



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: 11 November 2009

THE PROSECUTOR

v.

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

**DECISION ON ADMISSION OF DOCUMENTS USED IN CROSS-EXAMINATION
OF ÉDOUARD KAREMERA AND WITNESS 6**

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

Office of the Prosecution:

Don Webster
Saidou N'Dow
Arif Virani
Eric Husketh
Sunkarie Ballah-Conteh
Takeh Sendze

Defence Counsel for Édouard Karemera
Dior Diagne Mbaye and Félix Sow

Defence Counsel for Matthieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl

Defence Counsel for Joseph Nzirorera
Peter Robinson and Patrick Nimy Mayidika Ngimbi

INTRODUCTION

1. During the cross-examination of Édouard Karemera, the Prosecution relied on documents that were not previously admitted during its case-in-chief and sought admission of six of these documents into evidence. The three Accused opposed the admission of three of the documents and the Chamber requested the Parties to file written submissions on the issue.¹ On 2 November 2009 the Prosecution sought admission of a letter sent to the Government of Rwanda by members of a joint commission (“Commission”) investigating human rights abuses dated 18 January 1993 (“the FIDH letter”) which was used during the cross-examination of Witness 6.² The Chamber decided to issue rulings on the admission of all the requested documents in one written decision.³

2. At the conclusion of Édouard Karemera’s defence, counsel for Karemera agreed with the Prosecution that three of the documents should be admitted into evidence: (i) Karemera’s letter to General Augustin Ndindiliyimana dated 24 June 1994; (ii) the Report of the International Commission of Investigation on Human Rights Violations in Rwanda since 1 October 1990 (“Report”); and (iii) *Déclaration du gouvernement rwandais relative au rapport final de la commission internationale d’enquête sur les violations des droits de l’homme au Rwanda depuis le 1^{er} octobre 1990*.⁴ No objections were made as to the admission of these three documents by any other Party. As such, the Chamber will admit these three documents into evidence.

3. The Prosecution now moves the Chamber to admit the remaining three documents for the purposes of impeaching Édouard Karemera’s credibility and rebutting his testimony: (i) declassified U.S. State Department document No. 1 – outgoing telegram dated 29 April 1994; (ii) declassified U.S. State Department document No. 2 – fax dated 2 June 1994; and (iii) *préfet* Clément Kayishema’s draft letter to the Minister of the Interior.⁵ The three Accused

¹ T. 28 May 2009, pp. 31-35.

² T. 2 Nov. 2009, pp. 13-16, 29-34. This potential exhibit was drafted by the Commission in response to a letter from the Government of Rwanda after reading the Report of the International Commission of Investigation of Human Rights Violations in Rwanda since 1 October 1990, previously marked for identification in this trial as I-P-3.

³ *Ibid.*

⁴ T. 28 May 2009, pp. 32-33.

⁵ Prosecutor’s Submission Concerning Admission of Documents used in Cross-Examination of Édouard Karemera, filed 5 June 2009 (“Prosecution’s Motion”); Prosecutor’s Consolidated Reply to Defence Submissions – Admission of Documents used in Cross-Examination of Édouard Karemera, filed 23 June 2009 (“Prosecution’s Reply”).

persons oppose the Prosecution's Motion.⁶ The Prosecution moves separately for admission of the FIDH letter as related to the Report and written by the same Commission members.⁷

DELIBERATIONS

4. Generally, the Prosecution must present all evidence in support of its case during its case-in-chief.⁸ This is to protect the fair trial rights of the Accused under Article 20 (4)(b) and (e) of the Statute and allow a fair opportunity to challenge evidence tendered by the Prosecution against him or her.⁹ The admission of Prosecution evidence outside of its case-in-chief is not ordinarily in the interests of justice or judicial economy as it requires the Defence to engage in additional investigations and production of evidence in the context of very complex and lengthy trials.¹⁰ This general principle is reflected in Rule 85(A) of the Rules of Procedure and Evidence ("Rules"), which provides for the sequence of evidence presented at trial and also in Rule 90 (G)(i) which enumerates appropriate topics for cross-examination. However, there is no absolute ban on the admission of fresh evidence by the Prosecution after the close of its case. The Chamber notes that it has the discretion to admit fresh evidence under Rule 89 (C) of the Rules, taking into account the relevance and probative value of that evidence and the need to ensure a fair trial.¹¹

5. When seeking to assess the potential prejudice suffered by the Accused as a result of the admission of fresh evidence, the Chamber must have particular regard for the purpose for which the admission of this evidence is sought. Indeed, "the risk of prejudice caused by the admission of fresh evidence probative of guilt is potentially greater as compared to fresh

⁶ Joseph Nzirorera's Response to Prosecution Motion for Admission of Exhibits Used with Édouard Karemera, filed 8 June 2009 ("Nzirorera's Response"); Réponse de Karemera à la « Prosecutor's Submission concerning Admission of Documents used in Cross-Examination of Édouard Karemera », filed 22 June 2009 ("Karemera's Response"); Réponse de Matthieu Ngirumpatse à la requête du Procureur en admission de documents utilisés lors du contre-interrogatoire d'Édouard Karemera, filed 22 June 2009 ("Ngirumpatse's Response").

⁷ T. 2 Nov. 2009, p. 34.

⁸ See *Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, Case No. 99-46, Decision on the Prosecutor's Motion for Leave to Call Evidence in Rebuttal Pursuant to Rule 54, 73, and 85 (A) (iii) of the Rules of Procedure and Evidence (TC), 21 May 2003, para. 38; *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Case No. ICTR-98-41 ("*Bagosora et al.*"), Decision on Severance or Exclusion of Evidence Based on Prejudice Arising from Testimony of Jean Kambanda (TC), 11 September 2006, fn. 3 (and sources cited therein) ("*Bagosora* Decision on Testimony of Kambada").

⁹ *The Prosecutor v. Rasim Delić*, Case No. IT-04-83-AR73.1, Decision on Rasim Delić's Interlocutory Appeal against Trial Chamber's Oral Decision on Admission of Exhibits 1316 and 1317 (AC), 15 April 2008, para. 22 ("*Delić* Appeal Decision on Admission of Exhibits").

¹⁰ *Bagosora* Decision on Testimony of Kambada, para. 3.

¹¹ *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Appeals Judgement, para. 222 ("*Kordić and Čerkez* Appeal Judgement").

evidence admitted with the sole purpose of impeaching the witness.”¹² Moreover, the Chamber must also consider the various measures available to address the prejudice, including limiting the purpose for which the evidence is admitted, providing more time for re-examination and granting the possibility of recalling the witness.¹³

6. Édouard Karemera, Matthieu Ngirumpatse, and Joseph Nzirorera argue that documents cannot be admitted without being recognized by the witness. However, the Chamber notes that pursuant to Rule 89 (C), only sufficient indicia of reliability is required to establish that evidence is admissible at a preliminary stage which means there must be some indication that the document is what the moving party says it is and that its contents are reliable.¹⁴ Moreover, the admission into evidence of documents does not constitute a binding determination as to the authenticity or trustworthiness of the documents sought to be admitted, as these factors are to be assessed by the Trial Chamber later when determining the probative weight of the evidence.¹⁵ As a result, the Chamber finds that there is no requirement that a document be recognised by a witness in order to be admitted into evidence.

7. Matthieu Ngirumpatse separately requests that the Prosecution not be allowed to admit these documents during his absence from the proceedings as his consent for the trial continuing in his absence was not meant to extend to a witness as important as Édouard Karemera. The Chamber notes that in March 2009 Ngirumpatse waived his right to be present during trial until the Appeals Chamber had rendered its decision with respect to the Chamber’s decision on severance.¹⁶ The waiver explicitly provided that to the extent Édouard Karemera’s witnesses could assist Ngirumpatse in his defence, he considered that his counsel could follow their testimony in his absence and in his interest and report back to him on a regular basis.¹⁷

8. Édouard Karemera’s intention to testify in this case was well-known by the Defence for Matthieu Ngirumpatse at the time that the waiver was signed. Furthermore, the terms of the waiver do not refer to any exceptions or qualifications with respect to certain witnesses. Therefore, the Chamber finds that the terms of the waiver would not be breached by the

¹² *Delić* Appeal Decision on Admission of Exhibits, para. 22.

¹³ *Ibid.*, para. 23.

¹⁴ *Bagosora et al.*, Decision on Request to Admit United Nations Documents into Evidence under Rule 89(C) (TC), 25 May 2006, para. 4.

¹⁵ *Pauline Nyiramasuhuko v. Prosecutor*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko’s Appeal on the Admissibility of Evidence (AC), 4 October 2004, para. 7.

¹⁶ T. 23 Mar. 2009, pp. 20-24.

¹⁷ *Ibid.*

admission of Karemera's testimony or the otherwise fair and proper admission of documents by the Prosecution during his testimony. Had Ngirumpatse sought to modify or revoke his waiver, he could have done so at any stage prior to Karemera's testimony. To allow Ngirumpatse to modify or revoke his waiver on an *ad hoc* or *ex post facto* basis would cast uncertainty as to the entirety of the proceedings that have taken place in his absence.

Declassified U.S. State Department document No. 1 – outgoing telegram dated 29 April 1994 and Declassified US State Department document No. 2 – fax dated 2 June 1994

9. Declassified U.S. State Department document No. 1 describes a conversation between Deputy Assistant Secretary Prudence Bushnell and Colonel Théoneste Bagosora in which Bushnell told Bagosora to stop the killings of civilians in areas controlled by the Rwandan Army.¹⁸ Declassified U.S. State Department document No. 2 indicates that Cyprien Habimana, the Rwandan Ambassador in Nairobi, called the Interim Government in Marimba twice a day by satellite telephone.¹⁹

10. The Chamber notes that, with respect to reliability, Édouard Karemera's knowledge of these documents is not required to prove their authenticity as they have been sealed and certified by a State.

11. The Chamber finds that these documents are relevant and have probative value as they aim to be used to rebut Édouard Karemera's evidence that he had no knowledge of the opinion of the international community. The Chamber also finds that the admission of these documents into evidence will not compromise the fair trial rights of the Accused. Édouard Karemera adequately responded to these documents during his cross-examination and it is not likely that he would be in a better position to rebut the Prosecution's claim given more time.

12. The Chamber also finds that the first document is relevant and probative as to the international community's view of the events in Rwanda at that time, although is not probative as truth of that view. Further, document one was previously disclosed to the Defence in November 2007²⁰ and it relates to evidence previously admitted during the Prosecution's case-in-chief regarding a press conference held by Matthieu Ngirumpatse. Thus, the Defence was aware of the events surrounding this document and of the document itself at least 17 months prior to its use in cross-examination. Consequently, no prejudice is caused by the admission of this document and its use during cross-examination.

¹⁸ See Annex 1 to Prosecution's Motion (identified in the Prosecution Exhibit Bundle as A-1).

¹⁹ See Annex 2 to Prosecution's Motion (identified in the Prosecution Exhibit Bundle as E-62).

²⁰ Prosecution's Motion, pp. 4, 5.

13. The Chamber further finds that the second document is relevant and has probative value since it is tendered to rebut Édouard Karemera's testimony that he and other interim ministers could not receive regular updates from their embassies abroad. With respect to document two, although it was first disclosed and used during cross-examination, the prejudice caused to the Accused is minimal as this evidence is admitted for the limited purpose of refuting Édouard Karemera's testimony.

Préfet Clément Kayishema's draft letter to the Minister of the Interior

14. The Chamber notes that *préfet* Clément Kayishema's draft letter to the Minister of the Interior provides an overview of the security situation in Kibuye *préfecture* from April to July 1994, including matters relating to the civilian defence programme, internally displaced persons within the *préfecture*, fighting between and within political parties, hunger among the population, and the resumption of services in the prefecture.²¹

15. The Prosecution avers that this document serves to impeach Édouard Karemera's credibility and rebuts his testimony that: (i) the civil defence programme was not operational; (ii) that Clément Kayishema never prepared a report after the operation of *ratissage*; and (iii) that the victims and objects of those attacks were Rwandan Patriotic Front (RPF) clandestine brigades and combatants. The Prosecution also believes it may serve to prove, when taken with other evidence, that the civil defence programme was operational in Kibuye and that the "fugitives" being protected by *Opération Turquoise* were Tutsi civilians who survived the massacres, thereby serving to reinforce and prove the Prosecution's case-in-chief.²²

16. The Prosecution submits that this document was publicly available as part of the *Kayishema* case and that the Defence should have reviewed this document as part of its investigations.²³ The Prosecution argues that it used this document during cross-examination and are submitting this document for admission at this time because it could not anticipate that Édouard Karemera would testify to the legality of the civilian defence programme while denying that it was ever implemented, nor that he would testify that Clément Kayishema has never prepared or submitted a report addressed to him as he had been previously instructed.²⁴

²¹ See Annex 3 to Prosecution's Motion (identified in the Prosecution Exhibit Bundle as S-12). The Prosecution included in Annex I to its Reply a version of this exhibit with highlighting provided by Clément Kayishema to distinguish the handwriting of *sous-préfet* Gashongore.

²² Prosecution's Motion, para. 15; Prosecution's Reply, para. 8.

²³ Prosecution's Motion, para. 11; Prosecution's Reply, para. 8.

²⁴ Prosecution's Motion, paras. 13-14.

17. The Prosecution first disclosed this document during cross-examination and provided no convincing explanation as to its failure to tender this document into evidence during its case-in-chief. The Chamber finds that Édouard Karemera would need additional time to rebut the document, and accordingly, that it is not in the interests of justice to admit it at this stage of the proceedings as the prejudice to the Accused outweighs the probative value.

FIDH Letter

18. The Chamber notes that the FIDH letter is a follow-up to the Report specifically addressing concerns that the Government of Rwanda raised regarding allegations made in the Report. The Chamber finds that by his counsel's own admission, Édouard Karemera commented extensively on the Report at the time of his cross-examination.²⁵ Karemera provided the Chamber with the Government's official reply to the Report during his cross-examination, which is being admitted into evidence by the agreement of the parties along with the Report.

²⁵ T. 28 May 2009, p. 33.

19. The FIDH letter is a response to the Government's reply letter and adds nothing new to the findings of the original Report and therefore covers the same material and events that Karemera discussed extensively in his cross-examination. There were oral objections made by the Accused but they stemmed from an initial belief that the Report was not stipulated to by the Parties during the previous trial session.²⁶ Accordingly, the Chamber finds that this document should be admitted into evidence by the agreement of the Parties.

FOR THESE REASONS, THE CHAMBER

- I. GRANTS** the Prosecutor's Motion in part;
- II. ADMITS** into evidence (i) Karemera's letter to General Augustin Ndindiliyimana dated 24 June 1994; (ii) The Report of the International Commission of Investigation on Human Rights Violations in Rwanda since 1 October 1990; (iii) Déclaration du gouvernement rwandais relative au rapport final de la commission internationale d'enquête sur les violations des droits de l'homme au Rwanda depuis le 1^{er} octobre 1990; (iv) U.S. State Department document No. 1 – outgoing telegram dated 29 April 1994; (v) declassified U.S. State Department document No. 2 – fax dated 2 June 1994; and (vi) the FIDH letter dated 18 January 1993; and
- III. DIRECTS** the Registry to give these documents exhibit numbers.

Arusha, 11 November 2009, done in English.

Dennis C. M. Byron
Presiding Judge

Gberdao Gustave Kam
Judge

Vagn Joensen
Judge

[Seal of the Tribunal]

²⁶ T. 2 Nov. 2009, pp. 31-32.