



ICTR-98-42-T
14-12-2001
(4976-4971)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

4976
Mwamba

OR: ENG

TRIAL CHAMBER II

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

Registrar: Adama Dieng

Date: 14 December 2001

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The PROSECUTOR v. ÉlieNDAYAMBAJE
(Case No. ICTR-96-8-T)
The PROSECUTOR v. Joseph KANYABASHI
(Case No. ICTR-96-15-T)
The PROSECUTOR v. Pauline NYIRAMASUHUKO & Arsène Shalom NTAHOBALI
(Case No. ICTR-97-21-T)
The PROSECUTOR v. Sylvain NSABIMANA & Alphonse NTEZIRYAYO
(Case No. ICTR-97-29-T)
Case No. ICTR-98-42-T

DECISION ON PROSECUTOR'S MOTION TO MODIFY HER LIST OF EXHIBITS

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

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

BEING SEIZED of the “Prosecutor’s Motion for Leave to Modify her Exhibit List,” filed on 27 September 2001 (the “Motion”);

CONSIDERING the:

- (i) “Réponse à la Requête du Procureur pour être autorisé à modifier sa liste des pièces à conviction,” filed by the Defense of Kanyabashi on 2 October 2001 (“Kanyabashi’s Response”);
- (ii) “Requête en Extension des délais pour produire une Réplique à la Requête intitulée [Prosecutor’s Motion for leave to Modify her Exhibit List,]” filed by the Defense of Nteziryayo on 2 October 2001 (the “Motion by Nteziryayo”);
- (iii) “Réponse de S. Nsabimana à la Requête du Procureur déposée le 27 Septembre 2001 aux fins d’être autorisé à modifier sa liste des pièces à conviction,” filed by the Defense of Nsabimana on 5 October 2001;
- (iv) “Réponse à la Requête du Procureur afin de modifier sa liste des pièces à conviction,” filed by the Defense of Ndayambaje on 9 October 2001;
- (v) “Réponse de Pauline Nyiramasuhuko à la Requête du Procureur aux fins de modification de sa liste d’Exhibits,” filed by the Defense of Nyiramasuhuko on 15 October 2001;
- (vi) “Réponse à la Requête du Procureur afin de modifier sa liste des pièces à conviction,” filed by the Defense of Nteziryayo on 15 October 2001;
- (vii) “Prosecutor’s Reply to Defense Responses to the Prosecutor’s Motion for Leave to Modify her Exhibit List,” filed on 18 October 2001.

NOTING the Chamber’s “Decision on the Prosecutor’s Motion for Leave to Call Additional Witnesses and for the Transfer of Detained Witnesses,” of 24 July 2001 in this Case (the “*Decision to Call Witnesses and to Transfer Detained Witnesses*”);

CONSIDERING the Facsimile Transmission of 10 October 2001 from the Court Management Section to the Parties, indicating, as directed by the Chamber, that the Defense should file any responses to the Prosecutor’s Motion, which was translated on 5 October 2001, by 15 October 2001 and that the Prosecutor should file any Reply by 18 October 2001 (the “Facsimile Transmission of the Court Management Section”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”) in particular Rules 54, 73 and 73*bis*;

CONSIDERING that pursuant to Rule 73 of the Rules, the Motion will be decided on the basis of the written briefs only, as filed by the Parties.

commencement of trial. Further, unlike the Witness List, the List of Exhibits is not subject to amendments. The Defense argue that the obligation under Rule 73bis of the Rules allows the Accused a right to know, with certainty, before commencement of the trial, the evidence that the Prosecution intends to introduce against him or her in order to prepare a Defense and fully exercise his or her rights during cross-examination. The Defense argue that, if the request for modification is granted, the Accused will suffer prejudice in having to alter their Defense including their cross examination.

8. The Defense argue that the Prosecutor has not denied having possessed the 85 new exhibits at the time of filing her List of 30 April 2001.

HAVING DELIBERATED

Preliminary matters

9. The Chamber notes that the Defense of Nteziryayo requested an extension of time to respond to the present Motion for translation purposes. The Chamber notes that the Prosecutor's Motion was duly translated into French and thereby transmitted to the Accused and Defense Counsel. Therefore, the Chamber finds that the Defense Motion requesting an extension of time on the basis of translation has been rendered moot.

The Legal Basis of the Motion

10. The Chamber notes that Rule 73 of the Rules provides *inter alia* that, "[a]ny party may move before a Trial Chamber for appropriate ruling or relief after the initial appearance of the Accused." Rule 54 of the Rules, indeed characterized as a general provision provides that, "[a]t the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial." Rule 73bis(B)(v) of the Rules provides that, "At the Pre-Trial Conference the Trial Chamber or a Judge, designated from among its members, may order the Prosecutor, within a time limit set by the Trial Chamber or the said Judge, and before the date set for trial, to file [...] a list of exhibits the Prosecutor intends to offer stating, where possible, whether or not the Defense has any objection as to authenticity."

11. In the instant case, since the Prosecutor requests to modify her List of Exhibits after commencement of trial, a matter not provided for by Rule 73bis(B)(v) of the Rules or any other Rule, the Chamber shall make use of its general powers under Rule 54 of the Rules and consider the Motion on its merits accordingly.

Regarding the Request to Modify the List of Exhibits

12. In the instant Motion, the Prosecutor seeks to modify her List of Exhibits of 30 April 2001, which consists of 825 items by withdrawing 397 items and adding 85 new items thus replacing the said list with the List she has annexed to her Motion as Annex D. The Chamber notes that the said list of 30 April 2001 was filed pursuant to the Chamber's direction made under Rule 73bis(B)(v) of the Rules.

13. The Chamber notes that the Prosecutor's List of Exhibits of 30 April 2001 is simply a listing of exhibits the Prosecutor intends to produce in this case. Of the 825 items so listed in

SUBMISSION OF THE PARTIES

The Prosecutor's Submissions

1. The Prosecutor moves under Rules 54, 73 and 73bis(B) of the Rules for the Chamber to grant her leave to modify her list of exhibits, in the interest of judicial economy and for the efficient conduct of the trial. In this regard, the Prosecutor submits that pursuant to deadlines set by the Chamber, she filed her list of exhibits on 30 April 2001. The Prosecutor maintains that she seeks to modify such list by removing some exhibits and adding others.¹ The Prosecutor submits that the Defense will not be taken by surprise, as they have the remainder of this year and well into next year to inspect the new exhibits.
2. The Prosecutor argues that the Rules are unambiguous as to the setting of the time limit for the filing of the List of Exhibits, that is, before the date set for trial or within a specific time frame set by the Trial Chamber, but that they are silent on the specific time limit for the filing of or modification of the List of Exhibits after the commencement of trial.
3. Accordingly, the Prosecutor argues that the Chamber, pursuant to Rule 54 of the Rules, may use its discretionary powers to grant the modification of the List of Exhibits after the commencement of trial. In support of the said request, the Prosecutor draws the attention of the Chamber to the jurisprudence of the United States of America in the case of *Francisco v. Cascade Investment*, (Div. II No. 70-418) of 15 June 1971 (the "*Francisco v. Cascade Case*") whereby the Colorado Court of Appeals ruled that the lower court should have granted the applicant leave to amend the list of exhibits in order to "prevent a manifest injustice to the applicant."
4. The Prosecutor prays that the Chamber grant her leave to modify the List of Exhibits in accordance with Annex D, which is her proposed Modified List of Exhibits.

Defense Submissions

5. Counsel for Nyiramasuhuko, Ntahobali, Nteziryayo, Nsabimana, Ndayambaje and Kanyabashi (the "Butare Case") have responded to the Prosecutor's Motion, except for the Defense of Ntahobali. In their responses, the Defense Teams have objected to the Prosecutor's request.
6. The Defense allege that the Prosecutor's request has no valid judicial basis, when relying on Rules 54 and 73 of the Rules, which are of a general nature. Even if Rule 54 of the Rules specifically addresses the Chamber's powers to *inter alia* issue orders and summonses, it does not specifically confer on the Chamber power to use its discretion to allow a modification of the List of Exhibits.
7. In any case, the Defense submit that Rule 73bis(B)(v) of the Rules is unambiguous as it specifically addresses the List of Exhibits and stipulates that the list must be filed before the

¹ Annexed to her Motion the Prosecutor has the following: (1) Annex A containing the documents produced by Prosecution Witness Ghandi Shukry; (2) Annex B with 825 documents that were contained in the previous list of exhibits dated 30 April 2001 that the Prosecutor now seeks to modify; (3) Annex C containing 85 exhibits that were previously produced in the case of *Akayesu* and *Rutaganda* respectively and which are in the custody of the Registry; and (4) Annex D containing 428 exhibits the Prosecutor now seeks to use if the Chamber grants her leave to modify her previous list.

the said List, 111 items were produced by Prosecution Witness Ghandi Shukry and have been admitted by the Chamber to form part of the records of June 2001. The Chamber notes that, at this stage, the rest of the exhibits have only been listed, in order to be produced in court. Accordingly, the Prosecutor may modify her List after giving due notice to the Defense of such modification.

14. Having noted that the Defense did not object to the request, the Chamber allows the deletion of 397 items from the List of Exhibits of 30 April 2001, in the interests of judicial economy.

15. As regards the request to add 85 new exhibits, the Chamber considers the interests of judicial economy that have to be balanced with the rights of the Accused, guaranteed by Rule 73*bis* of the Rules to know, with accuracy, before commencement of trial, the evidence that the Prosecutor intends to produce in order to prepare his or her Defense and fully exercise his or her rights during cross-examination.

16. The Prosecutor indicates that she does not intend to use the 85 new items during the session of the trial scheduled for 22 October to 22 November 2001. In fact, the Prosecutor has stated that the Defense will have ample time to inspect the new items and have copies produced, pursuant to Rule 66(B) of the Rules, if they so wish, during the trial's recess. In a spirit of cooperation, the Prosecutor has, by letter of 12 October 2001, provided the Defense with copies of items listed in Annex D and has issued an invitation for five CD ROMs of other items listed in Annex D.

17. The Chamber thus finds that the Defense will have ample time to inspect the new materials and prepare, in so far as the 85 new items were not produced as evidence during the trial session held from 20 October to 22 November 2001. Consequently, the Chamber considers that the rights of the Accused will not be prejudiced by the addition of the 85 new items. Accordingly, in the interests of judicial economy, the Chamber grants the Prosecutor leave to modify her List of Exhibits and admits Annex D as the Prosecutor's Modified List of Exhibits.

18. Nonetheless, the Chamber notes that some of the items listed in Annex D are entitled, "interview," "witness statement," and "hearing" concerning various Accused, in particular, Kanyabashi, Nsabimana, Nyiramasuhuko and Ndayambaje. The Chamber recalls that, pursuant to Rule 66(A)(i) of the Rules, "[t]he Prosecutor is obliged to disclose to the Defense, within 30 days of the initial appearance of the Accused [...] all prior statements obtained by the Prosecutor from the Accused."

19. The Chamber recalls the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, (the "ICTY"), in particular the "Order on Motion to Compel Compliance by the Prosecutor with Rules 66(A) and 68," of 26 February 1999 in the case of *Prosecutor v. Kordic and Cerkez*. In this case, the ICTY Trial Chamber reiterated two Decisions of 27 January 1997 and 15 July 1998 in the case of *Prosecutor v. Blaskic* that prior statements include, "[a]ll the previous statements of the accused which appear in the Prosecutor's file, whether collected by the Prosecution or originating from any other source," which was further elaborated to be, "[a]ll statements made by the accused during questioning in any type of judicial proceedings." Similarly, this Chamber has also endorsed the aforesaid ICTY opinions in its "Decision on Defense Motion for Disclosure," of 1 November 2000 in the case of *Prosecutor v. Nyiramasuhuko et al.* In that case, this Chamber ordered communication to



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the Defense of, “[a]ny undisclosed prior statements of [co] Accused in the possession of the Prosecution made in any type of judicial proceedings, and whether collected by the Prosecution or originating from any other source, save for any material covered by 70(A) of the Rules which have not been disclosed[...].”

20. In the instant case, the Chamber reminds the Prosecutor of her obligation to immediately disclose to the concerned Accused all items listed in Annex D, which are prior statements made by the Accused, pursuant to Rule 66(A)(i) of the Rules.

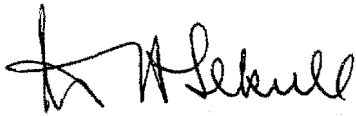
FOR THE ABOVE REASONS, THE TRIBUNAL,

GRANTS the Prosecutor leave, pursuant to Rule 54 of the Rules, to modify her List of Exhibits;

ORDERS the Prosecutor to file Annex D as her Modified List of Exhibits;

ORDERS that all items listed in Annex D, which are prior statements made by the Accused, be disclosed immediately, pursuant to Rule 66(A)(i) of the Rules.

Arusha, 14 December 2001



William H. Sekule
Presiding Judge



Winston C. Matanzima Maqutu
Judge



Arlette Ramarison
Judge

