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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

21964
smbs

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr Adama Dieng

Date: 2 December 2005

The PROSECUTOR

v.

Augustin NDINDILYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU

Case No. ICTR-00-56-T

21964
smbs

**DECISION ON BIZIMUNGU'S MOTION IN OPPOSITION TO THE
ADMISSIBILITY OF THE TESTIMONY OF WITNESS AOF**

Prosecution Counsel

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For A. Ndindiliyimana
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 Doumbia

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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 « *Requête en opposition à la recevabilité de la déposition du témoin AOF* »,¹ filed on 10 November 2005 ("the Motion");

HAVING RECEIVED AND CONSIDERED the

- i « *Réponse du Procureur à la requête présentée par le Conseil d'Augustin Bizimungu, s'opposant à la déposition à venir du témoin AOF* »² filed on 14 November 2005 ("the Response");
- ii « *Réplique de la Défense du Général Augustin Bizimungu à la Réponse du Procureur à la requête en opposition à la recevabilité de la déposition du témoin AOF* »³ filed on 21 November 2005⁴ ("the Reply");

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 written briefs filed by the Parties pursuant to Rule 73(B) of the Rules.

SUBMISSIONS OF THE PARTIES

The Defence

1. The Defence for Augustin Bizimungu requests the Chamber to issue an immediate ruling against the admissibility of part of Prosecution Witness AOF's proposed testimony for two main reasons:
 - i) because it relates to matters not alleged in the Indictment; and
 - ii) because the facts to which the witness will testify are situated outside the temporal jurisdiction of the Tribunal as stipulated in Article 7 of the Statute.
2. With respect to the first reason, the Defence submits that the Prosecution's Pre-Trial Brief filed on 17 June 2004 contains facts that do not appear in the Amended Indictment. The Defence also submits that it was in the Pre-Trial Brief and in its Opening Statement that the Prosecution first announced that Witnesses AOE and AOF would testify to these new allegations.
3. The Defence asserts that it raised these issues during Witness AOE's testimony on 8 June 2005; that the Chamber acknowledged that the allegations concerning the events of 7 and 8 April 1994 were not contained in the Indictment; that the Chamber ruled that the witness could only be questioned about issues relating to the *mens rea* surrounding those

¹ "Motion in Opposition to the Admissibility of the Testimony of Witness AOF." (Unofficial Translation)

² "The Prosecutor's Response to the Motion Presented by Augustin Bizimungu's Counsel in Opposition to the Proposed Testimony of Witness AOF." (Unofficial translation.)

³ "General Bizimungu's Reply to the Prosecutor's Response to the Motion in Opposition to the Admissibility of the Testimony of Witness AOF." (Unofficial translation.)

⁴ The Chamber notes that the filing was timely, pursuant to Rule 7 *ter* (B).

events; and that the Chamber concluded that the evidence about events in 1993 would be taken into consideration only if the Prosecution could prove that there was a conspiracy leading up to 1994.⁵

4. As concerns the proposed testimony of Witness AOF, the Defence submits that in a preliminary statement transmitted on 21 June 2005, it is alleged that during a meeting at the Nkuli *communal* office in December 1993, Augustin Bizimungu referred to Tutsis as a dangerous plant known as "Igisura." The Defence argues that since this allegation does not appear in the Indictment, it should not be admitted into evidence. The Defence further argues in this regard that paragraphs 27 and 29 of the Indictment are in contradiction to the proposed testimony of Witness AOF, as they point instead to meetings aimed at fighting the enemy.
5. Citing a decision by the Trial Chamber in the *Muvunyi* case,⁶ the Defence submits that when a statement on prior events refers to existing charges, it can be admitted into evidence, but that if such a statement creates new charges, as in the instant case, it should not be admitted into evidence. The Defence also cites an oral decision in which the *Ntagerura* Trial Chamber held that the Prosecution could not lead evidence on allegations that were not specifically charged in the indictment⁷ as well as a portion of the Judgement and Sentence in which the Trial Chamber reiterated the same points.⁸
6. The Defence submits that allowing the Prosecution to lead evidence of allegations that are not pleaded in the Indictment would be tantamount to creating new charges and would cause irreparable prejudice to the Accused.⁹ The Defence also submits that the only appropriate remedy in such a situation would be the filing by the Prosecution of a motion to amend the Indictment.
7. Regarding the second reason for the Motion, the Defence argues that Witness AOF's proposed testimony is inadmissible because it deals with events that occurred in 1991 and 1993 and are therefore situated outside the temporal jurisdiction of the Tribunal. In particular, the Defence asserts that AOF's statement to the effect that the Accused Bizimungu ordered the killing of five Tutsis at Nkuli in 1991 is not only an inadmissible *ultra vires* declaration, but is also a highly prejudicial statement because it tends to show Bizimungu's bad character and propensity to commit crime. The Defence points in particular to the following excerpt from the witness's pre-trial statement referring to the Accused Bizimungu:

"[...] He went round the caves inspecting them and thereafter gave orders to one of the soldiers to go and bring the five Tutsi who were being guarded in the vehicle of General BIZIMUNGU. [...] When these five Tutsi were brought to the caves, General BIZIMUNGU told the Tutsi to say their last prayers. He further told us that the five Tutsi were the accomplices who helped the RPF to attack Ruhengeri prison

⁵ See para. 4 of the Motion, citing the French Transcript of 8 June 2005, p. 18 (English Transcript, p. 17).

⁶ The Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-T, "Decision on Accused Tharcisse Muvunyi's Motion to Exclude Witness CCR's Testimony", 20 May 2005, para. 5.

⁷ The Prosecutor v. Ntagerura et al, Case No. ICTR-96-10A-T, Transcripts of 14 February 2001, p. 101 English, p. 161 French.

⁸ The Prosecutor v. Ntagerura et al, Case No. ICTR-99-46-T, "Judgement and Sentence", 25 February 2004, para. 66.

⁹ See para. 13 of the Motion.

and free some prisoners. After this, General BIZIMUNGU gave orders to one of the soldiers to shoot them and he did."¹⁰

8. The Defence submits that admitting Witness AOF's testimony could prolong the trial, as the Defence intends to raise objections regarding all aspects of the testimony that it considers inadmissible. The Defence further submits that only in exceptional circumstances should a Trial Chamber admit evidence of events falling outside the Tribunal's temporal jurisdiction and argues that Rule 93 of the Rules of Procedure and Evidence provides for such exceptions.
9. Relying on decisions by the *Bagosora* Trial Chamber¹¹ and the Supreme Court of Canada,¹² the Defence asserts that the prior acts of an Accused person falling outside the Tribunal's temporal jurisdiction can only be admitted into evidence after the following criteria are taken into consideration:
 - i) proximity in time to similar acts;
 - ii) degree of resemblance of those prior acts to the conduct charged;
 - iii) the frequency of similar acts;
 - iv) the circumstances surrounding the similar acts;
 - v) characteristics common to the events; and
 - vi) any similar factor likely to support the similar acts.
10. The Defence submits that the proposed testimony of Witness AOF does not fall under any of the recognised exceptions and that the findings of the *Bagosora* Trial Chamber should be applied *mutatis mutandis* to the present case. The Defence therefore submits that AOF's proposed testimony regarding Bizimungu's alleged involvement in the meeting in December 1993 and in the killing of the five Tutsis in 1991 should be declared inadmissible.

The Prosecution

11. The Prosecution submits that in a statement to investigators from the Office of the Prosecutor on 20 and 21 April 2004, Witness AOF indicated that he would testify to the following facts: that during 1991, when Augustin Bizimungu was the Commander of the Ruhengeri military zone, Bizimungu ordered the summary killing of five Tutsis and then told the civilians who had helped him that all Tutsis were the accomplices of the enemy and should be tracked down and killed; that from 1993, Bizimungu and his associates, together with Commander Bivugabagabo, the politician Félicien Kabuga, and others, provided military training and weapons to the *Amahindure* militia in Ruhengeri; that in 1993 Bizimungu repeatedly defined the Tutsis as the enemy and compared them to a dangerous plant known as "igisura" which needed to be weeded out; that on 11 June 1994, when Bizimungu had become the Chief of Staff of the Rwandan Army, he identified certain persons as accomplices of the enemy, thus causing the death of several Tutsis in Kareba at the hands of soldiers under his command.

¹⁰ Pre-trial statement of Witness AOF signed on 21 April 2004, at p. 3.

¹¹ *The Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T, "Decision on Admissibility of Proposed Testimony of Witness DBY", 18 September 2003.

¹² *R. v. Handy*, (2002) 2 R.C.S. 908, para 83.

12. The Prosecution submits that these facts are clearly stated in paragraphs 22, 23, 24, 25, 27 and 59 of the Indictment, which describe the policies implemented by the Hutu elites who were in control of the Rwanda Armed Forces from late 1990. According to the Prosecution, these passages also describe Bizimungu's active involvement in the training of a private militia in Ruhengeri that would later become the spearhead of the genocide.
13. The Prosecution argues that Witness AOF's proposed testimony is not aimed simply at portraying Bizimungu in a negative light, but rather at revealing a criminal enterprise that was well known from late 1990 and through which Bizimungu and his numerous associates methodically undertook different acts that inexorably led to the genocide. In support of this assertion, the Prosecution cites a decision by this Chamber which tends to support the admissibility of pre-1994 evidence to the extent that it is relevant in proving the existence of a conspiracy in 1994.¹³
14. Finally, the Prosecution also argues that Witness AOF's testimony should not be looked at in isolation, but should be examined in the context of the many Prosecution witnesses testifying to the existence of a criminal enterprise and of a deliberate pattern of conduct.

DELIBERATIONS

Challenge Based on Matters not Alleged in the Indictment

15. The Chamber recalls Article 19 of the Statute setting out the conditions under which trial proceedings will be conducted, and Article 20 stipulating the "minimum guarantees" to which an accused person is entitled. The Chamber also recalls Rule 47(C) of the Rules, which states:

The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.

16. The Chamber notes that the primary argument presented by the Defence under this rubric is that Witness AOF's proposed testimony contains an allegation that does not appear in the Indictment. According to the Defence, since this particular allegation is not supported by the Indictment, it should be declared inadmissible. The Defence argues that whereas the Indictment refers to military planning meetings that took place at Joseph Nzirorera's home in Mukingo *commune*, Witness AOF states that the meeting he attended in December 1993 was at the Nkuli *communal* office.
17. In this connection the Chamber has examined the witness's preliminary statement of 21 April 2004 and notes the following excerpt:

During this period that is in December 1993, General Augustin BIZIMUNGU held another meeting in the conference hall of Nkuli commune. The people that attended this meeting were selected from all the cellules of Nkuli and Mukingo commune. These people had been selected in order to undergo training. He told the gathering that the Tutsi should be hunted down and exterminated. He referred to them as a dangerous plant "IGISURA" that must be uprooted.¹⁴

¹³ *The Prosecutor v. Nindiliyimana et al*, Case No. ICTR-00-56-T, "Decision on Augustin Bizimungu's Preliminary Motion", 15 July 2004. (By Trial Chamber II, differently constituted.)

¹⁴ At page 4 of Witness AOF's preliminary statement, English version.

18. The Chamber has also examined the Amended Indictment, particularly paragraph 29, which reads as follows:

At the time, in Ruhengeri, between 1992 and 1994, Augustin Bizimungu, accompanied by Juvénal Kajelijeli and others, regularly took part in meetings that were generally held on Saturdays at the home of Joseph Nzirorera, the MRND National Secretary. The purpose of the meetings was to devise a strategy for fighting the Tutsi enemy.

19. While noting that Nkuli and Mukingo *communes* are both located in Ruhengeri *préfecture*, the Chamber agrees with the Defence that the allegations contained in the witness's statement are distinct from those appearing in the Amended Indictment.
20. The Chamber concurs with the position taken in the *Ntakirutimana* case, where the Appeals Chamber considered 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.¹⁵ Here, the Chamber takes note of the Defence's acknowledgement that in the Prosecution's Pre-Trial Brief and Opening Statement there was some indication that Witness AOF would testify to the allegations about the meeting at the Nkuli *communal* office.¹⁶
21. The Chamber concludes that although the allegation about the meeting at the Nkuli *communal* office as contained in Witness AOF's proposed testimony does not appear in the Amended Indictment, it falls within the pattern of what the Prosecution intends to prove according to subsequent communications in that respect. The Chamber also notes that the Defence has had ample notice and opportunity to prepare its case since at least June 2004. In the Chamber's view, Witness AOF's proposed testimony does not support a new charge that is not pleaded in the Indictment, but merely states a new material fact underpinning already-existing charges.¹⁷ Therefore, the Chamber finds that the evidence is admissible.

Challenge Based on the Tribunal's Temporal Jurisdiction

22. The Chamber recalls Article 7 of the Statute delineating the territorial and temporal jurisdiction of the Tribunal:

The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.

¹⁵ *The Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004, para. 34.

¹⁶ The Chamber has also examined the summary of Witness AOF's proposed testimony contained in Annexure IV to the Prosecution's Pre-Trial Brief.

¹⁷ *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-AR73, "Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005", 12 May 2005.

23. Under this rubric, the main argument advanced by the Defence is that Witness AOF's proposed testimony refers to events which occurred in 1991 and 1993 and which therefore fall outside the temporal jurisdiction of the Tribunal. The Defence acknowledges, however, that there are exceptional circumstances where a Trial Chamber may admit evidence of events pre-dating 1994 and points to the provisions of Rule 93 of the Rules as the basis for any exceptions.
24. The Chamber observes that it is well settled in the jurisprudence of the Tribunal that, pursuant to Rule 89(C), a Trial Chamber may admit any relevant evidence it deems to have probative value, including evidence falling outside the temporal jurisdiction of the Tribunal.¹⁸ Allegations of acts that pre-date 1994 do not constitute independent charges, but may comprise relevant and admissible evidence of crimes that took place in 1994 or constitute background facts which relate to or clarify continuing events.¹⁹ The Trial Chamber conducting the trial will itself deal with the admissibility and relevance of the subsidiary allegations. As stated more recently by the Appeals Chamber,

Article 7 of the Statute of the Tribunal does not preclude inclusion in an indictment of information or allegations relating to events falling outside the temporal jurisdiction of the Tribunal, provided that all of the crimes charged against the accused in the indictment are alleged to have been committed within the temporal jurisdiction period.²⁰

25. The Chamber recalls its oral ruling regarding the testimony of Prosecution Witness AOE, where it stated that the witness will be allowed to give evidence of events in 1993 "only if the Prosecution establishes the existence of a conspiracy in 1994, as alleged in the indictment."²¹ The Chamber also recalls an earlier ruling in this matter in which it was stated that background information on events pre-dating 1994 "may be of great significance in establishing that there was a criminal enterprise for a conspiracy to commit genocide."²²
26. The Chamber therefore concludes that while the Accused cannot be convicted for crimes not charged in the Indictment or not falling within the Tribunal's temporal jurisdiction, evidence of such crimes may nonetheless be admissible for the limited purpose of establishing a pattern of conduct, such as a conspiracy, that continued into 1994.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion in its entirety.

¹⁸ *Ngeze and Nahimana v. The Prosecutor*, Case No. ICTR-96-11-AR72, "Decision on the Interlocutory Appeals", 5 September 2000, p. 6.

¹⁹ *The Prosecutor v. Simon Bikindi*, Case No. ICTR-2001-72-I, "Decision on the Defence Motion Challenging the Temporal Jurisdiction of the Tribunal and Objecting to the Form of the Indictment and on the Prosecutor's Motion Seeking Leave to File an Amended Indictment", 22 September 2003, para. 34.

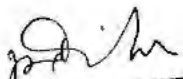
²⁰ *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-AR72.2, "Decision on Interlocutory Appeal Regarding Temporal Jurisdiction", 29 July 2004.

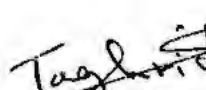
²¹ Transcript of 8 June 2005, at p. 17 in English, p. 18 in French.


²² *The Prosecutor v. Nindiliyimana et al*, Case No. ICTR-00-56-T, "Decision on Augustin Bizimungu's Preliminary Motion", 15 July 2004. (By Trial Chamber II, differently constituted.)

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Arusha, 2 December 2005


Asoka de Silva
Presiding Judge


Taghrid Hikmet
Judge


Seon Ki Park
Judge

