ICTR-00-56-T
31-03-2006
(22174-22168)

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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 Asoka de Silva, Presiding
Judge Taghrid Hikmet
Judge Seon Ki Park

Registrar: Mr. Adama Dieng

Date: 30 March 2006

The PROSECUTOR
v.
Augustin NDINDILIYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU

Case No. ICTR-00-56-T

DECISION ON NZUWONEMEYE'S MOTION TO EXCLUDE PARTS OF WITNESS AOG'S TESTIMONY

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the "Chamber");

BEING SEIZED OF François-Xavier Nzuwonemeye's "Urgent Motion to Exclude Parts of Witness AOG's Testimony" filed on 21 February 2006 (the "Motion");

HAVING RECEIVED AND CONSIDERED

i. The "*Réponse du Procureur à la requête du conseil de François-Xavier Nzuwonemeye, en date du 21 février 2006, poursuivant l'exclusion d'une partie du témoignage de AOG*"[1] filed on 23 February 2006, ("the Response");

ii. The "Defence Reply to the Prosecutor's Response to the Urgent Motion to Exclude Parts of Witness AOG's Testimony" filed on 1 March 2006, ("the Reply");

CONSIDERING the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules") in particular rules 72, 89(C) and 95 of the Rules;

HEREBY DECIDES the Motion on the basis of the written briefs filed by the Parties pursuant to Rule 73 of the Rules.

SUBMISSIONS

Relief Sought by the Defence

1. The Defence requests the Chamber to declare irrelevant and therefore inadmissible parts of the testimony given by Prosecution Witness AOG on 20 February 2006, relating to (1) the alleged relationship between the MRND and CDR parties, (2) the events at Nyamirambo Stadium, and (3) the speech delivered by Leon Mugesera in 1992.

Supporting Arguments

2. The Defence argues that the objectionable parts of Witness AOG's testimony concern material facts that are not pleaded in the Indictment and that "cannot reasonably be linked to any form of participation such as joint criminal enterprise or a formal charge in the Indictment such as conspiracy in relation to the Accused François-Xavier Nzuwonemeye."[2]

3. The Defence first submits that, pursuant to Rule 47(C) of the Rules, material facts underpinning the charges in the Indictment must be pleaded with sufficient specificity. In support of this argument, the Defence recalls the Appeals Chamber's statement in *The Prosecutor v. Niyitegeka*, that the "obligation on the part of the Prosecution [is] to state the Material Facts underpinning the Charges in the Indictment, but not the evidence by which such Material Facts are to be proven".[3] The Defence further refers to a decision in the case of *The Prosecutor v. Pauline Nyiramasuhuko*, where the Appeals Chamber stated that "for an

[1] "Prosecutor's Response to François-Xavier Nzuwonemeye's Motion of 21 February 2006, seeking the exclusion of part of AOG's testimony." (Unofficial translation).
[2] Motion, para. 2.
[3] *The Prosecutor v. Niyitegeka*, Case No.96-14-A, Appeals Judgment, 9 July 2004, para. 193.

indictment to be pleaded with sufficient particularity, it must set out the material facts of the Prosecution case with enough detail to inform the defendant clearly of the charges against him or her so that he or she may prepare his or her defence."[4]

4. The Defence submits that neither the Indictment nor the Pre-Trial Brief contain any reference to CDR, Nyamirambo, or Leon Mugesera.[5] The Defence also points out that the Mugesera speech was specifically pleaded in the Indictment against *Casimir Bizimungu et al.*[6] The Defence then argues that the jurisprudence on allowing the Prosecution to lead evidence not included in the Indictment can be summarized by the following statement from a decision of the Trial Chamber in the case of *The Prosecutor v. Protais Zigiranyirazo*: "the process of curing an indictment does take place only when the material fact was already in the Indictment in a certain manner, not when it was not included at all."[7]

5. The Defence further submits that the Prosecution did not adequately meet the requirement of stating the material facts underpinning the charges in the Indictment relating to conspiracy. According to the Defence, "paragraph 24 of the English version of the Indictment, in its vagueness does not come near the requirements of sufficiency in pleading" and cannot be used as a basis for leading the evidence that the Prosecution seeks to introduce.[8]

6. The Defence then suggests that the "Prosecutor relies heavily on the joint criminal enterprise theory to lead evidence from Witness AOG on important material facts, which are not pleaded in the Indictment",[9] and argues that the Prosecution cannot do this because the joint criminal enterprise theory is itself not properly pleaded in the Indictment. Citing *The Prosecutor v. Simic*,[10] the Defence emphasizes that in order to rely on the joint criminal enterprise theory, the Prosecution must specify the following in Indictment: the nature or purpose of the joint criminal enterprise; the time at which or the period over which the enterprise is said to have existed; the identity of those engaged in the enterprise, in so far as their identity is known, but at least by reference to their category as a group; and the nature of the participation by the accused in that enterprise. The Defence submits that joint criminal enterprise is not specifically referred to in this Indictment, and that none of the criteria listed above are set forth in it.[11]

6. The Defence further submits that the mention of the theory of joint criminal enterprise liability in the Pre-Trial Brief is not sufficient to cure its absence from the Indictment.

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[4] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's request for Reconsideration, 27 September 2004, paras. 11-12.
[5] Motion, para. 10.
[6] *The Prosecutor v. Casimir Bizimungu et al.*, Indictment, 12 may 1999, para. 5.8.
[7] *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-PT, ""Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief", 30 September 2005, para. 13.
[8] Motion, para. 14.
[9] Motion, para. 17.
[10] *The Prosecutor v. Simic*, Case No. IT-95-9-T, Judgment, 17 September 2003, para.145.
[11] Motion, para. 20.

The Prosecution's Response

7. In response to the Motion, the Prosecution first submits that paragraphs 22-25 of the Indictment refer to the emergence of a doctrine of exclusion that developed in the institutions of Rwanda, beginning in October 1990.[12] The Prosecution emphasizes the necessity of understanding the context surrounding the genocide, citing as support the decision of this Chamber on 15 July 2004, in which the Chamber refused to strike paragraphs 25, 26, 27 and 28 of the Indictment because "these particular paragraphs may be of great significance in establishing that there was a criminal enterprise for a conspiracy to commit genocide".[13]

8. According to the Prosecution, an Indictment should not be a catalogue of historical facts; it should outline the main tenets of the doctrine underlying the genocide, and allow the Pre-Trial Brief, the disclosure of evidence, and the testimony of witnesses to fill in the details.

9. The Prosecution points out that the Mugesera Speech was delivered to the Defence in Volume VI of its disclosure of supporting materials, sent by registered mail to the Registrar on 17 March 2004. The report of the International Commission of Inquiry set up by various human rights organizations in 1993, which analyzed the Mugesera speech, was disclosed at the same time. The Prosecution further remarks that Mugesera's indoctrinating works are specifically referred to in paragraph 13 of the Pre-Trial Brief.

10. The Prosecution then submits that paragraphs 23-25 of the Indictment do not always relate to the personal conduct of the Accused; their purpose is to explain a policy and outline a doctrine whose goal was to federate extremist Hutus. Citing the *Nitiyegeka* and *Blaskic* judgments in general as support, the Prosecution argues that the degree of specificity required in these circumstances is not the same as when the personal conduct of the Accused is in issue.[14]

11. Quoting from the *Nahimana* Judgment, the Prosecution submits that "conspiracy to commit genocide can be inferred from coordinated action by individuals who have a common purpose and are acting within a unified framework",[15] and suggests that the Accused Nzuwonemeye, by virtue of the conduct referred to in paragraphs 34, 38 and 39 of the Indictment, participated in the rupture of the constitutional order that laid the groundwork for the genocide.[16]

12. The Prosecution asserts that the Defence made a request similar to the present one during the hearing of 20 February 2006, and that this request was denied by the Chamber. Given this, the Prosecution argues that the admissibility of a second motion on this issue is debatable at best.[17]

13. The Prosecution further argues that by virtue of Rule 72, as well as the decision taken by Judge Arlette Ramaroson on the occasion of the new initial appearance convened on 30

[12] Response, para. 3.
[13] *The Prosecutor v. Augustin Bizimungu*, Case No. ICTR-00-56-I, Decision on Augstin Bizimungu's Preliminary Motion, 15 July 2004, paras. 26-27.
[14] Response, paras. 8-9.
[15] *The Prosecutor v. Ferninand Nahimana et al.*, Case No. ICTR-99-52-T, Judgment and Sentence, 3 December 2003, para. 1047.
[16] Response, para. 10-11.
[17] Response, para. 14.

April 2004, the Defence was obliged to raise any defects in the form of the Indictment within one month of receiving the translation it requested. According to the Prosecution, this deadline having passed, the Defence may not raise this objection during the course of the trial.

14. Finally, the Prosecution submits that according to Rule 98 *bis*, if the Defence considers that the charges against the Accused Nzuwonemeye are insufficient or that the crime of conspiracy has not been established, it must wait until the close of the Prosecution's case to make these arguments.

The Defence Reply

15. In reply to the Prosecution's Response, the Defence argues that the objections being raised in relation to the testimony of Witness AOG go to the substance and not the form of the Indictment, and that the thirty day deadline imposed by Rule 72 therefore does not apply in this instance.[18]

16. With respect to the specificity of the Indictment in relation to the conspiracy charge, the Defence argues that mere disclosure of a potential exhibit is insufficient to enable the defence to prepare its case, citing as support a decision in *The Prosecutor v. Radoslav Broanin and Momir Talic*, in which a Trial Chamber of the ICTY held that "notice that such evidence will be led in relation to a particular offence charged is *not* sufficiently given by the mere service of witness statements by the prosecution pursuant to the disclosure requirements imposed by Rule 66(A)."[19]

17. The Defence further notes that the Prosecution voluntarily removed an explicit reference to the Mugesera speech from paragraph 4.11 of the second Indictment dated 17 October 2002.[20]

18. Finally, the Defence remarks that the Prosecution does not address the issue of joint criminal enterprise in its Response, and reiterates that this theory was not pleaded in the Indictment.[21]

HAVING DELIBERATED

19. The Chamber recalls the provisions of Article 20(4) of the Statute, which sets out minimum guarantees for the Accused, including the right to be informed promptly and in detail of the nature and cause of the charge against him; Rule 47(C) of the Rules, which stipulates that the indictment must set forth a concise statement of the facts of the case and of the crime with which the suspect is charged; and Rule 89(C) which allows the Chamber to admit any relevant evidence which it deems to have probative value.

[18] Reply, paras. 3-5.
[19] *The Prosecutor v. Radoslav Broanin and Momir Talic*, Case No. IT-99-36-PT, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend", 26 June 2001, para. 62.
[20] Reply, para. 9.
[21] Reply, para. 10.

20. The Chamber considers that the gist of the Defence argument has two limbs to it: first, the Defence argues that the alleged relationship between the MRND and CDR parties, the arrest and detention of five thousand people at Nyamirambo stadium in 1990, and a speech given by Léon Mugesera in 1992, are material facts that have not been pleaded in the Indictment or the Pre-trial brief and therefore witness AOG's evidence relating to those facts is irrelevant and inadmissible. Second, the Defence argues that the Prosecution relies on the theory of joint criminal enterprise to lead evidence on important material facts not pleaded in the Indictment, and that this is impermissible because the theory of joint criminal enterprise has itself not been properly pleaded in the Indictment.

21. The Chamber notes that the Indictment does not explicitly refer to the relationship between the MRND and the CDR party, the arrests at Nyamirambo stadium, or the 1992 speech of Léon Mugesera. The Chamber considers that material facts underpinning the charges have to be pleaded in the Indictment. If they are not, the Indictment is defective. However, the defect can be cured by giving the Defence clear, timely, and consistent notice of the said facts through other communications from the office of the Prosecutor such as the pre-trial brief, the Prosecutor's opening statement, or witness statements.[22] Notice of material facts must be received in such circumstances that the Defence cannot claim to have been taken by surprise if the Prosecutor seeks to lead evidence relating to the facts in question.[23]

22. On the other hand, if the evidence sought to be tendered does not, in the Chamber's view, constitute a material fact, the Chamber must be satisfied that it is otherwise relevant so as to justify admission. In this respect, the Chamber is mindful of the jurisprudence of the Tribunal to the effect that evidence relating to events that happened prior to the temporal jurisdiction of the Tribunal can be admitted if (i) it is relevant to an offence continuing into the mandate year; (ii) the evidence provides context or background to the crime charged; or (iii) the evidence constitutes 'similar fact evidence' that demonstrates a consistent pattern of conduct.[24]

23. With respect to the relationship between the MRND and CDR parties, and the arrest and detention of people at the Nyamirambo stadium in 1990, the Chamber notes that neither of these events is specifically pleaded in the Indictment. They evidently took place before 1994, thus falling outside the temporal jurisdiction of the Tribunal. The Prosecutor, however, argues that they are relevant to the context that engendered the genocide and are therefore admissible on that ground.

24. The Chamber recalls a recent Decision in the *Zigiranyirazo case*, where the Trial Chamber held that evidence relating to the MRND and the establishment of *Interahamwe*, the Arusha Accords, the 'Hutu Power' movement and the Bugesera campaign were "facts [that] are only relevant to the background and the context of the specific allegations brought against

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[22] *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases No. ICTR-96-10-A and ICTR-96-17-A, 13 December 2004, para. 25, 27.

[23] Ibid., at para 27. The Appeals Chamber noted that whether 'facts' are 'material' depends on the nature of the case. It also indicated that 'mere service of witness statements by the [p]rosecution pursuant to the disclosure requirements' of the rules does not suffice to inform the Defence of material facts that the prosecution intends to prove at trial.

[24] *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, "Decision on Admissibility of Proposed Witness DBY", 18 September 2003, paras 4-14.

the Accused." The Chamber notes that the facts in the *Zigiranyirazo case* were not pleaded in the Indictment, but were mentioned in the pre-trial brief.[25]

25. The Chamber has considered witness AOG's testimony relating to the CDR Party and the arrest and detention of people at the Nyamirambo stadium, and is satisfied that this testimony is relevant to the background of some of the allegations laid against the Accused. Specifically, the evidence is relevant to the background and historical context of paragraphs 22 through 25 of the Indictment, which describe the conspiracy to commit genocide charged in Count 1, and paragraphs 26 through 37, which describe the acts that were executed in preparation for the genocide.

26. With respect to the Léon Mugesera speech, the Chamber again notes that this is not specifically pleaded in the current Indictment. The Chamber notes, however, that paragraph 13 of the Pre-Trial Brief dated 1 September 2004, mentions 'articles' authored by Mugesera, and his role in the incitement of hatred against the Tutsis. The Chamber further notes that the text of the Mugesera speech was disclosed to the Defence on 17 March 2004 as part of the supporting materials. In the circumstances, the Chamber considers that neither the mention, nor the content of Mugesera's speech by witness AOG in his testimony on 20 February 2006 could have taken the Defence by surprise. The Chamber is satisfied that the Defence received clear, timely and consistent notice of the Prosecution's intention to rely on the speech as relevant supporting material with respect to the strategy of "incitement to hatred" and to the "definition of the enemy" described in paragraph 25 of the Indictment. Consequently, the Prosecution's failure to specifically mention the speech in the Indictment does not render witness AOG's testimony on this issue inadmissible.

27. Having decided that the evidence of witness AOG on the relationship between the MRND and CDR parties, the arrest and detention of people at Nyamirambo stadium, and the speech of Léon Mugesera is admissible on the grounds discussed above, the Chamber sees no need, at this stage of the proceedings, to determine the question whether joint criminal enterprise has been adequatcly pleaded in the Indictment.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion in its entirety.

Arusha, 30 March 2006.

Aşoka de Silva	Ingrid Hikmet	Seon Ki Park
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

[25] *The Prosecutor v. Protais Zigiranyirazo*, case No. ICTR-2001-73-PT, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief, 30 September 2005, paras 15-18.