

ICTR-05-88-T
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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 24 June 2008

THE PROSECUTOR

v.

Callixte KALIMANZIRA

Case No. ICTR-05-88-T

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**DECISION ON DEFENCE MOTION TO EXCLUDE PROSECUTION WITNESSES
BWM, BWN, BXB, BXC, BXD AND BXL**

*Articles 17(4) and 20(4) of the Statute of the Tribunal, and Rule 47(C) of the Rules of
Procedure and Evidence*

Office of the Prosecutor
Christine Graham
Veronic Wright
Ousman Jammeh
Stephen Agaba
Karik Murukutla

Defence Counsel
Arthur Vercken
Anta Guisse

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INTRODUCTION

1. On 9 June 2008, the Defence for Kalimanzira moved the Chamber to exclude Witnesses BWM, BWN, BXB, BXC, BXD and BXL from the Prosecution Witness List on the basis that their anticipated testimonies are related to material facts not pleaded in the Indictment.¹ The Prosecution opposes the Motion in its entirety, asserting that the material facts at issue were either sufficiently pleaded in the Indictment or that any deficiencies were cured by subsequent timely, clear, and consistent notice.²

2. The Prosecution Witness List was not finalized until 22 June 2008. The final Witness List includes only two of the six Prosecution Witnesses which the Defence for Kalimanzira contests. Accordingly, all issues related to the evidence of Prosecution Witnesses BWN, BXC, BXD and BXL are now moot. The Chamber will only deal with the issues presented by the evidence of Prosecution Witnesses BWM and BXB.

DELIBERATIONS

3. The Defence for Kalimanzira submits that Witness BWM's and BXB's testimonies, as described in the Prosecutor's Pre-Trial Brief,³ relate to material facts and locations not pleaded in the Indictment,⁴ some of which could support separate charges. Because the Indictment specifically identifies various locations where the Accused's presence and conduct is alleged, the Defence for Kalimanzira maintains that allegations of criminal conduct in any other locations would fall outside the scope of the Indictment, in violation of the rights of the Accused to know the charges against him and prepare his defence, guaranteed at Articles 20(4)(a) and 20(4)(b) of the Statute of the Tribunal ("Statute").⁵

¹ See *Requête aux fins d'exclusion des témoins à charge BWM, BWN, BXB, BXC, BXD et BXL*, filed 9 June 2008.

² Prosecution Response to Defence Motion to Exclude Prosecution Witnesses BWM, BWN, BXB, BXC, BXD, and BXL, filed 16 June 2008.

³ Prosecutor's Pre-Trial Brief, filed 16 April 2008. For Witness BWM and BXB's summaries, see Annex B, pp. 17-19.

⁴ Indictment, filed 21 July 2005.

⁵ Article 20(4) of the Statute provides:

"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 which he or she understands of the nature and cause of the charge 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;

[...]"

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4. Articles 20(4)(a) and 20(4)(b) of the Statute should be read in conjunction with Article 17(4) of the Statute⁶ and Rule 47(C) of the Rules of Procedure and Evidence ("Rules"),⁷ which express the Prosecution's obligation to set out a "concise statement of the facts" in the indictment. The question of whether an indictment is pleaded with sufficient particularity depends on whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him or her so that he or she may prepare his or her defence.⁸ The degree of specificity depends on the allegations of the Prosecution. However, the Prosecution's obligation to provide particulars in the indictment is at its highest when it seeks to prove that the accused killed or harmed a specific individual.⁹

5. Defects in an indictment may be "cured" as an exceptional measure if the Prosecution subsequently provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.¹⁰ While omission of a count or charge from the indictment cannot be cured, omission of a material fact underpinning a charge in the indictment, in certain cases, can be. Mere service of witness statements by the Prosecution as part of its disclosure requirements is generally insufficient to provide notice to an accused. However, the Prosecution pre-trial brief (together with any annexes and charts of witnesses) and the Prosecution's opening statement are adequate sources of disclosure.¹¹

6. The Chamber also recalls that the indictment is the primary accusatory instrument, and that any other accusatory instrument cannot add charges or material facts amounting to charges that were not pleaded in the indictment.¹² The pre-trial brief addresses the legal and factual issues by developing the Prosecution's strategy at trial, and is therefore relevant to the case only as far as it develops such strategy in accordance with the indictment. As such, the

⁶ Article 17(4) of the Statute provides: "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. The indictment shall be transmitted to a judge of the Trial Chamber."

⁷ Rule 47(C) of the Rules provides: "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."

⁸ *The Prosecutor v. Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-10-A and 96-17-A, Judgement (AC), 13 December 2004, para. 470; see also *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Judgement (AC), 26 May 2003, para. 301-303.

⁹ See e.g. *The Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C, Decision on Defects in the Form of the Indictment (TC), 26 May 2005, para. 7; see also *The Prosecutor v. Blaskić*, Case No. IT-95-14-A, Judgement (AC), 29 July 2004, para. 213.

¹⁰ *The Prosecutor v. Kupreškić et al.*, Case No. IT-95-16, Judgement (AC), 23 October 2001, para. 114; *The Prosecutor v. Naletilić & Martinović*, Case No. IT-98-34, Judgement (AC), 3 May 2006, para. 26. See also *The Prosecutor v. Bagosora et al.*, Case 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 (AC), 18 September 2006, paras. 19, 24-26, 45-48.

¹¹ *Ibid.*

¹² See e.g. *The Prosecutor v. Zigiranyiraza*, Case No. ICTR-01-73-PT, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief (TC), 30 September 2005, para. 2.

Chamber will proceed with evaluating whether the alleged new facts and charges were pleaded in the Indictment or not. Wherever a material fact and/or charge is found not to be pleaded in the Indictment, the Chamber will proceed to evaluate whether such defect in the Indictment has been cured. Wherever the Chamber finds that such defect has not been cured, the evidence in question will be declared irrelevant to the case, even if the Prosecution keeps it in the Pre-Trial Brief.¹³

7. In the present case, the Pre-Trial Brief describes Witness BWM's and BXB's testimonies as relating to (i) the Accused's alleged presence and incitement at a roadblock in Sahera *secteur* (Ngoma *commune*) and at a meeting in the Sahera *secteur* office, (ii) killings which took place thereafter, (iii) the Accused's alleged involvement in the killings at Kabakobwa hill (also in Ngoma *commune*), and (iv) the Accused's alleged orders for the killings of a person named Rwigimba and his family, and of a person named Mazimpaka.

8. Paragraph 8 of the Indictment contains the allegation of the Accused's omnipresence in Butare *préfecture*, with several visits on several occasions to incite the population, which resulted in killings. Paragraph 15 of the Indictment contains the allegation that the Accused was often personally present at various roadblocks to supervise their operations and further incite the population to kill. The Chamber notes that Ngoma *commune* is in Butare *préfecture*. As such, evidence relating to the Accused's alleged presence and incitement at a roadblock in Sahera *secteur* (Ngoma *commune*) and at a meeting in the Sahera *secteur* office, as well as the killings which took place thereafter, constitute evidence which support allegations pleaded in the Indictment, and not material facts which could be characterized as new charges.¹⁴

9. With respect to the Accused's alleged involvement in the killings at Kabakobwa hill, the Chamber considers that such an event should have been specifically pleaded in the Indictment and constitutes a defect thereof. However, the Chamber finds this defect to have been cured by timely, clear and consistent notice through the Prosecutor's Pre-Trial Brief, anticipated witness summaries, and prior witness statements.¹⁵ The Defence for Kalimanzira has therefore had adequate time and facilities to prepare its defence with respect to these allegations and has suffered no prejudice from the Prosecution's neglect in specifying the

¹³ *Ibid.*

¹⁴ The Chamber also notes that reference to the Accused's presence and conduct in Sahera *secteur*, Ngoma *commune*, was made in the Prosecutor's Pre-Trial Brief, filed 16 April 2008, at paras. 54, 60-61, and in the anticipated witness summaries in Annex B, as well as in the Prosecutor's Opening Statements, T. 5 May 2008, pp. 3-4.

¹⁵ See Prosecutor's Pre-Trial Brief, filed 16 April 2008, at para. 54, and Annex B, summaries for Witnesses BWM, BXD, BXC, BXD, and BXL, at pp. 18-22. The statements for Witnesses BXB and BWM were also disclosed in redacted form on 13 December 2007, and then in un-redacted form on 28 March 2008.

killings at Kabakobwa hill in the Indictment. Moreover, given the seriousness of these assertions, it is in the interests of justice to ascertain the truth about the Accused's involvement in the killings at Kabakobwa hill.

10. Finally, with respect to the Accused's alleged orders for the killings of a person named Rwigimba and his family, and of a person named Mazimpaka, the Chamber finds that this evidence constitutes new and precise material facts which should have been pleaded in the Indictment. As recalled at paragraph 4 above, the degree of specificity required in the Indictment is at its highest where the accused is alleged to have killed or harmed a specific individual. Failure to mention these killings, which are susceptible of supporting separate charges of murder, cannot in this case be cured by such disclosure, even if it was made in a timely, clear and consistent manner. The Chamber therefore finds these facts to be irrelevant to this case and to the existing charges.

FOR THESE REASONS, THE CHAMBER

GRANTS the Motion in respect of evidence concerning the killings of a person named Rwigimba and his family, and of a person named Mazimpaka;

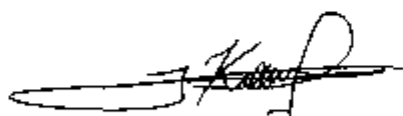
DENIES the Motion in respect of Prosecution Witnesses BWM and BXB concerning all other issues;

DECLARES the Motion in respect of Prosecution Witnesses BWN, BXC, BXD and BXL moot.

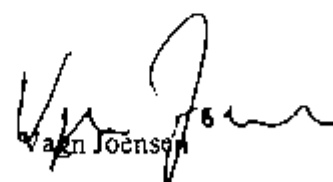
Arusha, 24 June 2008, done in English.


Dennis M. Byron

Presiding Judge


Gberdao Gustave Kam

Judge


Vagn Joensen

Judge

[Seal of the Tribunal]





TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
(Art. 27 of the Statute for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

To:	<input type="checkbox"/> Trial Chamber I K. M. Diako	<input type="checkbox"/> Trial Chamber II R. N. Kouamba	<input checked="" type="checkbox"/> Trial Chamber III C. K. Honetaru	<input type="checkbox"/> Appeals Chamber / Arusha F. A. Taton
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From:	<input checked="" type="checkbox"/> Chamber III Shelle Payton (names)	<input type="checkbox"/> Defence (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other (names)
Case Name:	The Prosecutor vs. Galixte Kalimanzira			Case Number: ICTR-05-85-T
Date:	Transmitted: 24 June 2008		Document's date: 24 June 2008	
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