

ICTR-98-41-T  
03-03-2004  
(18802 - 18800)

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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER I

**Before:** Judge Erik Møse, presiding  
Judge Jai Ram Reddy  
Judge Sergei Alekseevich Egorov

**Registrar:** Adama Dieng

**Date:** 2 March 2004

THE PROSECUTOR

v.

Théoneste BAGOSORA  
Gratien KABILIGI  
Aloys NTABAKUZE  
Anatole NSENGIYUMVA

*Case No. ICTR-98-41-T*

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**DECISION ON PROSECUTOR'S REQUEST FOR AN ORDER ALLOWING THE  
INSPECTION OF DEFENCE MATERIALS AND A TIME-LIMIT FOR COMPLIANCE  
PURSUANT TO RULES 66(B), 67(C) AND 73**

**Office of the Prosecutor:**

Barbara Mulvaney  
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**Counsel for the Defence**

Raphaël Constant  
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Kennedy Ogetto  
Gershom Otachi Bw'omanwa

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

**SITTING** as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

**BEING SEIZED OF** the “Prosecutor’s Request for an Order Allowing the Inspection of Defence Materials and a Time-Limit for Compliance Pursuant to Rules 66(B), 67(C) and 73 of the Rules of Procedure and Evidence”, filed on 29 January 2004 (“the motion”);

**CONSIDERING** the “Ntabakuze Defence Response to Prosecutor’s Request”, filed on 4 February 2004; the “Defence for Bagosora Response to the Prosecutor’s Request”, filed on 5 February 2004; the “Memoire en réponse à la requête du Parquet”, filed by the Kabiligi Defence on 9 February 2004; and the “Defence Response to the Prosecutor’s Motion”, filed by the Nsengiyumva Defence on 9 February 2004;

**HEREBY DECIDES** the motion.

**INTRODUCTION**

1. By way of a letter dated 8 April 2002, the Prosecution and the Defence agreed to a Revised Facilitation Agreement for Prosecution Exhibits (“the agreement”), whereby the Prosecution would provide to the Defence copies of all exhibits on its Exhibit List, to avoid the laborious and inconvenient process of having a physical inspection and formal marking of such voluminous documentation. The agreement is signed by representatives of the Prosecution and the four Defence teams. One of the revisions from the original agreement is the addition of words (“and hereby request”) to the effect that the Defence requested an inspection of the documents in a convenient manner. The agreement provides that the Defence retains its right under Rule 66(B) to conduct physical inspections of the exhibits upon the usual notice and request forms being provided. The stated purposes of the agreement are as follows:

- i. To ease the burden of Defence inspection of exhibits;
- ii. To provide both Parties with an opportunity to possess a well-ordered series of exhibits in indexed and tabbed binders, prior to the commencement of hearing evidence;
- iii. To reduce the need to call investigative witnesses merely to produce individual documents for individual marking as formal exhibits.

2. On 22 September 2003, the Prosecution requested inspection of Defence materials pursuant to Rule 67(C). Only the Defence for Bagosora responded, by providing a list of 42 items on a “courtesy basis”, whilst maintaining that the Defence had no obligation to disclose.

**SUBMISSIONS**

3. The Prosecution seeks reciprocal disclosure of Defence materials for inspection pursuant to Rule 67(C), which provision was triggered by the Defence request for documents evidenced by the agreement. The Prosecution submits that the Defence’s refusal to disclose constitutes unfair prejudice to the Prosecution, and access should be provided in the interests of justice and procedural fairness. The Prosecution also requests that such disclosure be ordered to take place

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no later than 1 March 2004, and in the same manner in which Prosecution disclosure was made, that is, by provision of a list of the materials and by furnishing the Prosecution with copies of the materials.

4. The Defence, in their four responses, argues that the agreement was never entered into by the Defence with the anticipation that it would constitute a trigger for the Prosecution to seek reciprocal disclosure under Rule 67(C). The agreement was merely intended to facilitate the production of Prosecution exhibits; at no time was disclosure of Defence materials discussed. Therefore the words "and hereby request" do not constitute a genuine *bona fide* request provided for in Rule 66(B).

5. Alternatively, the Defence submits that if the agreement does constitute such a trigger, the Rules do not stipulate when and how such an inspection of Defence materials should take place. The Defence will only be able to know which materials, if any, they intend to use as evidence at the trial, upon the conclusion of the Prosecution case, not before.

#### **DELIBERATIONS**

6. The first issue to be decided is whether or not the agreement constitutes, or contains, a request for inspection, within the meaning of Rules 66(B) and 67(C). The Chamber observes that the word "inspection" is used several times in the agreement. The second preambular paragraph refers to the right of the Defence to "inspect all exhibits" and "hereby request to conduct such inspection". Also, the third preambular paragraph refers to "a physical inspection of all such exhibits". According to paragraph 7, the purpose of the agreement is to facilitate "the management of Prosecution exhibits", one reason being to "ease the burden of Defence inspection of exhibits". On the other hand, paragraph 1 states that each Defence team will "RETAIN the individual right under Rule 66(B) to conduct physical inspections of the exhibits through the Evidence Unit, throughout the course of the proceedings, upon the usual notice and request forms being provided to the Evidence Unit."

7. In the Chamber's view, the text of the agreement is not clear. However, the wording and context suggest that the "inspection" related to particular exhibits that the Prosecution wanted to tender during the trial. The agreement resulted from an initiative taken by the Prosecution, and was drafted by the Prosecution. The words "hereby request to conduct such inspection" were inserted by the Prosecution. Moreover, there was no specific Defence request for inspection in the usual forms. In these circumstances, the Chamber finds it difficult to interpret the agreement as a request for inspection within the meaning of Rules 66(B) and 67(C).

8. Irrespective of the interpretation of the agreement, the Chamber finds that it is not necessary to determine the existence of a request to inspect as the motion is premature. The obligation of reciprocal disclosure relates only to materials that the Defence intends to use at trial, an assessment that the Defence will not be able to make until the Prosecution has closed its case.

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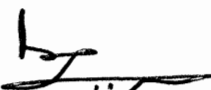
**FOR THE ABOVE REASONS, THE CHAMBER**

**DENIES** the motion.

Arusha, 2 March 2004



Erik Møse  
Presiding Judge



Jai Ram Reddy  
Judge



Sergei Alekseevich Egorov  
Judge

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