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United Nations
Nations Unies

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

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

Registrar: Adama Dieng

Date: 28 April 2003

The PROSECUTOR

v.

Juvénal KAJELIJELI

Case No. ICTR-98-44A-T

2003 APR 28 A 4: 43
JUDICIAL RECORDS ARCHIVES
ICTR

**DECISION ON THE MOTIONS OF THE PARTIES CONCERNING THE
INSPECTION AND DISCLOSURE OF A VIDEOTAPE**

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Prosecutor v. Juvénal Kajelijeli (Case No. ICTR-98-44A-T)

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

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

BEING SEIZED of:

- i. The “Prosecutor’s *ex-parte* Motion Pursuant to Rules 66(C) and 70(A) of the Rules of Procedure and Evidence”, filed on 10 February 2003 (the “Prosecution Motion”);
- ii. The Defence “Motion to Compel the Prosecutor to Produce a Copy of the Videotape for Defence”, filed on 17 February 2003 (the “Defence Motion”);
- iii. The “Defence’s Response in Opposition to Prosecutor’s *ex-parte* Motion Pursuant to Rules 66(C) and 70(A) of the Rules of Procedure and Evidence”, filed on 24 February 2003 (the “Defence Response to the Prosecution Motion”);
- iv. The “Prosecutor’s Reply to a Notice of Motion to Compel the Prosecutor to Produce a Copy of Video Tape for the Defence”, filed on 25 February 2003 (the “Prosecution Response to the Defence Motion”);
- v. The “Corrigendum to the Prosecutor’s Reply to a Notice of Motion to Compel the Prosecutor to Produce a Copy of Video Tape for the Defence”, filed on 26 February 2003 (the “Prosecution Corrigendum”);
- vi. The “Prosecutor’s Reply to Defence’s Response to Prosecutor’s *ex-parte* Motion Pursuant to Rules 66(C) and 70(A) of the Rules of Procedure and Evidence”, filed on 3 March 2003 (the “Prosecution Reply to the Defence Response”);

RECALLING the Chamber’s “Decision on Kajelijeli’s Motion for the Disclosure of Video Tapes of Defence Witness MEM” of 4 December 2002 (the “Chamber’s Decision of 4 December 2002”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence¹, particularly Rules 66(B), 66(C), 68 and 70(A);

NOW CONSIDERS the matter on the basis of the written briefs of the Parties, pursuant to Rule 73(A) of the Rules, and on the submission of the parties given during the oral hearing of 24 April 2003;

PRELIMINARY MATTER

1. The Chamber, seized of a Prosecution Motion, filed as an *ex parte* Motion, decided that it was in the interest of justice to hear the Motion *inter partes*. The Court Management

¹ Unless otherwise stated, all references to Rules are to be construed as references to the Rules of Procedure and Evidence.

Section was instructed to this effect on 14 February 2003 by way of written memorandum. On 17 February 2003 the Court Management Section communicated this instruction to the Parties.

2. This Chamber has decided to deal with both the Prosecution Motion and the Defence Motion together, as the real subject matter of both Motions, the issue of access by the Defence to the videotape, is essentially the same.

SUBMISSIONS OF THE PARTIES

The Prosecution Motion

3. The Prosecution brings an application pursuant to Rules 66(C) and 70(A) requesting the Chamber to declare that it need not make disclosure of a videotape, which was the subject of the Chamber's Decision of 4 December 2002, and subsequently the subject of inspection on 12 December 2002. It attaches a copy of a letter from the Defence, dated 30 January 2002, in which the Defence requests disclosure of a copy of this videotape.
4. In support of its Motion, the Prosecution submits that this videotape, supplied confidentially to the Judges pursuant to the requirements of Rule 66(C)², along with its own inventory of the contents, need not be disclosed to the Defence pursuant to Rules 66(C) and 70(A). It claims *inter alia* that the information contained in the videotape would, if disclosed, reveal to the Defence the identities of members of the Rwandan Authorities assisting it in the course of its work, and that this would have an adverse effect on the Prosecutor's relationship with the Rwandan Authorities. The submission of the Prosecution is that such a situation would prejudice further or ongoing investigations of the Prosecution, and therefore the Chamber should rule pursuant to Rule 66(C) that it need not disclose the videotape to the Defence.
5. The Prosecution further claims that the videotape reveals the identities of Prosecution Witnesses who are the subject of protection orders of the court, the identities of members of the Prosecution team participating in the exercise, their internal comments, and material relating to issues that are outside the temporal jurisdiction of the Tribunal.
6. The Defence objects to the Prosecution Motion. The Defence, having viewed the videotape on 12 December 2002, claims that the tape contains information that is important to the preparation of its case, and therefore it should be disclosed to the Defence, as requested in its Motion. Specifically, it reveals that:
 - a) MEM's interview on the tape corroborates his testimony in court and raises serious questions regarding the Prosecution motive to "terminate abruptly" the interview;

² The recording was actually supplied in the format of a computer file, recorded on compact disc. For the sake of clarity, we continue to use the terminology of videotape in this Decision.

- b) that the videotape reveals prior inconsistent statements of Prosecution witnesses GAP and GAO;
 - c) the videotape shows potential Prosecution witnesses for impeachment at trial.
7. The Defence claims that Prosecution has not fully complied with the Chamber's Decision of 4 December 2002 because the Accused himself was not able to inspect the videotape, thus breaching his rights under Article 20 of the Statute. It also feels that not enough time was given for inspection. The Prosecution's position remains that it has fully complied with the Chamber's Decision of 4 December 2002, with inspection of the videotape by Defence Counsel facilitated on 12 December 2002.

The Defence Motion

8. The Defence files a Motion pursuant to Rule 66(B) requesting the Chamber to compel the Prosecutor to provide the Defence with a copy of the videotape, which was the subject of the Chamber's Decision of 4 December 2002.
9. The Defence states that, having viewed the videotape on 12 December 2002, it intends to use the videotape of the testimony of MEM in the Defence case.
10. The Defence submits that the Accused has not had an opportunity to view the tape, and the Defence needs to consult with him prior to making a final decision concerning the use of the videotape.
11. The Prosecution submit that determination of the Prosecution Motion on the question of the videotape will bring to an end the issue, and that the Defence Motion introduces no new issue.

DELIBERATIONS

12. The Prosecution Motion is an application pursuant to Rules 66(C) and 70(A) to be relieved from any disclosure obligation regarding the videotape, which was the subject of the Chamber's Decision of 4 December 2002. The Defence Motion is an application to be provided with a copy of the videotape, as it intends to use the footage of Witness MEM contained therein at trial.
13. The submissions of both Parties also reveal that there exists disagreement as to whether or not the Chamber's Decision of 4 December 2002 has been properly complied with. As it may prove important, the Chamber will also consider this matter.

The Prosecution Application under Rule 66(C)

14. Having viewed the videotape, which was presented to the Chamber by the Prosecution pursuant to the requirements of Rule 66(C), and having heard the arguments of the Parties, the Chamber finds that the Prosecution has not adequately demonstrated that



should it be possible for the Defence to identify officials of the Government of Rwanda from the videotape who were assisting or facilitating the Prosecution in its investigations, further or ongoing investigations would be prejudiced. The Parties should bear in mind that all states have a legal duty to cooperate with the investigation and prosecution of persons accused of committing serious violations of international humanitarian law, pursuant to Article 28 of the Statute. Thus, the Prosecution's application under Rule 66(C) with regard to the videotape is denied.

The Prosecution Application under Rule 70(A)

15. Having viewed the videotape in camera, and having given the Parties an opportunity to argue the matter in court, the Chamber finds that the comments or observations of the officials of the Prosecution do not amount to "reports, memoranda, or other internal documents prepared by a party its assistants or representatives in connection with the investigation or preparation of the case", as envisaged under Rule 70(A). Thus, the Prosecution application under Rule 70(A) is denied.

The Defence Request for Disclosure or Further Inspection

16. In the Chamber's Decision of 4 December 2002, the Tribunal "ORDERS the Prosecutor to permit the Defence to inspect the video tape(s) of the interview of Defence Witness MEM pursuant to Rule 66(B) of the Rules". The Chamber does not agree with the Defence submission that under Article 20 of the Statute, it is always necessary for the Accused to be given an opportunity to inspect materials, when Counsel has already done so. Nevertheless, the Chamber is of the view that inspection entails giving the other party *adequate opportunity* to acquaint itself with the materials in question. In this particular situation, the materials in question consist of a videotape which, when played, may reveal information at a speed too fast to provide Counsel with adequate opportunity to take cognisance of the information.

17. Furthermore, in its Decision of 16 February 2000³, the Chamber observed that:

although Rule 66(C) [*sic*] of the Rules provides that the Prosecutor shall permit the Defence to inspect any books, documents, photographs and tangible objects in her custody, the Prosecutor should not only permit the Defence to inspect them, but should also, as much as possible, provide the Defence with certified copies thereof. The Chamber points out in this respect that said Rule 66(C) refers to "the obligation to disclose pursuant to Sub-Rules (A) and (B)"⁴.

18. The Prosecution Motion currently before the Chamber is essentially a request to determine whether or not it can be relieved of any obligation to disclose the videotape pursuant to Rules 66(C) and 70(A). The Chamber agrees with the Prosecution position that in the interests of judicial economy, determination of their Motion should also

³ Decision on the Defence Motion for Disclosure of All Materials the Prosecution intends to use at Trial, *Prosecutor v. Sylvain Nsabimana*, 16 February 2000 (certified English Translation, original filed in French).

⁴ This quote should be interpreted as reading "although Rule 66(B) of the Rules provides that..." The mistake originates in the official translation and not the original Decision of the Chamber, which was issued in French.



determine the outcome of the Defence Motion. Having determined that it cannot be relieved of such obligation, and fully aware that the Defence has made several requests to the Prosecution for this tape, the Chamber finds it in the interests of justice to require the Prosecution to disclose a copy of the videotape to the Defence without delay.

19. The Chamber reminds the Defence of its Decision of 6 July 2000, the "Decision on the Prosecutor's Motion for Protective Measures for Witnesses"⁵. The Defence should particularly note the order:

Prohibiting the Defence and the accused from sharing, revealing or discussing, directly or indirectly, any documents or any information contained in any documents, or any information which could reveal or lead to the identification of any individuals so designated to any person or entity other than the accused, assigned counsel or other persons working on the immediate Defence team;

For the sake of clarity, this Order also covers the videotape.

20. In this particular circumstance, information and identities are revealed on the videotape, which may affect the safety of protected witnesses in this and other cases. Thus, the Chamber orders that the videotape should remain only in the custody of Defence Counsel as an Officer of the Court, whilst of course fully respecting the Accused's right to view such material when in the presence of his Counsel. The videotape must not be reproduced, in whole or in part. Beyond this limited circulation, the contents of the videotape must not be discussed except between members of the Defence team and the Accused or in front of this Chamber, and must not form part of any public Motion.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Prosecution Motion in its entirety;

GRANTS the Defence Motion, subject to the Chamber's Decision on 6 July 2000, in the following terms:

ORDERS the Prosecution to immediately disclose to the Defence the videotape in its entirety.

ORDERS the Defence and the Accused, once they have received a copy of the videotape:

- (i) not to reproduce the videotape in whole or in part;
- (ii) not to discuss the contents of the videotape except between themselves or in front of this Chamber;
- (iii) not to reveal information contained in the videotape in any public Motion;
- (iv) that the sole copy of the videotape must remain only in the custody of Defence Counsel.

⁵ Decision on the Prosecutor's Motion for Protective Measures for Witnesses, *Prosecutor v. Juvénal Kajelijeli*, 6 July 2000

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Prosecutor v. Juvénal Kajelijeli (Case No. ICTR-98-44A-T)

Arusha, 28 April 2003



William H. Sekule
Presiding Judge



Winston C. Matanzima Maqutu
Judge



Arlette Ramaroson
Judge

[Seal of the Tribunal]