



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

752/H

ICTR-98-41-AR73  
26 September 2006  
(752/H - 746/H)

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding  
Judge Mehmet Güney  
Judge Liu Daqun  
Judge Theodor Meron  
Judge Wolfgang Schomburg

Registrar: Mr. Adama Dieng

Decision of: 25 September 2006

2006 SEP 26 P 2: 21  
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THE PROSECUTOR

v.

Théoneste BAGOSORA  
Gratien KABILIGI  
Aloys NTABAKUZE  
Anatole NSENGIYUMVA

Case No. ICTR-98-41-AR73

ICTR Appeals Chamber  
Date: 26 September 2006  
Action: P.T.  
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**Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence**

Office of the Prosecutor:

Mr. Hassan Bubacar Jallow  
Ms. Barbara Mulvaney  
Mr. Neville Weston  
Mr. Drew White  
Ms. Christine Graham  
Mr. Rashid Rashid

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
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Counsel for the Defence:

Mr. Raphaël Constant and Ms. Allison Turner for Théoneste Bagosora  
Mr. Paul Skolnik and Mr. Frédéric Hivon for Gratien Kabiligi  
Mr. Peter Erlinder and Mr. André Tremblay for Aloys Ntabakuze  
Mr. Kennedy Ogetto and Mr. Gershom Otachi Bw'Omanwa for Anatole Nsengiyumva

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1. The Appeals Chamber of 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 Serious Violations Committed in the Territory of Neighboring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of an interlocutory appeal<sup>1</sup> filed jointly by Anatole Nsengiyumva and Gratien Kabiligi ("Appellants") against a decision of Trial Chamber I,<sup>2</sup> ("Impugned Decision") dismissing Mr. Nsengiyumva's request for the disclosure of documents pursuant to Rule 66(B) of the Tribunal's Rules of Procedure and Evidence ("Rules").

### BACKGROUND

2. In April 2005, soon after the defence cases in this case commenced, the Prosecution disclosed that it had documents related to the immigration, refugee, and asylum status of certain defence witnesses that it intended to use during cross-examination for impeachment purposes.<sup>3</sup> On 16 May 2005, one of the Appellants, Mr. Nsengiyumva, requested the disclosure of this material,<sup>4</sup> in part, based on Rule 66(B) of the Rules.<sup>5</sup> On 27 September 2005, the Trial Chamber denied this request and held that the Prosecution would make such documents available at the time of cross-examination in conformity with the normal practice in the case.<sup>6</sup>

3. The Appellants sought certification to appeal the Impugned Decision, which the Trial Chamber granted on 22 May 2006.<sup>7</sup> The Appellants filed their joint appeal brief on 29 May 2006. The Prosecution responded on 8 June 2006,<sup>8</sup> and the Appellants replied on 12 June 2006.<sup>9</sup>

<sup>1</sup> Kabiligi and Nsengiyumva Joint Appeal under Rule 73(B) of Trial Chamber I's "Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses", 29 May 2006 ("Appeal").

<sup>2</sup> *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses, 27 September 2005 ("Impugned Decision").

<sup>3</sup> Impugned Decision, para. 1; Appeal, paras. 4, 5.

<sup>4</sup> Based on Nsengiyumva's request, the Trial Chamber described this material as follows: "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) Witness 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." See Impugned Decision, para. 3, footnote 4.

<sup>5</sup> Impugned Decision, para. 2. In addition, Mr. Nsengiyumva requested disclosure on the basis of Rule 68, which the Chamber denied. *Id.*, paras. 2, 9, 10. See also Appeal, para. 6.

<sup>6</sup> Impugned Decision, para. 12.

<sup>7</sup> *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements, 22 May 2006 ("Certification Decision"). The Trial Chamber did not certify the Appellants' appeal on the basis of Rule 68. *Id.*, para. 7.

<sup>8</sup> Prosecutor's Response to "Kabiligi and Nsengiyumva Joint Appeal under Rule 73(B) of Trial Chamber I's Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses", 8 June 2006 ("Prosecution Response").

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4. The Appellants argue that in reaching the Impugned Decision the Trial Chamber erred in its interpretation of Rule 66(B) and took account of extraneous considerations, such as the ability of the Appellants to obtain the documents themselves.<sup>10</sup> They submit that the immigration documents are essential in assisting them to assess the potential credibility of their case.<sup>11</sup> Consequently, the Appellants contend that they are being denied the right to make a full answer and defence to the charges against them without the requested disclosure.<sup>12</sup> The Appellants seek an order compelling the Prosecution to disclose the documents in question.<sup>13</sup>

5. The Prosecution responds that the Appellants cite no legal authority in support of their reading of Rule 66(B).<sup>14</sup> The Prosecution further refers to domestic legal provisions and national case law in support of the Trial Chamber's approach.<sup>15</sup> The Prosecution disputes that the Trial Chamber relied on any extraneous considerations in interpreting Rule 66(B), such as the ability of the defence to obtain the documents, and notes that this observation referred simply to the lack of prejudice in the present case.<sup>16</sup> In their Reply, the Appellants primarily attempt to distinguish the national case law referred to by the Prosecution.<sup>17</sup>

#### DISCUSSION

6. In this decision, the Appeals Chamber considers whether the Trial Chamber erred in denying the request for disclosure under Rule 66(B) of the Rules.<sup>18</sup> As the Impugned Decision relates to the general conduct of trial proceedings, this is a matter that falls within the discretion of the Trial Chamber.<sup>19</sup> A Trial Chamber's exercise of discretion will be reversed only if the challenged decision was based on an incorrect interpretation of governing law, was based on a patently

<sup>9</sup> Joint Kabiligi and Nsengiyumva Reply to "Prosecutor's Response to Kabiligi and Nsengiyumva Joint Appeal under Rule 73(B) of Trial Chamber I's Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses", 12 June 2006 ("Appellants Reply").

<sup>10</sup> Appeal, paras. 14-41.

<sup>11</sup> Appeal, paras. 15, 16.

<sup>12</sup> Appeal, paras. 34-41. At trial, Mr. Nsengiyumva's fair trial claims also included allegations related to witness intimidation and endangerment. Appeal, para. 6. The Appellants do not address these arguments on appeal and instead focus on their ability to assess the potential credibility of their case.

<sup>13</sup> Appeal, para. 42.

<sup>14</sup> Prosecution Response, para. 6.

<sup>15</sup> Prosecution Response, paras. 10-15.

<sup>16</sup> Prosecution Response, paras. 22, 23.

<sup>17</sup> Appellants Reply, paras. 5-24.

<sup>18</sup> Rule 66(B) refers to permitting "inspection". Nonetheless, the provision imposes a disclosure obligation on the Prosecution in the sense of making information available to the Defence. That it is a disclosure obligation in this general sense is reflected in the title of Rule 66, "Disclosure of Materials by the Prosecutor" as well as the language of Rule 66(C) which refers to Prosecution ability to apply to a Trial Chamber in certain circumstances to be relieved from the obligation "to disclose pursuant to Sub-Rules (A) and (B)". The use of the term "inspection" in Sub-Rule (B) simply relieves the Prosecution from providing copies of requested items to the Defence, though a Trial Chamber may nonetheless issue an order this end.

<sup>19</sup> *Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-00-55A-AR73(C), Decision on Interlocutory Appeal, 29 May 2006, para. 5 ("Muvunyi Appeal Decision").

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incorrect conclusion of fact, or was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.<sup>20</sup>

7. Rule 66(B) of the Rules provides for the inspection of certain items which are: (1) "material to the preparation of the defence case", or (2) "intended for use by the Prosecution as evidence at trial".<sup>21</sup> The Trial Chamber ruled that the immigration documents did not fall into either of these categories.<sup>22</sup> It reasoned that the immigration documents were not "material to the preparation of the defence case" because they did not counter the Prosecution's evidence presented during its case-in-chief, but rather concerned the credibility of defence evidence.<sup>23</sup> In addition, for the Trial Chamber, the immigration documents did not constitute material intended for use by the Prosecution at trial because, in its view, this category refers only to evidence for use during the Prosecution's case-in-chief, which is closed.<sup>24</sup>

8. The Appellants contend that, in reaching this conclusion, the Trial Chamber adopted an unduly restrictive interpretation of Rule 66(B) of the Rules contrary to its plain meaning.<sup>25</sup> The Appeals Chamber agrees. The language of Rule 66(B) does not support the Trial Chamber's restrictive approach. The Prosecution refers extensively to domestic legal provisions, in particular United States Federal Rule of Criminal Procedure 16(a)(1)(E),<sup>26</sup> in support of the Trial Chamber's approach.<sup>27</sup> However, the Appeals Chamber considers the meaning of Rule 66(B) to be sufficiently clear so as not to require resort to domestic legal provisions in determining its scope.<sup>28</sup> The Appeals Chamber routinely construes the Prosecution's disclosure obligations under the Rules broadly in accord with their plain meaning.<sup>29</sup> Nothing in Rule 66(B) limits an accused's right to inspection

<sup>20</sup> *Muvunyi* Appeal Decision, para. 5. See also *The Prosecutor v. Théoneste Bagosora et al.*, Case Nos. ICTR-98-41-AR73, ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decisions on Witness Protection Orders, 6 October 2005, para. 3 ("*Bagosora* Appeal Decision").

<sup>21</sup> Rule 66(B) states in full: "At the request of the Defence, the Prosecutor shall, subject to Sub-Rule (C), 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."

<sup>22</sup> Impugned Decision, para. 6.

<sup>23</sup> Impugned Decision, paras. 5, 6.

<sup>24</sup> Impugned Decision, paras. 5, 6.

<sup>25</sup> Appeal, paras. 14-25.

<sup>26</sup> This provision reads: "Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant." This rule was amended in 2002, and what was previously sub-part (C) - which is the reference cited by the Prosecution and the Trial Chamber (Impugned Decision paras. 6, 7; Prosecution Response, para. 12) - was moved with minor amendments to sub-part (B).

<sup>27</sup> Prosecution Response, paras. 10-16.

<sup>28</sup> This was the same approach taken by the ICTY Appeals Chamber in interpreting the scope of Rule 68. See *The Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004, para. 179 ("*Krstić* Appeal Judgement").

<sup>29</sup> *The Prosecutor v. Edouard Karemera et al.*, Case No. ICTR, 98-44-A73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June

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only of material related to the Prosecution's case-in-chief.<sup>30</sup> Rather, this Rule uses much broader language: "material to the preparation of the defence case" and "intended for use ... at trial".

9. The Appellants seek material potentially falling under both categories.<sup>31</sup> In accord with the plain meaning of Rule 66(B) of the Rules, the test for materiality under the first category is the relevance of the documents to the preparation of the defence case. Preparation is a broad concept and does not necessarily require that the material itself counter the Prosecution evidence.<sup>32</sup> Indeed, for the Appellants, the immigration documents are material to the preparation of their defence because these documents may improve their assessment of the potential credibility of their witnesses before making a final selection of whom to call in their defence.<sup>33</sup> The Appeals Chamber cannot exclude that this is an appropriate basis for authorizing the inspection of documents if the requisite showing is made by the defence. There are few tasks more relevant to the preparation of the defence case than selecting witnesses.<sup>34</sup> The Trial Chamber is the appropriate authority to make this case-specific assessment in the first instance under the appropriate standard. Moreover, the use of the phrase "at trial" in the second category of Rule 66(B) signals its applicability throughout the proceedings.<sup>35</sup> As such, at least some of the immigration documents sought are equally subject to inspection to the extent that they are intended as exhibits at trial.

10. The Appeals Chamber observes that this plain reading of Rule 66(B) of the Rules does not create a broad affirmative obligation on the Prosecution to disclose any and all documents which

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2006, paras. 9-13 ("*Karemera Appeal Decision*"). See also *Krstić Appeal Judgement*, para. 180; *The Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement*, 20 July 2004, paras. 265, 266 ("*Blaškić Appeal Judgement*").

<sup>30</sup> In contrast, United States Federal Rule of Criminal Procedure 16(a)(1)(E) expressly states that the government's disclosure obligation is limited to items to be used in its "case-in-chief". The United States Supreme Court in turn seized on this language to similarly restrict the category "material to preparing the defense" as well to preparations to counter the government's case-in-chief. See *United States v. Armstrong*, 517 U.S. 456, 462 (1996). It is significant that the Tribunal's Rules omit this reference in favour of a more broad formulation.

<sup>31</sup> In addition to prior statements, which could be used for impeachment purposes and possibly tendered as exhibits, the Appellants seek disclosure of a broader category of material, extending to correspondence between the Prosecution and state authorities. See *Impugned Decision*, para. 3, footnote 4 (quoted *supra*).

<sup>32</sup> Indeed, even under United States Federal Rule of Criminal Procedure 16, which is limited to disclosure on matters material to the preparation of the defence against the prosecutor's case-in-chief, evidence is material "as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." See *United States v. Marshall*, 132 F.3d 63, 68 (D.C. Cir. 1998) (emphasis added). Further, it also extends to some extent to information which might dissuade a defendant from pursuing an unmeritorious defence. *Id.*

<sup>33</sup> *Appeal*, para. 16.

<sup>34</sup> The Prosecution counters that providing possible impeachment material to the defence obviates the purpose of cross-examination and will only result in contrived and perjured testimony. Prosecution Response, para. 9. The Appeals Chamber disagrees. In the present case, the Appellants appear to be seeking disclosure precisely to avoid putting questionable witnesses on the stand. Moreover, the Prosecution still retains the ability to raise questions during cross-examination concerning the witness's preparation in light of the disclosure and make relevant arguments in its final submissions.

<sup>35</sup> The Appeals Chamber has held that Rule 66(B) is applicable on appeal as well if the material sought was not available at trial. See *Georges Rutaganda v. The Prosecutor, Case No. ICTR 96-3-A, Decision on the Prosecution's Urgent Request for Clarification in Relation to the Applicability of Rule 66(B) to Appellate Proceedings and Request for Extension of the Page Limit Applicable to Motions*, 28 June 2002, p. 2.

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may be relevant to its cross-examination, as suggested by the Trial Chamber.<sup>36</sup> Rule 66(B) is only triggered by a sufficiently specific request by the defence,<sup>37</sup> which in turn engages reciprocal disclosure obligations on the defence's part under Rule 67(C). In this case, as the Trial Chamber recognized, the defence sought a precise category of documents, namely immigration-related material, admittedly in the possession of the Prosecution.<sup>38</sup>

11. In addition, the Trial Chamber observed in the Impugned Decision that the defence was aware of the identity and residence of its witnesses and thus was capable of undertaking its own investigations for the material.<sup>39</sup> The Appellants contend that this is an irrelevant consideration and an error of law.<sup>40</sup> The Prosecution responds that the decision was not based on this observation.<sup>41</sup> The Appeals Chamber, for its part, cannot discern whether the Trial Chamber's observation was a basis for denying the motion. Nonetheless, in the Appeals Chamber's view, there is no requirement for the defence to make independent efforts to obtain material prior to receiving requested disclosure under the Rules. A request under Rule 66(B) is one of the methods available to the defence for carrying out investigations.

12. Finally, the Appeals Chamber notes that the Impugned Decision in fact provided for the disclosure of at least some of the requested material, the documents intended as exhibits, at the time of cross-examination.<sup>42</sup> This framework may be appropriate in some circumstances for certain material. The Appeals Chamber affirms that the Trial Chamber is best placed to determine both the modalities for disclosure and also what time is sufficient for an accused to prepare his defence based on the timing of such disclosure.<sup>43</sup> It is evident, however, that disclosure at the time of cross-examination is insufficient to the extent, as in this case, that the requested materials are intended to assist the defence select its witnesses.

### CONCLUSION

13. Accordingly, the Appeals Chamber finds that the Trial Chamber erred by narrowly construing the Prosecution's disclosure obligations under Rule 66(B) of the Rules in a manner inconsistent with the plain language of the provision.

<sup>36</sup> See, e.g., Impugned Decision, para. 6 ("Rule 66(B) cannot be interpreted as laying down a blanket obligation for the Prosecutor to disclose documents pertinent to its cross-examination of defence witnesses.").

<sup>37</sup> *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 40.

<sup>38</sup> Impugned Decision, para. 3.

<sup>39</sup> See Impugned Decision, para. 6 ("In relation to the requested immigration documents, the Chamber observes that the Defence is aware of the identify and country of residence of its witnesses and may make inquires 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."); Prosecution Appeal, para. 8.

<sup>40</sup> Appeal, paras. 26-29.

<sup>41</sup> Prosecution Response, para. 22.

<sup>42</sup> Impugned Decision, para. 12.

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**DISPOSITION**

14. For the foregoing reasons, the Appeal is **GRANTED**, and the Impugned Decision is **REVERSED**. The Prosecution is **ORDERED** to permit inspection by the defence of all the requested immigration documents that it intends to use as exhibits during cross-examination. Furthermore, with respect to the other immigration documents not intended for use as exhibits, the Appeals Chamber **REMITTS** this matter to the Trial Chamber for reconsideration consistent with this decision on whether they are material to the preparation of the defence.

Done in English and French, the English version being authoritative.

Done this 25th day of September 2006,  
At The Hague,  
The Netherlands.



[Seal of the Tribunal]

Judge Fausto Pocar  
Residing

<sup>43</sup> *The Prosecutor v. Edouard Karemera et al.*, Case No. ICTR, 98-44-A73.6, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, paras. 7, 8.