

ICTR-00-55B-A

25-10-2011

(1104bis/A - 1099bis/A)

1104bis/A  
A

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

APPEALS CHAMBER

Before: Judge Mehmet Güney, presiding  
Judge Fausto Pocar  
Judge Andréia Vaz  
Judge Theodor Meron  
Judge Carmel Agius

Registrar: Adama Dieng

Date: 10 August 2011

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**Ildephonse Hategekimana**

v.

**The Prosecutor**

Case No. ICTR-00-55B-A

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**PROSECUTOR'S RESPONSE TO "REQUETE EN EXTREME URGENCE  
D'ILDEPHONSE HATEGKIMANA AUX FINS D'ENJOINDRE AU PROCUREUR DE  
DIVULGUER TOUTES LES PIECES EN SA POSSESSION CONCERNANT LE PROCES  
DE L'ACCUSE EN VERTU DE L'ARTICLE 68 DU REGLEMENT DE PREUVE ET DE  
PROCEDURE (RPP)." FILED ON 28 JULY 2011**

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Office of the Prosecutor:

Hassan Bubacar Jallow  
James Arguin  
Alphonse Van  
Alfred Orono Orono  
Thembile Segoete  
Leo Nwoye  
Ndeye Marie Ka

Counsel for the Defence:

Jean de Dieu Momo  
Arsin Raoul Djamfa  
Narcisse Gaétan Donfack Zébazé

A11-0223 (E)

Translation certified by LSS, ICTR

**PRELIMINARY REMARKS**

1. The Prosecutor is conscious of the fact that he is filing his response to Hategekimana's motion beyond the ten day time limit prescribed by paragraph 13 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal. In fact, the Appellant filed his motion on 28 July 2011, and the Prosecutor had until Monday, 8 August 2011, to file his response with the Registry of the Tribunal. However, the Prosecutor wishes to state that the delay was beyond his control and requests the Appeals Chamber not to rule this response out of time and to accept it in the interests of justice.
2. In any event, the Appellant has not suffered any prejudice as a result of the delay.

**NATURE OF THE MOTION AND THE PROSECUTOR'S POSITION**

3. By an extremely urgent motion dated 28 July 2011 and received at the Registry of the Tribunal on the same day, Hategekimana requested the Appeals Chamber to order the Prosecutor to disclose a series of documents he listed in paragraph 8 of his motion, arguing that "the Appellant is convinced that the Prosecutor is in possession of other documents he ought to disclose to the Appellant but failed to do so".<sup>1</sup>
4. The Prosecutor opposes the motion, as he will demonstrate, and requests the Appeals Chamber to dismiss it in its entirety as unfounded since it fails to show that the documents sought by the Appellant are in the possession of the Prosecutor or that they exculpate him, within the meaning of Rule 68 of the Rules of Procedure and Evidence.

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<sup>1</sup> Hategekimana's motion, para. 7.

**RESPONSE TO APPELLANT'S CLAIMS**

5. On 11 July 2011, the Prosecutor filed his Respondent's brief to Hategekimana's Appellant's brief which was filed on 30 May 2011. In paragraph 32 of his Respondent's brief, the Prosecutor stated, pursuant to Rule 112(B) of the Rules of Procedure and Evidence ("the Rules"), that the required disclosures have been completed with respect to the material available to him at the time of that filing.
  
6. In fact, on 7 July 2011, under his continuous disclosure obligation, the Prosecutor confidentially disclosed to Hategekimana's Defence the following two documents:
  - (i) An investigation report from the Public Prosecutor's Office of the Butare Court (Rwanda) dated 4 October 2000, in Kinyarwanda, English and French;
  - (ii) A judgement from the Butare Court dated 1 December 2000, in Kinyarwanda, English and French.
  
7. Both documents were related to the same case (*The Prosecutor v. Théogène Mukwiye, alias Ruhango, et al.*).
  
8. On 28 July 2011, Hategekimana filed a motion for lifting the confidentiality of the disclosure of both documents, and the Prosecutor in his response dated the same day did not oppose the motion.
  
9. In his motion of 28 July 2011, Hategekimana criticized the Prosecutor for not stating "[reasons why he failed to disclose earlier, in particular, at trial or prior to the notice of appeal, considering that, on 3 December 2010, the Defence had filed a motion under Rule 68 with the Registry requesting him to disclose]".<sup>2</sup>

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<sup>2</sup> *Ibid.*, para. 5.

10. The Prosecutor recalls that on 7 July 2011, as part of his continuous disclosure obligation, he disclosed to the Defence the two above-mentioned documents from the Butare Court that were in his possession.
11. Hategekimana links the disclosure of both documents to the Prosecutor's disclosure obligation under Rule 68, recalling that on 3 December 2010 he had brought before the Trial Chamber such a motion against the Prosecutor.
12. Rule 68(A) of the Rules provides that "The 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".
13. In *Karemera et al.*, the Trial Chamber ruled in an oral decision of 16 February 2006 that "If the Accused wishes to show that the Prosecutor is in breach of these obligations, it must identify specifically the materials sought, present a *prima facie* showing of its probable exculpatory nature, and prove the Prosecutor's custody of the materials requested".<sup>3</sup>
14. Subsequent to an interlocutory appeal against the oral decision of 16 February 2006 by Joseph Nzirorera (one of the accused persons in *Karemera et al.*), the Appeals Chamber held that "to establish a violation of the Rule 68 obligation, the Defence must (i) establish that additional material exists in the possession of the Prosecutor; and (ii) present a *prima facie* case the material is exculpatory".<sup>4</sup>

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<sup>3</sup> *Karemera et al.*, Trial Chamber's Oral Decision of 16 February 2006, T., p. 4, paras. 23 to 25. The English version specifies: "... and proves the Prosecutor's custody or control of the materials requested" whereas the French version does not mention "control". But the Prosecutor's position is that the English version of the transcript considered as the original is authentic because Judge Byron who presided over the hearing and read out the decision speaks only English.

<sup>4</sup> *Karemera et al.*, Appeals Chamber, para. 13.

15. In his motion of 28 July 2011, Hategekimana drew up a long list of statements and testimonies of certain Prosecution witnesses in the instant case and of some persons unknown to the Prosecutor. The said statements and testimonies were, in any event, given before courts other than the International Criminal Tribunal for Rwanda, in particular:

- (i) Before the Butare Court, Rwanda (statements and testimonies of Michel Murigande, Théogène Mukwiye, Jean-Pierre Bizimungu, Prosecution Witnesses QDC, XR, Sadiki Sezirahiga, QCN, BYQ, CQC, BYR and a lady called Hadidja Umururarungu);
- (ii) Before the Cyangugu Court, Rwanda (statements of Prosecution Witness BYP);
- (iii) Before the Brussels Court of Assizes (statements and testimonies of Prosecution Witnesses QCQ and BYO); and
- (iv) Before a court in Canada (statements and testimonies of Prosecution Witness QCL).

16. Hategekimana fails to show that these statements and testimonies are in the custody and control of the Prosecutor.

17. In any event, it is established jurisprudence that the Prosecutor is under no obligation to obtain judicial documents concerning his witnesses from Rwandan authorities.<sup>5</sup> More particularly, the Prosecutor would not be under such obligation with respect to the judicial documents of his witnesses or other persons produced by non-Rwandan courts.

18. Therefore, the Prosecutor requests the Appeals Chamber to dismiss Hategekimana's motion in its entirety as unfounded.

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<sup>5</sup> Appeals Chamber, *Kalimanzira*, para. 25, citing Appeals Chamber in *Kajelijeli*, para. 263.

10996's/A

19. With regard to Hategekimana's motion of 3 December 2010 also filed under Rule 68, the Prosecutor does not intend to revisit the issue in this response and leaves it to the discretion of the Appeals Chamber already seized of the entire case, subsequent to the conviction of the Accused by the Trial Chamber for genocide and crimes against humanity in its judgement of 6 December 2010.

FOR THESE REASONS

May it please the Appeals Chamber:

Not to rule this response out of time in the interests of justice, as the slight delay in filing it would cause the Appellant no prejudice and, therefore, to allow the Prosecutor's response;

To dismiss Hategekimana's extremely urgent motion in its entirety as unfounded since it fails to show that the Prosecutor was in breach of his Rule 68 disclosure obligation.

The Respondent reserves the right to make further submissions.

Arusha, 10 August 2011

[Signed]

Alphonse Van

Senior Appeals Counsel

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AICC, P.O. Box 6016, Arusha, Tanzania - B.P. 6016, Arusha, Tanzanie  
Tel: 255 27 2504207-11 or 2504367-72 or 1 212 963 2850 Fax: 255 27 2504000/4373 or 1 212 963 2848/49

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PREUVE DE NOTIFICATION – CHAMBRE D'APPEL - ARUSHA**

<b>Date:</b> 25 October 2011	<b>Case Name / affaire:</b> ILDEPHONSE HATEGEKIMANA		
	<b>Case N° / n° de l'affaire:</b> ICTR – 00 – 55B - A		
<b>TO:</b>	<b>Appeals Chamber Support Unit, The Hague:</b> - Mr. Koffi Afande - Ms. Rosette Muzigo-Morrison - Mr. Ramadhani T. Juma	<input type="checkbox"/> Judge / Mehmet Guney <input type="checkbox"/> Judge / Fausto Pocar <input type="checkbox"/> Judge / Andresia Vaz <input type="checkbox"/> Judge / Theodor Meron <input type="checkbox"/> Judge / Carmel Agius	
	<b>ACCUSED / DEFENSE</b> <input checked="" type="checkbox"/> Accused / <i>Accusé</i> <b>I. HATEGEKIMANA</b> <small>see / voir * CMS4</small> <input checked="" type="checkbox"/> Lead Counsel / <i>Conseil Principal:</i> <b>JEAN DE DIEU MOMO</b> <input type="checkbox"/> In Arusha / à Arusha: (see / voir CMS3) <input type="checkbox"/> Fax: <input checked="" type="checkbox"/> Co-Counsel / <i>Conseil Adjoint:</i> <b>RAUL DJAMFA</b> <input type="checkbox"/> Arusha (see / voir CMS3) <input type="checkbox"/> Fax:		
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