

ICTR-98-44-T
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(43919-43868)

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

CASE No. ICTR-98-44-T

IN TRIAL CHAMBER No. 3

Before: Judge Dennis C.M. Byron, Presiding
Judge G. Gustave Kam
Judge Vagn Joensen

Registrar: Mr. Adama Dieng

Date Filed: 5 January 2009

THE PROSECUTOR

v.

JOSEPH NZIRORERA

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JOSEPH NZIRORERA'S 13th NOTICE OF RULE 68 VIOLATION
AND MOTION FOR REMEDIAL AND PUNITIVE MEASURES:
WITNESS ZF

The Office of the Prosecutor:

Mr. Don Webster
Ms. Allayne Frankson-Wallace
Mr. Iain Morley
Ms. Gerda Visser
Mr. Saidou N'Dow

Defence Counsel:

Mr. Peter Robinson
Mr. Patrick Nimy Mayidika Ngimbi

Counsel for Co-Accused:

Ms. Dior Diagne Mbaye and Mr. Felix Sow for Edouard Karemera
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ngirumpatse

1. Joseph Nzirorera respectfully notifies that Trial Chamber that he has once again uncovered additional violations of Rule 68 committed by the prosecution. He moves for appropriate remedial and punitive measures.

Witness ZF Testimony

2. Prosecution Witness ZF testified that Joseph Nzirorera was a member of a secret network whose aim was to exterminate the Tutsi. This network was known variously as the Abakozi, Friends of the Alliance, Dragons, or Zero Network.¹ Among the persons he listed as part of this network were Colonel Theoneste Bagosora and Alphonse Higaniro.²

The Withheld Material

3. Unbeknownst to Mr. Nzirorera, the prosecution had in its possession a statement from Colonel Bagosora dating back to 1992 in which he said:

I declare on my honour that I am not implicated in the actions of this fictitious group called "Reseau Zero"; in fact I am not even aware of its existence in Rwanda.³

4. This statement was not disclosed to Mr. Nzirorera until October 2008 after Colonel Bagosora appeared on Mr. Nzirorera's witness list and the prosecution was ordered to produce all statements of Mr. Nzirorera's witnesses pursuant to Rule 66(B).

5. Also unbeknownst to Mr. Nzirorera, the prosecution has in its possession a recorded interview from 1996 with Alphonse Higaniro, a former Minister and General Manager of a parastatal corporation known as SORWAL. In the interview, Mr. Higaniro was asked:

Were you a member of Reseau Zero?

¹ Transcript of 16 May 2006 @ 16-23

² Exhibit DNZ-108, Transcript of 19 May 2006 @19

³ This document, dated 31 October 1992, is attached as Annex "A"

To which he answered, "No."⁴

6. This statement was not disclosed to Mr. Nzirorera until October 2008 after the Alphonse Higaniro appeared on Mr. Nzirorera's witness list and the prosecution was ordered to produce all statements of Mr. Nzirorera's witnesses pursuant to Rule 66(B).

The Violation of Rule 68

7. Rule 68 provides that:

"The Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence."

8. A party alleging a violation of Rule 68 must: (1) identify specifically the material sought; (2) present a *prima facie* showing of its probably exculpatory nature; and (3) prove that the material requested is in the custody or under the control of the prosecution.⁵

9. Mr. Nzirorera has specifically identified the two statements which are the subject of this motion. They are clearly of an exculpatory nature since they expressly contradict the testimony of a prosecution witness. Indeed, this Trial Chamber has clearly held that information which contradicts that provided by a Prosecution witness is exculpatory within the meaning of Rule 68.⁶ And the material has been shown to be in the possession of the prosecution since the Bagosora statement bears a K# and the Higaniro interview was conducted by OTP investigators.

10. Therefore, yet another violation of Rule 68 has clearly been established.

⁴ This interview, dated 25 July 1996, is attached as Annex "B". The quoted portions appear on page 3

⁵ *Decision on Joseph Nzirorera's Appeal from Decision on 10th Rule 68 Motion* (14 May 2008) at para. 9

⁶ *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Oral Decision on Disclosure of Material from Joseph Serugendo* (30 May 2006); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motions for Disclosure of Information Obtained from Juvenal Uwilingiyimana* (27 April 2006) at para. 9

Prejudice to the Accused

11. The failure of the prosecution to disclose these statements as soon as practicable prejudiced Mr. Nzirorera because he was unable to use these materials in his cross examination of Witness ZF in 2006. The Trial Chamber has held that disclosure of contradictory information after a prosecution witness has testified causes prejudice to an accused.⁷

Remedial and Punitive Measures

12. The latest violation of Rule 68 comes on the heels of the prosecution's failure to disclose the closed session testimony of RPF insiders, which was the subject of *Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (21 July 2008). The Trial Chamber, in its decision on that motion, after finding that the prosecution had violated Rule 68 for the thirteenth time, said that:

“Although the Chamber is not prepared to state that the Prosecution can no longer be relied upon to discharge its Rule 68 obligations in this case, it notes that the Prosecution's compliance with the rules of disclosure has been less than adequate thus far. In fact, the Chamber finds that the increasing number of disclosure violations by the Prosecution is quickly approaching the threshold for sanctions of a more serious nature than mere disclosure of the misconduct to an internal disciplinary body. The Chamber hereby warns the Prosecution that future disclosure violations will not be met with the same lenience that has been displayed to date.”⁸

13. The violations continue.

⁷ *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (11 September 2008) at paras. 23-24, 32

⁸ *Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (11 September 2008) at para. 30

14. Mr. Nzirorera will address the appropriate remedial and punitive measures in his reply brief after the prosecution has had the opportunity to explain the reasons for the latest Rule 68 violation.

Conclusion

15. Mr. Nzirorera respectfully requests the Trial Chamber to (1) make an explicit finding that the failure to disclose the Bagosora and Higaniro statements prior to October 2008 violated Rule 68; and (2) impose such remedial and punitive measures as are warranted under the circumstances, taking into account the extent and pattern of violations.

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera

43914

ANNEX "A"

43913

K0246865

RETAINER-SOLEMN DECLARATION

I, the undersigned, Théoneste Bagosora, born at Gisenyi, residing in Kigali, Rwanda, hereby retain Mr Luc de Temmerman, of the Brussels Bar, to represent me in the broadest sense against the false accusations levelled against me by Messrs Reyntjens, Kuypers and Schers that I was a member of a movement that allegedly organised the "death squads" in Rwanda.

I declare on my honour that I am not implicated in the actions of the fictitious group called "RÉSEAU ZÉRO"; in fact, I am not even aware of its existence in Rwanda.

I am not charged with any crime in Rwanda.

Done at Kigali, 31 October 1992

[Signed]

43912

ANNEX "B"

43911

K0159157

IDENTIFICATION: 899/k96 - 2: Alphonse HIGANIRO
25/07/1996 KT00-0771

LENGTH: 90 MIN

QUALITY: GOOD

BROADCAST: ///

TRANSCRIPTION DATE: 07/02/2000

TRANSCRIBER'S NAME: Drocella ICYITEGETSE

FILE NAME: 899K96.WPD

DICTAPHONE: SANYO: BO - 760/19

N.B. Investigator 1 always speaks in English.

SIDE A

Investigator 1 [original in English]: ...present in Belgium this is the interview of Alphonse HIGANIRO, present here are also Alphonse HIGANIRO, Maître Edmond and Maître Karsters and ...[inaudible]... a linguist, and Mr. HIGANIRO continues with a story on the Akazu.

HIGANIRO: Uh... I was talking about the Akazu's alleged responsibility in the... the massacres in Rwanda. I had just explained that... you should look for the planners of the massacres amongst the planners of President HABYARIMANA's murder, because uh... the assassination of President HABYARIMANA was the trigger of uh... these massacres. And uh I was trying to show that I believe it is out of the question to implicate the Akazu in the planning of the assassination of President HABYARIMANA. My reasoning is twofold:
Uh... the first reason is that I believe it would have been inconceivable for one of the President's friends or for a prominent member of the Akazu to

shoot the plane down, knowing that he was on board. That is the first reason.

Uh...the second reason, which I believe cannot be ignored, is that the people who were members of the Akazu - the trio of in-laws - were nothing, absolutely nothing without President HABYARIMANA. President HABYRAIMANA was their shield. The population feared them because of the ties that existed between the President and his brothers-in-law. So President HABYARIMANA, unwittingly, enabled them to to act with impunity ... So... they hid behind their title of the "President's brothers-in-law" to demand protection so that the population would fear them.

And, once HABYARIMANA had disappeared, they were nothing. They would have been exposed to a great deal of revenge. So I cannot see any reason why they would have killed President HABYARIMANA. Of course, I could not have been a direct witness... a good witness uh...as my very own father-in-law perished in the plan. Thus, if there is one person who could not have been associated with that project it is I, I agree. And yet, if you take into consideration the facts, I do not really see why SAGATWA's friends would have decided to kill him. I really cannot see what that trio would gain by doing away with President HABYARIMANA, especially as they knew quite well that they were hated by Rwandan society.

As for their involvement in the murder of various people, as I said at the beginning, it is difficult to know because the... the... the massacre of politicians began the day after President HABYARIMANA's death, and as I was saying there was generally speaking an absolute curfew. And in my case in particular, I had to spend my mourning period at my father-in-law's residence. This meant it was virtually impossible to have any contact with so and so.

Investigator 1: Huh!

HIGANIRO: Impossible. You cannot know know what one person or another did without ruling out the possibility that they might have participated, but they could have... someone could have taken advantage of the generalized curfew to do things without the population knowing. That is what I had to say about the Akazu. I don't know... I am willing to provide you with any other information I might have available. Thank you.

Investigator 1 [original in English]: We continue with question 34th and that is: Do you know anything about an organization called *Réseau zéro*?

K0159159

- Interpreter:* We continue with number 34. Do you know anything about an organization called *Réseau zéro*?
- HIGANIRO: Uh...*Réseau zéro*, is a... a... a concept that was introduced by Christophe MFIZI. MFIZI is spelled M-F...
- Investigator 1: MFIZI?
- HIGANIRO: Yes that's it. He was the director of the Rwandan Information Bureau. In this regard, he was an important personality because he could participate in the governmental council debates. He was virtually a Minister of Information, but without that specific title. One day he was kicked out of his post. It would seem that, the Akazu was responsible, i.e. the President's in-laws. In any case, when he left his position he wasn't very happy. He wrote a book to denounce the Akazu's activities and that is where I first saw the concept *Réseau zéro*.
- Investigator 1: Hum.
- HIGANIRO: He thought that *Réseau zéro* was a sub-group of the Akazu in charge of executing people. So, did this sub-group really exist? Or is it a figment of his...
- Investigator 1: Huh.
- HIGANIRO: ...imagination. I have no information about that.
- Investigator 1: 35. We are going to ask you a question: Were you also a member of *Réseau zéro*?
- Interpreter:* 35. Were you also a member of *Réseau zéro*?
- HIGANIRO: No.
- Investigator 1: No. The reason that we have this question is that it was asked to be published by journalists I think one them corrected it somewhere in 1990 in which you were mentioned as one of the members of *Réseau zéro*.
- Interpreter:* Why do we ask this question? Because an article appeared in a publication – I do not have the publication – in which you were mentioned

as being one of the members of *Réseau zéro*.

Investigator 2: You have to listen to the Belgian media.

HIGANIRO: Yes, yes. They contain some things that are...

Investigator 2: Its' [inaudible], they say incredible things. [Laughter]

Interpreter: That's [inaudible] part of his answer.

HIGANIRO: And... as I said there were things like that... when I left to go south, I was not always appreciated by the opposition. And as the terms already existed, *Réseau zéro*, Akazu, and so on and so forth, those who, like myself, fitted the conditions that I described at the beginning were placed into the categories of *Réseau zéro*, Akazu, and things like that...

Investigator 2: Hum.

HIGANIRO: ...to justify the...the actions uh... the adverse actions to be taken against him! But if you look into the di...the...the different files that you have available you will certainly see that there is only one witness who states that. It isn't very often that you see mentioned that HIGANIRO was a member of the Akazu or of *Réseau zéro*.

Investigator 1: Ok. Uh...because of the ... the answer should indicate from questions 34, 35... 36, 37, 38.

Interpreter: In view of the answers that you have already given, in view of what you have already said, we shall skip 35, 36, 37 and 38.

HIGANIRO: Hum.

Investigator 1: So, we continue with 39. Did you ever give money to RTLM radio and for what reason?

Interpreter: Did you give RTLM any money? And for what reason?

HIGANIRO: Umm...yes I am a RTLM shareholder. I have some shares. Uh... the...the reason is that uh...I believed, like many Rwandans, that the multiparty system should go hand in hand with a...a liberalization of information.

Investigator 1: Huh.

HIGANIRO: And at that point, when we signed the Arusha accords, there was only one national radio station. And it had been made quite clear that the national radio station: "...must not be partisan. It must not broadcast the opinions of one party or another." This meant that measures were taken so that private radio stations could be created. And I believe, if my memory serves me right, that aside from RTLM, other radio station projects had already been accepted by the government. RTLM was the first one to be founded and I ... and I was contacted by some of its promoters.

Investigator 1: Hum.

HIGANIRO: They described their objectives...

Investigator 1: Huh.

HIGANIRO: ...what they were going to focus on, broadcast, news, music, advertising etc... And they recruited me to become a mem... a shareholder of that radio. I should mention that one share in ...that radio cost almost nothing. It cost something like five thousand Belgian francs a share. That's five thousand a share. So, many people became shareholders in that radio. I think there might have been over two thousand shareholders. The radio had over two thousand shareholders. Thus, I also bought shares. I... I did not listen to RTLM because it did not broadcast up to Butare.

Investigator 2: It didn't reach

HIGANIRO: It didn't reach...

Investigator 2: Okay

HIGANIRO: ...you had to climb onto the top of hills to listen to it. But when I went to Kigali, every now and then, I would listen to it; it was a station that had good music, they organized debates, etc... And this of course until the April events as we know them. But otherwise, those are the reasons... But why did I buy RTLM shares? Well, my objective was basically to support democracy. You see, democracy has to go hand in hand with freedom of the press, like here in the western world. Especially, as I had studied here, I could see what role the media play in a real democracy.