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12/3/2001
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule
Designated by the Trial Chamber pursuant to Rule 73 of the Rules

Registry: John Kiyeyeu

Date: 12 March 2001

Juvénal KAJELIJELI

Case No. ICTR-98-44A-T

**DECISION ON DEFENSE MOTION SEEKING TO
INTERVIEW PROSECUTOR'S WITNESSES OR ALTERNATIVELY
TO BE PROVIDED WITH A BILL OF PARTICULARS**

The Office of the Prosecutor:

Ken Fleming
Ifeoma Ojemeni
Melinda Pollard

Counsel for the Accused:

Lennox Hinds

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ICTR
Prosecutor's Office

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR NOUS
NAME / NOM: Dr. MINDUA K. M. Antoine
SIGNATURE: [Signature] DATE: 12.03.2001

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

JUDGE WILLIAM H. SEKULE, sitting as a single judge designated by the Trial Chamber to review this motion, pursuant to Rule 73 of the Rules of Procedure and Evidence (the "Rules"), on the basis of the written briefs filed by the Parties;

BEING SEIZED of the Defense's "Urgent Motion to Interview the Prosecutor's Witnesses or in the Alternative for Prosecutor to Provide a Bill of Particulars, pursuant to Rule 66(A) and 66(B) of the Rules, Dated 21 February 2001", (the "Motion") filed on 23 February 2001;

CONSIDERING the "Prosecutor's Response to Urgent Motion Dated February 21, 2001, by the Accused Juvénal Kajelijeli," (the "Prosecutor's Response") filed on 28 February 2001;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules, particularly Rules 66(A) and 66(B) of the Rules.

SUBMISSIONS OF THE PARTIES

1. In its Motion, the Defense requests to interview the Prosecutor's witnesses, prior to trial. Alternatively, the Defense requests that the Prosecutor provide, pursuant to Rules 66(A) and (B) of the Rules, a Bill of Particulars with respect to the specified witness statements, as enumerated in the Motion. The Defense requests that the Prosecutor provides the relevant dates and times when certain witness witnessed the Accused at a determined place and a detailed account of particular instances where the witness placed the Accused at those determined places. Additionally, the Defense requests that the Prosecutor provides copies of the witness' interviews either in the form of original tape recording in Kinyarwanda or in the native language of the witness, and/ or transcripts of the tape recordings in the original language of the witness.

2. As regards the Defense's request for the provision of the Bill of Particulars, the Prosecutor submits that this request is provided for under American law in order to provide the Defense with more factual details with respect to the Indictment. This request is not used for evidentiary discovery, as provided for in the Bill of Particulars, as requested in the Motion and, in any case, this is not a practice provided for in the Statute, the Rules or the jurisprudence of the Tribunal.

3. The Prosecutor submits that the Defense's attempt to bring the request under Rule 66(A) and 66(B) of the Rules is an abuse of process. She further submits that the statements of the respective witnesses contain ample information that will enable the Defense to prepare its case and further facts that go into issues of evidence can be obtained when cross-examining witnesses at trial.

4. As regards the Defense request to interview the Prosecution witnesses, the Prosecutor recalls the Chamber's Order in the "Decision on the Prosecutor's Motion for Protective Measures for Witnesses," dated 7 July 2000. The Prosecutor, on this basis, submits that a request to interview Prosecution witnesses can only be granted if the Chamber is satisfied that such a request is reasonable, and also if the witness consents to the interview. The Prosecutor submits that such a request, in the present case, should not be granted in order to avoid harassment and intimidation of witnesses, and to guarantee the safety of the witnesses, prior to trial. However, the Prosecutor submits that if the request is granted, the interviews should

be convened within the period of the disclosure of the un-redacted statements of the witnesses, in conformity with the said Order for Protective Measures for witnesses, which states that "[...] the Prosecutor disclose to the Defense the identity of the Prosecution witnesses before the beginning of the trial and no later than twenty-one (21) days before the testimony of said witness."

5. The Prosecutor concludes that the Motion should be dismissed as lacking merit and as being unfounded in law.

AFTER HAVING DELIBERATED

As regards the Defense Request to Interview Prosecution Witnesses or in the Alternative its Request for a Bill of Particulars

6. The Chamber notes that the Defense does not mention any provisions under the Statute nor the Rules on which it bases its request to interview witnesses prior to testimony at trial. It contends that its alternative request for a Bill of Particulars is based on Rules 66(A) and 66(B) of the Rules.

Rule 66: Disclosure of materials by the Prosecutor

Subject to the Provisions of Rules 53 and 69;

- (A) The Prosecutor shall disclose to the Defense:
 - (i) Within 30 days of the initial appearance of the accused copies of the supporting material, which accompanied the indictment when confirmation was sought, as well as all prior statements obtained by the Prosecutor from the accused.
 - (ii) 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; upon good cause shown a Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the defense within a prescribed time
- (B) At the request of the defense, the Prosecutor shall, subject to Sub-Rule (C), permit the defense to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defense, or are intended for use by the Prosecutor as evidence at trial or were obtained or belonged to the accused.

7. Neither Rules 66(A) or 66(B) of the Rules or any other provisions of the Statute provide for the Defense to interview witnesses prior to testimony at trial nor do they provide for a Bill of Particulars, as requested.

8. The Chamber recalls the provisions of Rule 89 of the Rules, specifically Sub-Rule (A), which provides that the rules of evidence set forth in Section 3 the Rules, shall govern the proceedings before the Chambers, and that the Chamber shall not be bound by national Rules of evidence. Sub-Rule (B) states that, in cases not otherwise provided for in Section 3 of the Rules, a Chamber shall apply rules of evidence which will best favour a fair

determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

9. In the instant case, upon a careful consideration of the Parties' submissions, the Chamber notes that the practice and the Rules of the Tribunal do not provide for the interviewing of witnesses prior to testimony at trial, nor do they provide for the kind of discovery, by way of a Bill of Particulars, as requested for in the Motion. The Chamber is, therefore, of the view that there is no basis under the Statute, the Rules and the practice obtaining in the Tribunal to interview witnesses before they testify at trial or to provide a Bill of Particulars, as requested for in the Motion.

10. Furthermore, the Chamber considers that the particulars requested for can be raised, by the Defense, at trial in the course of the cross-examination of the witnesses. Moreover, the Chamber recalls the Decision of Trial Chamber I of the International Criminal Tribunal for the Former Yugoslavia rendered on 26 February 1999 in *Prosecutor v. Kordic and Cerkez*, which stated that, "[...] the obligation to provide prior witness statements, pursuant to Rule 66(A)(ii) of the Rules is intended to assist the Defense in its understanding of the case against the Accused in accordance with his rights under Article 21 of the Statute," (which is Article 20 of the Statute of the Tribunal). In this regard, the Chamber considers that the statements of the respective witnesses, provided to the Defense pursuant to Rule 66(A)(ii) of the Rules would contain ample information to enable the Defense to prepare its defense.

As Regards the Defense Request for Disclosure

11. The Chamber notes that, in addition to the witness statements disclosed pursuant to Rule 66(A)(ii) of the Rules, the Defense requests for copies of the witness interviews, either in the form of original tape recordings, and/ or transcripts of the tape recordings. The Prosecutor has not responded to this request. The Chamber considers this request to be one falling under Rule 66(B) of the Rules, under which, subject to Rule 66(C) and Rule 70 of the Rules, the Defense, upon inspecting books, documents, photographs and tangible objects in the custody or control of the Prosecutor, and after it has shown that the said items are material to its defense or if the Prosecutor intends to use the said items at trial, the Prosecutor shall disclose the said items to the Defense. The Chamber further notes that, pursuant to Rule 66(B) of the Rules, if the said items were obtained or belonged to the Accused and the Prosecutor does not intend to use them for the prosecution of its case, then the said items could be returned to the Accused.

12. The Chamber is, therefore, of the view that if the Defense seeks disclosure of the said items and the items are indeed in the custody or control of the Prosecutor, the Defense could pursue the matter under the provisions of Rule 66(B) of the Rules.

13. Furthermore, the Chamber, mindful of the provisions of Rule 3(A) of the Rules, that the official languages of the Tribunal are English and French and Rule 3(B) that the Accused shall have the right to use his own language, considers that, if the said items are to be disclosed, then they could be disclosed to the Defense, in Kinyarwanda or the native language of the witness in addition to the official languages of the Tribunal, as requested for by the Defense if they were recorded in those languages,

ACCORDINGLY, THE TRIBUNAL

INVITES the Defense to seek for copies of the witness interviews, either in the form of original tape recordings, and/ or transcripts of the tape recordings pursuant to Rule 66(B) of the Rules, that is, if they wish to pursue this matter and the said items are in the control or custody of the Prosecutor.

DENIES the Motion in all other respects.

Arusha, 12 March 2001



William H. Sekule

Judge

