



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

(30205-30201)

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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 INFORMATION FROM THE UNHCR  
AND A MEETING WITH ONE OF ITS OFFICIALS

**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 Ntabakuze “Motion for an Order Compelling the Prosecutor to Disclose Exculpatory Information”, etc., filed on 14 July 2006 (“Specific Motion”); and, in part, the “Motion for an Order Compelling the Prosecutor to Disclose Various Exculpatory Documents Pursuant to Rule 68”, filed on 2 June 2006 (“General Motion”);

**CONSIDERING** the Prosecution Response, filed on 7 June 2006; the “Strictly Confidential Ntabakuze Request for a Timely Decision”, filed on 28 August 2006; the Ntabakuze Memorandum and Annexes, filed on 15 September 2006; the “Extremely Urgent Second Ntabakuze Request for a Timely Decision”, etc., filed on 18 September 2006;

**HEREBY DECIDES** the motion.

### INTRODUCTION

1. The Ntabakuze Defence requests the Chamber to: (i) order the Prosecution, pursuant to Rule 68 (A) of the Rules of Procedure and Evidence, to obtain reports from the United Nations High Commissioner for Refugees (“UNHCR”) “relating to the 1994 events in Rwanda”, including those prepared by a UNHCR official named Robert Gersony; and (ii) order the UNHCR, pursuant to Article 28 of the Statute, to facilitate an interview with Mr. Gersony, with a view to calling him as a witness.<sup>1</sup> In the alternative, the Defence requests a subpoena addressed to Mr. Gersony requiring that he meet with the Ntabakuze Defence; that he provide relevant UNHCR documents; and that he appear before the Chamber to give testimony.<sup>2</sup>

2. The Prosecution responds that it has already disclosed a UNHCR document to the Defence entitled “Summary of UNHCR Presentation Before Commission of Experts, 10 October 1994”.<sup>3</sup>

### DELIBERATIONS

(i) *Request for Exculpatory Material Pursuant to Rule 68 (A)*

3. 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.<sup>4</sup> Rule 68 does not provide a basis for compelling the

<sup>1</sup> Specific Motion, pp. 11-12; General Motion, p. 7.

<sup>2</sup> Specific Motion, p. 12.

<sup>3</sup> Response, para. 3 (c).

<sup>4</sup> *Kajelijeli*, Judgement (AC), 23 May 2005, para. 262 (“Defence must first establish that the evidence was in the possession of the Prosecution”); *Brđjanin*, 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

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Prosecution to review and obtain information from other sources.<sup>5</sup> Accordingly, the Prosecution is not under any obligation to make inquiries and obtain exculpatory information from the UNHCR or any other source.

4. The Prosecution asserts that it has disclosed a document from the UNHCR to the Defence, implying that this exhausts its obligations under Rule 68. The Prosecution is presumed to have discharged its obligations in good faith.<sup>6</sup> In the absence of any showing to the contrary, the request is denied.

(ii) *Order to the UNHCR Under Article 28*

5. Article 28 of the Statute imposes an obligation on States to “cooperate with the International Criminal Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law”. Such a request may be directed to an international organization, as well as individual states.<sup>7</sup> Indeed, the UNHCR has been the object of several such orders from this Tribunal in the past.<sup>8</sup>

6. The issuance of a request under Article 28 is subject to three conditions: (i) identification of the nature of the information sought with a reasonable degree of specificity; (ii) a showing that the information is relevant to the trial; and (iii) evidence that reasonable efforts have been undertaken to obtain the information without the intervention of the

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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”).

<sup>5</sup> *Simba*, Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68 (TC), para. 8 (“The Prosecution’s disclosure obligations under the Statute and the Rules do not extend to pursuing every possible avenue of investigation into a witness’s credibility on behalf of the Defence”); *Bagilishema*, Decision on the Request of the Defence for an Order for Disclosure By the Prosecution of the Admissions of Guilt of Witnesses Y, Z, and AA (TC), 8 June 2000, para. 6 (“A literal interpretation [of Rule 68 (A)] might suggest that mere knowledge of exculpatory evidence in the hands of a third party would suffice to engage the responsibility of the Prosecutor under that provision. However, to adopt such a meaning, would, in the extreme, allow for countless motions to be filed with the sole intention of engaging the Prosecutor into investigations and disclosure of issues which the moving party considered were ‘known’ to the Prosecutor. This would not be in conformity with Article 15 of the Statute [enshrining the independence of the Prosecutor]”).

<sup>6</sup> *Blaskic*, Judgement (AC), 29 July 2004, para. 264; *Karemera 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”); *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 (stating that a Chamber “must assume that the Prosecution is acting in good faith” in discharging its responsibility).

<sup>7</sup> *Blaskic*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (AC), 29 October 1997, para. 50, n. 68 (stating that a subpoena duces tecum should not be issued to an officer of an international organization in order to obtain a document from the organization; rather “it would be more proper to address the international organization on behalf of which he was to produce the document”); *Karemera et al.*, Decision on the *Ex Parte* Defence Motion for Order to United Nations Department of Peace-keeping Operations for Production of Documents (TC), 9 March 2004, paras. 9-19; *Simic et al.*, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others (TC), paras. 46-49.

<sup>8</sup> *Nyiramasuhuko et al.*, Decision on the Defence Motion Seeking a Request for Cooperation, etc., (TC), 25 August 2004; *Kajelijeli*, Decision on Kajelijeli’s Motion for Extension of Judicial Cooperation to Certain States Pursuant to Article 28 of the Statute of the Tribunal (TC), 9 May 2002; *Kamuhanda*, Decision on Kamuhanda’s motions for Extension of Judicial Cooperation to Certain States and to the UNHCR Pursuant to Article 28 of the Statute and Resolution 955 of the Security Council (TC), 9 May 2002; *Ntakirutimana*, Request for Cooperation (United Nations High Commissioner for Refugees) (TC), 18 December 2001.

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Chamber.<sup>9</sup> The second condition, relevance, requires the applicant to show that the information is relevant to any matter in issue before the Judge or Trial Chamber and that it is necessary for a fair determination of that matter.<sup>10</sup>

7. The Defence asks for an order to interview Robert Gersony.<sup>11</sup> Although not specifically requested, the Defence presumably also seeks disclosure of any reports or documents prepared by Mr. Gersony and his colleagues. Mr. Gersony is said to have knowledge of massacres of Hutu civilians “by the RPF during the invasion, and that such massacres were the result of a deliberate policy”.<sup>12</sup> The motion claims that the “RPF was responsible for civilian massacres in the Eastern part of the country for which the Accused is being held responsible.”<sup>13</sup> More broadly, the Defence argues that:

To the extent that it can be shown that the massacres for which the Prosecution seeks to hold the Accused accountable either did not occur, or were the direct or indirect conscious product of the RPF war strategy, it reduces the potential liability of the Accused at all levels, including conspiracy, planning, war crimes and so forth.<sup>14</sup>

8. The documents submitted by the Defence suggest that Mr. Gersony was not in Rwanda before August 1994. His investigations appear to have been concerned with the treatment of Hutu refugees as they returned to their homes in the aftermath of the war between government forces and the Rwandese Patriotic Front.<sup>15</sup> In this context, the Defence submission that Mr. Gersony’s knowledge extends to massacres “for which the Accused is being held responsible” is surprising. On the contrary, all indications suggest that Mr. Gersony’s information concerns events that occurred after the departure of any troops potentially under the command of the Accused. In this respect, the Chamber recalls its previous decision concerning alleged RPF conduct in the Prosecution’s possession:

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

<sup>9</sup> *Bagosora et al.*, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 10 March 2004.

<sup>10</sup> Relevance has not always been formulated in exactly the same words from one case to another. Some decisions, particularly where the relevance of the information is obvious, say no more than that the applicant must articulate its “relevance to the trial”. *Ndindiliyimana et al.*, Decision on Nzuwonomeye’s Motion Requesting Cooperation From the Government of Ghana Pursuant to Article 28 of the Statute (TC), 13 February 2006, para. 6; *Bagosora et al.*, Request to the Republic of France for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 22 October 2004, para. 3. Where relevance is contested, however, it has also been required that the information be “relevant to any matter in issue before the Judge or Trial Chamber”, and that the information be “necessary for a fair determination” of that matter. *Karemura et al.*, Decision on Joseph Nzirorera’s Motion for a Request for Governmental Cooperation (TC), 19 April 2005, para. 8. This language mirrors the standard codified in Rule 54 *bis* of the ICTY Rules which deals specifically with the conditions and modalities for issuing orders to States under Article 29 of the ICTY Statute. The Chamber considers this to be the appropriate standard. The limitation that the information be “necessary for a fair determination” of a question before the Chamber reflects a sensible concern that States and international organization not be burdened with numerous requests for information based on relevance alone, a standard which could potentially cast an unduly broad net. In addition, this is an area where a common standard amongst the international tribunals is desirable.

<sup>11</sup> Motion, p. 11.

<sup>12</sup> Motion, para. 17.

<sup>13</sup> Motion, para. 18.

<sup>14</sup> *Id.*

<sup>15</sup> Motion, Annex 5, pp. 1-2 (code cable from Shaharyar Khan to Annan, 14 October 1994).

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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.<sup>16</sup>

A generalized claim of relevance is insufficient to justify the issuance of an order under Article 28. In the absence of a showing of how, specifically, any aspect of Mr. Gersony's information concerns matters in issue in this trial and, further, that the information is "necessary for a fair determination" of those issues, the relevance standard has not been satisfied. Accordingly, no order under Article 28 is justified.


(iii) *Request for Subpoena to Mr. Gersony*

9. The applicant for a subpoena must show that (i) reasonable attempts have been made to obtain the voluntary cooperation of the witness; (ii) the witness's testimony can materially assist the applicant in respect of clearly identified issues; and (iii) the witness's testimony must be necessary and appropriate for the conduct and fairness of the trial.<sup>17</sup> For the reasons described in the previous section, neither the second nor third conditions are satisfied.


**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]



<sup>16</sup> *Bagosora et al.*, Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A) (TC), 8 March 2006, para. 7. Although that decision concerned disclosure under Rule 68 (A), the general propositions are equally germane to considerations of relevance.

<sup>17</sup> *Halilovic*, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 6; *Bagosora et al.*, Decision on Request for a Subpoena (TC), 11 September 2006, para. 5.