

ICTR-99-50-T  
26-01-2004  
(11998 — 11993)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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Or: ENG

**TRIAL CHAMBER II**

**Before:** Judge Asoka de Zoysa Gunawardana, Presiding  
Judge Khalida Rachid Khan  
Judge Lee Gacuiga Muthoga

**Registrar:** Adama Dieng

**Date:** 23 January 2004

**The PROSECUTOR**  
v.  
**Casimir BIZIMUNGU**  
**Justin MUGENZI**  
**Jerôme BICAMUMPAKA**  
**Prosper MUGIRANEZA**  
*Case No. ICTR-99-50-T*

2004 JAN 26 A 9:00  
JUDICIAL RECORDS

**DECISION ON MOTION FROM CASIMIR BIZIMUNGU OPPOSING TO THE  
ADMISSIBILITY OF THE TESTIMONY OF WITNESSES GKB, GAP, GKC,  
GKD AND GFA**

**Counsels for the Prosecution:**

Paul Ng'arua  
Ibukunolu Babajide  
Elvis Bazawule  
George Mugwanya

**Counsels for the Defence:**

Michelyne C. St. Laurent and Alexandra Marcil for Casimir Bizimungu  
Howard Morrison and Ben Gumpert for Justin Mugenzi  
Pierre Gaudreau and Michel Croteau for Jérôme Bicomumpaka  
Tom Moran and Christian Gauthier for Prosper Mugiraneza

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

**SITTING** as Trial Chamber II, composed of Judge Asoka de Zoysa Gunawardana, Presiding, Judge Khalida Rachid Khan and Judge Lee Gacuiga Muthoga (the “Chamber”);

**BEING SEIZED** of “Motion from Casimir Bizimungu Opposing to the Testimony of Witnesses GKB, GAP, GKC, GKD et GFA” filed on 19 January 2004, (the “said Motion”);

**NOTING** the “Prosecutor’s Response to Motion from Casimir Bizimungu Opposing to the Testimony of Witnesses (GKB), GAP, GKC, GKD et GFA (sic)” filed on 21 January 2004, (the “Response”);

**TAKING INTO CONSIDERATION** the submissions made by both parties when this matter was taken up in open court on 22 January 2004;

**NOTING** the “Decision on Prosecutor’s Request to Leave to Amend the Indictment” issued on 6 October 2003, (the “Decision on the Amended Indictment”);

## **ARGUMENTS OF THE PARTIES**

### *Defence Submissions*

1. The Defence requests the Trial Chamber to declare that the testimony of Witnesses GKB, GAP, GKC, GKD and GFA concerning events that occurred in Ruhengeri *préfecture* are not admissible. The Defence asserts that, “since the testimony of Witness GKB, the Prosecutor is presenting factual elements regarding the Amended Indictment, leaving aside the Trial Chamber’s Decision on the Amended Indictment”. Further, according to the Defence, “in order to justify new allegations against Casimir Bizimungu in the Amended Indictment, [the Prosecutor] tries to avoid the Decision rendered by the Trial Chamber by simply presenting his new elements during the trial”.

2. The Defence argues that, “even if the Appeals Chamber grants the Prosecutor’s Request for Leave to File an Indictment, the trial would very likely be adjourned in order to respect the rights of the accused”.

3. The Defence submits that, “since the current Indictment does not say a word to charge the defendant Casimir Bizimungu in Ruhengeri *préfecture* and since the supporting document does not say a word in this regard, the Defence for Casimir Bizimungu had no occasion to prepare his defence and investigate in relation with theses new allegations”. Quoting the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (the “ICTY”) in the cases of *The Prosecutor v. Kupreskic et al.*<sup>1</sup> and

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<sup>1</sup> *The Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001, para. 323.

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*The Prosecutor v. Brđjanin et al.*<sup>2</sup>, the Defence states that, “the principle that the evidence which should be taken into account by the Chamber in the evaluation of the guilt of an accused should have been specified in the Indictment”.

4. The Defence submits that, “the admissibility of the testimony of the five witnesses mentioned does not respect the requirements of a fair trial”<sup>3</sup> because the facts relating to Ruhengeri *préfecture* are material facts of the case against Casimir Bizimungu, which are not being stated in the Indictment.

5. For the foregoing reasons, the Defence for Casimir Bizimungu requests the Trial Chamber to declare that the testimony of Witnesses GKB, GAP, GKC, GKD and GFA concerning events that occurred in Ruhengeri *préfecture* are not admissible.

#### *Prosecution Submissions*

6. The Prosecutor opposes the motion on the grounds *inter alia* that, “all the evidence sought to be excluded is relevant to the Indictment”. According to the Prosecutor, “the evidence falls squarely within the ambit and scope of the Indictment: it supports the different modes of participation of the accused in the 1994 genocide and other transgressions of international humanitarian law in different parts of Rwanda and on divers dates as alleged in the Indictment. The Indictment extensively details the participation of all four accused under both Articles 6(1) and 6(3) of the Statute of the Tribunal”. The Prosecutor states that the allegation made by the Defence in the said Motion that the evidence from Witnesses GKB, GAP, GKC, GKD, and GFA fall outside the Indictment is erroneous, in that it fails to appreciate and recognise the fact that the Indictment alleges that the accused participated variously and in different parts of Rwanda in the genocide and other crimes committed throughout Rwanda in 1994.

7. The Prosecutor argues that, “the evidence being adduced by the witnesses clearly relate(s) to the crimes with which the accused are charged”. According to him, “the evidence clearly relates to the divers modes of participation of the accused in those crimes as alleged in the Indictment in divers areas and dates. In a nutshell, the evidence relates to the material allegations of the Prosecution case as embodied in the Indictment”.

8. The Prosecutor submits that, “the Indictment meets all requirements of an Indictment, namely that it sets out the material facts of the Prosecution case with enough details to inform the accused clearly of the charges against them so that they may prepare their defence”. The Prosecutor refers to the Tribunal and ICTY jurisprudence and mentions that, “it is not required that the Indictment state the evidence by which such material facts are to be proved”.<sup>4</sup>

<sup>2</sup> *The Prosecutor v. Brđjanin et al.*, Case No. IT-97-36-T, “Decision on Form of Further Amended Indictment and Prosecution Application to Amend”, 26 June 2001, para. 62.

<sup>3</sup> *The Prosecutor v. Kupreskic et al.*, op. cit., paras. 88-89.

<sup>4</sup> *The Prosecutor v. Kupreskic et al.*, op. cit. para. 88; *The Prosecutor v. Elizaphan and Gerard Ntakirutimana*, Cases No. ICTR-96-10-T & ICTR-96-17-T, Judgement, 21 February 2003, paras. 42-43; *The Prosecutor v. Furundija et al.*, Case No. IT-95-17/1-A, Judgement, 21 July 2000, para. 147; *The Prosecutor v. Krnojelac*, Case No. IT-97-25-T, “Decision on the Defence Preliminary Motion on the form

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9. The Prosecutor notes that, "ICTR and ICTY jurisprudence hold that a determination as to whether or not evidence/testimony or a particular fact adduced by a witness is material to the indictment cannot be determined in the abstract, but is dependent on the nature of the Prosecution case".<sup>5</sup> According to the Prosecutor, "all the evidence adduced or about to be adduced by the witnesses is relevant and material to the Indictment, bearing in mind the nature of the Prosecution case, the massiveness and widespread nature of the crimes in Rwanda and the participation of all four accused in these crimes as articulated above, as well as in the Prosecutor's Pre-trial Brief, including their participation in a common or joint criminal enterprise to kill Tutsis".

10. In the alternative, the Prosecutor submits that, "the evidence sought to be adduced, or already adduced in testimony encompasses more particularized and specific evidence to support various aspects of participation of the accused in the 1994 crimes at various locations and at diverse dates as alleged in the Indictment and sufficient notice thereof was furnished to the Accused".

11. Therefore, the Prosecutor prays the Trial Chamber to dismiss the said Motion in its entirety and to admit the testimony of Witnesses GKB, GAP, GKC, GKD and GFA.

#### **DELIBERATIONS**

12. It is observed that there are no specific acts alleged against Casimir Bizimungu in relation to events that took place in Ruhengeri *préfecture* in any part of the Indictment. When questioned by the Trial Chamber, the Prosecutor was unable to show the specific acts pleaded in the Indictment in respect of Casimir Bizimungu in Ruhengeri *préfecture*. The Trial Chamber considers that it is a requirement of the law that an Indictment should contain a statement of material facts setting out the specific acts with which the Accused is charged, in sufficient detail, to enable him to prepare his defence. This forms the essence of a fair trial as guaranteed by the provisions of Article 20 of the Statute.

13. The Chamber's attention has been drawn to the fact that, in the attempt to seek an amendment to the Indictment, the Prosecutor provided details which he omitted to state in the Indictment which was confirmed on 12 May 1999. 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. In this regard, the Trial Chamber would follow the jurisprudence of the Appeals Chamber in the case of *The Prosecutor v. Kupreskic et al.* in respect of this issue, which states 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

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of the Indictment", 24 February 1999, paras. 7 and 12; *The Prosecutor v. Krnojelac*, Case No. IT-97-25-T, "Decision on Preliminary Motion on Form of Amended Indictment", 11 February 2000, paras. 17 and 18, *The Prosecutor v. Brdjanin et al.*, Case No. IT-97-36-T, "Decision on Objections by Momir Talic to the Form of the Amended Indictment", 20 February 2001, para. 18.

<sup>5</sup> *The Prosecutor v. Kupreskic et al.*, op. cit., para. 89.

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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.<sup>6</sup>

14. It is noted that in some paragraphs of the Indictment, it is stated that "in several *préfectures*, including Butare, Kibuye, Kigali, Gitarama and Gisenyi, ministers [...] gave orders to commit, instigated, assisted in committing and did themselves commit massacres of members of the Tutsi population [...]".<sup>7</sup> The Trial Chamber, agrees with the reasoning of the ICTY in the case of *The Prosecutor v. Blaskic*,<sup>8</sup> and considers that phrases such as "including but not limited to" as well as other ambiguous phrases such as "among others" are to be avoided in order to ensure that the Indictment is specific and not too vague for the purposes of identifying the crimes against which the Accused must defend himself.

15. The Trial Chamber is of the view that the failure of the Prosecutor to mention the material facts in the Indictment regarding the involvement of Casimir Bizimungu in the events that took place in Ruhengeri *préfecture* upon which Witnesses GKB and GAP, who have already testified, and Witnesses GKC, GKD and GFA, who are yet to be called, leads to the conclusion that the said testimony should be disregarded in respect of Casimir Bizimungu.

16. In the particular circumstances of this case and taking into consideration the facts as alleged in the Indictment, which was confirmed in 1999, the Prosecutor is directed not to lead any evidence in relation to the events involving Casimir Bizimungu in Ruhengeri *préfecture* from Witnesses GKC, GKD and GFA.

17. Furthermore, the Trial Chamber is of the view that an objection of this type should have been raised as soon as possible, at the minimum before the commencement of the evidence of the disputed witnesses.

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<sup>6</sup> *The Prosecutor v. Kupreskic et al.*, op. cit., para. 88.

<sup>7</sup> Indictment, para. 6.30.

<sup>8</sup> *The Prosecutor v. Blaskic*, Case No. IT-95-14-T, "Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/lack of Adequate Notice of Charges)", 4 April 1997, paras. 22-24.

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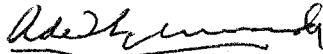
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18. Therefore the Trial Chamber observes that the Defence should have presented the said motion before GKB's testimony was taken. Nevertheless, in the interest of justice, the Trial Chamber now considers that this decision should also apply to the evidence given by Prosecution Witnesses GKB as well as GAP on the events involving Casimir Bizimungu in Ruhengeri *prefecture*.

**FOR THE ABOVE REASONS, THE TRIAL CHAMBER**

**GRANTS** the said Motion.

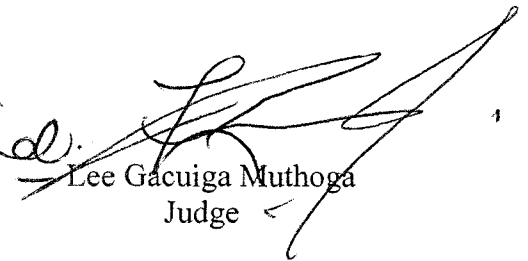
Arusha, 23 January 2004



Asoka de Zoysa Gunawardana  
Presiding Judge



Khalida Rachid Khan  
Judge



Lee Gacuiga Muthoga  
Judge

