

ICTR-2001-73-T
29-11-2006
(5850 - 5846)

5850
-HM



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Inés Mónica Weinberg de Roca, Presiding
Khalida Rachid Khan
Lee Gacuiya Muthoga

Registrar: Adama Dieng

Date: 29 November 2006

JUDICIAL RECORDS/ARCHIVES
UNICTR
2006 NOV 29 1 A 10: 09
RECEIVED

THE PROSECUTOR

v.

Protais ZIGIRANYIRAZO

Case No. ICTR-2001-73-T

**DECISION ON THE VOIR DIRE HEARING
OF THE ACCUSED'S CURRICULUM VITAE**
Rules 2, 42 and 95 of the Rules of Procedure and Evidence

Office of the Prosecutor:
Wallace Kapaya
Charity Kagwi-Ndungu
Sylver Ntukamazina
Gina Butler
Iskandar Ismail
Jane Mukangira

Defence Counsel:
John Philpot
Peter Zaduk

INTRODUCTION

1. On 27 and 28 June 2006, the Chamber held a *voir dire* hearing on the admissibility of a hand-written document entitled *Curriculum Vitae* ("CV") prepared by the Accused.¹ This document was included in a group of records that was tendered by the Prosecution on 3 October 2005 as Exhibit P2.² The CV was subsequently referred to during the Prosecution case. On 2 March 2006, the Defence formally raised an objection to the admissibility of the CV when it was referred to by witness Alison des Forges. According to the Defence, the CV, being a statement by the Accused, is not admissible into evidence because certain procedural safeguards have not been met.³ The Defence does not contest that the Accused is the author of the document, but contend that it was improperly obtained.⁴ The Prosecution contends that this document is already in evidence as Exhibit P2, and may therefore be referred to by Prosecution witnesses. Following these oral submissions, the Chamber decided to provisionally admit the document as part of Exhibit P42 and allow reference to it pending a determination of its final status. The Chamber held that a determination as to the admissibility of this document would be made following a *voir dire* hearing.⁵

DELIBERATIONS

Evidence from the Voir Dire Hearing

2. In January of 1998, investigators from the Prosecution received a call from a source, Mr. Pheneas Ruhumuliza, second vice-president of the national committee of the *Interahamwe*, informing them that the Accused had contacted him with a view to arranging a meeting because he wished to collaborate and shed light on the events surrounding the genocide in Rwanda.⁶

3. The investigators met with the Accused for the first time on the 6 or 7 of February 1998. At that initial meeting, the Accused stated he wanted to clear his name with the ICTR.⁷ The Accused further claimed that he was wanted by the Rwandan Government. The investigators asked the Accused to prepare a document of what he knew and what he had done before, during and after the genocide.⁸

4. The investigators next met with the Accused around 12 February 1998, where he turned over the first 14 hand-written pages of the document requested by the investigators, now known as the CV. The Accused presented the completed CV, totaling 36 pages, at a third meeting in March 1998.⁹

5. At the last meeting, which occurred on 26 or 27 March 1998, the Accused requested money to repair his "inatatu" bus. The investigators then informed the Accused that the

¹The Prosecution does not have the original CV, just a photocopy. T. 27 February 2006, p. 19.

²T. 3 October 2005 p. 26.

³T. 2 March 2006 pp. 37-38.

⁴T. 27 June 2006, p. 20.

⁵T. 2 March 2006 p. 45.

⁶T. 27 June 2006, pp. 5-6; T. 28 June 2006, p. 3 (they consulted others at the ICTR before proceeding with the meeting).

⁷T. 28 June 2006, p. 3.

⁸T. 27 June 2006, pp. 6-7; T. 28 June 2006, p. 4.

⁹T. 27 June 2006, pp. 9-11; T. 28 June 2006, pp. 4-5.

Office of the Prosecutor had analysed the CV and had decided that they were not interested in working with the Accused as there were several contradictions and matters that remained unclear in the CV. The Prosecution was therefore not in a position to assist the Accused.¹⁰

6. The Prosecution maintains that at the time of the first meeting the Accused was not a suspect or a target. As far as the investigators were concerned, he was the brother of Agathe Kanziga who was the wife of the late President Habyarimana.¹¹ The investigators testified that the Accused was not on the list of individuals against whom the Prosecution had issued arrest warrants for Operation NAKI (Nairobi-Kigali) which was carried out in Nairobi and in the various regions.¹²

7. The Prosecution was investigating the RTLM, however, and was in possession of information that the Accused contributed to its establishment.¹³ A Prosecution report of 19 January 1998 described the Accused as "allegedly a member of the Death Squad" and a founder of the RTLM, and reported his exile in April of 1994 with members of the Habyarimana family.¹⁴ Moreover, the name of the Accused appears on a 7 March 1997 tracking list,¹⁵ and on the list of the first category of genocide suspects put out by the Rwandan Government, dated 30 August 1996.¹⁶ Further, Witness SFH, who was interviewed by the Prosecution on 11-12 February 1998, stated that the Accused was involved in the killing of "Stanislaus Libakiwe".¹⁷ He was also allegedly implicated in the murder of "Diana (sic) Fossey" and the growing of cannabis in the Nyurgwe (phonetic) region.¹⁸ After each of the meetings with the Accused, the investigators prepared a report.¹⁹ In the investigators report of 17 February 1998, the Accused is referred to as a "suspect".²⁰

¹⁰ T. 27 June 2006, pp. 13-14; T. 28 June 2006, p. 5. The witness testified that the Accused's statements were discredited by statements made by Kambanda after his arrest during Operation NAKI in July 1997, which was a statement given prior to the investigators' first meeting with the Accused. T. 28 June 2006, p. 24. In return for the CV and the meetings, the Prosecution maintains that no offers, threats or inducements were made to the Accused, but the Accused did indicate that he wanted the Prosecution "to shed light on the genocide that took place in Rwanda in 1994, to clarify the conditions under which it arose. And he wanted [the Prosecution] to intervene with the Canadian authorities with regard to the document which led to his expulsion when he was in university -- when he was in Canada trying to complete his university studies." T. 27 June 2006, pp. 11-13; T. 28 June 2006, pp. 6, 19-20. One investigator stated that the Accused did not ask for the investigator's assistance with the Canadian government, but that he only informed them that he had been deported from Canada. T. 28 June 2006, p. 23. The investigator's 7 February 1998 report states, as read into the transcript, "[i]n this regard, we inform Mr. Z that it is premature to envisage protection for himself, as well as for members of his family, before the disclosed information is the subject of a -- an exhaustive analysis by the authorities of the Tribunal. It is at that moment that we shall be able to envisage various scenarios concerning his implication, his security, and his possible relocation, contingent upon an official, signed deposition made by himself." T. 28 June 2006, p. 22.

¹¹ T. 27 June 2006, pp. 5-6; T. 28 June 2006, pp. 3, 8.

¹² T. 27 June 2006, p. 21; T. 28 June 2006, p. 9.

¹³ T. 27 June 2006, pp. 27, 34-35.

¹⁴ T. 28 June 2006, pp. 13-15.

¹⁵ T. 27 June 2006, pp. 39-40.

¹⁶ T. 27 June 2006, pp. 40-43 (on the list as number 381).

¹⁷ T. 27 June 2006, pp. 45-47. The Indictment charges the Accused with the murder of Stanislas Sinibagiwe, also known as Stanislas Simbizi. See Amended Indictment, 8 March 2005, para. 46. It is not clear if Witness SFH was referring to the same person.

¹⁸ T. 28 June 2006, pp. 12-14.

¹⁹ T. 28 June 2006, p. 6.

²⁰ T. 27 June 2006, p. 20.

The Rights of Suspects

8. Rule 42 of the Rules of Procedure and Evidence (the "Rules"), entitled "Rights of Suspects During Investigation", stipulates that:

(A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands:

- (i) The right to be assisted by counsel of his choice or to have legal assistance assigned to him without payment if he does not have sufficient means to pay for it;
- (ii) The right to have the free assistance of an interpreter if he cannot understand or speak the language to be used for questioning; and
- (iii) The right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.²¹

Rule 42 (B) governs the questioning of a suspect in the absence of counsel, and provides for the possibility of a waiver of the right by the suspect:

(B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

9. In order to qualify for the procedural safeguards guaranteed under Rule 42 of the Rules of Procedure and Evidence (the "Rules"), the Accused would have to have been a "suspect" at the time of his meetings with the Prosecution investigators. Rule 2 of the Rules defines a suspect as "[a] person concerning whom the Prosecutor possesses reliable information which tends to show that he may have committed a crime over which the Tribunal has jurisdiction". While the evidence presented during the *voir dire* is not conclusive, there is evidence that the Prosecution possessed information that the Accused had committed crimes over which the Tribunal has jurisdiction. Given this uncertainty and mindful of the rights of the Accused, the Chamber finds that the Accused should have been treated as a suspect during the meetings with Prosecution investigators.

10. The Chamber will now determine whether the Rule 42 procedural safeguards have been met. The Prosecution did not advise the Accused of his rights as enumerated in Rule 42 (A) during any of the meetings. Nor do the circumstances suggest that the Accused's behaviour amounted to a knowing and voluntary waiver of these rights as contemplated in Rule 42 (B).

11. The Chamber is of the view that the procedural safeguards of Rule 42 have not been met. Relying on the principles enumerated above, the Chamber is also of the view that the Prosecution has not discharged its burden of showing that the Accused voluntarily waived his

²¹ In addition, Article 17 (3) of the Statute, "Investigation and Preparation of the Indictment", provides: "[i]f questioned, the suspect shall be entitled to be assisted by Counsel of his or her own choice". Article 20 (4)(g) confers on any Accused the right "[n]ot to be compelled to testify against himself or herself or to confess guilt".

right to the assistance of counsel, as required by Rule 42 (B). The Chamber will now decide on the appropriate remedy.


12. Rule 95 requires the exclusion of evidence "if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings".


13. The Chamber notes that Rule 95 does not require automatic exclusion of all unlawfully obtained evidence.²² Rather, "in applying the provisions of Rule 95, this Tribunal considers all the relevant circumstances and will only exclude evidence if the integrity of the proceedings would indeed otherwise be seriously damaged".²³ As stated by the ICTY Chamber in *Delalić et al.*, it is difficult to imagine a statement taken in violation of the fundamental right to the assistance of counsel which would not require its exclusion under Rule 95 as being "antithetical to, and would seriously damage, the integrity of the proceedings".²⁴

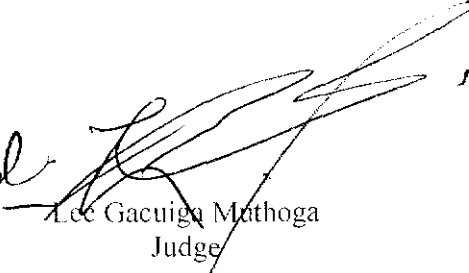
14. The Chamber finds that keeping the CV of the Accused on the record would seriously damage the integrity of the proceedings.

FOR THE ABOVE REASONS, THE CHAMBER EXPUNGES the CV of the Accused.

Arusha, 29 November 2006. done in English.


Inés Mónica Weinberg de Roca
Presiding Judge


Khalida Rachid Khan
Judge


Lee Gacuga Muthoga
Judge

[Seal of the Tribunal]

²² *Prosecutor v. Bizimungu et al.*, Decision on Casimir Bizimungu, Justin Mugenzi and Jerome Bicamumpaka's Written Submissions Concerning the Issues Raised at the Hearing of 31 March 2006 in Relation to the Cross Examination of Witness Augustin Kayinamwira (Formerly INGA) (TC), 1 November 2006, para. 12 ("*Bizimungu* Decision"); *Prosecutor v. Brđjanin*, Case No. IT-99-36-T, Decision on the Defence "Objection to Intercept Evidence" (TC), 3 October 2003, para. 54 ("*Brđjanin* Decision").

²³ *Bizimungu* Decision, para. 12; *Prosecutor v. Bizimungu et al.*, Decision on Prosper Mugiraneza's Renewed Motion to Exclude His Custodial Statements from Evidence (TC), 4 December 2003, para. 29; *Brđjanin* Decision, para. 61.

²⁴ *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on Zdravko Mucić's Motion For the Exclusion of Evidence (TC), 2 September 1997, para. 43; see also *Bagosora* Decision, para. 21.