



ICTR-98-41-T
22-05-2006
(27534 - 27531)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 22 May 2006

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

JUDICIAL RECORDS/ARCHIVES
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**DECISION ON CERTIFICATION OF INTERLOCUTORY APPEAL CONCERNING
PROSECUTION DISCLOSURE OF DEFENCE WITNESS STATEMENTS**

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

[Signature]

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 “Request to Certify for Appeal ‘Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses’, etc., filed by the Kabiligi Defence on 4 October 2005; and the “Motion to Request for Certification to Appeal the Trial Chamber’s Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses”, filed by the Nsengiyumva Defence on 11 October 2005;

CONSIDERING the Prosecution Response to the Kabiligi request, filed on 11 October 2005; the Reply thereto, filed on 14 October 2005; the Prosecution Further Response, filed on 17 October 2005; and the Reply to the Prosecution’s Further Response, filed on 19 October 2005;

HEREBY DECIDES the requests.

INTRODUCTION

1. On 27 September 2005, the Chamber denied a request by the Nsengiyumva Defence for an order requiring the Prosecution to disclose any documents or other materials in its possession concerning the immigration status of Defence witnesses.¹ The Prosecution had previously acknowledged that it had obtained statements made by Defence witnesses to national or inter-governmental immigration authorities, and had asked questions to Defence witnesses based on those previous statements. The Chamber rejected the Defence argument that either Rule 66 (B) or Rule 68 of the Rules of Procedure and Evidence (“the Rules”) generated an obligation to disclose any such materials. The Defence requests leave to appeal the Decision.

DELIBERATIONS

2. Leave to file an interlocutory appeal of a decision “may” be granted under Rule 73 (B) where it significantly affects the “fair and expeditious conduct of proceedings or the outcome of the trial” and where “immediate resolution may materially advance the proceedings”.

(i) *Fair and Expeditious Proceedings*

3. The Defence argues that Defence witness statements in the possession of the Prosecution must be disclosed under Rule 66 (B), which provides that the Prosecution must permit inspection of documents “which are material to the preparation of the defence”. The Chamber interpreted this provision to require the Prosecution to make available any document material to the Prosecution case-in-chief. The Defence argues, however, that the provision should encompass any document which could be used to challenge the credibility of Defence witnesses.² The failure to require the Prosecution to make any prior statements of Defence witnesses available well in advance of cross-examination is said to deprive the Defence of the opportunity to make a fully informed assessment of the credibility of its

¹ *Bagosora et al.*, Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses (TC), 27 September 2005 (“the Decision”).

² *Bagosora et al.*, Anatole Nsengiyumva’s Reply, etc., 1 June 2005, para. 27 (“It has also been shown that the Prosecution must disclose all relevant material in its possession intended for use or actually used at trial. Materials intended to assist impeachment or test the credibility should also be disclosed in accordance with the jurisprudence in *Delalic*”).

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witnesses.³ Disclosure would assist the Defence in deciding whether to withdraw its witness or, alternatively, to more fully prepare the witness's testimony so as to clarify and explain any apparent contradictions with a prior statement.⁴ Allowing the Prosecution to pose questions about statements which are disclosed no earlier than the start of the witness's cross-examination interferes with the fair trial rights of the Accused.

4. The category of documents covered by the Decision is much broader than witness statements. The original motion requested not only statements of Defence witnesses, but also any "material, documents, correspondence and any papers in [the Prosecution's] possession, control and/or custody that relate to immigration status".⁵ In rejecting this request, the Chamber ruled that "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".

5. The Chamber agrees that the Decision, as it relates to the broad category of documents potentially covered by Rule 66 (B), does affect the "fair and expeditious conduct of the proceedings". Certification may be appropriate where, in particular, "broad categories of evidence" are affected by a decision.⁶ The obligation advocated by the Defence could, in practice, require the Prosecution to disclose any and all documents which may be relevant to its cross-examination of Defence witnesses. Such an obligation, if it exists, would constitute a significant expansion of the Prosecution's duty to disclose which, in and of itself, could impact on the fair and expeditious conduct of proceedings. Failure to disclose a document which the Prosecution might wish to use during its cross-examination could, presumably, lead to an adjournment. Furthermore, the modalities for examining witnesses, including the practice of permitting the cross-examining party to disclose documents as late as the beginning of the cross-examination, would be changed. Given the range of documents involved, and its consequences for the conduct of the trial, the Chamber agrees that the first condition for granting certification is satisfied.

(ii) *Materially Advance the Proceedings*

6. The interpretation of Rule 66 (B) is a determination of law which may have significant practical consequences. The Defence has articulated its grounds for challenging the correctness of the decision, and the Chamber cannot say that the appeal has no prospect of success.⁷ The use of Defence witness statements to immigration authorities has not thus far had an obviously significant impact on Prosecution cross-examinations. The Chamber nonetheless believes, in light of the potential impact of its decision, that immediate resolution of the interpretation of Rule 66 (B) "will avoid the serious consequences that could result from proceeding throughout the remainder of the Defence case on an incorrect legal footing."⁸

³ Kabiligi Request, paras. 22-23.

⁴ *Id.* para. 15.

⁵ *Bagosora et al.*, Anatole Nsengiyumva's Extremely Urgent Motion Requesting Disclosure, etc., 16 May 2005, para. 22.

⁶ *Bagosora et al.*, Certification of Appeal Concerning Access to Protected Defence Witness Information (TC), 29 July 2005, para. 2.

⁷ *Bagosora et al.*, Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal (TC), 16 February 2006, para. 4.

⁸ *Bagosora et al.*, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses, 21 July 2005, para. 11. This certification related to an impugned decision which dealt with the correctness of the Trial Chamber's interpretation of witness protection orders.

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7. Certification of the ruling in respect of Rule 68 (A) would not, however, materially advance the proceedings. The decision applied the well-established rule that the Defence must suggest a *prima facie* basis to believe that the material requested is exculpatory.⁹ The Chamber found, on the basis of the submissions before it, that no such showing had been made. The Kabiligi Defence has raised the new argument in its certification request that any material which might be used by the Prosecution to undermine the credibility of Defence witnesses should be considered exculpatory. This new argument is inadmissible as a basis for certification, having not been raised in the original motion.¹⁰ In any event, the Chamber finds the argument to be unconvincing. Rule 68 (A) refers to “material” which “may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence”. Information which affects the credibility of Defence evidence does not, of itself, suggest the innocence or mitigate the guilt of the Accused.

8. The Chamber does not consider that a stay pending resolution of the appeal is warranted.¹¹ The only category of documents which the Defence has sought in this application is statements of prior witnesses to national immigration authorities. As mentioned above, absence of advance disclosure of these documents has not proven to be of great significance. Furthermore, the Defence may always make a request to recall a witness, should it be justified in the circumstances of a particular case.

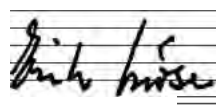
FOR THE ABOVE REASONS, THE CHAMBER

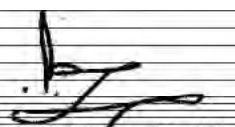
GRANTS the motion in part;


CERTIFIES for interlocutory appeal that part of the Decision on Disclosure of Material Relating to Immigration Statement of Defence Witnesses concerning the Prosecution’s disclosure obligations under Rule 66 (B);

DENIES the request for a stay.

Arusha, 22 May 2006


Erik Møse
Presiding Judge


Jai Ram Reddy
Judge


Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]



Bagosora et al., Decision on ~~Disclosure of Defence Witnesses~~ Statements in Possession of the Prosecution Pursuant to Rule 68 (A) (TC), 8 March 2006, para. 3.

¹⁰ *Nyiramasuhuko et al.*, Decision on Ntahobali’s and Nyiramasuhuko’s Motions for Certification to Appeal the “Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible” (TC), 18 March 2004, para. 21.

¹¹ Nsengiyumva Motion, p. 7. The precise request is that the use of any immigration statements be stayed pending resolution of the appeal.