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NATIONS UNIES

ICTR-07-91-I
01-10-2008
(1604-1600)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuga Muthoga
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 1 October 2008

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THE PROSECUTOR

v.

Léonidas NSHOGOZA

Case No. ICTR-2007-91-PT

DECISION ON DEFENCE MOTIONS FOR DISCLOSURE OF SUPPORTING MATERIALS; AND CLARIFICATION ON RULE 72 30-DAY PERIOD

Rules 54, 66 (A), 72, and 73 of the Rules of Procedure and Evidence

Office of the Prosecutor:

Richard Karegyesa
Renifa Madenga
Abdoulaye Seye
Dennis Mabura

For the Accused

Allison Turner
Counsel Assigned by the Registrar
Philippe Greciano

INTRODUCTION

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1. On 4 January 2008, the President of the Tribunal confirmed an Indictment against the Accused, Léonidas Nshogoza.¹ The Accused is charged, pursuant to Rule 77 of the Rules of Procedure and Evidence, with four counts of contempt of the Tribunal and attempt to commit acts punishable as contempt of the Tribunal. On 8 February 2008, the Accused voluntarily surrendered to the Tribunal and on 11 February 2008 he pleaded not guilty to each count.
2. On 12 March 2008, the Prosecutor disclosed 361 pages of supporting materials to the Defence, pursuant to Rule 66 (A) (i). Since this initial disclosure, the Defence and the Prosecutor have disagreed over the extent to which the Prosecutor has fully complied with the requirements of Rule 66 (A) (i). While that disagreement remains unresolved, the Prosecutor has provided the Defence with additional disclosures on a number of occasions, including transcripts of prior witness testimony in the *Kamuhanda* and *Rwamakuba* proceedings, as well as a redacted and translated version of the Accused's case file from the Rwanda Gasabo Court.
3. On 22 March 2008, the Defence filed a Motion, requesting the Chamber to order the Prosecutor to disclose all supporting materials that accompanied the Indictment.² The Defence asserted that 278 pages of such supporting materials had yet to be disclosed.³
4. On 8 April 2008, the Prosecutor made further disclosures to the Defence.⁴ After this disclosure, the Prosecutor asserted that all of the supporting materials had either been disclosed to the Defence, were sealed and confidential, or were part of the public domain.⁵
5. According to Rule 72 (A), any preliminary motion brought by the Defence must be brought no later than thirty days after the Prosecution has disclosed copies of all material and statements referred to in Rule 66 (A) (i). Maintaining its position that the Prosecutor had still not fulfilled his disclosure obligations under Rule 66 (A) (i), the Defence brought a second Motion seeking clarification as to when the 30-day period prescribed by Rule 72 (A) would elapse.⁶ Out of "an abundance of caution", the Defence submitted a series of Preliminary Motions on 11 April 2008, and again on 24 June 2008.⁷

¹ *Prosecutor v. Nshogoza*, Case No. ICTR-2007-91-1.

² "Urgent Defence Motion for Trial Chamber to Order the Prosecutor to Disclose all Rule 66 (A) Supporting Materials", filed on 22 March 2008 (the "Rule 66 Motion").

³ *Id.*, para. 11.

⁴ Specifically, the Prosecutor disclosed a redacted version of the "Solemn Declaration and Statement of GAA" dated 27 November 2007.

⁵ "Prosecutor's Reply to Addendum-Defence Response to Prosecutor's 'Clarifications on Documents Disclosed to the Defence on 12 March 2008'", paras. 2, 3.

⁶ "Urgent Defence Request Regarding the Commencement of the Rule 72 30-Day Delay", filed 10 April 2008 (the "Rule 72 30-Day Motion").

⁷ "Preliminary Pro Forma Submissions in Support of Preliminary Motions Pursuant to Rule 72 of the ICTR Rules of Procedure and Evidence", filed 11 April 2008 (the "First Rule 72 Motion"), para. 4; "Preliminary Motions Pursuant to Rule 72, and Alternative Motion under Rule 73 to Dismiss the Indictment", filed 24 June 2008 (the "Second Rule 72 Motion").



In each of those filings, the Defence reserved the right to supplement the motions pending the adjudication of the Rule 66 Motion.⁸

6. This Decision will therefore adjudicate all of the issues raised by both the Rule 66 Motion and the Rule 72 30-Day Motion.

DISCUSSION

7. Once an indictment has been confirmed, the Prosecutor's initial disclosure obligations are governed by Rule 66 (A) (i). Rule 66 (A) (i) provides, in relevant part, that "[t]he Prosecutor shall disclose to the Defence ... [w]ithin 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...."

8. Rule 66 (C) provides an exception to mandatory disclosure under sub-section (A). Specifically, "[w]here 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 ... to be relieved from the obligation to disclose...."

9. As outlined in Rule 72, the time period during which an Accused may bring preliminary motions is determined by reference to the Prosecutor's compliance with Rule 66 (A) (i). Rule 72 (A) provides that "[p]reliminary motions ... shall be in writing and be brought not later than thirty days after disclosure by the Prosecutor to the Defence of all material and statements referred to in Rule 66 (A) (i)...." It follows that the Accused's thirty day period to bring Preliminary Motions does not begin to run until the Prosecutor has fully disclosed all supporting materials and prior statements obtained from the Accused.

10. The Prosecutor maintains that, as of 8 April 2008, he had disclosed all of the supporting materials, with the exception of certain documents that were either in the public domain,⁹ or sealed and confidential.¹⁰ The Defence disputes this contention. It submits that two binders of supporting materials, one of which was labelled "strictly confidential", were relied upon by the confirming Judge, only one of which was

⁸ See First Rule 72 Motion, para. 9; Second Rule 72 Motion, para. 4.

⁹ The Prosecutor asserted that three documents requested by the Defence were publicly accessible, namely: (1) the Judgment and Sentence in the GAA Case dated 4 December 2004; (2) the Order of the Appeals Chamber in the *Kamuhanda* Case dated 19 May 2005; and (3) the transcripts of the case against GAA dated 10 August and 3 December 2007. See *supra* note 5, para. 3.

¹⁰ The Prosecutor asserted that two of the documents requested by the Defence were confidential or otherwise not publicly available, namely: (1) the Plea Agreement between the Prosecutor and GAA; and (2) the transcripts of the *Kamuhanda* Appeal on 18 and 19 May 2005, which the Prosecutor labeled as "partly closed and partly public." *Id.*



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disclosed.¹¹ The Defence calculates that up to 278 pages of supporting materials have yet to be disclosed. Furthermore, the Defence asserts that at least two of the documents the Prosecutor claims to be in the public domain are not in fact publicly accessible.¹²

11. The Chamber is not prepared to conduct a reconciliation of the documents disclosed to the Defence with those that the Prosecutor submitted for confirmation of the Indictment. However, in order to ensure compliance with the clear directives of Rule 66, and relying upon its general power under Rule 54,¹³ the Chamber finds it appropriate to require the Prosecutor to file a signed declaration, no later than three days from the date of this Decision, stating that he has fully complied with his Rule 66 (A) (i) obligations.

12. To the extent the Prosecutor asserts that any of the documents submitted to the confirming Judge with the Indictment are not subject to mandatory disclosure under Rule 66 (A) (i), by reason of Rule 66 (C) or otherwise, the Prosecutor must describe in the Declaration the general nature of such documents and the legal basis relied upon for their non-disclosure.

13. The Chamber notes that, in some cases, the Prosecutor might satisfy his disclosure obligations by drawing the Defence's attention to the location of material which is already available in the public domain. However, noting the specific language of Rule 66 (A) (i), and in order to resolve this ongoing dispute as a matter of priority, the Chamber considers that the Prosecutor should ensure that the Defence has access to any supporting materials which it claims are part of the public domain.

FOR THESE REASONS the Chamber

ORDERS the Prosecutor to file a Declaration, within five working days of the date of this Decision, stating that he has fully complied with his Rule 66 (A) (i) obligations, and/or with respect to any material which he claims falls within an exception to that Rule, to provide a description of that material and a legal basis for its non-disclosure; and

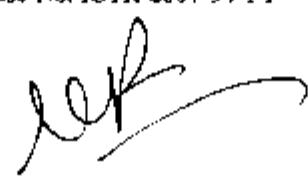
ORDERS the Prosecutor to ensure that the Defence has access to any supporting materials which it claims are part of the public domain; and

DECLARES that the 30-day period provided for in Rule 72 (A) for submitting Preliminary Motions will run from: either (i) the date on which the Prosecutor's Declaration is filed; or (ii) to the extent that the Prosecutor must disclose further documents pursuant to this Decision, the date of the last disclosure, whichever is later; and

¹¹ "Defence Response to Prosecutor's 'Clarification on Documents Disclosed to the Defence on 12 March 2008'" filed 2 April 2008, paras. 2, 7.

¹² These are the Order of the Appeals Chamber in the *Kamuhanda* Case dated 19 May 2005 and the transcripts of the case against GAA dated 10 August and 3 December 2007. *Id.* para. 4 and attached table.

¹³ Rule 54 provides: "At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation and for the preparation or conduct of the trial."

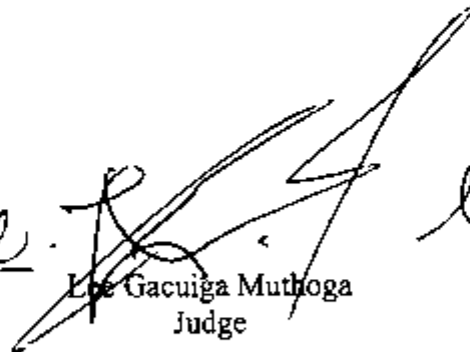



STAYS any Decision on the merits of the Defence's First and Second Rule 72 Motions until the 30-day period has elapsed; and

PERMITS the Defence to amend its pending Rule 72 Preliminary Motions, or file new Preliminary Motions, within the 30-day period, if it so wishes.

Arusha, 1 October 2008


Khalida Rachid Khan
Presiding Judge


Le Gacuiya Muthoga
Judge


For and on behalf of
Emile Francis Short
Judge

