



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge Laity Kama, Presiding
Judge William H. Sekule
Judge Mehmet Güney

Registry: John Kiyeyeu

Decision of: 4 February 2000

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THE PROSECUTOR
v.
Eliezer NIYITEGEKA
Case No. ICTR-96-14-I

**DECISION ON THE DEFENCE MOTION FOR
DISCLOSURE OF EVIDENCE**

The Office of the Prosecutor:

Don Webster

Counsel for the Accused:

Sylvia Geraghty

International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda	
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NAME / NOM:	AMINATTA L. R. N'GUM
SIGNATURE:	<i>Aminatta L. R. N'Gum</i> DATE: 07/02/2000

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (The "Tribunal"),

SITTING as Trial Chamber II, composed of Judges Laïty Kama, Presiding, William H. Sekule, and Mehmet Güney;

BEING NOW SEIZED of a Defence application of extreme urgency for disclosure of evidence (the Motion) filed on 9 November 1999 and the Prosecutor's Response to Defence application of extreme urgency for disclosure of evidence filed on 2 December 1999;

HAVING heard the parties on the Defence application on 7 December 1999;

CONSIDERING Rule 53 and Rule 66 of the Rules of Procedure and Evidence (the Rules);

NOTING that the indictment against the Eliezer Niyitegeka was confirmed on 15 July 1996;

NOTING the Order for arrest and transfer on 16 December 1998;

NOTING that the Accused was arrested on 9 February 1999 in Nairobi (Kenya) and transferred to the Tribunal on 11 February 1999;

NOTING that the accused made his initial appearance on 15 April 1999 and that this appearance was followed by a status conference on the same day;

NOTING that on 7 July 1999, a Prosecution motion for amendment, a motion for joinder and a proposed amended indictment were served upon the Defence;

NOW decides the Defence Motion.

ARGUMENTS OF THE PARTIES

The Submissions of the Defence

1. The Defence submits that the Trial Chamber made no exemption under Rule 53(A), 53(B) or 66(C) to prevent the disclosure of an indictment, of information or materials in the interest of justice or to protect information obtained by the Prosecutor. Rather, during the status conference of 15 April 1999, the Prosecution undertook to disclose to the Defence the supporting material under Rule 66(A)(i) and stated that a request would be filed to allow the disclosure of the witness statements in a redacted form within 60 days in accordance with Rule 66(A)(ii). When the copy of the first amended indictment was received on 14 May 1999 without any supporting material, the Defence directed a request to the Prosecution with regard the supporting material, otherwise known as Annex B. On or about 11 June 1999 (57 days after the initial appearance) the Defence received the same supporting material as the one disclosed to the accused the day that he was arrested. After the proposed amendment indictment was filed on 7 July 1999, the Defence made a request for disclosure of evidence in support of the first amended indictment and the proposed amended indictment. After repeated requests, a lack of response, and being furnished with documents that were not in support of Niyitegeka's indictment, the Defence now argues that the Prosecution violated Rule 66(A).

2. The Defence seeks copies of all supporting material, including redacted witness statements and exculpatory evidence pursuant to Rule 68 be immediately disclosed to the Defence.
3. Further, the Defence argues that as long as she is not provided with the evidence against the Accused, she cannot reply to the Prosecutor's Motions for amendment and joinder. If there is no disclosure, this will result in unfair and unequal conditions for the Accused that has not been provided with documents that were already disclosed to other accused named in the joinder motion, namely Bizimungu and Karemera.
4. The Defence also deplored that the Prosecutor's motions for amendment and joinder were not translated into a language that the Accused understands and moved that the Motions be stayed pending disclosure.
5. Finally, the Defence raises the issue of the date for trial and questions the responsibilities lying behind the setting of this date. Precisely, the Defence argues that if the Registry or the Court had not failed to set this date, the Prosecution would have had to comply with the obligation to disclose evidence to the accused in accordance with rule 66(A)(ii).

The Prosecution Response

6. The Prosecution opposes the Defence request for disclosure and for a stay of the proceedings of the amendment and joinder motions.
7. The Prosecution is of the view that in compliance with the letter and the spirit of the Rules, all supporting material, which accompanied the initial indictment, was disclosed to the Defence within 30 days of the initial appearance in accordance with Rule 66(A)(i). This supporting material is a comprehensive document which provides for the legal basis of the arrest and detention of Niyitegeka, although it is concise, as were all documents issued by the Office of the Prosecutor in 1996. The Prosecution is not in possession of any exculpatory evidence.
8. Moreover when Prosecution agreed during the status conference to submit witness statements to the Defence in support of Rule 66(A)(ii), it meant that, as a matter of practice, all evidence should be redacted and should form part of a preliminary witness list. Thus, Prosecution argues that a preliminary list will depend on the Chamber's ruling on the joinder motion. Consequently, the Accused will be provided with the supporting material in accordance with the new charges when he makes an initial appearance on new charges and once appropriate arrangements for witness protection are made.
9. On the issue of the Defence application for a stay of proceedings of the joinder motion, the Prosecution argues that the disclosure of individual witness statement is not a pre-condition for a competent defence to a Prosecutor's motion for joinder. The Prosecution contends that if granted, the stay of proceedings would not facilitate the case proceedings.
10. In response to a question from the Bench about the witness statements referred to in the present supporting material, the Prosecution replied that they did not object to provide the Defence with the witness statements related to the existing indictment. Nevertheless, for

judicial economy induced by a joint case, it would be too complex to disclose these statements, as no final list of witnesses to call to testify at trial is yet available.

11. The Prosecution argued that setting a date for trial was in all respect premature considering many preliminary pending motions and urged the Trial Chamber to apply standards of fairness for both parties.

AFTER HAVING DELIBERATED,

12. TAKING INTO ACCOUNT that the existing indictment served upon the accused is still in force with a mandatory obligation of disclosure;

13. CONSIDERING that the Prosecution did not formally oppose the disclosure of witness statements that supported the present indictment and that would not be related to the pending motion for amendment and joinder;

14. CONSIDERING that under Rule 68, the Prosecution has an obligation to disclose to the Defence, as soon as practicable, any evidence that could exculpate the Accused;

On the Disclosure of Supporting Material

15. CONSIDERING that according to Rule 66(A)(i) the Prosecution should have disclosed to the Defence copies of the supporting material which accompanied the indictment when confirmation was sought within 30 days of the initial appearance of the Accused and not 57 days later. It was the responsibility of the Prosecution to ensure that the Registry would transmit these documents without delays to the Defence;

On the Disclosure of Witness Statements

16. CONSIDERING that, under Rule 66(A)(ii), the Prosecution has an obligation to disclose to the Defence, no later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial;

17. CONSIDERING that, in the present case, the Trial Chamber would not set a date for trial before hearing and ruling on the motion for amendment of the indictment and the motion for joinder. Further, the Trial Chamber notes that, even if Article 62 states that, after the initial appearance of the Accused, the Registry should set a date for trial, the practice of the Tribunal has evolved; a status conference is usually organised after this initial appearance to decide if it is possible to set a date for trial. Thus, during the status conference dated 15 April 1999, the Prosecution confirmed that it was under the obligation to serve on the Defence witness statements at least 60 days before trial and that, prior to that, the Prosecution would eventually make appropriate redactions pursuant to a ruling on a witness protection motion that the Prosecution would file.

18. NOTING, however, that this mandatory obligation stated in Rule 66(A)(ii) indicates a final time limit for disclosure. This disclosure process should be regularly updated as the Prosecution gathers evidence against the accused during on going investigations. Even if no

date for trial has yet been set, the Prosecution should not wait for the setting of this date to disclose any evidence relevant to the preparation of the case by the Defence. Trial Chamber II in *Prosecutor v. Bagambiki and Imanishimwe*, ICTR 97-36-I at 4 (Decision on the Defence motion for disclosure)(21 October 1998), observed:

Thus, in the instant case, although the prosecution is not in violation of Rule 66 (A) (ii) of the Rules, in view of the fact that the accused made his initial appearance more than one year ago, the prosecutor should have made a concerted effort to continue and complete its disclosure obligations at the earliest opportunity.

19. CONSIDERING that any statement of a witness that the Prosecution intends to call to testify in support of the present indictment against the Accused could be disclosed in a redacted form to the Defence if the Prosecution made an application to this end. Moreover, the Trial Chamber recalls the Prosecutor that her obligation to disclose evidence under Rule 66(A)(ii) is not conditioned upon witness protection measures.

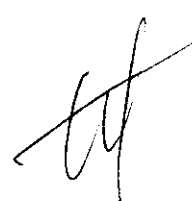
20. BEING mindful of the Defence request to be served with documents in a language understood by the Accused, the Trial Chamber reminds the Prosecution to respect the rights of the Accused, in accordance with Article 20 and Rule 3.

On the Disclosure of Annex B

21. CONSIDERING that, in conformity with the jurisprudence of this Tribunal, the Accused is not entitled to supporting material for an amended indictment until leave was granted by the Trial Chamber to amend the indictment leading to a further appearance of the Accused to enter a plea on the new charges.

22. CONSIDERING, however, that if leave to amend the indictment was granted by the Trial Chamber and after the initial appearance of the Accused on the new charges, the Prosecutor would then be obliged, under Rule 66, to disclose to the Defence, all supporting material, including Annex B thereof. The Trial Chamber would then consider that, under these circumstances, the Prosecutor should immediately proceed with the disclosure of the above-mentioned supporting material and start the disclosure of witness statements according to Rule 66(A)(ii), to allow the Defence to prepare its reply to the Prosecutor's motion for joinder.

23. THEREFORE, until leave to amend the indictment is possibly granted by the Trial Chamber, there is no such obligation to disclose the evidence supporting the amended indictment.



FOR ALL THE ABOVE REASONS, THE TRIAL CHAMBER,

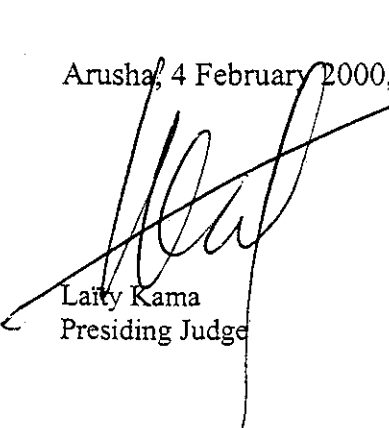
RECALLS the Prosecutor's obligation to ensure that the Registry serves on the Accused, all the above documents, including supporting material, in a language that the Accused understands, without undue delay;

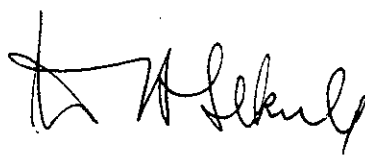
REMINDS the Prosecutor to disclose to the Defence any exculpatory evidence as soon as they enter into the Prosecutor's possession;

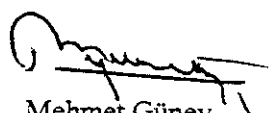
ORDERS, pursuant to Rule 66(A)(ii), the Prosecutor to disclose immediately to the Defence any witness statement, or any other evidence, which the Prosecution intends to use in relation to the existing indictment;

DENIES the Defence request to obtain, at this stage of the proceedings, the supporting material of the Prosecutor's application for amendment and that the Prosecutor's Motions for amendment and joinder be stayed.

Arusha, 4 February 2000,


Laity Kama
Presiding Judge


William H. Sekule
Judge


Mehmet Güney
Judge

(Seal of the Tribunal)

