

ICTR-98-44-T  
29-10-2009  
(48597 - 48592)

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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: 29 October 2009

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JUDICIAL RECORDS SECTION  
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JOSEPH NZIRORERA'S APPLICATION FOR CERTIFICATION  
TO APPEAL ORAL DECISION ON 26<sup>th</sup> NOTICE OF RULE 66  
VIOLATION AND 17<sup>th</sup> NOTICE OF RULE 68 VIOLATION

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The Office of the Prosecutor:

Mr. Don Webster  
Mr. Saidou N'Dow  
Mr. Arif Virani

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 applies, pursuant to Rule 73(B), for certification to appeal the Trial Chamber's oral *Decision on Joseph Nzirorera's 26th Notice of Rule 66 Violation: Witness 6* (28 October 2009).

2. In its decision, the Trial Chamber ruled that the prosecution was not obliged to disclose Rule 66(B) material which came into the prosecution's possession after the time it was requested and had no continuing duty to disclose the statement when it came into possession of it.

3. Mr. Nzirorera contends that the Trial Chamber erred by failing to apply Rule 67(D) to items subject to disclosure under Rule 66(B). Rule 67(D) provides:

If either party discovers additional evidence or information or materials which should have been produced earlier pursuant to the Rules, that party shall promptly notify the other party and the Trial Chamber of the existence of the additional evidence or information or materials.

4. Rule 73(B) provides:

"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 whether the prosecution has a continuing duty to produce materials requested under Rule 66(B) is one which significantly affects the fairness of the trial and its potential outcome. The prosecution's withholding of items which are material to the defence goes to the very heart of the fairness of the trial.

6. The issue is also one for which an immediate resolution by the Appeals Chamber would significantly advance the proceedings. The ruling involves broad categories of information that the prosecution is now able to withhold. If the Chamber is found to have erred, after judgement, in refusing to order disclosure, the trial will have proceeded on an erroneous footing and many witnesses may have to be recalled after the Rule 66(B) disclosure is made.

7. These same considerations have led this Chamber to grant certification to appeal under similar circumstances.

8. In its *Decision on Prosecutor's Motion for Certification to Appeal the Chamber's Decision on Joseph Nzirorera's Motion for Inspection of Pierre Celestin Mbonankira and Decision on Prosecution's Cross-Motion for Enforcement of Reciprocal Disclosure* (2 October 2007), this Trial Chamber granted the prosecution's application for certification to appeal its decision on disclosure under Rule 66(B) and the scope of reciprocal disclosure under Rule 67(C).

9. The Trial Chamber held that:

The Impugned Decisions concern the ambit of the reciprocal disclosure obligation of the Parties and thus touch upon the fairness of the proceedings. Further the disclosure issues at stake affect the expeditious conduct of the proceedings and are likely to arise recurrently.<sup>1</sup>

10. The same conclusion applies to the issue in Mr. Nzirorera's application for certification, which involves the interplay between Rules 66 and 67, which touches upon the fairness of the proceedings, and which are likely to recur.

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<sup>1</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Motion for Certification to Appeal the Chamber's Decision on Joseph Nzirorera's Motion for Inspection of Pierre Celestin Mbonankira and Decision on Prosecution's Cross-Motion for Enforcement of Reciprocal Disclosure* (2 October 2007) at para. 5

11. The issue of disclosure of statements of prosecution witnesses who have already testified has also been found to meet the criteria for certification to appeal. In its *Decision on Defence Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK* (4 April 2007), the Trial Chamber held that its decision refusing binding orders for statements of witnesses who had already testified was appropriate for certification as it would affect a number of prosecution witnesses. The Chamber went on to say:

If the Chamber's interpretation of the applicable legal standard is incorrect, then the effect on the Defence would be profound as previous witness statements constitute an important tool for assessing the credibility of witnesses.<sup>2</sup>

12. The Trial Chamber went on to say that the application of disclosure rules to witnesses who had previously testified in the case constituted a "crucial" matter of procedure and evidence warranting an immediate resolution by the Appeals Chamber.<sup>3</sup>

13. Applying that same reasoning to the issue in Mr. Nzirorera's certification application, the same result should occur. The issue deals with the prosecution's continuing obligation of disclosure of items material to the preparation of the defence. It has the same "profound" effect and constitutes the same "crucial" matter of procedure and evidence.

14. Certification to appeal has also been granted for the prosecution to appeal a decision interpreting its Rule 68 obligations via the electronic disclosure suite on the

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<sup>2</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK* (4 April 2007) at para. 10

<sup>3</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK* (4 April 2007) at para. 10

grounds that the issue involved multiple witnesses and was likely to recur.<sup>4</sup> Similarly, certification was granted to the defence on the issue of whether mixed exculpatory/inculpatory material must be disclosed under Rule 68 where the issue was also one likely to recur.<sup>5</sup>

15. The experience in this trial demonstrates that this issue is indeed likely to recur. It first arose in connection with the Trial Chamber's *Decision on Joseph Nzirorera's 23<sup>rd</sup> Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Witness ALG* (30 March 2009). The Trial Chamber denied certification to appeal that decision because of its belief that there "was no serious doubt regarding the correctness of the legal principles at issue."<sup>6</sup>

16. The Trial Chamber has acknowledged that this precise issue has never been decided by the Appeals Chamber, but claims that the ICTY Appeals Chamber decision in the *Blaskic* case pertaining to witness statements is controlling.<sup>7</sup> But the Trial Chamber is mistaken. *Blaskic* relied upon an interpretation of the phrase "intends to call to testify at trial" in Rule 66(A)(ii). It held that "Following the giving of their testimony in the *Blašić* case, the witnesses ceased to be "witnesses whom the Prosecutor intends to call to testify at trial" in that case within the meaning of sub-Rule 66 (A) (ii), and there was no

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<sup>4</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Oral Decision on Certification of the Oral Decision of 16 February 2006 for Stay of Proceedings* (26 February 2006)

<sup>5</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on 10<sup>th</sup> Rule 68 Motion* (4 March 2008)

<sup>6</sup> *Decision on Joseph Nzirorera's Application for Certification to Appeal Disclosure Decision on Witness ALG* (30 April 2009) at para. 5

<sup>7</sup> The Trial Chamber cited the case as if it was a 2008 decision, but it was actually decided in 2000. *Prosecutor v Blaskic*, No. IT-95-14-A, *Decisions on the Appellant's Motions for Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings* (26 September 2000)

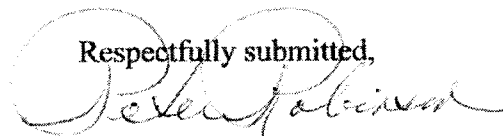
obligation on the part of the Prosecution to disclose to the Appellant transcripts of their subsequent testimony provided in the course of a different case.”<sup>8</sup>

17. Rule 66(B) contains entirely different language. It pertains to items “material to the preparation of the defence.” The Appeals Chamber has held that preparation of the defence continues into the defence case.<sup>9</sup> Therefore, there is no similar restriction as that in Rule 66(A)(ii).

18. The Trial Chamber’s interpretation of Rule 66(B) is also unsound as a practical matter. Now an accused has to make repeated, periodic requests to make sure that documents he had requested earlier have not since come into the possession of the prosecution. Surely this is not what was intended.

19. The Trial Chamber should grant certification for Mr. Nzirorera to appeal its decision that there is no continuing obligation on the prosecutor to disclose material requested pursuant to Rule 66(B). It is a novel and recurring issue, and the Trial Chamber’s decision is erroneous.

Respectfully submitted,

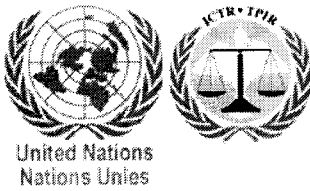


PETER ROBINSON  
Lead Counsel for Joseph Nzirorera

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<sup>8</sup> Para. 16

<sup>9</sup> *Prosecutor v Bagosora et al*, 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* (25 September 2006); *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.11, *Decision on the Prosecutor’s Interlocutory Appeal Concerning Disclosure Obligations* (23 January 2008) at paras. 14-16



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<b>Case Name:</b>	The Prosecutor vs. <b>Joseph Nzirorera</b>		<b>Case Number:</b> ICTR-98-44-T	
<b>Dates:</b>	Transmitted: <b>28 October 2009</b>		Document's date: <b>28 October 2009</b>	
<b>No. of Pages:</b>	<b>6</b>	<b>Original Language:</b> <input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda		
<b>Title of Document:</b>	<b>JOSEPH NZIRORERA'S APPLICATION FOR CERTIFICATION TO APPEAL ORAL DECISION ON 26th NOTICE OF RULE 66 VIOLATION AND 17th NOTICE OF RULE 68 VIOLATION</b>			
<b>Classification Level:</b>		<b>TRIM Document Type:</b>		
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