

ICTR-00-55C-T
03-12-2010
(4274-4271)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Lee Gacuiga Muthoga, *Presiding*
Seon Ki Park
Robert Fremr

Registrar: Adama Dieng

Date: 3 December 2010

JUDICIAL RECORDS SECTION
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THE PROSECUTOR

v.

Ildephonse NIZEYIMANA

CASE NO. ICTR-2000-55C-PT

DECISION ON DEFENCE MOTION FOR DISCLOSURE OF EXCULPATORY
EVIDENCE

Rules 68 and 73 of the Rules of Procedure and Evidence

Office of the Prosecution:
Drew White
Kirsten Gray
Yasmine Chubin
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Astou Mbow

Defence Counsel for Ildephonse Nizeyimana:
John Philpot
Cainnech Lussiaà-Berdou
Myriam Bouazdi

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INTRODUCTION

1. The trial in this case is scheduled to commence on 17 January 2011.¹
2. On 28 October 2010, the Defence filed a motion pursuant to Rule 68(A) of the Rules of Procedure and Evidence (“the Rules”), requesting disclosure of materials from the *Ntaganzwa* case relating to the massacre at the Cyahinda Parish.² The Defence submits that “any evidence in possession of the Prosecution that might tend to suggest that the Ntaganzwa indictment version of the events that unfolded in Cyahinda is true rather than the one detailed in the Nizeyimana indictment can only be exculpatory and fall within the scope of Rule 68”.³
3. On 2 November 2010, the Prosecution filed a response to the Defence motion.⁴ The Prosecution disputes that the materials requested by the Defence are exculpatory within the meaning of Rule 68(A).⁵ The Prosecution acknowledges, however, that some of the supporting materials from the *Ntaganzwa* case may be relevant to Nizeyimana’s defence and therefore fall within the scope of Rule 66(B).⁶ The Prosecution notes in its response that it has already disclosed several materials from the *Ntaganzwa* case to the Defence.⁷ Finally, the Prosecution annexes over 300 pages of documents, which it submits contain all remaining relevant material from the *Ntaganzwa* case.⁸
4. On 9 November 2010, the Defence filed a reply to the Prosecution response, acknowledging receipt of the requested documents but arguing that, under Rule 68, it is entitled to the unredacted versions of these statements.⁹

DELIBERATIONS

5. Rule 68(A) of the Rules of Procedure and evidence provides that, “[t]he 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 Prosecution evidence.” The determination of which materials are subject to disclosure under this provision, is a fact-based enquiry made by the Prosecution.¹⁰
6. To show that the Prosecution has breached its disclosure obligations under Rule 68(A), an accused must: (1) identify the specific material sought; (2) present a *prima facie* showing of its probable exculpatory nature; and (3) prove that the material requested is in the custody or under the control of the Prosecution.¹¹ Information is considered

¹ Scheduling Order (TC), 3 November 2010, Order II.

² Nizeyimana Defence Motion for Disclosure of Exculpatory Evidence, filed on 28 October 2010 (“Motion”).

³ Motion, para. 12.

⁴ Prosecution Response to Defence Motion for Disclosure of Exculpatory Evidence, filed on 2 November 2010 (“Response”).

⁵ Response, paras. 3, 5.

⁶ Response, paras. 3, 11.

⁷ Response, para. 5.

⁸ Response, Annexes A and B.

⁹ Defence Reply to Prosecution Response to Defence Motion for Disclosure of Exculpatory Evidence, filed on 9 November 2010, para. 10 (“Reply”).

¹⁰ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.13, Decision on “Joseph Nzirorera’s Appeal from Decision on Tenth Rule 68 Motion” (AC), 14 May 2008, para. 9; *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza’s Motions for Leave to Present Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 34.

¹¹ *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-AR73, Decision on Kanyarukiga’s Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents (AC), 19 February 2010, para. 16; *Karemera et al.*, Decision on “Joseph Nzirorera’s Appeal from Decision on Tenth Rule 68 Motion” (AC), para. 9; *Nahimana et al.*, Decision on Appellant Jean-Bosco Barayagwiza’s Motions for Leave to Present Additional Evidence

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exculpatory under Rule 68(A) if there is any possibility, in light of the submissions of the parties, that the information could be relevant to the defence of the accused.¹²

7. The Defence in this case has broadly identified the materials sought as those which “support[] the facts alleged in paragraphs 6.31 to 6.35 of the indictment against Ladislas Ntaganzwa or that tend to suggest that the Cyahinda parish massacres were committed by [gendarmes] and civilians, not ESO soldiers.”¹³ In making its request, the Defence submits that it “is not in a position to be specific as to the exact nature of the evidence in the custody or control of the Office of the Prosecutor that supports the version of events described in the Ntaganzwa indictment”.¹⁴

8. The Chamber recalls that the Prosecution has previously disclosed materials from the *Ntaganzwa* case on 19 October and 21 December 2009.¹⁵ The Chamber further recalls that in its response to the Defence Motion, the Prosecution disclosed more than 300 pages of documents, which it submits are the remainder of the relevant materials from the *Ntaganzwa* case.¹⁶ Accordingly, the Chamber finds that the Defence request has largely been satisfied.

9. In its reply, however, the Defence argues that although the redacted versions of the requested documents have now been disclosed, Rule 68, unlike Rule 66(B), requires the Prosecution to provide unredacted versions of these materials.¹⁷ The Defence relies for its argument on a Trial Chamber decision in the *Bagosora* case.¹⁸

10. In *Bagosora*, however, the Prosecution did not dispute that portions of the statements disclosed contained evidence that could be characterised as exculpatory.¹⁹ Rather, in that case, the only issue for the Trial Chamber was whether the identities of the authors of the exculpatory statements had to be disclosed under Rule 68.²⁰ That is not the case here.

11. In the instant case, the Chamber notes that although the requested documents have now been disclosed in their redacted form, the Defence has not indicated whether any of the documents disclosed are in fact exculpatory, nor has it indicated which unredacted statements it is requesting. The Chamber notes that, contrary to its submission in the original motion, the Defence should now be in a position to specifically identify the materials that it believes are exculpatory. Without this additional specificity, the Chamber finds that it is not in a position to assess whether the redacted portions of the disclosed documents are in fact subject to the

pursuant to Rule 115 of the Rules of Procedure and Evidence (AC), para. 34. The Chamber notes that in the *Kanyarukiga* case, the Appeals Chamber found that, “contrary to the Appellant’s submission, his burden of proof could not be met by merely showing a *prima facie* case of custody or advancing a ‘presumption of possession’.” *Kanyarukiga*, Decision on Kanyarukiga’s Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents (AC), para. 16.

¹² *Karemera et al.*, Decision on “Joseph Nzirorera’s Appeal from Decision on Tenth Rule 68 Motion” (AC), para. 12.

¹³ Motion, *prayer to the Trial Chamber*.

¹⁴ Motion, para. 13.

¹⁵ Disclosure for Defence, filed on 21 December 2009. *See also* Response, para. 11; Reply, para. 10 (acknowledging that the requested documents have been disclosed in redacted form).

¹⁶ Response, para. 11, Annexes A and B.

¹⁷ Reply, para. 10.

¹⁸ Reply, para. 6, citing *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion for Disclosure Under Rule 68 (TC), 1 March 2004, fn. 5.

¹⁹ *Bagosora et al.*, Decision on Motion for Disclosure Under Rule 68 (TC), para. 5.

²⁰ *Bagosora et al.*, Decision on Motion for Disclosure Under Rule 68 (TC), para. 5. *See also* *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza’s Motion to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68 (TC), 10 December 2003, para. 21.

disclosure obligations of Rule 68. Therefore, the Chamber declines to order disclosure of the requested material at this stage.

FOR THESE REASONS, THE CHAMBER

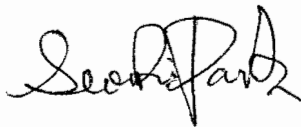
DISMISSES the Defence motion.

Arusha, 3 December 2010, done in English.

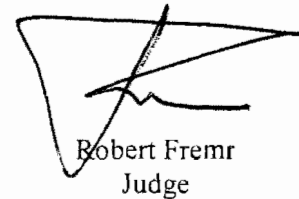
[read and approved by]



Lee Gacuiga Muthoga
Presiding Judge



Seon Ki Park
Judge



Robert Fremr
Judge

[absent at the time
of signature]

[Seal of the Tribunal]

