

ICTR-96-3-A
19 DECEMBER 2002
(9211H-9218H₀₁₃)

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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

APPEALS CHAMBER

Before: Judge Claude Jorda, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Fausto Pocar
Judge Theodor Meron

Registry: Adama Dieng

Decision of: 12 December 2002

ENGLISH
Original: FRENCH

2002 DEC 23 A 9231

JUDICIAL RECORDS/ARCHIVES
ICTR

GEORGES ANDERSON NDERUMBUMWE RUTAGANDA
(Appellant)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-96-3-A

ICTR Appeals Chamber

Date: 19 December 2002
Action: PG
Copied To: All Judges, Pa
Judicial Archives,

DECISION ON THE URGENT DEFENCE MOTION FOR DISCLOSURE AND ADMISSION
OF ADDITIONAL EVIDENCE AND SCHEDULING ORDER

Office of the Prosecutor:
Mr. Norman Farrell

Counsel for the Defence:
David Jacobs
David Paciocco

Translation certified by LSS, ICTR

HAG(A)02-0068 (E)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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NAME / NOM: ROSETTE MUZIGO-MORRISON

SIGNATURE: [Signature] DATE: 19 Dec. 2002

The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (the "Appeals Chamber")

Considering the appeals lodged by Georges Anderson Nderubumwe Rutaganda (the "Appellant") and the Prosecution on 5 and 6 January 2000 respectively, against the Judgement and Sentence rendered by Trial Chamber I on 6 December 1999,

Considering the appeals hearing held in Arusha, Tanzania, on 4 and 5 July 2002,

Considering the "Urgent Defence Motion for an Order Varying the Grounds of Appeal Pursuant to Rule 107 *bis* and Rules 114 and 116 of the Rules of Procedure and Evidence; for Disclosure Pursuant to Rules 66(B) and 68 of the Rules of Procedure and Evidence; for a Rehearing of Oral Argument in the Appeal Pursuant to Article 24 of the Statute of the International Tribunal for Rwanda, and for the Admission of Additional Evidence Pursuant to Rules 115 (A) and (B) of the Rules of Procedure and Evidence, as well as a Request for the Extension of the Page Limit Applicable to Motions" filed by the Appellant on 4 November 2002 (the "Motion"),

Considering the "Prosecution Response to the Defence Request for an Urgent Hearing on the Defence Motion Filed on 4 November 2002" and the "Confidential Prosecution Response to Urgent Defence Motion for an Order Varying Grounds of Appeal; for Disclosure; for a Rehearing of Oral Argument in the Appeal; Admission of Additional Evidence as well as a Request for Extension of Page Limit Applicable to Motions Filed on 4 November 2002", filed by the Prosecution on 6 and 14 November 2002 respectively (the "Response of 6 November 2002" or "The Response of 14 November 2002", as applicable),

Considering the "Defence Reply to the Prosecution Response to the Urgent Defence Motion Pursuant to Rule 107 *bis* and Rules 114 and 116 of the Rules of Procedure and Evidence; for Disclosure Pursuant to Rules 66(B) and 68 of the Rules of Procedure and Evidence; for a Rehearing of Oral Argument in the Appeal Pursuant to Article 24 of the Statute of the International Tribunal for Rwanda, and for the Admission of Additional Evidence Pursuant to Rules 115 (A) and (B) of the Rules of Procedure and Evidence, as well as a Request for the Extension of the Page Limit Applicable to Motions", filed by the Appellant on 18 November 2002 (the "Reply"),

Considering the "Decision on the Prosecutor's Urgent *Ex Parte* and Confidential Request for Variation of Protective Measures", rendered by the Trial Chamber in *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* on 14 November 2002 (the Decision on Variation of Protective Measures" and the "the Trial Chamber in the Media Case");

(1) Request to Extend the Page Limit set by the Practice Direction

Whereas the Appellant and the Prosecution attached to their respective briefs requests for leave to extend the page limit set by the Practice Direction on the Length of

Briefs and Motions On Appeal¹ ("Practice Direction on the Length of Briefs and Motions on Appeal");

Whereas the number and nature of issues raised in the Motion warrant the filing of lengthy briefs;

(2) Request for Disclosure pursuant to Rules 66(B) and 68 of the Rules

Whereas the Appellant requests the Appeals Chamber to order the Prosecution to disclose, pursuant to Rules 66(B) and 68 of the Rules of Procedure and Evidence (the "Rules"), the following evidence:

(1) The transcript of the *in camera* testimony of Witness X before the Trial Chamber in the *Media Case* ("*in camera* testimony of Witness X"), and any other evidence given by this Witness, whatever the case in which he provided evidence ("other evidence given by Witness X");

(2) Any evidence furnished by members of the National Committee of the *Interahamwe za MRND*, whatever the case in which they provided evidence ("evidence furnished by the National Committee of the *Interahamwe za MRND*");

(3) Any evidence that was relied upon for the decision to withdraw charges against Léonidas Rusatira ("evidence in the *Rusatira case*").

Whereas the Prosecution objects to the aforementioned requests, mainly on the grounds that:

(1) The *in camera* testimony of Witness X does not constitute exculpatory evidence within the meaning of Rule 68 of the Rules and is not in the "custody" of the Prosecution, as required by Rule 66(B) of the Rules;

(2) The other evidence furnished by Witness X falls under Rule 70 of the Rules and/or does not contain exculpatory evidence falling under Rule 68 of the Rules;

(3) The request in respect of the evidence furnished by the National Committee of the *Interahamwe za MRND* is too vague and does not show in what way the Prosecution failed to discharge its disclosure obligations;

(4) The request in respect of the evidence in the *Rusatira case* is otiose, as the Prosecution has already undertaken to disclose the relevant information to the Appellant;

Whereas, moreover, the Appellant and the Prosecution have suggested that the Appeals Chamber could review the materials referred to in the Appellant's motion for disclosure, in order to determine whether the said materials contain exculpatory evidence

¹ Adopted on 16 September 2002.

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within the meaning of Rule 68 of the Rules, and **NOTING** that the Prosecution has, in this regard, filed the *in camera* testimony of Witness X in an *Ex Parte* annex to its Response of 14 November 2002;

Whereas subject to Rules 66(C) and 70 of the Rules, Rule 66(B) allows the Defence to inspect, *inter alia*, documents in the custody or control of the Prosecution which are material to the preparation of the defence;

Whereas Rule 68 of the Rules provides that "The Prosecutor shall, as soon as practicable, disclose to the Defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of Prosecution evidence";

Whereas Rules 66(B) and 68 of the Rules are applicable on appeal;²

Considering, however, that Rule 66(B) of the Rules does not apply on appeal when the evidence requested by the Defence was available at the trial;³

Whereas, unlike Rules 66(A)(ii) and 68 of the Rules, Rule 66(B) does not require the Prosecution to *disclose* any material to the Defence;

Whereas under Rule 68 of the Rules, it is for the Prosecution to determine whether or not evidence is exculpatory, and **whereas** the Appeals Chamber does not intervene in the exercise of this discretion by the Prosecution, unless it is shown that the Prosecution abused its discretion;⁴

Whereas the Appeals Chamber can issue an order for disclosure, such as the one requested by the Appellant, only upon a showing that the Prosecution failed to discharge its obligations and that the request for disclosure is sufficiently specific;⁵

Whereas the Appellant has failed to show how the Prosecution's decision to the effect that the *in camera* testimony of Witness X, the other evidence given by Witness X and the evidence furnished by the National Committee of the *Interahamwe* za MRND does not contain exculpatory evidence amounts to an abuse of discretion in this instance;

Whereas the *in camera* testimony of Witness X is not in the custody or control of the Prosecution as required under Rule 66(B) of the Rules;

² Decision ("Prosecution's Urgent Request for Clarification in Relation to the Applicability of Rule 66(B) to Appellate Proceedings and Request for Extension of the Page Limit Applicable to Motions"), *Georges Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, 28 June 2002, p. 3 ("Rutaganda Decision of 28 June 2002") Decision ("Defence Motion Under Rule 68 Requesting the Appeals Chamber to Order the Disclosure of Exculpatory Material and for Leave to File Supplementary Grounds of Appeal", *Alfred Musema v. The Prosecutor*, Case No. ICTR-96-13-A, 18 May 2001 ("Musema Decision of 18 May 2001") Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, *The Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-A, Appeals Chamber, 26 September 2000, para. 32 ("Blaskic Decision").

³ *Rutaganda* Decision of 28 June 2002, p. 3.

⁴ *Musema* Decision of 18 May 2001, p. 4 citing the *Blaškić* Decision, para. 39.

⁵ *Musema* Decision of 18 May 2001, p. 4. As stated by the Appeals Chamber of ICTY in *Blaškić*, a request based on Rule 68 is not required to be so specific as to precisely identify which documents shall be disclosed (*Blaškić* Decision, para. 40).

Considering therefore that, with regard to the *in camera* testimony of Witness X, the conditions required for the Appeals Chamber to intervene on the basis of Rules 66(B) and 68 of the Rules are not met;

Whereas the Order Varying Protective Measures does not specify whether the Appeals Chamber can allow the Appellant to have access to the *in camera* testimony of Witness X on any other basis than the aforementioned provisions;

Considering that Witness X is under protective measures as ordered by the Trial Chamber in the *Media Case*⁶ and that the trial is still in progress;

Whereas it is therefore the said Trial Chamber to determine whether the *in camera* testimony of Witness X can, in any event, be disclosed to the Appellant and, if so, to set the conditions under which it may be used by the Appellant;

Considering that, with respect to other evidence provided by Witness X and the evidence furnished by the National Committee of the *Interahamwe za MRND*, the Appellant has not shown that the Prosecution has failed to discharge its obligations under Rules 66 and 68 of the Rules;

Considering moreover that the requests for disclosure of the said evidence are vague and do not show how it is material to the preparation of the defence;

Whereas, since the Prosecution has undertaken to disclose the evidence in the *Rusatira* case to the Appellant, the request for communication of the said evidence appears otiose;

(3) The Other Requests by the Appellant

Whereas it also transpires from the Appellant's briefs that he requests:

(1) The admission, pursuant to Rule 115 of the Rules, of Witness X's open-session testimony in the *Media Case* in the form of transcripts ("X's open-session testimony"), as well as any evidence that the Prosecution may disclose to him (the "Motion for Admission of New Evidence");

(2) Leave to amend his Notice of Appeal in order to add two new grounds of appeal relating to (a) failure by the Prosecution to fulfil its disclosure obligations; and (b) the alleged presentation of "inconsistent theories" on the structure and role of the *Interahamwe za MRND* in the *Rutaganda* and *Media* cases;

(3) A re-hearing of the arguments on appeal;

Whereas the Prosecution is opposed to some of these motions, chiefly on the grounds that:

⁶ "Decision on the Prosecutor's Application to Add Witness X to List of Witnesses and for Protective Measures", *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-T, 14 September 2001.

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(1) X's open-session testimony does not meet the criteria set forth in Rule 115 of the Rules;⁷

(2) The motion for leave to amend the Notice of Appeal is unfounded and is based on erroneous assumptions;

Noting that X's open-session testimony is dated 18, 19, 20, 21, 25 and 26 February 2002,

Recalling that the appeal hearing took place in July 2002,

Considering that Rule 115(A) of the Rules provides that a motion for the admission of additional evidence must be filed not less than fifteen days before the date of the hearing,

Whereas Rule 115(B) of the Rules stipulates that the presentation of such evidence shall be allowed only if the interests of justice so require,

Recalling that where a motion for the admission of additional evidence is filed outside the time limits set forth in Rule 115(A) of the Rules, the Appeals Chamber has the discretion to overlook such non-compliance upon a showing of good cause,⁸

Considering that the Motion for Admission of Additional Evidence was brought more than five months after the appeal hearing,

Considering that because the deliberations are in an advanced stage, the Appeals Chamber would consider such a request only in exceptional circumstances,

Considering that the following facts constitute exceptional circumstances in the instant case, namely: (a) in its oral decision rendered on 4 July 2002⁹ – that is, on the first day of the appeal hearing –, the Appeals Chamber ordered the Prosecution to allow the Defence to inspect the written statements in the *Rusatira* case, pursuant to Rule 66 (B) of the Rules; and (2) since then, the Prosecution has slowly disclosed new evidence to the Defence,

Considering that, with regard to X's open-session testimony, additional clarifications are required to establish the existence of exceptional circumstances,

⁷ The Prosecution mainly submits that the Motion for the Admission of X's testimony in open session is not specific and that mere references to open-session transcripts of Witness X do not constitute evidence within the meaning of Rule 115 of the Rules. The Appeals Chamber notes that the Appellant's arguments relating to the criteria set forth in Rule 115 of the Rules are advanced in the Response, and the Prosecution therefore had no opportunity to respond to them.

⁸ Decision on "Confidential Motion (i) to file two witness statements served by the Prosecutor on 18 May 2001 under Rule 68 disclosure to the Defence, and (ii) to file the statement of Witness II served by the Prosecutor on 18 April 2001 and (iii) to file a supplemental ground of appeal"; and Scheduling Order, *Alfred Musema v. The Prosecution*, Case No. ICTR-96-13-A, 28 September 2001, pages 3 and 4.

⁹ Oral Decision on "Prosecution's Extremely Urgent Motion for clarification of whether witness statements are to be disclosed during appellate proceedings pursuant to Rule 66(B)", Transcript of appeal hearing, 4 July 2002, *Georges Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, pp. 17 and 18.

Considering, moreover, that paragraph 7 of the Practice Direction on Formal Requirements for Appeals from Judgement¹⁰ ("Practice Direction on Formal Requirements"), sets out the conditions under which a motion for admission of additional evidence may be submitted to the Appeals Chamber,

Considering that the Motion for Admission of Additional Evidence does not comply with paragraph 7 of the Practice Direction on Formal Requirements,

Considering that, pursuant to Rule 108 of the Rules, the Appeals Chamber may, on good cause being shown by motion, authorize a variation of the grounds of appeal,

Considering that the Appeals Chamber does not yet have all the information that would enable it to determine whether such good cause exists in the instant case,

Considering, therefore, that the motions for amendment of the notice of appeal and for a re-hearing of the appeal are premature in the instant case,

For the foregoing reasons,

Grants the requests of the Appellant and the Prosecution for extension of the page limits laid down in the Practice Direction on the Length of Briefs and Motions on Appeal;

Denies the Appellant's motions for disclosure by the Prosecution of the *in camera* testimony of Witness X, other evidence given by Witness X, and the evidence provided by the National Committee of the *Interahamwe za MRND*;

Declares that the motion relating to evidence in the *Rusatira* case is otiose;

Indicates that it is incumbent upon the Trial Chamber in the *Media* Case to decide whether the Appellant may be granted access to the *in camera* testimony of Witness X and, if so, under what conditions;

Orders:

1. The Prosecution to complete disclosure of the evidence in the *Rusatira* case and, where necessary, any other evidentiary material by 16 December 2002 at the latest;
2. The Appellant to file, if he so wishes, a request for access to the confidential material before the Trial Chamber in the *Media* Case by 7 December 2002 at the latest;
3. The Appellant to file a *consolidated motion* pursuant to Rule 115 of the Rules by 6 January 2003 at the latest, it being understood that the said consolidated motion will, on the one hand, specify all the additional evidence he intends to adduce and, on the other hand, conform to the Practice Direction on Formal Requirements;

¹⁰ Adopted on 16 September 2002.

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4. The Appellant to further state in the consolidated motion the reasons for which he did not request the admission of Witness X's open-session testimony before 4 November 2002, that is, more than seven months after the said testimony was adduced before the Trial Chamber in the *Media Case*;

5. The Prosecution to file its response to the consolidated motion by 16 January 2003 at the latest;

6. The Appellant to file a reply, if he so wishes, by 20 January 2003 at the latest;

Indicates that the Appeals Chamber will dispose of the motions relating to the amendment of the Notice of Appeal and to a rehearing of the appeal when it rules on the consolidated motion.

Done in French and English, the French being authoritative.

[Signed]
Claude Jorda,
Presiding Judge

Done at The Hague, The Netherlands, 12 December 2002

[Seal of the Tribunal]

