



ICTR-97-46-I
26-6-2000
(1198 - 1192)

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

1198

TRIAL CHAMBER III

ORIG: Eng.

Before: Judge Yakov Ostrovsky, designated by Trial Chamber III from among its members pursuant to Rule 73(A) of the Rules of Procedure and Evidence

Registrar: Dr. Agwu Ukiwe Okali

Decision of : 26 June 2000

2000 JUN 26 P 2 24
ICTR
COURT REGISTRY
RECEIVED

THE PROSECUTOR
versus
ANDRE NTAGERURA

Case No. ICTR-96-10A-I

DECISION ON DEFENCE MOTION FOR DISCLOSURE OF EVIDENCE
PURSUANT TO RULES 66 *et al* AND 73 OF THE RULES OF PROCEDURE AND
EVIDENCE AND ARTICLES 19(1), 20(2) AND 20(4)(b) OF THE STATUTE OF
THE TRIBUNAL

Counsel for the Accused:
Mr. Fakhya Konate
Mr. Benoit Henry

Counsel for the Prosecutor:
Mr. Leonard Assira
Ms. Lilliane Rasendra
Mr. Richard Karegyesa
Ms. Alexandra Harvey

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

SITTING in the person of Judge Yakov Ostrovsky, designated by Trial Chamber III from among its members pursuant to Rule 73(A) of the Rules of Procedure and Evidence (the “Trial Chamber” or the “Chamber”);

BEING SEIZED of the Motion Filed by Accused Ntagerura for Disclosure of Evidence Pursuant to Rules 66 *et al* and 73 of the Rules of Procedure and Evidence and Article 19(1), 20(2) and 20(4)(b) of the Statute of the Tribunal, dated 5 February 2000 and filed on 25 February 2000 (the “Motion”);

NOTING the Amendment to the Motion, dated and filed on 21 March 2000;

NOTING the Prosecutor’s Brief in Response to the Motion, dated 23 March 2000 and filed on 24 March 2000 (the “Brief in Response”), and the Corrigendum to the Brief in Response, dated 24 March 2000 and filed on 27 March 2000;

FURTHER NOTING the Defence Brief in Reply to the Prosecutor’s Brief in Response, dated 13 April 2000 and filed on 27 April 2000, and the Additional Documents and Authorities filed by the Defence in connection with its Brief in Reply, dated 24 April 2000 and filed on 2 May 2000;

RECALLING that the Motion was set down for a hearing on 26 May 2000 and that the Defence then requested the Trial Chamber to adjourn the hearing as it was not prepared to present arguments in support of its Motion because lead counsel was not present and the notice of the hearing was late;

FURTHER RECALLING that the Chamber granted the adjournment, ruled that it will consider the Motion on the briefs of the parties, ordered the Defence to submit clarification as to what documents it seeks and an explanation of why it seeks them, and ordered the Prosecutor to respond to this clarification and explanation by the Defence;

NOTING the List of Elements of Evidence filed by the Defence further to the order of the Chamber, dated 5 June 2000 and filed on 8 June 2000 (the “List”);

NOTING the Prosecutor’s Response filed further to the order of the Chamber, dated 19 June 2000 and filed on 20 June 2000 (the “Response”);

NOW CONSIDERS the matter without a hearing solely on the briefs of the parties, pursuant to Rule 73(A) of the Rules of Procedure and Evidence of the Tribunal (the “Rules”).

PLEADINGS BY THE PARTIES**Defence Submissions**

1. Relying on Articles 19(1), 20(2), and 20(4)(b) of the Statute of the Tribunal (the "Statute") concerning the rights of the accused, in particular his right to a fair trial including adequate time and facilities for the preparation of his defence, and Rules 66(A)(ii), 66(B), and 68 of the Rules, the Defence seeks an order for access to thirty-seven items of evidence.¹
2. The Defence posits that it requested thirty-five of the items on the List from the Prosecutor earlier, but that to date the Prosecutor has either not complied with its request as to these items or provided materials that were not usable as they were either illegible or incomplete.
3. The Defence argues that it needs access to the thirty-seven items on the List in order to prepare the defence of the Accused Ntagerura.
4. Consequently, the Defence requests the Chamber to order the Prosecutor to allow the Defence access to the items enumerated in the List, to direct the Prosecutor to provide copies of said items to the Defence, whenever possible, and to inform the Defence of items included in the List that do not exist.

Prosecutor's Response

1. The Prosecutor responds that the Defence failed to prove that the Prosecutor is in possession of the items it seeks nor did the Defence prove that the items are exculpatory or necessary for the preparation of the defence of the Accused.
2. The Prosecutor notes that she nevertheless communicated to the Defence items 3, 5, 16, 17, 27, 33, 36 from the List on 16 June 2000.
3. The Prosecutor states that she will communicate to the Defence at the earliest opportunity items 19, 20, 21, 23, 24, 28, and 29 from the List.
4. The Prosecutor advises that she cannot add anything further to or otherwise improve her earlier disclosure of items 18, 22, 25, and 26 on the List.
5. The Prosecutor submits that she does not have in her possession or under her control items 2, 4, 6, 7, 8, 9, 10, 12, 15, 30, 31, 32, 34, 35, 37, 38, and 39 on the List.
6. Consequently, the Prosecutor requests the Chamber to declare that the Prosecutor either

¹The List contains thirty-seven items numbered 1 through 12 and 15 through 39, that is to say numbers 13 and 14 have been omitted.

communicated or shortly will communicate to the Defence the various documents which are in her possession, where this is in conformity with the Rules, and to dismiss all other Defence requests.

FINDINGS

1. As the Defence correctly points out, the Statute safeguards the right of the accused to a fair trial, including adequate time and facilities for the preparation of his defence. *See* Articles 19(1), 20(2), and 20(4)(b) of the Statute. The Rules formalize this safeguard, *inter alia*, by providing for Prosecutor's disclosure of witness statements to the defence (Rule 66(A)(ii)), defence access to materials in the possession of the Prosecutor (Rule 66(B)), and Prosecutor's disclosure of exculpatory evidence to the defence (Rule 68). Indeed, the Defence grounded its Motion on these Rules.
2. Rule 66(A)(ii) of the Rules provides that before the date set for trial the Prosecutor is to disclose to the Defence copies of the statements of all witnesses whom she intends to call to testify at trial and, further, that in the event that the Prosecutor will subsequently identify additional witnesses, a Chamber may order copies of their statements to be made available to the defence within a prescribed time.
3. The Chamber wishes to point out that the interpretation the Defence gave to the latter part of Rule 66(A)(ii) of the Rules in its Motion is incorrect. The Defence stated that this part of the Rule "applies in the instant to witnesses that the Prosecutor does not intend to call to establish the guilt of the accused." Motion, Para. 66. A person whom the Prosecutor does not intend to call to establish the guilt of the accused is not a witness within the meaning of Rule 66 of the Rules. Rule 66(A)(ii) of the Rules is divided into two parts in order to distinguish, in the first part, witnesses known to the Prosecutor a certain number of days before the date set for trial and, in the latter part, witnesses the Prosecutor identifies after that date, so-called additional witnesses. Contrary to the assertion of the Defence, this Rule does not provide for disclosure of statements of persons whom the Prosecutor does not identify as witnesses or additional witnesses.
4. Rule 66(B) of the Rules provides that at the request of the defence, subject to Sub-Rule (C), the Prosecutor will permit the defence to inspect tangible objects in her custody or control, which are material to the preparation of the defence, or intended for use by the Prosecutor as evidence at trial, or which were obtained from or belonged to the accused. As long as the Prosecutor does not successfully invoke Sub-Rule (C) or Rule 70(A) of the Rules, this Rule therefore enables the defence to access certain items, provided, first, that the Prosecutor has custody or control of the items and, second, that the items are either material to the defence, are to be used as the Prosecutor's evidence, or came from the accused.
5. Finally, Rule 68 of the Rules compels the Prosecutor to disclose to the defence the existence of evidence which tends to suggest the innocence or mitigate the guilt of the

accused or which may affect credibility of prosecution evidence.

6. The Chamber notes that in her Response, the Prosecutor stated that she either communicated or will shortly communicate or cannot improve on her earlier communication of the following items from the List: 3, 5, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 33, and 36.
7. The Chamber further notes that the Prosecutor submitted that items 2, 4, 6, 7, 8, 9, 10, 12, 15, 30, 31, 32, 34, 35, 37, 38, and 39 are not in her custody or control. The Prosecutor is thus not in a position, nor is she required, to allow access to these items under Rule 66(B) of the Rules.
8. Therefore, the Trial Chamber needs to consider the present Defence request only as to items 1 and 11. The Chamber will give special consideration to the Defence request for item 38.
9. The Defence based its request for item 1, copies of written statements of Jean Kambanda to ICTR investigators, on Rules 66(A)(ii) and 66(B) of the Rules. Since the Prosecutor states that Kambanda is not presently included in the list of witnesses, Rule 66(A)(ii) of the Rules does not compel disclosure of his statements, as explained above in paragraph 3. However, because the statements are in the Prosecutor's custody or control and because they could well be material to the preparation of Ntagerura's defence, in as much as they apparently mention Ntagerura as a participant in government meetings where massacres of the civilian population were discussed, they are within the scope of Rule 66(B) of the Rules.
10. The Chamber, however, notes the Prosecutor's assertion that even if these statements were material, pursuant to Rule 66(C) of the Rules they should not be disclosed because such disclosure could impede further and ongoing investigations. Rule 66(C) of the Rules prescribes that a Trial Chamber could relieve the Prosecutor from her obligations under Rule 66(B), but this could be so only after the Prosecutor would provide the Chamber with the information that she seeks to keep confidential and after an *in camera* hearing.
11. The Chamber is satisfied, however, that both the interest of the Accused in having adequate time and facilities for the preparation of his defence and the interest of the Prosecutor in protecting her further and ongoing investigations can be protected by adopting the Prosecutor's proposal with respect to item 1 on the List. In her Response, the Prosecutor suggested that if the Trial Chamber would deem it necessary to order the Prosecutor to allow the Defence access to Kambanda's statements listed as item 1 on the List, the Prosecutor would allow the Defence to access the portions of such statements as concern the Accused Ntagerura. *See* Response, Para. 25. For the foregoing reasons, the Chamber orders the Prosecutor to act as she proposed in paragraph 25 of her Response.

12. As to item 11 on the List, the Chamber notes that the Defence sought access to documents concerning certain vehicle transfers, as enumerated in this item, under Rule 66(B) of the Rules. The Prosecutor did not mention item 11 in her Response. The Trial Chamber is of the opinion that unless the Prosecutor already communicated to the Defence the documents covered by this item, she should ascertain whether she has such documents in her custody or control and, if so, she should evaluate them under the criteria set out in Rule 66(B) of the Rules. In the event that said documents are material to the preparation of Ntagerura's defence, or if the Prosecutor intends to use them as evidence at trial, or if they came from the Accused, the Prosecutor, subject to Rule 66(C), must allow the Defence access to these materials. If, on the other hand, she already communicated this item to the Defence or if she does not have item 11 in her custody or control, she should advise the Defence and the Chamber accordingly.

13. Finally, the Chamber addresses the request of the Defence as to item 38 on the List, the 1997 report on the United Nations investigation into the downing of President Habyarimana's plane in 1994. The Trial Chamber notes that the Prosecutor indicated in her Response that she does not have such a report in her possession. The Trial Chamber notes that said report is in the possession of the President of the Tribunal, under seal. In the interest of justice and to facilitate expeditious preparations for trial in this case, the Trial Chamber decides that in the particular circumstances of this case it will invoke the inherent powers of the Tribunal and make the report available to the parties. The Trial Chamber stresses that it makes no finding as to the relevance of the report at this time and emphasizes that this action is not to be considered as setting any precedent. The Trial Chamber directs the Registrar to make the report available to the Accused and to the Prosecutor solely for use in this case.

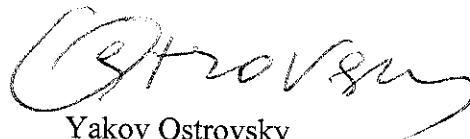
Prosecutor v. Ntagerura, ICTR-96-10A-I

FOR THESE REASONS, THE TRIBUNAL

GRANTS the Motion; and

1. **ORDERS** the Prosecutor to give effect to the Trial Chamber's orders made above in paragraphs 11 and 12 within fifteen (15) days of the date of this Decision;
2. **DIRECTS** the Registry to give immediate effect to the trial Chamber's decision made above in paragraph 13;
3. **RECOGNIZES** the Prosecutor's present efforts to comply with her disclosure obligations in this case; and
4. **URGES** both parties to facilitate expeditious preparations for the timely beginning of trial in the spirit of cooperation between them and pursuant to the Rules, without, to the extent possible, calling on the assistance of the Chamber.

Arusha, 26 June 2000.



Yakov Ostrovsky
Judge

[Seal of the Tribunal]