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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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**TRIAL CHAMBER III**

**Before Judges:** Dennis C. M. Byron, Presiding  
Emile Francis Short  
Gberdao Gustave Kam

**Registrar:** Adama Dieng

**Date:** 27 November 2006

**THE PROSECUTOR**

v.

Édouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA

Case No. ICTR-98-44-T

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**DECISION ON DEFENCE MOTION FOR EXCLUSION OF WITNESS GK'S  
TESTIMONY OR FOR REQUEST FOR COOPERATION FROM GOVERNMENT  
OF RWANDA**

*Articles 20 and 28 of the Statute; Rules 66 and 98 of the Rules of Procedure and Evidence*

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### INTRODUCTION

1. The proceedings in the instant case commenced on 19 September 2005. Prosecution Witness GK is scheduled to be called to testify during the fourth trial session between 26 October 2006 and 15 December 2006. The Defence for Nzirorera now moves the Chamber to exclude his forthcoming testimony as relief for the Prosecution's alleged serial violations of its disclosure obligations in the present case.<sup>1</sup> Should the Chamber decline to grant this remedy, the Defence requests an order for the cooperation of the Rwandan authorities in order to obtain some documents identified in a confidential annex to the Motion, and for the postponement of the cross-examination of Witness GK until those documents have been disclosed to the Defence. The Prosecution opposes the Motion in its entirety.

### DELIBERATIONS

2. According to the Defence, since the Prosecution failed to disclose the testimony of Witness GK in the *Ndindabahizi* trial no later than 60 days before the date set for trial, it violated its disclosure obligations as prescribed under Rule 66(A)(ii) of the Rules of Procedure and Evidence.<sup>2</sup> The Defence therefore contends that the forthcoming testimony of Witness GK should be excluded as an appropriate remedy for this failure.

3. The 60-day deadline prescribed by Rule 66(A)(ii) of the Rules must be read in connection with the rights of the accused, and in particular with his or her right to have adequate time and facilities to prepare his or her case and to examine, or have examined, the witness against him or her.<sup>3</sup> Late disclosure will not necessarily offend the rights of the accused.<sup>4</sup> When the disclosure of material which could assist the Accused to impeach the testimony of a Prosecution witness is made so late that it has an impact on the fairness of the trial, different types of remedy have been utilized by Trial Chambers. The evidence could be excluded, the trial or the testimony could be postponed, the cross-examination of the witness

<sup>1</sup> Joseph Nzirorera's Motion to Exclude Testimony of Witness GK or for Request for Cooperation to Government of Rwanda, filed on 13 November 2006.

<sup>2</sup> Rule 66(A)(ii) reads as follows:

Subject to the provisions of Rules 53 and 69;

(A) The Prosecutor shall disclose to the Defence:

[...] ii) No later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; upon good cause shown a Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the Defence within a prescribed time.

<sup>3</sup> See Tribunal's Statute, Articles 20(4)(b) and (e).

<sup>4</sup> *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("Karemera et al."), Oral Decision on Stay of Proceedings (TC), T. 16 February 2006, pp.5-15.

could be deferred, or the witness could be re-called.<sup>5</sup> Exclusion of evidence is at the extreme end of a scale of measures available to the Chamber in addressing delay in disclosure and violation of the rights of the accused.<sup>6</sup>

4. In the present case, the Defence has not shown, or even claimed, that Joseph Nzirorera has suffered any prejudice from the late disclosure of the witness' statement which would justify such an extreme remedy. In that respect, it must be noted that the document was disclosed more than three months before the witness was expected to testify and that other statements had already been disclosed to the Defence in a timely manner, such that the Accused had been given information on the anticipated evidence of the witness and issues affecting his credibility.<sup>7</sup>

5. The Defence also requests the exclusion of the anticipated testimony of Witness GK due to other incomplete disclosures. During a meeting held on 10 November 2006, it learned from Witness GK that he had provided "numerous signed statements and testimony about the 1994 events in Rwanda which have never been disclosed to the Defence".<sup>8</sup> The Defence recalls that following the Chamber's Decision of 14 September 2005, the Prosecution had to use its best efforts to obtain and disclose these materials.<sup>9</sup> In the Defence's view, the minimal best efforts that could have been expected from the Prosecution would have been to have interviewed the witness in advance of his testimony, and to have identified and collected the missing documents from the witness himself, who has them in Rwanda. The Defence concludes that the Prosecution has therefore once again violated a Chamber's order and that exclusion of the testimony of Witness GK is an appropriate remedy for the serial disclosure violations by the Prosecution in this case.

6. As a general rule, the Defence must first make its own independent efforts to secure evidence it wishes to use at trial other than exculpatory material in the possession of the

<sup>5</sup> *Karemera et al.*, Oral Decision on Stay of Proceedings (TC), T. 16 February 2006, pp.5-15; *Bagasora et al.*, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 17 December 2004, para. 8.

<sup>6</sup> *Karemera et al.*, Decision on Defence Oral Motions for Exclusion of XBM's Testimony, for Sanctions Against the Prosecution and Exclusion of Evidence Outside the Scope of the Indictment (TC), 19 October 2006; *Karemera et al.*, Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guichaoua; Defence Motion to Exclude the Witness' Testimony; and Trial Chamber's Order to Show Cause (TC), 1 February 2006, para. 11; *Karemera et al.*, Decision on Defence Motions to Exclude Testimony of Professor André Guichaoua (TC), 20 April 2006, para. 8.

<sup>7</sup> See for e.g.: Statements and other material disclosed on 14 February 2005 and 23 March 2005.

<sup>8</sup> This assertion is not disputed by the Prosecution.

<sup>9</sup> *Karemera et al.*, Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to bring Judicial and Immigration Records (TC), 14 September 2005, para. 11.

Prosecution.<sup>10</sup> In that respect, it is admitted that the Defence may have a legitimate need to interview a witness prior to trial in order to properly prepare its case and has therefore the right to contact and interview a potential witness.<sup>11</sup>

7. Under Rules 98 or 54 of the Rules, a practice has also developed, subject to considerations of the interests of justice, of requiring the intervention of the Prosecution to obtain and disclose certain records, specifically the Rwandan judicial records of a Prosecution witness.<sup>12</sup> Trial Chambers have resorted to these provisions, for instance, when the information could be considered as material for the preparation of the Defence case or to determine the credibility of Prosecution witnesses.<sup>13</sup>

8. In other situations, Trial Chambers have requested, pursuant to Article 28 of the Tribunal's Statute, the assistance and cooperation of some States in order to obtain documents.<sup>14</sup> According to the established jurisprudence, a request to a Chamber to make such an order must set forth the nature of the information sought; its relevance to the trial; and the efforts that have been made to obtain it.<sup>15</sup>

9. Due to the particular circumstances of the case, the Chamber has used both its power under Rule 98 and Article 28 of the Statute to assist the Defence in the preparation of its case. On 14 September 2005, the Chamber first requested the Prosecution to use its best efforts to obtain and disclose statements made to Rwandan authorities and records pertaining to the criminal prosecution of Prosecution witnesses for whom such materials have not been fully disclosed.<sup>16</sup> Then, in February 2005, the Chamber requested the assistance of the

<sup>10</sup> *Prosecutor v. Aloys Simba*, Case No. ICTR-2001-76-T, Decision on Matters Related to Witness KDD's Judicial Dossier (TC), 1 November 2004, para. 10.

<sup>11</sup> *Prosecutor v. Mile Mrksic*, Case No. IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party (AC), 30 July 2003; *Prosecutor v. Sefer Halilovic*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 12 to 15. The right to interview a potential witness is not unlimited and is generally subject to the witness' consent, see *Karemera et al.*, Decision on Reconsideration of Protective Measures for Prosecution Witnesses (TC), 30 October 2006.

<sup>12</sup> *Karemera et al.*, Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to bring Judicial and Immigration Records (TC), 14 September 2005, paras. 7-8; *Prosecutor v. François Karera*, Case No. ICTR-01-74-, Decision on Defence Motion for Additional Disclosure (TC), 1 September 2006, paras. 5-7.

<sup>13</sup> *Ibidem*.

<sup>14</sup> See for instance, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 10 March 2004, para. 4; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana (TC), 25 May 2004, para. 6; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request for Assistance Pursuant to Article 28 of the Statute (TC), 27 May 2005, para. 2; see also *Prosecutor v. Blaskic*, Case No. IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (AC), 29 October 1997, par. 32.

<sup>15</sup> *Ibidem*.

<sup>16</sup> *Karemera et al.*, Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to bring Judicial and Immigration Records (TC), 14 September 2005.

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Rwandan authorities to provide the Registry with all statements taken or received from some Prosecution witnesses, including GK, as well as judgements rendered by the Rwandan authorities against these witnesses.<sup>17</sup>

10. However, these decisions in no way undermined the Defence's obligation to prepare its case.<sup>18</sup> In the present situation, the Defence gives no reason why it did not previously meet with Witness GK while conducting its investigations when it could have obtained the said documents itself, nor does Counsel for Nzirorera allege that the witness refused to meet with him.

11. Moreover, according to various correspondences recently provided at the Chamber's request,<sup>19</sup> it appears that the Office of the Prosecutor, including the Prosecutor himself, made several efforts in order to obtain from the Rwandan authorities material concerning Witness GK. Recently, the Prosecution also undertook a further step to interview the witness concerning his judicial records, statements and testimonies he gave before Rwandan authorities.<sup>20</sup> As a result, three documents were collected from the witness and disclosed to the Defence.<sup>21</sup> It must be noted that it is only recently that the Defence has suggested that the Prosecution should interview some witnesses in order to obtain the information necessary to make a specific request for the documents to the Rwandan Government.<sup>22</sup>

12. The Chamber further notes that the Defence does not allege any prejudice resulting from the current situation. Exclusion of the forthcoming testimony of Witness GK is therefore not warranted.

13. In the alternative, the Defence moves the Chamber to request the cooperation of the Rwandan authorities in order to obtain the documents identified in a confidential annex to the Motion, and to postpone the cross-examination of Witness GK until those documents have been disclosed to the Defence.

14. Although the Defence met with the witness and therefore should have collected preliminary information as to the content of the documents sought, it does not show how they could be relevant to this trial. In addition, the Rwandan authorities have recently indicated

<sup>17</sup> *Karemera et al.*, Decision on Motions for Order for Production of Documents by The Government of Rwanda and For Consequential Orders (TC), 15 February 2006.

<sup>18</sup> *Karemera et al.*, Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to bring Judicial and Immigration Records (TC), 14 September 2005, para. 11.

<sup>19</sup> Prosecutor's Submission Concerning Best Efforts to Obtain Rwanda Judicial Records of Witness HH, filed on 17 November 2006, following the Chamber's Order made orally on 16 November 2006.

<sup>20</sup> Will-Say Statement dated 7 November 2006.

<sup>21</sup> Prosecution's Response; disclosure made on 10 November 2006.

<sup>22</sup> Joseph Nzirorera's Motion for Further Order to Obtain Documents in Possession of Government of Rwanda, filed on 18 October 2006.

that they are "willing to provide to any party, any other documents that can be specified to ease verification of their existence".<sup>23</sup> An Order requesting the assistance of the Rwandan authorities is not therefore warranted at this stage.

15. Since the Defence does not show or allege any prejudice to the rights of the Accused or impact on the fairness of the trial, the Chamber does not find any reason to postpone the cross-examination of Witness GK. In any event, the Defence may draw the Chamber's attention to inconsistencies between the testimony of the witness before this Chamber and any declaration or record obtained subsequently. If prejudice can be shown from its inability to put these inconsistencies to the witness, the Defence may file a motion for him to be recalled.

**FOR THE ABOVE REASONS, THE CHAMBER DENIES** the Defence Motion in its entirety.

Arusha, 27 November 2006, done in English.

Dennis C. M. Byron

Presiding Judge

Emile Francis Short

Judge

Gberdao Gustave Kam

Judge



<sup>23</sup> Letter dated 13 October 2006, following Chamber's Decision on Defence Motion to Report Government of Rwanda to United Nations Security Council (TC), 2 October 2006.