

ICTR-98-44A-T
2-11-2001
(1623-1618)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 2 November 2001

The PROSECUTOR
v.
Juvénal KAJELIJELI
Case No. ICTR-98-44A-T

JUDICIAL RECORDS/ARCHIVES
ICTR

2001 NOV -21 P 2:36

**DECISION ON JUVÉNAL KAJELIJELI'S MOTION REQUESTING THE
RECALLING OF PROSECUTION WITNESS GAO**

The Office of the Prosecutor:

M. Moore
Ifeoma Ojemeni
Ibukunolu Alao Babajide

Counsel for the Defence:

Lennox Hinds
N. M. Bompaka

Handwritten initials/signature

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

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SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, William C. Matanzima Maqutu and Arlette Ramaroson;

BEING SEIZED of the, "Requête de la Défense aux fins de ré-audition d'un témoin du Procureur," filed on 4 October 2001 (the "Motion");

NOTING the Chamber's "Decision on Kajelijeli's Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials pursuant to Rule 66(B) and Rule 68 of the Rules of Procedure and Evidence," of 5 July 2001 (the "Kajelijeli Decision");

NOTING FURTHER the Chamber's oral ruling rendered on 5 September 2001 ordering, "[p]ursuant to Rule 90 *bis* of the Rules, that the four detained witnesses known under the pseudonyms GAO, GDD, GDQ and GAP shall remain temporarily detained at the Tribunal's Detention Facilities in Arusha until otherwise ordered by the Chamber, so as to testify";

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules") in particular Rules 66(A)(ii), 90(G), 90(F) and 90*bis*;

HAVING HEARD the Parties on 5 October 2001, now decides the Motion;

SUBMISSIONS OF THE PARTIES

1. The Defense submit that, in order to efficiently cross-examine and to gauge the credibility of Prosecution detained witnesses GAO, GDD, GDQ and GAP, they require the statements made by the said witnesses before the Rwandan judicial authorities. The Defense further submit that they have been able to obtain the prior statements of witness GAO made before the Rwandan authorities. As a result of the discrepancies between GAO's testimony before the Tribunal and the said prior statements, they request the Chamber to order the re-hearing of GAO on these discrepancies.

2. Additionally, the Defense request that the Chamber order the Prosecutor to obtain from Rwanda, the prior statements of witnesses GDD, GDQ and GAP and disclose them to the Defense because, despite their best efforts, the Defense have been unable to obtain them.

3. The Prosecutor maintains that she has fully complied with her disclosure obligations under the Rules and that if the Defense seek further documents in preparation for their defense, then under the principle of equality of arms, they must themselves make all efforts to obtain that which they seek. She maintains that neither is she obliged under the Rules to obtain documents from National Authorities, nor is she obliged to disclose that which she does not possess.



HAVING DELIBERATED

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4. The Chamber notes that the Defense request the following: (1) the re-hearing of detained witness GAO and (2) the Prosecutor's disclosure of all prior statements of detained witnesses GDD, GDQ and GAP.

As to the Defense request to re-hear detained witness GAO

5. The Defense request the re-hearing of GAO in the interests of justice, following discovery of statements made by said witness before the Rwandan Authorities prior to his testimony before the Tribunal. The Defense maintains that GAO falsely represented himself before the Rwandan Authorities and also before the Tribunal.


6. The Prosecutor objects to the Motion and submits that the Motion seeks to delay the proceedings contrary to the provisions of Rule 90(F)(ii) of the Rules. She maintains that the Defense have not made sufficient showing as to (1) the kind of statements the Defense have obtained in Rwanda, and (2) how the said statements, if particularized, would be useful to the proceedings before the Tribunal.

7. At this juncture, the Chamber recalls Rule 90(G) of the Rules: "Cross-examination shall be limited to points raised in the examination-in-chief or matters affecting the credibility of the witness. The Trial Chamber may, if it deems it advisable, permit inquiry into additional matters, as if on direct examination" (emphasis ours).

8. Furthermore, the Chamber notes the "Decision on the Defense Motion for Disclosure of the Declarations of the Prosecutor's Witnesses Detained in Rwanda, and All Other Documents or Information Pertaining to the Judicial Proceedings in Their Respect," in *Prosecutor v. Nyiramasuhuko et al*, (ICTR-97-21-T) of 18 September 2001 (the "*Nyiramasuhuko Decision*"). In the said Decision, the Chamber was of the opinion at para 6 that, "[s]tatements of Prosecution detained witnesses, including possible confessions, are material to the preparation of the Defence, and for the eventual evaluation of the credibility of said witnesses" (emphasis ours).

9. The Chamber recalls the hearing of GAO's testimony on 24 July 2001 whereby, upon testifying that he had made statements confessing to genocide before the Rwandan Judicial Authorities, GAO volunteered in court to provide the Defense with the said confessional statements. The Defense made a formal request for the said confessional statements to be handed over directly to them in court. The Prosecutor objected to this request as being irregular. With regard to the request by the Defense that GAO provide them with his confessional statements, which he claimed to have with him in Arusha, the Chamber orally ordered the witness to provide these statements to the Parties, in particular to the Defense, through the Registry. The Chamber directed the Registry to obtain the said statements from the witness and to provide them to the Parties, who might then ask the witness relevant questions arising from the said statements.

10. Despite the Chamber's ruling and direction, the Registry informed the Chamber



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that the witness did not in fact have the said confessional statements with him in Arusha. The Chamber proceeded to advise the Defense to make all possible efforts to obtain the said statements, but if unsuccessful, they could seek assistance from the Chamber.

11. The Defense now claim in their Motion to have obtained statements made by GAO before the Rwandan Authorities prior to his testimony before the Tribunal and therefore, requests the Chamber to re-hear GAO in order to demonstrate discrepancies between the said prior statements and GAO's testimony before the Tribunal.

12. The Chamber notes that witness GAO has already given his testimony in court and has been fully examined. It is the view of the Chamber that GAO should only be further cross-examined to answer questions on the alleged discrepancies between the said prior statements and his testimony before the Tribunal.

13. Accordingly, rather than granting the Defense request to re-hear witness GAO, the Chamber orders the recall of GAO so that the Defense can cross-examine the latter on the alleged discrepancies between the statements made before the Rwandan Authorities and his testimony before the Tribunal on 23, 24 and 25 July 2001 in order to test his credibility. The Chamber indicates that the Prosecutor may also ask questions, in re-examination, with regard to the said statements, if she so wishes.

On the Defense Request that the Prosecutor Disclose All Prior Statements of Detained Witnesses GDD, GDQ and GAP

14. As regards prior statements of GDD, GDQ and GAP, the Defense submits that between 18 and 27 September 2001 they were unable to obtain any prior statements of the said witnesses. The Defense argues that in any case, it is the duty of the Prosecutor to obtain the said statements of her witnesses and to make them available to the Defense. The Defense therefore requests that the Chamber order the Prosecutor to obtain the prior statements of GDD, GDQ and GAP and make them available to the Defense.

15. The Prosecutor submits that she has complied with her disclosure obligations under the Rules and cannot therefore disclose that which she does not possess. The Prosecutor maintains that she is not under any obligation to obtain documents under the control of national authorities. Nonetheless, the Prosecutor calls upon the principle of equality of arms and requests that the Defense provide her with the statements once they obtain them from Rwanda.

16. The Chamber notes that in order to make a determination, it must consider the relevancy of these statements, and who bears the responsibility of obtaining these statements from Rwanda.

17. In determining whether the said statements are relevant, the Chamber notes that in preparation for the trial, the Prosecutor would have be expected to find out and obtain all prior statements of detained witnesses that such witnesses might have made in other similar investigations and judicial proceedings, in so far as they could be relevant to the



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issues with which the Chamber is seized.

18. Consequently, it follows that if such statements are expected to be in the possession of the Prosecutor, then the Chamber's jurisprudence in the *Nyiramasuhuko Decision* applies to any statements or documents pertaining to these judicial proceedings that have "[c]ome into the custody or control of the Prosecutor... should be disclosed to the Defense pursuant to Rule 66(A)(ii), and the Defense should be allowed to inspect any other documents pertaining to the judicial proceedings of these detained witnesses pursuant to Rule 66(B)" (emphasis ours).

19. Furthermore, the Chamber is of the view that, falling within the purview of Rule 66(A)(ii) of the Rules, and in the interest of justice, these statements could be material to the preparation of a case and the testing of the credibility of the witnesses pursuant to Rule 90(G) of the Rules. Such statements could also facilitate the Chamber in the eventual evaluation and ascertainment of the truth and of the credibility of the witnesses.

20. In the instant case therefore having decided that these statements are relevant, the Chamber has carefully considered the question as to who bears the responsibility of obtaining the said statements of the Detained Witnesses from Rwanda. The Chamber is of the opinion that since these witnesses were to be called by the Prosecutor in her case against the Accused, it was incumbent upon her to have had, in her possession, the said statements, particularly as the said statements might be used in weighing the credibility of the said witnesses. Accordingly, in the interests of justice, the Chamber finds that the Prosecutor bears the responsibility of obtaining the said statements from the Rwandan Authorities and of providing them to the Defense, pursuant to Rule 66(A)(ii) of the Rules.

21. The Chamber notes that Trial Chamber I, seized with a similar request by the Defense in the *Prosecutor v. Nahimana, Ngeze and Barayagwiza*, Case No. ICTR-99-52-T, (The "*Media Trial*"), issued an Oral Ruling on 4 September 2001 directing that the Prosecutor make every effort to obtain from the Government of Rwanda the records of that witness including plea agreements, the date of conviction and sentences and any confessions that have been filed with the courts as well as the records of all other witnesses she intends to call or have called who are in custody in Rwanda. It is that Trial Chamber's opinion that those records are relevant for cross-examination and that they may curtail extensive cross-examination.

22. Consequently, the Chamber grants the Defense request and orders the Prosecutor to make all efforts to obtain to the extent possible, the prior statements made before the Rwandan Authorities of detained witnesses GDD, GDQ and GAP and to furnish these statements to the Defense.

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FOR ALL THE ABOVE REASONS, THE TRIBUNAL

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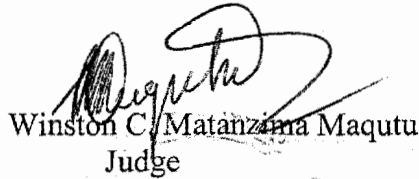
23. **GRANTS** the Motion and:

- (I) **ORDERS** the recall of detained witness GAO so that the Defense may further cross-examine GAO on the alleged discrepancies between his statements made before the Rwandan Authorities and his testimony before the Tribunal;
- (II) **ORDERS** the Prosecutor to make all possible efforts to obtain, and to provide the Defense with the prior statements made before the Rwandan Authorities of detained witnesses GDD, GDQ and GAP.

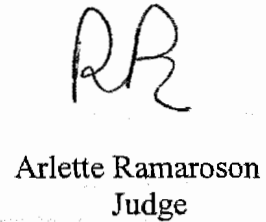
Arusha, 2 November 2001,



William H. Sekule
Presiding Judge



Winston C. Matanzima Maqutu
Judge



Arlette Ramaroson
Judge



(Seal of the Tribunal)