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19-01-2009
(13229 - 13223)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 19 January 2009

The PROSECUTOR

v.

Arsène Shalom NTAHOBALI
Case No. 97-21-T

Joint Case No. ICTR-98-42-T

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**DECISION ON NTAHOBALI'S MOTION FOR EXCLUSION OF EVIDENCE OR
FOR RECALL OF WITNESSES**

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

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

BEING SEIZED of the "*Requête de Arsène Shalom Ntahobali en rappel de témoins*", filed on 24 November 2008 ("Ntahobali's Motion");

CONSIDERING the:

- i. "Prosecutor's Response to the '*Requête de Arsène Shalom Ntahobali en rappel de témoins*'", filed on 28 November 2008 ("Prosecution's Response");
- ii. "*Réplique de Ntahobali à la réponse du Procureur à sa requête en rappel des témoins*", filed on 2 December 2008 ("Ntahobali's Reply");

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

NOW DECIDES the Motion pursuant to Rule 73 (A) of the Rules, on the basis of the written briefs filed by the Parties.

SUBMISSIONS OF THE PARTIES

Ntahobali's Motion

1. The Defence moves the Chamber to exclude the testimonies of Prosecution Witnesses FAM, TA, QJ, QCB, TN, TK, SJ, SU, QBP, RE, SS, FAP, SD and QY or alternatively, to recall these witnesses for further cross-examination. If recalled, the Defence further requests that the witnesses not be informed about the reasons for their recall.

2. The Defence submits that various amendments to Rule 90 (G) have caused prejudice to the Accused as his right to cross-examine certain Prosecution Witnesses was restricted under the Rule from the beginning of the trial on 11 June 2001 until 26 January 2004, when the amendments came into effect, whereas the Prosecution was able to cross-examine all the Defence Witnesses on every point which it deemed to support its case. The Defence alleges that the wording of Rule 90 (G) during the aforesaid period of time was similar to that of Rule 90 (H) of the ICTY Rules and, on the basis of the *Milutinovic* Decision,¹ that the Defence's right to cross-examine Prosecution witnesses should not have been restricted. Relying on Rule 6 (C), the Defence asserts that it should benefit from an equality of treatment.

3. The Defence further argues that the Prosecution failed to comply with its disclosure obligations as provided by Rule 65 (A) (ii) given that it only disclosed the full unredacted statements and personal particulars of its witnesses on 30 January 2002, seven and a half months after the commencement of the trial. As a result, the Defence's right to conduct an effective cross-examination of certain Prosecution Witnesses, in particular Ghandy Shukry and TA who both testified before 30 January 2002, was violated.

¹ *Prosecutor v. Milutinovic et al*, Case No. IT-05-87-AR73.1, "Decision on Interlocutory Appeal Second Decision Precluding the Prosecution From Adding General Wesley Clark to its 65 *ter* Witness List", 20 April 2007, para.20.



4. The Defence argues that these factors have rendered the trial unfair and the appropriate remedy would be the recall of Prosecution Witnesses who testified against the Accused before 26 January 2004 or the simple exclusion of their evidence, if the Chamber deems it appropriate. The Defence alleges that the Prosecution Witnesses would be cross-examined on elements on which the Defence theory is based and on topics other Prosecution Witnesses have testified on.

The Prosecution's Response

5. The Prosecution opposes the Motion. It argues that it is not correct to assume that it enjoyed a larger benefit while cross-examining the Defence Witnesses following the amendment of Rule 90 (G). The Prosecution further asserts that it never received witness statements from the Defence for Ntahobali to allow it to put suggestions to these witnesses. Furthermore, it was open to the Defence at all stages of the proceedings to put suggestions to witnesses on the basis of the testimony of other witnesses who had already testified.

6. The Prosecution submits that the Defence did not argue at the time it occurred that the alteration of Rule 90 (G) would infringe upon its enshrined rights pursuant to Article 20 of the Statute, indicating that the substantive and procedural rights of the Accused were not affected. The Prosecution indicates that trials can only be conducted on the basis of existing law.

7. The Prosecution argues that the Appeals Chamber's pronouncement on Rule 90 (H) in the *Milutinovic* Decision was made with regard to the particular context of the case, in which the proposed cross-examination would have been unduly and unfairly proscribed. According to the Prosecution, there was no such prohibition curtailing the right of the Defence to cross-examine the witnesses in the instant case and the ruling in the *Milutinovic* case is not of general application.

8. The Prosecution relies on the Decision of 15 July 2003² and submits that rights contemplated by Rule 6 (C) are only vested rights of a substantive nature and Rule 90 (G) does not vest a substantive right but is purely a procedural mechanism.

9. The Prosecution submits that the cross-examination of certain Prosecution Witnesses by the Defence was limited because it took too much time or was deemed not to be relevant and not as a result of a strict interpretation of then Rule 90 (G) by the Chamber, as alleged by the Defence.

10. The Prosecution submits that the recall of witnesses is an inappropriate remedy since the Defence has not shown that any specific prejudice accrued to it because of the alteration of Rule 90 (G); nor has it even identified any specific issues it would be able to put to the impugned witnesses in the event of their recall.

Ntahobali's Reply

11. The Defence submits that the principle laid down in *Milutinovic et al.* does apply to the instant case as the concerned amendment of the Rules affects the Accused's substantive right to a fair trial.

² *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, "Decision in the Matter of Proceedings Under Rule 15bis (D)", 15 July 2003.



12. Regarding the issues on which the Defence seeks to cross-examine the witnesses, the Defence submits that Witness QAM could be cross-examined about Léopold Ruvurajabo, about whom Witness QCB testified. Witness TA could be confronted with the assertions of the subsequent witnesses concerning the rapes, abductions and killings which allegedly happened at the *préfecture* office, on the alleged roadblock located near Ntahobali's home and on the events at the EER. Witness QJ could be cross-examined about the assertions of subsequent witnesses about events at the *préfecture* office, on events at Hotel *Faucon* and the nearby roadblock, on the Hotel Ibis and the *Interahamwe* who stayed there.

13. Witness QCB could be cross-examined on the assertions of subsequent witnesses relating to rapes, abductions and killings which occurred at the *préfecture* office, to the roadblock allegedly monitored by Ntahobali as well as the events at the EER. Witness TN could be cross-examined on the expected testimony of Witnesses QBM and EY who were subsequently withdrawn from the witness list, on Jean-Baptiste Nsizabira's responsibility for the death of two persons that has been imputed to Ntahobali.

14. Witness TK may have been cross-examined about the assertions made by witnesses who testified subsequent to his testimony concerning the rapes, abductions and killings at the *préfecture* office and also about his relationship with Witness QJ.

15. Witness SJ may have been cross-examined about the allegations of witnesses who testified after him about the rapes, abductions and killings at the *préfecture* office, at the EER and at the roadblocks alleged to have been overseen by Ntahobali.

16. Witness SU could have been cross-examined on assertions made by witnesses who testified after him about the rapes, abductions and killings at the *préfecture* office, the EER and the roadblock imputed to Ntahobali. Witness SU may also have been cross-examined about his relationship with Witness SS.

17. Witness QBP could have been cross-examined on assertions made by witnesses who testified after him about the rapes, abductions and killings at the *préfecture* office, the roadblock imputed to Ntahobali and the EER. Finally, Witnesses RE, SS, FAP, SD and QY may have been cross-examined on assertions made by witnesses who testified after them about the rapes, abductions and killings at the *préfecture* office, the events at the University hospital, the roadblock alleged to have been overseen by Ntahobali and the EER.

18. The Defence quotes the *Popovic* Decision, which states that the cross-examining party need not explain in every detail the evidence it intends to adduce, nor need it identify the witness or the provenance of the contradictory evidence.³

DELIBERATIONS

19. As a preliminary matter, the Chamber notes that no reason has been put forward by the Defence for the late filing of this Motion. The Chamber considers that no specific deadline applies to the filing of such motions but that it is in the interests of judicial economy not to wait until the end of the case for their filing if the documents or information relied upon have been available to the Defence for a substantial amount of time.

20. The Chamber further notes the Defence submissions regarding the Prosecution's failure to comply with its disclosure obligations. Recalling its Decision of 26 November

³ *Prosecutor v. Popovic et al*, Case No. IT-05-88-T, "Order Setting for the Guidelines for the Procedure Under Rule 90 (H) (ii)", 6 March 2007, para. 2.

2008, the Chamber underscores that measures were taken to remedy these failures, including and not limited to the issuance of warnings to Prosecution Counsel; this issue was therefore settled and does not need relitigating.⁴

• **Applicability of Rule 6 (C)**

21. At the outset, the Chamber underscores that the Defence is raising issues relating to the amendment of Rule 90 (G) over five years after its entry into force.⁵ The Chamber notes that pursuant to Rule 5, issues regarding “Non-compliance with Rules” should be raised at the earliest opportunity.⁶ In addition, the Chamber recalls that the Chamber may only exercise its discretion to grant relief if the alleged non compliance is proved and has caused material prejudice.

22. As stated by the Appeals Chamber “every amendment enters into force “immediately”, i.e., whether substantive or procedural, it applies to all cases of which the Tribunal is then or may in future be seised, the sole qualification being that the amendment, of whatever kind, must not “operate to prejudice the rights of the accused in any pending case”.”⁷ The only question under the Rules is whether the amendment to Rule 90 (G) has operated to prejudice the rights of the Accused.

23. In the instant case, the Defence argues that it was deprived of its full right to cross-examine certain Prosecution witnesses under former Rule 90 (G). In the Chamber’s view, the Defence has not demonstrated how the amendment of Rule 90 (G) has prejudiced the Accused. The Defence has not demonstrated how it has been prevented from putting its case to Prosecution witnesses during their cross-examination. The Chamber considers that the Defence’s right to a full defence has been safeguarded throughout the proceedings in conformity with the Statute and the Rules, irrespective of amendments which may have taken place.

24. Finally, having reviewed the *Milutinovic* Decision⁸ relied upon by the Defence, the Chamber is of the opinion that the context under which the Appeals Chamber rendered the said Decision is different and does not apply in this case. Indeed in the *Milutinovic* case, the Appeals Chamber upheld the Trial Chamber’s Decision that the use of Rule 70 to curtail the scope of a witness’s cross examination than otherwise provided by the Rules would render the proceedings unfair.

⁴ *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, “Decision on Ntahobali’s Motion for a Stay of Proceedings for Undue Delay”, 26 November 2008, para. 61.

⁵ The challenged Rule 90 (G) was adopted during the Thirteenth Plenary Session which took place on 26 and 27 May 2003.

⁶ *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-I, “Decision on the Defence Extremely Urgent Motion on Habeas Corpus and For Stoppage of Proceedings”, 23 May 2000, para. 82.

⁷ *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-A.15bis, Decision in the matter of proceedings under Rule 15 bis (D) 24 September 2003, para. 14.

⁸ *Prosecutor v. Milutinovic & Others*, Case No. IT-05-87-AR73.1, “Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution From Adding General Wesley Clark to Its 65^{ter} Witness List” (AC), 20 April 2007, para. 20.

- **Exclusion of Evidence**

25. Exclusion of evidence is a remedy which is at the extreme end of a scale of measures available to the Chamber in addressing the prejudice caused to an accused.⁹ An accused must demonstrate that he has suffered a degree of prejudice that would justify the extreme remedy of excluding the witness's testimony.¹⁰ In the Chamber's view, no valid reason has been advanced by the Defence to justify the exclusion of the Witnesses' testimonies under the circumstances of this Motion. The Chamber therefore denies the request for exclusion of evidence and shall now address the alternative request for recall of witnesses.

- **Recall of Prosecution Witnesses FAM, TA, QJ, QCB, TN, TK, SJ, SU, QBP, RE, SS, FAP, SD and QY**

26. A Chamber may recall a witness where good cause is demonstrated by the moving party. Factors to be taken into account are the purpose for which the witness will testify and the party's justification for not offering such evidence when the witness originally testified.¹¹ The recall of a witness should be granted only in the most compelling of circumstances where further evidence is of significant probative value and not of a cumulative nature, such as to explore inconsistencies between a witness's testimony and a declaration obtained subsequently. In case of inconsistencies, the Defence may request the recall of a witness if prejudice can be shown from its inability to put these inconsistencies to that witness. If there is no need for the witness's explanation of the inconsistency, because it is minor or its nature is self-evident, then the witness will not be recalled.¹²

27. The Chamber sees no reason to depart from this established jurisprudence and observes that the Defence's request to recall the witnesses listed has no legal basis. Therefore, the Chamber denies the Defence request for recall of witnesses. As for the Defence's additional request to prohibit anyone from informing any witness about the reasons for their recall, the Chamber observes that this issue is moot. In any event, there is no basis for such a specific request.¹³

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion in its entirety.

⁹ *Prosecutor v. Karemera, et al.*, Case No ICTR-98-44-T, "Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guichaoua; Defence Motion to Exclude the Witness' Testimony; Decision on Defence Motions to Exclude Testimony of Professor Andre Guichaoua", 20 April 2006, para. 8.

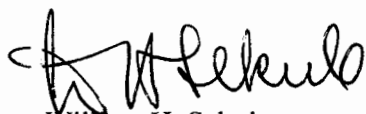
¹⁰ *Prosecutor v. Karemera et al.*, Case No ICTR-98-44-T, "Decision on Joseph Nzirorera's Second Motion to Exclude the Testimony of Witness AXA and Edouard Karemera's Motion to Recall the Witness", 4 March 2008, para. 19.

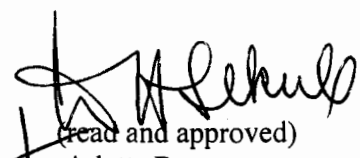
¹¹ *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, "Decision on Ntahobali's Strictly Confidential Motion to Recall Witnesses TN, QBQ and QY For Additional Cross-examination", 3 March 2006, para. 32.

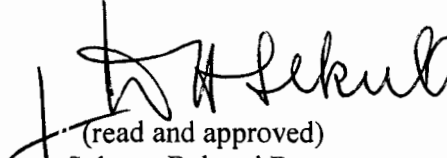
¹² *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, "Decision on Kanyabashi's Motion to Re-Open His Case and to Re-Call Prosecution Witness QA", 2 July 2008, para. 33.

¹³ *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T "Decision on Ntahobali's Motion for Exclusion of Evidence or for Recall of Prosecution Witnesses QY, SJ and Others", 3 December 2008, para. 28.

Aruha, 19 January 2009


William H. Sekule
Presiding Judge


(read and approved)
Arlette Ramaroson
Judge


(read and approved)
Solomy Balungi Bossa
Judge

(absent at the time of

(absent at the time of

signature)



[Seal of the Tribunal]