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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: 14 February 2011

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL RECORDS ARCHIVE

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**DECISION ON DEFENCE MOTION TO EXCLUDE EVIDENCE
OF MATERIAL FACTS NOT CHARGED
IN THE INDICTMENT AND/OR IN THE PROSECUTION'S PRE-TRIAL BRIEF**

Office of the Prosecutor

Mr. Wallace Kapaya
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Ms. Anne-Gaëlle Denier
Ms. Chloé Gaden-Gistucci

MS

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 to Exclude Evidence of Material Facts Not Charged in the Indictment and/or in the Prosecution’s Pre-Trial Brief (Rule 73 of the Rules of Procedure and Evidence)”, filed confidentially on 20 September 2010 (the “Defence Motion”);

CONSIDERING:

- (a) The “Prosecution’s Response to Defence Motion to Exclude Evidence of Material Facts Not Charged in the Indictment and/or in the Prosecution’s Pre-Trial Brief (Rule 73 of the Rules of Procedure and Evidence)”, filed confidentially on 24 September 2010 (the “Prosecution Response”); and
- (b) The “Defence Reply to Prosecution’s Response to Defence Motion to Exclude Evidence of Material Facts Not Charged in the Indictment and/or in the Prosecution’s Pre-Trial Brief”, filed confidentially on 28 September 2010 (the “Defence Reply”);

CONSIDERING also 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.

INTRODUCTION

1. The Prosecution case commenced on 23 September 2009 and spanned three sessions: from 23 September through 22 October 2009, from 25 January through 18 March 2010, and from 23 through 31 August 2010. Over the course of 53 trial days, the Prosecution called 20 witnesses and tendered 28 exhibits.

SUBMISSIONS OF THE PARTIES

Defence Motion

2. The Defence seeks to exclude 42 material facts testified to by 15 witnesses, arguing that these were not charged in the Indictment and/or in the Prosecution’s Pre-Trial Brief and yet were admitted during the course of the Prosecution’s case over Defence objections.¹

3. The Defence recalls the Chamber’s acknowledgement that although it admitted evidence of material facts not charged in the Indictment, it is not possible to convict the Accused on the basis of those specific allegations. As the Prosecution has rested its case-in-chief, the Chamber can consider the admission of these material facts on a global basis.²

¹ Defence Motion, paras. 1, 51.

² *Id.*, para. 2.

4. It is well-established before this Tribunal that the Indictment must state the material facts underpinning the charges, in order to provide timely and clear notice to the Accused so that he may prepare his defence. The Defence recalls that without sufficient notice of the material facts, no conviction thereon may result. In particular, the Defence argues that allegations that the Accused ordered others to commit murders, and that he participated in meetings, are material facts that should have been pleaded in the Indictment.³

5. Moreover, the Defence notes an Appeals Chamber Decision in the *Bagosora et al.* case, which stated that “while the addition of a few material facts may not prejudice the Defence in the preparation of its case, the addition of numerous material facts increases the risk of prejudice as the Defence may not have sufficient time and resources to investigate properly all the new material facts.”⁴

6. The Defence identifies 42 allegations (Items A through PP) that, in its view, are “material”. These 42 material facts can be divided into three categories: 11 that might support a conviction themselves (Items E, F, H, U, GG, II, and LL through PP); 20 that involve the alleged acts and conduct of the Accused (Items A, C through F, H, I, M, O, U, CC through EE, GG through II, and NN through PP); and 27 pertaining to his alleged subordinates or to members of the alleged joint criminal enterprise (Items G through I, K, L, N, Q through X, BB, and EE through PP).⁵

Prosecution Response

7. The Prosecution seeks dismissal of the Defence Motion. At the outset, the Prosecution contends the Defence Motion is “inadmissible” as all 42 material facts were already subject to Defence objections which were duly ruled upon by the Chamber. If the Defence wanted to revisit these decisions, it should have sought certification to appeal them within the authorized time period. As the Defence did not do so, it is estopped from now seeking the exclusion of evidence.⁶

8. The Prosecution also submits that the material facts should not be excluded because the Accused received proper notice of the particulars through the Indictment, the Pre-Trial Brief, witness statements, disclosures pursuant to Rule 67 (D), judicial records and the opening statement.⁷

9. The Accused was afforded ample opportunity to prepare his defence. Indeed, the Prosecution points out that the Defence conducted “inordinate” cross-examination of these witnesses. In the Prosecution’s view, the Defence has failed to show any prejudice that would justify an extreme measure such as exclusion of evidence.⁸

³ *Id.*, paras. 8, 10, 14, 17.

⁴ *Id.*, para. 29, citing *The Prosecutor v. Théoneste 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 (“*Bagosora, et al.* Appeals Decision of 18 Sept. 2006”), para. 26.

⁵ Defence Motion, paras. 1, 34, 36-44. The Chamber notes that these three categories do not include six items (B, J, P, Y, Z and AA), but list some items twice (E, F, I, EE, HH, LL and MM), three times (H, U, GG, II, NN, OO) or four times (PP).

⁶ Prosecution Response, paras. 4-5, 15, 20, Tables 1-2.

⁷ *Id.*, paras. 3, 6-10, 19.

⁸ *Id.*, paras. 3, 8-9, 11-14, 16.

10. Finally, the Prosecution submits that the Chamber exercised its discretion appropriately by admitting the contested evidence, which is relevant and has probative value.⁹

Defence Reply

11. The Defence rebuts the Prosecution's assertion that it should have requested certification to appeal the Chamber's decision to admit the 42 material facts. The Defence distinguishes between the relief sought when it raised objections in court, whereby it requested that the evidence not be admitted, and the relief currently sought for the evidence to be excluded.¹⁰

12. In addition, the Defence contends that its Motion is timely. Only after the close of the Prosecution's case can the Chamber analyze the material facts not pleaded in the Indictment and/or in the Pre-Trial Brief on a global, cumulative basis, as mandated by the Appeals Chamber.¹¹

13. The Defence insists that the Indictment is vague and imprecise according to the jurisprudence of the Tribunal, and that the Defence did not receive adequate notice of these allegations. The Defence adds that the Prosecution failed to establish how the 42 material facts were pleaded in the Indictment.¹²

14. The lack of notice of these material facts has prejudiced the Accused. The Defence could have investigated these material facts, submitted relevant *Gacaca* records, and sought pertinent evidence from Prosecution witnesses who testified prior to the late notification.¹³

DELIBERATIONS

15. As a preliminary matter, the Chamber will address whether the Defence should be barred from revisiting the issue of exclusion of evidence, as submitted by the Prosecution.¹⁴ The Appeals Chamber has indicated that an accused may file a further motion to exclude evidence, even after the Defence has previously objected to the admission of that evidence.¹⁵ In light of this jurisprudence, and taking into account the interests of justice, the Chamber will consider the Defence Motion on its merits.

16. The Chamber also notes that the Prosecution considers that four Items (N, FF, GG and HH) have been "dropped":¹⁶

⁹ *Id.*, paras. 8, 17-18, Table 1.

¹⁰ Defence Reply, paras. 5-6.

¹¹ *Id.*, paras. 7-13.

¹² *Id.*, paras. 14-24, 27-28.

¹³ *Id.*, para. 26.

¹⁴ See Prosecution Response, paras. 4, 15.

¹⁵ See *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004, para. 199. See also *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ndayambaje's Motion for Exclusion of Evidence (TC), 1 September 2006, para. 23.

¹⁶ Prosecution Response, Table 1 ("Dropped. Please refer to paragraph 11 of Prosecutor's Response to Defence Motion for Acquittal under Rule 98 bis dated 15 September 2010.").

- N. Alleged violence and possible killing of a woman who had allegedly been stopped and whose hands had allegedly been bound at the *Petit Bruxelles* roadblock before she was allegedly going to be killed.
- FF. Alleged arrest, torture and killing of Ignace Ruhatana, on the 7 April 1994, in order to prevent him to hand over to donors documents that he had allegedly written.
- GG. First time witness ANAP mentions that she thinks USAID sponsored the PRIME project and the Census Project. Witness ANAP states that Ruhatana had discussed the matter of embezzlement at length with Nzambazamariya because she had also worked with the USAID.
- HH. Internal investigations allegedly carried out by Ruhatana in the Ministry of Planning, by allegedly questioning or interviewing many people who worked on the Census project. Alleged subsequent document written by Ruhatana, according to which the number of people who worked on the Census project was exaggerated, even though the staff of the Ministry of Planning was used, and some people were paid whereas they were not working on the project.¹⁷

17. As both Parties appear to agree that these four Items are not part of the Prosecution's case against the Accused, the Chamber grants the Defence Motion to exclude them. Accordingly, the Chamber declares that the portions of the testimony pertaining directly to Items N, FF, GG and HH are excluded.

18. With respect to the remaining Items, the Chamber recalls that the Appeals Chamber has held 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."¹⁸ Moreover, the Appeals Chamber has ruled that a failure to plead certain allegations does not necessarily render such evidence inadmissible, as that evidence may be relevant to the proof of any allegation pleaded in the Indictment.¹⁹ Furthermore, Rule 89 (C) provides that the Chamber has the discretion to admit any relevant evidence which it deems to have probative value.

19. The Chamber considers that the remaining items are relevant and may also provide context to allegations pleaded in the indictment. The Chamber is therefore not convinced that they should be excluded at this stage of the proceedings.

¹⁷ Defence Motion, para. 1.

¹⁸ *Arsène Shalom Ntahobali and Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-97-21-AR73, 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, para. 15.

¹⁹ *Id.*; *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgement (AC), 27 November 2007, para. 103; *Bagosora et al.* Appeals Decision of 18 September 2006, note 40; *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement (AC), 23 May 2005, para. 269; *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005 (AC), 12 May 2005, para. 55.

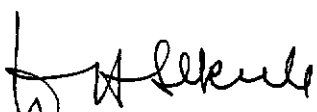
FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Defence Motion in part;

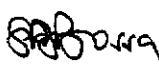
DECLARES that the portions of the testimony pertaining directly to Items N, FF, GG and HH are excluded; and

DENIES the Defence Motion in all other respects.

Arusha, 14 February 2011



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

