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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr Adama Dieng

Date: 16 February 2004

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The PROSECUTOR

v.

Pauline NYIRAMASUHUKO
Arsène Shalom NTAHOBALI
Sylvian NSABIMANA
Alphonse NTEZIRYAYO
Joseph KANYABASHI

Case No. ICTR-98-42-T

DECISION ON DEFENCE URGENT MOTION TO DECLARE PARTS OF THE EVIDENCE OF WITNESSES RV AND QBZ INADMISSIBLE

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Tintinga Pacere, Richard Perras for Ntesiryayo
Michel Marchand, Simone Santere for Kanyabashi

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEISED of the "Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible" (the "Motion"), filed on 12 July 2004;[1]

NOTING that the Accused Ntahobali, Nsabimana, Nteziryayo, and Kanyabashi joined in this motion during the oral hearing of 16 February 2004;

CONSIDERING the "Prosecutor's Response to Nyiramasuhuko's Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible" (the "Response"), filed on 13 February 2004, as well as the Prosecutor's oral response to the moving parties oral arguments of 16 February 2004;

CONSIDERING the Indictment against Pauline Nyiramasuhuko and Arsène Shalom Ntahobali, as amended on 10 August 1999 ("Nyiramasuhuko and Ntahobali Amended Indictment"); the Indictment against Sylvain Nsabimana and Alphonse Nteziryayo, as amended on 12 August 1999 ("Nsabimana and Nteziryayo Amended Indictment"); and the Indictment against Joseph Kanyabashi, as amended per the decision of Trial Chamber II on 12 August 1999, 31 May 2000, and 8 June 2001 ("Kanyabashi Amended Indictment");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the matter, pursuant to Rule 73 (A), on the basis of the written and oral submissions of the Parties.

Submissions of the Parties:

Defence

1. The Accused Nyiramasuhuko contends that Witness RV's statement, dated 15 May 2000, Witness RV's "Will Say" statement of 27 June 2002 and Witness QBZ's "Will Say" statement of 27 June 2002 support facts that are not alleged in the Indictment, in particular:

- Nyiramasuhuko's presence in Muganza *Commune* for a meeting on a football pitch near the *Bureau communal* where she spoke;
- Nyiramasuhuko's presence when Elie Ndayambaje was appointed;
- Nyiramasuhuko's presence on Kabuye hill where she spoke.

2. She relies on several cases to submit that there is a well established jurisprudence to the effect that specific facts alleged by a witness which have not been pleaded against the accused in the Indictment are not admissible.

[1] The Motion was filed in French and originally entitled: « *Requête d'extrême urgence de Pauline Nyiramasuhuko aux fins de déclarer inadmissibles en partie les témoignages des témoins RV et QBZ* ».

3. Nyiramasuhuko further contends that paragraphs 6.47, 6.52, 6.54, and 6.56 of the indictment do not mention any specific fact recounted by Witnesses RV and QBZ, notwithstanding the Prosecution's submission that there exist general paragraphs in the Indictment that could encompass all specific facts mentioned by the Witnesses to support the charge of conspiracy.

4. Nyiramasuhuko argues that if these witnesses (Witness RV and Witness QBZ) were allowed to testify to those facts, her right to a fair trail would be violated, as those two Witnesses are the only ones to implicate the accused in Muganza Commune on Kabuye hill, whereas those events were never mentioned in the pre-trial brief or during the opening statement by the Prosecution.

5. Nyiramasuhuko also mentions that because of this lack of specificity in the Indictment with respect to those facts, no investigation was conducted on her behalf in order to challenge these Witnesses.

6. Therefore, Nyiramasuhuko prays the Chamber to grant the Motion, declare inadmissible the testimony of RV and QBZ on her alleged acts in Muganza *préfecture* and on Kabuye, order the Prosecutor not to examine the witnesses on those facts, and warn the Witnesses to this effect.

Prosecution

7. The Prosecution submits that, as acknowledged by the Defence, the Prosecution had sent in respect of Witnesses RV and QBZ copies of "Will Say" advisories on 27 June 2002. The statement of Witness RV dated 15 May 2000 was disclosed to the Defence in redacted format on 7 June 2001 and non-redacted format on 31 January 2002. The Prosecutor further notes that Witness QBZ was listed in the pre-trial brief filed 11 April 2001 and that Witness RV was listed as a witness as early as 24 July 2001. Hence, argues the Prosecution, the Defence has been in possession of the information contained in the "Will Say" letters for more than 18 months, and cannot therefore claim lack of time to prepare for the testimony of these witnesses.

8. The Prosecutor emphasizes that for the Defence to wait to file the present Motion one trial day prior to the testimony of Witness RV is an abuse of the Court's process and that the Chamber should dismiss the Motion on that basis alone.

9. The Prosecutor submits that Paragraph 5.8 of the Indictment specifically refers to incitement to hatred and violence propagated from April to July 1994, and that, *inter alia*, Accused Pauline Nyiramasuhuko, Alphonse Nteziryayo, Elie Ndayambaje and Sylvain Nsabimana publicly incited the people to exterminate the Tutsi population and its accomplices. The evidence which can be led from Witness RV regarding attendance by Nyiramasuhuko at the installation of Ndayambaje in June 1994, is an example which goes to prove that paragraph of the Indictment.

10. The Prosecutor further submits that Paragraphs 6.17 and 6.50 to 6.56 refer to the general allegations of involvement in massacres against Tutsi by Accused Nyiramasuhuko and others. The proposed evidence by Witness QBZ is an example of involvement by Nyiramasuhuko in this particular massacre.

11. Therefore, the Prosecutor prays the Chamber to dismiss the Motions in their entirety.

HAVING DELIBERATED,

12. In order to determine the Motion, the Chamber first recalls the relevant texts of the Statute and Rules:

- Article 17(4): "Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute";
- Article 20(4): "In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language he or she understands of the nature and cause of the charges against him or her; (b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing";
- Rule 47(C): "The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged".

13. The Trial Chamber agrees with the reasoning of the ICTY in the case of *The Prosecutor v. Blaškić* interpreting the above texts:[2]

> an indictment, by its very nature and given the very initial phase in which it is reviewed, is inevitably concise and succinct. Such is the meaning, such is the spirit of the texts governing the proceedings of the International Tribunal, themselves inspired by international standards and their interpretation.

14. Furthermore, the Chamber agrees with the following pronouncement of the ICTY Appeals Chamber in the *Kupreškić* Case:

> A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the accused. For example, in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail.[3]

15. In this respect, it is the view of this Trial Chamber that an indictment must be considered in its entirety and not as isolated parts and paragraphs.

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[2] ICTY, *The Prosecutor v. Blaskic*, Case No. IT-95-14-T, Decision on the Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof (Vagueness / Lack of Adequate Notice of Charges)(TC), 4 April 1997, para. 21.

[3] ICTY, *The Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgment (AC), 23 October 2001, para. 89.

16. The Trial Chamber recalls its Decision in the *Kamuhanda* Case dated 6 February 2002 relating to the issue of admissibility of some Witnesses who testified on events which were not directly referred to in the Indictment against the Accused:[4]

> The Chamber is of the opinion that, although events at Gishaka Parish were not directly referred to in the Indictment against the Accused, the said Indictment states that the Accused is alleged to have "[s]upervised the killings in the area [Kigali-Rural]" during the month of April 1994. The Chamber notes that Gishaka Parish is in a *commune* located in the *Préfecture* of Kigali-Rural and that similar mention of the activities of the Accused can be found in the Prosecutor's Pre-Trial Brief. Additionally, the Prosecutor points out that her opening statement sets out allegations with respect to the involvement of the Accused in events that occurred in Gishaka Parish.

17. The Trial Chamber applies the same standard in the present Motion.

18. In light of the foregoing, the question now to consider is whether the facts indicated in the disclosed "Will Say" advisories and statements of Witness RV and Witness QBZ have been sufficiently pleaded in the Indictments against the Accused persons in this case. The Chamber is satisfied that those facts have been sufficiently pleaded in the following paragraphs of the Indictments:

- In respect of Nyiramasuhuko, paragraphs 5.1, 5.8, 6.20, 6.38, 6.39, 6.52 to 6.56 of the Nyiramasuhuko and Ntahobali Amended Indictment;
- In respect of Ntahobali, paragraphs 5.1, 6.39, 6.52 to 6.56 of the Nyiramasuhuko and Ntahobali Amended Indictment;
- In respect of Nsabimana, paragraphs 5.1, 5.8, 6.32, 6.53, 6.57 to 6.61 of the Nsabimana and Nteziryayo Amended Indictment;
- In respect of Nteziryayo, paragraphs 5.1, 5.8, 6.31, 6.53, 6.57 to 6.61 of the Nsabimana and Nteziryayo Amended Indictment; and
- In respect of Kanyabashi, paragraphs 5.1, 5.8, 6.58, 6.62 to 6.65 of the Kanyabashi Amended Indictment.

These paragraphs of the Indictments do clearly contain allegations of criminal conducts, as charged in the Indictments, on part of the Accused in Rwanda and/or in Butare *Préfecture* within which Muganza is located.

19. The Trial Chamber is aware of the necessity for the Accused to be informed of the nature and cause of the charges against him or her and to have adequate time and facilities for the preparation of their defence.

20. With regard to the time frame, the Prosecutor submits in its Response that, as acknowledged in the Motion, the Prosecution had, on 27 June 2002, sent to the Defence "Will Say" advisories in respect of Witnesses RV and QBZ; the statement of Witness RV dated 15 May 2000 was disclosed to the Defence in redacted form on 7 June 2001 and non-redacted form on 31 January 2002. The Prosecutor further submits that Witness QBZ was listed in the pre-trial brief filed 11 April 2001 and that Witness RV was listed as a witness as early as 24 July 2001. This presumes that the Defence were in possession of the information contained in

[4] *The Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-T, Decision on the Prosecutor's Motion to Add Witnesses (TC), 6 February 2002, para. 13 ; cited in *The Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-T, Judgment and Sentence, 22 January 2004, para. 57.

the "Will Say" letters for more than 18 months. The Defence have not rebutted this presumption.

21. In this connection, this Trial Chamber concurs with the development of the jurisprudence of this Tribunal to the effect that the right of an accused to a fair trial may not be taken to have been prejudiced if he or she was informed of the nature and cause of the charges against him or her, has had adequate notice of such, and has had adequate facilities for the preparation of his or her defence.[5]

22. The Trial Chamber agrees with the Appeals Chamber in *Kupreškić et al* that the issue of failure to plead material facts in the Indictment is distinct from the issue of lack of adequate notice infringing the Accused's right to a fair trial.[6] The significance of this distinction lies mainly in the difference between the material which the Trial Chamber may fairly receive in evidence during the trial of an Accused and the use to which the Chamber may put any material so received into evidence.

23. Furthermore, this Trial Chamber notes that in the *Kupreškić* Decision of 23 October 2001, the ICTY Appeals Chamber did not exclude:[7]

> the possibility that, in some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.

24. In the *Kupreškić* case, the Appeals Chamber excluded testimony after having expressed its concern as to how close to the witness' testimony in court the Prosecutor disclosed the statement to the Defence. The time frame there in question was less than one month. Such a close time frame was considered by the Appeals Chamber as a factor militating against the admissibility of such testimony.[8]

25. This Decision is distinguishable in that notice of the points of the testimonies of Witnesses RV and QBZ implicating the Accused persons in the alleged meetings was provided at least eighteen months prior to Witness' testimony in Court. The Trial Chamber finds this to be sufficient time for the Accused to prepare their defence. In the circumstances, the Chamber sees no prejudice to the right of the Accused to a fair trial.

26. In view of all the foregoing, it is the view of the Trial Chamber that the facts indicated in the "Will Say" advisories and statements of the proposed witnesses are covered in the Amended Indictments. Moreover, the Trial Chamber considers that the Accused have had enough time to investigate and prepare their defence on these particular points.

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[5] *Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jerôme Bicamumpaka, and Prosper Mugiraneza,* Decision on Motion from Casimir Bizimungu Opposing the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA, 23 January 2004, para 13 *citing Prosecutor v. Zoran Kupreškić,* Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 88.
[6] *Kupreškić* Appeal Judgment, para. 87.
[7] *Id.* para. 114.
[8] *Id.* para. 120.

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FOR THE ABOVE REASONS,

THE TRIAL CHAMBER:

DISMISSES the Motion in its entirety.

Arusha, 16 February 2003

William H. Sekule
Presiding Judge

Arlette Ramaroson
Judge

Solomy Balungi Bossa
Judge

[Seal of the Tribunal]