



UNITED NATIONS
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1 CR-99-50-T
25-09-2006
(23387-23380)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 25 September 2006

THE PROSECUTOR
v.
CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JÉRÔME-CLÉMENT BICAMUMPAKA
PROSPER MUGIRANEZA

Case No. ICTR-99-50-T

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**DECISION ON CASIMIR BIZUMUNGU'S REQUESTS FOR DISCLOSURE OF THE
BRUGUIÈRE REPORT AND THE COOPERATION OF FRANCE**

Article 28 of the Statute and Rule 68 of the Rules of Procedure and Evidence

Office of the Prosecutor:

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Mr. Pierre Gaudreau and Mr. Michel Croteau for **Jérôme-Clément Bicamumpaka**
Mr. Tom Moran and Ms. Marie-Pierre Poulain for **Prosper Mugiraneza**

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“Tribunal”),

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuga Muthoga and Judge Emile Francis Short (the “Trial Chamber”);

BEING SEISED of the “Requête de Casimir Bizimungu aux fins de Communication par le Procureur du Rapport Bruguière (Confidentielle)”, filed on 24 February 2006 (the “Rule 68 Motion”),¹ and the “Requête de Casimir Bizimungu aux Fins de Coopération de la France, filed on 4 May 2006 (the “Article 28 Motion”);

CONSIDERING the “Prosecutor’s Response to Casimir Bizimungu’s Motion for Disclosure of the Bruguière Report”, filed 2 March 2006 (the “Rule 68 Response”);

CONSIDERING the “Réplique à la Réponse du Procureur à la Requête de Casimir Bizimungu en Communication du Rapport Bruguière”, filed 20 March 2006 (the “Rule 68 Reply”);²

NOTING that the Prosecution did not file a response to the Article 28 Motion;

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), particularly Article 28 of the Statute and Rules 54, and 68 of the Rules;

NOW DECIDES the Motion solely on the basis of the briefs of the Parties, pursuant to Rule 73 (A) of the Rules.

INTRODUCTION

1. On 24 February 2006, the Defence for Casimir Bizimungu filed a Confidential Motion, relying on Rule 68 of the Rules, for disclosure of the Report of French Judge Jean-Louis Bruguière (“Bruguière Report”, or “Report”), which concerns the 6 April 1994 fatal attack on then Rwandan President Habyarimana’s plane. On 11 May 2006, the Defence filed a related Motion, relying on Article 28 of the Statute and Rule 54 of the Rules, requesting the Chamber to order the cooperation of France in procuring the Bruguière Report. Because of the related nature of the requests, the Chamber will now rule upon them together.

SUBMISSIONS

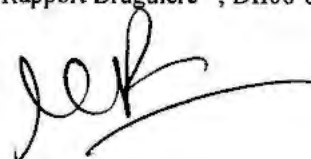
The Rule 68 Motion

The Defence Request

2. The Defence for Casimir Bizimungu moves the Trial Chamber to issue an order, pursuant to Rule 68(A) of the Rules, directing the Prosecution to disclose the Bruguière Report. If the Prosecution is not in possession of the Report, the Defence requests the Chamber to order the Prosecution to obtain a copy of it and to disclose it to the Defence.

¹LCSS translation available in draft at time of filing: “Casimir Bizimungu’s Motion for the Prosecutor to Disclose the Bruguière Report”, DII06-0059 (E).

²LCSS translation available in draft at time of filing: “Reply to the Prosecutor’s Response to the ‘Requête de Casimir Bizimungu Aux Fins de Communication par le Procureur du Rapport Bruguière’”, DII06-0060 (E).



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3. The Defence notes that the Prosecution failed to respond to Casimir Bizimungu's previous requests for the Report in compliance with Rule 68,³ and annexes its correspondence with the Prosecution requesting the document.⁴ It further submits that the Bruguière Report is a well identified document known to the Prosecution.⁵
4. The Defence asserts that the Bruguière Report will provide evidence relevant to several of the Indictment's counts. In general, these arguments can be summarised as follows: (i) the Report shows that the shooting down of the plane by the Rwandan Patriotic Front ("RPF") was the main cause of the massacres, thereby diverting or at least mitigating responsibility for them;⁶ (ii) the Report calls into question the Prosecution's theory of a conspiracy by negating responsibility for the alleged triggering event; (iii) the Report has a bearing on the state of mind of government ministers at the time; (iv) the Report is relevant to the level of government control over the situation in Rwanda at the time; (v) the Report explains events in the context of resumed hostilities between the RPF and the Rwandan government, thereby showing the necessity of civil defence measures, including the establishment of roadblocks; and (vi) the Report is relevant to the classification of the conflict as international or non-international, and therefore alleged violations of the Geneva Conventions, because it may contain information regarding Ugandan assistance to the RPF.
5. In addition to its relevance to allegations in the Indictment, the Defence also asserts that the Report's information implicating the RPF in Habyarimana's death will impeach numerous Prosecution witnesses, especially those over whom the RPF exerts considerable control. Many witnesses in this case either live or are detained within Rwanda's borders; and thus, the Defence asserts that their testimony is subject to the RPF's approval.

The Prosecution's Response

³ *Prosecutor v. Blaskic*, Decision on the Production of Discovery Materials, 27 January 1997, ruled that in response to a request for disclosure, the Prosecution must: State whether the material is in its possession; and state whether in its opinion the material is likely to be exculpatory. Or it may state that although the material may be exculpatory, it should not be disclosed for some reasons.

⁴ This correspondence comprises the following annexes: Annex C, Divulguation à la défense de Casimir Bizimungu du Mémoire Hourigan et du Rapport Bruguière en Vertu de l'article 68 du Règlement de procédure et de preuve, dated 10 June 2004; Annex D, Prosecutor's Response to the "Request for Disclosure of Documents Pursuant to Rule 68, dated 14 June 2004; Annex E, Deuxième demande de divulgation du Rapport Bruguière en vertu de l'article 68 du Règlement de procédure et de preuve, dated 22 June 2004; and Annex F, Reply to the Defence's "Second Request for Disclosure of the Bruguière Report Pursuant to Rule 68, dated 1 July 2004.

⁵ In support of this assertion, the Defence relies upon a *dossier de press* (Annex A), which includes press coverage of: the Commission Rogatory convened by Judge Bruguière with the Prosecution's consent, and former Prosecutor Carla Del Ponte's statements that her office was working closely with Bruguière intending to use his findings to determine whether to open an investigation of its own.

⁶ The Defence relies on numerous sources in support of this contention, including: Annex B, Report of the Special Rapporteur of the Human Rights pursuant to Resolution S-31 of the Commission and the Decision 1994/223 of the Economic and Social Council, Witness QU's statement that the person who shot him/her said they did so in retaliation because the Head of State had been killed, T. 17 March 2004, p. 15, Witness D's testimony that the massacres perpetrated after 6 April 1994 were mainly caused by the crash of the President's plane, T. 15 June 2004, p. 58, line 4., and Witness Nkuliyingoma's report that ethnic hostilities resumed following Habyarimana's plane crash, T. 8 July 2004, p. 17.



6. In response, the Prosecution submits that it is not better situated to obtain the document than the Defence. Judge Bruguière denied each of the Defence's three requests for the document on the grounds that it is sealed pursuant to Article 11 of the French Code on criminal proceedings.
7. The Prosecution also maintains that the Bruguière Report's investigation into the attack upon President Habyarimana's plane is irrelevant to the Accused's case. According to the Prosecution, the Trial Chamber's oral decision of 1 June 2005 (reaffirmed on 23 February 2006) ruled that the Indictment is not based upon any alleged involvement by the Accused in the downing of the President's plane. Although this ruling reiterated the Defence's right to present its case in the manner it deems most appropriate, it also directed the Defence not to delve into Habyarimana's assassination in great detail.

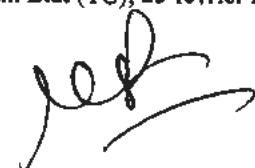
The Defence Reply

8. The Defence submits that the Prosecution's failure to deny knowledge of the Bruguière Report is a tacit admission that it is in its possession.
9. Bizimungu argues that it is his right to tell his side of the story and, therefore, exculpatory evidence under Rule 68 should not be strictly limited to "the formulation of the indictment".

The Article 28 Motion

10. In the Article 28 Motion, the Defence seeks the same material via another means, requesting that the Chamber order the French government to cooperate by disclosing the Bruguière Report to Casimir Bizimungu. For the purposes of the Article 28 Motion, the Defence relies upon many of the factual allegations in its Rule 68 Motion.
11. The Defence submits that it is seeking disclosure of a well-known document that it has specifically identified. Although not in the public domain, this report attracted a lot of media attention and publicity. Furthermore, in his communications with the Defence, Judge Bruguière acknowledged the existence of the document by refusing to disclose it.
12. The Defence argues that the relevance of the Report to the criminal responsibility of the Accused is a question of fact which varies from case to case, depending on the positions occupied by the Accused and the circumstances under which they found themselves at the moment those events took place.
13. The Defence notes that Judge Bruguière refused to disclose the report, and includes an annexure to the Motion consisting of email communications between Defence Counsel and Judge Bruguière in the course of which the Judge states: (i) under French law the report is not to be disclosed to third persons;⁷ and (ii) there is no

⁷ Despite Judge Bruguière's claim, the Defence recalls that *dossiers d'instruction* have been the subject of orders made by other Trial Chambers of the ICTR, and in this respect it cites the Trial Chamber's decision in *Karemera et al.*, in which that Chamber ordered a State to disclose documents contained within a *dossier d'instruction*. *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-PT, *Décision Relative à la Requête de Joseph Nzirorera aux Fins d'Obtenir la Coopération du Gouvernement d'un Certain État (TC)*, 23 février 2005.



domestic avenue for judicial review of his inability to disclose the report to third persons.

14. The Prosecution did not file a response to the Article 28 Motion.

DELIBERATIONS

The Rule 68 Motion

15. Rule 68 (A) obliges the Prosecution to disclose 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.”⁸ These obligations are of a continuous nature.⁹
16. The Prosecution makes the initial determination of whether information and materials are exculpatory.¹⁰ Where the Defence believes that exculpatory evidence or materials in the Prosecution’s custody or control have not been disclosed, it may request that the Trial Chamber order disclosure pursuant to Rule 68. For this request to succeed the Defence must sufficiently identify the material sought and make a sufficient showing that it is exculpatory.¹¹
17. The Chamber finds that the materials provided by the Defence have sufficiently identified the material sought, the Bruguière Report, for the purposes of Rule 68.
18. Moving to the exculpatory character of the Bruguière Report, the Chamber notes that several of Bizimungu’s arguments on this point were advanced jointly by the Defence—albeit in less detail—in their request for reconsideration of the Chamber’s Oral Ruling of 1 June 2005, where the issue of who shot down the plane was ruled improper for the cross-examination of Prosecution Expert Witness Dr. Alison Des Forges.
19. As noted in its Reconsideration of Oral Ruling of 1 June 2005 on Evidence Relating to the Crash of the Plane Carrying President Habyarimana, the Chamber has reviewed the jurisprudence of the Tribunal on this issue.¹² The trend has been to allow limited questioning of witnesses regarding the responsibility for the shooting down of the President’s plane,¹³ but Trial Chambers have generally been more

⁸ Rule 68 (A) of the Rules of Procedure and Evidence.

⁹ Rule 68 (E) of the Rules of Procedure and Evidence; *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Decision on the Appellant’s Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings (AC), 26 September 2000, para. 32.

¹⁰ *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Decision on the Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order (AC), 12 December 2002, para. 18.

¹¹ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Bicumumpaka’s Motion for Disclosure of Exculpatory Evidence (MDR Files), 17 November 2004, para. 14.

¹² *Bizimungu et al.*, Case No. ICTR-99-50-T, Reconsideration of Oral Ruling of 1 June 2005 on Evidence Relating to the Crash of the Plane Carrying President Habyarimana, 23 February 2006, para. 8.

¹³ For example, *Prosecutor v. Bagosora et al.*, T. 25 September 2002, pp.39-41; T. 22 January 2004, pp. 53-55 (cross-examination of prosecution witness Romeo Dallaire); T. 27 January 2004, pp. 82-83 (cross-examination of prosecution witness Romeo Dallaire); T. 12 May 2005, pp.32-33 (testimony of defence witness Dr. Helmut Strizek); *Prosecutor v. Nyiramasuhuko et al.*, T. 15 June 2004, pp.57-58 (allowing the defence to “put their case” regarding responsibility for shooting down the plane to prosecution witnesses on cross-examination as long as they did not go into unnecessary detail); T. 5 October 2004, pp.37-40 (cross-examination of prosecution witness André Guichaoua).



reluctant to deal at length with this issue because they have found that its resolution will not assist them in addressing the criminal responsibility of the accused in their respective trials.¹⁴

20. The Chamber reiterates that the answer to the question, “Who shot down President Habyarimana’s plane?” has no bearing on the responsibility of the Accused in this trial. The charges against Casimir Bizimungu and his co-Accused are not based upon their alleged responsibility or involvement in former President Habyarimana’s assassination. Thus, evidence as to who is responsible for the crash of the President’s plane would not assist the Chamber in determining the guilt or innocence of the Accused.
21. The Chamber understands that the Defence strategy with regard to the Bruguière Report does not rest on denying the responsibility of the Accused for bringing down Habyarimana’s plane. The Defence seeks to show that the RPF shot down former President Habyarimana’s plane, and that this action destabilised Rwanda and aroused the Rwandan people to such a degree that the country moved beyond the control of the government, and thus of the Accused. Without addressing this argument in detail, the Chamber notes that its essence—as it relates to the charges against the Accused—is not the identity of President Habyarimana’s assassins, but rather the circumstances faced by the Rwandan government after his death. The Defence can make this argument just as effectively without the Bruguière Report. Arguments related solely to the historical record, as opposed to the specific charges against the Accused, are beyond the scope of this trial.
22. The Chamber notes that arguments related to the nature of the conflict—whether it is a non-international or international armed conflict under the Geneva Conventions—are moot as a result of its Decision on the Prosecution’s Motion for Judicial Notice, which took judicial notice, as a fact of common knowledge under Rule 94 (A), that the armed conflict in Rwanda in 1994 was non-international.¹⁵
23. Regarding the credibility of Prosecution witnesses, the Chamber rejects the Defence argument that the Report, which the Defence submits will contradict statements made by RPF officials to the international community, can be used to impeach the

¹⁴ For example, in *Ntagerura et al.*, the Chamber ruled that the report and testimony of a proposed expert witness dealing with this issue would not aid the Chamber in considering issues relevant to the trial. *Ntagerura et al.*, T. 4 July 2002, pp. 7-8. In *Karemera et al.*, the Chamber denied a similar request under Rule 68, finding that Accused Nzirorera had failed to show how materials relating to the assassination of President Habyarimana could suggest the innocence or mitigate the guilt of the accused, or affect the credibility of the prosecution evidence. *Karemera et al.*, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, para. 15. In a series of later decisions in the same case the *Karemera et al.* Chamber denied specific requests for the Bruguière Report, reiterating that the charges in that case are not based on any alleged responsibility of the Accused in the assassination of President Habyarimana, and that evidence regarding the shooting down of the plane could not relieve the government Ministers of their alleged individual criminal responsibility for international crimes committed in Rwanda during 1994. *Karemera et al.*, Decision on Accused Nzirorera’s Motion for Inspection of Materials, 5 February 2004, para. 11; *Décision Relative à la Requête de Joseph Nzirorera aux Fins d’Obtenir la Coopération du Gouvernement Français*, 23 February 2005, para. 11; Decision on Joseph Nzirorera’s Application for Certification to Appeal the Decision Denying his Request for Cooperation to Government of France, 31 March 2005, para. 6; Decision on Joseph Nzirorera’s Motion to Compel Inspection and Disclosure, 5 July 2005, para. 12.

¹⁵ *Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosecutor’s Motion for Judicial Notice, 22 September 2006, para. 11.



credibility of Prosecution witnesses living in Rwanda on the basis that their testimony is controlled by the current RPF government. If anything, the Bruguière Report may be relevant to the RPF's credibility, which is not at issue before this Tribunal and does not fall within the scope of the term "Prosecution evidence" under Rule 68 (A). While evidence of RPF control over Prosecution witnesses might affect such witnesses' credibility, the Defence has not demonstrated that the Bruguière Report would enlighten the Chamber on such matters. Thus, the Chamber finds that the Defence has failed to make a sufficient showing that the Bruguière Report may affect the credibility of Prosecution witnesses.

24. The Chamber therefore rules that the Defence for Casimir Bizimungu has failed to show the exculpatory character of the Bruguière Report for the purposes of Rule 68.

The Article 28 Motion

25. Article 28 of the Statute mandates State cooperation with the Tribunal in the "investigation and prosecution of persons accused of committing serious violations of international humanitarian law".¹⁶ Pursuant to this Article, States are required to comply with requests or orders issued by Trial Chambers regarding, among other things, the "production of evidence" and "the service of documents".¹⁷ The criteria to be satisfied by the party seeking an order for State cooperation with the production of evidence or service of documents under Article 28 of the Statute are: (i) the party seeking the material must specifically identify, to the extent possible, the documents sought; (ii) the party must articulate the document's relevance to the trial; and (iii) the party must show that its efforts to obtain the documents have been unsuccessful.¹⁸
26. The Chamber finds that the Defence has identified the material sought, the Bruguière Report, with sufficient specificity for the purposes of Article 28 of the Statute.
27. Nonetheless, with respect to the relevance of the Bruguière Report to this trial, the Chamber notes its ruling that the Defence failed to show the exculpatory character of the Report for the purposes of its request under Rule 68. For the same reasons—notably, (i) that the Indictment charges none of the Accused with shooting down President Habyarimana's plane; (ii) that the identity of Habyarimana's assassins are not relevant to any Defence based on the inability to control the country after his killing; and (iii) that the Defence has not shown that the Report would be helpful in assessing the credibility of witnesses—the Chamber finds that the Defence has failed to show the relevance of the Bruguière Report to this trial for the purposes of Article 28.

¹⁶ Article 28 (1), Statute of the International Tribunal for Rwanda.

¹⁷ Article 28 (2), Statute of the International Tribunal for Rwanda.

¹⁸ *Bagosora et al.*, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, 10 March 2004, para. 4; see also *Bagosora et al.*, Decision on Request to the Republic of Togo for Assistance Pursuant to Article 28 of the Statute, 31 October 2005, para. 2. *Prosecutor v. Blaskic*, Judgement on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997 (AC), 29 October 1997; *Prosecutor v. Nindiliyimana et al.*, Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of Ghana Pursuant to Article 28 of the Statute, 13 February 2006, para. 6; Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of Togo Pursuant to Article 28 of the Statute, 13 February 2006, para. 6; Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of the Netherlands Pursuant to Article 28 of the Statute, 13 February 2006, para. 6.



FOR THE FOREGOING REASONS, THE CHAMBER

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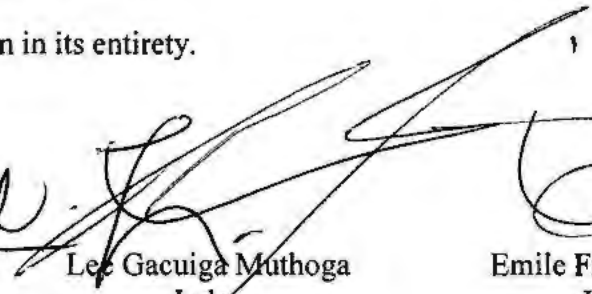
DENIES the Rule 68 Motion in its entirety.

DENIES the Article 28 Motion in its entirety.

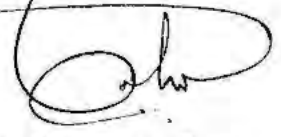
Arusha, 25 September 2006



Khalida Rachid Khan
Presiding Judge



Lee Gacuiga Muthoga
Judge



Emile Francis Short
Judge

