



UNITED NATIONS
NATIONS UNIES

ICTR-05-82-PT
18-03-2009
(987 - 982)

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 Gacuiga Muthoga
Aydin Sefa Akay

Registrar: Mr. Adama Dieng

Date: 18 March 2009

THE PROSECUTOR
v.
DOMINIQUE NTAWUKULILYAYO

Case No. ICTR-05-82-PT

INTERIM ORDER TO THE PARTIES REGARDING DISCLOSURE

Rules 54 and 66 of the Rules of Procedure and Evidence

Office of the Prosecutor:
Charles Adeogun-Phillips
Ibukunolu Alao Babajide
Thembile Seogoete

Counsel for the Defence:
Francois Roux
Dorothee Le Fraper du Hellen

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INTRODUCTION

1. The trial in this case is scheduled to commence on 30 March 2009. On 30 January 2009, the Prosecution filed disclosures pursuant to Rule 66 (A) (ii) of the Rules of Procedure and Evidence ("Rules"),¹ and an additional statement was disclosed by the Prosecution on 24 February 2009.²
2. On 20 February 2009, the Defence filed a motion alleging violations of the Prosecution's disclosure obligations under Rule 66.³ The Defence requested that, due to these violations, the Chamber order the exclusion of certain evidence, and an adjournment of the trial.
3. On 27 February 2009, the Chamber issued a Decision on the First Defence Motion, in which the Chamber found the Prosecution in violation of its disclosure obligation under Rule 66 (A) (ii) and ordered that the Prosecution:
 - (i) 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) (ii); and
 - (ii) certify, in writing, that such a search has been conducted, and that all disclosures have been made, in accordance with Rule 66 (A) (ii) of the Rules no later than 9:30 a.m. 6 March 2009.⁴
4. On 6 March 2009, the Prosecution provided certification in relation to Rule 66 (A) (i) instead of sub-Rule (A) (ii).⁵ The Chamber therefore issued a further order for the Prosecution to comply with its Order of 27 February 2009 by 11 March 2009.⁶ The Prosecution filed the required certification on 12 March 2009.⁷
5. In addition, on 4 and 6 March 2009, the Prosecution filed a large number of disclosures indicating that the disclosures were made pursuant to Rules 66 (A) and (B).

¹ Rule 66 (A) (ii) provides that 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.

² *Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-PT, Confidential Disclosure of 24 February 2009.

³ *Ntawukulilyayo*, "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 ("First Defence Motion").

⁴ *Ntawukulilyayo*, 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' ("Order of 27 February 2009")

⁵ *Ntawukulilyayo*, Prosecutor's Certification in Respect of Rule 66 Disclosure, 6 March 2009, paras. 3 and 5.

⁶ *Ntawukulilyayo*, Order for the Prosecutor to Comply with the Chamber's Order of 27 February 2009, 9 March 2009.

⁷ *Ntawukulilyayo*, Prosecutor's Certification in Respect of Rule 66 Disclosure, though dated 11 March 2009, filed on 12 March 2009.



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6. On 11 March 2009, the Defence filed a Motion alleging, among other things, breach of the Prosecution's disclosure obligations under Rule 66 (A) (ii) and requesting that the Chamber order that the evidence of those witnesses, whose statements were disclosed after 6 March 2009, be excluded.⁸

7. The Prosecution responded to the Motion on 17 March 2009.⁹

DISCUSSION

Disclosure under Rule 66 (A) (ii)

8. 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.

9. 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.¹⁰ The Prosecutor must disclose previous statements of all Prosecution witnesses, in whatever form, to the Defence.¹¹ 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.¹²

10. 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

⁸ *Ntawukulilyayo*, "Requete en Urgence de la Defense en Rejet des Nouvelles Declarations Produites ou Annoncees et non Encore Produites par le Procureur en Dehors des Delais Prevus par l'Article 66 (A) (ii) de Reglement de Procedure et de Preuve", 11 March 2009 ("Motion").

⁹ *Ntawukulilyayo*, Prosecution's Response to 'Requete en Urgence de la Defense en Rejet des Nouvelles Declarations Produites ou Annoncees et non Encore Produites par le Procureur en Dehors des Delais Prevus par l'Article 66 (A) (ii) de Reglement de Procedure et de Preuve', 17 March 2009 ("Prosecution Response").

¹⁰ *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. 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.).

¹¹ *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).

¹² *Bizimungu et al.*, Strict Compliance Decision, para. 8; *Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-2007-91-PT, Decision on Defence Motions for Disclosure under Rules 66 and 68 of the Rules of Procedure and Evidence, 22 December 2008 ("*Nshogoza* Decision"), para. 22.



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which are not accessible to it.¹³ In addition, the Prosecution is presumed to discharge its obligations under Rule 66 (A) (ii) in good faith.¹⁴

11. With regard to the 60 day time limit for disclosure prescribed by sub-Rule (A) (ii), it is noted that early disclosure of redacted witness statements is encouraged.¹⁵ The obligation of disclosure is an ongoing one, and the deadline under Rule 66 (A) (ii) is to be interpreted as a final date for disclosure, with the expectation that the Prosecution will make disclosure prior to this date if possible.¹⁶

12. 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.¹⁷ Rule 66 (A) (ii) must be read in light of the accused's right to have adequate time and facilities for the preparation of his defence in accordance with Article 20 (4) (b) of the Statute.

13. 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.¹⁸ An accused must demonstrate that he has suffered a degree of prejudice that would justify the extreme remedy of excluding a Prosecution witnesses' testimony.¹⁹

¹³ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph 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; and *Nshogoza* Decision, para. 23.

¹⁴ *Karemera et al.*, Decision on Joseph 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.

¹⁵ *Prosecutor v. Bisengimana*, Case No. ICTR-2000-60-I, Decision on Bisengimana's Motion for Disclosure of Materials (Rule 66 (A) (i)), 28 March 2003 ("*Bisengimana* Decision"), para. 9; *Prosecutor v. Nyiramasuhuko, Decision on Defence Motion for Disclosure of Evidence*, 1 November 2000, para. 39.

¹⁶ *Bisengimana* Decision, para. 9.

¹⁷ *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.

¹⁸ *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.

¹⁹ *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.



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Request to Exclude Evidence due to the Prosecution's Late Disclosure

14. The Chamber notes that on 30 January 2009, one day after the 60 day time limit, the Prosecution disclosed a CD containing statements and indicated that such disclosure was made pursuant to Rule 66 (A).²⁰ The Chamber further notes the Prosecution submission that some of these statements were disclosed to the Defence on 10 June 2008, as part of the Rule 66 (A) (i) material supporting the Indictment.²¹ On 24 February 2009, the Prosecution made an additional late disclosure of a Rule 66 (A) (ii) statement.²² Furthermore, following the Order of 27 February 2009, the Prosecution made further late disclosures of Rule 66 (A) (ii) material on 4 and 6 March 2009, which consist of over 700 pages.²³

15. The Defence submits that the late disclosure of Rule 66 (A) (ii) statements causes the Accused prejudice and does not allow him adequate time to prepare his defence. The Defence request is for an order to exclude the evidence of witnesses whose statements were disclosed after 6 March 2009, the deadline set by the Chamber for the Prosecution to provide certification pursuant to the Order of 27 February 2009.

16. The Chamber however notes that the disclosures of 4 and 6 March 2009 were not circulated by the Court Management Section until 9 and 12 March 2009 due to technical problems with the Tribunal's server. The Prosecution therefore did not file any disclosures after 6 March 2009.

17. The Chamber nonetheless considers that, pursuant to its obligation under Articles 19 and 20 of the Statute to ensure a fair and expeditious trial and to ensure that the rights of the Accused are respected, the Chamber must determine whether the Accused's right to have adequate time to prepare his defence has been affected by the Prosecution's late disclosures, which date back to 30 January 2009.

18. In view of the hundreds of pages which have been disclosed by the Prosecution after the 60 day time limit, and noting that the trial is scheduled to commence in 12 days, the Chamber considers it necessary to direct the Parties to urgently collaborate and provide further information to the Chamber with regard to all Rule 66 (A) (ii) disclosures made to date. Following receipt of this information, the Chamber will decide whether the Accused's right to adequate time to prepare his defence has been adversely affected by the late disclosures, and if necessary, determine the appropriate remedy.

²⁰ The Prosecution did not specify whether the disclosures were made pursuant to sub-Rule (A) (i) or (ii).

²¹ Prosecution Response, para. 2. Rule 66 (A) (i) provides that the Prosecution shall disclose to the Defence, 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.

²² Ntawukulilyayo, Confidential Disclosure, 24 February 2009.

²³ Ntawukulilyayo, Confidential Disclosures Parts 1 to 4 made on 4 March 2009, and Confidential Disclosures Parts 1 to 2 made on 6 March 2009.



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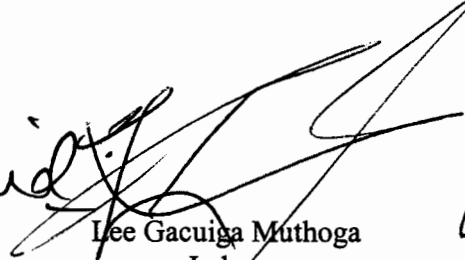
FOR THE ABOVE REASONS, THE CHAMBER

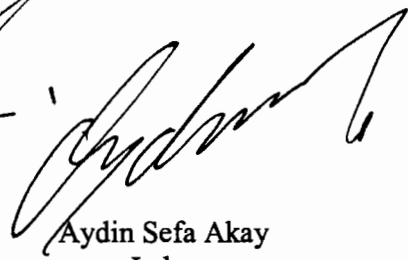
ORDERS that the Parties immediately, and in any case, no later than 9.30 a.m. on 23 March 2009, collaborate and provide the Chamber with a joint table which:

- (i) lists the Prosecution witnesses, with pseudonyms where relevant;
- (ii) identifies the Rule 66 (A) (ii) material disclosed in respect of each witness, with the dates on which those disclosures were made; and
- (iii) states whether the Parties agree on the dates of the disclosures, and whether they agree that the disclosed material falls within Rule 66 (A) (ii).

Arusha, 18 March 2009


Khalida Rachid Khan
Presiding Judge


Lee Gacuiya Muthoga
Judge


Aydin Sefa Akay
Judge

