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ICTR-98-44-T
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UNITED NATIONS

International Criminal Tribunal for the
Prosecution of Persons Responsible for
Genocide and Other Serious Violations of
International Humanitarian Law committed
in the territory of Rwanda and Rwandan
Citizens responsible for genocide and other
such violations committed in the territory of
neighbouring States, between 1 January
1994 and 31 December 1994

Case No. ICTR-98-44-T

Date: 4 February 2004

ENGLISH

Original: FRENCH

TRIAL CHAMBER III

Before: Judge Andréia Vaz, presiding
Judge Flavia Lattanzi
Judge Rita Arrey

Registry: Adama Dieng

Date: 4 February 2004

THE PROSECUTOR

v.

ANDRÉ RWAMAKUBA *et al.*

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[Signature]

DECISION ON DEFENCE MOTIONS:

**REQUEST FOR CERTIFICATION TO APPEAL RULINGS DISALLOWING
CROSS-EXAMINATION ON PRIOR INCONSISTENT STATEMENTS**

and

**MOTION ON BEHALF OF THE ACCUSED DR. ANDRE RWAMAKUBA FOR A
REQUEST TO THE STATE OF RWANDA FOR ASSISTANCE IN ACCESSING
AND OBTAINING DOCUMENTS IN COURT DOSSIERS**

*Article 28 of the Statute and Rules 54, 73 and 89 of the Rules of Procedure and
Evidence*

Counsel for the Accused:

David Hooper and Andreas O'Shea
Andreas O'Shea

Counsel for the co-Accused:

Peter Robinson
Dior Diagne
Charles Roach and Frédérik Weyl

Office of the Prosecutor:

Don Webster
Ifeoma Ojemeni
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CIII04-0017 (E)

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Traduction certifiée par la SSL, TPIR

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

SITTING as Trial Chamber III ("the Chamber"), composed of Judge Andréia Vaz, presiding, Judge Flavia Lattanzi and Judge Rita Arrey,

BEING SEIZED OF a motion by the Defence for André Rwamakuba for certification to appeal under Rule 73(B) of the Rules of Procedure and Evidence ("the Rules"), entitled "Request for Certification to Appeal Rulings Disallowing Cross-Examination on Prior Inconsistent Statements", filed on 15 December 2003 against oral decisions rendered on 4, 8 and 10 December 2003 ("the first motion"),

NOTING that, in the first motion, the Defence requests an extension of the seven-day time-limit pursuant to Rule 73(C), until 15 December 2003, the date on which the Request for Certification to Appeal the Decision of 4 December 2003 was filed, submitting that the slight delay was due to the need to file the request for certification and the appeals against the Decisions of 8 and 10 December 2003 cumulatively,

CONSIDERING that the Chamber has taken account of the request for certification to appeal against the Decision of 4 December 2003, and the request for extension of the time limit therefore serves no purpose,

BEING SEIZED also of a motion by the Defence for André Rwamakuba for an order to the Rwandan authorities to cooperate in the production of judicial documents, entitled "Motion on Behalf of the Accused Dr. André Rwamakuba for a Request to the State of Rwanda for Assistance in Accessing and Obtaining Documents in Court Dossiers", filed on 15 December 2003 ("the second motion"),

CONSIDERING that the Prosecutor has not responded to those motions, and has not requested the Chamber for an extension of the time limit to do so,

CONSIDERING the Statute and Rules of the Tribunal,

CIII04-0017 (E)

RULES on the basis of the briefs filed by the Defence, in accordance with Rule 73(A) of the Rules.

Submissions of the Parties

The Defence (first motion)

1. As background to its motion, the Defence recalls that it brought several oral motions before the Chamber on 4, 8, and 10 December 2003 concerning the use of certain documents during the cross-examination of Prosecution witnesses RO, RJ and GIO. The Defence alleged that the documents were prior statements given by the said witnesses before the Rwandan authorities. The witnesses did not acknowledge the statements or the signatures appearing on the documents to be theirs.
2. The Defence further recalls that it had requested the Chamber to grant it leave to cross-examine the witnesses on the statements, subject to verification of their authenticity later. In the Defence's view, the Chamber had two options: either to authorize verification of authenticity *a posteriori*, or to admit the documents conditionally as being authentic, on the basis of circumstantial evidence. The Defence maintains that in both cases, the Chamber should have permitted cross-examination.
3. The Defence points out that its temporary inability to verify the authenticity of the statements presented is due to the failure by Rwanda to comply with its obligations to cooperate with the Tribunal pursuant to Article 28 of the Statute.
4. The Defence contends that use of the statements in question is essential in order to assess the credibility of the witnesses, and that the absence of such assessment has caused prejudice to the Accused. Consequently, the oral decisions rendered by the Chamber involve an issue that could significantly affect the outcome of the trial, and only an immediate decision by the Appeals Chamber could prevent the loss of time that would result from the inevitable recall of the witnesses, once the Defence has satisfied the Chamber of the authenticity of the statements in question.

5. Accordingly, the Defence requests leave to appeal the decisions denying its motions to cross-examine the witnesses in question on their alleged prior statements.

The Defence (second motion)

6. As indicated in paragraph 3 above, the Defence submits that it tried, in vain, to obtain certified copies of the Prosecution witnesses' statements made before the Rwandan courts. The Defence's request made to the *Procureur Général* of the Kigali Supreme Court to be granted access to certain court dossiers was refused and the *Procureur Général* allegedly expressed his categorical refusal to allow Defence Counsel from the International Criminal Tribunal for Rwanda access to Rwandan court dossiers. The Chamber having forbidden the Defence from confronting the Prosecution witnesses, during cross-examination, with certain statements that it had obtained through its investigations, on the grounds that they had not been authenticated, the Defence considers that only an order of the Tribunal addressed to the Rwandan authorities would enable it to discharge its duty to the Accused. The order sought would invite the Rwandan authorities:

- (i) To allow the Defence access to six court dossiers listed in Annex A to the motion;
- (ii) To permit the Defence to make or have made copies of such parts of the court dossiers as it may deem relevant;
- (iii) To provide authentication of each copy of the documents.

The Prosecutor (first and second motions)

7. During cross-examination conducted during the hearings on 4, 8 and 10 December 2003, the Prosecutor objected to the Defence motion for the production of prior statements of the aforementioned Prosecution witnesses, on the grounds that the Defence had not obtained their authentication.

Deliberations

First motion

8. During the hearings of 4, 8 and 10 December 2003, the Chamber did indeed decide that the Defence could not cross-examine Prosecution witnesses RO, RJ and GIO on their previous statements purportedly made before the Rwandan authorities, but not authenticated by the Defence.

9. The Chamber recalls that Rule 73 (B) of the Rules authorizes it to certify the appeal against a decision:

"(...) if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings."

10. In the instant case, the Chamber considers that its aforementioned oral decisions do not involve an issue that would significantly affect the outcome of the trial, as required under Rule 73(B) of the Rules.

11. The Chamber acknowledges that the use of certain documents during cross-examination to verify the credibility of a witness can influence assessment of the probative value of the testimony.

12. However, it is essential to note that Rule 89(C) of the Rules restricts the admission of evidence to that which the Chamber deems to have probative value. The Chamber cannot affirm the probative value of documents from an unknown source and cannot allow the assessment of the credibility of the witnesses in question on the basis of such documents. Having failed to verify the authenticity of the documents obtained out of court, the Chamber rightfully excluded them in accordance with Rule 89 (D) of the Rules.

13. The Chamber further considers that the decisions in question do not involve an issue likely to affect the outcome of the trial. In fact, the decisions do not relate to the modalities for presentation of documents by a single party, but apply to both the Defence and the Prosecution.

14. The Chamber adds that it did not categorically exclude the use of the documents in question. In general, it falls to the party producing a document to prove its authenticity before the Chamber. Oral decisions of the Chamber do not restrict the right of the Defence to prove the authenticity of documents subsequently, by requesting, to that end, the cooperation of the authorities presumed to have produced the documents, and even the assistance of the Chamber. In view of all the avenues available to the Defence, the oral decisions at issue cannot be regarded as being capable of influencing the outcome of the trial.

15. Furthermore, the Chamber considers that since the oral decisions were based on the fact that the documents have not been authenticated, they do not imply a denial of leave to the Defence to test the credibility of a Prosecution witness by means of contradictory previous statements. The Defence is always entitled to verify the credibility of witnesses with all types of evidence that are in consonance with the Rules, in conformity with the principles governing a fair and expeditious trial. In this respect, the impugned oral decisions have no influence on the outcome of the trial.

16. *Ad abundantiam*, the Chamber finds that these Decisions do not involve an issue that could affect the expeditious conduct of the trial. The oral decisions relate to requirements set out by the Rules, particularly Rule 89(C) and (D), for tendering a document in evidence at trial. If the parties follow the procedure prescribed by the Rules, the speed of the proceedings will not be affected.

17. Consequently, the Chamber finds that the conditions under Rule 73(B) have not been met.

Second motion

18. With regard to the second motion, the Chamber notes that the Defence did not adduce evidence of failure by the Rwandan Government to cooperate with it to have access to certain court dossiers and to obtain certain copies of documents in those dossiers. The Chamber invites the Defence to contact the Registrar, through the Defence Counsel and Detention Management Section, to follow up this request for cooperation by the Rwandan authorities.

**FOR THE FOREGOING REASONS,
THE TRIBUNAL**

- I. DENIES** the request for certification;
- II. DISMISSES** the motion for cooperation;
- III. INVITES** the Defence to contact the Registrar, through the Defence Counsel and Detention Management Section, to follow up the request for cooperation by the Rwandan authorities.

Arusha, 4 February 2004

[Signed]

Adrésia Vaz

Presiding Judge

[Signed]

Flavia Lattanzi

Judge

[Signed]

Florence Rita Arrey

Judge
