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21-10-2004  
(18648-18639)

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

18648  
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Or: ENG

TRIAL CHAMBER II

**Before:** Judge Khalida Rachid Khan, Presiding  
Judge Lee Gacuiga Muthoga  
Judge Emile Francis Short

**Registrar:** Mr Adama Dieng

**Date:** 21 October 2004

JUDICIAL RECORDS/ARCHIVES  
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**The PROSECUTOR**  
v.  
**Casimir BIZIMUNGU**  
**Justin MUGENZI**  
**Jérôme-Clément BICAMUMPAKA**  
**Prosper MUGIRANEZA**  
*Case No. ICTR-99-50-T*

**DECISION ON BICAMUMPAKA'S MOTIONS TO DECLARE PARTS OF THE  
TESTIMONY OF WITNESSES GHT, GHY AND GHS INADMISSIBLE**

**Office of the Prosecutor:**

Mr. Paul Ng'arua  
Mr. Ibukunolu Babajide  
Mr. Elvis Bazawule  
Mr. Justus Bwonwonga  
Mr. Shyamlal Rajapaksa

**Counsel for the Defence:**

Ms. Michelyne C. St Laurent and Ms. Alexandra Marcil for **Casimir Bizimungu**  
Mr. Howard Morrison, QC and Mr. Ben Gumpert for **Justin Mugenzi**  
Mr. Pierre Gaudreau and Mr. Michel Croteau for **Jérôme-Clément Bicamumpaka**  
Mr. Tom Moran for **Prosper Mugiraneza**

18647

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

**SITTING** as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the “Trial Chamber”);

**SEISED** of

(i) “Bicamumpaka’s Motion to Declare Parts of the Witnesses GHT and GHY Testimonies Inadmissible”, filed on 15 September 2004 (the “Motion Concerning Witnesses GHT and GHY”);

(i) “Bicamumpaka’s Motion to Declare Parts of the Witnesses GHS Testimony Inadmissible”, filed on 27 September 2004 (the “Motion Concerning Witness GHS”);

**HAVING RECEIVED**

(iii) The “Prosecutor’s Extremely Urgent Response to Jerome Bicamumpaka’s Motion to Declare Parts of the Witness GHT and GHY Testimonies Inadmissible”, filed on 17 September 2004 (the “Response to the Motion Concerning Witnesses GHT and GHY”);

(iv) “Bicamumpaka’s Reply to the Prosecutor’s Response to the Motion to Declare Parts of the Witness GHT’s and GHY’s Testimony Inadmissible”, filed on 22 September 2004 (the “Reply to the Response to the Motion Concerning Witnesses GHT and GHY”);

(v) The “Prosecutor’s Extremely Urgent Response to Jerome Bicamumpaka’s Motion to Declare Parts of the Witness GHS Testimony Inadmissible”, filed on 4 October 2004 (the “Response to the Motion Concerning Witness GHS”);

**SUBMISSIONS**

*Relief Sought*

1. The Defence requests the Chamber to direct the Prosecution not to lead any evidence from Witnesses GHT and GHY (in relation to events occurring in Kabuga *commune*) or from Witness GHS (in relation to events involving the Accused in Kigali city).

*Supporting Arguments*

2. The Defence argues that to admit witness testimonies and other evidence in relation to material facts not pleaded in the indictment violates the basic rights of an Accused to be informed in detail of the nature and cause of the charges against him so as to adequately prepare his defence, as guaranteed by Articles 17(4) and 20(4) of the Statute of the Tribunal (the “Statute”) and Rule 47(C) of the Rules of Procedure and Evidence (the “Rules”).



3. The Defence submits that the Indictment does not specify any events in Kigali beyond those concerning the *Centre Hospitalier de Kigali* (CHK). The Indictment contains general statements in paragraphs 6.38 and 6.39 concerning the role of the Rwandan Army (FAR) and militiamen in Kigali, but not the Ministers of the Government generally, nor Bicomupaka specifically.<sup>1</sup> Therefore, the Indictment does not provide sufficient notice of charges based on events in Kabuga *commune* as alleged by Witnesses GHT and GHY or charges based on events in Kigali *préfecture* or city as alleged by Witness GHS.

4. The Defence submits that references in the Indictment to Kigali are distinguishable from references to Gitarama, which speak generally of criminal activity by Ministers and members of the Government. Moreover, the references to Kigali are inapposite, as they contain no general reference to criminal activity by the civilian government or its ministers, beyond the alleged events occurring at CHK.

5. The Defence submits that according to the jurisprudence of the Tribunal, a witness may not testify on facts not pleaded with sufficient particularity in the Indictment,<sup>2</sup> and, witness statements are insufficient in and of themselves to set out the material facts alleged against the Accused, in order to determine evidence that is admissible during trial.<sup>3</sup>

6. The Defence states that it should not be required at this stage of the proceedings to revisit its investigations into a new charge introduced at this stage. Any such investigation would be hasty, inadequate, and would prejudice the rights of the Accused to a fair trial.

#### *Prosecution Response*

7. The Prosecution opposes the granting of both Motions. The Indictment contains allegations specifically dealing with the Accused's criminal activities in Kigali, besides those the Defence highlights in its Motions.<sup>4</sup> The Prosecution categorises its case as one where the Accused perpetrated and is responsible for widespread killings and other transgressions of international humanitarian law over a period of time *throughout* Rwanda, not excluding any *préfecture*, and including Kigali. It identifies paragraphs 5.19, 5.22, 5.25, 6.10 and 6.30 as being the relevant paragraphs of the Indictment alleging the criminal conduct of the Accused in Kigali to which the testimony of Witnesses GHT, GHY and GHS is material, and go to provide proof.

<sup>1</sup> *Motion Concerning Witnesses GHT and GHY*, para. 8; *Motion Concerning Witness GHS*, para. 8.

<sup>2</sup> The Defence cites *Prosecutor v. Niyitegeka*, Case No. ICTR-99-14-A, Judgement [AC], 9 July 2004, para. 193, and *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16, Judgement [AC], 23 October 2001, para. 88 as authority for its proposition.

<sup>3</sup> The Defence cites *Prosecutor v. Niyitegeka*, Case No. ICTR-99-14-A, Judgement [AC], 9 July 2004, para. 221, and *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-T, Judgement [TC], 25 February 2004, para. 66 as authority for its proposition.

<sup>4</sup> *Response to the Motion Concerning Witnesses GHT and GHY*, para. 6; *Response to the Motion Concerning Witness GHS*, para. 6.



8. The Prosecution submits that the relevance, or materiality of evidence to an indictment and the degree of specificity of an indictment depend upon the nature of the Prosecution's case, the nature or mode of the Accused's participation in the alleged crime, the complexity of the crimes, and the geographical area and period over which the crimes are committed. Taking this into consideration, the paragraphs of the Indictment identified adequately set out the facts in Witness GHT, GHY and GHS's statements. Their testimony is thus admissible.

9. The Prosecution provides the following summary of the contents of allegations of criminal conduct against the Accused contained in the statements of Witnesses GHT, and GHY:<sup>5</sup>

(i) GHT states that on 7 April 1994, Jerome Bicomumpaka arrived in her father in law's house in Kabuga (Kigali rural) in a white pick up vehicle carrying five soldiers who were armed with rifles. The vehicle was loaded with weapons. Jerome Bicomumpaka then asked one Abubacar Nduwayezu who at the time was a motorcycle taxi driver to go and help him distribute weapons to the Interahamwe militiamen so that "the latter could begin to kill the Tutsis". Jerome Bicomumpaka cautioned GHT's father in law's family members to stay away from the Sorghum fields to avoid being killed because "the Tutsi massacres are going to begin".

(ii) GHY states that a few days following 6 April 1994 in Kabuga (Kigali rural), her brother in law informed her that Jerome Bicomumpaka had ordered the killing of all Tutsis.

(iii) GHY further stated that a motor vehicle belonging to the Ministry of Justice arrived in her home carrying Interahamwe and weapons that were unloaded and kept in the house of a named person. Thereafter GHY saw Jerome Bicomumpaka get out of the same vehicle and went into the named person's residence where the weapons were earlier unloaded and kept.

(iv) GHY states that killings reached their peak in the locality after the weapons were distributed.

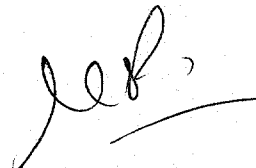
And in relation to Witness GHS:<sup>6</sup>

(v) Witness GHS worked for a printing company in Kigali as secretary and semi-manager. Witness got to know accused Jerome Bicomumpaka in 1992 when the latter started bringing his private documents and MDR party documents to be published and photo-copied. Witness used to type the documents brought by Jerome Bicomumpaka for them to be printed and remembers contents of the documents typed.

(vi) Witness states that in 1993, after the death of President (Ndadaye) of Burundi, documents bearing the following titles were brought by Jerome Bicomumpaka to be printed.

<sup>5</sup> Response to the Motion Concerning Witnesses GHT and GHY, para. 11.

<sup>6</sup> Response to the Motion Concerning Witness GHS, para. 11.



*“MDR is against the Arusha Accords”  
“We shall not get into the same trap as Burundi”  
“We shall fight the Inyenzi (Tutsi) to the last one.”*

(vii) In 1994, after the Kabusunzu Congress, it was publicly announced that MDR Power had separated from MDR Jerome Bicamumpaka in the company of others including Marie Vianney and Nkezabera who attended the Kabusunzu meeting came to the office of the witness to print the Statute of MDR Power.

(viii) In 1994 March, witness overheard a conversation between the Director of Kangura Newspaper, Hassan Ngeze, and Jerome Bicamumpaka, to the effect that in 1959, “we forgot to eliminate the children, when you kill a snake you have to hit the head and you have to find and destroy the eggs. In 1959, we didn’t destroy the eggs but this time we should hit the head of the snake and find and eliminate all the eggs.”

10. The Prosecution submits that no prejudice has been caused to the Accused, and the latter cannot be surprised, since the statements of Witnesses GHY and GHT “were disclosed in 2000 and in the Prosecutor’s application for variation of witnesses dated 24 May 2004”<sup>7</sup> and “the redacted English statement of Witness GHS was disclosed in 2000 and the French in 2002. The unredacted versions of both languages were disclosed on 8 October 2003. On 20 October 2003 the Prosecutor disclosed the evidence of this witness in summary form [...]”<sup>8</sup>.

#### *Defence Reply*

11. In Reply to the Response to the Motion concerning Witnesses GHT and GHY the Defence submits that the paragraphs cited by the Prosecution therein as paragraphs charging events against the Accused in Kigali are insufficient. They inadequately set out the events in Kigali mentioned in the testimony of Witnesses GHT and GHY. It further submits that:

- (i) Paragraph 5.19 speaks only of the role of MRND party members in distributing weapons to militia, and that the Accused was not a member of the MRND party;
- (ii) Paragraph 5.22 charges “some members of government”, but not all, and makes no mention of either the Accused or events in Kigali;
- (iii) Paragraph 5.25 speaks of the role of UNAMIR in introducing the Kigali Weapons Security Area- events which have no connection with the testimony of Witnesses GHT and GHY;
- (iv) Paragraph 6.10 mentions “numerous cabinet members”, but makes no specific mention either of the Accused nor events in Kigali.

<sup>7</sup> Response to the Motion Concerning Witnesses GHT and GHY, para. 19

<sup>8</sup> Response to the Motion Concerning Witness GHS, para. 19



(v) Paragraph 6.30 mentions Kigali only as part of a list of prefectures, in which a list of individuals “knew or had reason to know that their subordinates had committed or were preparing the commit errors [sic], and failed to prevent these crimes from being committed or to punish the perpetrators thereof.” The paragraph does not sufficiently specify the events alleged by Witnesses GHT and GHY in Kigali.

12. The Defence submits that the Prosecution has failed to address the Defence submissions in the Motion Concerning Witnesses GHT and GHY, and reiterates that the events in Gitarama, and their specification in the Indictment, are factually distinguishable from events occurring in Kigali.

## DELIBERATIONS

### *Preliminary Matters*

13. The Trial Chamber will decide the Motion concerning Witnesses GHT and GHY and the Motion concerning Witness GHS together as the issues involved for determining the admissibility of the testimony of the three witnesses and the submissions from the Parties thereon are similar.

14. Although the Motion Concerning Witness GHT and GHY was filed prior to the testimonies of Witnesses GHT and GHY, upon the directions of the Trial Chamber, Witnesses GHT and GHY testified without prejudice to the consideration of, and subject to, the outcome of the present Decision. Witness GHS has not yet testified before the Trial Chamber.

### *Analysis*

15. The Trial Chamber is of the view that the Appeals Chamber Decision in the *Nyitegeka* case has accurately stated the position of both Tribunals on the issue of sufficiency and specificity of the Indictment. The Trial Chamber considers the following paragraphs as being particularly relevant:<sup>9</sup>

193. The law governing challenges to the failure of an Indictment to provide notice of Material Facts is set out in detail in the ICTY Appeals Chamber’s Judgement in *Kupreškić*. The *Kupreškić* Judgement stated that Article 18(4) of the ICTY Statute, read in conjunction with Articles 21(2), 4(a) and 4(b), “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.”<sup>10</sup> *Kupreškić* discussed several factors that may bear on the determination of materiality, although whether certain facts are “material” ultimately depends on the nature of the case. If the Prosecution Charges personal physical commission of criminal acts, the Indictment should set

<sup>9</sup> *The Prosecutor v. Eliezer Niyitegeka*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004

<sup>10</sup> *Kupreškić et al.* Appeal Judgement, para. 88.



forth “the identity of the victim, the time and place of the events and the means by which the acts were committed.”<sup>11</sup>

[...]

195. Failure to set forth the specific Material Facts of a crime constitutes a “material defect” in the Indictment.<sup>12</sup> Such a defect does not mean, however, that trial on that Indictment or a conviction on the unpleaded material fact necessarily warrants the intervention of the Appeals Chamber. Although *Kupreškić* stated that a defective Indictment “may, in certain circumstances” cause the Appeals Chamber to reverse a conviction, it was equally clear that reversal is not automatic.<sup>13</sup> *Kupreškić* left open the possibility that the Appeals Chamber could deem a defective Indictment to have been cured “if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the Charges against him or her.”<sup>14</sup>

16. Further, the Trial Chamber notes the decision of the Appeals Chamber in the *Nyiramasuhuko* case<sup>15</sup> where it stated:

11. [...] for an indictment to be pleaded with sufficient particularity, it must set out the material facts of the Prosecution case with enough detail to inform the defendant clearly of the charges against him or her so that he or she may prepare his or her defence. The required degree of specificity depends very much on the facts of the case and the nature of the alleged criminal conduct. If an indictment does not plead the material facts with sufficient detail, this can be remedied in certain circumstances at trial, for instance, by amendment of the indictment. Where a defect remains, the question then arises whether the trial of the accused was rendered unfair.<sup>16</sup>

12. [...] the failure to specifically plead certain allegations in the indictment does not necessarily render the evidence inadmissible. The Trial Chamber has the discretion to under Rule 89(C) to admit any evidence which it deems to have probative value, to the extent that it may be relevant to the proof of the other allegations specifically pleaded in the Indictment.

17. As the Defence submits, *Kabuga commune* is not specifically mentioned in the Indictment. However, the Trial Chamber considers that this does not necessarily prevent the admission of evidence relating to events occurring in *Kabuga commune*.<sup>17</sup> In line with the Appeals Chamber reasoning, the Trial Chamber must determine whether the paragraphs in the Indictment clearly set out the charges against the Accused, including

<sup>11</sup> *Id.*, para. 89.

<sup>12</sup> *Id.*, para. 114.

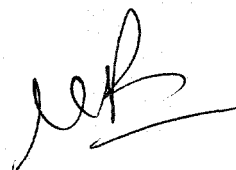
<sup>13</sup> *Ibid.* (emphasis added).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Nyiramasuhuko v. Prosecutor*, Case No ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko’s Request for Reconsideration (AC), 27 September 2004.

<sup>16</sup> (Internal footnote omitted).

<sup>17</sup> See for example *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-T, Decision on the Prosecutor’s Motion to Add Witnesses GKI, GKJ and GKL (TC), 6 February 2002, para. 13.



the material facts underpinning the charges against the Accused. Where the Indictment does set out the material facts underpinning the charges, but is lacking in specificity on the details, the Trial Chamber may look to the pre-trial disclosure to determine whether the Accused would be prejudiced by the admission of the evidence.

18. Unredacted disclosure of the statements of Witnesses GHT and GHY was made on 8 October 2003. The Pre-Trial Brief was filed on 20 October 2003.<sup>18</sup> The Trial Chamber finds that the material facts concerning the distribution of weapons by members of the cabinet of the interim government, of which the Accused was a member, are set out in paragraphs 5.22, and 6.10 read together with 6.9 of the Indictment. The witness statements of Witnesses GHT and GHY and the Pre-Trial Brief gave further details on the material facts concerning the Accused's alleged particular involvement in distribution of weapons and set out the evidence against the Accused in detail.

19. The Trial Chamber further notes its previous ruling on the addition of these witnesses to the Prosecution Witness list:

Regarding the addition of Witnesses DCH, GHT, and GHY who were inadvertently omitted in the Prosecutor's Witness list, the Trial Chamber notes that they had nonetheless been included in the Prosecutor's Pre-Trial Brief of 20 October 2003. In addition, Witness GHT's statement was disclosed on 15 December 2000; Witness GHY's statement was disclosed on 20 August 2002; and Witness DCH's statement was disclosed on 19 December 2003. The Trial Chamber is of the view that the addition of these witnesses does not constitute an addition *per se* but is to be considered as a correction of a mistake by the Prosecutor. Further, the Trial Chamber notes that the Defence has had sufficient notice of the particulars of these witnesses and of the content of their prospective testimony, and will not be unduly prejudiced by their addition to the Prosecutor's Witness List.<sup>19</sup>

20. Thus, this issue has already received the attention of the Trial Chamber, and at that time the Parties were given the opportunity to make their submissions. The Trial Chamber recalls that the Defence for Bicomumpaka did not oppose this Motion.

21. The Trial Chamber is thus satisfied that the Accused has received adequate notice of the case against him in a clear, timely and consistent manner and that no prejudice will be caused to the Accused by the admission of the testimonies of Witnesses GHT and GHY.

22. Unredacted disclosure of the statements of Witness GHS was made on 8 October 2003. The Pre-Trial Brief was filed on 20 October 2003.<sup>20</sup> The paragraphs of the Indictment cited by the Prosecution in its Response to the Motion concerning Witness

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<sup>18</sup> Prosecution's Pre-Trial Brief Pursuant to Rule 73 bis (B)(i), filed on 20 October 2003; See particularly para. 198 therein.

<sup>19</sup> *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosecutor's Very Urgent Motion Pursuant to Rule 73 bis (E) for Leave to Vary the Prosecutor's List of Witnesses (Confidential) (TC), 23 June 2004, para. 20

<sup>20</sup> Prosecution's Pre-Trial Brief Pursuant to Rule 73 bis (B)(i), filed on 20 October 2003; See particularly para. 275-277 therein.





GHS<sup>21</sup> are inapt. According to the Prosecution's Pre-Trial Brief, Witness GHS will be called to establish Conspiracy to Commit Genocide, Complicity in Genocide, and Direct and Public Incitement to Genocide.<sup>22</sup> The Trial Chamber also notes the content of the Witness Statement of GHS dated 10 April 2000, where the Accused is alleged to have had the following conversation with Hassan Ngeze, Editor of *Kangura* newspaper:

**Bicamumpaka:** *I hope you did not forget anything.*

**Ngeze:** *Don't worry – I did not leave out a thing, my writing is very solid.*

**Bicamumpaka:** *Be sure that it is very strong, because this time we have to eliminate all the cockroaches. In 1959 we forgot to eliminate the children. When you kill a snake you have to hit the head and you have to find and destroy the eggs. In 1959 we didn't destroy the eggs, but this time we should hit the head of the snake and find and eliminate all the eggs.*

23. The Trial Chamber finds that the material facts concerning the involvement of members of the government, which includes the Accused, in Direct and Public Incitement to Genocide by spreading messages of Hutu power and ethnic hatred and violence through the use of the media, including *Kangura* newspaper, are set out in paragraphs 5.1, 5.3, 5.10 and 5.11 of the Indictment. The witness statements of Witness GHS and the Pre-Trial Brief gave further details on the material facts concerning the Accused's alleged particular involvement in the above-mentioned crime and set out the evidence against the Accused in detail.

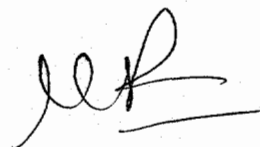
24. The Trial Chamber is thus satisfied that the Accused has received adequate notice of the case against him in a clear, timely and consistent manner and that no prejudice will be caused to the Accused by the admission of the testimonies of Witness GHS.

25. The Trial Chamber is thus satisfied that the evidence of Witnesses GHT and GHY, and the anticipated evidence of Witness GHS is relevant, and that no prejudice is caused to the Accused by their admission.

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<sup>21</sup> *Response to the Motion Concerning Witness GHS*, para. 12

<sup>22</sup> Prosecution's Pre-Trial Brief Pursuant to Rule 73 bis (B)(i), filed on 20 October 2003, para. 275-277; Witness Summary, p.126.

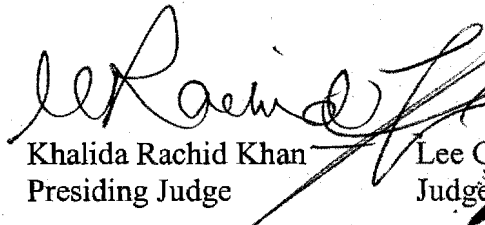


**FOR THE ABOVE REASONS, THE TRIAL CHAMBER**

**DENIES** the Motion Concerning Witnesses GHT and GHY;

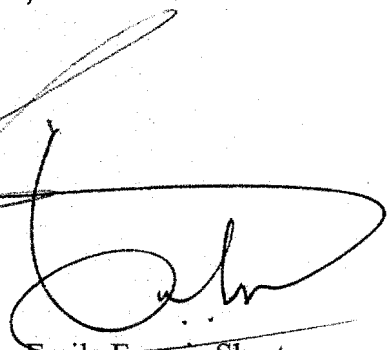
**DENIES** the Motion Concerning Witness GHS.

Arusha, 21 October 2004



Khalida Rachid Khan  
Presiding Judge

Lee Gacigira Muthoga  
Judge



Emile Francis Short  
Judge

