

ICTR-98-44-T
11-11-2008
(38335-38323)

38335

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

CASE No. ICTR-98-44-T

IN TRIAL CHAMBER No. 3

Before: Judge Dennis C.M. Byron, Presiding
Judge G. Gustave Kam
Judge Vagn Joensen

Registrar: Mr. Adama Dieng

Date Filed: 11 November 2008

THE PROSECUTOR

v.

JOSEPH NZIRORERA

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JOSEPH NZIRORERA'S 12th NOTICE OF RULE 68 VIOLATION
AND MOTION FOR REMEDIAL AND PUNITIVE MEASURES:
EVIDENCE OF RPF INFILTRATION AND CRIMES

The Office of the Prosecutor:

Mr. Don Webster
Ms. Allayne Frankson-Wallace
Mr. Iain Morley
Ms. Gerda Visser
Mr. Saidou N'Dow

Defence Counsel:

Mr. Peter Robinson
Mr. Patrick Nimy Mayidika Ngimbi

Counsel for Co-Accused:

Ms. Dior Diagne Mbaye and Mr. Felix Sow for Edouard Karemera
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ngirumpatse

1. Joseph Nzirorera respectfully notifies that Trial Chamber that he has once again uncovered another series of violations of Rule 68 committed by the prosecution. He moves for appropriate remedial and punitive measures.

The Undisclosed Material

2. In October 2008, the prosecution disclosed, for the first time, the following documents concerning infiltration and crimes committed by the RPF in the area controlled by the Rwandan government:

- (A) Redacted statement taken on 9 February 2001 (R000-0223)

This witness, whose identity is redacted, was a member of the RPA Military Police from 1992. He revealed that a clandestine group of RPF soldiers, known as the “technicians”, were deployed in Kigali for the purpose of infiltrating the youth wings of political parties, including the Interahamwe to provoke violence. These technicians committed crimes which were blamed on the MRND.¹

- (B) Redacted statement taken on 15 March 2002 (R000-0204)

The witness, whose identity is redacted, was a Corporal in the RPA from 1990. He revealed that the RPA infiltrated a group of trained soldiers known as the “technicians” into Kigali in 1992 to provoke insecurity in the country. They committed crimes which were blamed on MRND, including infiltrating the Interahamwe and killing Tutsi.²

- (C) Redacted statement taken on 16 May 2002 (R000-0269)

The witness, whose identity is redacted, was a member of the RPA battalion known as the “Lions” from 1992. He revealed that the RPA was responsible for killings of civilians in the Demilitarized Zone in the north in 1993 that were blamed on the MRND and Habyarimana regime. After the RPF killed the civilians, the RPF’s Radio Muhabura accused the Habyarimana regime of violating the Arusha Accords.³

¹ The statement is attached as Confidential Annex “A” to this motion.

² The statement is attached as Confidential Annex “B” to this motion.

³ The statement is attached as Confidential Annex “C” to this motion.

(D) Redacted statement taken on 19 May 2002 (R000-0217)

The witness, whose identity is redacted, was a high ranking officer in the RPA. (His exact rank has been redacted). He confirmed the existence of the RPA soldiers sent to Kigali in 1993 to infiltrate the population and commit murders to be blamed on the MRND and Habyarimana regime, and names the members of this group of infiltrators known as “technicians”⁴

Rule 68 Violation

3. Rule 68(A) provides:

“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.”

4. A party alleging a violation of Rule 68 must: (1) identify specifically the material sought; (2) present a *prima facie* showing of its probably exculpatory nature; and (3) prove that the material requested is in the custody or under the control of the prosecution.⁵

5. Mr. Nzirorera has specifically identified the four statements in question, and has established that the material was in the custody and control of the prosecution since 2001 and 2002. With regard to its exculpatory nature, this Trial Chamber has already held that testimony concerning infiltration of the Interahamwe by the RPF was required to be disclosed pursuant to Rule 68.⁶ And virtually identical statements dealing with information about the activities by the “technicians” have been held by the Trial Chamber in *Ndindiliyimana* to be exculpatory within the meaning of Rule 68.⁷

⁴ The statement is attached as Confidential Annex “D” to this motion

⁵ *Decision on Joseph Nzirorera’s Appeal from Decision on 10th Rule 68 Motion* (14 May 2008) at para. 9

⁶ *Decision on Joseph Nzirorera’s Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (11 September 2008) at para. 10

⁷ *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Defence Motions Alleging Violation of the Prosecutor’s Disclosure Obligations Pursuant to Rule 68* (22 September 2008) at para. 27

6. In the *Bagosora* case, the Trial Chamber held that such material was required to be disclosed pursuant to Rule 68, saying that:

“Descriptions of infiltration into areas of government control by RPF soldiers disguised as civilians could provide context or background information which may assist the Chamber in understanding some of the conduct about which the Chamber has heard testimony during the Prosecution case.”⁸

7. While the Trial Chamber has held that information of the RPF’s commission of specific crimes, such as the assassination of Felicien Gatabazi and President Habyarimana is not of an exculpatory nature⁹, the information of the systematic infiltration by the RPF into the Interahamwe and the efforts of the RPF to undermine the Arusha Accords by committing crimes while claiming it was the MRND which was violating the Accords, contradicts the prosecution’s evidence that the accused ordered crimes by Interahamwe and sought to undermine the Arusha Accords.

8. Therefore, the four statements are of an exculpatory nature and the failure to disclose them constitutes yet another violation of Rule 68 by the prosecution.

Misrepresentations by the Prosecution

9. The failure to disclose the four statements as soon as practicable is not only evidence of a Rule 68 violation, but of serious misrepresentations made by the prosecution to this Trial Chamber.

10. On 23 December 2005, Mr. Nzirorera requested that the prosecution provide,

“inspection and disclosure of any information in possession of the prosecution which may tend to show that the RPF had infiltrators among the Rwandan

⁸ *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Disclosure of Defence Witness Statements in the Possession of the Prosecution Pursuant to Rule 68(A)* (8 March 2006) at para. 6

⁹ *Decision on Joseph Nzirorera’s Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (11 September 2008) at para. 14. Mr. Nzirorera disagrees with this part of the decision.

population in the period 1990-94, or that the RPF was responsible for violent acts committed in Rwanda during that period.”¹⁰

11. The prosecution disclosed a few statements pursuant to this request and represented that “this prosecution trial team has, once again, requested a search of the OTP evidence database for RPF Rule 68 materials using the criteria and the suggestions offered by Nzirorera in his recent motion and letters, specifically concerning nine (9) potential witnesses. Aside from the forthcoming disclosure of the two witness statements, the Prosecutor is not aware of any other materials that should be disclosed pursuant to Rules 66(B) and 68(A).”¹¹

12. None of the four witness statements which are the subject of this motion were disclosed at that time.

13. The Trial Chamber specifically addressed this claim by the prosecution. It said that:

“In the light of these principles, the Prosecution’s contentions that ‘[its] *trial team* is not aware of any other materials that should be disclosed pursuant to Rules 66 (B) and 68 (A)’ and that “the review did not identify [the two above-mentioned] statements since they were deemed to be *sub judice* in the *Bagosora et al.* trial” are unsatisfactory. The Prosecution must actively review the material in the possession of the Office of the Prosecutor, and not only the documents in possession of this trial team, and, at the very least, inform the accused of the existence of exculpatory material.”¹²

14. Despite this admonition, the four witness statements which are the subject of this motion were still not disclosed.

¹⁰ Letter of 23 December 2005, attached as Annex “A”

¹¹ *Prosecutor’s Response to Nzirorera’s Motion to Compel Disclosure of RPF Material and for Sanctions* (29 September 2006) at para. 9

¹² *Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution* (19 October 2006) at para. 12

15. In its Decision, the Trial Chamber also held that the prosecution's conduct in disclosing the statements of RPF infiltration in redacted form was in breach of the prior Chamber's Decision of 4 July 2006. The Chamber went on to say:

"Such misconduct is unacceptable; it remains offensive, obstructs the proceedings and is contrary to the interests of justice. The Chamber therefore finds that a sanction should be imposed against the Prosecution, by formally drawing the attention of the Prosecutor himself, as the disciplinary body, to this misconduct."¹³

16. Despite the existence of these sanctions, the prosecution has now only disclosed the four statements concerning RPF infiltration in redacted form. It has refused subsequent requests to disclose the entire statements.¹⁴

17. Therefore, the prosecution misrepresented that it had disclosed all statements concerning RPF infiltration into Kigali, and has persisted in disclosing the statements in redacted form, despite having been sanctioned for this very misconduct by the Trial Chamber.

Remedial and Punitive Measures

18. The latest violation of Rule 68 comes on the heels of the prosecution's failure to disclose the closed session testimony of RPF insiders, which was the subject of *Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (21 July 2008). The Trial Chamber, in its decision on that motion, after finding that the prosecution had violated Rule 68 for the thirteenth time, said that:

"Although the Chamber is not prepared to state that the Prosecution can no longer be relied upon to discharge its Rule 68 obligations in this case, it notes that the Prosecution's compliance with the rules of disclosure has been less than adequate thus far. In fact, the Chamber finds that the increasing number of disclosure violations by the

¹³ *Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution* (19 October 2006) at para. 17

¹⁴ The e-mail correspondence with the Senior Trial Attorney is attached as Annex "E" to this motion.

Prosecution is quickly approaching the threshold for sanctions of a more serious nature than mere disclosure of the misconduct to an internal disciplinary body. The Chamber hereby warns the Prosecution that future disclosure violations will not be met with the same lenience that has been displayed to date.”¹⁵

19. Despite this language, the prosecution continues to violate Rule 68 by having withheld the four statements in question for some 7-8 years and by continuing to refuse to disclose the statements in unredacted form.

20. The prosecution’s violations in this instance has prejudiced the defence of Joseph Nzirorera because it has prevented him from learning of the identity of potential witnesses who can be located, interviewed, and included in the list of defence witnesses to be called in his case in chief. The Trial Chamber has already ruled that this is the very purpose for which disclosure of the unredacted statements was required.¹⁶

21. In addition, Mr. Nzirorera was unable to confront prosecution witnesses with the information from these four individuals indicating that the RPF had infiltrated the Interahamwe and may have been responsible for crimes alleged to have been committed by Interahamwe. Witnesses who offered testimony that the MRND wished to sabotage the Arusha Accords and that crimes were committed by the Interahamwe in Kigali prior to the death of President Habyarimana to block the implementation of the Arusha Accords included Witnesses UB, ALG, HH, AWE, AWD, GOB, and Frank Claeys.

22. Therefore the latest violations of Rule 68 not only warrant sanctions against the prosecution for its misconduct, but warrant remedial measures to cure the prejudice to

¹⁵ *Decision on Joseph Nzirorera’s Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (11 September 2008) at para. 30

¹⁶ *Decision on the Prosecutor’s Application pursuant to Rules 39, 68 and 75 of the Rules of Procedure and Evidence for an Order for Conditional Disclosure of Witnesses Statements and other documents pursuant to Rule 68(A)* (4 July 2006); *Decision on Joseph Nzirorera’s Motion for Modification on Disclosure of RPF Witnesses* (8 April 2008)

Mr. Nzirorera. Such remedial measures should include declaration of a mistrial, or failing that, stay of proceedings pending the appointment of a special master and his certification that all exculpatory evidence has been disclosed to the defence.

23. In the *Lubanga* case at the ICC, the Trial Chamber and the Appeals Chamber have had the courage to declare that a trial cannot proceed when a court cannot be sure that exculpatory evidence is available to an accused.¹⁷ The failure of this Trial Chamber to act in spite of violations which dwarf those in *Lubanga* demonstrates that Mr. Nzirorera is the object of an unfair trial, presided over by a Trial Chamber unwilling to take adequate measures against the prosecution to ensure that his rights are respected.

24. Mr. Nzirorera respectfully requests that the Trial Chamber (1) find that the prosecution has once again violated Rule 68 by failure to disclose the four RPF statements as soon as practicable; (2) find that the prosecution has misrepresented the non-existence of such statements in its pleadings to this Trial Chamber; (3) impose punitive and remedial measures as a consequence of these violations.

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera

¹⁷ *Prosecutor v Lubanga*, No. ICC-01-04/01-06, *Decision on the consequences of non-disclosure of exculpatory materials...* (13 June 2008); *Prosecutor v Lubanga*, No. ICC-01-04/01-06, *Judgement on the Appeal of the Prosecutor Against the Decision of Trial Chamber I entitled Decision on the consequences of non-disclosure of exculpatory materials...* (21 October 2008)

ANNEX "E"

19 October 2008

> Dear Don,
>
> I received a CD Rom on Thursday, 16 October 2008 containing statements
> about RPF crimes, including the assassination of President Habyarimana.
> The information is very important to us, and may lead to additional trial
> witnesses we would want to call. However, all of the statements are
> redacted and it is not possible to know who the author of the statement
> is,
> and in some cases, substantive information is also redacted.
>
> I am requesting pursuant to Rule 68, and in line with previous decisions
> of
> the Chamber, that you disclose the statements in unredacted form as soon
> as
> possible.
>
> Please let me know if you are willing to do this, or you prefer me to file
> a motion with the Trial Chamber.
>
> Yours truly,
>
> Peter Robinson
> Lead Counsel for Joseph Nzirorera
>

20 October 2008

- > Dear Peter,
- >
- > We disclosed 20 statements. For the most part the disclosure was made
- > under Rule 68(B).
- >
- > Kindly identify the statements that you deem to fall under Rule 68(A) and
- > we will consider your request. For certain statements there should be no
- > dispute at all. You are well aware that TC3 has already held that
- > statements concerning the assassinations of President Habyarimana and
- > certain other political officials (Gatabazi, Bucyana, Gapyisi) are not
- > Rule
- > 68 in our case.
- >
- > I suggest that we take things step by step. For which statements do you
- > need identifying information, and what is the R68(A) basis for the
- > request.
- >
- > Thanks and regards
- >

20 October 2008

Don,

I don't understand.

Rule 68(B) provides: "Where possible, and with the agreement of the Defence, and without prejudice to paragraph (A), the Prosecutor shall make available to the Defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the Defence can search such collections electronically."

Are you saying that the RPF documents contained on the CD Rom are "relevant" material under Rule 68(B), which is somehow different than "material, which ...may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence"?

I don't read Rule 68(B) that way at all. I see it as applying to the same category of material as Rule 68(A), but allowing you to disclose it electronically, such as through EDS. In fact, the Appeals Chamber in our case suggested at one point that you could satisfy your Rule 68(A) obligation by making available discrete, identifiable collections of documents on EDS.

What is the basis for your redactions? How can I possibly use this information to obtain witnesses for my defence case if I don't have any way to contact these people?

I see all of the material that you disclosed as falling under Rule 68(A). Disclosure of the identity of these witnesses, who are RPF insiders, will allow me to obtain evidence of RPF crimes, committed or encouraged by their clandestine infiltrators, which were blamed on Interahamwe and MRND, or which justified the setting up of roadblocks and other civil defence measures.

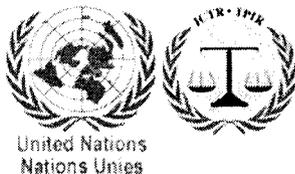
The Trial Chamber has already held that the identity of witnesses possessing such exculpatory information must be disclosed. These witnesses stand on the very same footing as other disclosures for which you have already been sanctioned for refusing to make.

Therefore, I reiterate my request that you disclose the identities of all the persons whose statements were contained in your CD Rom disclosure. So please let me know whether you are willing to disclose the identities voluntarily.

Yours truly,
Peter Robinson

38323

No response ever received to this e-mail



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

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I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

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| Dates: | Transmitted: 11 November 2008 | | Document's date: 11 November 2008 | |
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Filing Party hereby submits only the original, and **will not submit** any translated version.

Reference material is provided in annex to facilitate translation.

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