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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

Original: English

TRIAL CHAMBER III

Before: Judge Lloyd G. Williams, Q.C., Presiding
Judge Andréia Vaz
Judge Sergey A. Egorov

Registrar: Adama Dieng

Date: 8 August 2003

THE PROSECUTOR

v.

**JOSEPH NZIRORERA
EDOUARD KAREMERA
MATHIEU NGIRUMPATSE
ANDRÉ RWAMAKUBA**

Case No. ICTR-98-44-I

JUDICIAL RECORDS/ARCHIVES
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**DECISION ON THE MOTION BY THE DEFENCE FOR NZIRORERA FOR
DISCLOSURE OF WITNESS STATEMENTS**

Rules 66(A)(ii) and 94 bis of the Rules of Procedure and Evidence

Defence Counsel:
Peter Robinson
Didier Skornicki
David Hooper
Charles Roach, Frédéric Weyl

Office of the Prosecutor
Amanda Reichman

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“Tribunal”),

SITTING in the person of Judge Andréia Vaz, designated by Trial Chamber III pursuant to Rule 73(A) of the Rules of Procedure and Evidence of the Tribunal (“Rules”);

BEING SEISED of the “Defence Motion for Disclosure of Witness Statements,” filed on 4 December 2002 by the Defence for Accused Joseph Nzirorera (“Motion”);

CONSIDERING the “Prosecution Response to Defence Motion for Disclosure of Witness Statements” filed on 26 February 2003 and the Defence “Reply Memorandum: Motion for Disclosure of Witness Statements” of 28 February 2003;

CONSIDERING FURTHER the Pre-Trial Brief in the present case, filed by the Prosecutor on 15 March 2002;

NOW DECIDES the matter solely on the basis of the briefs of the parties pursuant to Rule 73(A) of the Rules.

Submissions of the Parties

Defence

1. The Defence for Nzirorera seeks disclosure of “all of the statements of all witnesses” whom the Prosecutor intends to call to testify at trial. The Defence argues that Rule 66(A)(ii) of the Rules only identifies the 60th day before trial as the last possible date of disclosure. The Defence contends that when witnesses are specifically named and identified by the Prosecutor as likely to be called, their statements should be disclosed as early as possible in advance of this deadline.

2. The Defence for Nzirorera also seeks disclosure of specific witness statements which have not been disclosed. These materials pertain to Prosecution Witnesses G and AEN, Georges Ruggiu, Omar Serushago, André Guichaoua, and Jean Kambanda.

Prosecution

3. In her response, the Prosecutor argues that, under Rule 66(A)(ii), there are no exigencies requiring disclosure in advance of the 60th day before the trial begins. The Prosecutor nonetheless accepts that she is not obliged to wait for the arrival of the 60th day before trial commencement, and that it is desirable for the Prosecutor to disclose witness statements as early as possible.

4. The Prosecutor further states that Witness G is a specially protected witness, and thus none of the material or information requested is automatically available “save for the portions of the materials that are relevant to the case.”

5. The Prosecutor further asserts that she is aware of her obligations regarding the statements of Georges Ruggiu, Omar Serushago, André Guichaoua, Jean Kambanda and

Witness AEN, and “has undertaken to disclose the materials requested by the Defence, and will continue to do so.”

Defence Reply

6. The Defence states that the Prosecutor has failed to “disclose some 5000 pages of testimony” regarding those witnesses referred to in the previous paragraph.

Deliberations

7. Rule 66(A)(ii) requires the disclosure of witness statements “no later than 60 days before the date set for trial.” This date has been consistently interpreted as a final deadline.¹ The rule compels the Prosecutor to disclose her witness statements as early as possible, without waiting for the arrival of the 60th day prior to commencement of trial or for the filing of the Prosecution’s complete witness list. Under the rule, the Prosecution must disclose a witness’ prior statement(s) as soon as it decides to call a specific witness. This obligation is therefore of a continuing nature.

8. The Prosecutor’s Pre-Trial Brief of March 2002 identifies the following witnesses as likely to be called against the Accused: Witnesses G, GAP, GAQ, GAR, GBG, GBC, GDG, GHJ, GHL, and UB, Georges Ruggiu and Omar Serushago. The following additional witnesses are listed as likely to be called against co-Accused Karemera, Ngirumpatse or Rwamakuba: Witnesses ACV, AEN, CN, FS, GBY, GHD, GIJ, GIN, GJA, GK, GLL, GLM, GLN, GLO, HF, NNZ, OZ, QBG, RJ, RO, UAE, UB, VI, QBG, XV and XXC. In the Pre-Trial Brief, the Prosecutor also indicates that she intends to call André Guichaoua and François-Xavier Nsanzuwera as expert witnesses.

9. It appears to the Chamber that the Prosecutor may not yet have complied with her complete disclosure obligations pursuant to Rule 66(A)(ii), even though she made her choice as to witnesses she intends to call more than a year ago. This is surprising, considering the Prosecutor’s own statement in the Pre-Trial Brief that “[d]isclosure of all statements of all witnesses whom the Prosecutor intends presently to rely upon at trial has been provided to the Defence.”²

10. In the Chamber’s opinion, the Prosecutor must disclose, without further delay, the statements of all the witnesses whose names or pseudonyms appear in the Pre-Trial Brief whom she intends to call at trial.

¹ See *Prosecutor v. Paul Bisengimana*, Case No. ICTR-2000-60-I, Decision on Bisengimana’s Motion for Disclosure of Materials (Rule 66(A)(i)), 28 March 2003, para. 9; *Prosecutor v. Jean Mpambara*, Case No. ICTR-2001-65-I, Decision (Defence Motion for Disclosure of Documents and Objections Regarding the Legality of Procedures), 28 February 2002, para. 24; *Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Defence Motion for Disclosure of Evidence, 1 November 2000, para. 40; *Prosecutor v. Emmanuel Bagambiki et al*, Case No. ICTR-97-36-I, Decision on the Defence Motion for Disclosure in Respect of Samuel Imanishimwe, 21 October 1998, p. 4.

² Pre-Trial Brief at para. 128. The Prosecutor identifies the expert report of André Guichaoua as the one statement that had not been handed over, and submitted that it would be delivered as soon as she obtained it.

11. The disclosure obligation extends to statements made by all witnesses to be called in the joint trial, even where they are testifying with respect to co-Accused.³ The Prosecutor should therefore disclose to the Defence for Nzirorera the statements of all the witnesses named in the Pre-Trial Brief, including those only expected to testify against the co-Accused.

12. Furthermore, the principle of *beneficium cohaesionis* requires that when a remedy is granted to one Accused, that remedy should be extended, where equal reasons apply, to the other co-Accused.⁴ Consequently, the Chamber extends this decision to Nzirorera's co-Accused, Édouard Karemera, Mathieu Ndirumpatse and André Rwamakuba.

13. As regards the expert witnesses the Prosecutor intends to call, the Chamber recalls that Rule 94 *bis* requires that disclosure of the statements of expert witnesses be made "as early as possible" and that the rule provides no pre-trial deadline as in Rule 66(A)(ii).

14. The Chamber further notes the ambiguous nature of the Prosecutor's claim that the statements of Witness G are not "automatically available to the Defence save for the portions of the material that are relevant to the case." If this witness is to appear at trial for the Prosecution, as indicated in the Pre-Trial Brief, his or her prior statements should be disclosed.

15. The Chamber finally notes that some of the witnesses listed in the Pre-Trial Brief have appeared at trial in other cases. Witnesses AEN, FS, WD, X, Nsanzuwera, Ruggiu and Serushago appeared in the "*Media*" trial,⁵ and Witnesses GAP and GBG appeared in the *Kajelijeli* trial.⁶

16. Trial Chamber I in the *Media* case, made available to this Chamber the closed session transcripts and exhibits under seal relating to Witnesses AEN, FS, WD, X, Nsanzuwera, Ruggiu, and Serushago.⁷ That Chamber also requested that the present Chamber determine the date and manner in which these documents should be disclosed to the Defence for Nzirorera, and coordinate with the Registry as to such disclosure. Trial Chamber I further ordered that the protective measures in place concerning the witnesses in the *Media* Case remain in force and apply *mutatis mutandis* to the Defence for Nzirorera. Trial Chamber I finally ordered that the documents be treated as confidential material to be kept under seal.

17. The present Chamber notes that testimonies given by witnesses in other proceedings before the Tribunal fall under the Prosecutor's obligation of disclosure under Rule 66(A)(ii). This order therefore sets the deadline envisioned in the Trial Chamber I Decision in respect of the closed session testimony and related sealed exhibits in the *Media* Case to the Defence for Nzirorera. In light of the principle of *beneficium cohaesionis*, the disclosure ordered by Trial Chamber I will be extended to Nzirorera's co-Accused.

³ See *Prosecutor v. Nyiramasuhuko and Ntahobali*, Case No. ICTR-97-21-T, Decision on Defence Motion for Disclosure of Evidence, 1 November 2000, para. 33.

⁴ See *Prosecutor v. Théoneste Bagosora et al*, Case No. ICTR-98-41-T, Decision on Defense Motions of Nsengiyumva, Kabiligi, and Ntabakuze Challenging the Prosecutor's Pre-Trial Brief and on the Prosecutor's Counter-Motion, 23 May 2002, para. 11.

⁵ *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-T.

⁶ *The Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T.

⁷ Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received under Seal, 5 June 2003 (Confidential Decision).

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18. A similar motion filed by the Defence for Nzirorera is currently pending before Trial Chamber II, regarding witnesses on the Prosecutor's list in the present Case who appeared in the *Kajelijeli* trial. Should Trial Chamber II, as trial Chamber I did in the *Media* Case, decide to hand over to this Chamber the transcripts of closed session testimony and related exhibits from witnesses GAP and GBG, who testified in the *Kajelijeli* Case, this order shall be held to extend to these materials as well.
19. The Chamber adds that the Prosecutor should liaise with the Registry with respect to the material filed under seal or presented in closed session in other proceedings in order to carry out this disclosure as soon as possible, if necessary in a redacted form, where temporary non-disclosure of the identity of a witness or victim so requires pursuant to the applicable protection orders.
20. If the Prosecutor considers that some of the materials referred to in this decision are subject to an exception to disclosure, she may apply to the Chamber for leave not to disclose them, with supporting justifications, within 15 days of the date of this decision.
21. The Chamber emphasizes that the disclosures herein remain subject to the necessary temporary redactions pursuant to the applicable protective measures for victims and witnesses.
22. Should the Prosecutor decide not to call a particular witness listed in the Pre-Trial Brief, then she should notify the Chamber and the Defence within 10 days of the date of this decision. Disclosure of the prior statements of any such witnesses will in that case be made on the basis of Rule 66(B), to the extent that these statements, or part of these statements, refer to one or another co-Accused in the present case.

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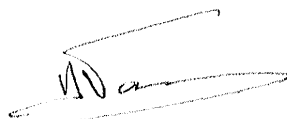
FOR THE FOREGOING REASONS,

THE TRIBUNAL

I. ORDERS, pursuant to Rule 66(A)(ii) of the Rules, that the Prosecutor disclose within 15 days to each of the Accused Karemera, Ndirumpatse, Nzirorera and Rwamakuba, copies of the statements of all the witnesses referred to in the Pre-Trial Brief whom she intends to call at trial which remain to be disclosed, subject to the redactions necessary pursuant to the applicable non-disclosure orders regarding the identity of protected victims and witnesses; and

II. FURTHER ORDERS that the Prosecutor continue to disclose to the Defence the statements of witnesses as she decides who she will likely call to testify.

Arusha 8 August 2003



Andrézia Vaz
Judge

(Seal of the Tribunal)

