

ICTR-97-29-T
18-9-2001
(4627-4621)

4627
Musingu



International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

0271

OR: ENG

TRIAL CHAMBER II

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

Registrar: Adama Dieng

Date: 18 September 2001

JUDICIAL DEPARTMENT / SERVICES
ICTR
2001 SEP 18 10:01
MGR

The PROSECUTOR

v.

Sylvain NSABIMANA & Alphonse NTEZIRYAYO

Case No. ICTR-97-29-T

DECISION ON THE DEFENCE MOTIONS FOR DISCLOSURE
OF COPIES OF THE PROSECUTOR'S EXHIBIT

Rules 66(B) and 73 of the Rules

The Office of the Prosecutor:

Silvana Arbia
Japhet Mono
Jonathan Moses
Gregory Townsend
Adesola Adeboyejo
Manuel Bouwknecht

Counsel for Nsabimana:

Josette Kadji
Charles Patie Tchacounte

Counsel for Nteziryayo:

Titinga Frédéric Pacere
Richard Perras

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIEE CONFORME A L'ORIGINAL PAR NOUS
NAME / NOM:
SIGNATURE:..... DATE:.....

4626

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

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

BEING SEIZED of:

(i) The "Requête en communication de preuve afin que le Procureur fournisse à la Défense copie des items mentionnés dans sa liste d'Exhibit (Articles 54 et 73(A) du Règlement de procédure et de preuve)" filed on 29 May 2001 by the Defence for Nteziryayo ("Nteziryayo's Motion");

(ii) The "Requête de S. Nsabimana, aux fins de communications à la Défense de certaines pièces visées dans les annexes "A" et "B" de ce qui a été qualifié "Prosecutor's Exhibit List"" filed on 4 June 2001 ("Nsabimana's Motion");

(iii) The "Prosecutor's Response to Nteziryayo's Motion for Disclosure of Copies of the Prosecutor's Exhibits" filed on 6 June 2001 (the "Response to Nteziryayo's Motion");

(iv) The "Prosecutor's Response to Nsabimana's Motion for Disclosure of Copies of the Prosecutor's Exhibits" filed on 6 June 2001 (the "Response to Nsabimana's Motion");

CONSIDERING the "Prosecutor's Exhibit List" filed on 30 April 2001 pursuant to Rule 73bis(B)(v) of the Rules, containing Annex "A" and Annex "B" (the "Prosecutor's Exhibit List");


CONSIDERING the Statute and the Rules of Procedure and Evidence of the Tribunal (the "Statute" and the "Rules") specifically Rules 66(B) and 73 of the Rules;

NOW CONSIDERS the Motion solely on the basis of the written briefs filed by the Parties, pursuant to Rule 73(A) of the Rules.

SUBMISSIONS OF THE PARTIES:

Defence Submissions

1. Counsel for Nsabimana essentially request the Chamber to order the Prosecutor to disclose to them:
 - (a) A copy of all materials in Annex "A" of the Prosecutor's Exhibit List, which materials total approximately 300 items, where these Exhibit primarily concern Sylvain Nsabimana, in which case they are identified by the initials "S.N.", or where they concern unspecified accused, in which case they are identified as "Various";
 - (b) A copy of all materials in Annex "B" of the Prosecutor's Exhibit List, which Annex lists the sites and the corresponding videotapes, photographs, and sketches about which the first Prosecution witness, Investigator for the Prosecutor Ghandi Shukry, came to testify before the Chamber from 13 to 27 June 2001.
2. Similarly, the Defence for Nteziryayo request the Chamber to order the Prosecutor to disclose to them, before the commencement of trial, a copy of Items 102 to 122 on the Prosecutor's Exhibit List, which are identified as "AN", after the initials of the Accused. They further request that the Chamber order the Prosecutor to specify which materials



characterized as “various accused” in the Prosecutor’s Exhibit List are relevant to Nteziryayo, so that copies of those relevant materials can be disclosed to them, before the commencement of trial.

3. The Defense argue that copies of all these items, which are on the Prosecutor’s Exhibit List, are to be disclosed in the light of the fundamental right of the Accused to a fair trial, since the mere *inspection* of all such items which the Prosecutor intends to tender against the Accused at trial would not enable them to fully prepare their defence and, particularly, to determine their authenticity.
4. The Defense for Nsabimana specifically submit that the Chamber, in the « Décision relative à la Requête de la Défense aux fins de communication de l’ensemble des pièces dont entend se prévaloir le Procureur », rendered in the Nsabimana Case on 16 February 2000 (the “Nsabimana Decision of 16 February 2000”), interpreted Rule 66(B) as granting not only a right to inspect items upon which the Prosecutor intends to rely at trial, but also a right to receive copies of all such items, in underlining the Prosecutor’s duty to disclose (“communiquer”, in the original French wording of the Decision) to the Defence the said items.

Prosecutor’s Submissions

5. The Prosecutor submits that the Defence seek disclosure that exceeds the provisions of Rule 66(A) and 66(B) of the Rules so as to circumvent inspection under Rule 67(C) of the Rules.
6. The Prosecutor submits that although arrangements had been made for inspection by representatives of the Defence team of Nsabimana of the Prosecutor’s Exhibit, said representatives failed to show up. Since that time, none of the Defence have sought to inspect the material in her Exhibit List. The Prosecutor further submits that, as provided for under Rule 66(B) of the Rules, she is willing to permit such inspection and then make copies for the Defence of specific items they identify as relevant to them. The Prosecutor further suggests that the failure to request inspection on the part of the Defence is a ploy to avoid triggering the reciprocal duty under Rule 67(C) of the Rules.
7. The Prosecutor requests the Chamber to instruct the Accused to inspect the Exhibit in her Exhibit List so that they can request copies of the items they consider relevant to them and said items can be provided to them. Nevertheless, the Prosecutor contends that inspection pursuant to Rule 66(B) of the Rules is an *inter partes* procedure, permission to which need not be made by way of a Motion. Consequently, the Prosecutor prays that the Chamber deny the Motion.

HAVING DELIBERATED,

(a) Principles: Rule 66(B) of the Rules and the Provision of Copies

8. The Chamber notes that the Defence bring their request for disclosure of *copies* of the Prosecutor’s Exhibit under Rule 66(B) of the Rules, whereas Rule 66(B) of the Rules only envisions *inspection* of such items.

9. The Defence relies on a Chamber's holding to submit that the Prosecutor is under a duty, pursuant to Rule 66(B) of the Rules, to provide them with copies of all items she intends to use at trial. This holding runs thus:

"[...] any item [...] which the Prosecutor has not previously disclosed to the Defence, pursuant to the provisions of Rule 66, shall not be used against Sylvain Nsabimana during the trial" (unofficial translation, French original version reads: « [...] toute pièce [...] que le Procureur n'aurait pas préalablement communiquée à la Défense en application des dispositions de l'Article 66, ne pourra être utilisée contre Sylvain Nsabimana lors du procès », Nsabimana Decision of 16 February 2000, para. 3).

10. The Nsabimana Decision of 16 February 2000 in general, and the above holding in particular does not warrant such interpretation of the term "disclosure", or "communication" in French. As suggested by Rule 66's title, the Prosecutor's duty to disclose under the said Rule does not only refer to her duty to provide copies of documents (as for prior statements made by the accused, supporting material accompanying the Indictment and witness statements pursuant to Sub-Rules 66(A)(i) and 66(A)(ii) of the Rules). It also refers, under Sub-Rule 66(B) of the Rules, to the Prosecutor's duty to allow inspection of specific material, including those requested by the Defence in the present Motion, namely, "any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused".
11. The Chamber therefore recalls that an obligation to disclose copies of items exists only in respect of Rule 66(A)(i) and 66(A)(ii) of the Rules, whereas "Rule 66(B) of the Rules provides only for the inspection of designated materials [to the effect that] [t]his provision articulates a duty to *reveal* rather than a duty to *transmit* evidence" (*The Prosecutor v. Pauline Nyiramasuhuko and Others*, Case No. ICTR-97-21-T, "Decision on the Urgent Motion by the Defence for Disclosure of Evidence by the Prosecutor", 1 November 2000, unofficial translation, emphasis ours).
12. The Nsabimana Decision of 16 February 2000 did however grant the Defence with a *limited* right to receive copies of the materials envisaged under Rule 66(B), *subject to the Prosecution's ability to so provide* (See the Decision of 16 February 2000, notably at para. 8: « La Chambre est d'avis que, bien que le paragraphe B de l'Article 66 du Règlement mentionne que le Procureur doit permettre à la Défense d'examiner tous les livres, items, photographies et autres objets en sa possession, le Procureur doit non seulement permettre à la Défense de les examiner, mais aussi, *autant que faire se peut*, lui en fournir des copies conformes » (emphasis ours)).
13. A request for copies of such items is to be addressed to the Prosecution, notably at the time of inspection or thereafter upon selection of specific materials which, in whole or in part, appear necessary for the defence of the accused (See, in this respect, the Decisions on disclosure of evidence of 1 November 2000 and 8 June 2001 in *The Prosecutor v. Pauline Nyiramasuhuko and Others*, Case No. ICTR-97-21-T; and the "Decision on Defence Motion seeking to Interview Prosecutor's Witnesses or Alternatively to be Provided with a Bill of Particulars" of 12 March 2001 rendered in the Case *The*

Prosecutor v. Kajelijeli, where the Chamber held, at para. 11, that “[...] the Defence, upon inspecting books, items, 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 Defence or if the Prosecutor intends to use the said items at trial, the Prosecutor *shall* disclose [copies of] the said items to the Defence.” (emphasis ours)).

14. The Prosecution therefore has a limited obligation to provide the Defence with copies of items inspected pursuant to Rule 66(B) of the Rules. Should the Prosecution have been unable, despite its best efforts, to provide copies of all these items, the Defence may make copies of the remaining items.
15. Having clarified the principle of limited disclosure of copies of items after inspection by the Defence pursuant to Rule 66(B) of the Rules, the Chamber need not rule on the incidental arguments submitted by the Defence in this respect, relating to Articles 19 and 20 of the Statute and Rules 68, 73 *bis* (V), 89 (B), 89 (C), 89 (D), and 94 (B) of the Rules, in support of its interpretation of Rule 66 (B) of the Rules.

(b) The Specific Requests

Items listed in Annex A of the Prosecutor's Exhibit List

16. The items of which copy is requested by the Defence are the Exhibit in the Prosecutor's Exhibit List. In filing the said List, the Prosecutor expressed her intention to tender the items therein against the Accused and/or some or all of the other Accused in these joint proceedings. Even so however, it follows from the Rules and the jurisprudence referred to above that even items “[which] are intended for use by the Prosecutor as evidence at trial” as, undoubtedly, those requested by the Defence, are to be actually inspected prior to the latter submitting a request for copies.
17. The Prosecutor asserts in this regard that they invited the Defence for Nsabimana to inspect the items at a specific date, and that they did not present themselves for the said inspection until the hours of business had passed. The Prosecutor further submits that although “Nteziryayo requested inspection in a notice filed [...] on 15 March 2001”, Counsel for the Accused “never contacted the Office of the Prosecutor for the inspection.” The Defence remain silent in this regard. The Chamber therefore considers that copies of none of the items requested by the Defence can therefore, at this stage, be disclosed to the Defence for Nsabimana or to the Defence for Nteziryayo.
18. The Chamber however notes that, according to the Prosecutor's Exhibit List, the items marked after the initials of the Accused will be tendered specifically against the concerned Accused. The materiality of these items for the Defence of the concerned Accused may thus be considered *prima facie* established. In light of the particular circumstances of the request, including the fact that trial has already commenced in the present proceedings, the Chamber finds that it is in the interests of justice, in the present case, to exceptionally order the Prosecutor to disclose a copy of items 437 to 536 of Annex “A”, which are demarcated with the initials “SN”, to the Defence for Nsabimana, as well as a copy of items 102 to 122 on her Exhibit List, which are demarcated with the initials “AN”, to the Defence for Nteziryayo. Copy of these items shall be made in whole

or in part, depending on the extent to which the Prosecution intends to use these items in its case against each Accused.

19. The Chamber further decides that the provision of copies of all the items marked "SN" and "AN" in Annex A of the Prosecutor's Exhibit List without prior inspection nevertheless triggers the Defence reciprocal obligation to grant inspection of the material they intend to use as evidence within the circumstances of this case, pursuant to Rule 67(C) of the Rules. The Chamber specifically notes in this regard that the Defence should have sought inspection of the items requested pursuant to Rule 66(B) of the Rules in a timely manner.
20. With regard to the second series of items, which are referred-to as "Various" in Annex "A" of the Prosecutor's Exhibit List, the Chamber holds as follows:
 - (i) With respect to the request by Counsel for Nteziryayo that the Prosecutor specify which materials characterized as "Various" in the Prosecutor's Exhibit List are relevant to Nteziryayo so that copies of those relevant materials can be disclosed to them, pursuant to Rule 66(B) of the Rules, the Defence of Nteziryayo should make a request to the Prosecutor to inspect those items and thereupon request copies of those which they deem to be necessary for their defence, only resorting to the Chamber if the Prosecutor refuses permission to inspect or to make copies of any of the said items;
 - (ii) Similarly, with regard to the request made by the Defence for Nsabimana for disclosure of copies of all items in Annex "A" marked "Various", before commencement of trial the Chamber considers that, pursuant to Rule 66(B) of the Rules, the Defence is to first request inspection of those items to thereafter request copies of those which they deem to be necessary for their defence, resorting to the Chamber only if the Prosecutor refuses permission to inspect or to make such copies.

Items Listed in Annex B of the Prosecutor's Exhibit List

21. As to the request for disclosure of copies of the items referred-to in Annex "B" of the Prosecutor's Exhibit List, the Chamber recalls that it ordered during the hearing of 11 June 2001 that the Defence be provided with the items in this Annex (*See*, Transcripts of the proceedings of 11 June 2001). The Defence request in this regard is therefore moot.

Bona Fide Prior Disclosure of Copies of the Items on which the Prosecutor's Witnesses Will Rely During Their Testimony

22. Additionally, it is the Chamber's opinion that the Prosecutor must *bona fide* disclose to all Accused in this case at the earliest available opportunity, and at least prior to the date of testimony by the witness copy of any items she intends to use at trial during the testimony of its witnesses.



FOR THE ABOVE REASONS,

4621

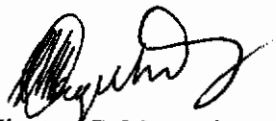
THE TRIBUNAL:

- I. ORDERS** the Prosecutor to disclose a copy of items 102 to 122 on the Prosecutor's Exhibit List to the Defence for Nteziryayo, in whole or in part, depending on the extent to which the Prosecution intends to use each of these items in its case against the Accused;
- II. ORDERS** the Prosecutor to disclose a copy of items 437 to 536 on the Prosecutor's Exhibit List to the Defence for Nsabimana, in whole or in part, depending on the extent to which the Prosecution intends to use each of these items in its case against the Accused;
- III. ORDERS** the Defence to grant the Prosecution, upon their request, inspection of the materials they intend to use as evidence, pursuant to Rule 67(C) of the Rules.
- IV. DENIES** the Defence Motions in all other respects.

Arusha, 18 September 2001



William H. Sekule
Presiding Judge



Winston C. Matanzima Maqutu
Judge



Arlette Ramarason
Judge

(Seal of the Tribunal)