

ICTR-98-44-T
30-10-2007
(31737-31733)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

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

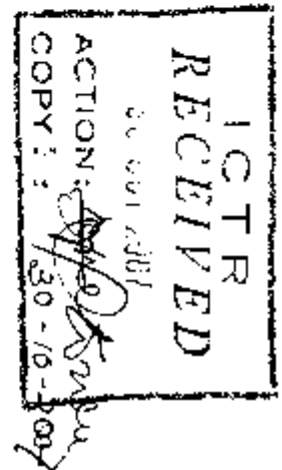
Registrar: Adama Dieng

Date: 30 October 2007

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA
Case No. ICTR-98-44-T



**DECISION ON JOSEPH NZIRORERA'S MOTION TO EXCLUDE THE
TESTIMONY OF PROSECUTION WITNESS UPENDRA BAGHEL**

Rules 54, 66(B) and 73 of the Rules of Procedure and Evidence

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INTRODUCTION

1. During the presentation of its case, the Prosecution intends to call Prosecution Investigator Upendra Baghel as a witness. On 17 October 2007, the Defence for Nzirorera moved the Chamber, pursuant to Rules 54 and 73 of the Rules of Procedure and Evidence ("Rules"), for an order excluding the testimony of that witness due to the failure of the Prosecution to permit inspection of certain material under Rule 66(B).¹ The Defence explains that in its letter dated 1 August 2005, it requested of the Prosecution that if it intends to have Baghel testify that certain documents or recordings were obtained from third parties, such as agencies of the Rwandan government, the Prosecution disclose any receipt or contemporaneous records showing the transfer of that material to Office of the Prosecutor ("OTP").² The Prosecution, however, never responded to that request, but has now informed the Parties that it intends to have Baghel identify a number of documents and recordings which were obtained from such parties.

2. The Prosecution opposes the Motion.³ It submits that the Defence failed to make an adequate request for inspection under Rule 66(B); that the requirements for inspection are not met due to the lack of specificity of the request; and that in view of the circumstances, the remedy sought is inappropriate.

DELIBERATION

3. Rule 66(B) of the Rules provides that: }

At the request of the Defence, the Prosecutor shall, subject to Sub-Rule (C), 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. It is the established jurisprudence of this Tribunal that 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 material is intended for use by the Prosecutor as evidence at trial or was obtained from or belonged to the accused, or

¹ Joseph Nzirorera's Motion to Exclude the Testimony of Witness Upendra Baghel, filed 17 October 2007 ("Nzirorera's Motion").

² Letter of 1 August 2005; the Defence also refers to oral submissions it made in court on 6 July 2006.

³ Prosecutor's Response to Nzirorera's Motion to Exclude the Testimony of Witness Upendra Baghel, filed 22 October 2007 ("Prosecutor's Response")

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the Defence makes a *prima facie* showing that the document for which inspection is sought is material to its preparation.⁴

Are the requirements for inspection met in the present case?

5. Relying upon two Trial Chamber decisions in the *Bagosora et al.* and *Zigiranyirazo* cases as well as the Appeals Chamber's Decision of 25 September 2006,⁵ the Prosecution disputes the specificity of the material sought for inspection. It submits that upon a sufficiently specific request, the Chamber could order the Prosecution to permit the Defence to inspect certain categories of documents if these documents are deemed to be either material to the preparation of the defence or intended for use by the prosecution as evidence at trial.

6. In its Decision of 25 September 2006, the Appeals Chamber recalled that inspection of a precise category of documents is permitted.⁶ It also held that the Prosecution's disclosure obligations under the Rules must be interpreted broadly in accord with their plain meaning.⁷

7. In the present case, the Chamber is satisfied that by seeking inspection of "any receipt or contemporaneous records showing the transfer of material from third parties to OTP" in connection with the documents and material about which the Prosecution intends to have Baghel testify, the Defence's request is sufficiently and clearly identified. Such request does not create just a "broad affirmative obligation" on the Prosecution. It is also clear that those documents are in the Prosecution's possession. Any receipt or contemporaneous records

⁴ *Prosecutor v. Ndayambaje et al.*, Decision on the Defence Motion for Disclosure, (TC) 25 September 2001, para. 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.

⁵ The Prosecution refers to *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 ("*Bagosora* Trial Chamber Decision"), para. 4; *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 ("*Bagosora* Appeals Chamber Decision"); and *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on Defence Motion for Disclosure under Rule 66(B) of the Rules (TC), 21 February 2007 ("*Zigiranyirazo* Trial Chamber Decision") as follows: The prosecution refers further to the *Zigiranyirazo* case in which it is stated that the "[c]hamber 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." 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." (Prosecution's Submissions, para. 6 (footnotes omitted).

⁶ *Bagosora* Appeals Chamber Decision, para. 10.

⁷ *Bagosora* Appeals Chamber Decision, para. 8; see also *Karemera et al.*, Case No. ICTR, 98-44-A73 7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006, paras. 9-13; *Krstic* Appeal Judgement, para. 180; *The Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-A, Judgement, 20 July 2004, paras. 265, 266.

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showing the transfer of material from third parties to OTP that the Prosecution intends to admit into evidence during the testimony of Baghel are "material intended for use by the Prosecutor as evidence at trial" and may be relevant to the preparation of the defence of the Accused, including the cross-examination of the witness.

8. The Chamber notes that in the Trial Chamber Decisions referred to by the Prosecution, the issue was not the same as the one presently at stake. In both cases, the Defence sought inspection of documents that it believed would be used by the Prosecution during the cross-examination of Defence witnesses.⁸ The Trial Chamber accepted that "it may be difficult or impossible to know whether a document will be tendered [by the Prosecution] as an exhibit [during the cross-examination of the Defence witness] until the witness's testimony-in-chief has been heard."⁹ Here, the Chamber cannot accept that it is difficult or impossible for the Prosecution to know what exhibit it will tender during the examination of its own witness.

9. The Prosecution acknowledges that the documentation that the Defence for Nzirorera seeks can be disclosed to the Parties as a function of an itemized listing of proposed exhibits that would be offered through the investigator.

10. In those circumstances, the Chamber finds that inspection of the said material should be granted.

Is exclusion of the evidence warranted?

11. The Defence contends that it has been prejudiced by the delay in disclosure because it is now in the position of having no way to test the credibility of the witness or the accuracy of his assertions.¹⁰ It submits that this is another violation of the Rules and orders of this Trial Chamber by the Prosecution. It therefore moves the Chamber to exclude the testimony of Witness Baghel.

12. Exclusion of the evidence is an extreme remedy. The Chamber has already decided to order the inspection. This is the usual remedy. In view of the conduct of the case, the Chamber does not expect that the list of exhibits to be disclosed will provide any surprises. However, its inspection is nonetheless required. Although the Prosecution is approaching the end of its case the Chamber has considered that Witness Upendra Baghel cannot be called

⁸ Bagasora Trial Chamber Decision, para 1; Zigiranyirazo Trial Chamber Decision, para. 1.

⁹ Bagasora Trial Chamber Decision, para 4.

¹⁰ Nzirorera's Motion, para 11.


UJ.

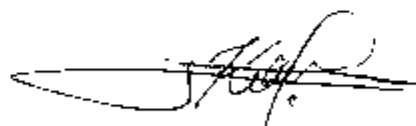
before the week commencing 12 November 2007, and that the inspection can be undertaken so that the accused will have adequate time and facilities to prepare their defence.¹¹

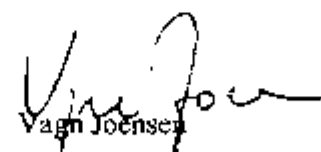
FOR THOSE REASONS, THE CHAMBER

- I. **ORDERS** the Prosecution to file within 3 days the will-say statement of Witness Upendra Baghel and the list of exhibits it intends to tender during his testimony;
- II. **ORDERS** the Prosecution to permit inspection of any receipt or contemporaneous records showing the transfer of material or documents from third parties to Office of the Prosecutor which will be tendered into evidence during the testimony of Witness Upendra Baghel;
- III. **DENIES** the Defence Motion for exclusion of the testimony of Prosecution Witness Upendra Baghel.

Arusha, 30 October 2007, done in English.


With the consent and on
behalf of
Dennis C. M. Byron
Presiding Judge
(Absent during signature)


Gberdao Gustave Kam
Judge


Vagn Joensen
Judge

[Seal of the Tribunal]

¹¹ Bagosora decision para 12; *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR, 98-44-A73.6, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 March 2006, paras. 7, 8.