

0428

ICTR-97-21-T
18-9-2001
(1181-1175)

1181
Mwamp



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Original: English

TRIAL CHAMBER II

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

Registrar: Adama Dieng

Decision of: 18 September 2001

JUDICIAL PROCEEDINGS
ICTR
2001 SEP 18 P 12: 03
MGR

The Prosecutor

v.

Pauline NYIRAMASUHUKO et al.

Case No. ICTR-97-21-T

**DECISION ON THE DEFENCE MOTION FOR DISCLOSURE OF THE
DECLARATIONS OF THE PROSECUTOR'S WITNESSES DETAINED IN
RWANDA, AND ALL OTHER DOCUMENTS OR INFORMATION PERTAINING
TO THE JUDICIAL PROCEEDINGS IN THEIR RESPECT**

The Office of the Prosecutor:

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

Counsel for Nyiramasuhuko:

Nicole Bergevin
Guy Poupart

Handwritten signature

Handwritten date: 18/9/2001

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, pursuant to Rule 73 of the Rules of Procedure and Evidence (“the Rules”), of a “Requête reconventionnelle en communication de preuve Article 73 du Règlement de procédure et de preuves” filed on 21 May 2001 by Counsel for Pauline Nyiramasuhuko (“the Motion”);

CONSIDERING the “Prosecutor’s Reply to the Defence Responses to the Prosecutor’s Supplemental Motion for the Transfer of Detained Witnesses under Rule 90bis” in which the Prosecutor replied to Nyiramasuhuko’s Counter Motion for detained witnesses’ statements from National authorities in Rwanda, filed on 24 May 2001 (“the Reply”);

NOTING the “Prosecutor’s Supplemental Reply to Nyiramasuhuko’s Counter Motion for an Order to Compel Production of Information, Documents and Statements of Detained Witnesses from Local and National Authorities in Rwanda”, filed on 7 September 2001;

NOTING the Chamber’s “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,” (*Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, 5 July 2001) (“the Kajelijeli Decision”);

NOTING also the “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,” (Trial Chamber I, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, 8 June 2000) (“the Bagilishema Decision”);

CONSIDERING that the Parties were informed that the Motion would be decided upon on the sole basis of their written briefs, pursuant to Rule 73(A) of the Rules of Procedure and Evidence of the Tribunal (“the Rules”);

CONSIDERING the Statute of the Tribunal (“the Statute”), and the Rules, specifically Articles 19 and 20 of the Statute and Rules 66 and 68 of the Rules;

SUBMISSIONS OF THE PARTIES

1. The Defence

- (i) The Defence requests that the Chamber order disclosure of the declarations of the Prosecutor’s witnesses who are currently detained in Rwanda, and all other documents or information pertaining to the proceedings before the Rwandan jurisdictions in their respect.

- (ii) The Defence submits that this request is justified by the very foundation of cross-examination, one of the principal objectives of which is to test the credibility of the witness. In the absence of this information, the Defence argues that the rights accorded to the Accused by Article 19 and 20 of the Statute, that is the right to a fair trial, and to cross-examine the witnesses against her, would be undermined.
- (iii) As the witnesses are Prosecution witnesses, the Defence submits that it is incumbent upon the Prosecutor to disclose the requested information and documents for each of the detained witnesses, and that it is not for the Defence to try to obtain this information, not knowing the identity of the witnesses.

2. **The Prosecution's Reply**

- (i) The Prosecutor submits that the Order sought by the Defence exceeds the scope of the duties incumbent upon the Prosecutor, as neither the Statute nor the Rules impose any affirmative duty on the Prosecutor "to go and obtain unknown evidence from national authorities for the Defence."
- (ii) In support of this argument, the Prosecutor cites case-law of this Tribunal, as well as that of the International Criminal Tribunal for the Former Yugoslavia (ICTY), namely Decisions denying similar Defence requests in the *Prosecutor v. Bagambiki and Imanishimwe*, ICTR-97-36, the *Prosecutor v. Ntagerura*, ICTR-99-46-T, and the *Prosecutor v. Dosen and Kolundzija*, IT-95-8.

HAVING DELIBERATED

Admissibility of the Prosecutor's Second Reply

The Chamber recalls that the deadlines set in Rule 73 (D) of the Rules indicate that "a responding party shall, thereafter, file any reply within five days from the date on which Counsel received the Motion." The Chamber further notes that the Prosecutor has legitimately exercised her right to respond to the Defence Motion within the prescribed time limits of Rule 73(D) of the Rules through her 24 May 2001 submissions, but has not shown good cause for a waiver of the prescribed time limit in filing a further submission dated 7 September 2001. The Chamber will therefore not consider this further Reply in ruling on the instant Motion.

As to the merits

- 3. The Chamber notes that the Motion requests two types of documents or information:
 - (i) any statements made by detained Prosecution witnesses to the Rwandan authorities, including any confessions by said witnesses;



- (ii) any other documents or information pertaining to the judicial proceedings in Rwanda in respect of said detained witnesses.
4. The Chamber notes that the Defence did not make reference to a specific Rule governing disclosure as the foundation of the Motion.
5. Nonetheless, the Chamber notes that any request of prior statements of the Prosecutor's witnesses could fall either under Rule 66(A)(ii), Rule 66(B) or Rule 68 of the Rules and has therefore decided to review the request in light of each of these respective legal bases. The Chamber will therefore consider the Defence request for disclosure of the said statements under Rule 66(A)(ii), and the Defence request for disclosure of the said other information or documents under Rule 66(B) and Rule 68 of the Rules.

On the Statements of Detained Witnesses

6. The Chamber notes that Rule 66(A)(ii) does not distinguish between statements taken by the Prosecutor and those taken by national authorities in the course of other judicial proceedings involving a witness. The Chamber also agrees with the Defence that the statements of Prosecution detained witnesses, including any possible confessions, are material to the preparation of the defence, and for the eventual evaluation of the credibility of said witnesses.
7. The Chamber recalls that in a different matter, Trial Chamber III of the Tribunal ruled that Rule 66(A)(ii) does not apply to disclosure of statements made by Prosecution witnesses to the Rwandan authorities *inter alia* for the reason that "[t]he statements sought by the Defence are not those taken by the Prosecutor." (See "Decision on Bagambiki's Motion for Disclosure of the Guilty Pleas of Detained Witnesses and of Statements by Jean Kambanda," *The Prosecutor v. Bagambiki*, Case No. ICTR-99-46-T, 1 December 2000).
8. Nonetheless, the Chamber notes that in the "Decision on the Motion by the Accused Zejnil Delalic for the Disclosure of Evidence" in *The Prosecutor v. Delalic et al* (Case No IT-96-21-T, 26 September 1996) an ICTY Trial Chamber indicated that "[t]he final component of this Sub-rule [66(A)(ii)] provides that the Prosecution must reveal to the Defence "all prior statements obtained by the Prosecutor from prosecution witnesses," which does not limit the disclosure obligation to the statements *taken* by the Prosecutor, but rather to those in her *possession*. Moreover, in the "Decision on the Production of Discovery Materials" in *The Prosecutor v. Blaskic* (Case No IT-95-14-PT, 27 January 2001) ("Blaskic Decision on Production") at paras. 37 and 38, the ICTY Trial Chamber indicated that "all the previous statements of the accused which appear in the Prosecutor's file, whether collected by the Prosecution or originating from any other source, must be disclosed to the Defence immediately. The same interpretation of Sub-Rule 66(A) leads the Trial Chamber to draw *no distinction* between the form or forms which these statements may have. [...] Furthermore, the Trial Chamber considers that the same



criteria as those identified in respect of the accused's previous statements must apply *mutatis mutandis* to the previous statements of the witnesses also indicated in Sub-Rule 66(A)." (Emphasis ours.)

9. In the instant case, the Chamber considers that following this interpretation of Sub-Rule 66(A)(ii), statements made during the course of judicial proceedings by Prosecution witnesses expected to testify at trial—regardless of the origin of said judicial proceedings—are subject to the obligation of disclosure under Rule 66(A)(ii) if they are within the custody and control of the Prosecution. Since the Prosecutor submits that she is not in the possession or custody of any such statements and since the Defence has brought no *prima facie* evidence to the contrary, the Chamber must dismiss the Defence request.

On any other documents or information pertaining to the Judicial proceedings of the detained witnesses

10. As to the request for disclosure of any information or documents pertaining to the judicial proceedings in respect of the detained witnesses, the Chamber notes that disclosure of such items, if they are under the custody or control of the Prosecutor, would fall under Rule 66(B), which provides that "[a]t the request of the defence, the Prosecutor shall [...] permit the defence to inspect 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 notes that Rule 66(B) provides for the disclosure of evidence under the custody or control of the Prosecutor that fall into three categories: (1) those that are material to the preparation of the Defence, (2) those that are intended for use by the Prosecutor as evidence at trial, or (3) those that were obtained from or belonged to the accused. The Prosecution is clearly under the obligation to turn over for inspection all evidence in the second and third categories. (See "Decision on the Motion by the Accused Zejnir Delalic for the Disclosure of Evidence", *The Prosecutor v. Delalic et al.*, Case No. IT-96-212, 6 September 1996 at para. 5) ("Delalic Decision on Disclosure").
12. With regards to the first category, namely evidence that is material to the preparation of the Defence, the Chamber recalls that "Rule 66(B) imposes on the Prosecutor the responsibility of making the initial determination of materiality of evidence within its possession and if disputed, requires the Defence to *specifically identify evidence material to the preparation of the Defence* that is being withheld by the Prosecutor" (Emphasis ours) (See *Delalic Decision on Disclosure*, at para 11). The Defence, when resorting to the Chamber, is required to show that their request is justified under Rule 66(B) of the Rules and, specifically, to satisfy the Chamber that the requested documents are material to the preparation of the Defence. (See "Decision on Bagambiki's Motion for Disclosure of the Guilty Pleas



of Detained Witnesses and Statements by Jean Kambanda”, *The Prosecutor v. Bagambiki*, Case No. ICTR-99-46-T, 1 December 2000).

13. As noted above, the Chamber is satisfied that the documents in question are material to the preparation of the Defence. The Chamber therefore notes that should such documents pertaining to the judicial proceedings in respect of detained witnesses be in or fall into the custody of the Prosecutor, they should be made available, without delay, to the Defence for inspection pursuant to Rule 66(B).
14. The Chamber further notes that such documents pertaining to the judicial proceedings in respect of detained witnesses could also be requested by the Defence pursuant to Rule 68, provided that (1) they are in the custody of the Prosecutor and (2) they “in any way tend[] to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence”.
15. As to the first condition, the Chamber reaffirms its finding in the Kajelijeli Decision, and concurs with the Bagilishema Decision, that “the obligation [imposed by Rule 68] 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.” (See the Kajelijeli Decision, at para.13; the Bagilishema Decision at para.15, in which the Chamber found that “both Rules [66 and 68] imply possession by the Prosecutor of the documents or evidence”; See also the “Decision on the Request of the Accused Hazim Delic Pursuant to Rule 68 for Exculpatory Information” (“The Delalic Decision on Rule 68”, *The Prosecutor v. Delalic et al.*, Case No. IT-96-21, 24 June 1997 at para.12), and the Blaskic Decision on Production, at para.50).
16. The Chamber notes, as stated above, that the Prosecution does not acknowledge being in the possession or custody of such documents, nor has the Defence brought evidence to the contrary. The Chamber therefore finds that the first condition for obligatory disclosure under Rule 68 is not present.
17. Furthermore, with respect to the second condition, the Chamber notes that, when requesting disclosure pursuant to Rule 68, the Defense “must submit to the Trial Chamber all *prima facie* proofs tending to make it likely that the evidence is exculpatory” (See Blaskic Decision on Production, para. 50, See also the Delalic Decision on Rule 68, at para. 13). The Chamber notes that the Defence Motion in the instant case presents no such *prima facie* evidence.
18. The Chamber therefore finds that the Defence has not shown good cause warranting disclosure of any other documents pertaining to judicial proceedings in Rwanda in respect of said witnesses under Rule 68.

19. Nonetheless, the Chamber reiterates that should any such statements or documents pertaining to these judicial proceedings come into the custody or control of the Prosecutor, the statements should be disclosed to the Defence pursuant to Rule 66(A)(ii), and the Defence should be allowed to inspect any other documents pertaining to the judicial proceedings of these detained witnesses pursuant to Rule 66(B).

FOR ALL THE ABOVE REASONS THE CHAMBER HEREBY

DISMISSES the Motion.

Arusha, 18 September 2001




William H. Sekule
Presiding Judge



Winston C. Matanzima Maqutu
Judge



Arlette Ramarason
Judge



(Seal of the Tribunal)