



ICTR-00-55C-PT
06-01-2011
(5538-5534)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER III

Before Judges: Lee Gacuga Muthoga, *Presiding*
Seon Ki Park
Robert Fremr

Registrar: Adama Dieng

Date: 6 January 2011

THE PROSECUTOR

v.

Ildéphonse NIZEYIMANA

CASE NO. ICTR-2000-55C-PT

JUDICIAL DEPARTMENT
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**DECISION ON DEFENCE URGENT PRE-TRIAL MOTION FOR DISCLOSURE
UNDER RULE 66(A)(ii) OF THE RULES OF PROCEDURE AND EVIDENCE**

Rules 66(A)(ii) and 73 of the Rules of Procedure and Evidence

Office of the Prosecution:

Drew White
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Sparz

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INTRODUCTION

1. The trial in this case is scheduled to commence on 17 January 2011.¹
2. On 6 December 2010, the Defence filed an urgent pre-trial motion for disclosure of witness statements pursuant to Rule 66(A)(ii) of the Rules of Procedure and Evidence (“the Rules”).² The Defence submits that it is reasonable to assume that the Prosecution has met with its witnesses within the past year and that the Prosecution took notes during these interviews.³ The Defence therefore requests that the Trial Chamber “order the Prosecutor to disclose all statements as yet undisclosed, either oral or written, including interview notes and confirmatory statements for all trial witnesses including [W]itness ZBH.”⁴
3. On 13 December 2010, the Prosecution filed a response to the Defence motion, objecting to the Defence’s characterisation of Prosecution interview notes as “witness statements” subject to the disclosure obligations of Rule 66(A)(ii).⁵ The Prosecution further contends that the logic of the Defence motion fails because “it relies on an unstated and unproven premise that all ‘confirmatory’ or ‘review’ interviews produce disclosable witness statements.”⁶ The Prosecution submits that the Defence motion “is an unmeritorious attempt to delay the commencement of the hearing of evidence against the Accused, and is yet another example of the ongoing Defence strategy to both delay the trial and attribute blame to the Prosecution for the Defence strategy of delay.”⁷
4. On 14 December 2010, the Defence filed a reply to the Prosecution response, arguing that it does not wish to know how the Prosecution evaluates its witnesses but that “[i]nterview notes recording a witness’ recollection of events in question must be disclosed.”⁸ The Defence reframes its request for relief as follows: “Order the Prosecutor to disclose all statements providing recollections or descriptions of the events as yet undisclosed, either oral

¹ Scheduling Order (TC), 3 November 2010, Order II.

² Urgent Pre-Trial Motion for Disclosure under Rule 66(A)(ii) of the R.P.E., filed on 6 December 2010 (“Motion”).

³ Motion, paras. 3-4.

⁴ Motion, para. 13.

⁵ Prosecution Response to Defence Urgent Pre-Trial Motion for Disclosure under Rule 66(A)(ii) of the R.P.E., filed on 13 December 2010, paras. 10-40 (“Response”).

⁶ Response, para. 7.

⁷ Response, para. 41.

⁸ Reply to Prosecutor’s Response to Urgent Pre-Trial Motion for Disclosure under Rule 66(A)(ii) of the R.P.E., filed on 14 December 2010, para. 13 (“Reply”).

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or written, including interview notes and reconfirmation statements for all trial witness[es], and in particular for [W]itness ZBH.”⁹

5. On 15 December 2010, the Prosecution filed a rejoinder to respond to the modified request for relief in the Defence Reply.¹⁰

DELIBERATIONS

6. Rule 66(A)(ii) of the Rules provides that,

The Prosecution shall disclose to the Defence:

i) ...

ii) 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; 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.

7. The Prosecution’s obligation under Rule 66(A)(ii) extends to all witness statements in its custody or control or to which it has access¹¹ but not to those that are not in its possession or otherwise accessible to it.¹² The Prosecution is presumed to act in good faith, and the onus is on the Defence to demonstrate that the materials sought are in the possession of the Prosecution and have not yet been disclosed.¹³ It is insufficient for the Defence to merely assert that a greater number of statements should have been disclosed.¹⁴ Trial Chambers have

⁹ Reply, p. 5.

¹⁰ Prosecution Rejoinder to Defence Reply to Prosecution Response to Defence Urgent Pre-Trial Motion for Disclosure under Rule 66(A)(ii) of the R.P.E, filed on 15 December 2010, para. 4.

¹¹ See, e.g., *Prosecutor v. Gatete*, Case No. ICTR-2000-61-PT, Decision on Defence Motions for Disclosure Pursuant to Rule 66(A)(ii) and Commencement of Trial (TC), 13 October 2009, para. 12; *Prosecutor v. 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 ed ses Effects Sur le Calendrier du Proces*’ (TC), 27 February 2009, para. 5; *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 (TC), 11 July 2007, para. 6.

¹² See, e.g., *Gatete*, Decision on Defence Motions for Disclosure Pursuant to Rule 66(A)(ii) and Commencement of Trial (TC), para. 12; *Ntawukulilyayo*, Decision on Defence ‘*Requete en Urgence de la Defense Concernant les Manquements du Procureur a ses Obligations de Communiquer les Pieces ed ses Effects Sur le Calendrier du Proces*’, para. 5; *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, para. 6. See also *Niyitegeka v. Prosecutor*, Case No ICTR-96-14-A, Judgement (AC), 9 July 2004, para. 35 (“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)”).

¹³ See *Ntawukulilyayo*, Decision on Defence ‘*Requete en Urgence de la Defense Concernant les Manquements du Procureur a ses Obligations de Communiquer les Pieces ed ses Effects Sur le Calendrier du Proces*’, para. 14; *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, para. 8.

¹⁴ *Gatete*, Decision on Defence Motions for Disclosure Pursuant to Rule 66(A)(ii) and Commencement of Trial (TC), para. 23; *Ntawukulilyayo*, Decision on Defence ‘*Requete en Urgence de la Defense Concernant les*

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consistently denied requests for disclosure pursuant to Rule 66(A)(ii) where the Defence has failed to demonstrate the existence of the records in question.¹⁵

8. In this case, the Defence postulates that, because many of the witness statements disclosed to the Defence are “very old”, “[c]ertainly such witnesses have been interviewed by Prosecution attorneys and investigators in the past year.”¹⁶ As an example, the Defence points to Witness ZBH, whom the Prosecution acknowledges having met in the past ten months.¹⁷ The Defence further posits that, “surely the Prosecution keeps notes of such meetings.”¹⁸ The Defence contends that, “it would be unlikely, to say the least, that the OTP would go forward with calling those people without meeting with them themselves, taking notes and verifying ... their statements.”¹⁹ The Defence therefore concludes that, in accordance with Rule 66(A)(ii), these interview notes must be disclosed to the Defence at least 60 days before trial.²⁰

9. The Chamber notes that the Defence request is based primarily on a series of assumptions. Indeed, the only concrete information offered in support of the Defence submission that the Prosecution is in breach of its obligations under Rule 66(A)(ii) is the fact that the Prosecution has met with Witness ZBH on at least three occasions.²¹ The Chamber finds that this is insufficient to demonstrate that the materials sought by the Defence exist in the possession of or are accessible to the Prosecution. Accordingly, the Chamber finds that the Defence has failed to satisfy its burden under the jurisprudence of the Tribunal.

Manquements du Procureur a ses Obligations de Communiquer les Pieces ed ses Effects Sur le Calendrier du Proces, para. 14.

¹⁵ *Gatete*, Decision on Defence Motions for Disclosure Pursuant to Rule 66(A)(ii) and Commencement of Trial (TC), para. 24; *Ntawukulilyayo*, Decision on Defence ‘*Requete en Urgence de la Defense Concernant les Manquements du Procureur a ses Obligations de Communiquer les Pieces ed ses Effects Sur le Calendrier du Proces*’, para. 14; *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, para. 8. *See also Niyitegeka*, Judgement (AC), para. 37 (“In the present case, the Appellant has not sufficiently demonstrated that additional records exist that have not been disclosed to the Defence. Without a showing of availability of such records it has not been established that the Prosecution did not fulfil[] its duty to disclose pursuant to Rule 66(A)(ii) of the Rules.”).

¹⁶ Motion, para. 3.

¹⁷ Motion, para. 3. *See also* Response, paras. 6, 43.

¹⁸ Motion, para. 4.

¹⁹ Motion, para. 10.

²⁰ Motion, para. 4.

²¹ Motion, paras. 3, 11.

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FOR THESE REASONS, THE CHAMBER

DENIES the Defence motion.

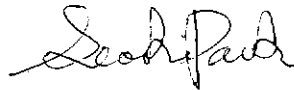
Arusha, 6 January 2011, done in English.

[read and approved by]



Lee Gacuiga Muthoga
Presiding Judge

[absent at the time
of signature]



Seon Ki Park
Judge

[Seal of the Tribunal]



[read and approved by]



Robert Fremr
Judge

[absent at the time
of signature]