

ICTR-99-54-T 10106  
03-02-2011 Fricla  
(10106-10102)



International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda

OR: ENG

**TRIAL CHAMBER II**

Before: Judge William H. Sekule, Presiding  
Judge Solomy Balungi Bossa  
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 03 February 2011

**The PROSECUTOR**

v.

**Augustin NGIRABATWARE**

Case No. ICTR-99-54-T

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**DECISION ON DEFENCE MOTION TO EXCLUDE EVIDENCE  
FALLING OUTSIDE THE TEMPORAL JURISDICTION OF THE TRIBUNAL**

**Office of the Prosecutor**

Mr. Wallace Kapaya  
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Mr. Michael Kalisa  
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**Defence Counsel**

Mr. Peter Herbert  
Ms. Mylène Dimitri  
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Ms. Anne-Gaëlle Denier  
Ms. Chloé Gaden-Gistucci

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ICTR-

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

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

**BEING SEIZED** of the "Defence Motion for Exclusion of Evidence Falling Outside the Temporal Jurisdiction of the Tribunal", filed confidentially on 26 October 2010 (the "Defence Motion");

**CONSIDERING:**

- (a) The "Prosecutor's Response to Defence Motion for Exclusion of Evidence Falling Outside the Temporal Jurisdiction of the Tribunal", filed on 2 November 2010 (the "Prosecution Response"); and
- (b) The "Defence Reply to Prosecutor's Response to Defence Motion for Exclusion of Evidence Falling Outside the Temporal Jurisdiction of the Tribunal", filed confidentially on 8 November 2010;

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

**NOW DECIDES** the Motion pursuant to Rules 73 (A) and 89 (C) of the Rules.

**SUBMISSIONS OF THE PARTIES**

***Defence Motion***

1. The Defence seeks to exclude evidence falling outside the Tribunal's temporal jurisdiction, including three allegations concerning criminal acts committed on various dates before 1994 in which the Accused and other individuals were allegedly involved, and six allegations concerning meetings which the Accused is said to have attended before 1994. In these meetings, the Accused is alleged to have delivered a hate speech against Tutsis, distributed weapons, and participated in the planning of attacks upon Tutsis.<sup>1</sup>

2. The Defence argues that these nine allegations do not meet any of the three purposes for which evidence falling outside the temporal jurisdiction of the Tribunal may be admitted, and thus should not be taken into consideration by the Chamber.<sup>2</sup> The *Nahimana, et al.* Appeals Judgement lays down these purposes as follows:

- (a) to clarify a given context;
- (b) to establish by inference the elements of criminal conduct occurring in 1994; or
- (c) to demonstrate a deliberate pattern of conduct.<sup>3</sup>

<sup>1</sup> Defence Motion, paras. 2, 4, 29, 33-34, 43,

<sup>2</sup> *Id.*, paras. 24-26, 30-32, 34

<sup>3</sup> *Id.*, para. 18, citing *Ferdinand Nahimana, et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement (AC), 28 November 2007 ("*Nahimana, et al.* Appeals Judgement"), para. 315. See also Defence Motion, paras. 19-23.

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3. Because any probative value of this evidence is outweighed by its prejudicial effect, the Chamber should exclude the evidence. This should be done before the presentation of the Defence case, in order to preserve judicial resources.<sup>4</sup>

#### **Prosecution Response**

4. The Prosecution does not dispute the jurisprudence cited by the Defence. The Prosecution submits, however, that the pre-1994 allegations provide context or show a consistent pattern of conduct of the Accused that is replicated in 1994.<sup>5</sup>

5. Some of these allegations are said to provide context to witnesses' descriptions of Faustin Bagango's criminal conduct against Tutsis.<sup>6</sup> It is further submitted that Prosecution witness ANAD's description of the attacks on him in January and July 1993 provide context as to why he attended the meeting in January 1994.<sup>7</sup>

6. In addition, the Prosecution argues that attacks on Tutsis were planned during the meetings allegedly attended by the Accused on various dates before 1994, and therefore establish a consistent pattern of criminal conduct on the part of the Accused that continued in 1994.<sup>8</sup>

#### **Defence Reply**

7. The Defence prays at the outset that the Chamber disregard the Prosecution Response as it was filed one day late. The Prosecution neither requested for an extension of time to file a Response, nor provided an explanation for its late filing.<sup>9</sup>

8. As regards the merits of the Prosecution Response, the Defence submits that the Prosecution failed to properly appreciate the jurisprudence providing for situations wherein evidence falling outside the temporal jurisdiction of the Tribunal may be admitted. The Defence argues that the 2006 *Ndindiliyimana, et al.* Trial Chamber Decision cited by the Prosecution<sup>10</sup> has been superseded by the 2007 Appeals Chamber Judgement in *Nahimana, et al.*<sup>11</sup> The latter lays down a different version of the three categories under which pre-1994 evidence is admissible. In particular, the Defence submits that the first category has changed from pre-1994 evidence being admissible if "it is relevant to an offence continuing in 1994"<sup>12</sup> to such evidence being admissible if it can "establish by inference the elements of criminal conduct occurring in 1994."<sup>13</sup>

9. The Defence adds that the third category of admissible pre-1994 evidence is no longer comprised of similar fact evidence which is relevant to prove intent, to disprove accident or

<sup>4</sup> *Id.*, paras. 13, 27-28, 34-42.

<sup>5</sup> Prosecution Response, paras. 8-13.

<sup>6</sup> *Id.*, paras. 8-12.

<sup>7</sup> *Id.*, para. 14.

<sup>8</sup> *Id.*, para. 15.

<sup>9</sup> Defence Reply, paras. 5-6.

<sup>10</sup> *Id.*, para. 9, referring to *The Prosecutor v. Ndindiliyimana, et al.*, Case No. ICTR-00-56-T, Decision on Nzuwonemeye's Motion to Exclude Parts of Witness AOG's Testimony, 30 March 2006, FN 4.

<sup>11</sup> *Id.*, citing *Nahimana, et al.* Appeals Judgement, para. 315.

<sup>12</sup> *Id.*, citing the Prosecution Response, para. 7.

<sup>13</sup> *Id.*, citing *Nahimana, et al.* Appeals Judgement, para. 315.

mistake, or to prove identity or to disprove innocent associations, where the probative value of such evidence outweighs its prejudice, but is now defined as evidence demonstrating "a deliberate pattern of conduct."<sup>14</sup>

10. As regards the Prosecution contention that some of the pre-1994 allegations serve to provide context behind witnesses' descriptions of Bagango's criminal conduct, the Defence emphasizes that the context referred to in this jurisprudential exception is "to explain a situation, to explain how an incident occurred, how it started or how it unfolded."<sup>15</sup> The Defence submits that Bagango's character has nothing to do with a given context, and does not need clarification, and therefore does not fall within the jurisprudential exception.<sup>16</sup>

11. The Defence further submits that Prosecution witness ANAO's testimony relates to an independent crime itself, as it is well-established that participation in roadblocks amounts to a crime in itself. Accordingly, such evidence must be excluded as it supports a crime on the part of the Accused rather than merely falling within the three jurisprudential exceptions to when pre-1994 evidence may be admitted.<sup>17</sup>

12. The Defence stresses that evidence of meetings the Accused allegedly attended in 1993 can constitute crimes in themselves and lead to convictions *per se*, and therefore do not fall within the third category of pre-1994 evidence demonstrating a deliberate pattern of conduct. The Defence submits that such evidence must relate to the character of the Accused that tends to demonstrate a given pattern or conduct, but in no way establishes crimes *per se*.<sup>18</sup>

#### DELIBERATIONS

13. As a preliminary matter, the Chamber notes that the Prosecution filed its Response after the deadline provided by the Chamber,<sup>19</sup> neither providing any compelling reason therefor nor seeking additional time to do so. In the Chamber's view, the Prosecution Response is time-barred; in the interest of justice, however, the Chamber will consider it and the Defence Reply thereto while resolving the Defence Motion. The Chamber expects the Parties to comply with the prescribed deadlines in the future.

14. The Chamber recalls that Rule 89(C) of the Rules provides that the Chamber may admit any relevant evidence which it deems to have probative value.

15. It is apparent from the *Nahimana, et al.* Appeals Judgement, which the Defence cites in support of its Motion,<sup>20</sup> that the three purposes listed, for which evidence falling outside the temporal jurisdiction of the Tribunal may be admitted, are non-exhaustive. The Appeals Chamber referred to such situations merely by way of example. Moreover, it noted that "[i]t is well established that the provisions of the Statute on the temporal jurisdiction of the Tribunal do not preclude the admission of evidence on events prior to 1994, if the Chamber

<sup>14</sup> *Id.*, paras. 7 and 9.

<sup>15</sup> *Id.*, para. 13.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*, para. 15.

<sup>18</sup> *Id.*, paras. 17-19.

<sup>19</sup> The Defence filed its Motion on 26 October 2010. The following day, the Chamber provided the Prosecution with five days to respond. Because 1 November 2010 was a working day, any Response was due that day under Rule 7ter (B). The Prosecution filed its Response on 2 November 2010. See Prosecution Response, p. 1.

<sup>20</sup> Defence Motion, para. 18.

deems such evidence relevant and of probative value and there is no compelling reason to exclude it.”<sup>21</sup>

16. The Chamber considers that the impugned allegations<sup>22</sup> are relevant and have probative value, and that some of them may serve to clarify a given context or a pattern of conduct. Therefore, the Chamber considers the Defence arguments concerning any prejudicial impact of these allegations<sup>23</sup> unsubstantiated. At any rate, the Accused cannot be convicted for criminal conduct which took place before 1994.<sup>24</sup>

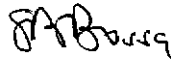
**FOR THE ABOVE REASONS, THE CHAMBER**

**DENIES** the Defence Motion.

Arusha, 03 February 2011



William H. Sekule  
Presiding Judge



Solomy Balungi Bossa  
Judge



Mparany Rajohnson  
Judge

[Seal of the Tribunal]



<sup>21</sup> *Nahimana, et al.* Appeals Judgement, para. 315, citing *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-AR72.2, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction (AC), 29 July 2004, p. 4.

<sup>22</sup> Defence Motion, paras. 2, 4, 29, 33-34, 43.

<sup>23</sup> See, for example, Defence Motion, para. 28 (“...its prejudicial impact far outweighs any said relevant or probative value. Hence, Dr. Augustin Ngirabatware would be irreparably harmed, and the judicial process would be greatly undermined should the [Chamber fail to exclude the evidence falling outside the Tribunal’s temporal jurisdiction].”).

<sup>24</sup> See *Nahimana, et al.* Appeals Judgement, para. 310; *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement (AC), 23 May 2005, para. 200.