



UNITED NATIONS
INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

ICTR-98-44-T
28-6-2007
(29208-29202)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

29208
J. J. J.

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 28 June 2007

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

28 JUN 2007 12:12 PM
J. J. J.

**DECISION ON JOSEPH NZIRORERA'S MOTION FOR INSPECTION OF REPORT
ON INTERAHAMWE**

Rules 66 (B) and 70 (A) of the Rules of Procedure and Evidence

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INTRODUCTION

1. The trial in this case started on 19 September 2005 before Trial Chamber III composed of Judges Dennis C. M. Byron, presiding, Emile Francis Short and Gberdao Gustave Kam. The fourth trial session concluded on 13 December 2006.
2. As a result of Judge Short's withdrawal from the case in January 2007, the remaining Judges decided on the continuation of the proceedings with a substitute judge.¹ On 20 April 2007, the Appeals Chamber affirmed this decision.²
3. As a result, Judge Vagn Joensen was appointed by the Secretary-General as an *ad litem* Judge to form part of the bench in the present case.³ He could, however, join the bench only after he had certified that he had familiarised himself with the record of the proceedings.⁴
4. Meanwhile, Joseph Nzirorera filed a Motion moving, pursuant to Rule 66(B) of the Rules of Procedure and Evidence ("Rules"), the Chamber to order the Prosecution to permit inspection of the report issued by a crime analyst of the Office of the Prosecutor, Massamba Ndiaye, entitled "The History of the Interahamwe".⁵ Taking note of the Prosecution's Response acknowledging that the said report was made available to an expert witness who was expected to testify in another case pending before the Tribunal,⁶ the Chamber, composed of Judge Dennis Byron sitting pursuant to Rule 54 of the Rules, ordered the Prosecution on to provide additional information as to the circumstances under which the disclosure of

¹ *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera ("Karemera et al.")*, Case No. ICTR-98-44-T, Decision on Continuation of the Proceedings (TC), 6 March 2007.

² *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR15 bis.3, Decision on Appeals Pursuant to Rule 15 bis (D), (AC) 20 April 2007.

³ Judge Joensen was sworn in on 2 May 2007.

⁴ See Rules of Procedure and Evidence, Rule 15bis (D): "If, in the circumstances mentioned in the last sentence of paragraph (C), the accused withholds his consent, the remaining Judges may nonetheless decide to continue the proceedings before a Trial Chamber with a substitute Judge if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice. This decision is subject to appeal directly to a full bench of the Appeals Chamber by either party. If no appeal is taken or the Appeals Chamber affirms the decision of the Trial Chamber, the President shall assign to the existing bench a Judge, who, however, can join the bench only after he or she has certified that he or she has familiarized himself or herself with the record of the proceedings. Only one substitution under this paragraph may be made"

⁵ Joseph Nzirorera's Motion for Inspection of Report on Interahamwe, filed on 24 April 2007.

⁶ Prosecutor's Response to Joseph Nzirorera's Motion for Inspection of Report on Interahamwe, filed on 25 April 2007

Massamba Ndiaye's report was made to a potential expert witness.⁷ On 28 May 2007, the Prosecution complied with the Chamber's Order.⁸

5. As Judge Vagn Joensen certified on 8 June 2007 that he has familiarized himself with the record of the proceedings, the Chamber being now fully composed is ready to rule on Joseph Nzirorera's Motion.

DISCUSSION

6. According to Rules 66 (B) of the Rules, the Prosecution shall, at the request of the Defence, "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 [...]".

7. In cases where the Prosecution refuses such inspection, the Defence may move the Chamber to order such inspection provided that (i) the Defence clearly and sufficiently identifies the material sought, (ii) the material is within the Prosecution's custody or control; and (iii) the Defence makes a *prima facie* showing that the document for which inspection is sought is material for its preparation.⁹ Trial Chambers have assessed the materiality of documents sought for inspection by determining whether they were necessary for the preparation of the cross-examination of witnesses¹⁰ or in connection with the Indictment.¹¹ In the *Bagosora et al.* case, the Appeals Chamber considered that immigration documents were material to the preparation of the defence of Anatole Nsengiyumva and Gratien Kabiligi 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.¹² It held that:

⁷ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Order for Additional Information, (TC) 23 May 2007.

⁸ Prosecutor's Submission of Additional Information Pursuant to Trial Chamber III order of 23 May 2007 concerning Nzirorera's Motion to Compel inspection of Interahamwe Report, 28 May 2007.

⁹ See *Prosecutor v. Ndayambaje et al.*, Decision on the Defence Motion for Disclosure, (TC) 25 September 2001, par. 10; *Prosecutor v. Bagosora 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; *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Decision on the Motion by the Accused Zejnil Delalic for the Disclosure of Evidence, (TC) 26 September 1996; See also *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera Motion to Compel Inspection and Disclosure, (TC) 5 July 2005, para. 9.

¹⁰ *The Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-T, Decision on Motion to Disclose the Defence All the Facts and Authorities that Led to the Arrest, Detention and Provisional Release of Prosecution Witnesses TBG, TBH, TBI, TBJ and TBK, (TC) 1 August 2003.

¹¹ *The Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-T, Decision on Motion to Disclose to the Defence All the Facts and Authorities that Led to the Arrest, Detention and Provisional Release of Prosecution Witnesses TBG, TBH, TBI, TBJ and TBK, (TC) 1 August 2003; *Prosecutor v. Elie Ndayambaje*, Case No. ICTR-96-8-T, Decision on the Defence Motion for Disclosure, (TC) 25 September 2001.

¹² *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, para. 9.

In accord with the plain meaning of Rule 66 (B) of the Rules, the test for materiality under the first category 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.¹³

8. In the present case, it is not disputed that the report sought for inspection is clearly and sufficiently identified, and is in the Prosecution's possession.¹⁴ The Prosecution, however, disputes that the said report is "material to the preparation of the defence". In the Prosecution's view, Joseph Nzirorera's contention that the report could be used as the basis for the cross-examination of Prosecution witnesses is too vague and does not satisfy the test for inspection. The Prosecution also disputes that the report could be used for the development of evidence for the Defence case, even if Joseph Nzirorera intends to call the author of the report, Massamba Ndiaye, as a Defence witness.

9. In the present case, the report entitled "The History of the Interahamwe" is connected to the creation, formation and control over Interahamwe, which is a core issue in the present trial in view of the charges alleged against the Accused in the Indictment.¹⁵ The Chamber is therefore satisfied that this report is *prima facie* material to the preparation of the defence of Joseph Nzirorera, and that the requirements under Rule 66 (B) for an inspection are met in the present case.¹⁶

10. The Prosecution, however, also contends that the report is not subject to inspection because it would be an internal document prepared by the Prosecution in connection with the investigation and preparation of its case, and therefore would fall within the exception provided for by Rule 70 (A) of the Rules.¹⁷ It disputes Joseph Nzirorera's contention that the report, initially prepared by the Prosecution in connection with investigations and preparation of this case, has lost the character of an "internal document" because it has already been disclosed outside the Office of the Prosecutor to a Prosecution expert witness and the Defence in another proceeding before the Tribunal.

¹³ *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, para 9 (emphasis added)

¹⁴ Prosecutor's Response to Joseph Nzirorera's Motion for Inspection of Report on Interahamwe, 25 April 2007 para 2.

¹⁵ See Indictment, particularly at paras 9, 10, 11, 24.1, 24.2, 24.8, 59, 62.6,

¹⁶ *Ibidem*

¹⁷ Rules of Procedure and Evidence, Rule 70 (A): "Notwithstanding the provisions of Rules 66 and 67, reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connexion with the investigation or preparation of the case are not subject to disclosure or notification under the aforementioned provisions"

11. The Prosecution also contends that the report is not finalized as yet and is subject to continuous revision by the Senior Legal Attorney in the present case.¹⁸ It submits that Mr. Ndiaye continues to conduct and document his analysis of the Interahamwe and the civil defense program and that his opinions and assessments of the evidence develop incrementally as a function of his ongoing analysis and his work as a Crime Analyst for the *Karemera et al.* case, and as such may reflect the internal assessments of evidence of the Prosecution team in *Karemera et al.*, to which the defense has no entitlement.

12. As the Appeals Chamber held, one of the purposes of the Prosecution's investigative function is "to assist the Tribunal to arrive at the truth and to do justice for the international community, victims, and the accused."¹⁹ The Prosecution has a distinct obligation to participate in the process of administering justice,²⁰ and its disclosure obligations, notably set forth by Rule 66(B), aim to participate in proper administration of justice and a fair trial.²¹ In the Chamber's view, the exception of non-disclosure set forth under Rule 70 (A) of the Rules must therefore be restrictively interpreted to what is necessary.

13. In the present case, although the expert witness was never called to testify in the *Nchamihigo* case, the report entitled "The History of the Interahamwe" was indeed disclosed to the Defence in that case, as part of the disclosures in connection with the expected testimony of the expert witness. The Prosecution explicitly acknowledges this fact in its further submissions to the Chamber, but contends that it does not affect the internal character of the document.²²

14. In the Chamber's view, the fact that the report has been disclosed to a party which is not member or representative of the OTP, such as the Defence in another case entails that the report can no longer be regarded as an internal document to be protected from disclosure under the exceptional provision of Rule 70. The fact that the report was disclosed in another proceeding before the Tribunal does not affect this conclusion. As the Appeals Chamber also

¹⁸ Prosecutor's Submissions of Additional Information pursuant to Trial III Chamber Order of 23 May 2007 Concerning Nziroreza's Motion to Compel Inspection of Interahamwe Report, 28 May 2007

¹⁹ *Prosecutor v Karemera and al.* Case No. ICTR-98-44-AR 73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations. (AC) 30 June 2006, para. 9

²⁰ *Ibidem*, para. 9. In that Decision the AC held: "In other words, the Prosecution has a distinct obligation to participate in the process of administering justice by disclosing to the Defence, as required by Rule 68(A), material which it actually knows "may suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecution evidence".

²¹ *Ibidem*. See also *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73 (AC), Decision on Interlocutory Appeals on Witness Protection Orders, 6 October 2005, para. 44

²² Prosecutor's Submissions of Additional Information pursuant to Trial III Chamber Order of 23 May 2007 Concerning Nziroreza's Motion to Compel Inspection of Interahamwe Report, 28 May 2007

held, the Prosecution teams are all representatives in the same Office of the Prosecutor.²³ The Chamber, however, accepts that the obligation to disclose the report only applies to the version of the report disclosed to the Defence in the *Nchamihigo* case.

15. Furthermore, contrary to the Prosecution's assertion, the fact that the report sought by Nzirorera was not available in the Prosecution Electronic Disclosure Suite ("EDS") does not affect this conclusion. The existence of an EDS system does not relieve the Prosecution from its disclosure obligations according to the Rules.²⁴ As held by the Appeals Chamber,

[...] the Prosecution must actively review the material in its possession for exculpatory material and, at the very least, inform the accused of its existence. In the view of the Appeals Chamber, the Prosecution's Rule 68 obligation to disclose extends beyond simply making available its entire evidence collection in a searchable format. A search engine cannot serve as a surrogate for the Prosecution's individualized consideration of the material in its possession.²⁵

FOR THESE REASONS, the CHAMBER


- I. **GRANTS** Joseph Nzirorera's Motion; and accordingly
- II. **ORDERS** the Prosecution to permit the Defence to inspect Ndiaye's Report as disclosed to the Defence in the *Nchamihigo* case.

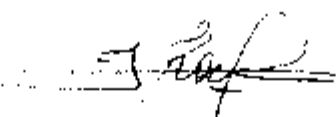
Arusha, 28 June 2007, done in English.

²³ *Prosecutor v. Bagosora and al.*, ICTR, Case No. 98-41-ARZ. 73, Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005, para 43: "Nowhere in the Statute or Rules is it stated that the Prosecutor's obligations may be limited to specific teams within the Office of the Prosecutor, which in the practice of the Tribunal, are sometimes referred to as the "Prosecution" in an individual case. The ordinary meaning and context of the text of the Rules suggest that the obligations of the Prosecutor rest on him or her alone as an individual who is then able to authorize the Office of the Prosecutor as a whole, undivided out, in fulfilling those obligations." See also *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Disclosure of RFP Material and for Sanctions against the Prosecution, (TC) 19 October 2006, para. 11.

²⁴ See Rule 68(B) of the Rules: "Where possible, and with the agreement of the Defence, and without prejudice in paragraph (A), the Prosecutor shall make available to the Defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the Defence can search such collections electronically."

²⁵ *Prosecutor v. Karemera and al.*, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, (AC) 30 June 2006, para. 10


Dennis C. M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge


Vagh Joensen
Judge

[Seal of the Tribunal]





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Case No /Affaire No.: **ICTR-98-44-T**

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