

ICTR-98-44-T
12-1-2009
(43941-43932)

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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: 12 January 2009

THE PROSECUTOR

v.

JOSEPH NZIRORERA

2009 JAN 12 A 9:25
JUDICIAL RECORDS/ARCHIVED

JOSEPH NZIRORERA'S 14th NOTICE OF RULE 68 VIOLATION
AND MOTION FOR REMEDIAL AND PUNITIVE MEASURES:
MICHEL BAKUZAKUNDI

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 notifies that Trial Chamber that he has once again uncovered additional violations of Rule 68 committed by the prosecution. He moves for appropriate remedial and punitive measures.

Testimony about Michel Bakuzakundi

2. Prosecution Witness BTH testified that after the February 1993 RPF attack, a meeting was held at the Mukingo communal office at which the formation of the Amahindure or Virunga Force was announced.¹ He identified Michel Bakuzakundi as one of the organizers of this meeting and testified that Bakuzakundi had attended it.²

3. Prosecution Witness GBU testified that Bakuzakundi attended the swearing-in ceremony of Juvenal Kajelijeli in June 1994 at which Joseph Nzirorera had congratulated the Interahamwe for killing the Tutsi of Mukingo.³

The Withheld Material

4. Unbeknownst to Mr. Nzirorera, the prosecution had in its possession a statement from Michel Bakuzakundi from 1996 in which he said:

I want to emphasize that between September 1990 and January 1994 I was continually on mission outside the country because during that period I was the Assistant Director General of the Rwanda-Arab Libyan joint company for production and marketing of agricultural and livestock products, SODEPARAB, and later Director of Agricultural Production.⁴

5. This tends to contradict the testimony of Witness BTH that Bakuzakundi organized and attended a meeting in Mukingo in 1993.

¹ Transcript of 8 June 2006 @ 45

² Transcript of 8 June 2006 @ 45

³ Transcript of 5 December 2006 @ 24; Exhibit DNZ-281

⁴ This document, dated 3 April 1996, is attached as Annex "A"

6. The 1996 statement of Bakuzakundi also contradicts the testimony of Witness GBU that Bakuzakundi was present at the June 1994 swearing-in of Juvenal Kajelijeli. It says:

“On 17 April 1994, the United Nations evacuated my family to Nairobi, Kenya. I was among the people evacuated on that trip. You will therefore understand that I could not have committed the massacres I am accused of, even during that period.”

7. This statement was not disclosed to Mr. Nzirorera until September 2008 after Michel Bakuzakundi appeared on Mr. Nzirorera’s witness list and the prosecution was ordered to produce all statements of Mr. Nzirorera’s witnesses pursuant to Rule 66(B).

The Violation of Rule 68

7. Rule 68 provides that:

“The Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.”

8. A party alleging a violation of Rule 68 must: (1) identify specifically the material sought; (2) present a *prima facie* showing of its probably exculpatory nature; and (3) prove that the material requested is in the custody or under the control of the prosecution.⁵

9. Mr. Nzirorera has specifically identified the statement which is the subject of this motion. It is of an exculpatory nature since it tends to contradict the testimony of two prosecution witness. Indeed, this Trial Chamber has clearly held that information which contradicts that provided by a Prosecution witness is exculpatory within the

⁵ *Decision on Joseph Nzirorera’s Appeal from Decision on 10th Rule 68 Motion* (14 May 2008) at para. 9

meaning of Rule 68.⁶ And the material has been shown to be in the possession of the prosecution.

10. While the statement of Mr. Bakuzakundi does not specifically address his attendance at the Mukingo meetings, the Appeals Chamber and this Trial Chamber have held that whether information “may suggest the innocence or mitigate the guilt of the accused” must depend on an evaluation of whether there is any **possibility**, in light of the submissions of the parties, that the information could be relevant to the defence of the accused.⁷

11. The statement of Mr. Bakuzakundi, which had been in the possession of the prosecution for 10 years before Witness BTH and GBU testified, certainly raised more than a possibility that he was outside of the country at the time these meetings took place.

12. Therefore, yet another violation of Rule 68 has been established.

Prejudice to the Accused

13. The failure of the prosecution to disclose the Bakuzakundi statement as soon as practicable prejudiced Mr. Nzirorera because he was unable to use these materials in his cross examination of Witnesses BTH and GBU in 2006. The Trial Chamber has held

⁶ *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Oral Decision on Disclosure of Material from Joseph Serugendo* (30 May 2006); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motions for Disclosure of Information Obtained from Juvenal Uwilingiyimana* (27 April 2006) at para. 9

⁷ *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.13, *Decision on Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion* (14 May 2008) at para. 12; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Disclosure of Defence Witness Statements in the Possession of the Prosecution Pursuant to Rule 68(A)* (8 March 2006) at para. 5; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (11 September 2008) at para. 6; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures* (25 October 2007) at para. 6

that disclosure of contradictory information after a prosecution witness has testified causes prejudice to an accused.⁸

14. Although Witness BTH later recanted his testimony about the 1993 meeting, the prosecution continues to maintain that BTH's original testimony is the truth. And Witness GBU has maintained his testimony about the swearing-in ceremony of Kajelijeli—an event which is charged against Mr. Nzirorera as incitement to genocide.⁹

Remedial and Punitive Measures

15. The latest violation of Rule 68 comes on the heels of the prosecution's failure to disclose the closed session testimony of RPF insiders, which was the subject of *Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (21 July 2008). The Trial Chamber, in its decision on that motion, after finding that the prosecution had violated Rule 68 for the thirteenth time, said that:

“Although the Chamber is not prepared to state that the Prosecution can no longer be relied upon to discharge its Rule 68 obligations in this case, it notes that the Prosecution's compliance with the rules of disclosure has been less than adequate thus far. In fact, the Chamber finds that the increasing number of disclosure violations by the Prosecution is quickly approaching the threshold for sanctions of a more serious nature than mere disclosure of the misconduct to an internal disciplinary body. The Chamber hereby warns the Prosecution that future disclosure violations will not be met with the same lenience that has been displayed to date.”¹⁰

16. Mr. Nzirorera has now identified five additional violations of Rules 66 and 68 since that decision.¹¹ The Trial Chamber has taken no action.

⁸ *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (11 September 2008) at paras. 23-24, 32

⁹ Indictment @ para. 32.5

¹⁰ *Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (11 September 2008) at para. 30

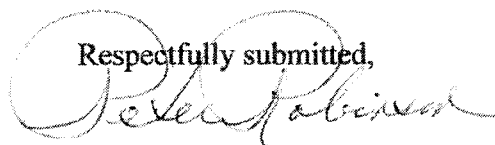
¹¹ *Joseph Nzirorera's 19th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Jean-Marie Vianney Mudahinyuka* (6 October 2008); *Joseph Nzirorera's 20th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Colonel Felicien Muberuka* (30 October 2008);

17. Mr. Nzirorera will address the appropriate remedial and punitive measures in his reply brief after the prosecution has had the opportunity to explain the reasons for the latest Rule 68 violation.

Conclusion

18. Mr. Nzirorera respectfully requests the Trial Chamber to (1) make an explicit finding that the failure to disclose the Bakuzakundi statement prior to September 2008 violated Rule 68; and (2) impose such remedial and punitive measures as are warranted under the circumstances, taking into account the extent and pattern of violations.

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera

Joseph Nzirorera's Twelfth Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures: Evidence of RPF Infiltration and Crimes (11 November 2008); Joseph Nzirorera's 21st Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Theophile Urikumwenimana (13 November 2008—Oral Motion); Joseph Nzirorera's 13th Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures: Witness ZF (5 January 2009)

ANNEX "A"

REPUBLIC OF CAMEROON
Peace - Work - Fatherland

M.T. OM.M.M.

YAOUNDE COURT OF APPEAL

K0153694

PUBLIC PROSECUTOR'S OFFICE

No: 275 048 / PGY

INTERVIEW REPORT:

On the third day of the month of April, in the year one thousand nine hundred and ninety-six;

I, MESSINA TEME, General Advocate of the Central Court of Appeal;

In my office located in the *Palais de Justice* [Court House];

Assisted by OMBOUDA MBONO, the Secretary;

Pursuant to Articles 15 and 20 of Law No. 64/LF/13 of 26 June 1964 governing extradition;

Interrogated Michel BAKUZAKUNDI, born around 1952, in Rutoyi (Rwanda), son of Ezeckiel MUTAYOMBA and the late Lidie NYABUNUMA, and formerly a Director for Agricultural Production in Rwanda, presently living in Cameroon.

Present during the interrogation was the his counsel, Advocate Benjamin ONDIGUI, Barrister-at-Law in Cameroon.

The person appearing before me, against whom an international arrest warrant was issued on 15 March 1996 by the Director of Public Prosecutions in the Court of Appeal of Kigali, is accused of genocide and crimes against humanity, which he allegedly committed between 1 October 1990 and 31 July 1994. The accused stated the following:

On being questioned, he answered:

I deny the accusations being brought against me.

As far as I am concerned, the accusations against me are mere fabrication. Indeed, that is why they are presented in general terms in the arrest warrant.

I should thus point out that the manner in which the charges are presented reflects a smear campaign by the RPF, for the charges are levelled against people from different social and professional categories of people most of whom did not know each other or even lived together.

I want to emphasize that between September 1990 and January 1994, I was continually on mission outside the country because during that period, I was the Assistant Director-General of the Rwanda-Arab Libyan joint company for production and marketing of agricultural and livestock products, SODEPARAB and later Director of Agricultural Production.

With that type of occupation, I do not see how I could have been able to organise the said attacks against civilians in my country. It should be noted that between 1 October 1990 and August 1993, the RPF, which had launched an attack on the country, was regularly engaged in fighting with the Rwandan armed forces on the northern front. The fighting had not yet spread to the rest of the country. The RPF attack resulted in the massacre of civilians and the displacement of several hundreds of thousands of people within the country. It is therefore absurd that now that the RPF is power, it is seeking to incriminate civilians who were fleeing the war.

From 6 to 9 April 1994, that is, immediately after the assassination of the President of the Republic, I remained at home with my family, as had been ordered by the Ministry of Defence. I left the city with my family on 9 April 1994 and, using bush paths, we managed to reach Masaka village, located twenty kilometres from the capital city. On 17 April 1994, the United Nations evacuated my family to Nairobi, Kenya.

I was among the people evacuated on that trip. You will therefore understand that I could not have committed the massacres I am accused of, even during that period.

In conclusion, I insist that the charges brought against me are part of the political persecution campaign by the RPF regime in power in Rwanda, which is intent on exterminating the Hutu elite who survived the various massacres of 1994 and after.

I should also add that I consider myself a refugee in Cameroon and that is why the United Nations High Commission for Refugees issued a refugee certificate to me. Furthermore, I freely surrendered to the authorities and should the case arise, I would rather appear before the International Tribunal for Rwanda, rather than the Rwandan courts.

That is all I have to say.

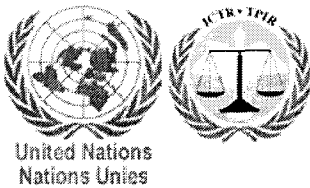
Having read the statement, the said Michel BAKUZAKUNDI certifies the truth thereof and signs it along with me and my Secretary on the same day, month and year mentioned above.

K0153696

MESSINA TEME
[signed]
General Advocate
[and stamped]

Michel BAKUZAKUNDI
[signed]
The person appearing

Marcel OMBOUDA MBONO
[signed]
Secretary



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

To:	<input type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input checked="" type="checkbox"/> Trial Chamber III C. K. Hometownu	<input type="checkbox"/> Trial Chamber III A. N'Gum
	<input type="checkbox"/> Chief, CMS J.-P. Fomété	<input type="checkbox"/> Appeals Chamber / Arusha Chamber II F. A. Talon		<input type="checkbox"/> Appeals Chamber / The Hague K. K. A. Afande R. Muzigo-Morrison
From:	<input type="checkbox"/> Chamber (names)	<input checked="" type="checkbox"/> Defence Peter Robinson (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
Case Name:	The Prosecutor vs. Joseph Nzirorera		Case Number: ICTR-98-44-T	
Dates:	Transmitted: 10 January 2009		Document's date: 12 January 2009	
No. of Pages:	10	Original Language:	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
Title of Document:	JOSEPH NZIRORERA'S 14th NOTICE OF RULE 68 VIOLATION AND MOTION FOR REMEDIAL AND PUNITIVE MEASURES: MICHEL BAKUZAKUNDI			
Classification Level:		TRIM Document Type:		
<input type="checkbox"/> Ex Parte		<input type="checkbox"/> Indictment	<input type="checkbox"/> Warrant	<input type="checkbox"/> Correspondence
<input type="checkbox"/> Strictly Confidential / Under Seal		<input type="checkbox"/> Decision	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Notice of Appeal
<input type="checkbox"/> Confidential		<input type="checkbox"/> Disclosure	<input type="checkbox"/> Order	<input type="checkbox"/> Appeal Book
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II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

CMS SHALL take necessary action regarding translation.			
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CMS SHALL NOT take any action regarding translation.			
<input type="checkbox"/> Filing Party hereby submits BOTH the original and the translated version for filing, as follows:			
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III - TRANSLATION PRIORITISATION (For Official use ONLY)

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<input type="checkbox"/> Urgent		<input type="checkbox"/> Hearing date:
<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: