



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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2007
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OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, 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

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**DECISION ON JOSEPH NZIRORERA'S MOTION TO EXCLUDE THE
TESTIMONY OF WITNESS AXA**

Rules 73, 54 and 98 of the Rule of Procedure and Evidence

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Dior Diagne Mbaye and Félix Sow

Defence Counsel for Mathieu Ngirumpatse
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Defence Counsel for Joseph Nzirorera
Peter Robinson and Patrick Niny Mayidika Ngimbi

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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. The fourth trial session concluded on 13 December 2006.
2. As a result of Judge Short's withdrawal from the case in January 2007, Judge Vagn Joensen joined the bench in June 2007 as substitute judge.¹ The fifth trial session started on 12 June 2007. During this session, the Prosecution intends to call 16 witnesses, including Witness AXA.
3. On 11 June 2007, Joseph Nzirorera filed a motion to exclude the testimony of this witness.² The Prosecution opposes the motion in its entirety.³

DISCUSSION

4. Joseph Nzirorera submits that contrary to the Chamber's order of 14 September 2005, the Prosecution has not used its best efforts to obtain and disclose to the Defence the Rwandan judicial records of Witness AXA.⁴ To evidence the existence of judicial records of the witness, Nzirorera relies upon a statement to the Office of the Prosecutor in which Witness AXA stated that he had pleaded guilty for his role in various attacks of the Kibuye prefecture and that "[he] ha[d] mentioned that Karemera helped [them] to get weapons to commit the genocide". Joseph Nzirorera explains that he attempted to interview the witness in Rwanda to identify his judicial records himself but that he failed to obtain the correct authorization to get access to the witness.⁵
5. Joseph Nzirorera submits that he is prejudiced by the Prosecution's failure to use its best efforts to obtain these judicial records as he will be required to cross-examine the

¹ See: *Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse, 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.

² Joseph Nzirorera's Motion to Exclude Testimony of Witness AXA, filed on 11 June 2007.

³ Prosecutor's Response to Joseph Nzirorera's Motion to Exclude the Testimony of Witness AXA, filed on 18 June 2007.

⁴ *Karemera et al.*, Decision on the Motions to Compel Inspection and Disclosure and to Direct Witness to Bring Judicial Immigration Records (TC), 14 September 2005, para. 11.

⁵ Nzirorera's Motion, footnote 3.

witness without the benefit of his prior statements. He therefore moves the Chamber to exclude the anticipated testimony of Witness AXA.

6. In view of the representations made by the Prosecution, the Chamber is satisfied that the Prosecution has made continuous efforts to obtain the judicial records of Witness AXA. These efforts included several representations made by the Office of the Prosecutor to the relevant Rwandan authorities, as well as correspondence and visits to these authorities.⁶ The Chamber, however, recalls that since its Decision of September 2005, it clarified that "to comply with an order to use its best efforts to obtain information about prior witness statements and/or judicial records from Rwandan authorities, the Prosecution must in a timely manner conduct systematic interviews of the witnesses in order to elicit as detailed information as possible as to when, where and by which authority they have been interviewed, examined and/or tried and make inquiries to the Rwandan authorities with reference to the information thus elicited."⁷

7. The Chamber finds it therefore necessary that the Prosecution, as ascertained in its Response, continues to use its best efforts to obtain the judicial records of Witness AXA.

8. Exclusion of evidence, however, is at the extreme end of a scale of measures available to the Chamber in addressing the prejudice caused to an Accused in the preparation of his defence.⁸ In the present case, the Defence has not shown that it has suffered any prejudice from the lack of disclosure of the judicial records of the witness which would justify such an extreme remedy. Furthermore, where appropriate, the Chamber has discretion to recall the witness and therefore, exclusion of the anticipated testimony of Witness AXA is not warranted.

FOR THE ABOVE REASONS, THE CHAMBER

I. **DENIES** Joseph Nzirorera's Motion to exclude the testimony of Witness AXA;

⁶ Prosecutor's Response, para.2, footnote 2.

⁷ *Karemura et al.*, Decisions on Joseph Nzirorera's Motions to Vacate the Decision on Defence Motion for Subpoenas to Prosecution Witnesses, to Exclude the Testimony of Witnesses AMB, ANU, AWD, AWE, FH, and KGV, and to postpone the testimony of Witness ANU (TC), 14 June 2007, para. 17.

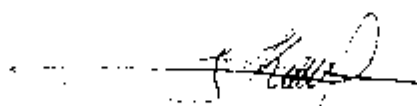
⁸ *Karemura et al.*, Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guichaoua; Defence Motion to Exclude the Witness' Testimony; and Trial Chamber's Order to Show Cause (TC), 1 February 2006, para. 11; *Karemura et al.*, Decision on Defence Motions to Exclude Testimony of Professor André Guichaoua (TC), 20 April 2006, para. 8; *Karemura et al.*, Decision on the 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, para. 6.

II. **REQUESTS** the Prosecution pursuant to Rule 98 of the Rules to continue to use its best efforts to obtain and disclose to the Defence the Rwandan judicial records pertaining to Witness AXA.

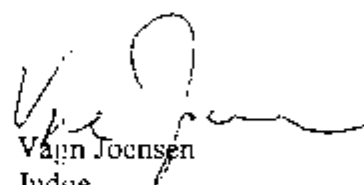
Arusha, 1 July 2007, done in English.



Dennis C. M. Byron
Presiding Judge



Gberdao Gustave Kam
Judge



Vagn Joensen
Judge

[Seal of the Tribunal]





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Date: 11 July 2007

Case Name / Affaire: The Prosecutor vs.

- Joseph NZIRORERA
- Mathieu NGIRUMPATSE
- Edward KAREMERA

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

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