

ICTR-98-44-AR73.18
15-2-2010
(3275/A - 3253/A)

3275/A
Jury

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

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

IN THE APPEALS CHAMBER

Before: An Appeals Chamber
Registrar: Mr. Adama Dieng
Date Filed: 15 February 2010

THE PROSECUTOR

v.

EDOUARD KAREMERA,
MATTHIEU NGIRUMPATSE, and
JOSEPH NZIRORERA

JUDICIAL RECORDS ARCHIVES
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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

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1. Joseph Nzirorera, hereby appeals, pursuant to certification¹, 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).

2. In the decision, the Trial Chamber held that (1) the prosecution's obligation under Rule 66(B) is not a continuing one, and does not extend to items which come into its possession after a request is made; and (2) Mr. Nzirorera's second Rule 66(B) request was insufficiently specific to require compliance by the prosecution.

Background

3. In the Third Amended Indictment, it is alleged that Joseph Nzirorera founded, trained, and equipped an *Interahamwe* militia in his native commune of Mukingo, in Ruhengeri prefecture.² It is also alleged that:

On a date unknown between 7 – 12 April 1994 **Joseph NZIRORERA** prepared, aided and abetted or committed killings of Tutsis in Remera, *Kigali-ville préfecture*, by providing information about certain Tutsis that were in hiding to a leader of the *Interahamwe* militias and by providing a vehicle, provisions, and instructions to the *Interahamwe* so that those persons could be forced out of hiding and killed. Among those killed were Aloys KAREKEZI, his wife, and son.³

4. Mr. Nzirorera's current trial began on 19 September 2005. The prosecution rested its case on 4 December 2007. Mr. Nzirorera's defence case commenced on 19 October 2009.

5. On 23 November 2009, Joseph Nzirorera filed *Joseph Nzirorera's 27th Notice of Rule 66 Violation* after the prosecution disclosed a document for the first time during the cross examination of witness Jean Damascene Niyoyita. The document was a letter from Aloys Karekezi to the Prime Minister dated 30 November 1993 in which he complained that:

“Mr. Joseph Nzirorera, Executive Secretary of the MRND, has an armed Militia in Byangabo, Mukingo commune, which includes a certain Noehli, a nephew of Nzirorera...; and Musafiri...and Bagabo, a cousin of Nzirorera... These persons fired shots during the night of Saturday to Sunday 27/11.

¹ *Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on 27th Rule 66 Violation* (9 February 2010)

² *Third Amended Indictment* at para. 62

³ *Third Amended Indictment* at para. 63.2

The day before they had rifled through the homes of the Bagogwe⁴, threatening that they were going to kill them because, according to them, the Inkotanyi⁵ were going to attack that same night. Another witness who came from Gisenyi informed us that this militia stopped vehicles that were coming from Gisenyi or Ruhengeri during the days on Monday and Tuesday 29.11 and were asking if there weren't any Tutsi aboard, so that they could be removed...⁶

6. The individuals mentioned in the letter: Noelhi, Musafiri, and Bagabo, have been identified by prosecution witnesses as members of the Interahamwe in Mukingo commune.⁷ The author of the letter, Aloys Karekezi, is identified in the indictment (see paragraph 3, above) as a person who was killed by Interahamwe acting on instructions of Mr. Nzirorera.

7. Mr. Nzirorera contended that this letter should have been disclosed to him pursuant to Rule 66(B) as it was material to the preparation of his defence. He pointed to two separate requests that he had made for such information.

8. The first request was made in a letter of 14 June 2002, item #64:

A copy, in electronic format if possible, of all documents furnished to the OTP by the government of Rwanda that is intended to be used by the Prosecution at trial, is material to the defence, is exculpatory, or affects the credibility of evidence to be offered by the Prosecution.

In order to assist you in determining what is material to the defence, please be advised that we believe that the following issues are material:

- (C) acts committed by members of the MRND party and whether Mr. Nzirorera planned, ordered, or otherwise aided and abetted those acts, or was responsible for them under Article 6(3)
- (D) **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) (emphasis added)⁸

⁴ Bagogwe are a tribe of Tutsi found in northwestern Rwanda.

⁵ Inkotanyi is a name for the Rwandan Patriotic Front, comprised mostly of Tutsis.

⁶ A copy of the letter is attached as Annex "A" to this response. It is identified as IP56 in the trial record. The letter is in French, and the English translation above is from an unofficial translation provided by the prosecution. See *Prosecution's Response to Joseph Nzirorera's 27th Notice of Rule 66(B) Violation – Niyoyita Document* (23 November 2009) at fn. 3

⁷ See for example Transcript of 4 December 2006@9,13

⁸ A copy of the letter was attached to the *Notice* and is reproduced here as Annex "B".

8. The second request was made in a letter dated 29 October 2009, which requested:

All documents obtained from the government of Rwanda, its agencies, departments, or subdivisions, or its Gacaca jurisdictions which deal with the following issues which are material to our defence:

1. The acts and conduct of the Interahamwe in Kigali, Ruhengeri, Gisenyi, or Kibuye prefectures
3. The existence of the Interahamwe in Kigali, Ruhengeri, Gisenyi, and Kibuye prior to the death of President Habyarimana⁹

9. The prosecution responded to the motion and denied that there had been a violation of Rule 66(B) because the requests were insufficiently specific.¹⁰ The parties made oral submissions on 23 November 2009.¹¹ During that hearing, the prosecution informed the Trial Chamber that the document in question had been received by OTP's evidence unit in October 2002—after the June 2002 request.¹²

10. While the document may have been entered into the prosecution's database in October 2002, the document could have been in its possession since before June 2002. Indeed, the document may well have been among a large number of documents furnished to the prosecution by the Rwandan government in February 2002, which took a very long time for the OTP to process.

11. On 24 November 2009, the Trial Chamber delivered its oral decision on the motion. It said that:

“On 23rd November 2009, Joseph Nzirorera filed a written motion for a finding that the Prosecution violated Rule 66(B) of the Rules of Procedure and Evidence by failing to disclose or allow inspection of a letter written by Aloys Karekezi to the prime minister of Rwanda on 30 November 1993. Nzirorera also requests that the Chamber preclude the Prosecution from using the letter in any way during the trial and that it restricts its cross-examination of Witness Jean Damascène Niyoyita to the time taken during his direct examination.

“The letter at issue complains of summary executions of Bagogwe Tutsi in Mukingo *commune* committed by Rwandan soldiers and includes a postscript that specifically mentions Nzirorera and several of his relatives.

⁹ A copy of the letter was attached to the *Notice* and is reproduced here as Annex “C”.

¹⁰ *Prosecution's Response to Nzirorera's 27th Notice of Rule 66 Violation—Jean Damascène Niyoyita* (23 November 2009)

¹¹ Transcript of 23 November 2009 @ 1-12.

¹² Transcript of 23 November 2009 @ 3

“The Prosecution opposed the motion in its entirety in a written response dated 23rd November 2009. Both parties supplemented their filings with oral submissions on 23rd November 2009.

“The Chamber recalls the Appeals Chamber's holding in a 25 September 2006 decision in *Bagosora et al* that Rule 66(B) disclosure obligations are only triggered by a sufficiently specific request by the Defence.

“Joseph Nzirorera argues that he made a sufficiently specific request to the Prosecution for disclosure of the document at issue in two letters dated 14 June 2002 and 29 October 2009. Joseph Nzirorera contends that his 14 June 2002 request is sufficiently specific because it requests a copy of all documents furnished to the Prosecution by the government of Rwanda that concern 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).

“However, the Prosecution has stated that it did not receive the Karekezi letter until October 2002. In the *Niyitegeka* judgement the Appeals Chamber held that something which is not in the possession of or accessible to the Prosecution cannot be subject to disclosure because no one is bound to an impossibility. Further, the Chamber has already stated in its oral decision of 28th October 2009 that a document which is not in the custody or control of the Prosecution when a Rule 66(B) request is made cannot be subject to inspection.

“The Chamber reiterates that the Prosecution does not have an ongoing obligation under Rule 66(B) to disclose all information that comes into its custody or control regarding a request made at a particular moment in the past. Thus, the Chamber dismisses the 14th June 2002 request as irrelevant because it is clear that the Karekezi letter was not in the custody or control of the Prosecution at that time.

“Concerning the 29th October 2009 request, Joseph Nzirorera contends that it is sufficiently specific because it requests all documents obtained from the government of Rwanda, its agencies, departments or subdivisions or its Gacaca jurisdictions, which deal with: (1) the acts and conduct of the *Interahamwe* in Kigali, Ruhengeri, Gisenyi or Kibuye *préfectures*; and (2) the existence of the *Interahamwe* in Kigali, Ruhengeri, Gisenyi or Kibuye *préfectures* prior to the death of President Habyarimana. The Chamber will consider whether this request satisfies the requirement of Rule 66(B) because it was made after the Prosecution came into possession of the Karekezi letter.

“In the *Bagosora et al* decision, the Appeals Chamber noted that a request for documents related to the immigration, refugee and asylum status of certain defence witnesses constituted a precise category of documents, which was sufficiently specific to trigger a Rule 66(B) inspection by the Prosecution. While the current

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request does not concern immigration documents, the Chamber considers the degree of specificity accepted by the Appeals Chamber to be instructive.

“The Chamber finds that Joseph Nzirorera's 29th October 2009 request for all documents furnished to the Prosecution by the Rwandan government which concern the acts and conducts -- conduct or existence of the *Interahamwe* in Kigali, Ruhengeri, Gisenyi or Kibuye *préfectures* is impermissibly broad because it arguably encompasses any document related to these *préfectures* which mentions the word "*Interahamwe*". The scope of this request far exceeds the degree of specificity that was accepted by the Appeals Chamber in its *Bagosora et al* decision. The Chamber considers that Nzirorera has many options available to him for tailoring his requests to match the degree of specificity required by Rule 66(B).

“Accordingly, Joseph Nzirorera's motion is denied.”¹³

12. On 1 December 2009, there was filed *Joseph Nzirorera's Application for Certification to Appeal Decision on 27th Rule 66 Violation*. The prosecution responded on 4 December 2009.¹⁴ On 9 February 2010, the Trial Chamber granted certification to appeal.¹⁵

Grounds of Appeal

13. Mr. Nzirorera contends that:

- (A) The Trial Chamber erred in concluding that the document came into the possession of the prosecution after the June 2002 letter
- (B) The Trial Chamber erred in ruling that the prosecution has no continuing obligation to afford inspection of Rule 66(B) material
- (C) The Trial Chamber erred in ruling that Mr. Nzirorera's Rule 66(B) request was not sufficiently specific.

Standard of Review

14. The Appeals Chamber has frequently held that the Trial Chamber's exercise of discretion will be reversed only if it is demonstrated that the Trial Chamber made a discernible error because its decision was based upon an incorrect interpretation of

¹³ Transcript of 24 November 2009 @ 1-3

¹⁴ *Prosecutor's Response to Joseph Nzirorera's Application for Certification to Appeal the Decision on 27th Rule 66 Violation*

¹⁵ *Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on 27th Rule 66 Violation*

governing law, on a patently incorrect conclusion of fact, or because it was so unfair and so unreasonable to constitute an abuse of the Trial Chamber's discretion.¹⁶

15. Mr. Nzirorera contends that the Trial Chamber made an incorrect interpretation of governing law when it held that there was no continuing obligation to permit inspection of Rule 66(B) material and that Mr. Nzirorera's Rule 66(B) request did not meet the specificity requirement.

Applicable Rules

Rule 66: Disclosure of Materials by the Prosecutor

Subject to the provisions of Rules 53 and 69;

(A) The Prosecutor shall disclose to the Defence:

- i) Within 30 days of the initial appearance of the accused copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused, and
- ii) No later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; upon good cause shown a Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the Defence within a prescribed time.

(B) At the request of the Defence, the Prosecutor shall, subject to Sub-Rule (C), permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

(C) Where information or materials are in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting *in camera* to be relieved from the obligation to disclose pursuant to Sub-Rules (A) and (B). When making such an application the Prosecutor shall provide the Trial Chamber, and only the Trial Chamber, with the information or materials that are sought to be kept confidential.

Rule 67: Reciprocal Disclosure of Evidence

¹⁶ *Decision on Prosecution's Interlocutory Appeal Concerning Disclosure Obligations* (23 January 2008) at para. 7 and cases cited therein.

Subject to the provisions of Rules 53 and 69:

(A) As early as reasonably practicable and in any event prior to the commencement of the trial:

- (i) The Prosecutor shall notify the Defence of the names of the witnesses that he intends to call to establish the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with Sub-Rule (ii) below;
- (ii) The Defence shall notify the Prosecutor of its intent to enter:
 - (a) The defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;
 - (b) Any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.

(B) Failure of the Defence to provide such notice under this Rule shall not limit the right of the accused to rely on the above defences.

(C) If the Defence makes a request pursuant to Rule 66 (B), the Prosecutor shall in turn be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the Defence and which it intends to use as evidence at the trial.

(D) 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.

Argument

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

16. Mr. Nzirorera contends that the Trial Chamber erred in failing to require that the prosecution establish that the document was not in its possession in June 2002 when the first request was made. The prosecution only established when the document was entered into its database. However, it is well known that there is significant delay

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between when items come into the possession of the Office of the Prosecution in Kigali and the time when they are entered in the prosecution's database in Arusha.¹⁷

17. The prosecution informed the Trial Chamber and parties in February 2002 that it had recently come into possession of a large amount of material from the Rwandan government.¹⁸ The Karekezi document may well have come into the prosecution's possession at that time.

18. Because the fact of when the prosecution came into possession of a document is within the sole province of the prosecution, it must bear the burden of establishing that it was not in possession of an item at the relevant time. The statement of the Senior Trial Attorney as to when the document was entered into the prosecution's database was insufficient to discharge that burden.

19. Therefore, the Trial Chamber made an incorrect application of governing law when failing to require the prosecution to bear the burden of establishing when it had come into possession of the Karekezi letter.

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

20. In any event, the Trial Chamber's ruling that "the Prosecution does not have an ongoing obligation under Rule 66(B) to disclose all information that comes into its custody or control regarding a request made at a particular moment in the past" was an incorrect application of governing law.

21. Rule 66(B) applies, *inter alia*, to items which are material to the preparation of the defence. Neither the Trial Chamber nor the prosecution contested that the Karekezi letter was material to the preparation of Mr. Nzirorera's defence—given that he has contested the existence of an *Interahamwe* or militia in Mukingo, his association with or control over any such group, and his involvement in the death of Karekezi.

¹⁷ See Affidavit of Maria Warren attached to *Prosecutor's Response to Joseph Nzirorera's Third Motion for Return of Property and Sanctions for Violation of Court Order* (30 July 2003) showing that property seized from Mr. Nzirorera in June 1998 was not entered into the prosecution's database until sometime after July 2000—some two years after it came into the possession of the prosecution.

¹⁸ Transcript of 8 February 2002 @ 7

22. Rule 67(D) provides for a continuing obligation of disclosure upon the parties when it “discovers additional evidence or information or materials which should have been produced earlier pursuant to the Rules.”

23. On 14 June 2002, Mr. Nzirorera requested, pursuant to Rule 66(B), all documents furnished to the OTP by the government of Rwanda pertaining 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).

24. The Karekezi letter falls into that category, having been obtained from the government of Rwanda, pertaining to acts committed by the Interahamwe, and accusing Mr. Nzirorera of being responsible for them. Therefore, the letter was subject to inspection under Rule 66(B).

25. If indeed the prosecution did not come into possession of this letter until October 2002, the issue is whether it was obligated to offer it for inspection under its continuing duty imposed by Rule 67(D).

26. This precise issue has not previously been decided by the Appeals Chamber.

27. In the *Blaskic* case, the Appeals Chamber held that there was no continuing obligation to disclose Rule 66(A)(ii) witness statements.¹⁹ However, *Blaskic* relied upon an interpretation of the phrase “intends to call to testify at trial” in Rule 66(A)(ii). It held that “following the giving of their testimony in the *Blaškić* case, the witnesses ceased to be ‘witnesses whom the Prosecutor intends to call to testify at trial’ in that case within the meaning of sub-Rule 66 (A) (ii), and there was no obligation on the part of the Prosecution to disclose to the Appellant transcripts of their subsequent testimony provided in the course of a different case.”²⁰

28. Rule 66(B) contains entirely different language. It pertains to items “material to the preparation of the defence.” The Appeals Chamber has held that preparation of the defence, and the prosecution’s Rule 66(B) obligation to permit inspection of items material to the preparation of the defence, continues into the defence case.²¹ Therefore,

¹⁹ *Prosecutor v Blaskic*, No. IT-95-14-A, *Decisions on the Appellant’s Motions for Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings* (26 September 2000)

²⁰ Para. 16

²¹ *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);

there is no similar restriction for Rule 66(B) material as there is for Rule 66(A)(ii) material.

29. The Trial Chamber's interpretation of Rule 66(B) is also unsound as a practical matter. An accused would have to make repeated, periodic requests to make sure that documents he had requested earlier as material to the preparation of the defence have not since come into the possession of the prosecution. Surely this is not what was intended by the Rules.

30. Since items "material to the preparation of the defence" are often of an exculpatory character, the interests of justice are best served by applying the same rules to Rule 66(B) material as are applied to Rule 68 material. It is clear that there is a continuing duty of disclosure of Rule 68 material.²²

31. The ICTR prosecutor's position in this case, and the Trial Chamber's holding, are also contrary to the view of the Office of the Prosecution of the ICTY, which has taken the position that it indeed has a continuing duty of disclosure of Rule 66(B) material.²³

32. Therefore, the Trial Chamber made an incorrect interpretation of governing law by holding that there is no continuing obligation to offer Rule 66(B) material for inspection. Its decision should be reversed.

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

33. Should the Appeals Chamber find that the prosecution's Rule 66(B) obligation was triggered by the June 2002 request, there would be no need to examine whether that obligation was also triggered by Mr. Nzirorera's second request of 29 October 2009.

34. However, if it is necessary to examine the October 2009 request, the Appeals Chamber will find that the description of "all documents obtained from the government

Prosecutor v Karemera et al, No. ICTR-98-44-AR73.11, *Decision on the Prosecutor's Interlocutory Appeal Concerning Disclosure Obligations* (23 January 2008) at paras. 14-16

²² *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on the Prosecutor's Motion to Move for Decision on Niyitegeka's Requests for Review Pursuant to Rules 120 and 121* (28 September 2005) at page 8; *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.7, *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006) at para. 13

²³ *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Trial Chamber's Order Clarifying Proper Late Disclosure Procedure Under Rule 67(C) and/or Other Appropriate Sanctions* (7 November 2007) at para. 5

of Rwanda, its agencies, departments, or subdivisions, or its Gacaca jurisdictions which deal with...the acts and conduct of the Interahamwe in Kigali, Ruhengeri, Gisenyi, or Kibuye prefectures or...the existence of the Interahamwe in Kigali, Ruhengeri, Gisenyi, and Kibuye prior to the death of President Habyarimana” was sufficiently specific to trigger the prosecution’s Rule 66(B) obligation to afford inspection.

35. The degree of specificity of items “material to the preparation of the defence” must take into account the degree of specificity of the indictment, since the indictment frames the issues in the case. A description of items material to the preparation of the defence of an accused charged with the murder of a single individual at a specified time and place will be narrower than a description of items material to the preparation of the defence of an accused charged with any crime committed by one of thousands of “Interahamwe” throughout Rwanda.

36. The latter is precisely the situation in Mr. Nzirorera’s case. The indictment does not limit the crimes for which he is alleged to be responsible to any individual perpetrator, victim, date, or location. He is simply alleged to be responsible for all crimes of the “Interahamwe” within Rwanda. During the prosecution case, the Trial Chamber denied on some 47 occasions, defense motions to exclude evidence on the grounds that the acts had not been specified in the indictment.²⁴

37. In that context, items in the possession of the prosecution which deal with the acts and conduct of the Interahamwe throughout Rwanda are material to the preparation of Mr. Nzirorera’s defence. He has to defend against all such acts. His request, which limited the documents to those obtained from the government of Rwanda and to acts in four of the 11 prefectures in Rwanda, was sufficiently specific in the context of the case he has to meet.

38. Similarly, the existence of the Interahamwe structure of the MRND party in the prefectures is a disputed issue of fact in the case. Therefore, items which show the existence of the Interahamwe are material to the preparation of the defence. Mr. Nzirorera’s request, which limited the documents to those obtained from the government

²⁴ See *Joseph Nzirorera’s Motion to Exclude Evidence of Material Facts Not Charged in the Indictment* (7 January 2008)

of Rwanda and to four of the 11 prefectures in Rwanda, was sufficiently specific in the context of the case he has to meet.

39. In addition, the prosecution has interpreted its disclosure obligations very narrowly throughout this case.²⁵ Therefore, in order to obtain the material he is entitled to, Mr. Nzirorera is constantly required to guess at what the prosecution is hiding up its sleeve. In this case, disclosure has become a carnival game in which Mr. Nzirorera, with a blindfold over his eyes, is required to throw darts at a target. Under the prosecution's view, unless he hits the center target exactly, it will not disclose anything to him.

40. The disputed document in this case is a perfect example. It is material to the preparation of the defence on its face. It is written by a person Mr. Nzirorera is charged with ordering to be killed. It names Mr. Nzirorera as the leader of a militia in his native commune. It names three people who the prosecution claims were members of the Interahamwe, two of whom are relatives of Mr. Nzirorera. Any responsible prosecutor looking at the document would immediately recognize that such a document is material to the preparation of the defence. Instead, the prosecution in Mr. Nzirorera's case hid the document for 7 years, finally springing it upon the MRND President for Mukingo commune who, as a defence witness, disputed the existence of Interahamwe in that commune.

41. The Appeals Chamber should not countenance such gamesmanship. It is contrary to the interests of justice and to a fair trial.

42. In the *Bagosora* case, the Appeals Chamber held that a request for all statements of prospective defence witnesses and Gacaca materials about such witnesses were sufficiently specific to trigger the prosecution's Rule 66(B) obligation.²⁶ Therefore, descriptions of categories of documents are permissible when evaluating the specificity of a request under Rule 66(B).

43. Trial Chambers of the ICTR and ICTY have also found requests for categories of documents, such as pertaining to a geographical area (Butare prefecture)²⁷ and for

²⁵ See *Joseph Nzirorera's Motion for Mistrial at the Close of the Prosecution's Case* (7 January 2008)

²⁶ *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence Motion for Disclosure Under Rule 66(B) of the Rules* (21 February 2007) at paras. 8-9

²⁷ *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Arsene Shalom Ntahobali's Motion for Disclosure of Documents* (31 January 2006) at para. 26

immigration records of defence witnesses²⁸, or statements and prior testimony which mention the accused²⁹ to be sufficient to trigger the prosecution's obligation under Rule 66(B).

44. The Trial Chamber's concern for the burden upon the prosecution in having to search for all documents (1) received from the Rwandan government; (2) dealing with four prefectures; and (3) containing information pertaining to acts or existence of the Interahamwe, was misplaced. A restaurant with a big menu is expected to bear the burden of requests for any item on that menu. Likewise, having drafted its indictment so that it can choose at any time during the trial from a vast menu of acts committed by the Interahamwe, the prosecution can hardly complain when asked to disclose information from various items on that vast menu.

45. The Trial Chamber incorrectly interpreted governing law when deciding that the prosecution was relieved from producing the Karekezi letter because Mr. Nzirorera's second request was too broad. Its decision should be reversed on that basis as well, if necessary.

Conclusion

46. The Trial Chamber erred in allowing the prosecution to ambush Mr. Nzirorera and his witness by withholding a document which was clearly material to the preparation of the defence and which it had in its possession for more than 7 years. Its conclusion that there is no continuing obligation of disclosure under Rule 66(B), and that the request of Mr. Nzirorera was insufficiently specific, treated disclosure as a game, rather than an essential ingredient to a fair trial. Its decision should be reversed and the matter remanded to the Trial Chamber for imposition of an appropriate remedy.

²⁸ *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

²⁹ *Prosecutor v Seselj*, No. IT-03-67-PT, *Decision on Form of Disclosure* (4 July 2006) at para. 16, 18