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27-09-2011
(104351-104341)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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MFMMS

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 27 September 2011

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

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**DECISION ON DEFENCE MOTION FOR RECONSIDERATION OR
CERTIFICATION TO APPEAL THE CHAMBER'S DECISION OF 29 AUGUST
2011, OR ALTERNATIVELY, A DEFENCE SECOND MOTION FOR
INSPECTION OF MATERIALS IN THE PROSECUTION'S CUSTODY**

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Rashid Rashid
Mr. Iskandar Ismail
Mr. Michael Kalisa
Ms. Faria Rekkas

Defence Counsel

Mr. Peter Herbert
Ms. Mylène Dimitri
Mr. Deogratias Sebureze
Ms. Anne-Gaëlle Denier
Ms. Chloé Gaden-Gistucci

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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 Motion for Reconsideration of or Alternatively, Certification to Appeal the Trial Chamber's Decision of 29 August 2011 on Defence Motion for Inspection of Materials in the Prosecution's Custody, or, Alternatively, Second Extremely Urgent Motion for Disclosure of Immigration Record of Defence Witnesses Pursuant to Rule 66 (B) of the Rules of Procedure and Evidence", filed confidentially on 5 September 2011 (the "Defence Motion");

CONSIDERING:

- (a) the "Prosecutor's Reply to "Defence Motion for Reconsideration of or Alternatively, Certification to Appeal the Trial Chamber's Decision of 29 August 2011 on Defence Motion for Inspection of Materials in the Prosecution's Custody, or, Alternatively, Second Extremely Urgent Motion for Disclosure of Immigration Record of Defence Witnesses Pursuant to Rule 66 (B) of the Rules of Procedure and Evidence"", filed on 7 September 2011 (the "Prosecution Response");
- (b) the "Defence Reply to Prosecution 'Reply' to Defence Motion for Reconsideration of or Alternatively, Certification to Appeal the Trial Chamber's Decision of 29 August 2011 on Defence Motion for Inspection of Materials in the Prosecution's Custody, or, Alternatively, Second Extremely Urgent Motion for Disclosure of Immigration Record of Defence Witnesses Pursuant to Rule 66 (B) of the Rules of Procedure and Evidence", filed on 9 September 2011 (the "Defence Reply");
- (c) the "Corrigendum to Defence Motion for Reconsideration of or Alternatively, Certification to Appeal the Trial Chamber's Decision of 29 August 2011 on Defence Motion for Inspection of Materials in the Prosecution's Custody, or, Alternatively, Second Extremely Urgent Motion for Disclosure of Immigration Record of Defence Witnesses Pursuant to Rule 66 (B) of the Rules of Procedure and Evidence Pursuant to Rule 66 (B) of the Rules of Procedure and Evidence" ("Corrigendum"), filed confidentially on 16 September 2011;

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 66 (B) and 73 of the Rules.

INTRODUCTION

2 

104349

1. On 3 May 2011, the Defence filed confidentially 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" ("Original Defence Motion").
2. 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 ("26 August 2011 Decision").¹
3. On 29 August 2011, the Chamber issued the Impugned Decision granting the Original Defence Motion in part, ordering the Prosecution to make available for inspection by 2 September 2011 two categories of materials.²
4. The Chamber deemed the Original Defence Motion moot insofar as it concerned the request for inspection of discretely identified items obtained from or which belonged to the Accused. The Defence was able to inspect these items on 2 and 3 June 2011.³
5. The Chamber denied the Original Defence Motion as regards the remaining six categories of materials as these were described in overly broad terms and were not specifically identified.⁴

¹ 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.

² Decision on the Defence Motion for Inspection of Materials in the Prosecution's Custody (TC), 29 August 2011 ("Impugned Decision"), para. 46. The Prosecution was ordered to make the following available for inspection by the Defence: (a) the seven pages missing from a document denied admission by the Chamber containing apparent statement of Messrs. Moustapha Niasse and Amadou Abdou Ly; and (b) any other items seized from or belonging to the Accused which are in possession or control of the OTP.

³ 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; 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; 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. 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.

⁴ Impugned Decision, paras. 44-45. These materials were the following: (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; (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.

6. On 1 September 2011, the Defence sought reconsideration and/or certification to appeal the 26 August 2011 Decision.
7. On 5 September 2011, the Defence filed the present Defence Motion.
8. On 15 September 2011, the Chamber granted certification to appeal the 26 August 2011 Decision.⁵
9. On 16 September 2011, the Defence filed a Corrigendum to the Defence Motion, correcting the name of country of residence of one Defence witness from which immigration records are sought.

SUBMISSIONS OF THE PARTIES

Defence Motion

Reconsideration

10. The Defence seeks reconsideration of the Impugned Decision on all three grounds therefor: (a) the discovery of a new fact that was not known to the Chamber at the time of the Impugned Decision; (b) there has been a material change in circumstances since the Impugned Decision; and (c) there is reason to believe that the Impugned Decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice.⁶
11. The Defence posits that the provision of information in the Defence Motion constitutes a new fact or a material change in circumstances meriting reconsideration of the Impugned Decision.⁷
12. The Defence further argues that the Chamber committed an error or abused its power or discretion in issuing the Impugned Decision.⁸
13. As regards the immigration records of Defence witnesses, the Defence contends that the Chamber had no basis to require further specificity as the Appeals Chamber had already established that immigration records of Defence witnesses *per se* are subject to inspection by the Defence under Rule 66(B).⁹

⁵ Decision on the Defence Motion for Reconsideration and/or Certification to Appeal the Decision of 26 August 2011 (TC), 15 September 2011.

⁶ Defence Motion, paras. 18-19.

⁷ *Id.*, paras. 20-32.

⁸ *Id.*, para. 33.

⁹ *Id.*, paras. 35-40, citing *The Prosecutor v. Théoneste Bagosora et al.* ("*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 and Procedure and Evidence (AC), 25 September 2006 ("*Bagosora et al. Appeals Decision of 25 September 2006*"), para. 10.

104347

14. The Defence adds that the Chamber had no reason to require more details regarding the immigration records as it had previously ordered the Prosecution to disclose immigration records to the Defence under Rule 66(B).¹⁰

15. The Defence stresses that the Impugned Decision seriously prejudices the Accused as the Defence was ordered to file its final list of 19 remaining witnesses by 5 September 2011. As the Defence was unable to inspect the immigration records, it was not able to determine whether these contained information affecting the credibility of some of its remaining 19 witnesses.¹¹

Certification to Appeal

16. The Defence alternatively requests certification to appeal the Impugned Decision. The Defence contends that the issue of whether the Defence should have been allowed to inspect the materials under Rule 66(B) affects the fair and expeditious conduct of the proceedings and the outcome of the trial. The Defence reiterates that the Impugned Decision deprived it of access to immigration records which could have been determinative of the inclusion or exclusion of an individual in the final list of 19 remaining Defence witnesses. The Defence cites in this regard a *Bagosora et al.* Trial Decision which held that the interpretation of Rule 66(B) is an issue that warrants certification to appeal.¹²

17. The Defence likewise believes that an immediate resolution of this issue by the Appeals Chamber will materially advance the proceedings. Should the Appeals Chamber reverse the Impugned Decision, the Defence will be able to make a fully informed decision as to the selection of its 19 remaining witnesses before completing its case.¹³

18. The Defence does not appear to seek reconsideration of or certification to appeal the Impugned Decision insofar as it denied inspection by the Defence of materials other than immigration records.

Second Motion for Inspection of Materials

19. As an alternative to the reconsideration or certification to appeal the Impugned Decision, the Defence incorporates into the Defence Motion a "New Extremely Urgent for the Disclosure of Immigration Records of Defence Witnesses and for the Inspection under Rule 66(B) of the Rules of Procedure and Evidence" ("Second Motion for Inspection").


20. The Defence identifies the eight Defence witnesses residing in Belgium, Cameroon, Republic of Congo, Germany, South Africa, Switzerland, and Uganda whose

¹⁰ Defence Motion, para. 37, referring to Decision on Prosecution Motion Requesting a Cooperation Order to France (TC), 30 March 2011, para. 17.

¹¹ Defence Motion, paras. 38-39.

¹² *Id.*, paras. 48-55, citing *Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements (TC), 22 May 2006, para. 5.

¹³ Defence Motion, paras. 56-62.

5 

104346

immigration records it wishes to inspect. The Defence further describes these immigration files as consisting of asylum applications, interview records, signed declarations, relevant subjective and objective information provided by the witnesses under the provisions of the 1951 Geneva Convention, the decision of the national authorities, the transcript of any subsequent hearing held before a national court where the asylum application was decided and the judgement thereof. Where the UNHCR was involved, the Defence also seeks to inspect the relevant interview notes, and any relevant determination of the immigration status made by the UNHCR by or on behalf of the receiving State.¹⁴

21. The Defence seeks inspection of documents received by the Prosecution in response to its requests for cooperation from relevant States and institutions in relation to its investigation of the Accused's alibi. The Defence has now specifically outlined the material sought from each country.¹⁵

22. The Defence likewise wishes to inspect statements given by 29 Defence witnesses to various authorities, such as Interpol police officers, lawyers, ICTR investigators, and the ICTR Prosecutor or domestic prosecutors.¹⁶

23. Finally, the Defence seeks inspection of *gacaca* and judicial material consisting of *gacaca* testimonies between 1994 and 2011, and any prior conviction, statement or complaint against the witness between 1994 and 2011, in relation to 16 Defence witnesses.¹⁷

Prosecution Response

24. The Prosecution argues that the Defence Motion is merely an attempt to re-litigate issues settled in the Impugned Decision. The Prosecution adds that the newly supplied details in the Defence Motion do not constitute new facts or a material change in circumstances meriting reconsideration of the Impugned Decision.¹⁸

25. The Prosecution notes that the description of the *gacaca* records sought to be inspected remains overly broad, spanning the period between 1994 and the present.¹⁹

26. The Prosecution submits that the Chamber did not err or abuse its discretion or power in issuing the Impugned Decision. The Chamber merely relied on the Parties' submissions, and the Defence failed to provide sufficient information.²⁰

¹⁴ Defence Motion, paras. 29, 67-73 p. 8, Table number 1; Corrigendum to the Defence Motion.

¹⁵ *Id.*, pp. 13-14, 27, Table number 3; paras. 74-76, 81.

¹⁶ *Id.*, pp. 10-13, Table number 2; paras. 74-76, 81. The Chamber notes that there is an inconsistency between the statements sought as described in Table number 2 and that in paragraph 81 of the Defence Motion.

¹⁷ *Id.*, pp. 13-14, 27, Table number 2; para. 74-76, 81. The Chamber observes that while the label used in Table number 2 of the Defence Motion is "*Gacaca* and judicial material", the Defence does not appear to refer to judicial material in addition to *gacaca* records elsewhere in the Defence Motion.

¹⁸ Prosecution Response, paras. 10, 14-17.

¹⁹ *Id.*, para. 18.

²⁰ *Id.*, paras. 21-22.

6 

27. The Prosecution stresses that the proper timing of disclosure of immigration records is shortly prior to cross-examination of the relevant Defence witness. The Prosecution likewise points out that the Prosecution is not an investigative arm of the Defence.²¹

Defence Reply

28. The Defence maintains that the new information provided in the Defence Motion constitutes new facts and material circumstances warranting reconsideration of the Impugned Decision.²²

29. The Defence notes that the Prosecution is unable to reconcile jurisprudence concerning immigration records, the Chamber's 30 March 2011 Decision on the Prosecution Motion Requesting a Cooperation Order Directed to France, and the Impugned Decision, so as to be able to assert that the Chamber did not abuse its power or reconsideration in the latter's issuance.²³

30. The Prosecution likewise failed to address the prejudice suffered by the Defence as a result of the inability to refer to the immigration records when determining the final list of witnesses.²⁴

31. The Defence highlights that the Appeals Chamber has stressed that the Defence is not required to make independent efforts to obtain material prior to receiving requested disclosure under the Rules, and a request under Rule 66(B) is in fact one means by which the Defence can conduct its investigations.²⁵

DELIBERATIONS

32. The Chamber recalls its discussion of Rule 66 (B) in the Impugned Decision and incorporates the same herein by reference.²⁶

Reconsideration and Certification to Appeal

33. The Chamber wishes to point out that it is frivolous on the part of the Defence to likewise seek reconsideration or certification to appeal the Impugned Decision, when it nevertheless intends to file a Second Motion for Inspection addressing the deficiencies of the Original Defence Motion. It is a waste of scarce judicial resources for the Chamber to consider superfluous submissions. While the re-filing of a Motion involving the same facts and issues as a previously denied Motion would generally be deemed frivolous, the present circumstances permit the re-filing of a Motion.

²¹ *Id.*, paras. 27-30.

²² Defence Reply, para. 7.

²³ *Id.*, para. 10.

²⁴ *Id.*, para. 12.

²⁵ *Id.*, para. 8, citing the Impugned Decision, para. 45.

²⁶ Impugned Decision, paras. 28-34.

34. The Chamber therefore considers that it is unnecessary to address the submissions concerning reconsideration and certification to appeal, and will proceed to address the submissions in the Second Motion for Inspection.

Second Motion for Inspection

Immigration Records

35. The Chamber notes that the Defence interprets a *Bagosora et al.* Appeals Decision to mean that the phrase "immigration records" should automatically be deemed sufficiently specific insofar as Rule 66(B) requests for inspection are concerned.²⁷ The Chamber wishes to point out, however, that the Trial Decision subject of this Appeals Decision did not merely refer to "immigration records", but in fact concerned "statements by some Defence witnesses to immigration authorities of the States in which they have sought refuge."²⁸ There is thus no basis for the Defence to argue that a blanket reference to immigration records alone suffices to satisfy the specificity requirement of Rule 66(B).

36. The Defence has made it clear that it needs to inspect these materials so as to facilitate its final selection of witnesses. The Appeals Chamber has held that while the Trial Chamber is best placed to determine the appropriate timing and modalities for disclosure, it is insufficient to disclose materials required for this purpose at the time of cross-examination.²⁹

37. The Chamber considers that the Defence has now sufficiently described the immigration files of eight Defence witnesses.

38. The Chamber further deems that in accordance with the *Bagosora et al.* Appeals Decision,³⁰ the immigration records of eight Defence witnesses residing in Belgium, Cameroon, Republic of Congo, Germany, South Africa, Switzerland, and Uganda, are *prima facie* material to the preparation of the Defence, with regard to the selection of its witnesses.

Documents Concerning Accused's Alibis

39. The Chamber finds that the Defence's description of the documents received by the Prosecution in response to its requests for cooperation from relevant States and institutions concerning its investigation of the Accused's alibis lacks specificity. The Defence does not identify the particular responses and documents allegedly received by the Prosecution in response to their cooperation requests to States.

40. Moreover, the Defence does not establish how these documents are *prima facie* material to its preparation, particularly insofar as the selection of its witnesses is concerned.

²⁷ Defence Motion, para. 35, citing *Bagosora et al.* Appeals Decision of 25 September 2006, para. 10.

²⁸ *Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses (TC), 27 September 2005, para. 1.

²⁹ *Bagosora et al.* Appeals Decision of 25 September 2006, para. 12.

³⁰ *Id.*, para. 10.



Witness Statements

41. The Chamber notes that in the Defence Motion, paragraph 81 describes the statements sought to be inspected as those given by 29 Defence witnesses to Interpol police officers, lawyers, ICTR investigators, and the ICTR Prosecutor or domestic prosecutors, while Table number 2 only refers to statements of these witnesses to ICTR authorities. The Chamber finds the description of the statements in paragraph 81 of the Defence Motion overly broad, and considers that the description of the statements in Table number 2, being limited to those given to ICTR authorities, to be sufficiently specific.

42. The Chamber considers that the statements given by 29 Defence witnesses to ICTR authorities from 1994 to 2011 are likewise *prima facie* material to the preparation of the Defence, with regard to the selection of its witnesses.

Gacaca Records

43. The Chamber notes that the label used in Table number 2 of the Defence Motion is "*Gacaca* and judicial material". Aside from this label, the Defence makes no reference in its Motion to judicial documents sought to be inspected in addition to those arising from *gacaca* proceedings. It is to be recalled that the Original Defence Motion only sought inspection of "[g]*acaca* material about Defence witnesses in the possession of the Prosecution."³¹ The Chamber finds that the inclusion of the reference to judicial material in addition to *gacaca* records renders the request overly broad, and will therefore address the Defence request only insofar as it relates to *gacaca* material.

44. The Chamber considers that the limitation of *gacaca* material sought to be inspected to those relevant to 16 Defence witnesses makes the inspection request sufficiently specific: *gacaca* testimonies between 1994 and 2011, relevant prior convictions of these Defence witnesses, statements or complaints made against these Defence witnesses between 1994 and 2011.

45. The Chamber considers that the *gacaca* material, as now delimited, is *prima facie* material to the preparation of the Defence with regard to the selection of its witnesses.

46. The Chamber once again notes that the Prosecution does not appear to contest that it has custody or control of the immigration records of the eight Defence witnesses, statements to ICTR authorities of the 29 Defence witnesses, and *gacaca* material concerning 16 Defence witnesses. The Chamber thus finds that the Defence has met the three requirements of Rule 66(B) with respect to these three categories of materials.

47. The Chamber therefore orders the Prosecution to immediately make available for inspection by the Defence the following categories of items:

³¹ Original Defence Motion, para. 58.

104342

- a) The immigration files of eight Defence witnesses residing in Belgium, Cameroon, Republic of Congo, Germany, South Africa, Switzerland, and Uganda, as described in Table number 1 of the Defence Motion, subject to the Corrigendum;
- b) Statements given by 29 Defence witnesses to ICTR authorities, as described in Table number 2 of the Defence Motion; and
- c) *Gacaca* material relevant to the 16 Defence witnesses identified in Table number 2 of the Defence Motion, consisting of *gacaca* testimonies between 1994 and 2011, and relevant prior convictions of these Defence witnesses, statements or complaints made against these Defence witnesses between 1994 and 2011.

48. The Defence appears to no longer seek inspection of two categories of materials subject of the Original Defence Motion,³² making no reference thereto throughout the Defence Motion.

49. The Chamber denies the Second Motion for Inspection insofar as the Defence seeks to inspect documents received by the Prosecution in relation to its requests for cooperation from relevant States and institutions in relation to its investigation of the Accused's alibis. The Defence has failed to sufficiently describe these documents and establish that these are *prima facie* material to its preparation, particularly with respect to the final selection of its witnesses.

³² These two categories are: (1) 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; and (2) 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.



104341

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Defence Motion insofar as it constitutes a second Motion for Inspection, in part, with respect to the items identified in paragraph 47 of this Decision;

DENIES the Defence Motion insofar as it constitutes a second Motion for Inspection, in part, as regards the documents received by the Prosecution in relation to its requests for cooperation from relevant States and institutions in relation to its investigation of the Accused's alibis;

DISMISSES the Defence Motion as moot insofar as it seeks reconsideration or certification to appeal the Impugned Decision; and

ORDERS the Prosecution to immediately make available for inspection by the Defence the materials enumerated in paragraph 47 of this Decision.

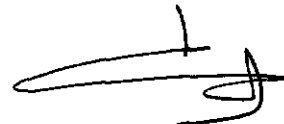
Arusha, 27 September 2011



William H. Sekule
Presiding Judge



[Seal of the Tribunal]



Mparany Rajohnson
Judge