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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-00-56-T
23-05-2008

(66919 - 66915) OR: ENG

TRIAL CHAMBER II

Before: Judge Asoka de Silva, Presiding
Judge Taghrid Hikmet
Judge Seon Ki Park

Registrar: Mr. Adama Dieng

Date: 23 May 2008

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The PROSECUTOR
v.
Augustin NDINDILYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU
Case No. ICTR-00-56-T

**INTERIM ORDER ON DEFENCE MOTIONS REGARDING THE
PROSECUTION'S DISCLOSURE OF ALLEGED EXCULPATORY MATERIAL**

Office of the Prosecutor:

Mr. Alphonse Van
Mr. Moussa Sefon
Mr. Segun Jegede
Mr. Lloyd Strickland
Mr. Abubacarr Tambadou
Ms. Felistas Mushi
Ms. Faria Rekkas
Ms. Marlize Keefer

Counsel for the Defence:

Mr. Gilles St-Laurent and Mr. Ronnie MacDonald for Augustin Bizimungu
Mr. Christopher Black and Mr. Vincent Lurquin for Augustin Ndingilyimana
Mr. Charles Taku and Ms. Beth Lyons for François-Xavier Nzuwonemeye
Mr. Fabien Segatwa and Mr. Seydou Doumbia for Innocent Sagahutu

Taghrid Hikmet

INTRODUCTION

1. On 4 February 2008, the Chamber ordered the Prosecution to again review the documents in its possession and to disclose to the Defence all exculpatory material by the end of February.¹ On 29 February 2008, the Prosecution disclosed to the Defence a total of 140 witness statements comprising approximately 3000 pages. On 7 March 2008, the Chamber ordered the Defence to file any motions relating to the Prosecutor's 29 February 2008 disclosure not later than 28 March 2008.²

2. The Defence for Sagahutu filed its Motion on 17 March 2008; the Defence for Bizimungu and the Defence for Nzuwonemeye both filed their Motions on 28 March 2008; the Defence for Ndindiliyimana filed its Motion on 31 March 2008, three days outside the time limit set by the Chamber. The Prosecution responded to all the Motions.³ The Prosecution's Response to Sagahutu's Motion was filed out of time. Bizimungu and Nzuwonemeye replied on 7 April 2008; Ndindiliyimana filed a Reply on 8 April 2008.⁴

DISCUSSION

A. Ndindiliyimana's Motion

3. As a preliminary matter, the Chamber notes that the Ndindiliyimana Defence neither sought nor received the Chamber's permission to file its Motion and Reply out of time. The Chamber observes that the Defence for Ndindiliyimana has repeatedly failed to comply with the Chamber's orders relating to time.⁵ Such non-compliance with the Chamber's orders is an abuse of the Court's process and violates Counsel's obligation to the Court and his client. Ndindiliyimana's Motion could readily be dismissed due to his unexplained non-compliance with the Chamber's Order. However, bearing in mind the significance of the issue at stake and the interests of the Accused Ndindiliyimana, the Chamber will consider the Motion.

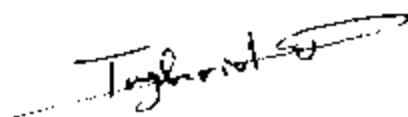
¹ T. 4 February 2008, pp. 12-13, for the Chamber's Oral Order for the Prosecution to disclose exculpatory material.

² Scheduling Order following the Status Conference of 5 and 6 March 2008 (1C), 7 March 2008.

³ *Réponse du Procureur à la "Requête aux fins de communication de pièces à décharge et autres éléments pertinents - Article 68RPF" présentée par la défense du Capitaine Innocent Sagahutu le 17 Mars 2008*, filed on 27 March 2008; Prosecutor's Joint Response to Major Francois-Xavier Nzuwonemeye based on Prosecutions Violations of Rule 68 and for Relief, pursuant to Rules 5, 90(g)(ii) and 90(g) (iii) RPE and Augustin Bizimungu's "*requête en arrêt des procédures et conclusions subsidiaires*", filed on 2 April 2008; Prosecutor's Response to General Augustin Ndindiliyimana's "Motion for Disclosure Violations, Remedial and Punitive measures", filed on 2 April 2008.

⁴ *Réplique de Augustin Bizimungu à la "Prosecutor's Joint Response to Major Francois-Xavier Nzuwonemeye based on Prosecution's Violations of Rule 68 and for Relief, pursuant to Rules 5, 90(g)(ii) and 90(g) (iii) RPE and Augustin Bizimungu's "requête en arrêt des procédures et conclusions subsidiaires"*, filed on 7 April 2008; Nzuwonemeye Defence Reply to Prosecution's Joint Response to Nzuwonemeye Defence Motion, Based on Prosecution's Violations of Rule 68, filed on 7 April 2008; Ndindiliyimana's Reply to Respondent's response to Motion Re Disclosure and Remedial Measures, filed on 8 April 2008.

⁵ See for example Decision on Ndindiliyimana's Request for Certification of the Chamber's Proprio Motu Decision of 30 November 2007 (TC), 6 February 2008, paras. 2, 4, and 5, where the Chamber admonished Lead Counsel Christopher Black for his late filing, for using inappropriate language when addressing the Chamber, and recalled the many warnings issued to Lead Counsel Black about his disrespectful attitude towards the Bench.



4. The Ndindiliyimana Defence submits that at least 20 statements included in the Prosecutor's disclosure of 29 February 2008 are exculpatory of the Accused and should have been disclosed at an earlier stage of the proceedings.

5. Rule 68 of the Rules of Procedure and Evidence requires the Prosecutor to disclose material which, in his actual knowledge, may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence. The initial determination of whether material is exculpatory therefore lies with the Prosecutor. Where the Defence requests the disclosure of alleged exculpatory material in the possession of the Prosecutor, it must present a *prima facie* case which would make probable the exculpatory nature of the materials sought. If the Defence satisfies the Chamber that the Prosecution has violated its Rule 68 obligations, the Tribunal must examine whether the Defence has been prejudiced by such violation before considering whether a remedy is appropriate.⁶

6. In an attempt to demonstrate the *prima facie* exculpatory nature of the statements, the Defence Motion contains excerpts from the statements and discusses their alleged exculpatory nature. However, the Defence does not annex any of the statements it relies upon.

7. The Prosecution responds, *inter alia*, that it had disclosed some of the alleged exculpatory material in the past. In particular, the Prosecution notes that it has disclosed at least six of the statements that Ndindiliyimana alleges are exculpatory.

B. Nzuwonemeye's Motion

8. The Defence for Nzuwonemeye submits that on 3 or 19 March 2008, the Prosecution disclosed 39 heavily redacted exculpatory statements relating to the Rwandan Patriotic Front (RPF). According to the Defence, the identities of the witnesses who gave these statements were redacted, thereby reducing their value for the Defence. The Defence requests the Chamber to order the Prosecution to disclose the identity of the concerned witnesses.

9. The Defence also alleges that part of the Prosecutor's disclosure of 29 February 2008 included exculpatory statements from one of Nzuwonemeye's drivers on 6 and 7 April 1994; exculpatory material relating to the so-called ENI report; the meeting of senior military officers of the RAF at *Ecole Supérieur Militaires* (ESM) on 7 April 1994; the killing of opposition politicians in the early days of April 1994; the killing of UNAMIR soldiers at Camp Kigali; and the killing of civilians at various locations in Kigali, including the CHK.

10. Annexed to the Defence Motion is a table containing excerpts from the alleged exculpatory statements, the names of the Prosecution witnesses whose evidence is challenged by the statement(s), and the paragraphs of the Indictment to which the statements relate. This information is useful, but cannot substitute for the statements themselves which are the only documents that the Chamber can rely upon to make an informed decision.

C. Bizimungu's Motion

11. Bizimungu's Defence submits that the 29 February 2008 disclosure includes several statements that contradict the evidence of witnesses called by the Prosecution and therefore

⁶ *The Prosecutor v. Kajelijeli*, ICTR-98-44A, Judgement (AC), 23 May 2005, para. 262.

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should have been disclosed at an earlier stage of the proceedings. The Defence argues that had this material been disclosed earlier, it could have been used to cross-examine Prosecution witnesses, or the Defence could even have attempted to meet the witnesses with a view to calling them as Defence witnesses.

12. However, the Defence fails to annex the alleged exculpatory statements contained in the 29 February 2008 disclosure.

D. Sagahutu's Motion

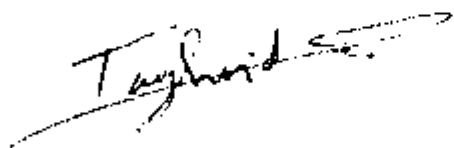
13. The Sagahutu Defence submits that the Prosecution violated Rule 68 because of its late disclosure on 29 February 2008. According to the Defence, the Prosecution should have disclosed these documents following the Chamber's Order of 17 September 2004.

14. Sagahutu requests that the Prosecution disclose the un-redacted versions of the documents numbered R0000280-283, and R0000299-302 contained in the 29 February 2008 disclosure. The Defence has annexed redacted versions of the said documents to its Motion.

E. Remedies

15. In addition to the above submissions, the Defence teams request the dismissal of all charges against the Accused and other punitive measures against the Prosecution.

HAVING CONSIDERED the above Defence submissions and noting the request to dismiss all charges against the Accused persons and other punitive measures against the Prosecution, the Chamber finds it necessary for it to review the alleged exculpatory materials in full. It is only upon such review that the Chamber will be in a position to render a fully informed decision on the Defence Motions. The Chamber recalls that it is the responsibility of the moving party to provide the Chamber with all of the materials required to arrive at a reasoned decision.



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FOR THE ABOVE REASONS, THE CHAMBER HEREBY

WARNS the Prosecution and the Defence for Ndindiliyimana to ensure that their pleadings are filed within the timeframes stipulated under the Rules or by the Chamber;

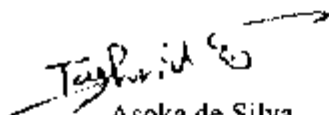
ORDERS the Defence teams for Bizimungu, Ndindiliyimana, and Nzuwonemeye to each file the alleged exculpatory documents from the Prosecution's disclosure of 29 February 2008 relevant to its case;

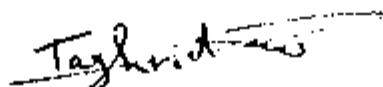
ORDERS the Prosecution to clearly indicate the specific dates on which it disclosed the six statements referred to in its Response to Ndindiliyimana's Motion and to file un-redacted versions of them with the Chamber;

ORDERS the Prosecution to file confidentially for the exclusive use of the Chamber the un-redacted versions of only the alleged exculpatory documents listed in the Defence Motions, including the thirty-nine pages of RPF materials mentioned in Nzuwonemeye's Motion and documents numbered R0000280-283, and R0000299-302 referred to in Sagahutu's Motion. The Chamber will consider the said documents *in camera* so as to determine their exculpatory nature before rendering any further Orders on the various remedies requested by the Defence;

ORDERS the Parties to file all the above documents within seven days of the date of this Interim Order.

Arusha, 23 May 2008


Asoka de Silva
Presiding Judge
(read and approved;
absent at the time of signature)


Taghrid Hikmet
Judge


Seon Ki Park
Judge

[Seal of the Tribunal]

