



UNITED NATIONS
NATIONS UNIES

ICTR-07-91-T
8-6-2009
(4261-4256)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

4261
2009/06/08
JMP

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Aydin Sefa Akay
Registrar: Mr. Adama Dieng
Date: 8 June 2009

2009 JUN - 8 P 5 18
A 08:08 am. 08/06/2009

THE PROSECUTOR

v.

Léonidas NSHOGOZA

Case No. ICTR-07-91-T

**DECISION ON DEFENCE FUTURE MOTION FOR ORDER TO REGISTRAR TO
PROVIDE INFORMATION TO THE DEFENCE REGARDING PROSECUTION
VISITS TO WITNESS GAA AT UNDF**

Rule 54 of the Rules of Procedure and Evidence

Office of the Prosecutor:

For the Accused:

Richard Karegyesa
Abdoulaye Seye
Dennis Mabura
Marie Ka

Allison Turner

INTRODUCTION

1. On 20 March 2009, the Defence filed a Motion requesting an order to the Registrar to provide information relating to visits by representatives from the Office of the Prosecutor to Witness GAA while he was in detention at the UN Detention Facility ("UNDF") between August and November 2007.¹
2. On 28 April 2009, the Chamber issued a decision ordering the Registrar to provide the Defence with the information it had requested. On 29 April 2009 the Registrar filed submissions and provided the Defence with the information as ordered by the Chamber.²
3. By way of Motion filed on 8 May 2009, the Defence now submits that the information provided by the Registrar is inaccurate or incomplete and seeks a further order to the Registrar to provide additional information and an order to the Prosecutor to comply with his disclosure obligations under Rules 66 and 68 of the Rules of Procedure and Evidence ("Rules").³
4. The Prosecutor did not respond to the Motion.

DISCUSSION

Applicable Law on the Registrar's Role

5. Article 16 (1) of the Statute of the Tribunal ("Statute") provides that the Registrar shall be responsible for the administration and servicing of the Tribunal.
6. Rule 33 (A) of Rules states that the Registrar shall "assist the Chambers, the Plenary Meetings of the Tribunal, the Judges and the Prosecutor in the performance of their functions." Sub-Rule (B) further provides that, in the execution of his functions, the Registrar may make oral or written representations to Chambers on any issue arising in the context of a specific case which affects or may affect the discharge of such functions. Article 4 (4) of the Directive for the Registry of the Tribunal ("Directive") mirrors the provisions in the Statute and the Rules, and Article 49 of the Directive provides that the Registrar is responsible for the administration and servicing of the Tribunal and serves as its channel of communication.⁴

¹ *Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Defence Motion for Order to Registrar to Provide Information to the Nshogoza Defence Regarding Prosecution Visits to GAA at UNDF in 2007, 20 March 2009.

² *Nshogoza*, "Registrar's Submissions under Rule 33 (B) of the Rules on the Decision on Defence Motion for Order to the Registrar to Provide information to the Defence Regarding Prosecution Visits to Witness GAA at UNDF," filed 29 April 2009; *Nshogoza*, "Confidential Annex to Registrar's Submissions under Rule 33 (B) of the Rules on the Decision on Defence Motion for Order to the Registrar to Provide information to the Defence Regarding Prosecution Visits to Witness GAA at UNDF," filed 29 April 2009.

³ *Nshogoza*, "Defence Further Motion to Order Registrar to Provide Complete Information on OTP Visits to GAA, and Motion to Order Prosecutor to Comply with Rule 66 and 68 Disclosure Obligations," filed 8 May 2009 ("Motion").

⁴ Article 4 (4) of the Directive states that the Registrar shall assist the Chambers, the Plenary meetings of the Tribunal, the Judges and the Prosecutor in the performance of their functions. Under the authority of the President, he shall be responsible for the administration and servicing of the Tribunal; Article 5 (1) states that the Registrar shall discharge his functions in accordance with Article 16 of the Statute and Rule 33 of the Rules; and Article 49 provides that pursuant to Article 16 of the Statute, the Registry is responsible for the administration and servicing of the Tribunal and that pursuant to Rule 33 of the Rules, the Registrar assists the Chambers, the plenary meetings of the Tribunal, the Judges and the Prosecutor in the performance of their functions. Under the



4259

7. Pursuant to these provisions, the Registrar's role is therefore of an administrative, "ministerial", and "logistical nature".⁵

8. With regard to a party requesting that the Registrar provide certain information which may fall outside the aforementioned administrative functions, Rule 54 of the Rules allows a Judge or Trial Chamber to issue, at the request of either party, or *proprio motu*, such orders as may be necessary for the conduct of the trial. The words "necessary . . . for the preparation or conduct of the trial" in Rule 54 must be interpreted in light of the Chamber's obligation under Articles 19 and 20 of the Statute to ensure a fair and expeditious trial, and to ensure that the rights of the accused are respected at all times.⁶ Hence, an order for the provision of information by the Registrar may be appropriate where the fairness of the trial so requires.

Applicable Law on Disclosure

9. Under Rule 66 (A) (ii), 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. The term "witness statement" under Rule 66 (A) (ii) 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.⁷

10. Rule 68 (A) 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." 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.⁸

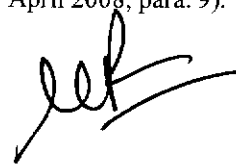
authority of the President of the Tribunal, the Registrar is responsible for the administration and servicing of the Tribunal and serves as its channel of communication.

⁵ *Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-2001-70-I, Decision on the Prosecutor's Motion to Order the Registrar to Provide Photographs of the Accused for Purposes of Identification, 25 October 2002, para. 13.

⁶ Article 19 (1) provides, among other things, that Trial Chambers shall ensure that a trial is fair and expeditious and Article 20 sets out the rights of the accused. With regard to interpreting Rule 54 in light of Articles 19 and 20, see also *Prosecutor v. Blaskić*, Case No. IT-95-14, Decision on the Republic of Croatia to the Issuance of Subpoenae Duces Tecum, 18 July 1997, para. 32; and *Nshogoza*, Decision on Motions Requesting Assignment of Counsel of Choice, 13 October 2008, para. 19.

⁷ *Milutinović et al.*, Case IT-05-87-T Decision on Ojdanić Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66 (A) (ii), 29 September 2006, para. 14 (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. 15.).

⁸ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Justin Mugenzi's Request for Disclosure Order, 23 July 2008, para. 7 (citing *Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Ntabakuze Motion for Disclosure of Prosecution Files, para. 4; and *Karemura et al.*, Decision on Defence Motion for Disclosure of RPF 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 (TC), 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 Bicamumpaka's Motion Requesting Recall of Prosecution Witness GFA; Disclosure of Exculpatory Material; and to Meet with Witness GFA, 21 April 2008, para. 9).



11. 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.⁹ 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 accused of the existence of any exculpatory material.¹⁰ The Prosecutor is presumed to be acting in good faith unless the moving party adduces *prima facie* evidence to the contrary.¹¹

12. 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.¹²

13. Pursuant to Rule 70 (A), any reports, memoranda or internal documents prepared by the Prosecutor in the course of the investigation or preparation of the case are exempt from disclosure by the Prosecutor unless they are exculpatory.¹³

Should the Chamber Make a Further Order to the Registrar?

14. The Chamber ordered the Registrar to provide the following information relating to visits by Prosecution representatives to Witness GAA while in detention at the UNDF between August and November 2007:

- (i) The number of visits;
- (ii) The dates of visits;
- (iii) The duration of visits;
- (iv) The purpose of visits (if available and as recorded).¹⁴

15. The Defence submits that the information provided by the Registrar is incomplete because it does not provide the names of all the persons who visited Witness GAA in detention, and does not provide the date and place of the meeting at which Witness GAA

⁹ Rule 68 (E); *Prosecutor v. Augustin Ndingiyimana et al.*, Case No. ICTR-00-56-T, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008, para. 9.

¹⁰ *Karemera et al.*, Case No. ICTR-99-44-T, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006, paras. 9-10.

¹¹ *Ndingiyimana et al.*, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008, para. 12; *Karemera 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. 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).

¹² *Ndingiyimana 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); *Karemera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para. 13.

¹³ Rule 70 (A); *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'Appellant 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

¹⁴ *Nshogoza*, Decision on Defence Motion for Order to the Registrar to Provide Information to the Defence Regarding Prosecution Visits to UNDF, 28 April 2009.



1257

signed a plea agreement with the Prosecutor.¹⁵ The Chamber notes that the information that the Defence now seeks was not part of information that was originally requested, nor did the the Chamber direct the Registrar to provide such information to the Defence in its order of 28 April 2009.

16. The Chamber recalls that the Registrar's role is of an administrative nature. In light of the Defence submissions that the information requested may be relevant to Witness GAA's credibility and could assist in the preparation of the Defence case, the Chamber ordered the Registrar to provide the information to the Defence.¹⁶

17. The Chamber considers that the Defence has not demonstrated how the further information requested would be of assistance to the Defence case. The Chamber is therefore not satisfied that it would be in the interests of justice for it to make an order to the Registrar, pursuant to Rule 54 of the Rules, to provide the further information requested to the Defence.

Should the Chamber Order the Prosecutor to Comply with His Disclosure Obligations?

18. In addition, the Defence seeks an order to the Prosecutor to provide the purpose of various visits to Witness GAA, as well as written reports or statements arising from the meetings which took place on 10 August 2007, and on 6, 9 and 28 February 2008 between Witness GAA and staff members from the Office of the Prosecutor ("OTP").

19. The Chamber considers that any written report arising from the visit between the staff member from the OTP and Witness GAA would be exempt from disclosure pursuant to Rule 70 (A). Further, written memoranda or records regarding the purpose of visits to Witness GAA by the Prosecutor, if they exist, would also be exempt from disclosure pursuant to Rule 70 (A).

20. The Defence submits that the Prosecutor should be sanctioned for violating his disclosure obligations because the fact that staff member from the OTP visited Witness GAA while he was in detention is "information that was never provided to the defence."¹⁷ According to the Defence, this information should have been disclosed pursuant to Rule 66 (A) (ii). The Chamber considers that such information does not fall within the meaning of "witness statement" for the purpose of Rule 66 (A) (ii).

21. Any witness statement taken during the course of such meetings, if it exists, should have been disclosed to the Defence pursuant to Rule 66 (A) (ii). The Chamber notes that the Prosecutor has repeatedly stated that he has complied with his disclosure obligations and denied that he as any further statements taken from Witness GAA.¹⁸ Further, the Chamber

¹⁵ Motion, para. 3.

¹⁶ Order to Registrar, paras. 15-16

¹⁷ Motion, para. 5 – 9.

¹⁸ Nshogoza, "Prosecutor's Response to 'Extremely Urgent Motion for Order to the Prosecution to Fully and Immediately Comply with 22 December 2008 Disclosure Court Order and Other Disclosure Obligations Pursuant to Rules 41, 54, 66, 68 and 73 of the ICTR Rules of Procedure and Evidence,'" filed 4 February 2009; 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 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 Nshogoza', filed 3 November 2008; "Prosecutor's Response to 'Defence Application for Certification to Appeal Decision of 22 December



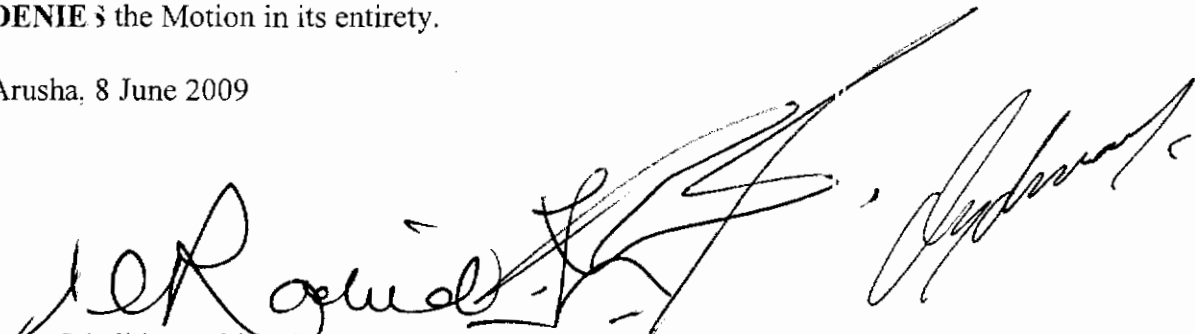
considers that the Defence has not presented new information to suggest that any such statement exists.

22. With respect to the submission that the Prosecutor should be sanctioned for violating his Rule 68 (A) disclosure obligations, the Chamber recalls that the Prosecutor is presumed to act in good faith. Further, where the Defence asserts that the Prosecutor has violated his disclosure obligations under Rule 68 (A), the Defence must define the material sought with reasonable specificity, establish that the material is in the custody and control of the Prosecutor, and present a *prima facie* case that the material is exculpatory or potentially exculpatory. While the material sought has been defined with reasonable specificity, the Chamber is not satisfied that the Defence has presented a *prima facie* case that the material is in the custody or control of the Prosecutor, and that it is exculpatory or potentially exculpatory. Accordingly, the Chamber is not satisfied that the Defence has not demonstrated that the Prosecutor has violated his Rule 68 disclosure obligations.

FOR THESE REASONS, the Chamber

DENIES the Motion in its entirety.

Arusha, 8 June 2009



Khalida Rachid Khan
Presiding Judge

Lee Gacuga Muthoga
Judge

Aydin Sefa Akay
Judge

[Seal of the Tribunal]



2009 and Alternately Request for Review," filed 5 January 2009; "Prosecutor's Response to "Urgent Motion for Stay of Proceedings Due to On-going Violation of the Prosecutor's Disclosure Obligations," filed 9 February 2009, para. 23; Nshogoza, "Prosecutor's Certification of Compliance with Trial Chamber's Order of 5 February 2009 Regarding Disclosure Obligations," filed 9 February 2009.