

ICTR-98-44-T
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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 4 March 2008

JUDICIAL RECORDS/ARCHIVES
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THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

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

Rule 73(B) of the Rules of Procedure and Evidence

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Peter Robinson and Patrick Nimy Mayidika Ngimbi

INTRODUCTION

1. On 21 November 2007, Joseph Nzirorera filed his Tenth Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures.¹ In his motion, Joseph Nzirorera alleged that the Prosecution failed to disclose exculpatory documents from the United States National Security Archives. The Chamber held that Joseph Nzirorera had not established the exculpatory nature of the documents, and denied that motion in its entirety on 5 February 2008.²

2. On 7 February 2008, Joseph Nzirorera filed an application for certification to appeal the 5 February 2008 decision.³ Specifically, Joseph Nzirorera contends that the Chamber erred when it stated that: (1) second-hand information is not subject to disclosure under Rule 68; and (2) a document containing both exculpatory and incriminatory information is only subject to disclosure under Rule 68 if the document is exculpatory in its entirety.⁴ The Prosecution filed its response on 11 February 2008,⁵ and Joseph Nzirorera filed his reply on 13 February 2008.⁶

DELIBERATIONS

The Standard for certifying an interlocutory appeal under Rule 73(B)

3. Rule 73(B) provides that leave for an interlocutory appeal may be granted only where the "*decision involves an issue* (emphasis added) 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."

¹ Joseph Nzirorera's Tenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures, filed on 21 November 2007.

² *The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera*, ("Karemera, et al.") Case No. ICTR-98-44-, Decision on Joseph Nzirorera's Tenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures, (TC) ("Impugned Decision"), 5 February 2008.

³ Joseph Nzirorera's Application for Certification to Appeal Decision on Tenth Rule 68 Motion, ("Nzirorera's Motion"), 8 February 2008.

⁴ Nzirorera's Motion, para. 4.

⁵ Prosecutor's Response to Joseph Nzirorera's Application for Certification to Appeal Decision on Tenth Rule 68 Motion, ("Prosecutor's Response"), 11 February 2008.

⁶ Reply Brief: Joseph Nzirorera's Application for Certification to Appeal Decision on Tenth Rule 68 Motion, ("Joseph Nzirorera's Reply"), 13 February 2008.

4. A Trial Chamber grants certification to appeal *decisions*,⁷ not isolated principles of law or dicta. Certification has been granted where a *decision* may concern the admissibility of broad categories of evidence, or where it determines particularly crucial matters of procedure or evidence.⁸

Should the interlocutory appeal be certified concerning second-hand information?

5. In the impugned decision, the Chamber recalls stating that the assessment of the weight to be attributed to a particular piece of evidence under Rule 68(A) must be based on a *prima facie* showing that the evidence may affect the credibility of a witness's testimony.⁹ Furthermore, the Chamber recalls stating that: "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 rumours does not constitute a *prima facie* showing of evidence that may affect the credibility of the testimony of witnesses."¹⁰

6. The Chamber notes that it did not rely on this principle in the impugned decision when it denied the admissibility of the documents at issue.¹¹ Accordingly, the Chamber does not certify the appeal concerning certain types of second-hand information because the impugned decision did not involve this issue.

Should the interlocutory appeal be certified concerning mixed exculpatory/incriminating information?

7. As a preliminary matter, the Chamber recalls that it only applied its principle regarding mixed exculpatory and incriminatory information to decide the admissibility of one of the seven documents at issue in the impugned decision, a report by the United States Embassy in Kigali ("Document 2").¹² Therefore, certification of this issue will be limited to the Chamber's decision regarding that document only.

8. In the impugned decision, the Chamber recalls stating: "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

⁷ *Karemera, et al.*, Decision on Joseph Nzirorera's Application for Certification to Appeal Issue of Prosecution's Obligation to Record Exculpatory Information, (TC), filed on 26 November 2007, para. 4.

⁸ *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jerome-Clement Bicamumpaka, and Prosper Mugiraneza*, Case No. ICTR-99-50-T, ("Bizimungu, et al.") Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses (TC), filed on 28 September 2005, para. 3.

⁹ Impugned Decision, para. 19.

¹⁰ Id.

¹¹ Impugned Decision, paras. 14, 23, 26, 29, 32, 36.

¹² Impugned Decision, para. 23.

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)."¹³

9. Concerning Joseph Nzirorera's application to appeal this principle, the Chamber acknowledges that documents containing mixed exculpatory and incriminatory information compose a broad and crucial¹⁴ category of evidence that is often submitted to the Chamber. Accordingly, the Chamber finds that this issue significantly affects the fairness and expeditious conduct of the proceedings, and the outcome of the trial.

10. Moreover, because the Defence has not yet presented its case, it is very likely that the issue of the Prosecution's disclosure obligations regarding mixed exculpatory and incriminatory information will recur. Accordingly, the Chamber also finds that immediate resolution of this issue by the Appeals Chamber would materially advance the proceedings.


FOR THESE REASONS, THE CHAMBER

- I. **GRANTS** Joseph Nzirorera's application for certification to appeal in part, as to its decision to deny the admissibility of Document 2 on the grounds that it was not exculpatory in its entirety, and
- II. **DENIES** his application for certification of the issue of second-hand information.

Arusha, 4 March 2008, done in English.


Dennis C. M. Byron

Presiding Judge
(Absent during signature)


Gberdao Gustave Kam

Judge
(Absent during signature)


Vagn Joensen

Judge



¹³ Impugned Decision, para. 20.

¹⁴ The Appeals Chamber has stated that the onus on the Prosecution to comply with Rule 68 to the best of its ability "is not a secondary obligation and is as important as the obligation to prosecute." *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Judgement (AC), 16 January 2007, para 72.



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