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ICTR-01-72-A  
29-7-2009  
(768/A - 760/A)

**International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda**

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**IN THE APPEALS CHAMBER**

Before: Judge Patrick Robinson, *President*  
Judge Mehmet Güney  
Judge Fausto Pocar  
Judge Liu Daqun  
Judge Theodor Meron

Registrar: Adama Dieng

Filed on : 29 July 2009

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JUDICIAL DEPARTMENT  
RECORDS SECTION

**SIMON BIKINDI**

v.

**THE PROSECUTOR**

*Case No. ICTR-01-72-A*

**PROSECUTOR'S RESPONSE  
to "Confidential Defense Motion to Admit Additional Evidence  
on Events in Kivumu"**

Office of the Prosecutor  
Hassan Bubacar Jallow  
Alex Obote-Odora  
Dior Fall

Counsel for Simon Bikindi  
Andreas O'Shea

**A. — Nature of the Filing and Prosecutor’s Position**

1. On 9 July 2009, Simon Bikindi (hereinafter “The Appellant”) filed his “Confidential Defence Motion to Admit Additional Evidence on Events in Kivumu” (hereinafter the Motion) and on 10 July 2009, he filed his “Corrigendum to Confidential Defence Motion to Admit Additional Evidence on Events in Kivumu” (hereinafter the Corrigendum).

2. The Prosecutor opposes the Motion. The Appellant seeks to call Witnesses DKV, DKM, and the Appellant himself on appeal and requests the admission, pursuant to Rule 115 of the Rules of Procedure and Evidence (hereinafter “the Rules”), of their written statements, 3 purported attestations from the Director of the *Ecole Normale*, Gacaca judges in Kivumu, and one Father Theunis, respectively, a copy of the magazine Dialogue mentioning a number of priests killed in 1994, Gacaca records in Kinyarwanda, purportedly concerning killing in Nyamyumba commune, Kivumu secteur, and a proffered statement from a legal assistant in his defence team, purportedly on geography and distance. He makes unsubstantiated assertions of law and fact, claiming that the proffered evidence “bears directly on the credibility and reliability of [Prosecution Witnesses AKJ and AKK’s] evidence at trial and the *likelihood* that the alleged acts were committed by the appellant in the way described.”<sup>1</sup> He also contends, without much more detail, that it “is crucial to the assessment of the true degree of ineffectiveness of assistance afforded the accused at trial.”<sup>2</sup>

3. The Motion should be dismissed in its entirety as the proffered evidence does not qualify for admission under Rule 115, considering that:

- The proffered evidence was available at trial. The Appellant is only raising issues that were already raised at trial and attempts to call more witnesses and evidence of the same sort he adduced at trial, purportedly to *confirm*<sup>3</sup> his case, thereby impermissibly seeking a trial *de novo*.
- The proffered evidence is irrelevant for the purpose of Rule 115. The

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<sup>1</sup> Motion, para.16 [emphasis added]. See also the Corrigendum, paras. 37-40.

<sup>2</sup> Corrigendum, para. 39.

<sup>3</sup> Motion, paras. 17, 21, 25, 27, and 29.

circumstances of the deaths of Father Gatore, Kalisa and Kabayiza were litigated at trial. The Trial Chamber already decided the matter in favour of the Appellant and rejected prosecution evidence to the effect that these three victims were killed in June 1994.<sup>4</sup> Further, the proffered evidence *could* not, or more appropriately, *would* not have had any impact on the Appellant's conviction and sentence, which is not related to the deaths of these victims.

**B. — Responses to Issues in the Appellant's Motion**

**(i) *The proffered evidence was available at trial***

4. As the Appeals Chamber has repeatedly held that for evidence to be admitted under Rule 115, it must not have been available at trial in any form whatsoever, and the applicant must demonstrate that it could not have been discovered through the exercise of due diligence.<sup>5</sup>

5. The Appellant's arguments, at paragraphs 34 through 36, stem from a misunderstanding of the threshold test and mix up the availability of the evidence itself, *in any form whatsoever*, and that of any source, physical or documentary, of the same. The proffered evidence in the Motion was available at trial. First, it is similar to other evidence adduced at trial and the Appellant fails to give any cogent reason to explain why he chose not to bring more of the same sort of evidence if it was necessary. For example, Defence Witness Shadrack Bizimana, a former Rwandan judge, testified that Father Gatore, as well as Father Nsengiyumva and Kabayiza "were killed in April 1994". He also explained that when those deaths were discussed at Gacaca meetings, no mention was made of Bikindi.<sup>6</sup> Witness XUV, a former *Interahamwe*, stated that he witnessed the killing of Father Gatore on 13 April 1994 and had never heard of Bikindi's involvement."<sup>7</sup>

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<sup>4</sup> J. para. 336

<sup>5</sup> *Prosecutor v. Ntagerura et al.*, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004, para. 9. See also *Prosecutor v. Muvunyi*, Decision on Request to Admit Additional Evidence, 27 April 2007, para. 7.

<sup>6</sup> J. para. 333

<sup>7</sup> *Id.*

6. Second, it is incorrect that the Appellant's purported evidence on ineffective assistance could not have been raised during trial.<sup>8</sup> The Appellant managed to have replaced his previous lead counsel, after the latter's letter informing Prosecution Counsel that he suspected his co-Counsel of trying to influence a prosecution witness.<sup>9</sup> The co-Counsel, whom the Appellant protected and claimed he had confidence in, even after his cross-examination of AKJ<sup>10</sup>, is the same one he now accuses of having been incompetent during trial. The Appellant had ample time and opportunity to raise such an issue, if indeed it was genuine. The Appellant does not give any reason to explain why he chose not to do so during trial, between the appointment of Lead Counsel in this appeal, who was also lead counsel during trial as from 9 May 2007 and the end of the trial, in the Defence Closing Brief, dated 30 April 2008, or during closing arguments, on 26 May 2008.

7. Third, the fact that the Appellant alleges that he recently discovered DKM physically and got to know of DKV's knowledge of Kalisa, does not, in any way, establish that the proffered evidence – from these witnesses or any other sources - was not available at trial or could not have been discovered through the exercise of due diligence. Similarly, the fact that Gacaca proceedings were conducted and obtained after trial judgement was rendered in this case, or that the magazine Dialogue, dated September 1994, was allegedly discovered after the said judgement, does not imply that the purported evidence contained therein was not available at trial in any other form whatsoever. The Appellant makes no cogent demonstration in this regard.<sup>11</sup>

8. Fourth, the Appellant investigated the allegations concerning Kivumu, where the potential witnesses, including the Gacaca judges reside; he cross-examined prosecution witnesses AKK and AKJ. He knowingly called the witnesses he deemed appropriate to support his case, including DVR, QUTI, KMS and Apolline Uwimana, TIER and CQK, HZTX. He, for example, decided not to call DVK, while he admittedly knew about this

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<sup>8</sup> Motion, para. 34.

<sup>9</sup> *Letter to William Egbe from Wilfred Nderitu*, dated 8 February 2007; *Demande de retrait de la Commission d'office du Conseil principal*, 10 February 2007 and *Decision Withdrawing the Assignment of Mr. Wilfred N. Nderitu as Lead Counsel for the Accused Simon Bikindi*, 29 March 2007.

<sup>10</sup> *Letter from Simon Bikindi, re: Demande d'ajournement des audiences dans l'Affaire ICTR 2001-72-T*, 10 February 2007 ; *Requête aux Fins d'Acquittement de Simon Bikindi en Vertu de l'Article 98 bis du Règlement de Procédure et de Preuve*, 15 March 2007, signed by both the Appellant and co-Counsel.

<sup>11</sup> Motion, para. 35.

witness' existence.<sup>12</sup> Contrary to the allegation of lack of competent counsel, Counsel for the Appellant at trial successfully managed to raise doubt as to the deaths of Father Gatore. Even, assuming, *arguendo*, that there were any failings or oversights on the part of the Appellant, Rule 115 does not provide for a mechanism to remedy them on appeal.

9. The Motion should be dismissed on these grounds.

*(ii) The proffered evidence is not relevant to findings material to the conviction or sentence and would not, or even could not, have had any impact on the verdict under appeal*

10. The Appellant's arguments regarding relevance and impact of the proffered evidence are poorly substantiated, and, in any event, they are flawed in law and in fact. He appears to claim that the proffered evidence, which concerns the date or dates of the deaths of Father Gatore, Kalisa and Kabayiza and the claim that witnesses did not mention the Appellant's name during Gacaca proceedings, could have affected the credibility of Prosecution Witnesses AKK and AKJ regarding the date(s) of the deaths of Father Gatore, Kalisa and Kabayiza, in such a way that the Trial Chamber would have necessarily excluded their evidence about the separate incident on the Kivumu-Kayove road, for which he was convicted.

11. In a statement dated 26 February 2009, **Witness DKV** claims that that Father Gatore and Kabayiza were killed in April 1994 and that Bagango, former bourgmester of Kivumu, was primarily responsible for the killings in Kivumu.<sup>13</sup> As for **Witness DKM**, he essentially talks about his own involvement in the genocide, the death of Fathers Gatore and Nsengiyumva and the role of former bourgmester Bagango.<sup>14</sup> In the magazine **Dialogue**, providing a list of priests killed during the genocide, Father Gatore is said to have been killed in April 1994.<sup>15</sup>

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<sup>12</sup> Motion, para. 34. See also *Corrigendum to Confidential Defence Motion to Admit Additional Evidence on Events in Kivumu* ["Corrigendum Motion"] para. 38.

<sup>13</sup> Motion, Annexure "A".

<sup>14</sup> Motion, Annexure "B".

<sup>15</sup> Motion, Annexure "F2".

12. The Appellant does not explain how this proffered evidence is relevant to his conviction for direct and public incitement to commit genocide. First, the Trial Chamber did not accept AKK's evidence regarding the date of the death of Father Gatore. It found that:

[T]he Defence evidence on Father Gatore and Kabayiza's deaths raises reasonable doubt as to whether they were actually killed in June 1994. The Chamber recalls that none of the Prosecution witnesses were eye witnesses to the deaths. While the Chamber has no reason to question the credibility of Witness AKK that Gatore died in June 1994, it considers that the doubt raised by the Defence as to when Father Gatore was killed must weigh in favour of the Accused.<sup>16</sup>

13. Second, the Appellant's conviction and sentence are not based on the deaths of Father Gatore, Kabayiza and Kalisa. He was only convicted for the inchoate offence of direct and public incitement to commit genocide for his acts and utterances on the Kivumu-Kayove road in June 1994, because:

[T]owards the end of June 1994, in Gisenyi prefecture, the Appellant travelled on the main road between Kivumu and Kayove in a convoy of *Interahamwe* and broadcast songs, including his own, using a vehicle outfitted with a public address system. When heading towards Kayove, the Appellant used the public address system to state that the majority population, the Hutu, should rise up to exterminate the minority, the Tutsi. On his way back, the Appellant used the same system to ask if people had been killing Tutsi, who were referred to as snakes.<sup>17</sup>

14. The proffered evidence, allegedly *confirming* the doubt as to when Father Gatore was killed, is therefore irrelevant for the purpose of Rule 115, as it does not relate to "findings material to the conviction or sentence, in the sense that those findings were crucial or instrumental to the conviction or sentence."<sup>18</sup> The Motion should be dismissed on this basis too.

15. Furthermore, even if the proffered evidence, which was available at trial, were deemed, *arguendo*, relevant and credible – and there is no cogent demonstration in this

<sup>16</sup> J. para. 334. See i.e. J. paras. 333 (evidence of Shadrack Bizimana) (Defence Exhibit D.111).

<sup>17</sup> J. paras.281, 422 [emphases added].

<sup>18</sup> *Prosecutor v. Mrksic and Sljivancanin*, Case No. IT-95-13/1-A, Decision on Mile Mrksic's Second Rule 115 Motion, 13 February 2009, para. 7, *Kupreskic et al.* Appeal Judgement ["(AC)"], para. 62, referring to *Prosecutor v. Krajisnik*, Case No. IT-00-39-A, Decision on Appellant Momcilo Krajisnik's Motion to Call Radovan Karadic Pursuant to Rule 115, 166 October 2008, para. 5; *Prosecutor v. Stanisic and Simatovic*, Case No. IT-03-69-AR65.4, Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, 26 June 2008, para. 7.

regard<sup>19</sup>—the Appellant fails to establish that its exclusion would amount to a miscarriage of justice, in that, had the additional evidence been adduced at trial, it *would* have had an impact on the verdict.<sup>20</sup>

16. Concerning the Kivumu-Kayove road incident in June 1994, the Trial Chamber carefully considered the credibility and reliability of Witnesses AKK and AKJ in light of the entire evidence adduced at trial. It already considered that “the doubt raised by the Defence as to when Father Gatore was actually killed does not discredit Witness AKK’s first-hand and articulate evidence on Bikindi’s exhortation to kill Tutsi on his way to Kayove.”<sup>21</sup> In this regard, “Defence Witnesses did not succeed in raising a reasonable doubt regarding the Prosecution evidence”<sup>22</sup> and “the Chamber does not believe Bikindi’s denial of driving around Gisenyi in such a vehicle with a public address system playing his songs in light of the *convincing evidence* of Witnesses AKK and AKJ.”<sup>23</sup> The Trial Chamber therefore properly found that:

[The testimony of AKK and AKJ] corroborates each other on key points. Both witnesses put Bikindi in a vehicle with loudspeakers making anti-Tutsi utterances in a convoy of buses filled with Interahamwe on the road between Kivumu and Kayove in June 1994. Witness AKJ specified that the incident took place at the end of June 1994. Both witnesses were able to recognise Bikindi as they had seen him before.<sup>24</sup>

17. It was open to the Trial Chamber, as a matter of law, to accept some parts of the witnesses’ testimony (concerning the Kivumu-Kayove road incident), while rejecting others (concerning the deaths of Father Gatore, Kalisa and Kabayiza).<sup>25</sup> The proffered evidence cannot disclose any error in this regard.

<sup>19</sup> Motion, paras. 32, 33

<sup>20</sup> *Prosecutor v. Nahimana et al*, Case No. ICTR 99-52-A, Decision on Appellant Jean-Bosco Barayagwiza’s Motions for Leave to Present Additional Pursuant to Rule 115 of the Rules of Procedure and Evidence, 18 December 2006, para. 6 and Decision on Appellant Hassan Ngeze’s Six Motions for Admission of Additional Evidence on Appeal and/or Further Investigation at the Appeal Stage, 23 February 2006, para. 9; *Prosecutor v. Naletilic and Martinovic*, IT-98-34-A, Decision on Naletilic’s Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence, 7 July 2005, para. 15

<sup>21</sup> J. para. 272.

<sup>22</sup> J. para. 277.

<sup>23</sup> J. para. 280.

<sup>24</sup> J. para. 276 [internal references omitted].

<sup>25</sup> *Karera* Appeal Judgement, para. 88; *Seromba* Appeal Judgement, para. 110.

18. According to the Appellant, more evidence from **Gacaca proceedings**<sup>26</sup> and **DKV** that the Appellant's name was not mentioned during Gacaca proceedings<sup>27</sup>, contribute "to raising doubts as to the *likelihood* of Bikindi, a famous individual, having incited killings just before Gatore and Kabayiza were killed in Kivumu, since the killings in Kivumu and their incitement was extensively discussed during Gacaca proceedings."<sup>28</sup> The Appellant's argument is based on mere assumptions and probability. However, evidence, similar to that already considered by the Trial Chamber,<sup>29</sup> that witnesses who testified during Gacaca proceedings against specific accused persons did not mention the name of the Appellant among those who incited Hutus to kill Tutsi in Kivumu, does not show that the Appellant did not commit the offence on the Kivumu-Kayove road, for which he was convicted.<sup>30</sup> Such evidence is not sufficient to disclose any error or demonstrate that the proffered evidence *would* have had any impact on the verdict supported by credible evidence regarding the event on the Kivumu-Kayove road in June 1994, duly accepted by the Trial Chamber.<sup>31</sup>

19. Similarly, the "*Attestation from the Director of the Ecole Normale*"<sup>32</sup> from one Gerard Bahizi who claims that contrary to Witness AKK's assertion that he attended said school in 1992, he did not find his name in the records of the school. This would not have had any impact on the verdict under appeal. Gerard Bahizi himself states that documents were lost and nowhere to be found. As such, the proposed attestation cannot be seen as a definitive statement of fact, reliable and capable of having any impact on AKK's credibility and, more importantly, on the verdict under appeal.

20. Further, in the absence of any argument regarding availability, reliability, relevance, and impact on the verdict, it is not clear what the map and the statement dated 14 February 2009 from one Buhuru, a member of the Appellant's defence team, purportedly on geography and distances<sup>33</sup>, support, and why they should be admitted under Rule 115.

<sup>26</sup> Motion, Annexure "E" ["Gacaca documents"]

<sup>27</sup> Motion, Annexure "A".

<sup>28</sup> Motion, para.26.

<sup>29</sup> See e.g J. para. 333.

<sup>30</sup> Juvénal Kajelijeli v. The Prosecutor, Decision On Second Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 7 March 2005.

<sup>31</sup> J. Para. 272

<sup>32</sup> Motion, Annexure "D".

<sup>33</sup> Motion, Annexure "H".

Notably, upon the Appellant's request, the Trial Chamber conducted a site-visit between 14 and 18 April 2008. Thus, a "map of the road between Goma-Gisenyi-Kivumu-Kayove toward Kibuye" *would* not have made any difference. It is in any event inadmissible under Rule 115. Again, Rule 115 does not provide an opportunity, on appeal, to litigate *de novo* any issue or remedy a party's failings or oversights at trial.

21. In sum, none of the proffered pieces of evidence, regarding the deaths of Father Gatore, Kalisa and Kabayiza, or the contention that witnesses during Gacaca proceedings did not mention the name of the Appellant, is capable of showing any error on the part of the Trial Chamber. None of the proffered pieces of evidence *would*, or even *could* have had any impact on the Trial Chamber's findings that the Appellant directly and publicly incited the killing of Tutsi on the main road between Kivumu and Kayove, in June 1994.

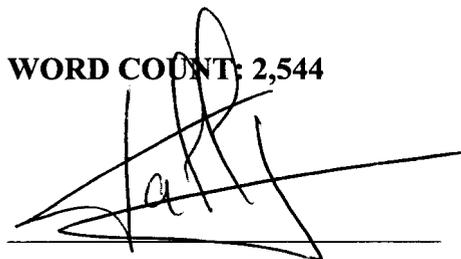
22. The Motion should be dismissed on these grounds too.

#### **RELIEF SOUGHT**

26. On the basis of the foregoing, the Prosecutor respectfully requests that the Motion be dismissed in its entirety.

Respectfully submitted this 29 July 2009, in Arusha, Tanzania.

**WORD COUNT: 2,544**



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