph can not be said to have been proved. Furthermore, as we have demonstrated in our discussions of the specific related allegations, *supra*, the allegationns themselves have not been proved beyond a reasonable doubt. Therefore paragraph 5.10 of the Indictment has not been proved, and is essentially irrelevant to the present deliberations on the matter of criminal responsibility of Aloys Ntabakuze.

Paragraph 5.16 of the Indictment:

The training was supervised by military, including Aloys Ntabakuze, Protais Mpiranya, Anatole Nsengiyumva, Léonard Nkundiye, and civilian authorities. Training was conducted simultaneously in several prefectures around the country: Kigali, Cyangugu, Gisenyi and Butare, as well as in the Mutara sector. Training also took place in military camps, notably Gabiro, Gako, Mukamira and Bigogwe, as well as around these camps or in neighbouring forests.

2359. Paragraph 5.16 of the indictment is too vague because it does not indicate any specific acts allegedly done by the Accused. It does not indicate when, where, how and why he would have been involved in the alleged training. Therefore the Accused was not clearly informed of the charges against him, in violation of Article 20 (4) (a) of the Statute.

²⁴⁷⁸ Witnesses XBM, XXC, LAI, XBG, Des Forges, Exhibits P24B, P33, P36B, DK28B and DK32 mentioned in paragraph 1988 of the Prosecution Final Trial Brief under paragraph 5.10 of the indictment have nothing to do with Major Ntabakuze because none of them brought evidence against him with respect to this allegation. The Prosecution attempt to read the three indictments as joint document against all the four Accused violated Rule 82 (A) and contradicted established jurisprudence before the ICTR and ICTY as underlined *supra* under “Part Two: The Law”, in paragraph 18. Even in the case of the joint indictment against Kabiligi and Ntabakuze, each Accused is accorded the same rights as if they were tried separately according to Rule 82 (A). Moreover, the content of Exhibits P2A, P3, P23 as well as the testimony of Desforges are connected to the alleged abduction of the Prime Minister. But evidence on this allegation was declared inadmissible by the Chamber in its decision of 3 November 2003.

2360. Furthermore, the Prosecution did not adduce evidence about the involvement of Ntabakuze in the supervision of the training of the militia²⁴⁷⁹. The allegations made by Prosecution witness XAB and GS have nothing to do with *supervision*, and they are simply hearsay about the involvement of two Para Commando soldiers in training at Gabiro in 1993 and mere speculation about alleged supply of ammunition by the Para Commando Battalion in 1993. As well, this evidence falls outside the temporal jurisdiction of the Tribunal.
2361. Prosecution witnesses A and BY, both Interahamwe leaders, testified that Interahamwe were never trained to exterminate Tutsi. They said that Interahamwe were trained to protect MRND leaders. Furthermore, none of them implicated Major Ntabakuze or Para Commando soldiers in the training of Interahamwe.²⁴⁸⁰
2362. The allegations that are related to this overly vague and imprecise paragraph of the Indictment have not, themselves been proved beyond a reasonable doubt. The paragraph, therefore, has not, itself, been proved either. For all these reasons, paragraph 5.16 of the Indictment can not be relied upon to ground a conviction of Major Ntabakuze..

Paragraph 5.17 of the Indictment:

In Kigali préfecture, Aloys Ntabakuze and Protais Mpiranya supervised the training of MRND militia, the Interahamwe.

2363. Paragraph 5.17 of the indictment is too vague in that it does not indicate any specific acts of the Accused, nor does it indicate when, where, how and why the Accused Major Aloys Ntabakuze would have been involved in the alleged training. On the other hand, the Prosecution failed to adduce any testimony about this alleged involvement of Ntabakuze in the supervision of the training of the militia in Kigali²⁴⁸¹. Having introduced *no evidence* to

²⁴⁷⁹ See the discussion *supra*, in the section entitled: *ALLEGATIONS OF TRAINING OF MILITIAS*, regarding all of the evidence cited in this discussion of paragraph 5.16 of the Indictment.

²⁴⁸⁰ Witnesses Dallaire, DN, DA, LAI, A, XBG, Exhibits P2A, P33B, P36B, DK28B and DK32B mentioned in paragraph 1988 of the Prosecution Final Trial Brief under paragraph 5.16 of the indictment have nothing to do with Major Ntabakuze because none of them brought evidence against him with respect to this allegation. The Prosecution attempt to read the three indictments as joint document against all the four Accused violated Rule 82 (A) and contradicted established jurisprudence before the ICTR and ICTY as underlined *supra* under “Part Two: The Law”, in paragraph 18. Even in the case of the joint indictment against Kabiligi and Ntabakuze, each Accused is accorded the same rights as if they were tried separately according to Rule 82 (A). Moreover, DCH’s allegations about meetings at Kabuga were excluded by the Trial Chamber decision of 29 June 2006.

²⁴⁸¹ See the discussion *supra*, in the section entitled: *ALLEGATIONS OF TRAINING OF MILITIAS*, regarding all of the evidence cited in this discussion of paragraph 5.17 of the Indictment.

support the allegation in the paragraph, the Prosecution clearly has not proved the paragraph at all, let alone beyond a reasonable doubt. Paragraph 5.17 of the indictment is thus essentially irrelevant to any deliberations on the guilt or innocence of Major Ntabakuze.²⁴⁸²

Paragraph 5.22 of the Indictment:

Before and during the events referred to in this indictment, Aloys Ntabakuze, Augustin Bizimana, Théoneste Bagosora, Protais Mpiranya, Anatole Nsengiyumva, and others distributed weapons to the militiamen and certain carefully selected members of the civilian population with the intent to exterminate the Tutsi population and eliminate its "accomplices".

2364. Paragraph 5.22 of the indictment is too vague in that it does not clearly indicate any specific acts of the Accused Major Aloys Ntabakuze. It does not indicate when, where and how the Accused supposedly distributed weapons, nor does it with any specificity, or give even a single example, to whom the weapons would have been supplied with the intent to exterminate Tutsi population and eliminate its “accomplices”. It is submitted that this paragraph is fatally vague, and utterly lacking in particulars. Therefore, the Accused was not clearly informed in violation of Article 20 (4) (a) of the Statute.

2365. It is submitted that the references in paragraph 5.22 of the Indictment are too vague and generic, specifying no particular places or occasions when such distribution would have taken place, and that they should have been pleaded in the Indictment with much greater particularity.

2366. We reiterate that the *acts and conduct* of the Accused, as well as the *time and place* of the alleged events *must* be pled in the Indictment in some form before clarification can be provided by non indictment disclosure. Being mindful of the Appeals Chamber’s statement that “a Trial Chamber can only convict the accused of crimes which are charged in the indictment”,²⁴⁸³ it is submitted that these allegations were not in the Indictment with sufficient specificity to ground a conviction on any charge.

2367. Most importantly, we have clearly demonstrated, in our discussion about the *ALLEGATIONS ABOUT SUPPLYING WEAPONS AND AMMUNITION TO THE INTERAHAMWE*, *supra*, the allegations

²⁴⁸² Witness GS mentioned in paragraph 1988 of the Prosecution Final Trial Brief under paragraph 5.17 of the indictment did not testify on training of militia in Kigali and much less about Major Ntabakuze with respect to this allegation. He rather testified about training in Mutara.

²⁴⁸³ *Naletilic*, Judgement (AC), at paragraph 26.

not specifically spelled out, but related to this allegation have not been proved beyond a reasonable doubt. The paragraph, itself, has thus, not been proved either.²⁴⁸⁴

Paragraph 6.7 of the Indictment:

In the morning of 7 April, another meeting of the FAR officers was held at the Ecole Supérieure Militaire (ESM); those participating included Major Aloys Ntabakuze, Major François-Xavier Nzuwonemeye and Lt. Col. Léonard Nkundiye. Also present were the commanding officers of the sectors of operation in Rwanda, the commanders of the military camps and officers of the General Staffs (AR and GN). The Commander of the Presidential Guard, Major Mpiranya, did not attend that meeting. Meanwhile, his men were already perpetrating massacres. The meeting was chaired by Colonel Théoneste Bagosora. He reiterated his position, maintaining that the military should take power. For the third time, Colonel Théoneste Bagosora refused that the Prime Minister be consulted, adding that he did not know if she was still alive.

2368. Presumably Paragraph 6.7 of the Indictment is intended to further the count of conspiracy, but it contains no specific allegation about conspiracy, *per se*. In fact, it does not describe any criminal conduct of Major Ntabakuze, at all. The fact of army officers meeting following the assassination of the President is a normal event that would be expected to take place under the circumstances. There is nothing in the paragraph to suggest that criminal discussion took place at that unsurprising meeting. Therefore, it can not support any count against the Major.

Paragraph 6.8 of the Indictment:

While this meeting was going on, Prime Minister Agathe Uwilingiyimana was tracked down, arrested, sexually assaulted and killed by Rwandan Army personnel, more specifically members of the the Para Commando Battalion of Major Ntabakuze, Presidential Guard, and the Reconnaissance Battalion. Concurrently, members of the same units arrested, confined and killed important opposition leaders and prominent figures in the Tutsi community. Hence, the following were killed: the President of the Constitutional Court, the Chairman of the PSD party and Minister of Agriculture, the Vice-Chairman of the PL party and Minister of Labor and Community Affairs, as well as a member of the Political Bureau of the MDR, the Minister of Information. That same morning, the ten Belgian Para commandos from UNAMIR who were guarding the Prime Minister were murdered at Kigali military camp.

²⁴⁸⁴ Witnesses ZF, AAA, BY and GS mentioned in paragraph 1988 of the Prosecution Final Trial Brief under paragraph 5.22 of the indictment have nothing to do with Major Ntabakuze because they did not testify against him about this allegation. The Prosecution attempt to read the three indictments as joint document against all the four Accused violated Rule 82 (A) and contradicted established jurisprudence before the ICTR and ICTY as underlined *supra* under “Part Two: The Law”, in paragraph 18. Even in the case of the joint indictment against Kabiligi and Ntabakuze, each Accused is accorded the same rights as if they were tried separately according to Rule 82 (A).

2369. Paragraph 6.8 of the Indictment describes what the Prosecutor called the ‘Constitutional Killings’ in the Prosecutor’s Final Brief. As such, it is, by exception, directly related to evidence presented at trial, which it succinctly describes. However, while it mentions Major Ntabakuze’s name, it does not indicate the direct involvement of the Major Ntabakuze. Nor does it indicate which unit or soldiers of the Para Commando Battalion under the control of the Accused were alleged to have been involved in the killing of the Prime Minister Agathe Uwilingiyimana and opposition leaders.
2370. Furthermore, it does not indicate the Major Ntabakuze’s alleged mode of participation in the alleged criminal conduct described therein. Thus, with regard to Major Ntabakuze, the paragraph may be seen to be somewhat vague and therefore, the Accused was not fully informed of the accusations against him in violation of Article 20 (4) (a) of the Statute. As well, the Prosecution has failed to provide any explanation as to why this paragraph is referred to under both Rule 6 (1) and Rule 6 (3).
2371. Whilst the Indictment provides information relating to the position of the alleged victims,²⁴⁸⁵ the Ntabakuze Defence reminds the Trial Chamber an indictment must plead *material facts* going to proof of the crime charged with a particularity sufficient to allow the accused to know the nature of the case against him.²⁴⁸⁶ It is submitted that these allegations provide the accused with no information which would allow him to investigate their veracity, for example, the time of the assassinations, the identity of the perpetrators, or the manner in which it is alleged the victims were killed. It is submitted that this defect materially impaired the preparation of the Ntabakuze Defence case as the Indictment failed to put the Ntabakuze Defence on notice as to how the Prosecution intended to use information adduced at trial, and eliminated any real possibility for the Ntabakuze Defence to effectively prepare its defence.
2372. The Indictment is also vague with respect to the mode of responsibility for which it is alleged Major Ntabakuze is liable for these killings. Not only does it appear that the Prosecution intends the political assassinations to go towards evidence for almost every

²⁴⁸⁵ Indictment, para 6.8.

²⁴⁸⁶ *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 23; *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 November 2006) at para.20; *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defects in the Form of the Indictment* (5 August 2005) at para. 9; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Kabiligi Request for Particulars of the Amended Indictment* (27 September 2005) at para. 4.

count in the Indictment,²⁴⁸⁷ the Prosecution also alleges that Major Ntabakuze is responsible for those crimes under both direct and superior command responsibility.²⁴⁸⁸ The mode of Major Ntabakuze's alleged direct participation in the killings is similarly arcane, with the Indictment pleading almost every mode of direct responsibility contained in Article 6(1):

[The Accused and their co-conspirators] participated in the planning, preparation or execution of a common scheme, strategy or plan, to commit the atrocities set forth above. The crimes were committed by them personally, by persons they assisted or by their subordinates, and with their knowledge or consent.²⁴⁸⁹

2373. This Tribunal has recognized the importance of clarity in the indictment vis-à-vis the mode of an accused's participation.²⁴⁹⁰ An indictment that fails to indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged may be ambiguous and could be found defective.²⁴⁹¹

2374. The Ntabakuze Defence recognizes the right of the Prosecution to plead different forms of liability in the alternative, where it may not be clear how the evidence will be led in trial.²⁴⁹² However, it is submitted that the practice whereby a material fact is pleaded as evidence for almost every count in the Indictment, on the basis of almost every form of individual criminal liability, does not allow the accused to know the real nature of the case against him with any certainty.²⁴⁹³ Furthermore, it casts doubt on the Prosecution's compliance with their obligation to include in the Indictment only those forms of liability for which cogent evidence exists.²⁴⁹⁴

2375. On the other hand, the Prosecution failed to adduce *any* evidence about Major Ntabakuze's alleged personal involvement in these incidents or about the alleged involvement of Para

²⁴⁸⁷ Paragraph 6.8 of the Indictment, the primary paragraph relating to the 'Constitutional killings', is referred to as going towards proof of every count in the Indictment, save counts 6 and 10: Indictment, pages 45-54.

²⁴⁸⁸ Paragraph 6.8 is also referred to as proof of individual responsibility under both 6(1) and 6(3) of the Statute, being direct and command responsibility respectively: Indictment, pages 45-54.

²⁴⁸⁹ Indictment, para 6.51.

²⁴⁹⁰ *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defects in the Form of the Indictment* (5 August 2005) at para. 13; *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 259.

²⁴⁹¹ *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *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) at para. 27

²⁴⁹² *Prosecutor v Mpambara*, No. ICTR-2000-65-I, *Decision on the Defence Preliminary Motion Challenging the Amended Indictment* (30 May 2005) at para. 4.

²⁴⁹³ *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defects in the Form of the Indictment* (5 August 2005) at para. 13.

²⁴⁹⁴ *Prosecutor v Muvunyi*, No. ICTR-2000-55A-PT, *Decision on the Prosecutor's Motion for Leave to Amend the Indictment* (24 February 2005) at paras. 52-53; *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-I, *Decision on the Defence Preliminary Motion Objecting to the Form of the Indictment* (15 July 2004) at para. 32-33.

Commando soldiers under the effective control of Major Aloys Ntabakuze in either the assassination of Prime Minister Agathe Uwilingiyimana or that of other opposition leaders.²⁴⁹⁵

2376. Furthermore, the Ntabakuze Defence has clearly shown in our section entitled *ALLEGATIONS ABOUT KIMIHURURA INCIDENTS* that these allegations have not been proved beyond a reasonable doubt. For all these reasons, paragraph 6.8 of the Indictment has not been proved.

Paragraph 6.18 of the Indictment:

As from 7 April 1994, massacres of the Tutsi population and the murder of numerous political opponents were perpetrated throughout the territory of Rwanda. These crimes, which had been planned and prepared for a long time by prominent civilian and military figures who shared the extremist Hutu ideology, were carried out by militiamen, military personnel and gendarmes on the orders and directives of some of these authorities, including Major Aloys Ntabakuze and Brigadier Général Gratien Kabiligi.

2377. Paragraph 6.18 of the indictment is so vague as to say nothing identifiable with any specificity whatsoever. It fails to indicate where, when and to whom the Accused Major Aloys Ntabakuze is alleged to have given orders and directives to perpetrate massacres of Tutsi and political opponents throughout the country. This paragraph is defective due to fatal vagueness. Therefore the Accused was not clearly informed of the charges against him through this paragraph, in violation of Article 20 (4) (a) of the Statute. As well, the Prosecution has failed to provide any explanation as to why this paragraph is referred to under both Rule 6 (1) and Rule 6 (3).

2378. We reiterate that while the Ntabakuze Defence recognizes the right of the Prosecution to plead different forms of liability in the alternative, where it may not be clear how the evidence will be led in trial,²⁴⁹⁶ it is submitted that the practice whereby a material fact is pleaded as evidence for almost every count in the Indictment, on the basis of almost every form of individual criminal liability, does not allow the accused to know the real nature of

²⁴⁹⁵ Prosecution witnesses General Dallaire and Beardsley mentioned in paragraph 1993 of the Prosecution Final Trial Brief under paragraph 6.8 of the indictment did not testify against Major Ntabakuze or Para Commando soldiers with respect to this allegation. The Prosecution attempt to read the three indictments as joint document against all the four Accused violated Rule 82 (A) and contradicted established jurisprudence before the ICTR and ICTY as underlined *supra* under “Part Two: The Law”, in paragraph 18. Even in the case of the joint indictment against Kabiligi and Ntabakuze, each Accused is accorded the same rights as if they were tried separately according to Rule 82 (A).

²⁴⁹⁶ *Prosecutor v Mpambara*, No. ICTR-2000-65-I, *Decision on the Defence Preliminary Motion Challenging the Amended Indictment* (30 May 2005) at para. 4.

the case against him with any certainty.²⁴⁹⁷ Furthermore, it casts doubt on the Prosecution's compliance with their obligation to include in the Indictment only those forms of liability for which cogent evidence exists.²⁴⁹⁸

2379. On the other hand, the Prosecution failed to adduce *specific* evidence about the planning of massacres involving Major Ntabakuze or about the existence of extremist Hutu ideology involving Major Ntabakuze or about orders and directives by Major Ntabakuze to perpetrate massacres throughout the country.

2380. It is submitted for all of these reasons, that the fatally vague paragraph 6.18 of the Indictment has not been proven.²⁴⁹⁹

Paragraph 6.24 of the Indictment:

Following the meeting of the morning of 7 April 1994, Colonel Théoneste Bagosora flouted these requests and ordered Major Aloys Ntabakuze, Commander of the Para-Commando Battalion, Major François-Xavier Nzuwonemeye, Commander of the Reconnaissance Battalion, and Lieutenant Colonel Léonard Nkundiye, former Commander of the Presidential Guard, to proceed with the massacres. On the same day, on the orders of Colonel Théoneste Bagosora, groups of soldiers, including elements of the Presidential Guard and of the Para-Commando Battalion, proceeded to carry out selective assassinations of people whose names were on a list.

2381. Like so much of this singularly flawed Indictment, Paragraph 6.18 suffers from the vice of vagueness with respect to the alleged assassinations, in particular regarding Major Ntabakuze, or those under his command. It fails to indicate the victims that were allegedly assassinated, when, where and by whom exactly. It fails to indicate whether or not the soldiers involved were under the effective control of Major Ntabakuze. This paragraph, as well, does not indicate whether Major Ntabakuze is alleged to have complied with the alleged order from Colonel Bagosora. Indeed, it does not indicate Major Ntabakuze's mode of participation in this allegation. This paragraph, while it says something, simply doesn't say enough, clearly enough, to keep it from being defective. Thus, this is another instance in which Major Ntabakuze was not clearly

²⁴⁹⁷ *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defects in the Form of the Indictment* (5 August 2005) at para. 13.

²⁴⁹⁸ *Prosecutor v Muvunyi*, No. ICTR-2000-55A-PT, *Decision on the Prosecutor's Motion for Leave to Amend the Indictment* (24 February 2005) at paras. 52-53; *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-I, *Decision on the Defence Preliminary Motion Objecting to the Form of the Indictment* (15 July 2004) at para. 32-33.

²⁴⁹⁹ The Prosecutor even did not mention, in paragraph 1994 of his Final Trial Brief, any witnesses that led evidence about the allegation contained in paragraph 6.18 of the indictment. Instead, he merely referred to paragraphs 5.1; 5.36 and 6.19 onwards of the indictment.

informed of the accusations against him, in violation of Article 20 (4) (a) of the Statute.

2382. With respect to the alleged order of Colonel Bagosora, while the paragraph does not specifically spell out the alleged utterance of Colonel Bagosora (“*MUHERE ARUHANDE*”), it is one of the very few instances in which there is some correspondence between the description of an event in the Indictment and that found in the evidence. On the other hand, the evidence adduced by the Prosecution regarding this allegation was not credible in the least.
2383. Prosecution Expert witness Reyntjens alleged that his informant, who did not testify before the Chamber, overheard Colonel Bagosora saying to the three officers “*MUHERE ARUHANDE*”. Prosecution Expert witness Desforges relied on Reyntjens. So neither of them is a direct witness of the alleged statement made by Bagosora, and no direct witness testified. Furthermore, the expression allegedly overheard by the informant does not exist in Kinyarwanda. Professor Reyntjens himself expressed doubt about the reliability of his lone informant. Thus, the testimony can not be relied upon.
2384. Besides, Major Ntabakuze was not subordinate of Colonel Bagosora and was not answerable to him. The Prosecution did not adduce evidence to support any contrary proposition. Instead, Ntabakuze Defense witnesses, including Major Ntabakuze himself, as well as some Prosecution witnesses all testified that Major Ntabakuze was subordinate to Colonel Muberuka and not to Colonel Bagosora.
2385. These issues are more fully explored in our section entitled, *CONSPIRACY: ALLEGATIONS ABOUT BAGOSORA ORDERING “MUHERE AHUHANDE”* in which it is amply demonstrated that this allegation has not been proved beyond a reasonable doubt. For all these reasons, it is evident that paragraph 6.18 of the Indictment must be found to have not been proven, either.

Paragraph 6.27 of the Indictment:

On 8 April 1994, at a general assembly, the Commander of the Para Commando Battalion, Aloys Ntabakuze, ordered his soldiers to "avenge the death of the President Habyarimana by killing the Tutsi". Further, he encouraged his troops by confirming

that certain Tutsi and their "politician accomplices" had been killed. Indeed, several opposition leaders had been assassinated the previous day.

2386. The Indictment, at paragraph 6.27, refers to a general assembly alleged to have taken place on 8 April 1994. The evidence at trial consisted of descriptions of one or more assemblies alleged to have taken place at various times on 7 April 1994. The Defence has submitted that the assembly mentioned in the Indictment cannot be the same assembly as any of those mentioned by the various Prosecution witnesses at trial, the Indictment having been crystal clear that the date concerned was the 8th and not the seventh. It is well established that the assassinations occurred on April 7, 1994. So the following day is exactly April 8, 1994.

2387. The Prosecution failed to adduce evidence about any assembly allegedly held on 8 April 1994. Prosecution witnesses who talked about an assembly placed it on 6 and/or 7 April, 1994. Whatever may be the case with respect to their credibility, none of them supported this paragraph. Thus, there was a lack of consistency between the Indictment and the evidence. In assessing the evidence in Rwamakuba case, the Trial Chamber was confronted with similar situation and ruled in favour of the Defence by disregarding the allegation and the evidence²⁵⁰⁰.

2388. Nevertheless, in its original Decision on our Motions for Exclusion of Evidence, this Chamber found that while

[t]here is undoubtedly a discrepancy between the date in the Indictment [of the alleged assembly] and the dates in the Pre-Trial Brief summaries ...[a] cursory review of the summaries, however would have revealed this discrepancy and revealed that, regardless of the date, paragraph 6.27 is alleging the same event as is mentioned in the summaries.²⁵⁰¹

The Chamber thus considered that the Defence “had reasonable notice of the material fact on which the Prosecution would rely”²⁵⁰².

2389. We have argued, in our submissions on reconsideration of that Decision²⁵⁰³, that while a “cursory review” might suggest that we are dealing with the same event, a more careful view would have plainly revealed exactly the opposite. The sentence in Paragraph 6.27 which says, “Indeed, several opposition leaders had been assassinated the previous day” clearly

²⁵⁰⁰ TC Judgment against Rwamakuba on 20/09/2006, para 92 to 93, 125 to 126, 144, 166 to 168.

²⁵⁰¹ *Bagosora et al.*, Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006, at paragraph 18.

²⁵⁰² *Ibidem*.

²⁵⁰³ *Bagosora et al.*, Ntabakuze Submissions Regarding the Application of the Appeals Chamber’s 18 September 2006 Decision on Questions of Law Related to the Exclusion of Evidence, 15 October 2006, at paragraphs 61-64

places the event in question on the 8th of April. The Pre-Trial Brief, itself, also contained a reference to the assembly of 8 April 1994, in the summary of witness LN²⁵⁰⁴.

2390. Thus, it is manifestly clear that both the Indictment and Pre-Trial Brief gave unambiguous notice of a meeting on 8 April 1994, while the alleged meeting of 7 April 1994 was completely absent from the Indictment. While the Chamber has “cured” this defect in the Indictment, the Chamber has also suggested that the Prosecution should have “corrected the error once it was discovered”.²⁵⁰⁵

2391. The failure of the Prosecution to plead any assemblies on 7 April 1994 in the Indictment, and the failure to correct this error, if indeed it is an error, by seeking to amend the Indictment, should preclude any conviction resulting from this allegation. Furthermore, as the discussion in the section of this Brief entitled: *ALLEGATIONS OF PHYSICAL PRESENCE AT A GENERAL ASSEMBLY ON 6 OR 7 APRIL 1994 AND PHYSICALLY COMMITTING CRIMINAL ACTS, BY UTTERING ORDERS TO HARM CIVILIANS* amply demonstrates, the related, though unmentioned, allegations have not been proved beyond a reasonable doubt.

2392. For all these reasons, paragraph 6.27 of the Indictment has not been proved, and should be disregarded in the final analysis.

Paragraph 6.28 of the Indictment:

Thereafter, commanders of the Presidential Guard, of the Para Commando Battalion, Major Aloys Ntabakuze, and of the Reconnaissance Battalion were in communication with Colonel Théoneste Bagosora sometimes using a separate radio network.

2393. The Prosecution failed to adduce specific evidence about the allegation concerning Major Ntabakuze articulated in paragraph 6.28 of the Indictment. Furthermore, the paragraph does not describe any criminal conduct of Major Ntabakuze. In the absence of specific evidence, the paragraph has not been proved and it thus cannot support any count against him. Therefore, this paragraph should be accorded no weight in the final analysis.²⁵⁰⁶

²⁵⁰⁴ Prosecutor’s Pre-Trial Brief, at page 96. “Witness will state that on 8th April 1994, Major NTABAKUZE chaired a meeting with Camp Kanombe soldiers. etc....”

²⁵⁰⁵ *Bagosora et al.*, Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006, at paragraph 18.

²⁵⁰⁶ Witnesses ZF, Dallaire, DA, BJ, Des Forges, Reyntjens mentioned under paragraph 6.28 of the indictment, in paragraph 1994 of the Prosecution Final Trial Brief, have nothing to do with Major Ntabakuze since none of them led evidence about the alleged communication network between Colonel Bagosora and Major Ntabakuze. This is a blatant misrepresentation of evidence in record before the Tribunal. Besides, the content of Exhibit DB256 is not fact in evidence. (see para 87 *supra*)

Paragraph 6.29 of the Indictment:

From April to July 1994, Brigadier-General Gratien Kabiligi, Chief of military operations in the Rwandan Army regularly met with the Commander of the Presidential Guard, Protais Mpiranya, and the Commander of the Para Commando Battalion, Aloys Ntabakuze and also with Colonel Théoneste Bagosora.

2394. Similarly, the Prosecution failed to adduce specific evidence about the allegation concerning Major Ntabakuze articulated in paragraph 6.29 of the Indictment. Furthermore, the paragraph does not describe any criminal conduct of Major Ntabakuze. In the absence of specific evidence, the paragraph has not been proved and it thus cannot support any count against him. Therefore, this paragraph should be accorded no weight in the final analysis.²⁵⁰⁷

Paragraph 6.30 of the Indictment:

During the massacres, Brigadier-General Gratien Kabilibi encouraged and supported the militiamen who were murdering Tutsi civilians and ordered his men to use the Interahamwe at the roadblocks. Moreover, in mid-April 1994, Gratien Kabiligi ordered the murder of a soldier in the Forces Armées Rwandaises of Tutsi descent, as well as certain members of his family.

2395. Paragraph 6.30 of the Indictment does not describe any criminal conduct attributable Major Ntabakuze. General Kabiligi was not a subordinate of Major Ntabakuze; hence Major Ntabakuze had no command responsibility regarding the General's actions. This paragraph does not support any of the counts against Major Aloys Ntabakuze. Therefore this paragraph should be ignored with regard to Major Ntabakuze.

Paragraph 6.31 of the Indictment:

From April to July 1994, their statements, the orders they gave and their acts, Brigadier Général Gratien Kabiligi and Major Aloys Ntabakuze, exercised authority over members of the Forces Armées Rwandaises, their officers and militiamen. The military and militiamen, as from 6 April 1994, committed massacres of the Tutsi population and of moderate Hutu which extended throughout rwandan territory with the knowledge of Brigadier Général Gratien Kabiligi and Major Aloys Ntabakuze.

²⁵⁰⁷ Witnesses DY, DBQ and DK11 mentioned in paragraph 1994 of the Prosecution Final Trial Brief under paragraph 6.29 of the indictment have nothing to do with Major Ntabakuze since they did not lead evidence against him in connection with this particular allegation. Besides, the content of Exhibit DB61B is not fact in evidence. (see para 87 *supra*)

2396. Paragraph 6.31 of the Indictment does not indicate when, where and to whom the statements were allegedly made by Major Ntabakuze. It does not specify the statements allegedly made by Major Ntabakuze. It fails to indicate specifically the alleged orders issued or the alleged acts committed by Major Ntabakuze. Nor does indicate Major Ntabakuze's alleged mode of participation. It gives not a single concrete example of anything. So, the paragraph is thus fatally vague, as it does not inform Major Ntabakuze of any concrete aspects of the charges against him. In fact, the paragraph appears to be either merely introductory of specifics to come.²⁵⁰⁸
2397. On the other hand, the Prosecution did not adduce specific evidence to support the contention that Major Ntabakuze exercised authority over members of the FAR, (other than the Para Commando Battalion), and their officers. Nor did the Prosecution adduce any concrete and specific evidence to demonstrate that Major Ntabakuze would have exercised authority over militiamen. As well, no direct evidence was led regarding the alleged knowledge of Major Ntabakuze that members of the FAR, their officers and militiamen committed massacres throughout the Rwandan territory.
2398. For all of these reasons, paragraph 6.31 of the Indictment has not been proven by the Prosecution with regards to any allegations it may contain about Major Ntabakuze.

Paragraph 6.46 of the Indictment:

The massacres thus perpetrated were the result of a strategy adopted and elaborated by political, civil and military authorities in the country, such as Gratien Kabiligi, Aloys Ntabakuze, Théoneste Bagosora, Augustin Ndindiliyimana, Augustin Bizimungu, Aloys Ntiwiragabo, Protais Mpiranya, François-Xavier Nzuwonemeye, Anatole Nsengiyumva, Augustin Bizimana and Tharcisse Renzaho, who conspired to exterminate the Tutsi population. As from on 7 April, other authorities at the national and local levels espoused this plan and joined the first group in encouraging, organizing and participating in the massacres of the Tutsi population and its "accomplices".

2399. The Prosecution failed to adduce any concrete evidence concerning a strategy or plan to exterminate the Tutsi population. No concrete evidence was adduced concerning the alleged conspiracy between the various persons named in the paragraph. As well, there was no concrete evidence adduced regarding the specific involvement of Major Ntabakuze in the strategy, plan or conspiracy alleged in paragraph 6.46 of the Indictment. While it is true that conspiracy can be proved by circumstantial evidence, the covert nature of the crime being

²⁵⁰⁸ The Prosecutor even did not mention in paragraph 1994 of his Final Trial Brief under paragraph 6.31, any witness who specifically made these allegations. Instead, he merely referred to paragraphs 4.1-4.8; 6.1-6.42 of the indictment.

such as to make direct evidence hard to come by, it must be remembered that circumstantial evidence only provides proof of that for which the conclusion sought by the Prosecution is the *only* conclusion that can be reasonably reached from the circumstantial evidence.

2400. We have provided a cogent alternative explanation for the tragedy of Rwanda, in our section entitled *AN ALTERNATIVE EXPLANATION FOR THE TRAGIC EVENTS IN RWANDA*, an explanation, supported by witnesses and contemporaneous documents, that reasonably negates the necessity to have recourse to an imaginary conspiracy or plan to explain how the events unfolded. Even if the Chamber might find the explanation we have provided to be less likely than the planning and conspiracy theory, it is submitted that the explanation has at least raised a reasonable doubt by showing the conspiracy/plan theory to be *not* the *only* reasonable explanation of the circumstantial evidence.²⁵⁰⁹

2401. Paragraph 6.46 of the Indictment has thus not been proven by the Prosecution.

Paragraph 6.49 of the Indictment:

From April to July 1994, the officers of the General Staff of the Army participated in daily meetings at which they were informed of the massacres of the civilian Tutsi population. These meetings assembled the members of the General Staff and unit commanders, including, among others, Major-General Augustin Bizimungu, Brigadier-General Gratien Kabiligi, Major Aloys Ntabakuze, Major Protais Mpiranya, Major François-Xavier Nzuwonemeye, Colonel Aloys Ntwiragabo, as well as Colonel Théoneste Bagosora, and the Chief of Staff of the Gendarmerie, General Augustin Ndindiliyimana.

2402. No evidence was adduced by the Prosecution about the alleged participation of Major Aloys Ntabakuze in the daily meetings at the Army HQ alleged in paragraph 6.49 of the indictment. Therefore, regarding Major Ntabakuze, this paragraph is not proven, and should be disregarded in the deliberations concerning the guilt or innocence of Major Ntabakuze.²⁵¹⁰

Paragraph 6.50 of the Indictment:

Knowing that massacres of the civilian population were being committed, the political

²⁵⁰⁹ The Prosecutor even did not mention in paragraph 1996 of his Final Trial Brief under paragraph 6.46, any witness who specifically made these allegations. Instead, he merely referred to paragraphs 5.1-5.36; 6.18-6.42 of the indictment.

²⁵¹⁰ Witnesses Des Forges, CE, Kambanda, Exhibits DB61B and DB92B mentioned in paragraph 1996 of the Prosecution Final Trial Brief under paragraph 6.49 of the indictment have nothing to do with Major Ntabakuze since they did not lead evidence against him with respect to this allegation.

and military authorities, including Brigadier-General Gratien Kabiligi and Major Aloys Ntabakuze, took no measures to stop them. On the contrary, they refused to intervene to control and appeal to the population as long as a cease-fire had not been declared. This categorical refusal was communicated to the Special Rapporteur via the Chief of Staff of Rwandan Army, Major-General Augustin Bizimungu.

2403. Paragraph 6.50 of the indictment does not give any precise examples where Major Aloys Ntabakuze would have failed to take measures to stop the killing or refused to intervene, to control or to appeal to the population to stop the massacres. It does not even indicate if Major Ntabakuze had the capacity to take measures to stop the massacres. This paragraph does not indicate Major Ntabakuze's alleged mode of participation in the allegation. An indictment must plead *material facts* going to proof of the crime charged with a particularity sufficient to allow the accused to know the nature of the case against him.²⁵¹¹ It is submitted that these allegations provide the accused with no information which would allow him to investigate their veracity, for example, the time or places of events, the identity of the perpetrators, or when and under what circumstances Major Ntabakuze refused to intervene.
2404. It is submitted that this defect materially impaired the preparation of the Ntabakuze Defence case as the Indictment failed to put the Ntabakuze Defence on notice as to how the Prosecution intended to use information adduced at trial, and eliminated any real possibility for the Ntabakuze Defence to effectively prepare its defence. This paragraph, while it says something, simply doesn't say enough, clearly enough, to keep it from being defective. Thus, this is another instance in which Major Ntabakuze was not clearly informed of the accusations against him, in violation of Article 20 (4) (a) of the Statute.
2405. On the other hand, the Prosecution did not adduce evidence about Major Ntabakuze's alleged failure or refusal to stop the killings or of his alleged refusal to appeal to the population to stop the killings on any of the occasions or under any of those circumstances that are not mentioned in the Indictment. For all these reasons, paragraph 6.50 of the Indictment has not been proven and cannot form the basis of a conviction for Major Ntabakuze.²⁵¹²

²⁵¹¹ *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 23; *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 November 2006) at para.20; *Prosecutor v Karemera et al.*, No. ICTR-98-44-PT, *Decision on Defects in the Form of the Indictment* (5 August 2005) at para. 9; *Prosecutor v Bagosora et al.*, No. ICTR-98-41-T, *Decision on Kabiligi Request for Particulars of the Amended Indictment* (27 September 2005) at para. 4.

²⁵¹² Witness Kambanda mentioned in paragraph 1996 of the Prosecution Final Trial Brief under paragraph 6.50 of the indictment has nothing to do with Major Ntabakuze since he did not lead evidence against him with respect to this allegation. Besides, the Exhibits P4A, P6, P238, P6A, P368A are reports which cannot be used to put facts at issue about the acts and conduct of the Accused into evidence. (see para 92 *supra*)

Paragraph 6.51 of the indictment:

Brigadier-General Gratien Kabiligi and Major Aloys Ntabakuze, in their position of authority, acting in concert with, notably Théoneste Bagosora, Augustin Nindiliyimana, Augustin Bizimungu, Aloys Ntwiragabo, Protais Mpiranya, François- Xavier Nzuwonemeye, Anatole Nsengiyumva, Augustin Bizimana and Tharcisse Renzaho, participated in the planning, preparation or execution of a common scheme, strategy or plan, to commit the atrocities set forth above. The crimes were committed by them personally, by persons they assisted or by their subordinates, and with their knowledge or consent.

2406. Similarly to our submissions in relation to paragraph 6.46, it is submitted that the Prosecution failed to adduce any concrete evidence concerning a strategy or plan to commit the atrocities referred to in paragraph 6.51. No concrete evidence was adduced concerning the alleged conspiracy between the various persons named in the paragraph. As well, there was no concrete evidence adduced regarding the specific involvement of Major Ntabakuze in the strategy, plan or conspiracy alleged in paragraph 6.51 of the Indictment. While it is true that conspiracy can be proved by circumstantial evidence, the covert nature of the crime being such as to make direct evidence hard to come by, it must be remembered that circumstantial evidence only provides proof of that for which the conclusion sought by the Prosecution is the *only* conclusion that can be reasonably reached from the circumstantial evidence.

2407. We have provided a cogent alternative explanation for the tragedy of Rwanda, in our section entitled *AN ALTERNATIVE EXPLANATION FOR THE TRAGIC EVENTS IN RWANDA*, an explanation, supported by witnesses and contemporaneous documents, that reasonably negates the necessity to have recourse to an imaginary conspiracy or plan to explain how the events unfolded. Even if the Chamber might find the explanation we have provided to be less likely than the planning and conspiracy theory, it is submitted that the explanation has at least raised a reasonable doubt by showing the conspiracy/plan theory to be *not the only* reasonable explanation of the circumstantial evidence.²⁵¹³

2408. A reasonable doubt having been raised by the Defence, it is submitted that the allegations in paragraph 6.51 of the Indictment have therefore not been proved beyond all reasonable doubt, and cannot form the basis for a conviction of Major Ntabakuze.

²⁵¹³ The Prosecutor even did not mention in paragraph 1996 of his Final Trial Brief under paragraph 6.51, any witness who specifically made these allegations. Instead, he merely referred to paragraphs 5.1-5.36; 6.1-6.50 of the indictment.

B. PARAGRAPHS OF THE INDICTMENT PURPORTEDLY SUPPORTING COUNTS 1 TO 5 AND 7 TO 9 PURSUANT TO RULE 6 (3)

Paragraph 5.33 of the Indictment:

Cooperation between the Interahamwe and certain military personnel, particularly those in the Para-Commando Battalion and the Presidential Guard, was manifested in early 1994 in opposition to the implementation of the institutions provided for under the Arusha Accords. On 5 January 1994, at the time of the swearing-in ceremony of the Broad Based Transitional Government, the Interahamwe organized a demonstration in cooperation with members of the Presidential Guard. They prevented political opponents from entering the Conseil national de Développement (CND). The swearing-in of the members of the Government did not take place. In the end, only the President, Juvénal Habvarimana, was sworn in.

2409. The Prosecution failed to adduce any evidence about implication of Para Commando soldiers in the event alleged in paragraph 5.33 of the Indictment. Therefore, with regards to Major Ntabakuze and the Para Commandos, this paragraph was not proved.²⁵¹⁴

Paragraph 5.34 of the Indictment:

On 8 January 1994, Interahamwe, in complicity with elements of the the Para-Commando Battalion and the Presidential Guard dressed in civilian clothes, again organized a demonstration near the CND. On that occasion. the Interahamwe had hidden weapons very nearby and were equipped with radios provided by the Presidential Guard. That demonstration was intended to provoke and cause injury to the Belgian UNAMIR soldiers.

2410. As with paragraph 5.33, the Prosecution failed to adduce any evidence about implication of Para Commando soldiers in the event alleged in paragraph 5.34 of the Indictment. Therefore, with regards to Major Ntabakuze and the Para Commandos, this paragraph was not proved.²⁵¹⁵

Paragraph 5.35 of the Indictment:

Finally, as of 7 April 1994, throughout Rwanda, Tutsis and certain moderate Hutus, began to flee their homes to escape the violence to which they were victims on their hills and to seek refuge in places where they had traditionally felt safe, notably

²⁵¹⁴ Witnesses Beardsley, Dallaire, Exhibits P33B and DB80 mentioned in paragraph 1991 of the Prosecution Final Trial Brief under paragraph 5.33 of the indictment did not lead any evidence against the Para Commando Battalion.

²⁵¹⁵ Witnesses Beardsley, Dallaire, Claes, Exhibits P170, P33B and DB80 mentioned in paragraph 1991 of the Prosecution Final Trial Brief under paragraph 5.34 of the indictment did not lead any evidence against the Para Commando Battalion with respect to the alleged incident on 8 January 1994.

churches, hospitals and other public buildings such as commune and préfecture offices. On several occasions, gathering places were indicated to them by the local authorities, who had promised to protect them. For the initial days, the refugees were protected by a few gendarmes and communal police in these various locations, but subsequently, the refugees were systematically attacked and massacred by militiamen, often assisted by the same authorities who had promised to protect them. During the numerous attacks on the refugees throughout the country, personnel of the FAR, military or gendarmes, who were supposed to protect them, prevented the Tutsi from escaping and facilitated their massacre by the Interahamwe. On several occasions, these FAR personnel participated directly in the massacres.

2411. Paragraph 5.35 of the indictment does not indicate where and when the events occurred. It does not indicate with precision who the victims were or the perpetrators and with what means they perpetrated the atrocities. The expressions “*certain moderate Hutus*” and “*several occasions*” are too vague.
2412. Furthermore, there is no indication in this paragraph that the perpetrators spoken of therein were subordinates of Major Ntabakuze. This paragraph does not indicate Major Ntabakuze’s alleged mode of participation or responsibility as a superior regarding the events in the allegation. It does not describe any criminal conduct of Major Ntabakuze or of any of his subordinates. With regard to Major Ntabakuze, the paragraph is fatally vague, and thus defective.
2413. On the other hand, the Prosecution failed to adduce evidence about the alleged involvement of Major Ntabakuze in the events alleged in paragraph 5.35 of the Indictment, and thus, with regards to Major Ntabakuze’s possible criminal liability, the paragraph can not be said to have been proved, and cannot form the basis of a conviction.²⁵¹⁶

Paragraph 5.36 of the Indictment:

Furthermore, soldiers, militiamen and gendarmes raped, sexually assaulted and committed other crimes of a sexual nature against Tutsi women and girls, sometimes after having first kidnapped them.

2414. It is submitted that paragraph 5.36 of the Indictment is fatally vague, providing no particulars whatsoever about any specific crimes or any specific perpetrators. It does not indicate if any of the soldiers involved were subordinates of Major

²⁵¹⁶ Witnesses Beardsley and EU mentioned in paragraph 1991 of the Prosecution Final Trial Brief under paragraph 5.35 of the indictment did not lead any evidence against the Para Commando Battalion. Witness WB did not lead evidence supporting this paragraph of the indictment ever. Instead, there is misrepresentation by the Prosecution of evidence in record before the Tribunal about WB. (see analysis of Allegation about the IAMSEA incident *supra*)

Ntabakuze. It does not indicate where, when and how those soldiers would have perpetrated the atrocities. It does not indicate, or even hint at the Major Ntabakuze's alleged mode of participation or responsibility as a superior.

2415. The specific allegations of rape which appeared in the evidence of this trial do not appear anywhere in the Indictment of the Accused Ntabakuze, nor does his name appear anywhere in the Indictment in relation to allegations of rape. Regarding our appeal on exclusion of evidence, the Appeals Chamber noted that “[i]f the Trial Chamber decides that an adjournment is warranted, it could also order the Prosecution to amend the indictment for greater clarity, but this might not be required in every case”.²⁵¹⁷
2416. We have submitted before, and we reiterate that the present case is one in which greater clarity was indeed required so that the Accused might know with precision the precise parameters of the charges against him, which do not appear with any degree of clarity in the Indictment. It is submitted that while supporting documents may provide clarity or detail to vague allegations in the Indictment, such extrinsic material is an inadequate substitute for amendment of the Indictment in the face of complete silence in the Indictment regarding the incidents alleged.
2417. We maintain our position that accusations that do not appear in the Indictment cannot rationally form the basis for conviction. Absence from the Indictment means failure to charge. Not being charged, one cannot be convicted.
2418. On the other hand, the Prosecution failed to adduce credible evidence to support the paragraph. Prosecution Expert witness Nowrojee, who testified about rape in general did not implicate Para Commando soldiers. Prosecution witnesses DBQ and AAA testified about the involvement of Para Commando soldiers in rape. In our discussion *supra* entitled *ALLEGATIONS ABOUT RAPE*, we have shown that the allegations about rape by Para Commando soldiers under the command of major Ntabakuze have not been proved beyond a reasonable doubt. Therefore, with regards to Major Ntabakuze, paragraph 5.36 of the Indictment has not been proved beyond a reasonable doubt.²⁵¹⁸

²⁵¹⁷ 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, at paragraph 37.

²⁵¹⁸ Witnesses Beardsley, Dallaire, ZF, OAB, DBJ, XXY, DAS, XXJ, Serushago, UT, EU, DCH, DAZ, BY, Nowrojee and Exhibit P287A mentioned in paragraph 1991 of the Prosecution Final Trial Brief under paragraph 5.36 of the

Paragraph 6.8 of the Indictment:

While this meeting was going on, Prime Minister Agathe Uwilingiyimana was tracked down, arrested, sexually assaulted and killed by Rwandan Army personnel, more specifically members of the the Para Commando Battalion of Major Ntabakuze, Presidential Guard, and the Reconnaissance Battalion. Concurrently, members of the same units arrested, confined and killed important opposition leaders and prominent figures in the Tutsi community. Hence, the following were killed: the President of the Constitutional Court, the Chairman of the PSD party and Minister of Agriculture, the Vice-Chairman of the PL party and Minister of Labor and Community Affairs, as well as a member of the Political Bureau of the MDR, the Minister of Information. That same morning, the ten Belgian Para commandos from UNAMIR who were guarding the Prime Minister were murdered at Kigali military camp.

2419. Whilst the Indictment provides information relating to the position of certain of the alleged victims, paragraph 6.8 of the indictment does not indicate who the prominent figures in the Tutsi community were that it speaks of. It is submitted that an indictment must plead all the *material facts* going to proof of the crime charged with a particularity sufficient to allow the accused to know the nature of the case against him.²⁵¹⁹

2420. It is submitted that this and related allegations provide the accused with insufficient information which would have allowed him to fully investigate their veracity, for example, the time of the assassinations, the identity of the perpetrators, or the manner in which it is alleged the victims were killed. It is submitted that this defect materially impaired the preparation of the Ntabakuze Defence case as the Indictment failed to put the Ntabakuze Defence on notice as to how the Prosecution intended to use information adduced at trial, and eliminated any real possibility for the Ntabakuze Defence to fully and effectively prepare its defence.

2421. The Indictment is also vague with respect to the mode of responsibility for which it is alleged Major Ntabakuze is liable for these killings. Not only does it appear that the Prosecution intends the political assassinations to go towards evidence for almost every

indictment did not lead any evidence against members of the Para Commando Battalion. The Prosecution attempt to read the three indictments as joint document against all the four Accused violated Rule 82 (A) and contradicted established jurisprudence before the ICTR and ICTY as underlined *supra* under “Part Two: The Law”, in paragraph 18. Even in the case of the joint indictment against Kabiligi and Ntabakuze, each Accused is accorded the same rights as if they were tried separately according to Rule 82 (A). Besides, the mention of Witness XAB with respect to the alleged involvement of Para Commando soldiers in rape is inappropriate since this allegation was excluded by the Trial Chamber decision of 29 June 2006.

²⁵¹⁹ *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 23; *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 November 2006) at para.20; *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defects in the Form of the Indictment* (5 August 2005) at para. 9; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Kabiligi Request for Particulars of the Amended Indictment* (27 September 2005) at para. 4.

count in the Indictment,²⁵²⁰ the Prosecution also alleges that Major Ntabakuze is responsible for those crimes under both direct and superior command responsibility.²⁵²¹ The mode of Major Ntabakuze's alleged direct participation in the killings is similarly arcane, with the Indictment pleading almost every mode of direct responsibility contained in Article 6(1):

[The Accused and their co-conspirators] participated in the planning, preparation or execution of a common scheme, strategy or plan, to commit the atrocities set forth above. The crimes were committed by them personally, by persons they assisted or by their subordinates, and with their knowledge or consent.²⁵²²

2422. This Tribunal has recognized the importance of clarity in the indictment vis-à-vis the mode of an accused's participation.²⁵²³ An indictment that fails to indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged may be ambiguous and could be found defective.²⁵²⁴

2423. The Ntabakuze Defence recognizes the right of the Prosecution to plead different forms of liability in the alternative, where it may not be clear how the evidence will be led in trial.²⁵²⁵ However, it is submitted that the practice whereby a material fact is pleaded as evidence for almost every count in the Indictment, on the basis of almost every form of individual criminal liability, does not allow the accused to know the real nature of the case against him with any certainty.²⁵²⁶ Furthermore, it casts doubt on the Prosecution's compliance with their obligation to include in the Indictment only those forms of liability for which cogent evidence exists.²⁵²⁷

2424. The Prosecution did not adduce evidence about the involvement of Para Commando soldiers under the effective control of Major Ntabakuze in the assassinations dealt

²⁵²⁰ Paragraph 6.8 of the Indictment, the primary paragraph relating to the 'Constitutional killings', is referred to as going towards proof of every count in the Indictment, save counts 6 and 10: Indictment, pages 45-54.

²⁵²¹ Paragraph 6.8 is also referred to as proof of individual responsibility under both 6(1) and 6(3) of the Statute, being direct and command responsibility respectively: Indictment, pages 45-54.

²⁵²² Indictment, para 6.51.

²⁵²³ *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defects in the Form of the Indictment* (5 August 2005) at para. 13; *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 259.

²⁵²⁴ *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *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) at para. 27

²⁵²⁵ *Prosecutor v Mpambara*, No. ICTR-2000-65-I, *Decision on the Defence Preliminary Motion Challenging the Amended Indictment* (30 May 2005) at para. 4.

²⁵²⁶ *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defects in the Form of the Indictment* (5 August 2005) at para. 13.

²⁵²⁷ *Prosecutor v Muvunyi*, No. ICTR-2000-55A-PT, *Decision on the Prosecutor's Motion for Leave to Amend the Indictment* (24 February 2005) at paras. 52-53; *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-I, *Decision on the Defence Preliminary Motion Objecting to the Form of the Indictment* (15 July 2004) at para. 32-33.

with in paragraph 6.8. Furthermore the Prosecutor has failed to explain why paragraph 6.8 of the Indictment was referred to under Rule 6 (1) and Rule 6 (3) when the Indictment specifies neither if Major Ntabakuze knew or had reason to know what was happening, nor what Major Ntabakuze would have done to prevent the atrocities; and when no evidence was adduced regarding Major Ntabakuze's alleged personal involvement in the incidents. As the Prosecution's Final Trial Brief does little more than allege Major Ntabakuze's implication in the 'Constitutional killings' generally²⁵²⁸, Major Ntabakuze still does not know the form of liability his alleged participation took.

2425. Our section, *supra*, entitled *ALLEGATIONS ABOUT KIMIHURURA INCIDENTS*, demonstrates convincingly that the Prosecution has not proved Major Ntabakuze's responsibility for the events alleged in paragraph 6.8 beyond a reasonable doubt. Given the defects in the Indictment and the Prosecution's case in its entirety, a conviction for these crimes would be manifestly unfair, and unwarranted on the evidence.²⁵²⁹

Paragraph 6.15 of the Indictment:

In the night of 6 to 7 April 1994, a number of Belgian military personnel were ordered to go to the Prime Minister's residence and to escort her to the national radio station, where she was to make an address. When they arrived at the Prime Minister's residence at around 5:00 a.m., they were attacked by FAR personnel, including elements from the Para-Commando Battalion, the Presidential Guard and the Reconnaissance Battalion. Later, the ten Belgian paracommandos, along with the five Ghanaian soldiers who were guarding the Prime Minister, were disarmed and arrested. Despite the terms under which their surrender was negotiated and the promise to take them to a UNAMIR base, the Belgian and Ghanaian soldiers were taken to Kigali military camp by Major Bernard Ntuyahaga.

2426. The Prosecution failed to adduce any evidence about the implication of Para Commando soldiers or Major Ntabakuze in the assassination of Prime Minister Agathe Uwilingiyimana alleged in paragraph 6.15 of the Indictment. Therefore, with regards to Major Ntabakuze and the Para Commandos, this paragraph was not proved.²⁵³⁰

²⁵²⁸ Prosecutions Closing Brief, at paragraphs 111, 263, and 275.

²⁵²⁹ Witnesses Beardsley and Dallaire mentioned in paragraph 1993 of the Prosecution Final Trial Brief under paragraph 6.8 of the indictment did not lead any evidence against members of the Para Commando Battalion with respect to this allegation.

²⁵³⁰ Witnesses Beardsley and Dallaire mentioned in paragraph 1994 of the Prosecution Final Trial Brief under paragraph 6.15 of the indictment did not lead any evidence against members of the Para Commando Battalion with respect to this allegation.

Paragraph 6.16 of the Indictment:

As soon as then arrived at Camp Kigali at around 9:00 a.m., the UNAMIR soldiers were attacked and beaten by Rwandan soldiers in front of Rwandan Army officers. Four of the Belgian soldiers were killed instantly. Meanwhile, the Ghanaian soldiers were set free. The six remaining Belgian soldiers withstood several attacks over some hours before finally being killed.

2427. Paragraph 6.16 of the indictment does not indicate any criminal conduct on behalf of Para Commando soldiers or Major Ntabakuze. Furthermore, no evidence implicating Para Commando soldiers in the allegations that appear in this paragraph was adduced by the Prosecution. Therefore, with regards to Major Ntabakuze and the Para Commandos, this paragraph was not proved.²⁵³¹

Paragraph 6.18 of the Indictment:

As from 7 April 1994, massacres of the Tutsi population and the murder of numerous political opponents were perpetrated throughout the territory of Rwanda. These crimes, which had been planned and prepared for a long time by prominent civilian and military figures who shared the extremist Hutu ideology, were carried out by militiamen, military personnel and gendarmes on the orders and directives of some of these authorities, including Major Aloys Ntabakuze and Brigadier Général Gratien Kabiligi.

2428. Paragraph 6.18 of the indictment is so vague as to say nothing identifiable with any specificity whatsoever. It fails to indicate where, when and to whom the Accused Major Aloys Ntabakuze is alleged to have given orders and directives to perpetrate massacres of Tutsi and political opponents throughout the country. The expressions “*numerous political opponents*”, “*throughout the territory*” and “*including*” are too vague to be meaningful in the context of an indictment.²⁵³² This paragraph is defective due to fatal vagueness. Therefore the Accused was not clearly informed of the charges against him through this paragraph, in violation of Article 20 (4) (a) of the Statute. As well, the Prosecution has failed to provide any explanation as to why this paragraph is referred to under both Rule 6 (1) and Rule 6 (3). It is submitted that it is a

²⁵³¹ Witnesses Beardsley and Dallaire mentioned in paragraph 1994 of the Prosecution Final Trial Brief under paragraph 6.16 of the indictment did not lead any evidence against members of the Para Commando Battalion with respect to this allegation.

²⁵³² See, for example, *Prosecutor v. Blaskic*, ‘Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/lack of Adequate Notice of Charges)’ of 4 April 1997, at paras. 22-24; see also *The Prosecutor v. Casimir Bizimungu et al.*, ‘Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA’ (TC) of 23 January 2004, at para. 14, upheld at Appeal in *Bizimungu et al.*, ‘Decision on Prosecution’s Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence’ (AC), of 25 June 2004.

nonsensical proposition to charge a person with ordering the commission of a criminal act and with being at the same time responsible pursuant to Rule 6 (3).

2429. We reiterate that while the Ntabakuze Defence recognizes the right of the Prosecution to plead different forms of liability in the alternative, where it may not be clear how the evidence will be led in trial,²⁵³³ it is submitted that the practice whereby a material fact is pleaded as evidence for almost every count in the Indictment, on the basis of almost every form of individual criminal liability, does not allow the accused to know the real nature of the case against him with any certainty.²⁵³⁴ Furthermore, it casts doubt on the Prosecution's compliance with their obligation to include in the Indictment only those forms of liability for which cogent evidence exists.²⁵³⁵
2430. On the other hand, the Prosecution failed to adduce *specific* evidence about the planning of massacres involving Major Ntabakuze or about the existence of extremist Hutu ideology involving Major Ntabakuze or about orders and directives by Major Ntabakuze to perpetrate massacres throughout the country.²⁵³⁶
2431. As well, there was no concrete evidence adduced regarding the specific involvement of Major Ntabakuze in any planning or conspiracy implied in this paragraph. While it is true that conspiracy can be proved by circumstantial evidence, the covert nature of the crime being such as to make direct evidence hard to come by, it must be remembered that circumstantial evidence only provides proof of that for which the conclusion sought by the Prosecution is the *only* conclusion that can be reasonably reached from the circumstantial evidence.
2432. We have provided a cogent alternative explanation for the tragedy of Rwanda, in our section entitled *AN ALTERNATIVE EXPLANATION FOR THE TRAGIC EVENTS IN RWANDA*, an explanation, supported by witnesses and contemporaneous documents, that reasonably negates the necessity to have recourse to an imaginary conspiracy or plan to explain how the events

²⁵³³ *Prosecutor v Mpambara*, No. ICTR-2000-65-I, *Decision on the Defence Preliminary Motion Challenging the Amended Indictment* (30 May 2005) at para. 4.

²⁵³⁴ *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defects in the Form of the Indictment* (5 August 2005) at para. 13.

²⁵³⁵ *Prosecutor v Muvunyi*, No. ICTR-2000-55A-PT, *Decision on the Prosecutor's Motion for Leave to Amend the Indictment* (24 February 2005) at paras. 52-53; *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-I, *Decision on the Defence Preliminary Motion Objecting to the Form of the Indictment* (15 July 2004) at para. 32-33.

²⁵³⁶ The Prosecutor even did not mention in paragraph 1994 of his Final Trial Brief under paragraph 6.18 of the indictment, any witness who supported this allegation. Instead, he merely referred to paragraphs 5.1-5.36 and 6.19 of the indictment.

unfolded. Even if the Chamber might find the explanation we have provided to be less likely than the planning and conspiracy theory, it is submitted that the explanation has at least raised a reasonable doubt by showing the conspiracy/plan theory to be *not* the *only* reasonable explanation of the circumstantial evidence.

2433. It is submitted for all of these reasons, that the fatally vague paragraph 6.18 of the Indictment has not been proven.

Paragraph 6.19 of the Indictment:

As of the night of 6 to 7 April, in the capital, elements of the Para Commando Battalion and Presidential Guard set up roadblocks, reinforced with armored vehicles, on the major roads, controlling people's movements. Concurrently, groups of soldiers scoured the city and murdered civilians.

2434. Like so many paragraphs in the Indictment, paragraph 6.19 suffers from the flaw of vagueness and lack of precision. It makes a general allegation about unidentified people engaged in an activity which, on the face of it, is *not* criminal, followed by another general allegation about unidentified people engaged in an activity which definitely *is* criminal, with no link whatsoever between the two allegations. Thus, reading this paragraph informs us of little more than that there were roadblocks set up and there were murders, both involving the participation of soldiers. Who those soldiers may be remains a mystery. Whether or not there is a connection between the murders and the roadblocks remains a mystery. Whether or not there is any alleged connection between Major Ntabakuze and either of these two activities remains a mystery.

2435. Furthermore, paragraph 6.19 of the indictment does not indicate where in the capital city the elements of the Para Commando Battalion allegedly set up roadblocks as of the night of 6 to 7 April 1994. It does not indicate where soldiers allegedly murdered civilians in the capital city. It does not indicate who any of the victims may have been. It does not indicate if those allegedly murderous soldiers were under the effective control of the Major Ntabakuze. It does not indicate Major Ntabakuze's alleged mode of participation or responsibility as a superior regarding the allegation. Thus the paragraph is defective due to vagueness and imprecision.

2436. On the other hand, the Prosecution did not adduce evidence implicating Para Commando soldiers in roadblocks and atrocities in the capital during the night of 6 to 7 April. Prosecution witnesses XAI and DBQ are the only witnesses to have testified about the manning of roadblocks by Para Commando soldiers, and their evidence was that this happened on 7 April and between 15 and 20 April 1994, not night of 6 to 7 April as stated in this paragraph. Whatever the case may be with respect to their credibility, those two witnesses did not make any allusion to the fact that atrocities were committed by Para Commando soldiers on the alleged roadblocks or to the fact of controlling people movements. They did not talk about the reinforcement of armoured vehicles either. Our section *supra*, entitled *ALLEGATIONS ABOUT ROADBLOCKS* has amply demonstrated that allegations about Para Commandos and roadblocks have not been proved beyond a reasonable doubt, and thus this paragraph was not proved beyond reasonable doubt.²⁵³⁷

Paragraph 6.32 of the Indictment:

The massacres of members of the Tutsi population and the murder of the moderate Hutu extended throughout the territory of Rwanda. In every prefecture, local civil and military authorities and militiamen espoused the plan of extermination and followed the directives and orders in order to execute it. They called on the civilian population to eliminate the enemy and its "accomplices". They distributed weapons to civilians and militiamen. They gave orders to commit, aided, abetted and participated in the massacres.

2437. Paragraph 6.32 is yet another paragraph of the Indictment that is too vague and general to inform Major Ntabakuze of anything material about the charges against *him*. It does not indicate the involvement of Major Ntabakuze or his subordinates in the events spoken about in the paragraph. It does not indicate where, when and who were the victims and what means were used to commit atrocities.

2438. The expressions "*throughout the territory*" and "*in every prefecture*" are too vague to inform anyone about any specific crime.²⁵³⁸ The paragraph does not indicate the Accused's

²⁵³⁷ Witnesses Beardsley, Dallaire, AE, Reyntjens and XAB mentioned in paragraph 1994 of the Prosecution Final Trial Brief under paragraph 6.19 of the indictment did not lead any evidence against members of the Para Commando Battalion with respect to incidents occurred during the night of 6 to 7 April 1994. The reference made about XAB is about allegation about rape which was excluded by the Trial Chamber decision of 29 June 2006. The Prosecution attempt to read the three indictments as joint document against all the four Accused violated Rule 82 (A) and contradicted established jurisprudence before the ICTR and ICTY as underlined *supra* under "Part Two: The Law", in paragraph 18. Even in the case of the joint indictment against Kabiligi and Ntabakuze, each Accused is accorded the same rights as if they were tried separately according to Rule 82 (A). Besides, Exhibit DNT33 is the book of Dallaire who did not lead evidence against Para Commando soldiers with respect to this allegation during his testimony.

²⁵³⁸ See, for example, *Prosecutor v. Blaskic*, 'Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/lack of Adequate Notice of Charges)' of 4 April 1997, at paras. 22-24; see also

mode of participation or responsibility as a superior in the events of the allegation. This paragraph is simply a general statement about the alleged state of affairs in Rwanda at the time, and does not engender criminal liability on the part of Major Ntabakuze.

2439. On the other hand, the Prosecution failed to adduce evidence to demonstrate the existence of a plan or of the involvement of Ntabakuze or his subordinates in it, if it existed. Nor was there any evidence adduced to support the notion that Ntabakuze or his subordinates called on civilian population to eliminate the enemy and its “accomplices”.²⁵³⁹

2440. In the complete absence of evidence of the involvement of Major Ntabakuze or his subordinates in the matter dealt with in paragraph 6.32, this paragraph can not be said to have been proved beyond a reasonable doubt with respect to Major Ntabakuze.

Paragraph 6.33 of the Indictment:

From April to July 1994, in all the regions of the country, members of the Tutsi population who were fleeing from the massacres on their hills sought refuge in locations they thought would be safe, often on the recommendation of the local civil and military authorities. In many of these places, despite the promise that they would be protected by the local civil and military authorities, the refugees were attacked, abducted and massacred, often on the orders or with the complicity of those same authorities.

2441. Again, except as a description of a general situation not specifically related to Major Ntabakuze, paragraph 6.33 of the Indictment is too vague and general to inform Major Ntabakuze of anything material about the charges against *him*. It does not indicate the involvement of Major Ntabakuze or his subordinates in the events spoken about in the paragraph. It does not indicate where, when and who were the victims and what means were used to commit atrocities. The paragraph does not indicate the Major Ntabakuze’s alleged mode of participation or responsibility as a superior.

The Prosecutor v. Casimir Bizimungu et al., ‘Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA’ (TC) of 23 January 2004, at para. 14, upheld at Appeal in *Bizimungu et al.*, ‘Decision on Prosecution’s Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence’ (AC), of 25 June 2004.

²⁵³⁹ The Prosecutor even did not mention in paragraph 1994 of his Final Trial Brief under paragraph 6.32 of the indictment, any witness who supported this allegation. Instead, he merely referred to paragraphs 6.34-6.42 of the indictment.

2442. On the other hand, the Prosecution failed to adduce evidence to support the involvement of Ntabakuze or his subordinates in this very general allegation.²⁵⁴⁰

2443. In the complete absence of evidence of the involvement of Major Ntabakuze or his subordinates in the matter dealt with in paragraph 6.33, this paragraph can not be said to have been proved beyond a reasonable doubt with respect to Major Ntabakuze.

Paragraph 6.34 of the Indictment:

By virtue of the fact that Kigali was the capital of Rwanda, seat of the Government, the place where the elite units of the Rwandan Army were based and where the headquarters for both the Army and the Gendarmerie were situated, several of the military and civilian figures who had planned and organized the massacres played a leading role in carrying out the massacres in Kigali.

2444. This is yet another example of a paragraph infected with fatal vagueness. Paragraph 6.34 of the Indictment fails to provide any meaningful specifics. The expressions “*several of the military and civilian figures*” is so vague as to tell us virtually nothing.²⁵⁴¹ It does not indicate when, where and with whom Major Ntabakuze would allegedly have planned and organized the massacres. It does not indicate when, where and how Major Ntabakuze or his subordinates would allegedly have played a leading role in the events. It does not indicate Major Ntabakuze’s mode of participation or responsibility as a superior.

2445. On the other hand, the Prosecution failed to adduce evidence to demonstrate the existence of a plan or of the involvement of Ntabakuze or his subordinates in it, if it existed. Nor was there any evidence adduced to support the notion that

²⁵⁴⁰ Witnesses Des Forges, Reyntjens, A, XXY, UT, DAZ, DCH, XBM, DY, KJ, LAI, ABQ, ZF, Dallaire, Beardsley, XXH, EU, XXJ, DBN, DBQ, XXC, DW, HU, DP, Exhibits DK42 and P50 mentioned in paragraph 1994 of the Prosecution Final Trial Brief under paragraph 6.33 of the indictment did not lead any evidence against members of the Para Commando Battalion with respect to this general allegation. The Prosecution attempt to read the three indictments as joint document against all the four Accused violated Rule 82 (A) and contradicted established jurisprudence before the ICTR and ICTY as underlined *supra* under “Part Two: The Law”, in paragraph 18. Even in the case of the joint indictment against Kabiligi and Ntabakuze, each Accused is accorded the same rights as if they were tried separately according to Rule 82 (A).

²⁵⁴¹ See, for example, *Prosecutor v. Blaskic*, ‘Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/lack of Adequate Notice of Charges)’ of 4 April 1997, at paras. 22-24; see also *The Prosecutor v. Casimir Bizimungu et al.*, ‘Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA’ (TC) of 23 January 2004, at para. 14, upheld at Appeal in *Bizimungu et al.*, ‘Decision on Prosecution’s Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence’ (AC), of 25 June 2004.

Major Ntabakuze was among the military and civilian figures who allegedly planned, organized and played a leading role in the massacres in Kigali.²⁵⁴²

2446. In the complete absence of evidence of the involvement of Major Ntabakuze or his subordinates in the matter dealt with in paragraph 6.34, this paragraph can not be said to have been proved beyond a reasonable doubt with respect to Major Ntabakuze.

Paragraph 6.35 of the Indictment:

On at least two occasions, Tharcisse Renzaho, Prefect of Kigali, who was also an officer on active service in the Rwanda Army, sent the conseillers de secteur and political leaders to collect weapons and ammunition from the Army headquarters in order to distribute them at the roadblocks. Those roadblocks were used to exterminate the Tutsi population and eliminate its "accomplices". Subsequently, Tharcisse Renzaho continued to distribute weapons to the Interahamwe.

2447. Paragraph 6.35 of the Indictment does not describe any alleged criminal conduct on the part of Major Ntabakuze or of any of his subordinates. Colonel Renzaho was not a subordinate of Major Ntabakuze and no evidence was adduced to support a contrary proposition.

2448. This paragraph cannot support any count against Major Ntabakuze. Not describing anything to do with Major Ntabakuze, this paragraph cannot be said to have been proved beyond a reasonable doubt with regard to Major Ntabakuze.

Paragraph 6.36 of the Indictment:

Starting on 7 April, in Kigali, elements of the Rwandan Army, Gendarmerie and Interahamwe perpetrated massacres of the civilian Tutsi population. Concurrently, elements of the Presidential Guard, Para Commando Battalion and Reconnaissance Battalion murdered political opponents. Numerous massacres of the civilian Tutsi population took place in places where they had seek refuge for their safety.

2449. Paragraph 6.36, like so much of this Indictment, is vague to the extent that it hints at information, without providing clarity. It does not indicate where, when, and with what Para Commando soldiers allegedly perpetrated the alleged atrocities and who the alleged victims were. It does not indicate if the soldiers allegedly involved were under the effective control

²⁵⁴² The Prosecutor even did not mention in paragraph 1995 of his Final Trial Brief under paragraph 6.34 of the indictment, any witness who supported this allegation. Instead, he merely referred to paragraphs 6.8, 6.18-6.42 of the indictment.

of Major Ntabakuze. It does not indicate Major Ntabakuze's mode of participation or responsibility as a superior.

2450. Inasmuch as it is quite impossible to know what events are being alleged, and who the parties involved would be, it is impossible to say that the paragraph has been proved beyond a reasonable doubt. The Chamber agreed with this assessment that paragraph 6.36 was too vague to provide notice of any specific allegation, but, in its various Decisions on our Motions for Exclusion of evidence, found that other forms of disclosure had cured the defect of vagueness with respect to a long list of allegations. In shorthand form, we have called these allegations about Kimihurura, Masaka, Ruhanga, Kabuga, IAMSEA, Kabeza, Kabeza 1, Akajagali, Kabusunzu Nyabyenda, Nyakabanda, Rwampara, Kicukiro – Sahara, Remera, Centre Christus, and Nzabonariba, each of which is dealt with in a separate section *supra*.

2451. It is submitted that the arguments we have made in the sections on each of these allegations have amply and clearly demonstrated that not one of these allegations has been proved beyond a reasonable doubt. Being fatally vague to the extent that it describes not a single specific allegation, yet the vice of vagueness having been “cured” by the Chamber with respect to many allegations, but having none of those allegations proved beyond a reasonable doubt, the paragraph itself cannot be said to have been proved beyond a reasonable doubt.

2452. Furthermore, as is argued *supra*, allegations admitted pursuant to cures to the defects of the Indictment do not become amended portions of that Indictment, and hence, though admitted, must have been admitted for some other purpose than to describe material facts and circumstances for which an accused can be held criminally liable. An accused can only be convicted for that with which he has been charged. Major Ntabakuze has not been charged with any of the allegations listed *supra*.

Paragraph 6.37 of the indictment:

ETO-Nyanza

As of 7 April 1994, many Tutsis sought refuge at the Ecole Technique Officielle (ETO), under the protection of UNAMIR, to escape the attacks against them. On 11 April 1994, immediately following the retreat of the UNAMIR Belgian contingent based at ETO, soldiers, including elements of the Presidential Guard, and Interahamwe rounded up a group of refugees and moved them to Nyanza. Théoneste Bagosora was present at the time. After forcing them to walk for two kilometres, the soldiers massacred the refugees. The survivors were dispatched by militiamen on the soldiers' orders.

2453. The Indictment at paragraph 6.37, *does* provide a *clear and precise* description of a particular event. However, the description found in this paragraph of the Indictment does *not* include *either* Major Ntabakuze or anyone under his command, nor does the description place *any part* of this event at the location of the Sonatube intersection, which is the allegation that emerged in the evidence.
2454. Alarming, especially for so serious an allegation of direct involvement and personal action, the Chamber has said that “[a]lthough the Indictment is perhaps not as crystalline as it could be in relation to this event, the Chamber finds that the notice provided in the Indictment and Pre-Trial Brief was sufficient”,²⁵⁴³ finding that “the reference to ‘soldiers’ [in paragraph 6.37] includes Para-commandos.”²⁵⁴⁴ And that “[t]he inclusive reference to Presidential Guard soldiers does not exclude Para-commando soldiers”.²⁵⁴⁵ It is submitted that there is a fundamental flaw in the logic that would say that “soldiers” rounding up refugees at ETO, and moving them to Nyanza, somehow, does not exclude the Para commandos at Sonatube, some two kilometres away.
2455. It is submitted that the standard for determining whether or not something is in the Indictment *must* be higher than “it’s not excluded”. Such a standard would mean that *anything* not mentioned in the Indictment, yet not specifically excluded, could be considered to be part of the Indictment. In that case, the Prosecution might as well have proffered a blank Indictment, because then the Accused would have been charged with *everything*. The Indictment is thus rendered meaningless as an accusatory instrument.
2456. An Indictment must raise the matter from the general to the particular. A fundamental characteristic of such exercise would be to indicate an Accused’s involvement in the allegations. The *fact* of his participation and his *mode* of participation are *essential* elements of the charging process. To suggest that the actors for whose deeds Major Ntabakuze might be held responsible through command responsibility are “included” in a general term or are “not excluded” by a more specific term stretches the limits of logic.
2457. Paragraph 6.37 of the indictment does not describe any criminal conduct of Major Ntabakuze or his subordinates. The paragraph indicates the involvement of

²⁵⁴³ *Bagosora et al.*, Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006, at paragraph 38.

²⁵⁴⁴ *Ibidem*.

²⁵⁴⁵ *Ibidem*.

Presidential Guard elements and Colonel Bagosora. Presidential Guard elements cannot stand for Para Commando soldiers nor can Colonel Bagosora stand for Major Ntabakuze. It is obvious that this paragraph does not indicate the Accused's mode of participation or responsibility as a superior in the allegation. It cannot support any count against Ntabakuze.

2458. The Prosecution failed to adduce evidence to prove this paragraph, especially about the Attack on ETO. The alleged incident known as "Sonatube Incident" is not described in this paragraph, and cannot be substituted for that which is described. Indeed, the form of responsibility according to the Indictment is Rule 6 (3) whereas the "Sonatube Incident", according to Prosecution witness AFJ's testimony, involves to some extent the personal acts of Major Ntabakuze. But this new material fact implicating Major Ntabakuze and the mode of participation pursuant to Rule 6 (1) were not pleaded in the indictment. Thus the Accused was not informed in violation of Article 20 (4) (a) of the Statute.

2459. In the *Imanishimwe* Case, the Appeals Chamber held, about the alleged Gashirabwoba killing, that the Accused was not clearly and coherently informed especially about the form of responsibility.²⁵⁴⁶ In paragraph 29 of the 11 September 2006 Mpambara judgment, the Trial Chamber was of the same opinion on similar issue.

2460. Notwithstanding all of these issues, the discussion of the *ALLEGATIONS ABOUT THE SONATUBE INCIDENTS*, *supra*, has amply demonstrated that the allegations discussed therein, which the Prosecutor and the Chamber have linked to paragraph 6.37 of the Indictment, have not been proved beyond a reasonable doubt. Thus, none of the allegations that would connect Major Ntabakuze to the allegations in this paragraph. The paragraph, itself, has therefore not been proved beyond a reasonable doubt with regard to Major Ntabakuze.

Paragraph 6.38 of the Indictment:

Near Saint-André School

From May to June 1994, soldiers under the orders of Brigadier-General Gratién Kabiligi checked the identities and took down the names of people recognized as being Tutsi who had taken refuge in a house across from Saint André school, in Kigali. On 8 June 1994,

²⁵⁴⁶ *Ntagerura and al* Appeals Judgment on 7 July 2006, para 164

these soldiers surrounded the house forced the occupants out and shot them to death.

2461. Paragraph 6.38 of the Indictment paragraph does not describe any criminal conduct of Major Aloys Ntabakuze. General Kabiligi was not a subordinate of Major Ntabakuze and no evidence was adduced to support a contrary proposition.
2462. Manifestly, this paragraph concerns neither Ntabakuze nor the Para Commando Battalion. Instead, the paragraph concerns Brigadier-General Kabiligi. Thus, Ntabakuze is not charged with any involvement in the incident mentioned *supra*. We have submitted in our past pleadings, and maintain that not being charged, he can not be convicted of the matter.
2463. Inasmuch as Major Ntabakuze does not figure in the allegations contained in this paragraph, the paragraph itself cannot be said to have been proved with regard to Major Ntabakuze.²⁵⁴⁷

Paragraph 6.39 of the Indictment:

Kibagabaga Mosque

On 7 April 1994, soldiers and militiamen came to the Mosque. The soldiers demanded that the refugees identify themselves with their identification cards. When the refugees refused, the soldiers attacked the mosque, shooting and killing many people. Afterwards, the refugees, the majority of whom were Tutsi, were forced to surrender their traditional weapons and the militiamen then attacked them in the presence of the soldiers. Several people died in the attack.

2464. Paragraph 6.39 of the Indictment does not describe any criminal conduct of Major Ntabakuze. It does not indicate that soldiers involved in the events described were subordinate of Major Aloys Ntabakuze or if they were under his effective control. This paragraph cannot support any count against Major Ntabakuze.
2465. Besides, the Prosecution did not adduce any evidence of any alleged involvement of Major Ntabakuze's in the events described in this paragraph. Inasmuch as Major Ntabakuze does

²⁵⁴⁷ Witnesses XXJ, DBQ, Exhibits P268 and DK37 mentioned in paragraph 1995 of the Prosecution Final Trial Brief under paragraph 6.38 of the indictment did not lead any evidence against members of the Para Commando Battalion with respect to the allegation described in paragraph 6.38. The Prosecution attempt to read the three indictments as joint document against all the four Accused violated Rule 82 (A) and contradicted established jurisprudence before the ICTR and ICTY as underlined *supra* under "Part Two: The Law", in paragraph 18. Even in the case of the joint indictment against Kabiligi and Ntabakuze, each Accused is accorded the same rights as if they were tried separately according to Rule 82 (A).

not figure in the allegations contained in this paragraph, the paragraph itself cannot be said to have been proved with regard to Major Ntabakuze.²⁵⁴⁸

Paragraph 6.41 of the Indictment:

On 20 April 1994, two military planes landed in Butare with numerous Presidential Guard and Para-Commando Battalion soldiers on board. These soldiers, in tandem with the Interahamwe of Butare and elsewhere, took part in murdering and massacring civilians, notably the former Queen of Rwanda Rosalie Gicanda, a historical symbol for all Tutsi.

2466. The Prosecution failed to adduce any evidence to support this allegation. Therefore, in the complete absence of evidence, paragraph 6.41 of the Indictment can not be said to have been proved.²⁵⁴⁹

Paragraph 6.44 of the indictment:

From 7 April 1994 around the country, most of the massacres were perpetrated with the participation, aid and instigation of military personnel, gendarmes and Hutu militiamen. Certain units of the Para Commando, Reconnaissance and Presidential Guard battalions were the most implicated in these crimes in the capital and in other préfectures, often acting in concert with the militiamen.

2467. Paragraph 6.44 is yet another example of a vague general paragraph that says nothing specific about anyone in particular. The expression “*certain units of the Para Commando*” is too vague.²⁵⁵⁰ This paragraph does not indicate where or when ‘certain’ units of the Para Commando Battalion were involved in the alleged, though undescribed,

²⁵⁴⁸ Witness HU mentioned in paragraph 1996 of the Prosecution Final Trial Brief under paragraph 6.39 of the indictment did not lead any evidence against members of the Para Commando Battalion with respect to this allegation. The Prosecution attempt to read the three indictments as joint document against all the four Accused violated Rule 82 (A) and contradicted established jurisprudence before the ICTR and ICTY as underlined *supra* under “Part Two: The Law”, in paragraph 18. Even in the case of the joint indictment against Kabiligi and Ntabakuze, each Accused is accorded the same rights as if they were tried separately according to Rule 82 (A).

²⁵⁴⁹ Witnesses A, Reyntjens, Des Forges, DBN, Exhibits P3, P5A, P238, DNT40 and DNT337 mentioned in paragraph 1996 of the Prosecution Final Trial Brief under paragraph 6.40 of the indictment did not lead any evidence against members of the Para Commando Battalion with respect to this allegation. The Prosecution attempt to read the three indictments as joint document against all the four Accused violated Rule 82 (A) and contradicted established jurisprudence before the ICTR and ICTY as underlined *supra* under “Part Two: The Law”, in paragraph 18. Even in the case of the joint indictment against Kabiligi and Ntabakuze, each Accused is accorded the same rights as if they were tried separately according to Rule 82 (A).

²⁵⁵⁰ See, for example, *Prosecutor v. Blaskic*, ‘Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/lack of Adequate Notice of Charges)’ of 4 April 1997, at paras. 22-24; see also *The Prosecutor v. Casimir Bizimungu et al.*, ‘Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA’ (TC) of 23 January 2004, at para. 14, upheld at Appeal in *Bizimungu et al.*, ‘Decision on Prosecution’s Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence’ (AC), of 25 June 2004.

atrocities. It does not indicate who the victims were and with what means the atrocities were perpetrated and why.

2468. Furthermore, it does not indicate if those soldiers were under the effective control of the Major Ntabakuze. It does not indicate Major Ntabakuze's alleged mode of participation or responsibility as a superior in the allegation. This paragraph is defective due to vagueness, in that it does not contain any particulars that would raise it from the general to the specific, thus failing in the duty to inform in violation of Article 20 (4) (a) of the Statute.

2469. On the other hand, the Prosecution failed to adduce any specific evidence to support this general allegation. Therefore, in the complete absence of evidence, paragraph 6.41 of the Indictment can not be said to have been proved.²⁵⁵¹

Paragraph 6.45 of the Indictment:

Further, from April to July 1994, in the course of the massacres, some soldiers gave assistance to militiamen, notably by providing them logistical support, i.e. weapons, transport and fuel.

2470. It is submitted that paragraph 6.45 of the indictment, like so many others is too vague to adequately inform Major Ntabakuze of any charges against him. The expression "*some soldiers*" is too vague to be informative of who is alleged to have been involved.²⁵⁵² The paragraph does not indicate that soldiers involved in the alleged incidents were Para Commando soldiers under the effective control of Major Aloys Ntabakuze. It does not indicate where, when, how and to whom exactly which soldiers are alleged to have provided logistic support. It does not indicate the Accused's mode of participation or responsibility as a superior. This paragraph is defective due to vagueness.

²⁵⁵¹ The Prosecutor even did not mention in paragraph 1996 of his Final Trial Brief under paragraph 6.44 of the indictment, any witness who supported this allegation. Instead, he merely referred to paragraphs 6.8, 6.18-6.42 of the indictment.

²⁵⁵² See, for example, *Prosecutor v. Blaskic*, 'Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/lack of Adequate Notice of Charges)' of 4 April 1997, at paras. 22-24; see also *The Prosecutor v. Casimir Bizimungu et al.*, 'Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA' (TC) of 23 January 2004, at para. 14, upheld at Appeal in *Bizimungu et al.*, 'Decision on Prosecution's Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence' (AC), of 25 June 2004.

2471. The Prosecution failed to adduce evidence about the involvement of Para Commando soldiers in the logistic supply of weapons to civilians. On the contrary, some Prosecution witnesses (XAB, DP and DCH) testified to the alleged implication of Major Ntabakuze in the supply of civilians or Interahamwe. There is thus a lack of clarity, indeed one might say total confusion, regarding the alleged form of responsibility of Major Ntabakuze. The mode of responsibility pursuant to Rule 6 (3) was not proven.²⁵⁵³
2472. In respect of this situation, the Appeals Chamber ruled in its judgment concerning *Ntagerura et al* that Imanishimwe was not clearly and coherently informed, especially about the form of responsibility²⁵⁵⁴ concerning the Gashirabwoba incident. In paragraph 29 of the 11 September 2006 Mpambara judgment, the Trial Chamber held the same opinion on similar issue.
2473. All of these defects in paragraph 6.45 aside, the section of this brief entitled *ALLEGATIONS ABOUT SUPPLYING WEAPONS AND AMMUNITION TO THE INTERAHAMWE, supra*, demonstrates that the evidence presented by the Prosecution on this issue has not proved the allegations beyond a reasonable doubt. The paragraph itself, then, has not been proved beyond a reasonable doubt.

Paragraph 6.47 of the indictment:

During the events referred to in this indictment, rapes, sexual assaults and other crimes of a sexual nature were widely and notoriously committed throughout Rwanda. These crimes were perpetrated by, among others, soldiers, militiamen and gendarmes against the Tutsi population, in particular Tutsi women and girls.

2474. On the occasion of the testimony of Prosecution Expert Witness Nowrojee, the Defence admitted the general proposition contained in this paragraph that:

During the events referred to in this indictment, rapes, sexual assaults and other crimes of a sexual nature were widely and notoriously committed throughout Rwanda.

²⁵⁵³ Witnesses LAI, XXH, AAA, A, Serushago, ZF, XBG, BY, KJ, ABQ, XXC, OAB, DO, Exhibits P5A, P351D and P442C mentioned in paragraph 1996 of the Prosecution Final Trial Brief under paragraph 6.45 of the indictment did not lead any evidence against members of the Para Commando Battalion with respect to this allegation. The Prosecution attempt to read the three indictments as joint document against all the four Accused violated Rule 82 (A) and contradicted established jurisprudence before the ICTR and ICTY as underlined *supra* under “Part Two: The Law”, in paragraph 18. Even in the case of the joint indictment against Kabiligi and Ntabakuze, each Accused is accorded the same rights as if they were tried separately according to Rule 82 (A).

²⁵⁵⁴ AC Judgment against André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe on July 7, 2006, para 164

However, concerning the specific criminal liability of Major Ntabakuze, Paragraph 6.47 of the Indictment is too vague and does not describe any criminal conduct of Major Ntabakuze or his subordinates.

2475. The expression “*throughout Rwanda*” is too vague to meaningfully put anyone on notice.²⁵⁵⁵ This paragraph does not indicate that any of the soldiers allegedly involved in the crimes it describes were subordinates of Major Ntabakuze under his effective control. It does not indicate who the victims were, where and when the soldiers, militiamen and gendarmes mentioned therein are alleged to have committed the alleged atrocities. It does not indicate Major Ntabakuze’s alleged mode of participation or responsibility as a superior. With regard to any particular accused, including Major Ntabakuze the paragraph is defective due to vagueness and lack of particulars.

2476. The Prosecution failed to adduce evidence about this general allegation except the testimony of the Expert witness Nowrojee. The Expert was not an eye witness and did not implicate Para Commando soldiers in any way.²⁵⁵⁶

2477. With regards to certain specific allegations that the Chamber has found to be related paragraph 6.47, the section entitled *ALLEGATIONS ABOUT RAPE, supra*, has conclusively demonstrated that the allegations are fraught with reasonable doubt, and have, thus, not been proven. Thus, the paragraph itself, as applied to Major Ntabakuze or the Para Commandos, has not been proven.

Paragraph 6.51 of the indictment:

Brigadier-General Gratien Kabiligi and Major Aloys Ntabakuze, in their position of authority, acting in concert with, notably Théoneste Bagosora, Augustin Ndindiliyimana, Augustin Bizimungu, Aloys Ntiwiragabo, Protais Mpiranya, François- Xavier Nzuwonemeye, Anatole Nsengiyumva, Augustin Bizimana and Tharcisse Renzaho, participated in the planning, preparation or execution of a common scheme, strategy or plan, to commit the atrocities set forth above. The crimes were committed by them

²⁵⁵⁵ See footnote on para 72 above

²⁵⁵⁶ Witnesses ZF, OAB, DBJ, XXY, DAS, XXJ, Serushago, Dallaire, Beardsley, UT, EU, LN, DCH, DAZ, BY, Exhibits 287A, P8A and P238 mentioned in paragraph 1996 of the Prosecution Final Trial Brief under paragraph 6.47 of the indictment did not lead any evidence against members of the Para Commando Battalion with respect to this allegation. The Prosecution attempt to read the three indictments as joint document against all the four Accused violated Rule 82 (A) and contradicted established jurisprudence before the ICTR and ICTY as underlined *supra* under “Part Two: The Law”, in paragraph 18. Even in the case of the joint indictment against Kabiligi and Ntabakuze, each Accused is accorded the same rights as if they were tried separately according to Rule 82 (A).

personally, by persons they assisted or by their subordinates, and with their knowledge or consent.

2478. It is submitted that the Prosecution failed to adduce any concrete evidence concerning a strategy or plan to commit the atrocities referred to in paragraph 6.51. No concrete evidence was adduced concerning the alleged conspiracy between the various persons named in the paragraph. As well, there was no concrete evidence adduced regarding the specific involvement of Major Ntabakuze in the strategy, plan or conspiracy alleged in paragraph 6.51 of the Indictment. While it is true that conspiracy can be proved by circumstantial evidence, the covert nature of the crime being such as to make direct evidence hard to come by, it must be remembered that circumstantial evidence only provides proof of that for which the conclusion sought by the Prosecution is the *only* conclusion that can be reasonably reached from the circumstantial evidence.²⁵⁵⁷
2479. We have provided a cogent alternative explanation for the tragedy of Rwanda, in our section entitled *AN ALTERNATIVE EXPLANATION FOR THE TRAGIC EVENTS IN RWANDA*, an explanation, supported by witnesses and contemporaneous documents, that reasonably negates the necessity to have recourse to an imaginary conspiracy or plan to explain how the events unfolded. Even if the Chamber might find the explanation we have provided to be less likely than the planning and conspiracy theory, it is submitted that the explanation has at least raised a reasonable doubt by showing the conspiracy/plan theory to be *not* the *only* reasonable explanation of the circumstantial evidence.
2480. A reasonable doubt having been raised by the Defence, it is submitted that the allegations in paragraph 6.51 of the Indictment have therefore not been proved beyond all reasonable doubt, and cannot form the basis for a conviction of Major Ntabakuze.

²⁵⁵⁷ The Prosecutor even did not mention in paragraph 1996 of his Final Trial Brief under paragraph 6.51 of the indictment, any witness who supported this allegation. Instead, he merely referred to paragraphs 5.1-5.36, 6.1-6.50 of the indictment.

C. PARAGRAPHS OF THE INDICTMENT PURPORTEDLY SUPPORTING COUNTS 6 AND 10 PURSUANT TO RULE 6 (3)

Paragraph 4.6 of the Indictment:

During the events referred to in this indictment, Aloys Ntabakuze exercised the functions of Commander of the Para-Commando Battalion in the Rwandan Army.

2481. The Ntabakuze Defense does not challenge the fact contained in paragraph 4.6 of the Indictment

Paragraph 4.7 of the Indictment:

Aloys Ntabakuze obtained a “B” commando certificate on 31 July 1976 and a paratrooper’s certificate on 12 August 1978. He obtained an “A” commando certificate on 28 June 1978. On the same date, he graduated from Rwanda’s Ecole Supérieure Militaire (ESM) with the rank of 2nd lieutenant. He was subsequently promoted to the rank of lieutenant on 4 February 1982. On 30 June 1984, he graduated from the Direction centrale de la sécurité militaire, of the Peoples’ Democratic Republic of Algeria, after a training course in security, specializing in “Presidential Protection”. He obtained an “A” paratrooper certificate on 2 August 1991. He served in the Presidential Guard before being promoted to the position of Commander of the Para-commando Battalion in the Rwandan Army in 1992.

2482. Paragraph 4.7 of the Indictment contains many errors of fact, which were corrected by Major Ntabakuze during his testimony in September 2006. He stated for example that he was appointed commander of the Para Commando Battalion in June 1988 upon his graduation from the United States Army Command and General Staff College, at Leavenworth, Kansas. He confirmed that he held that position until 2 July 1994.

Paragraph 4.8 of the Indictment:

In his capacity as a Commander of the Para Commando Battalion of the Rwandan Army, Aloys Ntabakuze exercised authority over the units of the Battalion.

2483. The Ntabakuze Defense does not challenge the basic fact contained in paragraph 4.8 of the Indictment, but notes and emphasizes that Major Ntabakuze did *not* exercise authority over units that had been temporarily transferred to other Battalions during the period of that transfer.

Paragraph 5.36 of the Indictment:

Furthermore, soldiers, militiamen and gendarmes raped, sexually assaulted and committed other crimes of a sexual nature against Tutsi women and girls, sometimes after having first kidnapped them.

2484. It is submitted that paragraph 5.36 of the Indictment is fatally vague, providing no particulars whatsoever about any specific crimes or any specific perpetrators. It does not indicate if any of the soldiers involved were subordinates of Major Ntabakuze. It does not indicate where, when and how those soldiers would have perpetrated the atrocities. It does not indicate, or even hint at the Major Ntabakuze's alleged mode of participation or responsibility as a superior.
2485. The specific allegations of rape which appeared in the evidence of this trial do not appear anywhere in the Indictment of the Accused Ntabakuze, nor does his name appear anywhere in the Indictment in relation to allegations of rape. Regarding our appeal on exclusion of evidence, the Appeals Chamber noted that "[i]f the Trial Chamber decides that an adjournment is warranted, it could also order the Prosecution to amend the indictment for greater clarity, but this might not be required in every case".²⁵⁵⁸
2486. We have submitted before, and we reiterate that the present case is one in which greater clarity was indeed required so that the Accused might know with precision the precise parameters of the charges against him, which do not appear with any degree of clarity in the Indictment. It is submitted that while supporting documents may provide clarity or detail to vague allegations in the Indictment, such extrinsic material is an inadequate substitute for amendment of the Indictment in the face of complete silence in the Indictment regarding the incidents alleged.
2487. We maintain our position that accusations that do not appear in the Indictment cannot rationally form the basis for conviction. Absence from the Indictment means failure to charge. Not being charged, one cannot be convicted.
2488. On the other hand, the Prosecution failed to adduce credible evidence to support the paragraph. Prosecution Expert witness Nowrojee, who testified about rape in

²⁵⁵⁸ 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, at paragraph 37.

general did not implicate Para Commando soldiers. Prosecution witnesses DBQ and AAA testified about the involvement of Para Commando soldiers in rape. In our discussion *supra* entitled *ALLEGATIONS ABOUT RAPE*, we have shown that the allegations about rape by Para Commando soldiers under the command of major Ntabakuze have not been proved beyond a reasonable doubt. Therefore, with regards to Major Ntabakuze, paragraph 5.36 of the Indictment has not been proved beyond a reasonable doubt.²⁵⁵⁹

Paragraph 6.8 of the Indictment:

While this meeting was going on, Prime Minister Agathe Uwilingiyimana was tracked down, arrested, sexually assaulted and killed by Rwandan Army personnel, more specifically members of the Para Commando Battalion of Major Ntabakuze, Presidential Guard, and the Reconnaissance Battalion. Concurrently, members of the same units arrested, confined and killed important opposition leaders and prominent figures in the Tutsi community. Hence, the following were killed: the President of the Constitutional Court, the Chairman of the PSD party and Minister of Agriculture, the Vice-Chairman of the PL party and Minister of Labor and Community Affairs, as well as a member of the Political Bureau of the MDR, the Minister of Information. That same morning, the ten Belgian Para commandos from UNAMIR who were guarding the Prime Minister were murdered at Kigali military camp.

2489. Whilst the Indictment provides information relating to the position of certain of the alleged victims, paragraph 6.8 of the indictment does not provide sufficient detail to clearly understand the allegations. It is submitted that an indictment must plead all the *material facts* going to proof of the crime charged with a particularity sufficient to allow the accused to know the nature of the case against him.²⁵⁶⁰

2490. It is submitted that this and related allegations provide the accused with insufficient information which would have allowed him to fully investigate their veracity, for example, the time of the assassinations, the identity of the perpetrators, or the manner in which it is alleged the victims were killed. It is submitted that this defect materially impaired the

²⁵⁵⁹ Witnesses Beardsley, Dallaire, ZF, OAB, DBJ, XXY, DAS, XXJ, Serushago, UT, EU, DCH, DAZ, BY, Nowrojee and Exhibit P287A mentioned in paragraph 1991 of the Prosecution Final Trial Brief under paragraph 5.36 of the indictment did not lead any evidence against members of the Para Commando Battalion with respect to this allegation. The Prosecution attempt to read the three indictments as joint document against all the four Accused violated Rule 82 (A) and contradicted established jurisprudence before the ICTR and ICTY as underlined *supra* under “Part Two: The Law”, in paragraph 18. Even in the case of the joint indictment against Kabiligi and Ntabakuze, each Accused is accorded the same rights as if they were tried separately according to Rule 82 (A). Besides, the mention of Witness XAB with respect to the alleged involvement of Para Commando soldiers in rapes is inappropriate since this allegation was excluded by the Trial Chamber decision of 29 June 2006.

²⁵⁶⁰ *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 23; *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 November 2006) at para.20; *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defects in the Form of the Indictment* (5 August 2005) at para. 9; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Kabiligi Request for Particulars of the Amended Indictment* (27 September 2005) at para. 4.

preparation of the Ntabakuze Defence case as the Indictment failed to put the Ntabakuze Defence on notice as to how the Prosecution intended to use information adduced at trial, and eliminated any real possibility for the Ntabakuze Defence to fully and effectively prepare its defence.

2491. However, the Prosecution did not adduce evidence about the involvement of Para Commando soldiers under the effective control of Major Ntabakuze in the alleged sexual assault and assassinations dealt with in paragraph 6.8. Our sections, *supra*, entitled *ALLEGATIONS ABOUT KIMIHURURA INCIDENTS*, and *ALLEGATIONS ABOUT RAPE* demonstrate convincingly that the Prosecution has not proved Major Ntabakuze's responsibility for the events alleged in paragraph 6.8 beyond a reasonable doubt. Given the defects in the Indictment and the Prosecution's case in its entirety, a conviction for these crimes would be manifestly unfair, and unwarranted on the evidence.²⁵⁶¹

Paragraph 6.42 of the Indictment:

Between April and June 1994, several people found refuge at the secondary nursing school in Kabgavi, Gitarama prefecture, where students and staff were already located. On several occasions during this period, soldiers and Interahamwe militiamen abducted and raped female Tutsi students and refugees. Minister of Defense Augustin Bizirana and the General Staff of the Rwandan Army were informed of this situation but did not take any effective steps to end the crimes once and for all.

2492. Paragraph 6.42 of the indictment does not indicate any involvement of Major Ntabakuze or his subordinates in the allegation. Nobody among the persons mentioned in this paragraph was a subordinate of Major Ntabakuze, nor is Major Ntabakuze himself mentioned in any way.

2493. The paragraph is also fatally vague in its mention of "several occasions" as the time parameters, and "soldiers" and "Interahamwe militiamen" as the alleged perpetrators. Such vague references make it impossible to tell who the alleged criminals are and when they allegedly committed their crimes.

²⁵⁶¹ Prosecution witnesses General Dallaire and Beardsley mentioned in paragraph 1993 of the Prosecution Final Trial Brief under paragraph 6.8 of the indictment did not testify against Major Ntabakuze or Para Commando soldiers with respect to this allegation. The Prosecution attempt to read the three indictments as joint document against all the four Accused violated Rule 82 (A) and contradicted established jurisprudence before the ICTR and ICTY as underlined *supra* under "Part Two: The Law", in paragraph 18. Even in the case of the joint indictment against Kabiligi and Ntabakuze, each Accused is accorded the same rights as if they were tried separately according to Rule 82 (A).

2494. The only precise references in the paragraph are to the crime and the place, along with a precise reference to the Minister of Defense Augustin Bizirnana and the General Staff of the Rwandan Army, allegedly committing a crime in virtue of their command responsibility. One wonders why their alleged crimes appear in Major Ntabakuze's Indictment, when the crimes that the Prosecution alleges he committed have, for the most part, been left out.

2495. Thus, the paragraph does not indicate any criminal conduct on the part of Major Ntabakuze or that of any of Major Ntabakuze's subordinates. Furthermore no evidence whatsoever was adduced about any involvement of Para Commando soldiers in rape at Kabgayi. Therefore, in the complete absence of evidence concerning Major Ntabakuze or his subordinates, paragraph 6.42 of the Indictment can not be said to have been proved in respect of Major Ntabakuze or any of his subordinates.²⁵⁶²

Paragraph 6.47 of the indictment:

During the events referred to in this indictment, rapes, sexual assaults and other crimes of a sexual nature were widely and notoriously committed throughout Rwanda. These crimes were perpetrated by, among others, soldiers, militiamen and gendarmes against the Tutsi population, in particular Tutsi women and girls.

2496. On the occasion of the testimony of Prosecution Expert Witness Nowrojee, the Defence admitted the general proposition contained in this paragraph that:

During the events referred to in this indictment, rapes, sexual assaults and other crimes of a sexual nature were widely and notoriously committed throughout Rwanda.

However, concerning the specific criminal liability of Major Ntabakuze, Paragraph 6.47 of the Indictment is too vague and does not describe any criminal conduct of Major Ntabakuze or his subordinates.

2497. The expression "*throughout Rwanda*" is too vague to meaningfully put anyone on notice.

²⁵⁶³ Similarly, the expression "*among others, soldiers, militiamen and gendarmes*" clearly provides no useful information as to who the alleged criminals might be. This

²⁵⁶² Prosecution witnesses DAZ, XAI and UT mentioned in paragraph 1996 of the Prosecution Final Trial Brief under paragraph 6.42 of the indictment did not testify against Major Ntabakuze or Para Commando soldiers with respect to this allegation. This is a blatant misrepresentation of evidence in record before the Tribunal.

²⁵⁶³ See, for example, *Prosecutor v. Blaskic*, 'Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/lack of Adequate Notice of Charges)' of 4 April 1997, at paras. 22-24; see also *The Prosecutor v. Casimir Bizimungu et al.*, 'Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA' (TC) of 23 January 2004, at para. 14, upheld at Appeal in *Bizimungu et al.*, 'Decision on Prosecution's Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence' (AC), of 25 June 2004.

paragraph does not indicate that any of the soldiers allegedly involved in the crimes it describes were subordinates of Major Ntabakuze under his effective control. It doesn't implicate Major Ntabakuze at all, so one wonders why it is in his indictment.

2498. Furthermore, the paragraph does not indicate who the victims were, or where and when the anonymous soldiers, militiamen and gendarmes mentioned therein are alleged to have committed their alleged crimes. It does not indicate what Major Ntabakuze's alleged mode of participation or responsibility as a superior might have been. The paragraph is so broad, general and vague that, with regard to any particular accused, including Major Ntabakuze, the paragraph is fatally defective due to vagueness and lack of particulars.

2499. The Prosecution failed to adduce evidence about this general allegation except the testimony of the Expert witness Nowrojee. The Expert was not an eye witness and did not implicate Para Commando soldiers in any way. Furthermore, with regards to any specific allegations about rape that emerged in the testimony, evidence that the Chamber has found to be related paragraph 6.47, the section entitled *ALLEGATIONS ABOUT RAPE, supra*, has conclusively demonstrated that those specific allegations are fraught with reasonable doubt, and have, thus, not been proven. Thus, the paragraph itself, as applied to Major Ntabakuze or the Para Commandos, has not been proven.²⁵⁶⁴

²⁵⁶⁴ Witnesses ZF, OAB, DBJ, XXY, DAS, XXJ, Serushago, Dallaire, Beardsley, UT, EU, LN, DCH, DAZ, BY, Exhibits 287A, P8A and P238 mentioned in paragraph 1996 of the Prosecution Final Trial Brief under paragraph 6.47 of the indictment did not lead any evidence against members of the Para Commando Battalion with respect to this allegation. The Prosecution attempt to read the three indictments as joint document against all the four Accused violated Rule 82 (A) and contradicted established jurisprudence before the ICTR and ICTY as underlined *supra* under "Part Two: The Law", in paragraph 18. Even in the case of the joint indictment against Kabiligi and Ntabakuze, each Accused is accorded the same rights as if they were tried separately according to Rule 82 (A).

III. CONCLUSION

2500. It is submitted that none of the paragraphs that the Indictment indicates are the paragraphs supporting the Counts have been proved beyond a reasonable doubt. Furthermore, a very large number of those paragraphs are fatally vague, and failed to provide Major Ntabakuze with adequate notice of the Charges against him, in violation of Article 20 (4) (a) of the Statute of the Tribunal.

2501. In looking at the evidence against Major Ntabakuze in this trial, either from the optic of individual paragraphs of the Indictment, or individual allegations, or taken as a whole, it is manifest that the Prosecutor has failed to present evidence that proves any criminal acts and conduct of Major Ntabakuze beyond a reasonable doubt. Since a reasonable doubt persists, Major Ntabakuze must be acquitted of all the charges that have been levelled against him