



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

CHAMBER I - CHAMBRE I

OR : ENG

Before:

Judge Laïty Kama, Presiding Judge
Judge Lennart Aspegren
Judge Navanethem Pillay

Registry:

Mr. K.M.Mindua

Decision of: 4 September 1998

**THE PROSECUTOR
VERSUS
GEORGES ANDERSON NDERUBUMWE RUTAGANDA**

Case No. ICTR-96-3-T

DECISION ON THE DEFENCE MOTION FOR DISCLOSURE OF EVIDENCE

The Office of the Prosecutor:

Mr. James Stewart
Mr Udo Gehring

Counsel for the Accused:

Ms. Tiphaine Dickson

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the
"TRIBUNAL"),**

SITTING as Trial Chamber I, composed of Judge Laïty Kama as Presiding Judge, Judge Lennart Aspegren and Judge Navanethem Pillay;

HAVING BEEN SEIZED by the Defence Counsel's motion of 30 October 1997, pursuant to Rules 66, 67, 68 and 70 of the Rules of Procedure and Evidence (the

ARules@), requesting an order for disclosure in certain specific instances and other relief such as, the adjournment of the proceedings until full disclosure has been made to the Defence, the prohibition of the Prosecutor from calling witnesses whose identity and corresponding documentary evidence have not been disclosed and the imposition of a fine on the Prosecutor as a form of sanction for the late disclosure of evidence and the identities of the witnesses.

NOTING that the Defence Counsel filed a written notice of amendment to her motion, dated 2 March 1998, withdrawing her averments in paragraphs 54 to 65; 72 to 76; and 109 to 111 of the said motion;

CONSIDERING that the Prosecutor opposed Defence Counsel=s motion in a written response dated 5 February 1998;

HAVING HEARD the parties at a hearing on 2 March 1998;

CONSIDERING THE DEFENCE COUNSEL=S SUBMISSIONS,

1. The Defence Counsel, in paragraphs 8, 19, 20, 22, 38, 40, 49, 80, 85, 89, 112, 119, 122, 136 and 142 of her written motion made a number of requests in respect of disclosure of material, which material Defence Counsel alleges is in the Prosecutor=s possession or under her control. The Defence Counsel requested the Prosecutor to :

(1.1) furnish Defence Counsel with an inventory of the evidence in her possession, except for evidence governed by Rule 70 of the Rules; the Prosecutor must also indicate which evidence she does not intend to disclose and reasons for her refusal to do so;

(1.2) indicate to the Defence which witnesses she does not intend to call to the stand when she complies with her obligation in respect of disclosure;

(1.3) disclose to the Defence names of all the prosecution witnesses bearing pseudonyms and a final list of expert witnesses the Prosecutor intends to call, as well as their résumés and written reports;

(1.4) disclose to the Defence unredacted copies of the witness statements, including those who have testified, in accordance with the Tribunal=s witness protection order of 26 September 1996;

(1.5) disclose to the Defence any exculpatory evidence in the possession of the Prosecutor or of which she is aware, including the names and addresses of exculpatory witnesses;

(1.6) disclose to the Defence the identities of the members of UNAMIR that were present when the accused allegedly made a speech, as mentioned in the statement of witness X;

(1.7) disclose to the Defence the series of documents concerning the distribution of weapons to the civilian population, as mentioned in the *Rapport du groupe ad hoc Rwanda à la commission des affaires étrangères*;

(1.8) furnish the Defence with a French translation of the passages, excerpts, letters or other documents written in the Flemish language, as contained in the *Rapport du groupe ad hoc Rwanda à la commission des affaires étrangères*;

(1.9) furnish the Defence with all protocols or agreements made between the Tribunal or if applicable, the Officer of the Prosecutor) and the Government of Rwanda, regarding the conditions of movement of witnesses and the exhumation of bodies on Rwandan soil;

(1.10) furnish the Defence with the dates on which the searches, excavations, exhumations or other any other activity that may have taken place on the accused's property, a list of the persons present, an inventory of the goods seized, as well as the chain of possession of such goods;

(1.11) disclose to the Defence any document, report or expert opinion concerning the Interahamwe;

(1.12) disclose to the Defence copies of documents the prosecution witnesses intend to refer to when giving evidence;

(1.13) disclose to the Defence the interview or summary notes of the meeting between General Roméo Dallaire and Mr. Luc Côté; and

(1.14) disclose to the Defence the results of the investigation concerning the circumstances of the attack on the plane carrying the President Habyarimana on 6 April 1994;

2. The Defence Counsel requested in paragraphs 32, 40, 44, 49, 66, 69, 77, 80, 89, 99, 107, 115, 125, 129 and 133 of her written motion, that the Prosecutor make immediate disclosure of the following information once she receives confirmation of its existence :

(2.1) any tape, cassettes or notes made during the collection of statements from prosecution witnesses who have testified or who will testify in the trial of the accused;

(2.2) any exculpatory evidence, including the names and addresses of exculpatory witnesses;

(2.3) the dates and places of the meetings, held by Mr. Esdras Mpamo and the minutes thereof, as described in the written statement of witness AEE@;

(2.4) the identities of the members of UNAMIR that were present when the accused allegedly gave a speech, as described in the written statement of witness AX@;

- (2.5) all relevant evidence concerning a commercial transaction, as described in the written statement of witness AN@;
- (2.6) the exact location, date and minutes of a meeting held by the MRND, near the Masango communal office, as described in the statement of witness AC@;
- (2.7) the identification of the editorial staff of the newspaper ALe FLAMBEAU@ on 17/12/1993;
- (2.8) a series of documents referred to in the *Le Rapport du groupe ad hoc Rwanda à la commission des affaires étrangères*;
- (2.9) all protocols or agreements made between the Tribunal and the government of Rwanda;
- (2.10) tapes and transcripts of all speeches to which the Prosecutor intends to refer to, including those which may be referred to by prosecution witnesses;
- (2.11) the questions put to each witness when their statements were taken;
- (2.12) any map, diagram, communication, telex or any other document which may indicate the RPF positions in Kicukigo secteur, between 7 and 16 April 1994;
- (2.13) medical reports for the witnesses in respect of whom the Prosecutor intends to exhibit their wounds;
- (2.14) any statement or report given by prosecution witnesses to the police or judicial authority, concerning the events of 1994;
- (2.15) details of the criminal records of prosecution witnesses, if applicable;
- (2.16) the interview or summary notes of the meeting between Mr. Luc Côté and General Dallaire; and
- (2.17) the results of the investigation of the plane crash, carrying the late President Habyarimana on 6 April 1994.

3. The Defence Counsel submitted that in the event of the Prosecutor not being in possession or not having any knowledge of the information requested, the Prosecutor must be obliged to conduct a reasonable search to confirm the existence of this information.

CONSIDERING THE PROSECUTOR=S SUBMISSIONS,

4. The Prosecutor=s submissions to Defence Counsel=s various requests for disclosure are:-

(4.1) Disclosure was made in respect of the 15 witnesses who have to date testified. Approximately 25 witnesses remain to be heard to complete the prosecution case and complete disclosure has been made in respect of all but 4 of these witnesses. In respect of two of these four witnesses partial disclosure has been made. In respect of the third witness, the Prosecutor is presently trying to identify and locate a Rwandan Journalist responsible for video footage of Interahamwe activities and the Prosecutor is therefore not in a position to make full and complete disclosure in respect of this witness. In respect of the fourth witness, the Prosecutor has filed a motion requesting the Chamber's permission in delaying disclosure of the identity and statement of the witness, for reason of safety to the witness and the witnesses family and also for the purposes of safeguarding on-going investigations;

(4.2) All other Defence requests in respect of paragraphs 20, 22, 38, 40 and 49 of Defence motion have been fulfilled;

(4.3) In respect of paragraph 80 of the Defence motion; relating to certain documents concerning the activities of the militia, the Prosecutor was unsuccessful in obtaining these documents;

(4.4) In respect of paragraph 112 of the Defence motion; enquiries have been made with Dr Haglund who stated that the dates , places and persons present at the Amgar Garage exhumations are identified in his report which was communicated to the Defence. Dr Haglund is also unaware of any other searches made at the Amgar Garage property, besides the preparation of sketches made by crime scene analyst, Pierre Heuts. The sketches, photographs and video tape made by Pierre Heuts, were entered as evidence, when he testified as the first witness in the Trial;

(4.5) The defence request in respect of paragraph 119 of Defence motion is broad and unfocused and therefore falls outside the scope of the relevant rules of disclosure. Expert witness, Professor Reyntjens testified that the interahamwe were the spearhead of the genocide. There is also a great deal of evidence on the record to establish the widespread and pervasive involvement of the interahamwe in the events of April to July 1994, notably in Kigali. A mass of witness statements unrelated to the case of the accused, acquired by the Prosecutor make reference to the interahamwe. The Defence has failed to show why it is material to the defence to have access to this mass of documentation.

5. The Prosecutor further submitted that:-

(5.1) she has complied with the Rules in respect of disclosure and has obeyed the decision of the Tribunal in respect of witness protection measures;

(5.2) she cannot supply what is not in her custody or control and the Office of the Prosecutor should not function as an investigative agency for the Defence;

(5.3) unless she proposes to use documents as evidence at the trial of the accused, she is not obliged to translate them into English or French, for the purposes of disclosure or inspection;

(5.4) she is mindful of her obligation to disclose to the Defence exculpatory evidence, pursuant to Rule 68 of the Rules, and her interpretation and understanding of this rule is that it imposes an obligation on her to provide information, that is, to alert the Defence to the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused, or may affect the credibility of prosecution evidence. Nevertheless disclosure of evidence that may mitigate the guilt of the accused has already been made to the Defence.

AFTER HAVING DELIBERATED,

6. The Tribunal notes that in terms of Rule 66(A)(i) and (ii) of the Rules, the Prosecutor is obliged *firstly*, to make available to the Defence, within 30 days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when the indictment was confirmed, as well as all prior statements made by the accused to the Prosecutor and *secondly*, to make available to the Defence copies of all statements of prosecution witnesses that will be called to testify at the trial of the accused, no later than sixty days before the commencement of the trial. This obligation is subject to the provisions of Rules 53 and 69. The Prosecutor may, pursuant to Rule 69(A), apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness, where the person may be in danger or at risk, until the person is brought under the protection of the Tribunal.

7. The Tribunal notes that pursuant to Rule 66(B) of the Rules, the Prosecutor, upon a request from the Defence, shall permit the Defence to inspect any books, documents, photographs or tangible objects in her custody or control, subject to any one of the following three conditions been met :

(i) the inspection of any of these items must be material to the preparation of the accused's defence;

(ii) the items must be intended to be used by the Prosecutor as evidence at the trial of the accused;

(iii) the items were obtained from or belonged to the accused.

Furthermore, pursuant to Rule 68, the Prosecutor has an obligation to disclose to the Defence the existence of evidence known to the Prosecutor, which may suggest the innocence of the accused, mitigate the guilt of the accused or affect the credibility of prosecution evidence.

8. The Tribunal notes that it has in this case, rendered a decision on 26 September 1996, granting protective measures to prosecution witnesses, pursuant to Rule 69(A). In this

decision it was ordered that the names, addresses and other identifying information of the witnesses shall not be disclosed to the Defence until such time the witnesses are brought under the protection of the Witnesses and Victims Protection Unit.

9. The Tribunal accepts the Prosecutor's oral and written submission, that she had made to the Defence full and complete disclosure of all exculpatory evidence, pursuant to Rule 68.

10. The Tribunal notes that the Prosecutor has not made full and complete disclosure in respect of four witnesses, namely Dominic Cunningham-Reid, Nick Hughes, a Rwandan journalist responsible for the video footage taken in Kigali on the alleged activities of the Interahamwe and a witness who is subject to a witness protection order pursuant to Rule 69(A), referred to by the pseudonym JJ.

11. The Tribunal notes that the Prosecutor has filed a motion dated 9 December 1997, seeking an order to delay the disclosure of the identity and statements of witness JJ to the Defence. The hearing of this motion is pending.

12. The Tribunal notes that the other three witnesses are not subject to any orders pursuant to Rules 53 and 69 and full disclosure in respect of these three witnesses ought to have been made, pursuant to Rule 66(A)(ii).

FOR THESE REASONS, THE TRIBUNAL:

ORDERS that the Prosecutor make immediate disclosure, pursuant to Rule 66(A)(ii) of the Rules, in respect of the three witnesses Dominic Cunningham-Reid, Nick Hughes and the Rwandan journalist in question;

DISMISSES Defence Counsel's motion in every other respect.

Arusha, 4 September 1998

Laïty Kama
Presiding Judge

Lennart Aspegren
Judge

Navanethem Pillay
Judge

(Seal of the Tribunal)