



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

2131/H

ICTR-98-44-AR73.13

14th May 2008

~~{2131/H - 2124/H}~~

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

Decision of: 14 May 2008

ICTR Appeals Chamber
Date: 14 May 2008
Action: R.J.
Copied To: concerned Judges,
Parties, ST/OS, LES, ALB, L.S.

Archives

THE PROSECUTOR

v.

**Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-AR73.13

JUDICIAL RECORDS SECTION
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DECISION ON "JOSEPH NZIRORERA'S APPEAL FROM DECISION ON TENTH RULE 68 MOTION"

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion" filed on 11 March 2008 ("Motion" and "Appellant", collectively). The Prosecution filed its Response opposing the Motion on 20 March 2008.¹ The Appellant filed his Reply on 26 March 2008² and a Supplemental Submission on 16 April 2008.³

A. Background

2. This is an appeal against the "Decision on Joseph Nzirorera's Tenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures" of 5 February 2008 ("Impugned Decision"). In the Impugned Decision, the Trial Chamber *inter alia* held that a certain document from the United States Embassy in Kigali ("Document 2") was not exculpatory and that it "has found no *prima facie* showing that the Prosecutor has violated Rule 68 (A)" of the Rules of Procedure and Evidence of the Tribunal ("Rules").⁴ On 4 March 2008, the Trial Chamber granted certification to appeal this finding.⁵ On 16 April 2008, the Trial Chamber partially reconsidered the Impugned Decision in relation to another document which originated from the State Department of the United States and held that the Prosecution had violated Rule 68 (A) of the Rules by not disclosing this document to the Appellant.⁶

B. Submissions

3. The Appellant requests reversal of the Impugned Decision and a return of this matter to the Trial Chamber for the determination of an appropriate remedy.⁷ He argues that in reaching the Impugned Decision, the Trial Chamber misinterpreted Rule 68 of the Rules,⁸ rendering a decision contrary to the letter and spirit of the rule. He further claims that the Impugned Decision is contrary

¹ Prosecutor's Response to Joseph Nzirorera's Interlocutory Appeal from Decision on Tenth Rule 68 Motion, 20 March 2008 ("Response").

² Reply Brief: Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion, 26 March 2008 ("Reply").

³ Supplemental Submission: Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion, 16 April 2008 ("Supplemental Submission"). The Appeals Chamber will not consider the Supplemental Submission as the Rules do not provide such a filing.

⁴ Impugned Decision, paras. 16-23, 37.

⁵ Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on Tenth Rule 68 Motion, 4 March 2008 ("Decision Granting Certification").

⁶ Decision on Motion for Partial Reconsideration of the Decision on Joseph Nzirorera's Tenth Notice of Rule 68 Violation, 16 April 2008.

⁷ Motion, para. 36.

⁸ Motion, para. 35.

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to decisions of the Appeals Chamber in which the application of the rule has been considered.⁹ He argues that the Trial Chamber erred as a *matter of law* in holding that the Prosecution may withhold exculpatory information from disclosure under Rule 68(A) of the Rules, where such information is “mixed” with inculpatory information”.¹⁰ The Appellant thus claims that the Impugned Decision creates jurisprudence that will detrimentally affect the fairness of all trials.¹¹

4. The Appellant contends that the Trial Chamber incorrectly interpreted the law on what constitutes exculpatory material.¹² In this regard, he submits that the Trial Chamber misunderstood the “fundamental purpose” of Rule 68 of the Rules and that the Trial Chamber considered Document 2 as if the Defence were seeking to admit it into evidence as an exhibit.¹³ The Appellant also submits that the Trial Chamber’s approach contravenes the express language of Rule 68, which requires disclosure of any material suggesting the innocence of an accused or affecting the credibility of the Prosecution’s evidence.¹⁴ He argues that Rule 68 does not envision a balancing test, as employed by the Trial Chamber, but rather broad disclosure of any material that could conceivably assist the accused.¹⁵

5. In response, the Prosecution contends that the Motion should be dismissed in its entirety,¹⁶ as the Appellant has advanced no cogent argument to support the contention that the Trial Chamber committed a legal error in rendering the Impugned Decision.¹⁷ It submits that the Trial Chamber did not hold that the Prosecution may withhold exculpatory information from disclosure under Rule 68(A) of the Rules where such information is “mixed” with inculpatory information.¹⁸ The Prosecution states that the Trial Chamber ruled that the Prosecution did not violate its disclosure obligations, as Document 2 was not exculpatory material deliberately withheld, as implied by the Appellant.¹⁹ The Prosecution claims that Document 2 was made available to the Defence as “relevant material” through the Electronic Disclosure Suite, under Rule 68(B) of the Rules.²⁰

⁹ Motion, para. 35.

¹⁰ Motion, paras. 3, 10.

¹¹ Motion, para. 35.

¹² Motion, paras. 14, 15.

¹³ Motion, para. 22.

¹⁴ Motion, para. 31.

¹⁵ Motion, para. 31.

¹⁶ Response, paras. 6, 25.

¹⁷ Response, para. 6.

¹⁸ Response, para. 6.

¹⁹ Response, para. 10.

²⁰ Response, para. 10.

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C. Standard of Review

6. Under Rule 68(A) of the Rules, the Prosecution is obliged to disclose, in good faith, exculpatory and other relevant material to an accused.²¹ In the Impugned Decision, the Trial Chamber ruled that the Prosecution did not violate this obligation in relation to a particular Decision.²² A discretionary rule, to which the Appeals Chamber has not previously referred, the Impugned appeal is filed against a discretionary decision of a Trial Chamber, the issue on appeal is not whether the decision was correct, in the sense that the Appeals Chamber agrees with it, but rather whether the Trial Chamber has correctly exercised its discretion in rendering the decision.²⁴ Consequently, the Trial Chamber's exercise of discretion will only be reversed where it is demonstrated that the Trial Chamber committed a discernible error in rendering the Impugned Decision, based on an incorrect interpretation of the governing law, a patently incorrect conclusion of fact, or where the Impugned Decision was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.²⁵

D. Discussion

7. The Appellant's contention is that the Trial Chamber erred in law when it held in the Impugned Decision that the Prosecution may withhold exculpatory information from disclosure under Rule 68(A) of the Rules, where such information is "mixed' with inculpatory information".²⁶ The Appeals Chamber notes that the Trial Chamber indicated that "it only applied its principle regarding mixed exculpatory and incriminatory information to decide the admissibility of one of the seven documents at issue in the [I]mpugned [D]ecision, [Document 2]". It concluded therefore that

²¹ *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Motions Relating to the Appellant Hassan Ngeze's and the Prosecution's Requests for Leave to Present Additional Evidence of Witnesses ABC1 and EB, 27 November 2006, para. 11.

²² See Impugned Decision, paras. 21-23.

²³ *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008 ("*Karemera et al.* Decision of 23 January 2008"), para. 7 referring to *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.10, Decision on Nzirorera's Interlocutory Appeal Concerning his Right to be Present at Trial, 5 October 2007, para. 7 ("*Karemera et al.* Decision of 5 October 2007"); *The Prosecutor v. Élie Ndayambaje et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeals against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List, 21 August 2007 ("*Ndayambaje et al.* Decision of 21 August 2007").

²⁴ *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.5, Decision on Vojislav Šešelj's Interlocutory Appeal Against the Trial Chamber's Decision on Form of Disclosure, 17 April 2007, para. 14.

²⁵ *Karemera et al.* Decision of 23 January 2008, para. 7 referring to *Karemera et al.* Decision of 5 October 2007, para. 7; *Ndayambaje et al.* Decision of 21 August 2007, para. 10.

²⁶ Motion, paras. 3, 10.

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"certification of this issue will be limited to the Chamber's decision regarding that document only".²⁷

8. The Appellant submits that Document 2 contains a portion of information that is exculpatory, as it contradicts the Prosecution's evidence that the MRND and CDR parties conspired together to exterminate Tutsis²⁸ and states that neither the Prosecution nor the Trial Chamber disputed that this portion of information is exculpatory. The Prosecution pointed to other parts of Document 2 which it claimed were incriminatory,²⁹ while the Trial Chamber merely concluded that there was "no *prima facie* showing that Document 2 contains exculpatory information".³⁰ The Appellant argues that the Trial Chamber evaluated the information in Document 2 as if the Defence was seeking to admit the document as an exhibit,³¹ even though Rule 68 of the Rules is not an admissibility provision but a disclosure provision.³² He asserts that the Trial Chamber's approach is at odds with that employed by the Appeals Chamber in relation to exculpatory evidence.³³

9. The Appeals Chamber notes that Rule 68(A) of the Rules imposes an obligation on the Prosecution to disclose to the Defence, as soon as practicable, any material which, in the actual knowledge of the Prosecution, may suggest the innocence or mitigate the guilt of an accused or affect the credibility of the evidence led by the Prosecution in that particular case. The determination of which materials are subject to disclosure under this provision, is a fact-based enquiry made by the Prosecution.³⁴ If an appellant wishes to show that the Prosecution is in breach of its disclosure obligation, he or she must (1) identify specifically the material sought; (2) present a *prima facie* showing of its probable exculpatory nature; and (3) prove that the material requested is in the custody or under the control of the Prosecution.³⁵

²⁷ Decision Granting Certification, para. 7.

²⁸ Motion, paras. 11, 12.

²⁹ Motion, paras. 12, 13.

³⁰ Impugned Decision, para. 23.

³¹ Motion, para. 22.

³² Motion, para. 23.

³³ Motion, paras. 24-30.

³⁴ *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006 ("Nahimana et al. Decision of 8 December 2006"), para. 34, referring to *inter alia* *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion Requesting that the Prosecution Disclosure of the Interview of Michel Bagaragaza Be Expunged from the Record, 30 October 2006, para. 6; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para. 16.

³⁵ *Nahimana et al.* Decision of 8 December 2006, para. 34.

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10. In the present case, the Appellant specifically identified the material sought and the Prosecution conceded before the Trial Chamber that Document 2 was in its possession.³⁶ However, the Prosecution indicated that the material sought was not exculpatory.³⁷

11. The Appeals Chamber notes that the Trial Chamber considered the portion of information in Document 2 referred to by the Appellant but concluded that "Document 2, when read in its entirety, does not tend to suggest that there was no relationship between the CDR and MRND parties".³⁸ In arriving at this conclusion, the Trial Chamber reasoned that when a document contains both exculpatory and incriminating information on the same issue, all the information on that particular issue "must be read in context".³⁹ It further reasoned that "only information, that, when read in its entirety tends to be exculpatory, must be disclosed under Rule 68(A) [of the Rules]."⁴⁰ Consequently, for the Trial Chamber, Document 2 did not suggest the innocence or mitigate the alleged guilt of the Appellant or affect the credibility of the Prosecution's case, pursuant to Rule 68(A) of the Rules. The Appeals Chamber will consider whether the Trial Chamber committed a discernible error in its reasoning and conclusion.

12. The Appeals Chamber agrees with the Appellant's contention that Rule 68 of the Rules, as a rule of disclosure rather than admissibility of evidence, imposes a categorical obligation to disclose any document or witness statement that contains exculpatory material. Consequently, this obligation is not subject to a balancing test. Because the Trial Chamber applied an incorrect legal standard, it by definition committed a discernible error. The Appeals Chamber notes that the Trial Chamber earlier considered alleged violations of Rule 68(A) of the Rules,⁴¹ and adopted the reasoning from a decision in the *Bagosora et al.* case.⁴² In that case, the Trial Chamber, when considering whether certain witnesses' statements contained exculpatory material, ruled that:

whether [the] 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.⁴³

The Appeals Chamber considers this to be the correct standard for assessing whether certain material is to be considered as exculpatory within the meaning of Rule 68(A) of the Rules. In this

³⁶ Impugned Decision, para. 16.

³⁷ Impugned Decision, paras. 3, 5.

³⁸ Impugned Decision, para. 23.

³⁹ Impugned Decision, para. 20.

⁴⁰ Impugned Decision, para. 20.

⁴¹ See *The Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Notice of 25 October 2007").

⁴² *Karemera et al.* Decision of 25 October 2007, para. 6, referring to *The Prosecutor v. Bagosora et al.*, Case 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 ("*Bagosora et al.* Decision") para. 5.

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case, the Trial Chamber, by reasoning that exculpatory material in a document could be rendered nugatory by the existence of inculpatory material, applied an incorrect legal standard resulting in an abuse of its discretion.

13. The only remaining question concerns whether Document 2, in fact, contains exculpatory material. As the Trial Chamber itself recognized, Document 2 contains some information which suggests that there is no relationship between the MRND and CDR parties. This is particularly relevant to the Appellant in view of the Indictment *inter alia* alleging that the Appellant participated in a joint criminal enterprise with a number of persons including the leader of the CDR party, Jean-Bosco Barayagwiza, and that he also committed conspiracy to commit genocide with Jean-Bosco Barayagwiza.⁴⁴ Furthermore, the Appellant asserts that Prosecution witnesses have testified to an agreement between the MRND and CDR parties, and that these parties had a secret pact to persecute Tutsis.⁴⁵ Document 2 reports that in 1992, leaders of both the MRND and CDR parties contended that these parties were separate with totally different ideologies and that both parties were critical of each other.⁴⁶ If the Trial Chamber had applied the correct legal standard the Appeals Chamber is satisfied that it would have held that Document 2 contains exculpatory material and is subject to disclosure pursuant to Rule 68(A) of the Rules.

14. On the basis of the foregoing, the Appeals Chamber holds that the Trial Chamber erred in finding that there was no *prima facie* showing that Document 2 contained exculpatory information and that by not disclosing it, the Prosecution had not violated Rule 68(A) of the Rules. Consequently, this matter is remitted to the Trial Chamber to determine whether the Appellant is prejudiced by the Prosecution's violation of Rule 68(A) of the Rules and the appropriate remedy, if any.

E. Disposition

15. For the aforementioned reasons, the Appeals Chamber **GRANTS** the appeal filed by Joseph Nzirorera; **REVERSES** the Impugned Decision in part; and **REMITTS** the matter to the Trial Chamber to determine whether Joseph Nzirorera is prejudiced by the Prosecution's violation of Rule 68(A) of the Rules and an appropriate relief, if required.

⁴³ *Bagosora et al.* Decision, para. 5.

⁴⁴ See Amended Indictment of 3 April 2008, paras. 6(iii), 23.

⁴⁵ Motion, paras. 7-9.

⁴⁶ Document 2, pp. 7-8.

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Done in English and French, the English text being authoritative.

Done this 14th day of May 2008,
at The Hague,
The Netherlands.



Judge Fausto Pocar,
Presiding



[Seal of the Tribunal]

