

ICTR-98-44-T
6-2-2004
(9407-9402)

9407
#m



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Original: English

TRIAL CHAMBER III

Before: Judge Andréia Vaz, Présidente
Judge Flavia Lattanzi
Judge Florence Rita Arrey

Registrar: Adama Dieng

Date: 6 February 2004

The PROSECUTOR

v.

**Édouard KAREMERA,
Mathieu NGIRUMPATSE,
Joseph NZIRORERA and
André RWAMAKUBA**

Case No. ICTR-98-44-T

JUDICIAL RECORDS SECTION
1017
2004 FEB -6 P 1:05
[Signature]

**DECISION ON ACCUSED NZIRORERA'S MOTION
TO EXCLUDE EVIDENCE**

Counsel for the Accused:
Peter Robinson

Counsel for the Co-Accused:
Dior Diagne
Charles Roach and Frédéric Weyl
David Hooper and Andreas O'Shea

Office of the Prosecutor:
Don Webster
Dior Fall
Ifeoma Ojemeni
Simone Monasebian
Holo Makwaia
Tamara Cummings-John
Ayo Fadugba
Sunkarie Ballah-Conteh

41

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“Tribunal”),

SITTING as Trial Chamber III, composed of Judges Andrésia Vaz, presiding, Flavia Lattanzi and Florence Rita Arrey (“Chamber”);

BEING SEISED of the “Motion to Exclude Evidence” filed on 13 October 2003 by the Defence for Accused Joseph Nzirorera, pursuant to the Rule 73 of the Rules of Procedure and Evidence of the Tribunal (“Motion”, “Defence”, “Accused” and “Rules”);

CONSIDERING the “Prosecutor’s Response to Joseph Nzirorera’s Motion to Exclude Evidence” filed on 20 October 2003 (“Response”) and the “Reply Brief: Motion to Exclude Evidence”, filed by the Defence on 27 October 2003 (“Reply”);

CONSIDERING the Statute of the Tribunal (“Statute”) and the Rules, particularly Rules 54, 68, 73, 94 *bis*, 95 and 98 of the Rules;

NOW DECIDES, pursuant to Rule 73(A) of the Rules, solely on the basis of the written briefs filed by the parties.

Submissions of the Parties

Motion

1. The Defence requests the Chamber, prior to commencement of the trial:

(i) To exclude the appearance of prosecution witnesses whose prior statements were not timely disclosed by the Prosecutor, and the production at trial of exhibits which, similarly, were not timely disclosed by the Prosecutor;

(ii) To exclude the appearance of prosecution witnesses in whose regard the Rwandan authorities have failed to produce statements collected by judicial authorities during criminal proceedings in Rwanda, in breach of the Request for Cooperation of the Government of the Republic of Rwanda Pursuant to Article 28 of the Statute, rendered on 25 October 2002 by Trial Chamber I of the Tribunal, then seised of the present Case;

(iii) To order the Prosecutor, pursuant to Rule 54 or 98 of the Rules, to obtain from the Rwandan Authorities the statements referred to at Sub-paragraph 1(ii) above;

(iv) To exclude in-court identification of the Accused by the witnesses, since the circumstances of trial necessarily lead the witnesses to identify the person on trial, and to order instead that the witnesses be asked to identify the Accused on the basis of a series of six photographs of unrelated individuals, including the Accused, prior to the witnesses’ appearance in court and in the presence of the Defence;¹

(v) Pursuant to Rule 95 of the Rules, to exclude the production at trial of prosecution evidence consisting in any of the items seised from the Accused’s residence in Benin in 1998, and to order that an evidentiary hearing take place in regard to the circumstances of the

¹ Relying *inter alia* on the Appeals Chamber’s statement that “a Trial Chamber must proceed with extreme caution when assessing a witness’ identification of an accused made under difficult circumstances” in *Prosecutor v. Bagilishema*, Judgement (Reasons), Case No. ICTR-95-1A-A (AC), 3 July 2002, para. 75. Reference being further made, in this paragraph of the *Bagilishema* Appeals Chamber’s Judgement, to *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeal Judgement (AC), 23 October 2001, para. 39.

search and seizure of 1998 and in regard to the maintenance of the Accused's property since the seizure;²

(vi) To order the Prosecutor to limit expert witness evidence in the case-in-chief to only one out of the three experts comprised in his list of witnesses of 10 October 2003, on the following grounds: (a) expert witness testimony has not had much impact in the Tribunal jurisprudence to date, (b) the Prosecutor is trying to compensate for a lack of evidence against the Accused with expert witnesses' opinions, and (c) expert witness Guichaoua was deemed unreliable in the *Semanza* Judgement 15 May 2003 while experts Des Forges and Reyntjens were found to be biased and/or unreliable by the Federal Court of Appeals of Canada in the recent *Mugesera* Judgement of 8 September 2003;³

(vii) To limit the expert witnesses' testimony to evidence other than the Accused's alleged conduct or responsibility, or the fact finding process would be contaminated.

2. As a conclusion, the Defence states that it has no objection to the Chamber deferring a decision on these matters until they arise in the course of trial.

Response

3. The Prosecutor essentially responds:

(i) In reference to the Defence submissions at Sub-paragraphs 1(i) and (ii) above,

(a) That these requests are similar to the Defence "Notification of Failure to Comply with Trial Chamber Order and Motion for Remedial Measures", filed on 5 September 2003 and that he relies on his Response thereto, as filed on 8 September 2003;⁴

(b) That, should the Chamber be persuaded that the Defence has been disadvantaged by "recent" disclosure of certain witness statements, an appropriate remedy would be to delay the concerned witnesses' appearance before the Chamber in order to afford the Defence an opportunity to conduct further investigations.

(ii) In reference to the Defence submissions at Sub-paragraphs 1(ii) and 1(iii) above,

(a) That his entire case is based solely on the statements recorded by Prosecution Investigators;

(b) That prior statements collected by Rwandan judicial authorities from prosecution witnesses to be called in the present case were tendered as exhibits by the Defence in the *Prosecutor v. Kajelijeli* Case, No. ICTR-98-44A, and that these statements are available to the Defence through the Registry;

(c) That he has only recently become aware of the existence of a file of materials provided to the Prosecutor by the Rwandan Prosecutor General, which includes statements from three protected prosecution witnesses to appear in this case, that some of these statements are in Kinyarwanda and that, prior to disclosing these documents or parts of these documents, he needs time to determine whether they are or not subject to an exception to disclosure under the Rules;

² Relying on the Defence "Third Motion for Return of Property and Sanctions for Violation of Court Order" filed on 16 January 2003.

³ Referring to *Prosecutor v. Semanza*, ICTR-97-20-T, Judgement and Sentence (TC), 15 May 2003 and to the Judgement rendered on 8 September 2003 in the *Mugesera et al. v. Minister of Citizenship and Immigration* Case, Can. Fed. Ct. App., 2003 FCA 325 (Reasons for Judgment).

⁴ As summarised in the Chamber's Decision on the Defence Notification of Failure to Comply with Trial Chamber Order and Motion for Remedial Measures of 20 October 2003.

(iii) In reference to the Defence submissions at paragraph 1(iv) above, that the proposed identification procedure has not been the practice in the Tribunal; that dock identifications are in the interests of justice; and that the Chamber will assess the weight to be given to in-court identifications made of the Accused at trial.

(iv) In reference to the Defence submissions at paragraph 1(v) above, that these issues have already been raised in several Defence motions, and that he relies on his responses previously filed in relation to these motions, adding that the Defence so far has failed to show which of the seised material, if admitted at trial, would seriously compromise the integrity of the proceedings.⁵

(v) In reference to the Defence submissions at paragraph 1(vi) above, that these issues are premature, and that the Defence will have an opportunity to cross-examine the expert witnesses, to establish the methodology used in regard to their research, and to challenge the reliability or relevance of their evidence, after their preliminary statements are disclosed, pursuant to Rule 94 *bis* of the Rules.

Reply

4. The Defence essentially replies:

(i) In reference to the Prosecutor's submission at paragraph 3(i)(a) above, that the Chamber has not yet ruled on whether the testimony of the witnesses concerned by the lack of prior disclosure should be excluded due to the Prosecution's violations of Rule 66(A)(ii) of the Rules;

(ii) In reference to the Prosecutor's submission at paragraph 3(i)(b) above, that he is still in breach of Rule 66(A)(ii) in respect to Witnesses ACM, GAP, GBF, GBU, GBV, GFA, GFF, and others; and that, in view of his repeated failure to timely disclose materials required under Rule 66(A)(ii), granting additional time to the Defence to prepare itself before the testimony of the concerned witnesses is not an adequate remedy;

(iii) In reference to the Prosecutor's submissions at paragraph 3(iii) above, that the Prosecution itself, in the *Prosecutor v. Kamuhanda* Case, No. ICTR-99-54A-T, suggested the requested procedure in the first place, and that the only reasonable inference from this change of attitude is a fear that the witnesses will prove unable to identify the Accused from an array of photographs;

(iv) In reference to the Prosecutor's submissions at paragraph 3(v) above, that the Chamber should set a firm deadline for disclosure of the expert witness reports for this issue to be resolved, and affording sufficient time for the Defence to be able to prepare for the expert witnesses' cross examination.

⁵ Referring to the Prosecutor's Response to the Defence "Third Motion for Return of Property and Sanctions for Violation of Court Order," filed on 16 January 2003; a response filed on 30 July 2003, particularly at paragraphs 19 and 20, p.4.

Deliberations

5. The Order requested at paragraph 1(i) above, relating to the exclusion of several witnesses who have already testified, and the exclusion of undisclosed exhibits, is too general. In any event, although some pre-trial disclosures were carried out by the Prosecutor with delay in respect of some of the witnesses in the first trial session, the Defence accepted that the concerned witnesses appear in the first session, and agreed to cross-examine them on the basis of the disclosures received, with a proviso that these witnesses could be called back for the purposes of cross-examination if there are any issues newly raised in prior statements which had not been disclosed 60 days prior to their appearance.⁶ The request therefore lacks substance.
6. The request summarised at paragraph 1(ii) above is premature. This issue shall be raised at the appropriate time, during the trial.
7. The Chamber invites the Defence to seek disclosure of the statements or alleged statements of prosecution witnesses collected by Rwandan judicial authorities, which were tendered by the Defence in the *Kajelijeli* Case (See, paragraph 3(ii)(b) above), before the proper authority.
8. The Chamber notes the Prosecutor's engagement at paragraph 3(ii)(c) above, and invites him to determine whether these prior statements might, in his view, be subject to an exception to disclosure under the Rules, if he has not done so yet.
9. The Chamber now turns to the request summarised at paragraph 1(iii) above, referring to statements made by prosecution witnesses in the course of judicial proceedings in Rwanda. The Chamber recalls that it has held that these statements are Rule 68 material.⁷ The Chamber consequently ordered the Prosecutor, pursuant to Rule 54 of the Rules, to seek to obtain all such statements from the Rwandan government or from the concerned witnesses themselves, as soon as possible prior to their appearance, and to disclose such statements, when received, to the Defence.⁸ The Prosecutor is hereby reminded of this Order. He should continue to seek to obtain all such statements from the Rwandan Authorities and to disclose them to the Defence.
10. With regard to the request for exclusion of in-court identification of the Accused summarised at paragraph 1(iv) above, the Chamber recalls its oral decision of 2 December 2003, dismissing the Defence request.⁹ The Chamber adds that the Defence has failed to provide reasons compelling a change of practice in respect of the modalities of identification of the Accused in the present case. The Chamber will evaluate on a case-by-case basis the probative value of the identifications made.
11. The requests summarised at paragraph 1(v) above, relating to the evidence seized from the Accused at the time of his arrest, were dismissed in the Decision on the Defence

⁶ Tr. 3 Nov. 2003, p. 34. (Informal meeting held with the Parties, in closed session, under the Chamber's Senior Legal Officer's supervision.)

⁷ See para. 8 of the *Décision relative à la requête de la Défense aux fins de la délivrance d'une ordonnance enjoignant aux témoins à charge de produire, lors de leur comparution, leurs agendas ou autres écrits datant de 1992 à 1994 et leurs déclarations faites devant des autorités judiciaires rwandaises* rendered in the present case on 24 November 2003.

⁸ See *Ibid.*, Order I.

⁹ Tr. 2 Dec. 2003, p. 2.

Notification of Failure to Comply with Trial Chamber Order and Motion for Remedial Measures rendered on 20 October 2003. This request has therefore become moot.

12. The Chamber considers that there is no need to limit beforehand the scope of expert witness evidence to be adduced in the present case. At the time of giving evidence, the Chamber will exercise its discretionary power to conduct the proceedings. It will decide on the admissibility of specific evidence adduced by the expert when and as the issue arises. The request summarised at paragraph 1(vi) therefore lacks substance.

13. With regard to the allegedly excessive number of expert witnesses to be called by the Prosecutor (See paragraph 1(vii) above), the Chamber gives little weight, and finds little relevance, to the Defence statements that expert witness testimony has not had much impact in the Tribunal jurisprudence to date, and that the Prosecutor is trying to compensate for a lack of evidence against the Accused with expert witnesses' opinions. The third argument, that some of these witnesses were found to be unreliable by the Chamber in a different composition, or by another court, lacks relevance to the present proceedings. This Chamber will make its own findings at the close of the trial. The Defence request therefore lacks substance.

FOR THE ABOVE REASONS,

THE CHAMBER

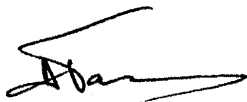
I. INVITES the Prosecutor to determine whether the statements collected by Rwandan judicial authorities from prosecution witnesses in the present Case, as referred-to at paragraphs 3(ii)(c) and 8 above, might, in his view, be subject to an exception to disclosure under the Rules, if he has not done so yet;

II. INVITES the Defence to seek disclosure of the statements referred-to at paragraphs 3(ii)(b) and 7 above before the proper authority;

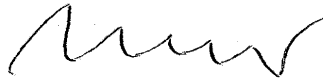
III. REMINDS the Prosecutor that he should endeavour to seek all statements made by prosecution witnesses in the course of judicial proceedings against them from the Rwandan government or from the concerned witnesses themselves, as soon as possible and prior to their appearance, and to disclose such statements, when received, to the Defence;

IV. DISMISSES the Motion in all other respects.

Arusha, 6 February 2004



Andrézia Vaz
Presiding



Flavia Lattanzi
Judge



Florence Rita Arrey
Judge

(Seal of the Tribunal)

