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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  
Gberdao Gustave Kam  
*sitting pursuant to Rule 15 bis (F) of the Rules of Procedure and Evidence*

**Registrar:** Adama Dieng

**Date:** 22 March 2007

**THE PROSECUTOR**

v.

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

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**DECISION ON DEFENCE MOTION FOR COOPERATION OF RWANDA TO OBTAIN STATEMENTS OF PROSECUTION WITNESSES ALG, GK AND UB**

*Article 28 of the Statute of the Tribunal*

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## INTRODUCTION

1. The trial in this case started on 19 September 2005 before a composition of the Trial Chamber composed of Judges Dennis C. M. Byron, presiding, Emile Francis Short and Gberdao Gustave Kam. So far, four trial sessions have been held for the presentation of the Prosecution case.

2. On 13 February 2006, following Joseph Nzirorera's application, that 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, including those of Witnesses ALG, UN and GK.<sup>1</sup>

3. On 13 October 2006, the Rwandan Government informed that 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 case 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".<sup>2</sup>

4. In a Motion filed on 2 January 2007,<sup>3</sup> the Defence for Nzirorera moved that Chamber to issue a request for cooperation to the Government of Rwanda for it to produce copies of the documents specified in Confidential Annex "A" to its motion relating to Prosecution Witnesses ALG, GK and UB. The Prosecution decided not to respond to the motion and deferred the matter to the Chamber's discretion.<sup>4</sup>

5. On 19 January 2007, Judge Short decided to withdraw from the case. In accordance with Rule 15 bis (D) of the Rules, the remaining Judges decided on the continuation of the proceedings with a substitute judge.<sup>5</sup> The President also authorized the Trial Chamber,

<sup>1</sup> *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse 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.

<sup>2</sup> *Karemera et al.*, Decision on Defence Motion for Further Order to Obtain Documents in Possession of Government of Rwanda (TC), 27 November 2006, at para. 4.

<sup>3</sup> Defence for Nzirorera, Motion for Request for Cooperation of Government of Rwanda: Statements of Witnesses ALG, GK, and UB, filed on 2 January 2007 ("Nzirorera's Motion").

<sup>4</sup> See email correspondence sent by the Lead Counsel to the Coordinator for the Court Management Section on 5 March 2007.

<sup>5</sup> *Karemera et al.*, Decision on Continuation of the Proceedings (TC), 6 March 2007 ("Decision on Continuation of the Proceedings").

composed of Judges Byron and Kam, to conduct routine matters, such as the delivery of decisions, in the absence of the substitute judge.<sup>6</sup>

6. The Chamber notes that the Prosecution called Witnesses UB, ALG and GK during the second and fourth trial sessions. Prosecution Witness UB was examined by the Prosecution for four and a quarter days from the 22 February 2006 to the 28 February 2006 and cross-examined by the Defence for nine and a half days from 28 February 2006 to 15 March 2006. Prosecution Witness ALG was examined by the Prosecution for one and half days on 26 October 2006 and 27 October 2006 and cross-examined by the Defence for five and three quarter days from 27 October 2006 to 7 November 2006. Prosecution Witness GK was examined by the Prosecution for one day on 8 December 2006 and 11 December 2006 and cross-examined by the Defence for one and three quarter days on 11 December 2006 and 12 December 2006.

**DISCUSSION**

7. Article 28 of the Tribunal's Statute imposes an obligation on States to "cooperate with the [Tribunal] in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law". A request for assistance under this provision may include the service of documents.<sup>7</sup> Article 28(2)(c) of the Statute prescribes that States shall comply without undue delay with any request for cooperation issued by a Trial Chamber for the service of documents. According to the established jurisprudence of this Tribunal as well as of the International Criminal Tribunal for former Yugoslavia, any request for production of documents, under Article 28 of the Statute, must (i) identify as far as possible the documents or information to which the application relates; (ii) set out succinctly the reasons why such documents are deemed relevant to the trial; and (iii) explain the steps taken by the applicant to secure the State's assistance.<sup>8</sup>

<sup>6</sup> See Rules of Procedure and Evidence, Rule 15 bis (F); and Interoffice Memorandum from the President to Judge Byron, filed on 13 March 2007.

<sup>7</sup> Statute, Art. 28(2): "States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:

[...] (c) the service of documents; [...]"

<sup>8</sup> *Prosecutor v. Théoneste Bagosora, Giratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Case No. ICTR-98-41-T ("Bagosora et al."), Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 10 March 2004, at para. 4; *Bagosora et al.*, Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana (TC), 25 May 2004, at para. 6; *Bagosora et al.*, Decision on Request for Assistance Pursuant to Article 28 of the Statute (TC), 27 May 2005, at para. 2; *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, at para. 32.

8. In the present case, the Defence lists a number of specific prior witness statements in Confidential Annex A to its Motion.<sup>9</sup> As well, in its Motion, it refers to the passages of the testimony of witnesses ALG and GK wherein they confirmed the existence of prior statements given to the Rwandan authorities.<sup>10</sup> With respect to Witness UB, the Defence explains that it learned of the existence the witness' prior statements when Lead Counsel for Mr. Nzirorera was shown these statements during a meeting with former Rwandan Prime Minister Pierre Celestin Rwigema.<sup>11</sup> The Chamber notes that, during the proceedings, the Prosecutor, in response to a question posed by the President, confirmed that the information contained in the list given by witness GK was sufficient to be able to track down the statements.<sup>12</sup> Accordingly, the Chamber is satisfied that the Defence has identified with sufficient particularity the documents to which its application relates.

9. The Chamber agrees with the Defence that "disclosure of judicial records is not merely for the benefit of the preparation of the Defence but it is also required to assist the Trial Chamber in its assessment of witness credibility pursuant to Rule 90(G) of the Rules".<sup>13</sup> The Chamber also acknowledged that the prior statements sought were included generically in the Trial Chamber's Decision of 13 February 2006, since the Chamber found, at that time, that the requirements to request the cooperation of the Rwandan Government for the disclosure of these documents were met.<sup>14</sup>

10. The circumstances have, however, changed since that decision. The statements sought by the Defence in the present motion concern witnesses who have already testified in the present case.<sup>15</sup> As such, the criterion of relevancy must be understood by reference to the standard for recalling witnesses:

A party seeking to recall a witness must demonstrate good cause, which previous jurisprudence has defined as a substantial reason amounting in law to a legal excuse for failing to perform a required act. In assessing good cause, the Chamber must carefully consider the purpose of the proposed testimony as well as the party's justification for not offering such evidence when the witness originally testified. The right to be tried with undue delay as well as concerns of judicial

<sup>9</sup> Confidential Annex A to Nzirorera's Motion, at 3-4.

<sup>10</sup> Nzirorera's Motion, at paras. 6 and 8 (ALG: T. 7 Nov. 2006, at 35-38 and Exhibits DNZ-187 and 188; GK: T. 12 Dec. 2006 at 35 and Exhibit DNZ-287).

<sup>11</sup> *Ibid.*, at para. 10.

<sup>12</sup> T. 12 Dec. 2006, at 38.

<sup>13</sup> Nzirorera's Motion, at para. 2 (referring to *Karemura et al.*, Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records (TC), 14 September 2005, at para. 8).

<sup>14</sup> *Ibid.*, at para. 3 (referring to *Karemura et al.*, Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders (TC), 13 February 2006).

<sup>15</sup> Prosecution Witness UB testified between 22 February and 15 March 2006; ALG testified between 26 October and 7 November 2006; GK testified between 8 and 12 December 2006.

economy demand that recall should be granted only in the most compelling of circumstances where the evidence is of significant probative value and not of a cumulative nature.<sup>16</sup>

11. In order to have a witness recalled, the Defence must point demonstrate that there are inconsistencies between the testimony of this witness before the Chamber and any declarations obtained subsequently and that it has suffered prejudice from its inability to put these inconsistencies to the witness.<sup>17</sup> The Chamber will then decide whether there is a need for the witness' explanation of the inconsistency or whether the inconsistency is minor or self-evident so that recall is not necessary.<sup>18</sup>

12. As such, in a context where a witness has already testified, the Chamber is of the view that in order to satisfy the criterion of relevance for an Article 28(2)(c) order, the moving party must make a *prima facie* demonstration that the statements could reveal inconsistencies between the witness's testimony and his prior statements. Accordingly, the moving party must demonstrate that the prior statements bear on subjects on which the witnesses testified before the Chamber and that these statements may be inconsistent with this testimony. Conversely, prior statements which are consistent with the witness' testimony or are on subjects on which the witness did not testify have no value in credibility assessment and are therefore not relevant to this trial.

13. In the present motion, the Defence does not show the relevance of the prior statements sought for Witnesses ALG and GK to the trial in that they bear on subjects on which the witnesses testified before the Chamber or in that they may be inconsistent with their testimonies. Regarding the prior statements of Witness UB, the Defence contends that they appear to "provide further details concerning false accusations of the distribution of weapons and prefecture security meetings", to "falsely implicat[e] Rwanda Defence Minister Marcel Gatsinzi in the meetings" and to "provid[e] dates for the meeting which differed from his trial testimony."<sup>19</sup> Under these circumstances, the Chamber therefore finds that the second

<sup>16</sup> *Prosecutor v. Bagosora et al.*, Decision on the Prosecution Motion to Recall Witness Nyarujwa (TC), 29 September 2004, para. 6. See also *Prosecutor v. Bagosora et al.*, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination (TC), 19 September 2005, para. 2; *Prosecutor v. Simba*, Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination (TC), 28 October 2004, para. 5.

<sup>17</sup> *Karemura et al.*, Decision on Defence Motion for Exclusion of Witness GK's Testimony or for Request for Cooperation from Government of Rwanda (TC), 27 November 2006, at para. 15. *Prosecutor v. Bagosora et al.*, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses, 16 December 2003, para. 8.

<sup>18</sup> See, e.g., *Prosecutor v. Bagosora 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; *Prosecutor v. Bagosora et al.*, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination (TC), 19 September 2005, para. 3.

<sup>19</sup> *Ibid.*, at para. 11.

criterion has only been met for the prior statements of Witness UB and therefore that the Defence's application regarding the prior statements of Witnesses ALG and GK falls to be rejected.

14. With respect to the third criterion, the Defence sets forth the efforts used to obtain the cooperation of the Rwandan authorities. It attaches a copy of a letter addressed to the Rwandan authorities, requesting copies of the specific witness statements of Witness UB, purportedly sent on 29 November 2006.<sup>20</sup> The Defence claims that it has not received any response to these letters.<sup>21</sup> It further contends that the Government of Rwanda "never complied with the existing Request for Cooperation, but insisted on receiving more specific requests."<sup>22</sup> The Chamber finds that the Defence for Nzirorera has demonstrated that it has taken all reasonable efforts to obtain the prior statements requested from the Rwandan authorities.

**FOR THOSE REASONS, THE CHAMBER**

- I. **GRANTS**, in part, the Defence for Nzirorera's Motion;
- II. **REQUESTS** the cooperation of the Government of Rwanda to provide the Registry with the statements of Witness UB which are specified in the confidential Annex to the present Decision;
- III. **ORDERS** the Registry to disclose to all the parties in the present case the documents specified in paragraph II above;
- IV. **DIRECTS** the Registrar to serve this request for cooperation, including the Confidential Annex, on the relevant authorities of the Government of Rwanda;
- V. **DENIES** the remainder of the Motion in its entirety.

Arusha, 22 March 2007, done in English.

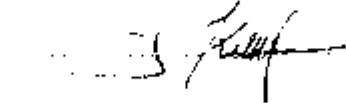


Dennis C. M. Byron

Presiding Judge



[Seal of the Tribunal]



Gberdao Gustave Kam

Judge

<sup>20</sup> Confidential Annex C to Nzirorera's Motion, at 9-10.  
<sup>21</sup> Nzirorera's Motion, at paras. 7, 9 and 13.  
<sup>22</sup> *Ibid.*, at para. 13.



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<b>Dates:</b>	Transmitted: <b>22 March 2007</b>		Document's date: <b>22 March 2007</b>	
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Case Name / Affaire: **The Prosecutor vs.**

**- Joseph NZIRORERA  
- Mathieu NGIRUMPATSE  
- Edouard KAREMERA**

Case No / Affaire No.: **ICTR-98-44-T**

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A:

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- Judge E. Mase, President
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  - Judge F. R. Arrey (Karema)
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  - Judge S. K. Park (Nindindiyimana et al)
  - SLO
  - A. Leroy, Co-ordinator
  - A. Marong (Nindindiyimana et al)

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- TC3
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  - Judge I. M. Weinberg de Roca (Zgranjyazo)
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  - C. Denis, Co-ordinator (Karemera et al & Rwamakuba)
  - H. Gogo, Co-ordinator (Seromba)

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- OTP / BUREAU DU PROCUREUR
- Senior Trial Attorney in charge of case: **D. Webster**
  - DEFENSE *Handwritten initials*
  - Accused / Accusé: **J. Nzirorera, M. Ngirumpatse & E. Karemera**
  - Lead Counsel / Conseil Principal: **P. Robinson, C. Hounkpatin & D. Diagne**
  - In / à Arusha Arusha (signature)
  - Co-Counsel / Conseil Adjoint: **P. N. M. Ngimbi, F. Weyl & F. Sow**
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