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(23728-23724) *ump*



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Emile Francis Short
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 14 September 2005

THE PROSECUTOR

v.

**Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-PT

2005 SEP 14 P 2:55
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**DECISION ON MOTIONS TO COMPEL INSPECTION AND DISCLOSURE AND
TO DIRECT WITNESSES TO BRING JUDICIAL AND IMMIGRATION RECORDS**

Rules 54, 66(B) and 98 of the Rules of Procedure and Evidence

Office of the Prosecutor:
Don Webster
Gregory Lombardi
Iain Morley
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Dior Diagne Mbaye and Félix Sow
Defence Counsel for Mathieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl
Defence Counsel for Joseph Nzirorera
Peter Robinson

[Handwritten initials]

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

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Emile Francis Short and Gberdao Gustave Kam, (“Chamber”);

BEING SEIZED of Joseph Nzirorera’s “Second Motion to Compel Inspection and Disclosure,” filed on 14 July 2005 (“Motion on Inspection and Disclosure”);

CONSIDERING the Prosecution’s Response to the Motion and the Defence Reply filed respectively on 20 and 22 July 2005;

BEING ALSO SEIZED of Joseph Nzirorera’s “Motion for Order Directing Witnesses to Bring Judicial and Immigration Records” (“Motion on Judicial and Immigration Records”), filed on 14 July 2005;

CONSIDERING the Prosecution’s Response to the Second Motion filed on 25 July 2005, and the Defence Reply thereto, filed on 26 July 2005.

HEREBY DECIDES the Motion pursuant to Rules 54, 73 and 98 of the Rules of Procedure and Evidence (“Rules”) on the basis of the written submissions.

INTRODUCTION

1. The trial in the instant proceedings is scheduled to begin during the course of September 2005. On 5 July 2005, the Chamber decided a motion filed by the Defence for Nzirorera (“Defence”) to compel inspection and disclosure, which requested the inspection and disclosure of different documents and information.¹

2. The Defence now submits these Motions after its attempts to obtain further documents informally through correspondence with the Prosecution. It requests the Chamber to order the Prosecution witnesses to bring their judicial and immigration records when they come to testify, and the Prosecution to obtain and/or disclose the following information:

- a. Statements made to Rwandan authorities and records pertaining to the criminal prosecution of the Witnesses AWB, BDW, BGD, HH and KGV, as well as any other witness for whom such materials have not been fully disclosed;
- b. Report of Alison Des Forges in *Rwamakuba* Case;
- c. Witness T’s testimony in the *Nzabonimana* trial which took place in Belgium;
- d. Witness CR Memorandum of 3 March 2004;
- e. Statements of Prosecution Witnesses, including Witnesses ALC, BW, CR, ED, G and T, to immigration authorities concerning the events in Rwanda in 1994;
- f. All statements, reports and correspondence of Witness AHJ including those pertaining to his efforts to persuade Jean Kambanda to testify for the Prosecution; and
- g. Reports of all information obtained from Jean Marie Vianney Mudahinyuka who was, like Witnesses G and T, a member of the National Committee of the *Interahamwe* and is in custody in the United States.

¹ *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera* (“*Karemera et. al.*”), Case No. ICTR-98-44-PT, Decision on Joseph Nzirorera’s Motion to Compel Inspection and Disclosure (TC), 5 July 2005.

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3. The Prosecution consents to provide the Report of Alison Des Forges disclosed in the *Rwamakuba* Case and states that Witness CR Memorandum of 3 March 2004 has already been provided to the Defence. The Defence acknowledges the Prosecution's undertaking but reserves its right to bring these matters again to the attention of the Chamber where necessary.

4. The Chamber considers that these separate Motions seek the same relief and that it is appropriate to decide the remaining contentious Defence requests together.

DELIBERATION

Ordering the witnesses to bring records

5. The Chamber rejects the application by one party requesting the Chamber to issue a subpoena or a subpoena-like order to the witnesses of the other party to bring documents with them when they testify. The jurisprudence shows that a party seeking a subpoena must demonstrate "a reasonable basis for his belief that the prospective witness is likely to give information that will materially assist [him] with respect to clearly identified issues in the forthcoming trial."² The Defence has failed reach the threshold of proof. It has not identified the documents, nor indicated their contents, nor demonstrated that the Prosecution witnesses have the documents it seeks in their possession. The Chamber considers that the Defence has confused the responsibilities of a witness with the disclosure obligations of the Prosecution.

Ordering the Prosecution to obtain and disclose Judicial Records

6. The Defence requests the Chamber to order the Prosecution, pursuant to Rules 54, 66(A)(ii), 66(B), 68 and 98 of the Rules, to make its best efforts to obtain all prior statements and testimony and records of judicial proceedings of Prosecution witnesses Witnesses AWB, BDW, BGD, HH and KGV as well as Witness T's testimony in the *Nzabonimana* trial. It claims that pursuant to Rule 98 of the Rules the Chamber has the power *proprio motu* to order either party to produce additional evidence. The Defence contends that the other Trial Chambers have held that the Prosecution bears a responsibility under Rule 66(A)(ii) of the Rules to obtain and disclose copies of all the statements of the witnesses that the Prosecution intends to call to testify at trial. It further recalls that the Chamber in the prior trial made such an order under Rule 54 of the Rules.³

7. The Prosecution denies that it has the requested information and "respectfully" declines to research material on behalf of the Defence. The Chamber recalls that although the Defence has an obligation to conduct its own research⁴, a practice has developed, subject to considerations of the interests of justice, of requiring the intervention of the Prosecution to obtain and disclose certain records, specifically Rwandan judicial records of Prosecution witness.⁵ In these situations Trial Chambers have acted *proprio motu* under Rule 98 of the Rules, to order the Prosecution to obtain the relevant judicial dossier.⁶

² *The Prosecutor v. Sefer Halilovic*, Case No. IT-01-48-AR73, Decision on Issuance of Subpoenas (AC), 21 June 2004, para. 6 (footnotes omitted).

³ *Karemera et. al.*, Decision on Defence Motion for an Order to the Prosecution Witnesses to Produce, at their Appearance, their Diaries and Other Written Material from 1992 to 1994 and Their Statements Made Before the Rwandan Judicial Authorities (TC), 24 November 2003.

⁴ *The Prosecutor v. Aloys Simba*, Case No. ICTR-2001-76-T, Decision on Matters Related to Witness KDD's Judicial Dossier (TC), 1 November 2004, para. 10.

⁵ *Id.* at para. 11.

⁶ *Id.* at para. 15; *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva*, ("Bagosora et. al.") Case No. ICTR-98-41-T, Decision on the Request for Documents Arising

8. Trial Chambers have concluded that disclosure of judicial records is not merely for the benefit of the preparation of the Defence but it is also required to assist the Trial Chamber in its assessment of witness credibility pursuant to Rule 90(G) of the Rules.⁷

9. These principles applying to the Rwandan judicial records of the Prosecution witnesses should equally apply to the testimony of Witness T in the *Nzabonimana* trial which took place in Belgium.

10. This trial has not yet started. In all instances, orders for the Prosecution to produce further evidence as referred to above, have been made during the trial which often caused delay in cross-examination. The Chamber considers that there is an advantage in making appropriate orders early enough to allow compliance before the witnesses testify. Furthermore, according to the Defence, it is only recently that the Prosecution has stopped its usual compliance of obtaining and disclosing the required information in relation to other witnesses.

11. The Chamber therefore considers that it is appropriate to use its power under Rule 98 and require the Prosecution to use its best efforts to obtain the records indicated in Paragraph 2(a) and 2(c), *supra*, and disclose them to the Defence. This action is also permitted by Rule 54 which prescribes that at the request of either party or *proprio motu*, a Trial Chamber may issue such orders as may be necessary for the preparation or conduct of the trial. The Chamber's order in no way however, undermines the Defence's obligation to prepare its case.

Ordering the Prosecution to obtain and disclose Immigration Records

12. The Defence is also requesting the Prosecution to obtain and disclose statements of Prosecution witnesses made to immigration authorities concerning the events in Rwanda in 1994. While judicial records of witnesses have always been considered relevant in trials in the Tribunal, the relevance for immigration records is not readily obvious unless it can be demonstrated by the party requesting them that such records can be used to impeach a witness' credibility.

13. As a result, since the Defence has not adduced any evidence or given any information of the existence of these records or their content or shown how these documents may be relevant for its preparation, the application is purely speculative.

Statements, Reports and Correspondence of Witness AJH

14. The Prosecution does not deny that it has the records of Witness AJH's attempts to persuade former Prime Minister Jean Kambanda to testify against the Accused Nzirorera, but it contends that these records are not relevant and need not be disclosed pursuant to Rule 66 of the Rules because Mr. Kambanda is no longer being called as a witness in this case.

15. The Chamber considers that the information is material to the Defence preparation for cross-examination of Witness AJH. It therefore falls within the ambit of Rule 66(B) of the Rules which prescribes that the Prosecutor shall permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence.

Records of information obtained from Jean Marie Vianney Mudahinyuka

From Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003, para 7; *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, Judgement (Reasons) (AC), 3 July 2002, para. 63.

⁷ See for example: *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case No. ICTR-96-10-A, ICTR-96-17-A, Reasons for the Decision on Request for Admission of Additional Evidence (AC), 8 September 2004, paras. 47-52.

16. The Defence made a bare assertion that the Prosecution has obtained a statement from Jean Marie Vianney Mudahinyuka. The Prosecution has specifically denied its possession of such a statement. No evidence was adduced to support the assertion; as conceded by the Defence, there is no basis make an Order in this regard. There is no basis to make such an order.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS Nzirorera's Second Motion to Compel Inspection and Disclosure in part; and

ORDERS the Prosecution pursuant to Rule 98 of the Rules to use its best efforts to obtain and disclose to the Defence:

1. Statements made to Rwandan authorities and records pertaining to the criminal prosecution of the Witnesses AWB, BDW, BGD, HH and KGV, as well as any other witness for whom such materials have not been fully disclosed
2. The testimony of Witness T in the *Nzabonimana* trial in Belgium; and

ORDERS the Prosecution pursuant to Rule 66(B) of the Rules to allow the Defence to inspect all statements, reports and correspondence of Witness AHJ including those pertaining to his efforts to persuade Jean Kambanda to testify for the Prosecution.

DENIES the remainder of Nzirorera's Second Motion to Compel Inspection and Disclosure; and

DENIES Nzirorera's Motion for Order Directing Witnesses to Bring Judicial and Immigration Records, in its entirety.

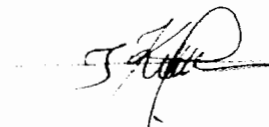
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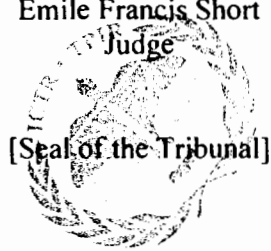
Dennis E. M. Byron
Presiding



Emile Francis Short
Judge



Gberdao Gustave Kam
Judge



[Seal of the Tribunal]