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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
Vagn Joensen

Registrar: Adama Dieng

Date: 28 September 2007

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

DECISION ON RECONSIDERATION OF ADMISSION OF WRITTEN STATEMENS IN LIEU OF ORAL TESTIMONY AND ADMISSION OF THE TESTIMONY OF PROSECUTION WITNESS GAY

Rules 90 and 92bis of the Rules of Procedure and Evidence

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INTRODUCTION

1. Pursuant to Count Five of the Indictment, Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera are charged with the commission of the crime of rape as a crime against humanity.[1] It is not alleged that the Accused personally or/and physically perpetrated the rapes, but rather that they are responsible for such crimes by virtue of their superior responsibility[2] for those who physically perpetrated them or, alternatively, by virtue of an extended form of joint criminal enterprise.[3]

2. On 11 December 2006, Trial Chamber III denied a Prosecution's Motion seeking the admission into evidence of the written statements of 63 purported rape witnesses as well as the transcripts of evidence of eight purported rape witnesses[4] in previous proceedings before this Tribunal, in lieu of them testifying orally, pursuant to Rule 92*bis* (A) and (D) of the Rules of Procedure and Evidence ("Rules").[5]

3. In reaching its conclusion, the Chamber held:

> However, according to the forms of liability pleaded in the Indictment (as outlined in paragraph one of this Decision, and the footnotes thereto) the evidence is to be relied upon to prove that rapes were committed on a widespread and systematic basis by the Accused's subordinates and/or co-perpetrators. These allegations are so pivotal to the Prosecution's case that it would be unfair to the Accused to permit the evidence to be given in written form without an opportunity to cross-examine the witnesses.[6]

4. Furthermore, as a result of this finding rejecting the admission of written statements, the Trial Chamber found that the number of 93 witnesses that the Prosecution intended to call

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[1] *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera ("Karemera et al.")*, Case No. 98-44-I, Amended Indictment, 24 August 2005.

[2] Paragraph 70 of the Indictment alleges that the rapes were so widespread and systematic that the Accused knew or had reason to know that the *Interahamwe* and other militiamen were about to commit them or that they had committed them; that they had the material capacity to halt or prevent the rapes, or punish or sanction the perpetrators; but that they failed to do so.

[3] Paragraph 69 (and 7) of the Indictment alleges that the rapes were the natural and foreseeable consequence of the object of the joint criminal enterprise to destroy the Tutsi as a group, and that the Accused were aware that rape was the natural and foreseeable consequence of the joint criminal enterprise in which they knowingly and wilfully participated. See also paragraphs 4, 5, 6, 7, 8, 14, 15 and 16 of the Indictment which also outline the general allegations of the joint criminal enterprise and relate to Count Five.

[4] Note that the Prosecution originally sought the admission of the previous trial testimony of nine witnesses, pursuant to Rule 92*bis*. However, by Corrigendum dated 3 October 2006, the Prosecution withdrew its application for the admission of the evidence of one of those nine witnesses – Witness FAF (a.k.a. 'TM' and 'RJ') – so that its final application pursuant to Rule 92*bis* (D) relates to the previous trial testimony of eight witnesses only.

[5] *Karemera et al.*, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules; and Order for Reduction of Prosecution Witness List (TC), 11 December 2006 ("Decision of 11 December 2006").

[6] *Ibid.*, para. 20.

to testify to the allegation of rapes and sexual assault was excessive.[7] It therefore ordered the Prosecution to drastically reduce the said number of witnesses.[8] On 7 May 2007, the Prosecution informed the Defence and the Chamber of its intention to call 16 witnesses, including Witness GAY, to testify to the allegations of rapes and sexual violence.[9]

5. During the fifth trial session, at the request of the Defence for Nzirorera, the Chamber decided to preclude the testimony of Prosecution Witness GAY concerning rapes of sexual assaults committed in Mukingo *commune* in April 1994.[10] It accepted the Defence's contention that the anticipated testimony of this witness has already been addressed by the judicial notice taken by the Chamber of the fact that rapes were committed in this area by Interahamwe in April 1994 ("Fact # 17").[11] The Chamber also agreed with the Defence for Nzirorera that "it would be unnecessary to expose a witness to the emotional impact of giving testimony of this nature when judicial notice has already been taken of the facts to which she will be testifying".[12] On 6 August 2007, the Prosecution filed a motion seeking certification to appeal this Decision.[13]

6. In a separate Order, the Chamber further invited the Prosecution to clarify whether the 16 sexual violence witnesses featured in the list of its prospective witnesses were included in the list of witnesses whose statements it sought to have admitted under Rule 92*bis* in lieu of them testifying orally.[14] The Prosecution responded as follows:

> When the prosecution filed its application under Rule 92bis on 20 February 2006, 13 of the 16 witnesses that currently figure on the prosecution's listing of prospective sexual violence witnesses were anticipated to testify orally and 3 of those 16 witnesses were only expected to provide evidence in written form. However *all 16 witnesses* were *incorporated* in the Rule 92bis application itself, and their evidence was *amenable to proof in written form*, having

[7] Decision of 11 December 2006, paras 26-28.
[8] Decision of 11 December 2006.
[9] Prosecutor's Interoffice Memorandum, filed on 7 May 2007 and Prosecutor's Submissions on its Final Witness List, filed on 30 May 2007. Those witnesses are known by the following pseudonym: GAY, FAL, GDT, GV, CSB, DBG, APK, APW, APM, BB, ATA, ARP, ATE, DBV, BIX and AQQ.
[10] T. 30 July 2007, pp. 7-8.
[11] T. 30 July 2007, p. 8. See *Karemera et al.*, Decision on Appeals Chamber Remand of Judicial Notice (TC), 11 December 2006. The Trial Chamber took judicial notice of the following adjudicated fact from *Kajelijeli* Judgement (fact no. 17, at p. 19): "Members of the Interahamwe, including Interahamwe from Mukingo commune and neighbouring areas committed rapes and sexual assaults in the Ruhengeri Prefecture between 7 and 10 April 1994."
[12] T. 30 July 2007, p. 8.
[13] Prosecutor's Application for Certification to Appeal the Oral Decision on Nzirorera's Motion to Preclude Testimony of Witness GAY, filed on 6 August; see also Joseph Nzirorera's Response filed on 7 August 2007 and the Prosecutor's Reply thereto filed on 8 August 2007.
[14] *Karemera et al.*, Interim Order to the Prosecutor to File the Written Statements of its Proposed 16 Sexual Violence Witnesses (TC), 15 August 2007.

satisfied the formal requirements of Rule 92bis(B)(i)(b) and having met the criteria established by the jurisprudence of this Tribunal, as set forth in the *Argument* in paragraphs 12 – 18 of the prosecution Rule 92bis motion of 20 February 2006.[15]

7. The Chamber then ordered *proprio motu* the Parties to file submissions concerning the reconsideration of its decision on the preclusion of Prosecution Witness GAY's testimony and the admission of the written statements of the 16 sexual violence witnesses in lieu of their oral testimony.[16]

8. The Prosecution filed its submissions on 31 August 2007 moving the Chamber to reconsider its prior decisions by either recalling Witness GAY to testify or admitting her written statement, and by admitting, under Rule 92 *bis*, the written statements of the other Prosecution witnesses to acts of sexual violence.[17] Conversely, the Defence for Nzirorera and the Defence for Ngirumpatse request the Chamber to maintain its prior decisions.[18] Furthermore, in a separate motion, the Defence for Nzirorera moves the Chamber to exclude, in addition to the testimony of Witness GAY, the testimony of the 15 remaining Prosecution witnesses to acts of sexual violence on the grounds that calling these witnesses would constitute an excessive number of witnesses being used to prove the same facts.[19]

DELIBERATIONS

Preliminary Matter

9. The Chamber notes the observations made by the Defence for Ngirumparse on the Chamber's Decision of 5 September 2007 denying its motion for extension of time in order to obtain the translation in French of some documents, and its application for the Chamber to

[15] Prosecutor's Submission Pursuant to Trial Chamber III Order of 15 August 2007 Concerning Sexual Violence Witnesses (filed on 15 August 2007), para. 7.
[16] *Karemera et al.*, Interim Order to the Parties to File Submissions Regarding Reconsideration of the Chamber's Exclusion of Witness GAY's Testimony and the Admission of Written Statements of the 16 Sexual Violence Witnesses Pursuant to Rule 92 *bis* (TC), 16 August 2007.
[17] Prosecutor's Submission Pursuant to Trial Chamber Order III of 16 August 2007 Concerning Reconsideration of (i) Preclusion of Testimony from Witness GAY *and* (ii) Rule 92bis Motion for Sexual Violence Witnesses, filed on 31 August 2007 ("Prosecution's Submissions").
[18] Joseph Nzirorera's Submissions on Reconsideration of Admission of Witness Statements of Sexual Assault Victims, filed on 3 September 2007 ("Nzirorera's Submissions of 3 September 2007"); Premières observations pour Mathieu Ngirumpatse conformément au "Trial Chamber III Order of 16 August 2007 Concerning Reconsideration of Preclusion of Testimony from GAY and Rule 92bis Motion for Sexual Violence Witnesses", filed on 10 September ("Ngirumpatse's Submissions"). On 5 September 2007, the Chamber granted a short extension of time to the Defence for filing their submissions.
[19] Joseph Nzirorera's Motion to Exclude Testimony of 15 Prosecution Witnesses to Acts of Sexual Violence, filed on 3 September 2007.

request the Registrar to pay any overtime done by its Legal Assistant when translating documents.[20] The Chamber finds, however, such a request unnecessary and inappropriate.

Reconsideration of the Chamber's Decision to Preclude the Testimony of Prosecution Witness GAY and of the Chamber's Decision of 11 December 2006

10. According to the established jurisprudence of the Tribunal, a Chamber has the inherent power to reconsider its decisions when (i) a new fact has been discovered that was not known to the Chamber at the time it made its original Decision; (ii) there has been a material change in circumstances since it made its original Decision; or (iii) there is reason to believe that its original Decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice thereby warranting the exceptional remedy of reconsideration.[21]

11. The Defence for Nzirorera and the Defence for Ngirumpatse submit that no such exceptional circumstance exist to justify a reconsideration of the Chamber's Decision to preclude the testimony of Witness GAY.

12. The Chamber, however, accepts the Prosecution's contention that its decision to preclude oral testimony from GAY on the ground that it was cumulative evidence was erroneous. The witness' anticipated testimony was indeed expected to include the witness' observations of Joseph Nzirorera in gatherings with Juvenal Kajelijeli and other known Interahamwe, evidence that goes beyond adjudicated fact #17.

13. The Chamber, however, notes that in its submissions, the Prosecution now suggests an alternative to calling the witness for oral testimony. The Prosecution acknowledges that Witness GAY's evidence could be admitted in written form and that recalling the witness to testify orally "would entail explaining to the witness the need to transport her, yet again, far from her home to appear before a court that has previously shunned her."[22] Furthermore, the Prosecution submits that the Chamber could admit Witness GAY's statement only in part "by explicitly limiting the evidence that it receives in writing to the fact that *GAY was raped by*

[20] Ngirumpatse's Submissions, paras. 2-12.
[21] *Karemera et al.*, Case No. ICTR-98-44-PT, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses, 29 August 2005, para. 8; *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Modification of Protective Order: Timing of Disclosure, 31 October 2005, para. 3; *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting with Defence Witness, 11 October 2005, para. 8 (note also the authorities cited in footnotes contained within that paragraph).
[22] Prosecution's Submissions, para. 25; see also at para. 24.

certain named Interahamwe in Mukingo, including NIYIGABA Michel, in early-mid April 1994".[23] In view of those circumstances, the Chamber will consider whether to admit the Witness GAY' statement in lieu of her oral testimony along with the statements of the other 15 Prosecution witnesses of sexual assaults.

14. The Defence for Nzirorera and the Defence for Ngirumpatse also submit that no exceptional circumstance exists in the present case to justify reconsideration of the prior Trial Chamber's Decision of 11 December 2006. In their view, the only thing that has changed since the original decision denying admission of the statements is that the Trial Chamber has become increasingly concerned over the progress of the trial in light of the Tribunal's completion strategy.[24]

15. The Chamber notes that in the initial application made by the Prosecution in February 2006, of the 16 witnesses who are currently on its prospective list of witnesses to be called, the evidence of only three was sought to be admitted in written form under Rule 92 *bis*.[25] The 13 other witnesses were anticipated to testify orally, and there was no application for the admission of their written statements in lieu of their oral testimony.

16. The Chamber is satisfied that new circumstances have arisen since the filing of the Decision of 11 December 2006 that affect its premise and provide more compelling reasons for the Chamber to exercise its discretion to reconsider it, including by ruling on the admission of the statements of the 13 other Prosecution witnesses.

17. The number of witnesses to be considered for the admission of their evidence in written form has been drastically reduced since then. Whereas in February 2006, the Prosecution sought the admission of written statements and transcripts for 72 witnesses, now it only seeks the admission of 16 statements. The Prosecution no longer opposes that the witnesses be called for cross-examination where the Chamber would find it necessary.[26] The Prosecution also accepts the admission of part of the statements, where the Chamber finds it appropriate.[27] These changes in the relief sought are consistent with the prior Prosecution

[23] Prosecution's Submissions, para. 38 and footnotes 38 and 39.
[24] Nzirorera's Submissions of 3 September 2007, paras. 4 and 5; Ngirumpatse's Submissions, para. 18.
[25] Prosecutor's Submission Pursuant to Trial Chamber III Order of 15 August 2007 Concerning Sexual Violence Witnesses, filed on 15 August 2007 ("Prosecution's Submissions"), para. 7. See Decision of 11 December 2006.
[26] In its submissions of February 2006, the Prosecution adopted a "all or nothing" position: either the Trial Chamber receive evidence in written form exclusively or hear numerous witnesses both in direct-examination and cross-examination (see Prosecution's Submissions, para. 30).
[27] Prosecution's Submissions, para. 38.

statement that it would renew its application under Rule 92 *bis* for evidence of sexual assaults depending on how oral testimony from witnesses developed on the trial record.[28]

18. Since the Decision of 11 December 2006, there is also a greater record of oral testimony of alleged rapes and acts of sexual assault on the trial record. So far, eight witnesses have given evidence of sexual violence. Consequently, the renewed Prosecution application for admission of evidence in written form is considerably narrowed in scope and more forcefully motivated by evidence that already appears on the trial record, including the six facts of common knowledge and the 127 previously adjudicated facts from other cases that are judicially noticed in this trial, including 23 judicially noticed facts of sexual violence.[29] Furthermore, the statements sought for admission could be of cumulative nature in that other witnesses have given oral testimony on similar facts. This new circumstance is particularly relevant when adjudicating on the admission of written statements in lieu of oral evidence.[30]

19. Contrary to the Defence's contention, there are therefore new circumstances warranting reconsideration of the Decision of 11 December 2006, which are in no way related to the Tribunal's completion strategy. The Chamber, however, recalls its mandate to guarantee the rights of the Accused to a fair trial, including the right of each of them to be tried without undue delay.[31]

Admission of Written Statements of 16 Prosecution Witnesses in lieu of their Oral Testimony

20. Rule 92 *bis* of the Rules bestows discretionary power upon a Trial Chamber to admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony, on the condition that it goes to prove a matter "other than the acts and conduct of the accused" as charged in the indictment. While a Chamber may admit the evidence of a witness in written form, it may also require, in addition, that the witness appear for cross-examination.[32]

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[28] See Prosecutor's Interoffice Memorandum, filed on 7 May 2007 and Prosecutor's Submissions on its Final Witness List, filed on 30 May 2007.

[29] *Karemera et al.*, Decision on Appeals Chamber Remand of Judicial Notice (TC), 11 December 2006.

[30] Rule 92 *bis* (A) (i) (a) reads:

> Factors in favour of admitting evidence in the form of a written statement include, but are not limited to, circumstances in which the evidence in question:
> (a) is of cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;
> [...]

[31] Article 20 of the Statute.

[32] See Rule 92 *bis* (E):

> [...] The Trial Chamber shall decide, after hearing the parties, whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination.

21. In the present case, it is not disputed that the formal requirements for admission of evidence in written form set out by Rule 92 *bis* (B) are met. Concerning the statement sought to be admitted for Prosecution Witness GV, the Chamber further notes that only the statement of 12 June 2007 is certified in accordance with the Rules and it will therefore only consider this statement as sought for admission. The core issues in dispute between the parties are whether the statements should be admitted and if so whether provision should be made for cross-examination of the witnesses.

Whether the Statements should be admitted

22. The Defence for Nzirorera, joined by the Defence for Ngirumpatse,[33] submits the following main arguments in support of rejecting the admission of the statements of the 16 Prosecution witnesses:

(i) it is impossible for the Chamber to assess the reliability of some statements sought to be admitted because it only exists either in French or in English;[34]

(ii) the concerned statements include evidence of the acts and conduct of the Accused or are pivotal to the case;[35]

(iii) some prior statements of the concerned witnesses were not disclosed to the Defence and that renders impossible the evaluation of her statement;[36]

(iv) admitting statements without the witness being subject to cross-examination would be unfair;[37]

(v) the evidence sought for admission is cumulative to judicial notice already taken by this Chamber;[38]

(vi) the statement goes beyond issues related to sexual assault;[39]

(vii) the sexual assault evidence is of low probative value;[40]

(viii) the witness was not found credible or reliable in another case[41] and the witness' statement is patently unbelievable or false;[42]

[33] Ngirumpatse's Submissions, para. 22.
[34] See: Witnesses GDT, GV and ATA.
[35] See: Witnesses GDT, FAL, ATA, ARP, ATE and BIX.
[36] See: Witnesses GDT, FAL, GV, CSB, APW, ATA, ARP, ATE and DBV.
[37] See: Witnesses GDT, FAL, GV, CSB, AQQ, APW, APM, BB, ARP and DBV.
[38] See: Witnesses GDT, GV and CSB.
[39] See: Witnesses FAL and GV.
[40] See: Witness FAL.

(ix) the witness was not a victim of any sexual assault.[43]

23. The Chamber has reviewed all these arguments and reached the following conclusions:

(i) Contrary to the contention made by the Defence for Nzirorera, the Chamber has facilities to understand both working languages of the Tribunal and has therefore no difficulty in reviewing statements existing in either French or English only.

(ii) Rule 92*bis*(A) explicitly excludes "acts and conduct of the accused as charged in the indictment". The Appeals Chamber has affirmed that it also excludes the accused's acts and conduct which establish his responsibility for the acts and conduct of others. However, the same Appeals Chamber has stated that Rule 92*bis* does not exclude the acts and conduct of *others* for which the Accused is alleged to be responsible, for example, the acts and conduct of his co-perpetrators or subordinates.[44] In the present case, apart from some specific portions of the statements of Witnesses GAY, FAL and GDT, the Chamber is satisfied that the statements of the 16 witnesses go to proof of matters other than the acts and conducts of the Accused. The statements of Witnesses GAY, FAL and GDT may nonetheless be admitted by redacting those portions which are specified in the annex to this decision. On the contrary, the Chamber does not agree with the Defence contention that there are elements of the statements of Witnesses ATA, APR, ATE and BIX which are so pivotal to the Prosecution case, and that the figures of authority to which they refer are so proximate to the Accused that their admission would be unfair.

(iii) The allegation that some prior statements were not disclosed is essentially speculative. In the absence of the statements there is no basis to indicate that the Chamber will not be able to assess the reliability of the evidence adduced in this manner. If any rules concerning disclosure have been breached then appropriate applications should be made for remedial action.

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[41] See: Witness APK and BB.
[42] See: Witness APM and BIX.
[43] See: Witness BB, ATA and ARP.
[44] See *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C) (AC), 7 June 2002, paras. 9-14; see also *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC), 16 June 2006, para. 52.

(iv) The Chamber will consider whether to call any of these witnesses for cross-examination on a case-by-case basis if it is necessary or desirable in the interests of justice to do so.

(v) The argument that the evidence is cumulative to the evidence already taken in the form of judicial notice is counter-productive, because that is a factor the Rules specifically indicate favours admission of the statements.[45] Their cumulative character diminishes the alleged prejudice that could be caused by their admission.

(vi) The fact that Witness GV's statement contains evidence that goes beyond issues related to sexual assault is not, as such, a ground for exclusion of the said statements.[46] Apart from matters that go to proof the acts and conduct of the accused, the Rules do not limit the content of the statements to any particular subject. The Prosecution's motivation of adducing evidence in support of allegations of rapes and sexual assault alleged at Count 5 of the Indictment is not a basis for either redaction or exclusion of portions of the testimony which contain other information. Furthermore, the alleged participation of Jean-Paul Akayesu in acts of genocide committed in April 1994 contained in the statement of Prosecution Witness GV can hardly be prejudicial to the Accused in light of the Trial Chamber Decision to take judicial notice of the genocide and adjudicated facts from the *Akayesu* (conviction) judgement.[47]

(vii) The arguments relating to the low probative value of the testimony confuse the principles governing the admissibility and evaluation of the weight of the testimony and are consequently rejected.

(viii) The Defence contends that it would be unfair to admit the statement of Witnesses APK and BB while in other trials at this Tribunal, these witnesses were found not credible and unreliable. It also asserts that the statements of Witness APM and BIX are "patently unbelievable" or "palpably false".[48] In relation to these arguments, the Chamber recalls that it is the ultimate adjudicator of the

[45] See Rule 92 *bis* (A) (i) (a).
[46] The Defence for Nzirorera moves the Chamber to deny the admission of the statement of Prosecution Witness GV because it contains allegations of involvement of Jean-Paul Akayesu in acts of genocide committed in April 1994 that goes beyond evidence on sexual assaults (see at para. 27 of Nzirorera's Submissions).
[47] *Karemera et al.*, Decision on Appeals Chamber Remand of Judicial Notice (TC), 11 December 2006.
[48] Nzirorera's submissions, paras. 48 and 78.

reliability and credibility of the witnesses in this case. The Chamber has perused the statements and does not consider that these arguments reach the standard of demonstrating that the nature and the source of the challenged statements render them unreliable or that their admission will be more prejudicial than probative.

(ix) The fact that some of the concerned witnesses were not victims of any sexual assault, and could therefore come and testify to the evidence contained in their written statement,[49] or have already testified in other proceedings before the Tribunal[50] are not grounds for denying the admission of their written statements. There is no overriding public interest in the evidence in question being presented orally, and the fact that their evidence is of a cumulative nature in that other witnesses have given oral testimony of similar facts is, conversely, a factor in favour of admitting their evidence in written form.[51]

24. In view of those circumstances, the Chamber is satisfied that the 16 statements may be admitted under Rule 92 *bis*.

Whether Provision Should Be Made for Cross-Examination of the Witnesses

25. The Defence for Nzirorera opposes the admission of several statements on the sole ground that it would be unfair to admit them without cross-examination of the witnesses.[52] It acknowledges that it is far better off by not having to call the witness to recount traumatic events.[53]

26. Of the arguments raised to support the need for cross-examination, the only one which requires serious consideration relates to those cases where issues of inconsistent prior statements were made and the connection of the witness to particular organisations of survivors of the genocide which are presented as credibility issues.

27. The Defence submits that Witness GAY, GDT, CSB, APM, made other statements or gave other testimonies and that it would be unfair to allow their testimony without cross-

[49] Witnesses BB, ATA and ARP.
[50] Witness CSB.
[51] See Rule 92 bis (A) (i) (a).
[52] See Defence's contention in connection with Witness GAY, CSB, DBG, APW, DBV and AQQ. Concerning Witness GAY, apart from the portions of the statements which include evidence on the acts and conduct of the Accused, the Defence contends that it would be unfair to admit the statement without cross-examination (Nzirorera's submissions, para. 9). In addition to an alleged lack of disclosure, the main Defence objection to the admission of the statement of Witnesses CSB, DBG, APW and DBV, is the need to cross-examine the witness (Nzirorera's submissions, paras. 34-35; 36-38).
[53] See the Defence's contention concerning Witness GAY (Nzirorera's submissions, para. 10).

examination to explore issues of contradictions and other elements of unreliability. The arguments were in these cases put in a general and non specific and, therefore, unpersuasive form. The Chamber does not consider that every inconsistency or contradiction warrants cross-examination and would require that, if appropriate, applications for cross-examination should be put in a manner which would allow a case-by-case evaluation.

28. The Defence also submits that Witness DBG was a member of IBUKA and should be cross-examined on her relationship with that organisation as a matter going to her credibility. In the Chamber's view, the fact of her affiliation with the organisation is admitted in her statement. This already allows the Defence to address the issue it raised. Cross-examination could be of little further benefit to the case of the Defence in the absence of further information.

29. None of the other submissions on the need for cross-examination are worthy of serious consideration. Concerning Witness GV, the Defence does not present any specific reason for cross-examining the witness. It also contends that DBG, AQQ, APW and DBV were ambiguous about the connection of the assailants with the MRND. If that is the case, since the burden of proof is on the Prosecution, it is not for the Defence to clarify the Prosecution's case by cross-examination. The Defence also submits that there were contradictions between Witness ARP's statement and Prosecution Witness GK about allegations that Witness GK participated in the attacks. In the Chamber's view, the contradictions exist and are for its evaluation at the appropriate time.

Exclusion of Testimony

30. In a separate Motion, the Defence for Nzirorera also moves the Chamber to exclude, in addition to the testimony of Witness GAY, the testimony of the 15 remaining Prosecution witnesses to acts of sexual violence on the grounds that calling these witnesses would constitute an excessive number of witnesses being used to prove the same facts.

31. According to Rule 73*bis* (D) of the Rules, the Trial Chamber may order the Prosecutor to reduce the number of witnesses if it considers that an excessive number of witnesses are being called to prove the same facts.[54] In such assessment, the Prosecution's duty under the Statute to present the best available evidence to prove its case has to be

[54] See *Bagosora et al.*, Case No. ICTR-98-41-T, Order for Reduction of Prosecutor's Witness List (TC), 8 April 2003.

balanced against the right of the accused to have adequate time and facilities to prepare his Defence and his right to be tried without undue delay.

32. As above-mentioned, the cumulative nature of the statements favours the admission of the evidence of those witnesses in written form in lieu of having them testifying orally. In view of those circumstances, the Chamber does not find that the rights of the Accused to be tried without undue delay will be impaired nor that the interests of justice require the reduction or the exclusion of the 15 Prosecution witnesses whose statements are admitted. The potential cross-examination of some of those witnesses on narrowed matters does not affect this conclusion. Joseph Nzirorera's Motion falls therefore to be rejected.

33. In view of the Chamber's decision, the Prosecution's request to grant certification to appeal the Chamber's Decision precluding the testimony of Witness GAY is moot.

FOR THE ABOVE REASONS, THE CHAMBER

I. **DECIDES** to admit the following statements which were attached to the Prosecution's Submissions of 15 August 2007: statements of Witnesses GV dated 12 June 2007; CSD dated 14 April 1999 and the reconfirmation statement annexed thereto; DBG dated 12 May 1999 and the reconfirmation statement annexed thereto; APK dated 26 August 1998; APW dated 21 October 1999; APM dated 28 August 1999; BB dated 19 October 1999; ATA dated 22 October 1999; ARP dated 1 and 5 June 2001; ATE dated 3 August 2000; DBV dated 11 May 1998; BIX dated 11 December 1999 and AQQ dated 18 May 1999.

II. **DECIDES** to admit the statements of Witness GAY dated 6 May 1999, FAL dated 1 March 2000 and GDT dated 8 March 2000, by redacting those portions of the statements which are specified in the confidential Annex to the decision;

III. **DENIES** the Prosecutor's Application for Certification to Appeal the Oral Decision on Nzirorera's Motion to Preclude Testimony of Witness GAY;

IV. **DENIES** Joseph Nzirorera's Motion to Exclude Testimony of 15 Prosecution Witnesses to Acts of Sexual Violence.

Arusha, 28 September 2007, done in English.

Dennis C. M. Byron
Presiding Judge

Gberdao Gustave Kam
Judge

Vagn Joensen
Judge

[Seal of the Tribunal]