



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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du

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Solomy Balungi Bossa
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 26 April 2012

ICTR-99-54-T
26th April, 2012
(110051 - 110039)

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

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**DECISION ON DEFENCE MOTION TO DECLARE
THE PROSECUTION IN VIOLATION OF ITS DISCLOSURE OBLIGATIONS**

Office of the Prosecutor

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa and Mparany Rajohnson (the “Chamber”);

BEING SEIZED of the “Defence Motion for the Trial Chamber to Declare the Prosecution in Violation of its Duty to Disclose pursuant to Rule 66(A)(ii) and 67(D) of the Rules of Procedure and Evidence and Defence Motion for the Trial Chamber to Declare the Prosecution in Breach of Disclosing Additional Exculpatory and Other Relevant Material pursuant to Rule 68(A)”, filed confidentially on 17 October 2011 (the “Defence Motion”);

CONSIDERING:

- (a) the “Prosecutor’s Reply to Defence Motion for the Trial Chamber to Declare the Prosecution in Violation of its Duty to Disclose pursuant to Rule 66(A)(ii) and 67(D) of the Rules of Procedure and Evidence and Defence Motion for the Trial Chamber to Declare the Prosecution in Breach of Disclosing Additional Exculpatory and Other Relevant Material pursuant to Rule 68(A)”, filed confidentially on 21 October 2011 (the “Prosecution Response”);
- (b) the “Corrigendum to: Prosecutor’s Reply to Defence Motion for the Trial Chamber to Declare the Prosecution in Violation of its Duty to Disclose pursuant to Rule 66(A)(ii) and 67(D) of the Rules of Procedure and Evidence and Defence Motion for the Trial Chamber to Declare the Prosecution in Breach of Disclosing Additional Exculpatory and Other Relevant Material pursuant to Rule 68(A)”, filed confidentially on 24 October 2011 (the “Prosecution Corrigendum”);
- (c) the “Defence Reply to the Prosecution Response to the Defence Motion for the Trial Chamber to Declare the Prosecution in Violation of its Duty to Disclose pursuant to Rule 66(A)(ii) and 67(D) of the Rules of Procedure and Evidence and Defence Motion for the Trial Chamber to Declare the Prosecution in Breach of Disclosing Additional Exculpatory and Other Relevant Material pursuant to Rule 68(A)”, filed confidentially on 28 October 2011 (the “Defence Reply”);
- (d) the “Prosecutor’s Response to the Defence Reply to the Prosecutor’s Response to the Defence Motion for the Trial Chamber to Declare the Prosecution in Violation of its Duty to Disclose pursuant to Rule 66(A)(ii) and 67(D) of the Rules of Procedure and Evidence and Defence Motion for the Trial Chamber to Declare the Prosecution in Breach of Disclosing Additional Exculpatory and Other Relevant Material pursuant to Rule 68(A)”, filed confidentially on 2 November 2011 (the “Second Prosecution Response”); and
- (e) the “Defence Submissions Regarding the Prosecution ‘Reply’ to the Defence Reply to the Prosecutor’s Response to the Defence Motion for the Trial Chamber to Declare the Prosecution in Violation of its Duty to Disclose

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pursuant to Rule 66(A)(ii) and 67(D) of the Rules of Procedure and Evidence and Defence Motion for the Trial Chamber to Declare the Prosecution in Breach of Disclosing Additional Exculpatory and Other Relevant Material pursuant to Rule 68(A)", filed confidentially on 4 November 2011 (the "Second Defence Reply");

CONSIDERING also the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Defence Motion pursuant to Rules 66, 67, and 68 of the Rules.

INTRODUCTION

1. On 8 September 2009, the Prosecution disclosed documents that it identified as pertaining to Prosecution Witnesses ANAA, ANAP and ANAQ.¹
2. On 22 December 2009, the Prosecution moved the Chamber for leave to vary its witness list, in part, by adding Prosecution Witness ANAT. The Prosecution also disclosed what it identified as a witness statement for Witness ANAT.²
3. On 28 January 2010, the Chamber granted the Prosecution leave to vary its witness list by adding, among others, Witness ANAT. The Chamber also urged the Prosecution to disclose to the Defence any *gacaca* or other records regarding the new witnesses as soon as possible.³
4. Also on 28 January 2010, the Prosecution disclosed what it identified as *gacaca* records pertaining to Witness ANAT.⁴
5. On 3 March 2010, the Prosecution disclosed various translations to the Defence. These translations included some that were identified as being Witness ANAT's statement and six sets of *gacaca* records concerning him.⁵
6. On 19 April 2010, the Prosecution disclosed to the Defence various documents, including some identified as being *gacaca* records of Witness ANAT. The Prosecution also included a "[c]omprehensive" list of disclosures, indicating that this was only the third disclosure concerning Witness ANAT.⁶

¹ See Further disclosure to Ngirabatware, Augustin, 8 September 2009, pp. 1-2.

² Prosecutor's Extremely Urgent Motion for Leave to Vary the List of Witnesses To Be Called and Extension of Witness Protection Orders, 22 December 2009, para. 50, Annex E (witness statement in English).

³ Decision on Prosecution Motion for Leave to Vary its Witness List (TC), 28 January 2010, p. 15.

⁴ Disclosure to Ngirabatware, Augustin (Continuous), 28 January 2010, p. 1.

⁵ Disclosure of translations to Ngirabatware, Augustin (Continuous), 3 March 2010, pp. 1, 3-4.

⁶ Supplemental translation disclosure to Ngirabatware, Augustin, 19 April 2010 ("Prosecution Disclosure of 19 April 2010"), pp. 1-9. The "Comprehensive Prosecution Disclosure List as of 18th of April 2010" stated that the Prosecution disclosed a witness statement in English on 15 December 2009, the French

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7. On 19 and 20 September 2011, during its cross-examination of Defence Witness DWAN-49, the Prosecution put a bundle of four documents to him. The Defence objected on various grounds, including its submission that because these documents appeared to be previous statements of Witness ANAT, the Prosecution had breached its obligations by not disclosing them sooner.⁷

8. On 20 September 2011, the Chamber admitted some of these documents into evidence as Prosecution Exhibits 57 and 58.⁸

SUBMISSIONS OF THE PARTIES

Defence Motion

9. The Defence requests the Chamber to declare that the Prosecution violated its disclosure obligations under Rules 66(A)(ii), 67(D), and 68(A), to exclude Prosecution Exhibit 58 from evidence, and to order the disclosure of a specific broadcast from Radio Afrique No. 1 in its audio and written form and any other exculpatory material relating to the Accused's alibi.⁹

Rules 66(A)(ii) and 67(D)

10. The Defence submits that the Prosecution failed to disclose in a timely manner four statements of Prosecution Witness ANAT, instead seeking to tender them into evidence on 20 September 2011 during the cross-examination of DWAN-49. According to the Defence, this non-disclosure violated Rules 66(A)(ii) and 67(D), as well as the Chamber's "order" of 28 January 2010.¹⁰

11. The Prosecution's failure to disclose these statements prior to trial, in accordance with Rule 66(A)(ii), has prejudiced the Accused. In particular, the Defence submits that the non-disclosure precluded the Defence from cross-examining Witness ANAT concerning the statements. In order to remedy this prejudice, and also in order to avoid "open[ing] the door for the Prosecution to withhold statements" in the future, the Chamber should exclude Prosecution Exhibit 58 from the record.¹¹

translation of that statement on 3 March 2010, and the five *gacaca* records in English and Kinyarwanda that were said to be attached to that day's disclosure. See *id.*, p. 6.

⁷ T. 19 September 2011, pp. 57-81 (CS); T. 20 September 2011, pp. 2-31.

⁸ T. 20 September 2011, pp. 26-28; Prosecution Exhibit 57; Prosecution Exhibit 58.

⁹ Defence Motion, paras. 6, 8, 22, 27, 51-52.

¹⁰ *Id.*, para. 4, 13, 15-16, 19, 21-22. See also *id.*, paras. 9-12, 14-15, 17-18, 20. The Chamber notes that the first statement contains the alleged confession of Prosecution Witness ANAT, and was admitted into evidence as Prosecution Exhibit 58. The second and fourth statements contain what appear to be an order for arrest and two *gacaca* judgements, and were admitted as Prosecution Exhibit 57. The third statement is said to bear K number 0515204. See, for example, Prosecution Exhibit 57A (numbering K0515188 through K0515193, and K 0515199 through K0515200); Prosecution Exhibit 58A (numbering K0515194 through K0515198); Defence Motion, para. 4. See also, for example, T. 19 September 2011, pp. 62-65 (CS) (concerning the fourth document), 76 (CS) (regarding the first document); T. 20 September 2011, pp. 11-12 (regarding the second document), 15 (concerning the third document); Prosecution Exhibit 57(B) (French); Prosecution Exhibit 57(C) (English).

¹¹ Defence Motion, paras. 21-27, 52. See also *id.*, paras. 11-12.

Rule 68(A)

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12. The Defence seeks the disclosure of a Radio Afrique No. 1 audio record and its transcription of 25 April 1994.¹²

13. In addition, the Defence submits that the Prosecution has violated its disclosure obligations under Rule 68(A) by not disclosing this record sooner. The record is potentially exculpatory, according to the Defence, because it corroborates the Accused's alibi that he was in Gabon around 25 April 1994.¹³

Prosecution Response

14. Preliminarily, the Prosecution argues that the Defence Motion amounts to an interlocutory appeal of the Chamber's decision to admit Prosecution Exhibit 58. Because the Defence did not first seek certification to appeal, its interlocutory appeal should be dismissed outright.¹⁴

Rules 66(A)(ii) and 67(D)

15. The Prosecution submits that it did not come into possession of Prosecution Exhibit 58 until after Witness ANAT testified, and therefore could not have disclosed it beforehand. In any event, the Prosecution contends that the issues related to this document only "became live" during DWAN-49's testimony.¹⁵

16. Moreover, according to the Prosecution, the *gacaca* record does not qualify as a "statement" within Rules 66(A)(ii) or 67(D).¹⁶ Even if it did fall under these Rules, the Prosecution "reserves its right to the element of surprise".¹⁷

17. The Prosecution disputes that the Defence suffered any prejudice, as the Defence was able to address the key issues during its cross-examination of Witness ANAT.¹⁸

18. Finally, the Prosecution contends that it has previously disclosed various documents pertaining to Witness ANAT on 8 September 2009, 15 December 2009, 28 January 2010, and 19 April 2010.¹⁹ At least three of these disclosures, according to the Prosecution, were filed officially.²⁰

¹² *Id.*, paras. 37-47, 51-52. See also *id.*, paras. 28-36, 48-49. The Defence identifies the K-numbers of the document it seeks as being K0483486-K0483509. *Id.*, para. 37.

¹³ *Id.*, paras. 8, 41-47, 50, 52. See also *id.*, paras. 48-49.

¹⁴ Prosecution Response, paras. 24-30, 58. See also *id.*, para. 17, n. 9. In light of the Prosecution's submissions concerning certification to appeal, the Chamber understands the Prosecution's discussion of "Rule 72(B)" to apply instead to Rule 73(B). See *id.*, paras. 26-27.

¹⁵ *Id.*, paras. 37-38.

¹⁶ Although the Prosecution identifies "Rule 66(D)" as the applicable rule, the Chamber notes that there is no "Rule 66(D)", and therefore considers from the context that the Prosecution intends to refer to Rule 67(D). See *id.*, para. 44.

¹⁷ *Id.*, paras. 40-41, 44.

¹⁸ *Id.*, paras. 34-35. See also *id.*, para. 43.

¹⁹ *Id.*, paras. 4 (8 September 2009 and 15 December 2009), 6 ("On December 2009"), 8 (28 January 2010), 9 (19 April 2010), 39 (8 September 2009, 28 January 2010, and 19 April 2010).

²⁰ *Id.*, para. 39 (pertaining at least to the alleged disclosures on 8 September 2009, 28 January 2010, and 19 April 2010).

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Rule 68(A)

19. The Prosecution considers that there is nothing exculpatory about the document sought by the Defence. The document bears the year 2004, and appears to be a transcript of a portion of a radio broadcast from a Rwandan radio station. The radio programme seems to consist of fielding various calls from listeners who express their views on the downing of President Habyarimana's plane. There is nothing to indicate that the actual recording was done in Gabon, or that it was carried out in 1994. In addition, the veracity of its contents cannot be verified.²¹

Prosecution Corrigendum

20. The Prosecution discloses the document specified in the Defence Motion, along with the Kinyarwanda and English versions thereof.²²

21. The Prosecution further submits that, if the Chamber finds that the Defence did not address any relevant issue during its cross-examination of Witness ANAT, then the witness should be recalled.²³

Defence Reply

22. Preliminarily, the Defence argues that the Prosecution Corrigendum should be disregarded as the Parties have been repeatedly warned not to file multiple submissions, and no exceptional circumstances exist for the filing of a Corrigendum. Moreover, the Defence submits that the Corrigendum goes beyond merely correcting typographical errors and providing clarification, but also alters the substance of the Prosecution Response.²⁴

23. The Defence disagrees that its Motion amounts to an interlocutory appeal. According to the Defence, the Chamber's admission of Prosecution Exhibit 58 concerned only one statement by Witness ANAT, whereas the current Defence Motion alleges that the Prosecution breached its disclosure obligations as they relate to four such statements. This issue has not yet been litigated.²⁵

Rules 66(A)(ii) and 67(D)

24. The Defence asserts that *gacaca* records constitute statements within the context of Rule 66(A)(ii). Prosecution Exhibit 58 contains an alleged confession of Prosecution Witness ANAT and is therefore a statement that the Prosecution was required to disclose.²⁶

25. The Defence further submits that even if the Prosecution did not have the statements at the time of Witness ANAT's testimony, the Prosecution should have disclosed them promptly in accordance with Rule 67(D). The Prosecution's disclosure of

²¹ *Id.*, paras. 50-55. See also *id.*, paras. 45-49, 56-57.

²² See Prosecution Corrigendum, para. 4, Annex (containing documents numbered K0362915-K0362943, K0483486-K0483509, and K0485923-K0485938). The Prosecution also amends four paragraphs of its Response. See *id.*, paras. 1-4.

²³ *Id.*, paras. 3, 5.

²⁴ Defence Reply, paras. 7-10. The Defence also submits that the Prosecution Response is littered with factual errors. See *id.*, paras. 11-18, 34-35, 49.

²⁵ *Id.*, paras. 21-24, 30.

²⁶ *Id.*, paras. 27-28. See also *id.*, paras. 29-30, 32-33.

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other documents does not relieve it of the obligation to disclose these statements as well.²⁷

26. The Defence adds that even if it addressed Prosecution Witness ANAT's confession during his cross-examination, this does not detract from the Prosecution's breach of its disclosure obligations. This breach, according to the Defence, has prejudiced the Accused, and cannot be remedied from the recall of Witness ANAT for further questioning.²⁸

Rule 68(A)

27. The Defence contends that the disclosed transcript of the radio broadcast is incomplete. According to the Defence, the disclosed document only pertains to Part II of a broadcast, and the Chamber should order that Part I also be disclosed.²⁹

28. The Defence submits that the delayed disclosure of this document has caused prejudice to the Defence. Had it been disclosed earlier, the Defence could have questioned the Accused about its contents and about the radio station itself.³⁰

29. Finally, the Defence asserts that the Prosecution should have known about this document's exculpatory nature, especially because the Prosecution's own investigator considers that this constitutes evidence that the Accused was in Gabon between 25 and 27 April 1994.³¹

DELIBERATIONS

Multiple Submissions

30. As a preliminary matter, the Chamber notes with concern that it received a total of six submissions from the Parties, despite the Rules only allowing three. The Chamber has indicated on numerous previous occasions that the Parties should avoid filing multiple submissions beyond those allowed by the Rules.³² It appears that the Parties have chosen to ignore these unequivocal statements from the Chamber.

²⁷ *Id.*, paras. 31, 37. See also *id.*, paras. 34-36, 38, 44.

²⁸ *Id.*, paras. 39, 45-47. See also *id.*, paras. 42, 44.

²⁹ *Id.*, paras. 52, 55.

³⁰ *Id.*, para. 53. See also *id.*, para. 54.

³¹ *Id.*, para. 54, citing Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence Discovered in the Course of Presentation of the Defence Case, 4 October 2011 ("Prosecution Motion of 4 October 2011"), p. 30.

³² Decision on Defence Motion for Inspection of Materials in the Prosecution's Custody (TC), 29 August 2011, para. 27; Decision on Defence Motion to Declare Written Statements Admissible and for Leave for Certification of These Written Statements by a Presiding Officer (TC), 11 April 2011, para. 18; Decision on Defence Motion for Reconsideration of the Decision Rendered on 28 October 2009 (TC), 15 October 2010, para. 20; Decision on Defence Motion for Second Reconsideration of Witness Protective Measures (TC), 15 July 2010, para. 15. See also Decision on Prosecution Motion for Testimony via Video-Link of Prosecution Rebuttal Witnesses II, V, VI and VII (TC), 5 March 2012 ("Decision of 5 March 2012"), para. 21; Decision on Defence Motion Requesting a Cooperation Order Directed at the Republic of Austria (TC), 1 February 2012, para. 14; Decision on Defence Motion for Reconsideration and/or Certification to Appeal the Trial Chamber's Decision of 14 November 2011 on Rebuttal Evidence (TC), 13 December 2011, para. 42.



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31. The Chamber considers that unnecessary, multiple submissions are a waste of scarce judicial resources. Moreover, they may indicate that the Party at fault is not giving due consideration to the quality of its work before submitting it to the Chamber. Barring truly exceptional circumstances, the Chamber does not expect to receive any extra submissions in the future, from either Party. In this regard, the Chamber recalls that it recently issued a warning to the Parties for the filing of multiple submissions.³³

32. The Chamber has not taken either the Second Prosecution Response, or the Second Defence Reply, into account. But because the Prosecution Corrigendum contains the very document that the Defence seeks disclosure of under Rule 68(A),³⁴ the Chamber considers that it is in the interests of justice to accept this filing on an exceptional basis.

Prosecution Submissions on Disclosure Dates

33. The Prosecution, in its Response, submits that it disclosed documents concerning Witness ANAT on 8 September 2009, 15 December 2009, 28 January 2010, and 19 April 2010.³⁵ The Defence disputes that it received any disclosure for Witness ANAT on 8 September 2009 or on 15 December 2009.³⁶

34. The Chamber recalls that the Prosecution disclosed documents that it identified as relevant to Witness ANAT on 22 December 2009, 28 January 2010, 3 March 2010 and 19 April 2010. The Chamber observes, however, that it is unaware of any such disclosure occurring on 8 September 2009 or on 15 December 2009.

New Prayers for Relief in the Defence Reply

35. In its Reply, the Defence appears to add new prayers for relief that did not appear in the original Motion.³⁷

36. The Appeals Chamber has held that “ordinarily a reply is restricted to dealing with issues raised in an opposing party’s response. If a party raises a new argument or request for the first time in a reply then the opposing party is deprived of an opportunity to respond. This could harm the fairness of the [] proceedings”.³⁸

³³ Decision of 5 March 2012, para. 21.

³⁴ Compare Defence Motion, para. 37 (seeking disclosure of the document numbered K0483486-K0483509), and Prosecution Corrigendum, pp. 33-56 (numbered K0483286- K0483509).

³⁵ Prosecution Response, paras. 4 (8 September 2009 and 15 December 2009), 6 (“On December 2009”), 8 (28 January 2010), 9 (19 April 2010), 39 (8 September 2009, 28 January 2010, and 19 April 2010). See also Prosecution Corrigendum, para. 2 (amending information concerning the disclosure on 28 January 2010).

³⁶ Defence Reply, paras. 12-13.

³⁷ Compare Defence Reply, para. 55 (asking the Chamber to “DISMISS the Prosecution Response and the Corrigendum”, to “ORDER the Prosecution to disclose Part I of the 2004 broadcast”, and “ORDER the Prosecution to make a full review of its material and disclose any exculpatory material”), and Defence Motion, para. 52 (containing none of these prayers for relief).

³⁸ *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Judgement (AC), 8 October 2008, para. 229, quoting *Prosecutor v. Vlatko Kupreškić et al.*, Case No. IT-95-16-A, Decision on the Motions of Appellants Vlatko

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37. In this case, the Prosecution did ultimately respond to the Defence Reply.³⁹ The Chamber, however, has disregarded this additional filing because it was not permitted by the Rules or by the Chamber.

38. Taking this into account, the Chamber will assess only the prayers for relief identified by the Defence in its Motion.

Other Preliminary Matters

39. The Prosecution contends that the Defence Motion should be dismissed, as it amounts to an interlocutory appeal of the Chamber's decision to admit into evidence Prosecution Exhibit 58.⁴⁰

40. The Chamber recalls that the Defence has previously raised some of the arguments that it now raises in the Defence Motion.⁴¹ The Chamber further recalls, however, that it stated that these were issues that could be raised formally with the Chamber at a later stage.⁴² The Chamber therefore does not consider that the Defence Motion amounts to an interlocutory appeal that should be dismissed.

Alleged Disclosure Violation Under Rule 66(A)(ii)

41. Rule 66(A)(ii) provides, in part, that "[t]he 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".

42. The jurisprudence of this Tribunal confirms that "statements made during the course of judicial proceedings by Prosecution witnesses ... regardless of the origin of said judicial proceedings[,] are subject to the obligation of disclosure under Rule 66(A)(ii)".⁴³ Thus, for any *gacaca* statements of Prosecution witnesses that are within the custody or control of the Prosecution, Rule 66(A)(ii) requires that the Prosecution disclose them to the Defence.

Kupreškić, Drago Josipović, Zora Kupreškić and Mirjan Kupreškić to Admit Additional Evidence (AC), 26 February 2011 (filed confidentially), para. 70.

³⁹ See generally Prosecution Second Response.

⁴⁰ Prosecution Motion, paras. 24-30.

⁴¹ See T. 19 September 2011, pp. 66-67, 69 (CS) (submitting that the Prosecution breached Rules 66 (A)(ii) and 67 (D)); T. 20 September 2011, pp. 19-23, 29-31 (same).

⁴² T. 19 September 2011, p. 69 (CS); T. 20 September 2011, para. 31.

⁴³ *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. 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 (TC), 18 September 2001, para. 9. See also, for example, *The Prosecutor v. Jean-Baptiste Gatete* ("Gatete"), Case No. ICTR-2000-61-T, Decision on Defence Motion for Disclosure of Rwandan Judicial Records Pursuant to Rule 66 (A)(ii) and Order to the Prosecution to Obtain Documents (TC), 23 November 2009, para. 12; *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Callixte Nzabonimana's Motion for an Order Concerning Disclosure of Gacaca and Judicial Material Relating to Prosecution Witnesses (TC), 29 October 2009, para. 21; *Gatete*, Case No. ICTR-2001-61-PT, Decision on Defence Motions for Disclosure Pursuant to Rule 66 (A)(ii) and Commencement of Trial (TC), 13 October 2009, para. 11.

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43. The Defence Motion identifies four documents as being statements of Prosecution Witness ANAT, and alleges that these should have been disclosed pursuant to Rule 66(A)(ii), as well as Rule 67(D).⁴⁴

44. The first document ultimately became Prosecution Exhibit 58, which was admitted for credibility and specific issues, rather than for content.⁴⁵ The Prosecution, both in court and in its Response, identified this document as a confession of Witness ANAT.⁴⁶ The Chamber considers it clear that this document qualifies as a "statement" within the scope of Rule 66(A)(ii).

45. The Prosecution, however, submits, that this statement only came into its possession after the testimony of Witness ANAT.⁴⁷ Before this point in time, therefore, disclosure would not have been possible.⁴⁸ In light of this submission, the Chamber considers that the Prosecution's non-disclosure of the statement prior to Witness ANAT's testimony was not a violation of Rule 66(A)(ii).

46. As for the second and fourth documents, they are not described in the Defence Motion and are not addressed in the Prosecution Response.⁴⁹ The Chamber recalls, however, that a Defence witness appeared to identify these documents as coming from a *gacaca* court,⁵⁰ and that they were admitted into evidence as Prosecution Exhibit 57 with no objection from the Defence.⁵¹ A review of these documents indicates that they are an order for arrest and detention, and judgements from two *gacaca* courts. Because these documents do not originate from Witness ANAT, the Chamber considers that they do not constitute "statements" of this witness for the purposes of Rule 66(A)(ii).

47. As for the third document, the Defence Motion does not appear to describe it other than by K number, and the Prosecution does not address this document in its Response.⁵² The Chamber recalls that the Prosecution showed this document to a Defence witness, but without seeking to tender it into evidence.⁵³ As the Defence has not attached this document to its Motion, the Chamber is not in a position to determine whether this document is a "statement" that should have been disclosed pursuant to Rule 66(A)(ii).

⁴⁴ See Defence Motion, paras. 4, 13, 22, 27.

⁴⁵ Compare Defence Motion, para. 4(a) (concerning K0515194-K0515198), with Prosecution Exhibit 58 (K0515194-K0515198). See also T. 20 September 2011, pp. 27-28.

⁴⁶ See T. 19 September 2011, p. 76 (CS); Prosecution Response, para. 33.

⁴⁷ Prosecution Response, para. 37.

⁴⁸ See *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004, para. 35 ("[S]omething which is not in the possession of or accessible to the Prosecution cannot be subject to disclosure ...").

⁴⁹ See Defence Motion, paras. 4(b), 4(d); Prosecution Response, para. 31.

⁵⁰ See T. 19 September 2011, pp. 62-65 (CS); T. 20 September 2011, pp. 11-12.

⁵¹ Compare Defence Motion, paras. 4(b) (referring to K0515199-K0515200), 4(d) (identifying K0515188-K0515193), with Prosecution Exhibit 57(A) (consisting of documents numbered K0515188-K0515193 and K0515199-K0515200). See also T. 20 September 2011, pp. 17, 26; Prosecution Exhibit 57(B) (French); Prosecution Exhibit 57(C) (English).

⁵² See Defence Motion, para. 4(c) (referring to K0515204); Prosecution Response, para. 31.

⁵³ See T. 20 September 2011, pp. 15-16, 28-29.

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Alleged Disclosure Violation Under Rule 67(D)

48. Rule 67(D) states that “[i]f either party discovers additional evidence or information or materials which should have been produced earlier to the Rules, that party shall promptly notify the other party and the Trial Chamber of the existence of the additional evidence or information or materials”. Rule 67(D) applies to the disclosure regime pursuant to Rule 66(A).⁵⁴

49. The Appeals Chamber has held, however, that Rule 66(A)(ii):

[S]hould be given its plain meaning that, once a witness has given evidence in court, the Prosecution can no longer *intend* to call that witness to testify, and that there is therefore no obligation to make available any subsequent statements from the witness, unless the witness will be recalled as an Additional Prosecution witness.⁵⁵

50. Relying on this unequivocal statement from the Appeals Chamber, the *Karemera et al.* Trial Chamber held that Rule 67(D) does not impose a Rule 66(A)(ii) obligation after a witness has testified where the Prosecution does not intend to recall the witness.⁵⁶

51. The Chamber agrees with this reasoning. Because the Prosecution submits that it did not come into possession of Witness ANAT’s statement until after his testimony, the Chamber considers that there was no longer any obligation to make that statement available to the Defence pursuant to Rule 67(D), unless the Prosecution intended to recall the witness.

52. Because the Defence has not demonstrated that the Prosecution violated Rule 67(D), the Chamber denies the Defence Motion insofar as it alleges a violation of this Rule.

Disclosure of Alleged Potentially Exculpatory Material Under Rule 68(A)

53. The Defence Motion further seeks disclosure of a document it refers to as a “Radio Afrique No. 1 audio record of 25 April 1994, K0483486-K0483509”.⁵⁷ The Prosecution has disclosed a document in French with these K numbers, and has further

⁵⁴ *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR73.18, Decision on Joseph Nzirorera’s Appeal from Decision on Alleged Rule 66 Violation (AC), 17 May 2010, fn. 45 (“The Appeals Chamber notes that Rule 67(D) ... encompass[es] both an inspection of records pursuant to Rule 66(B) as well as the disclosure regime pursuant to Rules 66(A), 68, and 70 ...”).

⁵⁵ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-I4-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. 16.

⁵⁶ *The Prosecutor v. Édouard Karemera et al.* (“*Karemera et al.*”), Case No. ICTR-98-44-T, Decision on Joseph Nzirorera’s 23rd Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Witness ALG (TC), 30 March 2009, paras. 5-7. See also *Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera’s Application for Certification to Appeal Disclosure Decision on Witness ALG (TC), 29 April 2009, para. 5 (stating, in part, that “there is no ongoing disclosure obligation under Rule 66(A)(ii)” and that “there is no serious doubt regarding the correctness of [this] legal principle”).

⁵⁷ Defence Motion, para. 37. See also *id.*, para. 52.

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disclosed what appears to be Kinyarwanda and English versions of the document.⁵⁸ The Chamber therefore considers that the Defence request for disclosure is moot insofar as it seeks this document.

54. The Defence also asks that the Prosecution disclose the audio record corresponding to this broadcast, and requests the Chamber to declare that the Prosecution breached Rule 68(A).⁵⁹ While the transcript has been disclosed, the Prosecution insists that it is not exculpatory, and therefore any non-disclosure has not violated Rule 68(A).⁶⁰

55. Preliminarily, the Chamber notes that the Defence Motion does not appear to allege that the Defence was materially prejudiced by any non-disclosure of the transcript or the broadcast, and does not appear to seek any remedy. Instead, the Defence only seeks a declaration that the Prosecution violated Rule 68(A).⁶¹

56. Rule 68(A) states that “[t]he 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.”

57. In order to show a Prosecution breach of its disclosure obligations under Rule 68(A), the Defence must: (1) specifically identify the material sought; (2) present a *prima facie* showing of its probable exculpatory nature; and (3) prove that the material requested is in the custody or control of the Prosecution.⁶² As to the second ground, the *Kalimanzira* Appeals Judgement confirmed that the Prosecution’s obligation to disclose exculpatory material is to be interpreted broadly. The Appeals Chamber also emphasized that a Trial Chamber must assess only whether the requested material is “potentially”, instead of actually, exculpatory.⁶³

58. The Chamber considers that the Defence has specifically identified the material sought.

59. As for the exculpatory nature of the material, a review of the disclosed transcript reveals that there appears to be a lone reference to the Accused speaking over “*Radio Afrique No. [sic]* on 27 April”.⁶⁴ There appears to be no reference to the year that this would have occurred, nor whether this speech or any subsequent broadcast would have emanated from outside Rwanda. In the Chamber’s view, the non-descript nature of this

⁵⁸ Prosecution Corrigendum, para. 4, Annexes A(1) and A(2).

⁵⁹ See, for example, Defence Motion, para. 52.

⁶⁰ *Id.*, paras. 53-55.

⁶¹ See, for example, *id.*, paras. 49-50, 52.

⁶² See *Gaspard Kanyarukiga v. The Prosecutor*, Case No. ICTR-02-78-AR73, Decision on Kanyarukiga’s Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents (AC), 19 February 2010, para. 16; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.13, Decision on “Joseph Nzirorera’s Appeal from Decision on Tenth Rule 68 Motion” (AC), 14 May 2008 (“*Karemera et al. Appeals Decision of 14 May 2008*”), para. 9; *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement (AC), 23 May 2005, para. 262.

⁶³ *Kalimanzira Appeals Judgement*, paras. 18-20. See also *Karemera et al. Appeals Decision of 14 May 2008*, paras. 12-14.

⁶⁴ Prosecution Corrigendum, Annex, K0485938.

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information is insufficient to be potentially exculpatory. The Chamber therefore denies the Defence Motion insofar as it alleges a violation of Rule 68(A).

60. The Chamber notes that the Defence also asks for disclosure of the audio form of this broadcast.⁶⁵ The Chamber considers that such disclosure may be in the interests of justice, and therefore the Chamber urges the Prosecution to provide the audio form of the complete broadcast to the Defence, if the Prosecution has it in its custody.

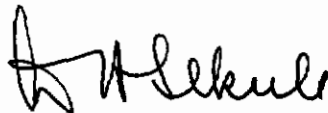
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion;

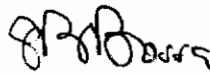
DISMISSES AS MOOT the Defence request for disclosure of the written form of a document numbered K0483486 through K0483509; and

URGES the Prosecution to disclose the full audio recording to the Defence, if the Prosecution has it in its custody.

Arusha, 26 April 2012



William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge



⁶⁵ See, for example, Defence Motion, paras. 51-52.