

ICTR-2001-70-I
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(1659-1656)

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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

Original : English

Trial Chamber III

Before : Judge Lloyd G. Williams, Q.C., Presiding
Judge Yakov Ostrovsky
Judge Pavel Dolenc

Registrar: Adama Dieng

Date: 20 November 2002

THE PROSECUTOR

v.

EMMANUEL RUKUNDO

CASE NO. ICTR-2001-70-I

JUDICIAL RECORDS ARCHIVES
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**DECISION ON THE DEFENCE MOTION FOR RETURN OF DOCUMENTS AND
OTHER SEIZED PERSONAL ITEMS**

Office of the Prosecutor:

Silvana Arbia
Jonathan Moses
Adelaide Whest
Gregory Townsend
Adesola Adeboyejo
Dennis Mabura

Defence Counsel:

Philippe Moriceau

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“Tribunal”)

SITTING as Judges Lloyd George Williams, Q.C., Presiding, Yakov Ostrovsky and Pavel Dolenc (“Chamber”);

BEING SEISED of the “Defence Motion for the Return of Documents and other Seized Personal Items” filed 3 October 2002 (“Motion”);

HAVING CONSIDERED the “Prosecutor’s Response to Rukundo’s Motion for Restitution of Seized Materials” filed 11 October 2002 (“Response”);

NOW CONSIDERS the matter solely on the basis of the briefs of the parties pursuant to Rule 73(A) of the Rules of Procedure and Evidence of the Tribunal (“Rules”).

Defence Submissions

1. The Defence submits that during the Accused’s arrest on 20 September 2001, the Prosecutor seized various documents and personal items from his residence. During his initial appearance on 26 September 2001, the Accused requested that the seized personal items be returned. The Defence notes that the Prosecutor on 16 October 2001 provided the Accused with an inventory of the 570 seized items, but failed to mention restitution.

2. The Defence does not dispute that the Prosecution may seize the Accused’s personal items at the time of arrest pursuant to Rule 40(A)(ii). Rather, the Defence emphasises that the Prosecutor’s authority to seize the Accused’s property is only in cases of urgency, which necessarily means that the seizure must be limited and justified.

3. The Defence asserts that the Prosecutor’s retention of the Accused’s personal items and documents is no longer justified because the Prosecution has not made use of them over the course of the last 14 months. The Defence explains that the Prosecutor’s lack of interest in the seized items is reflected, in part, by the fact that she never disclosed these items pursuant to Rule 66(A)(ii) nor requested their non-disclosure under Rule 53.

4. The Defence asserts that these items are important for the preparation of the Accused’s defence. Therefore, the Accused asserts that Article 20(4), which guarantees to the Accused adequate facilities for the preparation of his defence, justifies their return.

5. The Defence also asserts that the Prosecution’s continued and unjustified retention of items relevant to the Accused’s defence violates Rule 68, which requires the Prosecutor to disclose exculpatory material.

6. The Defence seeks the return of all of the seized documents and personal items based on Rule 66(B).

Prosecutor’s Submissions

7. The Prosecutor submits that the Defence should have sent a letter to the Prosecutor requesting to inspect the seized items pursuant to Rule 66(B) rather than file its Motion seeking their restitution.

8. The Prosecutor also submitted that the Motion “mischaracterise[s] the Prosecutor’s assessment of the evidentiary value of the seized items.” The Prosecutor further submits that she “strongly disagrees” with the Defence’s contention made in its submission that the Prosecution found nothing of “interest” in the seized items.

Deliberations

9. The Motion erroneously bases the Defence request for restitution of seized items on Rules 66(B) and 68. These rules govern the Prosecutor’s disclosure obligations and not the restitution of seized items. Nevertheless, a failure to cite to the correct rule should not preclude the Chamber from considering the request on its merits in the interests of justice and judicial economy.

10. The Chamber finds that restitution of seized items is regulated by Rule 41(B), which provides that the Prosecutor shall return to the accused, without delay, all of the temporarily seized materials that are of no evidentiary value. Pursuant to this Rule, the Prosecutor has an affirmative obligation to assess the evidentiary value of the seized materials in a timely manner in order to justify her retention of any seized materials and to return the unnecessary materials without delay. The Prosecutor should notify the Accused of her intention to retain specific items from the inventory which are deemed necessary for the preparation of her case.

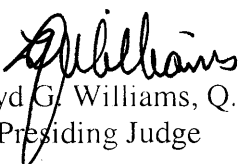
11. In this case, the Prosecutor has retained all of the items seized from the Accused without advancing any clear justification. However, the Chamber notes that neither party has raised any cogent arguments concerning the evidentiary value of specific seized items. Thus, the Chamber lacks the necessary information to intervene at this stage.

FOR THE FOREGOING REASONS, THE TRIBUNAL:


DENIES the Motion.

Judge Lloyd G. Williams concurs in the decision, but attaches his separate reasons.

Arusha, 20 November 2002.


Lloyd G. Williams, Q.C.
Presiding Judge


Yakov Ostrovsky
Judge


Pavel Dolenc
Judge

Seal of the Tribunal

Separate Concurring Opinion of Judge Lloyd G. Williams, Q.C.

1. I respectfully submit this separate opinion with regard to the decision of the Chamber. Although I fully agree with the outcome of the decision where it denies the Defence Motion, I cannot subscribe to certain aspects of reasoning by which the Chamber has reached that decision.

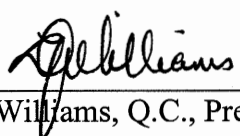
2. I decline to join the majority where it suggests that it could have analyzed the Motion based on its analysis of Rule 41 (B), a Rule that the Defence likely did not have knowledge of and which standards the Defence fails to raise or address in the Motion. The gravamen of the Defence claim is that it seeks restitution of documents that have evidentiary value to its case. Therefore, Rule 41 (B) would be the appropriate rule to perform the analysis to determine if indeed the Defence is entitled to the restitution of documents that have evidentiary value to the case. However, because the Defence has brought its motion pursuant to incorrect Rules, i.e., Rules 66 and 68, the analysis it has performed under those provisions in an effort to demonstrate its entitlement to restitution of documents having evidentiary value to its case may not fairly be transplanted wholesale into the analysis that is prescribed under Rule 41 (B). Because the Defence seeks restitution of material having evidentiary value to the Defence case pursuant to Rules 66 and 68, they necessarily apply the wrong tests, in demonstrating their entitlement for such relief. Thus, the Chamber is left to engage in a fair degree of conjecture about whether at least some of the requested documents are immune from immediate restitution because they have evidentiary value to the case pursuant to the letter of Rule 41 (B).

3. By expressing a disposition to address the Motion under Rule 41 (B), without due regard for Rules 66 and 68 and their attendant standards, the Chamber has placed its imprimatur on an unfortunate precedent whereby a Chamber, may *proprio motu*, contort a party's arguments under the provisions of one Rule to force fit them into the rationale of another Rule that was never envisioned by the party bringing the motion. In effect, the Chamber was primed to Rule upon a Rule 41 (B) motion when no such motion was placed before it.

3. Although, the Majority claims that they would and could have addressed the Motion on its substantive merits in the interest of justice and judicial economy, the present treatment of the Motion achieves neither objective. Lacking the factual basis to resolved the dangling issue of whether at least some of the requested documents and material may be withheld from immediate restitution, the Chamber leaves the issue open to be addressed later upon the filing by the Defence of a motion developing the requisite factual predicate and applying the appropriate legal standards pursuant Rule 41 (B).

4. For the foregoing reasons, I believe the more principled disposition of the Motion would have been to dismiss it pursuant to Rules 66 and 68 which do not provide for the restitution the Defence seeks. The Chamber should not have entertained or attempted to address the Motion on its substantive merits pursuant to the standards of Rule 41 (B), a Rule whose standards were not invoked by the Defence.

Dated: 20 November 2002



Lloyd G. Williams, Q.C., Presiding Judge