



ICTR-98-41-T
06-10-2006
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
(30192-30188)

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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 NTABAKUZE MOTION FOR DISCLOSURE
OF PROSECUTION FILES

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 the "Motion for the Disclosure of Exculpatory Evidence", filed by the Ntabakuze Defence on 7 November 2005;

CONSIDERING the Prosecution Response, filed on 10 November 2005; and the Reply to the Prosecutor's Response, filed on 14 November 2005;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Defence for Ntabakuze requests an order requiring the Prosecution to disclose "any and all evidence gathered by the Office of the Prosecutor concerning actions of members of the RPF".¹ The Defence claims that this information is exculpatory and must, accordingly, be disclosed in accordance with Rule 68 of the Rules of Procedure and Evidence. The Prosecution responds that Rule 68 requires disclosure only of material which shows that the RPF, rather than the Accused, committed the very crimes with which the Accused are charged. The Prosecution asserts that its review of the material in its possession does not reveal any such evidence.²

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.³ Accordingly, "[t]he initial decision as to whether material has to be disclosed under Rule 68 has to be made by the Prosecutor".⁴ 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.⁵ If the Defence claims that the obligation has been violated, it must: (i) define the exculpatory material with reasonable

¹ Defence Motion, p. 5.

² Prosecution Response, para. 6.

³ *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").

⁴ *Kordic & Cerkez*, Decision on Motion by Dario Kordic for Access to Unredacted Portions of October 2002 Interviews with Witness "AT" (AC), 23 May 2003, para. 24.

⁵ *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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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.⁶

3. A previous decision of this Chamber has expressed its view that a *prima facie* basis exists to believe that information concerning some – but not all – RPF activities may be exculpatory.⁷ The Chamber ordered partial disclosure of the statements of two witnesses describing such activities:

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.

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. The possible uses of such information suggested by the Defence would not, in the Chamber's view, be exculpatory.⁸

4. Information is exculpatory only if it tends to disprove a material fact alleged against the Accused, or if it undermines the credibility of evidence intended to prove those material facts. This depends on the nature of the charges and evidence heard against the Accused.⁹ Evidence of widespread infiltration by RPF operatives dressed as civilians, or operating in specific locations relevant to the Indictment, could be germane to crimes alleged against the Accused or those under his command.¹⁰ The presence of RPF soldiers at specific locations where the Accused or his subordinates are alleged to have committed crimes could, depending on the nature of the information, also be exculpatory.

5. On the other hand, evidence of RPF activities which have only a remote connection to the crimes alleged against the Accused is not exculpatory. For this reason, evidence of RPF operations at times or places unrelated to the crimes alleged against the Accused is not exculpatory. Furthermore, no criminal responsibility is alleged or implied against the

⁶ *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").

⁷ *Bagosora et al.*, Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A) (TC), 8 March 2006.

⁸ *Id.*, paras. 6-7 (citations omitted).

⁹ *Bagosora et al.*, Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006, para. 10.

¹⁰ The Defence has made clear its intention to pursue this strategy in defence of the Accused: e.g., T. 28 April 2005 pp. 66-67.

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Accused for the death of President Habyarimana. Paragraph 6.2 of the Indictment states that: "On 6 April 1994 at about 8:30 p.m., the plane carrying, among other passengers, the President of the Republic, Juvénal Habyarimana, was shot down on its approach to Kigali Airport, Rwanda." This event is characterized as the trigger for the alleged crimes which followed, but nowhere does the Indictment or the Pre-Trial Brief suggest that the Accused or any of his alleged co-conspirators were involved. Indeed, the Prosecution has declared unequivocally that the Accused is not charged with any involvement whatsoever in the former President's death.¹¹ Accordingly, although the fact of the shooting down of the plane is relevant to the case as providing context or background, the Defence has not shown that detailed information concerning the responsibility of any particular person is relevant to the charges against the Accused.¹²

6. Although some of the material within the category defined by the Defence may be exculpatory, this does not justify an order for disclosure of the entire category. The Prosecution is presumed to have diligently and in good faith discharged its obligation to disclose such information as may be exculpatory, in accordance with this and other rulings.¹³ Disclosure of an entire category of documents will only be ordered under Rule 68 where the category is accurately tailored to the exculpatory content. A very similar request for information concerning the conduct of enemy forces was rejected on this basis in *Delalic et al.*:

¹¹ Prosecution Response to "Bagosora Defence Urgent Motion for Investigation and Production of (Additional) Evidence ...", etc., filed on 19 December 2005.

¹² This approach is confirmed in numerous decisions in relation to identically or similarly worded indictments: *Kayishema*, Decision (AC), 28 September 2000, p. 3 ("CONSIDERANT qu'au soutien de sa demande le Requérent affirme que le Mémoire Hourigan donne des indications sur les auteurs présumés de l'attentat contre l'avion du Président rwandais; que le Procureur du Tribunal de l'époque a cru devoir arrêter les enquêtes menées à ce sujet par M. Hourigan; que ces faits, qui n'étaient pas connus lors du procès du Requérent, rouvrirait le débat sur la question de la culpabilité de celui-ci; CONSIDERANT que le Mémoire Hourigan n'était bien entendu pas disponible lors du procès en première instance, mais que sa teneur, que le Requérent cite, ne pouvait avoir un rapport avec les questions relatives au génocide sur lesquelles la Chambre de première instance devait se prononcer; qu'il n'est pas dès lors dans l'intérêt de la justice de l'admettre comme moyen de preuve supplémentaire en appel"); *Bizimungu et al.*, Decision on Casimir Bizimungu's Requests for Disclosure of the Bruguière Report and the Cooperation of France (TC), 25 September 2006, para. 27; *Bizimungu 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, paras. 10-11 ("The potential involvement or responsibility of the RPF or other forces not associated with the government of Rwanda cannot relieve the Accused of responsibility for the crimes they have been charged with. The Chamber is of the opinion that evidence as to who is responsible for the crash of the President's plane would not assist the Chamber in its decision as to the guilt or innocence of the Accused ... the jurisprudence of the Tribunal shows that questions relating to the responsibility of the shooting down of the plane may be put to a witness provided that this line of questioning does not go into great detail"); *Karempera et al.*, Décision Relative à la Requête de Joseph Nzirorera aux Fins d'Obtenir la Coopération du Gouvernement Français (TC), 23 February 2005, para. 11 (denying a motion for the Chamber to issue a request to the government of France to disclose to the Defence a report concerning those responsible for shooting down the Presidential plane) *Karempera et al.*, Decision on the Defence Motion for Disclosure of Exculpatory Evidence (TC), 7 October 2003, para. 14 ("The Defence has not shown how such materials, if they exist, could suggest the innocence of the Accused, who is not charged with taking part in the assassination, or how such materials could tend to mitigate the Accused's personal guilt or affect the credibility of the prosecution evidence"); *Kabiligi*, Decision on the Defence motion Seeking Supplementary Investigations (TC), 1 June 2000, para. 19 ("Defence Counsel has failed to establish any causal link between the requested investigation into the responsibility for the plane crash and the acts and omissions which form the basis of the charges against Kabiligi in the Indictment").

¹³ *Karempera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 17 ("The Trial Chamber is entitled to assume that the Prosecution is acting in good faith").

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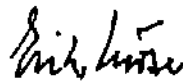
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[A]ny request for disclosure of information should clearly specify the material desired. The Request before the Trial Chamber fails to do so. It generally refers to all the evidence in the hands of the Officer of the Prosecutor concerning the conduct of forces of the Republic of Serbia, the Bosnian Serbs and others. The Rules permitting disclosure of certain documents cannot be used freely as a means to obtain all information from the Prosecution and then subsequently to determine whether it can be used or not.¹⁴

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]



¹⁴ *Delalic et al.*, Decision on the Request of the Accused Hazim Delic Pursuant to Rule 68 for Exculpatory Information (TC), 24 June 1997, para. 15.