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ICTR-2001-73-T
6-7-2006
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

Before: Judge Inés Mónica Weinberg de Roca, presiding
Judge Khalida Rachid Khan
Judge Lee Gacuiga Muthoga

Registrar: Adama Dieng

Date: 6 July 2006

JUDICIAL OFFICES
2006 JUL -6 P 11: 55
Duffy

THE PROSECUTOR

v.

Protais ZIGIRANYIRAZO

Case No. ICTR-2001-73-T

**DECISION ON THE DEFENCE MOTION FOR DISCLOSURE
OF EXCULPATORY INFORMATION WITH RESPECT TO PRIOR STATEMENTS
OF PROSECUTION WITNESSES**

Office of the Prosecutor:

Wallace Kapaya
Charity Kagwi-Ndungu
Silver Ntukamazina
Gina Butler
Iskandar Ismail
Jane Mukangira

Defence Counsel:

John Philpot
Peter Zaduk

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

SITTING as Trial Chamber III, composed of Judges Inés Mónica Weinberg de Roca, presiding, Khalida Rachid Khan and Lee Gacuiga Muthoga (“Chamber”);

BEING SEISED of the “Defence Motion for Disclosure of Exculpatory Information with Respect to Prior Statements of Prosecution Witnesses” filed on 20 April 2006 (“Defence Motion”);

CONSIDERING the “Prosecutor’s Response to the Defence Motion for Disclosure of Exculpatory Information with Respect to Prior Statements” filed 24 April 2006 (“Prosecution’s Response”);

CONSIDERING the “Reply to Prosecutor’s Response to Defence Motion for Disclosure of Exculpatory Information with Respect to Prior Statements of Prosecution Witnesses” filed on 27 April 2006 (“Defence Reply”);

CONSIDERING the “Prosecutor’s Rejoinder to the Defence Reply to the Prosecutor’s Response to the Defence Motion for Disclosure of Exculpatory Information with Respect to Prior Statements of Prosecution Witnesses” filed on 2 May 2006 (“Prosecution’s Rejoinder”);

CONSIDERING the “Second Reply to Prosecutor’s Rejoinder to the Defence Reply to The Prosecutor’s Response to Defense Motion for Disclosure of Exculpatory Information with Respect to Prior Statements of Prosecution Witnesses” filed on 8 May 2006 (“Defence’s Second Reply”);

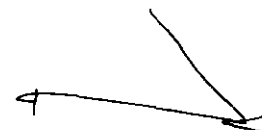
NOW DECIDES the Motion on the basis of the written briefs of the parties pursuant to Rule 73 (A) of the Rules.

SUBMISSIONS

The Defence Motion

1. Pursuant to Rule 68 (A) of the Rules, the Defence requests the Chamber to order the Prosecution to provide names and addresses of members of its staff who may be interviewed and called as defence witnesses. The Defence asserts that the requested Order is necessary to inquire into witness-taking procedures and to challenge the credibility of several Prosecution witnesses whose testimonies are markedly different from their written statements given to Prosecution investigators. In the alternative, the Defence requests the Prosecution to make a “from-the-Bar” declaration, affirming the integrity of the statement-recording process and reaffirming that the contents of each witness statement accords with the information given to Prosecution investigators. According to the Defence, the suggested declaration by the Prosecution should be followed by another declaration issued by the Chamber that it is satisfied with the Prosecution’s affirmations concerning the integrity of the statement-taking process. The application is premised on the disclosure obligations of the Prosecution, pursuant to Rules 66, 67 and 68.

2. The Defence asserts that the integrity of the statement-taking process is in question insofar as Prosecution witnesses have frequently explained discrepancies between their oral testimonies and their written statements as the result of inaccurate recording of information. The Defence contends that, by interviewing the Prosecution interviewers, it will be able to test the credibility of the witnesses in question and to ascertain the propriety of the statement-taking process.



The Prosecution's Response

3. The Prosecution requests the Chamber to dismiss the Defence Motion in its entirety. The Prosecution avers that the disclosure sought is not properly pegged by the Defence upon Rule 68, and contends that the assessment of witness credibility is a process that is properly conducted by the Chamber in its final deliberations.

4. The Prosecution argues that the Defence has exhausted its opportunity to challenge the credibility of the witnesses because: (1) the Defence has already been afforded the opportunity to challenge the credibility of the witnesses during extended cross examinations; (2) the Chamber had an opportunity to observe the witnesses in court; (3) both parties could have referred to the testimonies of the witnesses in their closing briefs; and (4) over the course of the present trial, the Prosecutor has disclosed its "Mission Reports" to the Defence containing the names and addresses of the personnel who have dealt with the witnesses referred to in the Defence motion. The Prosecution therefore submits that it has already disclosed to the Defence all relevant material pertaining to each witness, pursuant to Rule 66 and Rule 68.

5. The Prosecution further argues that the Rules do not impose a duty upon the Prosecution to conduct joint investigations with the Defence on all allegations of an exculpatory nature.

The Defence Reply

6. The Defence reiterates that, by its request to interview Prosecution staff members, it is seeking a convenient way to resolve the problem of contradictory or inconsistent witness statements, short of calling a large number of witnesses. Because the issue at bar is the integrity of the Prosecution's statement-taking process, the Defence argues that the Prosecution should formally affirm the integrity of this process. Alternatively, the Defence avers that the Chamber should indicate whether further evidence is necessary to establish the integrity of the statement-taking process.

The Prosecution Rejoinder

7. Noting two letters received from the Defence, both dated 26 April 2006, the Prosecution expresses its disapproval of requested interviews of more than forty Prosecution staff members. The Prosecution avers that its staff is a party to the proceedings and therefore that the Defence must meet a high threshold to justify calling them as witnesses, pursuant to Rule 54 of the Rules. The Prosecution argues that the Defence has not met this threshold, insofar as it has not presented empirical evidence of exceptional circumstances necessitating that the Prosecution staff give statements or testify before the Chamber. The Prosecution further argues that submissions made by Prosecution witnesses have already been disclosed to the Defence, pursuant to Rule 67 (D), and that the Chamber will evaluate any inconsistencies between these written submission and in-court testimonies in its judgement of the case.

8. The Prosecution argues that the Defence has not established any prejudice the Accused may suffer if Prosecution staff members are not called to give evidence on the statement-taking process. The Prosecution also asserts that, according to established

jurisprudence, merely raising doubt as to the credibility of a witness is not sufficient to establish that a witness knowingly gave false testimony.¹

9. The Prosecution also cites the standards set forth by the United Nations to interview UN staff and asserts that the Defence has failed to provide information to meet those standards.²

The Defence Second Reply to the Prosecution Rejoinder

10. The Defence submits that the purpose of its Motion relates only to disclosure and does not relate to the right to conduct interviews of members of the Prosecution staff. The Defence asserts that the proposed interviews will be limited and clearly related to the denials of particular witnesses referenced in the Defence Motion.³ The Defence also argues that, contrary to the Prosecution's assertions, there is no Rule 54 issue of subpoena in the present case.

DELIBERATIONS

11. By way of the present application, the Chamber is being moved to order the Prosecution to provide names and addresses of members of its staff so that they can be interviewed and eventually called as defence witnesses primarily in order to challenge the credibility of the several Prosecution witnesses who have given testimony which, in the Defence view, contradict statements given to investigators. In the alternative, the Defence suggests that the Prosecution make a "from-the-Bar" declaration affirming the integrity of the statement recording process, and re-affirm that the contents of each statement accords with the information given to the investigators. According to the Defence, this declaration by the Prosecutor should be followed by a declaration by the Chamber stating that it is satisfied with the Prosecutor's affirmations on the integrity of the process. The application is premised on the disclosure obligations of the Prosecution, under Rules 66, 67 and 68.

12. The Defence contends that an Order by the Chamber, of the kind being requested, is necessary to allow the Defence to interview members of the Prosecution to test the credibility of Prosecution witnesses whose testimony in court was markedly different from their written statements. The Defence also contends that the integrity of the process is in question, because witnesses frequently explained the discrepancies between their written statements and oral testimonies in court as being the result of poor recording by the interviewers. By interviewing the interviewers, therefore, the Defence asserts that it would be able to both test the credibility of the witnesses in question and ascertain the propriety and integrity of the statement-taking process.

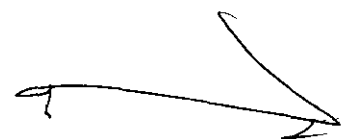
13. The Chamber considers the application of the Defence to be misconceived in law. There is no legal basis upon which a party, by calling the recorder of a witness's statement, can test the credibility of this witness or cast doubt on the integrity of the process.

¹ *Prosecutor v. Akayasu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 20.

² **UN Standards for Interviewing Current and Former UN Staff:**

(i) breach of duty or perpetration of fraud in the performance of their duties;
(ii) identifying with a reasonable degree of specificity the information that is being sought from the individuals to be interviewed, and
(iii) setting out the reasons why that information is relevant to the proper conduct of the Defence of an Accused person and necessary for a fair determination of the charges against an accused.

³ *Prosecutor v. Protais Zigiranyirazo*, Defence Motion for Disclosure of Exculpatory Information with Respect to Prior Statements of Prosecution Witnesses, 19 April 2006, par 12 ("Defence Motion").



14. Where a witness has signed a statement, accompanied by a declaration that the contents thereof are true and correct, there is a presumption flowing from such declaration – as well as declarations made by recorders or interviewers – that the statement was recorded pursuant to the Rules. This presumption can be challenged by evidence that shows failure to comply with the Rules.

15. Any challenge to the integrity of the statement-taking process should be underpinned by a *prima facie* showing of misfeasance. A witness's denial of the contents of a statement or the assertion that the witness said something different from what is recorded in the statement, cannot, in and of itself, provide justification for allowing the challenging party to interview and/or summon to testify the recorder or interviewer.

16. On the facts of the present application, two elements need to be satisfied, *prima facie*, to justify an inquiry. Firstly, the Defence must show that the alleged inaccurate recording of the statement materially affects its case in that the guilt or innocence of the Accused hinges on the wrongly recorded statement so that serious prejudice has been caused. Secondly, the Defence must show that there was malice on the part of the recorder in so doing.

17. The Defence submissions do not contain the slightest suggestion or showing that any misfeasance existed or that there was an error in the taking of the statements which are the subject of the challenge.

18. Had there been such a showing, it would have been appropriate to request a *voir dire* to try the conduct of the interviewers in the statement-taking process so as to establish any resultant inaccuracy or impropriety. It is important to note that proof of such impropriety would result in the exclusion of the impugned statement. Such proof of misfeasance in the statement-making process would not serve to challenge the credibility of the witness. A statement once recorded stands as a statement. If alleged to be untrue, a determination as to the credibility of the witness would ultimately be a matter for the Chamber to decide. Where a statement has been shown to be tainted, the Chamber will have to assess the witness's credibility without the advantage of a corroborative or contradictory prior written statement.

19. The Chamber is of the view that the time to challenge the accuracy of a statement, or to impugn the process of recording a statement, is when the statement is tendered in evidence. At this time, a challenge to the admissibility of a statement may be made, as can the process of determining its admissibility. The impugned statement must then be exhibited in the proceedings.

20. Finally, the Chamber considers that the Defence's alternative remedy deserves comment. In the event that the Chamber was not inclined to make the requested Order for the production of names and contact details of the relevant OTP staff, the Defence had suggested a two part remedy – i) a declaration from the Prosecutor as to the integrity of the process, and ii) a statement from the Chamber that it is satisfied with the said declaration, which would suffice. The Chamber is perplexed by the suggested alternative. The Chamber does not agree that such an affirmation by the Prosecutor can be legitimately made. As a matter of law, the Chamber takes the view that any submission from the Prosecution would not, in and of itself, serve to authenticate the statement-taking process nor would it serve to test a witness's credibility.

21. With regard to the second part of the suggested remedy, the Defence does not advance the legal basis upon which a Chamber could be called to make such a determination at this *interim* stage of the proceedings. The Chamber is not minded to, and will not, make any declaration or pronouncement of its view on any aspect of the testimony, or credibility, of witnesses testifying before it at this stage of the proceedings. It is clear and settled practice

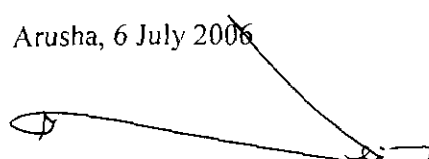
that such determinations are made at the end of the trial when the Chamber comes to deliberate on the totality of the evidence before it.


22. For the reasons stated above, the present application is dismissed. The Chamber wishes to record its concern at the very nature of the application, which it considers to be frivolous and possibly vexatious. The Chamber is also concerned that this is the second occasion in which it considers an application of the Defence to be frivolous.⁴ The Chamber recalls that the Defence was warned that sanctions could attach if a similarly frivolous application was to be brought. For the purposes of the present application, however, the Chamber will not impose any of the stipulated sanctions; but reiterates its warning that frivolous applications will, in future, meet with the full force of sanctions as stipulated in Rule 73 (F) of the Rules.

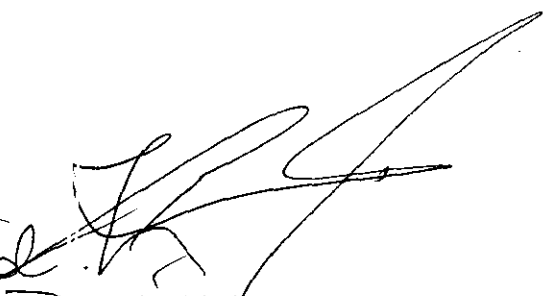
FOR THE ABOVE REASONS, THE CHAMBER

DISMISSES the Motion in its entirety;

Arusha, 6 July 2006


Inés Mónica Weinberg de Roca
Presiding Judge


Khalida Rachid Khan
Judge


Lee Gacuiga Mutloga
Judge



⁴ See *Prosecutor v. Zigiranyirazo*, 'Decision On Defence Motion To Exclude The Testimony Of Witness SGM', 27 April 2006.