



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-99-50-T

05-11-2007

(24524-24519)

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OR:
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TRIAL CHAMBER II

Before Judges: Khalida Rachid Khan, presiding
Emile Francis Short
Lee Gacuiga Muthoga

Registrar: Mr. Adama Dieng

Date: 5 November 2007

THE PROSECUTOR
v.
CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JÉRÔME-CLÉMENT BICAMUMPAKA
PROSPER MUGIRANEZA

Case No. ICTR-99-50-T

JUDICIAL
RECEIVED

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**DECISION ON BICAMUMPAKA MOTION TO INSPECT DOCUMENTS
PURSUANT TO RULE 66 (B) OF THE RULES OF PROCEDURE AND
EVIDENCE**

Office of the Prosecutor:

Mr. Paul Ng'arua
Mr. Ibukunolu Alao Babajide
Mr. Justus Dwonwonga
Mr. Elvis Bazawule
Mr. Shyam Lal Rajapaksa
Mr. Olivier De Schutter
Mr. William Mubiru

Counsel for the Defence:

Ms. Michelyne C. St. Laurent and Ms. Alexandra Marcil for **Casimir Bizimungu**
Mr. Ben Gumpert and Mr. Jonathan Kirk for **Justin Mugenzi**
Mr. Michel Croteau for **Jérôme-Clément Bicamumpaka**
Mr. Tom Moran and Ms. Marie-Pierre Poulain for **Prosper Mugiraneza**

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INTRODUCTION

1. By e-mail sent to the Prosecution dated 1 October 2007, the Defence for Mr Bicamumpaka ("Defence") requested the right to inspect three categories of documents related to all Defence witnesses.¹ The Defence submitted that these documents were material to the preparation of the defence, and therefore subject to inspection pursuant to Rule 66 (B). The Prosecution did not respond, and the Defence repeated its request by e-mail dated 9 October 2007.² The Prosecution again failed to respond.

2. The Defence now requests the Chamber to order the Prosecution to allow the inspection of the specified documents.³ The Prosecution has sent notice to the Defence that it is willing to grant inspection, with certain limitations, on a witness by witness basis.⁴ The Defence objects to these limitations.⁵

DISCUSSION

Inspection Pursuant to Rule 66 (B)

3. Rule 66 (B) provides for the inspection of "books, documents, photographs, and tangible objects" which are in the "custody or control" of the Prosecution; and either (i) "material to the preparation of the defence case; or (ii) "intended for use by the Prosecutor as evidence at trial."

4. The Appeals Chamber has interpreted this provision in the context of a defence request to inspect documents related to defence witnesses that the Prosecution had obtained from national immigration authorities.⁶ Applying the plain language of Rule 66 (B), the Appeals Chamber identified two categories of immigration documents subject to inspection: (i) those that are "material to the preparation of the defence"; and (ii) those that the Prosecution intends to use as evidence at trial. 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, but 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

¹ Defence Motion, Annex 1.

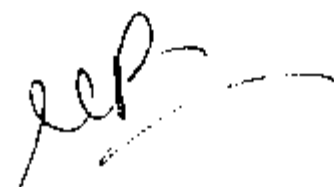
² Defence Motion, Annex 2.

³ Bicamumpaka Motion to Inspect Documents Pursuant to Rule 66 (B), filed 16 October 2007 ("Defence Motion").

⁴ Response of the Prosecutor to Mr. Jerome Bicamumpaka's request for inspection of certain documents filed 18 October 2007 ("Prosecution Response").

⁵ Bicamumpaka Reply to Prosecutor's Response to Motion to Inspect Documents Pursuant to Rule 66 (B), filed 19 October 2007 ("Defence Reply").

⁶ *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 ("Bagosora Appeals Chamber Decision").



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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.⁷

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."⁸ In that case, the Appeals Chamber stated that "immigration-related material, admittedly in the possession of the Prosecution" was sufficiently specific.⁹

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.¹⁰

The Sufficiency of the Defence Requests

7. In this case, the Defence requests the Chamber to order the Prosecution to allow the inspection of three categories of documents:

- (i) Any statements made by Defence witnesses to any representatives of the Prosecution;
- (ii) Any documents related to immigration proceedings concerning Defence witnesses which are in the possession of the Prosecution;
- (iii) Any documents originating in Rwanda [related to Defence witnesses], including but not limited to proceedings in the Rwandan ordinary courts or Gacaca courts, that are in the possession of the Prosecution.¹¹

8. The Prosecution has not responded regarding the specific categories of documents for which the Defence requests inspection, but submits, generally, that it is prepared to grant inspection pursuant to Rule 66 (B). The Prosecution, however, asks that the Defence make its requests in writing on a witness by witness basis and specifically identify the "thing or document requested for inspection." The Prosecution "reserves the

⁷ Bagosora Appeals Chamber Decision, para. 9.

⁸ *Id.*, para. 10.

⁹ *Id.*

¹⁰ *Id.*, para. 12.

¹¹ Defence Motion, para. 1.

right to refuse defence invitations to inspection if [it] considers any such request to be a fishing expedition."¹²

9. The Defence replies that the categories of documents listed in the Defence Motion are sufficiently specific.¹³

10. The Chamber considers that the limitations the Prosecution seeks to place on the Defence's right of inspection are inconsistent with the Prosecution's obligations pursuant to Rule 66 (B). The Defence need not identify individual documents or make requests for inspection on a witness by witness basis. A request to inspect categories of documents related to all identified defence witnesses should be allowed as long as the category of documents is identified with sufficient specificity, and the documents are material to the preparation of the defence or intended for use by the Prosecution as evidence at trial.¹⁴

11. The Chamber now considers whether the categories of documents listed by the Defence are subject to inspection pursuant to Rule 66 (B). In the Chamber's view, the Defence requests to inspect (i) "Any statements made by the [Defence] witnesses to any representatives of the Prosecutor", and (ii) "Any documents related to the immigration proceedings concerning the [Defence] witnesses which are in the possession of the Prosecutor", though they describe categories of documents, are sufficiently specific for the purposes of Rule 66 (B). As noted by the Appeals Chamber, immigration documents related to defence witnesses are material to the preparation of the defence because they may assist an accused in making a final selection of whom to call in his defence.¹⁵ The Chamber considers that prior statements of identified Defence witnesses made to representatives of the Prosecution may also assist the Defence in making a final selection of witnesses it intends to call. Thus, this category of documents is also material to the preparation of the defence for the purposes of Rule 66 (B). As such, the Prosecution must allow the Defence to inspect any documents that fall within the first two categories and are within its possession.¹⁶

12. The Defence also requests inspection of "Any documents originating in Rwanda [related to Defence witnesses], including but not limited to proceedings in the Rwandan ordinary courts or *Gacaca* courts, in the possession of the Prosecutor." In the Chamber's view, this request is overly broad and not sufficiently specific to trigger the right of inspection under Rule 66 (B). The Defence has not shown how all documents originating in Rwanda and related in some way to its witnesses are material to the preparation of the defence. In the Chamber's view, however, the more limited request to inspect records of proceedings in the Rwandan ordinary courts or *Gacaca* courts related to Defence witnesses is sufficiently specific and material to the preparation of the Defence. So limited, this category of documents must also be made available for inspection. Of course, to the extent the Prosecution intends to use any documents originating in Rwanda

¹² Prosecution Response, paras. 2-3, 6.

¹³ Defence Reply, para. 3.

¹⁴ See *Bagosora Appeals Chamber Decision*, paras. 9-10.

¹⁵ *Id.* para. 9.

¹⁶ The Chamber notes that, to the extent the Prosecution intends to use any documents that fall within these two categories as exhibits at trial, the documents would be equally subject to inspection for that reason.



as exhibits in trial, these documents are also subject to inspection pursuant to Rule 66 (B).

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Modalities of Inspection under Rule 66 (B)

13. On Friday, 19 October 2007, the Prosecution allowed the Defence to inspect some immigration files related to Defence witnesses. According to the Defence, the Prosecution did not make available for inspection any documents falling within the other categories requested by the Defence, limited the amount of time that the Defence had to inspect the documents, and did not allow the Defence to make copies of any documents it inspected.¹⁷ The Defence submits that the right of inspection envisaged pursuant to Rule 66 (B) includes the right to receive or make copies of inspected documents.¹⁸

14. Again, the limitations on the Defence right of inspection imposed by the Prosecution are inconsistent with the Prosecution's obligations pursuant to Rule 66 (B). The Prosecution must make available to the Defence all documents that come under the first two categories. Moreover, the Prosecution must allow the Defence sufficient time to inspect all documents made available for inspection. Finally, the Defence must be allowed to make copies of any documents that it deems relevant to its preparation.¹⁹

15. The Prosecution purports to "require" that the Defence "indicate that the Prosecutor too has a right to inspect documents and items that may come to the possession of the defence as a reciprocal right of inspection is extended to his office in return for this action."²⁰ The Prosecution cannot condition its obligation to respect the Defence's right of inspection under Rule 66 (B) on the Defence indicating that the Prosecution has a reciprocal right of inspection. This reciprocal right of inspection is enshrined in Rule 67 (C), and is triggered by any Defence request for inspection pursuant to Rule 66 (B), regardless of whether or not the Defence indicates that this is so. If the Defence refuses to honour its obligations pursuant to Rule 67 (C), then the Prosecution should bring this to the Chamber's attention.

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

FOR THESE REASONS, the Chamber

GRANTS the Defence Motion in part;

¹⁷ E-mail from Olivier De Schutter to Philippe Larochelle and Michel Croteau, dated 19 October 2007; E-mail from Philippe Larochelle to Olivier De Schutter, dated 19 October 2007.

¹⁸ Defence Reply, para. 6.

¹⁹ *Prosecutor v. Karemera, et al.*, Case No. ICTR-98-44-I, Decision on the Defence Motion for Disclosure of Items Deemed Material to the Defence of the Accused (TC), 29 September 2003, para. 15; see also *Prosecutor v. Nsabimana & Nteziryayo*, Case No. ICTR-97-29-T, Decision on the Defence Motions for Disclosure of Copies of the Prosecutor's Exhibit (TC), 18 September 2001, paras. 8-15.

²⁰ Prosecution Response, para. 7.



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ORDERS the Prosecution to permit the Defence to inspect

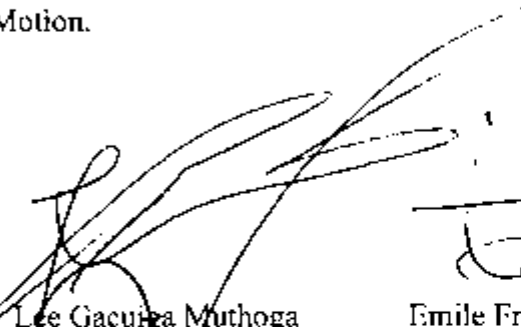
- (i) Any statements made by Defence witnesses to any representatives of the Prosecution;
- (ii) Any documents related to immigration proceedings concerning Defence witnesses which are in the possession of the Prosecution;
- (iii) Any records of proceedings in the Rwandan ordinary courts or *Gacaca* courts related to Defence witnesses;

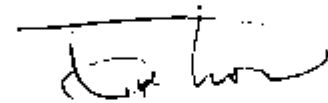
And to allow the Defence to make copies of any such documents it deems relevant to the preparation of its defence;

DENIES the rest of the Defence Motion.

Arusha, 5 November 2007


Khalida Rachid Khan
Presiding Judge


Lee Gacunga Muthoga
Judge


Emile Francis Short
Judge

[Seal of the Tribunal]

