ICTR-07-91-PT
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 31 December 2008

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THE PROSECUTOR

v.

Léonidas NSHOGOZA

Case No. ICTR-07-91-PT

DECISION ON DEFENCE MOTION FOR THE PROSECUTOR TO PRODUCE VIDEO TAPE OF INTERVIEW WITH WITNESS BUC

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

Office of the Prosecutor:

Richard Karegyesa
Abdoulaye Seye
Dennis Mabura
Florida Kabisanga

For the Accused:

Allison Turner

INTRODUCTION

1. On 20 October, the Defence filed a Motion, without reference to any particular Rule, seeking disclosure of a videotape of an interview between the Office of the Prosecutor and Witness BUC.[1]

2. The Prosecutor did not respond to the Motion. However, on 24 October 2008, the Prosecutor filed a "Clarification of Disclosures Made to Date."[2]

DISCUSSION

The Applicable Law

3. Pursuant to Rule 66 (A) (ii) of the Rules of Procedure and Evidence, copies of "the statements of all witnesses whom the Prosecutor intends to call to testify at trial" must be disclosed to the Defence no later than 60 days before the scheduled date for the commencement of the trial.

4. The term "witness statement" under Rule 66 (A) (ii) has been interpreted as an account of a person's knowledge of a crime which has been recorded in the course of an investigation into that crime.[3] The Prosecutor must disclose previous statements of all Prosecution witnesses, in whatever form, to the Defence.[4]

5. The obligation to disclose witness statements to the Defence extends to all witness statements in the custody or control of the Prosecutor, or to which the Prosecutor has access. However, the Prosecutor is not obligated to disclose documents which are not in his possession, or which are not accessible to him;[5] and, the Prosecutor is presumed to discharge his obligations under Rule 66 (A) (ii) in good faith.[6]

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[1] *Prosecutor v. Nshogoza*, "Defence Response to Prosecution Extremely Urgent Motion for Protective Measures and Motion for Request to Prosecutor to Produce Videotape of Interview with Witness BUC," filed 20 October 2008, para. 5 ("Motion").

[2] *Nshogoza*, "Prosecutor's Clarification of Disclosures Made to Date Pursuant to Rules 66 and 75 of the Rules of Procedure and Evidence," filed 24 October 2008 ("Clarification").

[3] *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66 (A) (ii), 29 September 2006, para. 14 (citing the Appeals Chamber in *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 15).

[4] *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-I, Decision on Prosper Mugiraneza's Motion to Require Strict Compliance with Rule 66 (A) (ii) ("Strict Compliance Decision"), para. 7 (citing *Prosecutor v. Tihomir Blaškić*, Case No IT-95-14-PT, Decision on the Production of Discovery Materials, 27 January 1997, para 38).

[5] *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion of Notice of Violation of Rule 66 (A) (ii) for Witness ALZ and AMC, and for Remedial and Punitive Measures, 11 July 2007, para. 6.

[6] *Ibid.*, para. 8.

Should the Prosecutor Disclose a Video Recording of the Meeting with Witness BUC?

6. The Defence submits that the Prosecutor sought a statement from Witness BUC on 31 July 2008. The Defence now seeks a copy of a video recording of the interview in order to contest the accuracy of the statement.[7]

7. In his Clarification, the Prosecutor lists, as having been disclosed, a statement from BUC made to the Prosecutor on 31 July 2008.[8] Thus, the Defence should already have a written record of the statement in question. However, as Witness BUC is on the Prosecutor's list of witnesses, any such video recording constitutes a "witness statement," which, if it is in the Prosecutor's possession, should be disclosed to the Defence.

8. The Chamber recalls that the Prosecutor is obligated to disclose witness statements which are in his possession, or to which he has access. Further, the Prosecutor is presumed to discharge his disclosure obligations in good faith. The Defence has not presented evidence to support its assertion that the Prosecutor has in his possession a video recording of the 31 July 2008 meeting.

9. However, the Chamber reminds the Prosecutor of his obligation to ensure that all statements, in whatever form, made by witnesses the Prosecutor intends to call to testify are disclosed to the Defence.

FOR THESE REASONS, the Chamber

DENIES the Motion in its entirety.

Arusha, 31 December 2008

For and on Behalf of
Lee Gacuiga Muthoga
Judge

Khalida Rachid Khan
Presiding Judge

For and on behalf of
Emile Francis Short
Judge

[Seal of the Tribunal]

[7] Motion, para. 5.

[8] Clarification, para. 9. The Chamber also notes that in his Pre-Trial Brief filed on 24 November 2008, the Prosecutor states, at paragraph 3, that he has complied with his disclosure obligations under Rule 66 (A) (i) and 66 (A) (ii) of the Rules of Procedure and Evidence.