



**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

ORIGINAL: ENGLISH

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 20 November 2006

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No.: ICTR-98-41-T

**DECISION ON NTABAKUZE MOTION FOR DISCLOSURE OF SPECIFIC
EXCULPATORY EVIDENCE**

The Prosecution

Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid
Gregory Townsend

The Defence

Raphaël Constant
Allison Turner
Paul Skolnik
Frédéric Hivon
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the “Motion for Disclosure of Exculpatory Evidence in the Possession of the Prosecutor Pursuant to Rule 68”, filed by the Ntabakuze Defence on 11 October 2006;

CONSIDERING the Prosecution Response, filed on 31 October 2006; the Ntabakuze Reply, filed on 9 November 2006; and the Prosecution Response to the Reply, filed on 10 November 2006;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Ntabakuze Defence seeks disclosure of evidence concerning alleged involvement by RPF soldiers in massacres at nine specific sites between April and June 1994 that have been attributed by Prosecution witnesses to soldiers under the Accused’s command. The Defence claims that confidential sources have indicated that such information, in particular in the form of witness statements, is in the Prosecution’s possession.¹ The Defence also requests disclosure of material concerning “any massacres at these sites that occurred during the period July – December 1994, which have been purported to have occurred during the period of April – June 1994”. More broadly, the Defence asks for “any other exculpatory information in the hands of the Prosecutor”.²

2. The Prosecution concedes that the material concerning the nine massacre sites, if it existed, would *prima facie* be potentially exculpatory.³ However, in response to the motion, the Prosecution undertook a specific review of its files which revealed, “to the best of [it]’s knowledge”, that it possesses no such material.⁴ It is willing to conduct further queries should the Defence provide more specific information identifying the material.⁵

DELIBERATIONS

3. Rule 68 (A) requires the Prosecution 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”. The initial determination of what material is exculpatory, which is primarily a facts-based judgement, rests with the Prosecution.⁶ The expression “actual knowledge” has been consistently interpreted as requiring that the material be in the Prosecution’s possession.⁷ Hence, if the Defence claims that the obligation to disclose exculpatory material has been violated it must: (i) define the material with

¹ Motion, para. 1.

² *Id.*, p. 4.

³ Response, para. 9.

⁴ *Id.*, para. 5.

⁵ *Id.*, para. 6.

⁶ *Karemera et al.*, Decision on Joseph Nzirorera’s Interlocutory Appeal (AC), 28 April 2006, para. 16.

⁷ *Kajelijeli*, Judgement (AC), 23 May 2005, para. 262 (“Defence must first establish that the evidence was in the possession of the Prosecution”); *Brdjanin*, Decision on Appellant’s Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials (AC), 7 December 2004 (application must “be accompanied by all *prima facie* proofs tending to show that it is likely that the evidence is exculpatory and is in the possession of the Prosecution”).

reasonable specificity; (ii) establish that it is in the custody and control of the Prosecution; and (iii) present a *prima facie* case that it is, in fact, exculpatory.⁸ The Prosecution is generally presumed to discharge its obligations under Rule 68 in good faith.⁹

4. The Prosecution concedes that if the material concerning the nine massacre sites were in its possession, it would be exculpatory. However, it claims that it has conducted a review of its files and made inquiries amongst its investigators which indicate that it has no such information.¹⁰ The Chamber has no basis to reject this assertion. The Defence reference to “confidential sources” is insufficient to contradict the Prosecution’s express and unequivocal statement that it has no such material to disclose.

5. The request for “any exculpatory information in the hands of the Prosecutor” is too general; it does no more than re-state the obligation already prescribed by Rule 68. The request for material concerning massacres that occurred during the period from July-December 1994, but which were “purported to” have been committed from April-June 1994, is also vague. In light of the Prosecution assertion that it has no such information, the Chamber need not consider whether the request is too uncertain and variable to be the object of an order under Rule 68.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 20 November 2006

Erik Møse
Presiding Judge

Jai Ram Reddy
Judge

Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

⁸ *Blaskic*, Case No. IT-95-14-A, Judgement (AC), 29 July 2004, para. 268, *Karemera et al.*, Decision on Joseph Nzizorera’s Interlocutory Appeal (AC), 28 April 2006, para. 13; *Bagosora et al.*, Decision on the Ntabakuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68 (TC), 6 October 2006, para. 2; *Bagosora et al.*, Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses (TC), 27 September 2005, para. 3 (“a request for production of documents has to be sufficiently specific as to the nature of the evidence sought and its being in the possession of the addressee of the request”).

⁹ *Kordic and Cerkez*, Case No. IT-95-14/2-A, Judgement (AC), 17 December 2004, para. 183 (“the general practice of the International Tribunal is to respect the Prosecution’s function in the administration of justice, and the Prosecution execution of that function in good faith”); *Karemera et al.*, Decision on Joseph Nzizorera’s Interlocutory Appeal (AC), 28 April 2006, para. 17 (“the Trial Chamber is entitled to assume that the Prosecution is acting in good faith”).

¹⁰ The Prosecution identifies seven documents which “do generally pertain to the times or places at question”, but does not suggest that these documents are disclosed pursuant to Rule 68 as being exculpatory. Response, para. 7. The basis for making the materials available in the Electronic Disclosure System is not made clear.