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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

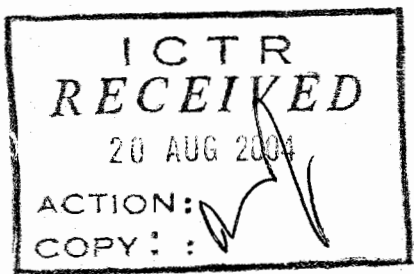
English
Original: French

TRIAL CHAMBER II

Before: Judge Arlette Ramaroson, presiding
Judge William H. Sekule
Judge Solomy Balungi Bossa

Registrar: Adama Dieng

Date: 15 July 2004



The Prosecutor

v.

Augustin BIZIMUNGU

Case No. ICTR-00-56-I

DECISION ON AUGUSTIN BIZIMUNGU'S PRELIMINARY MOTION

Office of the Prosecutor:
Ciré Aly Bâ
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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (The Tribunal),

Sitting as Trial Chamber II, composed of Judge Arlette Ramaroson, presiding, Judge William H. Sekule, and Judge Solomy Balungi Bossa;

Seized of:

- (i) The "Preliminary Motion" filed on 21 June 2004 by Michel Croisier, Defence Counsel for Augustin Bizimungu (the Motion);
- (ii) The "Prosecutor's Brief in Response to the Preliminary Motion Filed by Augustin Bizimungu's Counsel Pursuant to Rules 50(C) and 72 of the Rules of Procedure and Evidence", filed on 24 June 2004 (the Prosecutor's Response);
- (iii) The "Certified True Copy of the Amended Indictment in the Matter of *The Prosecutor v. Ndindiliyimana et al.*", filed by the Registry on 24 June 2004 (the Amended Indictment);
- (iv) The "Prosecutor's Supplementary Brief in Response to the Preliminary Motion Filed by Augustin Bizimungu's Counsel", filed 28 June 2004 (the Prosecutor's Supplementary Brief);
- (v) The "Corrigendum to the Brief in Response of 23 June 2004: Augustin Bizimungu's Preliminary Motions", filed on 29 June 2004 (the Prosecutor's Corrigendum);

Considering the Statute of the Tribunal (the Statute) and the Rules of Procedure of Evidence (the Rules), particularly Rules 50 and 72;

Decides, on the basis of the briefs submitted by the parties pursuant to Rule 73(A) of the Rules.

ARGUMENTS OF THE PARTIES

The Defence

1. The Defence submits that the Tribunal does not have personal jurisdiction over General Augustin Bizimungu and that it lacks the requisite impartiality to try him, since it continues to refuse to initiate any prosecutions against the "victors of the war".

2. The Defence submits that it is up to the Tribunal to prosecute all persons presumed responsible: the responsibility to initiate prosecutions should not fall on the Prosecutor, who is only responsible for preferring and substantiating charges. Leaving

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the discretion to initiate criminal proceedings with the Prosecutor compromises the impartiality of the Tribunal.

3. The Defence argues that the Amended Indictment of 31 March 2004 is invalid. The copy served on the Defence on 31 March 2003[sic] does not bear the Tribunal's seal, and that violates therefore the provisions of Rules 47(G) and 53bis(B) of the Rules. However, should the Chamber deem the Amended Indictment valid, the Defence requests the Chamber to take the following measures:

- To order the Prosecutor to identify the count of genocide in the introductory chapter by its correct and corresponding article in the Statute, so as to remove all ambiguity from the Amended Indictment. The Defence submits that Article 2(3)(a) of the Statute, and not Article 2(3)(b), as stipulated in the Amended Indictment, provides for the crime of genocide.
- To strike paragraphs 25, 26, 27, and 28 from the Indictment, since they describe facts relating to the historical context of the war in Rwanda and in no way clarify the crime of conspiracy to commit genocide.
- To order the Prosecutor to clarify paragraph 46 to give the Defence an opportunity to prepare an effective defence and/or, failing such clarifications, to strike off the said paragraph altogether.
- To order the Prosecutor to review the layout of the Indictment so as to avoid any confusion and ambiguity with regard to the introductory paragraphs to each count.
- To strike paragraphs 25, 26, 27, 28, 29, 31, and 32 from the Amended Indictment, since they fall outside the temporal jurisdiction of the Tribunal.
- To strike off the paragraphs or references that make it impossible for the Accused to know exactly when the crimes alleged and charged in the Indictment occurred, specifically paragraphs 29, 31, 32, 33, and 62. The Defence submits that the above-mentioned paragraphs are not sufficiently specific with regard to the periods involved and the alleged victims.
- To strike off the introductory paragraph to Count 1 due to the vague and imprecise nature of the wording or, alternatively, to strike off the phrase "*with some or all of*" contained therein.
- To order the Prosecutor to give the names of all those among the "*numerous other administrators, soldiers and civilians who espoused their cause*" who are purported to be part of the alleged conspiracy.
- To strike off paragraphs 120 to 126 of the Indictment and to drop the counts associated with those facts. The Defence submits that these paragraphs are vague and imprecise.
- To instruct the Prosecutor to make a choice in the Indictment between the crimes of genocide and complicity in genocide.

- To order that this trial be separated from that of Accused Mpiranya and, consequently, to order that all references to Mpiranya and the alleged crimes with which he is charged, either directly or indirectly, be expunged from the Indictment.

4. Lastly, the Defence submits that the many significant and serious defects highlighted in the Indictment justify the provisional release of Augustin Bizimungu. The Defence stresses, moreover, that detention on remand must be considered as a fundamental exception to personal liberty.

The Prosecutor

5. The Prosecutor submits that the grounds on which the Defence is challenging the Tribunal's personal jurisdiction to try the case are not among those specifically provided for in Rule 72(B) and (D) of the Rules. The Prosecutor therefore prays the Chamber to find and rule that the motion is inadmissible, or at least unfounded.

6. With regard to the period preceding 1994, referred to in the count of conspiracy to commit genocide, the Prosecutor refers to paragraph 27 of the Decision on François-Xavier Nzuwonemeye's preliminary motions, rendered by Trial Chamber II on 12 December 2002.¹

7. The Prosecutor maintains that under Rules 47(G) and 53bis(B) of the Rules, it is up to the Chamber to order the Registry to serve on the Defence a copy of the Amended Indictment in proper form.

8. The Prosecutor acknowledges that a typographical error crept into the wording of the count of genocide, where mention is made of Article 2(3)(b) instead of Article 2(3)(a). The Prosecutor undertakes to correct that error with a motion for separate trial that he intends to submit in a short time.

9. Concerning the deletion of paragraphs 25, 26, 27, and 28, the Prosecutor submits that the Defence's request on this issue lacks merit. These paragraphs intend to prove the existence of a criminal enterprise as regards the crime of conspiracy to commit genocide, which the Prosecutor intends to establish.

10. The Prosecutor submits that paragraph 46 of the Amended Indictment is simply transitional and as such may be deleted.

11. The Prosecutor submits that Rule 47 of the Rules does not outline any specific format for drafting indictments. Besides, the wording of the charges is in no way affected by the lack of numbering for the introductory paragraphs to each count. However, the Prosecutor has no problem numbering those paragraphs if it will make matters clearer.

¹ *The Prosecutor v. François-Xavier Nzuwonemeye*, Case No. ICTR-00-56-I, "Decision on Defence Preliminary Motions", 12 December 2002.

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12. The Prosecutor considers that paragraphs 28, 29, 31, and 32 contain essential information that may help the Accused to have a clear idea of the crimes with which he is charged. The Prosecutor points out that the information he has offered is the best available to him, but does not rule out the possibility that it may be improved.

13. The Prosecutor maintains that the Defence has no foundation to allege that the dates of the events specified in paragraphs 29, 31, 32, 33, and 62 are vague. Regarding paragraph 29, the Prosecutor submits that training of *Interahamwe* militiamen was organized during the period 1992 to 1994. The Prosecutor points out that during trial it will still be possible to ask witnesses if they recall the specific months and days when such training took place. Regarding paragraph 31, the Prosecutor maintains that, according to witnesses, the Saturday meetings at Joseph Nzirorera's residence continued to take place on a regular basis from 1992 to 1994. Regarding paragraphs 32 and 33, the Prosecutor submits that every Judgment handed down by the two *ad hoc* Tribunals acknowledges that an allegation of the sort "in January 1994, in Ruhengeri, X committed..." is specific and in no way infringes on the rights of the Accused. Lastly, regarding paragraph 62, the Prosecutor submits that the response letter that Augustin Bizimungu sent to the American diplomat has already been disclosed to the Defence as part of the exhibits on 17 March 2004.

14. Regarding the Defence's allegation that the introductory paragraph to Count 1 is vague and that the list of co-conspirators is incomplete, the Prosecutor recalls that in this count he is seeking to establish Augustin Bizimungu's criminal responsibility as part of a joint criminal enterprise: once the names of the major players in the conspiracy are disclosed, the requirement for a clear and specific charge is so met. Further, the Prosecutor points out that it takes two or more persons to commit the crime of conspiracy to commit genocide, and paragraph 31 clearly indicates that Augustin Bizimungu conspired with Joseph Nzirorera and Juvénal Kajelijeli.

15. The Prosecutor submits that the Defence request to strike off paragraphs 120-126 in the Indictment should be denied. The Defence has not explained why these paragraphs are vague and imprecise.

16. The Prosecutor acknowledges that the Amended Indictment includes eight counts. However, the Prosecutor points out that in fact there are only seven, since the count of complicity in genocide will be upheld only if the Trial Chamber finds that the Accused's responsibility for committing the crime of genocide has not been established. The two charges are not cumulative.

17. The Prosecutor confirms that he will file an *ex-parte* motion for a separate trial for Protais Mpiranya, since Mpiranya is still at large.

18. The Prosecutor submits that the Defence request for provisional release is inadmissible as matters stand, in that the requisite criteria under Rule 65(B) have not been met.

DELIBERATIONS

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Challenge based on lack of personal jurisdiction

19. The Chamber recalls the provisions of Rule 72(D) of the Rules which provides:

For purposes of paragraphs (A)(i) and (B)(i), a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to:

- (i) any of the persons indicated in Articles 1, 5, 6 and 8 of the Statute;
- (ii) the territories indicated in Articles 1, 7 and 8 of the Statute;
- (iii) the period indicated in Articles 1, 7, and 8 of the Statute; or
- (iv) any of the violations indicated in Articles 2, 3, 4 and 6 of the Statute.

20. The Chamber takes note of the Defence submission that the Tribunal does not have personal jurisdiction to try the Accused Augustin Bizimungu, since it failed in its obligations under Security Council Resolutions 955 of 8 November 1994 and 1165 of 30 April 1998.

21. The Chamber notes that the grounds raised by the Defence do not fall into any of the categories that would justify a jurisdictional challenge under Rule 72(D) of the Rules: regarding the lack of personal jurisdiction, under Rule 72(D)(i), the challenge must be based on the fact that the Accused does not fall into the category of persons indicated in Articles 1, 5, 6, and 8 of the Statute. Since the Defence submissions do not take that fact into account, the Chamber considers that the Defence request lacks merit.

Absence of the Tribunal's seal on the Indictment

22. The Chamber notes the Defence arguments that since the copy of the Indictment served on the Defence on 31 March 2004 does not bear the seal of the Tribunal, it is, as such, is invalid.

23. The Chamber notes that on 24 June 2004 it received from the Registry a certified true copy of the Amended Indictment bearing the Tribunal's seal. Additional copies were sent to the parties on 29 June 2004.

24. The Defence does not contest the fact that the Indictment read out during the initial appearance of 30 April 2004 is the same one, a copy of which was served on the Defence on 31 March 2004, and on which the Accused entered a plea pursuant to Rule 62 of the Rules. The validity of the Indictment, as confirmed by the Chamber, is not affected by the absence of a Tribunal's seal on the certified copies distributed to the parties.² Furthermore, the Registry has since distributed a new copy of the

² *The Prosecutor v. Jérôme Clément Bicomumpaka*, Case No. ICTR-99-50-I, "Decision on Motion for Defects in the Form of the Indictment and Lack of Jurisdiction", 8 May 2000, para. 5.1: "The absence

Indictment to all the parties, bearing the Tribunal's seal pursuant to Rule 47(G) of the Rules.

Typographical error in the wording of the count of genocide

25. The Chamber confirms that Article 2(3)(a), and not Article 2(3)(b), as mentioned in the introductory paragraph to Count II, covers the crime of genocide. Accordingly, the Chamber directs the Prosecutor to correct the mistake as specified above.

Deletion of paragraphs 25, 26, 27, and 28

26. The Chamber notes that the Defence has requested that paragraphs 25, 26, 27, and 28 be struck from the Indictment, on the grounds these paragraphs simply describe facts relating to the historical context of the war in Rwanda, and in no way clarify the crime of conspiracy to commit genocide.

27. The Chamber is of the opinion that these particular paragraphs may be of great significance in establishing that there was a criminal enterprise for a conspiracy to commit genocide. Accordingly, the Chamber deems it appropriate to reject the Defence request on this point.

Deletion of paragraph 46

28. The Chamber sees no problem in the deletion of this paragraph, if the Parties so agree.

Lack of numbering in the introductory paragraphs to the counts in the Indictment

29. The Chamber notes that the introductory paragraphs to each count in the Indictment are not numbered and that the Defence has requested that this be rectified. As the lack of numbers could bring about ambiguities, the Chamber orders that the rectifications be made.

Deletion of paragraphs 25, 26, 27, 28, 29, 31, and 32

30. The Defence has requested that paragraphs 25, 26, 27, 28, 29, 31, and 32 be struck from the Indictment on the grounds that they refer to a period before 1994, and that they are not specific.

31. The Chamber notes that those paragraphs concern the specific crime of conspiracy to commit genocide. The Chamber recalls the Decision of 13 April 2000 rendered on a similar motion by Trial Chamber II in the case of *Kabiligi and Ntabakuze*:³

of a seal on a copy of the Indictment reportedly submitted to the accused does not affect the validity of a duly confirmed indictment which is legally enforceable by such confirmation."

³ *The Prosecutor v. Kabiligi and Ntabakuze*, Case No. ICTR-96-34-I, "Decision on the Defence Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment Void *Ab Initio*", 13 April 2000, para. 39.

“As to the conspiracy charge, the Trial Chamber finds that the limited temporal jurisdiction of the Tribunal does not bar evidence of an alleged conspiracy of which the agreement was made before 1994. To the contrary, evidence of a pre-1994 conspiracy may be admissible and relevant in showing the commission of a conspiracy in 1994. Conspiracy is a “continuing crime.” [...] Because conspiracy is a continuing crime, the events that took place outside the period of the Statute can be taken into account if it can be shown that the conspiracy continued into the relevant period of the Statute. Evidence before 1994 may show when the conspiracy actually commenced. All activities prior to 1 January 1994, so far as they related to the conspiracy, may be relevant.”

32. The Chamber adheres to that Decision and concludes that references in the Indictment to events prior to 1 January 1994, which relate to the count of conspiracy to commit genocide, do not constitute a defect in the form of the Indictment.

33. Regarding the alleged ambiguity, the Chamber refers to the criteria established by Trial Chamber I in the *Niyitegeka* Judgment of 16 May 2003, which were upheld by the Appeals Chamber on 9 July 2004:⁴

“The Chamber recalls the recent Judgement in *Ntakirutimana*, following *Kupreskic*, wherein the degree of specificity required in Indictments was discussed. It was decided that material facts ought to be pleaded in respect of specific acts, although a high degree of specificity would be impracticable in the case of large-scale crimes; however, where the Prosecution is able to provide details, it should do so. Disclosure of witness statements, the Pre-trial Brief or other materials, and knowledge acquired during the course of the trial, may have the effect of curing any lack of notice in the Indictment.”

34. The Chamber notes that the challenged paragraphs refer to material acts with which the Accused is charged, as well as when and where those acts allegedly occurred. In light of the above-mentioned case law, the Chamber is therefore of the opinion that the challenged paragraphs are sufficiently specific.

35. Accordingly, the Chamber finds that the Defence request to strike off paragraphs 25, 26, 27, 28, 29, 31, and 32 lacks merit.

Ambiguity regarding the dates in paragraphs 29, 31, 32, 33, and 62

36. The Chamber notes the Defence contention that the above-mentioned paragraphs are not sufficiently specific with regard to the period of the alleged facts and to the identity of victims.

37. The Chamber considers that the references in the Indictment “between 1992 and 1994” and “in May 1994” in no way violate the rights of the Accused. The Chamber furthermore considers that during trial, both in examination-in-chief and cross-examination, it will always be possible to ask witnesses to give more information on the alleged facts. The Chamber finds that with regard to this issue, the Indictment has no defects in its form.

⁴ *The Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgment (TC), 16 May 2003, para. 44.

Ambiguity in the introductory paragraph to Count 1

38. The Chamber finds that the Defence request to strike off the introductory paragraph in Count 1 is unfounded. The Defence has failed to demonstrate how that paragraph is ambiguous and imprecise. The same applies to the phrase “with some or all of”.

Incomplete list of co-conspirators

39. The Chamber notes the Defence argument that the introductory paragraph to Count 1 in the Indictment contains a defect of form, since the Prosecutor has failed to provide the names of all the “numerous other administrators, soldiers and civilians who espoused their cause” and who are purported to be part of the alleged conspiracy.

40. The Chamber recalls the Decision of Trial Chamber II of 25 September 2002:⁵

“With respect to Count 1 of Conspiracy to commit Genocide, the Defence submits that the Prosecutor fails to state whether Sagahutu is charged as an accomplice, a perpetrator, or a co-perpetrator. The Chamber is of the view that in order for the Accused to understand the charges against him, he must know the role that he is accused of playing, with whom he is alleged to have conspired, and with whom he is alleged to have acted in complicity. Therefore the Chamber holds that Count I should be amended so as to complete the phrase “conspired with others” by indicating some of the names of the people with whom Sagahutu, and the other Accused, are alleged to have conspired to commit Genocide in line with the jurisprudence with regard to the count of Conspiracy.”⁶

41. The Chamber notes that in the introductory paragraph to Count 1, some names were cited as being those of Accused Augustin Bizimungu’s alleged co-conspirators. Hence, the Chamber finds that the Prosecutor has adhered to the Tribunal’s case law by indicating the names of those with whom Bizimungu is alleged to have conspired to commit genocide. Consequently, there is no need to order the Prosecutor to produce a comprehensive list of the people who are purported to be part of the alleged conspiracy.

Deletion of paragraphs 120 to 126

42. The Defence maintains that those paragraphs are vague and imprecise, and that they serve as a “patchwork” that allows the Prosecutor to charge the Accused with more than one count.

⁵ *The Prosecutor v. Sagahutu*, Case No. ICTR-00-56-T, “Decision on Sagahutu’s Preliminary, Provisional Release and Severance Motions” (TC), [25 September 2002] para. 34.

⁶ See *The Prosecutor v. Nahimana*, Case No. ICTR-96-11-T, “Decision on the Preliminary Motion Filed by the Defence on Defects in the Form of the Indictment”, 24 November 1997; *Prosecutor v. Blaskic*, Case no. IT-95-114, “Decision on the Defence Motion to Dismiss the Indictment Based on Defects in the Form Thereof” (TC), 4 April 1997.

43. The Chamber notes that those paragraphs describe the circumstances and the alleged commission of rapes as a crime against humanity perpetrated during the period in question. Furthermore, the Chamber points out that the Defence has not provided adequate explanations that would enable the Chamber to determine that those paragraphs are in fact vague or imprecise. The Chamber thus finds that the Defence request to strike off paragraphs 120-126 lacks merit.

Ambiguity regarding the number of counts retained

44. The Defence argues that the Prosecutor must make a choice in the Indictment between the counts of genocide and complicity in genocide.

45. The Chamber recalls that Article 2 of the Statute stipulates that the Tribunal has the power to prosecute persons committing one or any of the acts enumerated in paragraph 3 including, among others, the punishable act of complicity in genocide. The Tribunal's practice has been to allow an Accused person to be charged alternatively on the same set of facts. The Chamber therefore finds that there is no defect in the form of the Indictment in this respect.

Separate trial for Protais Mpiranya

46. The Prosecutor has indicated that he will soon file a motion for a separate trial for Protais Mpiranya, since Mpiranya is still at large. The Chamber takes due note thereof and will rule on the matter at the appropriate time.

Request for provisional release

47. The Chamber recalls the Defence arguments requesting the provisional release of the Accused, on the grounds there are significant and serious defects that it has pointed out in the Indictment.

48. The Chamber recalls that Rule 65(B) of the Rules governs the provisional release of Accused persons. The Chamber notes that the Defence has not made a request under that Rule.

49. The request submitted to the Chamber is merely a proposal to remedy the alleged defects in the Indictment. The Chamber is of the view that the Applicant has not only failed to demonstrate the alleged defects, but also that the defects are insignificant and in no way justify the adoption of such measures. Accordingly, the Chamber denies the request for provisional release.

For the foregoing reasons

The Tribunal,

Orders the Prosecutor:

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(a) To correct the article which provides for the crime of genocide in the introductory paragraph to Count II;

(b) To number all the paragraphs in the Indictment; and

Rejects all the other challenges in the Defence Preliminary Motion; and

Denies, as matters stand, the request for a separate trial for Protais Mpiranya; and

Denies the Defence request for provisional release.

Arusha, 15 July 2004

[Signed]
Judge Arlette Ramaroson
Presiding

[Signed]
Judge William H. Sekule

[Signed]
Judge Solomy B. Bossa

[Seal of the Tribunal]
