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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

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TRIAL CHAMBER I

Original: English

Before: Judge Navanethem Pillay, Presiding
Judge Erik Møse
Judge Asoka de Zoysa Gunawardana

Registrar: Ms Marianne Ben Salimo

Decision date: 29 March 2000

THE PROSECUTOR v. FERDINAND NAHIMANA
(ICTR-96-11-T)

DECISION ON THE DEFENCE'S MOTION FOR DISCLOSURE IN THE CASE OF
FERDINAND NAHIMANA

Office of the Prosecutor:

Mr Mohamed Othman
Mr William T. Egbe

Counsel for the Accused:

Mr Biju-Duval
Ms Diana Ellis

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

SITTING AS Trial Chamber I composed of Judge Navanethem Pillay, Presiding, Judge Erik Møse and Judge Asoka de Zoysa Gunawardana;

BEING SEIZED of the Defence’s motion, filed on 13 January 2000, asserting that the Prosecutor did not meet her obligations to disclose materials pursuant to Rules 66, 67 and 68 of the Rules of Procedure and Evidence (“the Rules”);

CONSIDERING the Prosecution’s reply to the said motion, dated 6 March 2000, and the Correction to the Prosecution’s reply, dated 13 March 2000, indicating the current status of disclosure by the Prosecutor.

Arguments by the Parties

The Defence

The Defence Counsel conceded that he had received some disclosures from the Prosecutor, but contended that the Prosecutor had not fully complied with Rule 66. Additionally, disclosures made by the Prosecutor pursuant to Rule 66 (B) were inadequate and do not meet the requirements of Rule 66 (B). Overall, the following particular disclosures still had to be made:

A full disclosure of names and other identifying information about the witnesses the Prosecutor intends to call at the trial;

The original version of a document entitled “Inter African Commission for the non-violence P.O. Box 1725, Nairobi, Kenya to the Executive Committee of sympathizers for the non-violence in Rwanda, Kigali-Rwanda,” which should be in a language the accused could understand;



Exhibit D containing fourteen extracts of the RTLM broadcastings and nineteen extracts of testimonies stating the names of the witness mentioned therein and a French copy of the transcripts of the recordings from which the extracts referred to in Exhibit D derive;

Documents referred to in the affidavits of 16 May and 12 July 1996 made by some officers in the Prosecutor's Office, which include, *inter alia*, the video recordings of meetings held by the organs of RTLM, video recordings of interviews, investigation reports from local organs and statements by witnesses A, B, C, D and E;

Full disclosure of the recordings of the broadcasts and their translations, disclosure of the Recordings of broadcasts (RTLM, Radio Rwanda and others) and their translations since out of the 151 tapes received, 11 are blank, 12 duplicated, 9 half empty, some radio broadcasts are missing and 13 transcripts of the recordings do not correspond to any of the recordings disclosed. Also the remaining 28 translations must be disclosed in the French Language since the Prosecutor is obliged to provide recordings as well as their translations in one of the working languages of the Tribunal, namely English or French, but preferably in French translation which would enable them to effectively check the translation;

Any supporting material which accompanied the Indictment of 12 July 1999 at the time of the request for the amendment used to support the new charges, which would have been disclosed thirty days from 25 November 1999, when a further initial appearance of the accused took place;

The prior statements of the accused including written documents, recordings and other audio visual documents containing the statements by the accused and the views expressed by the accused in various forms including his books, articles, interviews, before, during and after the period of genocide in 1994, which would have been disclosed by 20 March 1997. These would, *inter alia*, show what part the accused played in encouraging the separation of the Hutu and the Tutsi ethnic groups and would justify the use of violence against the Tutsi;



Prior statements of the accused referred to in the amended Indictment of 15 November 1999 such as the article entitled "Rwanda: Actual Problems and Solutions" referred to in para. 5.15. of the Indictment and other books and Articles referred to in para. 5.17, statements of the accused made during meetings he participated in between January and July 1999, 29 March to 12 April 1994 as stated in paras. 5.18- 5.20, statements made at meetings held at the Ministry of Information on 26 November 1993 and 10 February 1994 as alleged in paras. 6.21-22;

Copies of all statements of witnesses whom the Prosecutor intends to call to testify at trial and whom she should have disclosed by 5 January 2000 given that the date of trial was set as 6 March 2000. Moreover, pursuant to Rule 69 (C), the Prosecutor must disclose the identity of such witnesses in sufficient time to allow adequate time for the preparation of the Defence case;

The fourteen witness statements initially written in Kinyarwanda, which had been disclosed in French should be disclosed in their original Kinyarwanda versions. Further, nine witness statements have not been disclosed in their entirety, namely, WSMOO12, 15, 18, 20, 26, 33, 34, 43 and 44;

Disclosure by the Prosecutor of all other materials and documents in its custody or control as listed on pages 11-12 of the Defence motion must be done to enable the Defence to prove what his activities were during periods in question;

The Belgian investigations report on activities of the RTLM and all evidence documents and witness statements in the Hassan Ngeze case since the accused was being charged with offences committed in the same transaction with Ngeze, all materials in the Ngeze case to be disclosed to them, particularly all the copies of the Kangura newspaper published from May 1990 to December 1994;



All evidence documents and witnesses statements in the *Jean Bosco Barayagwiza* case and thus all the evidence incriminating or exculpatory in respect of Barayagwiza should also be disclosed, particularly the 17 documents including the instructions by Barayagwiza, recordings of Radio Rwanda and RTLM, letters, faxes and transcripts of meetings held on 26 November 1993 and 10 February 1994 at the Ministry of information;

All evidence documents and witnesses statements in the *Georges Ruggiu* case should be disclosed since the Indictment of 5 November 1999 alleges that the accused conspired with among others Ruggiu and Ruggiu participated in most crimes with which the accused is charged. Therefore, documents on his case have to be disclosed as they relate to the same transaction.

The Prosecutor

The Prosecutor noted that the applicable Rules to this motion are those Rules as amended by the Plenary on 21 February 2000. She stated that the Defence is seeking full disclosure of names of and other information about witnesses the Prosecution intends to call at the trial yet such witnesses are protected and the Trial Chamber has not ordered them to be lifted. Moreover, the Defence made multiple requests for the disclosure of documents without distinguishing between documents already disclosed and the documents, which the Prosecutor is under no obligation to disclose. She argued that the motion is premature and that issuing a court order would be superfluous for the major reason that the Prosecutor has met her obligation to disclose as demonstrated below:

The original document entitled "The Executive Committee of Sympathizers for the non-violence in Rwanda, Kigali-Rwanda" of which the Defence requested a French copy, is not in her possession although a copy of the translated version in French has been given to the Defence;



Extracts of broadcasts and witness statements in Exhibit D submitted to the confirming Judge on 12 July 1996, contains 20 extracts of witness statements and 14 extracts of broadcasts. All 20 witness statements have been disclosed to the Defence with identity particulars. The Defence has acknowledged receipt of 151 audio broadcasts in 1997 and this includes the 14 audio tapes referred to in the motion, which are all in French;

The Prosecutor has already disclosed 12 of the 14 documents and items mentioned in the affidavits of 15 May and 12 July 1996, but the Prosecutor is not in possession of the Minutes of the General Assembly of the Shareholders and the Board of Directors of RTLM SA as well as the report of interrogation on statements of an RTLM journalist made to a Rwandan investigating magistrate in 1994;

Supporting materials accompanying the proposed amended indictment at the time leave was sought (12 July 1999) to amend the Indictment, (Annex C) have been disclosed;

With respect to prior statements of the accused, the Prosecutor attempted to obtain cautionary statements from him in Cameroon soon after his arrest in 1996 without success. Subsequent efforts to record his statement whilst at the UNDF failed. In any event, the Defence does not distinguish between prior statements obtained by the Prosecutor pursuant to Rule 66 (A) (i) and documents in the possession of the Prosecutor which contains the views of the accused and his writings which are subject to disclosure under Rules other than those the Defence refers to. All prior statements listed by the Defence have been disclosed;

The public declarations of the accused being referred to in the amended Indictment of 15 November 1999, including four major documents, are all disclosed;

Regarding the statements of all Prosecution witnesses as required under Rule 66 (A) (ii), the Prosecutor has provided a total of 221 witness statements. The witnesses are subject to protective measures, but if the Trial Chamber lifts them, the names and other identifying information about the witnesses will be communicated to the Defence;

All material being disclosed is not available in both languages, but will be available in both working languages as soon as it is translated. On the other hand, for the Prosecutor to be able to provide the Kinyarwanda versions of 14 witness statements translated into French and disclosed to the Defence, the Defence must specify the pseudonyms or codes of these statements;

Concerning the nine witness statements not fully disclosed, the first pages of all these statements are missing because they contain the names and identifying information about the witnesses. They will be supplied when the Trial Chamber so orders;

Regarding the disclosure obligation of the Prosecutor under Rule 66 (B), the Prosecutor had disclosed 608 audiotapes, and the Defence has admitted having received 151 audiotapes. However, Rule 66 (B) requires the Defence to show 'materiality.' The request must be specific and identify the object in respect of which the inspection is sought. In case of broadcasts, their sources (either RTLM or Radio Rwanda (RR)) are not specified but the Prosecutor has nonetheless disclosed all material indicated by the Defence;

The 6-7 binders of the RTLM documents in the Belgian files have been made accessible to the Defence and are still available to it. There has been no further request from the Defence for which inspection has been denied;

Regarding the disclosure of evidence against the co-accused, all evidence has been disclosed with respect to Ngeze. In relation to Barayagwiza, there is no legal foundation for disclosure because the decision on joinder does not include Barayagwiza. However, five documents relating to him have already been disclosed, including the Radio Rwanda audio cassette recording # 1044 of 12 June 1994 as well as the interview by Ngeze of 29 April 1994;



Given that the date of trial has been set for 5 June 2000, the Prosecutor will comply fully with her disclosure 60 days before that date subject to Rules 53 and 69 regarding protective measures that may be ordered by the Chamber;

A fair and expeditious trial will not be guaranteed if the Defence seeks the full disclosure of names and identifying information of the witnesses the Prosecutor intends to call at trial without first ensuring their personal safety. The Prosecutor will, however, seek appropriate orders for their transfer to the Tribunal's protective custody and then disclose their identity. To this end, the Prosecutor requests the Trial Chamber to order the non-disclosure of the names and other identifying information of protected witnesses until 21 days before appearance since they are protected and are subjected to protective measures granted in other trials which are yet to begin.

Deliberations

Having considered the facts and circumstances surrounding disclosure in this case, the Trial Chamber is of the view that the present motion has been overtaken by events.

Firstly, the date set for trial has now moved to 5 June 2000. Therefore, pursuant to Rule 66 A (ii), the deadline for the disclosure of Prosecution witness statements has not yet passed, and the Prosecution has stated its intention to comply fully with Rule 66, within the prescribed time.

Secondly, on 24 February 2000, the Prosecutor filed its disclosures with the Registry. According to the Tribunal's Court Management Section, the Registry served 367 copies of tapes, on the accused, on 13 March 2000, and served twenty binders on the Defence, on 21 March 2000. By the end of March the Registry will be ready to serve on the Defence the 76 videotapes. Therefore, the process of disclosure is underway and the Defence will soon be in a better position to assess which documents and materials have not been disclosed, if any.



Furthermore, the Trial Chamber has not yet received the said documents and materials and thus is unable to assess the fullness of disclosure, at this stage.

Thirdly, pursuant to instruction by the Trial Chamber, the parties are to hold a status conference in the middle of April 2000, in order to settle outstanding matters including disclosure. The Chamber is of the view that following the receipt by the Defence of the said documents and materials, any outstanding matters regarding disclosure should be settled by the parties at the status conference.

Furthermore, the Chamber notes that some of the documents and materials referred to in the Defence motion, are not subject to disclosure. In *The Prosecutor vs. Hassan Ngeze*, ICTR-97-27-I in its decision, dated 16 March 2000, on the Defense's motion to compel discovery, the Chamber observed that, "under the Rules, the Defence is not entitled to *all* the evidence regarding the accused, which is in the possession of the Prosecutor. The Defence may only receive, from the Prosecutor, evidence that is likely to be used in the case against the accused as well as past statements by the accused and any exculpatory evidence which may support the Defence case, pursuant to Rule 68 of the Rules." However, in terms of Rule 66 (B), the Defence may apply to inspect the documents and materials relevant to the defence case. The parties, at the status conference should address the issue of inspection of such documents and materials.

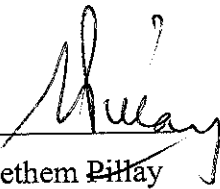
For all the above reasons, the Trial Chamber does not consider it appropriate to order the disclosure of specific documents and materials, by the Prosecution, at this stage.

**FOR THE ABOVE REASONS,
THE TRIBUNAL**

HEREBY orders that this motion be dismissed.



Arusha, 29 March 2000



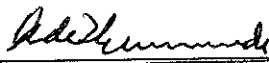
Navanethem Pillay

Presiding Judge



Erik Møse

Judge



Asoka de Zoysa Gunawardana

Judge

Seal of the Tribunal

