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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

CASE No. ICTR-98-44-AR73.9

IN THE APPEALS CHAMBER

Before: The Appeals Chamber

Registrar: Mr. Adama Dieng

Date Filed: 11 April 2007

THE PROSECUTOR

v.

JOSEPH NZIRORERA

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JOSEPH NZIRORERA'S INTERLOCUTORY APPEAL
OF DECISION ON OBTAINING PRIOR STATEMENTS
OF PROSECUTION WITNESSES AFTER THEY HAVE TESTIFIED

The Office of the Prosecutor:

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Ms. Dior Diagne Mbaye and Mr. Felix Sow for Edouard Karemera
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ndirumpatse

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1. Joseph Nzirorera hereby appeals, pursuant to certification granted under Rule 73(B), from the *Decision on Defence Motion for Cooperation of Rwanda to Obtain Statements of Prosecution Witnesses ALG, GK, and UB* (22 March 2007) issued by the two remaining Judges of the Trial Chamber.

Grounds of Appeal

2. Mr. Nzirorera raises two grounds of appeal:

- (A) The two remaining Judges were without authority to deliberate and render a decision on the motion pursuant to Rule 15 *bis* (F); and
- (B) The Judges erred in imposing an “inconsistency” requirement for obtaining undisclosed prior statements of a prosecution witness after that witness had testified.

Procedural History

3. Prior to commencement of the trial, Mr. Nzirorera filed *Joseph Nzirorera’s Second Motion to Compel Inspection and Disclosure* (13 July 2005). In response to that motion, the Trial Chamber ordered the prosecution, pursuant to Rule 98, to use its best efforts “to obtain and disclose to the defence statements made to Rwandan authorities and records pertaining to the criminal prosecution of...any witness for whom such materials have not been fully disclosed.”¹

4. Those best efforts soon proved inadequate. During the testimony of the very first witness, Ahmed Mbonnyunkiza, it was learned that he had given a statement to Rwandan judicial authorities on 22 July 1998 which had never been obtained by the prosecution or disclosed to the defence.²

5. When it appeared that the same situation was likely to arise with witnesses scheduled for the remaining trial sessions, Mr. Nzirorera filed *Joseph Nzirorera’s Motion for Order for Production of Documents by the Government of Rwanda and for Consequential Orders* (9 January 2006).

6. On 13 February 2006, the Trial Chamber requested the cooperation of the government of Rwanda to provide the Registry with:

- (a) All statements taken or received by the Rwandan authorities from the

¹ *Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records* (14 September 2005). The Trial Chamber denied Mr. Nzirorera’s request that the prosecution’s witnesses be directed to bring their judicial records with them when coming to testify.

² Transcript of 27 October 2005 at pg. 8

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[prosecution witnesses] and

- (b) all judgements rendered against the listed persons³

Documents for the witnesses scheduled for the second trial session were requested to be produced by 6 March 2006.⁴ The Rwandan government did not produce the material as requested.

7. On 22 May 2006, Mr. Nzirorera filed his *Motion to Report Government of Rwanda to United Nations Security Council*. In that motion, he requested that the prosecution not be allowed to call any witnesses for whom prior statements had been requested but not provided.

8. The Trial Chamber denied this motion on 2 October 2006. It instead requested that the government of Rwanda “explain...how they complied with the Trial Chamber’s Decision of 13 February 2006 and where appropriate, to supply the reasons why some material sought was not disclosed.”⁵

9. On 17 October 2006, the Rwandan Prosecutor General sent a letter to the Trial Chamber indicating that they had provided all the documents “at our disposal” and that “a party seeking to obtain documents should specify the documents needed.”⁶

10. Mr. Nzirorera thereupon set out to obtain the specifics required by the Rwandan government. On 18 October 2006, he filed *Joseph Nzirorera's Motion for Further Order to Obtain Documents in Possession of Government of Rwanda*. He requested that the Trial Chamber order the prosecution to contact its witnesses and obtain the information necessary to make a specific request for the documents to the Rwandan government, such as the dossier number, place of the interrogation, date of the interrogation, name of person conducting the interrogation, and the disposition of the case against the witness and its date. He requested that this material be disclosed to the defence 60 days before the witness testified.

³ *Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders* (13 February 2006)

⁴ *Decision* at page 5, number V. This included Witness ALG. Witness GK was also one of the witnesses listed in the Confidential Annex.

⁵ *Decision on Defence Motion to Report Government of Rwanda to United Nations Security Council* (2 October 2006) at page 4, number II

⁶ *Observations du Greffier Relatives a la Decision on Motion to Report Government of Rwanda to United Nations Security Council en Date du 2 Octobre 2006* (17 October 2006)

11. The Trial Chamber denied this motion on 27 November 2006.⁷

12. Meanwhile, over the objections of Mr. Nzirorera, Witness ALG testified during the fourth trial session. Witness ALG had refused a pre-trial interview with counsel for Mr. Nzirorera.⁸ It was only during his cross examination of Witness ALG on 7 November 2006, that Mr. Nzirorera's counsel was able to obtain specific information as to several statements the witness had made to Rwandan authorities that had never been disclosed to the defence.⁹

13. Witness GK also testified during the fourth session. Although Witness GK was willing to meet with counsel for Mr. Nzirorera, because of the prosecution's insistence that such meetings not take place until the witnesses arrive in Arusha, the meeting did not take place until 10 November 2006. At that time, Mr. Nzirorera's counsel learned of several statements which Witness GK had made to Rwandan authorities that had never been disclosed to the defence. On 13 November 2006, Mr. Nzirorera filed his *Motion to Exclude Testimony of Witness GK or for Request for Cooperation to Government of Rwanda*.

14. In that motion, he requested that the testimony of Witness GK be excluded for failure of the prosecution to use its best efforts to obtain the Rwandan statements, or for the testimony to be postponed until the statements were received. This motion, too, was denied by the Trial Chamber.¹⁰ Witness GK testified on 8-12 December 2006.

15. Armed with the specific information as to the dates and places of the undisclosed statements of Witnesses ALG and GK obtained during their cross examination, Mr. Nzirorera made specific requests for the statements to the Rwandan government in letters dated 13 November 2006 (Witness ALG) and 29 November 2006 (Witness GK)¹¹

⁷ *Decision on Defence Motion for Further Order to Obtain Documents in Possession of Government of Rwanda* (27 November 2006)

⁸ Exhibit DNZ-175

⁹ Transcript of 7 November 2006 @ 36-38, Exhibits DNZ-187 and 188. These statements are listed in Confidential Annex "A" to the *Motion for Request for Cooperation of Government of Rwanda: Statements of Witnesses ALG, GK, and UB* (2 January 2007).

¹⁰ *Decision on Defence Motion for Exclusion of Witness GK's Testimony or for Request for Cooperation from Government of Rwanda* (27 November 2006)

¹¹ Confidential Annexes "B" and "C" to *Motion for Request for Cooperation of Government of Rwanda: Statements of Witnesses ALG, GK, and UB* (2 January 2007)

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16. When no response was received, Mr. Nzirorera filed his *Motion for Request for Cooperation of Government of Rwanda: Statements of Witnesses ALG, GK, and UB* (2 January 2007). In that motion, he requested that the Trial Chamber issue a request for cooperation to the Government of Rwanda for the specific statements identified by Witnesses ALG and GK during their testimony.¹²

17. The prosecution did not oppose the motion.

18. Meanwhile, on 19 January 2007, the Presiding Judge of the Trial Chamber informed the President that Judge Emile Francis Short was unable to continue sitting in the trial of this case due to illness.¹³ The remaining Judges decided to continue the trial with a substitute Judge.¹⁴ Two of the accused appealed and the matter is pending with the Appeals Chamber.¹⁵

19. On 12 March 2007, the Presiding Judge requested that the President authorize the remaining Judges to conduct routine matters pursuant to Rule 15 *bis* (F). The President granted that authorization in a memorandum dated 13 March 2007.

20. On 22 March 2007, the remaining Judges issued their *Decision on Defence Motion for Cooperation of Rwanda to Obtain Statements of Prosecution Witnesses ALG, GK, and UB*. (the "Impugned Decision")

21. Mr. Nzirorera's *Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK* was filed on 23 March 2007. The prosecution filed its *Prosecutor's Response to Nzirorera's Motion for Certification to Appeal Trial Chamber III Denial of Motion to Obtain Statements of Witnesses ALG and GK* on 28 March 2007.

22. On 4 April 2007, the Trial Chamber granted certification to appeal.¹⁶

¹² Mr. Nzirorera also requested a Request for Cooperation be issued for the statements of Witness UB. The Trial Chamber granted that request and hence it is not the subject of this appeal.

¹³ Memorandum from Presiding Judge to President (19 January 2007)

¹⁴ *Decision on Continuation of the Proceedings*. (6 March 2007)

¹⁵ *Joseph Nzirorera's Appeal from Decision on Continuation of the Proceedings* (13 March 2007); *Requete d'Appel Pour M. Ngirumpatse Contre la Decision Relative a la Continuation de la Procedure* (13 March 2007)

¹⁶ *Decision on Defence Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK* (4 April 2007)

The Impugned Decision

23. After the filing of the motion, but prior to the decision, Judge Short resigned from the Trial Chamber for health reasons. In filings after Judge Short's resignation, Mr. Nzirorera had objected to decisions on motions being made by the remaining Judges in the absence of a full Trial Chamber.¹⁷ Nevertheless, the remaining Judges deliberated and issued decisions on a number of motions,¹⁸ including the Impugned Decision.

24. In its *Decision on Prosecutor's Motion to Unseal and Disclose to the Canadian Authorities the Transcripts of Witness CEA* (22 March 2007), issued the same day as the Impugned Decision, the remaining Judges discussed their authority to deliberate and decide motions in the absence of a fully constituted Trial Chamber.

25. The Judges noted that no motion had ever been decided under the provisions of Rule 15 *bis* (F) and that the provision had never been interpreted in the jurisprudence of the *ad hoc* Tribunals.¹⁹ They held, however, that the plain meaning of the terms "routine matters" and "delivery of decisions" allowed them to deliberate and decide motions in the absence of a fully constituted Trial Chamber.²⁰

26. In the Impugned Decision, the remaining Judges simply noted that they had been authorized by the President to conduct routine matters pursuant to Rule 15 *bis* (F) and then proceeded to decide the motion.²¹

27. On the merits, the remaining Judges held that the requirements for a request for documents from a State pursuant to Article 28 included a showing of (1) specificity; (2) relevance; and (3) efforts to obtain the documents voluntarily.²² They acknowledged that the specificity requirement had been met, and that Mr. Nzirorera had taken adequate steps to obtain the documents voluntarily.²³

¹⁷ *Joseph Nzirorera's Response to Prosecutor's Motion to Unseal and Disclose to the Canadian Authorities the Transcripts of Witness CEA* (7 March 2007) at para. 3;

¹⁸ *Decision on Defence Motion for Certification to Appeal Decision on Witness Proofing* (14 March 2007); *Decision on Prosecutor's Motion to Unseal and Disclose to the Canadian Authorities the Transcripts of Witness CEA* (22 March 2007); *Decision on Defence Motion for Certification to Appeal Decision on Appeals Chamber Remand of Judicial Notice* (22 March 2007); *Decision on Prosecutor's Motion for an Order to File Notice of Alibi* (22 March 2007); *Decision on Defence Motion for Certification to Appeal Decision on False Testimony* (23 March 2007)

¹⁹ para. 8

²⁰ paras. 9-12

²¹ Impugned Decision at para. 5

²² Impugned Decision at para. 7

²³ Impugned Decision at paras. 8, 14

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28. With respect to the relevance requirement, the remaining Judges held that since the witnesses whose prior statements were sought had already testified, the requirements were heightened and must be viewed in connection with the standard for recalling witnesses.²⁴ Therefore, they required a showing that the prior statements sought could reveal inconsistencies with the witness' trial testimony.²⁵ Because Mr. Nzirorera made no such showing for the statements of Witnesses ALG and GK, the remaining Judges declined to issue a request for those statements to the Rwandan government.²⁶

Standard of Review

29. The issues presented by this appeal, (1) the interpretation of Rule 15 *bis* and (2) whether a showing of relevance under Article 28 requires proof that a witness' prior statement is inconsistent with his or her trial testimony, are purely questions of law. As such they are subject to *de novo* review on appeal.²⁷

Argument

The Authority of the Remaining Judges

30. Rule 15 *bis* (F) provides that:

“In case of illness or an unfilled vacancy or any other similar circumstances, the President may, if satisfied that it is in the interests of justice to do so, authorize a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of one or more of its members.”

31. The issue is whether deliberating and deciding Mr. Nzirorera's *Motion for Request for Cooperation of Government of Rwanda: Statements of Witnesses ALG, GK, and UB* was a “routine matter” within the meaning of Rule 15 *bis* (F).

32. Mr. Nzirorera contends that it was not a routine matter, especially since the remaining Judges applied a novel standard of relevance in denying the motion. Indeed, in granting certification to appeal, the remaining Judges recognized that the issue constitutes

²⁴ Impugned Decision at para. 10

²⁵ Impugned Decision at para. 12

²⁶ Impugned Decision at para. 13. The remaining Judges did find that a sufficient showing had been made with respect to Witness UB and issued a request for his prior statements. Despite the issuance of that request, the Rwandan government has never produced the statements.

²⁷ *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 23

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a “crucial matter of procedure and evidence” which could affect the outcome of the trial.²⁸

33. The example of a routine matter provided in Rule 15 *bis* (F) is “the **delivery** of decisions.” The use of the word “delivery”, or “prononce” in French, connotes the act of revealing a decision which has already been made, rather than the making of a decision itself. Had the remaining Judges simply published a decision which had been deliberated upon and reached by the Trial Chamber prior to Judge Short’s resignation, they would be in compliance with Rule 15 *bis* (F). However, by deliberating on the motion and reaching a decision themselves, they exceeded the act of **delivery** of a decision and the scope of their authority under the Rule.

34. Rule 73(A) provides that motions may be ruled upon by “the Trial Chamber or a Judge designated by the Chamber from among its members.” While this provision allows for a decision by a single Judge, it requires that the three members of the Trial Chamber designate that Judge to rule on that motion. This was not done in this case.

35. The accused has the right to a decision by a Trial Chamber composed of three Judges.²⁹ If those Judges agree that a particular decision may be made by one of their members, the requirement is satisfied. However, once a Trial Chamber ceases to exist, such as when a Judge resigns, only routine decisions may be made by the remaining Judges.³⁰

36. Similarly, when a Judge of a Trial Chamber is temporarily absent during a trial, the remaining Judges can continue to hear the trial in his or her absence. However, this is strictly limited to a five day period.³¹

37. Therefore, the Rules carefully and specifically circumscribe the actions that can be taken when a Trial Chamber is not complete. Rule 15 *bis* (F) follows this principle by limiting the actions of the remaining Judges to routine matters.

38. Mr. Nzirorera respectfully contends that the remaining Judges exceeded their authority under Rule 15 *bis* (F) when they deliberated and decided on his *Motion for*

²⁸ *Decision on Defence Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK* (4 April 2007) at para. 10

²⁹ Article 11(2) of the Statute

³⁰ Rule 15 *bis* (F)

³¹ Rule 15 *bis* (A)

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Request for Cooperation of Government of Rwanda: Statements of Witnesses ALG, GK, and UB. He requests that the decision, therefore, be vacated.

The Relevance Requirement of Article 28

39. Article 28 of the ICTR statute provides that:

“1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

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:

- (a) The identification and location of persons;
- (b) The taking of testimony and the production of evidence;
- (c) The service of documents;
- (d) The arrest or detention of persons;
- (e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.”

40. The jurisprudence of the ICTR has established three requirements which must be met by a party seeking a Trial Chamber request for cooperation to a State pursuant to Article 28: The request must (i) identify, as far as possible, the documents or information to which the application relates; (ii) set out succinctly why the documents are deemed relevant to the trial; and (iii) explain the steps taken by the applicant to secure the State’s assistance.³²

41. With respect to the relevance requirement, the Trial Chamber in *Mr. Nzirorera* had already determined that the prior statements of prosecution witnesses, including Witnesses ALG and GK, made to Rwandan authorities “are necessary and relevant for a fair determination of the credibility of the witnesses concerned.”³³ This finding was in accord with what one Trial Chamber has described as “settled jurisprudence that the

³² *Prosecutor v Karemera et al*, No. IT-98-44-T, *Decision on Motions for Production of Documents by the Government of Rwanda and for Consequential Orders* (13 February 2006) at para. 7; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute* (10 March 2004) at para. 4; citing *Prosecutor v Blaskic*, No. IT-95-14-AR108bis, *Judgement on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber* (29 October 1997) at para. 32

³³ *Decision on Motions for Production of Documents by the Government of Rwanda and for Consequential Orders* (13 February 2006) at para. 8

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judicial records of a witness are material for his/her cross examination and are therefore necessary for the opposing party.”³⁴

42. However, in the Impugned Decision, the remaining Judges held that because Witnesses ALG and GK had already testified, the relevance requirement had changed. They reasoned that because a greater threshold was required to recall a witness, Mr. Nzirorera was now required to show that the statements sought “could reveal inconsistencies between the witness’ testimony and his prior statements.”³⁵

43. Mr. Nzirorera contends that the remaining Judges erred in imposing an “inconsistency” requirement for several reasons.

**There is a Continuing Duty to Disclose
Prior Statements of Prosecution Witnesses
Regardless of their Content**

44. The Appeals Chamber has recognized that prior statements constitute an important tool for assessing the credibility of a witness.³⁶ Trial Chambers at the ICTR have consistently recognized the importance of obtaining prior statements of prosecution witnesses who have been prosecuted in Rwanda, not only for the benefit of the accused, but for the benefit of the Trial Chamber in assessing credibility.³⁷

45. Because of this, Trial Chambers have ordered the prosecution to disclose such statements to the accused, to use its best efforts to obtain such statements from the Rwandan government, and have addressed requests for production of such statements directly to the Rwandan government.³⁸

³⁴ *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Defence Motion for the Cooperation of the Government of Rwanda in Relation With Prosecution Witnesses AVY and SGO* (17 January 2006)

³⁵ Impugned Decision at para. 12

³⁶ *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 169

³⁷ *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Juvenal Kajelijeli’s Motion Requesting the Recalling of Prosecution Witness GAO* (2 November 2001) at para. 18; *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Defence Motion for the Disclosure of the Declarations of the Prosecutor’s Witnesses Detained in Rwanda and all Other Documents and Information Pertaining to the Judicial Proceedings in their Respect* (18 September 2001) at para. 6; *Prosecutor v Bagambiki et al*, No. ICTR-98-46-T, *Decision on Bagambiki and Ntagerura’s Motion for Disclosure of Confessions of Detained Witnesses* (8 March 2002);

³⁸ *Prosecutor v Nzirorera et al*, No. ICTR-98-44-I, *Decision on Defence Motion for an Order to the Prosecution Witnesses to Produce, at their Appearance, their Diaries, and Other Written Materials from 1992 to 1994 and their Statements Made Before the Rwandan Judicial Authorities* (24 November 2003); *Prosecutor v Ndayambaje*, No. ICTR-96-8-T, *Decision on the Defence Motion Seeking Documents Relating to Detained Witnesses or Leave of the Chamber to Contact Protected Detained Witnesses* (15 November 2001) at para. 25; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Request for*

46. Prior statements of prosecution witnesses to Rwandan authorities have played a critical role in the Trial Chamber's assessment of credibility in cases before the ICTR.³⁹

47. The remaining Judges erred in determining that the duty to produce prior statements of prosecution witnesses changed once the witness had testified.

48. Rule 66(A)(ii) provides that:

"The Prosecutor shall disclose to the Defence... no later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial..."

49. Rule 67(D) provides that:

"If either party discovers additional evidence or information or materials which should have been produced earlier pursuant to the Rules, that party shall promptly notify the other party and the Trial Chamber of the existence of the additional evidence or information or materials."

50. The Appeals Chamber has consistently held that the prosecution's duty of disclosure is a continuing one, which continues during the defence case⁴⁰, the appeal⁴¹, and even after the appeal has been concluded.⁴² If the prosecution must provide prior statements of its witnesses even after the witness has testified, the same rule must apply

Documents Arising From Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (16 December 2003); *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 18; *Prosecutor v Bagilishema*, 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 Witnesses Y, Z and AA* (8 June 2000). *Prosecutor v Nchamihigo*, No. ICTR-01-63-T, *Order for Judicial Records* (12 October 2006); *Prosecutor v Simba*, No. ICTR-2001-76-T, *Decision on Matters Related to Witness KDD's Judicial Dossier* (11 November 2004) at para. 11.

³⁹ See, for example, *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 195; *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Judgement* (20 September 2006) at paras. 190, 193.

⁴⁰ *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence* (25 September 2006) at para. 8.

⁴¹ *Prosecutor v Brdjanin*, No. IT-99-36-A, *Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order the Registrar to Disclose Certain Materials* (7 December 2004); *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Decision on Appellant's Notice and Supplemental Notice of Prosecution's Non-Compliance with its Disclosure Obligation Under Rule 68 of the Rules* (11 February 2004) at para. 17; *Prosecutor v Bralo*, No. IT-95-17-A, *Decision on Motions for Access to Ex-Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material* (30 August 2006) at para. 29.

⁴² *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on the Prosecutor's Motion to Move for Decision on Niyitegeka's Requests for Review Pursuant to Rules 120 and 121* (28 September 2005) at page 8; *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.7, *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006) at para. 13.

to statements which, for one reason or another, do not come into the possession of the prosecution. To hold otherwise would be to provide a disincentive for the prosecution to obtain such statements from the Rwandan government.

51. The continuing disclosure requirement is also an important tool in preventing injustice. General Blaskic might still be in prison today if he was required to show inconsistencies before he was given access to the Croatian archives which became available after his trial.⁴³ Preventing access to prior statements of prosecution witnesses is of no benefit to anyone other than a lying witness, and is detrimental to the interests of justice and a fair trial.

**Prior Statements may be Relevant and Material
to the Defence Even if Not Inconsistent**

52. The remaining Judges erred in requiring a showing that the prior statement was inconsistent with the witness' trial testimony before it would make a request for the statement from the Rwandan government.

53. Prior statements may well be relevant to the trial and material to the defence even if they are not inconsistent.

54. For example, Trial Chambers have frequently found that the failure of the witness to mention the accused or a significant event in the prior statement was an indication that the witness was not credible.

55. In the *Bagilishema* case, where the accused was acquitted, the Trial Chamber found that a witness' failure to mention seeing the Accused distribute weapons in his prior statements required that the witness' testimony be "treated with caution".⁴⁴

56. In the *Mpambara* case, where the accused was also acquitted, the Trial Chamber held that the failure of a witness to mention a significant statement of incitement in his prior statement gave the Trial Chamber reasonable doubts about the credibility of his in-court testimony.⁴⁵

57. In the *Rwamakuba* case, where the accused was also acquitted, the Trial Chamber held that the failure of the witness to mention the accused in his prior statement

⁴³ *Prosecutor v Blaskic*, No. IT-95-14-A, *Judgement* (29 July 2004)

⁴⁴ *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 619.

⁴⁵ *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 107

rendered the testimony unworthy of belief.⁴⁶ A similar finding was made in the *Simba* trial, where the accused was convicted of some charges and acquitted of others.⁴⁷

58. In addition, disclosure of a prior statement may have value for other reasons, such as in providing leads to identifying potential defence witnesses. For example, a prior statement may identify a witness' driver, or other person who accompanied him or her during the 1994 Rwandan events. Interview of such persons by the defence may well lead to the identification of potential defence witnesses who can contradict the testimony of the prosecution's witness.⁴⁸

59. Therefore, the remaining Judges erred in requiring Mr. Nzirorera to demonstrate that a prior statement was inconsistent with the witness' trial testimony before requesting it from the Rwandan government.

**The remaining Judges Erred in
Failing to Apply the Legitimate
Forensic Purpose Test**

60. The remaining Judges created an impossible barrier to obtaining prior statements by requiring Mr. Nzirorera to demonstrate that the contents of the statement were inconsistent with the witness' trial testimony. How can Mr. Nzirorera know the content of the statement to determine if it is inconsistent if he cannot be granted access to the statement in the first place?

61. The remaining Judges conflated the standard for disclosure with the standard for admissibility. While it is correct that a witness could not be recalled if a prior statement disclosed after his testimony does not affect the credibility of the witness, the issue before the remaining Judges was not whether to recall the witness, but whether to allow the accused to have access to the prior statements.

62. Under analogous circumstances, the Appeals Chamber has not required a showing that prior statements or testimony are inconsistent before allowing a party access

⁴⁶ *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Judgement* (20 September 2006) at para. 114

⁴⁷ *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 195

⁴⁸ A perfect example of this occurred with Witness UB, whose Rwandan judgement, disclosed just prior to cross examination, revealed the identity of the witness' bodyguard. After Witness UB's testimony, the defence contacted the bodyguard, who contradicts the testimony of Witness UB in several respects, including Witness UB's claim that he attended a meeting with Mr. Nzirorera.

to closed session testimony of the witness in another case at the Tribunal. Rather, the Appeals Chamber has applied the "legitimate forensic purpose" test.

63. This test requires that a party show that access to the prior testimony "may be of material assistance to its case or that there is at least a good chance that it would."⁴⁹ In a previous decision in this case, the Appeals Chamber held that:

"A party is always entitled to seek material **from any source**, including from another case before the Tribunal, to assist in the preparation of its case if the material sought has been identified or described by its general nature and if a legitimate forensic purpose for such access has been shown."⁵⁰
(emphasis added)

64. The Appeals Chamber has also held that the relevance of the material sought can be established by showing that the events in the case from which the material is sought occurred in the same geographical area and during the same time as the events in the case against the accused.⁵¹ If there is no requirement that the prior testimony be inconsistent to obtain confidential testimony given at the Tribunal, why should such a requirement exist to obtain statements or testimony given in Rwandan judicial proceedings?

65. The legitimate forensic purpose test has also been applied by the Appeals Chamber to instances where the defence wishes to meet a potential witness. No advance requirement has been established that the potential witness will give testimony inconsistent to that of the prosecution's witnesses. Rather, the Appeals Chamber has held that "the legitimate forensic purpose to be established is that there is a reasonable basis for the belief that the prospective witness will be able to give information which will materially assist" the accused.⁵²

66. Likewise, Trial Chambers of the ICTR have held that "when the defence is not fully aware of the nature and relevance of the testimony of a prospective witness, it is in

⁴⁹ *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 November 2006) at para. 214; *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-A, *Decision on Motion by Radivoje Militec for Access to Confidential Information* (9 September 2005)

⁵⁰ *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Joseph Nzirorera's Motion for Access to Appeal Briefs* (9 September 2005) at page. 2

⁵¹ *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 November 2006) at para. 214

⁵² *Prosecutor v Krstic*, No. IT-98-33-A, *Decision on Application for Subpoenas* (1 July 2003) at para. 17

the interests of justice to allow the defence to meet the witness and assess his testimony.”⁵³

67. ICTR Trial Chambers have also held that a party need not prove that a document will be admissible to make a request for its disclosure. In the *Bagosora* case, the Trial Chamber granted a request to the Rwandan government of documents created or issued in the months preceding the start of 1994 on the showing only that such documents probably describe policies that may still have been in effect in that year and are, therefore, likely to be relevant.⁵⁴

68. Therefore, the remaining Judges erred in requiring that a statement of a prosecution witness be shown to be inconsistent with the witness’ trial testimony before a request for the statement would be made to the Rwandan government.

**The Prior Statements of Witnesses ALG and GK
Meet the Legitimate Forensic Purpose Test**

69. Witness ALG was a local government official in Kigali and a member of the MRND party structure at the level of the prefecture.⁵⁵ His testimony, given over eight days, covered a wide range of topics, including his allegation that the accused had control of the Interahamwe during the genocide and had instructed them to work with the Army to eliminate the Tutsi.⁵⁶

70. During his cross-examination, Witness ALG provided a list of the prior statements he had made to Rwandan authorities which had not been disclosed to the accused.⁵⁷ These statements pertained to the conduct of military officials in Kigali during the genocide. Witness ALG made statements about, and testified at the trial of, one

⁵³ *Prosecutor v Ndindiyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye’s Motion Requesting the Cooperation of the Government of The Netherlands Pursuant to Article 28 of the Statute* (13 February 2006) at para. 8; *Prosecutor v Ndindiyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye’s Motion Requesting the Cooperation of the Government of Ghana Pursuant to Article 28 of the Statute* (13 February 2006) at para. 8; *Prosecutor v Ndindiyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye’s Motion Requesting the Cooperation of the Government of Togo Pursuant to Article 28 of the Statute* (13 February 2006) at para. 8; *Prosecutor v Bagosora et al*, No. ICTR-98-44-T, *Decision on Request for Subpoena of Major General Yaache and Cooperation of the Government of Ghana* (23 June 2004)

⁵⁴ *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute* (10 March 2004) at para. 9

⁵⁵ Transcript of 26 October 2006 @ 16, 17

⁵⁶ Transcript of 26 October 2006 @ 61-64; Transcript of 27 October 2006 @ 5

⁵⁷ Transcript of 7 November 2006 @ 36-38, Exhibits DNZ-187 and 188

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military officer, in particular, who was accused of collaborating with the Interahamwe in attacks committed in Kigali.⁵⁸

71. From the prior statements that were disclosed for Witness ALG, Mr. Nzirorera was able to demonstrate on cross-examination that the witness had not implicated the accused when he discussed such topics as attendance at security meetings, erection of roadblocks, and distribution of weapons.⁵⁹ Yet at Mr. Nzirorera's trial, Witness ALG had accused him of responsibility for ordering the erection of roadblocks by Interahamwe, distribution of weapons to Interahamwe, and attending a security meeting at which he encouraged the Interahamwe.

72. Given the geographical and temporal overlap between the events which were the subject of the undisclosed prior statements and the testimony of Witness ALG at Mr. Nzirorera's trial, as well as the fact that his prior statements which were disclosed did in fact have significant impeachment value, Mr. Nzirorera demonstrated that the undisclosed prior statements "may be of material assistance to his case." The remaining Judges erred in requiring the impossible—that Mr. Nzirorera also demonstrate that the statements contained inconsistencies without being able to know the content of the statement.

73. With respect to Witness GK, he was also a local government official, but in the prefecture of Kibuye.⁶⁰ He testified about events in that prefecture, and denied any role in the genocide. Despite the fact that he had been imprisoned in Rwanda for 12 years, and had made many statements to Rwandan authorities, including the very *Prosecutor General's office* which was charged with producing statements to the ICTR, the defence was not provided with the great majority of these statements.

74. Among the documents which the witness acknowledged existed in his own dossier in Rwanda were four written statements about the events in Kibuye prefecture during the genocide and minutes of the proceedings of his own trial in which he testified. The witness also acknowledged testifying in two other cases of prisoners before Rwandan

⁵⁸ Exhibit DNZ-176

⁵⁹ Transcript of 6 November 2006 @ 19-22; Transcript of 7 November 2006 @ 27-29

⁶⁰ Transcript of 8 December 2006 @ 6

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courts and giving a sworn statement in the case of a third prisoner. None of these materials were disclosed.⁶¹

75. Given the paucity of Rwandan statements which were disclosed, the defence did not have the information necessary to launch an attack on the credibility of Witness GK. However, given that the undisclosed material dealt with the witness' execution of his duties in Kibuye, and covered the same geographical and temporal areas as Witness GK's trial testimony, there is a good chance that the material may be of material assistance to Mr. Nzirorera's case by calling into question the credibility of Witness GK.

76. As with Witness ALG, the remaining Judges erred in requiring Mr. Nzirorera to demonstrate that the undisclosed material contained inconsistencies with Witness GK's trial testimony.

**The Failure to Obtain the Prior Statements
Before the Witnesses Testified**

77. Mr. Nzirorera did everything he could to obtain the prior statements of Witnesses ALG and GK prior to their testimony. When the prosecution stated it was not in possession of these statements, prior to the commencement of the trial, Mr. Nzirorera sought and obtained an order requiring the prosecution to use its best efforts to obtain them from the Rwandan government and disclose them.⁶² He also unsuccessfully sought an order that the witnesses bring their copies of the prior statements to Arusha.⁶³

78. When the trial began and it became obvious that the prosecution was not obtaining and disclosing the Rwandan prior statements of its witnesses, Mr. Nzirorera sought and obtained a request for the Rwandan government to produce them.⁶⁴ When the Rwandan government failed to comply, Mr. Nzirorera sought an order reporting that government to the United Nations Security Council, the remedy provided for such failures.⁶⁵

⁶¹ Transcript of 12 December 2006 @ 35; Exhibit DNZ-287

⁶² *Joseph Nzirorera's Second Motion to Compel Inspection and Disclosure* (13 July 2005); *Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records* (14 September 2005)

⁶³ *Motion for Order Directing Witnesses to Bring Judicial and Immigration Records* (13 July 2005)

⁶⁴ *Joseph Nzirorera's Motion for Order for Production of Documents by the Government of Rwanda and for Consequential Orders* (9 January 2006); *Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders* (13 February 2006)

⁶⁵ *Motion to Report Government of Rwanda to United Nations Security Council* (22 May 2006)

79. Mr. Nzirorera also requested that the testimony of Witnesses ALG and GK be postponed until their prior statements were produced by the Rwandan government.⁶⁶ The Trial Chamber declined to enforce its request to the Rwandan government,⁶⁷ declined to order the prosecution to obtain the necessary information from its witnesses,⁶⁸ and declined to postpone the testimony of the witnesses.⁶⁹

80. During his cross examination of the witnesses, Mr. Nzirorera obtained information on the date and circumstances of the witnesses' undisclosed prior statements in Rwanda so as to be able to make a more specific request to the government of Rwanda, as that government had demanded.⁷⁰

81. Mr. Nzirorera did everything humanly possible to obtain the prior statements before Witnesses ALG and GK testified. The Appeals Chamber has said that Trial Chambers "shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case."⁷¹ The Trial Chamber in Mr. Nzirorera's case was capable of enforcing its *Request for Cooperation* when the Rwandan government failed to produce the prior statements of Witness ALG and GK. It was also capable of postponing the testimony of those witnesses until the statements were produced. It did neither.

82. For the remaining Judges to now turn around and penalize Mr. Nzirorera for not having obtained the prior statements before the witness testified is grossly unfair. Therefore, even if the Appeals Chamber were to find that a showing of inconsistency is required to obtain prior statements of prosecution witnesses who have already testified, it should not apply that rule to a situation where it was the Trial Chamber, and not the

⁶⁶ *Reply Brief: Motion to Report Government of Rwanda to United Nations Security Council* (22 May 2006) at para. 3; *Motion to Exclude Testimony of Witness GK or for Request for Cooperation to Government of Rwanda* (13 November 2006)

⁶⁷ *Decision on Defence Motion to Report Government of Rwanda to United Nations Security Council* (2 October 2006)

⁶⁸ *Decision on Defence Motion for Further Order to Obtain Documents in Possession of Government of Rwanda* (27 November 2006)

⁶⁹ *Decision on Defence Motion to Report Government of Rwanda to United Nations Security Council* (2 October 2006) at para. 7; *Decision on Defence Motion for Exclusion of Witness GK's Testimony or for Request for Cooperation from Government of Rwanda* (27 November 2006)

⁷⁰ *Observations du Greffier Relatives a la Decision on Motion to Report Government of Rwanda to United Nations Security Council en Date du 2 Octobre 2006* (17 October 2006); Confidential Annex "A" to *Motion for Request for Cooperation of Government of Rwanda: Statements of Witnesses ALG, GK, and UB* (2 January 2007)

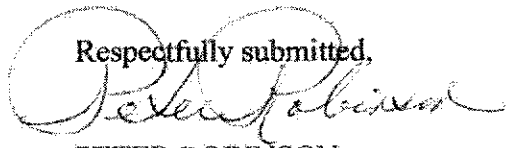
⁷¹ *Prosecutor v Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para. 52

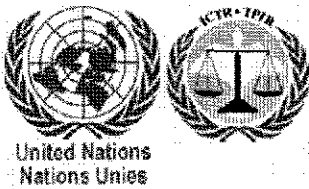
accused, who failed to obtain the statements prior to the commencement of the witness' testimony.

Conclusion

83. Mr. Nzirorera respectfully contends that the Impugned Decision was both unauthorized and incorrect. He requests that the Appeals Chamber vacate the decision and return the matter to the full Trial Chamber, when constituted, with guidance as to the proper standard to be employed when faced with a request to obtain prior statements of prosecution witnesses who have already testified.

Word count: 5030

Respectfully submitted,

PETER ROBINSON
Lead Counsel for Joseph Nzirorera



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