



UNITED NATIONS
NATIONS UNIES

ICTR-98-42-T
31-01-2006
(11585-11580)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

11585
Mwamba

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr Adama Dieng

Date: 31 January 2006

Handwritten signature and stamp: "RECEIVED 31 JAN 2006" and "11585".

The PROSECUTOR

v.

Arsène Shalom NTAHOBALI and Pauline NYIRAMASUHUKO
Case No. ICTR-97-21-T
Joint Case No. ICTR-98-42-T

DECISION ON ARSÈNE SHALOM NTAHOBALI'S MOTION
FOR DISCLOSURE OF DOCUMENTS
(Rules 66, 68 and 73 of the Rules)

Office of the Prosecutor

Ms Silvana Arbia, Senior Trial Attorney
Ms Adelaide Whest, Trial Attorney
Ms Holo Makwaia, Trial Attorney
Ms Adesola Adeboyejo, Trial Attorney
Ms Althea Alexis, Assistant Trial Attorney
Mr Michael Adenuga, Legal Advisor
Ms Astou Mbow, Case Manager

Defence Counsel for Ntahobali

Mr Normand Marquis, Lead Counsel
Mr Louis Huot, Co-Counsel

Handwritten signature.

11584

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

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEISED of the "*Requête de Arsène Shalom Ntahobali en communication de documents (Art. 66, 68 et 73, Règlement de Procédure et de Preuve)*", filed on 1 December 2005 (the "Motion");

CONSIDERING the "Prosecutor's Response to the Motion of Arsène Shalom Ntahobali for Disclosure of Documents", filed on 7 December 2005 (the "Prosecution Response") AND the "*Réplique de Arsène Shalom Ntahobali à la "Prosecutor's Response to the Motion of Arsène Shalom Ntahobali for Disclosure of Documents"*", filed on 12 December 2005 (the "Defence Reply");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular its Rules 66, 68 and 73;

NOW DECIDES the Motion, pursuant to Rule 73 (A) of the Rules, on the basis of the written briefs filed by the Parties.

SUBMISSIONS OF THE PARTIES

The Defence

1. The Defence outlines the sequence of events during which it requested the Prosecution to disclose to it certain documents, which it describes as forming part of the "Belgian files" pursuant to Rule 66(B) of the Rules.¹ The Defence notes that, while the Prosecution disclosed some of the said files, it neglected to disclose others despite numerous reminders to that effect.² The Defence submits that the said "Belgian files" concern persons accused of committing crimes in Butare, such as Higaniro, Kanyabashi, Ntezimana and Ndayambaje. The Defence argues that their case files are of interest to the case against the Accused Ntahobali.³

2. In a letter dated 26 August 2005, the Defence noted that the documents numbered K006-4772 to K006-5719, K007-5604 to K007-5629, K002-8277 to K002-8350 and K028-8207 were missing and requested the Prosecution to make the necessary disclosure.⁴

3. In a letter dated 9 September 2005, the Prosecution indicated to the Defence that having perused the documents requested, it had formed the opinion that the requested documents did not concern the Accused and that they were neither relevant nor of any interest. Therefore, the Prosecution argued that it would not disclose them unless the Defence proved that they were relevant.⁵ Furthermore, the Prosecution indicated that it had not used the requested documents during the presentation of its case.⁶

4. Following further unsuccessful requests for documents dated 13 September 2005, 14 November 2005, and 21 November 2005, the Defence decided to file a formal Motion under Rule 66(B),⁷ relying on the *Bagosora* Decision of 27 November 1997.⁸

¹ Motion at paras. 1 – 3, 5

² Motion at para. 4

³ Motion at paras. 5, 39

⁴ Motion at para. 7

⁵ Motion at para. 8

⁶ Motion at para. 9

⁷ Motion at paras. 16 – 23

⁸ Decision on the Motion by the Defence Counsel for Disclosure of 27 November 1997; Motion at para. 57

5. The Defence notes that none of the requirements under Rule 66 (B) call for the Defence to demonstrate that the documents it requests are relevant and of interest, contrary to the Prosecution's argument.⁹

6. The Defence outlines that contrary to the Prosecution's assertion that the Defence is asking for an unrestricted search, the Defence request is very precise and limited.

7. Moreover, the Defence recalls that the documents disclosed by the Prosecution in June 2005 are of the same nature as those currently requested, and there is no reference to the Accused in those documents either.

8. The Defence submits that the conditions under Rule 66(B) are not cumulative and that it is sufficient for it to show that the documents requested are material to the preparation of its case.¹⁰ On this issue, the Defence submits that:

- i) The requested documents from the "Belgian files" are documents which it has not yet perused and that therefore it is impossible for the Defence to precisely indicate the relevance of each document to its case;
- ii) The fact that the Prosecution did not use those documents when presenting its evidence is only one criterion under Rule 66(B). The Defence argues that it suffices that *prima facie*, those documents are material to the preparation of the Defence. Since all the documents with the identified K-numbers seem to refer to events in Ngoma *commune*, a location where the Accused is alleged to have committed crimes, their disclosure could enlighten Counsel as to whether the Accused should testify or otherwise;
- iii) Higaniro's file is important to the Accused's case who is allegedly an *Interahamwe* leader: Higaniro was the director of SORWAL, a company which was allegedly the financing organ of the *Interahamwe*, as testified to by Prosecution Expert Witness Guichaoua;
- iv) Kanyabashi's and Ndayambaje's files are important because they are both co-Accused who allegedly conspired in the planning and execution of the genocide;
- v) Ntezimana's file is material to the case of the Accused because he was a professor at *Université Nationale du Rwanda* (UNR), a location where the Accused is alleged to have led attacks.

9. The Defence argues that the Prosecution is not in a position to know how material the files are to the case against the Accused and that moreover, since the Prosecution has not raised any of the three exceptions for disclosure of materials under Rule 66(B), the Prosecution is duty-bound to disclose the same to the Defence.¹¹

The Prosecution Response

10. The Prosecution admits that it corresponded with the Defence regarding disclosure of documents. The Prosecution submits, however, that the request of November 2005 listed in the Motion concerned 3,800 pages of English, French, and Kinyarwanda documents.

11. The Prosecution requested the Defence to identify those documents it deemed necessary to its case among the 3,800 pages so that it could make a proper disclosure. The Prosecution submits that the Defence response to this request has been rather vague.

⁹ Motion at para. 24

¹⁰ Motion at paras. 34 and 38

¹¹ Motion at paras. 50, 52, 53

12. Regarding the requirements of Rule 66(B), the Prosecution submits that the Defence has failed to demonstrate whether the 3,800 pages it requests are “material to the preparation of the Defence”. Rather, the Prosecution argues that the Defence’s mere submission that the requested documents form part of the “Belgian files” is too broad and could cover innumerable or many more thousands of files/documents.

13. The Prosecution submits that it is the Chamber’s discretion to determine the scope of documents which are “material to the preparation of the defence,” and therefore not all documents mentioning Butare Prefecture could be requested and disclosed under Rule 66, because the spirit of the Rule is not to permit the Defence to go on a “fishing expedition”.

14. Noting that the Defence has merely indicated a series of “K” numbers without specifying the documents in question and without providing a schedule or index of the actual documents, the Prosecution points out that according to the Decision in *Bizimungu et al.*¹² referred to by the Defence, Rule 68 does not give the Defence the right to conduct an unrestricted search of the Prosecution’s electronic databases for material which the Prosecution is under no obligation to disclose under the Rules.

15. The Prosecution thus prays the Chamber to deny the Motion to disclose the listed documents in its entirety.

The Defence Reply

16. As a preliminary matter, the Defence, citing the jurisprudence of the Chamber to this effect, argues that the Prosecution Response was filed one day out of time and should therefore be rejected since no explanations have been provided for filing out of time.¹³

17. In the eventuality that the Chamber admits the Response, the Defence essentially submits the following:

- i) Regarding the Prosecution’s argument that the Defence request is too broad and vague as to the materiality of the requested documents to the case of the Accused, the Defence reiterates its arguments at paras. 45 to 48 of its Motion, adding that the Indictment against the Accused alleges that he exercised authority over the *Interahamwe* militia of Butare Prefecture;
- ii) Para. 6.9 of the Indictment alleges that the crimes committed in Butare Prefecture from 19 April 1994 onwards were planned;
- iii) Furthermore, the Indictment alleges that the Accused conspired to commit genocide with, among others, two retired *bourgmestres* of Butare Prefecture, namely Ndayambaje and Kanyabashi;
- iv) In this regard, the Defence argues that all the documents pertaining to Butare Prefecture are material to the preparation of the case for the Accused;
- v) Regarding the Prosecution’s accusation of a “fishing expedition” by the Defence because it merely lays out the “K” numbers of documents it requests, the Defence reiterates its submissions in the Motion and argues further that since it is not in possession of the documents in question, it is not possible for it to make an index of the same.

18. In conclusion, the Defence argues that it has largely demonstrated *prima facie* that the documents requested are material to the preparation of the Defence.

¹² *Prosecutor v. Bizimungu et al.*, “Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material,” of 1 December 2004 at para. 9

¹³ Defence Reply at paras. 4 - 20

11581

HAVING DELIBERATED

19. The Chamber has considered all the submissions of the Parties.

20. As a preliminary matter, the Chamber notes the Defence submissions that the Prosecution Response filed on 7 December 2005 was filed out of the time-limits set by the Chamber. The Chamber finds that the said Response was indeed filed one day out of time. Because the Prosecution has not provided the Chamber with any explanations for its tardy filing, the Chamber finds the said filing inadmissible.

21. The Chamber recalls the provisions of Rule 66(B): "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."

22. A plain reading of the Sub-Rule shows that the Prosecutor is obliged, subject to Sub-Rule (C) to *permit the Defence to inspect* the items enumerated, and is not obliged to *disclose* them pursuant to the Sub-Rule. However, the Defence is only required to demonstrate one of the three conditions laid out under Sub-Rule (B) before the Chamber may grant permission to inspect the enumerated items (emphasis ours).

23. In order to be granted inspection of evidence under Rule 66B, the Defence is required to demonstrate the *prima facie* materiality of the evidence in question to the preparation of its case, as well as that the said evidence is in the custody or control of the Prosecution. The requirement that the documents are in the custody or control of the Prosecution implies that "Defence Counsel must make specific identification of any requested documentation, thus enabling the Trial Chamber to take action".¹⁴

24. In the instant case, the Chamber notes that the Prosecution does not deny possessing the documents requested as identified by the K-numbers enumerated. Rather, it essentially submits that the request is too vague, since it concerns 3,800 pages of documents, some of which are in Kinyarwanda. On its part, the Defence submits that it is unable to make a precise indication of the relevance of each of the documents it requests, given that it has not been able to peruse each one of them.

25. To demonstrate materiality of the requested documents to its case pursuant to Rule 66(B), the Defence argues that said documents concern events in locations for which the Accused is alleged to have committed crimes, they concern his activities as an alleged leader of the *Interahamwe*, they concern his co-Accused, and they may enlighten Counsel as to whether the Accused should testify or otherwise.

26. The Chamber notes that the Defence is unable to precisely specify the exact relevance of each and every piece of document it requests since it has not had the opportunity to peruse them. In the Chamber's opinion, this notwithstanding, the Defence has made a *prima facie* demonstration that the documents it requests may be material to the preparation of its case, in the sense that they concern Butare *prefecture*.

¹⁴ See also *Prosecutor v. Nyiramasuhuko et al.* Case Number ICTR-97-21-T, Decision on the Defence Motion for the Disclosure of the Declarations of the Prosecutor's Witnesses Detained in Rwanda, and all other Documents or Information Pertaining to the Judicial Proceedings in their Respect, of 18 September 2001 at para. 12; *Prosecutor v. Delalic et al.*, Case No. IT-96-21-212, Decision on the Motion by the Accused Zejnil Delalic for the Disclosure of Evidence, of 6 September 1996, at para. 11.

11580

27. Accordingly, the Chamber orders the Prosecution, pursuant to Rule 66(B), to immediately permit the Defence to inspect the requested documents with K-numbers; K006-4772 to K006-5719, K007-5604 to K007-5629, K002-8277 to K002-8350 and K028-8207. Following such inspection, the Defence may indicate to the Prosecution the specific document(s) it considers to be material to the preparation of its case.

28. The Chamber also reminds the Parties of the provisions of Rule 67(C).

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

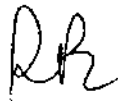
ORDERS the Prosecution, pursuant to Rule 66(B), to immediately permit the Defence to inspect the requested documents with the following K-numbers: K006-4772 to K006-5719, K007-5604 to K007-5629, K002-8277 to K002-8350, and K028-8207.

DENIES the Motion in all other respects.

Arusha, 31 January 2006



William H. Sekule
Presiding Judge



Arlette Ramaroson
Judge • TPIR



Solomy Balungi Bossa
Judge