



ICTR-99-54-T
25-03-2009
(486 - 484)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramarason
Judge Solomy Balungi Bossa

Registrar: Mr. Adama Dieng

Date: 24 March 2009

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The PROSECUTOR

v.

Augustin NGIRABATWARE
Case No. ICTR-99-54-T

**DECISION ON NGIRABATWARE'S MOTION FOR DISCLOSURE PURSUANT TO
RULE 68**

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Brian Wallace
Mr. Iskandar Ismail

Counsel for Ngirabatware

Mr. David C. Thomas

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa and Mamy Rajohnson (the “Chamber”);

BEING SEIZED of the “Defence Request for Disclosure of Exculpatory and Other Relevant Material Pursuant to Rule 68 of the Rules of Procedure and Evidence”, filed on 11 March 2009 (the “Motion”);

CONSIDERING the “Prosecutor’s Response to the Defence Motion for Disclosure of Exculpatory and Other Relevant Material Pursuant to Rule 68 of the Rules of Procedure and Evidence”, filed on 13 March 2009 (the “Response”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

NOW DECIDES the Motion pursuant to Rule 73 (A) of the Rules, on the basis of the written briefs filed by the Parties.

SUBMISSIONS OF THE PARTIES

1. The Defence requests the disclosure by the Prosecution of material in its possession which might fall under Rule 68 as being potential exculpatory evidence.
2. In its response, the Prosecution opposes the Motion and submits that it is continually making Rule 68 searches and in case of discovery of any exculpatory evidence, it will be disclosed immediately. The Prosecution further submits that it does not require a court order to ensure that its Rule 68 obligations are properly discharged.

DELIBERATIONS

3. Rule 68 (A) provides that the Prosecutor shall, 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. Pursuant to Rule 68 (E), the Prosecution’s disclosure obligations under Rule 68 (A) are ongoing.¹ The initial determination as to whether a document is exculpatory pursuant to Rule 68 (A) is primarily a fact-based judgement made by and under the responsibility of the Prosecution. The Prosecution is presumed to discharge its obligation in good faith.² Rule 68 imposes a categorical obligation on the Prosecution. Therefore, it cannot refrain from disclosing exculpatory material on the grounds that the document also includes material that incriminates the accused.³ The Prosecution’s obligation to disclose exculpatory material is essential to a fair trial. According to the Appeals Chamber, the obligation to disclose

¹ *The 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” (AC), 26 September 2000, para. 32; *The Prosecutor v Bizimungu et al.*, Case No. IT-99-50-T, “Decision on Prosper Mugiraneza’s Motion for Records of all Payments made directly or indirectly to Witness D”, 18 February 2008, para. 4.

² *The Prosecutor v. Karemera et al.*, Case No. IT-98-44-AR, “Decision on Joseph Nzirorera’s Interlocutory Appeal” (AC), 28 April 2006, para. 16; *The Prosecutor v. Karemera et al.*, Case No. IT-98-44-AR, “Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suites in Discharging Disclosure Obligations” (AC), 30 June 2006, paras. 8, 9; *The Prosecutor v. Bagosora et al.*, Case No ICTR-98-41-T, “Decision on Ntabakuze Motion for Disclosure of Prosecution Files”, 6 October 2006, para 2.

³ *The Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, “Decision on Defence Motions alleging Violations of the Prosecution’s Disclosure Obligations Pursuant to Rule 68”, 22 September 2008, para. 10.



exculpatory material forms part of the Prosecution's duty to assist in the administration of justice, and is as important as the obligation to prosecute.⁴

4. The Chamber recalls that when making a request for disclosure pursuant to Rule 68 (A), the Defence must (i) sufficiently identify the material sought; (ii) satisfy the Chamber on a *prima facie* basis of the Prosecution's custody or control of the materials requested; and (iii) present a *prima facie* case that the material is potentially exculpatory or may affect the credibility of the Prosecution evidence.⁵

5. In the instant case, the Chamber observes that no document has been properly identified by the Defence. Indeed, the Defence merely requests the disclosure of a broad category of documents without specifying them. Furthermore, the Defence did not demonstrate the manner in which these documents could have been exculpatory. The Motion is therefore denied. Nevertheless, the Chamber reminds the Prosecution of its obligation under Rule 68 (A) and to discharge it in a timely manner.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion in its entirety.

Arusha, 24 March 2009



William H. Sekule
Presiding Judge



Arlette Ramaroson
Judge



Solomy Balungi Bossa
Judge



[Seal of the Tribunal]

⁴ *The Prosecutor v. Nindiliyimana et al.*, Case No. ICTR-00-56-T, "Decision on Defence Motions alleging Violations of the Prosecution's Disclosure Obligations Pursuant to Rule 68", 22 September 2008, para. 12, citing *The Prosecutor v. Kordić and Cerkez*, Case No. IT-95-14/2-A, "Decision on Motions to Extend for Filing Appellants' Briefs" (AC), 11 May 2001, para. 14.

⁵ *The Prosecutor v. Blaskić*, Case No. IT-95-14-A, Judgement (AC), 29 July 2004, para. 268; *The Prosecutor v. Karemera et al.*, "Decision on Joseph Nzirorera's Interlocutory Appeal" (AC), 23 April 2006, para. 13; *The Prosecutor v. Bagosora et al.*, "Decision on the Ntabakuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68" (TC), 6 October 2006, para. 2; *The Prosecutor v. Bagosora et al.*, "Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses" (TC), 27 September 2005, para. 3 ("a request for production of documents has to be sufficiently specific as to the nature of the evidence sought and its being in the possession of the addressee of the request").