



UNITED NATIONS
NATIONS UNIES

ICTR-05-82-I
27-2-2009
(138 - 132)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

138
Jules
4

OR: ENG

TRIAL CHAMBER III

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

Registrar: Mr. Adama Dieng

Date: 27 February 2009

JUDICIAL FILE ARCHIVES
2009 FEB 27 P 3-17

THE PROSECUTOR
v.
DOMINIQUE NTAWUKULILYAYO

Case No. ICTR-05-82-PT

**DECISION ON DEFENCE 'REQUETE EN URGENCE DE LA DEFENSE
CONCERNANT LES MANQUEMENTS DU PROCUREUR A SES OBLIGATIONS
DE COMMUNIQUER LES PIECES ET SES EFFETS SUR LE CALENDRIER DU
PROCES'**

Rules 66 and 68 of the Rules of Procedure and Evidence

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Counsel for the Defence:
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INTRODUCTION

1. On 20 February 2009, the Defence filed a motion alleging a number of violations of the Prosecution’s disclosure obligations under Rule 66 of the Rules of Procedure and Evidence (“Rules”).¹ The Defence requests that, due to these violations, the Chamber order the exclusion of certain evidence, and an adjournment of the trial which is scheduled to commence on 30 March 2009.

2. The Prosecution did not respond to the Motion.

DISCUSSION

Law on disclosure

3. 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....” The “supporting materials” which the Prosecutor must disclose to the Defence are the materials upon which the charges are based. This includes all previous statements made by the accused that are contained in the Prosecutor’s files, whether these statements were taken by the Prosecutor or originated from another source.²

4. Pursuant to Rule 66 (A) (ii), the Prosecution is required to disclose, no later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial. A witness statement under Rule 66 (A) (ii) has been interpreted as an account of a person’s knowledge of a crime which has been recorded in the course of an investigation into that crime. It can include statements taken by entities other than the Prosecutor, which then result in the persons who gave the original statements becoming witnesses in proceedings before the Tribunal.³ The Prosecutor must disclose previous statements of all Prosecution witnesses, in whatever form, to the Defence.⁴ Further, the transcript of the testimony of a witness constitutes a statement within the meaning of Rule 66 (A) (ii) if the witness is to testify on the same subject matter as his previous testimony.⁵

¹ *Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-PT, “Requete en Urgence de La Defense Concernant les Manquements du Procureur a Ses Obligations de Communiquer les Pieces et Ses Effets sur le Calendrier du Proces”, 20 February 2009 (“Motion”).

² *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66 (A) (ii), 29 September 2006, para. 16 (citations omitted); *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2, Order on Motion to Compel Compliance by the Prosecutor on Rules 66 (A) and 68, p.2.

³ *Milutinović et al.*, Decision on Ojdanić Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66 (A) (ii), 29 September 2006, para. 14 (citing the Appeals Chamber in *Prosecutor v. Blaskić*, Case No. IT-95-14-A, Decision on the Appellant’s Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 15.).

⁴ *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza’s Motion to Require Strict Compliance with Rule 66 (A) (ii) (“Strict Compliance Decision”), para. 7 (citing *Prosecutor v. Tihomir Blaskić*, Case No IT-95-14-PT, Decision on the Production of Discovery Materials, 27 January 1997, para 38).

⁵ *Bizimungu et al.*, Case No., Strict Compliance Decision, para. 8.



5. The obligation to disclose witness statements to the Defence extends to all witness statements in the custody or control of the Prosecution, or to which it has access. However, the Prosecution is not obligated to disclose documents which are not in its possession, or which are not accessible to it.⁶ In addition, the Prosecution is presumed to discharge its obligations under Rule 66 (A) (ii) in good faith.⁷

6. Furthermore, under Rule 68 (A), the Prosecution is obliged to disclose 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.” The Prosecution’s disclosure obligations under this Rule are ongoing.⁸

7. Where the Defence believes that exculpatory material in the Prosecution’s custody or control has not been disclosed, it may request that the Trial Chamber order disclosure. Before the Chamber will grant a request under Rule 68, the Defence must sufficiently identify the material sought, show that it is in the custody or control of the Prosecution, and make a *prima facie* showing that it is exculpatory.⁹

Is the Prosecution in breach of its disclosure obligations?

8. The Defence alleges that the Prosecution has:

- (i) failed to disclose material supporting the Indictment in accordance with Rule 66 (A) (i);
- (ii) failed to disclose all statements in accordance with Rule 66 (A) (ii), or delayed in complying with Rule 66 (A) (ii), and failed to disclose material which was available to it at the time the Indictment was confirmed;
- (iii) not manifested any consideration for disclosure under Rule 68.¹⁰

9. The Chamber will consider each of the Defence allegations in turn.

(i) *Alleged failure to comply with Rule 66 (A) (i)*

10. The Motion states that at the initial appearance of the Accused on 10 June 2008, the Prosecution informally presented the Defence with a CD containing supporting documents for confirmation of the Indictment.¹¹ The Defence submits that at no stage between the Accused’s initial appearance, and the pre-trial conference on 16 December 2008 (“Pre-Trial Conference”), had the Prosecution stated that this was complete disclosure pursuant to Rule

⁶ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Josph Nzirorera’s Motion of Notice of Violation of Rule 66 (A) (ii) for Witness ALZ and AMC, and for Remedial and Punitive Measures, 11 July 2007, para. 6.

⁷ *Karemera et al.*, Decision on Josph Nzirorera’s Motion of Notice of Violation of Rule 66 (A) (ii) for Witness ALZ and AMC, and for Remedial and Punitive Measures, 11 July 2007, para. 8.

⁸ Rule 68 (E) of the Rules; *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Decision on the Appellant’s Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings (AC), 26 September 2000, para. 32.

⁹ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-90-50-T, Decision on Jérôme-Clément Bicamumpaka’s Motion Requesting Recall of Prosecution Witness GFA; Disclosure of Exculpatory Material; and to Meet with Witness GFA (TC), 21 April 2008, para. 9; Decision on Bicamumpaka’s Motion for Disclosure of Exculpatory Evidence (MDR Files) (TC), 17 November 2004, para. 14.

¹⁰ Motion, paras. 2 i), ii), iii), iv), and para. 12.

¹¹ Motion, para. 3.

66 (A) (i).¹² The Defence further refers to the Pre-Trial Conference at which the Chamber directed the Prosecution to file hard copies of the Rule 66 (A) (i) supporting documents with the Registry, and that the Registry transmit these documents to the Defence within 14 days.¹³ The Defence submits that this has not been done.

11. The Chamber notes that Rule 66 (A) merely requires the Prosecution to “disclose to the Defence”¹⁴ the materials specified in Sub-Rules (i) and (ii). There is, therefore, no requirement under the Rules that disclosure be made through the Registry. Furthermore, the Chamber considers that electronic disclosure of documents is sufficient for the purposes of discharging the Prosecution’s disclosure obligations. The Chamber recalls that during the Pre-Trial Conference, the Defence acknowledged having received, from the Prosecution, “unofficial disclosure” of supporting documents in a CD.¹⁵ The Chamber considers that as the Prosecution provided the Defence with the CD containing the documents supporting the Indictment, it is not in breach of its obligation under Rule 66 (A) (i).

(ii) *Alleged failure to comply with Rule 66 (A) (ii)*

12. The Defence submits that the Prosecution did not file its Rule 66 (A) (ii) statements on 29 January 2009, 60 days prior to the commencement of trial, as required to do so. Rather, the Prosecution filed un-redacted statements under Rule 66 (A) (ii) on 30 January 2009, and the Defence did not receive the CD containing these statements until 5 February 2009.¹⁶ According to the Defence, it has now received 21 new statements just 55 days prior to the commencement of trial, which includes two statements dating back to 1996 and nine statements taken prior to the date on which the Indictment was confirmed.¹⁷

13. The Defence further suggests that the Prosecution’s disclosure appears to be incomplete. More specifically, the Defence submits that were the disclosures complete, there would be a greater number of statements than those disclosed, such as, statements produced through investigations relating to *Gacaca* proceedings as many of the witnesses are, or were, detainees in Rwanda.¹⁸ In addition, the Defence alleges that the Prosecution has failed to disclose the transcripts of certain witnesses’ testimony before other Trial Chambers. The Defence submits that it cannot identify these witnesses because it has not been provided with their pseudonyms.¹⁹

14. The Chamber will first address the suggestion that the Prosecution’s disclosure of Rule 66 (A) (ii) statements is incomplete. The Chamber recalls that the Prosecution is presumed to be acting in good faith, and the onus is therefore on the Defence to demonstrate that the Prosecution has in its possession specific documents sought, and that they have not

¹² Motion, para. 4.

¹³ Motion, para. 5.

¹⁴ Emphasis added.

¹⁵ *Ntawukulilyayo*, T. 16 December 2008, pp. 5, 7. The Chamber notes that during the Pre-Trial Conference, the Prosecution was ordered to file hard copies of the supporting documents with the Registry, and for the Registry to transmit the materials within 14 days to the Defence. While the Chamber considers that the Prosecution was obliged to comply with the Chamber’s order, a failure to do so is not sufficient to amount to a violation of the obligation under Rule 66 (A) (i) as the documents supporting the Indictment were provided to the Defence in a CD.

¹⁶ Motion, para. 8.

¹⁷ Motion, para. 9 b).

¹⁸ Motion, para. 9.

¹⁹ Motion, para. 13 c).



been disclosed.²⁰ It is thus insufficient for the Defence to merely submit that a greater number of statements should have been disclosed. Accordingly, the Chamber will not make a finding that the disclosures made to date by the Prosecution are incomplete.

15. The Chamber, however, notes that the Prosecution, by filing its Rule 66 (A) (ii) statements one day late, is in violation of that Sub-Rule.

16. The Chamber further notes that on 24 February 2009, the Prosecution disclosed an additional witness statement under Rule 66 (A) (ii).²¹ In light of this disclosure, almost one month after expiration of the 60 day time limit, the Chamber considers it necessary to order the Prosecution to ensure that it conducts a thorough review of the materials in its possession with a view to ensuring full compliance with Rule 66 (A) (ii), and certify in writing that it has conducted such a search, and that all disclosures have been made. The Chamber further reminds the Prosecution that such disclosures include the disclosure of transcripts of witnesses' testimony before other Chambers.

(iii) Disclosure under Rule 68

17. The Defence expresses concern that the Prosecution has not yet manifested any consideration for disclosure of exculpatory material under Rule 68, and that as a result, the Defence may in due course have a large amount of material to consider.²²

18. The Chamber recalls that the Prosecution's obligation under Rule 68 is ongoing and that there is no prescribed time limit for such disclosure under the Rules.²³ Further, the Chamber notes that the Defence does not allege any specific breach by the Prosecution of its obligation under Rule 68. The Chamber therefore does not find the Prosecution in violation of its obligation under Rule 68. The Chamber, however, reminds the Prosecution of this obligation, particularly as the trial in this case is scheduled to commence on 30 March 2009.

Has the Accused suffered prejudice warranting a remedy?

19. The Defence submits that, as a result of the delayed and incomplete disclosures by the Prosecution, the Accused has suffered prejudice. In particular, the Defence submits that due to the incomplete disclosures, the Accused cannot know the case against him, and that a large volume of documents have been received only 55 days prior to the commencement of trial. The Defence requests the Chamber to order that:

- (i) the evidence of those witnesses whose statements were taken before the Indictment was confirmed be excluded; and
- (ii) the commencement of trial be adjourned until the Prosecutor has discharged its obligations under Rule 66 (A) (i) and (ii).

20. The Chamber will consider whether either, or both, of the requested remedies are warranted in this case.

²⁰ See *supra* para. 5 and footnotes 6 and 7.

²¹ *Ntawukulilyayo*, Confidential Disclosure, 24 February 2009.

²² Motion, para. 12.

²³ Rule 68 (E).



(i) Request for exclusion of evidence

21. The Chamber recalls that the fact that material has not been disclosed in a timely manner does not *per se* result in prejudice to an accused. Rather, an accused must demonstrate that he has suffered material prejudice as a result of the late disclosure.²⁴ Rule 66 (A) (ii) must be read in light of the right of the accused to have adequate time and facilities for the preparation of his defence.²⁵ Exclusion of evidence is a remedy which is at the extreme end of a scale of measures available to the Chamber in addressing the prejudice caused to an accused in the preparation of his defence.²⁶ An accused must demonstrate that he has suffered a degree of prejudice that would justify the extreme remedy of excluding the witnesses' testimony.²⁷

22. In the present case, that some of the witness statements disclosed were taken prior to confirmation of the Indictment, is not a sufficient reason for the exclusion of the evidence of those witnesses. Although there was a delay in the Defence receiving the Rule 66 (A) (ii) statements, the Chamber considers that the Defence has not specifically demonstrated how the late disclosure has caused the degree of prejudice to the Accused that would justify exclusion of witnesses' evidence.

(ii) Request for adjournment of trial

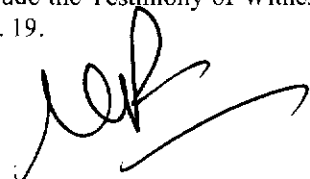
23. The Chamber recalls its obligation under Article 19 of the Statute to ensure that the trial is fair and expeditious and that proceedings are conducted in accordance with the Rules. The Chamber further recalls its obligations to ensure that the rights of the Accused under Article 20 are respected. In determining the date for commencement of trial, the Chamber had in mind its obligations under the aforementioned provisions, and the commencement of trial was scheduled following the Pre-Trial Conference with the Parties on 16 December 2008.

²⁴ *Prosecutor v. Juvenal Kajelijeli*, Case No. ICTR-98-44A-A, Judgement (AC), 23 May 2005, para. 262 ("If the Defence satisfies the Tribunal that the Prosecution has failed to comply with its Rule 68 obligations, then the Tribunal must examine whether the Defence has been prejudiced by that failure before considering whether a remedy is appropriate."); *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-R, Decision on the Prosecutor's Motion to Move for Decision on Niyitegeka's Requests for Review Pursuant to Rules 120 and 121 and the Defence Extremely Urgent Motion Pursuant to (i) Rule 116 for Extension of Time Limit, (ii) Rule 68 (A), (B) and (E) for Disclosure of Exculpatory Evidence Both of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda and (iii) Response to Prosecutor's Motion of 15 August 2005 seeking a Decision, in the Absence of Any Legal Submissions from the Applicant (AC), 28 September 2005, p. 7. See also *Prosecutor v. Karemera et al.*, Case No ICTR-98-44-T, Decision on Joseph Nzirorera's Sixth, Seventh and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive and Other Measures, 29 November 2007, para. 30.

²⁵ Article 20 of the Statute of the Tribunal.

²⁶ *Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR 98-42-T, Decision on Alphonse Nteziryayo's Motion for Exclusion of Evidence, 25 February 2009, para. 26; *Karemera et al.*, Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor Andre Guichaoua; Defence Motion to Exclude the Witness's Testimony; Decision on Defence Motions to Exclude Testimony of Professor Andre Guichaoua, 20 April 2006, para. 8. *Karemera et al.*, Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guichaoua; Defence Motion to Exclude the Witness' Testimony; and Trial Chamber's Order to Show Cause (TC), 1 February 2006, para. 11; *Karemera et al.*, Decision on Defence Motions to Exclude Testimony of Professor André Guichaoua (TC), 20 April 2006, para. 8; *Karemera et al.*, Decision on the Defence Oral Motions for Exclusion of XBM's Testimony, for Sanctions against the Prosecution and Exclusion of Evidence outside the Scope of the Indictment (TC), 19 October 2006, para. 6.

²⁷ *Karemera et al.*, Decision on Joseph Nzirorera's Second Motion to Exclude the Testimony of Witness AXA and Edouard Karemera's Motion to Recall the Witness, 4 March 2008, para. 19.



24. Adjournment of the trial, which would compromise the expediency of the proceedings, should only be a remedy where the Defence has demonstrated that it would suffer prejudice were the trial to proceed as scheduled. In the present case, the Defence submits that 55 days prior to the commencement of trial, it has received a large number of statements. However, the Chamber considers that a delay of five days in the Defence receiving the statements is not sufficient to warrant adjournment of proceedings, and the Defence has not sufficiently demonstrated that the Accused will suffer prejudice if the trial commences as scheduled on 30 March 2009.

25. Accordingly, the Chamber finds that while the Prosecution delayed in complying with its disclosure obligations under Rule 66 (A) (ii), the Defence has not demonstrated prejudice to the Accused warranting either the exclusion of evidence, or adjournment of the trial.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Defence Motion in part with respect to the request to order that the Prosecution is in violation of its disclosure obligations under Rule 66 (A) (ii);

ORDERS that the Prosecution conduct a thorough and diligent review of the materials in its possession with a view to ensuring full compliance with its disclosure obligations under Rule 66 (A) (i);

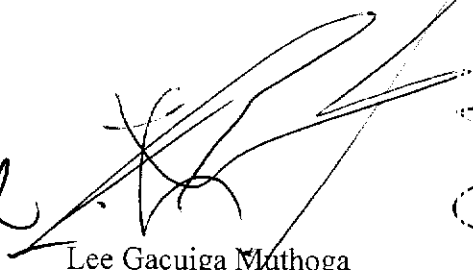
ORDERS that the Prosecutor certify, in writing, that such a search has been conducted, and that all disclosures have been made, in accordance with Rules 66 (A) (ii) of the Rules no later than 9:30 a.m. 6 March 2009; and

DENIES the Defence Motion in all other respects.

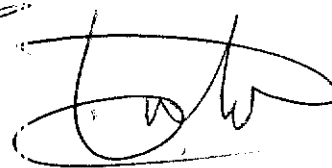
Arusha, 27 February 2009



Khaida Rachid Khan
Presiding Judge



Lee Gacuiga Muthoga
Judge



Emile Francis Short
Judge

[Seal of the Tribunal]

