

ICTR-00-56-T  
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NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

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

**Registrar:** Mr Adama Dieng

**Date:** 15 June 2006

The PROSECUTOR

v.

Augustin BIZIMUNGU  
Augustin NDINDILYIMANA

~~François-Xavier NZUWONEMEYE~~

Innocent SAGAHUTU

Case No. ICTR-00-56-T

2006 Jun 15 10:02  
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**DECISION ON NDINDILYIMANA'S EXTREMELY URGENT MOTION TO  
PROHIBIT THE PROSECUTION FROM LEADING EVIDENCE ON IMPORTANT  
MATERIAL FACTS NOT PLEADED IN THE INDICTMENT THROUGH  
WITNESS ANF**

**Office of the Prosecutor:**

Mr Ciré Aly Bâ  
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**Counsel for the Defence:**

Mr Gilles St-Laurent and Mr Ronnie MacDonald for Augustin Bizimungu  
Mr Christopher Black for Augustin Ndingliyimana  
Mr Charles Taku and Mr Hamuli Rety for François-Xavier Nzuwonemeye  
Mr Fabien Segatwa and Mr Seydou Doumbia for Innocent Sagahutu

**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 SEISED OF** the «*Requête en extrême urgence d'Augustin Ndindiliyimana aux fins d'interdire au procureur d'introduire en preuve à travers le témoin ANF des faits matériels essentiels non repris dans l'acte d'accusation*»<sup>1</sup> filed on 16 May 2006 (the "Motion");

**HAVING RECEIVED AND CONSIDERED** the

- (i) «*Réponse du Procureur à la Requête en extrême urgence d'Augustin Ndindiliyimana aux fins d'interdire l'introduction en preuve, à travers le témoin ANF, des faits matériels non repris dans l'acte d'accusation*»,<sup>2</sup> filed on 18 May 2006 (the "Response");
- (ii) «*Réponse de la Défense d'Augustin Bizimungu au soutien de la Requête en extrême urgence d'Augustin Ndindiliyimana datée du 16 mai 2006*»,<sup>3</sup> filed on 19 May 2006 (the "Bizimungu Response in support");
- (iii) «*Réplique à la Réponse du Procureur à la Requête en extrême urgence d'Augustin Ndindiliyimana aux fins d'interdire l'introduction en preuve, à travers le témoin ANF, des faits matériels non repris dans l'acte d'accusation*»,<sup>4</sup> filed on 23 May 2006 (the "Reply").

**CONSIDERING** the Statute of the Tribunal (the "Statute"), and the Rules of Procedure and Evidence (the "Rules"), in particular Article 20(4)(a) of the Statute and Rule 47(C) of the Rules;

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

## **SUBMISSIONS OF THE PARTIES**

### ***The Defence Motion***

1. The Defence requests the Chamber to prohibit the Prosecutor from leading evidence through Witness ANF, on some important material facts that are not pleaded in the Amended Indictment of 23 August 2004.

2. The Defence submits that Prosecution Witness ANF's statement deals almost exclusively with important events alleged to have occurred in Ntyazo *commune* and in the

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<sup>1</sup> "Augustin Ndindiliyimana's extremely urgent Motion to Prohibit the Prosecution From Leading Evidence on Important Material Facts not Pleaded in the Indictment through Witness ANF" (Unofficial Translation).

<sup>2</sup> "The Prosecution's Response to Augustin Ndindiliyimana's extremely urgent Motion to Prohibit the Introduction of Evidence on Material Facts not Pleaded in the Indictment through Witness ANF" (Unofficial Translation).

<sup>3</sup> "The Response of Augustin Bizimungu's Defence in Support of Augustin Ndindiliyimana's extremely urgent Motion dated 16 May 2006" (Unofficial Translation).

<sup>4</sup> "The Reply to '[t]he Prosecution's Response to Augustin Ndindiliyimana's extremely urgent Motion to Prohibit the Introduction of Evidence on Material Facts not Pleaded in the Indictment through Witness ANF'" (Unofficial Translation).



town of Nyanza, in which some *gendarmes* might have been involved whereas in the entire Indictment, there is no direct or indirect reference to the events at Ntyazo and Nyanza or to the alleged involvement of *gendarmes* in these events. The Defence refers in particular to the following alleged events:

- a. On 18 April 1994, the *gendarmes* at Nyanza attacked a vehicle full of Tutsis and killed them at a distance of about 3 kilometers from the Ntyazo Communal Office.
- b. Biguma told his fellow *gendarmes* at his friends' office to start killing.
- c. At the Ntyazo trade centre, *gendarmes* incited the population and some Burundian refugees to kill Tutsis.
- d. Chief Warrant Officer Biguma and his men pursued Nyagasasa, the *Bourgmestre* of Ntyazo, hunted him down, and killed him in Nyanza, together with numerous Tutsis including Pierre Nyakarashi.
- e. Sergeant Kabera killed Tutsis in Ndago *cellule*, Bugali *secteur*.
- f. The massive attack and extermination of refugees on Karama hill with the participation of *gendarmes*.
- g. The attack by *gendarmes* on refugees in Kaguma *secteur*.
- h. The murders of Rwabuhiri and Nzayinambaho

3. The Defence submits that the Chamber should resolve this matter beforehand and definitively, and thus save itself from the trouble of having to deal with this question during the witness's testimony, which could slow down the proceedings considerably.

4. The Defence refers to Article 20 (4)(a) of the Statute and, relying in particular on the "Cyangugu" Judgement<sup>5</sup> and the *Blaskic*<sup>6</sup> Appeals Chamber Judgement, submits that the Prosecution is under the obligation to plead the material facts underpinning the charges against the accused in the Indictment itself regardless of the form of responsibility.

5. The Defence submits that the process of curing a defective Indictment takes place only in exceptional and very limited circumstances when the material fact was already in the Indictment in a certain manner, not when it was not included at all.

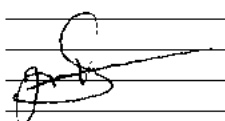
6. The Defence submits that ANF's statement is dated 4-6 June 2001 and the most recent Amended Indictment is dated 24 (*sic*) August 2004. On 30 April 2004, the Accused pleaded not guilty to the charges in the Indictment amended by the Prosecutor. By that time, the Prosecutor had had ANF's statement in his possession for almost three years. The Defence therefore argues that the Prosecution could have included in the Indictment the material facts contained in ANF's statement with the aim of making it conform to the letter and the spirit of the Statute and of the jurisprudence developed by the Tribunal and the ICTY.

7. The Defence submits that the Prosecutor deliberately failed to do so and therefore cannot at this stage, lead evidence on these material facts without first filing a motion to amend the Indictment.

8. Finally, the Defence submits that the material facts contained in the Indictment impose a limitation and the Prosecutor should not be authorised to introduce new facts.

<sup>5</sup> *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe*, Case No. ICTR-99-46-T, Judgement (TC), 25 February 2004.

*The Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14, Judgement (AC), 29 July 2004.

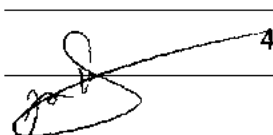


***The Prosecution Response***

9. The Prosecution requests the Chamber to dismiss the Motion as baseless.
10. The Prosecution acknowledges that the facts related by Prosecution Witness ANF are not mentioned in Counts 2 to 8 of the Indictment, but does not agree that they are absent from Count 1 (conspiracy to commit genocide).
11. The Prosecution submits that after a close reading of paragraphs 5, 18, 22, 25 and 53 of the Indictment, it can be said that the facts to which Witness ANF will testify are not new with respect to the Accused person's responsibility in 1994 and with respect to the acts or omissions attributed to him in the above-mentioned paragraphs. On the contrary, the Prosecution argues that the facts clearly illustrate the criminal conspiracy pleaded at Paragraph 22 of the Indictment as well as the refusal of the Accused, who was Chief of Staff of the National *Gendarmerie*, to assume the responsibilities incumbent upon him by protecting the civilian population.
12. The Prosecution further submits that the Accused has had the opportunity and the means to adequately prepare his defence through subsequent disclosures made to him regarding Witness ANF. These disclosures have been numerous, detailed, and more than reasonably timely, in order to allow for an appropriate defence.
13. The Prosecution points out that the redacted statements of Prosecution Witness ANF were transmitted to the Defence on 16 March 2004 and the Pre-Trial Brief on 17 June 2004. The Prosecution further points to paragraphs 89, 90, 92, 97, 98 of the Pre-Trial Brief, the factual summary of Prosecution Witness ANF's statement at page 108 of Annexure IV to the Pre-Trial Brief and the Opening Statement and submits that the Accused was notified of these facts about three to seven months before the start of the trial and was therefore able to adequately prepare his defence.
14. Finally, the Prosecution submits that it was through his own research effort that the Senior Trial Attorney learnt in March 2004 about certain statements concerning *Gendarmerie* Captains Bilikunzira and Sebhura and the Senior Trial Attorney immediately disclosed those witness statements to the Defence on 16 March 2004. According to the Prosecution, the trial date had already been set and it would not have been possible for the Chamber to accept another amendment to the Indictment.

***Bizimungu's Response in Support of the Motion***

15. The Defence for Bizimungu submits that it is in the interests of justice that the questions raised by the Defence for Ndingiyimana should be examined by the Chamber.
16. The Defence for Bizimungu further submits that the question of material facts not pleaded in the Indictment is a fundamental aspect of the Accused's right to a full defence and a fair trial.
17. The Defence for Bizimungu argues that it has always submitted that the Indictment is the only accusatory instrument under the Statute and the Rules and that evidence may be adduced only in regard to the allegations contained in the Indictment.



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18. The Defence for Bizimungu submits that it would be unfair for the Prosecution to introduce material facts that constitute new charges not pleaded in the Indictment.

19. Finally, the Defence for Bizimungu submits that the required specificity for the pleading of charges applies also to the pleading of material facts underpinning the charge of superior responsibility.

#### ***The Defence Reply***

20. In its reply, the Defence for Ndindiliyimana prays the Chamber to reject the Prosecution's explanation as to why the material facts of Witness ANF's expected testimony were not included in the Indictment, submitting that the Office of the Prosecutor is one entity and that the Military II Prosecution team has always had various persons involved in the management of the case. The Defence submits that the Office of the Prosecutor had Prosecution Witness ANF's statement in its possession for several years and it deliberately abstained from pleading the material facts in the Indictment.

21. The Defence for Ndindiliyimana also prays the Chamber to reject the Prosecution's argument that by the time Prosecution Witness ANF's statement was 'discovered', a trial date had already been set and it would not have been possible for the Chamber to accept another amendment to the Indictment, submitting that it is not up to the Parties to anticipate the decision of the Chamber.

22. The Defence for Ndindiliyimana asks the Chamber to take note of the Prosecution's admission that the facts related by Prosecution Witness ANF are not mentioned in Counts 2 to 8 of the Indictment and submits that the Prosecution therefore does not intend to prove Counts 2 to 8 through Prosecution Witness ANF.

23. The Defence for Ndindiliyimana further submits that, contrary to the Prosecution's assertion, paragraphs 5, 18, 22, 25 and 53 in support of Count 1 do not contain the facts which Witness ANF is expected to testify about.

24. Finally, the Defence for Ndindiliyimana wishes to reiterate its position that it has to defend itself only against the Indictment to which the Accused has pleaded not guilty and that it has prepared its defence only with respect to the material facts included in that document and on which the Prosecution has based its case.

#### **DELIBERATIONS**

25. The Chamber recalls Article 20(4)(a) of the Statute which guarantees an accused the right "[t]o be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her". In addition, Rule 47(C) of the Rules provides that "[t]he 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". In the jurisprudence of the Tribunal and the ICTY, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the Indictment, but not the evidence by which such material facts are to be proved at trial.<sup>7</sup> The determination of whether a particular fact is material and whether that fact has been pleaded

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<sup>7</sup> *The Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-A, Judgement (AC), 23 October 2001, paras. 88-90; see also *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases No. ICTR-96-10-A and ICTR-96-17-A, Judgement (AC), 13 December 2004, para. 24.

with the requisite degree of specificity must be made on case-by-case basis.<sup>8</sup> The Appeals Chamber in *Ntakirutimana* reasoned that in cases where the Prosecution alleges personal physical commission of specific criminal acts, such as murder of a named individual, the indictment should set forth such material facts as “the identity of the victim, the time and place of the events and the means by which the acts were committed.” On the other hand, such detail need not be pleaded where the sheer scale of the alleged crimes makes it impracticable to require the same degree of specificity in such matters.<sup>9</sup>

26. With regard to the pleading of superior responsibility, the Chamber recalls that the Indictment has to set forth a)(i) that the accused is the superior of (ii) subordinates sufficiently identified, (iii) over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and (iv) for whose acts he is alleged to be responsible; b) the conduct of the accused by which he may be found to (i) have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates, and (ii) the related conduct of those others for whom he is alleged to be responsible; and c) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.<sup>10</sup> Failure to plead these material facts renders the Indictment defective.<sup>11</sup>

27. The Chamber however recalls that defects in the Indictment may be cured where the Prosecution provides the Accused with timely, clear and consistent information underpinning the charges against him or her.<sup>12</sup> The Appeals Chamber has expressly found that certain defects in an Indictment may be cured through the Prosecution’s Pre-trial Brief, during disclosure of evidence or through proceedings at trial.<sup>13</sup> Whether a defect in the Indictment has been cured by subsequent disclosure involves, *inter alia*, consideration of the period of notice given to the Accused and the importance of the information to the ability of the Accused to prepare his or her defence.<sup>14</sup> Mention of a material fact in a witness statement does not necessarily constitute adequate notice: the Prosecution must convey that the material allegation is part of the case against the Accused.<sup>15</sup> The essential question is whether the Defence has had reasonable notice of, and a reasonable opportunity to investigate and confront the Prosecution case.<sup>16</sup>

28. In the instant case, the Chamber notes that Prosecution Witness ANF’s proposed testimony does not involve the *direct* participation of the Accused in the alleged events in Butare *préfecture* in 1994 but refers to his superior responsibility as set forth in paragraphs 61, 78, 109 and 118 and, to a certain extent, in Paragraph 53 of the Amended Indictment of 23 August 2004. The Chamber notes, however, that the events contained in Prosecution Witness ANF’s statement are not specifically pleaded in the Indictment.

<sup>8</sup> *Kupreskic*, Judgement (AC), paras. 89-90; *Ntakirutimana*, Judgement (AC), para. 25.

<sup>9</sup> *Kupreskic*, Judgement (AC), para. 89; *Ntakirutimana*, Judgement (AC), para. 25.

<sup>10</sup> *Blaskic*, Judgement (AC), 29 July 2004, para. 218.

<sup>11</sup> *Kupreskic*, Judgement (AC), para. 112.

<sup>12</sup> *Kupreskic*, Judgement (AC), para. 114; See also *The Prosecutor v. Mladen Naletilic and Vinko Martinovic*, Case No. IT-98-34-A, Judgement (AC), 3 May 2006, para. 26.

<sup>13</sup> *Ntakirutimana*, Judgement (AC), para. 27.

<sup>14</sup> *The Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgement (AC), 9 July 2004, para. 197; *Ntakirutimana*, Judgement (AC), paras. 82-84; *The Prosecutor v. Emmanuel Ndindabahizi*, Case No. ICTR-2001-71-I, Judgement (TC), 15 July 2004, para. 29.

<sup>15</sup> *Ntakirutimana*, Judgement (AC), para. 27 (“mere service of witness statements by the [P]rosecution pursuant to the disclosure requirements of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial”); *Niyitegeka*, Judgement (AC), para. 197.

<sup>16</sup> *Niyitegeka*, Judgement (AC), para. 196.

29. Although the scale of the alleged events mentioned in Witness ANF's proposed testimony makes it impractical to plead the facts with the same specificity required for acts involving the direct participation of an accused person, the Chamber considers it entirely possible for the Prosecution to have included the alleged events in the Indictment in at least a summarised form. The Chamber recalls that the Prosecution had been in possession of Witness ANF's statement for almost three years by the time the Indictment was amended. The Chamber is of the opinion that the Prosecution's argument that a member of its team "discovered" ANF's statement only in 2004 cannot serve as an excuse for the failure to plead the events in the Indictment. The Chamber finds the Indictment defective on this point.

30. With regard to the question whether the defect has been cured by subsequent disclosure, the Chamber recalls the summary of Prosecution Witness ANF's proposed testimony<sup>17</sup>:

Witness will testify that following the death of President Habyarimana, *gendarmes* including their commanders Adjutant Biguma and 1<sup>st</sup> Sgt. Twagirayezu incited the local authorities and Hutu civilians to kill all Tutsis in Butare Prefecture and assisted them in killing the Tutsis and moderate Hutus including the bourgmestre of Ntyazo commune, Nyagasaza, the families of the President of the Community Court in Ntyazo, Rwabuhiri Jean Pierre and his brother Nzayinambaho, at various locations in Ntyazo commune especially at the Karama Hill in Karuyumba Cellule. Witness will also say that the attackers looted Tutsi's property.

31. The Chamber notes that, according to Annex IV of the Pre-Trial Brief, the summary is relevant to Count 2 and 3 (Genocide and Complicity in Genocide) and Count 4 and 5 (Murder and Extermination as Crimes against Humanity).<sup>18</sup> Furthermore the Chamber notes that paragraphs 92 and 97 of the Pre-Trial Brief specifically mention the alleged massacre of Tutsis on Karama hill "by a Gendarmerie detachment led by Sergeant Twagirayezu." Finally, the Chamber notes that the list of points of the Indictment to which Prosecution Witness ANF will testify includes, *inter alia*, paragraphs 53, 61, 78 and 109.<sup>19</sup>

32. The Chamber observes that the Pre-Trial Brief and its annexes were filed on 1 September 2004, more than 20 months prior to Prosecution Witness ANF's expected testimony. Prosecution Witness ANF's redacted statement was disclosed in March 2004, the unredacted version in November 2005. The Chamber considers that the summary of Prosecution Witness ANF's proposed testimony as annexed to the Pre-Trial Brief, the specific reference to Counts 2-5, the indications in paragraphs 92 and 97 of the Pre-Trial Brief itself and the list of points in the Indictment put the Accused on sufficient notice that the alleged events in Witness ANF's statement are part of the Prosecution case. The Chamber further considers that the Defence has had timely notice of, and reasonable opportunity to investigate, these allegations. The Chamber therefore finds that the defect in the Indictment has been cured by subsequent disclosure. Accordingly, the Prosecution is allowed to lead evidence through Prosecution Witness ANF on the alleged events in Butare *préfecture* in 1994.

<sup>17</sup> Annex IV of the Pre-Trial Brief, p. 108.

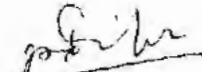
<sup>18</sup> *Ibid.*

<sup>19</sup> Filed on 9 May 2006.

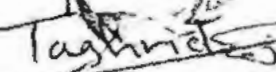
**FOR THE ABOVE REASONS, THE CHAMBER**

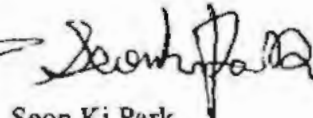
**DISMISSES** the Motion.

Arusha, 15 June 2006

  
Asoka de Silva  
Presiding Judge



  
Taghrid Hikmet  
Judge

  
Seon Ki Park  
Judge

[Seal of the Tribunal]