



UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 10 July 2008

THE PROSECUTOR

v.

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

**DECISION ON JOSEPH NZIRORERA'S MOTION FOR INSPECTION: MICHEL
BAGARAGAZA**

Rule 66(B) of the Rules of Procedure and Evidence

Office of the Prosecutor:

Don Webster
Alayne Frankson-Wallace
Iain Morley
Saidou N'Dow
Gerda Visser
Sunkarie Ballah-Conteh
Takeh Sendze

Deo Mbutu

Defence Counsel for Édouard Karemera
Dior Diagne Mbaye and Félix Sow

Defence Counsel for Mathieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl

Defence Counsel for Joseph Nzirorera
Peter Robinson and Patrick Nimy Mayidika
Ngimbi

INTRODUCTION

1. On 16 June 2008, Joseph Nzirorera moved to inspect the plea agreement between Michel Bagaragaza and the Office of the Prosecutor ("OTP"), as well as all information provided to the OTP by Bagaragaza concerning the events in Rwanda from 1990-1994, which had not previously been disclosed.¹ The Prosecution opposes the motion in its entirety.²

DELIBERATIONS

Applicable Law

2. Rule 66(B) of the Rules of Procedure and Evidence imposes an obligation upon the Prosecution, after receiving a request from the Defence, to allow the Defence to inspect any books, documents, photographs, and tangible objects in its custody or control, which: (1) are material to the preparation of the defence; or (2) are intended for use by the Prosecution as evidence at trial; or (3) were obtained from or belonged to the accused.

3. For a Trial Chamber to order inspection of documents considered material to the preparation of the Defence case, the Defence must: (1) demonstrate that the material sought is in the custody or control of the Prosecution; (2) establish *prima facie* the materiality of the document sought to the preparation of the Defence case; and (3) specifically identify the requested material.³ Within the framework of Rule 66(B), the test for materiality is the relevance of the documents sought to the preparation of the Defence case, and preparation is a broad concept.⁴ Thus, if the Defence requests to inspect documents pursuant to Rule 66(B) because their inspection may assist it in assessing the credibility of a witness before deciding to add him to the witness list, those documents are considered material under the Rule, and must be disclosed by the Prosecution.⁵

Discussion

4. The Prosecution does not dispute that the documents in question are in its custody or control. Moreover, Joseph Nzirorera has specifically identified the requested material. Therefore, the Chamber's decision on Nzirorera's Motion turns on whether Nzirorera has *prima facie* established the materiality of the documents sought to the preparation of his case.

5. According to the Prosecution, the legitimacy of this motion for inspection is doubtful because Joseph Nzirorera has continuously disregarded his Rule 73 *ter* obligations. The Prosecution submits that Nzirorera is trying to handicap its efforts by withholding his witness

¹ Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza ("Nzirorera's Motion"), filed on 16 June 2008; Reply Brief: Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza ("Nzirorera's Reply"), filed on 25 June 2008.

² Prosecutor's Response to "Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza," filed confidentially on 23 June 2008.

³ *The Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, and Joseph Nzirorera* ("Karemera *et al.*"), Case No. ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations (AC), 23 January 2008, para. 12.

⁴ *Karemera et al.*, Case No. ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations (AC), 23 January 2008, para. 14.

⁵ *Ibid.*

list, and then expecting the Prosecution to disclose information useful to his defence. Therefore, the Prosecution contends that the Chamber should, in fairness, oblige Joseph Nzirorera to comply with his Rule 73 *ter* obligations before it is ordered to disclose any documents under Rule 66(B). In support of this argument, the Prosecution also renews the arguments it made on 26 March 2008 in its response to Joseph Nzirorera's motion to inspect Defence witness information.

6. The Chamber is aware of no case law, and the Prosecution cites none, for the proposition that Rule 66(B) disclosures are contingent upon Defence compliance with Rule 73 *ter*. Accordingly, the Chamber dismisses this argument.

7. The Prosecution also argues that Joseph Nzirorera must show: (1) that he has met with Michel Bagaragaza to discuss the possibility that he will be called as a Defence witness; and (2) specifically how the documents requested would assist him to decide whether to call Bagaragaza to testify, in order to prove that his Rule 66(B) request is serious.

8. The Chamber recalls that the jurisprudence concerning Rule 66(B) does not require the Defence to specifically state *how* the documents requested will affect its evaluation of the credibility of a potential witness. The Appeals Chamber has clearly stated that the Defence only needs to assert that inspection of the documents *may* assist it in assessing the credibility of a witness before deciding to add him to the witness list, in order for disclosure under Rule 66(B) to be granted.⁶ Joseph Nzirorera has expressly claimed in his motion,⁷ and in a letter to the Prosecution,⁸ that he may call Michel Bagaragaza as a witness, and that the documents requested will help him decide whether to put Bagaragaza on the witness list.

9. The Prosecution correctly states that, in the said decision, the Appeals Chamber noted that Joseph Nzirorera had interviewed Witness BWN, and was considering including him on his witness list. However, while it may have considered this fact, the Chamber notes that the Appeals Chamber did not state that an interview with the potential witness is a necessary requirement for disclosure under Rule 66(B). Even so, it is evident that Nzirorera contacted Michel Bagaragaza through his counsel on 17 May 2008 to request an interview.⁹ Accordingly, the Chamber orders the Prosecution to disclose both sets of documents to Nzirorera.

10. Finally, the Prosecution requests that, if the Chamber decides to order inspection of the documents under Rule 66(B), it delay the disclosure until Michel Bagaragaza's plea agreement is finalized in open court. Noting that the confidentiality of the plea agreement ought to be respected until such time as it is final and made public, and that Joseph Nzirorera does not object to the Prosecution's request,¹⁰ the Chamber agrees that the disclosure of the plea agreement should be delayed until such time as it is finalized in open court.

⁶ *Ibid.*

⁷ Nzirorera's Motion, para. 6.

⁸ Annex "A" to Nzirorera's motion.

⁹ Annex "C" to Nzirorera's Reply.

¹⁰ Nzirorera's Reply, para. 9.

11. However, the Chamber notes that the second set of documents requested by Nzirorera is not subject to the same concerns as the plea agreement, and that the Prosecution has not requested any delay in disclosing them. Accordingly, the Prosecution must disclose forthwith all information provided to the OTP by Bagaragaza concerning the events in Rwanda from 1990-1994, which has not previously been disclosed.

FOR THESE REASONS, THE CHAMBER

- I. GRANTS** the motion in its entirety; and
- II. ORDERS** that the disclosure of the plea agreement be delayed until such time as it is finalized in open court.

Arusha, 10 July 2008, done in English.

Dennis C. M. Byron

Gberdao Gustave Kam

Vagn Joensen

Presiding Judge

Judge

Judge

[Seal of the Tribunal]