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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 Khalida Rachid Khan

Registrar: Adama Dieng

Date: 13 October 2003

JUDICIAL REGISTRATION DIVISION
ICTR
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THE PROSECUTOR

v.

JOSEPH NZIRORERA et al.

Case No. ICTR-98-44-I

**DECISION ON DEFENCE THIRD MOTION FOR RETURN OF
PROPERTY AND SANCTIONS FOR VIOLATION OF COURT ORDER**

Counsel for the Accused:
Peter Robinson and Dior Diagne

Counsel for the Co-Accused:
Didier Skornicki and John Traversi
David Hooper and Andreas O'Shea
Charles Roach and Frédéric Weyl

Office of the Prosecutor:
Don Webster
Tamara Cummings-John

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

SITTING as Trial Chamber III, composed of Judges Lloyd G. Williams, Q.C., Presiding, Andréia Vaz and Khalida Rachid Khan (“Chamber”);

BEING SEIZED of the “Third Motion for Return of Property and Sanctions for Violation of Court Order” filed on 16 January 2003 by the Defence for Accused Joseph Nzirorera (“Motion”);

CONSIDERING the Prosecutor’s Response to the Motion, filed on 30 July 2003 (“Response”) and the Defence Reply to the Response, filed on 11 August 2003 (“Reply”);

CONSIDERING the Statute of the Tribunal (“Statute”) and the Rules, particularly Rule 41(B) of the Rules of Procedure and Evidence (“Rules”);

NOW REVIEWS the Motions, pursuant to Rule 73(A) of the Rules, solely on the basis of the written briefs filed by the Parties.

I. Background

1. Following a Defence objection to the legality of the search of Joseph Nzirorera’s residence and seizure of materials at the time of the Accused’s arrest in Cotonou, Bénin, in 1998, Trial Chamber II of the Tribunal ordered on 7 September 2000 that an inspection of the items seized take place, that the seals on all items seized be removed during the inspection in the presence of the Defence, and that an inventory of the items seized be made and signed by the parties on that occasion.¹

2. In the Decision of 7 September 2000, Trial Chamber II further directed the Prosecutor, within sixty days from the date of the inspection, to return all documents and property seized which it did not intend to use as evidence against the Accused or which the Prosecutor did not intend to retain for the purposes of investigation and prosecution.

3. The inspection referred to at paragraph 1 above occurred on 5 August 2002. On the same day, the inventory of items seized was made and signed by the parties. A copy of the inventory is attached to the Motion. The inventory covers items referenced KA00-1000 to KAD-6146 save for some omissions, with correlating description and status of inspection by the Defence.²

4. Following the inspection, the Defence filed a motion seeking return of all property seized, and asked for the restitution of property which, the Defence alleged, had been lost since the search and seizure. The Defence objected that the Prosecutor had not returned any of the items that were inspected, contrary to the Order of 7 September 2000. The Defence further objected to the removal of the seals on the items that were seized, in its absence, prior to the inspection and contrary to the Order of 7 September 2000.

5. A decision was rendered on 13 December 2002 by Trial Chamber I of the Tribunal on this Defence motion. Trial Chamber I ordered the Prosecutor to return all items that he did

¹ *Prosecutor v. Nzirorera*, ICTR-98-44-T, Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized (TC), 7 September 2000 (“Decision of 7 September 2000”).

² See Annexure I to the Motion.



not intend to use as exhibits in the trial of the Accused within 30 days. Trial Chamber I further directed the Prosecutor to provide the Defence with a copy of all the materials retained as evidence.

II. First Request, for Return of Items Seized of no Evidentiary Value and Sanction Against the Prosecutor for Non-compliance with Two Court Orders and Rule 41(B) of the Rules

A) Parties' Submissions on First Request

Motion

6. The Defence objects that the Prosecutor has not, to the date of filing of the present motion, returned any items from the list of materials seized, contrary to the Prosecutor's obligation to return to the Accused all materials that are of no evidentiary value without delay, pursuant to Rule 41(B) of the Rules, and despite the Orders of 7 September 2000 and 13 December 2002.³

7. The Defence therefore renews its request for return of all materials of no evidentiary value seized in 1998 and asks for sanctions against the Prosecutor for failing to take the necessary steps to determine from among the materials seized those which are of relevance to the trial from those that are not.

Response

8. The Prosecution acknowledges that, at the time of the filing of the Motion, none of the items originally seized in 1998 had been returned to the Accused, as he deemed all of them to be necessary for the purposes of trial or investigation.

9. The Prosecutor adds that this internal decision was consistent with the Decision of 7 September 2000 and that he has authorized the return of some of the items seized, on 8, 13 and 29 July 2003 respectively.

10. The Prosecutor nonetheless acknowledges that he has failed to comply with the Orders of 13 December 2002 to, (i) return the property listed at Annex A to the Decision and, (ii) serve upon the Defence copies of all items seized from the Accused which are retained as evidence by the Prosecutor within 30 days.

11. With regard to Order (ii) above, the Prosecutor submits that the Defence received a copy of "almost all seized items" on 27 September 2002. The Prosecutor apologises to the Chamber and to the Defence for the delay in complying with Order (i) above, and specifies that the return of the items in question was authorized on 13 July 2003. The Prosecutor adds that, despite the delay in fully complying with all the Orders, no prejudice was caused to the Defence since none of the materials are exculpatory, within the meaning of Rule 68 of the Rules, and since they have little probative value. Hence, according to the Prosecutor, there is

³ Rule 41 of the Rules, entitled Preservation of Information, reads as follows:

(A) The Prosecutor shall be responsible for the preservation, storage and security of information and physical evidence obtained in the course of his investigations.

(B) The Prosecutor shall draw up an inventory of all materials seized from the accused, including documents, books, papers, and other objects, and shall serve a copy thereof on the accused. Materials that are of no evidentiary value shall be returned without delay to the accused."

little justification for imposing sanctions, particularly the extreme sanction requested by the Defence, namely the return of all property seized from the Accused.

Reply

12. The Defence objects that the Prosecutor has not yet returned any property, although it has indicated that it is prepared to do so. The Defence submits that property from the Accused has been lost or has gone missing, including a computer and MRND materials containing exculpatory evidence. The Defence states that the Prosecutor has offered no explanation for his repeated non-compliance with Rule 41(B) and with the Orders of 7 September 2000 and 13 December 2002.

B) Deliberations on First Request

13. The Chamber notes that the Prosecutor acknowledges a delay in fully complying with Orders (i) and (ii) of 13 December 2002, without providing a satisfactory explanation thereto. The Chamber notes the Prosecutor's apology, but is concerned with his lack of diligence. The Chamber emphasises that it is absolutely essential that the orders of Trial Chambers be complied with. If he has not yet done so, the Prosecutor should fully comply with Orders (i) and (ii) of the Decision of 13 December 2002 within 10 days from the date of this Decision. The Prosecutor's lack of compliance however appears to have been unintentional. In the absence of a substantial prejudice to the Accused shown by the Defence, the Chamber dismisses the Defence Requests for sanctions against the Prosecutor.

14. The Chamber is not able to make a determination in respect of the Defence's claim that property has been lost or has gone missing since the seizure of evidence in 1998, in view of a lack of evidence thereof.

III. Second Request, for Sanctions Against the Prosecutor for Removing the Seals Outside of the Presence of the Defence

A) Parties' Submissions on Second Request

Motion

15. The Defence contends that, in the Decision of 13 December 2002, Trial Chamber I omitted to respond to the first prong of the Defence requests and submissions in its previous motion for return of property.

16. The Defence therefore reiterates that the Prosecutor has broken the seals on the materials seized in 1998 outside of the presence of the Defence, in contradiction with the Order of 7 September 2000. The Defence contends that the Chamber is yet to decide on its request for the return of all the materials seized at the Accused's residence in 1998 which are currently in her custody or control, as a sanction against the Prosecutor.

Response

17. The Prosecutor acknowledges that, at the time of inspection referred to at paragraph 1 above, the seals had already been removed from the items seized.



18. The Prosecutor however maintains that the seals were broken before the Order of 7 September 2000:

(i) At some point in time, by officials of the Registry of the International Criminal Tribunal for the former Yugoslavia ("ICTY") in The Hague, who were seeking to identify the contents of several bundles of materials received by diplomatic pouch; and,

(ii) On 21 June 2000, by officials of the Registry of the Tribunal in Kigali, for the same reasons as indicated in sub para (i) above, and for dispatching the materials received to their intended recipients.

19. The Prosecutor attaches an Affidavit signed by Ms. Maria Warren, Chief of the Information and Evidence Support Section of his Office ("IESS") detailing the chain of custody of the Nzirorera seizures of 1998 ("Affidavit").

20. The Prosecutor further acknowledges that, on 29 November 2000, after the seals were broken, Legal Advisors in the Office of the Prosecutor, acting under authorisation from the competent authority, inspected the contents of the Nzirorera seizures in the context of a routine procedure within the mandate of the IESS, aiming at ensuring the integrity of the seizures and at documenting the chain of custody. The Prosecutor emphasises that Rule 41 of the Rules does not require the presence of the accused for the opening and inspection of evidence seized.

Reply

21. The Defence submits that the Prosecutor's submission that the seals had already been removed at the time of the Order of 7 September 2000 contradicts his suggestion, at the time when the Order was being considered that the seals be removed in the presence of the Defence.⁴ According to the Defence, the Prosecutor must have known that the seals were broken at the latest on 29 November 2000 when he inspected the property in Arusha. The Defence suggests that the Prosecutor should have notified the Chamber and the Defence and sought modification of the Order of 7 September 2000. The Defence urges the Chamber to sanction the Prosecutor for his lack of diligence and suggests that the sanction be the exclusion of all seized property as evidence at trial.

B) Deliberations on Second Request

22. Ms. Warren being the Chief of the IESS, the Chamber considers her competent to file the Affidavit and accepts its contents.

23. The Chamber further accepts the Prosecutor's explanations in respect of the breaking of the seals on the items seized at the Accused's residence in 1998, and notes that Trial Chamber II's Order of 7 September 2000 could not have been complied with at the time when the inspection occurred. The Chamber notes the Prosecutor's claim that, at the hearing of 2 June 2000 on the first Defence Motion requesting restitution of property seized from the Accused, he was unaware that the seals had been broken. The Chamber further observes that the breaking of the seals appears to have been inadvertent. Although unfortunate, it was not shown to have caused prejudice to the Accused. However, the Accused will be in a position

⁴ Referring to the Chamber's Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting Return of Personal Items Seized rendered in the present case, 7 September 2000 at para. 32.



to raise at trial any matters pertaining to this issue. The request for a sanction against the Prosecutor in respect of the breaking of the seals therefore falls to be dismissed.

24. The Chamber notes that, in future, Prosecution evidence under seal should be distinctly marked as such, and that a caution should be added forbidding unauthorised breaking of the seals.

IV. Anticipated Objections pursuant to Rule 95 of the Rules

A) Parties' Submissions on Anticipated Objections

25. A previous Defence objection to the admission of the items seized from the Accused's residence in 1998 pursuant to Rule 95 of the Rules was dismissed as premature by Trial Chamber II in the Decision of 7 September 2000. The Defence therefore warns that, should the seized items not be returned in totality to the Accused, it would challenge at trial the admissibility of each of the items seized.

26. The Prosecutor maintains in response that the seizures were properly carried out, and that the items seized were properly kept.

B) Deliberations

27. The Chamber considers that this is an issue to be raised and determined at trial.

V. Third Request, for an Evidentiary Hearing on the Two First Requests, the Circumstances Surrounding the Seizure of Materials from the Residence of the Accused in 1998 and the Prosecutor's Custody of These Materials Since 1998.

A) Parties' Submissions on Third Request

Motion

28. The Defence finally requests an evidentiary hearing before the Chamber concerning the circumstances of the seizure, custody and maintenance of the Accused's property by the Prosecutor, the removal of the seals by the Prosecutor outside of the presence of the Defence and the Prosecutor's repeated failure to return any property to the Accused.

Response

29. The Prosecutor responds that there is no need for an evidentiary hearing. The Prosecutor reiterates that he has maintained proper custody of the seized items following standard office procedures for the safeguarding of evidence in conformity with Rule 41 of the Rules.

Reply

30. Regarding the Affidavit of the Chief of IESS, the Defence objects that Mrs. Warren has no personal knowledge of the events, and that she has not provided supporting evidence to her claims. The Defence concludes that this affidavit merely tends to indicate that the

integrity of the seized items was maintained.⁵ Since part of Mr. Nzirorera's property was lost since the seizure in 1998, the Defence doubts the Prosecutor's assertion that he has maintained proper custody of the seized items.

31. The Defence adds to the request for an evidentiary hearing that the Chamber ought to order the Prosecutor to disclose all reports, inventories, receipts, and memoranda concerning the seizure and maintenance of Mr. Nzirorera's property 30 days in advance of such a hearing.

B) Deliberations on Third Request

32. The Parties have had the opportunity to submit the arguments they deemed necessary. As emphasised in an opening paragraph to the present Decision, the Chamber has deliberated on the basis of the Parties' written submissions, as envisioned in Rule 73(A) of the Rules. The Defence request for an evidentiary hearing is therefore dismissed.

33. Should the Prosecution have reports, inventories, receipts or memoranda concerning the seizure and maintenance of Mr. Nzirorera's property, such material should be disclosed to the Defence as soon as possible, subject to the respective provisions of the Rules.

FOR ALL THE ABOVE REASONS,

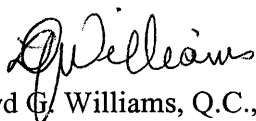
THE CHAMBER

I. ORDERS the Prosecutor to comply with the Orders of previous Trial Chambers within 10 days from the date of this Decision, if he has not yet done so;

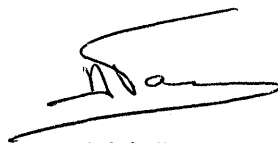
II. ORDERS the Prosecutor to disclose to the Defence all reports, inventories, receipts or memoranda concerning the seizure and maintenance of Mr. Nzirorera's property, if in the Prosecutor's custody or control, subject to the respective provisions of the Rules;

III. DISMISSES the Motion in all other respects.

Arusha, 13 October 2003



Lloyd G. Williams, Q.C.,
Presiding Judge



Andréia Vaz
Judge



Khalida Rachid Khan
Judge

(Seal of the Tribunal)



⁵ Affidavit at para. 3.