



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

OR: ENG.

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge William C. Matanzima Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 5 July 2001

THE PROSECUTOR
v.
Juvénal KAJELIJELI
Case No. ICTR-98-44A-T

**DECISION ON KAJELIJELI'S URGENT MOTION AND CERTIFICATION WITH
APPENDICES IN SUPPORT OF URGENT MOTION FOR DISCLOSURE OF
MATERIALS PURSUANT TO RULE 66(B) AND RULE 68 OF THE RULES OF
PROCEDURE AND EVIDENCE**

The Office of the Prosecutor:

K. Fleming,
I. Ojemeni,
M. Pollard,
J. Jayasuriya

Counsel for the Defence:

L. S. Hinds
N. M. Bompaka

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Winston C. Matanzima Maqutu and Judge Arlette Ramaroson (the “Chamber”);

BEING SEIZED of:

- (i) “Kajelijeli’s Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials pursuant to Rule 66(B) and Rule 68 of the Rules of Procedure and Evidence,” filed on 11 June 2001 with Appendices 1, 2 and 3; (the “Motion”)
- (ii) the “Prosecutor’s Response to Defense Motion for Disclosure of Materials Pursuant to Rule 66(B) and Rule 68,” with Attachments 1 and 2 filed on 18 June 2001; (the “Prosecutor’s Response”)
- (iii) the “Response to the Prosecutor’s Response to the Defence’s Urgent Motion for Disclosure of Materials Pursuant to Rule 66(B) and Rule 68” filed on 28 June 2001; (the “Reply”)

CONSIDERING the Chamber’s “Decision on Defense Motion Seeking to Interview Prosecutor’s Witnesses or Alternatively to be Provided with a Bill of Particulars,” in the instant case of 12 March 2001 (the “Decision of 12 March 2001.”)

HAVING HEARD the Parties on 4 July 2001;

AFTER HAVING DELIBERATED

Regarding the Authoritative Version of the Witnesses’ Statements Disclosed

1. The Defense submits that the English and French translations of the said witnesses’ statements have significant discrepancies leading to confusion as to their content and gave the example of statements in English and French of Witness GBW. Nevertheless, the Defence proposed to deal with such issues on a witness by witness basis as the trial progresses.
2. The Defense requests that the Prosecutor advise as to which version is correct and will be relied upon at trial and asked for clarification as to whether the signed version of the statement should be considered as the authoritative one.
3. The Prosecutor replied that the signed witness statement was to be considered as the original version and that the translated version bore no signature but a translation certificate. The Prosecutor added that they were ready to investigate on the Defense’s request any discrepancy specifically brought to their attention as they would in the case of GBW.
4. The Chamber finds that the issues will be clarified during the hearing and that the Parties should proceed in this manner.

Regarding the Disclosure of Witnesses' Interviews

5. The Defense requests pursuant to Rule 66 (B) original copies of transcripts and/or tape recordings of statements taken from witnesses either in Kinyarwanda or the native language of the witnesses.

6. The Prosecutor replied that tape recordings and transcripts of witnesses' interviews do not exist, nor do witnesses' statements in Kinyarwanda. The Prosecutor further replies that she has complied with her obligations under Rules 66 and 68 of the Rules, and should she come to know of any document that should be disclosed, she will comply with the Rules and disclose. The Prosecutor adds that she will comply with any request for inspection pursuant to Rule 66(B) of the Rules, but cannot be responsible for the Defense's lack of action.

7. The Defense replied that he "was informed during his May 21-24, 2001 visit to Rwanda that such taped interviews took place." but did not elaborate on this information during the hearing and was satisfied that the Prosecutor's position was put on the record during the hearing.

8. The Chamber recalls that Rule 66(B) of the Rules states, that "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 from or belonged to the accused."

9. In the instant case, since the Prosecutor has clearly stated that the tape recordings and transcripts of witnesses' interviews and/or witnesses' statements in Kinyarwanda do not exist, and are thus not in the Prosecutor's custody or control, the Chamber therefore dismisses the said request.

Regarding Rule 68 Disclosure of "Cooperation Agreements" and "Plea Agreements"

10. The Defense requests, pursuant to Rule 68 of the Rules, disclosure of "copies of any agreements between witnesses, particularly those convicted and serving sentences in Rwanda and the Tribunal and/or the government of Rwanda concerning their testimony," as well as disclosures of "all documents related to trial testimony, plea agreements and/or statements made by those convicted individuals in connection with their trials, pleas, or sentencing in Rwanda." The Defense alleges that these elements would affect the credibility of those detained witnesses that the Prosecutor intends to call at trial.

11. The Prosecutor orally replied that she did not have any such agreements in her possession and added that the Defence was presuming that the four detained witnesses were convicts whereas only one had been tried in Rwanda and the verdict was still pending.

12. Rule 68 of the Rules, provides that, "The Prosecutor shall, as soon as practicable, disclose to the Defense the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence."

13. The Chamber concurs with the jurisprudence of the Tribunal in the case of *Prosecutor v. Bagilishema*, ("Decision on the Request of the Defense for an Order For Disclosure by the

Prosecutor of the Admissions of Guilt of Witnesses Y, Z, and AA,” of 8 June 2000) where Trial Chamber I in its analysis of Rule 68 stated that the Rule, “carries two main elements. Firstly, the evidence must be known to the Prosecutor, and, secondly, it must in some way be exculpatory,” whereupon the said Trial Chamber was inclined “to equate known to custody and control or possession,” which are words used in Rule 66(B) and 67(C) of the Rules.

14. In the instant case, the Prosecution has stated categorically that it is not in possession of the said items. The Defense has not convinced the Chamber that said items exist or that they are exculpatory, therefore, the Chamber dismisses the Defense request pursuant to Rule 68 of the Rules. As in *Bagilishema*, the Chamber dismisses the Defense request pursuant to Rule 68 because “the obligation on the Prosecutor to disclose possible exculpatory evidence would be effective only when the Prosecutor is in actual custody, possession, or has control of said evidence.”

FOR ALL THE ABOVE REASONS THE TRIBUNAL:

DISMISSES the Defense Motion pursuant to Rule 66(B) and Rule 68 of the Rules

Arusha, 5 July 2001,

William H. Sekule,
Presiding Judge

Winston C. Matanzima Maqutu
Judge

Arlette Ramaroson
Judge

[Seal of the tribunal]