

ICTR-98-41-T
23-03-2004
(19134 - 19131)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 23 March 2004

THE PROSECUTOR

v.

**Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA**

Case No. ICTR-98-41-T

2004 MAR 27 P 3:38
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DECISION ON *AMICUS CURIAE* REQUEST BY AFRICAN CONCERN

Office of the Prosecutor:

Barbara Mulvaney
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Rashid Rashid

Counsel for the Defence

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André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'omanwa

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“the Tribunal”);

SITTING as Trial Chamber I, composed of Judge Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the “Demande introduite par African Concern aux fins d’autorisation de déposer un mémoire en qualité d’*amicus curiae* dans l’affaire Le Procureur c. Theoneste Bagosora” (“the Application”), filed by African Concern on 4 December 1998;

HEREBY DECIDES the motion.

INTRODUCTION

1. African Concern is a nongovernmental organization which seeks leave to appear as *amicus curiae* in order to address the Chamber on two related issues. Neither the Prosecution nor the Defence of the four Accused have responded to the motion or made any submissions in that regard.

SUBMISSIONS

2. African Concern seeks leave to file a written brief that addresses two issues. Firstly, it seeks to address the Chamber’s power to prosecute the Accused for violations of Article 3 Common to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol II, pursuant to Article 4 of the Statute, and for the unlawful taking of property, pursuant to Rule 88. Secondly, African Concern requests leave to address the Chamber on its power to order restitution to victims pursuant to Article 23(3) of the Statute and under Rules 88 and 105.

3. African Concern’s reason for making the application is that it wishes to provide the Chamber with a broader picture of the judicial implications of its decisions in the form of a thorough legal analysis of the principles that should guide the Tribunal when granting restitution to victims. It contends that restitution is a critical element of promoting justice and reconciliation in Rwanda, but that the victims’ interests in restitution are not adequately represented by either the Prosecution or Defence.

DELIBERATIONS

4. Pursuant to Rule 74, the Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization or person to appear before it and make submissions on any issue specified by the Chamber. Before leave will be granted for *amicus curiae* to appear before the Chamber or file a written brief, the proposed submissions must be relevant to the case and must assist the Chamber in the proper determination of it.¹

¹ *Musema*, Decision on an Application by African Concern for Leave to Appear as *Amicus Curiae* (TC), 17 March 1999, para. 2.

5. With regard to the first issue, which relates to the prosecution of the Accused for violations of the Statutes set forth above and Rule 88, the Chamber notes that Article 4(2)(e) of Additional Protocol II as incorporated into Article 4(e) of the Statute describes “[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”. African Concern has not identified the particular aspect of Article 4(2)(e) that it contends could be violated by the Accused’s alleged unlawful taking of property. For purposes of deciding the Application, the Chamber assumes that African Concern contends that the unlawful taking of property could constitute “outrages upon personal dignity, in particular humiliating and degrading treatment”.²

6. Rule 88 provides that “[i]f the Trial Chamber finds the accused guilty of a crime and concludes from the evidence that unlawful taking of property by the accused was associated with it, it shall make a specific finding to that effect in its judgement. The Trial Chamber may order restitution as provided in Rule 105”.

7. The Chamber concurs with *Musema* in discerning no connection between, on the one hand, the provisions cited (Article 4(e) of the Statute; Common Article 3 of the Geneva Conventions; Article 4(2)(e) of Additional Protocol II) and, on the other, restitution for the unlawful taking of property under Rule 88.³ Rule 88 provides a specific remedy if property is unlawfully taken in the course of the commission of other offences, but it does not provide that the taking of property constitutes a separate offence within the jurisdiction of the Tribunal. Furthermore, the Indictments against the four Accused do not allege that the Accused unlawfully took property, and any such purported act could not form the basis of a violation of the Statutes of the Tribunal in the present case.

8. With regard to the second issue, which relates to the issue of ordering restitution to victims of alleged crimes, the Chamber notes that the motion lacks any specific legal or factual arguments as to why African Concern’s submission would be desirable for the proper determination of this case. If the Chamber finds the Accused guilty of a crime and concludes from the evidence presented that the unlawful taking of property by the Accused was associated with that crime, it shall, pursuant to Rule 88, make a specific finding to that effect in its Judgment. In that event, the Chamber shall, pursuant to Rule 105, order the restitution of the property or the proceeds thereof or make such other order as it may deem appropriate.

9. As Rule 105 envisions a special hearing on restitution which only takes place after a judgement of conviction specifically includes findings on the unlawful taking of property, African Concern’s application is premature at this stage.

10. Moreover, as noted above, the Indictments do not allege that the Accused unlawfully took property. That being the case, African Concern has not articulated how its proposed submission regarding restitution to victims is relevant to the issues to be decided nor how such a submission would assist the proper determination of the case. Although the motion discusses the general problem of the unlawful taking of property in Rwanda, that general discussion remains unrelated to the specific facts at issue in this trial.

² *Id.*, para. 9.

³ *Id.*, para. 12.

11. Under these circumstances, the submission of a brief by African Concern on the subjects enumerated above would neither be relevant to the matters in dispute nor assist the Trial Chamber in the determination of issues before it. Consequently, pursuant to Rule 74, the Chamber declines to grant the Application.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the application.

Arusha, 23 March 2004



Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

