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24-08-2009
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

ICTR-99-54-0175

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

Registrar: Mr. Adama Dieng

Date: 24 August 2009

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-PT

DECISION ON DEFENCE REQUEST FOR AN AMENDMENT TO THE RESPONSE OF NGIRABATWARE TO PROSECUTOR'S REQUEST TO ADMIT FACTS

Office of the Prosecutor
Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Brian Wallace
Mr. Iskandar Ismail

Defence Counsel
Mr. Peter Herbert
Ms. Mylène Dimitri

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 "Trial Chamber");

BEING SEIZED of the "Defence Request for an Amendment to the Responses of Dr. Ngirabatware to Prosecutor's Requests to Admit Facts", filed on 21 July 2009 (the "Defence Motion");

CONSIDERING the:

i) "Prosecutor's Response to the Defence Request to Modify the Responses of the Accused to Prosecutor's Request to Admit Facts", filed on 24 July 2009 (the "Response");

ii) "Defence Reply to the Prosecutor's Response to the Request for an Amendment to the Responses of Dr. Ngirabatware to Prosecutor's Requests to Admit Facts", filed on 28 July 2009 (the "Reply");

iii) "Prosecutor's Rejoinder to the Defence Reply to the Prosecutor's Response to the Request for an Amendment to the Responses of Dr. Ngirabatware to Prosecutor's Requests to Admit Facts", filed on 29 July 2009 (the "Rejoinder");

iv) "Defence's Reply to the Prosecutor's Rejoinder to the Request for an Amendment to the Responses of Dr. Ngirabatware to Prosecutor's Requests to Admit Facts", filed on 31 July 2009 (the "Reply to the 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 of the Rules.

INTRODUCTION

1. On 9 March 2009, the Prosecution filed a Request to admit facts pursuant to Rule 73 *bis* (B) (ii).[1] On 12 March 2009, the Defence filed its Response to the request.[2]

2. On 19 May 2009, during a Status Conference, the Presiding Judge read out the list of admitted facts and received confirmation from the Defence Counsel that these were the admissions made by the Accused.[3]

[1] Prosecutor's Request to Augustin Ngirabatware to admit facts pursuant to Rule 73 *bis* (B) (ii) of the Rules of Procedure and Evidence ("Prosecutor's Request"), 9 March 2009.
[2] Response of Dr. Ngirabatware to the Prosecutor's request to admit facts ("Response to the Request"), 12 March 2009.
[3] T. 19 May 2009 pp. 14-15.

3. On 16 June 2009, the Registrar withdrew Professor David Thomas as Counsel for the Accused ("Withdrawal Decision").[4]

4. On 1 July 2009, the Registrar appointed Peter Herbert as Lead Counsel for the Accused.[5]

5. On 21 July 2009, the Defence filed the instant Motion seeking to amend the Response to the Prosecutor's request to admit facts.

SUBMISSIONS OF THE PARTIES

Defence Motion

6. The Defence submits that the Accused alerted newly appointed Co-counsel that he thought an error had been made at the 19 May 2009 status conference when the Presiding Judge read out the list of admitted facts.[6] The Defence later realized the Presiding Judge had not erred, since the previous Lead Counsel for the Accused had admitted that as Minister of Planning, Augustin Ngirabatware exercised authority and control over staff members of the Ministry.[7] However, the written instructions given by the Accused did not contain an admission of authority and control over the staff members of the Ministry of Planning as a whole, without any context or time frame. The previous Lead Counsel also failed to advise the Accused properly as to the legal implications of this admission and failed to explore the factual basis for this admission.[8]

7. The Defence recalls that the Accused requested the withdrawal of his Lead Counsel on 8 June 2009, mainly on account of "lack of confidence, lack of compromise on the Defence strategy and lack of communication".[9]

8. The Defence recalls that the Accused is charged under Article 6 (3) of the Statute with counts of genocide or complicity in genocide, which could, if proven, lead to a life sentence. The burden of proof falls on the Prosecution and the Accused would thus suffer a significant and irreversible prejudice to his right to a fair trial and to be presumed innocent until proven guilty if he were deprived of his ability to challenge one of the counts of the Indictment due to a strategic mistake by his previous Lead Counsel.[10] Therefore, the Defence submits the following proposed change to the admitted fact, which it submits would be an accurate reflection of the Accused's position:

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[4] Decision Withdrawing Professor David Thomas as Counsel for the Accused Augustin Ngirabatware, 16 June 2009.

[5] *See* Letter from the Registry titled "Your Assignment as Lead Counsel to represent the Accused Augustin Ngirabatware"; *see also* "Decision Withdrawing Professor David Thomas as Counsel for the Accused Augustin Ngirabatware" ("Withdrawal Decision"), filed on 16 June 2009.

[6] Co-counsel for the Defence was appointed on 1 June 2009, *see* Letter from the Registry titled "Your Assignment as Co-counsel to represent the Accused Augustin Ngirabatware", filed on 28 May 2009.

[7] Defence Motion, paras. 8, 9.

[8] Defence Motion, para. 10.

[9] Defence Motion, paras. 6, 7.

[10] Defence Motion, paras. 11, 12.

> Augustin Ngirabatware: "admits that he exercised ministerial control over the lawful administration of the Ministry before the 7th of April 1994. From April 7th, 1994 to the 14th of July, 1994, he was able to give a very limited number of lawful instructions to a very limited number of the staff in the Ministry." He makes no admission that these instructions were carried out lawfully as his ability to exercise effective control and authority was very limited due to the extreme circumstances.[11]

9. Counsel submits that the proposed amendment should be granted in the same spirit as requests to amend indictments.[12]

10. The Defence is aware of the exceptional nature of its request, but prays the Chamber to consider the exceptional situation of the Accused and act to ensure the proper administration of justice and a fair trial. The Accused is not allowed to address the Judges directly and thus had no opportunity to correct the mistaken admission, especially since the only intervening proceedings were conducted by way of telephone conference. Further, the new Lead Counsel and Co-counsel were appointed after the admission of facts and have no other means to restore their client's position.[13]

11. The Defence prays the Chamber to grant the proposed amendment, to order that this admission of facts regarding the Response to the second paragraph 3 (a) of the Request replaces the original admission, to order that the previous version be expunged from the record, and to declare that the other admissions of facts included in the Response remain the same.[14]

Prosecution Response

12. The Prosecution avers that "the Accused should not be allowed to recreate the facts admitted, simply because it recants a virtual admission of guilt and enables him to mount a defence."[15] The admission of facts by the Accused is analogous to a confession. The Defence failed to allege any violation of Rule 63 regarding questioning of the Accused, which would require invalidation of a confession as per Rule 92, and the admission cannot be vacated since it was made freely and voluntarily by the Accused.[16] The Accused should plead guilty to the complicity charges and command responsibility, in conformity with his previous admissions.[17]

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[11] Defence Motion, para. 17.

[12] Defence Motion, paras. 13, 14, Lead Counsel also invokes "his duty and according to the Code of professional conduct for Defence Counsel".

[13] Defence Motion, paras. 15, 16, *see also* para. 5 asserting that the Response to the Prosecutor's Request to admit facts was filed long before the appointment of the current Lead Counsel and Co-counsel.

[14] Defence Motion, para. 18.

[15] Prosecution Response, para. 5, *see also* paras. 14-15, the Prosecution submits that the Accused's belated recognition of the consequences of his admission is not a sufficient basis to entitle him to recant it and the request by the Defence to recreate the admission is an attempt to conceal the guilt of the Accused and his responsibility for the actions of his subordinates as pleaded in the indictment.

[16] Prosecution Response, para. 7.

[17] Prosecution Response, para. 16, *see also* para. 17, the Prosecution submits that the categorization by the Defence of the contentious admitted fact as a strategic mistake rather than a genuine misrepresentation of facts or the intention of the Accused underlines his guilt as charged in the indictment.

13. The Motion, which the Defence recognizes to be of an exceptional nature, is without legal basis.[18] It is inadmissible and is an attempt to besmirch the reputation of previous Counsel which should only be made after careful examination of the facts and exploration of all avenues for resolution.[19]

14. The analogy made by the Defence with the amendment of indictments is improper as the purpose of the two procedures is different.[20] However, while amendments to the Indictment are prohibited when they cause prejudice to the parties, the Defence's proposed amendment to the admitted facts will prejudice the Prosecution by requiring new investigations shortly before trial as well as undermining the Prosecution's understanding of the case.[21]

15. No mention of the admission made by the previous Lead Counsel was made in the Withdrawal Decision, and the written instructions of the Accused to the previous Lead Counsel mentioned in the Motion have not been introduced.[22] The Accused had every opportunity to address the Chamber at his initial appearance on 10 October 2008 and at the status conference on 19 May 2009 to correct errors made in the Response to the Request.[23]

16. Lastly, the Prosecution requests that if the Chamber grants the Motion, it should make a finding that the conflicting admissions are matters which affect the credibility of the Accused.[24]

Defence Reply

17. The Defence submits that motions for reconsideration do not rest on the Statute nor on the Rules, it is nevertheless well established that parties can file such motions and the Courts consider them.[25] Further, its request to amend admitted facts is generally based on Articles 19, 20 (3) and 20 (4) (g) of the Statute, which respectively entitle the Accused to a fair trial, to be presumed innocent, and not to be compelled to testify against himself or to confess guilt.[26] The Defence's qualification of the Motion as one of an exceptional nature did not refer to its legal basis but to the exceptional circumstances of the case.[27]

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[18] Prosecution Response, para. 6.
[19] Prosecution Response, para. 18.
[20] Prosecution Response, para. 8, the Prosecution submits that the amendment of indictments is meant to clarify and make the Prosecution's case more specific, while the purpose of this application is to change an answer that the Accused made voluntarily.
[21] Prosecution Response, para. 9.
[22] Prosecution Response, paras. 11, 12.
[23] Prosecution Response, para. 13. It should be noted that contrary to the Prosecution' submission on this point, the initial appearance of the Accused took place on 10 October 2009 and not on 10 October 2008.
[24] Prosecution Response, para. 19.
[25] Defence Reply, para. 7.
[26] Defence Reply, para. 8.
[27] Defence Reply, para. 9, the Defence refers in particular to the fact that the two counsel were appointed after the Response to the Request had been filed and that the Accused was not efficiently represented at this time.

18. The Accused's initial appearance took place on 10 October 2008, five months before the admission of facts. The Defence reiterates that the Accused could not address the Judges at the 19 May 2009 Status Conference.[28] The new attorneys have tried to act diligently with respect to their duty to restore the client's position by filing an official request to the Judges.[29] However, the matter could not be raised before the new Lead Counsel was able to meet with the Accused in person to thoroughly discuss it and explain the legal implications to his client.[30]

19. The lack of communication quoted in the Withdrawal Decision is the source of the contentious admission.[31] The Accused's written instructions to the previous Lead Counsel appear in a work day note of the Accused to his Lead Counsel, dated 12 May 2009. The previous Lead Counsel failed to properly advise the Accused with respect to the legal implications of such an admission and to explore the factual basis for making such an admission."[32]

20. The Prosecutor's analogy between the admitted facts and a confession is erroneous and the Defence does not see a nexus between the Defence's Request and guilty plea.[33] An admission of facts obviously does not amount to an admission of guilt. The admission of facts was wrongly drafted and was not made freely and voluntarily, contrary to the Prosecution's allegations.[34] The Accused was not fully consulted about the exact wording.[35] The Accused pleaded not guilty on all counts and he will maintain this position.[36] Guilt cannot be presumed and even less deduced from a request to modify the admission of facts.[37]

21. The Defence draws a parallel between Rules 73 *bis* (B) (ii) and 94, which according to the Reply share the same purpose of advancing expediency without compromising the rights of the Accused.[38] The practice of judicial notice must not be allowed to circumvent the presumption of innocence and the defendant's right to a fair trial.[39] Further, the Appeals Chamber's jurisprudence prohibits basing a finding of guilt

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[28] Defence Reply, para. 10, particularly when the proceedings are held via telephone conference.

[29] Defence Reply, para. 11.

[30] Defence Reply, paras. 12-13, the Defence submits that the new Co-counsel alerted the new Lead Counsel during a meeting on 16 July 2009 and that the length of the phone calls allowed to Accused persons detained at the UNDF did not allow such thorough discussions.

[31] Defence Reply, para. 14.

[32] Defence Reply, para. 15; *note* the Defence does not provide the work day note of the Accused with the submission, or otherwise substantiate its existence, but submits that the Accused never admitted that he exercised authority and control over staff members of the Ministry of Planning after 6 April 1994, and that he strictly indicates in the work day note that he denies that allegation as a whole without any context or time frame.

[33] Defence Reply, para. 16.

[34] Defence Reply, para. 17.

[35] *Id.*

[36] *Id.*

[37] *Id.*, The Defence notes that the Prosecutor's Regulations command that he be guided by the consideration of the presumption of innocence, and he therefore bears the burden of proof beyond a reasonable doubt citing Prosecutor's regulation No. 2 (1999), Standards of Professional Conduct, Prosecution Counsel, para. 1.

[38] Defence Reply, para. 19.

[39] *Id.*

solely on judicially noticed facts. A parallel can be drawn between the limits of both rules.[40]

22. The Prosecution is expected to know its case before going to trial and, as a result, the Defence request should not be likely to prejudice the Prosecution.[41] Rather, the Prosecution should have conducted investigations and be ready and able to prove beyond a reasonable doubt the three elements of command responsibility when it invokes it in the Indictment.[42] The Accused cannot accept any liability under Article 6 (3) of the Statute for unlawful activities of staff members if he was exercising his functions with due diligence and if he had no control over his subordinates at the time of the genocide.[43]

23. The Prosecution speculates on the motives and characteristics of Defence Counsel and its statements are unacceptable and unprofessional. The Defence demands that the Prosecution withdraw those allegations, without which it shall file a formal complaint to the President under the disciplinary code applicable to all advocates.[44]

24. The Prosecution's request that, should the Chamber grant the motion, it make a finding on the credibility of the Accused, is baseless.[45] The Defence reiterates its request for the relief applied for in the Motion.[46]

Prosecution Rejoinder

25. The Prosecution reiterates that the Motion is without legal basis, that it is furthermore inconsistent with the practice of the Tribunal, and that the analogy with the procedure to amend indictments is false.[47]

26. The Defence is imputing professional negligence on the part of Professor David Thomas who should therefore be heard on the matter. Indeed, Rule 97 does not protect communication between lawyer and client where the client and/or his subsequent lawyer impute(s) professional negligence.[48] This entails that the Accused has waived the lawyer-client privilege and has triggered the provisions of Rule 97 (A)(i) and (ii). The Prosecution thus requests the Chamber to order Professor Thomas to comment on the instructions he received from the Accused and the advice he gave him.[49] The Chamber should not decide the motion without hearing Professor Thomas.[50]

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[40] *Id.*
[41] Defence Reply, para. 21.
[42] Defence Reply, para. 20, 22.
[43] Defence Reply, para. 23.
[44] Defence Reply, para. 24, referring to the Prosecution's characterisation of the Defence Counsel as "eager and exuberant" in para. 15 of the Prosecution Response.
[45] Defence Reply, para. 25.
[46] Defence Reply, para. 26, *see also supra*, para. 13.
[47] Prosecution Rejoinder, paras. 4, 5.
[48] Prosecution Rejoinder, paras. 6-7.
[49] Prosecution Rejoinder, para. 8.
[50] Prosecution Rejoinder, para. 9.

27. The description of the Defence as "eager and exuberant" is not insulting, but the Prosecution withdraws those words.[51]

28. The Prosecution requests the Trial Chamber to order Professor David Thomas to comment on the Defence Motion, pursuant to Rule 54 and 97; to dismiss the Defence Motion in its entirety; and to recognize the Prosecution's withdrawal of the words complained of by the Defence and found in Paragraph 15 of the Response.[52]

Reply to the Rejoinder

29. The Defence argues that Rule 97 does not mention professional negligence as constituting an exception to the privilege of lawyer and client communications. The right to waive this privilege belongs to the Accused only when he considers that it is in his interest to do so.[53] The Prosecution thus may not oppose the Motion on the basis of lawyer-client privilege, nor does it have the right to request Professor Thomas to comment on the instructions he received from, or the advice he gave to the Accused.[54]

30. The Defence rejects the Prosecution's allegation that it is trying to impute professional negligence on the part of Professor Thomas, and states that it rather argued the lack of confidence, lack of compromise on the Defence strategy and lack of communication mentioned in the Withdrawal Decision. The contentious admission has been incorrectly made.[55] The Defence is neither accusing, nor condemning anyone, but rather seeking to restore its client's position on the facts he is willing to admit, and the Prosecution's contention about the previous Lead Counsel is thus irrelevant.[56]

31. The Defence submits that the Rejoinder should not be considered since it is bringing up new arguments.[57] It reiterates its request for the relief applied for in the Motion.[58]

DELIBERATIONS

32. As a preliminary matter, the Chamber notes the Prosecution's withdrawal of the words complained of by the Defence.

33. The Chamber recalls that the Prosecutor filed a Request to admit facts pursuant to Rule 73 *bis* (B)(ii) on 9 March 2009.[59] The Chamber further recalls that in a Motion filed

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[51] Prosecution Rejoinder, paras. 10, 11.
[52] Prosecution Rejoinder, para. 12.
[53] Reply to the Rejoinder, para. 10.
[54] Reply to the Rejoinder, paras. 11-12; *see also* paras. 13 and 14 of the Reply to the Rejoinder, quoting *Prosecutor v. Delalić et al.*, Decision on Motion to Preserve and Provide Evidence, Appeals Chamber, 22 April 1999.
[55] Reply to the Rejoinder, para. 15.
[56] Reply to the Rejoinder, para. 16.
[57] Reply to the Rejoinder, para. 17.
[58] Reply to the Rejoinder, para. 18; *see also supra,* paras. 13 and 34.
[59] The fact proposed by the Prosecution which gave rise to the Motion is fact No. 3 (a) which reads: "Augustin Ngirabatware was at all times referred to in this indictment, unless otherwise stated: Minister of Planning with the MRND Governments of 15 January 1989, 9 July 1990, 4 February 1991, and as part

on 11 March 2009, the Defence requested the Chamber to strike the Prosecution's request as premature.[60] Notwithstanding this Motion, the Defence responded to the Prosecution's request on 12 March 2009.[61] On 26 March 2009, the Chamber held that the Prosecution Request to admit facts was not premature since the wording of Rule 73 *bis* (B)(ii) provides that the Chamber "may" order the Prosecution to file admissions by the Parties, which implies that such admissions can also be filed prior to the Pre-Trial Conference.[62]

34. The Chamber recalls that Rule 73 *bis* (B)(ii), governing admitted facts, reads, in pertinent part:

> At the pre-Trial Conference the Trial Chamber or a Judge, designated from among its members, may order the Prosecutor, within a time limit set by the Trial Chamber or the said Judge, and before the dates set for trial, to file the following: [...]
>
> ii) Admissions by the parties and a statement of other matters not in dispute

35. The Chamber thus notes that the request to admit facts and its response were made according to the spirit of Rule 73 *bis* (B)(ii), with the goal of granting the Accused a fair and expeditious trial.

36. The Chamber recalls that it took note of those filings at the 19 May 2009 Status Conference. It further recalls that at that conference, the Presiding Judge read out the following facts admitted in the Response, which were not contested by former Defence Counsel:

> Augustin Ngirabatware was at all time referred to in this indictment, unless otherwise stated, the Minister of Planning with the MRND Governments of 9 July 1990, 4 February 1991, and as part of the first pluralist government of 31 December 1991, the second multi-party government of 16 April 1992, the third multi-party government of 18 July 1993, and from 9 April 1994 to mid-July 1994 in the Interim Government. As such he exercised authority and control over all staff members of the ministry.[63]

37. The Chamber notes that the admission of facts prior to the trial is a serious matter, which should be dealt with, within the spirit of expediting the proceedings and effectuating the right of the Accused to a fair and speedy trial. This procedure must be implemented in accordance with the rights of the Accused Person and the rules governing

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of the first pluralist government of 31 December 1991, the second multi-party government of 16 April 1992, the third multi-party government of 18 July 1993 and from 9 April 1994 to mid-July 1994 in the Interim Government. As such he exercised authority and control over all the institutions and staff members of his ministry."

[60] Defence Motion to Strike the Prosecutor's Request to Augustin Ngirabatware to Admit Facts Pursuant to Rule 73*bis* (B)(ii) of the Rules, 11 March 2009.

[61] The Accused's Response to the Prosecution's proposed fact No. 3 is: "The Accused denies that he was Minister of Planning with the MRND Government of 15 January 1989, he denies that he exercised authority and control over all the institutions of the Ministry of Planning, and he denies that the Ministry of Planning was "his ministry". He admits the remaining allegations of subparagraph (a) of the second paragraph 3".

[62] Decision on Defence Motion to Strike the Prosecutor's Request to Augustin Ngirabatware to Admit Facts Pursuant Rule 73*bis* (B)(ii) of the Rules", 26 March 2009, *see* para. 9.

[63] *See* Status Conference, T. 19 May 2009, pp. 14-15.

admissibility of evidence, respectively set out in Articles 19, 20 of the Statute and Rule 89 of the Rules.

38. The Chamber further notes that it is the practice at the Tribunal that the Parties agree on undisputed facts before trial and inform the Trial Chamber of the facts which will not be disputed at trial before the date set for trial. The Rules of Procedure and Evidence do not provide for the intervention of the Chamber at any stage of this procedure to validate or reject the admissions. The Parties' agreement is usually formalized at the Pre-Trial Conference, pursuant to Rule 73 *bis* (B)(ii), or shortly before the start of the case under Rule 73*bis* (F). The Chamber therefore considers that it may not intervene in the Parties' discussion of facts that may be admitted before the start of trial.

39. The Chamber thus concludes that, should there be any change exceptionally made by the Parties to the facts already agreed upon, the Chamber shall take note of the change. Any resulting issues can be addressed at trial, during the testing of the evidence. The Chamber therefore dismisses the Motion.

40. Lastly, the Chamber considers the request by the Prosecution for a finding that the amendment will affect the credibility of the Accused to be premature and the request to hear the Previous Lead Counsel and lift the privilege governing his communications with the Accused to be without basis in the context of this motion.

FOR THE ABOVE REASONS, THE TRIBUNAL

DISMISSES the Motion in its entirety.

Arusha, 24 August 2009

William H. Sekule
Presiding Judge

Solomy Balungi Bossa
Judge

Mparany Rajohnson
Judge

[Seal of the Tribunal]