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UNITED NATIONS  NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

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ICTR-97-29-T
3-MAY-2000
(3637-3632)

TRIAL CHAMBER II

Before: Laïty Kama, Presiding Judge,
designated by the Trial Chamber in accordance with
Rule 73 of the Rules of Procedure and Evidence

Registry: Mr. John Kiyeyeu

Decision of : 11 February 2000

THE PROSECUTOR

vs.

SYLVAIN NSABIMANA

Case No. ICTR 97-29-T

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**DECISION ON DEFENCE MOTION TO LIMIT POSSIBLE EVIDENCE TO BE
DISCLOSED TO THE DEFENCE AND TO EXCLUDE CERTAIN MATERIAL
ALREADY DISCLOSED BY THE PROSECUTOR**

Office of the Prosecutor:
Mr. Japhet Daniel Mono
Ms Andra Mobberley

Counsel for the Defence:
Ms Josette Kadji
Mr. Charles Tchakounte Patie

L 2558 (Eng)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“the TRIBUNAL”),

SITTING in the person of Laity Kama, Presiding Judge, designated to represent Trial Chamber II of the Tribunal, in accordance with Rule 73 of the Rules of Procedure and Evidence (“the Rules”),

SEIZED of the Defence motion dated 30 July 1999 to limit possible evidence to be disclosed to the Defence and to exclude certain material already disclosed by the Prosecutor in the matter of “The Prosecutor versus Sylvain Nsabimana”,

HAVING CONSIDERED the Prosecutor’s response to said motion, dated 11 November 1999 and filed with the Registry on 23 November 1999,

HAVING HEARD the parties at a hearing held to that effect on 9 February 2000,

Submissions of the Parties

The Defence

1. The Defence’s submissions to the Trial Chamber, under Rule 73 (A) of the Rules, are essentially as follows:

1.1 That the statements disclosed by the Prosecutor must either relate to the acts referred to in the Indictment or they must offer evidence that the “co-accused were involved in the same transaction”;

1.2 That among the statements disclosed by the Prosecutor to the Defence, over one hundred refer to accused other than Sylvain Nsabimana, including persons prosecuted before the Tribunal, and that said statements relate neither to the charges brought against Sylvain Nsabimana nor to the involvement of the co-accused in the same transaction;

1.3 That since under Sub-Rule 70 (E) of the Rules the Accused has the right to challenge the evidence presented by the Prosecutor, and since under Sub-Rule 70 (F) the Chamber has the right to exclude evidence of which the probative value is substantially outweighed by the need to ensure a fair trial, the Defence holds the contrary view that the evidence disclosed by the Prosecutor must have probative value commensurate with the need for a fair trial;

1.4 That, such being the case, the aforementioned statements disclosed to the Defence must be excluded since they do not meet the requirements for a fair trial;

1.5 That, furthermore, the disclosure by the Prosecutor of said testimonies interfere with the rights of the Defence as specified under Article 20 of the Statute of the Tribunal

(“the Statute”) including the right to adequate time and facilities for the preparation of a defence and the right to be tried within a reasonable period.

2. Consequently, the Defence requests:

2.1 That the Trial Chamber order the Prosecutor to rely only on the testimonies relating to the acts charged against the Accused, and where the joinder of the accused is concerned, statements that relate to the co-accused and offer proof that the co-accused were involved in the same transaction;

2.2 That prosecution evidence which do not bear any relation to the acts referred to in the Indictment or offer proof of a same criminal transaction among the co-accused be excluded;

2.3 That, consequently, the following evidence which relates neither to the acts alleged in the Indictment nor to the involvement of the co-accused in the same transaction be excluded:

NG, 628K.96, G, 775K.96, NK, K287-95, NI, C, B, 363K.95, 364K.95, 674K.96, NB, NL, NH, NG, M, NM, NN, included in the supporting documentation; and

RWPREGT – RWPREGT –08; RWPREGT –06; RWPREGT – 05; RWPREGT – 03; RWPREGT – 1; RWPOSGT – 1; MUDELEO – 1; FIDH/HRW – 1; ARUSHAZ – 7; BELGSGR –1; FARZZZZ –2; FARZZZZ –1; UNINATI –5; GUICAND –2; FARZZZZ –4; UNINATI –7; UNAMIR – 2; BAGOTHE –1; UNINATI –6; BAGOTHE –11; BOOHJAC –1; KAVAANN –2; UNINATI – 5; UNINATI –3; UNAMIRZ –1; STEERIN –1; STEERIN –2; AA1; AA2; AEI; A11; AX; BB1; BT1; BW1; BW2; CP1; CP2; DE1; DE2; DE3; DE4; DT1; ED1; E1 GATSIMAR –2; EK LEMALUCU; EQ1; ET1; RAI; TCI; XSI; TP1; QA1; QAA; QACI; QAGI; QAH1; QAJI; QAKI; QANI; XCI; SPI; EV1; EV2; RTI; RVI; RV2; QARI; QASI; QAVI; QAWI; QN1; TW1; TX1; XA1; TU1; TT1; QAL1; RV3; QAQ1; TD1; XB1; XU1; TP1; TO1; SL1; SM1 QAMI; QV2; QW1; QT; QU1; QV1; QV2; RGI; RH; QI1; QJ1; QP; QPI; QQ1e; QR1; QS1; SO1; RL1; SQ1; SR1; FA1; RB1; RO1; QB1; QD1; SY1; SZ1; TB1; TE1; TF1; TG1; TJ1; TN1; SR1; RY1; QF1; SU1; SV1; QY1; QY3; QZ1; RF1; SB1; SG1; ST1; KT3; RP; RR; RQ; RS; RK1; SJ1; SK1; SF1; SO2; TH1; XV1; QE1; QJ2; QBI1; QBN1; RH2; QBD1; QBH1; QAH1; QAJ1; QAN1; SN1; QAS1; QAV1; TU1; TX1; QAL1; QAQ1; QAR1; QBO1; IQ1; QZ2; QBF1; FA1; QBK1; BY1; QJ4; SA1; SF1; SV1; QJ3; QAGI; QAP1; DH2; GD1; QBJ; BM1; HT1, included in the documents entitled “Disclosure of evidence” or : “Document disclosure”.

The Prosecutor

3. In response to the Defence requests, the Prosecutor submitted, in the main:

3.1 That the Defence confuses the procedural requirements of disclosure with the substantive issue of admissibility of evidence, which is considered during the trial on the merits;

3.2 That Rule 70 (E), which deals exclusively with evidence *presented* by the Prosecutor, concerns the right of the accused to challenge the evidence adduced before the Trial Chamber during the trial on the merits and not the right to challenge evidence even before the trial begins;

3.3 That, as the case stands, it would be impossible for the Trial Chamber to exclude testimonies which are merely "potential evidence" which has not yet been adduced before a Trial Chamber pursuant to Rule 85 of the Rules, and that at this stage of the proceedings, it is only a matter for the accused to assess the evidence disclosed to him by the Prosecutor;

3.4 That the Defence's prayers, if granted, would be a restraint on the Prosecutor's obligations and duties as set out in the Rules and in the Statute which provide no other restrictions on disclosure of evidence by the Prosecutor to the Defence apart from those stipulated in Rule 73 *bis* (B) (iv);

3.5 That, on that same basis, the Defence would put into question the Trial Chamber's discretion to assess the evidence during the trial, as provided under Rule 89 (C) of the Rules;

3.6 That, in any case, all the statements disclosed to the Defence thus far are relevant and useful to the case, even if it is true that they do not all relate to Sylvain Nsabimana, which explains the joinder of his case with those of the others.

4. Consequently, the Prosecutor prays the Trial Chamber to dismiss the Defence motion.

AFTER HAVING DELIBERATED,

WHEREAS Sub-Rule 70 (F) of the Rules provides that the Trial Chamber may "*exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.*";

WHEREAS, although Rule 70 deals, in general, with matters not subject to disclosure and that it is included under Part Five of the Rules entitled "Pre-Trial Proceedings", its sub-Rule (F) deals more specifically with the Trial Chamber's power to exclude evidence and refers to Rule 89 of the Rules under Part Six of the Rules, dealing with Proceedings before Trial Chambers;

WHEREAS, consequently, the Trial Chamber holds that Sub-Rule 70 (F) of the Rules must be read in conjunction with the powers vested in the Chambers, under Rule 89 of the Rules, with respect to the presentation of evidence and that, as a result, sub-Rule (F) can only be applicable during proceedings before Trial Chambers;

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WHEREAS, furthermore, in order to exclude evidence on the grounds that its probative value was substantially outweighed by the need to ensure a fair trial, the Chamber must assess the admissibility and probative value of said evidence;

WHEREAS the Chamber finds that, at this stage in the proceedings, since the trial on the merits has not begun, it is not incumbent upon it to consider statements disclosed by the Prosecutor to the Defence;

WHEREAS, in any case, the statements referred to by the Defence has not yet been presented before the Trial Chamber;

WHEREAS, nevertheless, under Sub-Rule 66 (A) (ii), the Prosecutor has the duty to disclose to the Defence “[...] copies of the statements of all witnesses whom the Prosecutor intends to call to testify [...]”;

WHEREAS, the Chamber holds that Sub-Rule 66 (A) (ii), thus requires the Prosecutor to disclose only the statements of witnesses that she actually intends to call to testify at trial and not all statements that she may have collected during her investigations;

WHEREAS, as submitted by the Defence, the statements disclosed to it must, in the main, relate to the acts charged against Sylvain Nsabimana in the Indictment or they must offer proof that the co-accused were involved in the same transaction;

WHEREAS, moreover, the Trial Chamber reminds the Prosecutor that she must ensure the strict respect for the rights of the accused as set forth under Article 20 of the Statute;

WHEREAS, in the instant disclosure under Rule 66 (A) (ii) must be made in full compliance with the rights of the accused under Article 20 (4) (b) of the Statute which provides that the accused shall be entitled to “*To have adequate time and facilities for the preparation of his defence [...]*”

WHEREAS, consequently, the Prosecutor must, on the one hand, disclose to the Defence all the evidence useful for the preparation of the defence of the Accused, and on the other hand, as much as possible, refrain from swamping the Defence with the statements of witnesses whom she does not actually intend to call and which might not be otherwise useful for a proper determination of the case, in order to ensure that the Defence has adequate time and facilities to prepare its case and have it heard within a reasonable time.

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FOR THE FOREGOING REASONS,

THE TRIBUNAL

HOLDS that it is not incumbent upon it, at the current stage of the proceedings, to grant the Defence request to exclude statements already disclosed by the Prosecutor to the Defence, including those mentioned by the Defence in its motion;

REQUESTS the Prosecutor, nevertheless, to ensure, as much as possible, that she does not interfere with the rights of the accused by disclosing statements of witnesses whom she does not actually intend to call or which would not be otherwise useful for a proper determination of the case.

Arusha, 11 February 2000

Laity Kama
Presiding Judge

(Seal of the Tribunal)