



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-T
08-03-2006
(26570-26587)

TRIAL CHAMBER I

26570
S. Mumba

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

Registrar: Adama Dieng

Date: 8 March 2006

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

2006 MAR 8 PM 5:30
ICTR
PROSECUTOR
[Signature]

DECISION ON DISCLOSURE OF DEFENCE WITNESS STATEMENTS IN
POSSESSION OF THE PROSECUTION PURSUANT TO RULE 68 (A)

The Prosecution

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence

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

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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 "Urgent Motion for Immediate Disclosure of Defence Witness Prior Statements" and its "Strictly Confidential Annexes", filed by the Ntabakuze Defence on 4 October 2005; the "Motion to be Relieved of the Obligation to Disclose Witness Statement", filed by the Prosecution on 10 October 2005;

CONSIDERING the Responses to the Prosecution Motion, filed by the Defence for Ntabakuze, Bagosora and Kabiligi on 14, 18 and 20 October 2005, respectively; the Kabiligi Memorandum in support of the Ntabakuze Motion, filed on 20 October 2005; the Prosecution "Response to Ntabakuze Defence Motion for Disclosure of Exculpatory Evidence and Motion for Relief from any Disclosure Obligation as to the statement of Witness DM46", filed by the Prosecution on 10 November 2005; and the Response filed by the Ntabakuze Defence on 14 November 2005;

HEREBY DECIDES the motions.

INTRODUCTION

1. The Defence for Ntabakuze seeks disclosure of prior statements made by Defence Witnesses DM-30, DM-46, DM-80 and DM-81, on the basis that they are exculpatory under Rule 68 (A) of the Rules of Procedure and Evidence ("the Rules"). The Prosecution denies possessing any statements by Witness DM-30 and DM-81, and objects to the disclosure of the statements of the other witnesses on the grounds that they contain no exculpatory information. The Prosecution also asks to be relieved of any disclosure obligation under the Rule 68 (D), as such disclosure would prejudice ongoing Prosecution investigations into individuals named in the statements.

DELIBERATIONS

(i) Procedural Matters

2. The Defence argues that the Prosecution motion of 10 October 2005 is, in substance, a response to the Defence motion which, accordingly, must be deemed to have been filed outside of the time-limits prescribed by the Rules. Even assuming this to be the case, the Trial Chamber has discretion to consider late-filed submissions and, in the present instance, chooses to do so.¹

(ii) Exculpatory Character of the Statements

3. Rule 68 (A) requires the Prosecution to disclose any material which "may suggest the innocence or mitigate the guilt" of the accused. The initial determination of whether information is exculpatory is to be made by the Prosecution.² If the Defence contests this

¹ *Bagosora et al.*, Decision on Kabiligi Request for Particulars of the Amended Indictment (TC), 27 September 2005, para. 3; *Mpambara*, Decision on the Defence Preliminary Motion Challenging the Amended Indictment (TC), 30 May 2005, para. 1, n.1.

² *Bagosora et al.*, Decision on Disclosure of Materials Relating to Immigrations Statements of Defence Witnesses (TC), 27 September 2005, para. 9; *Brđanin*, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials (AC), 7 December 2004, para. 9; *Rutaganda*, Decision on the Urgent Defence Motion for Disclosure and Admission of Additional Evidence

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determination, it must present a *prima facie* basis to believe that the material sought is exculpatory.³ As the Prosecution avers that it does not possess any statements of Witnesses DM-30 and DM-81, the Chamber need only consider the statements of Witnesses DM-46 and DM-80.

4. The Prosecution claims that Witness DM-46's statement contains "only second-hand information", as the witness was outside Rwanda in 1994. Any disclosure obligation which does exist should be suspended in accordance with Rule 68 (D), as the statement names certain individuals, disclosure of which would prejudice ongoing investigations.⁴ The exculpatory character of Witness DM-80's statement is also contested. The Prosecution argues that information about the alleged criminal conduct of others could only be exculpatory if it related to "the exact specific acts with which the accused person has been charged".⁵ Information concerning crimes committed by other persons is irrelevant to the case against the accused, and could be used for no other reason than to mount a *tu quoque* defence. The Defence responds that the information can be used for a variety of purposes which are directly relevant to the Prosecution case against the accused.⁶ As with Witness DM-46, the Prosecution asserts that Witness DM-80's statement names specific individuals, disclosure of which would prejudice ongoing investigations, and that these statement cannot be easily redacted to conceal their identity. The Prosecution asks to be relieved of its disclosure obligation or, in the alternative, to be given the opportunity to redact the statement so as not to disclose certain individuals referred to therein.

5. The only issue now before the Chamber is whether the statements of Witness DM-46 and Witness DM-80 contain material which may be exculpatory, as defined by Rule 68 (A). The Chamber is not here concerned with the admissibility of such information. Nevertheless, whether information "may suggest the innocence or mitigate the guilt of the accused" must depend on an evaluation of whether there is any possibility, in light of the submissions of the parties, that the information could be relevant to the defence of the accused.

6. The Chamber is of the view, having examined the statements of Witness DM-46 and DM-80, that some of the information may be exculpatory. For example, descriptions of infiltration into areas of government control by RPF soldiers disguised as civilians could provide context or background information which may assist the Chamber in understanding some of the conduct about which the Chamber has heard testimony during the Prosecution case. Information concerning the assassination of President Habyarimana may also assist the Chamber in understanding the background to events in April 1994. The admission of any particular element of evidence will depend on the purpose for which it is tendered; whether the extent of detail is necessary for that purpose; and the Chamber's discretion to avoid needless consumption of time.⁷

and Scheduling Order (AC), 12 December 2002, para. 18; *Blaskić*, Decision on the Production of Discovery Materials (TC), 27 January 1997 ("*Blaskić* Decision"), para. 47.

³ *Bagosora et al.*, Decision on Disclosure of Materials Relating to Immigrations Statements of Defence Witnesses (TC), 27 September 2005, Decision of 27 September 2005, para. 9; *Blaskić* Decision, para. 50; *Delalic et al.*, Decision on the Request by the Accused Hazim Delic Pursuant to Rule 68 for Exculpatory Information (TC), 24 June 1997, para. 13; *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 (TC), 18 September 2001, para. 17; *Ndayambaje*, Decision on the Defence Motion for Disclosure (TC), 25 September 2001, para. 5.

⁴ Response, 10 November 2005, paras. 9-10.

⁵ Motion, 10 October 2005, paras. 4-5.

⁶ Response, 14 October 2005, para. 11.

⁷ A recent decision has underlined that questions concerning the assassination of the President Habyarimana warranted only general inquiry, and that extensive examination would not be permitted: *Bizimingu et al.*, Reconsideration of Oral Ruling of 1 June 2005 On Evidence Relating to the Crash of the Plane Carrying President Habyarimana (TC), 23 February 2006, para. 11 ("The jurisprudence of the Tribunal shows that

7. On the other hand, some of the information in the statements of the two witnesses is not exculpatory. Descriptions of crimes committed by RPF forces against civilians in geographic areas physically distant from combat between the opposing armed forces in 1994 would not suggest the innocence or mitigate the guilt of the accused. The impact of such events on the criminal conduct with which the accused are charged is too remote and indirect. The Defence submissions have not demonstrated that such information would assist in disproving any element of the offences with which the Accused are charged, or how it could sustain a valid excuse or justification for their alleged conduct.⁸ The possible uses of such information suggested by the Defence would not, in the Chamber's view, be exculpatory.

(iii) *Exemption under Rule 68 (D)*

8. Having reviewed the statements, the Chamber is satisfied that they may feasibly be redacted so as to conceal the identity of any targets of ongoing investigations, while still conveying the substance of exculpatory information. This is the appropriate means of both respecting the rights of the Accused and safeguarding the ability of the Prosecution to continue its investigations under Rule 68 (D).

FOR THE ABOVE REASONS, THE CHAMBER

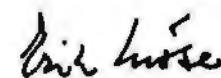
GRANTS the motions in part;

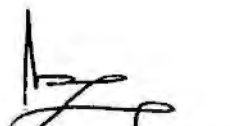
ORDERS the Prosecution to immediately identify and disclose to the Defence any exculpatory information in the statements of Witness DM-46 and Witness DM-80, in accordance with the guidance in the present decision;

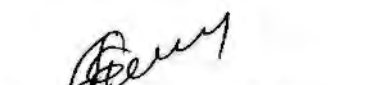
ORDERS the Defence, including the Accused, to keep the statements confidential to itself;

GRANTS the Prosecution request to redact the statements of Witness DM-46 and Witness DM-80 so as to conceal the identities of individuals who are the target of ongoing Prosecution investigations.

Arusha, 8 March 2006


Erik Møse
Presiding Judge


Jai Ram Reddy
Judge


Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]



questions relating to the responsibility for the shooting down of the plane may be put to a witness provided that this line of questioning does not go into great detail").

⁸ The word "disprove" is used here simply to mean that an element of the crime is less likely to be present than not. This should not be understood as meaning that any burden is placed on the Defence.