International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

ICTR-98-41-T
27-09-2005
(25466-25461)

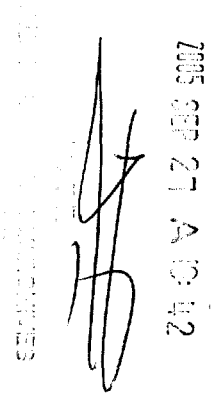
25466
S. Mussa

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 27 September 2005



THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON DISCLOSURE OF MATERIALS RELATING TO IMMIGRATION STATEMENTS OF DEFENCE WITNESSES

The Prosecution
Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence
Raphaël Constant
Paul Skolnik
Frédéric Hivon
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

25465

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

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

BEING SEIZED OF the Nsengiyumva Defence "Extremely Urgent Motion Requesting Disclosure of Documents and/or Materials Relating to Immigration, Refugee or Asylum Status of Defence Witnesses", filed on 16 May 2005 ("Defence Motion");

CONSIDERING the Prosecution Response, filed on 20 May 2005; and the Reply of the Defence for Nsengiyumva, filed on 1 June 2005;

HEREBY DECIDES the motion.

INTRODUCTION

1. In the course of the present trial, the Prosecution has confirmed that it has obtained statements by some Defence witnesses to immigration authorities of the States in which they have sought refuge. The Defence has unsuccessfully argued in a separate motion, now pending before the Appeals Chamber, that this practice violates the Defence witness protection orders.[1] The Chamber has ordered the Defence to disclose to the Prosecution the country of current residence of Defence witnesses.[2]

2. By the present motion, the Nsengiyumva Defence requests the Prosecution to disclose the immigration statements of Witnesses LIG-2 and LT-1, who have testified, and of any other Defence witness. It also requests disclosure of any documents concerning the immigration status of Defence witnesses and correspondence to or from the authorities concerned. Reference is made primarily to Rule 66 (B) and Rule 68 of the Rules of Procedure and Evidence ("the Rules"). In the alternative, the Defence requests that the Prosecution be ordered to permit the Defence to inspect any materials regarding Defence witnesses' immigration status which are in the Prosecution's possession, custody or control. The Prosecution argues that it is under no obligation to disclose or allow the inspection of such materials.

DELIBERATIONS

(i) Identification of Requested Materials

3. Case law has established that a request for production of documents has to be sufficiently specific as to the nature of the evidence sought and its being in the possession of the addressee of the request.[3] The Chamber considers that the Defence's identification of the requested materials relating to Witnesses LIG-2 and LT-1 meets these requirements. The conclusion is the same in respect of the request for materials concerning other Defence

---

[1] *Bagosora et al.*, Decision on Motion to Harmonize and Amend Witness Protection Orders (TC), 1 June 2005, paras. 9 to 17; *Bagosora et al.*, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses (TC), 21 July 2005.

[2] *Bagosora et al.*, Decision on Sufficiency of Defence Witness Summaries (TC), 5 July 2005. The Chamber denied the Defence request for certification, *see* Decision on Request for Certification Concerning Defence Witness Summaries (TC), 21 July 2005.

[3] *Prosecutor v. Blaskić*, Appeals Chamber 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. 40 (with references); *Prosecutor v. Kordic and Cerkez*, Order on Pasko Ljubicic's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the Kordic and Cerkez Case, 19 July 2002.

witnesses. Although of a general nature, the category of documents is defined precisely, and the Prosecution has admitted that it possesses immigration documents relating to such witnesses.[4]

(ii) Disclosure under Rule 66 (B)

4. Rule 66 (B) provides that:

> At the request of the Defence, the Prosecutor shall ... permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

The Defence argues that the immigration documents are indeed "material to the preparation of the defence" because they may be used by the Prosecution to impeach the credibility of Defence witnesses by showing that their testimony is inconsistent with the prior statements. Furthermore, since the Prosecution has openly declared its intention to use these documents, they must be disclosed under Rule 66 (B) as "intended for use by the Prosecutor as evidence at trial".

5. The Chamber recalls that Rule 66 is entitled "Disclosure Obligations by the Prosecutor". According to Rule 66 (A)(i), the Prosecution shall, within 30 days of the initial appearance, disclose to the Defence copies of supporting material which accompanied the indictment when confirmation was sought as well as all prior statements of the accused. Rule 66 (A)(ii) requires the Prosecution, no later than 60 days before the date set for trial, to disclose copies of the statements of all witnesses whom the Prosecution intends to call to testify at trial. Rule 66 (A) is clearly limited to disclosure of documents relating to the Prosecution case. Furthermore, Rule 66 appears in the Rules under Part Five, "Pre-Trial Proceedings", in Section 3 "Production of Evidence". Although some of the Rules in this section entail obligations throughout the trial, the Chamber considers that Rule 66 (B) requires that the Prosecution must make available all materials which will assist the Defence in countering the evidence to be presented by the Prosecution. The immigration documents requested by the present motion are not material to the Defence preparations to meet the Prosecution case, which is closed.

6. Rule 66 (B) requires the Prosecution to allow Defence inspection of three categories of documents. The third category (material which has been "obtained from or belonged to the accused") is not applicable in the present context. The second category ("intended for use by the Prosecutor as evidence at trial") must be read as referring to evidence being presented during the Prosecution case. A prior inconsistent immigration statement put to a witness, and possibly tendered as an exhibit, is not evidence in the sense of being presented to prove the truth of the content thereof.[5] The final category prescribed by Rule 66 (B) ("material to the

---

[4] The Defence motion describes the requested materials as materials, documents, correspondence and any papers in [the Prosecution's] possession, control and/or custody that relate to immigration status and/or records of (i) Witnesses LIG-2; (ii) Defence witness LT-1; (iii) any other Defence witnesses on the Nsengiyumva defence list in respect of whom inquiries into immigration, asylum and or refugee status may have been made; and (iv) any potential defence witnesses. According to the motion, such materials include, but are not limited to, any enquiry or correspondence from the Prosecution to any host country; any response from a host country thereto; documents forwarded in such correspondence; and documents relating to immigration, refugee status or record of proceedings relating thereto as disclosed by the host country, UNHCR or any other organization.

[5] T. 13 July 2004 p. 2; *Akayesu*, Judgement (AC), para. 134: ("In the opinion of the Appeals Chamber prior statement of witnesses who appear in court are as a rule relevant only insofar as they are necessary to a Trial Chamber in its assessment of the credibility of a witness. It is not the case, as appears to be suggested by Akayesu, that they should or could generally in and of themselves constitute evidence that the content thereof is truthful"). *See also Delalic et al.*, Decision on the Motion by the Accused Zejnil Delalic for the Disclosure of Evidence (TC), 26 September 1996, paras. 6-8, where a Trial Chamber found that Rule 16 (a) (1) (C) of the United States Federal Rules of Criminal Procedure provides some guidance in analyzing Rule 66. Rule 16 (a)

preparation of the defence") must also be understood as referring to the Defence preparations to meet the Prosecution case. The requested immigration documents are not part of the Prosecution case in the sense described above, but may be used during the Prosecution's cross-examination of Defence witnesses with a view to their impeachment. In the Chamber's view, Rule 66 (B) cannot be interpreted as laying down a blanket obligation for the Prosecution to disclose documents pertinent to its cross-examination of Defence witnesses. In relation to the requested immigration documents, the Chamber observes that the Defence is aware of the identity and country of residence of its witnesses and may make inquiries as to whether they have been interviewed by immigration authorities. The Defence is therefore in a position to carry out the necessary investigations to prepare its case and, on this basis, select its witnesses.

7. The *Kamuhanda* decision referred to by the Defence is distinguishable from the present question. In that case, Prosecution investigators had taken statements from witnesses after the Prosecution had received notice that they were Defence witnesses, in violation of the Chamber's witness protection order concerning the procedure for contacting of Defence witnesses. In the circumstances, the Chamber allowed the Defence to inspect the statements pursuant to Rule 66 (C).[6] Finally, the *Kajelijeli* decision, also referred to by the Defence, is not relevant as it related to disclosure of a statement of a Prosecution witness.[7] The Chamber concludes that none of the three alternatives in Rule 66 (B) requires disclosure or inspection of the immigration materials requested by the Defence.

8. This approach does not violate the rights of the Accused as set forth in Articles 19 and 20 of the Statute, as suggested by the Defence. There is no ICTR or ICTY case law supporting this view. The Defence has referred to legislation and jurisprudence of national jurisdictions invoked to the effect that comprehensive and ongoing disclosure obligations are essential for the fair trial of an Accused. No widespread practice of requiring disclosure of such statements in advance of cross-examination has been established. On the contrary, disclosure at the time of cross-examination appears to be a common procedure, and does not amount to "trial by ambush".[8]

(iii) Disclosure under Rule 68

9. Rule 68 (A) requires the Prosecution to "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". The initial determination of whether information is exculpatory is to be made by

---

(1) (C) provides that: "Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence *in chief* at the trial, or were obtained from or belonged to the defendant" (emphasis added).

[6] *Kamuhanda*, Decision on Kamuhanda's Motion for Disclosure of Witness Statements and Sanction of the Prosecutor (TC), 29 August 2002, in particular paras. 20, and 24-27. The Prosecution even received a warning under Rule 46 (A) of the Rules.

[7] *Kajelijeli*, Decision on Juvenal Kajelijeli's Motion Req uesting the Recalling of Witness GAO (TC), 2 November 2001.

[8] See e.g. Rule 16(a)(1)(C) of the United States Federal Rules of Criminal Procedure, cited above; Mueller & Kirkpatrick, Evidence (New York: Aspen, 2003), p. 523; Cross & Tapper, Evidence (London: Butterworth's, 1995), p. 322. *R. v. Stinchcombe* (1991), which has been referred to by the parties, does not address the issue at hand. The Chamber notes that the *Stinchcombe* case, relied on by the Defence, is distinghuishable from the present situation in at least two respects: first, that the disclosure obligation imposed on the Crown concerned statements derived from interviews conducted by the police or the Prosecution; and second, that there was no statutory regime of pre-trial disclosure whatsoever.

the Prosecution.[9] If the Defence contests this determination it must present *prima facie* evidence that the material sought is exculpatory in nature.[10] No such showing has been made by the Defence, nor would it seem likely that any such information would appear in an immigration statement which, at best, could merely serve to bolster the testimony of a witness.

10. Rule 68 (B), also relied upon by the Defence, does not create any independent or additional obligation, but simply provides that, where possible, the materials covered by sub-section (A) should be made available "in electronic form". This means only that the Prosecution may, with the agreement of the Defence, fulfill its disclosure obligations by using modern technology.[11]

(iv) Rule 70

11. Having decided that there is no disclosure obligation in the Rules or elsewhere which requires disclosure by the Defence, there is no need to address whether Rule 70 does, or does not, provide an exception in respect of the documents under discussion.

(v) Modalities

12. In order to ensure the smooth running of the trial, this Chamber has encouraged the parties to inform the other side, before a witness takes the stand, of documents they intend to use during examination of witnesses. These guidelines were, for instance, formulated during a Status Conference in June 2003, while the Prosecution was presenting its case.[12] At the same time, the Chamber has also acknowledged that there may be instances where such notification may only take place once cross-examination of a witness commences, in order to maintain the element of surprise.[13] The Chamber will continue to follow these practices. Consequently, the Defence will be entitled to see immigration statements at the time of cross-examination, which is in conformity with established practice in national jurisdictions.[14]

---

[9] *Prosecutor* v. *Brđanin*, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004, para. 9; *Prosecutor* v. *Rutaganda*, Decision on the Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order, 12 December 2002, para. 18; *Prosecutor v. Blaskić*, Decision on the Production of Discovery Materials, 27 January 1997 ("*Blaskić* Decision of 27 January 1997"), para. 47.

[10] *Blaskić* Decision of 27 January 1997, para. 50; *Prosecutor v. Delalic et al.*, Decision on the Request by the Accused Hazim Delic Pursuant to Rule 68 for Exculpatory Information, 24 June 1997, para. 13; *Prosecutor v. Nyiramasuhuko et al.*, 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, 18 September 2001, para. 17; *Prosecutor v. Ndayambaje*, Decision on the Defence Motion for Disclosure, Case No. ICTR-96-8-T, 25 September 2001 ("*Ndayambaje* Decision of 25 September 2001"), para. 5.

[11] *Prosecutor* v. *Bizimungu et al.*, Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material, 1 December 2004, para. 9.

[12] T. 13 June 2003, pp. 24-25 (closed session).

[13] *Id.* An example where the Defence did not disclose a document until the middle of cross-examination was T. 16 June 2004 pp. 33-37.

[14] Mueller & Kirkpatrick, Evidence (New York: Aspen, 2003), p. 523; Cross & Tapper, Evidence (London: Butterworth's, 1995), p. 322.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motion.

Arusha, 27 September 2005

Erik Møse
Presiding Judge

Jai Ram Reddy
Judge

Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]