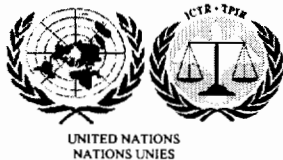


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ICTR-99-50-T
10-12-2004
(1988 — 1989)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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TRIAL CHAMBER II

Before: Judge Khalida Rachid Khan, Presiding
Judge Lee Gacuiga Muthoga
Judge Emile Francis Short

Registrar: Mr Adama Dieng

Date: 10 December 2004

The PROSECUTOR
v.
Casimir BIZIMUNGU
Justin MUGENZI
Jérôme-Clément BICAMUMPAKA
Prosper MUGIRANEZA

Case No. ICTR-99-50-T

ORIGINAL FILED IN ARCHIVES
ICTR

2004 DEC 10 P 2:00

**DECISION ON BICAMUMPAKA'S MOTION FOR DISCLOSURE OF
EXISTING COMPREHENSIVE LIST OF RADIO BROADCASTS**

Office of the Prosecutor:

Mr Paul Ng'arua
Mr Ibukunolu Babajide
Mr Justus Bwonwonga
Mr Elvis Bazawule
Mr Shyamlal Rajapaksa

Counsel for the Defence:

Mr Pierre Gaudreau and Mr Michel Croteau **for Jérôme-Clément Bicamumpaka**
Ms. Michelyne C St Laurent and Ms Alexandra Marcil **for Casimir Bizimungu**
Mr Ben Gumpert **for Justin Mugenzi**
Mr Tom Moran and Mr Christian Gauthier **for Prosper Mugiraneza**

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

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short (the “Trial Chamber”);

BEING SEIZED of “Bicamumpaka’s Motion for Disclosure” filed on 18 March 2004, (the “Motion”);

NOTING the “Prosecutor’s Response to Jerome Bicamumpaka’s Motion for Disclosure” filed on 23 March 2004, together with the “Corrigendum to Prosecutor’s Response to Jerome Bicamumpaka’s Motion for Disclosure” filed on 25 March 2004 (the “Response”);

NOTING ALSO “Jérôme Bicamumpaka’s Reply to Prosecutor’s Response to Jérôme Bicamumpaka’s Motion for Disclosure” filed on 1 April 2004 (the “Reply”);

NOW DECIDES the Motion on the basis of the written submissions of the Parties only pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the “Rules”).

ARGUMENTS OF THE PARTIES

Defence Submissions

1. The Defence requests the Trial Chamber to order the Prosecution to disclose to the Defence the list(s) of all radio broadcasts of RTLM and Radio Rwanda, which list(s) are already in existence within the Office of the Prosecutor.
2. The Defence argues its Motion on the basis of the provisions of Rules 66 (A)(i), 66 (B), 68 and 73 of the Rules.
3. The Defence argues that the expression supporting material of Rule 66 (A)(i) should be understood to mean all evidence to which the Indictment directly refers. While the Prosecution did not include the totality of the radio broadcasts of 1993 and 1994 in Rwanda, there is indication in the indictment that these formed part of its supporting material (Paragraphs 5.7, 5.8, 5.11, 5.12, 5.23, 6.12, 6.20, 6.28, 6.29 and 6.32).
4. The Defence submits that it has already received disclosure of 80 radio broadcasts in the form of CD-Roms, tapes and/or transcripts. The Defence further submits that other information revealed by the Prosecution in the course of the proceedings has led the Defence to conclude that there are far more than 80 tapes of radio broadcasts in the possession of the Prosecution. In this regard, the Defence attaches as “Annex A” two lists marked, respectively “Audio Tape Identification - Radio Rwanda - Box 24”, and “Audio Tape Identification - Box 27”.

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5. The Defence asserts that the tapes would be material to the preparation of the defence under Rule 66 (B) and that a clear indication of the materiality can be found in the allegations made in the Indictment, the Pre-Trial Brief and the Prosecution's Opening Statement.

6. The Defence further argues that the evidence is also material as it is potentially exculpatory under Rule 68 although the Defence admits that the list of tapes does not precisely qualify as exculpatory evidence. The Defence submits that the radio broadcasts are potentially exculpatory insofar as they mention, among others, the Accused whereabouts, speeches and interviews which would allow the Defence to rebuke certain Prosecution witnesses.

7. The Defence seeks disclosure of the list(s) of all radio broadcasts in the Prosecution's possession. These list(s) will assist the Defence to determine whether there are other broadcasts which the Prosecution had omitted to disclose, but which are either material to the defence of the Accused or provide exculpatory information.

8. The Defence submits that it filed the instant Motion because prior requests to the Prosecution had proved futile.

Prosecution Submissions

9. The Prosecution does not admit or deny the existence of the list(s) requested by the Defence. Rather, the Prosecution opposes the Motion on the basis on the fact that the Defence had not sufficiently demonstrated how the Rules or the case law assist the Defence in its claim.

10. The Prosecution asserts that it has complied with its disclosure obligations under the Rules. Specifically the Prosecution indicates that its disclosure obligation of supporting materials at the time of confirmation of the indictment under Rule 66 (A)(i) has long been discharged and is separate from disclosure obligation at the post-confirmation stage of the proceedings as stated in the Media case.

11. With respect to the Motion under Rule 66 (B), the Prosecution indicates that the Defence has failed to identify the broadcast with "specificity", that they are material to the Defence and concludes that the Defence is engaging in a fishing expedition.

12. With respect to the Motion under Rule 68, the Prosecution argues that the Defence has the duty to indicate with specificity which material is exculpatory and in the possession or control of the Prosecutor. The request for a list of all tapes of broadcasts equals a fishing expedition.

13. The Prosecution submits that the Motion is frivolous and constitutes an abuse of process. The Prosecution requests that the fees and costs be denied to the Defence.



Defence Reply

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14. In its reply, the Defence essentially reiterates that it is only seeking disclosure of lists of radio broadcasts at this stage, and not of the actual broadcasts.

DELIBERATIONS

15. The Chamber notes that the Defence bases its Motion on the provisions of Rules 66(A)(i), 66 (B) and 68 and will review it under these different legal bases.

16. Rule 66 (A)(i) provides as follows:

[...]

(A) The Prosecutor shall disclose to the Defence:

- (i) Within 30 days of the initial appearance of the accused copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused, and
- (ii) [...]

17. The Chamber is of the opinion that the documents disclosed to the Defence 30 days following the initial appearance of the Accused are “copies of the supporting material which accompanied the indictment”, and which were submitted to the confirming judge before the Indictment was confirmed-and nothing else. The Chamber finds that the Defence allegations that the “supporting material should be construed as including all the evidence which the Indictment directly refers to” to be unfounded in law. Therefore, the Chamber rejects the Defence Motion, pursuant to Rule 66 (A)(i) of the Rules.

18. Rule 66 (B) provides as follows:

At the request of the Defence, the Prosecutor shall, subject to Sub-Rule (C), permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

19. Rule 66 (C) which, qualifies the foregoing, provides as follows:

Where information or materials are in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from the obligation to disclose pursuant to Sub-Rules (A) and (B). When making such an application the Prosecutor shall provide the Trial Chamber, and only the Trial Chamber, with the information or materials that are sought to be kept confidential.



20. For the Chamber to compel inspection of documents under Rule 66 (B), it must be satisfied that what is sought to be inspected is something that is material to the preparation of the defence, or intended for use by the Prosecution as evidence at trial, or was obtained from or belonged to the Accused.

21. The Chamber notes that the Defence submits that the list of broadcasts is material to the preparation of the Defence. However, the Chamber is not persuaded by the Defence submissions that there is “clear indication of the materiality of the evidence.”¹ Even if the paragraphs of the Indictment quoted by the Defence in support refer to the medias in Rwanda, their alleged role and to some speeches made, the Chamber fails to see how a list of all radio broadcasts in the Prosecution’s possession can be material to the preparation of the Defence without any further specification under Rule 66(B) of the Rules.

22. Rule 68 (A) on Disclosure of Exculpatory and Other Relevant Material reads as follows:

- (A) The Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.

23. The Chamber has previously interpreted Rule 68(A) as follows:

The Prosecution is duty bound to 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 the Prosecution evidence, pursuant to Rule 68 of the Rules. This does not mean that the Prosecution should be forced to hunt for materials that it has no knowledge of. It does mean however that where the Defence has specific knowledge of a document covered by the Rule not currently within the possession or control of the Prosecution, and requests that document in specific terms, the Prosecution should attempt to bring such documents within its control or possession where the circumstances suggest that the Prosecution is in a better position than the Defence to do so, and, once this is successfully done, should be disclosed to the Defence; provided it is shown that the Defence had made prior efforts to obtain such document by its own means. This obligation stems from the Prosecution’s inherent duty to fully investigate a case before this court, and applies particularly in relation to obtaining previous statements made by Prosecution witnesses before the Rwandan Authorities, where, as a practical reality, the Prosecution enjoys greater leverage than the Defence.²

24. The Chamber stands by this interpretation and finds that the Defence has not shown in what way the list of radio broadcasts “may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.” The Chamber

¹ Motion, para. 16.

² *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Motion of Accused Bicomumpaka for Disclosure of Exculpatory Evidence [TC], 23 April 2004, para. 9.



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has further noted the Defence's own admission that the list of tapes "does not *per se* qualify as exculpatory evidence." Therefore, the Chamber rejects the Defence's Motion pursuant to Rule 68 of the Rules.

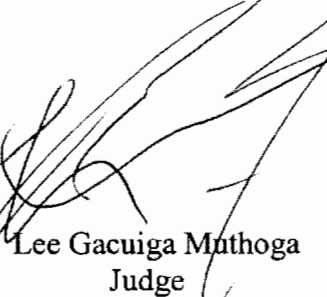
25. Finally, the Chamber notes again³ with concern the Defence objection about the Prosecution's response to Defence motions in general. The Chamber reminds the Parties of their obligation to conduct themselves in a manner befitting their respective roles, and to exercise discretion in calling for sanctions against the opposing Party.

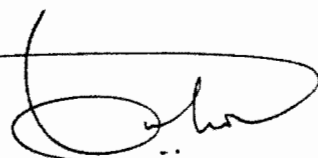
FOR THE ABOVE REASONS, THE TRIAL CHAMBER

DENIES the Motion in its entirety.

Arusha, 10 December 2004


Khalida Rachid Khan
Presiding Judge


Lee Gacuiga Muthoga
Judge


Emile Francis Short
Judge

(Seal of the Tribunal)

³ Decision on Bicomumpaka and Mugenzi's Motion for specificity in the Pre-trial Brief, 24 November 2004, par.36.