



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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XWS

OR: ENG

TRIAL CHAMBER II

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

ICTR-99-54-T
03-04-2012
(109781-109775)

Registrar: Mr. Adama Dieng

Date: 3 April 2012

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL RECORDS ARCHIVES
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**DECISION ON DEFENCE MOTION FOR STAY OF PROCEEDINGS BASED
ON ALLEGED NUMEROUS DEFECTS IN THE INDICTMENT**

Office of the Prosecutor

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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 Stay of Proceedings Based on the Cumulative Effect of Numerous Defects in the Indictment that Led to an Unfair Trial", filed on 22 February 2012 (the "Defence Motion");

CONSIDERING:

- (a) the "Prosecution's Response to Defence Motion for Stay of Proceedings Based on the Cumulative Effects of Numerous Defects in the Indictment that Led to an Unfair Trial", filed on 2 March 2012 (the "Prosecution Response"); and
- (b) the "Defence Reply to Prosecution's Response to Defence Motion for Stay of Proceedings Based on the Cumulative Effect of Numerous Defects in the Indictment that Led to an Unfair Trial", filed on 12 March 2012 (the "Defence Reply");

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

NOW DECIDES the Defence Motion pursuant to Articles 19 and 20 of the Statute and Rules 72 and 73 of the Rules.

INTRODUCTION

1. On 1 October 1999, the initial indictment against Ngirabatware was confirmed.¹
2. Ngirabatware's initial appearance took place on 10 October 2008.² On 23 October 2008, the Prosecution filed a motion to amend the Indictment.³ After the Defence was given additional time to respond to this motion,⁴ the Chamber granted it, in part, on 29 January 2009.⁵ The Prosecution filed an amended Indictment on 5 February 2009.⁶
3. Following a Defence motion, the Chamber ordered the Prosecution, on 8 April 2009, to amend the Indictment by providing further detail in two paragraphs and by

¹ Confirmation of the Indictment and Order for Non-Disclosure, dated 1 October 1999, p. 3. This indictment also pertained to Jean de Dieu Kamuhanda.

² See generally T. 10 October 2008.

³ Prosecutor's Motion for Leave to Amend the Indictment, 23 October 2008.

⁴ Decision on Defence Motion for Extension of Time to Respond to Prosecutor's Motion for Leave to Amend the Indictment Filed on 23 October 2008 (TC), 30 December 2008, p. 3.

⁵ Decision on Prosecution Motion for Leave to Amend the Indictment (TC), 29 January 2009, p. 11.

⁶ Amended Indictment, filed 5 February 2009.

clarifying one phrase in *the Indictment*.⁷ The Prosecution filed its Amended Indictment (the operative "Indictment") on 14 April 2009.⁸

4. The Prosecution's case-in-chief commenced on 23 September 2009, and closed on 31 August 2010.⁹

5. The Defence commenced its case-in-chief on 16 November 2010, and closed it on 22 February 2012.¹⁰

6. On 22 February 2012, the Defence filed the present Motion.¹¹

7. On 24 February 2012, the Chamber granted the Prosecution request for an extension of time to file its Response by 2 March 2012. The Chamber also provided an extension of similar length to the Defence for the filing of any Reply.¹²

SUBMISSIONS OF THE PARTIES

Defence Motion

8. The Defence asks the Chamber to order a stay of proceedings, dismiss all charges against the Accused, and order his release.¹³ According to the Defence, this relief is the only way to remedy the cumulative prejudice caused by defects in the Indictment and by evidence that was outside the scope of the Indictment or turned out differently than expected.¹⁴

9. As for the timing of its Motion, the Defence submits that the close of the Defence case provides the Chamber with a complete picture of the prejudice suffered by the Accused, especially in light of the reduced number of witnesses the Defence could call. The Defence further contends that "nothing in the Rules prohibits or limits the timing of such a motion".¹⁵

⁷ Decision on Defence Motion to Dismiss Based Upon Defects in Amended Indictment (TC), 8 April 2009, p. 11.

⁸ Amended Indictment, filed on 14 April 2009.

⁹ T. 23 September 2009, pp. 7-12; T. 31 August 2010, p. 56.

¹⁰ T. 16 November 2010, pp. 11-26; T. 22 February 2012, pp. 28-29.

¹¹ The Chamber notes that although the Defence Motion is dated 21 February 2012, it was filed the following day. See Defence Motion, p. 1.

¹² T. 24 February 2012, p. 7.

¹³ Defence Motion, paras. 77, 324-325.

¹⁴ See, for example, *id.*, paras. 66, 88, 324. For Defence arguments on Indictment defects, see *id.*, paras. 66, 70-75, 78, 89-106, 117-142, 150-157, 161, 163-164, 166-172, 175-189, 192-203, 205-208, 211-213, 215, 219-220, 222-224, 232, 236-239, 241-251, 253-264, 266-268, 270-280, 283, 290-293, 295, 297-299, 304-308, 311-313, 316, 318-322, 324. For Defence submissions on evidence, see *id.*, paras. 66-70, 76-77, 107-116, 139, 143-148, 158-162, 165, 173-174, 183, 190-191, 203-204, 208-210, 214-218, 221-222, 225-231, 233-235, 252, 265, 269, 284-290, 294, 296, 300-303, 309-311, 314-317, 324.

¹⁵ *Id.*, paras. 71, 73-75, 79-88.

Prosecution Response

10. The Prosecution submits that the Defence Motion should be denied, as it essentially seeks reconsideration of a host of issues that have already been litigated and decided in the course of this trial.¹⁶ In the Prosecution's view, this Motion is frivolous and an abuse of process, for which the Defence should be sanctioned and denied payment of fees.¹⁷

Defence Reply

11. The Defence replies that its Motion does not seek reconsideration, as evidenced by its title, and should not be subject to sanctions. The Defence further submits that because prejudice occurs after the fact, the cumulative impact of the prejudice can only be fully assessed in light of the present Motion.¹⁸

DELIBERATIONS

12. Article 19 (1) of the Statute provides, in part, that the Chamber "shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused". Article 20 (2) states in part that "the accused shall be entitled to a fair ... hearing", while Article 20 (4) enumerates the minimum guarantees that the Accused enjoys in the determination of any charge against him.

13. Rule 72 (E) further provides that: "Objections to the form of the indictment, includ[ing] an amended indictment, shall be raised by a party in one motion only, unless otherwise allowed by a Trial Chamber." In this regard, the Chamber recalls that the

¹⁶ Prosecution Response, paras. 9, 11-17, discussing Decision on Prosecution Motion for Leave to Amend the Indictment (TC), 29 January 2009; Decision on Defence Motion to Dismiss Based Upon Defects in the Amended Indictment (TC), 8 April 2009; Decision on Prosecution Motion for Leave to Vary Its Witness List (TC), 28 January 2010; Decision on Defence Motion for Certification to Appeal the Decision on Variation of Prosecution Witness List (TC), 22 February 2010; Decision on Defence Motion for Judgement of Acquittal (TC), 14 October 2010; Decision on Defence Motion for Certification to Appeal the Decision on Defence Motion for Judgement of Acquittal (TC), 11 November 2010; Decision on the Defence Motion for the Disqualification of the Judges of the Trial Chamber (Bureau), 25 January 2011; Decision on Defence Motion to Exclude Evidence Falling Outside the Temporal Jurisdiction of the Tribunal (TC), 3 February 2011; Decision on Defence Motion to Exclude Evidence of Material Facts Not Charged in the Indictment and/or in the Prosecution's Pre-Trial Brief (TC), 14 February 2011; Decision on Augustin Ngirabatware's Appeal of the Bureau's Decision of 25 January 2011 on Disqualification (AC), 18 April 2011; Decision on Defence Motion for Certification to Appeal the Decision on Exclusion of Evidence Falling Outside the Tribunal's Temporal Jurisdiction (TC), 10 May 2011; Decision on Defence Motion for Certification to Appeal the Decision on Exclusion of Material Facts Not Charged in the Indictment and/or in the Pre-Trial Brief (TC), 10 May 2011; Decision on the Defence Motion for Reconsideration or Certification to Appeal the Oral Decision of 13 July 2011, and on the Reduction of the Defence Witness List (TC), 26 August 2011; Decision on the Defence Motion for Reconsideration and/or Certification to Appeal the Decision of 26 August 2011 (TC), 15 September 2011; Decision on Ngirabatware's Appeal of the Decision Reducing the Number of Defence Witnesses (AC), 20 February 2012.

¹⁷ Prosecution Response, paras. 10, 12, 18, p. 12.

¹⁸ Defence Reply, paras. 6, 8-44.

Defence already objected extensively to the form of the Indictment,¹⁹ and that the Chamber ruled upon this issue over three years ago.²⁰

14. Similarly, the Chamber recalls that it has adjudicated many of the issues that the Defence raises anew in its Motion. Indeed, the Defence itself concedes that it already “raised, at length, the numerous defects in the Indictment, the new material facts falling outside the scope of the Indictment, and the material facts falling outside the temporal jurisdiction”.²¹ Although the Defence states that the Chamber has rejected all of these previous motions, the Chamber recalls that it has partially granted some of them.²²

15. Despite the Defence’s invitation for the Chamber to exercise its “discretion to reconsider its previous decisions”,²³ the Chamber declines to do so, especially as the Defence does not appear to make any submissions focused on reconsideration.

16. The Defence also submits that the Prosecution adduced evidence that was either unanticipated or outside the scope of the Indictment. The Chamber recalls that these

¹⁹ See *Defence Motion to Dismiss Based upon Defects in Amended Indictment*, 11 March 2009, pp. 3-8 (alleging that the Indictment uses vague terms, lacks specificity in providing dates and locations, inadequately identifies alleged collaborators and victims, and is defective in relation to Count 4 and the allegations of joint criminal enterprise in Count 6).

²⁰ *Decision on Defence Motion to Dismiss Based Upon Defects in the Amended Indictment (TC)*, 8 April 2009 (granting the Defence Motion in part, and ordering the Prosecution to amend two paragraphs, provide more details about the identify of alleged perpetrators, and specify paragraphs where the phrase “referred to herein above” occurred).

²¹ *Defence Motion*, para. 70.

²² *Id.* See, for example, *Decision on Prosecution Motion for Leave to Amend the Indictment (TC)*, 29 January 2009; *Decision on Defence Motion to Dismiss Based Upon Defects in the Amended Indictment (TC)*, 8 April 2009, p. 11 (granting the Defence Motion in part); *Decision on Prosecution Motion for Leave to Vary Its Witness List (TC)*, 28 January 2010; *Decision on Defence Motion for Certification to Appeal the Decision on Variation of Prosecution Witness List (TC)*, 22 February 2010, p. 7 (denying the Defence Motion for certification); *Decision on Defence Motion for Judgement of Acquittal (TC)*, 14 October 2010, p. 12 (denying the Defence Motion, and declaring that the Defence has no case to answer in respect of 15 paragraphs of the Indictment); *Decision on Defence Motion for Certification to Appeal the Decision on Defence Motion for Judgement of Acquittal (TC)*, 11 November 2010, p. 6 (denying the Defence Motion for certification); *Decision on Defence Motion to Exclude Evidence Falling Outside the Temporal Jurisdiction of the Tribunal (TC)*, 3 February 2011 (denying the Defence Motion); *Decision on Defence Motion to Exclude Evidence of Material Facts Not Charged in the Indictment and/or in the Prosecution’s Pre-Trial Brief (TC)*, 14 February 2011, p. 6 (granting the Defence Motion in part); *Decision on Defence Motion for Certification to Appeal the Decision on Exclusion of Evidence Falling Outside the Tribunal’s Temporal Jurisdiction (TC)*, 10 May 2011, p. 6 (denying the Defence Motion for certification to appeal); *Decision on Defence Motion for Certification to Appeal the Decision on Exclusion of Material Facts Not Charged in the Indictment and/or in the Pre-Trial Brief (TC)*, 10 May 2011, p. 8 (denying the Defence Motion for certification to appeal); *Decision on the Defence Motion for Reconsideration or Certification to Appeal the Oral Decision of 13 July 2011, and on the Reduction of the Defence Witness List (TC)*, 26 August 2011 p. 12 (denying the Defence Motion for reconsideration or certification to appeal); *Decision on the Defence Motion for Reconsideration and/or Certification to Appeal the Decision of 26 August 2011 (TC)*, 15 September 2011, p. 10 (granting the Defence Motion insofar as it sought certification to appeal). See also, for example, *Decision on Ngirabatware’s Appeal of the Decision Reducing the Number of Defence Witnesses (AC)*, 20 February 2012, para. 20 (dismissing the Defence appeal).

²³ *Defence Motion*, para. 70.

aspects have been addressed in previous decisions.²⁴ However, if there are any further aspects regarding these issues, they could be addressed in *Closing Briefs or Closing Arguments*, as the case is at the end of the evidence phase.

17. Ultimately, the Defence argues that “considering the cumulative effect of all the defects and the new material facts that led to new charges coupled with the evolution of the jurisprudence regarding defects in an Indictment, the only possible remedy is to dismiss all the charges against the Accused and to order a stay of proceedings”.²⁵

18. In the Chamber’s view, the Defence has not demonstrated any cumulative prejudice that would warrant dismissal of all charges against the Accused. As indicated above, the Chamber has already adjudicated many of these issues raised in the Defence Motion. The Chamber therefore denies the Defence Motion.

19. The Chamber further notes the Defence submissions to the effect that “[t]he Defence nevertheless presented the best Defence possible, under the circumstances, in order to cover all of the allegations, whether they were outside of the Indictment or not, as well as to cover the broad allegations by presenting Defence witnesses to cover the extremely broad periods of time referred to in the Indictment”.²⁶

²⁴See, for example, Decision on Defence Motion for Judgement of Acquittal (TC), 14 October 2010, p. 12 (denying the Defence Motion, and declaring that the Defence has no case to answer in respect of 15 paragraphs of the Indictment); Decision on Defence Motion for Certification to Appeal the Decision on Defence Motion for Judgement of Acquittal (TC), 11 November 2010, p. 6 (denying the Defence Motion for certification); Decision on Defence Motion to Exclude Evidence Falling Outside the Temporal Jurisdiction of the Tribunal (TC), 3 February 2011 (denying the Defence Motion); Decision on Defence Motion to Exclude Evidence of Material Facts Not Charged in the Indictment and/or in the Prosecution’s Pre-Trial Brief (TC), 14 February 2011, p. 6 (granting the Defence Motion in part); Decision on Defence Motion for Certification to Appeal the Decision on Exclusion of Evidence Falling Outside the Tribunal’s Temporal Jurisdiction (TC), 10 May 2011, p. 6 (denying the Defence Motion for certification to appeal); Decision on Defence Motion for Certification to Appeal the Decision on Exclusion of Material Facts Not Charged in the Indictment and/or in the Pre-Trial Brief (TC), 10 May 2011, p. 8 (denying the Defence Motion for certification to appeal); Decision on the Defence Motion for Reconsideration or Certification to Appeal the Oral Decision of 13 July 2011, and on the Reduction of the Defence Witness List (TC), 26 August 2011 p. 12 (denying the Defence Motion for reconsideration or certification to appeal); Decision on the Defence Motion for Reconsideration and/or Certification to Appeal the Decision of 26 August 2011 (TC), 15 September 2011, p. 10 (granting the Defence Motion insofar as it sought certification to appeal). See also, for example, Decision on Ngirabatware’s Appeal of the Decision Reducing the Number of Defence Witnesses (AC), 20 February 2012, para. 20 (dismissing the Defence appeal).

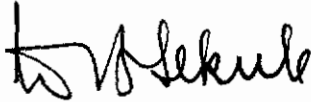
²⁵ Defence Motion, para. 324.

²⁶ *Id.*, para. 86.

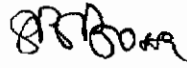
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion.

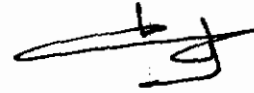
Arusha, 3 April 2012



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]

