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(28104 - 28100)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

28104
2006

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 27 November 2006

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

JUDICIAL RECORDS/ARCHIVES
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2006 NOV 21 1 P 5: 43

**DECISION ON DEFENCE MOTION TO OBTAIN DOCUMENTS PERTAINING TO
WITNESS HH IN POSSESSION OF GOVERNMENT OF RWANDA**

Article 20 of the Statute; Rules 54 and 98 of the Rules of Procedure and Evidence

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INTRODUCTION

1. The proceedings in the instant case commenced on 19 September 2005. The fourth trial session started on 26 October 2006 with the continuation of the Prosecution's case. On 16 November 2006, while cross-examining Prosecution Witness HH, the Defence for Nzirorera asked the witness to indicate when he had met Rwandan judicial authorities about a case other than his own case.¹ The witness acknowledged that he had met with Rwandan authorities but reiterated his refusal to give details on the contents of these discussions because it would impact on his security and the security of his family. The Chamber found, on the basis of the witness' explanation, that his refusal was consistent with the advice the Chamber had given him that he should not be compelled to make such disclosures in the interests of his security and the security of his family.²
2. As a result, the Defence for Nzirorera, joined by the Defence for Karemera and the Defence for Ngirumpatse, moved the Chamber to find an alternative means to obtain, and to provide the Defence with, the statements made by Witness HH to Rwandan authorities in judicial records other than his own.³
3. It must be noted that, in a previously filed written motion, the Defence for Nzirorera seeks to obtain the same documents by requesting the Chamber to order the Prosecution to contact 37 Prosecution witnesses, including Witness HH, and to obtain the information necessary to make a specific request for documents from the Rwandan government.⁴ This motion is dealt with separately by the Chamber.⁵

DELIBERATIONS

4. In its oral application, the Defence for Nzirorera acknowledges that "the Prosecutor in this instance has done what he could to get [the] records [pertaining to Witness HH]".⁶ It therefore requests, as an alternative means of obtaining the records, that the witness provide the Chamber *in camera* with a list of the statements the witness has made before the Rwandan authorities, including in relation to cases against other persons, and that the Trial Chamber then transmit that list to the Government of Rwanda on a confidential basis without

¹ T. 16 November 2006, pp. 19 and seq.

² T. 16 November 2006, p. 21.

³ T. 16 November 2006, pp. 23-29; and T. 17 November 2006, p. 6.

⁴ Joseph Nzirorera's Motion for Further Order to Obtain Documents in Possession of Government of Rwanda, filed on 18 October 2006.

⁵ See Decision on Defence Motion for Further Order to Obtain Documents in Possession of Government of Rwanda (TC), 27 November 2006.

⁶ T. 16 November 2006, p. 29.

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disclosing it to the parties. The Defence then suggests that as soon as the Trial Chamber receives the material from the Rwandan government, it make a determination as to whether the material contained in those statements are relevant to the scope of the witness' testimony. If the Chamber determines that those materials are relevant, they should then be disclosed to the Defence. The Defence for Nzirorera contends that this suggestion offers a "very fair solution to balancing [the] rights [of the witness] to security versus the Accused's rights".

5. According to Article 19 of the Tribunal's Statute, the Chamber "shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and *due regard for protection of victims and witnesses*".⁷ Article 20 of the Statute prescribes, among other things, the right of the Accused to have adequate time and facilities for the preparation of his or her defence and to examine, or have examined, the witnesses against him or her.⁸ In that respect, Trial Chambers have used their discretionary power under Rules 54 and 98 of the Rules of Procedure and Evidence, to order the Prosecution to use its best efforts to obtain and disclose information not in the Prosecution's possession when it could be considered material for the preparation of the Defence case or for use in evaluating the credibility of Prosecution witnesses.⁹

6. The Rules also specify that the Chamber exercises control over the mode of interrogating witnesses and may order appropriate measures to safeguard the privacy and security of witnesses, "provided that the measures are consistent with the rights of the accused".¹⁰ In the *Musema* Judgement, the Appeals Chamber recalled that it is the duty of the Trial Chamber to determine where the balance lies between the right of the accused and the protection of victims and witnesses, depending on the facts of each case.¹¹

⁷ Emphasis added.

⁸ Statute, Sub-Articles 20 (4) (a) and (e).

⁹ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003, para. 7; *Prosecutor v. Aloys Simba*, Decision on Matters related to Witness KDD's Judicial Dossier (TC), 1 November 2004, para 11; *Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("*Karemera et al.*"), Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to bring Judicial and Immigration Records (TC), 14 September 2005, paras. 7-8; *Prosecutor v. François Karera*, Case No. ICTR-01-74-, Decision on Defence Motion for Additional Disclosure (TC), 1 September 2006, paras. 5-7.

¹⁰ See respectively Sub-Rules 90(F) and 75(A).

¹¹ *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgement (AC), 16 November 2001, paras. 68 and 69 (footnotes omitted):

68. It emerges from ICTY case-law that, in discharging its duty to order appropriate measures for the protection of victims and witnesses,

the Tribunal has to interpret the provisions within the context of its own unique legal framework in determining where the balance lies between the accused's right to a fair and public trial, the

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7. In the present case, on the basis of the witness' statement made in court, the Chamber was satisfied that there were exceptional circumstances related to the security and safety of Witness HH and his family justifying that the witness should not be compelled to give information about Rwandan cases other than his own case. The Chamber found that such an exceptional measure was consistent with the rights of the Accused and therefore exercised its power under Rule 90(F) of the Rules with regard to these questions.¹²

8. In that respect, it must be noted that statements made by the witness to the Office of the Prosecutor, investigator's notes, as well as the witness' own Rwandan judicial records, and other exculpatory material concerning Witness HH were continuously disclosed by the Prosecution to the Defence on a timely basis.¹³ In addition, the Chamber used its power under Rule 98 and ordered the Prosecution to use its best efforts to obtain statements made to Rwandan authorities and records pertaining to the criminal prosecution of the Witness HH.¹⁴ Then, the Chamber requested the cooperation of the Rwandan Government in order to provide the same documents.¹⁵ On 13 October 2006, as a result of a further inquiry made by the Chamber,¹⁶ the Rwandan Government informed the Chamber that they had provided all the documents requested which were at their disposal.

right of the public to access information and the protection of victims and witnesses. How the balance is struck will depend on the facts of each case.

In respect of a Trial Chamber's power to order the non-disclosure of the identity of a victim or witness pursuant to Rule 69(A), it was held that:

Rule 69(A) requires the Prosecution to first establish exceptional circumstances. This is in accordance with the balance carefully expressed in Article 20.1: that "proceedings are conducted [...] with full respect for the rights of the accused and due regard for the protection of victims and witnesses". As the Prosecution correctly concedes, the rights of the accused are made the first consideration, and the need to protect victims and witnesses is a secondary one.

69. Case-law acknowledges that there is inherent tension between the accused's right to a fair and public trial, on the one hand, and the protection of victims and witnesses, on the other. Moreover, under case-law, it is indisputably the duty of the Trial Chamber to determine that exceptional circumstances exist which warrant non-disclosure of the identity of victims or witnesses and such determination depends on "the facts of each case".

¹² T. 16 November 2006, pp. 21-22 ; and T. 17 November 2006, pp. 1-2.

¹³ See for e.g.: disclosures made on 1 February 2005; 5 August 2005; 29 August 2005; 2 September 2005.

¹⁴ *Karemera et al.*, Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to bring Juicicial and Immigration Records (TC), 14 September 2005, para. 11.

¹⁵ *Karemera et al.*, Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders (TC), 13 February 2006.

¹⁶ *Karemera et al.*, Decision on Defence Motion to Report Government of Rwanda to United Nations Security Council (TC), 2 October 2006.

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9. As shown by the various correspondence, and acknowledged by the Defence, the Office of the Prosecutor, including the Prosecutor himself, has also deployed continuous and significant efforts in order to obtain the material sought.¹⁷

10. The Chamber notes that the Defence has extensively cross-examined Witness HH where he openly admitted in court that he had lied on several occasions in his prior statements.¹⁸ Having heard Witness HH's testimony, the Chamber is of the view that the relevant credibility issues have been explored in a manner which would enable fair evaluation of the witness' credibility.

11. Under these specific circumstances, the Chamber is satisfied that the Accused have had adequate time and facilities to prepare their defence and to cross-examine Witness HH, and that further enquiries of the nature suggested by the Defence are therefore unnecessary.

FOR THE ABOVE REASONS, THE CHAMBER DENIES the Defence Oral Application.

Arusha, 27 November 2006, done in English.

Dennis C. M. Byron

Presiding Judge

Emile Francis Short

Judge

Gberdao Gustave Kam

Judge



¹⁷ Prosecutor's Submission Concerning Best Efforts to Obtain Rwanda Judicial Records of Witness HH, filed on 17 November 2006, following the Chamber's Order made orally on 16 November 2006.

¹⁸ T. 16 November 2006 and 17 November 2006.