

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: 7 February 2008

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JOSEPH NZIRORERA'S APPLICATION FOR CERTIFICATION
TO APPEAL DECISION ON TENTH RULE 68 MOTION

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 hereby applies, pursuant to Rule 73(B), for certification to appeal the Trial Chamber's *Decision on Joseph Nzirorera's Tenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures* (5 February 2008).

2. In its decision, the Trial Chamber held that:

- (A) Information from sources who have neither witnessed themselves the events in question nor explained the source of their assumptions apart from a general reference to rumors does not constitute a *prima facie* showing of evidence that may affect the of the testimony of the witnesses.¹
- (B) When a document on a *prima facie* basis contains exculpatory information, as well as information supporting the prosecution case on the same issue, the Chamber notes that all information on the same issue must be read in context. Thus, only information that, when read in its entirety, tends to be exculpatory, must be disclosed under Rule 68(A).²

3. The Trial Chamber applied those principles in denying the motion, holding that Mr. Nzirorera had not established the exculpatory nature of documents from the United States National Security Archives.

4. Mr. Nzirorera contends that the Trial Chamber erred in limiting material subject to disclosure pursuant to Rule 68 to exclude second-hand information and to exclude mixed exculpatory/incriminatory information. He contends that the Trial Chamber misapprehended the nature and purpose of Rule 68, which is to alert the defence to potential witnesses or documents which might lead to discovery of useful evidence for the accused at trial. Its restrictive definition of the "exculpatory nature" of information under Rule 68 deprives the accused of the right to material which "may suggest the innocence or mitigate the guilt of the accused or affect the credibility of

¹ *Impugned Decision* at para. 19

² *Impugned Decision* at para. 20

Prosecution evidence.”³ This decision therefore affects the fairness and potential outcome of the trial and is in need of immediate correction from the Appeals Chamber.

4. Rule 73(B) provides that:

“Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”

5. Mr. Nzirorera contends that the issue of the scope of the “exculpatory nature” requirement of Rule 68 is one which significantly affects the fair conduct of the proceedings and the outcome of the trial. The Appeals Chamber has held that the prosecution’s duty to disclose exculpatory evidence is “not a secondary obligation and is as important as the obligation to prosecute.”⁴

6. The prosecution has acknowledged in its own application for certification to appeal a Rule 68 issue earlier in the trial that “the duty to disclose and the manner of disclosure are integral matters of procedure...which affects the fairness and expeditiousness of the proceedings.”⁵ The Trial Chamber agreed.⁶

7. Like the prosecution’s application, the Rule 68 issue in this case affects broad categories of evidence and is likely to recur during the course of the proceedings. This has been recognized as a factor which favors finding that the issue is one which

³ Rule 68(A)

⁴ *Ndindabahizi v Prosecutor*, No. ICTR-01-71-A, *Judgement* (16 January 2007) at para. 72

⁵ *Motion for Certification to Appeal Trial Chamber’s Decision Given Orally on 16 February 2006 Regarding the Role of the Electronic Disclosure Suite in Discharging the Prosecution’s Disclosure Obligations* (22 February 2006) at para. 14

⁶ Transcript of 28 February 2006 @ 41

significant affects the fairness of the proceedings. Certification has been granted where the decision may concern the admissibility of broad categories of evidence, or where it determines particularly crucial matters of procedure or evidence.⁷

8. This Trial Chamber recently granted certification to the prosecution to appeal issues of the scope of its disclosure obligations under Rule 66(B) and the reciprocal disclosure obligations of the defence under Rule 67(C). It found that such issues touch upon the fairness of the proceedings and are likely to recur.⁸ The same is true for the instant issue.

9. An immediate decision on this issue by the Appeals Chamber will also materially advance the proceedings. The Trial Chamber has now authorized the prosecution to withhold second-hand information and mixed exculpatory/incriminatory information. If the Appeals Chamber finds that the Trial Chamber unduly restricted the information required to be disclosed under Rule 68, and the decision on this issue has to await an appeal from the final judgement, it will require post-trial proceedings in this case to obtain the material to which the defence was entitled, to permit new, belated investigation on the newly disclosed material, and to evaluate the effect of the newly disclosed material on the Trial Chamber's findings of fact.

10. Therefore, the issues decided in the Impugned Decision met the criteria of Rule 73(B) for certification to appeal.

⁷ *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses* (21 July 2005) at para. 6; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Request for Certification Concerning Admission of Prosecution Exhibit P-417* (15 November 2006); *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for Certification to Appeal the Chamber's Decision Granting Kanyibashi's Request to Cross-Examine Ntahobali's 1997 Custodial Interviews* (1 June 2006) at para. 27

⁸ *Decision on Prosecutor's Application for Certification to Appeal The Chamber's Decision on Joseph Nzirorera's Motion for Inspection of Statement of Pierre Celestin Mbonankira and Decision on Prosecution Cross Motion for Enforcement of Reciprocal Disclosure* (2 October 2007)

11. While the correctness of a decision is not a criterion for certification to appeal, Mr. Nzirorera wishes to point out how the Trial Chamber's interpretation of Rule 68 operates to defeat the purpose and application of Rule 68.

12. For example, document 2 contained a report of an interview by the American *Charge d'Affairs* at its Embassy in Kigali with Mathieu Ngirumpatse and Jean Bosco Barayagwiza in August 1992. In his conversation with the *Charge*, Ngirumpatse was "critical of the CDR policy of ethnic separatism".

13. The Trial Chamber held that this information was not required to be disclosed because, in the same report, the Ambassador observed that other sources alleged that the CDR and MRND were working together.

14. This interpretation of Rule 68 cannot be correct. This is precisely the kind of information that an accused could use to identify witnesses to rebut the prosecution's evidence. Armed with this information, the accused can take steps to call the *Charge* to testify that Ngirumpatse told her that he was opposed to the CDR's ethnic separatist policy. This would allow him to directly contradict evidence from Witnesses UB, ALG, AWD, and GOB who alleged that the accused collaborated closely with the CDR party as part of their plan to exterminate the Tutsi. The existence in the same report of information from other sources which may contradict what Ngirumpatse said cannot operate to prevent access by the accused to Ngirumpatse's statements, which are clearly exculpatory.

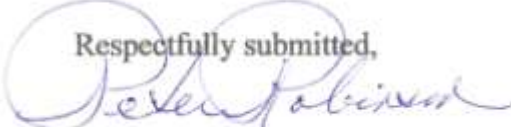
15. Both this Trial Chamber and the Trial Chamber in the *Bagosora* case have held that "whether information 'may suggest the innocence or mitigate the guilt of the accused' must depend on an evaluation of whether there is any *possibility*, in light of the

submissions of the parties, that the information could be relevant to the defence of the accused.”⁹ The statements of Mathieu Ngirumpatse to the *Charge* clearly meet this criteria, and do not lose their exculpatory character by being reported in the same document as contrary information.

16. This is one example of both the error in the Trial Chamber’s interpretation of Rule 68 and how the operation of that interpretation, shielding mixed exculpatory/incriminatory information from disclosure, would affect the fairness and potential outcome of the trial.

17. If the Trial Chamber’s decision is not immediately reviewed by the Appeals Chamber, the prosecution will be allowed to withhold all kinds of exculpatory material on the grounds that it was mixed with inculpatory material, or that it came from sources which did not have firsthand information. This will have disastrous consequences on the fairness of the trial, and, if followed, will erode the essential rights of the accused at International Tribunals to exculpatory information.

18. For all of these reasons, it is respectfully requested that the Trial Chamber grant certification to appeal its *Decision on Joseph Nzirorera’s Tenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures* (5 February 2008).

Respectfully submitted,

PETER ROBINSON
Lead Counsel for Joseph Nzirorera

⁹ *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. 5 *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera’s Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures* (25 October 2007) at para. 6;