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(28198-28194)

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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 15 December 2006

JUDICIAL RECORDS/ARCHIVES
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THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA
Case No. ICTR-98-44-T

DECISION ON PROSECUTOR'S MOTION TO ADMIT WITNESS STATEMENT
FROM JOSEPH SERUGENDO

Rule 89(C) and 92bis of the Rules of Procedure and Evidence

Office of the Prosecutor:
Don Webster
Alayne Frankson-Wallace
Iain Morley
Saidou N'Dow
Sunkarie Ballah-Conteh
Takeh Sendze

Defence Counsel for Édouard Karemera
Dior Diagne Mbaye and Félix Sow

Defence Counsel for Mathieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl

Defence Counsel for Joseph Nzirorera
Peter Robinson and Patrick Nimy Mayidika Ngimbi

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INTRODUCTION

1. The trial in this case started on 19 September 2005. During the third trial session, the Defence for each Accused and the Prosecution applied to call Joseph Serugendo as a witness for their respective cases.¹ The Chamber made no decision on these applications. At that time, there were serious concerns regarding Mr. Serugendo's health and whether or not it was possible or even feasible for him to testify.² The Registrar had already provided a medical report,³ but the Chamber considered that it needed further information in order to address the parties' applications and it requested the Registrar to inform the Chamber and the parties of Mr. Serugendo's current state of health and physical and psychological ability to testify, including via video-link, or to make a deposition.⁴

2. On 26 June 2006, the Registrar informed the Chamber that the Medical Officer concluded that Mr. Serugendo was not in a condition to undergo an interrogation, either by live testimony or through a deposition.⁵ At the last day of the third trial session, after the parties reiterated their requests, the Chamber noted that according to the last updated information provided by the Registrar, there had been no improvement in Serugendo's condition.⁶ The Chamber therefore considered that no order could be made at that time.⁷ On 22 August 2006, Joseph Serugendo succumbed to his illness and passed away.

3. The Prosecutor now requests the Chamber to admit an abridged statement ("Abridged Statement") from Joseph Serugendo pursuant to Rule 89(C) or Rule 92*bis* of the Rules of Procedure and Evidence.⁸ On 27 June 2006, Prosecution Counsel accompanied by a judicial officer appointed by the Registry, met Mr. Serugendo who verified the content of his prior statement and also reviewed the Abridged Statement. This document consists of a bi-lingual composite text of 40 pages,⁹ composed of extracts from an original statement of Joseph Serugendo which was disclosed to the parties on 12 June 2006.¹⁰

¹ T. 16 June 2006, pp. 1-3; T. 20 June 2006, p. 2.

² T. 20 June 2006, pp. 1-3 and 16.

³ The Registrar's Submissions Regarding Joseph Serugendo's Extremely Urgent Motion for Partial Enforcement of Sentence, filed on 19 June 2006, see T. 20 June 2006, p. 16.

⁴ *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("Karemera et al."), Order for the Registrar's Submission on Joseph Serugendo's Health Condition and Ability to Testify (TC), 20 June 2006.

⁵ The Registrar's Submissions Regarding Joseph Serugendo's Health Condition and Ability to Testify, filed on 26 June 2006.

⁶ T. 10 July 2006, p. 3.

⁷ *Ibidem* at p. 4.

⁸ Prosecutor's Motion to Admit Witness Statement from Joseph Serugendo pursuant to Rule 89(C) and 92*bis*(B), filed on 5 September 2006.

⁹ Annex B to the Motion.

¹⁰ This statement results from several meetings between the Office of the Prosecutor and Joseph Serugendo.

DISCUSSION*Preliminary Issue- Witness List*

4. On 30 May 2006, the Prosecution stated that it intended to make a motion to vary its witness list to include Mr. Serugendo. In an oral decision on the same day, the Chamber ordered that any application to add him to the witness list should be made forthwith.¹¹ On 13 June 2006, after learning that Mr. Serugendo was suffering from a fatal illness, the Defence for Nzirorera asserted its wish to have Mr. Serugendo testify on its behalf,¹² and made a motion on 19 June 2006 for him to be called as a Defence witness out of order.¹³ In response to the Chamber's query, the Prosecution admitted that the decision had not yet been made to call Mr. Serugendo as a Prosecution witness due to the state of his health and potential quality of his testimony.¹⁴ On 20 June 2006, the Prosecution made an oral motion to have Serugendo added to its witness list, and the Chamber deferred its decision until it received more information from the Registrar concerning Mr. Serugendo's health.¹⁵ The Defence for Nzirorera did not oppose the motion and asked that it be granted.¹⁶

5. Since both parties were in agreement that Mr. Serugendo should testify and the Prosecution's eventual motion to add him to the witness list was not in controversy, the Chamber finds this issue should not prevent the full evaluation of the present Motion.

Admission Pursuant to Rule 92bis

6. The Prosecution claims that its application is motivated by a concern to make Serugendo's evidence available to this Trial Chamber "in whatever form possible". It submits that, in accordance with Rule 92bis, the Abridged Statement excludes direct and indirect references to the acts or conducts of the Accused.

7. All three Accused oppose the Motion because there will be no cross-examination on matters so proximate to the Accused that its admission would be unfair. Specifically, the Defence points to specific paragraphs in the Abridged Statement that go to the acts and conducts of the Accused, making the statement ineligible for admission pursuant to Rule 92bis.

¹¹ T. 30 May 2006, p.62-64.

¹² T. 13 June 2006 p. 4-5.

¹³ T. 19 June 2006 p. 1.

¹⁴ T. 19 June 2006 p.4-5.

¹⁵ T. 20 June 2006 p. 2.

¹⁶ T. 20 June 2006 p. 16.

8. Rule 92bis provides that a witness statement can be admitted in lieu of oral testimony, if it satisfies certain criteria laid out in the Rule.¹⁷ A threshold requirement is that the evidence must go to proof of the matter other than the acts and conduct of the Accused.¹⁸ That is, a written statement upon which the prosecution relies to establish (a) that the accused committed (that is, personally physically perpetrated) any of the crimes charged himself or herself; or (2) that he planned, instigated or ordered the crimes charged; or (3) that he otherwise aided and abetted those who actually did commit the crimes in their planning, preparation or execution of those crimes; or (4) that he was a superior to those who actually did commit the crimes; or (5) that he knew or had reason to know that those crimes were about to be or had been committed by his subordinates; or (6) that he failed to take reasonable steps to prevent such acts or to punish those who carried out those acts.¹⁹

9. The Prosecution submits that the Abridged Statement deals with four substantive issues: RTLM as a vehicle of the MRND; The Structure of the *Interahamwe za MRND*; the role of the MRND in the Interim government; and the "pacification" tour of 10 April 1994", and that the Accused are not mentioned by name. Although that is accurate, perusal of the Abridged Statement indicates that the acts and conduct of the Accused are often the subject matter of its contents. Throughout the Abridged Statement, the Accused were implicitly referred to in a variety of ways, such as "certain personalities of the government and the MRND party"²⁰, "MRND Party Leadership"²¹, "MRND authorities"²², "Senior Officials of the MRND Party"²³, and "Interim Government"²⁴. An Accused need not be specifically named for statements to be held as going to the acts or conduct of the Accused²⁵, and in this case, it is the Prosecution's assertions that the Accused committed the crimes charged "by

¹⁷ For a full discussion on Rule 92bis, see the recent Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92bis of the Rules; and Order for Reduction of Prosecution Witness List, by this Chamber on 11 December 2006.

¹⁸ See Rule 92bis(A).

¹⁹ *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C) (AC), 7 June 2002, para. 10; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to 92 bis (D) – Foča Transcripts, 30 June 2003, para. 11; *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-T, First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant To Rule 92 bis (TC), 12 June 2003, para. 9.

²⁰ Abridged Statement para. 17.

²¹ Abridged Statement para. 26.

²² Abridged Statement para. 27, 49, 80.

²³ Abridged Statement para. 39, 48.

²⁴ Abridged Statement para. 40, According to the Prosecutor's Pre-Trial Brief, Édouard Karemera was Minister of the Interior in the Interim Government of 8 April 1994.

²⁵ See for example, *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva*, Decision on Prosecutor's Motion for the Admission of Written Statements Under Rule 92bis (TC), 9 March 2004, para. 22.

using their power and authority as high level MRND political party leaders and their status as current or former ministers of government to recruit, indoctrinate, arm, train, and mobilize Hutu militiamen and ordinary Hutu citizens, mostly subsistence farmers, to attack, harm and destroy the Tutsi population of Rwanda during the period 1990 – 1994.”²⁶ The Chamber finds that these expressions, found under each of the four substantive headings in Mr. Serugendo's statement, do go to the acts and conduct of the Accused.

10. As the Abridged Statement contains evidence which goes to the acts and conduct of the Accused, a threshold issue for admission pursuant to Rule 92*bis* has not been met.

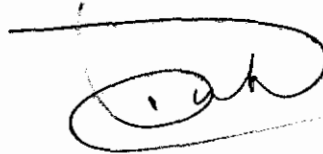
**FOR THE ABOVE REASONS, THE CHAMBER
DENIES** the Prosecution Motion in its entirety.

Arusha, 15 December 2006, done in English.



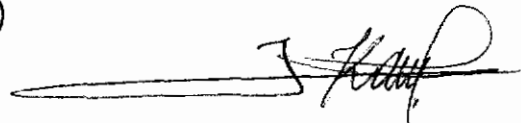
Dennis C. M. Byron

Presiding Judge



Emile Francis Short

Judge



Gberdao Gustave Kam

Judge

[Seal of the Tribunal]



²⁶ Prosecutor's Pre-Trial Brief para. 4.