



ICTR-01-74-T
01-09-2006
(7466 - 7463)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Sergei Alekseevich Egorov
Judge Florence Rita Arrey

Registrar: Adama Dieng

Date: 1 September 2006

THE PROSECUTOR

v.

François KARERA

Case No. : ICTR-01-74-T

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DECISION ON DEFENCE MOTION FOR ADDITIONAL DISCLOSURE
(RULE 98)

The Prosecution

Charles Adeogun-Phillips
Adesola Adeboyejo
Peter Tafah
Memory Maposa
Florida Kabasinga

The Defence

Carmelle Marchessault
Steven Kelliher

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Florence Rita Arrey;

BEING SEIZED OF the "Motion of Defence for Additional Disclosure", filed on 24 August 2006;

CONSIDERING the Prosecution Response, filed on 25 August 2006;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Defence requests the Chamber to order the Prosecution, pursuant to Rule 98 of the Rules of Procedure and Evidence, to use its best efforts to obtain and disclose certain confessions made by Defence Witnesses NKZ and ZIH to Rwandan authorities. The Defence also requests to re-call the witnesses in order to tender the sought confessions.

2. The two witnesses testified from 14 to 16 August 2006. During its cross-examination, the Prosecution tried to impeach them by using statements they had given to Rwandan authorities. In response, both witnesses referred to confessions they had made in Rwanda and stated that these documents were consistent with their testimony before the Chamber.¹ The Defence requested disclosure of these confessions. The Prosecution stated that it was under no such obligation and denied having the confessions.² With respect to Witness NKZ, the Defence requested that the Chamber order the Prosecution to produce the witness's confession, pursuant to Rule 98 of the Rules of Procedure and Evidence.³ The Chamber denied the request.⁴ It also recalled that each party is expected to investigate the judicial records of its own witnesses who have been subject to criminal proceeding, prior to calling them to testify.⁵

¹ Karera, T. 14 August 2006 pp. 36-59; T. 16 August 2006 pp. 11-16.

² Karera, T. 14 August 2006 pp. 50, 60, 68; T. 16 August 2006 pp. 20, 23-24.

³ Karera, T. 14 August 2006 p. 68.

⁴ Karera, T. 15 August 2006 p. 1.

⁵ Karera, T. 16 August 2006 pp. 26-27 ("The Chamber recalls that before any party presents a witness for trial, that party will have to consider whether the witness is useful to the presentation of its case. This goes for Prosecution witnesses as well as for Defence witnesses. When any of the witnesses presented is an accused or a convict, or is suspected of having been engaged in criminal proceedings or behaviour, then that party has to investigate any criminal antecedents of that witness. Again, this is the same for both parties. If that party is not successful in its investigation, it may, before calling that witness, seize the Chamber and argue that in spite of its best efforts it has not been able to obtain the documents, and the Chamber will then assist the party if there is a basis for that based on submissions. In such a motion, that party must show that it has made efforts to succeed. During the examination of the witness, the other party cross-examining the witness has the right to impeach that witness. It may use any document without any prior disclosure to the party that is presenting that witness. This is part of the general credibility exercise which any party would wish to perform; there is no disclosure obligation there. Then to the issue whether there is, according to the Defence -- and that is their argument -- that there should not be any selective submission of documents to the Court. The situation in this case is as follows: The OTP has explained that the 1998 confession, which has been referred to by the witness, is not in its possession. The Prosecution doesn't have it, and the Prosecution disputes that such a document exists. The Prosecutor is an officer of the court. The Chamber considers both parties as officers of the court. Based on this assessment, we cannot take this any further.")

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SUBMISSIONS

3. The Defence argues that once the Prosecution accessed the witnesses' criminal files in Rwanda it should have produced all the statements therein in order to provide a "complete and accurate picture". According to the Defence, fairness requires the Chamber to ensure that the Defence obtains the confessions. The Defence had no obligation to request the confessions from Rwanda, and could not have imagined that their existence would become relevant to the proceedings. The Defence refrained from requesting materials out of fear that the witnesses might refuse to testify if the Rwandan authorities suspected that they were Defence witnesses before the ICTR.

4. The Prosecution argues that the motion is moot with regard to Witness NKZ, as the Chamber has already made an oral ruling in respect of this witness. The Defence was under an obligation to obtain the criminal files of its witnesses. Rule 98 does not provide a legal basis for the motion, as it is reserved for orders made pursuant to the Chamber's own initiative.

DELIBERATIONS

5. Rule 98 provides that a "Trial Chamber may *proprio motu* order either party to produce additional evidence. It may itself summon witnesses and order their attendance". The provision leaves it to the discretion of the Chamber whether to make such an order. Trial Chambers have resorted to this provision, for instance, when the information could be considered as material for the preparation of the Defence case or to determine the credibility of Prosecution witnesses.⁶

6. On 15 August 2006, this Chamber made an oral ruling to the effect that it would not exercise its discretion under Rule 98 in relation to Witness NKZ's confession.⁷ The Chamber sees no reason to amend its decision.

7. Rule 98 does not give the parties any right to request additional evidence. It is for the Chamber to exercise its discretion.⁸ The Chamber did not make any ruling with respect to Witness ZIH during the trial. The present motion was filed on 24 August 2006, one day after

⁶ In *Bagilishema*, the Chamber ordered the Prosecution, pursuant to Rule 98, to produce written confessions of its witnesses, because "[t]he Chamber is of the view that the said written confessions could be material in evaluating the credibility of the said Prosecution witnesses". *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, para 10. In *Bagosora*, the Chamber ordered the Prosecution, under Rule 98, to obtain judicial records of Prosecution witnesses from Rwanda, and to disclose them to the Defence, as the documents were considered "important for the preparation of the defence". *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. Similarly, in *Simba*, the Chamber ordered the Prosecution, pursuant to Rule 98, to obtain and disclose files of its own witness "given the importance of these records to the preparation of the parties and given the familiarity of the Prosecution with its witnesses". *Simba*, Decision on Matters related to Witness KDD's Judicial Dossier (TC), 1 November 2004, para 11. However, in another decision in *Simba*, the Chamber denied a similar motion by the Defence, requesting the judicial records of two other Prosecution witnesses because "from the testimony of these witnesses, the materials requested by the Defence do not appear to directly relate to the credibility of any allegations against the Accused". *Simba*, Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68 (TC), 4 October 2004, para. 9.

⁷ Above, note 4.

⁸ *Semanza*, Decision on the Defence Motion for Orders Calling Prosecution Witness VZ Listed in Prosecution Witness List of November 2000 (TC), 6 September 2001, para. 6 ("Rule 98 is therefore solely at the disposal of the Chamber, acting in its own deliberative discretion. It is not a Rule upon which parties may rely in seeking to bring evidence before the Tribunal").

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the close of the Defence case. Under these circumstances, the Chamber has decided to consider, in light of the motion, whether it shall make any decision *proprio motu* under Rule 98 in respect of this witness.

8. Witness ZIH has been accused of criminal activity in Rwanda. As mentioned in the Chamber's oral ruling of 16 August 2006, it was to be expected that the Defence should have investigated his criminal files prior to calling him to testify.⁹ If encountering problems, the Defence could have requested the Chamber to order Rwanda, under Article 28 of the Statute, to provide documents pertinent to the witness's criminal file, including confessions, if any. But such an order requires that the party demonstrates first, that it has made reasonable attempts to obtain the requested documents without being successful, and second, describes with particularity the nature and relevance of the information.¹⁰ However, it follows from the Defence submissions that it made a deliberate decision not to make inquiries into the files of these witnesses, based on its experience with fearful and reluctant witnesses. Under these circumstances, the Chamber will not exercise its discretion *proprio motu*. In making its decision, the Chamber has taken into consideration the purported contents of the confession, viewed in the context of the witness's testimony. It is also noted that the alleged confession does not have a direct bearing on the alleged role of the Accused during the events.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

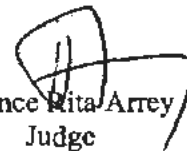
Arusha, 1 September 2006



Erik Møse
Presiding Judge



Sergei Alekseevich Egorov
Judge



Florence Rita Arrey
Judge

[Seal of the Tribunal]



⁹ Above, note 5.

¹⁰ *Simba*, Decision on Matters related to Witness KDD's Judicial Dossier (TC), 1 November 2004, para 9.