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27-11-2006
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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Shupf

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 27 November 2006

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

JUDICIAL RECORDS/ARCHIVES
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**DECISION ON DEFENCE MOTION FOR FURTHER ORDER TO OBTAIN
DOCUMENTS IN POSSESSION OF GOVERNMENT OF RWANDA**

Article 20 of the Statute; Rules 66, 68 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. On 13 February 2006, following Joseph Nzirorera's application, the Chamber requested the cooperation of the Government of Rwanda to provide the Registry with statements taken or received by the Rwandan authorities from 37 Prosecution witnesses, and judgements rendered against them.¹

2. Later, noting that none of the requested records had been provided, the Defence for Nzirorera moved the Chamber to request the Tribunal's President to report the failure of the Government of Rwanda to comply with the Chamber's Decision.²

3. The Chamber denied that application.³ It noted that on 11 July 2006, the Rwandan authorities had provided some of the documents sought.⁴ The Chamber was satisfied that the circumstances of the case did not show any unwillingness of the Rwandan authorities to cooperate with the Tribunal. The Rwandan authorities were further requested to explain how they complied with the Chamber's Decision of 13 February 2006, and, where appropriate, to provide the reasons why some material sought had not been disclosed.⁵

4. On 13 October 2006, the Rwandan Government informed the Chamber, by a letter communicated through the Registrar, that they had "provided all the documents requested and at their disposal"; that they are "willing to provide to any party, any other documents that can be specified to ease verification of their existence"; that they "cannot attend to requests made in a generic form"; and that "a party seeking to obtain documents should specify the documents needed".⁶

5. In a Motion filed on 18 October 2006,⁷ the Defence for Nzirorera now moves the Chamber to order the Prosecution to use its best efforts to obtain from the Rwandan Government prior statements of and judgements concerning the 37 witnesses listed in the

¹ *Prosecutor v. Edouard Karemera, Mathieu Ndirumpitse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("Karemera et al."), Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders (TC), 13 February 2006. These witnesses are known under the pseudonyms AJY, AKX, ALG, ALY, ALZ, AMB, AMC, ANP, ANT, ANU, AWB, AWE, AXA, BOW, BDX, BGD, BIS, BIT, FH, GAV, GBU, GDG, GFA, GFG, GFJ, GJQ, GK, GNK, GR, HH, KVG, NNZ, QBG, UB, XBM and XXQ.

² Motion to Report Government of Rwanda to United Nations Security Council, filed on 22 May 2006.

³ *Karemera et al.*, Decision on Defence Motion to Report Government of Rwanda to United Nations Security Council (TC), 2 October 2006.

⁴ The *Parquet Général* of Rwanda forwarded a bundle of documents concerning Witnesses ANU, GBU, GFA, GFG and GNK. See also Registrar's Office Memorandum filed on 19 July 2006.

⁵ *Karemera et al.*, Decision on Defence Motion to Report Government of Rwanda to United Nations Security Council (TC), 2 October 2006.

⁶ See Registrar's Submissions filed on 17 October 2006.

⁷ Joseph Nzirorera's Motion for Further Order to Obtain Documents in Possession of Government of Rwanda, filed on 18 October 2006.

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Decision of 13 February 2006. The Defence further indicates that "if nothing is done, the witnesses will be cross-examined in detail about the dates, places, and file numbers when they testify in Arusha".⁸

6. It must be noted that concerning two of the 37 witnesses, the Defence for Nzirorera seeks to obtain the same relief but through other means.⁹ With respect to Witness HH, the Defence acknowledges that the Prosecutor in this instance has done what he can to obtain the records,¹⁰ and therefore requests the Chamber to obtain these documents directly from the witness and the Rwandan authorities. Concerning Witness GK, the Defence seeks an order from the Chamber for the cooperation of the Rwandan authorities in order to obtain some documents identified in a confidential annex to the Motion. Each of these motions has been dealt with separately by the Chamber.¹¹

DELIBERATIONS

7. In the present Motion, the Defence contends that the letter of the Rwandan Government of 13 October 2006 imposes a specificity requirement when seeking to obtain documents from Rwandan authorities. It therefore moves the Chamber to order the Prosecution to contact the 37 witnesses listed in the Decision of 13 February 2006 and obtain the information necessary to make a specific request for the documents to the Rwandan government, including the dossier number, place and date of interrogation, name of person conducting the interrogation, and the disposition of the case against the witness and its date. The Defence then requests that the information be transmitted to the Defence no later than 60 days before the commencement of the witness' testimony. The Defence claims that this suggestion will save court time and Tribunal financial resources, since "if nothing is done, the witnesses will be cross-examined in detail about the dates, places, and file numbers when they testify in Arusha", and the witness may be asked to come back to Arusha for further cross-examination.¹² Should the Prosecution not be willing to do so, the Defence requests the Chamber to order that the Accused's Counsel or investigator be authorised to meet with the witnesses to obtain the information directly from them.

⁸ Reply Brief filed on 30 October 2006.

⁹ Oral Motions, T. 16 November 2006, pp. 23-29; and T. 17 November 2006, p. 6.; Joseph Nzirorera's Motion to Exclude Testimony of Witness GK or for Request for Cooperation to Government of Rwanda, filed on 13 November 2006.

¹⁰ T. 16 November 2006, p. 29.

¹¹ See Decision on Defence Motion to Obtain Documents Pertaining to Witness HH in Possession of Government of Rwanda (TC), 27 November 2006; Decision on Defence Motion for Exclusion of Witness GK's Testimony or For Request For Cooperation from Government of Rwanda (TC), 27 November 2006.

¹² Reply Brief filed on 30 October 2006.

8. According to the established jurisprudence, the Prosecution's obligations to disclose statements of its witnesses and exculpatory material, as set out by Rules 66(A)(ii) and 68 (A) of the Rules of Procedure and Evidence, only concern documents and material which are "in the custody or control of the Prosecution".¹³ As 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 Prosecution.¹⁴ In that respect, it is admitted that the Defence has the right to contact and interview a potential witness.¹⁵

9. 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 Rwandan judicial records of Prosecution witnesses.¹⁶ In these situations Trial Chambers have acted *proprio motu* under Rule 98 of the Rules, to order the Prosecution to use its best efforts in order to obtain the relevant judicial dossier.¹⁷ Under Rule 54 of the Rules, the Chamber may also issue orders as may be necessary for the conduct of the trial. Trial Chambers have resorted to these provisions, for instance, when the information could

¹³ 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.

Rule 68(A) reads as follows:

(A) The Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.

¹⁴ *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.

¹⁵ *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.

¹⁶ See for instance, *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.

¹⁷ Rule 98 reads as follows: "Trial Chamber may *proprio motu* order either party to produce additional evidence. It may itself summon witnesses and order their attendance".

See for instance, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Defence Motion for Additional Disclosure (TC), 1 September 2006, para. 5; *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.

be considered as material for the preparation of the Defence case or to determine the credibility of Prosecution witnesses.¹⁸

10. In the present case, the Chamber notes that six of the 37 witnesses in respect of whom the Defence seeks judicial records have been removed from the Prosecution Witness List and will not be called to give evidence in this trial.¹⁹ The Defence has not shown any reason for still requiring their judicial records, if they exist. In the Chamber's view, the Defence's application concerning the witnesses known by the pseudonyms AKX, BIT, GDG, GFG, GJQ and NNZ therefore falls to be rejected.

11. In addition, according to the information provided by the Prosecution, seven other witnesses have no judicial records as they were never prosecuted in Rwanda for genocide.²⁰ The Defence has not contested this submission nor claimed that these witnesses have testified or made statements in other cases in Rwanda. In that respect, it must be recalled that in the initial motion seeking cooperation of Rwandan authorities in order to obtain the same documents, the Defence indicated that it drew up a list of "the [37] prosecution witnesses believed to have been prosecuted in Rwanda and for whom there are judicial documents believed to be missing".²¹ Since the Defence has not adduced any evidence or given any information concerning the existence of these records, the application concerning the witnesses known by the pseudonyms AJY, BDX, BGD, BIS, GAV, GR and QBG is therefore also rejected.

12. Concerning the remaining 24 witnesses, the Chamber recalls that, on several occasions, it has provided every practicable facility under the Rules and Statute in order to assist the Defence in presenting its case.²² The Prosecution has also displayed continuous

¹⁸ *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.

¹⁹ Witnesses AKX, BIT, GDG, GFG, GJQ and NNZ; see *Karemera et al.*, Decision on Prosecutor's Motion to Vary its Witness List (TC), 2 October 2006.

²⁰ Witnesses AJY, BDX, BGD, BIS, GAV, GR and QBG; see Prosecutor's Response filed on 25 October 2006.

²¹ Reply Brief; Joseph Nzirorera's Motion for Order for Production of Documents by the Government of Rwanda and for Consequential Orders, filed on 18 January 2006.

²² *Karemera et al.*, Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders (TC), 13 February 2006; *Karemera et al.*, Decision on Defence Motion to Report Government of Rwanda to United Nations Security Council (IC), 2 October 2006; see also *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, where the Chamber required, pursuant to Rule 98 of the Rules of Procedure and Evidence, the Prosecution to use its best efforts to obtain statements made to Rwandan authorities and records pertaining to the criminal prosecution of the Witnesses AWB, BDW, BGD, HH and KGV, as well as any other witness for whom such materials have not been fully disclosed.

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efforts, both past and present, in seeking to provide the Defence with as many judicial records as possible from Rwandan authorities.²³

13. The Chamber wishes to make clear that its prior Decisions, and the subsequent efforts of the Prosecution, in no way obviate the Defence's obligation to prepare its case.²⁴ It is the Defence's obligation to conduct its own investigations. Contrary to the Defence's request, it does not need an authorization from the Chamber to meet with the witnesses to obtain information directly from them. The established jurisprudence recognizes the right of each party to contact and interview a potential witness.²⁵ "Witnesses to a crime are the property of neither the Prosecutor nor the Defence; both sides have an equal right to interview them."²⁶ In addition, in the present case, considering the protective measures applicable to the Prosecution witnesses, the Chamber has already specified the modalities for the Defence to meet with them.²⁷

14. The Defence is expected to use these facilities before a witness is called to testify in the present trial. While it has been clear in the course of the proceedings that some witnesses have refused to meet with the Accused's Counsel or investigator,²⁸ the Defence does not explain why it has not met with other witnesses at the appropriate time, nor does it claim that the witnesses refused to be interviewed. In that respect, the Chamber notes that the Defence only recently interviewed Witness GK, who is scheduled to testify in the course of December 2006. Again, the Defence does not explain why it did not meet the witness earlier in order to

²³ Prosecutor's Response to the Motion; see also 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. Further effort has been put in place by the Prosecution. In a recent will-say statement of Witness GK given on 7 November 2006, the witness provides details as to his judicial records, statements and testimonies he gave before Rwandan authorities. As a result, three documents were disclosed to the Defence.

²⁴ *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.

²⁵ *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.

²⁶ *Ibidem*.

²⁷ *Karemera et al.*, Order on Protective Measures for Prosecution Witnesses (TC), 10 December 2004, as amended by the Chamber's Decision on Reconsideration of Protective Measures for Prosecution Witnesses (TC), 30 October 2006:

ORDERS that the Defence shall notify the Witnesses and Victims Support Section of the Tribunal and the Prosecution in writing, on reasonable notice, of its wish to contact a protected Prosecution witness or potential Prosecution witness or a relative of such person. Should the witness or potential witness concerned agree to the interview, or the parents or guardian of that person, if that person is under the age of 18, WVSS shall immediately make all necessary arrangements for the witness to meet with the Defence and provide sufficient notice to the Prosecution of the time and place of the meeting. Except under exceptional circumstances, such meeting shall not take place at the outset of the witness' testimony in court. Where appropriate, WVSS may facilitate the interview.

²⁸ During their testimonies in court, Witnesses ALG and HH confirmed their refusal to meet with the Defence Counsel for Nziroera.

obtain the requested documents which appear to be in the witness' possession, in a timely fashion.²⁹

15. The Chamber further notes that the Prosecution has already requested judicial files from the Rwandan authorities, and has received and disclosed material received from the Rwandan Government to the Defence for 16 of the 37 Prosecution witnesses. The Defence for Nzirorera does not dispute the Prosecution's assertions, but submits that its Motion concerns how to obtain the "missing documents".³⁰ The Defence, however, has not adduced any evidence or given any information of the existence of these records or their content or show how these documents may be relevant for its preparation - the application is purely speculative.

16. Under these circumstances, the Chamber does not consider it appropriate to use its power under Rule 98 as requested by the Defence. The Chamber also considers that the Defence should refrain from making several applications seeking the same relief since they undermine the expediency of the proceedings.

FOR THE ABOVE REASONS, THE CHAMBER DENIES the Defence Motion.

Ausha, 27 November 2006, done in English.



Dennis C. M. Byron

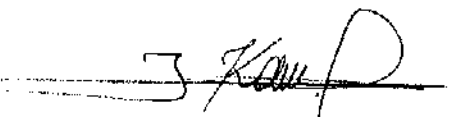
Presiding Judge



Françoise Short

Judge

[Seal of the Tribunal]



Gberdao Gustave Kam

Judge

²⁹ Joseph Nzirorera's Motion to Exclude Testimony of Witness GK or for Request for Cooperation to Government of Rwanda, filed on 13 November 2006.

³⁰ See Reply Brief filed on 30 October 2006.