



ICTR-98-42-1
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(13279-13272)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

13279
PM

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 25 February 2009

The PROSECUTOR

v.

Alphonse NTEZIRYAYO
Case No. ICTR-97-29-T

Joint Case No. ICTR-98-42-T

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DECISION ON ALPHONSE NTEZIRYAYO'S MOTION FOR EXCLUSION OF EVIDENCE

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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 Ramarosan and Solomy Balungi Bossa (the “Trial Chamber”);

BEING SEIZED of “Alphonse Nteziryayo’s Motion for Exclusion of Evidence”, filed on 23 January 2009 (“Nteziryayo’s Motion”);

CONSIDERING the:

- i. “Prosecutor’s Response to Alphonse Nteziryayo’s motion for exclusion of evidence”, filed on 30 January 2009 (“Prosecution’s Response”);
- ii. “Alphonse Nteziryayo’s Reply to Prosecutor’s Response to Nteziryayo’s Motion for Exclusion of Evidence”, filed on 4 February 2009 (“Nteziryayo’s Reply”);
- iii. “Prosecutor’s Rejoinder to correct misleading statement in Alphonse Nteziryayo’s Reply to Prosecutor’s Response to his motion for exclusion of evidence”, filed on 5 February 2009 (“Prosecution’s Rejoinder”).

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

Nteziryayo’s Motion

1. The Defence for Nteziryayo moves the Chamber to exclude portions of the evidence of Prosecution Witnesses FAM, QBV, QBY, FAB, RV, FAK, QBU, FAH, QG, QJ, QAF, FAL, FAG, QAL, QAH, FAI, TO and TP.¹
2. The Defence submits that the current stage of the proceedings is an appropriate moment to table the present motion, applying the indications outlined previously by the Trial Chamber.² The current stage in the proceedings is an appropriate “later stage in the trial proceedings”.³
3. The Defence argues that this Motion is concordant with the interests of judicial economy, considering that the evidence in question falls outside the scope of the indictment.

¹ Paragraph 39 and Annex to the Motion.

² In ruling on an objection raised by Nteziryayo’s Lead Counsel in the context of Witness FAM’s testimony and based on a lack of notice with regard to Nteziryayo’s alleged involvement in the events at Kabakobwa, the Chamber ruled that the matter “could be raised subsequently.” (T.6 March 2002, p. 83, lines 12-17) (Paragraphs 11-13 of the Motion). *Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Decision on Ndayambaje’s Motion for Exclusion of Evidence, 1 September 2006 (Paragraphs 14-16 of the Motion) where the court stated:

“Nonetheless, the Chamber recalls that the Accused is not barred from raising submissions regarding the vagueness of the indictment in support of the exclusion of evidence **at a later stage in the trial proceedings.**” (Emphasis added in the Motion).

³ *Idem*, referring to *Prosecutor v. Niyitegeka*, Appeals Chamber Judgement, 9 July 2004, para. 199.

Should this request be granted, it may “cure” in part the prejudice to Nteziryayo’s right to a fair trial.

4. The Defence postulates that the Decision of 29 August 2008 was motivated by the objective of narrowing the focus of the Closing Briefs on essential issues and submits that it would be inconsistent with this objective to have the closing brief and oral arguments littered with issues of credibility and evidence that should be excluded.

5. The Defence submits that the Appeals Chamber in both the *Military I* case and the *Media* case clearly specified that any new additional facts, that may represent separate charges, should be subject to an amended indictment in order to mitigate any possible prejudice to the Defence.⁴ The allegations targeted for exclusion fall within the category of new material facts. The risk of prejudice is the same whether the Prosecution knew of the material facts at the time the indictment was filed or subsequently discovered them during the course of the case. The accused must be “in a reasonable position to understand the charges against him or her”⁵ and be given reasonable notice of said charges.⁶

6. The Defence further submits that the imprecise nature of many accusations is confusing as to whether the Accused is actually responsible or not, specifically with respect to those accusations relating to alleged killings following incitement. The Appeals Chamber has previously specified that the accused be provided with sufficient notice of the approximate time and location of the crime alleged.⁷ The Defence submits that this information is not provided with adequate precision.

7. The Defence submits that although the Pre-Trial Brief was filed before the opening date of the trial on 11 June 2001, in accordance with Rule 73 *bis* (B) (iv) of the Rules, it had not been translated into French by that time. This is a violation of Rule 3 (B) of the Rules and in turn, a violation of the Accused’s rights pursuant to Article 20 (4) of the Statute.

Prosecution’s Response

8. The Prosecution opposes the exclusion of the evidence of the witnesses. The Prosecution submits that the Motion is actually an attempt at appealing the Trial Chamber’s 29 August 2008 Decision relating to the time frames and length of closing briefs. The Motion concerns issues that should be addressed in the closing brief.

9. The Prosecution opposes the exclusion of the evidence of the witnesses and submits that the Motion concerns issues that should be addressed in the closing brief. The Trial Chamber reserved the right to assess the evidence of these witnesses in its entirety at the

⁴ Quoting *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, para. 30 and *Prosecutor v. Nahimana et al.*, Appeals Chamber Final Judgement, 28 November 2007, paras. 406, 407 (Paragraph 23 of the Motion).

⁵ Quoting *Prosecutor v. Kupreskic et al.*, Appeals Chamber Judgement, 23 October 2001, para 114; *Naletilic & Martinovic*, Appeals Chamber Judgement, 3 May 2006, para. 26 (Paragraphs 24, 25 of the Motion).

⁶ Referring to *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Kabiligi Motion for Exclusion of Evidence (TC), 4 September 2006, para. 7 (referencing the *Prosecutor v. Muvunyi*, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005 (AC), 12 May 2005, para. 22); *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. 21-22; *Prosecutor v. Naletilic & Martinovic*, Appeals Chamber Judgement, 3 May 2006, para. 27; *Prosecutor v. Niyitegeka*, Appeals Chamber Judgement, 9 July 2004, para. 197 (Paragraph 26 of the Motion).

⁷ *Prosecutor v. Muvunyi*, Appeals Chamber Judgement, 29 August 2008, paras. 138-140 (Paragraph 31 of the Motion).

completion of the trial so as to be better able to measure their evidence and credibility. The Prosecution asserts that to raise these issues at this stage is to anticipate the judgement.

10. With regard to the timing of the motion, the Prosecution asserts that the Trial Chamber also ruled that the Motion could be brought in the final submissions, according to the Trial Chamber's opinion in relation to Witness FAM.⁸ The Prosecution submits that final submissions are tantamount to the closing brief.

11. The Prosecution proffers that the Indictment, Pre-Trial Brief and opening statement are not the sole modes of communication of said charges, but that clear and timely disclosure of charges may cure any alleged defect of an indictment. Moreover, the Appeals Chamber has clearly stated that the Defence may file a "timely motion", namely one ought to be submitted when the evidence is first admitted.⁹ The Prosecution submits that this Motion was filed more than six years after Witness FAM testified in March 2002 and consequently cannot be seen as having been timely filed.

12. The Prosecution further submits that the Accused has not demonstrated the apparent severe prejudice that he has suffered while preparing his Defence. The Defence has received adequate notice from the Indictment, Pre-Trial Brief and opening statement of the Prosecution, as well as witness statements or "will says". The Prosecution recalls that when this notice was deemed inadequate at any stage during the Trial proceedings, the Trial Chamber did exclude the evidence concerned.

13. The Prosecution argues that the Accused was adequately informed of the charges against him and was in a position to bring motions regarding the clarity of the Indictment even prior to 11 June 2001. The Prosecution submits that a French translation of the Pre-Trial Brief was filed on 15 June 2001 and subsequently served to all the Parties. The Defence has not defined the prejudice it suffered by receiving this translation three days after the commencement of the trial.

Nteziryayo's Reply

14. The Defence contends that the Prosecution's statement, that the Accused was in a position to bring motions regarding the clarity of the Indictment even prior to 11 June 2001,¹⁰ supports Nteziryayo's Motion, as the Prosecution appears to be conceding that prior to the Trial the Indictment was not pleaded with sufficient precision. Consequently a pre-trial motion to that effect was required. The Defence reiterates that this defect should have been cured by a Pre-Trial Brief outlining "the identity of the victim, the time and place of the events and the means by which the acts were committed with the greatest of precision".¹¹

15. The Defence asserts that even though the Pre-Trial Brief was filed on 15 June 2001, it submits that this was filed after the commencement of the case and consequently can no longer be viewed as a pre-trial brief in accordance with Rule 73 *bis* of the Rules. The Prosecution thereby concedes that there is no pre-trial brief as envisaged by the Rules.

⁸ T. 6 March 2002, p. 83 lines 19-25 (Paragraph 7 of the Prosecution's Response).

⁹ Referring to *Prosecutor v. Niyitegeka*, Appeals Chamber Judgement, 9 July 2004, paras. 197-199 (Paragraphs 8 and 9 of the Prosecution's Response).

¹⁰ Paragraph 14 of the Prosecution's Response.

¹¹ Referring to *Prosecutor v. Seromba*, Appeals Chamber Judgement, 12 March 2008, para. 27; *Prosecutor v. Muhimana*, Appeals Chamber Judgement, 21 May 2007, para. 76; *Prosecutor v. Ndindabahizi*, Appeals Chamber Judgement, 16 January 2007, para. 16; *Prosecutor v. Gacumbitsi*, Appeals Chamber Judgement, 7 July 2006, para. 49; *Prosecutor v. Ntakirutimana*, Appeals Chamber Judgement, 13 December 2004, para. 32 (Paragraph 4 of Nteziryayo's Reply).

16. The Defence argues that according to the Appeals Chamber in *Niyitegeka*, at this stage of the proceedings, the burden is on the Prosecution to show that no prejudice has been suffered by the Defence, as the Defence has raised an objection at the trial stage.¹² The Defence further submits that the Prosecution has failed to show how clear, timely and consistent notice was given to cure the defects of the Indictment, in relation to each of the factual allegations and portions of evidence for which the Defence had no notice. Consequently, the burden is not on the Defence to demonstrate prejudice, especially considering that the cumulative effects of the defects have not been cured. The Defence further submits that the Prosecution implicitly concedes the merits of the Motion, as it fails to address the substantive issues on evidence adduced without notice to Nteziryayo.

17. The Defence reaffirms its arguments regarding the timing of the current Motion, namely that the Accused is within his rights to file for exclusion of evidence at any time before the conclusion of the case.

18. The Defence points out that the preparation of a defence case begins long before the trial, with investigations on factual allegations, preparation of cross-examination questions and finding defence witnesses. The Defence maintains that without notice of evidence to be adduced before the Tribunal, the Defence is at a disadvantage in terms of conducting timely investigations and in turn preparing the defence case.

19. The Defence submits that the filing of the Pre-Trial Brief a few days into the trial is a fundamental violation of the rights of the Accused pursuant to Article 10 (4) (a) of the Statute [*sic*]. The Defence recalls that on 11 June 2001, the day before the Trial began [*sic*], the Lead Counsel of Nteziryayo had already informed the Trial Chamber and Prosecution of the prejudice to the Accused in relation to the lack of a pre-trial brief.

20. The Defence asserts that the Prosecution's Response is confusing in its logic. While the Prosecution argues that the issues within this Motion should be dealt with in the final submissions, it goes on to assert that the Motion should have been filed *ab initio*. The Prosecution must submit a clear position on this issue.

Prosecution's Rejoinder

21. The Prosecution submits that the Pre-Trial Brief was filed and served on 10 April 2001, namely two months before the trial began. It was the French translation of the Pre-Trial Brief which was filed on 15 June 2001, and to which the Defence in Nteziryayo's Reply referred.¹³

22. The Prosecution submits that the Defence was not hindered by any lack of knowledge of the English language because it submitted motions concerning the specificity of the Indictment prior to the start of the trial. The Prosecution affirms that there were no problems in the Indictment, that Nteziryayo had adequate notice of the charges in a language he understood and that the proper place for these pleadings is in final submissions in the closing brief.

¹² *Prosecutor v. Niyitegeka*, Appeals Chamber Judgement, 9 July 2004, para. 200.

¹³ Paragraph 5 of Nteziryayo's Reply.

DELIBERATIONS***Timing of the Motion***

23. The Chamber has carefully considered the Parties' submissions. The Chamber observes that as a preliminary issue, even if no specific deadline applies to the filing of such motions, it is not in the interests of judicial economy to do so at the end of the case if the documents relied upon have been available to the Defence.¹⁴ These documents have been accessible to the Defence for a substantial amount of time. In addition, the Tribunal's jurisprudence clearly states that the appropriate time to object to the admissibility of evidence is when the evidence is introduced.¹⁵ Even though the Accused is not barred from raising submissions regarding the vagueness of the indictment in support of the exclusion of evidence at a later stage in the trial proceedings,¹⁶ the Chamber concludes that this Motion was not timely filed.

Translation of the Pre-Trial Brief

24. The Chamber notes the Defence submissions that the provision of Rule 3 (B) was violated as the French translation of the Pre-Trial Brief was only served on 15 June 2001, that is four days after the commencement of the trial on 11 June 2001. While the Defence appears to argue that this was tantamount to there being no pre-trial brief at the commencement of the trial, the Chamber notes that the Pre-Trial Brief was in fact filed in English two months before the commencement of the trial, on 10 April 2001. Therefore, there was indeed a Pre-Trial Brief filed before the commencement of the trial and the Accused had notice of its existence.

25. In addition, the Chamber recalls that it may only exercise its discretion to grant relief if the alleged non-compliance is proved and has caused material prejudice.¹⁷ The Defence has failed to demonstrate that it suffered a material prejudice as a result of the fact that the French translation of this Pre-Trial Brief was made available on 15 June 2001, four days after the commencement of the Trial.

Exclusion of Evidence

26. 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.¹⁸ An accused

¹⁴ *Prosecutor v. Ntahobali*, Case No. ICTR-97-21-T, Decision on Ntahobali's Motion for Exclusion of Evidence or for Recall of Witness, 19 January 2009, para. 19; *Prosecutor v. Ntahobali*, Case No. ICTR-97-21-T, Decision on Ntahobali's Motion for Exclusion of Evidence or for Recall of Prosecution Witnesses QY, SJ and Others, 3 December 2008, para. 19.

¹⁵ *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-T, Decision on Ntahobali's Motion to Rule Inadmissible the Evidence of Prosecution Witness "TN", 1 July 2002, para. 18; *Prosecutor v. Niyitegeka*, Appeals Chamber Judgement, 9 July 2004, para. 199; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50, Decision on Casimir Bizimungu's Motion to Declare Part of the Testimony of Witness GTD Inadmissible, 30 November 2004, paras. 11, 13; *Prosecutor v. Ntakirutimana et al.*, Appeals Chamber Judgement, 13 December 2004, para. 22.

¹⁶ *Prosecutor v. Niyitegeka*, Appeals Chamber Judgement, 9 July 2004, para. 199.

¹⁷ *Prosecutor v. Ntahobali*, Case No. ICTR-97-21-T, Decision on Ntahobali's Motion for Exclusion of Evidence or for Recall of Witnesses, 19 January 2009, para. 21.

¹⁸ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor Andre Guichaoua; Defence Motion to Exclude the Witness's Testimony; Decision on Defence Motions to Exclude Testimony of Professor Andre Guichaoua, 20 April 2006, para. 8.

must demonstrate that he has suffered a degree of prejudice that would justify the extreme remedy of excluding the witnesses' testimony.¹⁹

27. According to the Appeals Chamber in this case, there can be no conviction of an accused on the basis of facts not charged in the indictment but only introduced by testimonies.²⁰ Nevertheless, although an allegation may not have been specifically pleaded, this does not in itself render such evidence inadmissible because it may be relevant to the proof of any other allegation pleaded in the indictment:

Indeed, pursuant to Rule 89(C) of the Rules, the Trial Chamber may admit any relevant evidence which it deems to have probative value. It should be recalled that admissibility of evidence should not be confused with the assessment of the weight to be accorded to that evidence, an issue to be decided by the Trial Chamber after hearing the totality of the evidence. Consequently, although on the basis of the present indictment it is not possible to convict Nyiramasuhuko in respect of her presence at the installation of Ndayambaje, evidence of this meeting can be admitted to the extent that it may be relevant to the proof of any allegation pleaded in the Indictment.²¹

28. The Chamber notes that some Trial Chambers' decisions are to the effect that it is appropriate to treat questions regarding the exclusion of evidence based on a vague indictment during trial proceedings.²² In the particular circumstances of this case, and in the interests of justice, the Chamber underscores that it will not consider issues relating to alleged defects in the indictment, vagueness and lack of notice at this stage of the proceedings, but in its final deliberations.²³ Likewise, the Chamber notes that issues relating to the credibility and evaluation of evidence have been raised in the Motion, whereas they also ought to be considered at a later stage with the totality of the evidence.²⁴ These issues are better raised in the Parties' closing briefs or final oral arguments.

29. Consequently, the request for exclusion of evidence is denied at this stage.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion in its entirety.

¹⁹ *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.

²⁰ *Prosecutor v. Nyiramasuhuko et al.*, Appeals Chamber, 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", 2 July 2004, para. 13.

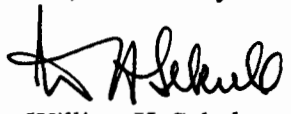
²¹ *Prosecutor v. Nyiramasuhuko et al.*, Appeals Chamber, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 2 July 2004, para. 15, recalled in *Prosecutor v. Nyiramasuhuko*, Appeals Chamber, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004, para. 12, and *Prosecutor v. Nyiramasuhuko et al.*, Appeals Chamber, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004, para. 7, quoting *Prosecutor v. Rutaganda*, Appeals Chamber Judgement, para. 33, citing *Prosecutor v. Delalić*, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, para. 31.

²² *Prosecutor v. Niyitegeka*, Appeals Chamber, Judgment, 9 July 2004, para. 196; *Prosecutor v. Bagosora et al.*, Decision on Motions for Judgement of Acquittal, 2 February 2005, para. 7; *Prosecutor v. Bagosora et al.*, Decision on Exclusion of Testimony Outside the Scope of the Indictment, 27 September 2005, para. 7.

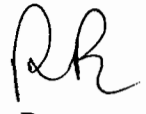
²³ See also *Prosecutor v. Nyiramasuhuko et al.*, Decision on Ndayambaje's Motion for Exclusion of Evidence, 1 September 2006, para. 25.

²⁴ *Idem*, para. 26.

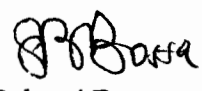
Arusha, 25 February 2009



William H. Sekule
Presiding Judge



Arlette Ramarason
Judge



Solomy Balungi Bossa
Judge



[Seal of the Tribunal]