



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
Vagn Joensen

Registrar: Adama Dieng

Date: 2 October 2007

THE PROSECUTOR

v.

**Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-T

**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 with the presentation of the first Prosecution witnesses. On 13 February 2006, the Chamber granted in part a motion filed by the Defence for Joseph Nzirorera by requesting the cooperation of the Government of Rwanda in providing 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, UB and GK.¹

2. On 13 October 2006, the Rwandan the Rwandan Government informed the Chamber that they had “provided all the documents requested and at their disposal”; that they were “willing to provide to any party, any other documents that can be specified to ease verification of their existence”; that they “[could not] attend to requests made in a generic form”; and that “a party seeking to obtain documents should specify the documents needed”.²

3. On 22 March 2007, Judges Byron and Kam decided to rule on Joseph Nzirorera’s Motion for Request for Cooperation of Government of Rwanda before Judge Vagn Joensen had joined the bench.³ They considered that the motion fell within the ambit of the routine matters they were authorised to conduct in the absence of Judge Joensen, under Rule 15 *bis* (F) of the Rules of Procedure and Evidence (“Rules”).⁴ They granted in part the motion by requesting the cooperation of the Government of Rwanda to provide the Registry with statements of Witness UB, but rejected the application in relation to Witnesses ALG and GK.⁵

¹ *Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse 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

² *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: letter communicated through the Registrar

³ On 8 June 2007, Judge Vagn Joensen joined the bench as substitute Judge in accordance to Rule 15 *bis* (D), *Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera* (“*Karemera et al.*”), Certification of the Familiarisation with the Record of the Proceedings (Judge Joensen), 8 June 2007. See *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Continuation of the Proceedings (TC), 6 March 2007; *Karemera et al.*, Case No. ICTR-98-44-R15bis.3, Decision on Appeals Pursuant to Rule 15 *bis* (D) (AC), 20 April 2007.

⁴ *Karemera et al.*, Decision on Prosecutor’s Motion for an Order to File Notice of Alibi (TC), 22 March 2007, para. 3. See: Interoffice Memorandum from the President to Judge Byron, filed on 13 March 2007; Rules of Procedure and Evidence, Rule 15 *bis* (F): “In case of illness or an unfilled vacancy or in any other similar circumstances, the President may, if satisfied that it is in the interests of justice to do so, authorise a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of one or more of its members.”

⁵ *Karemera et al.*, Decision on Defence Motion for Cooperation of Rwanda to Obtain Statements of Prosecution Witnesses ALG, GK and UB (TC), 22 March 2007.

4. On 31 May 2007, the Appeals Chamber laid down standards and principles defining what should be considered a “routine matter” under Rule 15 *bis* (F) of the Rules.⁶

5. On 17 July 2007, bearing in mind the Appeals Chamber principles, the Chamber, fully composed, then considered that the prior Decision of 22 March 2007 could not be considered as bearing on a routine matter and decided to vacate it, rendering it necessary to rule afresh on Nzirorera’s request for cooperation.⁷ The Chamber is now ready to reconsider the Motion.-

DISCUSSION

6. The obligation to “cooperate with the [Tribunal] in the investigation and prosecution of persons accused of committing serious violation of international humanitarian law” is imposed on States by Article 28 of the Tribunal’s Statute. The service of documents falls under a request for assistance under this provision,⁸ and, further, 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. Requirements for the request of production of documents under Article 28 of the Statute have been established by the jurisprudence of this Tribunal and that of the International Criminal Tribunal for former Yugoslavia; any request 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.⁹

7. In the present case, the Defence provides a list of specific prior statements of the concerned witnesses,¹⁰ and refers in its Motion to specific passages of the testimony of Witnesses ALG and GK wherein the existence of prior statements given to Rwandan

⁶ *Karemera et al.*, Case No. ICTR-98-44AR73.9, Decision on “Joseph Nzirorera’s Interlocutory Appeal of Decision on Obtaining prior Statements of Prosecution Witnesses after they have testified” (AC), 31 May 2007.

⁷ *Karemera et al.*, Decision on Motions to Vacate Decisions (TC), 17 July 2007, para. 18.

⁸ 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; [...].”

⁹ *Prosecutor v. Théoneste Bagosora, Gratién 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.

¹⁰ Confidential Annex A to Nzirorera’s Motion, at 3-4.

authorities is confirmed.¹¹ The Defence explains that it learned of Witness UB's prior statements when Lead Counsel for Joseph Nzirorera was shown these statements during a meeting with former Rwandan Prime Minister Celestin Rwigema.¹² During the trial proceedings, the Prosecutor also confirmed, that the information contained in the list given by Witness GK was sufficient to enable the tracking down of the statements.¹³ For these reasons the Chamber is satisfied that the Defence has identified with sufficient particularity the documents to which its application relates and that, therefore, the first criteria for requesting cooperation under Article 28 is met.

8. 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".¹⁴ The Chamber also acknowledges that its Decision of 13 February 2006 requested, in generic terms, the cooperation of the Rwandan Government in obtaining prior statements of the witnesses.¹⁵ However, since then, the circumstances have changed, as the three concerned Prosecution witnesses were heard by the Chamber during the second and fourth trial sessions.¹⁶ Therefore, the criterion of relevancy must be assessed in connection with the standard for recalling witnesses, as enunciated by the Tribunal:

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 without undue delay as well as concerns 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.¹⁷

¹¹ 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).

¹² *Ibid.*, at para. 10.

¹³ T. 12 Dec. 2006, at 38.

¹⁴ Nzirorera's Motion, at para. 2 (referring to *Karemera 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).

¹⁵ *Ibid.*, at para. 3 (referring to *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).

¹⁶ 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.

¹⁷ *Prosecutor v. Bagosora et al.*, Decision on the Prosecution Motion to Recall Witness Nyanjwa (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*,

9. In order to have a witness recalled, the Defence must show that there are inconsistencies between the testimony of the 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.¹⁸ It is then for the Chamber to decide whether there is need for the witness to explain the inconsistency or whether it is minor or self-evident and that recall is unnecessary.¹⁹

10. Where a witness has already testified, therefore, to satisfy the criterion of relevance for an Article 28(2)(c) order, the moving party must demonstrate *prima facie* that the prior statements could be inconsistent with the witness' testimony before the Chamber on the same matters. Conversely, prior statements that are consistent with the witness' testimony or on subjects on which the witness did not testify have no value in credibility assessment and are not relevant to this trial.

11. In the present motion, the Defence has not shown that the prior statements sought for Witnesses ALG and GK are relevant to the trial, demonstrating neither that they bear on subjects on which the witnesses testified before the Chamber nor the possibility of inconsistency with their testimonies.

12. The Defence contends that the prior statements of Witness UB 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."²⁰

13. Bearing this in mind, the Chamber finds that the second criterion has only been met for the prior statements of Witness UB and that the Defence's application regarding the prior statements of Witnesses ALG and GK falls to be rejected.

14. In arguing that its efforts to obtain the cooperation of the Rwandan Government satisfy the third criterion, the Defence attaches a copy of a letter addressed to the Rwandan

Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination (TC), 28 October 2004, para. 5.

¹⁸ *Karemera 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.

¹⁹ 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.

²⁰ *Ibid.*, at para. 11.

authorities, requesting copies of the specific witness statements of Witness UB, purportedly sent on 29 November 2006,²¹ and claims it received no response.²² It further contends that the Government of Rwanda “never complied with the existing Request for Cooperation, but insisted on receiving more specific requests.”²³ It is the finding of this Chamber that the Defence for Nzirorera has demonstrated that it has taken all reasonable efforts to obtain the prior statements requested from the Rwandan authorities and therefore met the third criteria for granting cooperation with respect to statements of Witness UB.

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, 2 October, done in English.

Dennis C. M. Byron
Presiding Judge

Gberdao Gustave Kam
Judge

Vagn Joensen
Judge

[Seal of the Tribunal]

²¹ Confidential Annex C to Nzirorera’s Motion, at 9-10.

²² Nzirorera’s Motion, at paras. 7, 9 and 13.

²³ *Ibid.*, at para. 13.