

ICTR-00-55C-PT
06-01-2011
(5533-5528)



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER III

Before Judges: Lee Gacuiga Muthoga, *Presiding*
Seon Ki Park
Robert Fremr
Registrar: Adama Dieng
Date: 6 January 2011

JUDICIAL SECRETARIAT
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THE PROSECUTOR

v.

Ildéphonse NIZEYIMANA

CASE NO. ICTR-2000-55C-PT

DECISION ON CONFIDENTIAL, EX PARTE DEFENCE MOTION FOR JUDICIAL COOPERATION OF THE GOVERNMENT OF THE REPUBLIC OF RWANDA

Article 28 of the Statute and Rules 54 and 73 of the Rules of Procedure and Evidence

Office of the Prosecution:
Drew White
Kirsten Gray
Yasmine Chubin
Zahida Virani
Astou Mbow

Defence Counsel for Ildéphonse Nizeyimana:
John Philpot
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INTRODUCTION

1. The trial in this case is scheduled to commence on 17 January 2011.¹
2. On 10 December 2010, the Defence filed a confidential ex parte motion for cooperation and judicial assistance from the Republic of Rwanda.² The Defence requests that the Trial Chamber ask the Republic of Rwanda to cooperate with the Tribunal and grant Nizeyimana's Defence access to Gacaca records from 15 trials conducted in the Huye District of Rwanda without undue delay.³ The Defence submits that, despite having received written authorisation from the appropriate authorities in Rwanda to access and copy Gacaca records, members of the Defence team have been unable to obtain the requested information directly from Rwanda.⁴

DELIBERATIONS

3. Article 28(1) of the ICTR Statute provides that, "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."
4. Article 28(2) mandates that,

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.
5. According to the jurisprudence of the Tribunal, a Trial Chamber may issue requests for production of evidence or service of documents by a State.⁵ A party requesting an order for State cooperation or judicial assistance under Article 28 must identify, to the extent

¹ Scheduling Order (TC), 3 November 2010, Order II.

² Urgent Ex Parte Defence Motion for Judicial Cooperation of the Government of the Republic of Rwanda, filed on 10 December 2010 ("Motion").

³ Motion, p. 4.

⁴ Motion, paras. 1-2.

⁵ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 10 March 2004, para. 4. See also *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Request for Cooperation by the Government of the Republic of Rwanda Pursuant to Article 28 of the Statute (TC), 24 September 2002.

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possible, the information sought; its relevance to the trial; and the efforts that have been made to obtain it.⁶ The requesting party should also define with particularity the type of assistance sought.⁷

6. The Defence in this case has identified the documents sought as Gacaca records, including investigation files, accusation files (*l'fishi Urwegwa*), *cahiers d'activités*, transcripts of hearings, witness declarations and judgement and sentencing documents, from 15 trials conducted in Huye District in Rwanda.⁸ According to the Defence, these are the same documents that the Defence has requested directly from authorities in Rwanda and for which authorisation was previously granted.⁹ Based on the information provided in the Defence motion and attached annexes, the Chamber finds that the Defence has specifically identified the material sought.

7. With respect to the material's relevance to the trial, the Defence submits that the records sought "all pertain to crimes and persons mentioned in the Indictment against Ildéphonse Nizeyimana and are thus of the utmost importance to the preparation of the Defence."¹⁰ The Chamber notes that at least five of the trials for which the Defence requests judicial records are directly related to persons named in the Indictment as co-perpetrators or members of a joint criminal enterprise with the Accused.¹¹ Others relate to proposed Prosecution witnesses.¹² Furthermore, the Chamber recalls that Trial Chambers of the Tribunal have consistently recognised that Rwandan judicial records are important for the preparations of the Defence.¹³ Accordingly, the Chamber finds that the materials sought by Nizeyimana's Defence are relevant to the trial in this case.

⁶ See, e.g., *Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion for an Order Directed at Switzerland (TC), 28 April 2010, para. 6; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Cooperation of the Government of Rwanda: RPF Archives (TC), 21 January 2008, para. 3; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Casmir Bizimungu's Requests for Disclosure of the Bruguière Report and the Cooperation of France (TC), 25 September 2006, para. 25; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 10 March 2004, para. 4.

⁷ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request to the Kingdom of The Netherlands for Cooperation and Assistance (TC), 7 February 2005, para. 5; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, para. 4.

⁸ Motion, para. 8.

⁹ Motion, para. 8, Annex.

¹⁰ Motion, para. 9.

¹¹ Compare Motion, para. 9 to Second Amended Indictment, filed on 29 September 2010.

¹² See Motion, para. 9.

¹³ See, e.g., *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Decision on the Defence Request for the Cooperation of Rwandan Government Pursuant to Article 28 (TC), 28 October 2004, para. 4, citing *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Decision on Defence Motion to Obtain Judicial Records Pursuant To Rule 68 (TC), 4 October 2004, para. 8; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on the Request for

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8. Finally, the Chamber recalls that,

As is the general practice in the Tribunal, the Defence must first make its own independent efforts to secure evidence it wishes to use at trial other than exculpatory material in the possession of the Prosecution. Once the Defence demonstrates its inability to obtain relevant material despite its good faith efforts, it may then seize the Chamber and request appropriate judicial assistance pursuant to Article 28 of the Statute.¹⁴

9. In this case, the Defence submits that it has sought to obtain the records in question from the Rwandan authorities.¹⁵ The Defence has presented documentation showing that it requested access to these Gacaca records on 31 August 2010, and that on 24 September 2010 two members of the Defence team were granted authorisation to access and copy these documents.¹⁶ According to an attached affidavit, members of the Defence team attempted to access the records on 30 September 2010 but were denied access and told that the Gacaca records were being sorted and that the process could take approximately two weeks.¹⁷ The Defence submits that, since 30 September 2010, it has repeatedly contacted the Documentation Centre of the *Centre National de Lutte contre le Génocide* in order to inquire about the status of the records.¹⁸ The original authorisation granted to members of the Defence has since expired, and the Defence has applied for an extension of that authorisation.¹⁹

10. The Chamber recognises the interest of the Documentation Centre of the *Centre National de Lutte contre le Génocide* and the Government of the Republic of Rwanda in periodically sorting and filing judicial records. It also recognises that it may take time to accomplish such tasks. The Chamber, however, is mindful of the upcoming commencement of the trial in this case and the relevance of the requested records to the trial, including potential Defence cross-examination of Prosecution witnesses. In light of the amount of time that has passed since the initial Defence request and the imminent commencement of the

Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003, para. 7; *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, 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, paras. 10-11.

¹⁴ *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Decision on the Defence Request for the Cooperation of Rwandan Government Pursuant to Article 28 (TC), 28 October 2004, para. 4, quoting *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Decision on Defence Motion to Obtain Judicial Records Pursuant To Rule 68 (TC), 4 October 2004, para. 11 (internal citation omitted).

¹⁵ Motion, paras. 1-2, 7, 10.

¹⁶ Motion, Annex.

¹⁷ Motion, Annex.

¹⁸ Motion, para. 10, Annex.

¹⁹ Motion, Annex.

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trial, the Chamber is satisfied that the Defence has demonstrated that it has made reasonable efforts to obtain the information requested without recourse to Article 28.

11. Finally, a Party requesting an order under Article 28 of the Statute must define the assistance sought with particularity.²⁰ The Defence requests that the Government of Rwanda “provide the Nizeyimana Defence with all necessary assistance to grant the Defence access to the requested documents in the shortest delay possible.”²¹ The Chamber is satisfied that the Defence has sufficiently defined the type of assistance sought in this case.

FOR THESE REASONS, THE CHAMBER

GRANTS the Defence motion;

REQUESTS the Government of Rwanda to assist the Defence team for Ildéphonse Nizeyimana in accessing and copying the Gacaca records enumerated in Confidential Annex A to this decision; and

DIRECTS the Registry to transmit the present decision to the Government of Rwanda, and to report back to the Chamber on its implementation;

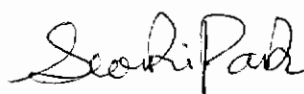
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Lee Gacuiga Muthoga
Presiding Judge

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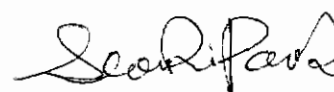


Seon Ki Park
Judge

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Robert Fremr
Judge

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²⁰ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request to the Kingdom of The Netherlands for Cooperation and Assistance (TC), 7 February 2005, para. 5; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, para. 4.

²¹ Motion, p. 4.