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UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda

**TRIAL CHAMBER III**

Case No. ICTR-T-2001-66-T

ENGLISH  
Original: FRENCH

Before Judges:       Andrésia Vaz, presiding  
                              Karin Hökberg  
                              Gberdao Gustav Kam

Registrar :           Adama Dieng

Date filed:           16 December 2005

JUDICIAL RECORDS/ARCHIVES  
UNICTR  
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2005 NOV 14 1 P 3: 46

**THE PROSECUTOR**

v.

**ATHANASE SEROMBA**

**DECISION ON THE DEFENCE MOTION REQUESTING THE CHAMBER TO  
ORDER AN INQUIRY INTO THE CIRCUMSTANCES AND THE REAL  
REASONS FOR THE WITHDRAWAL OF WITNESS FE36**

Office of the Prosecutor:  
Silvana Arbia  
Jonathan Moses  
Gregory Townsend  
Althea Alexis  
Tolulope Olowoye

Defence Counsel:  
Patrice Monthé  
Barnabé Nekuie  
Sarah Ngo Bihegué

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal"),

**SITTING** as Trial Chamber III composed of Judges Andréia Vaz, presiding, Karin Hökberg and Gberdao Gustave Kam (the "Chamber");

**BEING SEIZED** of the Defence motion titled: "Defence Motion Requesting the Chamber to Order an Inquiry into the Circumstances and the Real Reasons for the Withdrawal of Witness FE36", filed with the Registry on 30 November 2005;

**CONSIDERING** the Prosecutor's response titled: "Prosecutor's Response to the '*requête aux fins de voir ordonner l'ouverture d'une enquête sur les circonstances et les causes réelles de rétraction du témoin portant le pseudonyme FE36*'", filed with the Registry on 5 December 2005;

**CONSIDERING** the Defence Brief in reply filed with the Registry on 8 December 2005;

**CONSIDERING** the oral Decision of 28 November 2005, in which the Chamber reserved the right to take appropriate measures, given the conduct of Witness FE36;

**RULING** solely on the basis of briefs filed by the parties, pursuant to Rule 73(A) of the Rules of Procedure and Evidence (the "Rules");

#### **SUBMISSIONS OF THE PARTIES**

1. The Defence contends that at the hearing of 28 November 2005 and prior to his cross-examination by the Prosecutor, Witness FE36 had withdrawn part of the testimony he had given during his examination-in-chief by the Defence.
2. The Defence deplores the fact that despite its objection the cross-examination of Witness FE36 was delayed for five days by the Chamber at the request of the Prosecutor who had intended to conduct a background check on the witness.
3. The Defence stressed the fact that Witness FE36 had been threatened even before his trip to Arusha to testify before the Chamber. It indicated *inter alia*, that the witness had explained to the Chamber that third parties, in a bid to prevent him from travelling to Arusha, had threatened him with reprisals, and had, in the meantime, informed him of the contents of his statements.
4. Further, the Defence objects to the fact that during the cross-examination, the Prosecutor had relied on transcripts of the interview of Witness FE36's father with the Office of the Prosecutor, while failing to make prior disclosure of said transcripts to the Defence and the Chamber.
5. The Defence moreover alleges that the circumstances surrounding the withdrawal of witness FE36 were such that they portrayed the "manipulation" he had endured and which amounted to a case of contempt, punishable under Rule 77 of the Rules. Therefore, in addition to invoking the provisions of Rule 91, the Defence is requesting the Chamber to order an inquiry so

as to determine the real reasons and circumstances under which the witness confessed to having given false testimony at the hearing of 28 November 2005. The Defence further prays that such inquiry be entrusted to an INTERPOL expert or to any other independent expert whom the Chamber may deem fit to appoint and whose task, to be accomplished within a time limit set by the Chamber, would include:

- Interviewing Witness FE36 on the details of his activities between 31 October 2005, the date of resumption of the trial, and 28 November 2005, the date of withdrawal of the witness, both dates being inclusive;
- Interviewing any person whomsoever, including members of the Office of the Prosecutor and of the Defence, on all matters connected with the activities of Witness FE36 during the period mentioned above;
- Conducting the investigations in such manner as to assist the Chamber in determining whether pressure was exerted on the witness for him to withdraw his testimony before the Chamber;
- Compiling a comprehensive report for the Judges.

6. For his part, the Prosecutor contends that Witness FE36 spontaneously and wilfully withdrew his testimony, providing details of the false testimony he had given before the Chamber. The Prosecutor further submits, on the one hand, that he never had access to the witness who had withdrawn his testimony well before he was cross-examined and, on the other, that the Defence had failed to provide any evidence in support of its allegations. Consequently, the Prosecutor argues, the need to proceed with an inquiry in the instant case did not arise.

7. The Prosecutor further alleges that Witness FE36 was not the object of any intimidation, threat or subornation with a view to making him retract his testimony. He also alleges that the Defence had not deemed it appropriate to re-examine the witness on matters raised in the cross-examination, whereas it had been afforded that opportunity by the Chamber.

8. The Prosecutor moreover explains that the Chamber's decision to allow him three days before commencing cross-examination was justified by the fact that the Defence had failed in the case of Witness CBJ, to comply with the requirements of Rule 90(G)(ii) of the Rules.

9. He states that the use of statements by Witness FE36's father in cross-examination was quite lawful. In that regard, the Prosecutor submits that statements of that nature did not fall within the ambit of his disclosure obligations as provided under Rules 66 and 68 of the Rules. That aside, he also indicates that practice before the Tribunal did allow for such statements to be used in cross-examination without prior disclosure to the opposite party. He quotes in that regard, various rulings in the *Bagosora*<sup>1</sup> and *Butare*<sup>2</sup> trials.

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<sup>1</sup> Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses, dated 27 September 2005.

<sup>2</sup> Oral Decision, Transcripts, June 7, 2005, p. 23, lines 2-12.

10. Lastly, the Prosecutor submits that the rights of the Accused were not violated in the instant case. He was, as a result, requesting the Chamber to dismiss the Defence Motion in its entirety.

11. In its Brief in reply, the Defence maintains all its previous submissions. It argues further that the decisions cited by the Prosecutor were of no relevance to the resolution of the matter at hand.

### **DELIBERATIONS**

12. The Chamber recalls that it had allowed the Prosecutor a three-day postponement of the cross-examination of Witness FE36,<sup>3</sup> a Defence witness, because the Defence had failed to disclose to the Prosecutor, statements made by the witness within the time-limit required for preparation, as decided by the Chamber.

13. The Chamber notes that, at the hearing of 28 November 2005, even before being cross-examined by the Prosecutor, Witness FE36 had withdrawn part of the testimony he had given while being led in his evidence-in-chief by the Defence Counsel and in the course of which evidence he had alleged that pressure had been exerted on him.

14. The Chamber notes further that Witness FE36 was a protected witness in the care and custody of the Witness and Victims Support Section of the Registry whilst in Arusha.

15. As matters stand, the Chamber is of the view that it needs to be briefed beforehand by the Witness and Victims Support Section of the Registry on certain matters regarding Witness FE36's stay in Arusha to enable it carry out an appropriate appraisal of the submissions and claims of the parties.

### **FOR THE ABOVE REASONS, THE CHAMBER**

**ORDERS** Witness and Victims Support Section of the Registry to investigate the following matters:

- The duration of Witness FE36's stay in Arusha, specifying, in particular, his date of arrival and of departure from Arusha;
- Any information regarding the conditions of Witness FE36's residence at the Safe House;
- The duration of the initial preparation of Witness FE36 by the Defence, specifying the dates of visits by Defence Counsel;
- The identities of any persons with whom Witness FE36 came into contact before, during and after his examination-in-chief;

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<sup>3</sup> Transcripts of the hearing of 21 November 2005, p. 34, lines 1-2.

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The identities of any persons with whom Witness FE36 came into contact before and after his cross-examination until his return to Rwanda;

Any other relevant information concerning Witness FE36's stay in Arusha.

**DIRECTS** that the findings of the inquiry be communicated to the Chamber by 20 January 2006, at the very latest.

Done in Arusha, 16 December, 2005.

[Signed]

Andrésia Vaz  
Presiding Judge

[Signed]

Karin Hokborg  
Judge

[Signed]

Gberdao Gustave Kam  
Judge

[Seal of the Tribunal]

