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NATIONS UNIES

ICTR-07-91-T
28-04-2009
(4042 - 4038)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Aydin Sefa Akay

Registrar: Mr. Adama Dieng

Date: 28 April 2009

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THE PROSECUTOR

v.

Léonidas NSHOGOZA

Case No. ICTR-07-91-T

**DECISION ON DEFENCE MOTION FOR ORDER TO REGISTRAR TO PROVIDE
INFORMATION TO THE DEFENCE REGARDING PROSECUTION VISITS TO
WITNESS GAA AT UNDF**

Rule 54 of the Rules of Procedure and Evidence

Office of the Prosecutor:

Paul Ng'arua
Abdoulaye Seye
Dennis Mabura
Florida Kabisanga

For the Accused:

Allison Turner

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INTRODUCTION

1. On 20 March 2009, the Defence filed a Motion requesting an order to the Registrar to provide information relating to visits by Prosecution representatives to Prosecution Witness GAA while he was in detention at the UN Detention Facility ("UNDF") between August and November 2007.¹
2. The Prosecutor did not respond to the Motion.
3. On 23 March 2009, the Registrar provided written submissions, in relation to the Motion, pursuant to Rule 33 (B) of the Rules of Procedure and Evidence ("Rules").²

DISCUSSION

Preliminary Matter

4. The Registrar submits that records concerning visits to Prosecution witnesses by the Office of the Prosecutor are *prima facie* matters within the jurisdiction of the Prosecutor. The Registrar refers to Rule 70 (A) and submits that "absent an order from the Chamber, it would seem wrong to allow Counsel to get round that provision by asking the Registry to disclose the material."³
5. Rule 70 (A) of the Rules provides for the non-disclosure of reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of a case, provided the material is not exculpatory under Rule 68 (A).⁴
6. With regard to the Registrar's submissions on Rule 70 (A) privilege, the Chamber considers that this sub-Rule is not applicable to information provided or records prepared by the Registrar, as such information or records would not amount to "documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of a case". The Chamber will now turn to consider the merits of the Defence request.

Applicable Law

7. Article 16 (1) of the Statute of the Tribunal ("Statute") provides that the Registrar shall be responsible for the administration and servicing of the Tribunal.

¹ *Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Defence Motion for Order to Registrar to Provide Information to the Nshogoza Defence Regarding Prosecution Visits to GAA at UNDF in 2007, 20 March 2009 ("Motion").

² *Nshogoza*, Registrar's Submissions under Rule 33 (B) of the Rules on the Defence Motion for Order to Registrar to Provide Information to the Nshogoza Defence Regarding Prosecution Visits to GAA at UNDF in 2007, 23 March 2009 ("Registrar's Submissions"). For Rule 33 (B), see *infra* para. 8.

³ Registrar's Submissions, para. 5.

⁴ Rule 70 (A) states: "Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions." Rule 68 (A) provides that the Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.



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8. Pursuant to Rule 33 (A) of the Rules the Registrar shall "assist the Chambers, the Plenary Meetings of the Tribunal, the Judges and the Prosecutor in the performance of their functions." Sub-Rule (B) further provides that in the execution of his functions, the Registrar may make oral or written representations to Chambers on any issue arising in the context of a specific case which affects or may affect the discharge of such functions.

9. Article 4 (4) of the Directive for the Registry of the Tribunal ("Directive") mirrors the provisions in the Statute and the Rules and Article 49 of the Directive provides that the Registrar is responsible for the administration and servicing of the Tribunal and serves as its channel of communication.⁵

10. Pursuant to the aforementioned provisions, the Registrar's role is therefore of an administrative, "ministerial", and "logistical nature".⁶ The Registrar, is, for example, tasked with, among other things, serving as a channel of communication, preparing minutes at the Tribunal's plenary meetings and the sittings of the Chambers, recording the particulars of each case, and facilitating the availability of counsel for the accused.⁷ These functions highlight the impartial role of the Registry in the conduct of the Tribunal's affairs.⁸

11. With regard to a party requesting that the Registrar provide certain information which may fall outside the aforementioned administrative functions, Rule 54 of the Rules allows a Judge or Trial Chamber to issue, at the request of either party, or *proprio motu*, such orders as may be necessary for the conduct of the trial. The words "necessary . . . for the preparation or conduct of the trial" in Rule 54 must be interpreted in light of the Chamber's obligation under Articles 19 and 20 of the Statute to ensure a fair and expeditious trial, and to ensure that the rights of the accused are respected at all times.⁹ Hence, an order for the provision of information by the Registrar may be appropriate where the fairness of the trial so requires.

⁵ Article 4 (4) of the Directive states that the Registrar shall assist the Chambers, the Plenary meetings of the Tribunal, the Judges and the Prosecutor in the performance of their functions. Under the authority of the President, he shall be responsible for the administration and servicing of the Tribunal; Article 5 (1) states that the Registrar shall discharge his functions in accordance with Article 16 of the Statute and Rule 33 of the Rules; and Article 49 provides that pursuant to Article 16 of the Statute, the Registry is responsible for the administration and servicing of the Tribunal and that pursuant to Rule 33 of the Rules, the Registrar assists the Chambers, the plenary meetings of the Tribunal, the Judges and the Prosecutor in the performance of their functions. Under the authority of the President of the Tribunal, the Registrar is responsible for the administration and servicing of the Tribunal and serves as its channel of communication.

⁶ *Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-2001-70-I, Decision on the Prosecutor's Motion to Order the Registrar to Provide Photographs of the Accused for Purposes of Identification, 25 October 2002, para. 13.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Article 19 (1) provides, among other things, that Trial Chambers shall ensure that a trial is fair and expeditious and Article 20 sets out the rights of the accused. With regard to interpreting Rule 54 in light of Articles 19 and 20, see also *Prosecutor v. Blaskic*, Case No. IT-95-14, Decision on the Republic of Croatia to the Issuance of Subpoenae Duces Tecum, 18 July 1997, para. 32; and *Nshogoza*, Decision on Motions Requesting Assignment of Counsel of Choice, 13 October 2008, para. 19.



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Defence Request for the Registrar to Provide Information

12. The Defence requests an order for the Registrar to provide the following information relating to visits by Prosecution representatives to Witness GAA while in detention at the UNDF between August and November 2007:¹⁰

- (i) The number of visits;
- (ii) The dates of visits;
- (iii) The duration of visits;
- (iv) The purpose of visits (if available and as recorded).

13. The Defence submits that the aforementioned information is relevant to the issue of Witness GAA's credibility, which according to the Defence "is important for the determination of the outcome of the present proceedings."¹¹ The Motion further states that "one of the focal points in assessment of GAA's credibility will be identifying the moment at and the reasons for which he decided to dramatically change his story for the second time."¹² According to the Defence, if undue pressure was exerted on Witness GAA while at the UNDF, his credibility would be affected. The Defence further submits that the said information would "assist the Chamber in making an informed decision about the nature and development of GAA's second change of heart and thus in reaching the correct assessment of his credibility"¹³

Registrar's Submissions

14. In addition to the Registrar's submissions regarding Rule 70 (A), as already dealt with by the Chamber as a preliminary matter, the Registrar relies on Rule 33 (A) and states that the Statute and Rules do not identify the Registry as a "public organ."¹⁴ According to the Registrar, it is for the Chamber to determine what the Defence is entitled to in order to preserve its neutrality.

Should the Registrar Provide the Requested Information to the Defence?

15. The Chamber notes that the Registrar's role in assisting the parties is purely administrative.¹⁵ The Chamber, however, recalls that it may make such orders as are necessary for the conduct of proceedings pursuant to Rule 54, which should be read in light of Articles 19 and 20 of the Statute in order to ensure the fairness of proceedings and respect for the Accused's fair trial rights.

¹⁰ Motion, para. 2.

¹¹ Motion, para. 1.

¹² *Ibid* and footnote 1 of the Motion which refers to T. 17 February 2009, pp. 52-53; T. 19 February 2009, pp. 65-66, 73; and also Exhibit D18 (under seal).

¹³ Motion, para. 3.

¹⁴ Registrar's Submissions, para. 7.

¹⁵ See *supra* paras. 7-10.



16. Witness GAA is a key Prosecution witness in this case.¹⁶ The Chamber notes that Witness GAA testified before this Chamber that he was visited by the Prosecutor while in detention at the UNDF in 2007.¹⁷ In view of the Defence submissions, the Chamber considers that the information requested may assist the Defence in the preparation of its case. Accordingly, the Chamber considers it consistent with the Accused's fair trial rights as guaranteed by Article 20, to order the Registrar to supply the Defence with the requested information.


FOR THESE REASONS, the Chamber


GRANTS the Defence Motion; and


ORDERS the Registrar to provide the Defence and the Trial Chamber, by close of business 30 April 2009, with the following information with respect to Prosecution visits to Witness GAA while detained at the UNDF during the period August 2007 to November 2007:

- (i) The number of visits;
- (ii) The dates of visits;
- (iii) The duration of visits;
- (iv) The purpose of visits if recorded and available.

Arusha, 28 April 2009


Khalida Rachid Khan
Presiding Judge


Lee Gacuiga Muthoga
Judge
[Seal of the Tribunal]


Aydin Sefa Akay
Judge



¹⁶ Witness GAA gave evidence in the current proceedings, that in 2005, he falsely testified before the Appeals Chamber, in Rule 115 proceedings (which concern the presentation of additional evidence before the Appeals Chamber) in the *Kamuhanda* case, that he was not present at Gikomero when massacres took place and had not seen Jean de Dieu Kamuhanda there. According to Witness GAA's testimony in the current proceedings, his evidence in the *Kamuhanda* case in 2001 was in fact the truth and he only recanted that testimony and lied before the Appeals Chamber because he had received payments, and expected to receive further payments, from the Accused. See T. 16 February 2009, pp. 12-18, 24-28, 39-41.

¹⁷ *Nshogoza*, T. 19 February 2009, p. 66.