



ICTR-98-41-T 31670  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

07-12-2006  
(31670 - 31666)

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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 December 2006

**THE PROSECUTOR**  
v.  
**Théoneste BAGOSORA**  
**Gratien KABILIGI**  
**Aloys NTABAKUZE**  
**Anatole NSENGIYUMVA**  
*Case No.: ICTR-98-41-T*

JUDICIAL RECORDS ARCHIVES  
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2006 DEC - 11 P 12: 38

**DECISION ON KABILIGI MOTION FOR INSPECTION OF DOCUMENTS  
UNDER RULE 66 (B)**

**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  
Gershon 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 Kabiligi “Motion for Disclosure of Documents Intended to be Used by the Prosecution in the Cross-Examination of the Accused Kabiligi”, filed on 4 October 2006;

**CONSIDERING** the Prosecution Response, filed on 10 October 2006 and the Defence reply, filed on the 13 October 2006;

**HEREBY DECIDES** the motion.

**INTRODUCTION**

1. The Kabiligi Defence requests four categories of documents from the Prosecution, which the Defence believes may be used during, or may be relevant to, the cross-examination of the Accused if he testifies: (i) documents or materials that “relate to the alibi” of the Accused, or his “alleged travel ... around Rwanda during the period relevant to the Indictment”; (ii) “all personal agendas, diaries, passports, photographs, logs and travel documents, and correspondence to and from General Kabiligi” from the time-period covered by the Indictment up to the present; (iii) statements or documents given by the Accused to immigration authorities of various named countries; and (iv) documents seized from the Accused by ICTR investigators. These materials are sought under Rule 66 (B) of the Rules of Procedure and Evidence as interpreted, notably, by a recent decision of the Appeals Chamber in this case. The Accused is expected to start his testimony on 11 December 2006.

2. The Prosecution appears to accept that it must allow inspection of documents in the third and fourth categories, but contests that the obligation arises from Rule 66 (B) or that such disclosure must be made before the beginning of the witness’s testimony.<sup>1</sup>

**DELIBERATIONS**

3. Rule 66 (B) provides that:

At the request of the Defence, the Prosecutor shall ... 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.

The Appeals Chamber has interpreted this provision in the context of a Defence request to inspect documents concerning, and statements given by, its own witnesses that the Prosecution has obtained from national immigration authorities. The Appeals Chamber defined two categories of immigration documents: (i) those that the Prosecution “intends to use as exhibits”, which are automatically subject to inspection; and (ii) those not intended for use as exhibits, but which are otherwise “material to the preparation of the Defence” and,

<sup>1</sup> Response, paras. 7, 48 (“The Prosecution submits that it is not obliged to disclose the defence witnesses’ materials to the defence before the defence witness is sworn in”).

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therefore, subject to inspection. The precise scope of the second category was remitted to the Trial Chamber for further consideration in light of the following definition of materiality:

In accord with the plain meaning of Rule 66(B) of the Rules, the test for materiality ... 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. 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. 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. The Trial Chamber is the appropriate authority to make this case-specific assessment in the first instance under the appropriate standard.

...

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 may be relevant to its cross-examination, as suggested by the Trial Chamber. Rule 66(B) is only triggered by a sufficiently specific request by the defence, 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>2</sup>

The Appeals Chamber also recognized the Trial Chamber's discretion to determine the timing of inspection:

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. 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. 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.<sup>3</sup>

4. In respect of the first category of documents defined by the Appeals Chamber, the Prosecution argues that it does not form any intention as to which documents to use as exhibits until after the examination-in-chief of a Defence witness. Hence, no documents can be subject to advance inspection on that basis. The Trial Chamber accepts that it may be difficult or impossible to know whether a document will be tendered as an exhibit until the witness's testimony-in-chief has been heard. As the Chamber is not in a position to meaningfully review which documents the Prosecution intends to use as exhibits, it accepts the Prosecution submission that none of the documents sought are responsive to that category.

<sup>2</sup> *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on the Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence (AC), 25 September 2006, paras. 9-10.

<sup>3</sup> *Id.*, para. 12.

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5. The Chamber must also consider whether any of the documents requested are otherwise "material to the preparation of the defence". The Kabiligi request to inspect "documents or materials which relate to the alibi" of the Accused, or concerning his movements throughout Rwanda during the period relevant to the Indictment, potentially embraces a wide range of documents, of varying degrees of significance to the choice of whether the Accused will testify. The indefinite nature of the category risks creating just the "broad affirmative obligation" rejected by the Appeals Chamber in its decision. The request for personal agendas, diaries, travel documents and correspondence is, in the Chamber's view, also unduly broad and vague.

6. The request to inspect statements or documents given by the Accused himself to immigration authorities is a well-defined category of particular importance to the preparation of the Defence. The significance of a witness's own statements is reflected, in particular, in Rule 66 (A)(ii), which requires the Prosecution to disclose all prior statements of its own witnesses. The Defence has a similar obligation in respect of its witnesses.<sup>4</sup> In the present situation, the Chamber considers the Accused's prior statements to be material to the preparation of the Defence. Documents seized from the Accused by ICTR investigators may also be especially important and is a defined category of information. These documents are, accordingly, also subject to inspection under Rule 66 (B) as being material to the preparation of the Defence.

7. In order for the Defence to have a reasonable opportunity to review the documents and exercise its choice as to whether the Accused will testify, the inspection must be permitted immediately.

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<sup>4</sup> The Chamber exercised its discretion under Rule 73 *ter* (B) to require the Defence to provide statements of its own witnesses: T. 21 December p. 41: ("MR. PRESIDENT: Tomorrow or the 3rd of January you will provide the pseudonyms of each witness, the summary of the facts on which each witness will testify; the points in the indictment as to which witness will testify; and the estimated length of the time required for each witness. On the 7th you will give the names and the identifying information of these witnesses, unredacted statements of declarations given previously by the witness. MR. TREMBLAY: Mr. President, I have problems understanding why and -- why on the basis of what we have to disclose unredacted statements. I do not see any provision in the Rule that obligates us to disclose this to the Prosecutor; I don't see that. MR. PRESIDENT: 73 (B), last paragraph, yes. This -- it's being done in all other cases."). T. 16 May 2005 p. 30: ("MR. PRESIDENT: And there is a summary there. So you did very helpfully, Mr. White, provide us with this page concerning relief in this motion, and this discussion was useful .... 'Provide statements where available, and, if not, to provide comprehensive will-say statements.' Well, that leads to the -- to the question of which statements are lacking, which we will come back to later, but the obligation is there.")

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**FOR THE ABOVE REASONS, THE CHAMBER**

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**ORDERS** the Prosecution to permit the Defence to immediately inspect any statements or documents given by the Accused to immigration authorities, or documents seized from the Accused by ICTR investigators;

**DENIES** the motion in all other respects.

Arusha, 6 December 2006

Erik Mose  
Presiding Judge

Jai Ram Reddy  
Judge

Sergei Alekseevich Egorov  
Judge

[Seal of the Tribunal]

