

ICTR-99-50-AR73.2  
25 June 2004  
(729/H-721/H)

729/H  
RMM



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

**IN THE APPEALS CHAMBER**

**Before:**

Judge Theodor Meron, Presiding Judge  
Judge Mohamed Shahabuddeen  
Judge Mehmet Güney  
Judge Fausto Pocar  
Judge Inés Mónica Weinberg de Roca

**Registrar:**

Mr. Adama Dieng

**Decision of:**

25 June 2004

ICTR Appeals Chamber

Date: 25 June 2004  
Action: PG  
Copied To: Concerned Parties, Judicial Aid  
LOs, LSS

**THE PROSECUTOR**

v.

**CASIMIR BIZIMUNGU**

**JUSTIN MUGENZI**

**JEROME BICAMUMPAKA**

**PROSPER MUGIRANEZA**

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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NAME / NOM:

ROSETTE M MORRISON

Case No. ICTR-99-50-AR73.2

SIGNATURE:

*[Signature]*

DATE:

25/06/04

**DECISION ON PROSECUTION'S INTERLOCUTORY APPEALS AGAINST  
DECISIONS OF THE TRIAL CHAMBER ON EXCLUSION OF EVIDENCE**

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1. On 20 February 2004, the Trial Chamber, at the request of the Prosecution, certified two of its decisions for Interlocutory Appeal.<sup>1</sup> Both of the decisions certified concern the Trial Chamber's determination of motions filed by the accused Casimir Bizimungu ("Bizimungu"). In his motions Bizimungu requested the exclusion of evidence of certain prosecution witnesses from his trial on the ground that the evidence went to matters outside the scope of the indictment.<sup>2</sup> In both cases the Trial Chamber granted Bizimungu the relief sought. The Prosecution now appeals against those decisions.

### Background

2. The indictment against Bizimungu was confirmed in May 1999. In August 2003, the Prosecution filed a motion to amend the indictment and, in October 2003, the Trial Chamber refused that motion. It held that to allow the Prosecution to amend the indictment would cause prejudice to the Accused and also delay the proceedings due to commence on 3 November 2003. Following the request of the Prosecution, the Trial Chamber certified that decision for Interlocutory Appeal. The Appeals Chamber upheld the Trial Chamber's decision dismissing the Prosecution's Appeal.<sup>3</sup>

3. Of relevance to the issues in this Appeal is that some of the amendments the Prosecution sought to make to the indictment expanded the case against Bizimungu but also added specificity of names, places, dates and times to broad allegations made. The Appeals Chamber Decision held that:

"[h]ad the Prosecution solely attempted to add particulars to its general allegations, such amendments might well have been allowable because of their positive impact on the fairness of the trial. However, the Prosecution chose to combine changes that narrowed the indictment with changes that expanded its scope in a manner prejudicial to the Accused. Rather than distinguishing these categories of changes, which might have enabled the Trial Chamber to allow the former without allowing the latter, the Prosecution's Motion and Amended Indictment intertwined the two,

<sup>1</sup> Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 26 January 2004, 20 February 2004; Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 3 February 2004, 20 February 2004.

<sup>2</sup> Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA, 23 January 2004 ("January Decision"); Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witnesses AEI, GKE, GKF and GKI, 3 February 2004 ("February Decision").

<sup>3</sup> Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004 ("Appeals Chamber Decision").

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such that they were not readily separable. In this context, the Trial Chamber was justified in dismissing the entire request".<sup>4</sup>

It is against this backdrop that the decisions of the Trial Chamber in this Appeal need to be considered.

4. In the January Decision the Trial Chamber excluded the evidence of witnesses GKB, GKP, GKC, GKD and GFA that went to events involving Bizimungu in Ruhengeri Prefecture on the basis that the Prosecutor had not specifically identified this Prefecture in the indictment. In the February Decision the Trial Chamber excluded, on the same basis, the evidence of witnesses AEI, GKE, GKF and GKI that went to events involving Bizimungu also in Ruhengeri Prefecture.

5. The Prosecution bases its appeal on two grounds; the first concerns the Trial Chamber's decision to exclude certain evidence, and the second, concerns the degree of specificity required in an indictment. On the first ground, the Prosecution argues that the Trial Chamber committed discernible errors in the exercise of its discretion by excluding the above mentioned evidence of each of the witnesses in relation to events involving Bizimungu in Ruhengeri Prefecture.<sup>5</sup> First, the Prosecution says that by excluding the evidence, the Trial Chamber clearly misunderstood and failed to consider the nature of the Prosecution's case. Second, the Prosecution contends that the indictment against Bizimungu charges him with "perpetrating massive and systematic crimes throughout Rwanda" and that this plea does not exclude the Ruhengeri Prefecture.<sup>6</sup> Third, the Prosecution identifies several paragraphs of the indictment which contain allegations of criminal conduct to which, the Prosecution argues, the evidence excluded is material and relevant.<sup>7</sup> Fourth, the Prosecution argues that the excluded evidence relates to facts that are sufficiently pleaded and identifies those paragraphs of the indictment to which the evidence is allegedly relevant.<sup>8</sup>

6. The Prosecution points to a decision in the case of *Kamuhanda*, where Defence's complaints of vagueness of the indictment were rejected by the Trial Chamber, which held that a pleading identifying a Commune gave the Defence sufficient notice of events that occurred in one of the many Secteurs.<sup>9</sup> The Prosecution argues that "[b]y direct analogy, Ruhengeri Prefecture was one of the 11 Prefectures existing in Rwanda in 1994. In the same vein, the Bizimungu Indictment alleges

<sup>4</sup> Appeals Chamber Decision, par 20.

<sup>5</sup> Prosecutor's Appeal Against Trial Chamber II Decision of 23 January 2004 Excluding the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA And Trial Chamber Decision of 3 February 2004 Excluding the Testimony of Witnesses AEI, GKE, GKF and GKI All Implicating Casmir Bizimungu in Crimes in Ruhengeri Prefecture, 1 March 2004, ("Appeal Brief"), par 9.

<sup>6</sup> Appeal Brief, par 19.

<sup>7</sup> *Ibid*, par 20.

<sup>8</sup> *Ibid*, par 21.

<sup>9</sup> *Ibid*, par 33.

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the criminal conduct of the Accused occurred throughout Rwanda".<sup>10</sup> It argues that by charging Bizimungu for crimes committed "throughout Rwanda" and pleading that all crimes were perpetrated by Bizimungu "throughout Rwanda" the indictment sufficiently pleads and gives Bizimungu adequate notice for all crimes committed "throughout Rwanda, including Ruhengeri Prefecture".<sup>11</sup>

7. On the second ground of appeal, by relying upon the Appeals Chamber decision in the *Kupreškić* Appeal, that the degree of specificity required of an indictment is dependent on the nature of the Prosecution's case, the Prosecution claims that the Trial Chamber committed an error of law and fact in excluding the evidence of the witnesses on the ground that the Prosecution had not specifically identified Ruhengeri Prefecture in the indictment as a geographical region where crimes were committed.<sup>12</sup>

8. The Prosecution further claims that the decisions of the Trial Chamber are inconsistent with an earlier decision of a differently constituted Trial Chamber in the case of *Nyiramasuhuko*.<sup>13</sup> It says that in the *Nyiramasuhuko* case the Defence sought to exclude contents of a witness's statements on the ground that the specific criminal conduct of the accused in a particular location contained in the statement was not pleaded in the indictment.<sup>14</sup> The Trial Chamber refused the Defence's request, finding that paragraphs similar or identical to those in the Bizimungu indictment were sufficient, and that the evidence of specific criminal activities of the accused, although not directly pleaded in the indictment, were sufficiently pleaded in paragraphs of the indictment similar or identical to those in the Bizimungu indictment.<sup>15</sup>

9. In the alternative, the Prosecutor argues the Trial Chamber erred in law by failing to consider whether the excluded evidence was so closely connected to the facts in issue that it was admissible under Rule 89 of the Rules of Procedure and Evidence. It says that the excluded evidence is relevant and probative of its case that Bizimungu committed crimes throughout Rwanda.<sup>16</sup> It argues that the exclusion of the evidence "denies the Prosecutor his responsibility to prove the totality of his case".<sup>17</sup> It states that the allegation against Bizimungu is that "[b]efore and during 1994, the accused individually and in concert with others executed an enterprise to destroy

<sup>10</sup> *Ibid.*, par 34.

<sup>11</sup> *Ibid.*, pars 34-35.

<sup>12</sup> *Ibid.*, pars 23-24.

<sup>13</sup> *Ibid.*, par 27.

<sup>14</sup> *Ibid.*, par 28.

<sup>15</sup> *Ibid.*, par 30.

<sup>16</sup> *Ibid.*, par 44.

<sup>17</sup> *Ibid.*, par 45.

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the Tutsis population throughout Rwanda. This process of destruction constitutes the grand transaction forming the basis of the Indictment"<sup>18</sup>.

10. The Prosecution argues further that in excluding the evidence the Trial Chamber failed to consider all the components of its case, including the allegation that Bizimungu exercised command responsibility pursuant to Article 6(3) of the Statute over subordinates, including the Interahamwe throughout Rwanda. It says that the Trial Chamber failed to consider that to establish command responsibility it is sufficient that the Prosecution establishes examples of such control throughout Rwanda.<sup>19</sup>

11. The Prosecution alleges as a second ground of appeal that the Trial Chamber erred by holding that the absence of specific reference in the Indictment to Ruhengeri could not be cured by the references made to that Prefecture in the Pre-Trial Brief or from evidence in respect of that Prefecture adduced at trial.<sup>20</sup> It says that Bizimungu had adequate notice of the allegations of criminal conduct in Ruhengeri and that "the Trial Chamber erred in law by holding that the failure to include in the Indictment facts in the witness's testimony regarding Bizimungu's participation in Ruhengeri cannot be cured by references in the Pre-Trial Brief, the disclosed witness statements, the opening statement, or evidence adduced at trial itself".<sup>21</sup> Further, it says the Trial Chamber erred by failing to consider whether adequate notice had been given to Bizimungu by the disclosure of witness statements and the Prosecution's opening statement.<sup>22</sup> It says that the jurisprudence of the Tribunal is well established in holding that generalities in an Indictment may be cured by providing a clear and consistent disclosure to the Defence of all statements containing the material information as well as by material information in the opening statement, and at trial.<sup>23</sup> It says that the Prosecution provided to Bizimungu the statements excluded long before the start of the trial, the latest statements being disclosed 80 days prior to the trial's commencement.<sup>24</sup>

12. In response, Bizimungu says that the issue is whether the Trial Chamber erred in holding that the Indictment was not sufficiently pleaded in relation to alleged criminal activities in Ruhengeri Prefecture, thereby warranting the exclusion of prosecution evidence in relation to that Prefecture to avoid prejudice to the Defence.<sup>25</sup> He says that in the Indictment the Prosecution has particularised the charges against him specifically identifying the nature of the crime and the

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*, par 47.

<sup>20</sup> *Ibid.*, paras 49-58.

<sup>21</sup> *Ibid.*, par 51.

<sup>22</sup> *Ibid.*, par 52.

<sup>23</sup> *Ibid.*, par 52.

<sup>24</sup> *Ibid.*, par 56.

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Prefecture where the alleged criminal activity occurred.<sup>26</sup> Moreover, in the general allegations made in the Indictment, the Prosecution refers to specific Prefectures and no where does the Prosecution specifically identify Ruhengeri Prefecture as a geographical region in which he is alleged to have incurred criminal responsibility.<sup>27</sup> In light of the actual specificity contained in the Indictment Bizimungu argues that he was not adequately informed of the allegations in relation to Ruhengeri Prefecture as to enable him to prepare his defence and that admitting the new allegations would render his trial unfair.<sup>28</sup> In these circumstances, the Prosecution has not shown that in excluding the evidence the Trial Chamber erred in the exercise of its discretion.<sup>29</sup>

13. Bizimungu argues that, as a matter of principle, the Trial Chamber had the power to either admit or disallow any evidence. However, pursuant to Rule 89(B) and Rule 95 of the Rules, the Trial Chamber was required to ensure that it was fair to do so.<sup>30</sup> Bizimungu says that in this instance it would not have been fair as the indictment does not charge any criminal conduct to him in Ruhengeri Prefecture.<sup>31</sup> He says that the Trial Chamber noted that the Prosecution was unable to show the specific acts pleaded in the Indictment alleging criminal responsibility of Casimir Bizimungu in Ruhengeri Prefecture.<sup>32</sup> Further, Bizimungu argues that the proposed Amended Indictment, which the Trial Chamber rejected in a decision that was later upheld on Appeal, contained a considerable number of new allegations regarding criminal conduct of Bizimungu in Ruhengeri Prefecture.<sup>33</sup> Bizimungu says that by introducing the evidence excluded by the Trial Chamber, the Prosecution is attempting to circumvent the Trial Chamber's decision.<sup>34</sup>

14. Bizimungu says that, contrary to the assertions made by the Prosecution, the Trial Chamber did take into account the nature of the Prosecution's case in rendering the two impugned decisions, and that on this basis the Chamber found that the Prosecutor was attempting to expand the charges beyond those pleaded in the indictment.<sup>35</sup>

15. Bizimungu also refutes the Prosecution's claim that he is charged as a superior for crimes committed in Ruhengeri Prefecture. He says that the Prosecution's case is that Joseph Nzirorera

<sup>25</sup> Respondent Casimir Bizimungu's Brief in Response to the Prosecutor's Appeal Against the Decisions of 23 January 2004 and 3 February 2004 ("Response").

<sup>26</sup> Response, pars 52-55.

<sup>27</sup> Response, par 57.

<sup>28</sup> *Ibid*, par 31.

<sup>29</sup> Response, par 29.

<sup>30</sup> *Ibid*, par 32.

<sup>31</sup> *Ibid*, pars 33-37.

<sup>32</sup> *Ibid*, par 38.

<sup>33</sup> *Ibid*, par 39.

<sup>34</sup> *Ibid*, pars 42-46.

<sup>35</sup> *Ibid*, par 47.

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was the Interahamwe chief for Ruhengeri Prefecture and the Indictment does not charge him for the crimes committed by the Interahamwe in Ruhengeri Prefecture.<sup>36</sup>

16. Bizimungu challenges the analogy drawn by the Prosecution with the *Nyiramasuhuko* case as inappropriate. He says that Nyiramasuhuko is charged with crimes that occurred within one Prefecture and the statements in issue had been disclosed to the defence some 18 months earlier.<sup>37</sup> Bizimungu says that the *Kamuhanda* case is also of little assistance to the Prosecution. In that case the Prosecution was granted leave to call three new witnesses to give evidence in relation to massacres in a parish in Kigali-Rural Prefecture, and Kigali-Rural Prefecture was pleaded in the Indictment. Further, the Trial Chamber ordered the witnesses to testify only after the defence had been given sufficient time to prepare.<sup>38</sup>

### Analysis

17. The Prosecution's challenge is to the Trial Chamber's exercise of its discretionary power. The Appeals Chamber will only interfere in a Trial Chamber's exercise of discretion where the party making the challenge shows that the Trial Chamber misdirected itself as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion.<sup>39</sup> It is not sufficient for the Appeals Chamber to be merely satisfied that it would have exercised the discretion differently from that of the Trial Chamber; an error on the part of the Trial Chamber must be established.

18. Having considered the arguments of both parties, the Appeals Chamber is not satisfied that the Prosecution has identified any error on the part of the Trial Chamber in the exercise of its discretion to exclude the evidence of the witnesses. The arguments made by the Prosecution on Appeal were arguments largely put to the Trial Chamber and considered by it in both of the Impugned Decisions. In concluding that the evidence should be excluded, the Trial Chamber observed that, when given an opportunity to do so, the Prosecution was unable to identify any specific acts pleaded in the indictment alleging criminal activity on the part of Casimir Bizimungu in relation to Ruhengeri Prefecture. This conclusion must be considered in light of the Indictment as a whole, in which, although the Prosecution has in part used the phrase "throughout Rwanda" it

<sup>36</sup> *Ibid.*, pars 60-62.

<sup>37</sup> *Ibid.*, pars 66-67.

<sup>38</sup> *Ibid.*, pars 68-69.

<sup>39</sup> *Prosecutor Karemera et al.*, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 9 October Denying Leave to File an Amended Indictment, 19 December 2003, par 9.

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does plead with specificity the various geographical regions in which the accused is alleged to have occurred criminal responsibility. The Trial Chamber found that to permit the Prosecutor to lead the evidence excluded would cause prejudice to Bizimungu's defence as he had not been given sufficient notice of the allegations as guaranteed by Article 20 of the Statute because Ruhengeri Prefecture had not been specifically identified in contrast to other geographical regions. The fact that the evidence may have been admissible pursuant to Rule 89 does not show any error on the part of the Trial Chamber in concluding that in the interests of ensuring the fairness of the Trial it should be excluded. Further, in finding that the failure to plead could not be remedied by the Pre-Trial Brief, disclosed witness statements or the Prosecution's opening statement, the Trial Chamber made specific reference to the jurisprudence of the Appeals Chamber.<sup>40</sup>

19. The proposed amended indictment, which was rejected by the Trial Chamber on the basis of prejudice to the Defence and upheld on appeal, did contain specific allegations in relation to Ruhengeri Prefecture. The proposed amended indictment was rejected on the basis that it would cause prejudice to the Defence because, although it added greater specificity to some charges, it also made fresh allegations and pleaded new geographical regions. To admit the evidence excluded by the Trial Chamber in its impugned decisions, which is evidence that relates to what is essentially a newly identified geographical region, would undermine the Trial Chamber's conclusion that to permit the Prosecution to add new allegations at such a late stage in the proceedings would cause prejudice to the Accused. The essential issue in both of the Trial Chamber's decisions - the decision to reject the proposed amended indictment and the decisions to exclude the evidence of the witnesses subject of these appeals - was the same, that is that the Defence had not had the opportunity to prepare to defend against what are essentially fresh allegations and thus would suffer prejudice during trial should the Prosecution be permitted to present those allegations during trial. This conclusion was within the permissible scope of the Trial Chamber's discretion.

20. The other cases relied upon by the Prosecution, in which it says Trial Chambers have reached different conclusions, are inapposite. It is well established that when the exercise of discretion is involved reasonable minds may differ. What the Prosecution must establish is not that a differently constituted Trial Chamber may have reached a different conclusion, but that this Trial Chamber committed a discernible error in the exercise of its discretion in this case. This the Prosecution has failed to do.

21. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Prosecution's Appeal against the Impugned Decision of 23 January 2004 and the Impugned Decision of 3 February 2004.

<sup>40</sup> Impugned Decision 23 January 2004, par 13; Impugned Decision 3 February 2004, par 1.  
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