



ICTR-98-41-T
12-12-2006

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

(31884 - 31881)

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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: 12 December 2006

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

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**DECISION ON KABILIGI REQUEST FOR CERTIFICATION CONCERNING
INSPECTION OF DOCUMENTS PURSUANT TO 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
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 "Request for Certification of the 'Decision on Kabiligi Motion for Inspection of Documents Under Rule 66(B)' of 6 December 2006", filed by the Kabiligi Defence on 11 December 2006;

CONSIDERING the oral submissions of the parties on 11 December 2006;

HEREBY DECIDES the request.

INTRODUCTION

1. The Kabiligi Defence requests leave to file an interlocutory appeal from a decision of this Chamber that granted in part, and denied in part, a Kabiligi request to inspect Prosecution documents under Rule 66 (B) of the Rules of Procedure and Evidence.¹ The Chamber granted the Defence request to inspect statements made by the Accused and other documents related to immigration applications to national authorities; and all documents seized from the Accused by ICTR investigators. However, the Chamber denied a request to inspect "documents or materials which relate to the alibi of the accused Kabiligi, and alleged travel of General Kabiligi around Rwanda during the period relevant to the indictment", and of "all personal agendas, diaries, passports, photographs, logs and travel documents, and correspondence to and from General Kabiligi written during the period relevant to the Indictment, in the period up until his arrest, and since his detention in the UNDF".

DELIBERATIONS

2. Certification may be granted under Rule 73 (B) of the Rules when a decision "involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".

3. The choice of an Accused to give, or to decline to give, testimony at his or her own trial is unquestionably very important to the conduct of a trial. The question in the present case, however, is whether the category of documents whose inspection has not been granted "would significantly affect the fair and expeditious conduct of proceedings or the conduct of the trial", and whether resolution of that issue now may materially advance the proceedings. In the Impugned Decision, the Chamber granted two of the requests for inspection on the basis that they were well-defined and of apparent importance to the preparation of the Defence. The other two categories, however, were found to be "unduly broad and vague" and "of varying degrees of significance to the choice of whether the Accused will testify".² The Chamber was guided by the Appeals Chamber's statement that "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", and that such requests must be "sufficiently

¹ *Bagosora et al.*, Decision on Kabiligi Motion for Inspection of Documents Under Rule 66 (B) (TC), 6 December 2006 ("the Impugned Decision").

² Impugned Decision, para. 5.

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specific”.³ Once a sufficiently specific category has been defined, the Defence must make the “requisite showing” that the documents are material to the preparation of the defence. The determination of what is “material”, as distinct from the generality of “any and all documents which may be relevant” to the cross-examination, is a “case-specific assessment” to be made by the Trial Chamber.⁴

4. Certification of this issue – the impermissible vagueness of the categories – would not, in the Chamber’s view, materially advance the proceedings. Whether a category has been defined with sufficient specificity is a “case-specific assessment” which falls within the core of the Trial Chamber’s discretion. The first category articulated by the Defence could include any document which makes any reference to the whereabouts of the Accused in 1994, as “relat[ing] to the alibi of the accused and alleged travel of General Kabiligi”. Many such documents, however, would have only tangential significance to the choice of whether the Accused should testify and, hence, would not be material to the preparation of the Defence. The second category is also vague to the extent that it covers some documents which could be material, but many other documents that likely would not be. Leave to appeal the Chamber’s decision to deny inspection of these two broad categories on the basis that they are unduly vague and indefinite would not, in the Chamber’s view, materially advance the proceedings.⁵

5. Some documents within the two categories may be significant to the preparation of the Defence, but this does not mean that the categories as a whole, without further specification, raise an issue that would “significantly affect the fair and expeditious conduct of the proceedings”. Indeed, nothing prevents the Defence from interposing objections during the cross-examination of the Accused in respect of documents subject to disclosure under Rule 66 (B). On one previous occasion, the Chamber excluded questioning on a document that had not been disclosed in response to a proper request pursuant to Rule 66 (B).⁶ Should that situation arise during the cross-examination of the Accused, the Defence can object and, if not satisfied by the Chamber’s ruling, may request certification. Certification of those decisions, based on specific documents whose significance can be concretely assessed, may involve an issue that significantly affects the fair conduct of proceedings, and materially advances the proceedings. However, based on the general categories defined in the Impugned Decision, the Defence has not shown that either criterion is satisfied.

³ *Bagosora et al.*, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal’s Rules of Procedure and Evidence (AC), 25 September 2006, para. 10.

⁴ *Id.*, para. 9.

⁵ Certification of interlocutory appeals may only be granted on the basis of arguments and propositions which were first raised before the Trial Chamber. Some of the oral arguments presented by the Defence go beyond the specific argumentation concerning the two categories defined by the Defence in its motion, and are based instead on a much broader proposition that “we have a right to know what’s coming”. T. 11 December 2006 p. 6 (draft). The grounds for the original motion are narrower, based on the materiality of the specific categories defined by the Defence. The Chamber restricts its consideration of whether to grant interlocutory appeal to the argumentation and issues raised in the original motion. *Bagosora et al.*, Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries (TC), 21 July 2005 paras. 5-6 (“Permitting interlocutory appeals of decisions on the basis of arguments which were not advanced in relation to the original motion would encourage repetitive pleadings and could lead to resolution of issues by the Appeals Chamber without a prior decision on the merits by the Trial Chamber. Even though a Trial Chamber may at the certification stage revisit the substance of a decision, it does so only within the context of the criteria set out in Rule 73 (B). A certification motion is not an appropriate venue to advance new grounds of argument. A decision to grant certification on the basis of grounds which had not been previously argued could take the responding party by surprise, and circumvent the usual procedure for assessing motions on the merits”).

⁶ T. 28 September 2006 pp. 23-24 (Witness KVB-19).

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6. The potential materiality of the categories as a whole is further weakened by the Prosecution's assertion that at least some of the documents comprehended by the requests have already been disclosed. For example, the Prosecution asserts that all prior statements and photographs of the Accused have been disclosed.⁷ Moreover, many of the documents in the second category – such as, diaries, passports, and personal agendas – would already be subject to disclosure to the extent that the Impugned Decision ordered inspection of “documents seized from the Accused”. The failure to specifically define categories of documents that have not yet been disclosed, combined with the general nature of the requests, makes it impossible for the Chamber to make a reasoned assessment of the materiality of the categories without having some idea of at least the specific type of documents involved.

7. For these reasons, the Chamber finds that the Defence has not shown either that certification of appeal of the Impugned Decision would materially advance the proceedings, or that it involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial.


FOR THE ABOVE REASONS, THE CHAMBER

DENIES the request.

Arusha, 12 December 2006



Erik Mose
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]



⁷ T. 11 December 2006 p. 15 (draft).