

ICTR-98-44-T
27-11-2007
(32707 - 32704)

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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
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 26 November 2007

THE PROSECUTOR

v.

**Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-T

JUDICIAL AUTHORITY
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**DECISION ON JOSEPH NZIRORERA'S MOTION FOR IMMEDIATE
RETURN OF SEIZED PROPERTY**

Rule 41(B) of the Rules of Procedure and Evidence

Office of the Prosecutor:
Don Webster
Alayne Frankson-Wallace
Iain Morley
Saidou N'Dow
Gerda Visser
Sunkarie Ballah-Conteh
Takesh Sendze
Deo Mbutu

Defence Counsel for Édouard Karemera
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 Nimy Mayidika Ngimbi

INTRODUCTION

1. Joseph Nzirorera moves the Chamber to order, pursuant to Rule 41(B) of the Rules of Procedure and Evidence ("Rules"), the immediate return of all of those documents seized from him upon his arrest, which have not been included in the Prosecution's notice of exhibits to be offered at the conclusion of its case, filed on 2 November 2007.¹
2. The Prosecution requests that the Chamber deny the Motion in its entirety, asserting that it has provided Joseph Nzirorera with an inventory of all seized materials and returned those it deemed to be of no evidentiary value on 29 July 2003.²

DELIBERATIONS

3. Rule 41(B) provides that "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."
4. According to the jurisprudence of this Tribunal the Prosecution, pursuant to Rule 41(B), has an affirmative obligation to assess the evidentiary value of materials seized from an accused in a timely manner in order to justify the retention of any seized materials and to return the unnecessary materials without delay.³ It was, however, found that the Prosecution can be only ordered to hand over to the Defence the originals of documents that the Prosecution considers unnecessary for its investigations.⁴
5. Joseph Nzirorera states that the Prosecution seized approximately 1000 documents from him at the time of his arrest in Benin. He asserts that the Prosecution has indicated it intends to use only 14 of these items by including them in the notice of exhibits to be offered by the Prosecution during the testimony of Upendra Baghel.⁵ He claims that the Prosecution is obligated, pursuant to Rule 41(B), to immediately return the remaining items that have no evidentiary value.

¹ Joseph Nzirorera's Motion for Immediate Return of Seized Property, 5 November 2007.

² Prosecutor's Response to Nzirorera's Motion for Immediate Return of Seized Property, 12 November 2007

³ *Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-2001-70-1, Decision on the Defence Motion for Return of Documents and Other Seized Personal Items (TC), 20 November 2002, para. 10.

⁴ *Prosecutor v. Gratien Kabirigi and Aloys Ntabakuze*, Case No. ICTR-97-34-T, Decision on the Defence Motion to Implement Trial Chamber II Decision Rendered on 25 September 1998 Ordering the Return of Seized Items and on the Prosecutor's Motion for a Temporary Stay for the Execution of the Same Decision (TC), 19 May 2000, para. 7.

⁵ Notice of Additional Evidence Pursuant to Rule 67(D): OTP Investigator Upendra Baghel at Annexes A and B

6. Joseph Nzirorera asserts that the Prosecution has been in callous disregard of its obligations under Rule 41(B) for over nine years, dating from the seizure of his property, including approximately 1000 documents, on 5 June 1998. He recalls prior Trial Chamber's Decisions that directed the Prosecution to return Joseph Nzirorera's property.⁶

7. The Chamber considers as flawed Joseph Nzirorera's assertion that all the remaining items in the Prosecution's possession, which are not going to be used during the presentation of the Prosecution case in-chief, have no evidentiary value. The Chamber is of the view that seized materials can be of evidentiary value even after concluding the Prosecution case in-chief, since the Prosecution may rely on seized items to, *inter alia*, cross-examine Defence witnesses, contradict the content of documentary evidence presented by the Defence and the conduct of additional investigation on particular issues.

8. The Chamber notes that on 27 September 2002, Joseph Nzirorera received copies, on the basis of Rule 66(B) of the Rules, of all seized items for which he now seeks the immediate return of the originals. Regarding the originals of materials sought by Joseph Nzirorera, the Chamber considers that it is for Prosecution, in the first instance, to make the discretionary determination of whether the materials are of "no evidentiary value". Prior to the commencement of the trial, the Prosecution provided Joseph Nzirorera with an inventory of all seized materials, authorizing the return of those it deemed to be of no evidentiary value at that stage on 29 July 2003.⁷ The Chamber notes that the Prosecution has stated in its Response that it has made this assessment in good faith.

9. The Chamber stresses the fact that in its Response, the Prosecution is not clear whether the remaining material in its possession is of evidentiary value at the current stage of proceedings. The only assessment referred to in the Response is that of 29 July 2003, when the Prosecution assessed the evidentiary value of the seized materials. The Chamber is unable to conclude if the 2003 assessment is still accurate in respect of the remaining materials held

⁶ In a Decision of 7 September 2000, the Trial Chamber directed the Prosecution to return to the Defence, within 60 days of removal of the seals, all documents and property seized during the search conducted on 5 June 1998 the Prosecutor does not intend to use as evidence against the accused or which he does not intend to retain for purposes of investigation or Prosecution (Prosecutor v. Joseph Nzirorera et al., Case No. ICTR-98-44-I, Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting Return of Personal Items Seized, 7 September 2000, p. 10) In a Decision of 13 October 2003, the Trial Chamber ordered the Prosecution to return all items which it did not intend to use as exhibits in the trial within 30 days (Prosecutor v. Joseph Nzirorera et al., Case No. ICTR-98-44-I, Decision on Defence Motion for the Return of Property and Sanctions for Violation of Court Order and a Decision on Prosecution Request for Extension of Time to file a Response to Defence Motion, 13 December 2002). In a Decision of 13 October 2003, the Trial Chamber noted the Prosecution's lack of diligence and ordered the return of property within 10 days (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, 13 October 2003, para 13).

⁷ See Joseph Nzirorera's Motion, para.14 and Prosecution Response, para. 7

by Prosecution in light of the case's subsequent progression. Therefore, the Chamber considers it appropriate that the Prosecution, in order to justify their retention, should reassess the remaining material in order to ascertain whether it has any evidentiary value. Consequently, material that is deemed to have no evidentiary value should be returned to the Accused.

FOR THOSE REASONS, THE CHAMBER

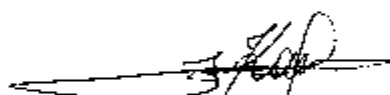
- I. **DIRECTS** the Prosecutor to reassess the remaining property in its possession and to provide a report to the Defence;
- II. **ORDERS** that in circumstances where the original documents are not needed in accordance with the new assessment, the documents should be returned to the Defence; and,
- III. **ORDERS** the Prosecution to comply with this Decision within 21 days from the date of its notification.
- IV. **DISMISSES** the Motion in all other respects.

Arusha, 26 November 2007, done in English.



Dennis C. M. Byron

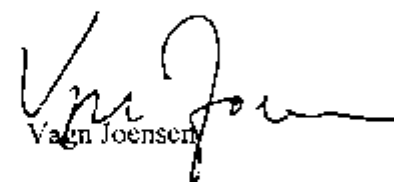
Presiding Judge



Gberdao Gustave Kam

Judge

[Seat of the Tribunal]



Vagn Joensen

Judge