

ICTR-00-61-T
23-11-2009
(3216-3206)



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

3216
AM

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Aydin Sefa Akay

Registrar: Mr. Adama Dieng

Date: 23 November 2009

THE PROSECUTOR

v.

Jean-Baptiste GATETE

Case No. ICTR-2000-61-T

JUDICIAL RECORDS/ARCHIVES
RECEIVED
2009 NOV 23 P 2:41
[Signature]

**DECISION ON DEFENCE MOTION FOR DISCLOSURE OF RWANDAN JUDICIAL
RECORDS PURSUANT TO RULE 66 (A)(ii) AND ORDER TO
THE PROSECUTION TO OBTAIN DOCUMENTS**

Rules 54, 66 and 98 of the Rules of Procedure and Evidence

Office of the Prosecutor:

Richard Karegyesa
Adelaide Whest
Drew White
Didace Nyirinkwaya
Yasmine Chubin

For the Accused:

Marie-Pierre Poulain
Kate Gibson

[Signature]

3215

INTRODUCTION

1. On 2 November 2009, the Defence filed a Motion requesting an order that the Prosecution use all best efforts to obtain Rwandan judicial records, including enquiring of its witnesses whether they have testified or made previous statements in Rwanda, and provide these documents immediately to the Defence.¹

2. The Prosecution filed its Response on 6 November 2009.² The Defence replied to the Prosecution Response on 12 November 2009.³

BACKGROUND

3. On 13 October 2009, the Chamber issued a Decision finding the Prosecution in breach of its disclosure obligation under Rule 66 (A)(ii)⁴ with regard to detained Prosecution Witness GJQ-4, who has now been removed from the Prosecution Witness List.⁵ In view of late disclosures relating to Witness GJQ-4, and the fact that no judicial records had been disclosed in respect of three other detained witnesses (with the exception of eight pages of *Gacaca* records relating to one),⁶ the Chamber ordered that the Prosecution:

- (i) Certify that it had conducted a thorough and diligent review of materials in its possession for the purposes of complying with Rule 66 (A)(ii) in respect of its four detained witnesses, and that all disclosures have been made; and

¹ Motion for Disclosure of Rwandan Judicial Records Pursuant to Rule 66 (A)(ii) of the Rules of Procedure and Evidence, 2 November 2009 ("Defence Motion").

² Prosecutor's Response to Defence Motion for Disclosure of Rwandan Judicial Records Pursuant to Rule 66 (A)(ii) of the Rules of Procedure and Evidence, 6 November 2009 ("Prosecution Response").

³ Reply to Prosecution Response to Motion for Disclosure of Rwandan Judicial Records, 12 November 2009 ("Defence Reply").

⁴ Rule 66 (A)(ii) of the Rules of Procedure and Evidence ("Rules") provides that no later than 60 days before the date set for trial, the Prosecution must disclose all statements of witnesses it intends to call to testify at trial.

⁵ Decision on Defence Motions for Disclosure Pursuant to Rule 66 (A)(ii) and Commencement of Trial, 13 October 2009 ("Decision of 13 October 2009"). The Decision addressed two Defence motions in which it alleged a breach of the Prosecution's disclosure obligations under Rule 66 (A)(ii), requested further disclosure and sought postponement of trial by 30 days. By way of additional background, on 14 September 2009, the Defence had written to the Prosecution requesting disclosure of documents given by Prosecution witnesses to sources other than the Prosecution, "whether they were issued by a Prosecution witness appearing as a witness, a claimant or an accused before national authorities." The Prosecution replied on 23 September 2009, stating that as of 18 September 2009, it had no other statements made by Prosecution witnesses to third parties, or Rwandan judicial records, in its possession, and would endeavour as soon as practically possible to disclose any new documents coming into its possession.

⁶ Judicial records disclosed on 24 September 2009 (received by the Prosecution on 23 September 2009) in respect of Prosecution Witness BBQ. See Prosecutor's Certification of Audit of Disclosurable [sic] Material (Confidential), 20 October 2009 ("Prosecution's Certification"). Although Witness BBQ has the status of a detained witness, his testimony revealed that he was in fact serving a sentence of community service which ended in 2008.



3214

- (ii) Search its records for the purposes of Rule 66 (B), for any judicial records pertaining to its witnesses.⁷

4. On 20 October 2009, the Prosecution certified that it was in possession of no further Rule 66 (A)(ii) material and that all judicial records in its possession with respect to its witnesses had been disclosed.⁸

5. On 20 October 2009, during cross-examination, Prosecution Witness BBM confirmed that he had testified before *Gacaca* courts. He further confirmed that the first time the Prosecution had asked him whether he had testified before the *Gacaca* courts was one day prior to his testimony.⁹ The Defence raised an oral objection that it had not been provided with any judicial records in respect of Witness BBM and that the question should have been put to the Witness earlier (“Defence Oral Objection”). The Defence submitted that the Prosecution is presumed to discharge its obligation under Rule 66 (A) in good faith and that the Prosecution had failed “to try and get all the disclosure under [Rule] 66 (A)(ii).”¹⁰

6. In response to the Defence Oral Objection, the Prosecution stated that there is “a false premise that the Prosecutor is under a positive obligation” to obtain *Gacaca* records for itself or for the Defence.¹¹

7. The Chamber subsequently indicated: “[T]here’s a misunderstanding of what the Prosecutor is obliged to disclose. The obligation to disclose extends to matters which are in his possession – or, which have been sought. And he has therefore sought or gone to seek it. It does not mean [...] that the Prosecutor has had a general duty to go on a fishing expedition to provide evidence to the Defence.”¹²

8. On 22 October 2009, during cross-examination, Prosecution Witness AWF confirmed that he too had testified before the *Gacaca* courts but that the Prosecution had not previously asked him whether he had done so.¹³

9. On 9 November 2009, during cross-examination of Prosecution Witness BBQ, it became apparent that the Witness had appeared before the *Gacaca* courts, that he had applied for a review of a *Gacaca* judgment and that he had a copy of the decision of the review (“*Gacaca* Review Decision”) at home. Witness BBQ stated that the Prosecution was aware of the document but had never asked him to produce it.¹⁴

⁷ Rule 66 (B) provides: “At the request of the Defence, the Prosecutor shall, subject to Sub-Rule (C), permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.”

⁸ Prosecution’s Certification, para. 17.

⁹ T. 20 October 2009, pp. 71-72.

¹⁰ T. 20 October 2009, pp. 72-73.

¹¹ T. 20 October 2009, p. 73.

¹² T. 20 October 2009, pp. 73-74.

¹³ T. 22 October 2009, pp. 55-56.

¹⁴ T. 9 November 2009, pp. 37-38 and referred to in the Defence Reply.



3213

DISCUSSION

Applicable Law

10. Pursuant to Rule 66 (A)(ii) of the Rules, copies of “the statements of all witnesses whom the Prosecutor intends to call to testify at trial” must be disclosed to the Defence no later than 60 days prior to commencement of the trial. The term “witness statement” has been interpreted as an account of a person’s knowledge of a crime which has been recorded in the course of an investigation into that crime.¹⁵ The Prosecution must disclose previous statements of all its witnesses, in whatever form, to the Defence.¹⁶ Rule 66 (A)(ii) does not distinguish between statements taken by the Prosecution and those taken by national authorities in the course of other judicial proceedings.¹⁷

11. The Prosecution’s obligation under Rule 66 (A)(ii) extends to all witness statements in its custody or control, or to which it has access. The Prosecution is not obliged to disclose documents which are not accessible to it.¹⁸ Furthermore, the Prosecution is presumed to discharge its disclosure obligations in good faith.¹⁹

12. Judicial records of Prosecution witnesses may constitute statements within the meaning of Rule 66 (A)(ii). Where they are not statements, they may be documents subject to inspection under Rule 66 (B), or subject to disclosure under Rule 68 (A).²⁰ Trial Chambers have consistently held that where such records sought by the Defence are not in the custody or control of the Prosecution, the primary obligation falls on the Defence to conduct a diligent investigation to locate them. Where the Defence has used its best efforts to obtain specific

¹⁵ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66 (A) (ii), 29 September 2006, para. 14 (citing the Appeals Chamber in *Prosecutor v. Blaskić*, Case No. IT-95-14-A, Decision on the Appellant’s Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 15).

¹⁶ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza’s Motion to Require Strict Compliance with Rule 66 (A)(ii), para. 7 (citing *Prosecutor v. Blaskić*, Case No. IT-95-14-PT, Decision on the Production of Discovery Materials, 27 January 1997, para. 38).

¹⁷ *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, Decision on The Defence motion for disclosure of the declarations of the prosecutor’s witnesses detained in Rwanda, and all other documents or information pertaining to the judicial proceedings in their respect, 18 September 2001, para. 6.

¹⁸ *Niyitegeka v Prosecutor*, Case No. ICTR-96-14-A, Judgment (AC), 9 July 2004, para. 35; *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Josph Nzirorera’s Motion of Notice of Violation of Rule 66 (A) (ii) for Witness ALZ and AMC, and for Remedial and Punitive Measures, 11 July 2007 (“Karemera Decision”), para. 6.

¹⁹ *Karemera Decision*, para. 8.

²⁰ See for example, *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Callixte Nzabonimana’s Motion for an Order Concerning Disclosure of Gacaca Judicial Material Relating to Prosecution Witnesses, 29 October 2009 (“Nzabonimana Decision”), para. 26; *Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-PT, Decision on Defence Extremely Urgent Motion on Issues Related to the Preparation of the Trial, 17 September 2009 (“Ngirabatware Decision”), para. 48; and *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence, 23 April 2004 (“Bizimungu Decision”) where the request for judicial records was made pursuant to Rule 68 (A). With regard to Rule 66 (B), see supra footnote 7. Rule 68 (A) provides: “The Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.”

3212

documents but has failed, it may request the assistance of the Prosecution where the circumstances suggest that the Prosecution is in a better position to obtain them.²¹

13. Notwithstanding the extent of the Prosecution's disclosure obligations under the Rules, a practice has developed at the Tribunal of ordering the Prosecution to obtain judicial records pursuant to a Trial Chamber's discretion under Rule 98 to "*proprio motu* order either party to produce additional evidence."²² Trial Chambers have exercised this discretion even where the Defence has not demonstrated prior efforts to obtain the requested judicial records.²³ In such instances, the orders have related to judicial records of detained Prosecution

²¹ See for example, *Nzabonimana* Decision, paras 27, 29 (the Defence request was under Rules 66 (A)(ii), 66 (B) and 68 (A). The Chamber found that the Prosecution was not in breach of its obligation under Rule 66 (A)(ii) as it did not have custody or control over the requested documents. The Chamber noted that the Defence has an obligation to conduct its own research); *Ngirabatware* Decision, paras. 48, 49 (with reference to Rules 66 (A)(ii) and (B), the Chamber stated that where material sought is not in the custody of the Prosecution, the primary obligation falls on the Defence to conduct a diligent investigation to locate it. However, where the Defence has not been able to do so and the Prosecution is in a position to assist the Defence access the material, the Prosecution should provide such assistance); *Karemera et al.*, Decision on Defence Motion for Further Order to Obtain Documents in Possession of Government of Rwanda, 27 November 2006, para. 9 (Rules 66 (A)(ii) and 68 (A) only concern documents within the custody or control of the Prosecution. As a general rule, the Defence must first make its own independent efforts to secure evidence it wishes to use at trial other than exculpatory material in the possession of the Prosecution); *Bizimungu* Decision, para. 9 (The Prosecutor should not be made to hunt for materials it has no knowledge of. However, where the Defence has specific knowledge of a document covered by the Rules not currently within the possession or control of the Prosecution, and requests that document in specific terms, the Prosecution should attempt to bring such documents within its control or possession where the circumstances suggest that the Prosecution is in a better position than the Defence to do so, and disclose to the Defence, provided it is shown that the Defence has made prior efforts to obtain such documents by its own means); *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Decision on Juvenal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO, 2 November 2001 ("*Kajelijeli* Decision") para. 2 (the Defence had made "best efforts" to obtain the judicial records of the detained Prosecution witnesses).

²² Rule 98 is to be distinguished from Article 28 of the Tribunal's Statute. The latter provides for a Chamber's authority to order State cooperation and judicial assistance for the purposes of, for example, obtaining documents, where the moving party has shown that it has (i) specifically identified the documents sought; (ii) articulated their relevance to the trial; and (iii) made unsuccessful efforts to obtain them. See for example, *Bizimungu et al.*, Decision on Urgent Second Motion of Defendant Bicomumpaka Regarding Cooperation of the Kingdom of Belgium, 27 February 2008, para. 9; and Decision on Casimir Bizimungu's Requests for Disclosure of the Bruguiere Report and the Cooperation of France, 25 September 2006, para. 25. Rule 98 does not require the same showing because the order to produce documents is directed at a party and not a State. See for example, *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Decision on Matters Related to Witness KDD's Judicial Dossier, 1 November 2004 ("*Simba* Decision"), para. 11.

²³ See for example, *Simba* Decision, paras 1, 11 ("Trial Chambers have in the past ordered, pursuant to Rule 98, the Prosecution to use its good offices to request the Rwandan judicial records of detained witnesses [...] With respect to the judicial records of detained witnesses, Rule 98 may be invoked to expedite the proceedings given the importance of these records to the preparation of the parties and familiarity of the Prosecution with its witnesses"); *Simba*, Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68, 4 October 2004, para. 9 (The Defence motion was denied because the Prosecution witnesses were "neither detained nor alleged accomplices" and "from the testimony of these witnesses, the materials requested by the Defence do not appear to directly relate to the credibility of any allegations against the Accused"); *Bizimungu* Decision, para. 11 (The Prosecution was ordered to obtain the guilty plea of a witness as it was found it may be relevant to the issue of the accused's alibi); *Bagosora et al.*, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses, 16 December 2003, para. 7 (The Prosecution was ordered, under Rule 98, to obtain judicial records of Prosecution witnesses from Rwanda, and to disclose them to the Defence, as the documents were considered "important for the preparation of the defence"); *Prosecutor v.*



3211

witnesses or records of a witness' confessions, convictions or guilty plea agreements, and been considered important to the preparation of the Defence case or to assisting the Chamber in its assessment of a witness' credibility pursuant to Rule 90 (G) of the Rules.

Preliminary Matter

14. As a preliminary point, the Prosecution submits that the Defence Motion is inadmissible as it constitutes an appeal of both the Chamber's Decision of 13 October 2009 and its "oral decision of 20 October 2009." The Prosecution submits that these are clear rulings on the matters at issue in the Defence Motion.²⁴

15. The Chamber considers that the issues before it now are separate and distinct from those in its Decision of 13 October 2009.²⁵ That Decision ruled on whether the Prosecution had complied with its obligations under the Rules. It did not address the issue in the Defence Motion, namely, whether the Prosecution should be ordered to use all best efforts to obtain judicial records, and enquire of all its witnesses whether they have ever testified or made previous statements in Rwanda.

16. Similarly, with regard to the trial proceedings on 20 October 2009, the Defence did not request an order in the terms set out in the Defence Motion. Nor did the Chamber render an oral decision on the issues in the Defence Motion. Rather, it merely recalled the nature of the Prosecution's obligation under Rule 66 (A)(ii).²⁶

17. Accordingly, the Chamber considers that it has not already ruled on the issues raised by the Defence. The Chamber will therefore proceed to consider the merits of the Defence Motion.

Ndayambaje et al., Case No. ICTR-96-8-T, Decision on the Defence Motions Seeking Documents Relating to Detained Witnesses or Leave of the Chamber to Contact Protected Detailed Witnesses, 15 November 2001, para. 26; *Kajelijeli* Decision, para. 17 (although not under Rule 98, the Chamber, in determining whether the requested statements were relevant, noted the Prosecutor would have been expected to find and obtain all prior statements of detained witnesses that such witnesses might have made in similar investigations and judicial proceedings, in so far as they could be relevant to the issues with which the Chamber is seized) and paras. 21, 22 (ordered the Prosecutor to make all efforts to obtain prior statements made before Rwandan authorities of detained witnesses citing *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Oral Ruling of 4 September 2001 directing the Prosecutor to make every effort to obtain from the Government of Rwanda the records of a witness' plea agreements, the date of conviction and sentences and any confessions filed with the courts as well as the records of all other witnesses the Prosecutor intends to call or has called who are in custody in Rwanda); *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witness Y, Z, and AA (TC), 8 June 2000, para. 10 (The Prosecution was ordered, pursuant to Rule 98, to produce written confessions of its witnesses, because "[t]he Chamber is of the view that the said written confessions could be material in evaluating the credibility of the said Prosecution witnesses").

²⁴ Prosecution Response, paras 2, 11-14.

²⁵ See supra para. 3.

²⁶ See supra para. 7.

3210

Parties' Submissions on the Merits

18. The Defence submits that the Prosecution has an obligation under Rule 66 (A)(ii) to obtain and disclose all Rwandan judicial records in relation to its witnesses. According to the Defence, the cross-examination of Prosecution Witnesses BBM and AWF shows that the Prosecution is not discharging its Rule 66 (A)(ii) obligation in good faith as it failed to ask its witnesses whether they have testified before *Gacaca* courts, or enquired as to this matter the day before the Witness testified at trial, thus making timely disclosure of material impossible.²⁷ It further refers to Witness BBQ's testimony in this case which suggests that additional judicial records exist with regard to this Witness.²⁸

19. The Defence further submits that it is insufficient for the Prosecution to assert that it has no more material in its possession in order to evade its disclosure obligations, as it is in a better position than the Defence to obtain *Gacaca* or judicial records relating to its witnesses. On this point, the Defence notes that three of the Prosecution witnesses are detained witnesses,²⁹ for whom the Prosecution has provided no judicial records, prior statements, confessions, or testimony, with the exception of eight pages of *Gacaca* records relating to Witness BBQ.³⁰

20. The Prosecution submits that it cannot disclose what it does not have and that it is unreasonable to expect it to have knowledge of and subsequently disclose documents pertaining to Rwandan judicial proceedings considering:

- (i) Witness BBM gave his first statement to the Prosecution on 28 May 1998, reconfirmation on 16 September 2003 and testified in *Gacaca* in 2004; and
- (ii) Witness AWF gave his first statement to the Prosecution on 16 December 2004,³¹ reconfirmation on 15 March 2005 at which time the *Gacaca* process he was involved in was in the preliminary stages and he had not yet testified.³²

21. The Prosecution submits that the Defence is required to outline its own efforts to obtain documents before a Trial Chamber may issue an order under Rule 98 as supported by the jurisprudence relied on by the Defence. The Prosecution further refers to State cooperation orders under Article 28 of the Statute, and the requirement that the moving party demonstrate unsuccessful efforts to obtain the documents.³³ The Prosecution states that the Defence has shown no independent efforts and ensuing failure to obtain the documents it claims exist.³⁴

²⁷ Defence Motion, para. 8, Defence Reply, paras 10, 13-15, 18.

²⁸ Defence Reply, para. 14 and see supra para. 9.

²⁹ Witnesses BVR, BVQ, and BBQ.

³⁰ Defence Motion, para. 10.

³¹ The Chamber however notes that Witness AWF's witness statement is dated 1 and 16 December 2004.

³² Prosecution Response, para. 17.

³³ See supra footnote 22.

³⁴ Prosecution Response, paras 20-23.



3209

Does Rule 66 (A)(ii) Require the Prosecution to Obtain Judicial Records for its Witnesses?

22. The Chamber first notes that all judicial records would not necessarily constitute “witness statements” for the purposes of Rule 66 (A)(ii). For example, the Defence refers to the Prosecution not having obtained and disclosed the *Gacaca* Review Decision relating to Witness BBQ in an attempt to rebut the presumption that the Prosecution is discharging its disclosure obligation in good faith.³⁵ However, the *Gacaca* Review Decision would not constitute a “witness statement” within the meaning of Rule 66 (A)(ii).³⁶

23. In addition, Rule 66 (A)(ii) does not impose a positive obligation on the Prosecution to obtain and disclose statements which are not within its custody or control.³⁷ Since the Prosecution is presumed to discharge its disclosure obligations in good faith, the onus is on the Defence to rebut this presumption by demonstrating that the Prosecution has not disclosed statements which are within its custody or control.

24. Therefore, contrary to the Defence submission, the Prosecution is not obliged to obtain and disclose all judicial records under Rule 66 (A)(ii).

25. In this case, recalling that the Prosecution (i) disclosed judicial records as soon as they came into its possession in relation to ten witnesses,³⁸ (ii) certified that it is in possession of no further Rule 66 (A)(ii) material,³⁹ and (iii) is not obliged to disclose statements which are not within its custody or control, the Chamber finds no reason to conclude that the Prosecution is in breach of its Rule 66 (A)(ii) obligation, or that it has not discharged this obligation in good faith.

The Chamber's Authority under Rule 98

26. Contrary to the Prosecution's submissions, an order pursuant to Rule 98 does not require the Defence to demonstrate unsuccessful efforts to obtain requested documents.⁴⁰ Rule 98 is to be distinguished from Article 28 where the order is directed at a State rather than a party to the proceedings.⁴¹ Furthermore, the wording of Rule 98, which allows for a *proprio motu* order, suggests that the exercise of the Chamber's discretion is not dependent on a party having demonstrated unsuccessful efforts to obtain the documents sought.

(i) *Should the Prosecution be ordered to Obtain Judicial Records for all its Witnesses under Rule 98?*

27. The Chamber notes that past cases where Trial Chambers have exercised their Rule 98 discretion are distinguishable from the present. In those instances, the Defence made specific

³⁵ Defence Reply, para. 14.

³⁶ See supra para. 10.

³⁷ See supra para. 11.

³⁸ See supra footnote 5.

³⁹ See supra para. 4.

⁴⁰ See supra para. 13 and footnote 23.

⁴¹ See supra footnote 22.



3208

requests, for example, for Rwandan judicial records of detained Prosecution witnesses, or records of convictions, confessions or guilty plea agreements, where the documents were considered to be important to the preparation of the Defence case or to assessing the credibility of witnesses.⁴²

28. In this case, the Defence has made a general request. The Defence has not demonstrated, nor does the Chamber consider, that all possible *Gacaca* or judicial records of all Prosecution witnesses, if they exist, would necessarily be relevant to the preparation of the Defence case or to assessing the credibility of witnesses.⁴³ In this regard, the Chamber also recalls that the Prosecution's obligations do not extend to pursuing every possible avenue of investigation into a witness' credibility on behalf of the Defence.⁴⁴ Accordingly, the Chamber does not deem it appropriate to exercise its discretion under Rule 98 to issue an order in the general terms requested by the Defence.

(ii) *Proprio Motu Order to Obtain Judicial Records of Detained Witnesses*

29. The Chamber recalls that no judicial records have been disclosed in respect of detained Witnesses BVR and BVQ. The Chamber has no reason to doubt that the Prosecution has disclosed all judicial records within its possession. However, considering that Witnesses BVR and BVQ are detained witnesses, judicial records must exist in Rwanda in relation to these witnesses. In addition, following Witness BBQ's testimony on 9 November 2009, further judicial records must also exist with respect to this Witness.⁴⁵

30. The Chamber considers that judicial records of detained witnesses may be material to the preparation of the Defence case or assist the Chamber in assessing the credibility of the witnesses.⁴⁶ Furthermore, the Prosecution is better placed to obtain the records of its detained witnesses, particularly given the stage of the proceedings. Accordingly, pursuant to its authority under Rules 98 and 54, as well as its obligation to ensure a fair and expeditious trial and respect the rights of the Accused,⁴⁷ the Chamber rules that the Prosecution should use its good offices to make enquiries with the Rwandan authorities as to whether further judicial records exist for Witnesses BVR, BVQ and BBQ, and if they do, obtain and immediately disclose these to the Defence.

⁴² See supra footnote 23.

⁴³ See for example, *Karemera et. al.*, Decision on Defence Motion for Further Order to Obtain Documents in Possession of Government of Rwanda, 27 November 2006, para. 15.

⁴⁴ See for example, *Simba*, Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68, 4 October 2004, paras. 8-9; and *Bagilishema*, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witness Y, Z, and AA, 8 June 2000, paras. 6, 10.

⁴⁵ Only eight pages have been disclosed in relation to Witness BBQ and his testimony on 9 November 2009 suggests that he has appeared before *Gacaca* courts more than once and has had a judgment and a *Gacaca* Appeal Decision delivered in relation to charges in Rwanda. See T. 9 November 2009, pp. 37-38.

⁴⁶ See supra para. 13 and footnote 23.

⁴⁷ In addition to Rule 98, Rule 54 provides that the Chamber may issue such orders as may be necessary for the conduct of the trial. In relation to the Chamber's obligation to ensure a fair and expeditious trial and to respect the rights of the Accused, see Articles 19 and 20 of the Statute.



3207

Should the Prosecution ask all its Witness if they have ever testified in Rwanda?

31. While judicial records may assist in the preparation of the Defence case or in assessing a witness' credibility, in view of the Chamber's findings that (i) the Prosecution has discharged its obligations under Rule 66 (A)(ii) in good faith, (ii) the Chamber does not consider that all possible *Gacaca* or judicial records of Prosecution witnesses would necessarily be relevant to the preparation of the Defence case or to assessing the credibility of witnesses, and (iii) noting that the Prosecution has disclosed judicial records as soon as they came into its possession, the Chamber does not consider it necessary or appropriate to direct the Prosecution on how to question its witnesses. Nonetheless, mindful that the Prosecution did not ask some of its witnesses whether they had testified in *Gacaca* courts, the Chamber reminds the Prosecution of the importance of such enquiries as *Gacaca* or judicial records may pertain to issues in the case or affect a witness' credibility.⁴⁸

Is the Defence Motion an Abuse of Process?

32. The Prosecution submits that the repeated re-litigation of the same issue is "unnecessary and disruptive" to the proceedings and constitutes an abuse of process under Rule 73 (F).⁴⁹ For the reasons set out in paragraphs 15 to 17 of this Decision, the Chamber does not consider that the Defence Motion constitutes re-litigation of the same issue. Accordingly, the Chamber does not find the Defence Motion to be an abuse of process under Rule 73 (F).

FOR THESE REASONS the Chamber,

- I. **DENIES** the Defence Motion; and
- II. **ORDERS** the Prosecution, pursuant to Rules 54 and 98 of the Rules, to:
 - (i) Use all best efforts to make enquiries with the Rwandan authorities as to whether judicial records exist in respect of Witnesses BVR and BVQ and whether further judicial records exist in respect of Witness BBQ;
 - (ii) If such judicial records exist, obtain and disclose these to the Defence immediately; and

⁴⁸ See for example, T. 20 October 2009, pp. 71-72 (Witness BBM); T. 3 November 2009, pp. 9-10 (Witness BAQ); T. 11 November 2009 (Witness BBR).

⁴⁹ Prosecution Response, para. 23. Rule 73 (F) provides that in addition to sanctions envisaged by Rule 46, a Chamber may impose sanctions against Counsel if Counsel brings a motion, including a preliminary motion, that, in the opinion of the Chamber, is frivolous or is an abuse of process. Such sanctions may include non-payment, in whole or in part, of fees associated with the motion and/or costs thereof.



3206

(iii) Report on the results of its efforts by close of business on 1 December 2009.

Arusha, 23 November 2009



Khalida Rachid Khan
Presiding Judge



Lee Gacuiga Muthoga
Judge



Aydin Sefa Akay
Judge

[Seal of the Tribunal]

