



UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

15601-98-44-T  
24-11-2004  
(15601-15598)

15601  
Dieng

OR: ENG

**Before Judge:** Dennis C. M. Byron, Presiding Judge  
**Registrar:** Adama Dieng  
**Date:** 24 November 2004

**THE PROSECUTOR**

v.

Édouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA  
André RWAMAKUBA

*Case No. ICTR-98-44-PT*

JUDICIAL RECORDS/ARCHIVES  
ICTR  
2004 NOV 24 A 11: 36  
[Signature]

**DECISION ON JUVENAL KAJELJELI'S MOTION FOR DISCLOSURE OF OPEN  
AND CLOSED SESSION TESTIMONY, EXHIBITS AND PRE-TRIAL  
STATEMENTS OF PROSECUTION WITNESSES GBU AND GFA**

*Rule 60(A), Rule 75(A), (F)(ii) and (G) of the Rules of Procedure and Evidence*

**Counsel for Juvenal Kajelijeli**  
Lennox S. Hinds

**Office of the Prosecutor:**  
James Stewart

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

**SITTING** as Trial Chamber III, composed of Judge Dennis C. M. Byron, presiding Judge, sitting pursuant to Rule 54 of the Rules of Procedure and Evidence (“Rules”);

**BEING SEIZED** of “Juvenal Kajelijeli’s Urgent Motion for Disclosure of Open and Closed Session Testimony, Exhibits and Pre-trial Statements of Prosecution Witnesses GBU and GFA, filed on 13 September 2004 (“Motion”), and the Prosecutor’s Response to the Motion, filed on 23 September 2004;

**NOW DECIDES** the Motion pursuant to Rule 73(A) on the basis of the written briefs filed by the parties.

**Parties’ Submissions**

*Defence*

1. The Defence for Juvenal Kajelijeli (“Defence”) requests the Chamber to order the Registrar to make available to Counsel for the Defence the transcripts, pre-trial statements and exhibits regarding prosecution witnesses GBU and GFA, pursuant to Rule 81(B). The Defence submits that the Judgement of Trial Chamber II in the trial of *The Prosecutor v. Juvenal Kajelijeli* was based on GBU’s testimony, and that the statements and testimony of GBU in the trial of *The Prosecutor v. Édouard Karemera et al.* would be relevant to assess GBU’s credibility. With respect to GFA, the Defence argues that his testimony might contradict the incriminating evidence that other witnesses gave against Juvenal Kajelijeli.

*Prosecutor*

2. The Prosecutor requests that the Motion be denied. He submits that Rule 81 of the Rules is not applicable, and that the Motion should be examined under Rule 75(F) and (G) of the Rules. With respect to GBU, he indicates that he will disclose the requested transcripts by the end of September 2004, so that the Motion will become moot. With respect to GFA, he submits that this witness has not testified in the trial of *The Prosecutor v. Juvenal Kajelijeli*. According to him, the Defence has not shown that the requested materials assist its case and is merely conducting a “fishing expedition”. He submits that the Defence has not demonstrated the inconsistencies between GFA’s testimony and the testimony of other witnesses in the trial of *The Prosecutor v. Juvenal Kajelijeli*. He concludes that he is not under a disclosure obligation pursuant to Rule 68(A) of the Rules.

**Deliberations**

3. The Chamber observes that the Prosecutor’s response and his request for an extension of time within which to file his response were submitted after the expiration of the time limit stipulated by Rule 73(E) of the Rules. However, the slight delay had no impact on the progress of the proceedings. Therefore and in the interest of justice, the Chamber takes note of the content of the Prosecutor’s response.

4. The Chamber notes that the Prosecutor has disclosed to the Defence the transcripts of GBU’s testimony on 30 September 2004. Therefore the only issue which remains contentious between the parties with respect to GBU is the disclosure of his pre-trial witness statements.

5. The Defence seeks to base its requests on Rule 81(B) of the Rules. The Chamber recalls that this Rule applies "when the reasons for ordering the non disclosure no longer exist". In the present case, the reasons for the non-disclosure, i.e. the protective measures for the prosecution witnesses in the case of *The Prosecutor v. Édouard Karemera et al.*, have never been rescinded. Therefore Rule 81(B) of the Rules does not apply.

6. The Prosecutor's disclosure of materials referring to protected witnesses who testified in another trial, and the continuance of protective measures in favour of these witnesses are the subject of Sub-Rules 75(F) and (G) of the Rules which read:

(F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures:

(i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the "second proceedings") unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule; but

(ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.

(G) A party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply:

(i) to any Chamber, however constituted, remaining seised of the first proceedings; or

(ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings.

7. The Chamber observes that Sub-Rules 75(F) and (G) of the Rules are no foundation for an additional disclosure obligation of the Prosecutor but rather require a pre-existing obligation. In the present case, the Chamber has to examine whether such a pre-existing obligation can be derived from Rule 68(A) of the Rules. Pursuant to this Rule, the Chamber needs to assess whether the requested materials "[may] in the actual knowledge of the Prosecutor [...] suggest the innocence or mitigate the guilt of the accused or affect the credibility of the prosecution evidence."

8. The Chamber recalls the assertion of the Defence that the requested materials contain exculpatory elements or affect the credibility of prosecution witnesses who have incriminated Juvenal Kajelijeli. In his response, the Prosecutor does not explicitly address this point but takes the position that his obligations under Rule 68(A) of the Rules "have not been triggered". The Chamber observes that, in relation to witnesses who gave evidence in other trials which the Prosecutor is required to disclose pursuant to Rule 68(A) of the Rules, the burden lies upon the Prosecutor to justify non-disclosure, not upon the Accused to justify disclosure<sup>1</sup>. The Chamber notes that the Prosecutor has not refuted the possibility that the requested materials contain exculpatory evidence or affect the credibility of prosecution witnesses who have incriminated Juvenal Kajelijeli. Thus, he has not discharged his burden to justify non-disclosure.

9. The Chamber finds that the Defence request is highly specific and refers to clearly indicated materials which contain, according to the Defence, exculpatory information. The

<sup>1</sup> *The Prosecutor v. Radoslav Brdanin and Momir Talic*, Case No. IT-99-36, Second Decision on Motions by Radoslav Brdanin and Momir Talic for Access to Confidential documents (TC), 15 November 2000, para. 11.

Chamber holds that this request is sufficiently precise and focused not to be a fishing expedition<sup>2</sup>.

10. The Chamber observes that the protective measures granted by Trial Chamber II on 6 July 2000 in favour of the prosecution witnesses in the trial of *The Prosecutor v. Édouard Karemera et al.*<sup>3</sup> are still in force.

11. In the light of its power to order *proprio motu* appropriate measures to safeguard the privacy and security of victims and witnesses pursuant to Rule 75(A) of the Rules, the Chamber reaffirms the obligation of Counsel for the Defence and any member of his team to comply with all protective measures that have previously ordered in favour of prosecution witnesses GBU and GFA.

**FOR THE ABOVE REASONS,**

**THE CHAMBER**

**REMINDS** the parties that the protective measures for prosecution witnesses GFA and GBU shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal.


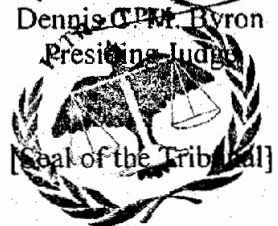
**DISMISSES** the Defence request with respect to open and closed session transcripts of the testimony of prosecution witnesses GBU as moot.

**GRANTS** the remainder of the Defence request.

**ORDERS** the Prosecutor to disclose to the Defence:

- (i) all of prosecution witnesses GFA's and GBU's pre-trial witness statements;
- (ii) all public or confidential exhibits tendered during prosecution witnesses GFA's and GBU's testimony; and
- (iii) all open and closed session transcripts of prosecution witness GFA's testimony.

Arusha, 24 November 2004

  
 Dennis C.M. Byron  
 Presiding Judge  
  
 [Seal of the Tribunal]

<sup>2</sup> Cf. *The Prosecutor v. Ivica Rajic*, Case No. IT-95-12-PT, Decision on Joint Defence Motion for Access to Confidential Supporting Material, Filings, Transcripts and Exhibits in the *Rajic* Case (TC), 15 September 2003, page 2, and *The Prosecutor v. Radoslav Brdjanin*, Case No. IT-99-36-T, Decision on Motion by Momcilo Gruban for Access to Confidential Materials in the Brdjanin and Talic Case (TC), 1 April 2003, page 2.

<sup>3</sup> See Decision on the Prosecutor's Motion for Protective Measures for Witnesses. Cf. also *The Prosecutor v. Nzirorera*, Decision on Prosecutor's Motion for Protective Measures for Witnesses, 12 July 2000 and *The Prosecutor v. Rwamakuba*, Decision on Prosecutor's Motion for Protective Measures for Witnesses, 22 September 2000.