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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER III

Before Judges: Andrésia Vaz, Presiding
Flavia Lattanzi
Florence Rita Arrey

Registrar: Adama Dieng

Date: 30 April 2004

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA
André RWAMAKUBA

Case No. ICTR--98-44-T

DECISION ON THE DEFENCE MOTION TO STRIKE TESTIMONY OF WITNESSES GBG AND GBV

Rule 89 of the Rules of Procedure and Evidence

Defence Counsel:
Peter Robinson

Defence Counsel of the Co-Accused:
Dior Diagne and Félix Sow
Charles Roach and Frédéric Weyl
David Hooper and Andreas O'Shea

Office of the Prosecutor:
Don Webster
Dior Sow Fall
Holo Makwaia
Gregory Lombardi
Bongani Dyani
Sunkarie Ballah-Conteh
Tamara Cummings-John
Ayodeji Fadugba

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("Tribunal"),

SITTING as Trial Chamber III, composed of Judges Andrésia Vaz, Presiding, Flavia Lattanzi and Florence Rita Arrey ("Chamber");

BEING SEIZED of the "Motion to Strike Testimony of Witnesses GBG and GBV" submitted by the Defence for Joseph Nzirorera ("Defence") on 15 March 2004 ("Motion");

CONSIDERING the Prosecutor's Response to the Motion filed on 22 March 2004 ("Response");

CONSIDERING the Reply by the Defence filed on 24 March 2004 ("Reply");

CONSIDERING the Statute of the Tribunal ("Statute") and the Rules of Procedure and Evidence ("Rules");

NOW DECIDES, pursuant to Rule 72 (A) of the Rules, solely on the basis of the written briefs filed by the parties.

I. Parties' submissions

Defence Motion and Reply

1. The Defence moves the Chamber for an order striking the testimony of Witnesses GBG and GBV and precluding any reliance on such testimony in any judgement rendered on the basis of the Amended Indictment of 18 February 2004 ("Amended Indictment"). In its Reply, the Defence clarifies that the requested order should strike all references to meetings that GBG and GBV allegedly attended at Gisesero and Ruhengeri stadium.

2. The Defence argues that, under the Amended Indictment, the testimony of Witnesses GBG and GBV with respect to gatherings in 1992 and 1993 lacks relevance, citing in support paragraphs 16 to 16.3, 22, 24 to 24.6 from the Amended Indictment.

3. In particular, the Defence points out that neither the meeting that, according to GBG, took place towards the end of 1992 at the football pitch at Gisesero near the office of Mukingo *commune* nor the two meetings of the MRND that, according to GBV, took place at the Ruhengeri stadium in 1993 are specifically charged in the Amended Indictment.

4. The Defence submits that the Prosecution had the opportunity to specify all of the meetings it wished to be considered and chose not to include the previously mentioned gatherings in its Amended Indictment. It further argues that admitting testimony about

uncharged events would compromise the purpose for which the Amendment of the Indictment was authorized.

5. The Defence declares that it intends to call eight witnesses whom it expects to testify that the alleged meetings did not occur.

Prosecutor's Response

6. The Prosecutor moves the Chamber to dismiss the Motion, which he perceives as a mere repetition of previous requests. He recalls the Chamber's decisions of 3 and 4 December 2003 dismissing the Defence requests to disregard parts of GBG's and GBV's testimony. He further argues that, by submitting these requests, the Defence has waived its right to challenge GBG's and GBV's testimony on any further grounds. He asserts that the indictment applicable in December 2003 did not contain allegations of specific meetings in 1993, either. The Prosecutor points out that the Defence failed to raise its objections to GBG's and GBV's testimony as soon as possible.

7. On the merits, the Prosecutor submits that he does not need to plead every detail in the indictment. He argues that evidence on events which occurred before 1994 can be relevant. He points out that the challenged testimony provides context and background on the creation of the Interahamwe, the status of the Accused in the community and the nature of the MRND party state.

8. The Prosecutor recalls that, even prior to February 2004, the Accused had been on notice that the allegations against him would refer to events in Ruhengeri and encompass facts of the nature as raised by GBG and GBV.

9. The Prosecutor considers that the Motion is frivolous and constitutes an abuse of process. He calls for the Defence to be sanctioned accordingly, pursuant to Rule 73 (F).

II. Deliberations

10. The Chamber recalls that the Defence requests of 3 December 2003 with regard to GBG and GBV were based on specific grounds: The former request argued that certain parts of GBG's testimony related to undisclosed elements[1]; the latter maintained that certain parts of GBV's testimony lacked relevance under the then valid indictment[2]. Conversely, the current Motion is motivated by arguments which clearly and solely pertain to the Amended Indictment. The Defence was in no position to raise these arguments at the time when the challenged testimony was given. The Chamber is satisfied that, by its requests of 3 December 2003, the Defence did not waive its right to challenge the testimony of GBG and GBV on the grounds set forth in its current Motion.

[1] Transcripts of 3 December 2003, page 2 line 9-12 (French version).
2 Transcripts of 3 December 2003, page 79 line 32 -page 80 line 3 (French version).

11. The Chamber notes that, as far as the filing of the Motion on 15 March 2004 is concerned, the Defence has discharged its duties in a timely manner. The time elapsed since the Witnesses' actual testimony is irrelevant since the grounds raised in the Motion for challenging the testimony could not possibly have been submitted before the Prosecutor's filing of the Amended Indictment. The Chamber is of the view that, in the month following this filing, the Defence discharged its duties by submitting numerous preliminary motions. There is no indication that the Defence lacked diligence or was procrastinating in the filing of its current request.

12. The Chamber observes that the Prosecutor's submissions relating to pre-1994 evidence are not pertinent. The current Motion does not raise the issue of the Tribunal's temporal jurisdiction. The Defence rather submits that the disputed events have not been explicitly pleaded in the Amended Indictment.

13. For all these reasons, the Chamber is satisfied that the Motion needs to be addressed on its merits.

14. With respect to the legal principles underlying its Decision on the Motion, the Chamber recalls

> (i) that it is a well-entrenched legal principle that any indictment has to give the accused notice in a sufficiently precise and detailed way to enable him to prepare his defence and to avoid prejudicial surprise[3];
>
> (ii) that the Chamber may admit any relevant evidence which it deems to have probative value; when deciding on the admissibility of evidence, the Chamber applies the rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law, without being bound by national rules of evidence (see Rule 89 of the Rules).

15. On the merits of the Motion, the Chamber observes that the Amended Indictment refers explicitly to numerous meetings[4]. Besides, the Prosecutor anticipated in his pre-trial brief of 27 October 2003 that GBG would testify on pre-1994 events and GBV would testify on Joseph Nzirorera's involvement in MRND meetings[5].

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3 This principle is constantly applied by the Chambers of both International Tribunals, see e.g. *The Prosecutor v. Rukundo*, Case No. ICTR-2001-70-I, Decision on Preliminary Motion, 26 February 2003, par. 22 and *The Prosecutor v. Bizimungu,* Case No. ICTR-99-50-T, Decision on Motion from Casimir Bizimungu to the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD and GFA, 23 January 2004, par. 12 and *The Prosecutor v. Kupreskic et al,* Case No. IT-95-16-A, Judgment, 23 October 2001, par. 88.

4 See Amended Indictment, par. 13, 16, 22 - 26.3, 32.1, 32.3, 33, 33.1,

5 "Prosecutor's supplemental pre-trial filing for supplemental pre-trial brief of 13 October 2003, Summaries of anticipated testimony and lists of exhibits", p. 3 and 4.

16. The Chamber observes that none of the allegations detailed in the Amended Indictment or in any of the pre-trial briefs refers explicitly to any specific meetings held in 1992. The Chamber has therefore thoroughly considered the question whether the Accused had received sufficient notice that, during trial, he would have to confront any witnesses who give evidence that he attended specific meetings in 1992. The Chamber considers that, at a later stage of the proceedings, it might have to address the issue whether it is estopped to take cognizance of evidence on meetings held in 1992.

17. With respect to the alleged meetings in 1993, the Chamber recalls the Appeals Chamber's Decision cited by the Defence which confirms that, under the given circumstances, the authorization of the Amendment is intertwined with the question of how to narrow the scope of the allegations and render them more specific[6]. The Chamber considers that the testimony of Prosecution witnesses should therefore not amplify the scope of allegations. In its decision of whether or not to accept certain evidence presented during trial, the Chamber will not circumvent the purpose that the Appeals Chamber established for the authorization of the Amended Indictment.

18. The Chamber observes that the listing of specific meetings in the Amended Indictment with respect to 1993 might create for the Accused the reasonable expectation that these specific meetings are the ones imputed to him and that, during trial, he will have to face evidence with respect to these very meetings. At the same time, the specification of meetings in 1993 creates reasonable doubts as to whether the Prosecutor might surprise the Accused in a prejudicial way, if he elicits evidence on any other meetings in 1993.

19. The Chamber is of the view that there may be reasonable doubts whether the standards that govern the degree of detail required in an indictment impose on the Prosecutor the obligation to specifically mention the meetings of the MRND at the Ruhengeri stadium in 1993 if he intends to present evidence on them. When evaluating the probative value of all evidence presented during the trial, the Chamber will assess whether or not the Prosecutor has failed to comply with this potential obligation, and whether or not it is unfair for him to have led evidence relating to these very meetings. However, the Chamber notes that evidence on the historical and social background of the events that took place in Rwanda in 1994 can be of interest to the Chamber even if it does not refer to specific charges.

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6 *Prosecutor v. Karemera*, Case No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003, Denying Leave to File an Amended Indictment, 19 December 2003, par. 15: "Although amending an indictment frequently causes delay in the short term, the Appeals Chamber takes the view that this procedure can also have the overall effect of simplifying proceedings by narrowing the scope of allegations, by improving the Accused's and the Tribunal's understanding of the Prosecution's case, or by averting possible challenges to the indictment or the evidence presented at trial. The Appeals Chamber finds that a clearer and more specific indictment benefits the accused, not only because a streamlined indictment may result in shorter proceedings, but also because the accused can tailor their preparations to an indictment that more accurately reflects the case they will meet, thus resulting in a more effective defence."

20. In the light of the foregoing observations, the Trial Chamber is of the view that, at the current stage of proceedings and after having heard the Witnesses, there is no need to strike the disputed portions of their testimony from the transcripts.

21. As stated in the Rules, the Chamber decides on the admissibility of certain evidence on the basis of the rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law[7].

22. The Chamber notes that the transcripts reflect what has been said at trial without determining the Chamber's evaluation of the probative value of the evidence at a later stage of the proceedings. The fact that a certain portion of a testimony remains on the trial's record does not exclude the Chamber from considering it to be irrelevant under the indictment that will ultimately be the basis of its judgment.

23. Moreover, the Chamber recalls that procedural rules from other jurisdictions that may be reasonable and legitimate within a jury trial system do not necessarily apply to the proceedings before this Tribunal[8]. An order to strike testimony can make sense in a jury trial in order to clarify upon which parts of the testimony the jury may rely. On the other hand, such a clarification is not necessary with respect to the judges of this Tribunal[9].

FOR THE ABOVE REASONS,
THE CHAMBER
DISMISSES THE MOTION.

Arusha, 30 April 2004

Andrésia Vaz	Flavia Lattanzi	Florence Rita Arrey
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

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[7] See Rule 89 of the Rules.

[8] Cf. *The Prosecutor v. Bagosora,* Case No. ICTR-98-41-T, Decision on Motions by Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses, 9 September 2003, par. 30.

[9] Cf. *The Prosecutor v. Stanislav Galić,* Case No. IT-98-29-T, Decision on Galić's Application pursuant to Rule 15(B), 28 March 2003, par. 15 f.: "This concern [...] is reflected in a number of national legal systems' rules of evidence. The Bureau does not believe that these concerns apply in the context of trials before the ICTY [...]. Judges, not lay jurors, are the triers of fact at the ICTY."