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ICTR-98-44D-T
19-05-2010
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

4346
LWAH

OR: ENG

TRIAL CHAMBER III

Before Judges: Solomy Balungi Bossa, Presiding
Bakhtiyar Tuzmukhamedov
Mparany Rajohnson

Registrar: Adama Dieng

Date: 19 May 2010

THE PROSECUTOR

v.

Callixte NZABONIMANA
Case No. ICTR-98-44D-T

JUDICIAL RECORDS/ARCHIVES
2010 MAY 19 3:14
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**DECISION ON 3RD MOTION OF DEFENDANT NZABONIMANA FOR DISCLOSURE
OF EVIDENCE**

(Rules 54, 66, 68 and 73 of the Rules of Procedure and Evidence)

Office of the Prosecutor

Paul Ng'arua
Memory Maposa
Simba Mawere
Ndeye Marie Ka
Mary Diana Karanja

Defence Counsel

Vincent Courcelle-Labrousse
Philippe Larochelle

INTRODUCTION

1. On 9 and 10 December 2010, the Trial Chamber conducted a deposition of witness Straton Sibomana¹ in Kigali, Rwanda, before Presiding Officer Mparany Rajohnson (“the Deposition”), pursuant to Rule 71 of the Rules of Procedure and Evidence (“Rules”).
2. During the second day of the Deposition,² the Prosecutor tendered two pieces of evidence: a written summary of Mr. Sibomana’s conviction before the national Gacaca court of Rwanda,³ and a DVD video capturing a portion of his proceedings before that court,⁴ of which certain excerpts⁵ were played before the Trial Chamber during cross-examination.⁶ Both documents were admitted into evidence as Exhibits P-16⁷ and P-17,⁸ respectively.
3. In a letter dated 10 March 2010 and communicated via email to the Prosecution on the same date, the Defence asserted that it had conducted an analysis of Exhibit P-17 and reached the conclusion that the video was the third in a set of 3 DVDs, and requested that the Prosecution disclose the remaining two DVDs.⁹ The Prosecution did not respond to this correspondence, and claims this was due to administrative oversight.¹⁰
4. On 8 April 2010, the Defence filed the instant Motion,¹¹ seeking “full and integral copies of both documents”, which, the Defence contends, the Prosecution has failed to disclose to the Defence.¹²
5. On 13 April 2010, the Prosecution filed a Response to the Defence Motion.¹³

¹ Although Mr. Sibomana was originally assigned the pseudonym RW-42 as a protected witness, he ultimately elected to renounce his protective measures and testify under his actual name, in open session.

² See Transcripts of Deposition of Straton Sibomana, 10 December 2009, in English and French (“English Transcript” and “French Transcript”, respectively).

³ English Transcript, p. 2, ll. 31-35; French Transcript, p. 3, ll. 14-21.

⁴ English Transcript, p. 31, ll. 34-35; French Transcript, p. 40, ll. 28-29.

⁵ English Transcript, p. 34, ll. 11-13; French Transcript, p. 43, ll. 18-20.

⁶ English Transcript, p. 32, l. 30 *et seq.*; French Transcript, p. 42, l. 1 *et seq.*

⁷ English Transcript, p. 1, ll. 21-32 and p. 6, ll. 13-20; French Transcript p. 1, l. 33 – p. 2, l. 3 and p. 8, ll. 1-9.

⁸ English Transcript, p. 50, ll. 2-5; French Transcript p. 63, ll. 18-30.

⁹ See Annex “C” to Motion, *infra* fn 11.

¹⁰ See Response, *infra* fn 13, para. 29.

¹¹ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Confidential 3rd Motion of Defendant Nzabonimana for Disclosure of Evidence, 8 April 2010 (“Motion”).

¹² Motion, para. 2.

¹³ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Prosecutor’s Response to Nzabonimana’s 3rd Motion for Disclosure of Evidence, 13 April 2010 (“Response”).

SUBMISSIONS OF THE PARTIES

Motion

6. The Defence advances two central arguments in its Motion: 1) that the Prosecution made binding undertakings before the Trial Chamber at the time it filed Exhibits P-16 and P-17 that it would communicate, in due course, “full and integral copies of both documents, which on their face, were incomplete;”¹⁴ and 2) that in any event, the Prosecution is under an obligation to disclose the documents sought by the Defence pursuant to Rules 66 (A) (ii) and 68 (A).¹⁵

7. With respect to the undertakings alleged in the Motion, the Defence, citing the French Transcript, asserts that when the Prosecution tendered Exhibit P-16, it undertook to provide “the missing pages of that document, which was page number 5 of a bigger document”.¹⁶ With respect to Exhibit P-17, the Defence asserts that the Prosecution “repeated on several occasions”¹⁷ an undertaking to convey to the Defence “the entirety”¹⁸ or an “integral copy”¹⁹ of the video, the scope of which the Defence submits encompasses “videos that were taken during the Gacaca trial of Straton Sibomana, on the following dates: A) Trial in the first instance between 5 and 11 June 2007; B) First trial in Appeal in September 2007; C) Second trial in Appeal in November 2007”.²⁰ The Defence asserts that the Prosecution’s undertaking obliges it to obtain these materials from the Rwandan authorities—if they are not already in the possession of the Prosecution—and to disclose them to Defence on an urgent basis.

8. Regarding the disclosure obligations allegedly arising from Rules 66 (A) (ii) and 68 (A), the Defence avers that the material sought is clearly identified, and that the Defence enjoys a fundamental right to properly cross-examine Prosecution witnesses with respect to any prior inconsistent statements or prior criminal activity in order to assess the credibility of those witnesses, which is a factor that must be taken into account by a Trial Chamber as potentially exculpatory.²¹ The Defence asserts that the Prosecution is aware of the material the Defence seeks, and argues that the Rules impose an obligation upon

¹⁴ Motion, para. 2.

¹⁵ Motion, paras. 20-21.

¹⁶ Motion, para. 3.

¹⁷ Motion, para. 6.

¹⁸ Motion, para. 4.

¹⁹ Motion, para. 6.

²⁰ Motion, para. 19.

²¹ Motion, paras. 22-28.

the Prosecution to seek out and obtain the sought-after materials from the relevant Rwandan authorities in order to disclose them to the Defence.²²

Response

9. The Prosecution denies having made any undertakings to produce the allegedly missing pages from Exhibits P-16.²³ It further denies having undertaken to disclose the remaining series of videos relating to the court proceedings of Straton Sibomana, of which Exhibit P-17 was apparently one instalment.²⁴ Rather, the Prosecution maintains that it only promised to produce the entirety of the specific DVD of which small excerpts were screened during the Deposition,²⁵ which it has indeed disclosed.²⁶

10. The Prosecution also denies having violated its disclosure obligations imposed by Rules 66 (A) (ii) and 68 (A) by not providing the material sought by the Defence in its Motion.²⁷ The Prosecution submits that it is “trite law” that the Prosecution is only obliged to disclose what is in its actual possession,²⁸ and asserts that it does not have in its possession the alleged missing pages from Exhibit P-16²⁹ or any other videos related to the proceedings that were the subject of Exhibit P-17,³⁰ because it has disclosed what was in its possession “with all due expedience”.³¹ In conclusion, the Prosecution maintains that because it does not have in its possession or control any of the material sought by the Defence,³² it is under no obligation to search for and disclose such materials,³³ and reminds the Defence it has an obligation to conduct its own investigations.³⁴

²² Motion, paras. 28-35.

²³ Response, para. 13.

²⁴ Response, paras. 17, 19-21.

²⁵ Response, para. 17.

²⁶ See Annexes “A” and “C” to Motion.

²⁷ Response, paras. 5-7, 23.

²⁸ Response, paras. 8-9, 14.

²⁹ Response, para. 14.

³⁰ Response, para. 22.

³¹ Response, para. 25.

³² Response, paras. 14, 22, 26.

³³ Response, paras. 25, 27.

³⁴ Response, paras. 22, 24.

DELIBERATIONS

Preliminary Matter

11. As a preliminary matter, the Trial Chamber notes that the Defence labelled the instant Motion as “Confidential”. However, the Trial Chamber recalls that Straton Sibomana elected to renounce his status as a protected witness and testify in open session under his own name. Moreover, while certain brief portions of the Deposition were conducted in closed session in order to safeguard the identify of other protected witnesses, the Chamber finds that nothing in the ensuing legal analysis would possibly reveal any of their personal particulars, nor those of any other protected witness. For these reasons, the Chamber finds no basis to render a confidential Decision with respect to the instant Motion, and consequently the instant Decision will be rendered publicly.

Applicable Law

12. Rule 66 (A) (ii) states that the Prosecutor shall disclose to the Defence

...[n]o 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; upon good cause shown a Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the Defence within a prescribed time.

The jurisprudence of this Tribunal suggests that Rule 66 (A) (ii) does not distinguish between statements taken by the Office of the Prosecutor at this Tribunal and those taken by national authorities in the course of other judicial proceedings involving a witness, and that no distinction should be drawn between the form in which these statements exist.³⁵ However, as the Appeals Chamber has affirmed, it is also the well-established jurisprudence at this Tribunal with respect to Rule 66 (A) (ii) that “something which is not in the possession of or accessible to the Prosecution cannot be subject to disclosure: *nemo tenetur ad impossibile* (no one is bound to an impossibility).”³⁶ Thus, when the Prosecution submits that it does not have custody or control of the sought-after statements and where the Defence fails to bring any *prima facie* evidence to the contrary, the Chamber must dismiss the Defence request.³⁷

13. Rule 68 (A) states:

³⁵ *Prosecutor v. Nyiramasuhuko et al.*, ICTR-97-21-T, Decision on the Defence Motion for 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, 18 September 2001 (“*Nyiramasuhuko*”), paras. 6, 8.

³⁶ *Niyitegeka v. Prosecutor*, ICTR-96-14-A, Judgement, 9 July 2004 (“*Niyitegeka*”), para. 35.

³⁷ *Nyiramasuhuko*, para. 9.

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.

The Trial Chamber recalls that the principle of *nemo tenetur ad impossibile* applies equally to Rule 68 (A).³⁸ Moreover, it has been well-established by the Appeals Chamber of this Tribunal that the duty to disclose exculpatory material is a fact-based determination that is the responsibility of the Prosecution,³⁹ and that a Trial Chamber is entitled to assume that the Prosecution is acting in good faith in carrying out this function.⁴⁰ If the Defence wishes to rebut this assumption and demonstrate that the Prosecution is in breach of its disclosure obligations under Rule 68 (A), it must: 1) identify the material sought with requisite specificity; 2) present a *prima facie* showing of its probable exculpatory nature; and 3) prove that the material requested is in the custody or under the control of the Prosecution.⁴¹ Moreover, the Prosecution may be relieved of its Rule 68 obligation if the existence of relevant exculpatory material is known to the Defence and if it is reasonably accessible through the exercise of due diligence, and the onus lies on the Defence to demonstrate that the material sought was not reasonably accessible.⁴²

Analysis

Undertakings by Prosecution

14. The Trial Chamber considers that before any analysis regarding whether the Prosecution has violated its disclosure obligations under the Rules can be conducted, the Chamber must first determine whether the undertakings alleged by the Defence are supported by the evidentiary record. This is because any undertaking made by an advocate before this Tribunal is binding on that party, even if such undertaking goes above and beyond what is required by the disclosure obligations imposed by the Rules.⁴³

³⁸ *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, Decision on Callixte Nzabonimana's Motion for an Order Concerning Disclosure of Gacaca and Judicial Material Relating to Prosecution Witnesses, 29 October 2009, para. 19.

³⁹ *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73.13, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion", 14 May 2008 ("*Karemera Rule 68 Appeal*"), para. 9; *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006 ("*Karemera Interlocutory Appeal*"), para. 16; *Prosecutor v. Nahimana*, ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006 ("*Nahimana*"), para. 33.

⁴⁰ *Karemera Interlocutory Appeal*, para. 17. See also *Nahimana*, para. 34, where the Appeals Chamber likewise states that it too will assume that the Prosecution is acting in good faith in carrying out its disclosure obligation.

⁴¹ *Karemera Rule 68 Appeal*, para 9; *Nahimana*, para. 34; *Karemera Interlocutory Appeal*, para. 13.

⁴² *Nahimana*, para. 33.

⁴³ See e.g., *Prosecutor v. Niyitigeka*, ICTR-96-14-T, Decision on Two Defence Motions Pursuant to, *Inter Alia*, Rule 5 of the Rules and the Prosecutor's Motion for Extension of Time to File the Modified Amended Indictment

15. At the outset of this analysis, the Trial Chamber recalls that the Deposition was conducted for the Prosecution by Mr. Paul Ng'arua, who conducted the entire the Deposition in English. Therefore, insofar as any ambiguity or discrepancy between the French and English transcripts might arise, the Trial Chamber considers the English Transcript to be the authentic record as to whether any statements made by the Prosecution can properly be construed as undertakings.
16. Having considered the above and having closely scrutinized the record, the Trial Chamber makes the following observations. First, when requested by the Defence to provide "the entire document"⁴⁴ for Exhibit P-16, and when the Presiding Officer explicitly inquired whether it was possible for the Prosecution to "supply the rest of the part of that document",⁴⁵ the Chamber observes that the Prosecution responded as follows:

But since we did not refer to the other parts of the document, I don't think it would be appropriate at this stage to admit it with the rest of the document so that he [i.e. the Defence] may use it for his own purposes later, but for now that is the official document that we have in respect to this charge.⁴⁶

The Trial Chamber does not consider such a response to constitute a binding undertaking on behalf of the Prosecution to supply the pages requested by the Defence. Second, the Chamber observes with respect to Exhibit P-17 that it is clear from both the English⁴⁷ and

Pursuant to the Trial Chamber II Order of 20 November 2000 / Warning to the Prosecutor's Counsel Pursuant to Rule 46(A), 27 February 2001 (noting at para. 46 "the Prosecutor's undertaking to go beyond her obligations under Rule 66(B)" by providing to the Defence documents it had unsuccessfully sought "in Rwanda and elsewhere", and subsequently directing, in its final disposition, that the Prosecutor "fully comply with the Statute and the Rules, and to make full and frank disclosure of all evidence she has undertaken to disclose.")

⁴⁴ English Transcript, p. 3, ll. 1-3. In the French Transcript, the relevant portion reads, at p. 3, ll. 27-28: "Le coin extérieur droit, il est marqué que c'est la page 5. Donc, je crois qu'il est souhaitable que nous ayons l'intégralité du document et non seulement les extraits".

⁴⁵ English Transcript, p. 3, ll. 5-7. The Trial Chamber notes that the Presiding Officer spoke in French, and thus the official record of his request is noted at p. 3, ll. 30-33 of the French Transcript as follows: "Monsieur le Procureur, vous avez entendu la demande de la Défense. Est-ce que vous pouvez donc effectivement venir également présenter les quatre dernières pages de ce document, pour voir également ce dont il retourne."

⁴⁶ English Transcript, p. 3, ll. 9-11.

⁴⁷ English Transcript, p. 32, ll. 2-22: "MR. LAROCHELLE: ...I have never received a copy of that DVD. I was told there was only one copy and I did not get it. So what is the proper situation, Mr. Prosecutor? MR. NG'ARUA: He is absolutely right. I confess; I misspoke. We, indeed, told him that we didn't have a spare copy and as soon as we get it, we will let him have it. Thank you. MR. PRESIDENT: Defence Counsel, I hope what you said does not constitute an objection to getting this video screened? Would you like to be patient for the video to be – a copy to be done? And perhaps Defence Counsel says it is unfortunate that he has not been given the opportunity to look at this video before, but – so he – does – he has not physically been provided with the – with this video. MR. LAROCHELLE: And the Prosecutor is about to screen a carefully selected script of that video. But since the Prosecutor – we insisted that this video should be given to us from the Gacaca. On several occasions we asked for this, but we did not receive it. We wanted it to be – we just deplore the manner in which the Prosecutor manages his disclosure of evidence. Thank you. MR. PRESIDENT: The Chamber has taken note of your comments. At

French⁴⁸ Transcripts that the Defence and the Presiding Officer questioned the Prosecution about its failure to disclose a specific, single DVD from which the Prosecution was proposing to show excerpts to the witness. The Prosecution then made the ensuing undertaking:

...As I had told my learned friend, this video was only availed to us yesterday and we are not even allowed to make a copy of this. As soon as we are able to, we would be able to give to my learned friend. We explained it to him and he had no objection. It is unfortunate. We were expecting him actually to disclose it to us because this is his witness and there was nothing further we could be able to do.⁴⁹

17. For the foregoing reasons, the Trial Chamber concludes that the Defence submission that the Prosecution made binding undertakings to disclose more material concerning Exhibits P-16 and P-17 to be unsupported by the evidentiary record.

Disclosure under Rule 66 (A) (ii)

18. With respect to Exhibit P-16, the Trial Chamber concludes that this document does not constitute a “statement” falling under the purview of Rule 66 (A) (ii). As the record clearly demonstrates, it is a summary of Mr. Sibomana’s Gacaca proceedings produced by the Rwandan authorities.⁵⁰ Therefore, no disclosure obligation can be imposed upon the Prosecution with respect to any alleged missing pages from that document under this provision of the Rules.

the same time, Prosecutor, is it true that nobody else had seen this DVD before? Or would you like to give some explanation about this video to the audience here?” (emphasis added)

⁴⁸ French Transcript, p. 40, l. 30 – p. 41, l. 30: “M. LE PRÉSIDENT [sic]: Je n’ai jamais reçu de copie de ce DVD. Jusqu’à ce que le dossier soit clair, on m’a dit qu’il n’y en avait qu’une seule et que je ne pouvais pas en avoir. Qu’en est-il exactement, Monsieur le Procureur? M. NG’ARUA: Je crois que cette fois-ci, mon confrère de la Défense a parfaitement raison. J’avoue, nous nous sommes entretenus, et je lui avais effectivement dit que nous «n’avons» pas de copie en réserve, mais que dès que nous en aurons, je ne manquerai pas de le lui communiquer. Il a parfaitement raison cette fois-ci – au temps pour moi. M. LE PRÉSIDENT: Maître, quand vous avez déclaré que vous ne ferez pas objection, est-ce que nous pouvons également donc attendre quelque temps la livraison de la copie de ce DVD? Me LAROCHELLE: Je maintiens que je ne ferais pas objection et qu’on peut jouer le DVD, je trouve simplement déplorable de ne pas avoir pu voir son intégralité, puisque, là, on va montrer un court extrait, je n’aurais jamais l’opportunité de montrer d’autres extraits de «ce» vidéo, qui, peut-être, sont pertinents pour le témoignage de Monsieur Sibomana. Puisque je n’ai jamais eu physiquement possession de ce DVD; et là, on va jouer un extrait soigneusement choisi, sans que je puisse savoir de quoi il retourne. Je tiens à simplement déplorer la manière dont la chose s’est faite, surtout... — et je tiens à ce que ça soit dans le dossier — surtout compte tenu de l’insistance avec laquelle nous avons demandé ces dossiers *Gacaca* au procureur depuis bien avant le début de ce procès. Donc, dans ces circonstances, alors que nous en avons fait à maintes reprises la demande répétée par toutes les façons, qu’on le joue de cette façon, en extraits, sans qu’on puisse voir l’intégralité [sic] du document, nous tenons simplement à déplorer la façon dont le Procureur gère son devoir de divulgation dans ce procès, encore une fois. Merci. M. LE PRÉSIDENT: Donc la Chambre prend acte de vos doléances et requêtes. Est-ce qu’en même temps, Monsieur Procureur, puisque personne n’avait vu auparavant, donc, ce DVD, est-ce que vous pourriez en même temps faire des commentaires pour que l’on discute, expliquer au moins quelles sont les choses que... les séquences que vous allez faire présenter?” (emphasis added)

⁴⁹ English Transcript, p. 32 ll. 24-28. (emphasis added)

⁵⁰ English Transcript, p. 2, ll. 31-35; French Transcript, p. 3, ll. 14-21.

19. Regarding Exhibit P-17, the Trial Chamber notes first and foremost, that Straton Sibomana is a Defence witness, not a Prosecution witness. Therefore, insofar as the Defence seeks the Prosecution to disclose videos pertaining to his Gacaca proceedings, Rule 66 (A) (ii) is completely unavailing. However, the Chamber observes that the Defence has provided an evidentiary foundation to suggest that these same proceedings involved Prosecution witnesses CNAE and CNAL.⁵¹ Therefore, the Chamber finds, in light of the jurisprudence cited above, that any statements captured on video by those witnesses during the course of such proceedings constitute statements for the purposes of Rule 66 (A) (ii). However, the Chamber recalls that the Prosecution states that it has disclosed all of the video material pertaining to Exhibit P-17 in its custody or control,⁵² and the Defence has failed to adduce any *prima facie* evidence to the contrary. Therefore, the Defence has failed to defeat the assumption that the Prosecution has carried out its disclosure obligation in good faith.
20. For the foregoing reasons, the Trial Chamber concludes that the Defence is not entitled to compel the Prosecution to disclose the materials it seeks regarding Exhibits P-16 and P-17 under Rule 66 (A) (ii).

Disclosure under Rule 68 (A)

21. With respect to Exhibit P-16, the Trial Chamber finds that the Defence has not advanced any *prima facie* argument in its Motion as to how the remaining pages it alleges exist would probably be exculpatory for the Accused, nor has it adduced any evidence—let alone proven—that the allegedly missing pages sought are under the custody or control of the Prosecution. For these reasons, the Defence has failed to demonstrate that the Prosecution has been derelict in the conduct of its disclosure obligation under Rule 68 (A).
22. As for Exhibit P-17, the Trial Chamber observes that the Defence has demonstrated the material it seeks with requisite specificity and has made a *prima facie* showing of its probable exculpatory nature, as it may contain contradictory statements of Prosecution witnesses or evidence of their prior criminal histories. However, as previously mentioned, the Prosecution asserts having disclosed all materials in its possession, and the Defence has provided no evidence to the contrary. Therefore, the Trial Chamber

⁵¹ Motion, para. 17 and Annex “B” to Motion.

⁵² Response, paras. 22, 25-26.


relies on the assumption that the Prosecution has conducted its disclosure function in good faith, and rejects any allegation that the Prosecution has breached its disclosure obligation with respect to materials under its custody and control. Thus, the relief sought by the Defence under Rule 68 (A) must be denied.

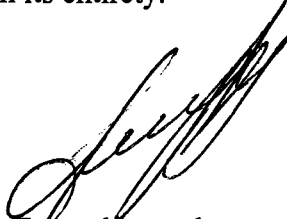
23. Finally, while the Trial Chamber is not persuaded that the Defence is entitled to the relief it seeks through the instant Motion, it recalls that any evidence filed before the Chamber that may, during the final appraisal of all evidence tendered during these proceedings, be viewed by the Chamber as incomplete is a factor that will be given due consideration when determining the probative value of such materials.


FOR THESE REASONS, THE CHAMBER

DENIES the Defence Motion in its entirety.

Arusha, 19 May 2010, done in English.


Solomy Balungi Bossa
Presiding Judge


Bakhtiyar Tuzmukhamedov
Judge


Mparany Rajohnson
Judge

[Seal of the Tribunal]

