



ICTR-01-76-T
01-14-2004
(2992 - 2987)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

2992

S. Mutsaers

OR: ENG

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Sergei Alekseevich Egorov
Judge Dennis C. M. Byron

Registrar: Adama Dieng

Date: 1 November 2004

JUDICIAL RECORDS/ARCHIVES
ICTR
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THE PROSECUTOR

v.

Aloys SIMBA

Case No. ICTR-01-76-T

DECISION ON MATTERS RELATED TO WITNESS KDD'S JUDICIAL DOSSIER

Office of the Prosecutor:

Richard Karegyesa
Sulaiman Khan
Ignacio Tredici
Amina Ibrahim

Counsel for the Defence

Sadikou Ayo Alao
Beth Lyons

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Dennis C. M. Byron;

BEING SEIZED OF the Defence’s oral motion for interpretation of the Trial Chamber’s Decision on the Defence Request for the Cooperation of Rwandan Government Pursuant to Article 28, made on 28 October 2004;

HAVING HEARD the parties on 28 and 29 October 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 10 May 2004, the Defence filed a motion pursuant to Article 28 of the Statute and Rules 66 and 73 of the Rules of Procedure and Evidence (“the Rules”), requesting the Chamber to order the Rwandan authorities to provide the Prosecution with the judicial dossiers of seventeen anticipated detainee witnesses, including Witness KDD, for disclosure to the Defence. In its motion, the Defence noted that it had made previous requests to the Prosecution for these documents, but made no mention of its own efforts to obtain them. On 14 July 2004, the Chamber denied the Defence’s request as premature and noted that the Prosecution had already indicated that it was in the process of trying to obtain the records for the Defence. The Chamber consequently instructed the Prosecution to make all efforts to obtain the criminal records of its detained witnesses by 2 August 2004.¹

2. The Prosecution disclosed a number of judicial documents in Kinyarwanda related to anticipated witnesses on 2 August 2004. On 1 September 2004, it made a second disclosure of judicial documents in Kinyarwanda, which contained a document from 1997 relating to Witness KDD. Two other judicial documents concerning Witness KDD had been previously disclosed in connection with his statement to investigator dated 30 November 2001, a Pro Justitia statement in Kinyarwanda, and a letter to the Gikongoro prison governor, in Kinyarwanda, French, and English. The two Kinyarwanda documents were sent for translation into French and disclosed to the parties on 22 October 2004.

3. On 27 October 2004, the Defence filed an urgent request under Article 28 to order the Rwandan authorities to communicate the entire judicial dossier of Witness KDD and to postpone his testimony until it was received. The Chamber denied the request on 28 October 2004 and stated:

5. The Chamber has reviewed the transcript from the 13 May 2003 status conference, which documents only the Defence’s need for judicial documents, not their efforts to obtain them. Consequently, in the Chamber’s view, the Defence has not adequately

¹ *Simba*, Decision on “Requête en vue d’ordonner des autorités rwandaises la communication au Procureur des dossier de poursuites des témoins prisonniers” (TC), 14 July 2004, paras. 6-7.

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demonstrated the efforts that it has undertaken to obtain the requested documents. Absent such a showing, the Defence's request for cooperation is premature.

6. The request for the adjournment of the testimony of the witness until the Defence obtains the full judicial dossier is also denied. The Defence may draw the Chamber's attention to inconsistencies between the testimony of the witness before this Chamber and any declaration or record obtained subsequently. If prejudice can be shown from its inability to put these inconsistencies to the witness, the Defence may submit a motion for his recall.²

4. At the end of Witness KDD's examination-in-chief on 28 October 2004, the Defence requested an interpretation of the Chamber's decision delivered earlier on that day.

SUBMISSIONS

5. The Defence explained that the Chamber's witness protection order precluded it from conducting the necessary investigations. It was also noted that the Chamber had previously ordered the Prosecution to obtain the documents and now was shifting the burden to the Defence. If the Prosecution was unable to obtain the documents, then as a corollary the Defence could not obtain them. According to the Defence, Rule 68 compels the Prosecution to provide all documents relating to the credibility of its witnesses. The Defence also drew the Chamber's attention to the fact that the only documents it received concerning KDD related to proceedings after his death sentence.

6. The Prosecution argued that the Chamber's decision was clear and that the Defence had not demonstrated due diligence as required by Article 28. It further noted that many Defence teams obtain judicial documents on their own.

DELIBERATIONS

7. In its decision of 14 July 2004, the Chamber stated:

6. The Trial Chamber notes that the Prosecutor has undertaken to redouble efforts and contacts with judicial authorities to obtain the criminal records of the detained witnesses he intends to call. Further the Trial Chamber takes into account the Prosecutor's assertion that "nothing in [his] contacts with the said authorities indicates to [him] a refusal to provide the information requested". The Trial Chamber thus considers that the Defence request to order the Rwandan Authorities to provide the documents would not be justified by the circumstances of this case.

7. Therefore, the Trial Chamber is of the view that the Motion is premature at this date and should be denied. However, considering that the trial is scheduled to start on 16 August 2004, the Trial Chamber acknowledges the Defence concerns and instructs the Prosecutor to make all necessary efforts to obtain the criminal records of the detained Prosecutor's witnesses and to disclose them to the Defence as soon as he receives them. Further, the Trial Chamber instructs the Prosecutor to inform the Trial Chamber of any

² *Simba*, Decision on the Defence Request for the Cooperation of Rwandan Government Pursuant to Article (TC), 28 October 2004.

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difficulty or delay he may encounter in the request of such records with the Rwandan Authorities.³

8. The Chamber's order of 14 July 2004 to the Prosecution was not based on Article 28 of the Statute. Although it was not expressly stated, the decision clearly relied on the Chamber's authority under Rule 98 of the Rules to order *proprio motu* a party to produce evidence. This provision may be relied on when a Chamber deems it appropriate to facilitate the production of judicial documents.⁴

9. A clear distinction must be made between the Chamber's authority to order the production of evidence based on Article 28 and Rule 98, respectively. Article 28 embodies the Chamber's authority to compel cooperation based on a state's obligations under Chapter VII of the United Nations Charter.⁵ This authority should not be invoked lightly.⁶ As such, a party seeking an order pursuant to Article 28 must demonstrate that it has made reasonable attempts to achieve the object of its request and has been unsuccessful.⁷ In addition, it must set forth the nature of the evidence sought with particularity and the relevance of that evidence to the trial.⁸

10. To date, the Defence has not been able to satisfy the threshold requirement that it first must have made reasonable efforts. No documentation or precise submissions have been provided.⁹ The Chamber's witness protection order does not impede the Defence's ability to request files from a domestic tribunal or prosecutor. Experience shows that Defence teams have been able to obtain Rwandan judicial documents. Furthermore, the Defence is not relieved of its obligation because the Prosecution has not yet been successful. In view of the threshold requirement under Article 28 the Chamber cannot, based on the information presently provided by the Defence, issue an order under that provision. This does not mean, as argued by the Defence, that the burden is shifted from the Prosecution to the Defence but is simply an application of principles developed in consistent case law.

11. The Trial Chambers have in the past ordered, pursuant to Rule 98, the Prosecution to use its good offices to request the Rwandan judicial records of detained witnesses. This is a different

³ *Simba*, Decision on "Requête en vue d'ordonner des autorités rwandaises la communication au Procureur des dossier de poursuites des témoins Prisonniers" (TC), 14 July 2004, paras. 6-7.

⁴ *Simba*, Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68 (TC), 4 October 2004, para. 9; *Bagosora et al.*, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003, para. 7; *Bagilishema*, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witness Y, Z, and AA (TC), 8 June 2000, paras. 10-11.

⁵ *Bagosora et al.*, Decision on Defence Motion to Obtain Cooperation from the Vatican Pursuant to Article 28 (TC), 13 May 2004, para. 3.

⁶ *Halilovic*, Decision on Issuance of Subpoenas (AC), 21 June 2004, paras. 6, 10.

⁷ *Bagosora et al.*, Request to the Republic of France for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 22 October 2004, para. 3; *Bagosora et al.*, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, paras. 4.

⁸ *Bagosora et al.*, Request to the Republic of France for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 22 October 2004, para. 3; *Bagosora et al.*, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, paras. 4; *Halilovic*, Decision on Issuance of Subpoenas (AC), 21 June 2004, paras. 6-7.

⁹ The Defence's reference to problems in contacting people sentenced to death (T. 27 October 2004 pp. 73-74) is not a sufficient explanation under Article 28.

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avenue of relief than Article 28 and does not necessarily require the same showing, given that the Chamber is issuing an order to a party and not a state. With respect to the judicial records of detained witnesses, Rule 98 may be invoked to expedite the proceedings given the importance of these records to the preparation of the parties and given the familiarity of the Prosecution with its witnesses. This explains why the Chamber made its order to the Prosecution on 14 July 2004 to obtain the judicial records of its witnesses even though the Defence had not yet made sufficient independent efforts.

12. The Defence is not correct when it asserts that the production of judicial documents falls within the Prosecution's obligation under Article 68. As this Chamber recently stated in the present case:

The Prosecution's obligation pursuant to Rule 68 is to disclose exculpatory evidence or evidence which may affect the credibility of Prosecution evidence, where such evidence is in its possession. It is not disputed that the requested documents are not within the Prosecution's possession. Thus, the motion must be dismissed. The Prosecution's disclosure obligations under the Statute and the Rules do not extend to pursuing every possible avenue of investigations into a witness's credibility on behalf of the Defence.¹⁰

13. Following these clarifications, the Chamber now turns to some additional observations. In its decision of 14 July 2004, the Chamber issued an additional instruction for the Prosecution to file a report with details as to which criminal records it had obtained, the criminal records it was about to obtain, and the ones it was unable to obtain. The Prosecution has not identified the full extent of its previous efforts. The Defence and the Chamber received only the documents and some indication to which witness they referred.

14. Witness KDD testified after the Chamber's decision of 28 October 2004. During his testimony, the witness indicated that he was arrested in 1994, initially convicted in 1998, and subsequently lodged an appeal. He also testified that after his conviction he pleaded guilty to other crimes.¹¹ The only document from the time period of the arrest, initial plea and conviction and appeal is a letter from 1997. Hence, a review of the disclosure concerning Witness KDD and his in court testimony reveals that there may be additional documents.

15. The Chamber order of 14 July 2004 to the Prosecution related to a number of witnesses. It is possible that some documents concerning Witness KDD may not have been identified given the general nature of the initial request. Based on the witness's testimony, the Chamber now acts on its own motion and makes a specific order under Rule 98. The Prosecution is requested to make additional efforts to obtain the judicial dossier of Witness KDD relating to his 1998 conviction, the subsequent appeal, and any guilty pleas. The Prosecution should disclose any records it obtains to the Defence and the Chamber by Friday 5 November 2004. If the Prosecution is unable to obtain any additional records, the Chamber requests that it document all its efforts and indicate any reasons for its inability to obtain further documents.

¹⁰ *Simba*, Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68 (TC), 4 October 2004, para. 8 (internal citations omitted).

¹¹ T. 28 October 1994 p. 49.

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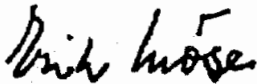
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16. The Chamber's present decision implies that the remaining examination of Witness KDD has to be postponed to a later date within the present trial segment. Meanwhile, the Chamber will hear the testimony of two Prosecution witnesses that are presently available and ready to testify in Arusha.

FOR THE ABOVE REASONS, THE CHAMBER

ORDERS the Prosecution to make additional efforts to obtain the judicial dossier of Witness KDD relating to his 1998 conviction, the subsequent appeal, and any guilty pleas, and to report on the results of its efforts by Friday 5 November 2004.

Arusha, 1 November 2004



Erik Møse
Presiding Judge



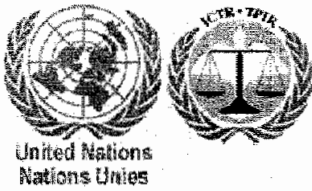
Sergei Alekseevich Egorov
Judge



Dennis C.M. Byron
Judge

(Seal of the Tribunal)





TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

To:	<input checked="" type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input type="checkbox"/> Trial Chamber III C. K. Homelouw	<input type="checkbox"/> Appeals Chamber / Arusha F. A. Talon
	<input type="checkbox"/> Chief, CMS J.-P. Fomété	<input type="checkbox"/> Deputy Chief, CMS M. Diop	<input type="checkbox"/> Chief, JPU, CMS K. K. A. Afande	<input type="checkbox"/> Appeals Chamber / The Hague R. Burriss
From:	<input checked="" type="checkbox"/> Chamber I Judges Møse, Egorov, Byron (names)	<input type="checkbox"/> Defence (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
Case Name:	The Prosecutor vs. Simba		Case Number: ICTR-01-76-I	
Dates:	Transmitted: 1 November 2004		Document's date: 1 November 2004	
No. of Pages:	6	Original Language: <input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda		
Title of Document:	Decision on Matters Related to Witness KDD's Judicial Dossier			
Classification Level:		TRIM Document Type:		
<input type="checkbox"/> Strictly Confidential / Under Seal		<input type="checkbox"/> Indictment	<input type="checkbox"/> Warrant	<input type="checkbox"/> Correspondence
<input type="checkbox"/> Confidential		<input checked="" type="checkbox"/> Decision	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Notice of Appeal
<input checked="" type="checkbox"/> Public		<input type="checkbox"/> Disclosure	<input type="checkbox"/> Order	<input type="checkbox"/> Appeal Book
		<input type="checkbox"/> Judgement	<input type="checkbox"/> Motion	<input type="checkbox"/> Book of Authorities
		<input type="checkbox"/> Submission from non-parties		
		<input type="checkbox"/> Submission from parties		
		<input type="checkbox"/> Accused particulars		

II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

CMS SHALL take necessary action regarding translation.			
<input checked="" type="checkbox"/> Filing Party hereby submits only the original, and will not submit any translated version.			
<input type="checkbox"/> Reference material is provided in annex to facilitate translation.			
Target Language(s):			
<input type="checkbox"/> English	<input checked="" type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda	
CMS SHALL NOT take any action regarding translation.			
<input type="checkbox"/> Filing Party hereby submits BOTH the original and the translated version for filing as follows:			
Original	in	<input type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda	
Translation	in	<input type="checkbox"/> English <input type="checkbox"/> French <input checked="" type="checkbox"/> Kinyarwanda	

CMS SHALL NOT take any action regarding translation.	
<input type="checkbox"/> Filing Party will be submitting the translated version(s) in due course in the following language(s):	
<input type="checkbox"/> English	<input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
KINDLY FILL IN THE BOXES BELOW	
<input type="checkbox"/> The OTP is over-seeing translation. The document is submitted for translation to: <input type="checkbox"/> The Language Services Section of the ICTR / Arusha. <input type="checkbox"/> The Language Services Section of the ICTR / The Hague. <input type="checkbox"/> An accredited service for translation; see details below: Name of contact person: Name of service: Address: E-mail / Tel. / Fax:	<input type="checkbox"/> DEFENCE is over-seeing translation. The document is submitted to an accredited service for translation (fees will be submitted to DCDMS): Name of contact person: Name of service: Address: E-mail / Tel. / Fax:

III - TRANSLATION PRIORITISATION (For Official use ONLY)

<input type="checkbox"/> Top priority	COMMENTS	<input type="checkbox"/> Required date:
<input type="checkbox"/> Urgent		<input type="checkbox"/> Hearing date:
<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: