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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
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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: 2 November 2007

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

DECISION ON THE PROSECUTION MOTION FOR ADMISSION INTO EVIDENCE OF POST-ARREST INTERVIEWS WITH JOSEPH NZIRORERA AND MATHIEU NGIRUMPATSE

Rules 89(C) and 95 of the Rules of Procedure and Evidence

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INTRODUCTION

1. On 27 April 2007, the Prosecution filed a Motion seeking the admission into evidence of fifty UNAMIR documents (Annex A), 10 exhibits admitted in other trials (Annex B) and transcripts[1] of post-arrest interviews with Mathieu Ngirumpatse and Joseph Nzirorera that investigators from the Office of The Prosecutor ("OTP") conducted with the former on 15, 16 and 17 June 1998 and with the latter on 12 and 13 June 1998 (Annex C).[2]

2. The Chamber will consider each Annex separately and rules in the present Decision on the admission into evidence of Annex C to the Prosecutor's Motion. The Defence for each accused opposes the Motion.[3]

DELIBERATION

Applicable law

1. Rule 89 (C) of the Rules of Procedure and Evidence ("the Rules"), provides that a Chamber "may admit any relevant evidence it deems to have probative value". According to the Appeals Chamber, the first step in the determination of whether a document is admissible is to ascertain whether sufficient indicia of reliability have been established.[4] While a Chamber always retains the competence under Rule 89(D) to request verification of the authenticity of evidence obtained out of court, "to require absolute proof of a document's

[1] The Chamber notes that although only the transcripts are sought to be admitted into evidence, both the audio-tapes and the transcripts of the interviews were made available to the Parties.

[2] Prosecutor's Motion for Admission of Certain Materials under Rule 89(c) of the Rules of Procedure and Evidence, filed on 27 April 2007 ("Prosecutor's Motion").

[3] Joseph Nzirorera's Response to Prosecution Motion to Admit Exhibits from the Bar Table, filed on 9 May 2007 ("Nzirorera's Response"), para. 99; Mémoire pour M. Ngirumpatse sur la Prosecutor's Motion for admission of certain materials under the rule 89 C of the Rules of Procedure and Evidence, filed on 22 May 2007 ("Ngirumpatse's Response"), paras. 5, 1°/ d) and 6; Soumission de Edouard Karemera suite à la requête du Procureur en admission de certaines pièces sur le fondement de l'Article 89 (C) du Règlement de Preuve et de Procédure, filed on 3 October 2007 ("Karemera's Response"), p. 12. See *Karemera et al.*, Case No ICTR-98-44-T, Décision en prorogation de délai supplémentaire (TC), 17 May 2007; *Karemera et al.*, Décision accordant une prorogation de délai supplémentaire (TC), 24 May 2007.

[4] See *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 7; *Prosecutor v. Georges Anderson Rutaganda*, Case No. ICTR-96-3-A, Judgement (AC), para. 33; *Prosecutor v. Delalic and Delic*, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998.

authenticity before it could be admitted would be to require a far more stringent test than the standard envisioned by Sub-rule 89 (C)."[5]

2. In accordance with jurisprudence, it is to the moving Party to prove that the document has *prima facie* relevance and that it has probative value.[6] In order to establish that evidence is relevant, the applicant must show that a connection exists between the evidence sought to be admitted and the proof of an allegation sufficiently pleaded in the indictment.[7] In order to establish that evidence has probative value, the applicant must show that the evidence tends to prove or disprove an issue.[8]

3. Moreover, when deciding on the admissibility of evidence, Trial Chambers must also guarantee the protection of the rights of the accused as prescribed by Articles 19 and 20 of the Statute. The Chamber therefore has the inherent power to exclude evidence if its probative value is substantially outweighed by its prejudicial effect or otherwise by the need to ensure a fair trial.[9]

4. Furthermore, Rule 95 of the Rules provides for the mandatory exclusion of evidence "if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."[10] According to the ICTY Trial Chamber in *Brdjanin*, when deciding on the exclusion of evidence, "the correct balance must be maintained between the fundamental rights of the accused and the

[5] *Prosecutor v. Delalic and Delic*, Case No. IT-96-21, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998 ("*Delalic* Appeals Decision on the Admissibility of Evidence").

[6] *See Prosecutor v. Nyiramasuhuko*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 7; *Prosecutor v. Georges Anderson Rutaganda*, Case No. ICTR-96-3-A, Judgement (AC), para. 33; *Prosecutor v. Delalic and Delic*, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998.

[7] *Prosecution v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible" (AC), 2 July 2004, para. 15; *Prosecution v. Pauline Nyiramasuhuko*, Case No. ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 12; *Prosecutor v. Theoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva.*, Case No. ICTR-98-41-T ("*Bagosora et al.*") Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (AC), 18 September 2006, fn. 40.

[8] *Prosecutor v. Blagojevic and Jokic*, Case No. IT-02-60-T, Decision on the Admission into Evidence of Intercept-Related Materials (TC), 18 December 2003, para. 17.

[9] *See Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Oral Motions for Exclusion of XBM's Testimony, for Sanctions Against the Prosecution and for Exclusion of Evidence Outside the Scope of the Indictment (TC), 19 October 2006, para. 29.

[10] *See Bagosora et al.*, Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89 (C) (TC), 14 October 2004, para 21 ("*Bagosora* Decision on the Admission of Certain Materials"); *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on the Voir Dire Hearing of the Accused's Curriculum Vitae (TC), 29 November 2006, para. 13.

essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law."[11]

Joseph Nzirorera's interview

5. The Defence for Nzirorera, while admitting that the interview otherwise would be of relevance and probative value and need not be authenticated by a witness, submits that the Motion be denied[12] because Joseph Nzirorera's rights were violated *in* relation to (i) his arrest without a warrant, (ii) the failure to inform him of the reasons for his arrest, (iii) the failure to promptly bring him before a Judge, (iv) the failure to promptly inventory and return his seized property, (v) the failure to record the complete interview with him, and (vi) the failure to respect his rights to silence and to legal assistance.[13]

i) *The Arrest*

6. The Chamber recalls that Trial Chamber II has previously found that the arrest of Joseph Nzirorera had been made on the basis of a case of urgency pursuant to Rule 40 and that the Appeals Chamber confirmed that decision.[14]

7. However, the Defence for Nzirorera disputes that the condition of urgency for his arrest was met.[15] It argues, moreover, that Trial Chamber II's findings have implicitly been overruled by the Appeals Chamber when addressing a similar issue in the *Kalijejeli* Appeals judgement.[16]

8. The Chamber is not satisfied that the Defence for Nzirorera has shown that the exceptional remedy of reconsideration is appropriate in the circumstance and will therefore not revisit the issue.

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[11] *Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Decision on the Defence "Objection to Intercept Evidence" (TC), 3 October 2003, para 62.

[12] Rule 95 reads as follows: "No evidence shall be admissible if obtained by methods which cast substantial doubt upon its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."

[13] Nzirorera's Response, para. 89.

[14] *Prosecutor v. Mathieu Ngirumpatse*, Case No. ICTR-97-44-I, Decision on the Defense Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Items (TC), 10 December 1999; *Prosecutor v. Joseph Nzirorera*, Case No. ICTR-98-44-T, Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized (TC), 11 September 2000, para. 25-26 ("*Nzirorera* Trial Chamber Arrest Decision"); *Prosecutor v. Joseph Nzirorera*, Case No. ICTR-98-44-A, Arrêt (Relatif à l'appel interlocutoire de la décision de la Chambre de première instance II du 11 septembre 2000) (AC), 4 May 2001, paras. 12-14 ("*Nzirorera* Appeals Chamber Arrest Decision").

[15] Nzirorera's Response, para. 46.

[16] Nzirorera's Response, para. 49; *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005; *Nzirorera* Trial Chamber Arrest Decision, para. 27.

(ii) The right to be informed of the reasons for the arrest

9. The Statute prescribes in Article 19(2) that "[a] person against whom an indictment has been confirmed shall ..... be taken into custody, [and be] immediately informed of the charges against him" and in Article 20(4)(a) that the Accused shall be entitled "[t]o be informed promptly and in detail ... of the charge against him or her."

10. In his Motion, the Prosecutor asserts that the OTP investigators complied with the "Rules", in particular Rules 42 and 43, but does not comment on the provisions of the Statute.[17] Nor in his Consolidated Reply does he comment on the contention by the Defence for Nzirorera that the requirement of Article 19(2) has not been met.

11. The Chamber notes that Joseph Nzirorera was arrested by the Benin authorities on 5 June 1998 and was interrogated by the OTP investigators on 12 and 13 June 1998. In its decision, Trial Chamber II did not address whether the accused had been promptly informed of the charges against him and limited itself to finding that "the current detention of the Accused did not violate the provisions of the Statute and the Rules."[18]

12. The Chamber further notes that the interview transcript indicates that, at the time of his interview, Joseph Nzirorera did not know of the charges against him, and that the investigators did not provide him with information as to why he was considered a suspect and as to any provisional charges against him.[19] The Chamber notes also that Joseph Nzirorera seemed to indicate in his interview that he was uncertain as to whether he was being charged at all.[20]

13. Therefore, the Chamber is of the view that the Prosecutor has not established that Joseph Nzirorera was informed about the charges or provisional charges against him or the nature and the cause thereof, be it promptly in connection with his arrest or at least before or during the interview sought to be admitted into evidence.

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[17] Prosecutor's Motion, para. 22.

[18] *Nzirorera* Trial Chamber Arrest Decision, para. 28.

[19] In the following exchange, Joseph Nzirorera asked the OTP interrogator of the charges against him and the OTP interrogated simply responded that there was no official indictment:

> J. (...) For as I told you, this interview, I would like to know the charges against me.
> R. We...to also explain to you that there have not been any official indictments. You are being reminded of Article 40, that is, the arrest warrant, that there is no official indictment.

Transcript of Interview with Joseph Nzirorera, part 4, p. 27.

[20] See in the following passage:

> J. (...) I was saying that it is against this background that I would like to tell you that...if charges are being brought against me, or will be brought against me regarding the massacres which took place in Rwanda, regarding the misfortune, the misfortune which befell our country, that I personally, my position, had nothing to do with it.

Transcript of Interview with Joseph Nzirorera, part 4, p. 29-30.

(iii) The right to be promptly brought before a Judge

14. The Appeals Chamber in the *Kajelijeli* Appeals Judgement discussed the right of a suspect to be promptly brought before a Judge following his or her arrest. It stated as follows:

> (...) Article 9 of the ICCPR provides that upon arrest and provisional detention, everyone has the right to be brought promptly before a Judge or official authorized to exercise judicial power.[21] The Human Rights Committee has interpreted Article 9 to mean that any delay in being brought before a Judge should not exceed a few days.[22] The Human Rights Committee has decided that under this article, four-days' delay is too long,[23] let alone lapses of 11 days, 22 days, or ten weeks.[24] Article 5(3) of the ECHR also requires that the suspect be brought promptly before a Judge or officer able to exercise judicial power upon arrest. The European Court of Human Rights has specified that two days' delay under this article is permissible;[25] however, four days and six hours constitute a violation even in complex cases, let alone one week or longer.[26]

15. It further held that:

> The request to the authorities of the cooperating State has to include a notification to the judiciary, or at least, by way of the Tribunal's primacy, a clause reminding the national authorities to promptly bring the suspect before a domestic Judge in order to ensure that the apprehended person's rights are safeguarded by a Judge of the requested State as outlined above. In addition, the Prosecution must notify the Tribunal in order to enable a Judge to furnish the cooperating State with a provisional arrest warrant and transfer order.[27]

16. The Defence for Nzirorera asserts that Joseph Nzirorera's right to be promptly brought before a Judge was not respected.[28] It moreover submits that had it been the case, he or his family may well have contacted a lawyer to advise him on the necessity and wisdom of consenting to an interview with OTP.[29]

17. The Chamber notes that Joseph Nzirorera was not brought before a judge before being transferred from Benin and thus not before the OTP interview. However, the Chamber is not satisfied that this fact in itself – had all his other due process rights been respected – would make the interview inadmissible pursuant to Rule 95.

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[21] Article 9(3) of the ICCPR states that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release...." *See also* ACHR, art. 7(5).

[22] *See* U.N. Human Rights Committee, General Comment No. 8, para. 2.

[23] *Michael Freemantle v. Jamaica*, CCPR/C/68/D/625/1995, 28 April 2000, para. 7.4.

[24] *Dennis Lobban v. Jamaica*, CCPR/C/80/D/797/1998, 13 May 2004, para. 8.3; *Ricardo Ernesto Gomez Casafranca v. Peru*, CCPR/C/78/D/981/2001, 19 September 2003para. 7.2; *Jones v. Jamaica*, para. 9.3.

[25] *Arminas Grauzinis v. Lithuania*, 37975/97, 10 October 2000, para. 25.

[26] *Terence Brogan and Others v. The United Kingdom, 10/1987/133/184-187*, 29 November 1988, paras. 6 and 62; *Talat Tepe v. Turkey*, 31247/96, 21 December 2004, paras. 64-70; *Abdullah Ocalan v Turkey*, 46221/99, 12 March 2003, para. 106.

[27] *Ibid.*, para. 222.

[28] Nzirorera's Response, para. 58.

[29] Nzirorera's Response, para. 63.

(iv) The Inventory and Return of Seized Property

18. Counsel for Nzirorera submits that the Prosecutor did not comply with Rule 41(B) which provides that "[t]he Prosecutor shall draw up an inventory of all materials seized from the accused, ..." and that "[m]aterials that are of no evidentiary value shall be returned without delay to the accused."

19. The Chamber finds that this issue is not sufficiently related to the evidence sought to be admitted so as it makes this evidence inadmissible pursuant to Rule 95.

(v) The full recording of the interview

20. Rule 43 provides that whenever the Prosecutor questions a suspect, the questioning shall be audio recorded or video recorded according to a certain procedure.

21. The Defence for Nzirorera submits that the requirement to audio-record or video record the questioning, contained in Rule 43, was not fully respected during the interview on 12 June 1998.[30] He refers to a number of references in the transcripts of the interview which would demonstrate that the OTP investigators had had a substantive discussion with Joseph Nzirorera concerning his rights and the charges brought against him before the recording began.[31] Accordingly, the Defence requests that, *before admitting the statement into evidence*, the Chamber holds an evidentiary hearing on the contents of the discussions between the OTP and Joseph Nzirorera which took place before the recording began and on their effect on Joseph Nzirorera's decision to participate in the interview.[32]

22. The Chamber notes that the transcripts do seem to indicate that some discussions between the OTP investigators and Joseph Nzirorera took place before the audio recording of his interview began. As to whether what was said during the discussions would make the interview inadmissible pursuant to Rule 95, the Chamber finds that this would require an evidentiary hearing as requested by the Defence. However, since the Chamber will find the interview inadmissible on other grounds, it does not find necessary to conduct an evidentiary hearing and will therefore not address the issue here.

[30] Nzirorera's Response, para. 67.
[31] *Ibid.*, paras. 67-70 (referring to Transcript of interview tape # 1, p. 1, 3, 6 and 12; Transcript of interview tape # 4, p. 27).
[32] Nzirorera's Response, paras. 71-72.

(vi) The rights to silence and assistance of counsel

23. Article 17(3) of the Statute and Rules 42(A)(i), 42(A)(ii) and 42(B)[33] entitle a suspect with the right to legal assistance and translation during questioning and provide in particular that questioning shall not proceed without the presence of counsel, unless the suspect has voluntarily waived his right to counsel. Rule 42(a)(iii) entitles a suspect with the right to silence and to be cautioned that any statement may be used as evidence against him or her.[34]

24. The Trial Chamber in *Bagosora* discussed the right to legal assistance at length:

> 16. Article 17 of the Statute and Rule 42 of the Rules state in unconditional terms that a detainee has a right to the immediate assistance of counsel; and, further, that questioning of the suspect "shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel". Not all legal systems confer this right on a detainee, but it is deeply and eloquently inscribed in the annals of many national and international legal systems. Along with the right to silence, this right is rooted in the concern that an individual, when detained by officials for interrogation, is often fearful, ignorant and vulnerable; that fear and ignorance can lead to false confessions by the innocent; and that vulnerability can lead to abuse of the innocent and guilty alike, particularly when a suspect is held incommunicado and in isolation.
> 17. The importance of the right to counsel, and the precariousness of its exercise by a suspect in detention, is reflected in the stringent requirement in Rule 42 (B) that a suspect has "voluntarily waived his right to counsel" before a custodial interrogation can take place. (...) National courts in which the right to counsel is recognized have elaborated that a waiver cannot be voluntary unless a detainee knows of the right to which he is entitled. To be so informed, the suspect must be informed that the right includes the right to the prompt assistance of counsel, prior to and during any questioning. Any implication that the right is conditional, or that the presence of counsel may be delayed until after the questioning, renders any waiver defective. These rights, and the practical mechanisms for their exercise, must be communicated in a manner that is reasonably understandable to the detainee, and not "simply by some incantation which a detainee may not understand". Generally, a suspect may be taken to comprehend what a reasonable person would understand; but where there are indications that a witness is confused, steps must be taken to ensure that the suspect does actually understand the nature of his or her rights.
> 18. Once the detainee has been fully apprised of his right to the assistance of counsel, he or she is in a position to voluntarily waive the right. The waiver must be shown "convincingly

[33] Article 17(3) reads as follows: "If questioned, the suspect shall be entitled to be assisted by Counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as necessary translation into and from a language he or she speaks and understands." Rules 42(A)(i) and (ii)read as follows: "(A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands: (i) The right to be assisted by counsel of his choice or to have legal assistance assigned to him without payment if he does not have sufficient means to pay for it; (ii) The right to have the free assistance of an interpreter if he cannot understand or speak the language to be used for questioning". Rule 42(B) reads as follows: "(A)Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel."

[34] Rule 42(A)(iii) reads as follows: "(A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands: (...) (iii) The right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence."

and beyond reasonable doubt". It must be express and unequivocal, and must clearly relate to the interview in which the statement in question is taken.[35]

25. The Chamber recalls that ,as stated by the ICTY Chamber in *Delalic*, it is difficult to imagine a statement taken in violation of the fundamental right to the assistance of counsel which would not require its exclusion under Rule 95 as being "antithetical to, and would seriously damage, the integrity of the proceedings".[36]

26. The Prosecutor asserts, in the present case, that Joseph Nzirorera waived his rights in an "express and unequivocal" manner during the interview[37] and in response to questions put to him by the Trial Chamber when he was asked about the voluntary nature of his statements during a court hearing on 16 July 1998.[38] At that time, Nzirorera indicated that, when he was arrested and detained, his rights had been read to him, and that he understood them. [39]

27. The Chamber notes that the beginning of the interview indicates that Joseph Nzirorera was somewhat confused as to the conditions for the exercise of his rights to counsel and to silence, although he did ultimately state that he understood the content and scope of these rights.[40] The Chamber notes that, at the beginning of the interview, he specifically stated that he would like to conduct the interview in the presence of counsel, and that the OTP investigator, instead of putting an end to the interview at this point as mandated by Rule 42(B), sought instead Joseph Nzirorera's agreement to waive his rights to counsel and silence in respect of non-"tendentious" or "delicate" questions.[41]

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[35] *Bagosora et al.*, Case No. ICTR-98-41-T, Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89 (C) (TC), 14 October 2004, paras. 16-18.

[36] *Prosecutor v. Delalic et al.*, Decision on Zdravko Mucic's Motion For the Exclusion of Evidence (TC), 2 September 1998, para. 43; Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, Decision on the Prosecutor's Motion for the Admission of certain Materials Under Rule 89 (C) (TC), 14 October 2004, para. 21.

[37] *See* Waiver dated 12 June 1998-06, Avis des droits-Nzirorera-K0054180 and waiver dated on 13 June 1998 K0054179, Transcription 12 June 1998 p. 1-11; *see also Prosecutor v. Bagosora*, Transcript of 12 June 2006, p.31 (cross examination witness Nzirorera); Prosecutor Consolidated Reply, para. 23.

[38] Transcript of 16 July 1998 before Judge Kama, p. 4.

[39] *Ibid.*

[40] Transcript of Interview with Joseph Nzirorera, part 1, p. 1-5, 6, 7, 10 and 13.

[41] See below the passage of the interview:

> J. In fact, you have to understand what I mean. I would like to go into the subject with *full details*, in the presence of my counsel as I mentioned. There are things that you told me yourself might be repeated in two years…
> R. Yeah
> J. ….in three years time. Thus I am telling you that this is a delicate matter. I would have liked to speak in detail about this subject in the presence of counsel.
> R. Okay
> J. These are things that you told me that…if we say certain things, we have to be in a position to repeat them in in two, three years.
> R. Yeah
> J. Thus if I tell you this is a delicate matter, I would prefer to go into all the details with a lawyer.
> R. Okay. That is why…

28. The Chamber further notes that on two other instances, Joseph Nzirorera refused to answer specific questions in the absence of counsel.[42] Contrary to their arrangement and to what is required by Rule 42(B), the investigator again proceeded to question Nzirorera in relation these specific issues.[43]

29. The Chamber also finds that, towards the end of the interview, Joseph Nzirorera expressed again his desire to meet with counsel. The OTP investigator sought clarification as to whether this affected Nzirorera's previous waiver of counsel.[44]

30. Moreover, the Chamber finds that the existing doubt as to whether Joseph Nzirorera had any knowledge of the charges or provisional charges against him or any related information as to why he was considered a suspect by the OTP, also entails substantial doubt as to whether he was in an informed position to waive his right to counsel or to answer questions put to him during this interview.[45]

J. I do not want to venture alone…
L. Okay
J. …into an arena where I do not know the dangers.
R. Okay. I understand. That is why we have told you that if you feel that one of the questions that I have asked you deals with a *tendentious subject or a delicate matter, as you have said, you don't* have to answer. You simply state: "I would rather wait to have counsel present to answer that question." Okay? That's it.
J. That's clear

Transcript of Interview with Joseph Nzirorera, part 1, p. 14.

[42] First of all, when questioned on the massacre of the Bagogwe, Transcript of Interview with Joseph Nzirorera, part 2, p. 19. Second of all, when questioned on the murder of members of the government on the night of 6 April 1994, Transcript of Interview with Joseph Nzirorera, part 4, p. 27.

[43] Transcript of Interview with Joseph Nzirorera, part 4, p. 27-28.

[44] *See* passage below:

J. (…) I am available at any time to answer any question. Also, as I told you, from…at some point, I had asked you to help me get a lawyer. As I told you, the sensitive nature of the matter is such that as we are not lawyers, I would need the services of a lawyer…to follow-up and assist me and if you get one, you shall bear the cost….of his defending me. Um…
R. Okay. In order to clarity one point, we shall agree (inaudible) for the questions, for example which we asked today or yesterday, are there questions you would not want to answer without your lawyer?
J. Um…
R. …it is (inaudible) no about what we have just…done here. You could have done that, you know I, you have the right to a lawyer, but you decided…
J. Not….I am award of that and I signed, I agree with you.
R. Perfect. Okay, we agree on that?
J. Ok…

Transcript of Interview with Joseph Nzirorera, part 4, p. 29.

[45] In particular, there are certain types of matters which Joseph Nzirorera might not have discussed had he been informed of the provisional charges against him or the information tending to show that he was guilty of a crime within the Tribunal's jurisdiction. This is certainly the case in relation to the extended forms of criminal responsibility with which he is charged. During the interview, Nzirorera most notably discussed his meetings and contact with Robert Kajuga (the national president of the Interahamwe and an alleged member of the joint criminal enterprise) and the civil defence programme, military training and weapons distribution, Transcript of Interview with Joseph Nzirorera, part 3, p. 11-12 and 20-22. Nzirorera's lack of awareness of the type of responsibility with which he might be charged comes through most clearly in the following passage, which

31. Therefore, the Chamber finds that the Prosecutor has not established beyond reasonable doubt that Joseph Nzirorera waived his right to be silent and to be assisted by counsel in an express and unequivocal manner.

Conclusion

32. Based on the foregoing, the Chamber concludes that there is substantial doubt as to the reliability of the interview and that its admission into evidence would be antithetical to and seriously damage the integrity of proceeding, wherefore pursuant to Rule 95, the interview is not admissible.

Mathieu Ngirumpatse's interview

33. The Defence for Ngirumpatse opposes the admission of his interview, submitting (i) that the recordings and hence the transcripts are not reliable, because it appears from the transcripts that the recordings are of extremely poor quality, and because the recordings might have been tampered with, having been in the possession of the Prosecutor for 10 years before the Defence got access to them, (ii) that the Prosecutor has not established the relevance and probative value of the interview, as no foundation has been laid through the testimony of a witness, and as the previous statement of a person who is not a witness before this Chamber is without relevance and purpose, (iii) that Mathieu Ngirumpatse was not informed about the charges against him and was misled into believing that an indictment was in existence, which was not the case, and (iv) that he was ill, in a state of stress as a result of his detention and subject to pressure by investigators, which amounts to threats or coercions and makes the interview inadmissible.[46]

34. The Defence for Nzirorera, joined by the Defence for Karemera and the Defence for Ngirumpatse, further submits, (v) that since parts of Mathieu Ngirumpatse's interview concern the acts of the co-accused, its admission would violate their right pursuant to Article 20(4)(e) of the Statute to cross-examine Mathieu Ngirumpatse, should he decide not to testify in his defence.[47]

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discusses links between the MRND and the Interahamwe and where the OTP investigator tried to reassure Nzirorera that the information discussed was innocuous:

> R. So there were contacts between the MRND officials and those of the Interahamwe?
> J. Even among the other parties, there were contacts.
> R. Yes. There was absolutely nothing wrong with that.
> J. It's only logical.

Transcript of Interview with Joseph Nzirorera, part 2, p. 46.

[46] Ngirumpatse's Reponse, para. 5.

[47] Nzirorera's Response, para. 95-96; Karemera's Response, p. 9; Ngirumpatse's Response, para. 5.

(i) Reliability

35. The Defence for Ngirumpatse requests the Chamber to compare the audio recordings with the transcripts thereof in the determination of the reliability of the transcripts.[48]

36. The Chamber, however, opines that it is for the Defence to substantiate and specify his objections to the transcripts. The Chamber will therefore rely on the transcripts and notes that the recordings seem to be of a poor quality and that a number of passages seem to be incomprehensible.[49] However, this does not in itself render the entire recordings and the transcripts thereof unreliable, but rather constitute an important factor in the assessment of the weight to be given to this evidence.

37. As to the authenticity of the recordings, the Defence's allegation that the recordings might have been tampered with is only substantiated by a reference to other recordings, not originating from OTP,[50] although Mathieu Ngirumpatse, as the one having been interviewed, should be in a position to provide the Defence with specifications to substantiate the allegation. Moreover, the Chamber notes that the recordings were made by OTP investigators and have been in the possession of OTP since they were made. It further notes that the Defence does not dispute that it is indeed Mathieu Ngirumpatse's voice which can be heard on the recordings, neither does it dispute the Prosecutor's contention that the audio-tapes of the interview were sealed in Mathieu Ngirumpatse's presence and that he signed a receipt to that effect.

38. The Chamber is therefore satisfied that the Prosecutor has made a *prima facie* showing of the reliability and authenticity of the recordings.

(ii) Relevance and probative value

38. The Chamber recalls that, according to the jurisprudence of the *ad hoc* tribunals, evidence need not be tendered through a witness in order to establish its relevance and probative value and that there are no impediments *per se* to admit previous statements of an accused into evidence.[51]

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[48] Ngirumpatse's Response, para. 5 c)b-c-d.
[49] As detailed in Ngirumpatse's Response, para. 5. g).
[50] Ngirumpatse's Response, para.5 e).
[51] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request to Admit United Nations Documents into Evidence under Rule 89(C) (TC), 25 May 2006, para. 4; *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, Judgement (TC), 3 March 2000, para. 35; *Prosecutor v. Kvočka et al.*, Decision on Zoran Zigic's Motion For Rescinding Confidentiality of Schedules Attached to the Indictment Decision On Exhibits (TC), 19 July 2001; *Prosecutor v. Prlic et al.*, IT-04-74-PT, Revised Version of the Decision Adopting

39. The Chamber further notes that the interview provides information on the general background of, and to some extent directly on, facts pleaded in the Indictment. The Chamber is therefore satisfied that the Prosecutor has made a *prima facie* showing of relevance and probative value.

(iii) The right to be promptly informed about the charges

40. In his Motion, the Prosecutor asserts that the OTP investigators complied with the "Rules", in particular Rules 42 and 43, but does not comment on Articles 19 and 20 of the Statute. Nor in his Consolidated Reply does he comment on the contention by Counsel that Mathieu Ngirumpatse was not informed about the charges against him.

41. The Chamber notes that the transcripts of Mathieu Ngirumpatse show that, at the begining of the interview, he had been informed by the OTP investigator of his right to be assisted by counsel, to free assistance of an interpreter, and to remain silent. He was also informed that the interview was being recorded and might be used as evidence, and that he could stop the interview at any time and request the service of counsel. The transcript further shows that Mathieu Ngirumpatse explicitly waived his rights, agreeing to be interviewed for the time being without the assistance of counsel, stating that he would engage counsel when he would be transfered to Arusha. The transcripts also shows that in several instances he declined to answer questions or to elaborate on an answer on the ground that he wanted to discuss the matter with his counsel before answering further. The Chamber finds no indication that he was informed about the charges against him or the nature and cause thereof.

42. The Chamber therefore finds that there is a substantive doubt as to whether Mathieu Ngirumpatse's was informed in detail of the nature and cause of the charges against him, according to Article 20(4)(a) of the Statute, be it promptly, before or during the interview. Moreover, the Chamber opines that this fact may likely have influenced Mathieu Ngirumpatse's decision on whether to consent to be interviewed at all or on which questions to answer without the assistance of counsel. Noting that Mathieu Ngirumpatse could not have known or foreseen that he, at a later stage, would be held liable under the extended form of being a participant in a joint criminal enterprise, the Chamber further holds that this fact, although it cannot be attributed to the Prosecution as a failure at the time to respect his due process rights, is a factor to take into consideration when deciding whether the admission of the interview would be consistent with the right of the accused to a fair trial.

Guidelines on Conduct of Trial Proceedings (TC), 28 April 2006; *Prosecutor v. Prlic et al.*, IT-04-74-T, Decision on Admission of Evidence (TC), 13 July 2006.

(iv) Threats or coercion

43. The Chamber notes that the Defence did not attempt to substantiate the allegation that the interview took place under circumstances that would amount to threats or coercion and that the transcripts show no sign thereof. The submission is therefore rejected.

(v) The rights of the co-accused to cross-examination

44. The Prosecutor submits that the admission of the transcripts will not infringe the rights of the co-accused.[52] To support its assertion, it argues that the accused have not articulated inconsistent defenses since, as defense witnesses in other ICTR cases, they have repeated bits and pieces of the same information they provided in the interviews sought to be admitted. Moreover, it submits that this Chamber has already admitted statements from the accused in the form of trial transcripts in other cases.[53] The Prosecutor alleges that the admission of transcripts from OTP interviews would be no different. It argues further that, to the extent that any of the accused can establish that they were unable to confront any one among them during the defense phase of the trial, the current objection can be renewed at the conclusion of the trial and this Chamber can take appropriate steps to afford a remedy.[54]

45. The Chamber notes that the transcripts indeed show that Mathieu Ngirumpatse gave information about the co-accused, in particular about the power struggle between Joseph Nzirorera and himself and that it seems unlikely that Joseph Nzirorera would fully agree on his version of events.

46. The Chamber therefore holds that it would be antithetical to the integrity of the proceedings to admit into evidence those parts of the interview with Mathieu Ngirumpatse that concerns the co-accused before Mathieu Ngirumpatse has indicated a decision to testify in his own defence.

Conclusion

47. Based on the reasons stated under (iii) the Chamber, pursuant to Rule 95, finds that it will be antithetical to the integrity of the proceedings and the right of the accused to a fair trial to admit into evidence any part of the audio recordings and the transcripts thereof of the interview with Mathieu Ngirumpatse.

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[52] Prosecutor's Consolidated Reply, para. 27.
[53] Prosecutor's Consolidated Reply, para. 27, citing the following exhibits: P-051; P-061; P-62; P-069; P-070, which are trial transcripts from each of the accused from the testimonies that they have offered as defense witnesses in other cases.
[54] *Ibid*, para. 27.

FOR THOSE REASONS, THE CHAMBER

DENIES the Prosecutor's Motion for Admission of Certain Materials under Rule 89 (C) as to Annex C.

Arusha, 2 November 2007, done in English.

Dennis C. M. Byron
Presiding Judge

Gberdao Gustave Kam
Judge

Vagn Joensen
Judge

[Seal of the Tribunal]