



ICTR-97-31-T
20-03-2007
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

(4713-4707)

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ORIGINAL: ENGLISH

TRIAL CHAMBER I

Before: Judge Erik Mose, presiding
Judge Sergei Alekseevich Egorov
Judge Florence Rita Arrey

Registrar: Adama Dieng

Date: 20 March 2007

THE PROSECUTOR

v.

Tharcisse RENZAHO

Case No. ICTR-97-31-T

2007 MAR 20 1 P 12-28
JUDICIAL RECORDS/ARCHIVES
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DECISION ON EXCLUSION OF TESTIMONY AND ADMISSION OF EXHIBIT

The Prosecution

Jonathan Moses
Katya Melliush
Ignacio Tredici
Shamus Mangan

The Defence

François Cantier
Barnabé Neukuie

John

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Igurov, and Judge Florence Rita Arrey;

BEING SEIZED OF the Defence oral motion of 2 March 2007 to exclude the testimony of a witness;

CONSIDERING the Prosecution's oral submissions on the same day;

BEING SEIZED OF the Prosecution request to tender an audio recording and its transcriptions as an exhibit, made orally on the same day;

HEREBY DECIDES the motion and request.

INTRODUCTION

1. During the Prosecution case, four witnesses claimed to recognize the Accused's voice on a tape containing a telephone conversation, during which he allegedly made incriminating statements.¹ In connection with these testimonies, as well as with the examination of an investigator on the first day of the trial, the Prosecution sought to tender the audio recording as an exhibit.² The Chamber denied these requests due to lack of information about the recording and its provenance.³ The Prosecution then sought to lead an additional witness, a journalist who purportedly had made the recording. The Chamber granted that request.⁴

2. On 2 March 2007, the journalist testified that he had made the tape recordings in Kigali between 14-18 April 1994 and gave evidence about the telephone conversation.⁵ After the examination-in-chief, the Defence made an oral motion to exclude the testimony. The Chamber denied the motion orally but stated that it would issue a written decision explaining its reasons.⁶ After cross-examination and re-examination, the Chamber announced that it would issue a written decision on the Prosecution request to admit the tape and its transcripts as an exhibit.⁷ The present decision contains the reasons for not excluding the testimony and the Chamber's ruling concerning the exhibit.

DELIBERATIONS

(i) Exclusion of Testimony

3. The Defence sought to exclude the testimony of the journalist because his testimony introduced a new material fact that does not appear in the Amended Indictment.⁸ The

¹ Testimonies of Witnesses GJJ (T. 22 January 2007 p. 40), UB (T. 23 January 2007 p. 24), ALG (T. 11 January 2007 p. 64) and AWE (T. 31 January 2007 p. 31).

² T. 8 January 2007 p. 46 (Prosecution investigator); T. 22 January 2007 pp. 9-10.

³ T. 8 January 2007 p. 52; T. 22 January 2007 p. 12; T. 15 January 2007 p. 35.

⁴ *Prosecutor v. Renzaho*, Decision on Prosecution Motion to Vary Witness List (TC), 16 February 2007, paras. 5-6.

⁵ T. 2 March 2007 pp. 4-7.

⁶ T. 2 March 2007 p. 25.

⁷ T. 2 March 2007 pp. 48-49.

⁸ T. 2 March 2007 pp. 12, 15, 16. The Defence referred to *Prosecutor v. Bagosora et al.*, Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006, para. 10 ("Where a material fact cannot be reasonably

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Defence had been given inadequate notice of this new fact. It was also argued that the Defence could not properly prepare for the testimony because the Prosecution only disclosed the last of its information regarding the witness on 1 March 2007.⁹

4. The Prosecution submitted that the witness's testimony does not amount to a material fact. The Accused is in no danger of conviction based on the facts to which the witness was testifying. Instead the testimony supports his criminal intent by shedding light on the origin of a recording that allegedly demonstrates that the Accused talked of "extermination".¹⁰ According to the Prosecution, the Defence received sufficient notice to prepare for the testimony.¹¹

5. The Chamber will first consider whether the tape containing the alleged incriminating statements constitutes a new material fact and, if so, whether adequate notice was given. It is recalled that under Article 17 (4) of the Tribunal's Statute and Rule 47 (C), the Prosecution must set forth in the indictment a concise statement of the facts of the case and of the crime with which the suspect is charged. This obligation must be interpreted in light of the rights of the accused to a fair trial, to be informed of the charges against him, and to have adequate time and facilities for the preparation of his defence.¹² The indictment has to fulfil the fundamental purpose of informing the accused of the charges against him with sufficient particularity to enable him to mount his defence.¹³

6. Depending on the specific circumstances of each case, the question to be determined is whether an accused was reasonably able to identify the crime and criminal conduct alleged in each of the paragraphs of the indictment.¹⁴ According to the jurisprudence of both *ad hoc* Tribunals, the Prosecution is obligated to state in the indictment the material facts supporting the charges, but not the evidence by which such material facts are to be proven.¹⁵

7. Where the state of mind with which the accused carried out his alleged acts is relevant, the Prosecution must either (i) plead the relevant state of mind itself as a material fact, in which case the facts by which that material fact is to be established are ordinary matters of evidence, and need not be pleaded; or (ii) plead the evidentiary facts from where the relevant state of mind is to be inferred.¹⁶

8. The Amended Indictment of 16 February 2006 pleads that the Accused is charged with the crime of genocide and complicity in genocide and had the "intent to destroy, in whole or in part, a racial or ethnic group".¹⁷ Paragraph 89 of the Pre-trial Brief, dated 31 October 2005, states that "there is direct and explicit evidence of the Accused's intent to kill

related to the Indictment, then it shall be excluded. Where the material fact is relevant only to a vague or general allegation in the Indictment, then the Chamber will consider whether notice of the material fact was given in the Pre-Trial Brief or the opening statement, so as to cure the vagueness of the Indictment".

⁹ T. 2 March 2007 p. 24.

¹⁰ T. 2 March 2007 p. 21.

¹¹ T. 2 March 2007 pp. 24-25.

¹² Statute, Articles 19, 20 (2), 20 (4)(a) and 20 (4)(b).

¹³ *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Judgement (AC), 13 December 2004, paras. 25 and 470; *Prosecutor v. Naletilic and Martinovic*, Judgement (AC), 3 May 2006, para. 23.

¹⁴ *Prosecutor v. Rutaganda*, Judgement (AC), 26 May 2003, para. 303.

¹⁵ *Ntakirutimana*, Appeal Judgement, paras. 25 and 470; *Rutaganda*, Appeal Judgement, paras. 301-303; *Naletilic and Martinovic*, Appeal Judgement, 3 May 2006, para. 23.

¹⁶ *Prosecutor v. Boskoski and Tarkulovski* (TC), Decision on Ijube Boskoski's Motion Challenging the Form of the Indictment, para. 11.

¹⁷ Amended Indictment, p. 4.

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and/or cause bodily or mental harm to Tutsi and his concurrent intent to destroy the Tutsi group in whole or in part". According to the Brief, his intent may also be inferred from a number of facts and circumstances, such as the general context in which the acts occurred in Rwanda between 6 April and 17 July 1994 and five specific pieces of evidence, including that "the Accused talked of 'extermination' during an intercepted telephone conversation with the *Bourgmestre* of Bicumbi, Mr. Rugambarara".¹⁸ Furthermore, the witness summaries attached to the Pre-trial Brief provided additional notice to the Defence that the Prosecution envisaged calling at least one witness to testify that it was the Accused's voice on a recording of an intercepted telephone call, in which he allegedly talks about "extermination".¹⁹

9. It follows that the Accused's *mens rea* was unambiguously pleaded in the Amended Indictment. The Pre-trial Brief informed the Defence of the Prosecution's intention to use the alleged intercepted conversation as evidence more than one year and two months before the start of trial. The Defence submission that there is lack of notice is unfounded.

10. The Chamber now turns to the issue whether the Defence received sufficient notice regarding the witness's testimony. The tape and its provenance was a matter of dispute between the parties from the first day of trial.²⁰ The journalist's testimony about how and when he recorded the tape was therefore relevant to the admissibility of the tape. Such authenticating evidence does not amount to a material fact and need not be pleaded in the Amended Indictment. The Defence was informed of the intention to call this witness through the Prosecution motion of 6 February 2007 to vary its witness list. The motion contained a summary of his testimony.²¹ The Defence was provided with a French translation of his will-say statement on 7 February 2007, more than three weeks before he testified. In its decision of 16 February 2007, the Chamber found that allowing the testimony would not result in unfair prejudice to the Accused. After having considered the Defence's additional arguments, the Chamber reiterates that the Defence had sufficient time to prepare for the testimony. It is not correct, as argued by the Defence, that the testimony was unrelated to the Amended Indictment because it did not mention the name of the Accused.²² Consequently, there is no basis for excluding his testimony.

(ii) Admission of Recording and Transcripts

11. The Defence argued that the recording was inadmissible because the tape had not timely been disclosed to the Defence by the Prosecution.²³ It was not known how the recording was made, and the authenticity of the recording had not been established.²⁴ The Prosecution submitted that adequate notice was provided to the Accused of the existence of the recording, as well as of the purpose for which the Prosecution intended to use it at trial. It was further argued that the evidence had extreme probative value and great relevance.²⁵

12. Rule 89 (C) of the Rules states that the Chamber "may admit any relevant evidence which it deems to have probative value". The Appeals Chamber has emphasized that a Trial

¹⁸ Pre-trial Brief, para. 89 (a).

¹⁹ Pre-trial Brief, p. 66 (Witness BKX).

²⁰ E.g. T. 8 January 2007 pp. 49-53 (Prosecution investigator); T. 22 January 2007 pp. 4-11.

²¹ The purpose of the testimony was also explained orally on the following day. T. 7 February 2007 p. 28 (introduction of Prosecution motion).

²² T. 2 March 2007 pp. 15-16.

²³ T. 8 January 2007 p. 46; T. 22 January 2007 pp. 2-3.

²⁴ T. 8 January 2007 pp. 46-47; T. 22 January 2007 p. 6.

²⁵ T. 8 January 2007 pp. 47-48; T. 22 January 2007 p. 9.

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Chamber's authority pursuant to Rule 89 (C) to admit any relevant evidence which it deems to have probative value grants it the discretion to admit evidence even where it is not possible to convict an accused on an allegation due to lack of notice.²⁶ In the present case the Defence had notice of the existence, content and purpose of the recording from 31 October 2005. The transcript of the intercepts was provided to the Defence on 6 December 2006, and the recording on 11 January 2007.²⁷ The Chamber considers that the elements furnished to the Defence regarding the recording provided timely, clear and consistent information that the Defence could then use to investigate and to prepare for the evidence in question.

13. As regards the authenticity of the tape, the Chamber observes that the witness recognized the Kinyarwanda transcript as reproducing the telephone conversations that he had recorded.²⁸ He testified that he gave copies of the recordings to Prosecution investigators, and that he had listened to an audio recording given to him by the Prosecution in the day or two preceding his testimony and identified it as one he had made. In view of the information provided by the witness, the Chamber considers that there is a *prima facie* basis to admit the tape, the Kinyarwandan transcripts and the translations into English and French.

14. The Defence has also argued that the legality of the recording has not been established, and that its admission would be in contravention of Rule 95.²⁹ This provision states that "[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability, or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings".

15. In relation to Rule 95, the question is whether RPF's eavesdropping on Rwandan authorities' telephone calls in April 1994 should lead to exclusion of evidence in pursuance of that provision. The Chamber observes that according to established ICTY case law, communications intercepted during the armed conflict in the Former Yugoslavia are not as such subject to exclusion. In *Prosecutor v. Brdjanin*, a Trial Chamber, after extensive survey of the relevant international law and national law, concluded that the intercepts were admissible and did not violate Rule 95:

[T]here is nothing in the Rules concerning the exclusion of illegally obtained evidence and ... as affirmed in the Kordic case, 'even if the illegality was established [...] [w]e have come to the conclusion that [...] evidence obtained by eavesdropping on an enemy's telephone calls during the course of a war is certainly not within the conduct which is referred to in Rule 95. It's not antithetical to and certainly would not seriously damage the integrity of the proceedings.' This Trial Chamber cannot but agree that communications intercepted during an armed conflict are not as such subject to exclusion under Rule 95 and should therefore be admitted upon a challenge based on the grounds laid down in that Rule.³⁰

²⁶ *Prosecutor v. Ntahobali and Nyiramasuhuko*, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible" (AC), 2 July 2004, paras. 14-16.

²⁷ T. 22 January 2007 pp. 2, 5, 9.

²⁸ T. 2 March 2007 pp. 9-10.

²⁹ T. 8 January 2007 pp. 49 and 52; T. 22 January 2007 p. 6. See also *Prosecutor v. Renzaho*, Decision on Prosecution Motion to Vary Witness List (TC), 16 February 2007, para. 5.

³⁰ *Prosecutor v. Brdjanin*, Decision on the Defence 'Objection to Intercept Evidence' (TC), 3 October 2003, para. 53. See also paras. 61 and 63. The Defence objected in vain to the admission of transcripts of intercepted telephone conversations, recorded by internal security personnel of the government of the Republic of Bosnia and Herzegovina before and during the war, on the grounds that the intercepts were illegally obtained. Reference is also made to the oral decision of 2 February 2000 in *Prosecutor v. Kordic and Cerkez*, T. 13694.

16. In the present case, the journalist testified that he was allowed by RPF soldiers to make tape recordings of conversations they were allegedly able to hear over the walkie-talkies. There is no information about the Rwandan law that was applicable to interception during the circumstances that prevailed in April 1994, when the recording was made, and hence whether the interception was illegal. But at any rate, this would not in itself lead to exclusion under human rights law or Tribunal case law.³¹ The Chamber does not have a basis to conclude that this evidence is antithetical to, and would seriously damage the integrity of the proceedings.

17. Finally, it is recalled that the admissibility of the recording should not be confused with the exact probative weight to be attached to it: the former requires some relevance and probative value, whereas the latter is an assessment to be made by the Trial Chamber at the end of the case.³²

³¹ *Prosecutor v. Brdjanin*, Decision on the Defence 'Objection to Intercept Evidence' (TC), 3 October 2003, paras. 42-56.

³² *Nyiramasuhuko v. Prosecutor*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 6.

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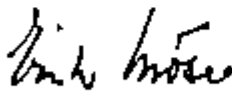
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motion to exclude testimony of a journalist for the reasons mentioned in the decision:

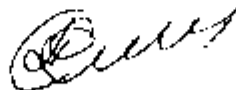
GRANTS the Prosecution request to admit the audio recording marked with reference number K100-1084, its Kinyarwanda transcription and the official French and English translations thereof, as an exhibit; and

REQUESTS the Registry to assign these documents with one exhibit number.

Arusha, 20 March 2007.



Erik Mose
Presiding Judge



Sergei Alekseevich Egorov
Judge



Florence Rita Arrey
P.P. Judge

[Seal of the Tribunal]





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Case Name:	The Prosecutor vs. Renzaho			Case Number: ICTR-97-31-I
Dates:	Transmitted: 20.03.07		Document's date: 20.03.07	
No. of Pages:	8		Original Language: <input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda	
Title of Document:	Decision on Exclusion of Testimony and Admission of Exhibit			
Classification Level:		TRIM Document Type:		
<input type="checkbox"/> Strictly Confidential / Under Seal		<input type="checkbox"/> Indictment	<input type="checkbox"/> Warrant	<input type="checkbox"/> Correspondence
<input type="checkbox"/> Confidential		<input checked="" type="checkbox"/> Decision	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Notice of Appeal
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		<input type="checkbox"/> Accused particulars		

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<input checked="" type="checkbox"/> Filing Party hereby submits only the original, and will not submit any translated version.			
<input type="checkbox"/> Reference material is provided in annex to facilitate translation.			
Target Language(s):			
<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda	
CMS SHALL NOT take any action regarding translation.			
<input type="checkbox"/> Filing Party hereby submits BOTH the original and the translated version for filing, as follows:			
Original	in	<input type="checkbox"/> English	<input type="checkbox"/> French
Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French

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<input type="checkbox"/> Urgent		<input type="checkbox"/> Hearing date:
<input checked="" type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: