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ICTR-97-29-T
16-4-2002
(4650-4645)

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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

Registry: Adama Dieng

Date: 16 April 2002

The PROSECUTOR

v.

Sylvain NSABIMANA, et al.

Case No. ICTR-97-29-T

2002 APR 18 P 12:08
ICTR

**DECISION ON NSABIMANA'S MOTION TO RETURN TO NSABIMANA'S
DEFENCE DOCUMENTS SEIZED FROM NZABIRINDA AT THE TIME OF
NZABIRINDA'S ARREST**

The Office of the Prosecutor:
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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Winston C. Matanzima Maqutu, and Judge Arlette Ramaroson (the “Chamber”);

BEING SEIZED OF:

- (i) The « *Requête en extrême urgence, aux fins de mesures relatives à certains documents saisis, lors de l’arrestation de l’enquêteur Joseph Nzabirinda le 21/12/2001 à Bruxelles en Belgique* »¹ filed on 24 December 2001 (the “Motion”);
- (ii) The “Prosecutor’s Response to Nsabimana’s Extremely Urgent Motion to Return to Nsabimana Defence Documents Seized from Nzabirinda at the Time of Nzabirinda’s Arrest”, filed on 14 January 2002 (the “Prosecutor’s Response”);
- (iii) The « *Réponse Préliminaire le 14 Janvier 2002 Par le Procureur Sur La Requête en Extrême Urgence Relative aux Documents Saisis Lors de l’Arrestation de L’Enquêteur Nzabirinda* »² filed on 29 January 2002 (the “Defence’s Reply”).

NOTING the “*Décision relative à la requête de la défense aux fins d’obtenir des mesures de protection pour les témoins de la Défense*”³ of 15 February 2000 (The « Decision on Witness Protection ») Case No. ICTR-97-29-I

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

NOW CONSIDERS the matter solely on the basis of the written briefs of the Parties, pursuant to Rule 73(A) of the Rules.

RELEVANT FACTS

1. On 4 December 2001, the Registrar’s Lawyers and Detention Facilities Management Section (LDFMS) terminated the contract of Joseph Nzabirinda (hereafter referred to as “Nzabirinda”) on the basis that he had provided false personal documents to the Tribunal. Nzabirinda worked for the Defence of Sylvain Nsabimana (hereafter referred to as “Nsabimana”).

¹ “Extremely Urgent Motion for Measures Concerning Certain Documents Seized from Investigator Joseph Nzabirinda at the Time of his Arrest on 21 December 2001 in Brussels (Belgium)” Certified Translation by LCSS, ICTR-97-29-T, 11 April 2002

² “Nsabimana’s Preliminary Reply to the Prosecutor’s Response of 14 January 2002 to Nsabimana’s Extremely Urgent Motion to Return to Nsabimana Documents Seized from Nzabirinda at the time of Nzabirinda’s Arrest” Certified Translation by LCSS, ICTR-97-29-T, 11 April 2002

³ “Decision Regarding the Defence Motion to Obtain Protective Measures for Defence Witnesses” (unofficial translation)

2. On 6 December 2001, the LDFMS sent a fax notifying the Defence of Nsabimana of the contract termination.
3. On 13 December 2001, President Pillay confirmed an indictment against Nzabirinda and issued a warrant of arrest. In that warrant, President Pillay requested all States to, *inter alia*:

“**SEARCH AND SEIZE** all physical evidence related to the crimes charged to Joseph NZABIRINDA, create an itemised inventory that is properly witnessed, and acknowledged by the Accused, and transfer said evidence and the inventory to the Office of the Prosecutor in Arusha, Tanzania;”⁴

ARGUMENTS OF THE PARTIES

The Defence of Nsabimana:

- (i) Maintains that all documents seized at the time of arrest concerning the identification and statements of the witnesses for the Defence are under its control;
- (ii) Requests that the Chamber order all seized materials to be placed under seal and returned immediately to the Registry of the Tribunal;
- (iii) Draws the Chamber’s attention to the Decision on Witness Protection, which prohibits the Prosecutor from deliberately undertaking a verification of the identity of a protected witness or participating in such verification⁵;
- (iv) Asserts that the Prosecutor may not make use of any element contained in these documents against the Accused;
- (v) Requests that the Prosecutor make available to it copies of the arrest warrant issued against Nzabirinda and the order for his transfer and provisional detention;
- (vi) Reserves a right to submit a “proper reply” once these documents have been received.

The Prosecutor submits that:

- (i) On or about 21 December 2001, Belgian authorities arrested Joseph Nzabirinda.
- (ii) Upon arresting Nzabirinda in the presence of an investigator of the Office of the Prosecutor, the Belgian authorities seized documents and other tangible items that were in his possession.

⁴ Id., at para. (b), page 2 (emphasis in original). *Prosecutor v. Nzabirinda, Warrant of Arrest and Order for Transfer and Detention*, 13 December 2001, ICTR-2001-77-I (the “warrant of arrest”)

⁵ Decision on Witness Protection, page 8, para. 8 (in French)

- (iii) The seized items remain in the custody of Belgian authorities.
- (iv) Nzabirinda was then transferred to the Tribunal's Detention Facility in Arusha (the "UNDF") on 21 March 2002, and remains unrepresented.
- (v) In relation to the issue as to whether the said seized items are in the possession of the Defence of Nsabimana or not, the Prosecutor submits that it is unclear whether said Defence took any steps to regain any materials from Nzabirinda during the two weeks between termination of his contract and his arrest.
- (vi) The Decision on Witness Protection only addresses the identity of the witnesses and not the seized documents themselves.

Therefore, the Prosecutor:

- (vii) Maintains that she is entitled to a copy of all documents seized once the names of witnesses have been redacted, as ordered by the Chamber in the Warrant of Arrest;
- (viii) Suggests that an *ex parte* and *in camera* proceeding be held before a Judge for the purposes of this redaction, with both representatives of Nsabimana and Nzabirinda present, but that this procedure should not be used for any document that does not relate to the Defence of Nsabimana;
- (ix) Submits that it is in her sole authority and discretion to determine what items seized from Nzabirinda constitute or do not constitute "evidence related to the crimes" within the meaning of the arrest warrant.

DELIBERATIONS

1. In view of the initial scheduled deadline set for replies of 28 January 2002⁶, the Chamber does not deem justified the Defence reservation of a further right to respond. The Chamber considers the "preliminary response" of 29 January 2002, whilst noting the late filing of the said document.
2. The Chamber notes the contention of the Defence that, at the time of arrest and seizure, the documents in question were under its control.
3. The Chamber notes that the arrest warrant against Nzabirinda of 13 December 2001 authorised States to seize all physical evidence relating to the crimes charged against Nzabirinda. Furthermore, it is noted that Defence of Nsabimana does not indicate whether or not it had attempted to recover the documents in question during the period following on from the termination of Nzabirinda's contract, which is a period of approximately two weeks before Nzabirinda's arrest. Allegedly, these documents remained with Nzabirinda. Considering the particular circumstances of the arrest, the Chamber deems that, for those two

⁶ Facsimile Transmission of 15 January 2002 from Court Management Section to Defence and Prosecution; Ref ICTR/JUD-11-6-2-02-2

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weeks, the documents were under the control of the Defence of Nsabimana. However, the privilege of possessing the said documents for two weeks is limited by the duty of the Prosecutor to obtain “all physical evidence related to the crimes charged to Joseph NZABIRINDA” as provided for in Nzabirinda’s warrant of arrest.

4. At this juncture, the Chamber will consider the issue of the protection of witnesses for the Accused Nsabimana. The Chamber recalls that by its Decision on Witness Protection it aimed at providing for the protection of witnesses and potential witnesses in this case.
5. The Chamber notes that both Parties are in agreement that witness identities for the Defence of Nsabimana should not at this stage be disclosed either to the Prosecutor or to the Public.
6. The Chamber recalls the decision on Witness Protection of 15 February 2000. In that decision, the Chamber ordered that “*Les noms, adresses et autres données d’identification des témoins potentiels à décharge, seront communiqués à la seule Section d’aide aux victimes et aux témoins dans le seul but de l’exécution des mesures de protection en faveur des personnes concernées*”⁷. The Chamber also ordered that “*Tout membre du Bureau du Procureur ne pourra communiquer avec un témoin à décharge que si celui-ci est consentant, et sur autorisation expresse de la Chambre ou d’un juge désigné par cette dernière*”⁸.
7. Accordingly, the Chamber finds that information relating to the identity of witnesses or potential witnesses for the Defence of Nsabimana, including witness statements, need not be revealed to the Prosecutor.
8. The Chamber is of the view that, under the warrant, all documents in their original form, which on their face relate solely to Nzabirinda, must be placed in the possession of the Prosecutor.
9. The Chamber finds it appropriate therefore that *ex parte* proceedings, involving representatives of Nsabimana’s Defence and the Registry only, be held, in order that the Registry can supervise the correct allocation of documents. The Chamber finds it appropriate that these proceedings be supervised by a Senior Legal Officer from the Registry.

⁷ page 8, Order 1 “Names, addresses and other information pertaining to identification of potential Defence witnesses will be communicated only to the Witness and Victim Support Section with the singular purposes of executing protective measures for the concerned persons” (unofficial translation).

⁸ page 8, Order 6 “Communication between any member of the Prosecutor’s Office and a Defence witness will be allowed only with the consent of the concerned witness and with the express authorisation of the Chamber or a Judge designated by the Chamber” (unofficial translation).



FOR THE FOREGOING REASONS THE CHAMBER

GRANTS the Defence Motion in the following terms:

ORDERS the Defence of Nsabimana, under the supervision of a Senior Legal Officer from the Registry, to take possession of statements of witnesses and other information identifying witnesses or potential witnesses for the Defence of Nsabimana;

ORDERS that all other documents seized during the arrest of Nzabirinda be handed over to the Prosecutor pursuant to the Warrant of Arrest and Order for Transfer and Detention of 13 December 2001

DENIES the Defence Motion in all other respects.

Arusha, 16 April 2002



William H. Sekule

Presiding Judge



Winston C. Matanzima Maqutu

Judge



Arlette Ramaroson

Judge



[Seal of the Tribunal]