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INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

TRIAL CHAMBER III

Case No. ICTR-05-88-I

ENGLISH
Original: FRENCH

Before: Judge Dennis C. M. Byron, presiding
Judge Gberdao Gustave Kam
Judge Vagn Joensen

Registrar: Adama Dieng

Date: 6 June 2008

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JUDICIAL RECORDS/ARCHIVES
15/07/08

THE PROSECUTOR

v.

CALLIXTE KALIMANZIRA

MOTION FOR EXCLUSION OF PROSECUTION WITNESSES
BWM, BWN, BXB, BXC, BXD AND BXL

(Articles 17, 18 and 20 of the Statute of the Tribunal
Rules 47, 50, 53bis and 62 of the Rules of Procedure and Evidence)

Office of the Prosecutor:

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Arthur Vercken, Lead Counsel
Anta Guisse, Co-Counsel
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By Indictment of 9 May 2005, the Prosecutor of the International Criminal Tribunal for Rwanda decided to prosecute Callixte Kalimanzira on three counts, namely genocide, complicity in genocide and direct and public incitement to commit genocide.

By Annotated Indictment of 21 July 2005, the Prosecutor set forth the factual elements in support of his allegations.

1. The Defence for Kalimanzira wishes by this Motion to have Prosecution Witnesses BWM, BWN, BXB, BXC, BXD and BXL excluded from the list of witnesses because their testimonies, as announced by the Prosecutor, relate only to acts not mentioned in the Indictments of 9 May and 21 July 2005.

Procedural background

2. The Indictments referred to above mention Callixte Kalimanzira's presence in various locations of Butare *préfecture*¹ between 6 April and mid-July 1994. The locations thus mentioned are as follows:

- Kabuye hill (Ndora commune, Gisagara *secteur*);²
- Gisagara centre (Mugusa *secteur*, Ndora commune);³
- Kibilizi *secteur* (Nyaruhengeri commune);⁴
- Mugusa commune office (Gikondo *secteur*);⁵
- Kigembe commune;⁶
- Muganza commune;⁷
- Nyamigango *cellule* (Gisagara *secteur*, Ndora commune);⁸
- Kibayi commune;⁹
- The border between Muganza/Remera *secteurs*, Muganza commune.¹⁰

3. On 28 February 2006, the first redacted witness statements were disclosed to Counsel for Callixte Kalimanzira.¹¹ Then on 3 December 2007, the Prosecutor disclosed to the Defence the testimonies (also redacted) of 47 witnesses, including for the first time the testimonies of Witnesses BWM, BWN, BXB, BXC, BXD and BXL. Lastly, on 28 March 2008, the Prosecutor disclosed to the Defence the unredacted statements of Prosecution witnesses.

¹ ICTR, *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-2005-88-I, Indictment filed on 21 July 2005, paras. 6 *et seq.*

² *Ibid*, paras. 9 *et seq.*, para. 25.

³ *Ibid*, para. 12.

⁴ *Ibid*, para. 13.

⁵ *Ibid*, para. 14.

⁶ *Ibid*, para. 16.

⁷ *Ibid*, para. 17.

⁸ *Ibid*, para. 19.

⁹ *Ibid*, para. 23.

¹⁰ *Ibid*, para. 22.

¹¹ ICTR, *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-2005-88-I, Memo of 28 February 2006.

4. On 16 April 2008, in its Pre-Trial Brief, the Prosecution set forth all the factual and legal elements in support of its case. Annex "A" of the Brief comprised the list of Prosecution witnesses to be called, as well as a brief summary of their will-say statements.

5. It is on reading the unredacted statements and the Pre-Trial Brief that the Accused discovered that the Prosecutor intended to call witnesses regarding events and sites not mentioned in the Indictment. The witnesses in question are BWM, BWN, BXB, BXC, BXD and BXL.

6. Witness BWM refers to Callixte Kalimanzira's supposed presence in Sahera *secteur*, Ngoma commune, to incite genocide there and thereby causing killings in this administrative unit.¹² BWN's testimony is about a purported distribution of weapons by Callixte Kalimanzira in Mukande *secteur*, Ndora commune.¹³ The testimonies of Witnesses BXB, BXC, BXD and BXL are supposedly intended to prove that Callixte Kalimanzira was present on Kabakobwa hill, Ngoma commune¹⁴ where he allegedly organized and supervised the killings.

7. The material acts recounted by these six witnesses, as well as the locations where they were supposedly committed, are not mentioned in the Indictment. In such circumstances, and in accordance with the provisions of Article 20 of the Statute of the Tribunal, Counsel for Callixte Kalimanzira request the outright withdrawal of these six testimonies.

Legal basis for withdrawing the testimonies on acts not mentioned in the Indictment

Guarantees under Article 20 of the Statute of the Tribunal

8. According to Article 20(4) of the Statute of the Tribunal:

"In the determination of any charge against the accused [...], the accused shall be entitled to [...] be informed promptly and in detail [...] of the nature and cause of the charge against him or her."

9. It thus follows clearly from the provisions of the above article that this information in its entirety should be mentioned in the indictment. The Prosecutor has an obligation to plead, with sufficient detail, all material facts underpinning the charges against an accused in the indictment so that the accused can prepare his defence.

10. As a consequence, each count of the indictment must indicate the legal characterization of the offence charged as well as the underpinning facts thereof alleged in the same indictment. In his indictment, the Prosecutor must also indicate unequivocally the mode and extent of an accused's participation in the alleged crime. It does not suffice to refer

¹² ICTR, *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-2005-88-I, Prosecutor's Pre-Trial Brief, 16 April 2008, Annex A, p. 41.

¹³ *Idem*. See also the statement by Witness BWN following the interviews of 2 October 2007 and 16 October 2007.

¹⁴ ICTR, *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-2005-88-I, Prosecutor's Pre-Trial Brief, 16 April 2008, Annex A, pp. 42, 43 and 45.

to Article 6(1) of the Statute which enumerates the many forms of individual criminal responsibility.¹⁵

11. International jurisprudence has, on several occasions, affirmed this principle. Hence, in the case of *Bizimungu et al.*, the Appeals Chamber pointed out that the Trial Chamber applied the law properly in considering that where an indictment contains a list of specific *préfectures* in which the accused is alleged to have committed certain crimes, the fact that other *préfectures* were not mentioned meant that the accused was not suspected of committing crimes in the *préfectures* not mentioned in the indictment.¹⁶

12. Furthermore, in *Kupreškić et al.*, the International Criminal Tribunal for the Former Yugoslavia decided that:

“An indictment shall, pursuant to Article 18(4) of the Statute, contain ‘a concise statement of the facts and the crime or crimes with which the accused is charged’. Similarly, Rule 47(C) of the Rules provides that an indictment, apart from the name and particulars of the suspect, shall set forth ‘a concise statement of the facts of the case’. The Prosecution’s obligation to set out concisely the facts of its case in the indictment must be interpreted in conjunction with Articles 21(2) and (4)(a) and (b) of the Statute. These provisions state that, in the determination of any charges against him, an accused is entitled to a fair hearing and, more particularly, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. In the jurisprudence of the Tribunal, 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 proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.”¹⁷

13. The Chamber will note that whereas the statements of Witnesses BWM, BWN, BXB, BXC, BXD and BXL relate only to the events which occurred in Sahera and Mukande *secteurs* and on Kabakobwa hill, the Indictment does not mention the direct or indirect participation of the Accused in the acts allegedly committed in these same locations.

14. Accordingly, in view of the above provisions, the acts referred to by the six Prosecution witnesses clearly constitute charges distinct from those already enumerated in the Indictment. The Prosecutor can therefore not call Witnesses BWM, BWN, BXB, BXC, BXD and BXL to testify without this creating a new ground for prosecution and violating the rights and interests of the Accused, who would not be given the opportunity to prepare his defence.

15. The Chamber should therefore note that it is imperative to exclude these witnesses from the proceedings so as to ensure a fair hearing.

Rules governing the drafting of an indictment

¹⁵ ICTR, *Ntagerura et al.* Judgement, 25 February 2004, paras. 29 *et seq.*

¹⁶ ICTR, *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, “Decision on Prosecution’s Interlocutory Appeals against Decisions of the Trial Chamber on Exclusion of Evidence”, 25 June 2004, paras. 17 *et seq.*

¹⁷ ICTY, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 88.

16. The rules governing indictments are expressly defined in Articles 17 and 18 of the Statute of the International Criminal Tribunal for Rwanda and in Rules 47, 50, 53 *bis* and 62 of the Rules of Procedure and Evidence. Under these rules, an 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*”.¹⁸

17. Rule 50 of the Rules of Procedure and Evidence provides that once an indictment is confirmed, it may not be amended, save with leave of the Judge who confirmed it.¹⁹ Case-law makes provision for adding some elements to cure any omissions from the indictment in the course of proceedings; but such additions must, on no account, lead to a radical transformation of the Prosecution’s case, and should not be such as would, on their own, support new charges. The Appeals Chamber recalled these points on 29 June 2006 in *Bagosora et al.*. It ruled as follows:

*“The Appeals Chamber stresses that the possibility of curing the omission of material facts from the indictment is not unlimited. Indeed, the new material facts should not lead to a radical transformation of the Prosecution’s case against the accused. The Trial Chamber should always take into account the risk that the expansion of charges by the addition of new material facts may lead to unfairness and prejudice to the accused. Further, if the new material facts are such that they could, on their own, support separate charges, the Prosecution should seek leave from the Trial Chamber to amend the indictment and the Trial Chamber should only grant leave if it is satisfied that it would not lead to unfairness or prejudice to the Defence.”*²⁰

18. In the matter at hand, it should be noted that the Prosecutor has not sought leave of the Chamber to amend his Indictment, and he therefore has no leave, by calling the six witnesses in dispute, to include new facts amounting to new charges that are separate from those listed in the Indictment.

19. It should be emphasised, moreover, that the written statements of Witnesses BWM, BWN, BXB, BXC, BXD were collected between 8 October 2002 and 25 June 2003. Only two statements by BXL post-date this period, and are dated 16 August 2005 and 12 January 2007.

21. [sic] Considering that the Amended Indictment was established on 21 July 2005, that is after most of these statements, it should be noted that the Prosecutor had enough time to incorporate them in it. He chose not to do so. He cannot decide to correct his error now without breaking the rules referred to above. The only course open to these testimonies, is their exclusion from the proceedings.

22. It should be pointed out, in passing, that the fact that the statements by Witnesses BWM, BWN, BXB, BXC, BXD and BXL are mentioned in the Prosecutor’s Pre-Trial Brief, or the fact that the statements by these six witnesses are now in the possession of the Defence

¹⁸ Rules of Procedure and Evidence, Rule 47(C).

¹⁹ *Ibid*, Rule 50(A)(i).

²⁰ ICTR, *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73, “Decision on Aloys Ntabakuze’s Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence”, 18 September 2006, para. 30.

does not cure the Indictment. The *Bizimungu* case recalled this: "It should be noted that the failure to include the facts in the Indictment cannot be cured by references in the Pre-Trial Brief or evidence adduced at trial."²¹

23. The exclusion of these witnesses thus seems unavoidable.

FOR THESE REASONS

*Considering Article 20 of the Statute of the International Criminal Tribunal,
Considering the Rules of Procedure and Evidence,*

The Defence requests the Trial Chamber of the International Criminal Tribunal for Rwanda to:

NOTE the blatant violation by the Prosecutor of the provisions of Article 20 of the Statute of the International Criminal Tribunal for Rwanda and of the provisions of the Rules of Procedure and Evidence.

Accordingly:

Purely and simply **EXCLUDE** Witnesses BWM, BWN, BXB, BXC, BXD and BXL from the list of Prosecution witnesses.

Paris, 6 June 2008

[Signed]

Arthur Vercken
Lead Counsel

[Signed]

Anta Guisse
Co-Counsel

²¹ ICTR, *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, "Decision on Motion from Casimir Bizimungu Opposing to [sic] the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA", 23 January 2004, para. 13.