International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Karin Hökborg
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 14 July 2005

THE PROSECUTOR
v.
André RWAMAKUBA

Case No. ICTR-98-44C-T

DECISION ON THE DEFENCE MOTION REGARDING WILL-SAY STATEMENTS

Office of the Prosecutor:
Don Webster
Dior Fall
Adama Niane
Tamara Cummings-John

Defence Counsel:
David Hooper
Andreas O'Shea

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

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Karin Hökborg, and Gberdao Gustave Kam ("Chamber");

BEING SEIZED on 28 June 2005, of the Defence Oral Motion on will-say statements ("Motion");

CONSIDERING the parties' oral submissions heard on 28 and 29 June 2005;[1]

HEREBY DECIDES the Motion**,** pursuant to Rule 73 of the Rules of Procedure and Evidence ("Rules").

1. The Chamber notes that the Appeals Chamber has already ruled on the definition of a witness statement in the *Niyitegeka* Appeals Judgement, setting out the "ideal standard of a record of witness interview" as follows:

▪ It is "composed of all the questions that were put to a witness and of all the answers given by the witness."

▪ The time of the beginning and the end of an interview, specific events that could have an impact on the statement or its assessment should be recorded as well;

▪ The interview must be recorded in a language the witness understands, and the witness must have the chance to read the record or to have it read out to him or her and to make the corrections he or she deems necessary;

▪ The witness must sign the record to attest to the truthfulness and correctness of its content to the best of his or her knowledge and belief;

▪ The investigator and the interpreter shall also sign the record.[2]

2. The Appeals Chamber nevertheless added in the same Judgement that "a statement not fulfilling the ideal standard set out above is not inadmissible as such. Pursuant to Rule 89(C) of the Rules, a Chamber may admit any relevant evidence which it deems to have probative value. However, any inconsistency of a witness statement with the standard set out above may be taken into consideration when assessing the probative value of the statement, if necessary."[3]

3. In the instant Motion, the Defence explicitly declared that the issue of admissibility of will-say statements was not at stake and that it does not oppose their admission. It requests that the Chamber directs the Prosecution that all future will-say statements not yet disclosed on the Defence are either read by the Witness or read to and signed by the Witness. It submits that such a practice direction will also apply to Defence Witness will-say statements. It argues that the fairness of the procedure and the rights of

the Accused to adequate time and facilities for the preparation of the Defence and his right to examine a witness require that the will-say statements are signed.[4] The Prosecution opposes the Motion.

4. The Chamber adopts and applies the principles set out by the Appeals Chamber in the *Niyitegeka* Appeals Judgment. In the *Simba* Case, the Chamber defined a will-say statement as "a communication from one party to the other party and the Chamber anticipating that a witness will testify about matters that were not mentioned in previously disclosed witness statements."[5] The main specificity of a will-say statement is to provide further details of the witness' anticipated testimony, putting the Accused on notice. It is in conformity with the Prosecution's obligations under Rule 67(D) of the Rules which requires each party to promptly notify the opposing party and the Chamber of the discovery and existence of additional evidence, information and materials that should have been produced earlier pursuant to the Rules. The Chamber finds that the use of will-say statements is different from the method of giving notice through a written and signed statement disclosed pursuant to Rule 66 of the Rules.

5. In the Chamber's view, the fact that the will-say statement is not signed does not limit the right of the Accused to cross-examine the Witness and show inconsistencies with his testimony at trial. The weight to be attached to such related evidence will be addressed at a later stage by the Chamber in light of the circumstances including the manner in which the interview was recorded and on a case-by-case basis.

6. While the will-say statement only supplements or elaborates on information previously disclosed to the Defence, the Chamber shares the Defence's view that it may eventually bring new elements on which the Defence was not put on notice. Although it is not acceptable for the Prosecution to mould its case against the Accused in the course of the trial, it must be admitted that a Witness may recall and add details to his or her prior statements. In this situation, several remedies are possible such as providing additional time to the Defence for its preparation or, where appropriate, the exclusion of the evidence.[6] Each time, the Chamber will apply the appropriate remedy on a case-by-case basis in conformity with the rights of the Accused, including the right to be tried without undue delay.

7. The Chamber however points out that the Prosecution cannot wait for the last moment to give notice of what the Witness will additionally testify to at the trial. It is expected that this additional information will be disclosed as soon as possible after the arrival of a Witness at the seat of the Tribunal, and not immediately before the presentation of a Witness.

FOR THOSE REASONS,

the Chamber

DENIES the Defence Motion.

Arusha, 14 July 2005, done in English.

Dennis C. M. Byron	Karin Hökborg	Gberdao Gustave Kam
Presiding	Judge	Judge

[Seal of the Tribunal]

[1] T. 28 June 2005, pp. 56 et ss. T. 29 June 2005, pp. 1-8.

[2] *Prosecutor v. Éliezer Niyitegeka*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004 (hereinafter *Niyitegeka* Appeals Judgement), par. 31-32.

[3] *Idem*, par. 36 [emphasis added].

[4] T. 28 June 2005, pp. 52, 54-55.

[5] *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Decision on the Admissibility of Evidence of Witness KDD (TC), 1 November 2004, par. 9.

[6] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Admissibility of Evidence of Witness DP (TC), 18 November 2003; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Admissibility of Evidence of Witness DBQ (TC), 18 November 2003.