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**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

Original: English

TRIAL CHAMBER III

Before: Judge Lloyd G. Williams, Q.C., Presiding
Judge Andréia Vaz
Judge Khalida Rachid Khan

Registrar: Adama Dieng

Date: 29 September 2003

THE PROSECUTOR

v.

JOSEPH NZIRORERA *et al.*

Case No. ICTR-98-44-I

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**DECISION ON THE DEFENCE MOTION FOR DISCLOSURE OF ITEMS
DEEMED MATERIAL TO THE DEFENCE OF THE ACCUSED**

Rule 66(B) of the Rules of Procedure and Evidence

Counsel for the Defence:
Peter Robinson

Counsel for Co-Accused:
Didier Skornicki for Edouard Karemera
David Hooper for Andre Rwamakuba
Charles Roach and Frédéric Weyl for Mathieu Ndirumapatse

Office of the Prosecutor:
Don Webster
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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("Tribunal"),

SITTING as Judge Andréia Vaz, designated by Trial Chamber III ("Chamber") pursuant to Rule 73(A) of the Rules of Procedure and Evidence of the Tribunal ("Rules");

BEING SEISED of the "Motion for Inspection of Items 'Material to the Preparation of the Defence'" filed on 4 December 2002 by the Defence for Accused Joseph Nzirorera;

CONSIDERING further:

(a) The "Prosecution Response to Defence Motion for Inspection of Items 'Material to the Preparation of the Defence'" filed on 26 February 2003 ("Response");

(b) The Defence "Reply Memorandum: Motion for Inspection of Items Material to the Preparation of the Defence" filed on 3 March 2003 ("Reply");

(c) The "Prosecutor's Consolidated Supplemental Response to (i) the Defense Motion for Inspection of Items 'Material to the Preparation of the Defence'; (ii) The Defense Motion for Disclosure of Exculpatory Material; (iii) The Defense Motion for Request for Cooperation to the Governments of United States, Belgium, France and Germany" filed on 18 August 2003 ("Prosecutor's Consolidated Response");

(d) The Defence "Reply to Prosecutor's Consolidated Supplemental Response: Assassination of President Habyarimana", filed on 20 August 2003 ("Reply to Prosecutor's Consolidated Response");

CONSIDERING the Statute of the Tribunal ("Statute") and the Rules, particularly Rule 66(B) of the Rules;

NOW DECIDES the Motion, pursuant to Rule 73(A) of the Rules, solely on the basis of the written briefs filed by the parties.

Submissions of the Parties*Defence Motion*

1. The Defence seeks an order, pursuant to Rule 66(B), for the Prosecutor to permit the Defence to inspect all books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence.

2. In addition to the general order, the Defence seeks an order compelling disclosure of the following items:

i) All documents, correspondence, recordings or media reports reflecting statements made by Mr. Nzirorera during 1992-1994, in the possession of the OTP;

ii) All correspondence, *communiqués*, or documents generated by the political party *Mouvement républicain national pour la démocratie et le développement* ("MRND") during the period 1992-1994; recordings, minutes, or news media reports of all MRND party meetings during the period 1992-1994; reports, cables or other records of the United Nations Assistance Mission for Rwanda ("UNAMIR"), the United Nations Special Representative in Rwanda, or the Belgian government relating to the MRND or Mr. Nzirorera; and the microfilmed documents which, the Defence alleges, were recently furnished to OTP by

the United States State Department, which contain MRND and other relevant documents seized in Rwanda in 1994;

iii) All correspondence, *communiqués* or documents generated by the executive committee of the Interahamwe, or any of its officers or directors, during the period 1992-1994; all documents which pertain to the training, supply, and support of the Interahamwe by the military, government or MRND; and all reports of UNAMIR, the United Nations Special Representative, or the Belgian government concerning the organization and operation of the Interahamwe. As part of this request, the Defence asks for the Rwamagana military Camp Commander's telegram referred to in paragraph 5.18 of the supporting material to the indictment, the video showing the distribution of arms referred to in paragraph 6.51 of the supporting material to the indictment and the report of Major Hock, entitled 'Rwanda, A study of the Interahamwe Militia' referred to in paragraph 5.17 of the supporting material to the indictment;

iv) The diary of Colonel Théoneste Bagosora, an Accused before the Tribunal;¹

v) The inventory or receipt prepared by the Benin authorities contemporaneous with the seizure of Mr. Nzirorera's property, and all reports, photographs, and videotapes of the search of the Benin residence;

vi) All reports, documents, and recordings which tend to show that Hutu extremists were not responsible for the assassination of President Habyarimana; all reports of interviews of persons who heard radio transmissions concerning the shooting down of the plane; and reports or notes of interviews or other information from persons formerly members of the Rwandan Patriotic Front ("RPF") who provided information about the shooting down of the plane, including Jean-Pierre Mugabe;

vii) An English translation of the report, documents and testimony placed before the Belgian Senate and French Parliament relating to the events which are the subject of the indictment, which have been translated by the Prosecutor. The Defence explains that these documents are available to the public, but only in French;

viii) A collection of newspaper articles about Rwanda concerning the events which are the subject of the indictment. This collection has already been furnished to other defence teams on a CD-Rom, contends the Defence.

3. The Defence further requests that the Prosecutor be ordered to provide copies of all the items requested, as summarised above. The Defence argues that the Tribunal's case law warrants a broad interpretation of Rule 66(B), as encompassing a Prosecutor's obligation to provide copies of all the materials falling under that Rule.²

Prosecutor's Response and Consolidated Response

4. The Prosecutor states that he is aware of his disclosure obligations and that he has disclosed, and will continue to disclose, all required materials subject to the reservations of Rules 66(C) and 70. The Prosecutor stresses, however, that many of the requests made by the Defence are "excessively wide and vague."

¹ In *Prosecutor v. Bagosora et al.*, Case No. ICTR-96-7-T. Hereinafter, the so-called *Military I* Case.

² Referring to *Prosecutor v. Nsabimana and Nteziryayo*, Case No. ICTR-97-29-T, Decision on the Defence Motions for Disclosure of Copies of the Prosecutor's Exhibit (TC), 18 September 2001, para. 14. Referring also to *Prosecutor v. Ndayambaje*, Case No. ICTR-96-8-T, Decision on the Defence Motion for Disclosure (TC), 25 September 2001, para. 7.

5. The Prosecutor addresses each of the specific requests directly, as follows:

i) The request for all statements of the Accused and all materials "*reflecting statements made by Mr. Nzirodera*" (Prosecutor's emphasis) is excessive in its ambit. The Prosecutor argues that full compliance is impossible, particularly since the request includes any allusion made by others to statements that the Accused may or may not have made;

ii) The request for all materials regarding the MRND is too wide;

iii) The request for Interahamwe materials is excessively wide and vague, save for the Rwamagana Camp Commander's telegram, the video showing a distribution of arms and the report of Major Hock, which the Prosecutor agrees to make available to the Defence for inspection;

iv) The Bagosora Diary has been disclosed to the Defence in the so-called *Military I* Case, and Nzirodera's Defence is at liberty to examine it;

v) The Prosecution is not in possession, and never has been in possession, of any inventory, receipt, report or recording from the search and seizure at the Accused's home in Benin;

vi) Responsibility for the assassination of President Habyarimana is not material to the Prosecution case and, thus, is not material to the Defence case;

vii) The request for documents from the testimony before the Belgian Senate and French Parliament is excessively wide. The Defence should specifically identify the documents requested;

viii) The request for Rwanda newspaper articles is overly broad. The Defence should specifically identify the articles it requests in English.

6. In the Consolidated Response, the Prosecutor essentially adds to his submissions in respect of the disclosure of documents pertaining to President Habyarimana's assassination that:

i) According to a *Delalic* Decision rendered by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), materiality means more than that the evidence in question bears some abstract logical relationship to the issues in the case, and the Defence has failed to meet this relevance criteria in respect of the documents in question;³

ii) Disclosure of the Hourigan Memorandum may have been ordered in other cases before the Tribunal, however the Trial Chambers concerned made no findings as to the relevance of the report to the defence of the concerned accused, while

iii) Recent decisions rendered by Trial Chambers I and III of the Tribunal have denied Defence applications for the appearance of witnesses whose testimony was relied upon by the Defence to bolster a theory that the RPF was responsible for the downing of President Habyarimana's plane, or applications for disclosure to the Defence or for the admission of, documentary evidence in this regard.⁴ Similarly, in the *Kayishema and*

³ Referring to *Prosecutor v. Delalic et al.*, Case No. IT-96-21, Decision on the Motion by the Accused Zejnil Delalic for the Disclosure of Evidence (TC), 26 September 1996.

⁴ Referring to *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Decision on the Defence Motion for Ngeze to Compel Disclosure of Statement and Supporting Documents of Protected Witness ZF (TC), 12 December 2002 and Decision on the Prosecutor's Urgent Motion to Bar the Ngeze Defense from Calling

Ruzindana Case, the Appeals Chamber dismissed a Defence motion for admission of the Hourigan Memorandum as additional evidence on appeal on the basis that the contents of the Memorandum, "could not have been of relevance to the issues of genocide which fell to be determined by the Trial Chamber, and that consequently it is not in the interests of justice to admit it as additional evidence on appeal"⁵.

Defence Replies

7. The Defence essentially submits, in reply to the Prosecutor's submissions:

i) That some of the requests are broad specifically to ensure that the Prosecutor conducts a diligent search of his evidence, in order to prevent the Prosecutor from "discovering" further evidence from materials currently in his possession, and introducing that evidence at trial. Accordingly, the Defence argues that the Prosecutor should be required to search his materials for statements of the Accused, MRND documents and Interahamwe documents, and to disclose any relevant documents found. If materials within the scope of the search are later produced, the Defence contends that the Prosecutor should have the burden of showing why they were not disclosed to the Defence before being allowed to introduce the materials as evidence at trial;

ii) That the disclosure requirement under Rule 66(B) extends beyond permitting the Defence to view the documents, and requires that the Prosecutor provide the Defence with a copy of the requested material. The Defence therefore argues that it is insufficient for the Prosecutor to remark that Nzirorera's Defence is free to examine a copy of the Bagosora Diary;

iii) That the information about the assassination of President Habyarimana is material to the Defence case. The Defence submits that if the Accused or his associates within the MRND "were responsible for the death of the President, it would be more likely that they had the intent to commit genocide and that the events were the product of the conspiracy and plan alleged in the indictment." On the other hand, if the Accused had nothing to do with the assassination, "it would be less likely that he participated" in such a conspiracy. The Defence further contends that disclosure of materials relevant to the circumstances surrounding President Habyarimana's assassination would enhance its understanding of the Accused's actions and decisions at the meetings in the immediate wake of the President's death. The Defence therefore alleges that the information about the assassination meets the Rule 66(B) test of materiality. The Defence adds that the motion is for disclosure of materials, not for admission of evidence and that, therefore, reference to the Tribunal's decisions summarised at para. 5 iii) above are not relevant;

iv) That, in view of the Prosecutor's representation that he has nothing in his possession regarding the search and seizure at the Accused's home, no further action on this request is necessary;

v) In response to the Prosecutor's request for clarification of its request for documents from the Belgian Senate and French Parliament, that the Defence is seeking disclosure of all transcripts or reports of testimony given at hearings, all reports or other

Wayne Madsen as a Witness (TC), 23 January 2003; *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-T, Oral Decision on the Prosecutor's Motion for the Exclusion of the Proposed Expert Reports and evidence of Antoine Nyetera, Uwe Friescke and Wayne Madsen (TC), 4 July 2002.

⁵ Referring to *Kayishema & Ruzindana v. Prosecutor*, Case No. ICTR-95-1-A, *Décision (Deuxième requête de Clément Kayishema aux fins de présentation à la Chambre d'appel de nouveaux éléments de preuve à partir du mémorandum rédigé par M. Hourigan)* (AC), 28 September 2000.

documents produced by witnesses or governments in connection with the inquiries into the events which are the subject of the indictment, and all reports of the Belgian Senate and French Parliament issued in connection with the inquiries into the events which are the subject of the Indictment. The Defence reiterates that it is not asking the Prosecutor to translate any of the documents, rather it is only asking for any existing translations of these public documents, in order to save time and money that would be needed for the Defence to translate these documents;

vi) That the collection of Rwandan newspaper articles has already been provided in digitised form to other Defence teams, and that the Defence is only asking for a copy of the same CD-Rom.

Deliberations

8. Pursuant to Rule 66(B), the Prosecutor shall, at the request of the defence and subject to, *inter alia*, Rule 66(C), permit the Defence to inspect any books, documents, photographs or tangible objects in his custody or control, which are material to the preparation of the defence, or which are intended for use by the Prosecutor as evidence at trial, or which were obtained from or belonged to the accused.

9. The Prosecutor is responsible for making the initial determination of materiality of evidence within its possession, in order to determine what should be disclosed pursuant to Rule 66(B). The Defence may believe that items material to its preparation other than those disclosed are in the Prosecutor's custody or control. It may in that case seize the Trial Chamber of a request for an order compelling disclosure. In doing so, the Defence is expected, firstly to sufficiently identify the materials sought ("the specificity requirement") and, secondly, to *prima facie* satisfy the Chamber of the materiality of the items requested to the Accused's defence ("the materiality requirement").

Items Material to the Defence of the Accused

10. Considering the specificity requirement, the request for disclosure of all books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the Defence, cannot be entertained.

Statements of the Accused

11. Disclosure of the statements of an accused is covered by Rule 66(A)(i) of the Rules, rather than Rule 66(B). Pursuant to the Rule 66(A)(i), the Accused's statements in the Prosecutor's custody or control were to be disclosed within 30 days of the initial appearance of the Accused, whether these statements were taken by the Prosecutor or obtained by him from others.⁶ The Defence does not refer to Rule 66(A)(i) as the legal basis of the request.

⁶ On Rule 66(A)(i) as encompassing all the statements of an accused in the Prosecutor's custody or control, whether these statements were collected by the Prosecutor or obtained from others, see *Prosecutor v. Blaskic*, Case No. IT-95-14-PT, Decision on the Production of Discovery Materials (TC), 27 January 1997, para. 38. This interpretation has been consistently upheld by ICTR Trial Chambers. See, in this respect, *Prosecutor v. Ngeze*, Case No. ICTR-97-27, Decision on the Defence's Motion to Compel Complete Discovery (TC), 16 March 2000, para. 13; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, Decision on Defence Motion for Disclosure of Evidence (TC), 1 November 2000, paras. 37-38; *Prosecutor v. Ndayambaje*, Case No. ICTR-96-8-T, Decision on Prosecutor's Motion to Modify her List of Exhibits (TC), 14 December 2001, para. 19.

There is no reason to doubt that disclosure of the Accused's statements was carried out in the stipulated deadline. Should the Prosecutor have, since that deadline, obtained other statements by the Accused which remain undisclosed to the Defence, these should be disclosed as soon as possible. The Prosecutor is reminded of his obligations in this regard. No further order is necessary.

12. The request for all materials "reflecting statements made by Mr. Nzirorera" is extremely broad. It encompasses allusions made by others to statements that the Accused may, or may not, have made. The Defence has not satisfied the Chamber of the materiality of such a broad category of documents of such limited evidentiary value. The request is therefore dismissed.

13. Documents falling into the above categories however remain to be disclosed as soon as possible if the Prosecutor intends to rely upon them at trial, in conformity with Rule 66(B) of the Rules, or if they are or could prove exculpatory, within the meaning of Rule 68 of the Rules. The Prosecution is reminded of its obligation in this regard.

MRND and Interahamwe Related Documents

14. The Chamber notes, in connection with the requests for all Interahamwe-related documents and for all MRND-related documents, as defined at paras. 2(ii) and 2(iii) above, the alleged link between the Interahamwe and the MRND party. The Chamber further notes, in this connection, that para. 4.23 of the Accused's Indictment reads: "In his capacity as Secretary-General of the... MRND..., Joseph Nzirorera exercised authority over the members of his party's youth wing, the Interahamwe". The Chamber therefore considers that the requests for an inspection of all Interahamwe-related documents and for all MRND-related documents should be granted in the sole respect of all official correspondence between the MRND Party directors and the Interahamwe officers and directors, during the period 1992-1994.

15. Rule 66(B) of the Rules affords the Defence a right to inspect relevant documents. Upon inspection, the Defence may make all the copies of the documents it deems relevant to its preparation. If the Prosecutor opposes the copying of specific documents, the Defence may seise the Chamber for a ruling on this issue.

Microfilms of Evidence Volunteered by the United States to the Tribunal

16. Reference to the volunteering of microfilmed documents to the Tribunal by the State Department of the United States of America was made during Dr. Alison Des Forges' testimony as an expert witness in the *Media* Trial. The Chamber has reviewed the transcript of the relevant trial proceedings in the *Media* Case. Dr. Des Forges explained that the microfilms consisted in documents seized by Officials of the United States Federal Bureau of Investigations in Rwanda in August and September 1994, and that this material comprises approximately 28,000 pages of documents.⁷ During a status conference, the Prosecution in the *Media* Case specified that the Evidence Unit of the Office of the Prosecutor had digitised all microfiches. Trial Chamber I in the *Media* Case decided that the digitised microfiches would be disclosed to the Defence. Trial Chamber I, however, ordered the Defence to respect

⁷ *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Tr. 22 May 2002 pp. 138 & 139 (Witness Des Forges' examination in chief) and Tr. 31 May 2002 pp. 116 & 117 (Witness Des Forges' cross-examination).

the confidentiality of the materials and specifically prohibited the Defence from sharing any of the materials with the Accused, in view of the fact that the microfiches allegedly contained internal documents of the Office of the Prosecutor or otherwise sensitive documents.⁸

17. The Chamber considers that the request for inspection of these 28,000 pages of documents is overly broad and the issue of materiality has not been met. Requests for inspection or disclosure of documents should not be made unless there are satisfactory grounds to do so. Judicial time and the Tribunal resources should be taken into account. Accordingly, the Chamber considers that the motion falls to be dismissed.

Prosecutor's Agreement to an Inspection by the Defence

18. The Chamber notes the Prosecutor's agreement to permit an inspection by the Defence of the Rwamagana Camp Commander's telegram, the video showing a distribution of arms, the report of Major Hock and the diary of Colonel Théoneste Bagosora.

Reports or Inventory Related to the Search of the Accused's Residence in Benin in 1998

19. The Chamber notes that the Defence specified in its Reply that it was not requesting any action from the Chamber, in view of the Prosecutor's submission that he is not, and never has been, in possession of reports or inventories related to the search of the Accused's residence in Benin, and to the seizure of items carried out at this occasion. If, in the future, the Prosecutor should obtain such information or documents, these should be disclosed as soon as possible to the Defence.

Reports and Other Documents Relevant to President Habyarimana's Assassination

20. The Chamber notes that, on 19 October 2000, Trial Chamber II, then seised of the present case, ordered the Registrar to disclose to the Defence of Accused Nzirorera the Memorandum prepared by Mr. Hourigan on the circumstances surrounding the downing of the presidential plane on 6 April 1994.⁹ The Defence is expected to liaise with former Defence Counsel so as to obtain transmission of all relevant files, as the case may be.

21. The Defence has not shown that the Prosecutor may be in possession of documents or reports on the assassination of President Habyarimana other than the Hourigan Report. The remaining requests under paragraph 2(vi) above are therefore dismissed.

Translation of the Belgian Senate and French Parliament Reports on the Events in Rwanda in 1994 and CD-Rom Containing Newspaper Articles on the Events in Rwanda in 1994

22. The Chamber considers that the request for translations of the public reports and relevant public documents from the Belgian Senate and French Parliament on the events in Rwanda in 1994 existing within the Office of the Prosecutor cannot be entertained since the Defence has not shown any relevance to its case. The same conclusion is drawn in respect of the collection of newspaper articles pertaining to the events in Rwanda in 1994.

⁸ *Id.*, Tr. 27 September 2002, pp. 41-43 (status conference, closed session).

⁹ *Décision relative à la requête de la Défense en communication de documents se trouvant sous la garde du Tribunal*, with a separate and Dissenting Opinion by Judge Mehmet Güney, 19 October 2000.



23. The Chamber has taken note of the Prosecutor's offer to meet with the Defence for the purpose of affording inspection,¹⁰ and it is hoped that this will solve any dispute between parties in that regard.

FOR THE ABOVE REASONS,

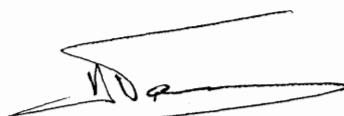
PURSUANT TO RULE 66(B) OF THE RULES,

THE TRIBUNAL,

I. ORDERS the Prosecutor to authorise the Defence to inspect all official correspondence between the MRND Party directors and the Interahamwe officers and directors, during the period 1992-1994; and

II. DISMISSES the Motion in all other respects.

Arusha, 29 September 2003



Andrézia Vaz
Judge

(Seal of the Tribunal)



¹⁰ Prosecutor's Response to Defence Notification of Failure to Comply with Trial Chamber Order and Motion for Remedial Measures, 8 September 2003, para. 8.