

ICTR-01-73-T  
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UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Inés Mónica Weinberg de Roca, Presiding  
Khalida Rachid Khan  
Lee Gacuga Muthoga

**Registrar:** Adama Dieng

**Date:** 21 February 2007

JURISDICTION  
R. G. V. 000

2007 FEB 21 - P 4: 32

**THE PROSECUTOR**  
v.  
**Protais ZIGIRANYIRAZO**

*Case No. ICTR-2001-73-T*

**DECISION ON DEFENCE MOTION FOR DISCLOSURE  
UNDER RULE 66 (B) OF THE RULES**

*Rule 66 (B) of the Rules of Procedure and Evidence*

**For the Office of the Prosecutor:**

Mr Wallace Kapaya  
Ms Gina Butler  
Ms Charity Kagwi-Ndungu  
Mr Sylvester Ntukamazina  
Mr Iskandar Ismail  
Ms Jane Mukangira

**Defence Counsel:**

Mr John Philpot  
Mr Peter Zaduk

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** ("Tribunal"),  
**SITTING** as Trial Chamber III, composed of Judges Inés Mónica Weinberg de Roca,  
 Presiding, Khalida Rachid Khan, and Lee Gacuga Muthoga (the "Chamber");  
**BEING SEIZED** of Protais Zigiranyirazo's "Motion for Disclosure under Rule 66(B)  
 R.P.P.", filed on 1 November 2006 (the "Motion");

**CONSIDERING** the

"Prosecutor's Response to Protais Zigiranyirazo's 'Motion for Disclosure under  
 Rule 66 (B) R.P.P.'", filed on 6 November 2006 (the "Prosecution Response");

"Reply to Prosecutor's Response to Protais Zigiranyirazo's Motion for Disclosure  
 under Rule 66 (B) R.P.P.", filed on 7 November 2006 (the "Defence Reply"); and

"Prosecutor's Rejoinder to the Defence Motion for Disclosure under Rule 66 (B)  
 of the Rules of Procedure and Evidence", filed on 9 November 2006 (the  
 "Prosecution Rejoinder");

**HEREBY DECIDES** the Motion.

#### INTRODUCTION

1. By its Motion, the Defence requests, pursuant to Rule 66 (B), that the Chamber order the Prosecution to allow the Defence to inspect the following materials:
  - (i) statements made by Defence witnesses to any person whatsoever which are in the possession of the Prosecution;
  - (ii) documents relative to the immigration status of any Defence witness which are in the possession of the Prosecution;
  - (iii) *Gacaca* material about Defence witnesses in the possession of the Prosecution; and
  - (iv) other impeachment material in the possession of the Prosecution.
2. The Defence request is based, in part, on a recent Appeals Chamber ruling clarifying the nature of disclosure under Rule 66 (B),<sup>1</sup> which the Defence characterizes as requiring disclosure upon request of "well identified materials in the hands of the Prosecutor [that are] useful to the preparation of the Defence".

<sup>1</sup> *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence (AC), 25 September 2006 (the "*Bagosora* Appeals Chamber Decision").

## DISCUSSION

*Inspection under Rule 66 (B)*

3. Rule 66 (B) provides for the inspection of "books, documents, photographs, and tangible objects" which are: (i) in the custody or control of the Prosecution; and (ii) "material to the preparation of the defence case; or (iii) "intended for use by the Prosecution as evidence at trial".<sup>2</sup>
4. The Appeals Chamber interpreted this provision in the context of a Defence request in the matter of the *Prosecutor v. Bagosora et al.*, to inspect documents related to Defence witnesses that the Prosecution had obtained from national immigration authorities. Applying the plain language of Rule 66 (B), the Appeals Chamber identified two categories of immigration documents subject to inspection: (i) those that the Prosecution intends to use as evidence at trial; and (ii) those that are "material to the preparation of the Defence". The Appeals Chamber remitted to the Trial Chamber the determination of the precise scope of the category of documents material to the preparation of the Defence. The Appeals Chamber described materiality as follows:
 

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.<sup>3</sup>
5. The Appeals Chamber was careful to note that its "plain reading of Rule 66 (B)" did "not create a broad affirmative obligation on the Prosecution to disclose any and all documents which may be relevant to its cross-examination ... Rule 66 (B) is only triggered by a sufficiently specific request by the defence".<sup>4</sup> In that case, the Appeals Chamber stated that "immigration-related material, admittedly in the possession of the Prosecution" was sufficiently specific.<sup>5</sup>
6. The Appeals Chamber left the timing of inspection to the discretion of the Trial Chamber, but noted that where the requested materials are intended to assist the defence in selecting its witnesses, disclosure at the time of cross-examination would not be sufficient.<sup>6</sup>

<sup>2</sup> Rule 66 (B) of the Rules of Procedure and Evidence.

<sup>3</sup> *Bagosora* Appeals Chamber Decision, para. 9.

<sup>4</sup> *Id.*, para. 10.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*, para. 12.

*Documents intended for use as evidence at trial*

7. The Prosecution contends that it has yet to determine what documents, if any, it intends to enter as exhibits, and, more generally, that it will not make a determination as to which materials will be used for cross-examination until after the examination-in-chief. The Defence submits that accepting the Prosecution's argument would reward the Prosecution for not being as forthcoming as they were in *Bagosora et al.* Nonetheless, as noted by the Trial Chamber on the remitted decision in *Bagosora et al.*, the "Chamber is not in a position to meaningfully review which documents the Prosecution intends to use as exhibits", and thus, must accept the Prosecution's submission that none of the requested documents is responsive to that category.<sup>7</sup> To determine otherwise would be to impose just the "broad, affirmative obligation on the Prosecution to disclose any and all documents which may be relevant to its cross-examination" that the Appeals Chamber rejected.<sup>8</sup>

*Documents that are material to the preparation of the Defence*

8. The Chamber must also determine whether any of the documents requested is "material to the preparation of the defence". The first, second, and third categories of documents for which the Defence requests inspection – namely (i) "statements made by Defence witnesses to any person whatsoever which are in the possession of the Prosecutor", (ii) "documents relative to the immigration status of any Defence witness", and (iii) *Gacaca* materials about Defence witnesses" are sufficiently specific. Indeed, the Prosecution acknowledges that the first two categories are "quite specific" and that it has in its possession materials that fall under all three categories. As noted by the Appeals Chamber, immigration documents related to Defence witnesses are material to the preparation of the defence because they may assist the Accused in making a final selection of whom to call in his defence.<sup>9</sup> The same reasoning applies to prior statements of identified Defence witnesses and to *Gacaca* material about Defence witnesses.
9. The Defence also requests inspection of "other impeachment material". As noted above, the Prosecution asserts that it will not be in a position to identify impeachment material until the close of the examination-in-chief of the relevant Defence witnesses. The Defence suggests that the Prosecution, by remaining silent, seeks to avoid its disclosure obligations. The Chamber need not address these arguments at this time, as the request to inspect "other impeachment material" is not sufficiently specific, and, therefore, must be rejected, so as to avoid creating the broad disclosure obligation rejected by the Appeals Chamber.
10. The Prosecution admits that it has in its possession statements, immigration documents, and *Gacaca* records relevant to Defence witnesses but argues that they

<sup>7</sup> *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Kabiligi Motion for Inspection of Documents under Rule 66(B) (TC), 6 December 2006, para. 4 (the "Bagosora Remit Decision").

<sup>8</sup> *Bagosora* Appeals Chamber Decision, para. 10.

<sup>9</sup> *Id.* para. 9.

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are materials that the Defence is or should be aware of, and thus disclosure at the time of cross-examination will not prejudice the Defence. The Appeals Chamber rejected the related argument that the Defence was capable of undertaking its own investigations for such materials relevant to its witnesses, finding that the Defence is not required "to make independent efforts to obtain material prior to receiving requested disclosure under the Rules. A request under Rule 66 (B) is one of the methods available to the Defence for carrying out investigations".<sup>10</sup>

11. The Prosecution also asserts that the Defence must show "that the Prosecutor intends to use the material for cross-examination and or to impeach the defence witnesses". Neither logic nor a plain reading of Rule 66 (B) supports the Prosecution's position. The Defence cannot be expected to show what the Prosecution intends to introduce as evidence at trial, especially where the Prosecution claims it will not know its own intentions in this regard until after the close of the examination-in-chief of the Defence witnesses. Moreover, Rule 66 (B) makes no mention of either "cross-examination" or "impeachment". It refers to certain materials that the Prosecution intends to use as evidence at trial or that are "material to the preparation of the Defence".
12. The Prosecution contends that the Defence has already selected its witnesses pursuant to Rule 73 *ter*, and that, therefore, inspection of the requested materials will not be of assistance to the Defence in that regard. As noted by the Defence, the final decision to call a witness is made subsequent to disclosure of the Rule 73 *ter* witness list. Indeed, in *Bagosora et al.*, the Defence had already commenced presenting its case when they rendered their request for inspection which led to the *Bagosora* Appeals Chamber Decision. Furthermore, the Prosecution submits that if the Defence were allowed to use Rule 66 (B) to alter its witness list it would prevent the Chamber from hearing all the relevant evidence and "pervert the course of justice", and would be "against the purpose of the establishment of the Tribunal". This argument must fail. Neither party is bound by its initial witness list; the Rules authorize the amendment of either party's witness list upon approval of the Chamber.<sup>11</sup>
13. Finally, the Prosecution submits that, if allowed, the "wholesale" inspection sought by the Defence will impair the Prosecution's ability to conduct a meaningful and effective cross-examination. Such disclosure, the Prosecution suggests, will upset the balance between the needs of the Prosecution to cross-examine and test the credibility of Defence witnesses, as outlined in Rule 90 (G)(i) and (ii), and the right of the Defence under Rule 66 (B) to inspect documents that the Prosecution intends to use as evidence at trial and that are material to the preparation of the Defence. Contrary to the Prosecution's arguments, the Defence is not requesting a blanket inspection. Rather the request is limited to well-defined categories of documents, as

<sup>10</sup> *Bagosora* Appeals Chamber Decision, para. 11.

<sup>11</sup> Rule 73 *bis*(E) (amendment of Prosecution's witness list); Rule 73 *ter*(E) (amendment of Defence's witness list).

the Prosecution itself admits in its submissions.<sup>12</sup> Moreover, Rule 90 (G)(i) and (ii) merely define the proper scope of cross-examination; the sub rules do not limit disclosure or inspection of documents to be used for cross-examination, and do not imbue either party with any rights to be balanced against positive disclosure obligations. This Decision does not prevent the Prosecution from using such documents for just that purpose.

14. To enable the Defence to have a reasonable opportunity to review the documents, the inspection must be permitted immediately.

**FOR THE FOREGOING REASONS, THE CHAMBER**

**GRANTS** the Motion in part;

**ORDERS** the Prosecution to permit the Defence to immediately inspect the following categories of documents:

- (i) statements made by Defence witnesses to any person whatsoever which are in the possession of the Prosecution;
- (ii) documents relative to the immigration status of any Defence witness which are in the possession of the Prosecution; and
- (iii) *Gacaca* material about Defence witnesses in the possession of the Prosecution;

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

Arusha, 21 February 2007, done in English.

  
Inés Mónica Weinberg de Roca  
Presiding Judge

  
Khalida Rachid Khan  
Judge

  
Lee Gacuga Muthoga  
Judge



<sup>12</sup> Prosecution Response, para. 9 (acknowledging that the Defence requests to inspect statements of Defence witnesses and immigration-related documents are "quite specific").





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Date: 21 February 2007 Case Name / Affaire: The Prosecutor vs. Protais ZIGIRANYIRAZO

Case No / Affaire No.: ICTR-01-73-T

To: A: TC1
Judge E. Mase, President
Judge J. R. Reddy
Judge S. A. Egorov
Judge F. Lattanzi (Mpambara)
Judge F. R. Arrey (Karera)
SLO
C. Gosnell, Co-ordinator

TC2
Judge W. H. Sekule
Judge A. Ramarosoan
Judge K. R. Khan (Bizimungu et al)
Judge A. J. N. de Silva
Judge S. B. Bossa (Nyiramasuhuku et al)
Judge L. G. Muthoga (Bizimungu et al)
Judge F. R. Arrey (Muvunyi)
Judge E. F. Short (Bizimungu et al)
Judge T. Hikmet (Ndindiyimana et al)
Judge S. K. Park (Ndindiyimana et al)
SLO
A. Leroy, Co-ordinator
A. Marong (Ndindiyimana et al)

TC3
Judge I. M. Weinberg de Roca (Zigiranyirazo)
Judge K. R. Khan
Judge D. C. M. Byron
Judge F. Lattanzi (Bakoni & Rukundo)
Judge L. G. Muthoga (Zigiranyirazo)
Judge F. R. Arrey (Rukundo)
Judge E. F. Short (Karamera et al)
Judge K. Hökberg (Seromba & Rwamakuba)
Judge G. G. Kam (Seromba, Karamera et al)
E O'Donnell, SLO
C. Denis, Co-ordinator
H. Goga, Co-ordinator

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DEFENSE
Accused / Accusé: P. Zigiranyirazo
Lead Counsel / Conseil Principal: J. Philpot
In / à Arusha Arusha
Co-Counsel / Conseil Adjoint: P. Zaduk
In / à Arusha Arusha
All Decisions: Appeals Chamber Unit, The Hague
All Decisions & Important Public Documents: Press & Public Affairs, Legal Library

From: De: J.-P. Fomété (Chief, CMS) N. Drallo (TC1) R. Kouambo (TC2) C. Hometowa (TC3) F. A. Talon (Appeals/Team IV)
Cc: A. Dieng A. Miller, OLA, NY D Registrar S Menon M Niang S van Driessche
Subject: WYSS Spokesperson E. O'Donnell DCOMS P. Enow

Kindly find attached the following document(s) / Veuillez trouver en annexe le(s) document(s) suivant(s):