

ICTR-98-44C-DT
23-5-2005
(227-224)

227
Hm



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
Karin Hökberg
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 23 May 2005

JUDICIAL RECORDS/ARCHIVES
ICTR
2005 MAY 23 P 5:43
Hm

THE PROSECUTOR

v.

André RWAMAKUBA
Case No. ICTR-98-44C-R90bis

DECISION ON PROSECUTOR'S MOTION FOR AN ORDER FOR TEMPORARY
TRANSFER OF WITNESSES PURSUANT TO RULE 90BIS

Rule 90bis(B) of the Rules of Procedure and Evidence

Office of the Prosecutor:
Don Webster
Dior Fall
Gregory Lombardi
Ian Morley
Bongani Dyani
Sunkarie Ballah-Conteh
Tamara Cummings-John
Takeh Sendze

Defence Counsel
David Hooper and Andreas O'Shea

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("Tribunal"),

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Karin Hökberg and Gustave Gberdao Kam ("Chamber");

NOTING the "Prosecutor's Motion for an Order for Temporary Transfer of Witnesses pursuant to Rule 90bis" ("Motion"), filed *ex parte* on 27 April 2005.

NOTING the "Order for Filing Additional Information to Prosecutor's Motion for Temporary Transfer of Witnesses", delivered by the Chamber on 6 May 2005;

NOTING the "Prosecutor's Filing in Response to Trial Chamber III Order of 6 May 2005 concerning the Prosecutor's Rule 90bis application", filed *ex parte* on 13 May 2005;

NOTING the "Prosecutor's Supplemental Filing in Response to Trial Chamber III Order of 6 May 2005 concerning the Prosecutor's Rule 90bis application", filed *ex parte* on 19 May 2005.

NOTING the "Prosecutor's Second Supplemental Filing in Response to Trial Chamber III Order of 6 May 2005 concerning the Prosecutor's Rule 90bis application", filed *ex parte* on 23 May 2005.

HEREBY DECIDES the Motion.

INTRODUCTION

1. The Separate Indictment against the Accused André Rwamakuba has been filed on 23 February 2005. The trial is scheduled to commence on 9 June 2005.

2. On 27 April 2005, the Prosecution filed *ex parte* a Motion seeking that the Chamber orders the temporary transfer of two detained witnesses from the Republic of Rwanda to the Tribunal Detention Facilities in Arusha. The said witnesses would be required to give oral evidence in the present case. The Prosecution contends that the requirements set out by Rule 90bis of the Rules for the said transfer are met. It also indicates that a letter from the Rwandan Minister of Justice will be filed, as soon as it is received, to confirm these representations.

3. Before addressing the Motion, the Chamber noted that the Prosecution did not specify the grounds for its *ex parte* filing and therefore directed the Prosecution to show cause why it should be heard *ex parte*.¹ In addition, the Chamber was of the view that the Prosecution should provide additional information in support of its request.² Accordingly, on 13 and 19 May 2005, the Prosecution filed additional submissions.

4. In its additional submission of 13 May 2005, the Prosecution contends that Motions seeking transfer of detained witnesses are purely administrative and *ex parte* by nature. The Defence would have no interest to be asserted in deciding in such a Motion. It further submits that the filing of such Motion *inter partes* increases the risk of threat or intimidation against

¹ *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-R54, Order for Filing Additional Information to Prosecutor's Motion for Temporary Transfer of Witnesses (TC), 6 May 2005.

² *Ibidem*.

the requested witnesses prior their arrival in Arusha. Finally, it notes that *ex parte* filing of such Motion is a usual practice of the Prosecution. To support its Motion, the Prosecution attached to its submissions of 19 and 23 May 2005, letters from Rwandan authorities.

DELIBERATIONS

On the ex parte Filing

5. As a general rule, applications must be filed *inter partes*. *Ex parte* filings should be entertained only when they are in the interests of justice "where the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact the application itself, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application".³ This requires consideration on a case-by-case basis and accordingly a practice of the Prosecution could not as such justify any *ex parte* filing.

6. The submissions filed by the Prosecution on 19 and 23 May 2005 contain information that could jeopardize the protective measures granted to the requested witnesses. Accordingly, the Chamber considers that, in the circumstances of this case, *ex parte* filing should be granted regarding the Prosecution's submission of 19 and 23 May 2005.

7. Conversely, the Chamber is of the view that an *inter partes* filing of the Motion of 27 April 2005 and the additional submission of 13 May 2005 does not cause any unfair prejudice to the requested witnesses or the Prosecution, while the Defence and the Accused are obliged to comply with the protective orders delivered by the Chamber.⁴ These submissions should be disclosed to the Defence. The urgency of the matter and the fact that the rights of the Accused to be tried without undue delay require a prompt disposal of the Motion to ensure the beginning of the trial as scheduled on 9 June 2005. Accordingly, the Chamber addresses now the Motion.

On the Request to Order Transfer of Detained Witnesses

8. Pursuant to Rule 90bis(B) of the Rules, a Chamber shall issue a transfer order only after prior verification that the following two conditions are met:

(i) The presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;

(ii) Transfer of the witness does not extend the period of his detention as foreseen by the requested State.

9. From the last information provided by the Victims and Witness Support Unit to the Prosecution, it appears that Witness GIN is required for criminal proceedings in Rwanda. The Prosecution indicates that it will make a further supplemental filing in support of its 90bis application for Witness GIN as soon as the Rwandan Ministry of Justice provides the necessary clarifications. The Chamber will therefore address that request when it would be provided with sufficient elements to verify that the requirements set out by Rule 90bis are met.

³ See *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-R66 (*Karemera et al.*), Decision on Motion to Unseal *Ex Parte* Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment (TC), 3 May 2005, para. 11.

⁴ *Karemera et al.*, Order on Protective Measures for Prosecution Witnesses (TC), 10 December 2005.

10. The Prosecution filed with the Chamber a letter from the Rwandan Minister of Justice, dated 19 May 2005, notifying that Witness GIQ is available to testify before the Tribunal. In the Chamber's view, that information is sufficient to support the conclusion that Witness GIQ will not be required for any criminal proceedings in progress in the territory of Rwanda during the period required by the Tribunal; or that duration of the transfer of that Witness to the Tribunal for the need of the testimony will not extend the period of the detention in Rwanda. Accordingly, the Chamber is satisfied that the requirements set out by Rule 90bis of the Rules are met in relation to Witness GIQ in the present case and for the requested period.

FOR THE ABOVE REASONS, THE CHAMBER

DIRECTS the Registrar to disclose to the Defence the "Prosecutor's Motion for an Order for Temporary Transfer of Witnesses pursuant to Rule 90bis", filed *ex parte* on 27 April 2005, and "Prosecutor's Filing in Response to Trial Chamber III Order of 6 May 2005 concerning the Prosecutor's Rule 90bis application", filed *ex parte* on 13 May 2005;

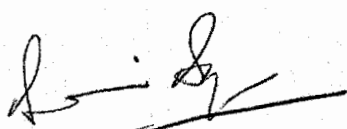
ORDERS pursuant to Rule 90bis of the Rules that detained Witness GIQ be transferred to the United Nations Detention Facilities in Arusha at an appropriate time prior to the testimony during the trial session set to commence on 9 June 2005 until 15 July 2005 inclusive;

REQUESTS the Government of Rwanda to comply with this Order and to arrange for the transfer of Witness GIQ in cooperation with the Registrar and the Tanzanian Government;

DIRECTS the Registrar to:

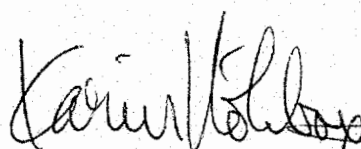
- (1) Transmit this Decision to the Governments of Rwanda and the United Republic of Tanzania;
- (2) Ensure the proper conduct of the transfer, including the supervision of the Witness in the United Nations Detention Facilities in Arusha;
- (3) Remain abreast of any changes which might occur regarding the conditions of detention provided for by the requested State and which may possibly affect the length of the temporary detention and, as soon as possible, inform the Trial Chamber of any such change.

Arusha, 23 May 2005, done in English.



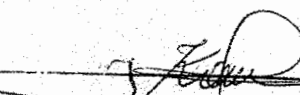
Dennis C. M. Byron

Presiding Judge



Karin Hökberg

Judge



Gherdao Gustave Kam

Judge

[Seal of the Tribunal]

