



ICTR-98-42-T

96-03-2002
(6353-6349)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

6353
Mwamba

OR: ENG

TRIAL CHAMBER II

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

Registrar: Adama Dieng

Date: 6 March 2002

The PROSECUTOR v. Élie NDAYAMBAJE

Case No. ICTR-96-8-T

Case No. ICTR-98-42-T

JUDICIAL
2002 MAR -6 P 2:52

DECISION ON NDAYAMBAJE'S MOTION TO *INTER ALIA* ORDER THE PROSECUTOR AND THE RWANDAN GOVERNMENT TO OBTAIN STATEMENTS AND TO SUSPEND HEARING OF DETAINED WITNESSES

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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 extrême urgence afin de faire respecter et appliquer la Décision de cette chambre datée du 15 novembre 2001, d'ordonner au Procureur de poser toutes les actions nécessaires pour obtenir les documents demandés, d'ordonner au Gouvernement Rwandais et à son Représentant le Procureur Général de coopérer avec le Tribunal et enfin de surseoir jusqu'à ce que la Décision du 15 novembre ait été respectée à l'audition de tous témoins détenus par le Gouvernement du Rwanda," filed on 17 January 2002 (the "Motion");
- (ii) the "Prosecutor's Reply to Ndayambaje Motion to Order the Prosecutor and the Rwandan Government and Its Representative to Cooperate to Obtain the Statements From Detained Witnesses," filed on 1 February 2002 (the "Prosecutor's Response");
- (iii) the "Réplique à la Réponse de Procureur à la Requête de l'Accusé en extrême urgence afin de faire respecter et appliquer la Décision de cette chambre datée du 15 novembre 2001, d'ordonner au Procureur de poser toutes les actions nécessaires pour obtenir les documents demandés, d'ordonner au Gouvernement Rwandais et à son Représentant le Procureur Général de coopérer avec le Tribunal et enfin de surseoir jusqu'à ce que la Décision du 15 novembre ait été respectée à l'audition de tous témoins détenus par le Gouvernement du Rwanda," filed on 14 February 2002 ("Ndayambaje's Reply");

RECALLING the "Decision on the Defense Motions Seeking Documents Relating to Detained Witnesses or Leave of the Chamber to Contact Protected Detained Witnesses," of 15 November 2001, (the "Decision of 15 November 2001");

NOTING the "Prosecutor's Report on Compliance with the Decision of 15 November 2001 Regarding Documents from Rwandan Authorities on Detained Witnesses," of 3 December 2001 (the "Prosecutor's Report");

CONSIDERING the Statute of the Tribunal (the "Statute") specifically Article 28 and the Rules of Procedure and Evidence (the "Rules") in particular Rules 7*bis*, 66(A)(ii) and 66(C);

NOW DECIDES pursuant to Rule 73 of the Rules the Motion on the basis of the written briefs only, as filed by the Parties.

SUBMISSION OF THE PARTIES

Defense Submissions

1. The Defense recalls the Prosecutor's Report indicating that after making her best efforts to obtain the prior statements of all detained witnesses made before the Rwandan authorities in full compliance with the Decision of 15 November 2001, the said authorities

refused her request. In her Report, the Prosecutor enclosed a copy of the response from *le Procureur général* of Rwanda, Mr. Gerard Gahima, signed on 26 November 2001.

2. The Defense submits that the Prosecutor's Report does not demonstrate that she made all necessary efforts to obtain the said documents. The Defense argues that the Prosecutor should have sustained her efforts to comply with the Chamber's order rather than promptly reporting her inability to so comply.

3. The Defense further maintains that even if the Prosecutor was delegated the task of obtaining the said documents, the Rwandan government also has a duty to cooperate pursuant to Article 28 of the Statute. The Defense adds in its Reply that, pursuant to Article 28 of the Statute, the Chamber does not make a direct request to a State, rather, the request was made by the Tribunal through the Prosecutor, as in the present case in accordance with its Decision of 15 November 2001. The Defense maintains that pursuant to the said Article, the Rwandan government is duty bound to communicate the requested documents to the Prosecutor, who, if she deems it appropriate, may provide the Chamber with reasons and justifications, pursuant to Rule 66(C) of the Rules for being relieved from disclosing the said ordered documents to the Defense.

4. The Defense argues that the justifications given by *le Procureur général* of Rwanda in the letter of 26 November 2001 do not meet any of the exceptions, outlined under Rule 7bis of the Rules, to forgo the obligation to cooperate.

5. The Defense therefore prays the Chamber to:

- (i) Order the Prosecutor to act within short delay to carry out the orders rendered by the Chamber in its Decision of 15 November 2001;
- (ii) Order the Rwandan Government and its representative, *le Procureur général* of Rwanda, to cooperate and furnish without delay the documents ordered in the Decision of 15 November 2001;
- (iii) Order that the Prosecutor may not call the detained witnesses to testify before the Chamber until the Rwandan government has fulfilled its obligation and the Prosecutor has communicated the relevant documents to the Defense; and
- (iv) Reserve the right of the Defense to introduce a subsequent motion for authorization to meet with the 27 detained witnesses.

Prosecutor's Response

6. The Prosecutor argues that she does not have the power to order the Rwandan government to communicate the documents sought, contrary to the Defense's arguments. The Prosecutor further argues that she cannot disclose documents that are not in her possession.

7. The Prosecutor argues that there is no basis upon which to criticize her for the steps taken in her efforts to comply with the Decision of 15 November 2001. The Prosecutor further draws the Chamber's attention to the fact that prior to the Order of 15 November 2001, she had already sought the said documents and had obtained some statements, which she had disclosed to the Defense.

8. The Prosecutor thus maintains that the Motion has no merit and should be dismissed.

HAVING DELIBERATED

9. The Chamber recalls its Decision of 15 November 2001, in which it reiterated the orders made in the *Nyiramasuhuko* Decision with regard to the Prosecutor's obligations pursuant to Rule 66(A)(ii) of the Rules, that, "[I]n the interests of justice, the Chamber finds that the Prosecutor bears the responsibility of obtaining the said statements from the Rwandan Authorities and of providing them to the Defense pursuant to Rule 66(A)(ii) [...]."¹

10. In the said Decision of 15 November 2001 it was noted that the Prosecutor had disclosed to all six Accused several redacted translated statements of three detained Prosecution witnesses, namely, QCB, FAM and QBV, made to Rwandan authorities and that the Prosecutor had not disclosed any other documents in her possession, at the time, because they were yet to be translated from Kinyarwanda into the official languages of the Tribunal.² The Chamber emphasized in the aforementioned Decision that, "[t]he Prosecutor's obligation to take all necessary action to facilitate the translation and, if applicable, the redaction of statements in her custody or control, to expedite disclosure to all six Accused [...]."³

11. In addition to the aforementioned Prosecutor's obligation, the Chamber ordered in its Decision of 15 November 2001 that the Prosecutor "[m]ake all efforts to obtain, to the extent possible, the prior statements made before the Rwandan authorities of all detained witnesses," and to, "[d]isclose to the Defense all statements obtained by her of detained witnesses whom she intends to call to testify at trial, at the latest by Thursday 31 January 2002."

12. Following the Decision of 15 November 2001, in an effort to comply with the Orders made, the Prosecutor requested from the Rwandan authorities, prior statements of all detained witnesses in the "Butare" case made before them. The said authorities were unable to meet the request, giving reasons. Whereupon the Prosecutor reported this position to the Chamber on 3 December 2001.

13. In the instant case, it is noted that the Defense is not satisfied with the reported efforts of the Prosecutor. For instance, the Defense argues that the Prosecutor has not enclosed a copy of the written request made to the Rwandan authorities and after a single attempt, by way of letter and one correspondence in writing from the Rwandan authorities, the Prosecutor has made no further efforts to comply with the Chamber's Orders. Furthermore, the Defense argues that a reading of the letter of 26 November 2001 from *le Procureur général* of Rwanda reveals that the Rwandan authorities' opposition to disclosure of the wholesale delivery of copies of the documents in question stating that they may consider requests on a case by case basis. (our emphasis)

14. Nevertheless, the Chamber observes that the Prosecutor promptly contacted *le Procureur général* of Rwanda and that she has enclosed in her Report, the written response from the said authorities. In the said reply to the Prosecutor, the Rwandan authorities state that they are unable to meet the Prosecutor's request for the "[w]holesale delivery of all documents in question." It is the Chamber's opinion that the Rwandan authorities appear to

¹ See the "Decision on the Defense 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," of 18 September 2001 in the *Prosecutor v. Nyiramasuhuko* Case No. ICTR-97-21-T.

² See para 3 of the Decision of 15 November 2001; See also "Prosecutor's Report on Recent Disclosure of Documents from the Rwandan Authorities on Detained Witnesses," of 12 November 2001 in the "Butare" Case.

³ Decision of 15 November 2001, para 24..

be in a position to provide the prior statements made before Rwandan authorities of detained witnesses if the said documents were specified.

15. Inasmuch as the Prosecutor has been disclosing the prior statements of Prosecution detained witnesses to the Defense, the Chamber considers it necessary for the Prosecutor to specify to the Rwandan authorities the exact documents required rather than requesting copies of all statements by Rwandan detainee witnesses appearing before Trial Chamber II in the Butare Case. Accordingly, the Chamber orders the Prosecutor to make further efforts to obtain from the Rwandan authorities the specific documents required. It is also important therefore that the Defense should indicate, where possible, the specific statements they require. (emphasis ours)

16. As regards the Defense argument that the Rwandan government has not discharged its duty to cooperate with the Tribunal pursuant to Article 28 of the Statute warranting the application of Rule 7bis of the Rules, the Chamber observes that all States are under a duty to cooperate and to provide judicial assistance to the Tribunal pursuant to Article 28 of the Statute. The Chamber is however not satisfied that there is any basis for saying that the Rwandan Government has not discharged its obligation for cooperating with the Tribunal in the instant case.

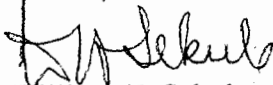
17. As regards the Defense request to deny the Prosecutor authorization to call the Detained witnesses until the Rwandan government has fulfilled its duty to cooperate and the Prosecutor has communicated the statements to the Defense, the Chamber notes that the said witnesses are competent to testify before the Tribunal and as provided for under Rule 90(A) of the Rules *inter alia*, "[w]itnesses shall, in principle, be heard directly by the Chambers." The Chamber is aware that, some statements could be used pursuant to Rule 90(G) of the Rules for matters affecting the credibility of the witness. Notwithstanding, the Chamber considers that this possible eventuality shall not preclude it from hearing the witnesses that are competent to testify before the Tribunal. On these grounds, the Chamber denies the Defense request.

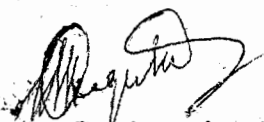
FOR THE ABOVE REASONS, THE TRIBUNAL,


ORDERS the Prosecutor to make further efforts to obtain from the Rwandan authorities the specific documents required; and

DENIES the Defense Motion in all other respects.

Arusha, 6 March 2002


William H. Sekule
Presiding Judge


Winston C. Matanzima Maqutu
Judge


Arlette Ramaroson
Judge





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