



UNITED NATIONS  
NATIONS UNIES

ICTR-98-44-T  
10-2-2009  
(2868-2864)

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

2868  
2009  
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OR: ENG

TRIAL CHAMBER III

**Before Judges:** Khalida Rachid Khan, presiding  
Lee Gacuiga Muthoga  
Aydin Sefa Akay

**Registrar:** Mr. Adama Dieng

**Date:** 10 February 2009

THE PROSECUTOR

v.

Léonidas NSHOGOZA

Case No. ICTR-07-91-T

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JUDICIAL RECORDS ARCHIVE  
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10/02/2009

**DECISION ON DEFENCE MOTION FOR ORDER TO PROSECUTOR TO COMPLY  
WITH HIS DISCLOSURE OBLIGATIONS AND MOTION FOR STAY OF  
PROCEEDINGS DUE TO THE ON-GOING VIOLATION OF THE PROSECUTOR'S  
DISCLOSURE OBLIGATIONS**

*Rules 54, 66, 68, and 73, of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Paul Ng'arua  
Abdoulaye Seye  
Dennis Mabura  
Marie Ka

**For the Accused:**

Allison Turner

## INTRODUCTION

1. The Defence alleges that the Prosecutor is in violation of his disclosure obligations. On 29 January 2009, the Defence filed a Motion seeking an order for the Prosecutor to comply with his disclosure obligations and with the Chamber's Order of 22 December 2008,<sup>1</sup> as well as sanctions against the Prosecutor ("Disclosure Motion").<sup>2</sup> By way of Motion filed on 5 February 2009, the Defence seeks a stay of proceedings until thirty days after the Prosecutor has fully complied with his disclosure obligations under Rules 66 and 68 of the Rules of Procedure and Evidence ("Stay Motion").<sup>3</sup>
2. The Prosecutor opposes both Defence Motions.<sup>4</sup>
3. This Decision will address the two Defence Motions as they both relate to the Defence allegations that the Prosecutor has violated his disclosure obligations.

## DISCUSSION

4. In support of the Stay Motion, the Defence asserts that the most serious disclosure violations are the late disclosure of the supporting materials which accompanied the Indictment; the 19 January 2009 disclosure of audio recordings of interviews with Witness GAA conducted on 11 May 2005 and 9 August 2007; and the 28 January 2009 disclosure of audio recordings of an interview with Witness GAA which took place on 29 September 2005.<sup>5</sup>
5. According to the Defence, the Accused has suffered prejudice because he has not had sufficient time to prepare his defence, including time to prepare for cross-examination of Prosecution witnesses, with the information that has been recently disclosed, as well as with information which the Defence asserts has not yet been disclosed.<sup>6</sup>
6. The Defence also submits that the Prosecutor violated Rule 41 of the Rules, which provides that the Prosecutor "shall be responsible for the preservation, storage and security of information and physical evidence obtained in the course of its investigations," when he provided the Defence with a defective copy of the 9 August 2007 audio recording of the interview with Witness GAA.<sup>7</sup>

<sup>1</sup> *Prosecutor v. Nshogoza*, Case No. ICTR-07-91-PT, Decision on Defence Motions for Disclosure under Rules 66 and 68 of the Rules of Procedure and Evidence, 22 December 2008.

<sup>2</sup> *Nshogoza*, "Extremely Urgent Defence Motion for Order to the Prosecution to Fully and Immediately Comply with 22 December 2008 Disclosure Court Order and Other Disclosure Obligations," filed 29 January 2009.

<sup>3</sup> *Nshogoza*, "Motion for Stay of Proceedings Due to the On-going Violation of the Prosecutor's Disclosure Obligations," filed 5 February 2009.

<sup>4</sup> *Nshogoza*, "Prosecutor's Response to 'Extremely Urgent Defence Motion for Order to the Prosecution to Fully and Immediately Comply with 22 December 2008 Disclosure Court Order and other Disclosure Obligations pursuant to Rules 41, 54, 66, 68 and 73 of ICTR Rules of Procedure and Evidence'," filed 4 February 2009 ("Response to Disclosure Motion"); "Prosecutor's Response to 'Urgent Motion for Stay of Proceedings Due to on-going Violation of the Prosecutor's Disclosure Obligations'," filed 9 February 2009 ("Response to Stay Motion").

<sup>5</sup> Stay Motion, paras. 7, 11,

<sup>6</sup> Disclosure Motion, para. 30.

<sup>7</sup> Stay Motion, para. 11; Disclosure Motion, paras. 13 -19.



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7. The Prosecutor responds that he conducted repeated searches of his databases, and acted in good faith; that the Defence has failed to show any prejudice caused by the late disclosure of the audio recordings; and that he does not intend to rely on the content of any of the recently disclosed audio recordings.<sup>8</sup> In addition, the Prosecutor submits that the content of the recently disclosed tapes is not new to the Accused.<sup>9</sup>

8. The Prosecutor further explains that the audio recordings of the 29 September 2005 interview were overlooked because they were not processed and referenced as part of the materials relating to the investigation conducted by Special Counsel Loretta Lynch and that the audio recording of the 9 August 2007 was faulty. The Prosecutor advises that sealed originals are in the custody of the evidence unit and that he has no objection to any request to unseal the tapes under the Chamber's supervision.<sup>10</sup>

*1) The Chamber's Order of 22 December 2008*

9. The Chamber ordered the Prosecutor to disclose to the Defence: i) Supporting materials for the Witness GAA indictment; ii) Witness GEX's Statement to the Prosecutor dated 2003 or 2004; iii) Recordings of interviews with Witnesses GAA, BUC, GEI, SP-003 and SP-004; iv) Witness GAA's Closed Session testimony from the *Kamuhanda* proceedings, dated 20 September 2001, and v) not later than thirty days before the commencement of the Prosecutor's case, the un-redacted Indictment against the Accused.<sup>11</sup>

10. According to the Defence, the Prosecutor is in violation of the 22 December Order because he has not disclosed "copies of taped recordings of interviews with [W]itnesses GAA, BUC, GEI, SP-003 and SP-004, (and GAF)."<sup>12</sup> The Prosecutor responds that the Defence "appears to have relied upon the recantation statements, fabricated by the Accused, to claim the existence of a certain document."<sup>13</sup>

11. The Defence asserts that the twenty-two written statements disclosed to the Defence suggest that there may be tape recordings of the interviews.<sup>14</sup> The Prosecutor responds that audio recordings of interviews are not systematically made, and that the Prosecutor has no other audio recordings of the twenty-two written witness statements that have been disclosed.<sup>15</sup>

<sup>8</sup> Response to Disclosure Motion, para 10; Response to Stay Motion, para. 3, 4, 6, 8, 10.

<sup>9</sup> Response to Stay Motion, paras. 12, 13; Response to Disclosure Motion, para. 12.

<sup>10</sup> Response to Disclosure Motion, para. 7-12. In the Response to Stay Motion, the Prosecutor explains, at paragraph 7, that the 9 August 2007 recording is inaudible because the recording machine was subsequently found to be faulty. It is for this reason, the Prosecutor explains, that there was no written transcription of the interview. At paragraph 9 of the Response to Stay Motion, the Prosecutor explains that the 29 September 2005 audio recording was overlooked because the tapes were not properly referenced as part of the Lynch interviews. Further, the Prosecutor explains that there was no transcription of this recording, which is the reason the Prosecutor did not find this witness statement when he searched his databases.

<sup>11</sup> The Chamber ordered the disclosure of the materials, provided they were in the Prosecutor's possession and not yet disclosed.

<sup>12</sup> Disclosure Motion, para. 25

<sup>13</sup> Response to Stay Motion, paras. 20, 21.

<sup>14</sup> The Chamber ordered the tapes disclosed if they are in the Prosecutor's possession.

<sup>15</sup> Response to Disclosure Motion, para. 11; Response to Stay Motion, para. 18.



12. Since the filing of these Motions, the Chamber has ordered the Prosecutor to review all materials in his possession to ensure compliance with his disclosure obligations under Rules 66 and 68.<sup>16</sup> On 9 February 2009, the Prosecutor filed a document certifying that he has complied with his Rule 66 and Rule 68 disclosure obligations.<sup>17</sup> Therefore, the Chamber does not consider it necessary to make a further order in respect of disclosure.

## II) *Disclosure of the Supporting Materials and Recent Disclosure of the Audio Recordings*

13. Supporting materials were disclosed to the Defence on 12 March 2008. On 28 March and 8 April 2008, the Prosecutor asserted that all supporting materials had been disclosed or were in the public domain.<sup>18</sup> The Chamber subsequently ordered the Prosecutor to file a declaration that he had disclosed all Rule 66 (A) (i) materials.<sup>19</sup> The Prosecutor's declaration was filed on 9 October 2008, along with the disclosure of an additional document which should have been disclosed with the supporting materials.<sup>20</sup>

14. While the Chamber notes that not all supporting materials were disclosed within the required time frame, the Chamber considers that Defence has not demonstrated that the Accused suffered prejudice as a result of this delayed disclosure.

15. The audio recordings that were recently disclosed are "witness statements" within the meaning of Rule 66 (A) (ii) of the Rules and were therefore subject to disclosure sixty days before the commencement of the trial. Accordingly, the Chamber finds that the Prosecutor has violated his disclosure obligation under Rule 66 (A) (ii) through late disclosure of these statements by Witness GAA. However, the Chamber notes that the Prosecutor has disclosed several statements for this witness, and that the 11 May 2005 statement by Witness GAA was previously disclosed to the Defence in written form. Thus, it is the 9 August 2007 and 29 September 2005 statements by witness GAA that may contain information that is new to the Defence. However, the Defence does not claim that there is new information in these recently disclosed statements.

16. According to the Defence, these audio recordings are late disclosure of exculpatory material. Where the Defence asserts that the Prosecutor has violated his disclosure obligations under Rule 68 (A), it must: (i) define the material sought with reasonable specificity; (ii) establish that the material is in the custody and control of the Prosecutor; (iii) present a *prima facie* case that the material is exculpatory or potentially exculpatory.<sup>21</sup>

<sup>16</sup> Nshogoza, Order for the Prosecution to Conduct a Thorough Review and Certify that it has Complied with its Disclosure Obligations, 5 February 2009.

<sup>17</sup> Nshogoza, "Prosecutor's Certification of Compliance with Trial Chamber's Order of 5 February 2009 Regarding Disclosure Obligations, 9 February 2009.

<sup>18</sup> Nshogoza, "Prosecutor's Clarification on Documents Disclosed to the Defence on 12 March 2008," filed 28 March 2008; "Prosecutor's Reply to 'Addendum-Defence Response to Prosecutor's Clarification on Documents Disclosed to the Defence on 12 March 2008'," filed 8 April 2008.

<sup>19</sup> Nshogoza, Decision on Defence Motions for Disclosure of Supporting Materials; and Clarification on Rule 72-30 Day Period, 1 October 2008.

<sup>20</sup> Nshogoza, "Prosecutor's Declaration and Disclosure Pursuant to Rules 66 and 75 of the Rules of Procedure and Evidence Following Trial Chamber III's Order of 1 October 2008," filed 9 October 2008. At paragraph 3 of the Declaration, the Prosecutor states that there were certain oversights and that the supporting materials did not contain the Plea Agreement between the Prosecutor and Witness GAA.

<sup>21</sup> *Prosecutor v. Augustin Ndindiliyimana et al*, Case No. ICTR-00-56-T, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008 para. 13 (citations omitted); *Prosecutor v. Casimir Bizimungu et. al*, Case No. ICTR-99-50-T, Decision on Justin Mugenzi's

17. First the Chamber notes that the Prosecutor's obligation under Rule 68 is ongoing and that there is no prescribed time limit for such disclosure under the Rules. Second, the Defence does not support its assertion that the materials are exculpatory.<sup>22</sup> The Chamber therefore finds that there is no violation of the Prosecutor's obligation under Rule 68.

18. Accordingly, the Chamber considers that the Defence has failed to show that it has been prejudiced by the late disclosure of the audio recordings.

19. With respect to the alleged violation of Rule 41 by disclosure of a defective recording of the 9 August 2007 interview with Witness GAA, the Prosecutor has offered to allow the Defence access to the sealed original tape for the purpose of comparison with those disclosed to the Defence.<sup>23</sup> The Chamber considers that it would be appropriate for the Prosecutor to allow the Defence to review the original recording, in the presence of a representative from the Registry and the Office of the Prosecutor. During the course of the 9 February 2009 proceedings, the Chamber made an order for the Prosecutor to allow the Defence access to the tapes. Therefore, it is not necessary to make further orders in this regard.

**FOR THESE REASONS**, the Chamber

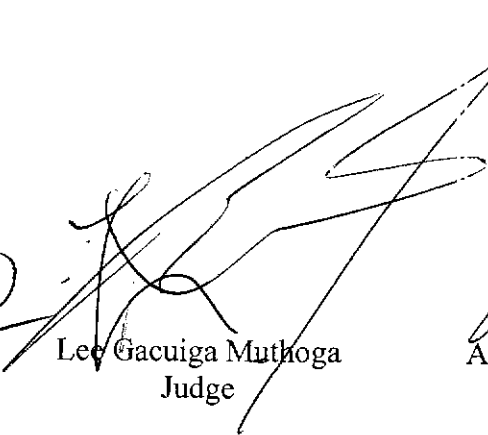
**DENIES** the Defence "Urgent Motion for Stay of Proceeding Due to On-going Violation of the Prosecutor's Disclosure Obligations," filed on 9 February 2009; and,

**DENIES** the "Extremely Urgent Defence Motion for Order to the Prosecution to Fully and Immediately Comply with 22 December 2008 Disclosure Court Order and Other Disclosure Obligations," filed on 29 January 2009.

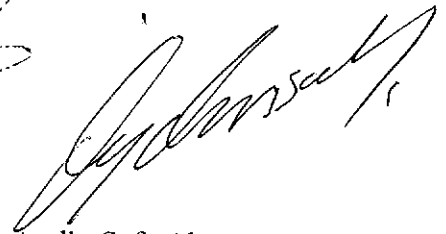
Arusha, 10 February 2009



Khulida Rachid Khan  
Presiding Judge



Lee Gacuiga Muthoga  
Judge



Aydin Sefa Akay  
Judge

[Seal of the Tribunal]



Request for Disclosure Order, 23 July 2008, para. 7 (citations omitted); *Prosecutor v. Karemera et al.*, Case No. ICTR-97-2 -T, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para. 13.

<sup>22</sup> Stay Motion, para. 4.

<sup>23</sup> Response, para. 8-9.