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United Nations  
Nations Unies

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:** 15 November 2002

JUDICIAL RECORDS/ARCHIVES  
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**The PROSECUTOR**

v.

**Juvénal KAJELIJELI**

*Case No. ICTR-98-44A-T*

**DECISION ON KAJELIJELI'S MOTION TO HOLD MEMBERS OF THE  
OFFICE OF THE PROSECUTOR IN CONTEMPT OF THE TRIBUNAL  
(RULE 77(C))**

Office of the Prosecutor  
Mr. Ken C. Fleming, Q.C.  
Ms. Ifeoma Ojemeni

Counsel for the Accused  
Professor Lennox S. Hinds  
Professor Nkeyi M. Bompaka

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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 Defence "Extremely Urgent Motion to Hold Responsible Members of the ICTR Office of the Prosecutor's Staff in Contempt of the Tribunal Pursuant to Rule 77(C) of the Rules of Procedure and Evidence", filed on 10 October 2002 (the "Defence Motion");
- ii. The "Prosecutor's Reply to Defence Motion for Contempt Proceedings Against Prosecutor's Staff Pursuant to Rule 77(C) of the Rules of Procedure and Evidence", filed on 21 October 2002 (the "Prosecution Response");
- iii. The Defence "Motion for Extension of Time to Reply to Prosecutor's Response in the Interests of Justice", filed on 28 October 2002 (the "Defence Motion for Extension of Time Limits");
- iv. The "Defence's Response to Prosecutor's Reply to Defence Extremely Urgent Motion to Hold Responsible Members of the ICTR Office of the Prosecutor's Staff in Contempt of the Tribunal Pursuant to Rule 77(C) of the Rules of Procedure and Evidence", filed on 4 November 2002 (the "Defence Reply");

**CONSIDERING** the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), particularly Rule 77 (C) and Rule 95;

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

**SUBMISSIONS OF THE PARTIES**

1. The Defence request the Chamber to hold responsible staff members of the Office of the Prosecutor in Contempt of the Tribunal, pursuant to Rule 77(C) of the Rules. In the alternative, the Defence request an evidentiary hearing on the issues. The Defence also request an interim order to transfer all detained witnesses for Kajelijeli to Arusha.
2. The Parties are in agreement that on 23 September 2002, Witness RGM was interviewed by a team of Prosecution investigators in Ruhengeri Prison, Rwanda, and that this interview was conducted in violation of the Chamber's Order for Protective Measures for Defence Witnesses which prescribes that the Prosecution notify the Defence prior to contacting one of their protected witnesses<sup>1</sup>.

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<sup>1</sup> Prosecutor v. Kajelijeli, *Decision on Juvénal Kajelijeli's Motion for Protective Measures for Defence Witnesses*, 3 April 2001 (the "Witness Protection Order")

3. The Defence assert that the Prosecution were aware as early as 30 June 2002 that Witness RGM is an extremely vulnerable Defence Witness who has confessed to Genocide in Rwanda, and who has been subject to threats and intimidation to implicate the Accused, and who had previously refused to succumb to these threats. They imply that there exists collusion between the Prosecution and the Rwandan First Deputy Prosecutor Mr. Rukira Wa Muhizi in the visit to the prison by Prosecution Investigators in order to interview Witness RGM. The Prosecution respond that Defence allegations to the effect that staff of the Office of the Prosecutor conspired with Mr. Rukira Wa Muhizi are erroneous and unfounded.
4. The Prosecution claim that on 23 September 2002 their Investigators were unaware that their interviewee was a protected witness for the Defence for Kajelijeli, and that their interviewee stated that he was willing to testify for the Prosecution. Given these circumstances, they claim that the Prosecution Investigators acted in good faith, and lacked the necessary *mens rea* to be guilty of acting in Contempt of an Order of the Chamber.
5. The Prosecution claim that the breach of the Witness Protection Order was innocently made by their investigators. They provide an affidavit of the Lead Investigator from the investigation in question in support of their contention. The Defence contest the Prosecution's submission that the interview with Witness RGM took place in good faith. They provide an affidavit of Witness RGM in support of their contention.
6. The Defence asserts that the statement taken from Witness RGM was illegally obtained, threatens the integrity of the Tribunal, and should be excluded pursuant to Rule 95 of the Rules. The Prosecution claim that the statement was obtained legally and that there are no grounds for exclusion

## DELIBERATIONS

### Preliminary Matter

7. The parties were informed on 14 October 2002 that the Motion would be decided on the basis of written briefs only, pursuant to Rule 73(A) of the Rules. On the 29 October 2002 the Registry informed the Defence that the Chamber granted its request for an extension of time in which to respond. Thus the Chamber, by issuing the scheduling order, rendered moot the Defence application for extension of time.

### Contempt allegation

8. Rule 77(C) of the Rules states that:

Any person who attempts to interfere with or intimidate a witness may be found guilty of contempt and sentenced in accordance with Sub-Rule (A).

*Handwritten initials*

9. The Chamber recalls its reasoning in its “Decision on the Prosecutor’s Further Allegations of Contempt”<sup>2</sup> where it found that:

[C]ontempt is by its very nature a criminal charge, for which an individual may be sentenced to a fine or a term of imprisonment, if found guilty (Rule 77(A) of the Rules). As such, the party alleging that such conduct occurred should satisfy the Chamber that the alleged contemnor(s) acted with an intention to commit the crime of contempt [...]. In this sense, Rule 77(C) of the Rules, which refers to interference with a witness as contempt, is to be construed as prohibiting only undue interference with a witness. Undue interference with the prosecution witnesses who were already contacted could have occurred, in the present case, if the individuals concerned acted in knowing and wilful violation of a witness protection order of this court, or if they tried to intimidate witnesses, as specified under Rule 77(C) of the Rules, or, notably, if they tried to induce them to change their testimony, as the Prosecutor alleges in the present case.

10. In the present case, the Chamber must decide whether or not the Defence has made out a *prima facie* showing of intention by the Prosecution to violate the Witness Protection Order, or whether the conduct of the Prosecution disparages the dignity of the Chamber. If it were so to find, then an evidentiary hearing for contempt charges would be necessary.
11. The Chamber has considered the submissions of the Parties, together with the affidavits attached thereto, and finds that the Defence have failed to show that the Prosecution Investigators deliberately violated the Witness Protection Order.
12. As regards the Defence’s further suggestion of collusion between the Prosecution and the Rwandan Authorities in order to change the testimony of Witness RGM, the Chamber finds these allegations to be unsubstantiated.

Statement of Witness RGM taken by the Prosecution

13. Rule 95 of the Rules states that:

No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

14. The Chamber takes very seriously matters that affect witnesses protected by an Order of the Chamber. The Parties are in agreement that the Prosecution violated the Witness Protection Order. The Chamber has already found that the Defence have failed to make a *prima facie* showing of contempt requiring an evidentiary hearing. However such violation, whether intentional or not, cannot be tolerated by the Chamber. The integrity of the proceedings is protected by the Chamber by means of the Orders that it issues. Violation of the procedure laid down by the Chamber in an Order with regard to the

<sup>2</sup> Prosecutor v. Kanyabashi et al, *Decision on the Prosecutor’s Further Allegations of Contempt*, 30 November 2001.

formalities of contacting protected witnesses for the other side is antithetical to the integrity of, and causes serious damage to, the proceedings.

- 15. In the circumstances of this case, the Chamber finds that it must remedy the situation by excluding the statement taken by the Prosecutor. This finding is made without prejudice to the statement's admissibility in any other case.

**FOR THE ABOVE REASONS, THE TRIBUNAL**

**GRANTS** the Defence Motion in part, and excludes the statement taken by the Prosecution from Witness RGM on 23 September 2002 from all proceedings affecting the Accused before this Tribunal, pursuant to Rule 95 of the Rules.

**DENIES** the Defence Motion in all other respects.

Arusha, 15 November 2002



William H. Sekule  
Presiding Judge



Winston C. Matanzima Maqutu  
Judge



Arlette Ramaroson  
Judge

