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NATIONS UNIES

ICTR-98-44D-T
31-03-2011
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Solomy Balungi Bossa, Presiding
Bakhtiyar Tuzmukhamedov
Mparany Rajohnson

Registrar: Adama Dieng

Date: 31 March 2011

THE PROSECUTOR

v.

Callixte NZABONIMANA

Case No. ICTR-98-44D-T

JUDICIAL RECORDS ARCHIVES
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DECISION ON DEFENCE MOTION FOR THE ADMISSION OF DOCUMENTARY EVIDENCE: "OFFICIAL GOVERNMENT OF RWANDA COMMENTS ON THE DRAFT UN MAPPING REPORT ON THE DRC"

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

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INTRODUCTION

1. On 31 January 2011, the Defence filed a Motion, pursuant to Rule 89(C) of the Rules of Procedure and Evidence ("Rules"), requesting that the Trial Chamber admit into evidence a document titled, "Official Government of Rwanda Comments on the Draft UN Mapping Report on the DRC" ("Commentary").¹ This Commentary was a response by the Government of Rwanda to a draft Report by the United Nations Office of the High Commissioner for Human Rights ("OHCHR") documenting, *inter alia*, allegations of serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of Congo ("DRC") between March 1993 and June 2003 by Rwanda ("UN Mapping Report").²

2. On 7 February 2011, the Prosecution filed a Response opposing the Motion.³

3. On 10 February 2011, the Defence filed its Reply.⁴

SUBMISSIONS OF THE PARTIES

Defence Motion

4. The Defence submits that the Commentary on the UN Mapping Report has been officially released by the Rwandan Ministry of Foreign Affairs and Cooperation.⁵ It is therefore an authentic document.⁶

5. The Defence is of the view that the Commentary is relevant and has probative value.⁷ In particular, it points to paragraph 8 of the Commentary which states that "From 1991 to 1993, the bulk of the militia [...] from the ruling party MRND and its allies were

¹ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Nzabonimana's Motion for the Admission of Documentary Evidence: "Official Government of Rwanda Comments on the Draft UN Mapping Report on the DRC" ("Motion"), 31 January 2011.

² Motion, para. 1

³ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Prosecutor's Response to Nzabonimana's Motion for the Admission of Documentary Evidence: "Official Government of Rwanda Comments on the Draft UN Mapping Report on the DRC" ("Response"), 7 February 2011.

⁴ *Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Reply to Prosecutor's Response to Nzabonimana's Motion for the Admission of Documentary Evidence: "Official Government of Rwanda Comments on the Draft UN Mapping Report on the DRC" ("Reply"), 10 February 2011.

⁵ Motion, para. 14

⁶ Motion, paras. 13 & 15.

⁷ Motion, para. 17.

concentrated in Kigali and in places where they were still strong (North, partially West and East)." The Defence argues that this admission, read cumulatively with the assertion that "in the country side [...] there were no organised militia and few military personnel", undermines the Prosecution contention that the MRND and *Interahamwe* militia operated in Gitarama in 1994, as alleged in Indictment.⁸ Specifically, the Defence notes that paragraphs 8, 23, 30, 32, 51, 52 and 55 of the Indictment charge Nzabonimana with committing crimes in Gitarama *Prefecture*, "which is in the countryside, and not the capital."⁹ Moreover, the Commentary corroborates the testimony of those witnesses who testified that the MRND had been physically expelled from Gitarama and that there were no *Interahamwe* in the *Prefecture* in 1994.¹⁰

6. The Defence concludes that the admission of the Commentary into evidence will not prejudice the Prosecution or its witnesses. The Defence intends to refer to the Commentary in its Closing Brief, and therefore the Prosecution has ample time to rebut its contents.¹¹

Prosecution Response

7. The Prosecution notes that of the 61 paragraphs contained in the Commentary the Defence seeks to rely only on paragraph 8.¹² The silence of the Defence on the rest of the document suggests that other paragraphs contain matters which are not relevant to the Defence case.¹³ More generally, the Prosecution is of the view that the Commentary has no probative value, and lacks the necessary indicia of reliability.¹⁴

8. On the issue of relevance, the Prosecution observes that paragraph 8 of the Commentary refers to the period 1991-1993, while the temporal jurisdiction of the Tribunal

⁸ Motion, paras. 18-19, 20-23.

⁹ Motion, para. 21.

¹⁰ Motion, para. 21, *see* The Testimonies of certain Defence Witnesses disputing the presence of *Interahamwe* in Gitarama *Prefecture*: T. 3 May 2010 p. 49 (T31); 25 May 2010. p 41 (Jean Marie Vianney Mporanzi); T. 1 June 2010, p. 68 (T34); T. 2 June 2010, p. 47 (T28); T. 6 July 2010, p. 28 (T134); T.8 July 2010, pp.29, 34 & 38 (T97); T. 13 July 2010, p. 62 & T. 15 July 2010, pp. 37-38 (T98).

¹¹ Motion, para. 25.

¹² Response, paras. 7-9.

¹³ Response, para. 9.

¹⁴ Response, paras. 10-13.

only begins on 1 January 1994.¹⁵ Thus, the Defence has failed to connect the Commentary with the allegations pleaded in the Indictment, particularly paragraphs 32, 51, 52 and 55.¹⁶

9. With respect to the indicia of reliability, the Prosecution submits that the Commentary is not signed and does not bear the name or title of an authorising or drafting party. Therefore no individual can testify to the veracity of the contents of the document.¹⁷ In addition, the Commentary was not obtained from the archives of the Government of Rwanda, and "only" bears the stamp "of the purported authorizing authority which could easily be reproduced."¹⁸ The Defence should have requested that the Chamber invoke Rule 89 (D) to ascertain the authenticity of the documents.¹⁹

10. The Prosecution further contends that Commentary is unreliable as it is not clear whether it was drafted on the basis of "hearsay, firsthand account, expert research, duress, fear or favour or any grounds."²⁰ It further argues that by definition the Commentary consists merely of "political remarks of persons purporting to represent the Government of Rwandan in a bid to exonerate the Government from the allegations contained in the UN Mapping Report."²¹ Moreover, even if the document could be attributed to the Government of Rwanda, it would amount to no more than the "opinion of a government" reacting to "apparent international pressure" meaning that the document is "highly susceptible to bias, lack of objectivity and veracity."²²

Defence Reply

11. In its Reply, the Defence contends that even though it intends to rely on a portion of the document to disprove allegations in the Indictment, it is crucial to consider the document in its entirety as this will enable the Chamber to have a fuller understanding of the context in which the relevant comments were made.²³ Moreover, it intends to rely on paragraphs 36-38 of the Commentary in addition to paragraph 8.²⁴

¹⁵ Motion, para. 38.

¹⁶ Motion, para. 42.

¹⁷ Response, paras. 13 and 20.

¹⁸ Response, para. 18.

¹⁹ Response, para. 23.

²⁰ Response, para. 25.

²¹ Response, para. 26.

²² Response, paras 28-30.

²³ Reply, para. 6.

²⁴ Reply, paras. 12-13.

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12. The Defence is of the view that it has established a *prima facie* case that the Commentary is reliable.²⁵ The document was obtained from the official website of the Government of Rwanda, and is also posted on the official website of the OHCHR.²⁶ The cover letter of the Commentary identifies the "Government of Rwanda" as the author of the Commentary. Moreover, the document bears the seal of the Government of Rwanda and "Rwandan Permanent Mission" appears on the cover letter and the Commentary. The cover letter is stamped and dated. The electronic copy of the document is numbered "No. 555/16/OHCHR/VS/ka/10" indicating that the document was filed at the OHCHR.²⁷ The Defence concludes that there is no requirement that a document bear the signature of an individual for admission into evidence.²⁸

13. In response to the Prosecution argument that the Commentary is not relevant to the Indictment, the Defence cites the finding in *Nahimana et al* that "a Trial Chamber may validly admit evidence relating to pre-1994 acts and rely on it where such evidence is aimed at clarifying a given context."²⁹ It further argues that information falling outside the temporal jurisdiction of the Tribunal "may be useful in helping the Accused and the Trial Chamber to appreciate the context of the alleged crimes, particularly due to the complexity of the events that occurred in Rwanda, during 1994."³⁰

DELIBERATIONS

Applicable Law

14. Rule 89 (C) of the Rules provides that a Chamber "may admit any relevant evidence which it deems to have probative value." Rule 89 (D) adds that a Chamber "may request verification of the authenticity of evidence obtained out of court." In determining the relevance of evidence, the moving party must show that a connection exists between the evidence sought to be admitted and the proof of an allegation sufficiently pleaded in the

²⁵ Reply, paras. 17-18.

²⁶ Reply, para. 19.

²⁷ Reply, paras. 24-25.

²⁸ Reply, para. 24.

²⁹ Reply, para. 31; citing *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Judgement, 28 November 2007, para. 315.

³⁰ Reply, para. 31; citing *Prosecutor v. Nahimana et al.*, Case No. ICTR-96-11-T, Decision on the Defence Preliminary Motion Pursuant to Rule 72 of the Rule of Procedure and Evidence, 12 July 2000.

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indictment.³¹ In order to establish the probative value of the evidence, the moving party must show that the evidence tends to prove or disprove an issue.³² A factor in the assessment of the relevance and probative value of evidence is the requirement that it be *prima facie* credible; that is, it must have sufficient indicia of reliability.³³ Indicia of reliability include: the authorship of the document; whether it is an original or a copy; the place from which the document was obtained in conjunction with its chain of custody; whether its contents are supported by other evidence; and the nature of the document itself, such as signatures, stamps, or the form of the handwriting.³⁴

15. While a Chamber may always request verification of the authenticity of evidence obtained out of court, pursuant to Rule 89(D), "to require absolute proof of a document's authenticity before it could be admitted would be to require a far more stringent test than the standard envisioned by sub-rule 89(C)."³⁵

16. Finally, the admissibility of evidence should not be confused with the assessment of weight to be accorded to that evidence, or even whether its contents are truthful or accurate,³⁶ which are issues to be decided by the Chamber after hearing the totality of the evidence.³⁷

Authenticity of the Document

³¹ *The Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse, and Joseph Nzirorera*, Case No. ICTR-98-44-T ("*Karemera et al.*"), Decision on the Prosecution's Motion for Admission of Certain Exhibits into Evidence, 25 January 2008, para. 6; *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Admit Documents Authored by Enoch Ruhigira, 26 March 2008, para. 3.

³² *Karemera et al.*, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ndirumpatse, 2 November 2007, para. 2; *Karemera et al.*, Interim Order on the Prosecutor's Motion for Admission of Documents, 8 August 2007, para. 7.

³³ *The Prosecutor v. Delalic and Delic*, Case No. IT-96-21 ("*Delalic et al.*"), Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998 ("Decision on Admissibility"), para. 20; *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41 ("*Bagosora et al.*"), Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole, 13 September 2004, para. 8.

³⁴ *Bagosora et al.*, Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole (TC), 13 September 2004, para. 9; and *Bagosora et al.*, Decision on request to Admit United Nations Documents into Evidence Under Rule 89(C) (TC), 25 May 2006, para. 4 (and sources cited therein).

³⁵ *Delalic et al.*, Decision on Admissibility, para. 20.

³⁶ *Bagosora et al.*, Decision on Request to Admit United Nations Documents into Evidence under Rule 89(C), 25 May 2006, para. 4.

³⁷ *Karemera et al.*, Decision on Admission of UNAMIR Documents, para. 7; *Karemera et al.*, Decision on Admission of Certain Exhibits, para. 6; *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Decision on the Admission of Prosecution Exhibits 27 and 28, 31 January 2005, para. 12.

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17. The Trial Chamber observes that the Commentary is available on the official website of the OHCHR.³⁸ Accordingly, the Trial Chamber is satisfied that there are *prima facie* indicia that the Commentary is authentic.

Relevance and Probative Value of the Commentary

18. The document at issue is a response by the Government of Rwanda to allegations that its troops were involved in serious violations of human rights and international humanitarian law committed on the territory of the DRC between March 1993 and June 2003.

19. With respect to the Prosecution contention that the document was drafted under "apparent international pressure", the Trial Chamber observes that the Prosecution has provided no evidence to substantiate this claim, and recalls that the weight to be accorded to the document will be determined by the Trial Chamber at a later stage. Further, although the Commentary appears to describe the political and military situation that prevailed before the temporal jurisdiction of the Tribunal, the Trial Chamber considers that paragraph 8 of the Commentary could assist the Chamber in understanding the political context of events in Rwanda between 1991 and 1993, the period preceding the events that are alleged in the Indictment.


FOR THESE REASONS, THE TRIAL CHAMBER

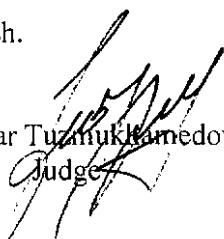
GRANTS the Motion in part;


ADMITS into evidence paragraph 8 of the "Official Government of Rwanda Comments on the Draft UN Mapping Report on the DRC";

REQUESTS that the Registry assign exhibit numbers to the document.

Arusha, 31 March 2011, done in English.


Solomy Balungi Bossa
Presiding Judge


Bakhtiyar Tuzmukhomedov
Judge


Mparany Rajohnson
Judge

[Seal of the Tribunal]

³⁸ http://www.ohchr.org/Documents/Countries/ZR/DRC_Report_Comments_Rwanda.pdf