

ICTR-00-56-T
5 - 11 - 2004
(18800 - 18795)

TRIAL CHAMBER II

18800
Mwanja

Before: Judge Arlette Ramaroson, presiding
Judge William H. Sekule
Judge Solomy Balungi Bossa

Registrar: Adama Dieng

Date filed: 16 September 2004

JUDICIAL RECORDS/ARCHIVES
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THE PROSECUTOR

v.

FRANÇOIS-XAVIER NZUWONEMEYE

**DECISION ON FRANÇOIS-XAVIER NZUWONEMEYE'S MOTION UNDER
RULES 73 *BIS*(B) AND 66(B), RELATING TO THE PRE-TRIAL BRIEF**

Office of the Prosecutor:

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Defence Counsel:

André Ferran
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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II composed of Judges Arlette Ramaroson, presiding, William H. Sekule and Solomy Balungi Bossa;

BEING SEIZED of:

- (i) A "Motion under Rules 73 *bis*(B) and 66(B) of the Rules, relating to the Pre-trial Brief" filed on 23 August 2004 by Antoine Beraud, Defence Counsel for François-Xavier Nzuwonemeye (the "Motion");
- (ii) The "Prosecutor's Brief of 30 August in Response to the Motion Filed on Behalf of Accused François-Xavier Nzuwonemeye under Rules 73 *bis*(B) and 66(B) of the Rules" (the "Prosecutor's Response");
- (iii) The "Corrigendum to the Defence Motion" filed on 8 September 2004 (the "Defence Corrigendum");

HAVING REGARD TO the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), particularly Rules 73 *bis* and 66;

HEREBY RULES as follows on the basis of briefs filed by the parties under Rule 73(A) of the Rules;

PARTIES' SUBMISSIONS

The Defence

1. The Defence submits that the Prosecution was in violation of Rule 73 *bis*(B)(iv)(c) of the Rules. It argues that the list of witnesses that the Prosecution intends to call in support of its case, as appended to the Pre-trial Brief of 17 June 2004, did not include the points of the Indictment on which said witnesses will be expected to testify.
2. The Defence argues further that such an omission on the part of the Prosecution undermines its interests and causes substantial prejudice to the Defence. Indeed, the Prosecution's failure to provide details on the points of the Indictment on which each witness will be testifying automatically opens the door for the Prosecution to introduce fresh charges during trial proper, to which the Defence will be required to answer. Hence, the Defence that the Prosecutor's Pre-trial Brief be withdrawn or, in any case, be laid out in conformity with the Rules.
3. The Defence also seeks disclosure of the testimonies of some Prosecution witnesses, namely Alison Des Forges, General Roméo Dallaire, XAF, DY, DN, AN, DO, DAK, HP, DA, GS, DBQ, DBN, XXO and LN, pursuant to Rule 66(B) of the Rules.

The Prosecution

4. On the alleged violation of Rule 73 *bis*(B)(iv)(c), the Prosecution submits in response that, at the Status Conference of 30 April 2004, the presiding Judge had only sought clarification from the Prosecution on the state of disclosure of exhibits and witness statements; the Prosecution was never asked to indicate the points of the Indictment on which each witness would be expected to testify. The Prosecution further submits that, in any event, the Pre-trial Brief, unlike the Indictment, is not mandatory.
5. On the Defence's requests for the disclosure of the testimonies of some witnesses or expert reports, the Prosecution states that it is at a loss as to whether the Defence wished to inspect the said documents or merely to have them disclosed.
6. The Prosecution stresses that there are no prior statements by General Dallaire, just 2417 documents from UNAMIR, which was under his command from September 1993 to September 1994, and the French and English versions of his book "Shake Hands with the Devil". These documents were disclosed to the Defence on 26 July 2004 and 16 March 2004, respectively. The Prosecution further indicates that this witness will be led in evidence on the basis of the above-mentioned documents.

7. The Prosecutor submits that he will be relying on Rule 94(B) or 92 *bis*(D) of the Rules in his examination of Expert Witness Alison Des Forges.
8. He states further that the statements of Witnesses XA, FD, YD, ND, OD, AK, HP, DA, GS, DBN and LN have already been disclosed to the Defence on one or more occasions. On the full disclosure of witness statements, the Prosecutor argues that he has a 21-day time limit before the appearance of each witness to effect such a disclosure.¹
9. Lastly, the Prosecutor submits that Witness XXO, AN and DBQ are not on his list. However, should the Defence consider their testimonies to be in any way exculpatory, it could seek their disclosure under Rule 68, not Rule 66(B) of the Rules.

DELIBERATIONS

On the failure to indicate the points of the Indictment on which each Prosecution witness is expected to testify and the prejudice that the Defence may suffer as a result.

10. The Chamber notes that there is no dispute in regard to the fact that the list of Prosecution witnesses appended to the Pre-trial Brief does not include the points of the Indictment on which each witness will testify. This could, however, be addressed during the Pre-trial Conference that is scheduled pursuant to Rule 73 *bis* of the Rules.

On the withdrawal of the Pre-trial Brief of 17 June 2004

11. The Chamber recalls that Rule 73 *bis* of the Rules provides that the Chamber or a designated Judge from among its members may, during the Pre-trial Conference, order the Prosecutor to file a pre-trial brief addressing the factual and legal issues. In the instant case, the Prosecutor has deemed it appropriate to file a brief prior to the pre-trial conference. The Chamber finds that the issue of the relevance of the brief and the objections thereto by the Defence should be addressed during the pre-trial conference, convened under Rule 73 *bis* of the Rules.

On the disclosure of the statements of Witnesses XXN, AN and DBQ

12. The Chamber notes some contradiction between the legal basis on which the motion relies and the substance of the motion itself. Indeed, the Defence's request for the disclosure of witness statements is based on Rule 66(B) of the Rules. Now, under that Rule, the Defence may only seek leave to inspect the documents in the Prosecutor's possession. The motion for the disclosure of the statements of the above-mentioned witnesses, whom the Prosecution does not intend to call, should,

¹ The Prosecution relies on Chamber II's "Decision on the Prosecutor's Motion to Vary and Extend Witness Protection Measures", of 19 March 2004.

for its part, be based on Rule 68 of the Rules. The Chamber finds that the two provisions lay down different criteria which lead to different consequences.

13. Consequently and as the Defence submissions now stand, the Chamber is not in a position to rule on this discrepancy and urges the Defence, if it so desires, to specify the nature of its request.

Disclosure of General Roméo Dallaire's testimonies

14. The Prosecution response that there are no prior statements of the said witness as is customary and that all the documents which the Prosecution will be relying on in its examination-in-chief have already been disclosed to the Defence is duly noted. In the light of the copies of the dispatch notes on the record, the Chamber finds that the disclosures sought by the Defence have already been effected, and that this ought to be duly noted.
15. Be that as it may, the Chamber notes, as established by case law,² that prior statements of material witnesses in the other cases before the Tribunal are part of the documents subject to disclosure under Rule 66(A)(ii) of the Rules, even without the Chamber having to intervene. General Roméo Dallaire's testimonies in other cases in which he has appeared before the Chamber should, therefore, be disclosed under the above Rule. Consequently, the Chamber partially grants the Defence motion on this point, but on different legal grounds.

On the disclosure of the statements of Witness Alison Des Forges

16. The Chamber takes note of the Prosecutor's response with respect to the issue above and finds the Defence request for disclosure of Witness Alison Des Forges's testimonies premature at this stage of the proceedings, and accordingly denies the request.

On the disclosure of the statements of Witnesses XAF, DY, DN, DO, DAK, HP, DA, GS, DBN and LN

17. In light of the supporting material presented, the Chamber notes that the said statements have already been disclosed to the Defence. The Chamber therefore takes due note and consequently finds the Defence request without merit.

FOR THESE REASONS

THE CHAMBER HEREBY

² *The Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, "Decision on Disclosure of Transcripts and Exhibits of Witness X", TC, of 3 June 2004.

REFERS the issues raised in regard to the omission of the points on which each Prosecution witness will be expected to testify and the relevance of the Prosecution's Brief to the Pre-trial Conference to be held under Rule 73 *bis* of the Rules,

PARTIALLY GRANTS the Defence motion with respect to the prior statements of General Roméo Dallaire and **ORDERS** that all transcripts of his earlier testimonies before the Tribunal be disclosed to the Defence in French and, as the case may be, in English.

URGES the Defence to specify, if it so desires, the nature and legal basis for its request for the statements of Witnesses XXN, AN and DBQ;

DENIES all other requests by the Defence.

Arusha, 16 September 2004

[Signed]

Judge Arlette Ramaroson
Presiding Judge

Judge William Sekule

Judge Solomy B. Bossa

