



ICTR-98-41-T
11-04-2007
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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(34695-34692)

TRIAL CHAMBER I

Before: Judge Erik Mose, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 11 April 2007

THE PROSECUTOR

v.

Théoneste BAGOSORA
Gratien KABILIGI
Aloys NTABAKUZE
Anatole NSENGIYUMVA

Case No. ICTR-98-41-T

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DECISION ON BAGOSORA MOTION FOR DISCLOSURE OF AGENDA

The Prosecution

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid
Gregory Townsend
Kartik Murukutla

The Defence

Raphaël Constant
Allison Turner
Paul Skolnik
Frédéric Hivon
Peter Erlinder
Marc Nerenberg
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;

CONSIDERING the Bagosora “Urgent Motion for Prosecution Disclosure Pursuant to Rule 66 (B)”, filed on 29 January 2007;

CONSIDERING the Prosecution Response, filed on 5 February 2007; the Bagosora Reply, filed on 12 February 2007; and the Prosecution submissions, filed on 10 April 2007;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 17 September 2002, the Prosecution sought to tender as an exhibit photocopied selected excerpts of the so-called Bagosora agenda (or diary) through the testimony of Alison Des Forges, a Prosecution expert.¹ The Chamber did not grant this request due to lack of authentication.² An attempt to have the document admitted in connection with the testimony of a Prosecution investigator, Maxwell Nkole, was also denied.³ On 21 June 2004, twenty-six non-consecutive pages were admitted into evidence as part of the report of Antipas Nyanjwa, a handwriting expert.⁴

2. During his testimony, Colonel Bagosora confirmed that these excerpts contained his handwriting but could not verify that they formed an authentic part of a daily diary in the absence of the original.⁵ The Defence believes that the original agenda is in the possession of the Prosecution and moves the Chamber to order disclosure and inspection of it, or in the alternative, photocopies of the pages that have not already been admitted into evidence.

DELIBERATIONS

3. The Defence argues that it is entitled to view the agenda in its entirety pursuant to Rule 66 (B) of the Rules of Procedure and Evidence. According to this provision, 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”.

4. The Bagosora Defence was instructed to close its case on 13 October 2006, the evidentiary phase of the trial concluded on 18 January 2007, and the Prosecution submitted its Closing Brief on 1 March 2007. The Defence has been aware since the testimony of Alison Des Forges on 17 September 2002 that the Bagosora agenda may have been in the possession of the Prosecution. In spite of this, it has never made any request to the Prosecution for inspection of the original or additional photocopied extracts, nor did it ask

¹ T. 17 September 2002, p. 85. A very limited extract of the agenda was admitted through Exhibit P-3, Alison Des Forges’ book *Leave None to Tell the Story*, on 5 September 2002.

² T. 17 September 2002 pp. 89-96.

³ T. 8 June 2004 pp. 27-37.

⁴ Report of Antipas Nyanjwa dated 26 May 2004, admitted as Exhibit P-278.

⁵ T. 27 October 2005 pp. 65, 67.

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Alison Des Forges to disclose her copy of the agenda. The Defence has not offered an adequate explanation as to why it did not request inspection sooner. Rather, it chose to investigate the whereabouts of the original agenda through the Rwandan authorities. The Chamber facilitated a Defence request to the Rwandan authorities for documents belonging to Bagosora by its decision in March 2004, and an explicit request for the agenda in October 2006.⁶ This resulted in a recent email which is the main basis for the belated Defence request.

5. A request for inspection of additional evidence at this late stage of the proceedings is highly unusual and can only be allowed in exceptional circumstances.⁷ The Defence moves the Chamber to order inspection of the Bagosora agenda based on the recent response from the Rwandan authorities to the Registry, quoted in the email. A prerequisite for inspection under Rule 66 (B) is that the Prosecutor must be in "custody or control" of the document sought. In the Chamber's view, the wording of the email does not establish that the Prosecution is in custody or control of the entire Bagosora agenda.⁸

6. Both parties have referred to the transcripts of the case. The Chamber observes that Alison Des Forges testified that a full and complete copy of the original agenda exists, that it is or was in her possession, and that she transmitted a copy to Prosecution investigators. Her testimony, however, was not quite clear as to whether she transferred a complete copy of the agenda or just the extracts now in the Prosecution's custody.⁹ Prosecution investigator Maxwell Nkole stated that Alison Des Forges transferred extracts of the photocopied agenda to the Prosecution, that he had never seen the original and that an entire copy was not held in the evidence unit.¹⁰ Yet, he also gave an answer which was less unequivocal.¹¹

7. In order to dispel any lack of clarity, the Chamber has, in connection with its consideration of the present motion, asked the Prosecution to provide further information.¹² The Prosecution has answered that to the best of its knowledge, the Office of the Prosecutor does not now nor has it ever been in possession of the entire diary (or other parts of it than the twenty-six pages), either in its original or photocopied form. Nor has it any knowledge of any

⁶ *Bagosora et al.*, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 10 March 2004; *Bagosora et al.*, Further Request to the Government of Rwanda for Cooperation and Assistance (TC), 26 October 2006.

⁷ See *Bagosora et al.*, Decision on Bagosora motion to tender statement of witness B-06 (TC), 3 April 2007, para. 4.

⁸ Motion, Annex A; Correspondence between the Witnesses and Victims Support Section of the Tribunal in the Kigali office and the Defence, dated 22 January 2007: ("The Office of the Prosecutor General informed WVSS that according to their recollection this agenda was given to the OTP. The(re) is no indication of who in particular within the OTP it was given to.")

⁹ T. 17 September 2002, pp. 84-86 ("This is a document which I examined in the original, and copied. It was a usual form of a bank agenda-calendar-planning kind of book. I received it from an RPF leader in July of 1996 and copied it at that time and, with his permission, transferred a copy -- gave a copy to International Tribunal investigators.")

¹⁰ T. 8 June 2004, pp. 27, 34 ("The witness: No, we don't have the entire (diary) in our evidence unit. ... We asked from Madam Alison Des Forges for the entire diary. She promised to give us the entire diary, but only gave us the relevant portions of this diary. So we couldn't get a photocopy of the whole of the pages, including the empty pages. Mr. President: So you do not have in your possession the entire diary, a copy? The witness: No. Mr. President: And you do not have the original? The witness: No. Judge Reddy: Have you ever seen the original? The witness: No, Mr. President. I only have seen the copies which are in front of you.")

¹¹ T. 8 June 2004 p. 35 ("The witness: We received the whole diary and lifted out the pages we thought that are relevant to our investigation")

¹² Interoffice memorandum to the Prosecution of 5 April 2007.

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person or individual within the Office of the Prosecutor who is now or ever has been in possession of this material.¹³

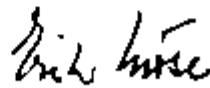
8. Based on this clarification, the Chamber concludes that the Prosecution is not in "custody or control" of the entire original agenda or other pages than the twenty-six, and that it does not have photocopies thereof. Consequently, the Defence request under Rule 66 (B) is denied.

9. Referring to a statement during the testimony of the Accused, the Defence has suggested that the contents of the agenda may be exculpatory and that the Prosecution is under an obligation to disclose it under Rule 68.¹⁴ On the basis of the information provided by the Prosecution, the Chamber also denies this request.

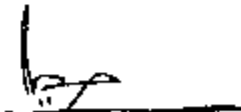
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 11 April 2007



Erik Mose
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]



¹³ Prosecution submissions of 10 April 2007, para. 4. Its observations in para 2 (b) of the Response and in para. 11 (g) of its submissions of 26 February 2006 (in relation to another Bagosora motion) were of a general nature.

¹⁴ Reply, para. 10, referring to the Accused's statement at T. 27 October 2005 p. 68: "Well, that is intriguing. I am perplexed by this because I believe that those pages that they didn't want to disclose to me, definitely had exculpatory material therein, and they refused to give me those pages."



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