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International Criminal Tribunal for Rwanda
1998 APR 17 P 12:39
TRIAL CHAMBER II

OR: ENG.

Before: Judge Yakov A. Ostrovsky, Presiding
Judge William H. Sekule
Judge Navanethem Pillay

Registry: Mr. John Kiyeyeu

Decision of: 16 April 1998

**THE PROSECUTOR
VERSUS
ELIE NDAYAMBAJE**

Case No. ICTR-96-8-T.

**DECISION ON THE DEFENCE MOTION OF UTMOST URGENCY TO RESOLVE
ALL DIFFICULTIES POSED BY THE FILE PROCESSING AND, IN PARTICULAR,
ISSUES OF EVIDENCE DISCLOSURE, JUDICIAL CALENDAR AND NON-
ENFORCEMENT OF DECISIONS OF THE TRIAL CHAMBER IN THE
NDAYAMBAJE CASE**

The Office of the Prosecutor:

Mr. James K. Stewart
Mr. Chile Eboe-Osuji
Mr. Robert Petit

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: PRISCA NYAMBE
SIGNATURE: *Prisca Nyambe* DATE: 17.4.98

The Counsel for the Accused:

Mr. Charles Tchoungang

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The International Criminal Tribunal for Rwanda,

SITTING AS Trial Chamber II (“the Trial Chamber”), composed of Judge Yakov A. Ostrovsky, Presiding, Judge William H. Sekule, and Judge Navanethem Pillay;

NOTING the indictment filed on 17 June 1996, by the Prosecutor against Elie Ndayambaje, pursuant to Rule 47 of the Rules of Evidence and Procedure (“the Rules”), charging him with genocide, conspiracy to commit genocide, crimes against humanity and violations of Article 3 common to the 1949 Geneva Conventions and the 1977 Additional Protocol II thereto;

HAVING CONSIDERED the decision confirming this indictment, signed by Judge Tafazzal H. Khan on 21 June 1996;

BEING MINDFUL OF the initial appearance of the accused which took place on 29 November 1996;

CONSIDERING the motion of utmost urgency filed by the Defence on 17 February 1998, to resolve administrative and procedural difficulties, seeking disclosure of the complete Belgian file; permission to approach the Belgian government if necessary; clarification of witness protection measures, and sanctions against the Prosecution and the Victims and Witnesses Unit;

REMINDED of the fact that this motion was set for hearing on 3 March 1998 initially, but due to the non-appearance of Defence Counsel, the matter was postponed at the request of the Defence Counsel to a date, namely 11 March 1998;

NOTING the written response by the Prosecutor filed on 27 February 1998, requesting that the motion be dismissed and that Defence Counsel be warned officially, for the “offensive and abusive” language of his filed motion,

FURTHER NOTING the Prosecutor’s oral submissions for pecuniary sanctions against Defence Counsel for his nonattendance on 3 March 1998, which was later withdrawn in writing;

HAVING HEARD the parties in open session on 11 March 1998, after a delay occasioned by the late appearance of Defence Counsel,

The Defence Counsel requested the following measures:

1. An order directing the Office of the Prosecutor (“the OTP”) to disclose the complete Belgian file, examined by Judge D. Vandermeersch, accompanied by translation of documents from Flemish into English or French, within twenty days of the rendering of this decision, stating that it was his belief that a full review of the file would lead him to find exculpatory materials. He further stated that the question of which portion of these files may be relevant to the defence of his client should be a matter for decision by the Defence and not the Prosecution.

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2. Furthermore, Defence Counsel requested the Trial Chamber's authorization to approach the legal authorities of the Kingdom of Belgium for a copy of said file, should the OTP fail to comply within the allotted time.

3. Defence Counsel argued that the Trial Chamber's decision of 8 September 1997, on the protection of defence witnesses, had not as yet been implemented by the Victims and Witness Unit ("VWU" or "the Unit"). He stated that he had provided witness information under seal to the VWU, but that to date, no conclusive measures had been taken to protect these witnesses, particularly those residing in Kenya. Defence Counsel sought an order for compliance by the VWU within 20 days of the date of decision.

4. Finally, the Defence Counsel contended that the Prosecutor's failure to disclose all the contents of the Belgian file amounted to non-compliance with the Trial Chamber's order of disclosure, wherefore Defence Counsel requested sanctions against the Prosecutor.

5. A further request made by the Defence Counsel for the adoption of pre-established calendar to avoid uncertainties and delays, was abandoned by him at the hearing in view of the fact that a date for trial has been fixed.

The Prosecution responded:

1. The defence motion should be dismissed, in its entirety, on both procedural and substantive grounds.

A) Procedurally, the Prosecution argued that the orders requested by the Defence must be based on fact and supported by evidence. Because all factual allegations made by the Defence were submitted without supporting documentation or correspondences and because the Prosecution disputed each allegation, the motion should be dismissed.

B) The substantive grounds argument was supported by production of excerpts from various cases, including *Prosecutor v. Delalić, et al.* (IT-96-21-T) 26 September 1996. In *Delalić*, the International Criminal Tribunal for the Former Yugoslavia held that the Defence "... must make a *prima facie* showing of materiality and that the requested evidence is in the custody or control of the Prosecutor." (para. 9). Therefore, it was ruled that it would be inappropriate for the Trial Chamber to intervene until such time that the requesting party would specify its needs for certain documents. (para. 10).

The Prosecution further stated that it would be logistically impossible for them to physically disclose the entire file, due to its enormity and because it concerned this particular accused only minimally. Moreover, the file contains names of protected witnesses. The Prosecution asked the Trial Chamber to note that 129 witness statements (PV's) have already been disclosed to the Defence from the Belgian file.

2. With regard to the issue of translation, the Prosecution contended that less than twenty percent of the contested documents were in Flemish. The Prosecution sought clarification of the obligation to have documents translated.

3. The Prosecution objected to the use of offensive language such as “procedural guerrilla strategy” and “taking extraordinary liberties with the imperative decisions of this Trial Chamber,” in the instant motion and called for an official warning pursuant to Rule 46 of the Rules.

4. Subsequent to the hearing and by a communication to the Registrar, the Prosecutor withdrew his request for financial sanction against the Defence Counsel.

The Representative of The Victims and Witness Unit explained at the hearing that:

1. On a number of occasions the VWU had been in contact with Defence Counsel pursuant to this Chamber’s 8 September 1997 order and that the Unit’s procedures have been explained to him.

2. The Office of the Registrar was prepared to assist the Defence Counsel and take all possible measures to ensure cooperation between the Tribunal and the government of the Republic of Kenya as well as the United Nations High Commission for Refugees for witness protection purposes, once the VWU received the needed information concerning the witnesses.

The Defence Counsel had produced a list of witnesses under seal, but had denied the VWU access to the list until such time as the negotiations with the Kenyan government were concluded. This obstructed deliberations as the Kenyan authorities were reluctant to provide blanket assistance to unknown individuals.

- 3. The VWU orally requested that the Trial Chamber take note
 - a) of their on-going negotiations with the Kenyan government and
 - b) that Defence Counsel is in default of the witness protection decision of the Trial Chamber, *supra*, by withholding the particulars of the potentially protected witnesses and
 - c) that the VWU is prevented from implementing the order of the Trial Chamber, as long as Defence Counsel withholds disclosure of the witnesses particulars and imposes conditions of his own.

DELIBERATIONS:

I. On the issue of disclosure of the entire Belgian file, the Trial Chamber notes the following:

1. Rule 66 of the Rules provides two criteria for discovery of documents: materiality to the preparation of the defence and intended use by the Prosecution as evidenced at trial. The Prosecution has stated that they have disclosed relevant materials from the Belgian file, on this basis. The Defence has laid no foundation in fact or in law to warrant a disclosure of the complete Belgian file, in disregard of the said stipulations.

Furthermore, the Trial Chamber notes the Prosecution’s statement that the Belgian file is comprised of thousands of pages and covers not only the accused and other accused, indicted by

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the Tribunal, but various other parties and events unrelated to this case. Not only is it highly impractical to discover the entire file, but it might be prejudicial to the rights of other persons to do so. We remind the Prosecution however, of its obligation under Rule 68 to disclose exculpatory evidence, should such information be discovered during the course of further investigations.

2. With regard to translation of the pertinent documents, we find nothing in the Rules which indicates that the OTP is under a direct duty to provide the Defence with translation services. They are however, responsible to initiate the translation process with regard to *any documents which they intend to use*. It is then that, in accordance with Rule 3(E) of the Rules and this Trial Chamber's previous rulings, the Registrar becomes the responsible party for making arrangements for translations.

Therefore, it is open to both the Prosecutor and Defence Counsel to approach the Registry with requests for translation of materials to be used from the Belgian file. The Defence may approach the Registry to have translated any documents from the said file, which fall within the scope of this order. The ultimate responsibility for translation of documents rests with the Registry.

3. Finally, with regard to the Defence request for authorization to approach the legal authorities in Belgium for access to the above mentioned files, no such authorization is necessary. Therefore, should Defence Counsel so desire, he may contact the appropriate officials in the Belgian government, in the course of preparing his case.

II. With regard to witness protection issues raised by the Defence:

The Trial Chamber is of the view that the VWU is not in default of the witness Protection order, as alleged by the Defence Counsel and holds that the conduct of the Defence Counsel by imposing new conditions extraneous to the decision may not only be hindering the work of the VWU, but also violates the integrity of the decision of the Chamber.

If Defence Counsel intends to use Tribunal resources to protect his witnesses, as he is so entitled under Rule 75, he *must* provide the VWU with the necessary information it needs to assist in the preparation of the case in an appropriate manner, without imposing additional conditions which would cause undue burdens on the Unit.

III. On the issue of requests for sanctions against the parties:

1) The **Defence** has called for sanctions against the Prosecution for non-compliance with our previous orders on disclosure. The Chamber is of the view that the question of sanctions do not arise in the instant case, as the Prosecution has complied with its disclosure obligations under the Rules.

2) The **Prosecutor** has also requested that punitive measures be imposed against Defence Counsel, in its written submissions, for the use of offensive and abusive language.

The Chamber notes that Defence Counsel's failure to attend the session of 3 March 1998, without proper explanation and his dilatory attendance at the session of 11 March 1998, caused delays and inconvenience for the Chamber and also notes that the choice of certain language used by Counsel is unfortunate and reprehensible. The Chamber however, does not see the need to proceed further except to remind Counsel to conduct himself professionally.

FOR THE REASONS STATED ABOVE THE TRIAL CHAMBER:-

- (1) **Dismisses** the Defence motion for an order directing the Prosecutor to disclose the complete Belgian file.
- (2) **Dismisses** the Defence motion for an order for compliance by the VWU of the Witness Protection Order of 8 September 1997.
- (3) **Dismisses** the orders for sanctions requested by the Prosecution and Defence.

Done in Arusha, this 14th day of April 1998.

Yakov A. Ostrovsky
 03.04.98
 Yakov A. Ostrovsky
 Presiding Judge

William H. Sekule
 William H. Sekule
 Judge

Navanethem Pillay
 Navanethem Pillay
 Judge

(Seal of the Tribunal)



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