



UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Khalida Rachid Khan,
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 26 March 2007

THE PROSECUTOR

v.

André RWAMAKUBA

Case No. ICTR-98-44C

**DECISION ON PROSECUTION'S MOTION TO UNSEAL AND DISCLOSE TO THE
CANADIAN AUTHORITIES THE TRANSCRIPTS OF WITNESS HF**

Office of the Prosecutor:

Dior Fall
Iain Morley
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Tamara Cummings-John

Defence Counsel

David Hooper and Andreas O'Shea

INTRODUCTION

1. The trial against André Rwamakuba started on 9 June 2005 before Judges Dennis C. M. Byron, presiding, Karin Hökberg and Gustave Gberdao Kam. Eighteen Prosecution witnesses, including Witness HF, were heard over 39 trial days.¹ On 20 September 2006, the Chamber rendered acquitted Rwamakuba of all charges.²

2. Witness HF testified, in part, in closed-session hearings on 12 July 2005 in accordance with prior protective measures requiring that those parts of a Prosecution witness's testimony which might reveal his or her identity be heard in closed session and that the transcripts thereof be put under seal.³

3. On 6 March 2007, responding to a request made by the Canadian authorities, the Prosecution filed a confidential motion with the President of the Tribunal seeking a variance of the witness protection measures for Witness HF. The Prosecution seeks leave to disclose to the Canadian authorities the closed session transcript of the testimony of Witness HF of 12 July 2005 as well as sealed Exhibit P-54 (the witness's protected information sheet).⁴ The Defence for André Rwamakuba did not respond to this Motion.

4. As no Trial Chamber was seized of this matter, the President assigned the motion to Trial Chamber III,⁵ which then appointed the above Chamber to deal with this matter.⁶

DISCUSSION

5. While the Rules of Procedure and Evidence provide a mechanism for the routine disclosure of closed session testimony or of protected information between different

¹ The Prosecution conducted its case during two trial sessions: from 9 June to 15 July 2005 and from 22 August to 13 September 2005.

² *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Judgement (TC), 20 September 2006.

³ *Prosecutor v. Rwamakuba*, ICTR-98-44-T, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (TC), 22 September 2000; *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44-R75, Order on Protective Measures for Prosecution Witnesses (TC), 10 December 2004.

⁴ Prosecutor's Motion to Unseal and Disclose to the Canadian Authorities the Transcripts of Witness HF, filed on 6 March 2007 ("Prosecutor's Motion").

⁵ Interoffice Memorandum from the President to Judge Khan, filed on 26 March 2007.

⁶ Interoffice Memorandum from Judge Khan to Judge Byron, filed on 26 March 2007.

proceedings before the Tribunal,⁷ this mechanism is not strictly applicable to the present circumstances as the request concerns a trial before Canadian authorities.⁸

6. In a number of previous decisions, Trial Chambers have granted similar orders for disclosure to national authorities on the basis of Article 28(1) of the Tribunal's Statute, which provides for cooperation and judicial assistance of States with the Tribunal.⁹ In the *Ndayambaje et al.* case, Trial Chamber II held that "the guiding principles of state cooperation under Article 28 (1) of the Statute also apply to requests for cooperation or judicial assistance from States to the Tribunal, in their investigation or prosecution of persons accused of committing serious violations of international humanitarian law" and that the investigation of crimes committed in Rwanda in 1994 by national authorities "is in line with the principles of state cooperation envisaged by the completion strategy in Security Council Resolutions 1503 and 1534."¹⁰

⁷ See Rules 75(F) and (G):

"(F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures:

(i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the "second proceedings") unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule; but

(ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings."

(G) A party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply:

(i) to any Chamber, however constituted, remaining seized of the first proceedings; or

(ii) if no Chamber remains seized of the first proceedings, to the Chamber seized of the second proceedings."

⁸ See, e.g., *Prosecutor v. Casimir Bizimungu and al.*, Case No. ICTR-99-50-T, Decision on the Prosecutor's Request for an Order of Disclosure of Closed Session Transcripts and Sealed Prosecution Exhibits Pursuant to Rules 69 and 75 of the Rules of Procedure and Evidence (TC), 2 February 2005.

⁹ Article 28 reads as follows:

"1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:

(a) The identification and location of persons;

(b) The taking of testimony and the production of evidence;

(c) The service of documents;

(d) The arrest or detention of persons;

(e) The surrender or the transfer of the accused to the International Tribunal for Rwanda."

Prosecutor v. Ndayambaje et al., Case No. ICTR-98-42-T, Decision on Prosecution's Motion to Unseal the Transcripts of Witness WDUSA (TC), 1 November 2006; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Prosecution Motion to Unseal and Disclose to Canadian Authorities the Transcripts of the Testimonies of Witnesses TA, QCB, TK, SJ, FAI, QY, and QBQ (TC), 19 March 2007. See also *Prosecutor v. Ntagurera et al.*, Case No. ICTR-99-46, Decision on Disclosure of Closed Session Testimony of Witness K1H (TC), 21 March 2007.

¹⁰ *Prosecutor v. Ndayambaje et al.*, Case No. ICTR-98-42-T, Decision on Prosecution's Motion to Unseal the Transcripts of Witness WDUSA (TC), 1 November 2006, para. 15.

7. According to the above jurisprudence, a request for disclosure of closed session testimony to national authorities may be granted when the following conditions are met: (1) such a request is in keeping with the Tribunal's objective of investigating and prosecuting persons accused of committing serious violations of international humanitarian law in Rwanda; (2) the witness concerned has consented to the disclosure of the closed session testimony; and (3) the Chamber has ascertained that there is no risk to the privacy and security of the witness concerned. In addition, when granting such a request, a Trial Chamber should guarantee that the protective measures granted to the witness concerned will continue to have effect *mutatis mutandis* in any proceedings before the national authorities. The Chamber is of the view that many of the above conditions mirror those set out for disclosure pursuant to Rule 75 (F) of the Rules and therefore that these conditions are in keeping with the spirit of Rule 75.

8. The Chamber finds that all three conditions are met in the instant case. First, the Prosecution explains that it received requests for disclosure from both the Canadian Prosecution and the Defence Counsel in the trial of Désiré Munyaneza.¹¹ As this trial relates to crimes committed in Rwanda in 1994, the Chamber finds that disclosure is in keeping with the Tribunal's objective of investigating and prosecuting persons accused of committing serious violations of international humanitarian law in Rwanda as well as with the principles of state cooperation envisaged by the completion strategy set out in Security Council Resolutions 1503 (2003) and 1534 (2004).

9. Second, the Chamber notes that Witness HF has consented to the disclosure of the closed session transcripts of his testimony to the Canadian authorities.¹² Third, and in consequence of the preceding, the Chamber is of the view that there is no risk for the privacy and security of the witness concerned.

10. As a result, the Chamber finds that it is in the interests of justice to vary its order for protective measures for Witness HF pursuant to Rule 75(A) for the purposes of disclosing the closed session transcripts of this witness to the Canadian authorities.

¹¹ Annex 1 and Annex 2, respectively, to the Prosecutor's Motion.

¹² See Annex 3 to the Prosecutor's Motion.

FOR THOSE REASONS, THE CHAMBER

I. GRANTS the Prosecutor's Motion;

II. DIRECTS the Registry to unseal Exhibit P-54 and the closed session transcripts of Witness HF of 12 July 2005, make copies and serve them upon the Prosecution for onward transmission to the Canadian authorities;

III. ORDERS that the protective measures granted to Witness HF shall continue to have effect *mutatis mutandis* in any proceedings before the Canadian court.

Arusha, 26 March 2007, done in English.

Dennis C. M. Byron

Presiding Judge

Khalida Rachid Khan

Judge

Gberdao Gustave Kam

Judge

[Seal of the Tribunal]