



UNITED NATIONS
NATIONS UNIES

ICTR-00-56-T
31-08-2009
(30194 - 30191)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

30194
Musang

OR: ENG

TRIAL CHAMBER II

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

Registrar: Adama Dieng

Date: 31 August 2009

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

JUDICIAL RECORDS ARCHIVES

2009 AUG 31 P 3:37

**DECISION ON AUGUSTIN BIZIMUNGU'S MOTION FOR DISCLOSURE OF A
CONTESTED DOCUMENT**

Office of the Prosecution:

Mr Alphonse Van
Mr Moussa Sefon
Mr Lloyd Strickland
Mr Abubacarr Tambadou
Ms Faria Rekkas

Counsel for the Defence:

Mr Gilles St-Laurent and Mr Benoît Henry for Augustin Bizimungu
Mr Christopher Black and Mr Vincent Lurquin for Augustin Ndindiliyimana
Mr Charles Taku and Ms Beth Lyons for François-Xavier Nzuwonemeye
Mr Fabien Segatwa and Mr Seydou Doumbia for Innocent Sagahutu

INTRODUCTION

1. The evidence in this case was completed on 18 February 2009 after four and one half years of trial. Closing arguments were heard from 24-26 June 2009. On 26 June 2009, the Defence for Bizimungu filed a Motion alleging that the Prosecution was withholding a document which contradicts the evidence of certain Prosecution witnesses, in violation of the Prosecution's disclosure obligations set out in Rule 68 of the Rules of Procedure and Evidence ("the Rules").¹
2. The Prosecution opposes the Motion, stating that the document in question is not exculpatory in accordance with Rule 68 of the Rules, and that the Defence has not been prejudiced by the Prosecution's failure to disclose the document.²
3. On 6 July 2009, the Chamber issued an interim order that the withheld document be translated into English and French and filed *ex parte* for a proper determination of the Motion.³

DELIBERATIONS

4. The Defence submits that the Prosecution is in violation of its Rule 68 disclosure obligation because it failed to provide the Defence with a document which shows that the Virunga Force was created at meetings on 19 and 23 June 1994, instead of dates between 1992 and 1994 as alleged by Prosecution Witnesses GAP, GFA and GFV. Furthermore, the Defence asserts that the document contradicts Prosecution evidence that Bizimungu attended meetings and provided military training and weapons to members of the Virunga Force and therefore qualifies as exculpatory material that the Defence could have used to cross-examine the Prosecution witnesses.
5. The Chamber recalls that some of the material facts supporting the charge of Conspiracy to Commit Genocide against Bizimungu are that from 1992-1994 he provided military training to militias and youths, and that before and during the events of April 1994, he distributed weapons to militias for the purpose of killing Tutsi civilians.⁴ To prove these allegations, the Prosecution called evidence from Witnesses GAP, GFA and GFV.

(i) Did the Prosecution Violate its Disclosure Obligation?

6. The Chamber recalls that Rule 68(A) of the Rules requires the Prosecutor to disclose "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 Prosecution evidence."⁵ The determination of whether or not the material is exculpatory initially rests with the Prosecution. Where the Defence seeks disclosure of alleged exculpatory material, it must (i)

¹ *Requête en extrême urgence de la défense du général Augustin Bizimungu en communication d'éléments de preuve*, filed on 26 June 2009.

² Prosecutor's Response to Augustin Bizimungu's "*Requête en extrême urgence de la défense du général Augustin Bizimungu en communication d'éléments de preuve*", filed on 1 July 2009.

³ *Interim Order for Ex Parte Disclosure of Contested Document (TC)*, 6 July 2009.

⁴ *Indictment*, para. 27; Prosecution's Pre-Trial Brief, paras. 35, 37.

⁵ See for example the recent decisions in this case regarding Rule 68 violations: *Decision on Nindiliyimana's 2nd Motion for Disclosure Violations (TC)*, 25 February 2009; *Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68 (TC)*, 22 September 2008.

define or identify the material sought with reasonable specificity; (ii) satisfy the Chamber on a *prima facie* basis of the Prosecutor's custody and control of the requested material; and (iii) satisfy the Chamber on a *prima facie* basis of the exculpatory or potentially exculpatory character of the requested material.⁶

7. The Chamber observes that the document at issue contains the minutes of meetings of the Virunga Force for 19 and 23 June 1994, respectively. In the minutes of the 19 June meeting, under the heading "Management Plan", there is a discussion regarding the setting up of a bank account, and what receipt books should be used. The minutes of the 23 June meeting show a discussion on statutes and by-laws that should be adopted. The document also lists the people who attended the meetings on both dates, and it is clear that Bizimungu's name does not appear anywhere.

8. There are also indications, however, that these were not the first meetings of the Virunga Force as at the 19 June meeting there was already a Steering Committee in place, and at the 23 June meeting there was a discussion concerning committees that appear to have been created prior to the 19 June meeting. The Chamber finds that although the minutes do not definitively answer the question of whether the Virunga Force was created at those meetings, one could infer from the organizational discussions that it had already been in existence prior to 19 June 1994. This is not totally inconsistent with the Prosecution evidence that the Virunga Force was created between 1992 and 1994.

9. However, the Chamber finds that in view of the uncertainty surrounding the date that the Virunga Force was established, the document containing the minutes of the 19 and 23 June 1994 meetings could have been used by the Defence to cross-examine the Prosecution witnesses. Such cross-examination could have cleared any doubts about the exact date that the Force was created. The Chamber therefore concludes that in view of its relevance to the Defence's cross-examination, the document constitutes exculpatory material within the meaning of Rule 68 and the jurisprudence of the Tribunal. As such, the Prosecution's failure to disclose it constitutes a violation.

(ii) What is the appropriate remedy?

10. Since the Chamber has found that the Prosecution has violated its Rule 68 obligation, it must now determine what remedy, if any, is appropriate under the circumstances considering: the rights of the Accused, any prejudice suffered as a result of the violation and the current stage of the proceedings.⁷

11. The Chamber recalls its previous holding that not every violation of a Rule 68 obligation warrants a remedy. Before the Chamber exercises its discretion to grant a remedy, it must first ascertain that material prejudice has been caused to the Accused amounting to an infringement of his right to a fair trial.⁸

⁶ Decision on Ndingilyimana's 2nd Motion for Disclosure Violations (TC), 25 February 2009, paras. 6-7 (internal citations omitted); Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68 (TC), 22 September 2008, paras. 12-13 (internal citations omitted).

⁷ See for example *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44, Decision on 'Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion (AC), 14 May 2008, para. 12.

⁸ Decision on Defence Motions Alleging Violation of the Prosecution's Disclosure Obligations Pursuant to Rule 68, 22 September 2008, para. 14; See also *Karemera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 7.

12. The Chamber notes that on the issue of the Virunga Force, the Defence cross-examined the Prosecution witnesses and led evidence in support of its own case.⁹ Considering the contents of the document at issue, the totality of the evidence heard about the Virunga Force, and the current stage of the proceedings, the Chamber finds that it would be inappropriate to recall the Prosecution witnesses or admit further submissions on this matter. In the interests of justice, however, the Chamber will, *proprio motu*, admit the document into evidence and take it into account in its assessment of the credibility of the Prosecution evidence regarding the Virunga Force.¹⁰

13. The Chamber recalls that it has already issued a reprimand to the Prosecution for its violation of Rule 68 obligations.¹¹

FOR THE ABOVE REASONS, THE CHAMBER

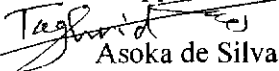
GRANTS the Defence Motion in part;

ORDERS the Registry to disclose the document and its English and French translations to all the Parties and to assign it a Number as a Chambers Exhibit;

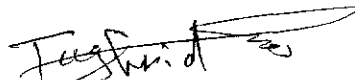
DENIES the Motion in all other respects.

Arusha, 31 August 2009, done in English.

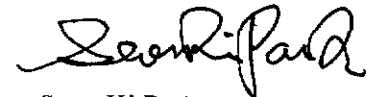
Read and approved by


Asoka de Silva

Presiding Judge


Taghrid Hikmet





Seon Ki Park

Judge

⁹ See for example, T. 26 May 2005, p. 16; T. 1 February 2006, pp. 21, 25; T. 29 October 2008, pp. 28-29.

¹⁰ Decision on Nzuwonemeye's Urgent Motion for Admission of CN's Statement into Evidence (TC), 20 March 2009, para. 12.

¹¹ See reprimand in Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68 (TC), 22 September 2008,