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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Aydin Sefa Akay

Registrar: Mr. Adama Dieng

Date: 3 November 2009

THE PROSECUTOR

v.

Jean-Baptiste GATETE

Case No. ICTR-2000-61-T

JUDICIAL DEPARTMENT
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**DECISION ON DEFENCE MOTION ON ADMISSIBILITY OF ALLEGATIONS
OUTSIDE THE TEMPORAL JURISDICTION OF THE TRIBUNAL**

Rule 89 (C) of the Rules of Procedure and Evidence

Office of the Prosecutor:

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For the Accused:

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INTRODUCTION

1. On 15 October 2009, the Defence filed a Motion requesting that the Chamber order that evidence of pre-1994 acts, as disclosed by the Prosecution through its witness statements, be declared inadmissible because it falls outside the temporal jurisdiction of the Tribunal and does not meet the criteria for admission of such evidence.¹
2. On 19 October 2009, the Prosecution filed its Response opposing the Defence Motion.² On 26 October 2009, the Defence filed its Reply to the Prosecution Response.³

DISCUSSION

Applicable Law on Admissible Evidence

3. Rule 89 (C) of the Rules of Procedure and Evidence ("Rules") provides that a Chamber "may admit any relevant evidence which it deems to have probative value." The Chamber therefore has a broad discretion when assessing the admissibility of evidence.⁴ For the purpose of admission pursuant to Rule 89 (C), a document will be considered relevant if it can be established that there is a connection between the evidence and one or more allegations against the accused in the indictment.⁵ In order to be probative, evidence must tend to prove or disprove an issue and be sufficiently reliable.⁶
4. In addition, according to the Tribunal's jurisprudence "a distinction must be drawn between admissibility of evidence, and the exact weight to attach to it. The former requires some relevance and probative value, whereas the latter is an assessment to be made by the Chamber at the end of the case."⁷

¹ Motion on Admissibility of Allegations Outside the Temporal Jurisdiction of the Tribunal, 15 October 2009 ("Defence Motion").

² Prosecutor's Response to the Defence "Motion on Admissibility of Allegations Outside the Temporal Jurisdiction of the Tribunal", 19 October 2009 ("Prosecution Response").

³ Reply to Prosecutor's Response to the Defence "Motion on Admissibility of Allegations Outside the Temporal Jurisdiction of the Tribunal", 26 October 2009 ("Defence Reply").

⁴ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Deo Sebahire Mbonyinkebe (Rule 89 (C)) (TC), 2 September 2005 ("*Bizimungu Decision*"), para 10; *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2, Decision on Appeal Regarding Statement of a Deceased Witness (AC), 21 July 2000 ("*Kordic Decision*"), para. 20; *Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC) 4 October 2004, ("*Nyiramasuhuko Decision dated 4 October 2004*"), paras 6-7; *Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Admit Documents Authored by Enoch Ruhigira (TC), 26 March, 2008 ("*Karemera Decision*"), para. 3.

⁵ *Karemera Decision*, para. 3 (citing *Prosecutor v. Pauline Nyiramasuhuko and Arsene Shalom Ntahobali*, Case No. ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsene Shalom Ntahobali on the "Decision on Defence urgent Motion to Declare Part of the Evidence of Witnesses RV and ABZ Inadmissible" (AC), 2 July 2004).

⁶ *Bizimungu Decision*, para. 14; *Nyiramasuhuko Decision dated 4 October 2004*, para. 7; *Kordic Decision*, para. 24.

⁷ *Nyiramasuhuko Decision dated 4 October 2004*, para. 6; *Bizimungu Decision*, para. 16.

Applicable Law Regarding Evidence of Pre-1994 Events

5. The Tribunal’s temporal jurisdiction is clearly defined in Articles 1 and 7 of the Statute as being limited to adjudication of crimes within the subject-matter jurisdiction of the Tribunal committed between 1 January and 31 December 1994.⁸ It is well established that this does not preclude the admission of evidence of pre-1994 events, if a Chamber deems such evidence relevant and of probative value and if there is no compelling reason to exclude it.⁹ For example, a Trial Chamber may admit and rely on evidence relating to pre-1994 acts where such evidence is aimed at:

- (i) clarifying a given context, such as providing historical context or background;
- (ii) establishing by inference the elements (in particular, criminal intent) of criminal conduct occurring in 1994;
- (iii) demonstrating a deliberate pattern of conduct.¹⁰

⁸ See Article 1 of the Tribunal’s Statute on the competence of the Tribunal: “The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute”. See also Article 7 of the Statute on the territorial and temporal jurisdiction of the Tribunal: “The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighboring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994”.

9 Rule 89 (C) of the Rules. See also *Ferdinand Nahimana et al. v. The Prosecutor*, Appeal Judgment, Case No. ICTR-99-52-A, 28 November 2007 (AC), (“*Nahimana Appeal Judgment*”), para. 315 (citing *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-AR72.2, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, 29 July 2004 (“*Simba Appeal Decision*”), p. 4 (“[...] it will be for the Trial Chamber to decide whether to admit evidence relating to events falling outside the temporal jurisdiction of the Tribunal in accordance with Rule 89(C) of the Rules of Procedure and Evidence of the Tribunal”)).

10 *Nahimana Appeal Judgment*, para. 315 citing *Simba Appeal Decision*, p. 3; *Aloys Ntabakuze v. The Prosecutor*, Case No. ICTR-97-34-A, Decision on the Interlocutory Appeal against the Decision of 13 April 2000 of Trial Chamber III, 13 November 2000, p. 5 (evidence clarifying a given context); *Jean-Bosco Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision on the interlocutory appeals against the Decision of the Trial Chamber dated 11 April and 6 June 2000 (AC), 14 September 2000 (“*Barayagwiza Decision*”), p. 4 (evidence clarifying a given context); *Emmanuel Rukundo v. The Prosecutor*, Case No. ICTR-2001-70-AR72, Decision (Notice of Appeal against Decision of 26 February 2003 on the Preliminary Objections), 17 October 2003, p. 5 (establishing elements of criminal conduct occurring in 1994); *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-T, Arrêt (Appeal against the Decision of 13 March 2001 dismissing the Defence Motion Objecting to the Jurisdiction of the Tribunal), 16 November 2001, p. 4 (establishing elements of criminal conduct occurring in 1994); *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, (“*Bagosora Admissibility Decision*”) paras. 11-14 (demonstrating a deliberate pattern of conduct); *Hassan Ngeze and Ferdinand Nahimana v. Prosecutor*, Cases No. ICTR 97-27-AR72 and ICTR 96-11-AR72, Décision sur les appels interlocutoires, 5 September 2000 (“*Ngeze and Nahimana Appeal Decision*”) (demonstrating a deliberate pattern of conduct); *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR93 & ICTR-98-41-AR93.2, Decision on Prosecutor’s Interlocutory Appeals Regarding Exclusion of Evidence, 19 December 2003 (“*Bagosora Appeal Decision*”) para. 13 (demonstrating a deliberate pattern of conduct). Furthermore, Rule 93 of the Rules provides that “[e]vidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice.” Rule 93 does not create an exception to Rule 89 (C), but rather is illustrative of a specific type of evidence which may be admitted by a Trial Chamber and must be read in conjunction with Rule 89 (C). See for example, *Bagosora Appeal Decision*, para. 13 and *Nahimana Appeal Judgment*, footnote 759.

6. However, the Tribunal will only have jurisdiction to convict an accused where all the elements required to be shown, in order to establish guilt, were present in 1994. The existence of continuing conduct is no exception to this rule.¹¹

7. Even where evidence of pre-1994 events falls within one of the aforementioned categories for admission, a Trial Chamber may refuse to admit it where its probative value is outweighed by its prejudicial effect on the accused.¹²

Submissions of the Parties

8. The Defence submits that the Prosecution intends to lead evidence on the Accused's alleged pre-1994 acts, well in excess of its attempts in other cases. Those allegations can be categorized as follow:

- (i) remarks and/or acts against Tutsis;¹³
- (ii) activities against the Rwandan Patriotic Front ("RPF") and RPF accomplices;¹⁴
- (iii) political background and/or activities;¹⁵ and
- (iv) acts relating to and involvement with the *Interahamwe*.¹⁶

10. According to the Defence, much of this evidence is inadmissible either because it does not fall within one of the categories for admissible evidence of pre-1994 events, or, if it does, the prejudicial effect on the Accused would outweigh the probative value of the evidence.¹⁷ The Defence requests the Chamber to order this pre-1994 evidence inadmissible before the relevant witnesses testify to avoid prejudice that will arise to the Accused should the evidence be heard. In support, the Defence cites the Separate Opinion of Judge Shahabuddeen in a *Nahimana* interlocutory appeal and a *Bagosora* Trial Chamber decision which it submits are the most instructive jurisprudence on this issue.¹⁸ The Defence contends that the ruling in the *Nahimana* Appeal Judgment, with respect to the admissibility of evidence of pre-1994 events, and the authorities cited therein, are not instructive on the issue since they relate to the correct pleading and scope of an indictment, rather than the issue of whether pre-1994 evidence may be admitted.¹⁹

11. The Defence further submits that the issue in the Defence Motion is not *res judicata* as the Pre-Trial and Trial Chambers' Decisions on defects in the Indictment and the Pre-Trial Brief²⁰ made no rulings on the admissibility of pre-1994 evidence pursuant to Rule 89 (C).²¹

¹¹ *Nahimana* Appeal Judgment, para. 313, 317.

¹² *Bagosora* Appeal Decision, para. 13, *Nahimana* Appeal Judgment, para. 319 and footnote 764.

¹³ See Defence Motion, paras. 21 c), d), i), j), l), o), r).

¹⁴ See Defence Motion, paras. 21 a), b), e), l), m), r).

¹⁵ See Defence Motion, paras. 21 c), d), e), g), h), k), o), p).

¹⁶ See Defence Motion, paras. 21 f), h), j), k), n), p), q), s).

¹⁷ See Defence Motion, paras. 26, 27, 35. With respect to one allegation, namely, that in 1992, after he was removed from office, Gatete was appointed as a director in the Ministry of Family and Women's Development (Witness BAY), the Defence concedes that it is within the Chamber's discretion to admit evidence of this allegation for the purposes of clarifying a given context. See Defence Motion, paras 28-30.

¹⁸ Judge Shahabuddeen Opinion and *Bagosora* Admissibility Decision. See Defence Motion, para. 7.

¹⁹ Defence Motion, paras 13-19.

²⁰ Decision on Defence Motion Concerning Defects in the Amended indictment, 3 July 2009 and Decision on Defence Motion Raising Defects in the Prosecution Pre-Trial Brief of 19 August 2009, 2 October 2009 (stating that the proper stage to determine the admissibility and evidential value, if any, of allegations referring to pre-

12. The Prosecution responds that this matter has previously been settled by the Chamber's Defects Decisions and that the Defence seeks to re-litigate the issue rather than request reconsideration.²² It further submits that (i) the Defence Motion is premature; and (ii) the proposed evidence of pre-1994 events falls within one or more of the three categories for admissibility of such evidence.²³ The Defence, in its Reply, reiterates its previous submissions and makes additional submissions regarding the prejudicial effect of the targeted evidence if heard.

Preliminary Matters

13. The Chamber first notes that from the ten witnesses whose proposed testimonies include evidence on pre-1994 events, two witnesses have been removed from the Prosecution Witness List.²⁴ Furthermore, one witness has testified and did not give evidence on pre-1994 events as referred to in the witness' statement disclosed by the Prosecution.²⁵ Therefore, in relation to these three witnesses, the Defence Motion is moot.

14. The Chamber also recalls that in its Defects Decisions of 22 May and 3 September 2009, it did not rule upon the admissibility of the specific material challenged by the Defence,²⁶ which is to be found within the Prosecution's witness statements disclosed on 18 September 2009.²⁷ Accordingly, the Chamber does not consider the issues in the Defence Motion to be *res judicata*.

Should the Chamber Order the Exclusion of Evidence at this Stage?

15. The Chamber will now turn to consider the Defence request to exclude evidence of certain allegations of pre-1994 acts.

16. The Chamber notes that it is not precluded from making a determination, in accordance with its broad discretion under Rule 89 (C), as to whether particular evidence should be admitted, before that evidence is heard.²⁸ However, the Chamber does not consider that, as submitted by the Defence, the *Bagosora* Admissibility Decision is the most instructive jurisprudence on the issue of admissibility of evidence relating to pre-1994 events. First, the subsequent *Nahimana* Appeal Judgment clearly addresses the issue of admissibility of

1994 events, is during the assessment of evidence. See respectively paras 30 and 22 of the aforementioned Decisions hereinafter referred to as the ("Defects Decisions").

²¹ See Defence Motion, paras 39-40.

²² See Prosecution Response, paras 2-3.

²³ See Prosecution Response, paras 23 and 31.

²⁴ Decision on Prosecutor's Motion to Vary List of Witnesses Pursuant to Rule 73bis (E) of the Rules of Procedure and Evidence, 19 October 2009, granting the Prosecution Motion to remove Witness GJQ-4 and BMZ from its Witness List.

²⁵ Witness BCS testified on 21 October 2009 (see Transcript of 21 October 2009).

²⁶ See Defence Motion, para. 21.

²⁷ The Defence has previously challenged the ability of the Prosecution to charge the Accused with pre-1994 events with regard to the first Indictment and then with regard to the Pre-Trial Brief in connection with the Amended Indictment. See the Chamber's Defects Decisions. The Chamber was not asked to rule on allegations contained in witness statements and made no rulings with respect to the admissibility of evidence.

²⁸ *Bagosora* Appeal Decision, paras. 13 and 16.

evidence of pre-1994 events.²⁹ Its ruling does not suggest that it is limited to cases relating to the correct pleading and scope of an indictment. The Chamber will not infer, as the Defence does, that by citing jurisprudence relating to the correct pleading and scope of an indictment, the Appeals Chamber intended to limit its ruling to such circumstances. Second, while the *Bagosora* Trial Chamber, in its Admissibility Decision, decided to exercise its discretion to make a determination on the relevance and probative value of particular evidence before it was heard, other Trial Chambers are not obligated to exercise their discretion in the same way.

17. In the present case, the Chamber is not satisfied, without having heard the relevant witnesses, that their proposed testimonies include evidence of pre-1994 events which falls outside the boundaries for possible admission. Once the Chamber has heard the evidence, it will be able to assess its relevance and probative value pursuant to Rule 89 (C). If such evidence is admitted, the exact weight to be attached to it will be determined at a later stage when assessing all the evidence as a whole.


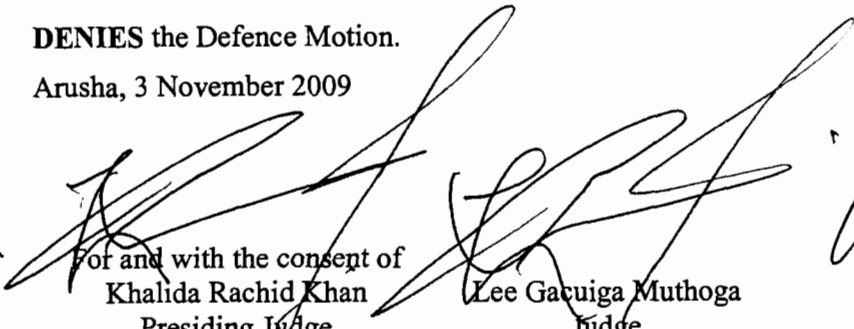

18. The Chamber considers that precluding the seven remaining witnesses from giving evidence of the alleged pre-1994 events described in their statement would fail to give due regard to the fact that the charges in this case, and those in other cases before the Tribunal “do not concern isolated offences” and “the scale of events, in space and in time, is unknown to normal municipal adjudication.”³⁰

19. With respect to the Defence concern regarding the prejudice that will arise if the proposed testimonies are heard, the Chamber recalls that “professional judges would know how to treat that evidence [...] without unfairness to the accused.”³¹ In this regard, the Chamber recalls that when assessing the evidence as a whole, it is at all times bound by the limitations on the use of pre-1994 evidence as set out in paragraphs 5 to 7 of this Decision, is able to properly weigh the evidence and is mindful of its obligation to respect the rights of the Accused.³²

FOR THESE REASONS, the Chamber

DENIES the Defence Motion.

Arusha, 3 November 2009

For and with the consent of
 Khalida Rachid Khan
 Presiding Judge

Lee Gacuiga Muthoga
 Judge

Aydin Sefa Akay
 Judge

[Seal of the Tribunal]



²⁹ See supra para. 5.

³⁰ Judge Shahabubbeen Opinion, para. 2.

³¹ *Ibid.*

³² The Chamber’s obligations under Articles 19 and 20 of the Statute to ensure a fair trial and to respect the rights of the accused.