



UNITED NATIONS
NATIONS UNIES

ICTR-98-44-T
03-09-2009
(47742-47737)

47742
A

**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: 02 September 2009

2009 SEP 23 P 2:55
JUDICIAL RECORDS/ARCHIVES
RECEIVED

THE PROSECUTION

v.

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

**DECISION ON PROSECUTION'S MOTION FOR ADMISSION OF I-P-32 INTO
EVIDENCE PURSUANT TO RULE 89 (C)**

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

Office of the Prosecution:
Don Webster
Saidou N'Dow
Arif Virani
Eric Husketh
Sunkarie Ballah-Conteh
Takeh Sendze

Defence Counsel for Édouard Karemera
Dior Diagne Mbaye and Félix Sow

Defence Counsel for Matthieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl

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

84

47741

INTRODUCTION

1. On 12 November 2008, following the testimony of Édouard Karemera's Witness RKF, the Prosecution moved this Chamber to admit a document entitled "Distribution List of Firearms".¹ Karemera objected on the ground that the reliability and the authenticity of the document were in doubt.² On 13 November 2008, the Chamber ruled that the document did not meet the threshold of authenticity and that it would not be admitted. It was marked as I-P-32 for identification purposes.³ On 1 April 2009, the Prosecution again requested the Chamber to admit I-P-32 and the Defense for Édouard Karemera reiterated its objections.⁴ The Chamber maintained its decision not to admit I-P-32 as no new event had occurred.⁵

2. The Prosecution presently moves this Chamber to admit I-P-32, together with supporting documents, pursuant to Rule 89 (C) of the Rules of procedure and Evidence ("Rules").⁶ Matthieu Ndirumpatse and Édouard Karemera both oppose the motion.⁷ The Prosecution has filed a consolidated reply.⁸

DELIBERATIONS

Preliminary issues

1. The Chamber wishes to remind that when ruling during proceedings that an item, which has not been recognized by the witness being examined, cannot be admitted into evidence, but only marked for identification purposes, the Chamber does not make a final ruling on the admissibility of the item in the sense, that the Party in question must meet the high threshold for the ruling to be reconsidered, if that Party afterwards procure further foundation for the item to be admitted into evidence, be it through another witness or on the basis of other material. Since the Prosecutor has

¹ T. 12 November 2008, p. 19.

² T. 12 November 2008, p. 20.

³ T. 13 November 2008, p. 54

⁴ T. 1 April 2009, p. 38-39.

⁵ T. 1 April 2009, p. 40.

⁶ Prosecutor's Motion for Admission of I-P-32 into Evidence Pursuant to Rule 89 (C) of the Rules of Procedure and Evidence, filed 25 June 2009 ("Prosecutor's Motion").

⁷ *Réponse de Karemera à la "Prosecutor's Motion for Admission of IP 32 into Evidence pursuant to Rule 89 C) of the Rules of Procedure and Evidence"*, filed 30 June 2009 ("Karemera's Response"); *Réponse de Matthieu Ndirumpatse à la Requête du Procureur en admission en preuve d'un document écrit*, filed 30 June 2009 ("Ndirumpatse's Response").

⁸ Prosecutor's Consolidated Reply to Édouard Karemera's and Matthieu Ndirumpatse's Responses to its Motion for Admission of I-P-32 into Evidence, filed 2 July 2009 ("Prosecution's Reply").



47740

procured new material to substantiate his request, the Chamber will consider the request on this basis pursuant to Rule 89 (C) of the Rules⁹.

3. The Chamber is also mindful of the fact that I-P-32 is presented after the close of the Prosecution case. With this regard, the Chamber reminds that as a general rule, the Prosecution must present all of the evidence in support of its case during its case-in-chief,¹⁰ and that admission of Prosecution evidence outside of its case-in-chief may not be in the interests of justice or judicial economy.¹¹ However, the Chamber recalls that there is no absolute ban on the admission of fresh evidence by the Prosecution after the close of its case, and that the Chamber has the discretion to admit fresh evidence under Rule 89(C), taking into account the probative value of that evidence and the need to ensure a fair trial.¹² I-P-32 has been used in the Prosecution case during the cross-examination of Defence witnesses and the Chamber believes that its admission under Rule 89 C) does not, as such, affect the Accused's right to a fair trial or the interests of justice.

Applicable Law

4. The admissibility of evidence, including documentary evidence, is governed by Rule 89(C) of the Rules which allows the Chamber to admit any relevant evidence it deems to have probative value.¹³ In order to establish that evidence is relevant, the moving party must show that a connection exists between the evidence sought to be admitted and the proof of an allegation sufficiently pleaded in the indictment.¹⁴ To establish the probative value of the evidence, the moving party must show that

⁹ *The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delalic and Esad Landzo*, Case No. IT-96-21 ("Delalic et al."), Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998 ("Decision on Admissibility"); *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("Karemera et al."), Decision on the Prosecution Motion for Reconsideration of Oral Decisions of 25 June 2007 and 03 July 2007 Concerning the Admission in Evidence of Documents Marked I-P-005 and I-P-006, 5 November 2007, para. 5.

¹⁰ See *Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, Case No. 99-46-T, Decision on the Prosecutor's Motion for Leave to Call Evidence in Rebuttal Pursuant to Rule 54, 73, and 85 (A) (iii) of the Rules of Procedure and Evidence, 21 May 2003, para. 38; *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, Case No. ICTR-98-41-T ("Bagosora et al."), Decision on Severance or Exclusion of Evidence Based on Prejudice Arising from Testimony of Jean Kambanda, 11 September 2006, fn. 3 (and sources cited therein) ("Bagosora Decision on Testimony of Kambanda"). See also *The Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-AR73.1, Decision on the Prosecution's Appeal against the Trial Chamber's Order to Call Alibi rebuttal Evidence During the Prosecution's Case in Chief, 16 October 2008, paras 11-12; *Prlić Appeal Decision on Cross-Examination Documents*, fn. 70 (and sources cited therein).

¹¹ *Bagosora Decision on Testimony of Kambanda*, para. 3.

¹² *Prlić Appeal Decision on Cross-Examination Documents*, para. 23; *The Prosecutor v. Dario Kordić and Mario Cerkez*, Case No. IT-95-14/2-A, Appeals Judgement, para. 222.

¹³ *Karemera et al.*, Decision on the Prosecution Motion for Admission Into Evidence of UNAMIR Documents (TC), 20 October 2007, paras. 5-7; *Karemera et al.*, Decision on the Joseph Nzirorera's Motion for Admission of UNAMIR Related Documents (TC), 28 November 2007, para. 4.

¹⁴ *Karemera et al.*, Decision on the Prosecution's Motion for Admission of Certain Exhibits into Evidence, 22 January 2008 (TC), ("Decision on Admission of Certain Exhibits"), para. 6; *Karemera et al.*,

P24

47739

the evidence tends to prove or disprove an issue.¹⁵ A factor in the assessment of the relevance and probative value of evidence is the requirement that it be *prima facie* credible; that is, it must have sufficient indicia of reliability.¹⁶ While a Chamber always retains the competence under Rule 89 (D) to request verification of the authenticity of evidence obtained out of court, "to require absolute proof of a document's authenticity before it could be admitted would be to require a far more stringent test than the standard envisioned by Sub-rule 89 (C)."¹⁷ In this regard, the Chamber considers that it is now well settled that documents need not be recognized by a witness to be considered as having probative value.¹⁸

5. Édouard Karemera and Matthieu Ngirumpatse argue that the Chamber already rejected twice the admission of I-P-32.¹⁹ Karemera further contends that the Prosecution relies on the same arguments that already led to the dismissal of its previous motions.²⁰ The Chamber notes, however, that the Prosecution presents new arguments with the new documentation in support of its application in the form of a statement signed by Innocent Ryumugabe on 16 June 2009. Ryumugabe declares in his statement that he took office as *sous-préfet* of Birambo in October 1994, that he had been interviewed by the two investigators on 11 December 1995 and that he gave them copies of 4 documents including I-P-32. Ryumugabe further states that he had found the documents in an office previously occupied by the Commander of the UNAMIR.²¹ Thus, Ryumugabe's statement corroborates the note by OTP investigators accompanying I-P-32.²²

6. Édouard Karemera contends that I-P-32, accompanied with Ryumugabe's statement, does not satisfy the condition of authenticity and that it is unreliable.²³ Matthieu Ngirumpatse presents similar arguments.²⁴ The Chamber recalls that at this stage of admission of evidence, the implicit requirement

Decision on Joseph Nzirorera's Motion to Admit Documents Authored by Enoch Ruhigira, 26 March 2008 ("Decision to Admit Ruhigira Documents"), para. 3; *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Admit Documents Obtained from the RPF Archives in Kigali, 13 February 2009, par. 3.

¹⁵ *Karemera et al.*, Decision on the Prosecution Motion for Admission Into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse, 2 November 2007, para. 4; *Karemera et al.*, Interim Order on the Prosecutor's Motion for Admission of Documents, 8 August 2007, para. 7 (and cases cited therein).

¹⁶ *Delalic et al.*, Decision on Admissibility, para. 20; *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41, Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole, 13 September 2004, para. 8.

¹⁷ *Delalic et al.*, Decision on Admissibility, para. 20.

¹⁸ *Karemera et al.*, Decision on Admission of Certain Exhibits, para. 7 (and cases cited therein); *Karemera et al.*, Decision on the Prosecution Motion for Admission Into Evidence of UNAMIR Documents, 30 October 2007 ("Decision on Admission of UNAMIR Documents"), para. 6.

¹⁹ Karemera's Response, para. 13; Ngirumpatse's Response, para. 12.

²⁰ Karemera's Response, para. 18.

²¹ United Nations Mission for Rwanda.

²² Document I-P-32 is accompanied by a note signed by OTP investigators Sylvie Becky and Alain Ribaux on 12 December 1995, where the two investigators made an account of an interview they had with the then *sous-préfet* of Birambo, Innocent Ryumugabe on 11 December 1995, who gave them 4 documents including I-P-32, of which they made copies before returning them back to the *sous-préfet*.

²³ Karemera's Response, paras. 17 and 21.

²⁴ Ngirumpatse's Response, paras. 12 and 16.

88

47738

of reliability means no more than that there must be sufficient indicia of reliability to make out a *prima facie* case.²⁵

7. Édouard Karemera argues that the Prosecution is trying to mislead the Chamber by submitting a non authentic document and by seeking its admission on the basis of an affirmation by Innocent Ryumugabe, contacted in June 2009 to corroborate an investigator's note established in 1995 by the Prosecution. Karemera further alleges that such practice is in breach of the Rules governing evidence.²⁶ The Chamber again recalls that in order for a document to be admitted at this stage of proceedings its authenticity need not to be fully ascertained. In addition, Karemera does not show how the fact that Ryumugabe's statement was taken in June 2009 would mislead the bench.

8. Édouard Karemera also contends that the Prosecution confronted the document to Defense witnesses but neither its origin, nor the information contained therein were confirmed by these witnesses.²⁷ However, it is well established that documents need not be recognized by a witness to be considered as admissible under Rule 89 (C). Therefore, the fact that the origin of I-P-32 and the information therein contained were not confirmed by witnesses or that the Prosecution did not call Ryumugabe to testify, does not prevent the document from being admitted at this stage of the proceedings.

9. Édouard Karemera and Mathieu Ngirumpatse do not challenge the relevance of I-P-32 and Matthieu Ngirumpatse challenges the probative value of I-P-32.²⁸ It is alleged in the Indictment that the three Accused exercised effective control over the network of national and regional leaders in the 'civil defense program' and the *Interahamwe* militias;²⁹ that they purchased and distributed weapons to armed militias particularly the *Interahamwe*;³⁰ and that they enlisted the resources and logistics of the Ministry of Defense and the structures of authority in the territorial administration to "distribute firearms to political party 'youth wing' militias".³¹ I-P-32 has a direct link with these allegations. Other documents such as Exhibit D. Nz 347 and Exhibit P. 59 were admitted on this issue. I-P-32 was used by the Prosecution in the cross-examination of Defense Witnesses ETK and DEU, and the latter declared that he knew at least five of the persons whose names are listed in I-P-32.³² For these reasons, the Chamber finds I-P-32 to be relevant and of probative value.

²⁵ *Delalic et al.*, Decision on Admissibility, para. 20.

²⁶ Karemera's Response, para. 29.

²⁷ Karemera's Response, para. 23.

²⁸ Réponse de Ngirumpatse, para. 2.

²⁹ Prosecutor's Filing in Compliance with Chamber III Order of 19 March 2008, Amended Indictment of 3 April ("Indictment") 2008, para. 13.

³⁰ Indictment, para. 14.

³¹ Indictment, para. 36.

³² T. 1 April 2009, pp.25-26.

84


47737

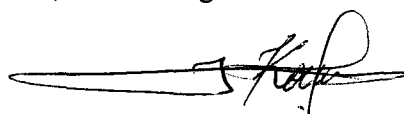
10. In the Chamber's opinion, the Prosecution, by presenting a duly signed affidavit from Ryumugabe, has established that I-P-32 bears sufficient indicia of reliability to meet the threshold standard for admissibility at this stage of the proceedings even if the document is unsigned and of an unknown author. Consequently, the Chamber decides to admit these documents.

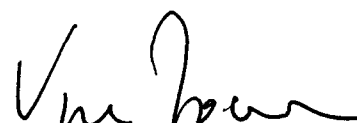
FOR THE ABOVE MENTIONED REASONS, THE CHAMBER

- I. GRANTS** the Prosecution Motion and **ADMITS** into evidence Document I-P-32 and the accompanying documentation as a single exhibit;
- II. REQUESTS** the Registry to assign an exhibit number to the admitted documents.

Arusha, 02 September 2008, done in English.


Dennis C. M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge


Vagn Joensen
Judge

