THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

CASE No. ICTR-98-44-AR73.9

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Adama Dieng

Date Filed: 25 April 2007

THE PROSECUTOR

v.

EDOUARD KAREMERA,
MATHIEU NGIRUMPATSE, and
JOSEPH NZIRORERA

REPLY BRIEF:
JOSEPH NZIRORERA'S INTERLOCUTORY APPEAL OF DECISION ON OBTAINING PRIOR STATEMENTS OF PROSECUTION WITNESSES AFTER THEY HAVE TESTIFIED

The Office of the Prosecutor:
Mr. Don Webster
Ms. Allayne Frankson-Wallace
Mr. Iain Morley
Ms. Gerta 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 has appealed from the *Decision on Defence Motion for Cooperation of Rwanda to Obtain Statements of Prosecution Witnesses ALG, GK, and UB* (22 March 2007) issued by the two remaining Judges of the Trial Chamber. The prosecution filed its *Response* on 23 April 2007. Mr. Nzirorera now files this reply.

Authority of the Remaining Judges

2. The prosecution's response on the issue of whether the remaining Judges exceeded their authority under Rule 15 *bis* (F) in the Impugned Decision is full of incongruities.

3. In its *Prosecutor's Response to Nzirorera's Motion for Certification to Appeal Trial Chamber III Denial of Motion to Obtain Statements of Witnesses ALG and GK* (28 March 2007), the prosecution took the position that:

> "The Prosecutor submits that 'routine matters' would include matters that do not go to the merits of a case, that would not determine the outcome of the Trial Chamber's deliberation on a point of law or evidence, and that only uncontroversial issues fall within the ambit of the routine for purposes of Rule 15bis (F)."[1]

4. Under this formulation, the Impugned Decision would not constitute a "routine matter" since it dealt with a controversial issue—denying the accused access to prior statements of a prosecution witness.

5. In its brief on appeal, the prosecution has taken a different position. It has now constructed a "substance vs. procedure" formulation for what constitutes a routine matter under Rule 15 *bis* (F).

6. However, even under its test, the issue under consideration could not be considered "routine". As the remaining Judges themselves found in granting certification:

> "First of all, the Chamber finds that this issue could affect the **outcome** of the trial…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…This issue therefore constitutes a **crucial** matter of procedure and evidence…" (emphasis added)[2]

[1] Para. 16

7. Mr. Nzirorera would further note that the substance vs. procedure distinction made by the prosecution in its *Response* is not contained in the text of Rule 15 *bis* (F). As the prosecution has pointed out in another context[3], if the drafters of the Rule intended that such a distinction be made in determining what constitutes routine matters, it could have so specified in the Rule.

8. The prosecution also argues that the requirement that the President find that the interests of justice are satisfied before authorizing the remaining Judges to conduct routine matters elevates the types of matters which can be considered. This argument does not advance its substance vs. procedure test. What if the remaining Judges decided to remove counsel for an accused and force the accused to represent himself? Such a decision would be procedural, rather than substantive, but could hardly be considered routine.

9. Rather than fashioning a test made from whole cloth, the Appeals Chamber should interpret Rule 15 *bis* (F) by looking to the plain meaning of its text. The example of a routine matter provided in Rule 15 *bis* (F) is the **delivery** of decisions. The use of the term "delivery" is telling—it connotes the act of pronouncing a decision which had already been made, not the making of the decision itself. This provides the answer to the issue raised in Mr. Nzirorera's appeal. The making of a decision by the remaining Judges on a "crucial" issue, which could have a "profound" effect on the "outcome" of the trial cannot be considered a "routine matter."

10. The Appeals Chamber should conclude that the remaining Judges were without authority to render the Impugned Decision and should vacate it.

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[2] *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

[3] See *Response* at paras. 7-8

Article 28 issue

11. The prosecution's response raises an interesting issue under Article 28 of the Statute not previously decided by the Appeals Chamber—whether there is a "necessity" requirement in addition to a "relevance" requirement when requesting production of documents from a State.[4]

12. The requirements of (i) specificity; (ii) relevance; and (iii) efforts at voluntary compliance found in the jurisprudence of the ICTR[5] come directly from the ICTY Appeals Chamber's seminal decision in the *Blaskic* case.[6] No showing of necessity was required.

13. After the *Blaskic* decision, the judges of the ICTY decided to enact Rule 54 *bis*, which added the requirement of necessity. However, the judges of the ICTR have chosen not to enact Rule 54 *bis* or any other rule regulating requests for State cooperation. Therefore, there is no basis for imputing a necessity requirement to requests for cooperation under Article 28. Such a requirement, if it is to be imposed, should come from the judges sitting in plenary session. The Appeals Chamber in *Blaskic* has already determined that no such requirement exists in the Statute itself.[7]

14. However, the existence of a necessity requirement would not make a practical difference in Mr. Nzirorera's request for cooperation since the remaining Judges based their decision on the relevance requirement. The issue before the Appeals Chamber is whether the remaining Judges erred in holding that the relevance requirement required a showing that a prior statement contains an inconsistency with the witness' trial testimony.

15. The prosecution claims that Mr. Nzirorera can only speculate that the contents of the statements would be relevant and that he has not made a showing that the contents of the witness' prior statements would justify recalling the witness.[8] This conflates the separate steps of disclosure and admissibility. At the disclosure stage, without having

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[4] *Response* at para. 16
[5] See Impugned Decision at para. 7; *Prosecutor v Karemera et al*, No. IT-98-44-T, *Decision on Motions for Production of Documents by the Government of Rwanda and for Consequential Orders* (13 February 2006) at para. 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. 4;
[6] *Prosecutor v Blaskic*, No. IT-95-14-AR108*bis*, *Judgement on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber* (29 October 1997) at para. 32
[7] The language of ICTR Article 28 is identical to that of ICTY Article 29.
[8] *Response* at paras. 18 and 20

access to the contents of the material sought, it is impossible for any party to make a concrete showing that the documents sought are admissible.

16. That is why the Trial Chamber in the *Zigiranyirazo* case, for example, held that it is "settled jurisprudence that the judicial records of a witness are material for his/her cross examination and are therefore necessary for the opposing party."[9]

17. An examination of cases in which requests for State cooperation have been issued and upheld demonstrates that Mr. Nzirorera's request meets the relevance requirements of Article 28.

18. The most recent decision of the Appeals Chamber concerning Article 29 of the ICTY statute was in the *Ojdanic* case. There, the accused sought disclosure from NATO and its member countries, including the United States, of all intercepted conversations with 24 named individuals during the period covered by the indictment. The Appeals Chamber upheld the determination that this request satisfied the relevance requirement.[10]

19. Obviously, the accused in Ojdanic could not show that the content of all the intercepted conversations contained relevant material such as to make each conversation admissible at the trial. However, the relevance requirement at the stage of obtaining documents was satisfied by a showing that there was a legitimate forensic purpose for the request.

20. The Appeals Chamber decision explicitly rejected the requirement that a party requesting documents from a State show that the document in fact exists. The Appeals Chamber said that "in many cases it would be impossible for an applicant to prove the existence of these materials."[11] Therefore, if it is permissible to request documents which one doesn't know for sure exists, it must be permissible to request, as Mr. Nzirorera did, prior statements of prosecution witnesses that do exist, but for which one doesn't know for sure contains inconsistencies with trial testimony.

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[9] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Defence Motion for the Cooperation of the Government of Rwanda in Relation With Prosecution Witnesses AVY and SGO* (17 January 2006)
[10] *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108*bis*.2, *Decision on Request of the United States of America for Review* (12 May 2006) at para. 21
[11] *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108*bis*.2, *Decision on Request of the United States of America for Review* (12 May 2006) at para. 23

21. The Appeals Chamber has also upheld the issuance of a binding order for categories of documents in the *Kordic & Cerkez* case without requiring that the contents of each document be known and be shown to be relevant to the trial.[12]

22. The ICTY Trial Chamber in the *Milosevic* case also approved a number of binding orders to Serbia which required production of categories of documents, some of which may or may not ultimately have been relevant enough to be admitted into evidence.[13]

23. At the ICTR, in the *Bagosora* case, the Trial Chamber granted a request to the Rwandan government of documents created or issued in the months preceding the start of 1994 on the showing only that such documents probably describe policies that may still have been in effect in that year and are, therefore, likely to be relevant.[14] And ICTR Trial Chambers, including that of Mr. Nzirorera, have consistently issued requests for cooperation to the government of Rwanda for prior statements without requiring a showing that the contents would make the statement admissible at the trial.[15]

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[12] *Prosecutor v Kordic & Cerkez*, No. IT-95-14/2-AR108*bis, Decision on the Request of the Republic of Croatia for Review of a Binding Order* (9 September 1999)

[13] *Prosecutor v Milosevic*, No. IT-02-54-T, *Second Decision on Prosecution Motion for Orders Pursuant to Rule 54 bis Against Serbia and Montenegro* (12 June 2003); *Third Decision on Prosecution Motion for Orders Pursuant to Rule 54 bis Against Serbia and Montenegro* (18 June 2003); *Fifth Decision on Applications Pursuant to Rule 54 bis of Prosecution and Serbia and Montenegro* (15 September 2003); *Seventh Decision on Applications Pursuant to Rule 54 bis of Prosecution and Serbia and Montenegro* (23 September 2003); *Eleventh Decision on Applications Pursuant to Rule 54 bis of Prosecution and Serbia and Montenegro* (13 November 2003); *Thirteenth Decision on Applications Pursuant to Rule 54 bis of Prosecution and Serbia and Montenegro* (17 December 2003)

[14] *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

[15] *Prosecutor v Karemera et* al., No. ICTR-98-44-T, *Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders* (13 February 2006); *Prosecutor v Karemera et al*, No. ICTR-98-44-I, *Decision on Defence Motion for an Order to the Prosecution Witnesses to Produce, at their Appearance, their Diaries, and Other Written Materials from 1992 to 1994 and their Statements Made Before the Rwandan Judicial Authorities* (24 November 2003); *Prosecutor v Ndayambaje*, No. ICTR-96-8-T, *Decision on the Defence Motion Seeking Documents Relating to Detained Witnesses or Leave of the Chamber to Contact Protected Detained Witnesses* (15 November 2001) at para. 25; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Request for Documents Arising From Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses* (16 December 2003); *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 18; *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witnesses Y, Z and AA* (8 June 2000). *Prosecutor v Nchamihigo*, No. ICTR-01-63-T, *Order for Judicial Records* (12 October 2006); *Prosecutor v Simba*, No. ICTR-2001-76-T, *Decision on Matters Related to Witness KDD's Judicial Dossier* (11 November 2004) at para. 11.

24. Therefore, the prosecution's claim that the relevancy requirement for a request for documents from a State requires knowledge of the contents of the documents is not supported by the jurisprudence of either *ad hoc* Tribunal.

25. An analogous situation exists where the defence wishes to meet a potential witness. The Appeals Chamber confronted this situation in the *Krstic* case. It did not require the accused to establish that the potential witness will give testimony inconsistent to that of the prosecution's witnesses. Rather, the Appeals Chamber employed the legitimate forensic purpose test. It required only that "there is a reasonable basis for the belief that the prospective witness will be able to give information which will materially assist" the accused.[16]

26. Likewise, Trial Chambers of the ICTR have held that "when the defence is not fully aware of the nature and relevance of the testimony of a prospective witness, it is in the interests of justice to allow the defence to meet the witness and assess his testimony."[17] No requirement is made before issuance of an order that the content of the witness's testimony must be admissible, or inconsistent with prosecution evidence.

27. Therefore it is simply not the case that orders carrying sanctions for non-compliance require an advance showing of relevance equal to that needed for admissibility of evidence.

28. Mr. Nzirorera established that Witnesses ALG and GK had made prior statements to the Rwandan government concerning the events of April-July 1994 in their respective communes—the same events which were the subject of their trial testimony. The remaining Judges erred in requiring Mr. Nzirorera to also demonstrate that the undisclosed statements contained inconsistencies with the witnesses' trial testimony.

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[16] *Prosecutor v Krstic*, No. IT-98-33-A, *Decision on Application for Subpoenas* (1 July 2003) at para. 17

[17] *Prosecutor v Ndindliyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of The Netherlands Pursuant to Article 28 of the Statute* (13 February 2006) at para. 8; *Prosecutor v Ndindliyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of Ghana Pursuant to Article 28 of the Statute* (13 February 2006) at para. 8; *Prosecutor v Ndindliyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of Togo Pursuant to Article 28 of the Statute* (13 February 2006) at para. 8; *Prosecutor v Bagosora et al*, No. ICTR-98-44-T, *Decision on Request for Subpoena of Major General Yaache and Cooperation of the Government of Ghana* (23 June 2004)

29. The prosecution has failed to address Mr. Nzirorera's argument that a prior statement of a witness can be relevant even if it does not contain an inconsistency.[18] Nor has it addressed Mr. Nzirorera's argument that he should not be disadvantaged by the failure to obtain the prior statements prior to the testimony of the witnesses.[19] Each of those matters, standing alone, is sufficient to cause the decision of the remaining Judges to be overturned.

Conclusion

30. It is respectfully submitted that the remaining Judges erred in deliberating and deciding that a showing of inconsistency is required before a request for a prosecution witness' prior statement will be made to a State for a witness who has already testified. The Impugned Decision should be vacated.

Word count: 1926

Respectfully submitted,

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[18] Appeal brief at paras. 52-59
[19] Appeal brief at paras. 77-82