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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

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

Registrar: Mr. Adama Dieng

Date: 22 December 2008

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THE PROSECUTOR

v.

Léonidas NSHOGOZA

Case No. ICTR-2007-91-PT

DECISION ON DEFENCE MOTIONS FOR DISCLOSURE UNDER RULES 66 AND
68 OF THE RULES OF PROCEDURE AND EVIDENCE

Rules 66 & 68 of the Rules of Procedure and Evidence

Office of the Prosecutor:

For the Accused

Richard Karegyesa
Abdoulaye Seye
Dennis Mabura
Florida Kabisanga

Allison Turner

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INTRODUCTION

1. This Decision will deal with two Defence Motions – filed on 24 and 29 October 2008, respectively – seeking orders from the Chamber for the Prosecutor to disclose certain materials.
2. The Defence filed a Motion for disclosure of various documents pursuant to Rules 66 and 68 on 22 October 2008 (the “Motion”).¹
3. On 29 October 2008, the Defence filed a further Motion for disclosure under Rule 66 (A) (ii), for time to investigate and for the provisional release of the Accused (the “29 October Motion”).²
4. The Prosecutor responded to the 29 October Motion, stating that he had disclosed both Rule 66 (A) and Rule 68 materials, and that the materials requested by the Defence had either been disclosed or, to the knowledge of the Prosecutor, were non-existent.³
5. The Defence replied on 10 November 2008, and annexed two tables, one identifying the materials which the Defence submits have yet to be disclosed, and a second table containing Defence submissions on the relevance of the materials.⁴

BACKGROUND

6. The Accused made his initial appearance on 11 February 2008.⁵
7. On 12 March 2008, the Prosecutor disclosed supporting materials to the Defence.
8. On 22 March 2008, the Defence filed a Motion for an order to the Prosecutor to disclose all supporting material under Rule 66 (A) (i), submitting that the disclosure was incomplete.
9. The Prosecutor filed a “Clarification of Documents Disclosed to the Defence” on 28 March 2008.⁶ The Defence responded to the Prosecutor’s Clarification on 2 and 3 April.⁷ On 8 April 2008, the Prosecutor filed a Reply to the Defence’s Response.⁸

¹ *Ashogaza*, “Motion for Disclosure Under Rules 66 and 68 of the ICTR R.P.E.” filed 22 October 2008 (“Motion”). On 7 October 2008, Mr. Greciano (then the appointed counsel) filed “Requete de la Défense Conformément aux Articles 66 A) et 66 B) du Règlement de Procédure et de Preuve.” After she was appointed counsel for the Accused, Ms Turner filed her own motions seeking disclosure. As the matter of Mr. Greciano’s motion has already been brought to the attention of the Defence, the Chamber now considers the motion filed by Mr. Greciano to be moot.

² *Ashogaza*, “Defence Motion for Order to the Prosecution to Complete Rule 66 (A) (ii) Disclosure, Request for Time to Investigate Before Trial, and Motion for the Provisional Release of Léonidas Nshogaza,” filed 29 October 2008 (“29 October Motion”).

³ *Ashogaza*, “Prosecutor’s Response to ‘Defence Motion for Order to the Prosecution to Complete Rule 66 (A) (ii) Disclosure, Request for Time to Investigate Before Trial, and Motion for the Provisional Release of Léonidas Nshogaza,’” filed 3 November 2008 (“Prosecutor’s Response”).

⁴ *Ashogaza*, “Defence Reply to Prosecutor’s Response to Defence Motion filed 29 October 2008 on Disclosure Violations and Provisional Release,” filed 10 November 2008 (“10 November Reply”).

⁵ *Ashogaza*, I, 11 February 2008, p. 7.

⁶ *Ashogaza*, “Prosecutor’s Clarification on Documents Disclosed to the Defence on 12 March 2008.”

10. On 1 October 2008, the Chamber issued a Decision on the 22 March Motion. In that Decision the Chamber ordered the Prosecutor to file a declaration stating that he had complied with his Rule 66 (A) (i) obligations.⁹

11. On 9 October 2008 the Prosecutor filed his Declaration and made further disclosure.¹⁰

12. On 24 October 2008, the Prosecutor filed another Clarification of disclosures that had been made to date.¹¹

DISCUSSION

Preliminary Matters

(i) Defence Submission Regarding the Prosecutor's Declaration of 9 October

13. The Chamber notes that the Defence has made further submissions regarding the Prosecutor's disclosure obligations, despite the Prosecutor's Declaration made in compliance with the Chamber's Order of 1 October 2008.¹²

14. During the Status Conference of 22 October 2008, the Chamber decided that the Prosecutor's Declaration complied with the Chamber's 1 October Decision, in which the Chamber ordered the Prosecutor to file a declaration that he had complied with his disclosure obligations under Rule 66 (A) (i).¹³ Accordingly, the Chamber will disregard the Defence's further submissions concerning the Prosecutor's disclosure of Rule 66 (A) (i) materials.

(ii) Defence Request for Time to Investigate and to Prepare its Case before Trial

15. In the 29 October Motion, the Defence requested time to investigate and prepare its case before trial.¹⁴

⁹ Nshogoza, "Defence Response to Prosecutor's 'Clarification on Documents Disclosed to the Defence on 12 March 2008'," filed 2 April 2008; Nshogoza, "Addendum-Defence Response to Prosecutor's 'Clarification on Documents Disclosed to the Defence on 12 March 2008,'" filed 3 April 2008.

¹⁰ Nshogoza, "Prosecutor's Reply to 'Defence Response to Prosecutor's Clarification on Documents Disclosed to the Defence on 12 March 2008,'" filed 8 April 2008.

¹¹ Nshogoza, Decision on Defence Motions for Disclosure of Supporting Materials; and Clarification of the Rule 72 30-Day Period, 1 October 2008.

¹² Nshogoza, "Prosecutor's Declaration and Disclosure Pursuant to Rules 66 and 75 of the Rules of Procedure and Evidence, Following Trial Chamber III's Order of 1 October 2008," filed 9 October 2008 ("Prosecutor's Declaration").

¹³ Nshogoza, "Prosecutor's Clarification of Disclosures Made to Date, Pursuant to Rules 66 and 75 of the Rules of Procedure and Evidence," filed 24 October 2008.

¹⁴ A, paragraph 21 of the 29 October Motion, the Defence asserts that the Prosecutor has repeatedly violated his Rule 66 (A) (i) disclosure obligations, and with respect to relevant witness statements, submits that the Prosecutor is "presumed to possess others not yet disclosed...."

¹⁵ T, 29 October, pp. 18-19. The Defence submitted that disclosure was not complete. In addition, the Defence submitted that though the document was called a declaration, it did not say that the Prosecutor had complied with his obligations. The Defence requested, at page 18, "a declaration once and for all that the Prosecutor has complied with its Rule 66 (A) (i) obligations." The Chamber decided, at page 19, that the document filed by the Prosecutor was the declaration, and that the time for filing Rule 72 motions should run from the date of filing of the Prosecutor's Declaration.

¹⁴ 29 October Motion, paras. 3, 44.

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16. At the Pre-Trial Conference of 30 October 2008, the Chamber granted the Defence's request for six to eight weeks to investigate and prepare for trial, and moved the proposed trial date from 23 November 2008 to 2 February 2009.¹⁵ The trial has now been scheduled to commence on 9 February 2008.¹⁶ The Chamber notes that from the 30 October Pre-Trial Conference, when the Defence requested additional time to prepare, to the scheduled date for trial is approximately fourteen weeks. This is six to eight weeks more than the amount of time the Defence sought for the investigation and preparation of its case.

17. The request for additional time is, therefore, moot.

18. The Chamber will now consider the Defence requests for disclosure.

The Law on Disclosure

if Disclosure under Rule 66

19. Rule 66(A) (1) of the Rules requires the Prosecutor to disclose to the Defence "[w]ithin 30 days of the initial appearance of the accused copies of supporting material which accompanied the indictment... as well as all prior statements obtained by the Prosecutor from the accused."

20. The "supporting materials" which the Prosecutor must disclose to the Defence are the materials upon which the charges are based. This includes all previous statements made by the accused that are contained in the Prosecutor's files, whether these statements were taken by the Prosecutor or originated from another source.¹⁷

21. Under Rule 66 (A) (1), copies of "the statements of all witnesses whom the Prosecutor intends to call to testify at trial" must be disclosed to the Defence no later than 60 days before the scheduled date for the commencement of the trial.

22. The term "witness statement" under Rule 66 (A) (1) has been interpreted as an account of a person's knowledge of a crime which has been recorded in the course of an investigation into that crime. It can include statements taken by entities other than the Prosecutor, which then result in the persons who gave the original statements becoming witnesses in proceedings before the Tribunal.¹⁸ The Prosecutor must disclose previous statements of all Prosecution witnesses, in whatever form, to the Defence.¹⁹ Further, the

¹⁵ Draft T.31 (October), p. 3.

¹⁶ *Xhagoca*, Scheduling Order, 18 December 2008.

¹⁷ *Prosecutor v. Milan Mihajlovic et al.*, Case No. IT-05-87-T, Decision on (Joint) Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66 (A) (1), 29 September 2006, para. 16 (citations omitted); *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14-T, Order on Motion to Compel Compliance by the Prosecutor on Rules 66 (A) and 68, p. 2.

¹⁸ *Mihajlovic et al.*, Decision on (Joint) Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66 (A) (1), 29 September 2006, para. 14 (citing the Appeals Chamber in *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 15.1).

¹⁹ *Prosecutor v. Vlatko Bliznjak et al.*, Case No. ICTY-99-50-T, Decision on Prosper Muganyizi's Motion to Revoke Stipic's Compliance with Rule 66 (A) (1), 17 March 2000, para. 7 (citing *Prosecutor v. Theodor Merck*, Case No. IT-95-14-PT, Decision on the Production of Discovery Materials, 27 January 1997, para. 38).

transcript of the testimony of a witness constitutes a statement within the meaning of Rule 66 (A) (ii) if the witness is to testify on the same subject matter as his previous testimony.²⁰

23. The obligation to disclose witness statements to the Defence extends to all witness statements in the custody or control of the Prosecutor, or to which the Prosecutor has access. However, the Prosecutor is not obligated to disclose documents which are not in his possession, or which are not accessible to him.²¹ Furthermore, the Prosecutor is presumed to discharge his obligations under Rule 66 (A) (ii) in good faith.²²

24. Statements from persons who are not on the Prosecutor's witness list do not fall under Rule 66 (A) (ii); however, they may fall under Rule 66 (B).²³

25. Rule 66 (B) provides, in relevant part, that subject to certain exceptions, the Prosecutor must allow the Defence, upon request, to inspect any "books, documents, photographs, and tangible objects in his custody or control, which are material to the preparation of the defence, or intended for use by the Prosecutor as evidence at trial ..."²⁴

26. Documents are material to the preparation of the Defence if they are relevant to the preparation of the defence case, including preparation of the cross-examination of a witness; preparation being a broad concept which is not limited to material to counter the Prosecution evidence.²⁵ The materiality of the information sought can also be determined by reference to the Indictment.²⁶

27. A request under Rule 66 (B) is one of the methods available to the defence in carrying out its investigation. The Defence is not required to make independent efforts to obtain the material prior to requesting disclosure under Rule 66 (B).²⁷ However, Rule 66 (B) does not create a broad obligation on the Prosecutor to disclose any and all documents which may be

²⁰ *Bisimungu et al.*, Case No. Strict Compliance Decision, para. 8.

²¹ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion of Notice of Violation of Rule 66 (A) (ii) for Witness ALZ and AMC, and for Remedial and Punitive Measures, 11 July 2007, para. 6.

²² *Karemera et al.*, Decision on Joseph Nzirorera's Motion of Notice of Violation of Rule 66 (A) (ii) for Witness ALZ and AMC, and for Remedial and Punitive Measures, 11 July 2007, para. 8.

²³ *Muhamović et al.*, Decision on Ojđanić Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66 (A) (ii), 29 September 2006, para. 19.

²⁴ Rule 66 (C), which sets out the exception to the Rule 66 disclosure obligations states: "[w]here information or materials are in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting *in camera* to be relieved from the obligation to disclose pursuant to Sub-Rules (A) and (B). When making such an application the Prosecutor shall provide the Trial Chamber, and only the Trial Chamber, with the information or materials that are sought to be kept confidential."

²⁵ *Prosecutor v. Théoneste 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, 25 September 2006, para. 9; *Karemera et al.*, Decision on Defence Motions for Disclosure of Information Obtained from Exénéal Uwilingiyimana, 27 April 2006, para. 15.

²⁶ *Karemera et al.*, Decision on Defence Motions for Disclosure of Information Obtained from Juvénal Uwilingiyimana, 27 April 2006, para. 15.

²⁷ *Bagosora et al.*, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence, 25 September 2006, para. 11.

relevant to his cross examination. The Prosecutor's obligation under Rule 66 (B) is only triggered by a sufficiently specific request from the Defence.²⁸

28. Finally, there are some exceptions to the Prosecutor's disclosure obligation. Rule 70 (A) provides that "reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure...." Under Rule 70 (B), where information is obtained by the Prosecutor on a confidential basis and is used only for the purpose of generating new evidence, neither the original information, nor its source, shall be disclosed by the Prosecutor without the consent of the entity or the person who provided the information.

1) Disclosure under Rule 68

29. Rule 68 of the Rules requires the Prosecutor to "as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecution evidence."

30. Where the Defence asserts that the Prosecutor has violated his disclosure obligations under Rule 68 (A), it must: (i) define the material sought with reasonable specificity; (ii) establish that the material is in the custody and control of the Prosecutor; (iii) present a *prima facie* case that the material is exculpatory or potentially exculpatory.²⁹

31. Materials are exculpatory only if they tend to disprove a material fact alleged against the accused person, or if they undermine the credibility of evidence intended to prove those allegations.³⁰

32. The duty to disclose exculpatory material under Rule 68 (A) is a positive and continuing obligation, regardless of the public or confidential character of the material.³¹ As the Prosecutor's obligation to disclose exculpatory material is crucial to a fair trial, the Prosecutor must actively review the material in his possession, and, at minimum, inform the

²⁸ *Bagosora et al.*, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence, 25 September 2006, para. 10; *Prosecutor v. Zigiranyirazo*, Case No. ICTR-01-71-F, Decision on Defence Motion for Disclosure under Rule 66 (B) of the Rules, 21 February 2007, para. 5.

²⁹ *Prosecutor v. Augustin Ndundulyimana et al.*, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008 para. 13 (citations omitted); *Bizimungu et al.*, Decision on Justin Mugenzi's Request for Disclosure Order, 23 July 2008, para. 7 (citations omitted); *Karemara et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para. 15.

³⁰ *Bizimungu et al.*, Decision on Justin Mugenzi's Request for Disclosure Order, 23 July 2008, para. 7 (citing *Bagosora et al.*, Decision on Ntabakaze Motion for Disclosure of Prosecution Files, para. 4; and *Karemara et al.*, Decision on Defence Motion for Disclosure of RPT Material and for Sanctions against the Prosecution, 19 October 2006, para. 6; *Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI (1C), 14 September 2004, para. 11; see also *Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion for Records of all Payments Made Directly or Indirectly to Witness D, 18 February 2008, para. 4; and see also *Bizimungu et al.*, Decision on Jerome-Clement Biamumpaka's Motion Requesting Recall of Prosecution Witness G1A; Disclosure of Exculpatory Material; and to Meet with Witness G1FA, 21 April 2008, para. 9).

³¹ Rule 68 (1); *Ndundulyimana et al.*, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008, para. 9.

accused of the existence of any exculpatory material.³² The Prosecutor is presumed to be acting in good faith unless the moving party adduces *prima facie* evidence to the contrary.³³

33. The Chamber will now consider the Defence requests for disclosure in respect of each set of documents requested.

1) THE LYNCH REPORT

34. The Defence asserts that a report by Special Counsel Loretta Lynch (the "Lynch Report") and all associated or related materials, including, but not limited to, witness statements arising from the investigation, are exculpatory or potentially exculpatory and therefore subject to disclosure under Rule 68 (A), or alternatively, under Rule 66 (B).³⁴ The Lynch Report is, the Defence submits, the "lynchpin" of the Prosecutor's case against the Accused.³⁵ The Defence suggests that the Prosecutor's disclosure of witness statements arising from the investigation conducted by Special Counsel Lynch supports this assertion.³⁶

35. According to the Prosecutor, his correspondence with Special Counsel Lynch is protected correspondence under Rule 70 (A).³⁷

36. The Chamber recalls that Rule 70 (A) provides for the non-disclosure of reports prepared by the Prosecutor, his assistants or representatives in connection with the investigation or preparation of the case. The Chamber considers that any memoranda or reports prepared by Special Counsel Lynch that were prepared in the conduct of the investigations ordered by the Appeals Chamber in the *Kamuhanda* proceedings, provided the materials are not exculpatory, are exempt from disclosure pursuant to Rule 70 (A).³⁸

37. The Defence, however, submits that the materials are exculpatory. The Defence reasons that the Prosecutor's non-disclosure of the Lynch Report, and related materials,

³² *Karenjera et al.*, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006, paras. 9-10.

³³ *Nkundiyimana et al.*, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008, para. 12; *Karenjera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para. 17; *Prosecutor v. André Rwamakuba et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Disclosure, 15 January 2004, para. 3 (citing the Appeals Chamber in *Prosecutor v. Blaskić*, Case No. 11-95-14-A, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 45).

³⁴ 22 October Motion, Annexure 1. In particular, the Defence requests witness statements for "SP-003, SP-006, SP-007, SP-008, SP-009, SP-010, SP-011, SP-012, SP-13, SP-14, SP-018, and all other witness statements obtained in the context of this investigation and not yet disclosed... taken in the context of the investigation in 2005..."; Motion, para. 16.

³⁵ 22 October Motion, para. 4.

³⁶ *Ibid.*, footnote 5.

³⁷ Prosecutor's Response, para. 11.

³⁸ *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-A, Decision on Jean de Dieu's Request Related to Prosecution Disclosure and Special Investigation, para. 7; *Procureur c. Ferdinand Nahimana et al.*, Décision Relative à la Requête de l'Appellante Hassan Ngeze Concernant la Communication du Rapport De l'Avocat Général Chargé de l'Enquête sur les Allégations d'Entrave au Cours de la Justice, Case No. ICTR-99-52-A, 23 February 2006, para. 16. The Special Counsel conducted investigations into possible contempt and perjury for both the *Nahimana* and *Kamuhanda* proceedings. See also *Prosecutor v. Hassan Ngeze*, Case No. ICTR-99-52-A, "Prosecutor's Urgent Motion Pursuant to Rules 39 (iv), 54, and 107, for an Order, pursuant to Rule 77 (C) (ii) and Rule 91 (B) (i), directing the Prosecutor to investigate certain matters, with a view to contempt and false testimony, respectively."

implies that the materials are not incriminating. The Defence further asserts that if the materials were not exculpatory, the Prosecutor would have either used them in support of the indictment, or disclosed them to the Defence.³⁹ Therefore, they must be exculpatory or potentially exculpatory.

38. The Defence, however, has not demonstrated that the materials tend to disprove a material fact alleged against the Accused, or that they undermine the credibility of evidence intended to prove those facts. The Chamber is therefore not satisfied that the Defence has demonstrated, *prima facie*, that the Lynch Report and related materials are exculpatory or potentially exculpatory.

39. Furthermore, the Chamber considers that the request for "all associated materials" is not sufficiently specific to trigger the Prosecutor's disclosure obligation under Rule 66 (B).

40. The Defence also seeks all witness statements obtained in the context of the investigation, and which have not yet been disclosed.⁴⁰

41. The Chamber is not satisfied that all the witness statements arising from the investigation into possible contempt and false testimony in the *Kamukanda* proceedings are relevant to the preparation of the Defence case, particularly since the scope of the investigation was not limited to the Accused. The request is not sufficiently specific to trigger the Prosecutor's obligation to allow the Defence to inspect the materials pursuant to Rule 66 (B). The Chamber notes that various witness statements arising from this investigation have, according to the Prosecutor, already been disclosed to the Defence.⁴¹

(I) WITNESS GAA INDICTMENT AND SUPPORTING MATERIALS

42. The Defence seeks disclosure of the indictment against Witness GAA, and all its supporting materials under Rule 68 (A), or alternatively, Rule 66 (B).⁴²

43. Witness GAA entered a plea of guilty of contempt of the Tribunal contrary to Rule 77 (A) and 77 (G) of the Rules. In addition, he admitted to having received and accepted inducements from the Accused to give false testimony before the Appeals Chamber.⁴³

44. The Defence asserts that all Rule 66 (A) (i) supporting materials for the indictment against Witness GAA are exculpatory or potentially exculpatory.⁴⁴ The Defence further submits that the indictment against Witness GAA and its own supporting materials are, *prima facie*, exculpatory because the Accused is charged with offences which are "effectively the same" as those with which Witness GAA was charged.⁴⁵ According to the Defence, all

³⁹ *Ashogaza*, 10 November Reply, Annex "Table 2, Rule 68 (A) Materials section 1. A2 paragraph 14 of its Reply, the Defence incorporates all submissions in the Annex Table 2 into the Reply.

⁴⁰ Motion, Annexure 1.

⁴¹ *Ashogaza*, Prosecutor's Declaration, Strictly Confidential Annex.

⁴² Motion, para 16; Motion, Annexure 1, 10 November Reply, Annex "Table 2, section 2."

⁴³ *Prosecutor v. G.A.*, Case No. ICTR-07-90-R77-1, 1, 3 December 2007, pp. 3-5.

⁴⁴ 22 October Motion, Annexure 1; in particular, the Defence requests witness statements for "SP-005, SP-006, SP-007, SP-008, SP-009, SP-010, SP-011, SP-012, SP-13, SP-14, SP-018, and all other witness statements obtained in the context of this investigation and not yet disclosed... taken in the context of the investigation in 2005...."

⁴⁵ *Ashogaza*, 10 November Reply, Annex "Table 2, Rule 68 (A) Materials section 2.

evidence which incriminates Witness GAA for the acts for which the Accused is now charged is, *prima facie*, exculpatory or potentially exculpatory for the Accused.⁴⁶

45. The Chamber notes that, since the filing of the Motion, the Prosecutor disclosed the GAA indictment and amended indictment to the Defence pursuant to Rule 66 (B).⁴⁷ In addition to the indictment, the Prosecutor disclosed certain witness statements.⁴⁸ Therefore, it is only the supporting materials, if they have not yet been disclosed, for which disclosure is required.

46. The Chamber considers that the Defence has not established how the materials requested tend to disprove a material fact alleged against the Accused, or how they undermine the credibility of evidence intended to prove those allegations. Therefore, the Chamber is not satisfied that the Defence has established that the supporting materials for the indictment against Witness GAA are, *prima facie*, exculpatory for the Accused.

47. Considering, however, that Witness GAA implicated the Accused in his guilty plea, the information relating to the charges against Witness GAA may be relevant to the preparation of the Defence case. The Chamber recalls that the Prosecutor's obligation to disclose under Rule 66 (B) is only triggered by a sufficiently specific request. The request for the supporting materials relating to the indictment of Witness GAA is sufficiently specific, and disclosure pursuant to Rule 66 (B) is warranted. However, the request for "other materials," of which the Defence is not aware, is not sufficiently specific.

III) WITNESS GEX STATEMENT AND MEMOS RELATED TO MEETINGS WITH THE PROSECUTOR

48. Under Rule 68 (A), or alternatively, Rule 66 (B) the Defence seeks a copy of a statement it asserts was given to the Prosecutor by Witness GEX in 2003, or early 2004 to recant a prior statement Witness GEX made against Mr. Kamuhanda.⁴⁹

49. The Defence submits that this document is exculpatory because the Witness accused Mr. Kamuhanda and later recanted. The Defence submits that evidence that Mr. Kamuhanda was "not present or responsible for the charges he faced" is, *prima facie*, exculpatory for the Accused.⁵⁰

50. Mr. Kamuhanda has already been tried and convicted. The purpose of these proceedings is not to re-open that case, but rather, to determine whether the Accused committed the offences for which he stands charged under the Indictment. The guilt or innocence of Mr. Kamuhanda has no bearing on the issue of whether the Accused engaged in the activities which gave rise to the charges against him. The Chamber is therefore not satisfied that the Defence has demonstrated that Witness GEX's statement is, *prima facie*, exculpatory for the Accused.

⁴⁶ *Ibid*

⁴⁷ *Ashogwa*, "Disclosure of Relevant Documents Pursuant to Rule 66 (B) and 75 (F) (ii)", filed 5 December 2008

⁴⁸ It is not clear whether or not these materials are the supporting materials for the GAA indictment.

⁴⁹ *Ashogwa*, Motion, para. 16; Motion, Annexure 1;

⁵⁰ 10 November Reply, Annex - Table 2, Rule 68 (A) Materials section 3.

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51. According to the indictment, Witness GEX, who is not on the Prosecutor's list of witness, is one of the protected witnesses with whom the Accused met, along with Witness GAA, contrary to a protective measures order.⁵¹ The Chamber therefore considers that statements by Witness GEX that are in the Prosecutor's possession may be material to the preparation of the Defence case. Further, the request for Witness GEX's statement to the Prosecutor or to the Victims and Witnesses Support Unit, dated 2003 or 2004, is sufficiently specific to trigger the Prosecutor's disclosure obligation under Rule 66 (B).

52. The Chamber observes that in the Annex to the Prosecutor's 9 October Declaration and Disclosure, the Prosecutor lists a "Recantation Statement" by Witness GEX dated 17 March 2004 as having been disclosed to the Defence.⁵² This appears to be the same statement which the Defence seeks by way of its 22 October Motion and 10 November Reply. If, however, this is not the document the Defence seeks, the Prosecutor should allow the Defence to inspect the statement sought pursuant to Rule 66 (B), if it is in the Prosecutor's possession.

53. The Defence also seeks all memos and reports related to the Prosecutor's meeting with Witness GEX. The Chamber recalls that reports and memoranda prepared in connection with the investigation or preparation of the case are exempt from disclosure under Rule 70 (A).⁵³

IV) WITNESS BUC STATEMENT TO THE OFFICE OF THE PROSECUTOR PRE-1994

54. The Defence seeks disclosure of a statement it asserts was made by Witness BUC to the Prosecutor pursuant to Rule 68 (A), or alternatively Rule 66 (B).⁵⁴

55. The Defence submits that Witness BUC mentions having given a statement to the Prosecutor prior to April 2004, and that there must, therefore, be some record of this statement.⁵⁵ The Prosecutor responds that the statement is not in his possession.

56. The Defence has not identified the document that refers to the April 2004 statement with sufficient specificity - for example, the date and title of the document, as well as the date of its disclosure - for the Chamber to assess this request.

V) WITNESS STATEMENTS

57. In its 29 October Motion, the Defence seeks disclosure of sixteen additional witness statements under Rule 66 (A) (ii).⁵⁶

58. The Prosecutor submits that thirteen of the sixteen witness statements that the Defence seeks do not exist, and that the other three documents in question have been disclosed to the Defence.⁵⁷

⁵¹ *Ashogaza*, Indictment, 7 January 2008; *Ashogaza*, "Prosecutor's Filing of List of Witnesses and Exhibits" filed 27 October 2008.

⁵² *Ashogaza*, Prosecutor's Declaration, Strictly Confidential Annex, Folder 1, Item no. 4.

⁵³ See also *Kovemera et al.*, Decision on Defence Motions for Disclosure of Information Obtained from Juvénal Lwigiinyimana, 27 April 2006, para. 16.

⁵⁴ Motion, Annexure 1: Motion Para 16.

⁵⁵ 10 November Reply, Annex "Table 2, Rule 68 (A) Materials, section 4."

⁵⁶ 29 October Motion, para. 23. In footnote 16 and Annexure 1, the Defence submits that there are at least two Witness BUC statements, seven Witness GAA statements, one Witness GAF statement, and three Witness BLP statements that are yet to be disclosed.

59. The Defence has not presented evidence to establish that the Prosecutor has in his possession the documents sought, and that they have not been disclosed. The Chamber, however, reminds the Prosecutor of his obligation to ensure that all statements by witnesses whom the Prosecutor intends to call to testify are disclosed to the Defence.

60. The Defence also seeks all recordings of interviews with Witnesses GAA, BUC, GEI, SP-003, SP004, and SP-0017 pursuant to Rule 66 (B).⁵⁸

61. Since Witnesses GAA, BUC, GEI, SP-003 and SP-004 are on the Prosecutor's list of witnesses, any recordings of interviews with these witnesses would be relevant to the preparation of the Defence case and should be made available to the Defence.⁵⁹ There is no reference to a Witness SP-0017 on the Prosecutor's list of witnesses, and the Defence has not sought to establish the relevance of the witness's interview to the preparation of the Defence case under Rule 66 (B).

VI) UN-REDACTED INDICTMENT

62. The Defence seeks the un-redacted Indictment against the Accused under Rule 66 (B).⁶⁰

63. The Confirming Judge ordered that the Indictment and supporting materials be redacted for the purpose of protecting the identity of victims and witnesses, and that the materials should remain redacted until the Trial Chamber lifts the confidentiality.⁶¹

64. The Chamber made an Order for protective measures for Prosecution witnesses on 24 November 2008.⁶² According to this Order, the Prosecutor will disclose the names, addresses, whereabouts and other information that might identify or assist in identifying the witnesses and their families ("identifying information") no later than thirty days before the commencement of the Prosecutor's case.⁶³

65. The Chamber has reviewed the un-redacted Indictment and considers that, taking into account the rights of the Accused to a fair and public hearing as enshrined in Article 20 of the Statute, it would be appropriate for the Prosecutor to disclose the un-redacted Indictment

⁵⁷ Prosecutor's Response, para. 10, and Annex 1. The Prosecutor identifies the following materials as "not in the Prosecutor's possession": Witness BUC Pre-2004 to OTP, Witness BUC Pre-25 Sept 08 to OTP, Witness GAA May 2006 Statement to CID (not in possession/non-existent), Witness GAA "Several" other statements to CID pre July 2007, Witness GAA 17 June Pro Justitia to CID, Witness GAA 25 July 2007 "Open Letter," Witness GAA Pre - 25 Sept 08 to OJP, Witness GAF Pre-25 Sept 08 to OTP, Witness SP-004 Pre-25 Sept 08 to OJP, Witness GEI, Pre-25 Sept 08 to OTP. The Prosecutor identifies the following documents as "non-existent": Witness GAA All Interview Notes, Statements to OTP in UNDF Detention, Witness GAA, 2006 (approx) Videotaped Statements to OJP in Kigali, Witness SP-003 Pre-25 Sept 08 to OTP.

⁵⁸ 10 November Reply, Annex "Table 2, Rule 66 (B) Materials, section 3."

⁵⁹ These statements may also fall within the meaning of "witness statement" under Rule 66 (A) (i).

⁶⁰ Motion, Annexure 1.

⁶¹ *Ashogaza*, Confirmation of the Indictment and Witness Protection Orders, 4 January 2008, pp. 2-3.

⁶² *Ashogaza*, Decision on Prosecutor's Extremely Urgent Motion for Protective Measures for Victims and Witnesses, 24 November 2008.

⁶³ *Ibid.*, p. 6.

when he discloses the identifying information relating to the protected witnesses: that is, no later than thirty days before the commencement of the Prosecutor's case.⁶⁴

VII) CLOSED SESSION ENGLISH TRANSCRIPT FROM KAMUHANDA PROCEEDINGS; OPEN AND CLOSED SESSION TRANSCRIPTS FROM THE RWAMAKUBA PROCEEDINGS

66. Pursuant to Rule 66 (B), the Defence seeks the closed session English transcript of the testimony of Witness GAA in the proceedings in *Prosecutor v. Kamuhanda*⁶⁵ dated 20 September 2001. Additionally, the Defence seeks all closed session transcripts from the proceedings in *Prosecutor v. Rwamakuba*⁶⁶ where witnesses mention Jean de Dieu Kamuhanda.⁶⁷

67. The Chamber considers that since Witness GAA is on the Prosecutor's list of witnesses, the prior testimony of this witness may be material to the preparation of the Defence. The transcript should be made available to the Defence pursuant to Rule 66 (B).

68. Rule 75 (f) (ii) provides that protective measures for victims and witnesses shall not prevent the Prosecutor from discharging his disclosure obligations in respect of another proceeding, provided the Prosecutor notifies the Defence of the protective measures orders from the first proceedings.⁶⁸

69. The Defence also seeks, pursuant to Rule 66 (B), all open and closed session transcripts from the *Rwamakuba* proceedings where witnesses testify about the massacre at Gikomero Parish Compound.⁶⁹ According to the Defence, this material is relevant because Rwamakuba, like Kamuhanda, was accused of leading attacks in Gikomero. The Defence asserts that evidence relating to the Gikomero massacres is, therefore, material to the preparation of the Defence case.⁷⁰

70. The Accused has not been charged with any crime relating to a participation in a massacre, but rather with contempt of the Tribunal, and attempt to commit contempt of the Tribunal. The Chamber is not, therefore, satisfied that evidence relating to a massacre at Gikomero Parish compound is relevant to the preparation of the Defence case.

⁶⁴ The adoption of protective measures requires a careful balancing between the need to secure the safety and security of victims and witnesses, and the rights of the Accused to a fair and public hearing as enshrined in Article 20 of the Statute. See *Prosecutor v. Juvenal Rugambarara*, Case No. ICTR-00-59-1, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 31 January 2006, para. 10; *Prosecutor v. Simon Bikindi*, Case No. ICTR-01-72-PT, Decision on Protective Measures for Prosecution Witnesses, 4 September 2006, para. 7.

⁶⁵ *Prosecutor v. Kamuhanda*, ICTR-99-54-I.

⁶⁶ *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44-T.

⁶⁷ Motion, Annexure 1.

⁶⁸ Rule 75 (f) (ii) *Bimungu et al.* Decision on Jerome Clement Bicamumpaka's Motion Requesting Recall of Prosecution Witness GFA; Disclosure of Exculpatory Material; and to Meet with Witness GFA, 21 April 2008 at paras 11-12; *Prosecutor v. Ferdinand Nahimana et al.* Decision on Disclosure of Transcripts and Exhibits of Witness X, 3 June 2004. At paragraph 4 of the Witness X Decision, the Chamber explains that "Rule 75 (f) was intended to create a mechanism for the routine disclosure of closed session testimony." Thus, the Prosecutor was required to disclose the prior closed session testimony and related exhibits without any intervention from the Chamber.

⁶⁹ 10 November Reply, Annex "Table 2 - Rule 66 (B) Materials sections 2"

⁷⁰ *Ibid.*

71. Regarding the request for all closed session transcripts from the *Rwamakuba* proceedings that mention Mr. Kamuhanda, the Defence asserts that the materials are "relevant to the underlying case of *Kamuhanda* and therefore material to the preparation of the defence of Mr. Nshogoza."⁷¹

72. The Chamber reiterates that it is not the purpose of these proceedings to re-open the *Kamuhanda* case. The Defence has not demonstrated how the documents sought are material to the preparation of the Defence case.

Is the Prosecutor in Violation of his Disclosure Obligations?

73. In its 29 October Motion, the Defence asserts that the Prosecutor is "in chronic violation" of his Rule 66 and 68 disclosure obligations, and that the Prosecutor is in "continuous and serious violation" of his Rule 68 disclosure obligations, primarily due to the non-disclosure of the Lynch Report and related materials.⁷²

74. The Chamber recalls that the Prosecutor is presumed to be acting in good faith unless the Defence adduces *prima facie* evidence to the contrary.⁷³ In order to support an allegation that the Prosecutor has violated his disclosure obligations under Rule 68 (A), the Defence must establish that the Prosecutor has the material in his possession, and must demonstrate, *prima facie*, that the material is exculpatory.⁷⁴ The Chamber is not satisfied that the Defence has discharged this burden.

75. Finally, the Chamber notes that the Defence filed repeated motions seeking identical or similar relief. The Chamber deprecates this practice. Filings which require the Chamber to address multiple motions on the same issue are unnecessary, and result in a waste of valuable judicial time and resources.

FOR THESE REASONS the Chamber hereby,

GRANTS the Defence Motion⁷⁵ in part; and,

ORDERS the Prosecutor to disclose to the Defence the following materials pursuant to Rule 66 (B), if they are in the Prosecutor's possession:

- i) Supporting materials for the Witness GAA indictment;
- ii) Witness GEX Statement to the Prosecutor dated 2003 or 2004;

⁷¹ Motion, Annexure 1, para. 6g.

⁷² Motion paras. 21, 26 - 28, 33, 39.

⁷³ *Adudibimona et al.*, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008, para. 12; *Karemura et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para. 17; *Prosecutor v. André Rwamakuba et al.*, Case No. ICTR-98-44-1, Decision on Defence Motion for Disclosure, 15 January 2004, para. 3 (citing the Appeals Chamber in *Prosecutor v. Blaskić*, Case No. IT-95-14-A, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 45);

⁷⁴ *Karemura et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para. 13;

⁷⁵ This refers to both the Motion, the 29 October Motion, and the 10 November Reply.

iii) Recordings of interviews with Witnesses GAA, DUC, GBI, SP-003 and SP-004;
and

ORDERS the Prosecutor to disclose Witness GAA's Closed Session testimony from the *Kumuhanda* proceedings, dated 20 September 2001, pursuant to Rules 66 (B) and 75 (F) (i);

ORDERS the Prosecutor to disclose to the Defence, not later than 30 days before the commencement of the Prosecutor's case, the un-redacted Indictment against the Accused; and

DENIES the Defence Motions in all other respects.

Arusha, 22 December 2008

Lee Gouiga Muthoga

For and on behalf of
Lee Gouiga Muthoga
Judge

Khalida Raheed Khan

Khalida Raheed Khan
Presiding Judge
(Seal of the Tribunal)



Emile Francis Sibar

For and on behalf of
Emile Francis Sibar
Judge