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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: 20 October 2003

JUDICIAL DEPARTMENT
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THE PROSECUTOR

v.

JOSEPH NZIRORERA *et al.*

Case No. ICTR-98-44-I

**DECISION ON THE DEFENCE NOTIFICATION OF FAILURE TO
COMPLY WITH TRIAL CHAMBER ORDER AND MOTION FOR
REMEDIAL MEASURES**

Counsel for the Accused:
Peter Robinson and Dior Diagne

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

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Don Webster
Dior Fall
Ifeoma Ojemeni
Simone Monasebian
Holo Makwaia
Tamara Cummings-John

[Signature]

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 SEISED of the “Notification of Failure to Comply with Trial Chamber Order and Motion for Remedial Measures”, filed on 5 September 2003 by the Defence for Accused Joseph Nzirorera (“Motion”);

CONSIDERING the Prosecution Response to the Motion, filed on 8 September 2003 (“Response”) and the Defence Reply to the Response, filed on 22 September 2003 (“Reply”);

CONSIDERING the Prosecution Pre-Trial Brief, filed in the present Case, pursuant to Rule 73*bis* of the Rules of Procedure and Evidence (“Rules”), on 15 March 2003;

CONSIDERING the Decision on the Motion by the Defence for Nzirorera for Disclosure of Witness Statements, rendered in the present Case on 8 August 2003 (“Decision of 8 August 2003”), in which the Chamber ordered the Prosecutor:

(i) To disclose to Accused Karemera, Ngirumpatse, Nzirorera and Rwamakuba, copies of the statements of all the witnesses referred to in the Pre-Trial Brief whom he intended to call at trial which remained to be disclosed, subject to the redactions justified pursuant to the applicable non-disclosure orders regarding the identity of protected victims and witnesses (“Order I of 8 August 2003”); and

(ii) To notify the Chamber and the Defence, within 10 days of the date of the Decision, if he decides not to call a particular witness listed in the Pre-Trial Brief (“Order II of 8 August 2003”).¹

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

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

Parties’ Submissions*Motion*

1. The Defence alleges that the Prosecutor is in violation of both Orders of 8 August 2003, in that he has neither disclosed further witness statements nor notified the Defence of witnesses listed in the Pre-Trial Brief which he did not intend to call. According to the Defence, three remedial measures would address the Prosecutor’s non-compliance and ensure that such conduct is not repeated, namely, exclusion of the testimony of all witnesses for whom disclosure has not been made; a ruling of contempt pursuant to Rule 77(A)(iii) of the Rules and a warning pursuant to Rule 46(A) of the Rules.

¹ Decision of 8 August 2003, para. 22.

Response

2. The Prosecutor responds that, at the time of the filing of the Response, he had "substantially" complied with the Chamber's Orders of 8 August 2003 and that, if lapses occurred, he has not wilfully disobeyed them.

3. The Prosecutor specifies, regarding Order I of 8 August 2003:

(i) That he has not yet provided the Accused with statements of only three witnesses, Jean Kambanda, Georges Ruggiu and Witness G.

(ii) That these three witnesses occupy a special status with his Office, in that they have agreed to cooperate with him; that Jean Kambanda and Georges Ruggiu pleaded guilty before the Tribunal for crimes within its jurisdiction, were convicted and are serving the sentence imposed upon them by the Tribunal, while Witness G is a confidential informant;

(iii) That none of these witnesses have made a formal statement, but that they have provided the Prosecutor with "unorthodox statements" consisting in the transcripts of extensive tape-recorded interviews;

(iv) That these interviews will be the subject of a forthcoming Prosecutor's motion to limit disclosure to selected portions of their transcripts, while Witness G will be the subject of a forthcoming request for special protective measures;

(v) That Order I of 8 August 2003 should be modified so as to allow the Prosecutor:

(a) To serve copies of the transcribed interviews of Jean Kambanda and Georges Ruggiu on the Accused by 16 September 2003, the date of an anticipated meeting with the Defence for the Accused;

(b) To withhold service of copies of the transcribed interviews with Witness G pending the anticipated resolution of a Prosecutor's motion for special protective measures;

(vi) That he respectfully apologizes for any unintended inference that he was not mindful of the Chamber's Order; but also,

(vii) That the Accused has not suffered and will not suffer any prejudice from the withholding of the disclosure in respect of these three witnesses, since trial has not yet commenced, so that none of the remedial measures proposed by the Defence are warranted in his case.

Reply

4. The Defence does not refer to the meeting of 16 September 2003 with the Prosecutor, as anticipated by the latter in his Response. The Defence however replies, essentially:

(i) That the Prosecutor has not yet provided the statements of Witnesses Jean Kambanda and Georges Ruggiu as he proposed to, in the Response;

(ii) That the Prosecutor has claimed since September 2002 that special protective measures would be requested for Witness G but that he has never done so;

(iii) That, pursuant to Rule 66(A)(ii), the prior statements of all intended prosecution witnesses ought to have been filed 60 days before trial; that, accordingly, Witness G's statements should have been disclosed by the Prosecutor on 4 September 2003; and that the Prosecutor's failure to seek leave not to disclose this witness' prior statements before that

deadline amounts to a waiver from the Prosecutor's right to seek special protective measures for Witness G;

(iv) That the Prosecutor wrongly declares, as summarised at para. 5(i) above, that all the prior statements of the 37 witnesses other than Kambanda, Ruggiu and "G" have been disclosed, in that:

(a) He has not yet disclosed a prior statement of Witness GAP, dated 2002;

(b) He has refused to disclose the cassettes of the interviews of Witness Omar Serushago;

(v) That the Prosecutor cannot add to his list any new witnesses whose statements have not been disclosed within the deadline stipulated in Order I of 8 August 2003;

(vi) That the Chamber should consider a pattern of violations of Trial Chambers Orders and Rules by the Prosecutor in this and other cases.²

Deliberations

5. The Chamber notes the Prosecutor's statement that, as of the filing of his Response, he had not provided the Accused with the prior statements of Prosecution Witnesses Jean Kambanda, Georges Ruggiu and Witness G. The Prosecutor has therefore failed to comply with Rule 66(A)(ii) of the Rules, pursuant to which these statements were to be disclosed no later than 60 days prior to trial, that is, no later than 3 September 2003, and with the Order of 8 August 2003. His claim that these three witnesses occupy a special status with his Office affords no explanation to the violation. Neither does his claim that the statements collected from these witnesses are "unorthodox". Nothing in the text of Rule 66(A)(ii) allows for differentiating the witness statements in the Prosecutor's control or custody on the basis of the form in which these statements exist. Transcripts of tape-recorded interviews of prosecution witnesses are prior statements within the meaning of Rule 66(A)(ii). The fact that the Prosecutor considered that exceptions to his obligation to disclose these statements applied under the Rules in the present case, presumably pursuant to Rule 66(C), is of no consequence. The Prosecutor should have seised the Chamber of a request to be relieved from his obligation to disclose these statements prior to the deadlines.

6. Considering a Memorandum sent by the Prosecutor to the Defence and the Court Management Section of the Tribunal, the Prosecutor appears to have since complied with Rule 66(A)(ii) and the Order of 8 August 2003 in respect of the prior statements of Jean Kambanda and Georges Ruggiu.³

² Referring, (i) in the present Case, to the Prosecutor's alleged admission of violation of two orders of the Chamber requiring the return of the Accused's property and the removal of the seals on the items seised at the Accused's residence in Benin in 1998 outside of the presence of the Defence, in the "Prosecutor's Response to Joseph Nzirorera's Third Motion for Return of Property and Sanctions for Violation of Court Order", filed on 30 July 2003; (ii) in the present Case also, to the Prosecutor's repeated violations of the Rule 73(E) requirement that the party concerned file any response to the other party's motion within five days from the date when the motion is received; (iii) in other cases, essentially to a warning delivered by Trial Chamber II of the Tribunal pursuant to Rule 46 of the Rules "to the same prosecution team", according to the Defence, in *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, Decision on Prosecutor's Motion to Correct Indictment dated 22 December 2000 and Motion for Leave to File an Amended Indictment & Warning to the Prosecutor's Counsels Pursuant to Rule 46(A) (TC), 25 January 2001.

³ Interoffice Memorandum entitled, "Disclosure of CD containing Serushago, Ruggiu and Kambanda Interview Transcript and Redacted Witness Statement of ZF", dated 26 September 2003.

7. Besides, the Chamber has rendered a Decision granting exceptional measures aiming at ensuring the safety of Witness G. Pursuant to that Decision, Witness G's prior statements are to be disclosed within five days to the Defence, in a redacted form.⁴

8. Considering the above, the Prosecutor's request for a modification of the Order of 8 August 2003 is moot.

9. The Accused's right to receiving timely disclosure pursuant to Rule 66(A)(ii) has been violated, and the Prosecutor's failure to comply with Order I of 8 August 2003 is evident. The Chamber deplores the Prosecutor's failure to comply with Rule 66(A)(ii) and to abide by the Order of the Trial Chamber in a timely manner.

10. Furthermore, considering that neither Witness G, nor Jean Kambanda, nor Georges Ruggiu are to testify during the first trial session, which is scheduled to commence on 3 November 2003, the Chamber is not satisfied that the Accused suffered prejudice as a result of the delayed disclosure.⁵ These witnesses should not be called to testify until 60 days from the date of this Decision. This ought to satisfy any grievances of the Defence.

11. The Chamber invites the Prosecutor to verify the status of Rule 66(A)(ii) disclosures in respect to Witness GAP's statements. Furthermore, as stated above, nothing in the text of Rule 66(A)(ii) allows for differentiating between witness statements on the basis of the form in which they are available to the Prosecutor. Witness statements recorded on audio or video tapes, if they exist in such form, are to be disclosed pursuant to that Rule. The Chamber therefore orders the Prosecutor to disclose to the Defence the cassettes of Omar Serushago's interview(s), if these cassettes have not yet been disclosed. The Chamber however considers that Rule 66(A)(ii) has substantially been complied with in respect of Witness Omar Serushago's prior statement(s), in view of the Defence acknowledgement that the transcripts of this witness' interview(s) were disclosed.

12. Finally, the Chamber notes that Rule 73bis(E) of the Rules allows the Prosecutor to amend his list of witnesses without the Chamber's leave until trial commences, notwithstanding his obligation to disclose witnesses' prior statements under Rule 66(A)(ii). Where prosecution witnesses are added to his list after the deadline of 60 days prior to trial, as in the present case, the Prosecutor is expected to disclose the prior statements of additional witnesses as soon as possible. The Prosecutor is hereby reminded of his obligations in this regard.

⁴ Decision on the Prosecutor's Motion for Special Protective Measures for Witnesses G and T; and to Extend the Decision on Protective Measures for Prosecution Witnesses in the Nzirorera and Rwamakuba Cases to Co-Accused Ngirumpatse and Karemera; and Defence Motion for Immediate Disclosure, rendered in the present Case on 20 October 2003, Order 7.

⁵ See Prosecutor's Final Witness List, 10 October 2003, para. V, p. 4.

FOR THE ABOVE REASONS,

THE CHAMBER,

I. DEPLORES the Prosecutor's lack of compliance with Rule 66(A)(ii) of the Rules and with Order I of 8 August 2003.

II. ORDERS the Prosecutor, pursuant to Rules 54 and 66(A)(ii) of the Rules, to verify the status of the disclosures made with respect to Witness GAP's statement(s), and to disclose to the Defence, the cassettes of Prosecution Witness Omar Serushago's interview, if he has not yet done so;

III. DISMISSES the Motion in all other respects.

Arusha, 20 October 2003



Lloyd G. Williams, Q.C.,

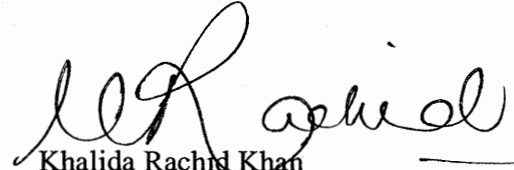
Judge

Presiding



Andréia Vaz

Judge



Khalida Rachid Khan

Judge

(Seal of the Tribunal)

