



UNITED NATIONS
NATIONS UNIES

ICTR-00-56-T
28-10-2005
(20610 — 20604)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

20610
smh

OR: ENG

TRIAL CHAMBER II

Before: Judge Asoka de Silva, Presiding
Judge Taghrid Hikmet
Judge Seon Ki Park

Registrar: Mr Adama Dieng

Date: 28 October 2005

The PROSECUTOR
v.
Augustin NDINDILYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU

Case No. ICTR-00-56-T

2005 OCT 28 PM 1:00

**DECISION ON BIZIMUNGU'S MOTION TO EXCLUDE THE TESTIMONY OF
WITNESS AP**

Prosecution Counsel

Mr Ciré Aly Bâ
Mr Alphonse Van
Ms Ifeoma Ojemeni Okali
Mr Moussa Sefon
Mr Segun Jegede
Mr Abubacar Tambadou
Ms Faria Rekkas
Ms Anne Bodley

Defence Counsel

For A. Ndindilyimana
Mr Christopher Black
For A. Bizimungu
Mr Gilles St-Laurent & Mr Ronnie MacDonald
For F-X. Nzuwonemeye
Mr Charles Taku
For I. Sagahutu
Mr Fabien Segatwa & Mr Seydou Dumbia

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the “Chamber”);

BEING SEIZED OF Augustin Bizimungu’s oral motion to have Witness AP’s testimony declared inadmissible, presented on 8 September 2005 (“the Motion”);

HAVING HEARD AND CONSIDERED the oral submissions of the Parties made on 8 September 2005 (the “Oral Responses”);

HAVING RECEIVED AND CONSIDERED the

- i. « *Mémoire de la Défense d’Augustin Bizimungu au soutien de la requête orale présentée lors de l’audience du 8 septembre 2005 demandant de déclarer inadmissible la déposition du témoin AP a l’égard de la détermination de la responsabilité du supérieur hiérarchique* »¹ filed on 12 September 2005 (the “Written Motion”);
- ii. “Submissions by Respondent (*sic*) Augustin Ndindiliyimana in Support of Motion to Exclude Testimony of Witness AP made by Applicant” filed on 12 September 2005 (the “Written Response”);

NOTING that the Prosecution has not filed a written submission;

RECALLING its Oral Ruling of 8 September 2005 directing the Defence to proceed with the cross-examination of Witness AP pending a final decision, and inviting the Parties to make written submissions regarding the issues raised in the Motion;

CONSIDERING the Statute of the Tribunal (the “Statute”), and the Rules of Procedure and Evidence (the “Rules”) in particular Rule 73 of the Rules;

HEREBY DECIDES the Motion on the basis of the oral submissions and written briefs filed by the Parties pursuant to Rule 73(A) of the Rules.

ORAL SUBMISSIONS

The Defence for Augustin Bizimungu

1. Following the examination-in-chief of Prosecution Witness AP on 8 September 2005, the Defence for Augustin Bizimungu orally requested the Chamber to declare Witness AP’s testimony inadmissible to the extent that it attempted to establish the superior responsibility of the commanding military officers.
2. The Defence submitted that whereas the facts alleged in Witness AP’s testimony attempted to show the responsibility of Major-General Kabiligi and his hierarchical

¹ “Augustin Bizimungu’s Defence Brief in Support of the Oral Motion Presented on 8 September 2005 Requesting that Witness AP’s Testimony be Declared Inadmissible With Respect to Establishing the Responsibility of Hierarchical Superiors.” (Unofficial translation.)

superiors, including the Accused General Augustin Bizimungu, those facts were not mentioned in Kabiligi's own trial (also known as the "Military I" case).

3. Counsel for Bizimungu asserted that there was no evidence that Kabiligi did anything that could point to his responsibility or that of his superiors, and that if these allegations had at least been raised in Kabiligi's trial, Kabiligi would have had the opportunity to confront and challenge the witness.
4. The Defence further asserted that it was impossible to gauge the veracity of these allegations since the Accused was not given any notice and was unable to vindicate his fundamental right to confront his accuser.
5. Counsel for Bizimungu stated that the Tribunal's jurisprudence weighs against the admissibility of evidence adduced through indirect testimony and noted that the guilt of the Accused cannot be established through induction or inference.

The Defence for Augustin Ndindiliyimana

6. The Defence for the Accused Augustin Ndindiliyimana made an oral submission in support of Bizimungu's Motion and added that the Defence in this matter was not in a position to respond to Witness AP's account of General Kabiligi's activities during the relevant period.
7. The Defence submitted that in his direct testimony Witness AP provided general background information, but no relevant evidence concerning any of the Accused in this case, and that the witness's evidence was against General Kabiligi and not against the Reconnaissance Battalion.

The Defence for Innocent Sagahutu

8. The Defence for the Accused Innocent Sagahutu noted that this was a serious issue requiring a serious decision and urged that, in the interest of fairness, Witness AP's testimony should be declared inadmissible with respect to Sagahutu.

The Defence for François-Xavier Nzuwonemeye

9. The Defence for the Accused François-Xavier Nzuwonemeye observed that this was a matter of fundamental human rights, natural justice and due process, and that since General Kabiligi who was the main person implicated by Witness AP's testimony was not present here to defend himself, the testimony should be excluded.

The Prosecution's Response

10. The Prosecution submitted that General Kabiligi was not here because he was not one of the Co-Accused in this case and that Witness AP was testifying against Augustin Bizimungu, not against Kabiligi.

20607

11. The Prosecution stated that Witness AP's testimony pointed to the fact that roadblocks were being set up and manned by soldiers under Bizimungu's command, and to the fact that people were being killed openly throughout Kigali, whether by the *Interahamwe* or by soldiers, but that the superior officers did nothing to stop the killing or to protect people and property.
12. The Prosecution cited the 1962 law creating the Rwandan Army and the 1974 law establishing the Rwandan *Gendarmerie*, and noted that both forces were responsible for maintaining public order and security.

WRITTEN SUBMISSIONS

The Defence for Augustin Bizimungu

13. In its written submission in support of the oral Motion presented on 8 September 2005, the Defence for Bizimungu repeats its position that the testimony of Witness AP should be declared inadmissible with respect to Augustin Bizimungu's responsibility as a hierarchical superior.
14. The Defence submits that the prejudice caused by AP's testimony is clearly greater than its probative value. According to the Defence, it is well established in the Tribunal's jurisprudence that a Trial Chamber may exclude a piece of evidence whose probative value is outweighed by the need for a fair trial.² The Defence also submits that evidence whose reliability cannot adequately be tested cannot have probative value.³
15. The Defence asserts that Witness AP's testimony related to Kabiligi's activities and movements from April to July 1994; that Bizimungu was unaware of the facts alleged by AP; and that only Kabiligi could adequately cross-examine this witness to gauge his credibility. In the view of the Defence, admitting Witness AP's testimony would be prejudicial to the Accused Augustin Bizimungu's right to have a full and plain defence.
16. The Defence also submits that Augustin Bizimungu was not properly informed that Witness AP would be testifying against him. It notes that neither the witness's pre-trial statement nor the summary of Witness AP's testimony presented in Annexure IV to the Prosecution's Pre-Trial Brief made any reference to Augustin Bizimungu.
17. According to the Defence, apart from AP's redacted statement and with the exception of paragraphs 31 to 63 of the Pre-Trial Brief, the primary indication of the content of Witness AP's testimony at the commencement of these proceedings was Annexure IV of the Pre-Trial Brief. The Defence also asserts that it was only on 5 September 2005, when the Prosecution indicated the paragraphs of the Indictment on which AP would testify, that the Defence became aware that this witness would give evidence on Bizimungu's responsibility as a hierarchical superior.
18. The Defence submits that under the circumstances, the Accused Augustin Bizimungu would suffer serious prejudice as a result of the Prosecution's method of disclosure. In

² Citing *The Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T « Décision relative à la déposition envisagée du Témoin DBY », 18 September 2003; and *The Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-A, "Decision on Prosecutor's Interlocutory Appeal Regarding Exclusion of Evidence," 19 December 2003

³ Citing *The Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T, "Decision on Sufficiency of Defence Witness Summaries", 5 July 2005, para. 6.

 4

20606

the view of the Defence, the Indictment and the pre-trial statements by witnesses, rather than subsequent disclosures by the Prosecution, ought to be sufficient to inform the Accused of the charges against him.

19. Finally, citing the “serious violations” of the fundamental right of the Accused to a fair and just trial pursuant to Articles 19(1) and 20(4) of the Statute, the Defence requests the Chamber to declare Witness AP’s testimony inadmissible to the extent that it seeks to establish Augustin Bizimungu’s responsibility as a hierarchical superior.

The Defence for Augustin Ndingiyimana

20. In its written submission, the Defence for Augustin Ndingiyimana supports Bizimungu’s oral Motion and requests that it should be granted because the testimony of Witness AP has no probative value and its acceptance will be prejudicial to the Defence case.
21. Defence for Ndingiyimana submits that Witness AP’s testimony has nothing to do with the Accused Sagahutu and Nzuwonemeye, since AP was detached from the Reconnaissance Battalion in order to be attached to the Army General Staff Headquarters. The Defence also submits that the testimony of Witness AP is not relevant to the charges against Bizimungu or Ndingiyimana, or “to any of the charges before this Trial Chamber”, but involves only General Kabiligi who is not before this Trial Chamber and whose actions as described by AP do not constitute criminal actions.
22. According to the Defence, AP’s testimony can only be prejudicial to the Defence as it includes statements that the witness saw soldiers and *gendarmes* at certain points in the city and tries to associate them with *Interahamwe* without establishing a connection. The Defence asserts that there is no evidence whatsoever as to the identity of the dead bodies mentioned in the witness’s testimony, how they came to meet their death, or the context in which that happened. It concludes that the only objective in presenting this evidence is to prejudice the Accused in the eyes of the Trial Chamber by implying that they are responsible for those deaths.
23. The Defence challenges the assertion in the Prosecution’s oral response to the effect that the dead bodies in question were Tutsi civilians and that they were killed because of the active involvement of the Accused in their deaths through their subordinate personnel or due to their inaction in saving the victims.
24. Finally, the Defence submits that Witness AP’s allegation of seeing a roadblock manned by *gendarmes* would be prejudicial to the Defence if admitted because such a claim was never disclosed to the Defence and it did not have the time to investigate the claim. The Defence for Ndingiyimana therefore prays the Chamber to grant Bizimungu’s oral Motion and exclude Witness AP’s testimony in its totality.

HAVING DELIBERATED

25. The Chamber recalls Article 20(4) of the Statute, which sets out the minimum guarantees for the Accused, including the right to be informed promptly and in detail of the charges against him; the right to have adequate time and facilities to prepare his defence; and the right to examine witnesses against him.

20605

26. The Chamber also recalls Rule 89(C) of the Rules, which prescribes that a Chamber may admit any relevant evidence which it deems to have probative value.
27. The Chamber is mindful of the standard endorsed in the *Ntakirutimana* case, where the Appeals Chamber took into consideration such factors as whether any defect in the Indictment was cured by other Prosecution communications regarding the material facts underlying its case, and whether such information was timely, clear and consistent enough to ensure that the Accused does not suffer undue prejudice.⁴
28. The Chamber has examined the Prosecution's Pre-Trial Brief and notes that in Annexure IV, where the Prosecution presents a summary of Witness AP's proposed testimony, there is no mention of the Accused Bizimungu or Ndindiliyimana. Instead, only the Accused Nzuwonemeye and Sagahutu are implicated.⁵
29. The Chamber also notes that on 5 September 2005, barely two days before Prosecution Witness AP was expected to start testifying in this matter, the Prosecution issued a letter, addressed to no one in particular, indicating that AP would be testifying on the following paragraphs of the Indictment: 3, 15, 17, 21, 22, 25, 59, 69, 70, 83, 108 and 119.
30. With respect to Bizimungu, the Chamber observes that these paragraphs of the Indictment allege his superior responsibility as a high-ranking officer of the Rwandan Army during the relevant period, as well as that of Ndindiliyimana as the Chief of Staff of the National *Gendarmerie*.
31. While the Chamber agrees with the Defence that the Prosecution failed to provide sufficient notice about the specific content of Witness AP's proposed testimony, the Chamber also notes that the said witness was expected to testify to allegations already pleaded in the Indictment. As the primary charging instrument, the Indictment itself has already served notice on the Accused as to the main charges against them. Furthermore, the Chamber has examined Witness AP's pre-trial statement and concludes that it provides sufficient notice of the witness's intent to testify on the activities of soldiers and *gendarmes*.
32. Additionally, as confirmed by the Appeals Chamber in the *Nyiramasuhuko* case, while lack of notice may preclude conviction on an unpleaded allegation, the evidence may nonetheless be admitted, pursuant to Rule 89(C), to the extent that it may be relevant in proving any allegation pleaded in the indictment.⁶ Having heard all of Witness AP's testimony, including both the examination-in-chief and the cross-examination, the

⁴ *Prosecutor v. Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004, para. 34.

⁵ The summary reads as follows: "Witness will testify that following the death of President Habyarimana on 6 April 1994, Major Nzuwonemeye ordered for a parade of the Reconnaissance Battalion that night and requested them to check the arms of the Battalion and also assigned duties to commanders of squadrons A, B and C. Witness will say that Squadron A under the command of Captain Sagahutu was *inter alia* assigned to patrol Kigali city and to protect certain places with its heavy vehicles, which were equipped with radios. Witness will testify that the Tutsi soldiers within the army were considered as accomplices and that CRAP was an elite unit within the RAF."

⁶ *Nyiramasuhuko et al 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 ABZ Inadmissible'" (AC), 2 July 2004, paras. 14 and 15.

20604

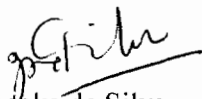
Chamber is satisfied that the evidence is relevant, has probative value, and is thus admissible.

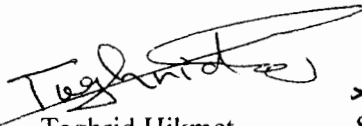
33. The Chamber also echoes the Appeals Chamber's caution to the effect that "admissibility of evidence should not be confused with the assessment of the weight to be accorded to that evidence"⁷ as the latter issue can only be determined after taking the totality of the evidence into consideration.

FOR THE ABOVE REASONS, THE CHAMBER

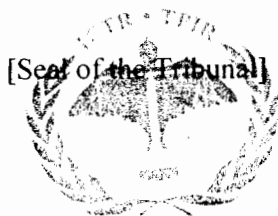
DENIES the Motion in its entirety.

Arusha, 28 October 2005


Asoka de Silva
Presiding Judge


Taghrid Hikmet
Judge


Seon Ki Park
Judge



⁷ *Ibid.*, para 15.