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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: 21 September 2007

JUDICIAL RECORDS ARCHIVE
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THE PROSECUTOR

v.

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

DECISION ON PROSECUTION CROSS-MOTION FOR ENFORCEMENT OF
RECIPROCAL DISCLOSURE

Rule 67 of the Rules of Procedure and Evidence

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INTRODUCTION

1. The trial in this case started on 19 September 2005 with the presentation of the first Prosecution witnesses. On 22 March 2007, before Judge Vagn Joensen had joined the bench in the present case,¹ Judges Dennis Byron and Gberdao Gustave Kam denied a Prosecution motion for an order for Edouard Karemera and Mathieu Ngirumpatse to file notice of alibi in respect to certain allegations set forth in the Indictment.² They considered that the motion fell within the ambit of the routine matters they were authorized to conduct in the absence of Judge Joensen, under Rule 15 bis (F) of the Rules of Procedure and Evidence ("Rules").³

2. On 31 May 2007, the Appeals Chamber however laid down standards and principles defining what should be considered a "routine matter" under Rule 15 bis (F) of the Rules.⁴ Bearing in mind those principles, the Chamber, fully composed, then decided to vacate the prior Decision of 22 March 2007, rendering it necessary to rule afresh on the Prosecution motion for an Order to file a notice of alibi.⁵

3. Meanwhile, on 11 June 2007, Joseph Nzirorera moved the Chamber to allow his Defence to inspect all the statements made by Pierre Celestin Mbonankira in the possession of the Prosecutor.⁶ In its response thereto, the Prosecution not only opposed this application but moved, in turn, the Chamber to order reciprocal disclosure from the Defence under Rule 67 (C) of the Rules. It further filed new submissions for an order for the Accused to provide notice of alibi if the Accused intend to rely on such a defence.⁷

¹ On 8 June 2007, Judge Vagn Joensen joined the bench as substitute Judge in accordance to Rule 15 bis (D), *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera* ("Karemera et al."), Certification of the Familiarisation with the Record of the Proceedings (Judge Joensen), 8 June 2007. See *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Continuation of the Proceedings (TC), 6 March 2007; *Karemera et al.*, Case No. ICTR-98-44-R15bis.3, Decision on Appeals Pursuant to Rule 15 bis (D) (AC), 20 April 2007.

² *Karemera et al.*, Decision on Prosecutor's Motion for an Order to File Notice of Alibi (TC), 22 March 2007. The said allegations were those contained at Paragraphs 25.2, 33.2, 40, 47 and 55 of the Indictment and paragraph 101 of the Prosecution's Pre-Trial Brief, see Prosecutor's Motion for an Order to File Notice of Alibi Pursuant to Rule 67(A)(ii), 20 December 2006, filed on 20 December 2006.

³ *Karemera et al.*, Decision on Prosecutor's Motion for an Order to File Notice of Alibi (TC), 22 March 2007, para. 3.

⁴ *Karemera et al.*, Case No. ICTR-98-44AR73.9, Decision on "Joseph Nzirorera's Interlocutory Appeal of Decision on Obtaining prior Statements of Prosecution Witnesses after they have testified" (AC), 31 May 2007.

⁵ *Karemera et al.*, Decision on Motions to Vacate Decisions (TC), 17 July 2007, para. 18.

⁶ Joseph Nzirorera's Motion for Inspection of Statement of Pierre Celestin Mbonankira, filed on 11 June 2007.

⁷ Prosecutor Response to Nzirorera Motion for Inspection and Prosecutor's Cross-Motion for Enforcement of Reciprocal Disclosure Pursuant to Rule 67, filed on 18 June 2007 ("Prosecution Cross-Motion"); see also Prosecutor's Consolidated Reply to Defence Responses to Prosecutor's Cross-Motion for Enforcement of Reciprocal Disclosure Pursuant to Rule 67, filed on 26 June 2007 ("Prosecutor's Consolidated Reply").

4. On 20 September 2007, the Chamber granted Nzirorera's Motion.⁸ It will now rule on the Prosecution's cross-motion for reciprocal disclosure, considering that those submissions supersede the prior Prosecution's prior submissions on the alibi notice. The Defence for Nzirorera and the Defence for Ngirumpatse oppose the Prosecution's application.⁹

DISCUSSION

Prosecution Request for Reciprocal Disclosure pursuant to Rule 67(C) and for Enforcement of a Reciprocal Disclosure Regime

5. In the Prosecution's view, should the Chamber grant Joseph Nzirorera's request for inspection of the statements of Mr. Mbonankira, it should adopt a similar standard in reviewing the Prosecution's requests for reciprocal disclosure pursuant to Rule 67 (C).¹⁰

6. The Prosecution explains that with a view to assessing the credibility and reliability of potential evidence to be adduced before the Chamber, it requested disclosure of memoranda of interviews made by Joseph Nzirorera's Defence team.¹¹ The Defence for Nzirorera, however, either refused to disclose the said documents¹² or, according to the Prosecution, disclosed it so late that the Prosecution could not use it to better prepare the examination of its own witness in court.¹³ The Prosecution contends that had the Defence provided reciprocal disclosure of the said memoranda, the proceedings would have been enhanced by eliciting direct evidence more comprehensively.¹⁴ In the Prosecution's view, if the Defence is entitled to inspect witness statements as documents pursuant to Rule 66 (B), a logical conclusion is that under Rule 67 (C) the Prosecution be allowed to inspect similar materials in the Defence's possession.

7. According to Rule 67 (C), if the Defence makes a request for inspection of material in possession of the Prosecution pursuant to Rule 66 (B), the Prosecution shall in turn be

⁸ *Karemera et al.*, Decision on Joseph Nzirorera's Motion for Inspection of Statement of Pierre Celestin Mbonankira (TC), 20 September 2007.

⁹ Joseph Nzirorera's Response to Prosecution Cross-Motion for Enforcement of Reciprocal Disclosure, filed on 19 June 2007 ("Nzirorera's Response"); Mémoire en réponse pour M. Ngirumpatse sur la Prosecution Cross-Motion for Enforcement of Reciprocal Disclosure Pursuant to Rule 67, filed on 20 June 2007 ("Nzirorera's Response").

¹⁰ Prosecution Cross-Motion, para. 25.

¹¹ Prosecution Cross-Motion, paras. 26-29.

¹² The Prosecution refers to a memorandum of interviews of Bandali Abdulmohamed recorded by Joseph Nzirorera's Defence team.

¹³ The Prosecution refers to memoranda of interviews of Prosecution Witness ANU by Joseph Nzirorera's Defence team that the Defence first refused to disclose, and then moved the Chamber to admit in evidence during the cross-examination of the witness.

¹⁴ Prosecutor's Consolidated Reply.

entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the Defence and *which it intends to use as evidence at trial.*

8. Contrary to the Prosecution's assertion and according to the ordinary and clear meaning of the Rules, the disclosure obligations of the Prosecution and the Defence are not identical. Inspection of material by the Defence under Rule 66 (B) is broader in that the accused's right is not limited to materials that are intended for use by the Prosecution as evidence at trial. It also includes documents which are *material to the preparation of his defence.*¹⁵ As held by the Appeals Chamber, "preparation is a broad concept and does not necessarily require that the material itself counter the Prosecution evidence."¹⁶ This is not so for the Prosecution's right under 67 (C): inspection applies to Defence documents which it intends to use as evidence at trial only.

9. In the present matter, the Prosecution has failed to make a *prima facie* case showing that the Defence intends to use Bandali's interview notes as evidence at trial. The Prosecution's desire to use the statement to assess credibility of its witnesses is not an interest which triggers any obligation under Rule 67 (C). The Prosecution's request for inspection of those notes is therefore misplaced at this stage.

10. The Prosecution also moves the Chamber to articulate a standard for disclosure under Rules 66 (B), 67 and 68 that can be applied fairly to all parties with a view to availing the Chamber with the most reliable evidence during the trial.¹⁷

11. Relying upon the Appeals Chambers jurisprudence and standards, the Trial Chamber has already on several occasions set out the applicable standards concerning the Prosecution's disclosure obligations under the Rules.¹⁸ The Chamber does not find necessary to reiterate its

¹⁵ Rule 66 (B) reads: "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."

¹⁶ *Prosecutor v. Bagosora et al.*, Case 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 (AC), 25 September 2006, para. 9.

¹⁷ Prosecution Cross-Motion, para. 30.

¹⁸ See for instance: Decision on Disclosure of Witness Reconfirmation Statements (TC), 23 February 2005; Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure (TC), 5 July 2005; Oral Decision on Stay of Proceedings (TC), T. 16 February 2006; Decision On Defence Motion For Disclosure Or Inspection Of Hand-Written Notes From OTP Investigator (TC), 26 April 2006; Decision on Defence Motions for Disclosure of Information Obtained From Juvénal Uwilingiyimana (TC), 27 April 2006; Oral Decision on Five Defence Motions (TC), T. 6 June 2006; Decision on the Prosecutor's application pursuant to Rules 39, 68 and 75 of the Rules of Procedure and Evidence for an order for conditional disclosure of witness statements and other documents pursuant to Rule 68(A) (TC), 4 July 2006; Decision On Joseph Nzirorera's Notice Of Violation Of Rule 68 And Motion For Remedial Measures (TC), 12 July 2006; Decision on Defence Motion to Compel

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prior reasoning thereto. The Chamber has now further clarified the applicable standard for the Defence's reciprocal disclosure obligations under Rule 67 (C), clarifying that they are not identical to those applicable to the Prosecution.

Prosecution Motion for an Order to File Notice of Alibi

12. In the Prosecution's view, the Indictment, the Pre-Trial Brief and Opening Statement contain factual pleadings with sufficient particularity to place the Accused on notice of times and places where they are alleged to have been present. It is particularly concerned with the potential notice of alibi in connection with paragraphs 25.2, 33.2, 40, 47 and 55 of the Indictment as well as paragraph 101 of the Prosecution Pre-Trial Brief.¹⁹ It contends that disclosure of a potential or intended alibi defence will afford a more expeditious adjudication of the evidence by focusing all the Parties and the Chamber on genuinely contested matters in the case. It observes that neither Edouard Karemera nor Mathieu Ngirumpatse have filed notice of alibi so far.

13. The Defence for Nzirorera, joined by the Defence for Ngirumpatse, submits that notice of alibi under Rule 67 (A) (ii) (a) does not apply to facts contained in the Pre-Trial Brief as this information cannot serve to allege a crime not contained in the Indictment.²⁰ It seeks for Chamber clarification on those points before making an effort to provide further notice of alibi. The Defence for Nzirorera further requests the Chamber to hold, as a matter of interpretation of Rule 67 (A), that a notice of alibi is not required for events where the Prosecution's evidence has not conformed to the date alleged in the Indictment.²¹ The Defence for Ngirumpatse also contends that the use of phrase such as "on or around 18 April 1994" in the Indictment renders the allegations against the Accused so vague that he cannot enter a notice of alibi.²²

14. Rule 67 (A) (ii) (a) prescribes that "as early as reasonably practicable and in any event prior to the commencement of the trial", the Defence shall notify the Prosecutor of its intent to enter the defence of alibi.

Best Efforts To Obtain And Disclose Statements And Testimony Of Witness UB (TC), 10 October 2006; Decision On Defence Motion For Disclosure Of RPF Material And For Sanctions Against The Prosecution (TC), 19 October 2006. See also Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations (AC), 30 June 2006.

¹⁹ Prosecution Cross-Motion, para. 32; Prosecutor's Consolidated Reply, paras. 15, 19, 20, 21.

²⁰ Nzirorera's Response, para. 11; Ngirumpatse's Response, p. 3.

²¹ Nzirorera's Response, para. 10.

²² Ngirumpatse's Response, p. 4.

15. This provision implies that the obligation to give an alibi notice is triggered as soon as practicable after the accused becomes aware of the nature and cause of the charges against him or her and intends to show that by reason of his or her presence at a particular place or places at a particular time or times, he or she was unlikely to have been at a place where the offence is alleged to have been committed at the time of its alleged commission. According to Article 17(4) of the Statute of the Tribunal ("Statute") and Rule 47(C) of the Rules, the charges against the accused are the one set forth in the Indictment. Although a failure to set forth the specific material facts of a crime may be cured through timely, clear, and consistent information from the Prosecution through the Pre-Trial Brief, for instance,²³ the Indictment has to fulfil the fundamental purpose of informing the accused of the charges against him with sufficient particularity to enable him to mount his defence.²⁴

16. Rule 67 (A) (ii) (a) does not imply an obligation on the Defence to enter a defence of alibi as this could be inconsistent with the presumption of innocence and the right of the accused to remain silent.²⁵ There is a subjective element as the obligation cannot arise unless the Defence intends, on behalf of the accused, to enter the defence of alibi. An intention to lead evidence to show that the accused was not at the scene of the alleged crime does not necessarily require the filing of an alibi notice unless the accused intends to show that he or she was at a particular place at the time the crime was alleged to have been committed. If the crime is alleged to have been committed within a stated time-frame, an intention to allege that the accused was at a particular place for part of the period within that time frame may not require the filing of an alibi notice. It would be different if the intended evidence covers the entire time frame alleged.

17. Rule 67 (B) also specifically directs that failure to give notice of alibi shall not limit the right of the accused to rely on this defence. Disclosure of notice of alibi at the earliest stage of the proceedings, however, contributes to the fairness of the trial, as enshrined in Article 19 (1) of the Statute, and the proper administration of justice.²⁶ There is therefore a

²³ *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004 ("*Niyitegeka* Appeal Judgement"), para. 195; *Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006 ("*Ntagerura* Appeal Judgement"), paras. 30; *Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-A, Judgement (AC), 7 July 2006 ("*Gacumbitsi* Appeal Judgement"), para. 49.

²⁴ *Ntakirutimana* Appeal Judgement, paras. 25 and 470; *Ntagerura* Appeal Judgement, para. 22.

²⁵ *Prosecutor v. Simeon Nchamihigo*, Case No. ICTR-2001-63-T, Decision on Defence Compliance with Rule 67 of the Rules of 5 April 2007 (TC), para. 8.

²⁶ See *Prosecutor v. Rutaganda*, Case No. ICTR-93-A, Judgment (AC), 12 May 2003, para. 241; *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-PT, Decision on Prosecution Motion for Notice of Alibi and Reciprocal Inspection (TC), 14 June 2005, para. 7.

professional obligation on Defence Counsel to file a notice of alibi as soon as it is known that the accused intends to enter such a defence.²⁷

18. Thus far, the Prosecution has not shown – and the Defence does not claim – that Edouard Karemera and Mathieu Ngirumpatse intend to enter a defence of alibi on the allegations against them as charged in the Indictment. An order directing the Defence either for Karemera or for Ngirumpatse to file a notice of alibi is therefore not warranted.

19. The Defence for Nzirorera has already filed his notice of alibi and the only matter in issue is whether he has given sufficient details as to the place he claims to have been present at the time of the alleged crime in accordance with Rule 67 (A) (ii) (a).²⁸ The Prosecution indeed submits that Nzirorera's alibi notice concerning paragraph 32.3 of the Indictment is deficient insofar as it only states that the Accused was in Mukingo *commune* on 30 April 1994. In the Prosecution's view, the mere indication of a geographical region is, however, insufficient to provide a notice of alibi defence.

20. Paragraph 32.3 of the Indictment does not specify an exact date or time of the alleged event.²⁹ In that context, the statement that Joseph Nzirorera was in Mukingo *commune* is sufficiently detailed. He could not give more specific details unless he remained in one place all day. Nzirorera's notice therefore provides sufficient indication of the place where the Accused claims to have been present at the time of the alleged crime. An order to Joseph Nzirorera to file additional details of his notice to alibi is therefore not warranted.

21. Although the Prosecution's Motion falls to be rejected, the Chamber does not find that it should be sanctioned as suggested by the Defence for Ngirumpatse.³⁰

²⁷ *Ibidem*.

²⁸ Pursuant to Rule 67 (A) (ii) (a), the notice of alibi once given must specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi.

²⁹ Paragraph 32.3 reads: On or about 30 April 1994 at a meeting of the *conseil de sécurité* at the Kigali-ville *préfecture* office, Joseph NZIRORERA publicly thanked the Interahamwe of Kigali for the good work that they were doing and offered them money for the purchase of beer. Tharcisse RENZAHO and Laurent SEMANZA, among others, also participated in the meeting. All participants were aware that Interahamwe in Kigali were systematically killing Tutsi residents at roadblocks and in neighborhood patrols. When a participant at the meeting asked for an explanation of who the enemy was, Joseph NZIRORERA responded that "a Hutu who joined the RPF is our fool, while a Tutsi who joined the MRND is now the enemy of the country", concluding that "a Tutsi is the enemy of Rwanda." Such remarks were intended to, and had the consequence of, inciting attacks upon all Tutsi.

³⁰ Ngirumpatse's Response.

FOR THOSE REASONS, THE CHAMBER

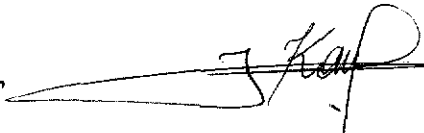
- I. **DENIES** the Prosecutor's Cross-Motion for Enforcement of Reciprocal Disclosure Pursuant to Rule 67;
- II. **DENIES** Mathieu Ngirumpatse's application to impose sanctions upon the Prosecution.

Arusha, 21 September 2007, done in English.



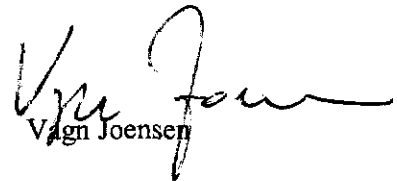
Dennis C. M. Byron

Presiding Judge



Gberdao Gustave Kam

Judge



Vagn Joensen

Judge

[Seal of the Tribunal]





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