



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-44-T
11-7-2007
(29413 - 29410)

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OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 11 July 2007

THE PROSECUTOR

v.

**Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA
Case No. ICTR-98-44-T**

2007 JUL 11 P 12:20
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**DECISION ON JOSEPH NZIRORERA'S MOTION ON NOTICE OF VIOLATION
OF RULE 66(A)(ii) FOR WITNESSES ALZ AND AMC, AND FOR REMEDIAL AND
PUNITIVE MEASURES**

Rules 66 (A)(ii) and 73 of the Rules of Procedure and Evidence

Office of the Prosecutor:
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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 and Patrick Niny Mayidika Ngimbi

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INTRODUCTION

1. The trial in this case started on 19 September 2005 before Trial Chamber III composed of Judges Dennis C. M. Byron, presiding, Emile Francis Short and Gberdao Gustave Kam. The fourth trial session concluded on 13 December 2006.
2. As a result of Judge Short's withdrawal from the case in January 2007, Judge Vagn Joensen joined the bench in June 2007 as substitute judge.¹ The fifth trial session started on 12 June 2007.
3. On 11 June 2007, Joseph Nzirorera filed a notice of non compliance by the Prosecution with its disclosure obligations under the Rules of Procedure and Evidence in relation to Prosecution Witnesses AMC and ALZ, the latter being scheduled to testify during the fifth trial session.² He requests the Chamber to impose appropriate remedial and punitive measures for this violation. The Prosecution opposes the Motion.³

DISCUSSION

4. Joseph Nzirorera submits that the Prosecution has only disclosed one statement respectively for Witnesses ALZ and AMC, while it appears that each of these witnesses had signed two further statements as a result of interviews with the Office of the Prosecutor ("OTP"). According to Nzirorera, Witness ALZ advised his Counsel that he had been interviewed three times by OTP and signed statements on each occasion. Witness AMC also declared to Nzirorera's Counsel that he had provided three signed statements to OTP. Nzirorera therefore requests the Chamber to find that the Prosecution failed to comply with its disclosure obligations under Rule 66(A) (ii) of the Rules of Procedure and Evidence as it never disclosed the other statements of Witnesses ALZ and AMC, and impose appropriate remedial and punitive measures for this violation.

¹ See: *Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera ("Karemera et al.")*, Case No. ICTR-98-44-T, Decision on Continuation of the Proceedings (TC), 6 March 2007; *Karemera et al.*, Decision on Appeals Pursuant to Rule 15 bis (D), (AC) 20 April 2007. Judge Joensen was sworn in on 2 May 2007 and certified that he had familiarized himself with the record of the proceedings on 8 June 2007, see *Karemera et al.*, Certification of the Familiarisation with the Record of the Proceedings, 8 June 2007.

² Joseph Nzirorera's Notice of Violation of Rule 66 (A)(ii) for Witnesses ALZ and AMC and Motion for Remedial and Punitive Measures, filed on 11 June 2007.

³ Prosecutor's Response to Nzirorera's Motion of 11 June 2007 suggesting AMC and ALZ disclosure violations, filed on 18 June 2007.

5. Pursuant to the Rule 66(A)(ii) of the Rules, the Prosecution is obliged to disclose to the Defence "[n]o later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial [...]".

6. According to the established jurisprudence, the Prosecution has an obligation to disclose the witness statements that are in its possession or which it has access to.⁴ The Appeals Chamber held that "something which is not in the possession of or accessible to the Prosecution cannot be subject to disclosure: *nemo tenetur ad impossibile* (no one is bound to an impossibility)".⁵ Therefore, a document which is not in the possession or accessible to the Prosecution cannot be subject to disclosure.⁶

7. In the present case, the Prosecution asserts that a review of its database has not revealed the existence of any of the alleged statements. It submits that the fact that the witnesses were met three times by an OTP investigator does not mean that each time, a statement was drafted.

8. In view of these circumstances, considering that the Prosecution is also presumed to discharge its obligations in good faith,⁷ there is no reason to believe that the Prosecution has failed to discharge its obligation under Rule 66(A)(ii) by not disclosing other statements of Witnesses ALZ and AMC, which are not found to be in its possession. No remedial or punitive measures as requested by Joseph Nzirorera are therefore warranted.

9. The Chamber also takes note of the Prosecution's commitment to further inquiry on the matter and to disclose the said statements if they exist.

⁴ *Prosecutor v. Kayishema*, Case No ICTR-95-I-T, Decision on preliminary motion filed by Defence (TC), 6 November 1996, *ICTR Report 1995-1997*, pp. 298-300; *Prosecutor v. Semanza*, Case No ICTR-97-20-I, Decision on Semanza's Motion for Subpoenas, Depositions and Disclosure (TC), 20 October 2000, *ICTR Report 2000*, p. 2364 and seq., par. 38 (emphasis added); *Karemera et al.*, Decision on the Defence Notification of Failure to Comply with Trial Chamber Order and Motion for Remedial Measures (TC), 20 October 2003, paras. 5 and 9; *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004, par. 35.

⁵ *Prosecutor v. Niyitegeka*, Case No ICTR-96-14-A, Judgement (AC), 9 July 2004, par. 35.

⁶ *Karemera et al.*, Decision on Disclosure of Witness Reconfirmation Statements (TC), 23 February 2005, paras. 6 and 7.

⁷ *Prosecutor v. Niyitegeka*, Case No ICTR-96-14-A, Judgement (AC), 9 July 2004, par. 37.

FOR THESE REASONS, THE CHAMBER

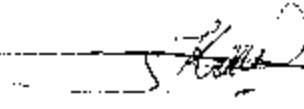
DENIES Joseph Nzirorera's Motion in its entirety.

Arusha, 11 July 2007, done in English.



Dennis C. M. Byron

Presiding Judge



Gberdao Gustave Kam

Judge



Vagn Joensen

Judge



[Seal of the Tribunal]