ICTR-98-44-AR73.18
24-2-2010
(3327/A - 3323/A)

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

CASE No. ICTR-98-44-AR73.18

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson
Judge Fausto Pocar
Judge Liu Daqin
Judge Theodor Meron
Judge Carmel Agius

Registrar: Mr. Adama Dieng

Date Filed: 24 February 2010

2010 FEB 24 P 3:30
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THE PROSECUTOR

v.

EDOUARD KAREMERA,
MATTHIEU NGIRUMPATSE, and
JOSEPH NZIRORERA

REPLY BRIEF:
JOSEPH NZIRORERA'S APPEAL FROM
DECISION ON 27th RULE 66 VIOLATION

The Office of the Prosecutor:
Mr. Don Webster
Mr. Saidou N'Dow
Mr. Takeh Sendze

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, has appealed from the Trial Chamber's *Oral Decision on Joseph Nzirorera's 27th Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures* (24 November 2009). On 22 February 2010, the prosecution filed its response.[1] Mr. Nzirorera now replies.

(A) The Trial Chamber erred in concluding that the document came into the possession of the prosecution after the June 2002 letter

2. The prosecution, in its response, has shed absolutely no light on when it actually came into possession of the Karekezi letter.

3. Instead, it relies upon general statements in the jurisprudence that an accused must prove that an item for which he seeks inspection or disclosure is in the possession of the prosecution.[2]

4. The issue is different, however, in this case. Mr. Nzirorera has established that the Karekezi letter is in the possession of the prosecution. The issue is *when* it came into the prosecution's possession.

5. Mr. Nzirorera is aware of no jurisprudence of the Tribunals in which this issue has been specifically decided. He contends that once an accused has established that an item he has requested is in the possession of the prosecution, if the prosecution contends that the item is otherwise not subject to disclosure, the burden shifts to the prosecution to establish the exemption from disclosure.

6. In this case, if the prosecution contends that the item was exempt from disclosure because it was not in possession of the item at the time of the request, it must bear the burden of establishing when the item came into its possession.

7. Any other application of the burden of proof would completely frustrate the disclosure regime of the Rules. An accused has absolutely no means of establishing when the prosecution came into possession of an item. It simply has no access to internal documents, receipts, or data entry records of the prosecution by which such information can be established. By virtue of the prosecution's sole custody and access to this

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[1] *Prosecutor's Response to Joseph Nzirorera's Interlocutory Appeal of Trial Chamber III's Decision on 27th Rule 66 Violation*

[2] *Response* at para. 20

material, the prosecution must bear the burden of seeking to exempt itself from disclosure of an item in its possession, such as by claiming the item was not in its possession at the time the request was made.

8. Mr. Nzirorera again points out that such a predicament is caused by the attitude of the prosecution in its case, which prefers to place obstacles in the path of disclosure rather than forthrightly stating when it came into possession of the document in question.

9. Because the Trial Chamber failed to require the prosecution to establish that it was not in possession of the Karekezi letter at the time of the June 2002 request, its decision should be reversed.

(B) The Trial Chamber Erred in Ruling that the Prosecution has no Continuing Obligation to Afford Inspection of Rule 66(B) material

10. The prosecution seeks to avoid the provisions of Rule 67(D) by creating an artificial distinction between disclosure and inspection.[3]

11. 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.

12. The Rule, by its terms, is not limited to disclosure, as opposed by inspection. The use of the word "produce" demonstrates that the Rule applies to both producing an item for disclosure and producing an item for inspection. Although the preamble to Rule 67 makes its provisions "subject to Rules 53 and 69", the Rule makes no exemption for Rule 66(B). Therefore, nothing in the text of Rule 67 demonstrates an intention that its terms not apply to "inspection" as well as "disclosure".

13. This makes sense, since it is just as impossible to disclose an item not in one's possession as it is to offer that item for inspection. And it is just as easy to offer inspection of an item that later comes into one's possession as it is to disclose it. The

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[3] *Response* at para. 31

prosecution has cited no authority for its claim that the disclosure/inspection distinction justifies departure from its continuing obligation under Rule 67(D).

14. Significantly, the prosecution offers no other argument to support the Trial Chamber's conclusion that Rule 66(B) material is not subject to a continuing duty.

15. Instead, the prosecution seeks to undermine the Trial Chamber's decision by claiming that the June 2002 request was insufficiently specific.[4] Although it rejected the October 2009 request as insufficiently specific, the Trial Chamber implicitly found the June 2002 request to meet the specificity requirement of Rule 66(B), since it went on to consider whether the prosecution's duty to permit inspection was a continuing one. Had there been no duty to permit inspection in the first place, it would have been unnecessary to determine whether that duty continued.

16. Mr. Nzirorera deals with the specificity requirement of both requests below.

17. The Trial Chamber erred in concluding that there was no continuing duty on the prosecution to offer inspection under Rule 66(B) of items coming into its possession after its receipt of a request. Its decision should be reversed.

(C) The Trial Chamber Erred in Ruling that Mr. Nzirorera's Rule 66(B) Request was not Sufficiently Specific

18. The prosecution has applied the broadest possible interpretation to Mr. Nzirorera's requests so as to create a straw man which it can conveniently destroy. In fact, neither request required inspection of the wholesale number of documents claimed by the prosecution.

19. The October 2009 request was limited to "documents obtained from the government of Rwanda". That, in and of itself, reduces the number of documents significantly, since the vast majority of the prosecution's collection is comprised of witness statements and reports generated by its own investigators.

20. The request is further limited to "acts and conduct of the Interahamwe" or "the existence of the Interahamwe". This is a discrete group of individuals, comprising a small fraction of the population.

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[4] *Response* at para. 33

21. The request is further limited to "Kigali, Ruhengeri, Gisenyi, or Kibuye prefectures"—four of the eleven prefectures of Rwanda.

22. As Mr. Nzirorera pointed out in his opening brief, he is charged with responsibility for all crimes committed in the entire territory of Rwanda by "Interahamwe". His efforts to require the prosecution to specify the victims and perpetrators have been regularly opposed by the prosecution and rejected by the Trial Chamber.[5] The prosecution has failed to discuss or refute Mr. Nzirorera's contention that the specificity of a request for items material to the preparation of the defence must be evaluated in light of the specificity of the allegations which the accused has to meet.

23. Likewise, the June 2002 request was limited to materials "furnished by the government of Rwanda"—reducing the scope of the prosecution's search considerably. It was further limited to "acts committed by members of the Interahamwe and whether Mr. Nzirorera planned, ordered, or otherwise aided and abetted those acts, or was responsible for them under Article 6(3)". Therefore, not all acts of the Interahamwe were included. The acts must have been those for which there was also information of a link to Mr. Nzirorera. This reduced the number of documents to a very small group, and was directly targeted to those acts for which responsibility was sought to be attributed to the accused.

24. The Karekezi letter falls squarely within both of Mr. Nzirorera's requests. Any responsible prosecutor would have recognized that it was material to the preparation of the defence, given the link between Mr. Nzirorera, the persons alleged to be Interahamwe in his own family and his own commune, and the fact that the author of the letter was a named victim of Mr. Nzirorera in the indictment. The prosecution's failure to offer this letter for inspection was an injustice and a display of pure gamesmanship which should not have been countenanced by the Trial Chamber.

25. The requests in this case are no broader than those requests in *Bagosora* for immigration records which have been upheld by the Appeals Chamber.[6] Both types of

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[5] *Decision on Defects in the Form of the Indictment* (3 August 2005); *Decision on Defence Motions Challenging the Indictment as Regards the Joint Criminal Enterprise Liability* (14 September 2005); *Decision on Motions for Judgement of Acquittal* (19 March 2008)

[6] *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) at para 10

requests required the prosecution to search through its database for materials related to a category of documents. Whether searching for the name of a particular witness, or the name of a particular accused, the prosecution has the capacity in both instances to identify the documents requested and to offer them for inspection. If this imposes a burden on the prosecution, it is a burden that it must bear when undertaking a wide-ranging prosecution for crimes committed throughout an entire country by an unspecified number of individuals.

26. Therefore, it is respectfully requested that the decision of the Trial Chamber that the prosecutor was excused from complying with his Rule 66(B) obligations because of the lack of a specific request be reversed.

Conclusion

27. The Appeals Chamber is confronted with three important legal issues concerning the scope of the prosecution's duty of disclosure and inspection. Those issues arise in the context of a case in which disclosure violations have been rampant.[7] The Appeals Chamber, as part of its duty to ensure that International Tribunals meet the highest standards of fairness, should hold that (1) where the prosecution is in possession of a document, it bears the burden of establishing that it was not in possession of the document at the time of the request; (2) there is a continuing duty to afford inspection under Rule 66(B); and (3) the specificity requirement for items material to the preparation of the defence must be viewed in light of the scope of the charges which an accused must meet.

Word count: 1713

Respectfully submitted,

PETER ROBINSON
Lead Counsel for Joseph Nzirorera

[7] See compilation contained in *Joseph Nzirorera's Motion for Mistrial at the Close of the Prosecution Case* (7 January 2008)

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Case Name:	The Prosecutor vs. **Karemera et al**		**Case Number:**	ICTR-98-44-AR73.18
Dates:	Transmitted: **24 February 2010**		Document's date: **24 February 2010**	
No. of Pages:	**6**	**Original Language:** ☒ English	☐ French	☐ Kinyarwanda
Title of Document:	**REPLY BRIEF: JOSEPH NZIRORERA'S APPEAL FROM DECISION ON 27th RULE 66 VIOLATION**			

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