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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

104132
Mwema

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Solomy Balungi Bossa
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 29 August 2011

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

JUDICIAL RECORDS ARCHIVES
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2011 AUG 29 P 4: 05

**DECISION ON DEFENCE MOTION FOR INSPECTION
OF MATERIALS IN THE PROSECUTION'S CUSTODY**

Office of the Prosecutor

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

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

BEING SEIZED of the "Defence Extremely Urgent Motion for Disclosure of Immigration Records of Defence Witnesses and for Inspection Under Rule 66 (B) of the Rules of Procedure and Evidence", filed confidentially on 3 May 2011 (the "Defence Motion");

CONSIDERING:

- (a) the "Prosecutor's Response to the Defence's Extremely Urgent Motion for the Disclosure of Immigration Records of Defence Witnesses and for the Inspection Under Rule 66 (B) of the Rules of Procedure and Evidence", filed on 6 May 2011 (the "Prosecution Response");
- (b) the "Defence Reply to the Prosecutor's Response to Defence Extremely Urgent Motion for Disclosure of Immigration Records of Defence Witnesses and for Inspection Under Rule 66 (B) of the Rules of Procedure and Evidence", filed on 11 May 2011 (the "Defence Reply");
- (c) the "Prosecutor's Reply to the Defence Response to the Prosecutor's Reply (sic) to the Defence's Extremely Urgent Motion for Disclosure of Immigration Records of Defence Witnesses and for Inspection Under Rule 66 (B) of the Rules of Procedure and Evidence", filed confidentially on 13 May 2011 (the "Second Prosecution Response"); and
- (d) the "Defence Rejoinder to the Prosecutor's 'Reply' to the Defence Reply to the Prosecutor's Response to the Defence's Extremely Urgent Motion for Disclosure of Immigration Records of Defence Witnesses and for Inspection Under Rule 66 (B) of the Rules of Procedure and Evidence", filed on 16 May 2011 (the "Second Defence Reply");

CONSIDERING also the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Defence Motion pursuant to Articles 19 (1) and 20 of the Statute, and Rules 46, 66 (B) and 73 of the Rules.



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INTRODUCTION

1. On 11 March 2009, the Defence filed a Motion requesting the production and inspection of various items pursuant to Rule 66 (B).¹
2. On 13 March 2009, the Prosecution responded that the identified items were available for inspection, and that the Defence should have liaised with the Prosecution instead of filing a Motion.²
3. On 26 March 2009, the Chamber directed the Parties to set a timeframe for the Defence to carry out its requested inspection of certain materials pursuant to Rule 66 (B).³
4. On 16 June 2009, the Registrar withdrew the assignment of Lead Counsel for the Accused. The Registrar appointed new Lead Counsel on 1 July 2009.⁴
5. On 10 September 2009, the Defence acknowledged that it had requested inspection during the assignment of its former Lead Counsel, but stated that it did not wish to exercise its right to inspect, at that stage of the proceedings, the materials identified in the former Lead Counsel's Motion of 11 March 2009.⁵
6. On 15 February 2011, the Defence requested the Prosecution to disclose various documents that it considered to be exculpatory.⁶
7. In a letter dated 17 February 2011, the Prosecution invited the Defence to inspect, pursuant to Rule 66 (B), the materials seized from the Accused at the time of his arrest.⁷

¹ Defence Request for Production Pursuant Rule 66 (B), 11 March 2009. The Defence requested for the following items obtained from or which belonged to the Accused: a notebook entitled "1994 Agenda" seized in Paris, France, one laptop seized at the Jabba Multimedia computer firm, Berger Stresse 166, 60385 Frankfurt am Main, one Siemens C25 mobile telephone, one "Cruzer" USB memory stick, and one brown notebook seized at Weiterstadt Prison in Germany.

² Prosecutor's Response to the Defence Motion for Production Pursuant to Rule 66 (B) of the Rules of Procedure and Evidence, 13 March 2009, paras. 4-5. The Defence replied on 19 March 2009. See Dr. Ngirabatware's Consolidated Reply to Prosecutor's Responses Filed on March 13, 2009, 19 March 2009.

³ Decision on Ngirabatware's Motions Under Rule 66 (TC), 26 March 2009, para. 4, p. 4.

⁴ Decision Withdrawing Professor David Thomas as Counsel for the Accused Augustin Ngirabatware (Registrar), 16 June 2009, p. 2. See Decision on Defence Extremely Urgent Motion for Reconsideration of the Trial Chamber's Decision on the Trial Date (TC), 15 July 2009, para. 3.

⁵ Correspondence from Defence Co-Counsel to Prosecution Senior Appeals Counsel, "YOUR RESPONSE OF 9TH SEPTEMBER TO OUR LETTER OF THE SAME DATE / inspection of documents Article 66 (B) of the Rules of Procedure and Evidence", 10 September 2009, para. 7.

⁶ Correspondence from Defence Co-Counsel to The Prosecutor, "Disclosure of Rule 68 (A) materials", 15 February 2011. See also Defence Motion, Annex 1. These documents are as follows: a copy of the *registre de main courante*, n° 2741 of 30 April 1994; all other relevant documents attesting to the Accused's presence in Senegal between 30 April and 8 May 1994; copies of *Journax d'Afrique* of 27 to 28 June 1994; and the entirety of the handwritten notes which the two pages numbered K0243387-8 that were attached to Prosecution Exhibit 34.

⁷ Correspondence from Prosecution Senior Appeals Counsel to Defence Co-Counsel, "Disclosure of Rule 68 (A) Material – Prosecutor v Augustin Ngirabatware", 18 February 2011, para. 11. See also Defence Motion, Annex 2.

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8. On 25 February 2011, the Defence asked the Prosecution to disclose certain immigration files. In a letter dated 28 February 2011, the Prosecution declined to disclose these files.⁸

9. On 30 March 2011, the Chamber requested the Republic of France to provide the Prosecution with access to immigration and other records of six Defence witnesses (hereinafter, "France Cooperation Decision"). The Chamber also directed the Prosecution to disclose any said records obtained from the French government.⁹

10. On 1 April 2011, the Chamber found the Prosecution to be in violation of its disclosure obligations under Rule 68 (A).¹⁰

11. On 4, 6 and 8 April 2011, the Defence requested inspection of immigration files and "all documents in possession of the Prosecutor" pursuant to Rule 66 (B).¹¹

12. On 13 April 2011, in responding to these requests, the Prosecution denied the Defence request to inspect any documents other than the immigration and other records obtained pursuant to the France Cooperation Decision.¹²

13. On 18 April 2011, the Defence requested disclosure of immigration files, and inspection of various documents pursuant to Rule 66 (B). That same day, the Prosecution responded that it was maintaining its position as stated on 13 April 2011.¹³

⁸ Correspondence from Defence Co-Counsel to Prosecution Senior Appeals Counsel, "Disclosure of Immigration files", 25 February 2011; Correspondence from Prosecution Senior Appeals Counsel to Defence Co-Counsel, "Prosecutor v Augustin NGIRABATWARE: Disclosure of Immigration Files.", 1 March 2011. See also Defence Motion, Annexes 3, 4.

⁹ Decision on Prosecution Motion Requesting a Cooperation Order Directed to France (TC), 30 March 2011, para. 17, p. 6.

¹⁰ The Chamber found a Prosecution breach of its disclosure obligations under Rule 68 (A) by failing to disclose the audio records of the Radio Rwanda broadcasts of 9, 10, 11, 16, and 17 April 1994, and 24 May 1994. See Decision on Defence Motion for Disclosure of Additional Exculpatory Material and Other Relevant Material pursuant to Defence Oral Motion Presented on 24 November 2010 (TC), 1 April 2011, para. 30. The Chamber has since maintained this ruling. See Decision on Prosecution Motion for Reconsideration of the 1 April 2011 Decision on Additional Exculpatory Evidence (TC), 4 July 2011, para. 14.

¹¹ Correspondence from Defence to Prosecution Assistant Trial Attorney, "Augustin Ngirabatware / ICTR No. 99-54-T / Rule 66 (B) Inspection and disclosure of immigration files", 4 April 2011. See also Defence Motion, Annex 7. Correspondence from Defence Lead Counsel to Prosecution Assistant Trial Attorney, "Augustin Ngirabatware / ICTR No. 99-54-T / REMINDER Rule 66 (B) Inspection and disclosure of immigration files", 6 April 2011. See also Defence Motion, Annex 8. Correspondence from Defence Lead Counsel to Prosecution Trial Attorney, "Augustin Ngirabatware / ICTR No. 99-54-T / REMINDER Rule 66 (B) Inspection and disclosure of immigration files", 8 April 2011. See also Defence Motion, Annex 9.

¹² Correspondence from Prosecution Senior Appeals Counsel to Defence Lead Counsel, "Prosecutor v. Augustin NGIRABATWARE: Reminder: Rule 66 (B) Inspection and Disclosure of Immigration Files", 13 April 2011, para. 3 (xii). See also Defence Motion, Annex I0; Prosecution Response, Annex A. The Chamber notes that the Prosecution incorporated this correspondence into its Response. See Prosecution Response, note 9.

¹³ Correspondence from Defence Lead Counsel to Prosecution Senior Appeals Counsel, "The Prosecutor v. Augustin Ngirabatware / Case No. ICTR-99-54-T / REMINDER Rule 66 (B) Inspection and disclosure of

14. After the pleadings were completed, the Prosecution offered to make available for inspection on 2 June 2011 the discrete items identified by the Defence as having been seized from the Accused.¹⁴ The Chamber notes that the Defence acknowledges that this inspection took place on 2 and 3 June 2011.¹⁵

15. On 26 August 2011, the Chamber *proprio motu* ordered the Defence to reduce the number of its remaining witnesses to 19, and to file its final list of witnesses by 5 September 2011.¹⁶

SUBMISSIONS OF THE PARTIES

Defence Motion

16. The Defence seeks an order compelling the Prosecution to disclose, immediately upon receipt, the immigration records of all Defence witnesses in seven countries. The Defence also requests an order authorizing it to inspect various materials that it believes the Prosecution possesses.¹⁷ Finally, the Defence asks the Chamber to declare the

immigration files", 18 April 2011; Correspondence from Prosecution Senior Appeals Counsel to Defence Lead Counsel, "Prosecutor v. Augustin NGIRABATWARE: Reminder: Rule 66 (B) Inspection and Disclosure of Immigration Files.", 18 April 2011. See Defence Motions, Annexes 11, 12.

¹⁴ Correspondence from Prosecution Senior Appeals Counsel to Defence Lead Counsel, "Prosecutor v Augustin NGIRABATWARE: Schedule for Disclosure/Inspection of Material Seized From the Accused and Reciprocal Disclosure /Inspection of Material By the Defence - Rule 67 (C) of the Rules of Procedure and Evidence", 17 May 2011 ("Prosecution Letter of 17 May 2011").

¹⁵ Correspondence from Defence Lead and Co-Counsels to Prosecution Senior Appeals Counsel, "Re: The Prosecutor v. Augustin NGIRABATWARE: Inspection of Material Seized from the Accused - Request for Electronic Copy," 27 June 2011 ("Defence Letter of 27 June 2011"); Correspondence from Defence Lead and Co-Counsels to Prosecution Senior Appeals Counsel, "Re: The Prosecutor v. Augustin NGIRABATWARE: Inspection of Material Seized from the Accused - Request for Electronic Copy," 9 June 2011 ("Defence Letter of 9 June 2011"); Correspondence from Defence Lead Counsel to Prosecution Senior Appeals Counsel, "The Prosecutor v. Augustin NGIRABATWARE: Schedule for Disclosure/Inspection of Material Seized from the Accused and Reciprocal Disclosure/Inspection of Material by the Defence - Rule 67 (C) of the Rules of Procedure and Evidence", 23 May 2011 ("Defence Letter of 23 May 2011").

¹⁶ Decision on the Defence Motion for Reconsideration or Certification to Appeal the Oral Decision of 13 July 2011, and on the Reduction of the Defence Witness List (TC), 26 August 2011, paras. 58, 60.

¹⁷ These consist of the following:

- 1) Any cooperation request sent by the Prosecution, the answers and documents received from the following countries, all of which are reflected in the Accused's diplomatic passport: Belgium, Benin, Cameroon, Democratic Republic of Congo, Republic of Congo, France, Gabon, Italy, Ivory Coast, Kenya, Rwanda, Senegal, South Africa, Swaziland, Togo, and Zambia.
- 2) Any cooperation request sent by the Prosecution to private or public institutions, and the answers thereto and the documents received therefrom, such as Prosecution Exhibits 39, 41 and 43;
- 3) The seven pages missing from a document denied admission by the Chamber containing apparent statements of Messrs. Moustapha Niasse and Amadou Abdou Ly;

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Prosecution in breach of its disclosure obligations pursuant to Rule 66 (B), and to sanction the Prosecution for its persistent refusal to permit inspection and for obstructing justice.¹⁸

17. The Defence argues that the *ratio decidendi* of the France Cooperation Decision applies to the immigration files of Defence witnesses residing in countries other than France, as these are all material to the preparation of the Defence case in the context of Rule 66 (B). The Defence emphasizes that it has exhausted extrajudicial efforts to seek disclosure from the Prosecution, sending a total of seven letters thereto, but to no avail.¹⁹

18. The Defence submits that the responses to the Prosecution cooperation requests to all the countries reflected in the Accused's diplomatic passport are material to the preparation of the Defence or to be used by the Prosecution to counter the Accused's alibi.²⁰

Prosecution Response

19. The Prosecution asks the Chamber to find that the Prosecution has not breached its disclosure obligations, and to dismiss the Defence Motion.²¹

20. The Prosecution claims it never denied a Defence request to inspect material seized from the Accused. Although the Prosecution invited the Defence to inspect the seized material, this invitation did not apply to any additional material.²²

21. The Prosecution submits that it is under no obligation to disclose, at this point in the proceedings, any immigration records that it intends to use in cross-examination.

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- 4) All documents seized from the Accused by the Prosecution at the time of his arrest in September 2007 in Frankfurt, Germany, or during the search at his residence in Paris, France by the French police, documents numbered K0243380-6, and K0243389-95, one laptop seized at the Jabba Multimedia computer firm, Berger Stresse 166, 60385 Frankfurt am Main, one Siemens C25 mobile telephone, one "Cruzer" USB memory stick, and one brown notebook seized at Weiterstadt Prison in Germany;
 - 5) Any other items seized from or belonging to the Accused which are in the possession of the Prosecutor;
 - 6) Statements given by Defence witnesses to the authorities, such as Interpol, police officers, lawyers, ICTR investigators, and the ICTR Prosecutor or domestic prosecutors;
 - 7) *Gacaca* material about Defence witnesses in the possession of the Prosecution;
 - 8) Any books, photographs and tangible objects in the custody or control of the Prosecutor, which are intended for use by the Prosecutor at trial or may be material to the preparation of the Defence.

¹⁸ Defence Motion, paras. 49, 57-59, 62, 66, 74-75, 84, 86, 97.

¹⁹ *Id.*, paras. 29, 35.

²⁰ *Id.*, para. 64.

²¹ Prosecution Response, paras. 3, 27.

²² *Id.*, paras. 3-12.

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Instead, the Prosecution is obliged to disclose these records before the start of cross-examination.²³

22. The Prosecution also argues that it need not disclose correspondence with States and institutions. Some of these could generate material that might affect the security of witnesses or entities.²⁴ Moreover, the Defence request for these communications is vague and speculative.²⁵

23. Finally, the Prosecution claims that it has no duty to disclose material which it obtained during its investigation of, and preparation for, the Defence case. The Prosecution should be permitted to retain the element of surprise in order to test Defence witnesses. Instead, the Defence should search for the materials itself.²⁶

Defence Reply

24. The Defence reiterates its prayer for relief, and asks that the Prosecution be ordered to permit an inspection, and to disclose the requested materials.²⁷

25. The Defence posits that it is not obligated to make independent efforts to obtain material prior to receiving requested disclosure under Rule 66 (B).²⁸

DELIBERATIONS

Multiple Submissions

26. As a preliminary matter, the Chamber notes that, after the Defence Reply, the Prosecution filed a Second Prosecution Response and the Defence filed a Second Defence Reply thereto.

27. The Chamber has indicated on at least three occasions that the Parties should avoid filing multiple submissions beyond those allowed by the Rules.²⁹ This is now the

²³ *Id.*, paras. 3, 13-21, note 9, Annex A.

²⁴ The Prosecution also refers to Rule 70, but does not appear to make any submissions applying it in this case. See *id.*, para. 24.

²⁵ *Id.*, paras. 3, 24.

²⁶ *Id.*, paras. 3, 22-23, 25-26.

²⁷ Defence Reply, para. 37; Prosecution letter dated 17 May 2011 addressed to Defence Lead Counsel (re: Prosecutor v. Augustin NGIRABATWARE: Schedule for Disclosure/Inspection of Material by the Defence – Rule 67(C) of the Rules of Procedure and Evidence); and Defence letter of 23 May 2011. The Defence requested that the inspection and disclosure take place by the end of May, but the Chamber notes that the inspection of the discrete items identified by the Defence as having been seized from the Accused took place on 2 and 3 June 2011.

²⁸ *Id.*, para. 34.

²⁹ See Decision on Defence Motion to Declare Written Statements Admissible and for Leave for Certification of These Written Statements by a Presiding Officer (TC), 11 April 2011, para. 18 (“The Chamber has not taken these [additional] submissions into account, and reiterates that the Parties should avoid filing multiple submissions beyond those allowed by the Rules.”); Decision on Defence Motion for Reconsideration of the Decision Rendered on 28 October 2009 (TC), 15 October 2010, para. 20 (“The Chamber does not expect the Defence or any Party to file multiple submissions beyond those allowed by the Rules of Procedure and Evidence in the future.”); Decision on Defence Motion for Second Reconsideration of Witness Protective Measures (TC), 15 July 2010, para. 15 (“In part because no compelling reason is proffered for the filing of the [unsolicited Prosecution] Rejoinder, the Chamber

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fourth such occasion. Barring truly exceptional circumstances, the Chamber does not expect to receive any extra submissions in the future, from either Party.

Inspection Pursuant to Rule 66 (B)

28. Rule 66 (B) provides that:

At the request of the Defence, the Prosecutor shall . . . permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.³⁰

29. The Appeals Chamber has routinely construed the Prosecution's disclosure obligations under Rule 66 (B) "broadly in accord with their plain meaning".³¹ The Appeals Chamber has further stressed that the Defence is not required to make independent efforts to obtain material prior to receiving requested disclosure under the Rules. A request made under Rule 66 (B) is in fact one avenue through which the Defence can conduct its investigations.³²

30. If the Defence is not satisfied with the Prosecution's response to a request pursuant to this Rule, it may request that the Chamber order the inspection.³³

31. The Defence bears the burden of proving an alleged breach of the Prosecution's obligations pursuant to a request under Rule 66 (B). The Defence must (1) specifically identify the requested material (2) establish *prima facie* that the materiality of the document sought to the preparation of the Defence case; and (3) demonstrate that the material is in the custody or control of the Prosecution.³⁴

32. Concerning the specificity with which the materials sought to be inspected is described, the Appeals Chamber has provided the following guidelines:

The Defence may not rely on a mere general description of the requested information but is required to define the parameters of its inspection request with sufficient detail. Suitable parameters for such specification

neither sets out its substance above, nor considers it when evaluation the other three submissions by the Parties.").

³⁰ Rule 66 explicates that Rule 66 (B) is subject to Rules 53 (titled "Non-Disclosure"), 66 (C) (concerning Prosecution requests to the Chamber to be relieved from its disclosure obligations under certain circumstances), and 69 (titled "Protection of Victims and Witnesses").

³¹ *The 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 (AC), 25 September 2006 ("*Bagosora et al.* Appeals Decision of 25 September 2006"), para. 8.

³² *Id.*, para. 11. See also *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations (AC), 23 January 2008, para. 15.

³³ *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR73.18, Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66 Violation (AC), 17 May 2010 ("*Karemera et al.* Appeals Decision of 17 May 2010"), para. 12.

³⁴ *Id.*, para. 13.



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may be an indication of a specific event or group of witnesses which the request focuses on, a time period and/or geographic location which the material refers to, or any other features defining the requested items with specific precision. A request may also refer to a category of documents defined by criteria which apply to a distinct group of individuals. The scope of what constitutes a "discrete group of individuals" for the purpose of an inspection request, as well as the determination whether the required level of specificity has been met, is considered in light of the specific framework of the case.³⁵

33. As regards materiality, the Appeals Chamber has stated that "the test for materiality . . . is relevance of the documents to the preparation of the defence case".³⁶ The Appeals Chamber then described preparation "as a broad concept", and observed that "few tasks [are] more relevant to the preparation of the defence case than selecting witnesses".³⁷

34. With respect to immigration records of Defence witnesses in particular, the Appeals Chamber has accepted that such materials can be material to the preparation of the Defence, as these may assist the latter in making its selection of witnesses.³⁸

Materials Seized from the Accused or Belonging to Him

35. The Defence seeks to inspect all documents and items seized from, or belonging to, the Accused.³⁹

36. The Prosecution responds that it previously invited the Defence to inspect at least some of these documents, including in February 2011. It does not appear that the Prosecution addresses the instances in April 2011 when the Defence requests for inspection went unanswered for more than a week.⁴⁰

37. Rule 66 (B) plainly provides that the Prosecution must permit the Defence to inspect the requested materials in its custody or control that were obtained from, or belonged to, the Accused.

38. As noted earlier, the inspection of the discrete items identified by the Defence as having been seized from the Accused took place on 2 and 3 June 2011.⁴¹ The Defence Motion is thereby moot insofar as the request for the inspection of these discrete items is concerned. The Chamber notes, however, that the Prosecution only agreed to disclosure of the materials specifically identified by the Defence, and not to the inspection of "[a]ny

³⁵ *Karemera et al.* Appeals Decision of 17 May 2010, para. 32.

³⁶ *Bagosora et al.* Appeals Decision of 25 September 2006, para. 9.

³⁷ *Id.*

³⁸ *Id.*

³⁹ See, for example, Defence Motion, pp. 17-18, 24.

⁴⁰ See, for example, Prosecution Response, para. 9.

⁴¹ Defence Letter of 27 June 2011; Defence Letter of 9 June 2011; Defence Letter of 23 May 2011.

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other items seized from or belonging to the Accused which are in the possession or control of the OTP.”⁴²

39. The Chamber considers that the Defence has sufficiently described this latter category of materials so as to enable the Prosecution to determine which items to make available for inspection.

Documents Which Are Material to the Preparation of the Defence

40. The Defence seeks inspection of materials related to the Prosecution’s investigation of the Accused’s alibi, namely documents received by the Prosecution in response to its requests for cooperation from relevant States and institutions, and seven pages missing from a document denied admission by the Chamber containing apparent statements of Messrs. Moustapha Niasse and Amadou Abdou Ly.⁴³

41. The Defence likewise wishes to conduct a general inspection of all statements given by Defence witnesses to international and domestic law enforcement and prosecutorial authorities, and any *gacaca* material mentioning Defence witnesses in the Prosecution’s possession.⁴⁴

42. The Defence also seeks disclosure of the immigration records of its witnesses residing in Belgium, Cameroon, Democratic Republic of Congo, Germany, South Africa, Switzerland, and Uganda.⁴⁵ The Defence further wishes to inspect “[a]ny books, photographs and tangible objects in the custody or control of the OTP, which are intended for use by the Prosecutor at trial or may be material to the preparation of the Defence.”⁴⁶

43. The Prosecution points out that it never invited the Defence to inspect these materials which the latter deems material to its preparation.⁴⁷ The Chamber notes, however, that the Prosecution’s obligations under Rule 66 (B) are not triggered by an invitation from the Prosecution. Instead, as the Rule clearly states, the Prosecution shall permit inspection “[a]t the request of the Defence”. In this case, the Defence has requested inspection on numerous occasions.

44. As regards the specificity with which the materials sought to be inspected has been described, the Chamber considers that the Defence has not specifically identified the following items:

- a) Any cooperation request sent by the Prosecution to private or public institutions, and the answers thereto and the documents received therefrom, such as Prosecution Exhibits 39, 41 and 43;

⁴² Prosecution Letter of 17 May 2011, p. 2.

⁴³ Defence Motion, paras. 58, 60-74.

⁴⁴ *Id.*, para. 58, and p. 19.

⁴⁵ *Id.*, paras. 34-51.

⁴⁶ Defence Motion, p. 24.

⁴⁷ See Prosecution Response, paras. 12-21.

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- b) Statements given by Defence witnesses to the authorities, such as Interpol, police officers, lawyers, ICTR investigators, and the ICTR Prosecutor or domestic prosecutors;
- c) *Gacaca* material mentioning Defence witnesses;
- d) Any books, photographs and tangible objects in the custody or control of the Prosecution, which are intended for use by the Prosecution at trial or may be material to the preparation of the Defence;
- e) The immigration records of Defence witnesses residing in Belgium, Cameroon, Democratic Republic of Congo, Germany, South Africa, Switzerland, and Uganda; and
- f) Documents provided by the following States, and by institutions therein, in response to Prosecution cooperation requests investigating the Accused's alibi: Belgium, Benin, Cameroon, Democratic Republic of Congo, Republic of Congo, France, Gabon, Italy, Ivory Coast, Kenya, Rwanda, Senegal, South Africa, Swaziland, Togo, and Zambia.

45. The Chamber considers that these categories are too broad. For example, the Defence fails to identify or sufficiently categorize the witnesses residing in Belgium, Cameroon, Democratic Republic of Congo, Germany, South Africa, Switzerland, and Uganda. The Defence also fails to define what it means by documents provided by States and institutions therein in response to Prosecution cooperation requests investigating the Accused's alibi.

46. Conversely, the Chamber concludes that the Defence identified the following items with sufficient specificity:

- a) The seven pages missing from a document denied admission by the Chamber containing apparent statements of Messrs. Moustapha Niasse and Amadou Abdou Ly; and
- b) Any other items seized from or belonging to the Accused which are in the possession or control of the OTP.

47. With respect to the *prima facie* materiality of the materials sought to the preparation of the Defence, the Chamber considers that these two sufficiently identified categories of materials are *prima facie* material in this regard, particularly to the selection of its witnesses.

48. As for possession of the materials by the Prosecution, the Chamber notes that the Prosecution does not appear to contest that it has custody or control of these two sufficiently identified categories of materials.

49. The Chamber therefore orders the Prosecution to make available for inspection by the Defence the following items in its possession:

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- a) The seven pages missing from a document denied admission by the Chamber containing apparent statements of Messrs. Moustapha Niasse and Amadou Abdou Ly; and
- b) Any other items seized from or belonging to the Accused which are in the possession or control of the OTP.

Sanctions

50. The Defence further prays that the Prosecution be sanctioned for its persistent refusal to permit inspection and for obstructing justice. The Prosecution contends that it is not an investigation arm of the Defence. The Prosecution adds that it never refused inspection or disclosure of material seized from the Accused, and that it is under no obligation to disclose the other items referred to by the Defence.⁴⁸

51. In the circumstances of this case, the Chamber considers that it would not be appropriate to sanction the Prosecution. In particular, the Chamber notes that the Defence was able to avail itself of the relief foreseen by the Appeals Chamber in the *Karemera et al.* case.⁴⁹

52. The Chamber directs the Prosecution to make these documents available for inspection immediately and, in any case, by 2 September 2011.

⁴⁸ Defence Motion, paras. 86-92; See, generally, Prosecution Response.

⁴⁹ *Karemera et al.* Appeals Decision of 17 May 2010, para. 12.



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FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Defence Motion regarding the materials identified in paragraph 49 of this Decision;

DISMISSES the Defence Motion in part for being moot;

DENIES the Defence Motion in all other aspects; and

ORDERS the Prosecution to make available for inspection by the Defence immediately and, in any case, by 2 September 2011 the materials enumerated in paragraph 49 of this Decision.

Arusha, 29 August 2011



William H. Sekule
Presiding Judge



Mparany Rajohnson
Judge