



ICTR-98-41-T
06-10-2006
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

(30187-30184)

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ORIGINAL: ENGLISH

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 6 October 2006

THE PROSECUTOR

v.

Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

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DECISION ON THE NTABAKUZE MOTION FOR DISCLOSURE OF VARIOUS
CATEGORIES OF DOCUMENTS PURSUANT TO RULE 68

The Prosecution

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid
Gregory Townsend

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 a “Motion for an Order Compelling the Prosecutor to Disclose Various Exculpatory Documents Pursuant to Rule 68”, filed by the Ntabakuze Defence on 2 June 2006;

CONSIDERING the Prosecution Response, filed on 7 June 2006, and the Ntabakuze Reply, filed on 27 June 2006;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Ntabakuze Defence seeks disclosure from the Prosecution of eight categories of documents, on the basis that the documents may be exculpatory under Rule 68 (A) of the Rules of Procedure and Evidence. The documents consist of reports by UN agencies or the Office of the Prosecutor itself concerning events in Rwanda in 1994. One of the categories of documents – concerning reports prepared by the United Nations High Commissioner for Refugees – is the object of a separate motion filed by the Ntabakuze Defence which requests substantially the same relief on the same grounds. A separate decision, filed today, will address that request.¹

DELIBERATIONS

2. Rule 68 (A) provides that the Prosecution has an obligation to disclose “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 Appeals Chamber has consistently interpreted the words “actual knowledge” to require that the information be in the Prosecution’s possession.² Accordingly, “[t]he initial decision as to whether material has to be disclosed under Rule 68 has to be made by the Prosecutor”.³ This determination “is primarily a facts-based judgement made by and under the responsibility of the Prosecution”, which is presumed to discharge its obligation in good faith.⁴ If the Defence claims that the

¹ *Bagosora et al.*, Decision on Ntabakuze Motion for Information from the UNHCR and a Meeting With One of Its Officials (TC), 6 October 2006.

² *Kajelijeli*, Judgement (AC), 23 May 2005, para. 262 (“Defence must first establish that the evidence was in the possession of the Prosecution”); *Brdjanin*, 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 (application must “be accompanied by all *prima facie* proofs tending to show that it is likely that the evidence is exculpatory and is in the possession of the Prosecution”); *Blaskic*, Judgement (AC), 29 July 2004, para. 268 (applicant must establish that material “might prove exculpatory for the accused and is in the possession of the Prosecution”); *Bagosora et al.*, Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses (TC), 27 September 2005, para. 3 (“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 *Kordic & Carkoz*, Decision on Motion by Dario Kordic for Access to Unredacted Portions of October 2002 Interviews with Witness “AT” (AC), 23 May 2003, para. 24.

⁴ *Blaskic*, Judgement (AC), 29 July 2004, para. 264; *Bagosora et al.*, Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses (TC), 27 September 2005, para. 3 (“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”).

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obligation has been violated, it must: (i) define the exculpatory material with reasonable specificity; (ii) establish that the material is in the custody and control of the Prosecution; and (iii) present a *prima facie* case that the material is exculpatory.⁵

3. The Prosecution denies possessing any documents in four of the eight categories requested by the Defence: alleged files arising from an investigation by Michael Hourigan into the assassination of President Habyarimana on 6 April 1994; an alleged report by Mr. Hourigan to Louise Arbour concerning the assassination of President Habyarimana on 6 April 1994; reports by human rights observers regarding demographic changes in Rwanda; and documents from the United Nations Rwanda Emergency Office.⁶ The Defence has not contested this submission. In the absence of any indication to the contrary, the Chamber accepts this submission and denies any order in respect of these four categories.

4. Three categories of documents remain for consideration: "Human Rights Field Office for Rwanda ("HRFOR") reports related to individual massacre and/or burial sites, as well as summaries and reports relating to the 1994 events in Rwanda"; "OTP Special Investigation Unit ("SIU") reports related to individual massacre and/or burial sites, as well as summaries and reports relating to the 1994 events in Rwanda"; "Weekly summary reports by UNAMIR Military Observers to Headquarters in Kigali for all of 1994 and the first six months of 1995".⁷ The Defence submits that the documents will support the "Ntabakuze theory of the case as described in the Ntabakuze pre-defence brief", and explains how the categories described could potentially contain exculpatory documents. The Prosecution does not deny possession of documents in these categories, but submits that the documents have been reviewed and that any exculpatory information has already been disclosed.⁸

5. The Chamber must accept that the Prosecution has reviewed the documents in its possession in good faith and has complied with its disclosure obligations. The categories of documents are not so specific as to require disclosure of every document falling within their ambit. Under these circumstances, the Prosecution is obliged to review, identify and disclose any documents which may be exculpatory. In the absence of any showing that it has done otherwise, there is no basis for any order under Rule 68.

⁵ *Blaskic*, Judgement (AC), 29 July 2004, para. 268; *Karemera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 13 ("To establish a violation of the Rule 68 disclosure obligation, the Defence must (i) establish that additional material exists in the possession of the Prosecution; and (ii) present a *prima facie* case that the material is exculpatory").

⁶ Response, paras. 3 (d), 3 (e), 3 (f) and 3 (h).

⁷ Motion, para. 1.

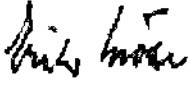
⁸ Prosecution Response, paras. 3(b), 3(c) and 3(g).

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FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 6 October 2006


Erik Mose
Presiding Judge


Jai Ram Reddy
Judge


Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

