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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: 30 March 2009

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JUDICIAL RECORDS ARCHIVES
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JOSEPH NZIRORERA'S MOTION TO RECALL
PROSECUTION WITNESSES ALG, AWD, G, and T

The Office of the Prosecutor:

Mr. Don Webster
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 hereby moves for an order that Prosecution Witnesses ALG, AWD, G, and T be recalled for further cross examination. He further requests that his own defence case not commence until he has completed his cross-examination of all prosecution witnesses, including Witnesses GBU and HH, who have already been ordered to be recalled.¹

2. A party seeking to recall a witness must demonstrate good cause—a substantial reason amounting in law to a legal excuse for failing to perform a required act. The Chamber must consider the purpose of the proposed testimony as well as the party's justification for not offering the evidence when the witness testified.²

Witness ALG

3. After Witness ALG testified, the prosecution took an additional statement from him. In this statement, Witness ALG makes new allegations against Mr. Nzirorera and contradicts himself on old ones.

4. Witness ALG now claims that Mr. Nzirorera regularly went to the Ministry of Defence during the genocide and obtained weapons and ammunition for the Interahamwe.³

¹ Consolidated Decision on Joseph Nzirorera's Motion to Recall Witness GBU... (6 August 2008) and Decision on Joseph Nzirorera's Motion to Recall Prosecution Witness HH (29 March 2009)

² Prosecutor v Karemera et al, No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Recall Ahmed Mboniyunkiza (25 September 2007) at para. 5; Prosecutor v Bagosora et al, No. ICTR-98-41-T, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross Examination (19 September 2005) at para. 2; Prosecutor v Niyiramasuhuko et al, No. ICTR-98-42-T, Decision on Ntahobali's Strictly Confidential Motion to Recall Witnesses TN, QBQ, and QY for Additional Cross-Examination (3 March 2006) at para. 32; Prosecutor v Bagosora et al, No. ICTR-98-41-T, Decision on Bagosora Defence Motion to Recall Witness Frank Claeys for Additional Cross Examination (19 February 2007) at para. 3; Prosecutor v Nindliyiimana et al, ICTR-00-56-T, Decision on Defence Motion to Recall Witness AOE for Additional Cross Examination (3 April 2007) at para. 6; Prosecutor v Niyiramasuhuko et al, No. ICTR-98-42-T, Decision on Kanyabashi's and Nsabimana's Motions to Cross Examine Prosecution Witness QA on Additional Topics (28 October 2008) at para. 25

³ Statement at p. 4. The statement is attached as Annex "A" to Joseph Nzirorera's 23rd Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures: Witness ALG (2 February 2009)

He claims that Mr. Nzirorera regularly visited Witness HH, an Interahamwe leader, and other Interahamwe in his area.⁴

5. Witness ALG now claims to have personally seen Mr. Nzirorera at the end of April and beginning of May at the Diplomat Hotel in the company of military officers, and claims to have also seen him at RTLM.⁵

6. Despite providing dozens of pages of prior statements in which he accused Mr. Nzirorera of various acts of wrongdoing,⁶ Witness ALG never once mentioned having knowledge of Mr. Nzirorera going to the Ministry of Defence to distribute weapons, having visited Witness HH in his area, or having personally seen him at the Diplomat Hotel or RTLM.

7. In fact, Witness ALG testified about a meeting at the Diplomat Hotel in which arms were distributed, but testified that he did not attend.⁷ He testified to seeing Nzirorera at the end of April 1994, but only at the Kigali prefecture office, not the Diplomat Hotel or RTLM.⁸

8. The new statement of Witness ALG was taken in November 2008. It was not disclosed to Mr. Nzirorera until February, 2009.⁹

9. Good cause exists to recall Witness ALG because the newly-disclosed statements undermine the credibility of Witness ALG. They are inconsistent with his earlier testimony and contain allegations which he would have expected to testify about

⁴ Statement at p. 5

⁵ Statement at p. 5

⁶ See Exhibits DNG 22-33, 37

⁷ Transcript of 27 October 2006 @ 5

⁸ Transcript of 26 October 2006 @ 58

⁹ The failure to disclose the statement is the subject of *Joseph Nzirorera's 23rd Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures: Witness ALG* (2 February 2009) The Chamber has not yet ruled on the motion. Given the Trial Chamber's desire to schedule the commencement of Mr. Nzirorera's case, it was deemed not prudent to further delay the filing of this motion.

at Mr. Nzirorera's trial had they been true. It is necessary to confront Witness ALG with these new statements and to allow him the opportunity to explain or comment upon the inconsistencies and omissions so the Trial Chamber can properly evaluate his credibility.

10. Therefore, it is respectfully requested that the Trial Chamber order Witness ALG to be recalled.

Witness AWD

11. The situation with Witness AWD is virtually identical to that of Witness HH, who the Trial Chamber has already ruled should be recalled.¹⁰

12. In its *Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (11 September 2008), the Trial Chamber found that the prosecution had violated Rule 68 by failing to disclose the testimony of Witness ALL-42 in the *Bagosora* trial. During his testimony, Witness ALL-42 alleged that Jean Pierre Turatsinze and certain officers of the national committee of the Interahamwe were working for the RPF during 1992-94.

13. The Trial Chamber, while denying Mr. Nzirorera the remedies he requested for the disclosure violation, observed that Mr. Nzirorera might be entitled to recall certain prosecution witnesses upon a showing of good cause.¹¹ Among the prosecution witnesses specifically cited as those whose cross-examination was impacted by the prosecution's disclosure violation were Witnesses AWD and HH, who testified about the actions of Turatsinze and the members of the national committee of the Interahamwe.

¹⁰ *Decision on Joseph Nzirorera's Motion to Recall Prosecution Witness HH* (29 March 2009)

¹¹ *Decision* at para. 32

14. The Trial Chamber granted a subpoena for counsel for Mr. Nzirorera to interview Witness AWD.¹² On 27 and 28 March 2009, Mr. Nzirorera's counsel attempted to interview Witness AWD in Rwanda but he was not available for an interview. Since counsel cannot return to Rwanda until late May, Mr. Nzirorera believes that the best remedy is to simply recall Witness AWD.

15. Good cause exists to recall Witness AWD because he testified extensively about his contacts with Jean-Pierre Turatsinze. The purpose of recalling Witness AWD is to obtain additional evidence demonstrating that Jean Pierre Turatsinze was in fact working for the RPF. Therefore, Turatsinze's conduct in distributing weapons should not be attributed to the accused, and his allegations to UNAMIR about a plan to exterminate Tutsis should not be credited.

16. Had Mr. Nzirorera been aware of the information from Witness ALL-42 which was improperly withheld from disclosure by the prosecution at the time of Witness AWD's testimony, he would have elicited this information on cross-examination. The justification for not offering the evidence when Witness AWD testified was that the defence was not aware of it at that time.

17. In granting Mr. Nzirorera the right to interview Witness AWD, the Trial Chamber erroneously stated in its decision that Witness ALL-42 had testified that Witness AWD was working for the RPF.¹³ However, this error does not change the good cause for recalling Witness AWD, which is the same as for calling Witness HH. Both witnesses testified to their extensive contacts with Turatsinze. Had the prosecution not

¹² *Decision on Joseph Nzirorera's Motions to Subpoena Witnesses AWD and G for Interview* (10 February 2009)

¹³ *Decision on Joseph Nzirorera's Motions to Subpoena Witnesses AWD and G for Interview* (10 February 2009) at paras. 18 and 19

violated its disclosure obligations, Mr. Nzirorera would have been entitled to confront each of these witnesses with ALL-42's information that Turatsinze was working for the RPF. Recalling these witnesses simply restores Mr. Nzirorera to the position he would have been in, but for the disclosure violation.

18. Therefore, it is respectfully requested that the Trial Chamber order that Witness AWD be recalled.

Witness G

19. The situation with Witness G is an even stronger one for recall than that for Witnesses HH and AWD. Witness ALL-42 directly accused Witness G of working for the RPF.

20. The Trial Chamber has already recognized the importance of this new information in its decision ordering Witness G to submit to an interview with counsel for Mr. Nzirorera. It has ruled that if Witness G was working for the RPF, it would affect his credibility.¹⁴

21. Mr. Nzirorera had originally wanted his counsel to interview Witness G prior to deciding whether to recall him. However, the Trial Chamber inserted the requirement that the prosecution speak to Witness G first, to convince him to be interviewed by Mr. Nzirorera's counsel.¹⁵ Despite the fact that the order was issued on 10 February, the prosecution has not managed to speak with Witness G, and does not propose to do so until 27 April.

¹⁴ *Decision on Joseph Nzirorera's Motions to Subpoena Witnesses AWD and G for Interview* (10 February 2009) at para. 7; *Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (11 September 2008) at para. 11

¹⁵ *Decision on Joseph Nzirorera's Motions to Subpoena Witnesses AWD and G for Interview* (10 February 2009) at para. 15

22. Because the Trial Chamber wishes Mr. Nzirorera to commence his defence case soon, and because that case cannot logically be commenced until the cross-examination of prosecution witnesses is completed, Mr. Nzirorera requests that Witness G simply be recalled for cross examination so as to avoid further delays.

23. With respect to the scope of that cross-examination, Mr. Nzirorera contends that he should also be able to question Witness G on two matters which have been disclosed since his original testimony.

24. The first matter is the amount of benefits paid by the Tribunal on behalf of Witness G. When Witness G originally testified, the Trial Chamber limited disclosure of his benefits to amounts paid to him directly. After the *Bizimungu* Trial Chamber came to a contrary conclusion, this Trial Chamber reconsidered its decision and ordered disclosure of the full amount, which was some 10 times greater than the amount disclosed to Mr. Nzirorera at the time of Witness G's testimony.¹⁶

25. Mr. Nzirorera contends that he should be able to question Witness G on these payments and their effect on his motivation to assist the prosecution by incriminating Mr. Nzirorera. Had the Trial Chamber made the decision to disclose the full amounts benefits in the first place, while Witness G was still testifying, Mr. Nzirorera could have questioned him about those payments, as the accused in the *Bizimungu* case did.

26. If the Trial Chamber decides to recall Witness G, it should put Mr. Nzirorera back in the position he should have been, but for the Trial Chamber's decision which it has now reconsidered.

¹⁶ *Decision on Joseph Nzirorera's Motion for Reconsideration of Oral Decision on Motion to Compel Full Disclosure of ICTR Payments for the Benefit of Witnesses G and T and Motion for Admission of Exhibit: Payments to Witness G* (29 May 2008)

27. Good cause exists to recall Witness G on this basis because the amount of the benefits goes directly to his credibility and the mere admission of an exhibit containing the amount does not deal with the influence of those payments on Witness G's testimony. That will remain a matter of speculation and inference only unless Mr. Nzirorera is able to confront Witness G with it.

28. The second matter is information contained in an interview of Witness G first disclosed to Mr. Nzirorera in November 2008. The report of the interview contains several matters that appear to be inconsistent with Witness G's testimony during Mr. Nzirorera's trial. These relate to new claims that it was Colonel Setako who sent for the Interahamwe committee members to meet Mr. Nzirorera and other MRND leaders at the Diplomat Hotel on 10 April 1994¹⁷, and that it was Colonel Setako who gave the orders from the Minister of Defence to incorporate the Interahamwe into the civil defence.¹⁸ It may well be that this evidences a desire by Witness G to incriminate OTP's targets in light of the vast amount of money paid by the prosecution to Witness G over a 10 year period.

29. The statement also contains other inconsistencies which relate to Mr. Nzirorera's case, including the fact that Witness G went to Gitega on 9 April 1994¹⁹, that the Interahamwe already had firearms by 9 April 1994²⁰, and that the Interahamwe no longer had an office in MRND headquarters in 1993 when Mr. Nzirorera became Secretary General.²¹

¹⁷ Statement, at p. 8, middle paragraph. The statement was submitted by the prosecution to the Trial Chamber on 7 November 2008.

¹⁸ Statement, at p. 21, first paragraph

¹⁹ Statement, at p. 12, last paragraph

²⁰ Statement, at p. 14, last 2 paragraphs

²¹ Statement at p/ 11, last paragraph

30. The Trial Chamber ruled, in the context of the request to interview Witness G, that this information could not be included in the cross-examination of Witness G in the event he was recalled because it was not part of the remedial measures ordered for the prosecution's disclosure violation.²² However, should the Trial Chamber order Witness G to be recalled for cross examination as a result of the disclosure violation, there is no reason why he should not also be questioned about inconsistent statements which were not available to Mr. Nzirorera at the time Witness G was cross examined.

31. Witness G is currently scheduled to testify by video link in the *Setako* trial during the week of 20 April 2009. The Trial Chamber should order that he be recalled in this trial for further cross examination and that his testimony be heard by video-link on Monday 27 April 2009.

Witness T

32. Witness T is also a witness for whom recall should be granted for the same reason that the Trial Chamber has already granted recall to Witness HH. Witness T testified extensively about his contacts with Jean Pierre Turatsinze, Robert Kajuga, and Witness G—all of whom Witness ALL-42 has identified as working for the RPF.

33. The Trial Chamber recognized the relevance and importance of this information when it granted an order that Witness T be interviewed by Mr. Nzirorera's counsel.²³

33. Witness T was interviewed on 12 March 2009 by the authorities of the State in which he is residing, in the presence of representatives of the prosecution and Mr.

²² *Decision on Joseph Nzirorera's Motions to Subpoena Witnesses AWD and G for Interview* (10 February 2009) at para. 17

²³ *Decision on Joseph Nzirorera's Motions for Request for Cooperation of a State (Confidential)*... (25 November 2008) at para. 6

Nzirorera. He stated that he was firmly of the belief that the Interahamwe was infiltrated by the RPF.²⁴ Therefore, he has information which is relevant to the trial, but was not able to be elicited when he testified because of the prosecution's disclosure violation.²⁵

34. In its decision granting the interview, the Trial Chamber, as it did with Witness AWD, made a slight factual error. It considered that Witness T only had contact with Turatsinze, and not the other leaders who Witness ALL-42 testified were also working for the RPF—Witness G, Robert Kajuga, and Phineas Ruhumuliza.²⁶

35. In fact, Witness T's testimony is replete with references to his frequent contacts with those three individuals.²⁷ Therefore, Mr. Nzirorera should be allowed to cross examine Witness T about the allegation that these individuals were working for the RPF.

36. There are two other matters which Mr. Nzirorera contends he should be allowed to question Witness T about.

37. The first matter involves the allegations made by Witness T in his July, 1996 statements that were the subject of yet another disclosure violation by the prosecution. The Trial Chamber has found that the prosecution violated Rule 66(A)(ii) by failing to disclose this statement before Witness T testified.²⁸ The Trial Chamber indicated in that

²⁴ This information was provided to lead counsel from the notes of his co-counsel from the hearing. A statement from that hearing and signed by Witness T was prepared by the authorities of the State, but has not yet been transmitted to the parties. Given the pendency of the commencement of Mr. Nzirorera's case, it has been deemed most prudent not to wait for the official statement.

²⁵ The nature of the contact with Witness T, which required that the questions be approved in advance by the Trial Chamber and asked by the authorities of the State, did not permit follow-up of this information for more particulars.

²⁶ *Decision on Joseph Nzirorera's Motions for Request for Cooperation of a State (Confidential)*...(25 November 2008) at para. 8

²⁷ See, for example, Transcript of 29 May 2006 @ 3; Transcript of 30 May 2006 @ 12-22; 58-60; Transcript of 31 May 2006 @ 16

²⁸ *Decision on Joseph Nzirorera's 25th Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Witness T* (24 March 2009)

decision that it would consider ordering Witness T to be recalled upon a showing of good cause.²⁹

38. In the report Witness T makes serious allegations against Mr. Nzirorera of fraud and bribery. These allegations are completely false, and demonstrate that Witness T was currying favor with the ICTR Office of the Prosecutor by leveling accusations against prominent figures such as Mr. Nzirorera in the hope of saving his own skin.

39. Had this statement been disclosed to Mr. Nzirorera prior to the cross examination of Witness T, he would have used it to demonstrate that Witness T has “gilded the lily” by implicating Mr. Nzirorera in some things that he did not participate in, such as distribution of weapons on 12 April 1994, as part of his strategy of self-preservation.

40. Therefore, good cause exists for allowing Witness T to be recalled and cross examined on the statement.

41. The second matter involves an issue identical to that with Witness G—the amount of payments made by the ICTR to Witness T. As with Witness G, the Trial Chamber reconsidered its original decision in which it refused disclosure of the full extent of the payments.³⁰ Also as with Witness G, the Trial Chamber has, in the context of a request for interview, indicated that Witness T could not be questioned about the payments if recalled.³¹

²⁹ *Decision on Joseph Nzirorera's 25th Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Witness T* (24 March 2009) at para. 6

³⁰ *Decision on the Full Disclosure of ICTR Payments Made for the Benefit of Witness T* (6 August 2008)

³¹ *Decision on Joseph Nzirorera's Motions for Request for Cooperation of a State (Confidential)...* (25 November 2008) at para. 8

42. Disclosure of the full amount revealed that it was many times greater than the amount disclosed to Mr. Nzirorera at the time of Witness T's testimony.³²

43. Mr. Nzirorera contends that he should be able to question Witness T on these payments and their effect on his motivation to assist the prosecution by incriminating Mr. Nzirorera. Had the Trial Chamber made the decision to disclose the full amounts benefits in the first place, while Witness T was still testifying, Mr. Nzirorera could have questioned him about those payments..

44. If the Trial Chamber decides to recall Witness T, it should put Mr. Nzirorera back in the position he should have been, but for the Trial Chamber's decision which it has now reconsidered.

45. Good cause exists to recall Witness T on this basis because the amount of the benefits goes directly to his credibility and the mere admission of an exhibit containing the amount does not deal with the influence of those payments on Witness T's testimony. That will remain a matter of speculation and inference only unless Mr. Nzirorera is able to confront Witness T with it.

46. Therefore, it is respectfully requested that the Trial Chamber order that Witness T be recalled. Because he is also subject to protective measures which require that he testify by video link, the Trial Chamber is requested to order that Witness T give his testimony on Tuesday, 28 April 2009, so that the parties attending the Witness G video link can immediately proceed to the location where Witness T can give his testimony.

³² *Decision on the Full Disclosure of ICTR Payments Made for the Benefit of Witness T* (6 August 2008)

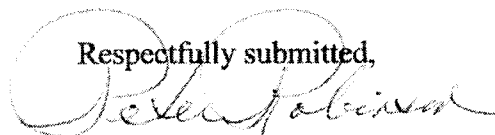
Ancillary Orders

47. Witnesses GBU, HH, AWD, and ALG are currently in Rwanda. The Trial Chamber is requested to order their transfer to Arusha no later than 28 April 2009, so that they can be available to testify immediately after the video link testimony of Witnesses G and T.

Conclusion

48. The Trial Chamber should order the recall of Witnesses ALG, AWD, G, and T, in addition to that already ordered for Witnesses GBU and HH, and should immediately undertake arrangements for these witnesses to testify during the next trial session, prior to the commencement of Mr. Nzirorera's case-in-chief.

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera