



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-00-55C-PT
31-01-2011
C4830-4826

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OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 31 January 2011

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THE PROSECUTOR

v.

Ildephonse NIZEYIMANA

CASE NO. ICTR-00-55C-PT

**DECISION ON URGENT DEFENCE MOTION
FOR DISCLOSURE OF PRIOR STATEMENTS**

Rules 66(A)(ii) and 70 of the Rules of Procedure and Evidence

Office of the Prosecution:
Drew White
Kirsten Gray
Yasmine Chubin
Zahida Virani

Defence Counsel for Ildephonse Nizeyimana:
John Philpot
Cainnech Lussiaa-Berdou
Myriam Bouazdi

INTRODUCTION

1. The trial in this case commenced on 17 January 2011.
2. On 21 January 2011 the Defence team of the Accused, Ildéphonse Nizeyimana, (“Defence” and “the Accused” respectively) filed the “Urgent Defence Motion for Disclosure of Prior Statements” (“Motion”). The Motion highlights certain witnesses’ confirmation that notes were taken during meetings between themselves and individuals affiliated with the Office of the Prosecutor (“Prosecution”).¹ On this basis, relying on Rule 66(A)(ii) of the Rules of Procedure and Evidence (“Rules”), the Defence requests that the Chamber order the Prosecution to review material in its possession and disclose any interview notes with Prosecution witnesses that have not yet been disclosed, after redacting them to remove information protected by Rule 70(A) of the Rules.² The Defence reserves the right to make additional submissions and request additional remedies, depending on the contents of any additional disclosures by the Prosecution.³
3. On 27 January 2011, the Prosecution filed a response to the Motion.⁴ The Prosecution submits that it has already met all of its disclosure obligations under Rule 66 of the Rules.⁵ It asserts that “[t]here is no obligation on a Prosecutor to record pre-trial preparation session either through audio or video recording or written form.”⁶ More specifically, the Prosecution argues, *inter alia*, that the Defence errs by considering Prosecutors’ “notes-to-self”,⁷ which the Prosecution suggests involve “mental impressions and thoughts”,⁸ as witness statements, as such materials are protected from disclosure under Rule 70 of the Rules.⁹ The Prosecution also suggests that not all witness interviews produce disclosable witness statements.¹⁰ The Prosecution specifies that it discloses “relevant new information” when that is provided by witnesses,¹¹ but does not consider itself obligated to “note or record information that has already been disclosed by the Prosecutor.”¹² Finally, the Prosecution asserts that while it

¹ Motion, paras. 9-11.

² Motion, paras. 4-5, p. 8.

³ Motion, p. 8.

⁴ Prosecution Response to Urgent Defence Motion for Disclosure of Prior Statements, filed on 27 January 2011 (“Response”).

⁵ Response, para. 26.

⁶ Response, para. 34.

⁷ Response, para. 14.

⁸ Response, para. 7. *See also* Response, para. 33.

⁹ Response, para. 14.

¹⁰ Response, para. 23.

¹¹ Response, para. 38.

¹² Response, para. 39.



provides notice of “material and necessary information” obtained from witnesses, it does not provide the Defence with “all the information received”.¹³

DELIBERATIONS

Applicable Law

4. The Chamber recalls that Rule 66(A)(ii) of the Rules requires disclosure of “copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial”. The Appeals Chamber has explained that in the context of Rule 66(A)(ii) of the Rules, a witness statement is an “account of a person’s knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime.”¹⁴ More specifically, the Appeals Chamber has noted that “[r]ecords of questions put to witnesses by the Prosecution and the answers given constitute witness statements pursuant to Rule 66(A)(ii) of the Rules”,¹⁵ and that even records of witness interviews which were not prepared in ideal form must still be disclosed.¹⁶ The Appeals Chamber has also held that under Rule 70(A) of the Rules, internal documents prepared by a party, separate from questions put to a witness and his or her answers, are not subject to disclosure.¹⁷

Analysis

5. The Chamber notes that the central issue disputed by the parties is whether information contained in private interview notes, prepared contemporaneously to meetings with witnesses, must be disclosed. As set out in the Niyitegeka Appeal Judgement, if these notes record questions put to a witness and/or answers given on relevant topics, that information must be disclosed.¹⁸ The Niyitegeka Appeal Judgement grants no exception to this obligation in the case of questions and answers that may be repetitive, and the disclosure

¹³ Response, para. 41.

¹⁴ *Prosecutor v. Blaškić*, 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.

The Appeals Chamber was referring to a provision in the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, that is equivalent to Rule 66(A)(ii) of the Rules.

¹⁵ *Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004 (“Niyitegeka Appeal Judgement”), para. 33.

¹⁶ Niyitegeka Appeal Judgement, paras. 31, 32, 35, 36.

¹⁷ Niyitegeka Appeal Judgement, paras. 33, 34.

¹⁸ The Chamber notes that this requirement does not, of course, apply to irrelevant questions such as whether a witness slept well, or is content with logistical arrangements.

obligation spans all relevant responses, not just material that the Prosecution considers particularly “material and necessary”.¹⁹

6. The Chamber observes, however, that just because notes are taken during an interview with a witness does not imply that these notes necessarily contain disclosable material. As the Prosecution correctly argues, notes detailing counsel work product, such as reflections on witnesses’ place within overall trial strategy, need not be disclosed.²⁰ The Chamber also recognises that private notes taken during interviews may involve such extensive discussion of material protected under Rule 70(A) of the Rules that redaction of these notes in preparation for disclosure is impractical. Insofar as this is the case, it is appropriate for the Prosecution to set-out relevant information in a separately disclosed document, rather than redacting and disclosing their private notes.

7. The Defence has not provided any evidence to suggest that the Prosecution’s undisclosed notes contain material that should have been disclosed.²¹ The Chamber reiterates that the Prosecution is presumed to discharge its obligations in good faith,²² and in the absence of evidence to the contrary, the Chamber accepts that the Prosecution has disclosed all the material it is required to.

8. Finally, the Chamber again reiterates to the parties that they must disclose records of all questions put to witnesses and of the answers given, even in cases where such questions and answers are repetitive.



¹⁹ See Niyitegeka Appeal Judgement, paras. 30-36. Cf. Decision on Defence Motion for Disclosure of Exculpatory Evidence, 3 December 2010, para. 5.

²⁰ See Rule 70 of the Rules. Cf. Niyitegeka Appeal Judgement, para. 34.

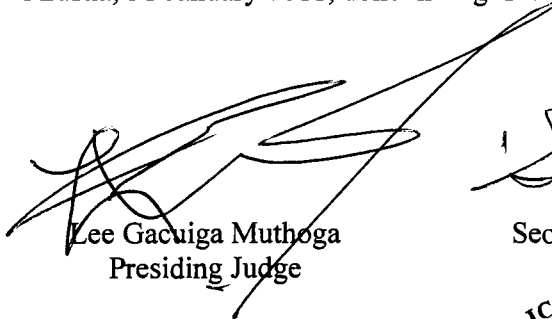
²¹ See Motion, paras. 9-12.

²² See Decision on Defence Urgent Pre-Trial Motion for Disclosure Under Rule 66(A)(ii) of the Rules of Procedure and Evidence, 6 January 2011, para. 7.

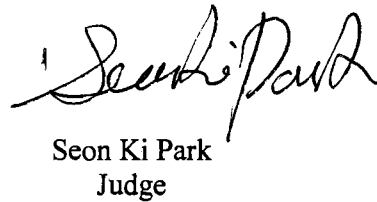
FOR THESE REASONS, THE CHAMBER

DENIES the Motion.

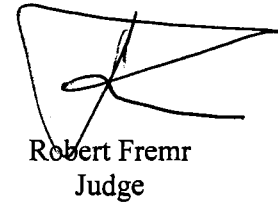
Arusha, 31 January 2011, done in English.



Lee Gacuiga Muthoga
Presiding Judge



Seon Ki Park
Judge



Robert Fremr
Judge

