

ICTR-98-44-T
20-9-2007
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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 20 September 2007

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

JUDICIAL RECORDS SECTION
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DECISION ON JOSEPH NZIRORERA'S MOTION FOR INSPECTION OF
STATEMENT OF PIERRE CELESTIN MBONANKIRA

Rule 66 (B) of the Rules of Procedure and Evidence

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Defence Counsel for Joseph Nzirorera:
Peter Robinson and Patrick Nimy Mayidika Ngimbi

INTRODUCTION

1. The proceedings in the instant case commenced on 19 September 2005 with the presentation of the Prosecution case. According to Joseph Nzirorera, some Prosecution witnesses in this trial have alleged that Pierre Celestin Mbonankira (also known as "Gafobo") was an *Interahamwe* from Mukingo commune who was present for the training of *Interahamwe*, distribution of weapons, meetings at Mr. Nzirorera's mother house, and attacks against Tutsi.¹
2. On 31 May 2007, Joseph Nzirorera requested the Prosecutor to allow his defence the inspection of all the statements made by Mr. Mbonankira in the possession of the Prosecutor.² The Prosecutor, however, declined the request.³
3. Joseph Nzirorera now moves the Chamber, pursuant to Rule 66(B) of the Rules of Procedure and Evidence ("Rules"), to make the necessary order to allow the said inspection.⁴ On 18 June 2007, the Prosecutor filed a response not only opposing this application but also, in turn, moving the Chamber to order reciprocal disclosure from Defence under Rule 67.⁵ It further requests the Chamber to adopt similar standards in reviewing the Prosecutor's request for reciprocal disclosure, should the Chamber grant Mr. Nzirorera's request for inspection of the statements of Mr. Mbonankira. The Chamber will deal with the Prosecutor's latter request in a separate decision.

DISCUSSION

4. Joseph Nzirorera submits that his defence team is considering including Pierre Celestin Mbonankira on its witness list.⁶ Relying on the Appeals Chamber Decision of 25 September 2006 in the *Bagosora et al.* case and on Trial Chambers decisions in the cases of

¹ Joseph Nzirorera's Motion for Inspection of Statement of Pierre Celestin Mbonankira, filed on 11 June 2007 ("Nzirorera's Motion"), para. 1.

² See Annex A to Nzirorera's Motion.

³ See Annex B to Nzirorera's Motion.

⁴ Nzirorera's Motion.

⁵ Prosecutor Response to Nzirorera Motion for Inspection and Prosecutor's Cross-Motion for Enforcement of Reciprocal Disclosure Pursuant to Rule 67, filed on 18 June 2007, para 22.

⁶ Nzirorera's Motion, para. 7.

Nyiramasuhuko et al., *Zigiranyirazo* and *Kamuhanda*,⁷ he contends that his request satisfies the requirements for inspection of material under Rule 66 (B) as the documents sought are "material to the preparation of the defence since it will assist his defence to evaluate whether to call the witness at trial".

5. In his response, the Prosecutor submits that this Trial Chamber should deny the Defence's request. Relying on the Declaration of Judges Jorda and Shahabuddeen attached to the Appeals Chamber Decision of 28 June 2002,⁸ the Prosecutor submits that the right of inspection under Rule 66 (B) does not apply to witness statements. He contends that both *Bagosora* Appeals Chamber Decision and the Declaration of Judges Jorda and Shahabuddeen in the *Rutaganda* case limit Rule 66 (B) inspection to documents that are "real evidence", that is, to "material considered not as an assertion of a state of facts but itself a fact." The Prosecutor further notes that the Appeals Chamber Decision in the *Bagosora* case did not concern inspection of witness statements, but immigration records, and that the Appeals Chamber did not examine the nature of the documents for which inspection was sought.

6. In the Prosecutor's view, requiring him to disclose all of his potential impeachment material, including the statements of prospective Defence witnesses, prior to their examination at trial undermines his ability to confront them effectively.

7. 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.

8. In cases where the Prosecution refuses such inspection, the Defence may move the Chamber to order such inspection provided that (i) the Defence clearly and sufficiently identifies the material sought; (ii) the material is within the Prosecution's custody or control; and (iii) the Defence makes a *prima facie* showing that the document for which inspection is sought is material to its preparation.⁹

⁷ *Prosecutor v. 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* Appeals Chamber Decision").

⁸ *Prosecutor v. Georges Rutaganda*, Case No. ICTR-96-3-A, Decision ("Prosecution's Urgent Request for Clarification in Relation to the Applicability of Rule 66(B) to Appellate Proceedings and Request for Extension of the Page Limit Applicable to Motions") (AC), 28 June 2002.

⁹ *Prosecutor v. Ndayambaje et al.*, Decision on the Defence Motion for Disclosure, (TC) 25 September 2001, para. 10; *Prosecutor v. Bagosora 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; *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Decision on the Motion by the Accused Zejnil Delalic for the

9. In the present case, it is not disputed that the report sought for inspection is clearly and sufficiently identified, and is in the Prosecution's possession.¹⁰ The issue at stake is whether the statements of Pierre Celestin Mbonankira can be considered as "material to the preparation of the defence."

10. In the *Bagosora et al.* case, Trial Chamber I denied the Defence's requests for inspection of immigration documents of certain defence witnesses that the Prosecution intended to use during cross-examination for impeachment purposes.¹¹ The Appeals Chamber reversed that decision holding as follows:

In accord with the plain meaning of Rule 66 (B) of the Rules, the test for materiality under the first category is the relevance of the documents to the preparation of the defence case. *Preparation is a broad concept and does not necessarily require that the material itself counter the Prosecution evidence.* Indeed, for the Appellants, the immigration documents are material to the preparation of their defence because *these documents may improve their assessment of the potential credibility of their witnesses before making a final selection of whom to call in their defence.* The Appeals Chamber cannot exclude that this is an appropriate basis for authorizing the inspection of documents if the requisite showing is made by the defence. There are few tasks more relevant to the preparation of the Defence case than selecting witnesses. The Trial Chamber is the appropriate authority to make this case-specific assessment in the first instance under the appropriate standard. Moreover, the use of the phrase "at trial" in the second category of Rule 66(B) signals its applicability throughout the proceedings. As such, at least some of the immigration documents sought are equally subject to inspection to the extent that they are intended as exhibits at trial."¹²

11. In the Chamber's view, this Appeals Chamber's Decision clearly set out the standards for a Trial Chamber when assessing whether a document is material to the preparation of the Defence, even if the Appeals Chamber did not deal with the nature of the documents as such.

12. According to those principles, the Chamber is of the view that Rule 66(B) may apply to witness statements when these documents may improve the Defence's assessment of the potential credibility of its witnesses before making a final selection of whom to call in their defence. This principle is consistent with the fairness of the proceedings and the rights of the Accused, including his right to be tried without undue delay. Should it indeed be discovered by such inspection that the witness lacks credibility and therefore should not be called as Defence witness, the fairness of the trial will be enhanced by avoiding undue delays.

Disclosure of Evidence (TC), 26 September 1996. See also *Prosecutor v. Karemera et al*; Case No. ICTR-98-44-T, Decision on Joseph Nzirorera Motion to Compel Inspection and Disclosure (TC), 5 July 2005, para. 9.

¹⁰ Annex B to Nzirorera's Motion, which is a letter from Prosecution Counsel in the case.

¹¹ *Bagosora* Appeals Chamber Decision, para. 2.

¹² *Bagosora* Appeals Chamber Decision, para 9 (emphasis added and footnotes omitted).

13. The Chamber is further not persuaded that the inclusion of witness statements within the purview of Rule 66 (B) will impair the ability of the Prosecutor to effectively cross-examine the Defence witnesses. This plain reading of Rule 66(B) does not create a broad affirmative obligation on the Prosecution to disclose any and all documents which may be relevant to its cross-examination.¹³ In each circumstance, the Defence will need to show that the requirements as set forth by Rule 66(B) are indeed met, including the specificity of the material sought.

14. In light of the Appeals Chamber's standards, the Chamber is satisfied that the witness statements sought are material to the preparation of Joseph Nzirorera's defence in that their inspection may assist his defence in assessing the credibility of Mr. Mbonankira before deciding to list him as a defence witness.

15. The Chamber notes the Prosecutor's contention that since the Defence Counsel for Nzirorera has already interviewed the witness, he is well placed to make an independent assessment of the credibility of the prospective witness and this therefore obviates the need to inspect the statements. As stated by the Appeals Chamber, a request under Rule 66 (B) is one of the methods available to the Defence for carrying out investigations.¹⁴ The fact that the Defence has already conducted some investigations concerning the prospective witness does not prevent the use of inspection to make further or additional investigations.

16. The Prosecutor also adds that in the event that Nzirorera's Motion is granted, the Chamber has the discretionary power to determine the timing of disclosure of the material sought. He stresses out the fact that Appeals Chamber accepted that in some circumstances, it would be appropriate to disclose the material at the commencement of cross-examination.

17. The timing of inspection is indeed within the Trial Chamber's discretion bearing in mind the right of each accused to have adequate time and facilities to prepare his Defence.¹⁵ In the Chamber's view, where the requested materials are intended to assist the Defence in selecting its witnesses, disclosure at the time of cross-examination would not be sufficient to enable the Accused to prepare his defence as suggested by the Prosecutor.

¹³ *Bagosora* Appeals Chamber Decision, para 10.

¹⁴ *Ibidem*.

¹⁵ *Bagosora* Appeals Chamber Decision, para 12.

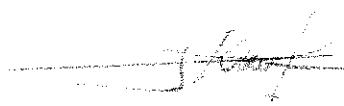
FOR THESE REASONS, THE CHAMBER

- I. **GRANTS** the Defence Motion for inspection of Mr Pierre Celestin Mbonankira's statements; and accordingly
- II. **ORDERS** the Prosecutor to permit as soon as practicable the inspection by the Defence for Joseph Nzirorera of the statements of Mr Pierre Celestin Mbonankira in possession of the Prosecutor.

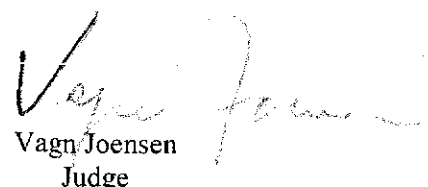
Arusha, 20 September 2007, done in English.



Dennis C. M. Byron
Presiding Judge



Gberdao Gustave Kam
Judge



Vagn Joensen
Judge

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Dates:	Transmitted: 20 September 2007		Document's date: 20 September 2007	
No. of Pages:	6	Original Language:	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
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