

ICTR-97-46-I
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UNITED NATIONS
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**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

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TRIAL CHAMBER III

ORIGIN: Eng.

Before: Judge Lloyd George Williams, Presiding
Judge Yakov Ostrovsky
Judge Pavel Dolenc

Registry: Dr. Agwu Ukiwe Okali

Decision of: 10 July 2000

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**THE PROSECUTOR
V.
ANDRÉ NTAGERURA**

Case No. ICTR-99-46-I

**DECISION ON THE PROSECUTOR'S MOTION FOR NTAGERURA'S DEFENCE
TO FULFILL ITS OBLIGATION IN RESPECT OF RECIPROCAL DISCLOSURE
OF EVIDENCE PURSUANT TO RULE 67(A)(ii) AND (C)**

Office of the Prosecutor:

Mr. Léonard Assira
Ms. Liliane Rasendra
Mr. Richard Karegyesa
Ms. Alexandra Harvey

Defence Counsel for Ntagerura:

Mr. Fakhy N'Fa Konate
Mr. Henri Benoît

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

SITTING as Trial Chamber III (the “Chamber”) composed of Judges Lloyd George Williams, presiding, Yakov Ostrovsky and Pavel Dolenc;

BEING SEIZED of the Prosecutor’s Motion for Andre Ntagerura’s Defence to fulfill its obligation in respect of Reciprocal Disclosure of Evidence Pursuant To Rule 67 (A) ii and (C) of the Rules of Procedure and Evidence (the “Rules”), filed on 19 June 2000;

CONSIDERING the Defence Response to the Prosecutor’s Motion, filed on 27 June 2000;

HAVING HEARD the parties on 3 July 2000;

NOW CONSIDERS the matter.

PLEADINGS BY THE PARTIES**Prosecutor’s submissions**

1. The Prosecutor asserts that she has disclosed numerous documents nearly eighteen months ago to the Defence at its request, pursuant to Rule 66(B) of the Rules. The Prosecutor also reminds the Defence of its reciprocal obligation of disclosure pursuant to Rule 67.
2. The Prosecutor concedes that the Defence obligation specified under Rule 67(A) regarding the defence of alibi and special defence are rendered optional by Rule 67(B). She argues, however, that the Defence obligations brought under Rule 67(C) are a different matter. Disclosure by the Defence of books, documents, photographs and any other tangible objects it might use is neither optional nor subject to the Prosecutor first fully satisfying the Defence’s own claims.
3. The Prosecutor contends that in the interests of equitable treatment of the parties, the Chamber ought to order the Defence: (1) to state whether it intends to rely upon alibi defence or any other special defence; (2) to state whether it intends to submit at trial any books, documents, photographs or any other tangible objects in its possession or under its control; (3) and if so, to provide the Defence fifteen days following notification of the ruling and in any event prior to the commencement of the trial, to fulfill its obligation of disclosure in respect of said documents, books and other effects and objects, failing which shall be irrevocably denied any right to use them as evidence at trial.

Defence Submissions

4. The Defence makes a preliminary objection that the Prosecutor’s allegations are not supported by any affidavit or sworn declaration, in violation of Article 27(2)(iii) of the Directive for the Registry of the International Tribunal for Rwanda, Judicial and Legal Services Division, Court Management Section, No. 2/98.
5. The Defence denies the Prosecutor’s allegations pertaining to the obligation of disclosure under Rule 66(B) of the Rules. It refers to numerous authorities and agrees

with the Prosecutor that the obligations under Rule 67(A)(ii) regarding the defence of alibi and other special defence are rendered optional by Rule 67(B). The Defence, therefore argues that the Prosecutor's request in this regard is contradictory and premature.

6. The Defence, however, stresses that it does not intend to rely on the defence provided under Rule 67(A)(ii)(b). The Defence states that it may rely on the defence of alibi, in which case the Prosecutor will be timely advised.
7. Regarding books, documents, photographs and other tangible objects the Prosecutor seeks disclosure, the Defence argues that a correct interpretation of the Rules requires that such disclosure is subject to prior compliance by the Prosecutor with Rule 66(B), in order to give full effect to the principle of equal treatment of the parties.
8. The Defence contends that its obligation to disclose does not go beyond that which is incumbent upon the Prosecutor and is restricted to enabling the Prosecutor to inspect books, documents, photographs and other tangible objects in the custody or under the control of the Defence. The Defence states that it will make such material available to the Prosecutor at the right time.
9. With regard to the time when disclosure will be made, the Defence asserts that there is no deadline imposed by Rule 67(C), nor is there a legal basis for the imposition of a penalty in case of non-compliance with an order to disclose within a time limit. The Defence asserts that it has not yet decided on the selection of documents and objects, which it intends to use as evidence at trial. The Defence therefore considers the Prosecutor's motion to be premature and requests the Chamber to dismiss it.

FINDINGS

Affidavit

10. The question raised by the Defence with respect to the Prosecutor filing an affidavit in accordance with Article 27(2)(iii) of the Directive for the Registry does not arise in this case because there is no dispute between the parties that the Prosecutor already disclosed to the Defence numerous documents, in accordance with Rule 66(B). There was therefore no necessity for an affidavit.

Disclosure

11. The adversarial principle, which lies at the heart of all trials, implies that any evidentiary material that a party intends to use can be taken into account by a court only if it has been disclosed to the other party which has had the opportunity to peruse and question it. This principle also requires that disclosure of material be made within a reasonable time limit, to provide for the preparation of trial.
12. Rule 67 reflects this principle in requiring the reciprocal disclosure of evidence. Indeed each party's constraints could vary the respective obligations, whilst not calling into question the very principle of disclosure.
13. The Chamber notes that Rule 67(A)(ii) specifies the obligation of the Defence to disclose, but notes also that pursuant to 67(B) if the Defence fails to comply with the

obligation, such failure will not limit its right to rely on the special defence or the defence of alibi.

14. In the present instance the Chamber takes note that the Defence does not intend to rely on any special defence pursuant to Rule 67(A)(ii)(b).
15. Regarding the defence of alibi, the Chamber also takes note that the Defence has represented that it will timely advise the Prosecutor if such defence is needed. The Chamber emphasizes that the Prosecutor should be so advised, to have sufficient time to peruse and question the defence of alibi, taking into consideration the dates and locations to which the Defence refers.
16. The question in dispute between the parties with regard to the disclosure of books, documents and other objects pursuant to Rule 67(C), relates to the reciprocal obligation and the time limit of disclosure. Rule 67(C) reads: "If the Defence makes a request pursuant to Rule 66(B), the Prosecutor shall in turn be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the defence and which it intends to use as evidence at the trial."
17. In the view of the Chamber, once the Defence makes a request of the Prosecutor under Rule 66(B) and the Prosecutor acts on that request, it immediately triggers the reciprocal provision of Rule 67(C).
18. The authorities cited by the Defence to deny its reciprocal obligation to disclose are not relevant in the present case.
19. The case of the *Prosecutor v. Zejnil Delalic et al* (Decision of 8 September 1997 on Motion To Specify The Documents Disclosed by The Prosecutor That Delalic's Defence Intends To Use As Evidence), which was cited and relied on by Counsel is not on all fours with the case presently before this Chamber. In the *Delalic* case, the Defence received from the Prosecutor all of the documents that were at issue. These documents were originally taken from the accused. The Prosecutor kept the originals and supplied copies to the Defence. In those circumstances, therefore, there was no need for the Defence to satisfy the reciprocal requirement of Rule 67(C) pursuant to Rule 66(B) because those requirements had already been met. The *Delalic* case is therefore of no assistance to the Defence.
20. The other issue, which arose in the *Delalic* case, is whether the Defence was required to give notice to the Prosecutor of the witnesses it intends to call at trial. However, this is not a live issue in the motion before this Chamber; the Chamber therefore expresses no view on that issue.
21. In the *Prosecutor v. Tadic* (Decision of 27 November 1996 on the Prosecutor Motion for Production of Defence Witness Statements), which was cited and relied on by Counsel, the Defence made no request of the Prosecutor under Rule 66(B), and, therefore, the reciprocal mechanism under Rule 67(C) was not triggered. Equally, this authority is of no assistance to the Defence.
22. Judge Stephen, in *Delalic*, in his Separate Opinion (page two) made the following statement:

The Defence, in high contrast to the Prosecutor's obligation of disclosure, is not required to make any disclosure whatever, unless it intends to rely on an alibi defence or any special defence...

23. If the words "...not required to make any disclosure whatever..." is meant to apply to the provisions of Rule 67(C), then with respect, the Chamber does not agree with this statement. The statement is too wide and far-reaching and does not take account of the reciprocal disclosure provisions under Rule 67(C).
24. Indeed in the following paragraph, Judge Stephen stated thus:


The Rules also provide for additional and reciprocal rights of inspection if the Defence requests inspection of "books, documents, photographs and tangible objects in the Prosecutor's custody or control which are material to preparation of the defence or are intended for use at trial"-Sub-rule 66 (B)...
25. Judge Stephen's statement above that the Defence is not required to "make any disclosure whatever..." appears to be in contradiction to the latter paragraph.
26. The cannons of the interpretation of statutes provide that words are to be given their natural meaning. The word "reciprocal," among its many meanings, means something done in return; bearing on or binding on each of the two parties equally.
27. It is therefore obvious in the Chamber's view, that the Defence is required in the context of this case to satisfy the requirement of Rule 67(C) and to allow the Prosecutor "to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the Defence and which it intends to use as evidence at the Trial."
28. The Chamber rejects the submission of Defence Counsel that since the Rules do not provide any time limit within which to comply with Rule 67(C) the Defence may do so whenever it wishes or maybe not at all.
29. The word "reciprocal" connotes an almost simultaneous exchange, or an exchange soon after or within a reasonable time, depending on circumstances. The Chamber, therefore, orders the Defence to meet the requirements of Rule 67(C) not later than the 31 July 2000. Failure to comply with the order of the Chamber may result in sanctions.
30. The Chamber wishes to point out that, pursuant to Rule 67(D), the disclosure requirements are of a continuing nature and that any documents or objects which come into the possession of the Defence after the 31 July 2000, which meet the requirements of Rule 67(C) should be disclosed to the Prosecutor. All the parties are expected to act in good faith at all times.


FOR THESE REASONS, THE TRIBUNAL:

- (A) **ORDERS** the Defence to allow the Prosecutor at the earliest opportunity and not later than 31 July 2000, to “inspect any books, documents, photographs and tangible objects within its custody or control and which it intends to use as evidence at trial”. The inspection of any such items that come into the possession of the Defence after 31 July 2000 should also be made available to the Prosecutor on a continuous basis.
- (B) **DRAWS** the attention of the parties that reciprocal disclosure of evidence under Rule 67 is a necessary requirement for expeditious and smooth proceedings of the trial. Therefore, the Tribunal urges both parties to facilitate the timely commencement 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.
- (C) **DENIES** the Motion in other respect.

Arusha, 10 July 2000.


Lloyd George Williams
Judge, Presiding


Yakov Ostrovsky
Judge


Pavel Dolenc
Judge

Seal of the Tribunal