



UNITED NATIONS
NATIONS UNIES

ICTR-98-44-PT
23-8-2005
(23513-23510)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

23513
2005

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Emile Francis Short
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 23 August 2005

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-PT

2005 AUG 23 P 12:39
ICTR

**DECISION ON DEFENCE MOTION FOR FULL DISCLOSURE OF PAYMENTS TO
WITNESSES AND TO EXCLUDE TESTIMONY FROM PAID WITNESSES**

Rule 73 of the Rules of Procedure and Evidence

Office of the Prosecutor:

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Dior Diagne Mbaye and Félix Sow

Defence Counsel for Mathieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl

Defence Counsel for Joseph Nzirorera
Peter Robinson

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

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Emile Francis Short, and Gberdao Gustave Kam (the “Chamber”);

BEING SEIZED of “Joseph Nzirorera’s Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses: *Oral Evidentiary Hearing Requested*” (the “Motion”), filed on 13 July 2005, and joined by the Accused Mathieu Ngirumpatse in his “Mémoire d’intervention de M. Ngirumpatse sur la requête de M. Nzirorera ‘for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses’”, filed on 2 August 2005 (the “Joinder”);

CONSIDERING the Prosecution’s Response, filed on 5 August 2005 (the “Response”);

HEREBY DECIDES the Motion, pursuant to Rule 73(A) of the Rules of Procedures and Evidence (the “Rules”).

ARGUMENTS OF THE PARTIES

1. On the basis of Rules 66(B) and 68 of the Rules, the Defence for the Accused Joseph Nzirorera and the Defence for the Accused Mathieu Ngirumpatse (the “Defence”) request the Chamber to order the Prosecution to disclose all records and information showing the amounts, dates, and purpose of all payments made by the Office of the Prosecutor (“OTP”), its employees, or persons or entities acting on its behalf, to all persons who are intended to be called as Prosecution witnesses at trial. The Defence further requests the Chamber to convene an oral evidentiary hearing to determine the extent and purpose of payments allegedly made by the Prosecution to its witnesses and to decide whether the testimonies of paid witnesses should be excluded on the basis of Rule 95.

2. The Defence alleges that Prosecution witnesses in Rwanda, including Witness GFA, have been “given cash” by the Prosecution’s investigators for transportation or other expenses.¹ It also alleges that the Prosecution has paid “thousands of dollars in cash” to Omar Serushago and to two ex-*Interahamwe* leaders (Witnesses G and T) who testified as Prosecution witnesses.² It further alleges similar improprieties regarding ICTR convict Jean

¹ *The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera (“Karemera et al.”)*, Case No. ICTR-98-44, Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, filed 13 July 2005, para. 10 (The Defence held that Witness GFA was provided with transport money in order to travel to Kigali on 26 August 2003 so that a comprehensive statement can be taken, as it would result from an investigative note of the meeting between 2 OTP Investigators and Witness GFA).

² *Id.* at paras 12-13. (The Defence quotes *Nahimana et al.*, T. 20 February 2001, p. 72; T. 26 November 2001, p. 10 (Exhibit #3 D73 admitted on 19 November 2001); and *Bagosora et al.*, T., 6 July 2004, pp. 36-37.)



Kambanda who testified for the Prosecution in other cases and was originally supposed to testify in this case, but will no longer testify as planned. The Defence contends that, due to the "revelations" of undisclosed payments to Jean Kambanda and Witness GFA,³ one can expect that the Prosecution has given financial compensation to a number of its other witnesses as well.

3. The Defence recalls this Chamber's Decision of 7 October 2003⁴ and argues that the Prosecution has violated Rule 68 of the Rules as well as the Chamber's Order for disclosure by failing to disclose the records of payments to witnesses. The Defence states that making payments or gifts to a witness is unlawful and affects the integrity of the proceedings. It supports this statement by citing national jurisprudence of the United States and other civil law jurisdictions.⁵

4. The Prosecution opposes the Motion and acknowledges its obligations under Rule 68, giving its assurance that the disclosure of information which falls within Rule 68 will be made on a continuing basis. Regarding the request for an oral evidentiary hearing, the Prosecution submits that it is unnecessary, since the Defence may cross-examine witnesses concerning any allegation of benefits conferred upon them by the Prosecution. The Prosecution further submits that if such an allegation is proved by the Defence during the conduct of its cross-examination of a witness, it will be open to the Chamber to exclude the witness' testimony pursuant to Rule 95.

DISCUSSION

5. In its Decision of 7 October 2003, the Chamber said:

"Information and records relating to benefits and promises made to Prosecution Witnesses or their families would fall under Rule 68 of the Rules in that they may affect the credibility of prosecution evidence."⁶

6. Rule 68 of the Rules, which governs the disclosure of exculpatory evidence, compels the Prosecutor to disclose to the Defence evidence within its knowledge which may be of an exculpatory nature and provides a framework within which the Prosecutor should deal with any such material.

³ *Karemera et al.* Motion, para. 11. (The Defence notes that Witness GFA testified in March 1994 in Nzirorera's first Trial and that no disclosure of any payment to him was ever made.)

⁴ *Karemera et al.*, Case No. ICTR-98-44-I, Decision on the Defence Motion for Disclosure of Exculpatory Evidence (TC), 7 October 2003

⁵ *Id.* at paras. 19-23; footnote 12.

⁶ *Id.* at para. 16.

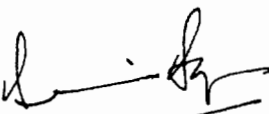



7. In light of Rule 68, the Chamber considers that the Defence has misinterpreted the extract quoted at paragraph 5, above. In its Decision of 7 October 2003, the Chamber did not intend for information and material concerning all expenses paid to a witness to be required to be disclosed to the Defence under Rule 68. Not all monies paid to a witness will fall within the category of material of an exculpatory nature or material which may affect the credibility of prosecution evidence. The management of witnesses and victims necessarily implies expenditure including, but not limited to, costs for transportation connected with the investigation and/or hearings. Materials relating to expenses paid which are reasonably required for the management of witnesses and victims do not fall within the ambit of Rule 68 and need not be disclosed. Material or information within the Prosecutor's knowledge concerning any benefits paid to and/or promises made to witnesses and victims beyond that which is reasonably required has a different character and should therefore be disclosed as evidence which may affect the credibility of witnesses under Rule 68 of the Rules. Rule 95 applies only if the complaining party has demonstrated that the method of obtaining the evidence is improper pursuant to the Rule.

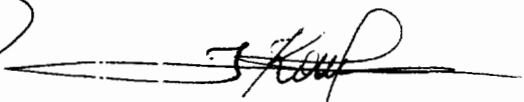
7. In the present case, the onus of proof is on the Defence as the party alleging a violation of Rule 68. The Chamber is of the view that the Defence has not adduced any evidence to support its bare allegations. An oral hearing to investigate these allegations would be no more than a fishing expedition and would have the effect of shifting the onus of proof to the Prosecution. The Chamber therefore determines that an oral hearing of the nature requested by the Defence is neither necessary nor appropriate.

FOR THOSE REASONS, THE CHAMBER
DENIES the Motion in its entirety.

Arusha, 23 August 2005, done in English.


Dennis C. M. Byron
Presiding


Emile Francis Shamba
[Seal of the Tribunal]
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Gberdao Gustave Kam
Judge