

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: 2 January 2008

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JOSEPH NZIRORERA'S MOTION FOR REQUEST FOR COOPERATION
TO GOVERNMENT OF RWANDA: RPF ARCHIVES

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 moves, pursuant to Article 28 and Rule 54, that the Trial Chamber request the Government of Rwanda that it facilitate production to his defence team of the following materials:

All correspondence, notes, memoranda, or official documents from July 1991 through July 1994 purportedly recovered from the MRND party or its officials or agents and to which the prosecution has been given access

Background

2. In connection with its *Prosecutor's Motion for Reconsideration of Oral Decisions of 25 June 2007 and 03 July 2007 Concerning Admission in Evidence of Documents Marked IP-005 and IP-006* (16 August 2007), the prosecution revealed that it had been given broad access to a large number of documents purportedly seized from the MRND party in 1994 and maintained in the archives of the Rwandese Patriotic Front (RPF).

3. In Annex "B" to that motion, the RPF archivist explained that in 1994 the RPF had seized a number of documents from the former MRND office in the Kabuga building in Kigali.¹ They had been maintained by the RPF since then. The prosecution was given access to inspect and copy whatever documents from within this material that it chose.²

4. In Annex "C" to that motion, the OTP Crime Analyst explained that Senior Trial Attorney Don Webster had been given access to the MRND collection and had selected certain documents to be copied. The Crime Analyst copied those documents in 2004.³

5. After receiving this motion and its annexes, counsel for Joseph Nzirorera went to the RPF headquarters in Kigali on 27 September 2007 and requested access to the

¹ *Affirmation by Venantie Mukagatare* at paras. 4-5

² *Affirmation by Venantie Mukagatare* at para. 5

³ *Affirmation by Adama Niane* at paras. 2-4

same documents provided to the prosecution. He was directed to RPF Conseiller for Communication Servilien Sebasoni. Mr. Sebasoni indicated that the RPF required that such a request be made to the Government of Rwanda, through its Special Representative in Arusha, Aloys Mutabingwa.

6. On 1 October 2007, counsel for Mr. Nzirorera wrote a letter to Mr. Mutabingwa requesting permission for access to the documents in the custody of the RPF. A copy of that letter is attached as Annex “A” to this motion. Mr. Mutabingwa requested that counsel contact him in Kigali later in the month after he had an opportunity to discuss the matter with RPF officials.

7. On Monday, 15 October 2007, counsel for Mr. Nzirorera spoke on the telephone with Mr. Mutabingwa, who advised that he had not yet had the opportunity to speak with the RPF officials.

8. On 17 October 2007, counsel for Mr. Nzirorera contacted Mr. Mutabingwa by telephone. Mr. Mutabingwa suggested that counsel for Mr. Nzirorera contact Prosecutor General Martin Ngoga for authorization to obtain access to the RPF material.

9. On 18 October 2007, counsel for Mr. Nzirorera proceeded to the Prosecutor General’s office in Kigali in an attempt to meet Mr. Ngoga. Mr. Ngoga was not available. Counsel for Mr. Nzirorera left a note with Mr. Ngoga’s secretary requesting an appointment, but there was never any response.

10. During late October and early November, counsel for Mr. Nzirorera went to the office of Mr. Mutabingwa in Arusha and requested an appointment to discuss access to the RPF archives. There was never any response.

11. On 19 November 2007, Mr. Nzirorera again made a written request for access to the RPF archives. A copy of that letter is Annex “B” to this motion. The letter stated that:

“We are now to the point where the prosecution is concluding its case and I will be expected to begin presenting my defence evidence. Therefore, it is important to me to determine whether the Rwandan government will voluntarily allow me access to the archives or whether it will be necessary for me to apply to our Trial Chamber for a formal request pursuant to Article 28 of the ICTR Statute.

I note that the Rwandan government has allowed free access to the ICTR prosecution to these same archives, so under the principle of equality of arms it would be expected to do the same for the defence.”

12. No response has ever been received to this letter.

Argument

13. Article 28 provides:

“1. States shall cooperate with the International Criminal Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:

- (a) The identification and location of persons;
- (b) The taking of testimony and the production of evidence;
- (c) The service of documents;
- (d) The arrest or detention of persons;
- (e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.”

13. Trial Chambers of the ICTR, including this one, have applied their powers pursuant to Rule 54 and issued binding orders to States where the request sets forth:

- (1) the nature of the evidence sought with particularity;
- (2) the relevance of that evidence to the trial; and

(3) the efforts that have been made to obtain the evidence.⁴

14. Mr. Nzirorera's request for cooperation meets all of these criteria.

15. The Appeals Chamber has held that the underlying purpose of the requirement of **specificity** is to allow a State, in complying with its obligation to assist the Tribunal in the collection of evidence, to be able to identify the requested documents for the purpose of turning them over to the requested party.⁵ A requested category of documents, defined with sufficient clarity to enable ready identification will suffice.⁶

16. Mr. Nzirorera has identified the documents he is seeking as a finite, particular category of material which the RPF and Office of the Prosecutor have acknowledged presently exists as a collection located in the RPF Secretariat building in Kigali. Therefore, the category of documents sought is already segregated and easy to locate and identify.

17. With respect to the requirements of **relevance**, a party need not prove that a document will be admissible to make a request for its disclosure, It is sufficient to demonstrate, for example, that government documents created or issued in the months

⁴ *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion to Request the Cooperation of the Government of a State* (23 February 2005) at para. 4; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request to the Kingdom of the Netherlands for Cooperation and Assistance* (7 February 2005); *Prosecutor v Ndindiyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Ex Parte and Confidential Motion to Obtain the Cooperation of the Kingdom of Belgium* (9 November 2005) at para. 10

⁵ *Prosecutor v Kordic & Cerkez*, No. IT-95-14/2-AR108bis, *Decision on Request of the Republic of Croatia for Review of a Binding Order* (9 September 1999) at para. 38; *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108bis.2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 15

⁶ *Prosecutor v Kordic & Cerkez*, No. IT-95-14/2-AR108bis, *Decision on Request of the Republic of Croatia for Review of a Binding Order* (9 September 1999) at para.39; *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108bis.2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 15

preceding the start of 1994 probably describe policies that may still have been in effect in that year and are, therefore, likely to be relevant.⁷

18. In this case, the prosecution has used documents it obtained from the RPF secretariat which allegedly originated from the MRND offices as its exhibits in its case-in-chief. Given that the indictment alleges a joint criminal enterprise among the MRND leadership in the years leading up to the genocide, documents from the MRND headquarters where they worked are likely to be relevant to the trial and necessary for the preparation and presentation of the defence case.

19. Finally, as indicated above, there can be no question that Mr. Nzirorera has made **efforts** to obtain the evidence before filing this motion and that those efforts have been unsuccessful.

20. In addition to the fact that the material sought is relevant and necessary to the defence, it is also important to consider that the principle of equality of arms, embodied in the rights provided in Articles 19 and 20 of the ICTR Statute, requires that the defence be given the same access to material as the prosecution. The principle of equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.⁸

21. The Appeals Chamber has observed that:

“Under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the

⁷ *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute* (10 March 2004) at para. 9

⁸ *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 69; *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 14

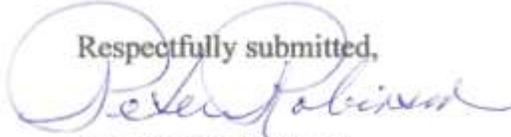
Rules and Statute when faced with a request by a party for assistance in presenting its case.”⁹

22. Therefore, the Trial Chamber should issue the request for cooperation to the government of Rwanda to ensure that the defence has the same access to relevant material as the prosecution.

Conclusion

23. It is respectfully requested that the Trial Chamber issue a request for cooperation to the government of Rwanda to facilitate production to the defence team of Joseph Nzirorera of the following materials:

All correspondence, notes, memoranda, or official documents from July 1991 through July 1994 purportedly recovered from the MRND party or its officials or agents and to which the prosecution has been given access

Respectfully submitted,

PETER ROBINSON
Lead Counsel for Joseph Nzirorera

⁹ *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 52.

ANNEX “A”

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1 October 2007

Mr. Aloys Mutabingwa
Special Representative
Government of Rwanda
Ngorogoro Building—Room 206
Arusha International Conference Center
Arusha, Tanzania

Re: *Prosecutor v Joseph Nzirorera*
No. ICTR-98-44-T

Dear Mr. Mutabingwa,

I hope this letter finds you doing well.

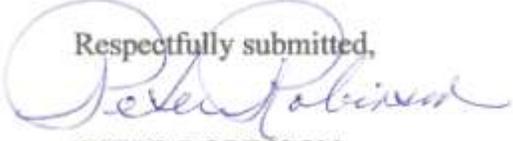
Last week I was in Kigali and had the honor of meeting with Servilien Sebasoni, the RPF Counselor for Communications. I was seeking to interview the RPF archivist, Venantie Mukangatware who had signed a statement for the Office of the Prosecutor in connection with a motion to admit some documents from the archives into evidence in Mr. Nzirorera's trial.

Mr. Sebasoni declined to allow me to speak with Ms. Mukangatware, but said it would be no problem to do so in the future so long as I passed the request by you.

It is essential that I be able to interview Ms. Mukangatware to be able to determine whether the proposed exhibits can properly be used in our trial and to verify that in fact the RPF seized the documents and to determine the location from which they were seized. In addition, I would like to discuss with her and/or Mr. Sebasoni the possibility of my having access to review other documents seized by the RPF.

I plan on returning to Kigali on 12 October and Mr. Sebasoni has graciously given me an appointment for 15 October with him. I would appreciate it if you could give me a written letter of introduction to the RPF Secretariat so I can carry out my work.

Thank you very much for your cooperation.

Respectfully submitted,

PETER ROBINSON
Lead Counsel for Joseph Nzirorera

cc: Hon. Adama Dieng for official transmission
Constant Hometowu for distribution to Judges and Parties

ANNEX “B”

PETER ROBINSON
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19 November 2007

Mr. Aloys Mutabingwa
Special Representative
Government of Rwanda
Ngorogoro Building—Room 206
Arusha International Conference Center
Arusha, Tanzania

Re: *Prosecutor v Joseph Nzirorera*
No. ICTR-98-44-T

Dear Mr. Mutabingwa,

I hope this letter finds you doing well.

You may recall that I wrote to you on 1 October 2007 requesting you to facilitate my access to the archives maintained by the RPF Secretariat. Mr. Servilien Sebasoni, RPF Counselor for Communications, had said that it was necessary for you to approve before he could allow me access to the archives.

I have stopped by your office on two occasions since then and have asked your secretary for an appointment with you, but have not received an appointment or a telephone call.

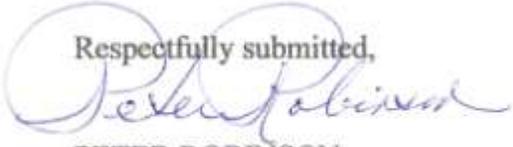
We are now to the point where the prosecution is concluding its case and I will be expected to begin presenting my defence evidence. Therefore, it is important to me to determine whether the Rwandan government will voluntarily allow me access to the archives or whether it will be necessary for me to apply to our Trial Chamber for a formal request pursuant to Article 28 of the ICTR Statute.

I note that the Rwandan government has allowed free access to the ICTR prosecution to these same archives, so under the principle of equality of arms it would be expected to do the same for the defence.

Mr. Aloys Mutabingwa
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I would appreciate if you could let me know the position of your government at your earliest convenience.

Thank you very much for your cooperation.

Respectfully submitted,

PETER ROBINSON
Lead Counsel for Joseph Nzirorera

cc: Hon. Adama Dieng for official transmission
Constant Hometowu for distribution to Judges and Parties