



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

19958
Mwanja

UNITED NATIONS
NATIONS UNIES

Or: ENG

TRIAL CHAMBER II

Before: Judge Khalida Rachid Khan, Presiding
Judge Lee Gacuiga Muthoga
Judge Emile Francis Short

ICTR-99-50-T
15-12-2004
(19958-19951)

Registrar: Mr Adama Dieng

Date: 15 December 2004

The PROSECUTOR

v.

Casimir BIZIMUNGU

Justin MUGENZI

Jérôme-Clément BICAMUMPAKA

Prosper MUGIRANEZA

Case No. ICTR-99-50-T

**DECISION ON JÉRÔME-CLÉMENT BICAMUMPAKA'S MOTION
FOR JUDICIAL NOTICE OF A RWANDAN JUDGEMENT OF
8 DECEMBER 2000 AND IN THE ALTERNATIVE FOR AN ORDER TO
DISCLOSE EXCULPATORY EVIDENCE**

Office of the Prosecutor:

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Mr Pierre Gaudrequ and Mr. Michel Croteau for **Jérôme-Clément Bicamumpaka**
Mr Ben Gumpert for **Justin Mugenzi**
Mr Tom Moran and Mr Christian Gauthier for **Prosper Mugiraneza**

JUDICIAL NOTICE/ARRETES
2004 DEC 15 P 30
ICTR

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga, and Judge Emile Francis Short (the "Chamber");

SEISED of the "Motion of Defendant Bicomumpaka for Judicial Notice of 8th December 2000 Rwandan Judgement and in the Alternative Order Disclosure of Exculpatory Evidence", filed on 1 October 2004 (the "Motion");

HAVING RECEIVED

- (i) The "Prosecutor's Response to Defendant Bicomumpaka for Judicial Notice of 8th December 2000 Rwandan Judgement and in the Alternative Order Disclosure of Exculpatory Evidence", filed on 11 October 2004 (the "Response");
- (ii) "Reply to Prosecutor's Response to Motion of Defendant Bicomumpaka for Judicial Notice of 8th December 2000 Rwandan Judgement and in the Alternative Order Disclosure of Exculpatory Evidence", filed on 18 October 2004 (the "Reply");

HEREBY DECIDES the Motion on the basis of the written briefs of the Parties, pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the "Rules").

ARGUMENTS OF THE PARTIES

Defence Submissions

Request for Judicial Notice, Pursuant to Rule 94 (B) of the Rules

1. The Motion seeks judicial notice of the existence and authenticity of the Judgement rendered by the Court of First Instance of Kigali on 8 December 2000 (the "Rwandan Judgement")¹. The Motion also requests that the Trial Chamber take judicial notice of the Rwandan Judgement's findings concerning the credibility of Witnesses DCH, GHY, and GHT, who testified before the Tribunal during the period 16 September 2004 through 1 October 2004.² The Defence submits that the Trial Chamber should recognize the findings of the Rwandan Judgement for the purposes of impeachment and not for the truth of the matters contained in the findings.

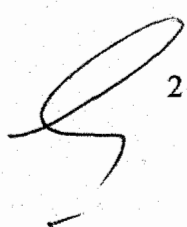
2. The Motion asserts that the word "Tribunal" in the text of Rule 94 (B) of the Rules should be "construed to mean any national court with jurisdiction concurrent to that of the ICTR".³ The Defence maintains that the Rwandan Judgement is "legitimate material for judicial notice"⁴ because it was rendered by a national court that has concurrent jurisdiction with the Tribunal to prosecute serious violations of international humanitarian law committed in Rwanda in 1994. The Defence cites Articles 8 and 9 of the Statute of the Tribunal as authority for this proposition.

¹ Motion, para. 10.

² Motion, para. 11.

³ Motion, paras. 8 and 14.

⁴ Motion, para. 10.



3. The Defence argues that “the laws of Rwanda enjoy a special status before the ICTR”.⁵ In support of this argument, the Defence refers to Article 23 of the Statute, which directs the ICTR Trial Chambers, in imposing prison sentences, to consider the general sentencing practice of the courts of Rwanda.

4. The Defence asserts, in accordance with the doctrine of issue estoppel, that the findings of the Rwandan Judgement, regarding the credibility of Witnesses DCH, GHY, and GHT, should apply to the present case for the purpose of impeachment, though not for the truth of the matters asserted therein.

5. The Defence further submits that only a few individuals accused of serious crimes committed during the 1994 events in Rwanda will be tried by the ICTR. The great majority of cases will be tried by the Rwandan Courts. Therefore, the Defence argues, judicial notice of findings in the Rwandan Judgement of 8 December 2000, regarding witness credibility, will promote judicial economy and avoid inconsistent judgements rendered by the Rwandan Courts and the ICTR.

Request for an Order for the Disclosure of Exculpatory Material, Pursuant to Rules 54 and 68 of the Rules

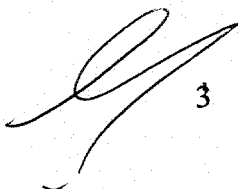
6. The Defence, in the alternative, seeks an order from the Trial Chamber to direct the Prosecution to produce “copies of all transcripts and witness statements before the Rwandan Court of First Instance of Kigali in the trial proceeding culminating in the Judgement of 8 December 2000”.⁶ The Defence indicates that the material requested includes, but is not limited to, the transcripts of all witnesses who testified in the Rwandan trial, witness statements given by Witness GHY and Witness DCH, notes of interviews, records of court proceedings, and any correspondence from witnesses that may be contained in the case file.

7. The Motion submits that the Rwandan Judgement was disclosed by the Prosecution to the Defence on 3 June 2004 and admitted into evidence on 30 September 2004, as Exhibit 3D8, in the present case. The Motion further acknowledges that the Defence used the Rwandan Judgement in its cross-examination of Prosecution Witnesses GHY and DCH.

8. The Defence asserts that it has specifically identified the transcripts and other material related to the Rwandan Judgement rendered on 8 December 2000. According to the Defence, the requested material will verify the findings of the Rwandan Judgement, regarding inconsistencies in the testimonies of Witnesses DCH, GHT, and GHY, and will impeach the credibility of these witnesses.

⁵ Motion, para. 15.

⁶ Motion, para. 20.



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9. The Defence, citing two Decisions rendered by the Trial Chamber,⁷ argues that it is the Prosecution's duty, pursuant to Rule 68 of the Rules, to obtain the requested material from the Rwandan Court and disclose it to the Defence. The Defence asserts that the Prosecution's obligation to secure evidence is not limited to documents currently within its control or custody. This obligation applies to exculpatory material, covered by Rule 68, which is specifically indicated by the Defence and which the Prosecution is in a better position to obtain.

The Prosecution Response

Request for Judicial Notice

10. The Prosecution submits that the Chamber, pursuant to Rule 94 (B) of the Rules, is authorized to take judicial notice only of adjudicated facts from proceedings of the ICTR. Therefore, judicial notice of the findings of the Court of First Instance of Kigali is inappropriate.

Request for an Order for Disclosure of Exculpatory Material, Pursuant to Rules 54 and 68 of the Rules

11. The Prosecution asserts that the Defence, by its conduct, has waived its right to further disclosure of material insofar as Witnesses GHT, DHY, and DCH have completed their evidence and the Chamber has discharged them, without reservation. According to the Prosecution, the Defence used the contents of the Rwandan Judgement to cross-examine Witnesses GHT, GHY, and DCH and failed to raise the issue of the requested material before these witnesses gave testimony. Therefore, the Prosecution argues, the Defence is precluded from seeking further disclosure in regard to the witnesses' evidence.

12. The Prosecution submits that it is not in possession of the material requested by the Defence and that, pursuant to Rule 68 of the Rules, it has no obligation to seek and disclose the requested material.

13. According to the Prosecution, the Defence has not demonstrated that it has made any prior efforts to obtain the requested material from the Rwandan authorities by its own means. The Prosecution submits that the Defence has been in possession of the Rwandan Judgement, in both Kinyarwanda and in French, since June 2004, and could have obtained the requested documents through an order of *Subpoena Duces Tecum*, before the witnesses testified in September and October 2004. The Prosecution argues, therefore, that the Defence Motion for disclosure of material related to the Rwandan Judgement should be denied.

⁷ *Casimir Bizimungu et al.*, Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence (TC), 23 April 2004, para. 9; *Joseph Nzirorera et al.*, Decision on the Defence Motion for Disclosure of Exculpatory Evidence (TC), 7 October 2004, para.11.

The Defence Reply

14. In its Reply, the Defence first states that it made no attempt to obtain the requested material, prior to cross-examination, because it received no advance notice that the testimonies of Witnesses of GHY and GHT would contradict the Rwandan Judgement. According to the Defence, a second reason that no prior efforts were made to obtain the material is because of the "long administrative process"⁸ involved in obtaining any public document from the Rwandan authorities. In view of these circumstances, the Defence requests the Trial Chamber, pursuant to Rules 54 and 68 of the Rules, to order the Prosecution to seek the requested material and, upon receipt, to disclose it to the Defence.

DELIBERATIONS

The Request for Judicial Notice

Facts Agreed Upon Through the Admissions Process: Existence and Authenticity of the Rwandan Judgement

15. The Motion seeks judicial notice of the "existence and authenticity" of a Rwandan Judgement rendered by the Court of First Instance of Kigali on 8 December 2000.⁹ The Chamber notes that the Rwandan Judgement was introduced into evidence, as Exhibit 3D8, with the concurrence of both Parties. As such, it constitutes evidence in the trial, and its existence or authenticity therefore is not in issue.

Contested Findings in the Rwandan Judgement

16. The Motion, relying on Rule 94 (B) of the Rules, also asserts that the Chamber should recognize the findings of the Rwandan Judgement in relation to the credibility of Prosecution Witnesses GHT, DCH, and GHY, who have already testified in this case. Rule 94 of the Rules states:

Judicial Notice

- (A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.
- (B) At the request of a party of *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the tribunal relating to the matter at issue in the current proceedings.

⁸ Reply, para. 10.

⁹ Motion, para. 11.

17. Pursuant to Rule 94 (B), a Chamber may decide to take judicial notice of “adjudicated facts” or “documentary evidence from other proceedings of the Tribunal”. In the present case, the Defence refers only to the findings of “adjudicated facts”, regarding the credibility of three persons, in a judgement rendered by a Rwandan National Court. The Defence submits, as a basis for its Motion, that the reference to the “Tribunal” in Rule 94 (B) “should be construed to mean any court with jurisdiction concurrent to that of the ICTR”.¹⁰

18. The Chamber observes that “the Tribunal” is defined in Rule 2 of the ICTR Rules of Procedure and Evidence as:

The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for Genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, established by Security Council Resolution 955 of 8 November 1994;

19. Accordingly, “the Tribunal” cannot be interpreted to include a Rwandan national court or any other national court, tribunal, or body. The Chamber therefore cannot take judicial notice of the Rwandan Judgement of 8 December 2000, and discussion of further arguments submitted by the Defence in support of its Motion for judicial notice is unnecessary.

Request for an Order for Disclosure of Exculpatory Material, Pursuant to Rules 54 and 68 of the Rules

20. Rule 68 (A) of the Rules provides:

The 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.

21. In its Decision in *Bizimungu et al.*, this Trial Chamber interpreted the Prosecution’s obligations, pursuant to Rule 68 (A), as follows:

The Prosecution is duty bound to disclose to the Defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the Accused or may affect the credibility of the Prosecution evidence, pursuant to Rule 68 of the Rules. This does not mean that the Prosecution should be forced to hunt for materials that it has no knowledge of. It does mean however that where the Defence has specific knowledge of a document covered by the Rule not currently within the possession or control of the Prosecution, and requests that document in specific terms, the Prosecution should attempt to bring such documents within its control or possession where the circumstances suggest that the Prosecution is in a better position than the Defence to do so, and, once this is successfully done, should be disclosed to the Defence; provided it is shown that the Defence had made prior efforts to obtain such document by its own means. This obligation stems from the Prosecution’s inherent duty to fully investigate a case before this court, and applies particularly in relation to obtaining previous statements made by Prosecution witnesses

¹⁰ Motion, para. 8.

before the Rwandan Authorities, where, as a practical reality, the Prosecution enjoys greater leverage than the Defence.¹¹

22. In accordance with the above interpretation of Rule 68 (A), the Trial Chamber has carefully reviewed the Parties' submissions for disclosure of material related to the proceedings of the Rwandan Judgement of 8 December 2000. Specifically, the Chamber notes the Prosecution's duty to disclose any exculpatory material within its possession to the Defence. However, if the Prosecution does not have in its custody this material, it should still "attempt to bring such documents within its control or possession",¹² provided that the Defence specifically identifies the requested material, demonstrates that it has made prior efforts to obtain the material, and shows that the Prosecution is in a better position than the Defence to procure the material. Thus, the Prosecution's duty to disclose exculpatory material, which is not currently within its possession, does not arise until the Defence satisfies the above conditions.

23. In the Chamber's view, the Defence in this case has failed to define the material sought with the requisite precision. Nor has it demonstrated in what way the Prosecution would be in a better position than the Defence to obtain the material requested or what efforts, if any, the Defence has made to obtain the material by its own means. These criteria must be satisfied before the Defence seeks recourse to the efforts of the Prosecution.¹³

24. According to the Tribunal's jurisprudence, a Chamber may not order the disclosure of material which "contradicts or calls into doubt the information provided by any prosecution witness, or which affects their credibility", unless such material is specifically identified.¹⁴

25. In the present case, the Defence has requested "copies of all transcripts and witness statements before the Rwandan Court of First Instance in Kigali in the trial proceedings culminating in the Judgement of 8th December 2000."¹⁵ In the Chamber's view, the Defence has failed to specify, in terms of date, witness, or nature of the event, the evidence sought and appears to be merely "embarking on a fishing expedition to obtain exculpatory material".¹⁶

26. In conclusion, the Chamber reiterates that Rule 68 (A) does not impose an obligation on the Prosecution to hunt for and disclose materials which are not in its possession or control, unless the Defence satisfies the requisite criteria specified above. According to the submissions of both Parties, the Prosecution disclosed the Rwandan Judgement to the Defence on 3 June 2004, in Kinyarwanda, and on 18 June 2004, in French. In the Trial Chamber's view, the Defence was informed of the source of the material at that time and could have made a reasonable effort to obtain the evidence presently requested, before the

¹¹ *Bizimungu et al.*, Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence (TC), 23 April 2004, para. 9.

¹² *Bizimungu et al.*, Decision on Motion of Accused Bicamumpaka for Disclosure of Exculpatory Evidence (TC), 23 April 2004, para. 9.

¹³ *Nzirorera et al.*, Decision on the Defence Motion for Disclosure of Exculpatory Evidence (TC), 7 October 2003, paras. 11 and 12.

¹⁴ *Nzirorera et al.*, Decision on the Defence Motion for Disclosure of Exculpatory Evidence (TC), 7 October 2003, para. 12.

¹⁵ Motion, para. 26.

¹⁶ *Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI (TC), 14 September 2004, para. 10.

testimonies of Prosecution Witnesses DCH, GHY, and GHT, in September and October 2004.

27. The Trial Chamber therefore is not satisfied that the Defence has demonstrated sufficient grounds, pursuant to Rule 68 (A) of the Rules or any other Rule, for the Chamber to order the Prosecution to seek and disclose the requested material.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

DENIES the motion in its entirety.

Arusha, 15 December 2004

[Handwritten signature of Khalida Rachid Khan]
 Khalida Rachid Khan
 Presiding Judge

[Handwritten signature of Lee Gacuiga Muthoga]
 Lee Gacuiga Muthoga
 Judge

[Handwritten signature of Emile Francis Short]
 Emile Francis Short
 Judge

