

ICTR-98-44-T  
11-7-2007  
(29423 - 29418)

29423  
Shupf



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Dennis C. M. Hyon, Presiding  
Gberdao Gustave Kam  
Vagn Joensen

**Registrar:** Adama Dieng

**Date:** 11 July 2007

**THE PROSECUTOR**

v.

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

ICTR 0011 P 355  
Shupf

**DECISION ON NZIRORERA'S MOTION TO STRIKE PARAGRAPH 25.2 OF THE AMENDED  
INDICTMENT AND EVIDENCE OF MRND MEETING IN GISENYI**

*Rule 68 of the Rules of Evidence and Procedure*

**Office of the Prosecutor:**  
Don Webster  
Alayne Frankson-Wallace  
Iain Morley  
Saidou N'Dow  
Gerda Visser  
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

Shupf

29/22

**INTRODUCTION**

1. The trial in this case started on 19 September 2005 before Trial Chamber III composed of Judges Dennis C. M. Byron, presiding, Emile Francis Short and Gberdao Gustave Kam. On 14 December 2006, that Trial Chamber requested, pursuant to Article 28 of the Tribunal's Statute, the Government of Rwanda to provide the Registry with a copy of the videotape of MRND rallies in Gisenyi which was purportedly introduced during the trial of MRND President Wellars Banyi in Gisenyi, as soon as practicable, for disclosure to the Defence.<sup>1</sup> The Chamber further respectfully requested that should the Rwandan authorities be unable to comply with the Chamber's request, they inform the Registry of this inability, by 31 January 2007, providing reasons why. In its Decision, the Chamber noted the previous efforts of the parties to locate the videotape<sup>2</sup> and held that this videotape was relevant to the trial as the MRND meeting at Umuganda Stadium in October 1993 was alleged in paragraph 25.2 of the Indictment, had been the subject of the testimony of Prosecution witnesses XDM and HH and that the former, during his testimony before the Chamber, had referred to the videotape in question and had acknowledged having seen it.<sup>3</sup>

2. On 19 January 2007, Judge Short withdrew from the case. Judge Vagn Joensen joined the bench in June 2007 as substitute judge, in accordance with Rule 15 *bis* (D) of the Rules of Procedure and Evidence.<sup>4</sup>

3. On 11 May 2007, the Registrar filed submissions pursuant to Rule 33(B) of the Rules of Procedure and Evidence ("Rules") in respect of the Decision of 14 December 2006.<sup>5</sup> He explained that in view of ensuring the implementation of the Decision, his Office had liaised with the competent Rwandan authorities, sent a representative on mission to Rwanda to meet with them as well as with representatives of the Office of the Prosecutor of the Tribunal ("OTP") in Kigali. As a result of his enquiries, the Registrar reported that the Office of the Prosecutor General of Rwanda advised that the videotape had been handed over to an

<sup>1</sup> *Prosecutor v. Édouard Karemera, Mathieu Ndirumpatswe and Joseph Nzirorera ("Karemera et al.")*, Decision on Defence Motion for Request for Cooperation to Government of Rwanda: MRND videotape (TC), 14 December 2006 ("Decision of 14 December 2006").

<sup>2</sup> *Ibid.*, para. 6.

<sup>3</sup> *Ibid.*, para. 5.

<sup>4</sup> *See: Prosecutor v. Édouard Karemera, Mathieu Ndirumpatswe, Joseph Nzirorera ("Karemera et al.")*, Case No. ICTR-98-44-T, Decision on Continuation of the Proceedings (TC), 6 March 2007; *Karemera et al.*, Decision on Appeals Pursuant to Rule 15 *bis* (D), (AC) 20 April 2007. Judge Joensen was sworn in on 2 May 2007 and certified that he had familiarized himself with the record of the proceedings on 8 June 2007, see *Karemera et al.*, Certification of the Familiarisation with the Record of the Proceedings, 8 June 2007.

<sup>5</sup> The Registrar's Submissions in Respect of the "Decision on Defence Motion for Request for Cooperation to Government of Rwanda: MRND videotape" of 14 December 2006, filed on 11 May 2007 ("Registrar's Submissions").

unknown representative of the OTP in Kigali on an unspecified date and that it was unable to find the videotape in its judicial archives, which had been damaged and partly lost after a judicial reform in 2002-2003.<sup>6</sup>

4. On 18 May 2007, the Prosecution submitted a supplemental filing in regard to the Registrar's Submissions.<sup>7</sup> It explained that it had undertaken further enquiries and that based on the results of these enquiries, it appeared that the OTP was not in possession of the videotape and that no records indicated that it had ever been in receipt of this videotape.

5. Meanwhile, on 7 May 2007, the Defence for Nzirorera filed a Motion requesting that the Chamber strike out paragraph 25.2 of the Indictment as well as the related evidence given by Prosecution Witnesses XBM and HFL.<sup>8</sup> On 10 May 2007, the Prosecution filed its Response opposing the Motion.<sup>9</sup>

## DISCUSSION

### *Preliminary Issue*

6. At the time of the filing of the Motion, while Judge Joensen had not joined the bench, the two remaining Judges had been authorized to conduct routine matters in absence of the substitute Judge, in accordance to Rule 15 *bis* (F).<sup>10</sup> In its Motion, the Defence for Nzirorera submitted that its Motion was not a routine matter within the meaning of Rules and could therefore not be dealt with by the two remaining Judges.<sup>11</sup>

7. This issue is moot as the Chamber is currently constituted by a full bench of three Judges.

### *On the Merits*

8. The Prosecutor has a positive and continuous obligation under Rule 68(A) of the Rules to disclose, as soon as practicable, to the Defence any material which, in his actual knowledge, may suggest the innocence, mitigate the guilt of the Accused or affect the

<sup>6</sup> An official letter to this effect from the Office of the Prosecutor General of Rwanda is appended to the Registrar's Submissions.

<sup>7</sup> Prosecutor's Supplemental Filing concerning Registrar's Submission of 11 May 2007 in respect of the "Decision on Defense Motion for Request for Cooperation to the Government of Rwanda : MRND Videotape" of 14 December 2006, filed on 18 May 2007.

<sup>8</sup> Motion to Strike Paragraph 25.2 of the Amended Indictment and Evidence of MRND Meeting in Gisenyi, filed on 7 May 2007 ("Nzirorera's Motion"); see also Reply Brief: Motion to Strike Paragraph 25.2 of the Amended Indictment and Evidence of MRND Meeting in Gisenyi, filed on 14 May 2007 ("Nzirorera's Reply Brief").

<sup>9</sup> Prosecutor's Response Motion to Strike Paragraph 25.2 of the Amended Indictment and Evidence of MRND Meeting in Gisenyi, filed on 10 May 2007 ("Prosecution Response").

<sup>10</sup> Interoffice Memorandum from President Erik Mase to Judge Byron, filed on 13 March 2007.

<sup>11</sup> Nzirorera's Motion, *ft.* 1.

credibility of the Prosecutor's evidence. The initial determination of what material is exculpatory, which is primarily a facts-based judgement, rests with the Prosecution.<sup>12</sup> The expression "actual knowledge" has been consistently interpreted as requiring that the material be in the Prosecution's possession.<sup>13</sup> The Prosecution is generally presumed to discharge its obligations under Rule 68 in good faith.<sup>14</sup>

9. If the Defence wishes to show that the Prosecution is in breach of these obligations, it must: (i) define the material with reasonable specificity; (ii) prove the Prosecutor's actual knowledge of the materials requested, i.e. establish that it is in the custody and control of the Prosecution; and (iii) present a *prima facie* showing of its probable exculpatory nature.<sup>15</sup>

10. The Defence for Nzirorera moves for an order striking the allegation in paragraph 25.2 of the Amended Indictment and the evidence of the MRND meeting in Gisenyi on the grounds that the negligent loss or destruction of the videotape of this meeting has prevented it from having access to and introducing exculpatory evidence.<sup>16</sup> It alleges that the Rwandan authorities disclosed the videotape to the OTP.<sup>17</sup> It argues that the loss or destruction of the videotape in question is highly prejudicial to the Accused because other Prosecution witnesses who have claimed that the MRND rallies included calls to massacre Tutsis have been consistently and repeatedly impeached by the videotapes of those meetings.<sup>18</sup> It also contends that the videotape is certain to be exculpatory as the Accused knows that he never attended this meeting.<sup>19</sup> It submits that it should not be obliged to prove the precise contents

<sup>12</sup> *Karemera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 16.

<sup>13</sup> *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, Judgement (AC) 23 May 2005, para. 262.

<sup>14</sup> *Kordic & Cerkez Appeals Judgement*, para. 183 ("the general practice of the International Tribunal is to respect the Prosecution's function in the administration of justice, and the Prosecution execution of that function in good faith"); *Karemera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 17 ("the Trial Chamber is entitled to assume that the Prosecution is acting in good faith").

<sup>15</sup> *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgement (AC), 29 July 2004, para. 268; *Karemera et al.*, Oral Decision on Stay of Proceedings (TC), 16 February 2006, p. 6; *Karemera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 13; *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengyamba*, Case No. ICTR-98-41-T ("*Bagosora et al.*"), Decision on the Ntabakuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68 (TC), 6 October 2006, para. 2; *Bagosora et al.*, Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses (TC), 27 September 2005, para. 3 ("a request for production of documents has to be sufficiently specific as to the nature of the evidence sought and its being in the possession of the addressee of the request").

<sup>16</sup> *Ibid.*, para. 1.

<sup>17</sup> Nzirorera's Reply, paras. 8-11. The Defence for Nzirorera refers to a conversation and correspondence between Defence Counsel and Prosecution Counsel, detailed in its Reply and Annex to its Reply as well as the Registrar's Submissions.

<sup>18</sup> Nzirorera's Motion, paras. 9-12; Nzirorera's Reply, paras. 12-13. The Defence for Nzirorera refers to the testimony of Witness Ahmed Mbonnyunkiza relating to the speech of President Habyarimana during the MRND rally of 15 November 1992, the testimony of Witness UB relating to Mathieu Ndirumpatse's speech at Nyamirambo stadium on 16 January 1994, the testimony of Witness IIII relating to Joseph Nzirorera's presence at the MRND Ruhengeri meeting of 15 November 1992.

<sup>19</sup> Nzirorera's Reply, para. 12.

of the videotape as the Prosecution should not be allowed to profit when it or its Rwandan counterparts are responsible for the loss of the videotape in the first place.<sup>20</sup> It finally refers to a number of decisions by the Appeals Chamber on the importance of the Prosecution's Rule 68 obligations and the need for the imposition for appropriate sanctions for violations of these obligations.<sup>21</sup> It concludes that "it is time to put the words of the Appeals Chamber in practice".

11. The Prosecution submits that the Defence for Nzirorera has failed to establish that the Prosecution had custody or control of the videotape, or that it negligently lost or destroyed the videotape, and that it failed to use its best efforts to locate the videotape. It contends that there is nothing in the OTP archives to suggest that the tape was ever received by or deposited with the OTP. It argues that it would be manifestly unjust for the Chamber to grant Nzirorera's Motion where the circumstances regarding the inability to locate the videotape are beyond the control of the Prosecution, despite its best efforts.<sup>22</sup> The Prosecution further argues that the Chamber should not accept the Defence's presumption as to the contents of the videotape, nor its assertion that it would contradict the testimony of Prosecution witnesses. It submits that the absence of the videotape is one of a number of matters for the Chamber to take into consideration when it is weighing the *viva voce* evidence of witnesses on the issues.<sup>23</sup> The Prosecution finally submits that the extent of the alleged prejudice to the Accused is exaggerated: there is nothing preventing the Defence from calling its own *viva voce* evidence in order to contradict the evidence given by Prosecution Witnesses on this allegation.<sup>24</sup>

12. The Chamber is of the view that while the Defence has identified the material sought with reasonable specificity, it has not shown that the Prosecution was in possession or control of the said videotape.

<sup>20</sup> *Ibid.*, para. 14.

<sup>21</sup> Nzirorera's Motion, paras. 15-16 (citing *Prosecutor v Rutaganda*, Case No. ICTR-96-03-R, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification (AC), 8 December 2006, para. 37; *Prosecutor v Oric*, Case No. IT-03-68-T, Decision on Ongoing Complaints About Prosecutorial Non-Compliance With Rule 68 of the Rules (AC), 13 December 2005, para. 20; *Prosecutor v Kordic & Cerkez*, Case No. IT-65-1412-A, Judgement (AC), 17 December 2004, paras. 183 and 242 ("Kordic & Cerkez Appeals Judgement"); *Prosecutor v Brljanin*, Case No. IT-99-36-A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order the Registrar to Disclose Certain Materials (AC), 7 December 2004; *Prosecutor v Krstic*, Case No. IT-98-33-A, Judgement (AC), 19 April 2004, paras. 174 and 215).

<sup>22</sup> Prosecution Response, paras. 5-8 (referring to a letter from the Office of the Prosecutor General of Rwanda to the Registrar, included in Annex to the Prosecution Response and cited by the Registrar in its Submissions, *supra*, fn. 5).

<sup>23</sup> *Ibid.*, paras. 9-11.

<sup>24</sup> *Ibid.*, para. 13.

29418

11 July 2007

13. On the basis of the submissions of the parties and the Registrar, the Chamber is not persuaded that the videotape in question is in the custody and control of the Prosecution. The Prosecution has asserted that it is not in possession of the videotape and it is deemed to discharge its obligations in good faith. Moreover, while the relevant Rwandan authorities claim to have transferred the videotape to the OIP, the information regarding this transfer is so vague and general that it cannot serve to contradict the Prosecution's express and unequivocal statement that it has not such material in its possession.

14. In view of the foregoing, the suppression of paragraph 25.2. of the Indictment or exclusion of evidence related to this paragraph is not warranted. The Chamber further notes that the Accused may still defend himself against this allegation, including by calling evidence to contradict the testimony of the Prosecution witnesses on that allegation, and the Chamber's decision on the admissibility of the testimony of Prosecution witnesses on the meeting does not touch upon the weight which may be accorded to this evidence at the judgement phase.

**FOR THOSE REASONS, THE CHAMBER**

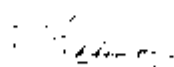
I. **DENIES** the Defence for Nzirorera's Motion.

Arusha, 11 July 2007, done in English.



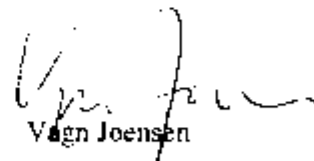
Dennis C. M. Byron

Presiding Judge



Gberdao Gustave Kam

Judge



Vagn Joensen

Judge

[Seal of the Tribunal]