

ICTR-98-44-T
28-7-2008
(36815-36808)

36815
JMP

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: 28 July 2008

JUDICIAL RECORDS ARCHIVE
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THE PROSECUTOR

v.

JOSEPH NZIRORERA

REPLY BRIEF:
JOSEPH NZIRORERA'S ELEVENTH NOTICE OF
RULE 68 VIOLATION AND MOTION FOR STAY
OF PROCEEDINGS

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 Ndirumpatse

1. Joseph Nzirorera has moved for a stay of proceedings after discovering fresh violations of Rule 68 by the prosecution. On 24 July 2008, the prosecution filed its *Prosecutor's Response to Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings*. Mr. Nzirorera now replies.

Witness BRA-1

2. The prosecution contends that in 2007 it disclosed the portion of Witness BRA-1's closed session testimony in which he contradicted Prosecution witness XXQ.¹ Mr. Nzirorera has now verified this to have been the case. Although the disclosure was not complete, Mr. Nzirorera withdraws his motion as to Witness BRA-1. It does not present a clear violation of Rule 68.

Witness ALL-42

3. The prosecution appears to offer several defences to the claim that it violated Rule 68 as to the closed session testimony of Witness ALL-42.

The "Better Late than Never" Defence

4. The prosecution claims that the Rule was not violated because it did finally make this disclosure in July 2008; almost two years after the transcript of Witness ALL-42's testimony came into its possession.²

5. This contention is belied by the very text of Rule 68 itself, which requires the disclosure to be made "as soon as practicable". The prosecution has not offered any explanation as to why it was not practicable to disclose the material in 2006 when it could have been used to cross examine the prosecution's witnesses who were testifying about the acts and statements of Jean Pierre Turatsinze and Robert Kajuga.

¹ Response at paras 6-7

² Response at para. 3

6. More importantly, the prosecution only disclosed the exculpatory material after it had been caught withholding it. Its July 2008 disclosure was not of its own initiative, but in response to Mr. Nzirorera’s specific request after discovering the prosecution had withheld exculpatory evidence.

7. To claim that the Rule was not violated because the prosecution fessed up after being caught is absurd. Can a taxpayer contend he did not violate the law prohibiting failure to pay taxes by writing a check after he is arrested for tax evasion? Can an ICTR defence team simply fail to show up for a trial session and contend it was not in contempt by simply showing up for the following session?

8. The fact is that the prosecution violated Rule 68 by failing to disclose the testimony of Witness ALL-42 for almost two years.

The “Too Burdensome” Defence

9. The prosecution claims that it was unable to comply with its Rule 68 obligation in this case because of the volume of material and the effort required to determine if material is exculpatory.³

10. The prosecution notably fails to details what procedures it has put in place to identify exculpatory evidence, particularly closed session testimony from other cases. The Appeals Chamber instructed it to put such procedures in place in 2005 when it granted the prosecution “office-wide” access to defence witness information so that the prosecution could fulfill its Rule 68 requirements.⁴

³ Response at para. 8
⁴ *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *Decision on Interlocutory Appeals of Decision on Witness Protection Orders* (6 October 2005) at para. 44

11. The prosecution obviously put no such procedures in place, even after it was found by the Appeals Chamber to have violated Rule 68 by failing to disclose closed session testimony from this case and the *Muhimana* case to Eliezer Niyitegeka.⁵

12. The concession by the prosecution that it is unable to provide disclosure of exculpatory evidence because of the burdens of locating and identifying it is the most potent argument for a stay of proceedings. Since, by its own admission, the prosecution is unwilling and unable to systematically review and identify exculpatory evidence from its holdings, the prosecution can be expected to have other Rule 68 material in its possession which it has not disclosed. That is the very reason why a stay is needed.

13. Mr. Nzirorera does not accept that the failure to disclose the testimony of Witness ALL-42 was an oversight. The witness specifically mentioned Mathieu Ngirumpatse in his testimony.⁶ His allegations that Jean Pierre Turatsinze was an RPF operative were made just two weeks before the prosecution called Frank Claeys as a witness in Mr. Nzirorera's case for the sole purpose of relating what Turatsinze told him.

14. The Senior Trial Attorney from Mr. Nzirorera's case has worked closely with the *Bagosora* trial team, sitting at the prosecution counsel table in that case on 5 and 6 July 2005 when Mr. Ngirumpatse testified in that case⁷, 16 and 17 March 2006 and 12 June 2006 when Joseph Nzirorera testified⁸, and on 16 June 2006 when Edouard Karemera testified.⁹

⁵ *Niyitegeka v Prosecutor*, No. ICTR-96-14-T, *Decision on Third Request for Review* (23 January 2008) at para. 27

⁶ Transcript of 8 November 2006 @ 38-39; Transcript of 9 November 2006 @ 1-5

⁷ Exhibits P61 and P62

⁸ Exhibits P69 and 70

⁹ Exhibit P51

15. Witness G, who ALL-42 testified was also working for the RPF, was also a common witness in both the *Bagosora* case and the case of Mr. Nzirorera. His testimony was led by the same prosecutor in both cases. And given the prominence of the role of the Interahamwe in the case against Mr. Nzirorera, it strains credulity to believe that the prosecution trial team in his case was unaware that a witness in the *Bagosora* trial had claimed that four of the top leaders of the Interahamwe—Kajuga, Ruhumuliza, Witness G, and Turatsinze—were working for the RPF.

16. Mr. Nzirorera further notes that five prosecution witnesses testified in both the *Bagosora* and *Karempera* cases, requiring a high degree of coordination between the two prosecution teams.¹⁰

17. Therefore, it seems likely that a conscious decision was made not to disclose this exculpatory material to Mr. Nzirorera. Either way, the violation of Rule 68 is inexcusable.

The “No Harm No Foul” Defence

18. The prosecution claims that Mr. Nzirorera has misled the Trial Chamber “by lumping instances where the Trial Chamber has found a breach with instances where it has not.”¹¹

19. The statistics speak for themselves. The number of times the Trial Chamber¹²

¹⁰ Witnesses G, T, ZF, XBM, and Frank Claeys

¹¹ *Response* at para. 10

¹² Transcript of 3 October 2005 @ 18; Transcript of 16 February 2006 @ 4, 8; Transcript of 24 May 2006 at 36; *Decision on Joseph Nzirorera's Notices of Rule 68 Violations and Motions for Remedial and Punitive Measures* (25 October 2007); Transcript of 4 July 2006 @ 32; Transcript of 5 July 2006 @ 2; *Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution* (19 October 2006) at para. 17; *Decision on Joseph Nzirorera's Sixth, Seventh, and Eighth Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures* (29 November 2007) at para. 12; *Decision on Joseph Nzirorera's Motion to Exclude the Testimony of Witness AMM* (15 June 2007); *Decision on Defence Motions to Exclude the Testimony of Witness QBG* (11 July 2007); Transcript of 10 October 2007 @ 7; *Oral Decision on Joseph Nzirorera's Ninth Notice of Violation of Rule 68 and Motion for Remedial and*

or Appeals Chamber¹³ has found that the prosecution in Mr. Nzirorera’s case failed to comply with its disclosure obligations is **14!**

20. There is no reason to even consider the 30+ other instances where the prosecution has been shown to have failed to disclose material which it was obligated to disclose.¹⁴ The fourteen breaches found by the Chambers is, by far, the highest recorded total of established disclosure violations in the history of international criminal law jurisprudence.

21. The prosecution claims that Mr. Nzirorera is not prejudiced by its failure to disclose Witness ALL-42’s testimony because he has not yet started presenting his case-in-chief.¹⁵ However, it has completely ignored Mr. Nzirorera’s assertion in his motion that the failure to disclose the testimony “prevented him from using the information in his cross-examination of witnesses who testified to statements and activities of Jean Pierre Turatsinze, such as Frank Claeys, Witness HH, and Witness AWD” and “from using the information in his examination of witnesses who testified to the activities of Robert Kajuga such as Witness HH, and Witness AJY.”¹⁶

22. All of these witnesses testified after 10 November 2006 when Witness ALL-42 gave his testimony in the *Bagosora* trial. Mr. Nzirorera has been prejudiced by the prosecution’s suppression of that favorable evidence

Punitive Measures (Transcript of 21 November 2007 @ 10-11); *Decision on Joseph Nzirorera’s Seventeenth Notice of Rule 66(A)(ii) and Motion for Remedial and Punitive Measures* (20 February 2008) at para. 10; *Decision on Reconsideration of Joseph Nzirorera’s Tenth Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures* (14 April 2008)

¹³ *Decision on Joseph Nzirorera’s Appeal from Decision on 10th Rule 68 Motion* (14 May 2008) at para. 13

¹⁴ *Joseph Nzirorera’s Motion for Mistrial at the Close of the Prosecution Case* (7 January 2008)

¹⁵ *Response* at para. 11

¹⁶ *Motion* at para. 19

The “Lubanga Case is Different” Defence

23. The prosecution lamely seeks to distinguish the International Criminal Court’s decision in *Lubanga* by asserting that the disclosure violation there involved materials obtained from third parties with assurances of confidentiality.¹⁷

24. However, the reason why the Trial Chamber in *Lubanga* stayed the proceedings was because the accused did not receive all of the exculpatory material to which he was entitled and thus it could not provide him with a fair trial. That is exactly the situation here.

25. The failure to disclose exculpatory material in Mr. Nzirorera’s case is not due to the prosecution’s commitments to third parties, but to the prosecution’s win-at-all-costs mentality in which it actively suppresses, or fails to diligently search for, exculpatory material.

26. Mr. Nzirorera has repeatedly caught the prosecution in disclosure violations in his case. As in *Lubanga*, the Trial Chamber simply cannot be assured that all exculpatory material has been or will be disclosed to Mr. Nzirorera. The result should be the same—a stay of proceedings until those assurances are in place.

Conclusion

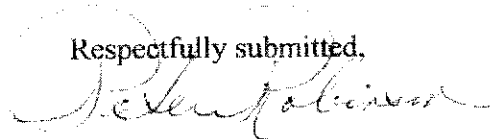
27. The prosecution failed to disclose evidence that the leaders of the MRND youth wing (including one of its own witnesses), alleged to be responsible for the most serious crimes during the genocide, were in fact controlled, not by the accused, but by the RPF. This is fundamental suppression of exculpatory evidence which goes to the very heart of the prosecution’s case against Mr. Nzirorera.

¹⁷ *Response* at para. 12

28. The prosecution's response to this motion is typical of its approach to disclosure in this case. Instead of acknowledging its failure to disclose the clearly exculpatory material, the prosecutor has dissembled. Significantly, it has stated that it is unable and unwilling to fully comply with Rule 68 because of the scope of its holdings and the manpower needed to search them.

29. Mr. Nzirorera respectfully requests that the Trial Chamber find that there has been a failure to comply with Rule 68 in connection with the testimony of Witness ALL-42, and put a stop to this unfair trial.

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

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

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Case Name:	The Prosecutor vs. Joseph Nzirorera		Case Number: ICTR-98-44-T	
Dates:	Transmitted: 26 July 2008		Document's date: 28 July 2008	
No. of Pages:	8	Original Language:	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
Title of Document:	REPLY BRIEF: JOSEPH NZIRORERA'S ELEVENTH NOTICE OF RULE 68 VIOLATION AND MOTION FOR STAY OF PROCEEDINGS			
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