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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER III

ENGLISH
Original: French

Before: Judge Andréia Vaz, presiding
Judge Flavia Lattanzi
Judge Florence Rita Arrey

Registry: Adama Dieng

Date filed: 15 January 2004

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K. S. N. M.

THE PROSECUTOR

v.

ANDRÉ RWAMAKUBA and Others

Case No. ICTR-98-44-T

DECISION ON DEFENCE MOTION FOR DISCLOSURE
Rule 66(B) of the Rules of Procedure and Evidence

Office of the Prosecutor:
Don Webster
Dior Fall
Ifeoma Ojemeni
Simone Monasebian
Holo Makwaia
Tamara Cummings-John
Ayo Fadugba
Sunkarie Ballah-Conteh

Defence for the Accused:
David Hooper
Andreas O'Shea

Defence for the co-Accused:
Didier Skornicki
René Martel
Charles Roach
Frédéric Weyl
Peter Robinson
Dior Diagne

Translation certified by the LSS, ICTR

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

SITTING as Trial Chamber III, consisting of Judge Andréia Vaz, presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey (“the Chamber”),

BEING SEIZED of the Motion entitled: “Motion for Disclosure of Evidence”, filed on 3 October 2003 by the Defence for André Rwamakuba (“the Motion”, “the Defence” and “the Accused”), pursuant to Rule 73 of the Rules of Procedure and Evidence (“the Rules”);

CONSIDERING the Response filed on 10 October 2003 by the Prosecution and the Reply filed on 20 October 2003 by the Defence,

CONSIDERING the Statute of the Tribunal (“the Statute”) and the Rules, in particular Rules 66, 68 and 70,

RULING solely on the basis of the submissions made by the parties, pursuant to Rule 73(A) of the Rules,

CONSIDERS THE MOTION.

Submissions of the parties

The Motion

A. *Disclosure relating to Prosecution witnesses under Rule 66(A)(ii) of the Rules, the Decision of 8 August 2003 and Rule 73bis of the Rules*

1. The Defence moves the Chamber to order the Prosecution to comply with its Decision of 8 August 2003 and to serve a finalized list of the Prosecution witnesses and their statements, together with a list of those witnesses no longer relied upon.¹

B. *Production, by the Prosecution, of sworn affidavits, and compliance with its obligations to disclose evidence pursuant to Rule 68 of the Rules*

¹ The Defence refers to the *Decision on the Motion by the Defence for Nzirorera for Disclosure of Witness Statements*, rendered by the Chamber on 8 August 2003.

2. The Defence requests, pursuant to Rule 68 of the Rules:
- (i) That the Chamber order the Prosecution to comply within a specified time limit with its obligations to disclose evidence of an exculpatory nature, or the existence of such evidence;
 - (ii) That the Prosecution file a report signed by a member of its team in the instant case in which the designated person declares:
 - (a) That he or she has conducted a full search of the materials in the possession of the Prosecution or otherwise within its knowledge; and
 - (b) That he or she is aware of the continuing nature of the obligation under Rule 68;
 - (iii) That the person designated to draw up the report referred to in the preceding subparagraph report his or her knowledge of that material which enables him or her to so certify.²
- C) *Disclosure of evidence deemed material to the defence of the Accused, and in some cases, exculpatory or potentially exculpatory evidence, pursuant to Rules 66(B) and 68 of the Rules*
3. The Defence requests, pursuant to Rule 66(B) and/or Rule 68 of the Rules, an order compelling the Prosecution to disclose a total of thirty documents or types of documents it deems material to the defence of the Accused, as they refer to allegations against him; the Defence classifies the documents into the following six general categories:
- (i) All statements of potential witnesses taken by the Prosecution during its investigation in which reference is made to the Accused;
 - (ii) Documents referring to Butare University Hospital:
 - (a) All statements taken by the Prosecution of persons present at Butare University Hospital during the relevant events or who have knowledge of the events at Butare University Hospital;

² As a precedent in terms of issuance of order for the Prosecution to file a similar statement, the Defence refers to the "Decision on Motion by Prosecution to modify Order for Compliance with Rule 68 of the Rules", rendered by the Trial Chamber of International Criminal Tribunal for the Former Yugoslavia ("the ICTY") in *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, 1 November 1999, p. 5.

- (b) Names of doctors, nurses and other persons present at Butare Hospital during the periods referred to in the Indictment and their current whereabouts;
 - (c) Statements relating to the operation of the militias at Butare Hospital;
 - (d) Plans and photographs identifying areas of the hospital relevant to the accusation;
 - (e) Reports and all details concerning non-governmental organizations (NGOs) and their employees present at Butare Hospital during the period referred to in the Indictment;
 - (f) Reports, data from investigations and all other details relating to the events at Butare Hospital from the United Nations, other international organizations, the Government of Rwanda or other Governments and their agents or from the media;
 - (g) Records of exhumations, including data on the identification of bodies, and names of persons deceased at Butare University Hospital;
 - (h) Records relating to the trials and investigations held in Rwanda regarding the events at Butare University Hospital;
- (iii) Documents relating to the Butare *préfecture* building
- (a) Statements of persons relating to events that took place in the *préfecture* building at the time relevant to the accusation;
 - (b) Plans and photographs relating to the *préfecture* building;
 - (c) Documents that may assist the Defence in identifying persons present in the *préfecture* building at the time relevant to the accusation;
- (iv) Documents relating to Gikomero commune:
- (a) Maps, plans, films, videos, etc, of Gikomero;
 - (b) Statements of persons present during the events that occurred in Gikomero and/or its neighbouring *communes* relevant to the events from April to July 1994, and/or statements of persons who, though not present, display knowledge of those events;
 - (c) Lists of persons questioned in relation to the events at Gikomero *commune* and neighbouring *communes*;
 - (d) Reports, including those of the Interim Government of Rwanda, other Governments, NGOs and the United Nations, relating to the situation in Gikomero or neighbouring *communes* between 6 and 30 April 1994;

- (e) Reports, including those of UNAMIR and KITBAT, on the area of Gikomero *commune* and neighbouring *communes* dating from April to June 1994; in particular, reports as to the access to Gikomero *commune* and neighbouring *communes* from Kigali, the troop dispositions of the Rwandan Patriotic Front (RPF), the Rwandan Armed Forces (FAR) and UNAMIR in and about the area, and reports of RPF movements in the *commune*;
 - (f) Reports from Churches and other civil society organizations in Gikomero *communes* and neighbouring *communes*;
 - (g) Records of exhumations conducted in or around the Gikomero *commune* area, including identification of bodies and names of deceased;
 - (h) Names of persons concerned in the events in Gikomero *commune* currently detention in Rwanda;
 - (i) Evidence or documents from cases before the Tribunal or in the Rwandan courts, and in the former instance a list of the proceedings held in closed session and the dates when they were held.
- (v) Documents and information relating to the allegations against the Accused in his capacity as a member of the Interim Government:
- (a) The recordings and transcripts of recordings referred to in the allegations against the Accused;
 - (b) Minutes, announcements, decisions, proclamations or other documents in which it is alleged the Accused participated, for instance, those relating to the civil defence programme or in which his name or portfolio is mentioned.
 - (c) Directives or communications between the Ministry of Primary and Secondary Education and other organs of government, schools, *préfectures* and local government offices;
 - (d) Undisclosed statements dealing with the formation and activities of the Interim Government and, in particular any such statements which mention the name of the Accused;
 - (e) Transcripts of recordings of statements made by the Prime Minister of the Interim Government, Jean Kambanda, including his diaries, and in particular those parts that refer to the Accused and to those events said to concern him;
 - (f) Lists of material known by the Prosecution to be in possession of other parties relating to the formation and activities of the Interim Government and relevant to the allegations concerning the Accused;
 - (g) Statements and all other material relating to the military and the Interim Government;

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- (h) Documents and all other evidence indicating attempts, or apparent attempts, by the Interim Government to negotiate the ending of hostilities with RPF;
- (vi) Documents and information relating to MDR and Hutu Power:
 - (a) Statements and other documents not used by the Prosecution concerning MDR and the activities of the Accused as a member of that party;
 - (b) Statements or references (e.g. by media) concerning the development of Hutu Power, and in particular any document or information of that kind relating to MDR and any such references made before 6 April 1994 and any that refer to the Accused;

Response

4. The Prosecution responds in a general manner to the requests made under Rule 66(B) and Rule 68 of the Rules:

- (i) That it is aware of its obligations under these Rules and has disclosed to the Defence, and will continue to do so, all items falling within these categories, subject to the provisions of Rules 66(C) and 70 of the Rules;
- (ii) That the requests are not sufficiently specific, and that the Defence has not provided sufficient grounds to establish that the documents requested are material to the defence of the Accused;

5. The Prosecution further responds that it will permit the Defence to inspect the following documents:

- (i) Plans and photographs of Butare University Hospital (with reference to the request summarized in paragraph 3(ii)(d) above);
- (ii) Maps, plans, films, videos, etc; of Gikomero (with reference to the request summarized in paragraph 3(iv)(a) above).

Reply

6. The Defence replies, essentially:

- (i) That the Prosecution does not provide any list of documents it says it has disclosed under Rules 66(B) and 68 of the Rules;
- (ii) That the Prosecution has not discharged its obligations under Rule 68, in that the Defence has received only two statements dealing with issues relating to Gikomero *commune* under this Rule;

- (iii) That to regard only requests for disclosure of specific and named documents as admissible would be contrary to the spirit of Rules 66(B) and 68 of the Rules and to the interests of justice;
- (iv) That in the present instance, the Defence cannot name the specific documents, but that requests adequately identifying the categories of documents should suffice.

Deliberation

A. Disclosures relating to Prosecution witnesses, under Rule 66(A)(ii) of the Rules, Decision of 8 August 2003, and Rule 73bis of the Rules

7. The Decision of 8 August 2003 dealt with the list of Prosecution witnesses filed on 15 March 2002. The Motion was filed by the Defence on 3 October 2003. On 10 October 2003, the Prosecution filed a new list of witnesses to replace the list filed on 15 March 2002. The Decision of 8 August 2003 therefore ceased to have any effect. Moreover, subsequent to the filing of the new list of Prosecution witnesses, the Prosecution made new disclosures under Rule 66(A)(ii) of the Rules. It is therefore necessary to dismiss the requests in paragraph 1 above.

B. Production of the Prosecutions's sworn affidavits, in compliance with its obligations to disclose exculpatory evidence (Rule 68 of the Rule).

8. The Appeals Chamber of ICTY was seized, in the *Blaskic* Case, of a request similar to the one made by the Defence in the instant case (see paragraph 2(i) above). The Defence in the *Blaskic* Case referred to the same precedent as did the Defence in the instant case, i.e. the Decision rendered on 1 November 1999 by Trial Chamber II of ICTY in the *Krnjelac* Case. The Appeals Chamber denied the request in question, ruling that that type of order should only be made by a Chamber in very rare instances, that the Prosecution is expected to fulfill its duties in good faith and that only where the Defence can satisfy a Chamber that the Prosecution has failed to discharge its obligations should an order of that type be contemplated.³ The Chamber subscribes to this reasoning, which it considers relevant in the light of the requests referred to in paragraphs 2(ii) and 2(iii) above. The Prosecution stated, in substance, that it was aware of its obligations under Rule 68 of the Rules and their continuing nature. Given that the Defence has not demonstrated that the Prosecution has failed to discharge its obligations under this Rule, the Chamber deems it appropriate to dismiss the requests referred to in paragraph 2 above.

³ *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-A, *Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings*, 26 September 2000, Section C, The Third Request, paras. 43 to 46, and in particular, para. 45.

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C. Disclosure of evidence material to the defence of the Accused, and in some cases, of exculpatory or potentially exculpatory evidence, pursuant to Rules 66(B) and 68 of the Rules

9. Given that the Prosecution permits the Defence to inspect the documents referred to in paragraphs 3(ii)(d), 3(iv)(a) and 3(v)(a) above, the requests for their compulsory disclosure are no longer necessary.

10. Furthermore, at an informal meeting between the parties presided over by the Chamber's Senior Legal Officer mandated to that effect by the Chamber on 30 October 2003, the Prosecution undertook to make available to the Defence teams for the Accused, within a time limit, the recordings and transcripts of recordings of RTLM and Radio Rwanda broadcasts in its possession. Therefore, the request for disclosure of recordings and transcripts of recordings referred to in the allegations against the Accused is no longer necessary, as the matters stand. If in the future the Prosecution decided to request the filing of these recordings as exhibits, it would have to so notify the Defence without delay, pursuant to Rule 66(B) of the Rules;

11. With regard to the other requests for compulsory of documents, the Chamber recalls that it is the duty of the Defence, in the first place, to identify with sufficient degree of precision the documents whose disclosure it seeks. Secondly, the Defence must demonstrate the materiality of the evidence for the defence of the Accused, under Rule 66(B) of the Rules, or that the documents sought are or could be exculpatory within the meaning of Rule 68 of the Rules.⁴

12. Having considered all these requests, the Chamber finds that they are too general. Furthermore, the Defence has not satisfied the Chamber of the relevance or materiality of some of the items requested for disclosure.

13. The Chamber further notes that, given the general nature of some of the requests, the Defence seems to be seeking a general right of access to all the Prosecution's documents. Trial Chamber I of ICTY dealt with similar requests in the *Blaskic* Case. In a decision dated 27 January 1997, it chose not to go down that path, "because the Statute and the Rules define the respective rights of the parties – the Prosecution and the Accused – *inter alia* in respect of disclosure of the evidence for which the Tribunal must ensure balanced respect".⁵ The Chamber subscribes to this reasoning and therefore finds that it could not grant such a broad right of inspection. The Chamber further finds that pursuant to Rules 66(B) and 68, it is in the first place the Prosecution's responsibility to

⁴ On this point, see recent decisions rendered by the Chamber, in the instant case, on the Motion by the Defence for Joseph Nzirorera: *Decision on the Defence Motion for Disclosure of Items Deemed Material to the Defence of the Accused*, 29 September 2003, para. 9, and *Decision on the Defence Motion for Disclosure of Exculpatory Evidence*, 7 October 2003, para. 11.

⁵ *Prosecutor v. Tihomir Blaskic*, Case No. IT-94-PT, *Decision on the Production of Discovery Materials*, 27 January 1997, para. 49.

determine the materiality of items in its possession or under its control to the defence of the Accused, or the exculpatory or potentially exculpatory nature of those items.

14. The Chamber, however, draws the Prosecution's attention to the continuing nature of its obligations under the aforementioned Rules.

FOR THESE REASONS,

THE CHAMBER

DISMISSES the Motion.

Arusha, 15 January 2004

[Signed]

Andrésia Vaz
Presiding Judge

[Signed]

Flavia Lattanzi
Judge

[Signed]

Florence Rita Arrey
Judge

[Seal of the Tribunal]

