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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-98-44-AR73.18
18th May 2010
{3479/H – 3467/H}

IN THE APPEALS CHAMBER

Before: **Judge Patrick Robinson, Presiding**
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron
Judge Carmel Agius

Registrar: **Mr. Adama Dieng**

Decision of: **17 May 2010**

ÉDOUARD KAREMERA
MATTHIEU NGIRUMPATSE
JOSEPH NZIRORERA

v.

THE PROSECUTOR

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

PUBLIC

DECISION ON JOSEPH NZIRORERA'S APPEAL FROM DECISION ON ALLEGED RULE 66 VIOLATION

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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 an interlocutory appeal filed by Joseph Nzirorera on 15 February 2010 ("Appeal")[1] against Trial Chamber III's ("Trial Chamber") oral decision on "Joseph Nzirorera's 27th Notice of Rule 66 Violation" of 24 November 2009 ("Impugned Decision").[2] On 22 February 2010, the Prosecution filed its response,[3] to which Nzirorera replied on 24 February 2010.[4]

A. Background

2. In his "Request for Disclosure No. 4" of 14 June 2002 ("June 2002 Inspection Request") pursuant to Rule 66(B) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), Nzirorera requested the Prosecution to provide him with a copy "of all documents furnished to the [Prosecution] by the [G]overnment of Rwanda that [are] intended to be used by the Prosecution at trial [...]."[5]

3. In the course of the proceedings the Prosecution permitted the inspection of certain materials obtained from the Government of Rwanda.[6]

4. Nzirorera's trial began on 27 November 2003, but a newly constituted Trial Chamber re-heard the case, beginning on 19 September 2005.[7] On 24 May 2005, the newly constituted Trial

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[1] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.18, Joseph Nzirorera's Appeal from Decision on 27th Rule 66 Violation, 15 February 2010.
[2] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, T. 24 November 2009 pp. 1-3.
[3] Prosecutor's Response to Joseph Nzirorera's Interlocutory Appeal of Trial Chamber III's Decision on 27th Rule 66 Violation, 22 February 2010 ("Response").
[4] Reply Brief: Joseph Nzirorera's Appeal From Decision on 27th Rule 66 Violation, 24 February 2010 ("Reply").
[5] Letter/Fax of 14 June 2002 from Nzirorera's lead counsel Mr. Peter Robinson to Prosecution Senior Trial Attorney Mr. Ken Fleming, attached to the Appeal as Annex "B". The June 2002 Inspection Request supplemented previous written requests for inspection made by Defence Counsel. *See* Response, paras. 4, 5.
[6] *See* Response, para. 9. The Prosecution avers that inspection was granted pursuant to and within the parameters of a decision of the Trial Chamber (*The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on the Defence Motion for Disclosure of Items Deemed Material to the Defence of the Accused, 29 September 2003, para. 14). *See* Response, para. 8. The Prosecution asserts that it responded to the June 2002 Inspection Request indicating that documents in the purview of the request had been disclosed. *See The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, T. 23 November 2009 p. 3.
[7] *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR15*bis*.2, Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 28 September 2004; *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR15*bis*.2, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 22 October 2004, para. 72. *See also The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-PT, Decision on Joseph Nzirorera's Motion for Order Finding Prior Decisions to be of "no Effect", 24 May 2005 ("Decision on Motion"), paras. 1-3.

Chamber found that any decisions delivered by the Bench in the first proceedings and relating to, *inter alia*, evidentiary matters, shall have no further effect.[8]

5. The Prosecution closed its case on 4 December 2007. Nzirorera's defence case commenced on 19 October 2009.[9]

6. On 29 October 2009, Nzirorera sent another letter to the Prosecution, requesting the inspection of "[a]ll documents obtained from the [G]overnment of Rwanda, its agencies, departments, or subdivisions, or its Gacaca jurisdictions" that address certain specified issues material to his defence.[10]

7. On 19 November 2009, the Prosecution disclosed during trial a letter of 30 November 1993 from Aloys Karekezi to the Prime Minister of Rwanda ("Karekezi Letter")[11] with the intention of using it during the cross-examination of Nzirorera Defence witness Jean-Damascene Niyoyita ("Niyoyita"). The cross-examination commenced on the same day.[12]

8. On 23 November 2009, Nzirorera filed "Joseph Nzirorera's 27th Notice of Rule 66 Violation"[13] ("Notice"), submitting that the Prosecution had violated Rule 66(B) of the Rules by failing to disclose or allow inspection of the Karekezi Letter pursuant to his June 2002 and October 2009 Inspection Requests although it was material to the preparation of his defence.[14] Accordingly, Nzirorera requested that the Prosecution be precluded from using the Karekezi Letter during the trial proceedings.[15]

9. On 24 November 2009, the Trial Chamber issued the Impugned Decision, denying the Notice. In particular, it dismissed the June 2002 Inspection Request because it found that the Karekezi Letter was not in the custody of the Prosecution at the time the request was made, and concluded that the Prosecution does not have an ongoing obligation under Rule 66(B) of the Rules

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[8] Decision on Motion, para. 9, *referring to The Prosecutor. v. Édouard Karemera et al.*, Case No. ICTR-98-44-PT, Decision on Severance of André Rwamakuba and Amendments of the Indictment, 7 December 2004.
[9] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, T. 4 December 2007 p. 52; T. 19 October 2009 p. 2.
[10] Letter of 29 October 2009 from Nzirorera's lead counsel Mr. Peter Robinson to the Prosecution Senior Trial Attorney ("October 2009 Inspection Request"), attached as Annex "C" to the Appeal. *See also* Response, para. 11.
[11] While the letter, dated "Kigali, 30 November 1993", is signed by Messrs. Aloys Karekezi, Gabriel Muvunyi, and Dieudonné Bizimungu, the parties as well as the Impugned Decision refer only to Karekezi. The Appeals Chamber will accordingly designate it as indicated above. According to the Impugned Decision, the Karekezi Letter "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". Impugned Decision, T. 24 November 2009 p. 1. A poor copy of the Karekezi Letter is attached to the Appeal as Annex "A".
[12] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, T. 19 November 2009 p. 22.
[13] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Joseph Nzirorera's 27th Notice of Rule 66 Violation, 23 November 2009.
[14] Notice, paras. 3-5. According to Nzirorera, the October 2009 Inspection Request "was successively renewed on 7, 14 and 21 November 2009 by e-mail following [a] Trial Chamber's ruling that there is no continuing obligation under Rule 66B [of the Rules]." Notice, fn. 2.

to allow the inspection of material received subsequent to an inspection request.[16] Further, it dismissed the October 2009 Inspection Request as impermissibly broad.[17]

10. On 9 February 2010, the Trial Chamber granted Nzirorera's application for certification to appeal the Impugned Decision with regard to the following findings: (i) the Prosecution does not have an ongoing obligation to produce materials for inspection under Rule 66(B) of the Rules pursuant to a request from the Defence which was made before the Prosecution came into possession of the material sought; and (ii) the June 2002 and October 2009 Inspection Requests could not have triggered an inspection obligation under Rule 66(B) because the requests were not sufficiently specific.[18]

B. Standard of Review

11. The Appeals Chamber recalls that decisions by Trial Chambers on disclosure are discretionary decisions to which the Appeals Chamber must accord deference.[19] In order to successfully challenge a discretionary decision, a party must demonstrate that the Trial Chamber has committed a discernible error resulting in prejudice to that party.[20] The Appeals Chamber will only overturn a Trial Chamber's discretionary decision where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[21]

C. Applicable law

12. Pursuant to Rule 66(B) of the Rules, the Prosecutor shall permit the Defence, upon request, to inspect documents and other records in his custody or control if these records (i) are material to the preparation of the Defence case; (ii) are intended for use by the Prosecution as evidence at trial; or (iii) were obtained from or belonged to the accused. If the Defence is not satisfied with the

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[15] Notice, para. 6.
[16] Impugned Decision, T. 24 November 2009 p. 2.
[17] *Id.*, p. 3.
[18] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on 27th Rule 66 Violation, 9 February 2010 ("Certification Decision"), paras. 3, 4, *deciding upon* Joseph Nzirorera's Application for Certification to Appeal Decision on 27th Rule 66 Violation, 1 December 2009.
[19] *See, e.g.*, *Gaspard Kanyarukiga v. The Prosecutor,* Case No. ICTR-02-78-AR73, Decision on Kanyarukiga's Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents, 19 February 2010, para. 9; *Prosecutor v. Radovan Karadžić,* Case No. IT-95-5/18-AR73.1, Decision on Appellant Radovan Karadžić's Appeal Concerning Holbrooke Agreement Disclosure, 6 April 2009 ("*Karadžić* Decision"), para. 14; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.13, Decision on "Joseph Nzirorera's Appeal From Decision on Tenth Rule 68 Motion", 14 May 2008 ("Second *Karemera* Decision"), para. 6.
[20] *Karadžić* Decision, para. 14, *referring to Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.3, Decision on Joint Defence Interlocutory Appeal Against Trial Chamber's Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims, 26 January 2009, para. 5.
[21] *Karadžić* Decision, para. 14; Second *Karemera* Decision, para. 6.

Prosecution's response to a request pursuant to Rule 66(B), it may request the Trial Chamber to order the inspection.

13. However, the Defence bears the burden of proving an alleged breach of the Prosecution's obligations pursuant to a request under Rule 66(B) of the Rules. It must therefore (i) demonstrate that the material sought is in the custody or control of the Prosecution; (ii) establish *prima facie* the materiality of the document sought to the preparation of the defence case; and (iii) specifically identify the requested material.[22]

D. Discussion

14. In his Appeal, Nzirorera submits that the Trial Chamber committed discernible errors on three grounds and requests that the Impugned Decision be reversed and the matter be remanded to the Trial Chamber for imposition of an appropriate remedy.[23] The Prosecution requests that the Appeal be dismissed.[24]

1. Whether the Prosecution was in Possession of the Karekezi Letter at the Time of the June 2002 Inspection Request

15. In its Impugned Decision, the Trial Chamber accepted the Prosecution's assertion that the Karekezi Letter came into its possession only in October 2002, well after its receipt of the June 2002 Inspection Request.[25]

16. Under his first ground of appeal, Nzirorera submits that the Trial Chamber erred in so concluding.[26] He asserts that the Prosecution bears the burden of establishing when the Karekezi Letter came into its possession and that it failed to satisfy this burden.[27] The Prosecution responds that the Trial Chamber correctly interpreted and applied the Appeals Chamber's jurisprudence in finding that the burden of proof was on Nzirorera.[28]

17. The Appeals Chamber notes that the question of who bears the burden of proof that the Prosecution was or was not in possession of the Karekezi Letter when it received the June 2002

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[22] *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-R68, Decision on Motion for Disclosure, 4 March 2010 ("*Kamuhanda* Disclosure Decision"), para. 14; *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 ("First *Karemera* Decision"), para 12. *See* also *The Prosecutor v. Théoneste Bagosora et al.*, Case 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 ("*Bagosora* Decision"), paras. 10, 11.
[23] Appeal, paras. 13, 46.
[24] Response, para. 53.
[25] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, T. 23 November 2009 p. 3. *See also* Impugned Decision, T. 24 November 2009 p. 2.
[26] Appeal, para. 13.
[27] Appeal, paras. 16, 17, 19; Reply, paras. 6, 9.
[28] Response, para. 19.

Inspection Request lies outside the explicit scope of the appeal as certified by the Trial Chamber.[29] However, in order to determine whether the June 2002 Inspection Request could trigger an inspection obligation pursuant to Rule 66(B) of the Rules,[30] it is necessary to consider this issue. Further, as the Prosecution explicitly responded to Nzirorera's contention in this respect[31] and considering that an immediate resolution of this predominantly legal question may materially advance the proceedings, the Appeals Chamber will entertain the issue on the merits.

18. In the present case, the Prosecution asserted, and the Trial Chamber accepted,[32] that it came into possession of the Karekezi Letter only in October 2002, months after the June 2002 Inspection Request.[33] In the Tribunal's practice, the Prosecution is presumed to discharge its disclosure obligations in good faith.[34] Accordingly, the Trial Chamber was entitled to rely on the Prosecution's representation that it only came into possession of the Karekezi Letter in October 2002.[35] On appeal, Nzirorera bears the burden of showing that the Trial Chamber's decision was based on a patently incorrect conclusion of fact. Instead, Nzirorera speculates that the Karekezi Letter "may well have come" into the Prosecution's possession prior to the time of the June 2002 Inspection Request without submitting any evidence to support his contention.[36]

19. In light of the foregoing, the Appeals Chamber finds that Nzirorera has failed to demonstrate that the Trial Chamber abused its discretion in finding that the Karekezi Letter was not in the custody or control of the Prosecution at the time of the June 2002 Inspection Request. Accordingly, Nzirorera's first ground of appeal is dismissed.

2. Whether the Prosecution has a Continuing Obligation to Afford Inspection of Rule 66(B) Material

20. In the Impugned Decision, the Trial Chamber found "that the Prosecution does not have an ongoing obligation under Rule 66(B) [of the Rules] to disclose all information that comes into its

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[29] Certification Decision, para. 3.

[30] The Appeals Chamber observes that the Certification Decision explicitly encompasses "the *requests* Nzirorera previously made" (emphasis added) in the ambit of the issues certified to appeal. *See* Certification Decision, para. 3.

[31] *See* Response, paras. 19-24.

[32] Impugned Decision, T. 24 November 2009 p. 2.

[33] *See* Response, para. 22, *referring to The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, T. 23 November 2009 p. 3. *See also* Response, Annex A.

[34] *Kamuhanda* Disclosure Decision, para. 14; *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. 17; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement"), para. 183.

[35] The Appeals Chamber notes that the Prosecution's contention and documentation indicating that the Karekezi Letter was entered into its database only on 9 October 2002 (*see* Response, para. 22 and Annex A), on the face of it, support the veracity of its statement.

[36] Appeal, para. 17. The Appeals Chamber notes Nzirorera's contention that there have been long delays in the past from the moment of the physical receipt of documents by the Prosecution to their entry in its database. *See* Appeal, para. 16 and fn. 17. However, Nzirorera does not submit any evidence to suggest that any such delay has been incurred regarding the Karekezi Letter or any other documents in the current case.

custody or control regarding a request made at a particular moment in the past".[37] Under his second ground of appeal, Nzirorera submits that the Trial Chamber erred in so ruling.[38]

21. Nzirorera purports that the Karekezi Letter was material to the preparation of his defence and subject to inspection pursuant to Rule 66(B) of the Rules.[39] He avers that even if the Prosecution did not come into possession of the Karekezi Letter until October 2002, it was still bound to offer it for inspection pursuant to Rule 67(D) of the Rules.[40] He further asserts that the Trial Chamber's interpretation of Rule 66(B) is practically unsound and was not intended by the Rules. He contends that this approach would require an accused to make repeated, periodic requests to ensure that documents requested earlier had not since come into the possession of the Prosecution.[41]

22. The Prosecution responds that Nzirorera confuses the different regimes of inspection prescribed by Rule 66(B) of the Rules and the disclosure that the Prosecution is required to make pursuant to Rules 66(A) and 68.[42] It argues that Rule 67(D) exclusively applies to the Prosecution's disclosure obligations and does not extend to any inspection under Rule 66(B).[43]

23. Nzirorera replies that Rule 67(D) is not limited to disclosure and that the Prosecution seeks to avoid this provision by creating an artificial distinction between disclosure and inspection.[44]

24. The Appeals Chamber notes that Rule 67(D) of the Rules provides that

> [i]f 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.

The Appeals Chamber considers that Rule 67(D) of the Rules also applies to materials subject to an inspection request pursuant to Rule 66(B) of the Rules.[45] Once the Defence files an inspection request pursuant to Rule 66(B) of the Rules, the Prosecution is under an obligation to permit inspection of the requested materials, provided that the requisite standards for such a request are

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[37] Impugned Decision, T. 24 November 2009 p. 2.
[38] Appeal, paras. 13, 20-32.
[39] Appeal, paras. 21, 23, 24.
[40] Appeal, paras. 22, 25.
[41] Appeal, para. 29.
[42] Response, paras. 26, 27. The Prosecution asserts that disclosure and inspection are different regimes as disclosure imposes an affirmative obligation on the Prosecution to locate material and submit a copy thereof to the Defence while under Rule 66(B) the Prosecution is merely required to permit the Defence to conduct physical inspection of certain materials in the Prosecution's custody. *Id.*, para. 26.
[43] Response, paras. 27, 31.
[44] Reply, paras. 10, 12, 13.
[45] The Appeals Chamber notes that Rule 67(D) of the Rules explicitly refers to material that "should have been *produced* earlier" (*emphasis added*), thus encompassing both an inspection of records pursuant to Rule 66(B) as well as the disclosure regime pursuant to Rules 66(A), 68, and 70 of the Rules. The Appeals Chamber further notes that in

met. This puts the requested records into the category of material "which should have been produced earlier" within the meaning of Rule 67(D) of the Rules. Accordingly, where such materials come into the Prosecution's possession subsequent to an inspection request from the Defence, the Prosecution is under a continuous obligation to promptly notify the Defence of their existence.

25. However, the Appeals Chamber reiterates that a continuous obligation to notify a party of inspection material pursuant to Rule 67(D) of the Rules can only arise where the underlying request reaches a degree of specificity that allows a direct and unambiguous identification of the sought material as squarely falling into the ambit of that request. This requires, as a minimum, the specificity described below.

26. The Appeals Chamber therefore finds that the Trial Chamber erred in finding that the Prosecution does not have an ongoing obligation to offer for inspection a document subject to a sufficiently specific pre-existing request made under Rule 66(B) of the Rules. The Appeals Chamber accordingly grants Nzirorera's second ground of appeal.

3. Whether the June 2002 and October 2009 Inspection Requests Were Sufficiently Specific

27. The Appeals Chamber is mindful that this appeal concerns only the Karekezi Letter.[46] It will therefore limit its analysis to the question whether the June 2002 and October 2009 Inspection Requests were sufficiently specific to trigger an obligation pursuant to Rule 66(B) of the Rules to permit its inspection.

(a) The June 2002 Inspection Request

28. In the June 2002 Inspection Request, Nzirorera solicited "[a] copy [...] of all documents furnished to the [Prosecution] by the [G]overnment of Rwanda", encompassing, *inter alia*, documents concerning "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)" of the Statute.[47]

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contrast, Rule 67(D) of the Rules of Procedure and Evidence of the ICTY uses the term "disclosed", which would, on its face, exclude the applicability of Rule 67(D) to Rule 66(B) of the Rules of Procedure and Evidence of the ICTY.

[46] The Appeals Chamber observes that the submissions of the parties focus on the question whether or not the specificity of either of the two Inspection Requests reasonably included the Karekezi Letter in their scope. *See* Appeal, paras. 34-38, 40, 44, 45; Response, paras. 32-35, 43, 48-51; Reply, paras. 19-25.

[47] Appeal, Annex "B", p. 2.

29. The Trial Chamber decided that the June 2002 Inspection Request was "irrelevant because it is clear that the Karekezi [L]etter was not in the custody or control of the Prosecution at [the] time [of the June 2002 Inspection Request]."[48]

30. Nzirorera submits that the Trial Chamber implicitly found that the June 2002 Inspection Request was sufficiently specific as it would not have otherwise considered whether the Prosecution's duty to permit inspection was a continuing one.[49] Further, he argues that the June 2002 Inspection Request confined the number of requested documents to a "very small group".[50]

31. The Prosecution responds that Nzirorera's June 2002 Inspection Request was impermissibly broad as it did not denominate "a precise category of documents".[51]

32. The Appeals Chamber recalls that to trigger the Prosecution's obligation under Rule 66(B) of the Rules, the Defence must, *inter alia*, specifically identify the requested material.[52] "Rule 66(B) of the Rules does not create a broad affirmative obligation on the Prosecution to disclose any and all documents which may be relevant to its cross-examination".[53] The Defence may not rely on a mere general description of the requested information but is required to define the parameters of its inspection request with sufficient detail. Suitable parameters for such specification may be an indication of a specific event or group of witnesses which the request focuses on, a time period and/or geographic location which the material refers to, or any other features defining the requested items with sufficient precision.[54] A request may also refer to a category of documents[55] defined by criteria which apply to a distinct group of individuals. The scope of what constitutes a "discrete group of individuals" for the purpose of an inspection request, as well as the determination whether the required level of specificity has been met, is considered in light of the specific framework of the case. The Appeals Chamber has previously found the specificity requirements to be satisfied *inter alia* in cases where the defence has sought access to a precise category of documents, such as immigration-related material of certain Defence witnesses,[56] or witness statements of a specific witness.[57]

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[48] Impugned Decision, T. 24 November 2009 p. 2.
[49] Reply, para. 15.
[50] Reply, para. 23.
[51] Response, paras. 33, 34. The Prosecution maintains that the June 2002 Inspection Request does not describe a *discreet category* of documents and would require it to review all documentation it has ever received from the Government of Rwanda to ensure compliance with the request. *Id.*, para. 33.
[52] First *Karemera* Decision, para. 12; *Bagosora* Decision, paras. 10, 11. *See also supra,* para. 15.
[53] *Bagosora* Decision, para. 10.
[54] *See ibid.*
[55] *Ibid.*
[56] *Ibid.*
[57] First *Karemera* Decision, paras. 14, 16.

33. The Appeals Chamber considers at the outset that nothing in the wording of the Impugned Decision suggests that the Trial Chamber found that the June 2002 Inspection Request was sufficiently specific. Further, it finds that sub-section (D) of the June 2002 Inspection Request delineated a category of documents linking acts of *Interahamwe* with Nzirorera; it also specified the quality of that link, namely whether he "planned, ordered, or otherwise aided and abetted those acts, or was responsible for them under Article 6(3)" of the Statute.[58] The Appeals Chamber considers that these indications define the request parameters with sufficient detail, particularly considering the broad nature of the charges against Nzirorera.[59]

34. Although the Karekezi Letter does not explicitly mention the term "*Interahamwe*", referring instead to Nzirorera "having" an armed militia, the Appeals Chamber considers that it would have been readily identifiable as material encompassed by the language of the June 2002 Inspection Request quoted above. Indeed, the Karekezi Letter relates mainly to the criminal activities of a militia and Nzirorera's authority over this militia.[60]

35. The Appeals Chamber therefore finds that the June 2002 Inspection Request was sufficiently specific to trigger the Prosecution's obligation to notify Nzirorera and subsequently grant inspection of the Karekezi Letter pursuant to Rule 66(B) and 67(D) of the Rules upon its receipt in October 2002.

(b) The October 2009 Inspection Request

36. In his October 2009 Inspection Request, Nzirorera solicited all documents obtained by the Prosecution from the Government of Rwanda, any of its departments, or its *Gacaca* jurisdictions, dealing with, *inter alia*, (i) the acts and conduct of the *Interahamwe* in Kigali, Ruhengeri, Gisenyi, or Kibuye prefectures; (ii) Nzirorera's knowledge, notice, or responsibility for the acts of the *Interahamwe*; and (iii) the existence of the *Interahamwe* in said prefectures prior to the death of President Habyarimana.[61]

37. The Trial Chamber found the October 2009 Inspection Request to be impermissibly broad, "because it arguably encompasse[d] any document related to [the Kigali, Ruhengeri, Gisenyi, or Kibuye] *préfectures* which mentions the word '*Interahamwe*'".[62]

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[58] Appeal, Annex "B", p. 2, para. 64(D).
[59] The Prosecution has not contested Nzirorera's contention that he is "alleged to be responsible for all crimes of the žInterahamwe' within Rwanda" (Appeal, para. 36). *See also The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Amended Indictment, 3 April 2008 ("Indictment")., paras. 22-80.
[60] *See* Karekezi Letter, p. 2 ("Monsieur NZIRORERA Joseph, Secrétaire Exécutif du M.R.N.D. a une milice armée [...]"), Appeal, Annex "A".
[61] Appeal, Annex "C". *See also* Response, para. 11.
[62] Impugned Decision, T. 24 November 2009 p. 3.

38. Nzirorera submits that the Trial Chamber erred in so finding.[63] He asserts that the degree of specificity of "items material to the preparation of the defence" must take into account the degree of specificity of the indictment as the latter frames the issues in the case.[64] He argues that the indictment in the present case[65] alleges that he is responsible for all crimes of the *Interahamwe* within Rwanda and that the existence of the *Interahamwe* structure of the MRND party in the prefectures is a disputed issue of fact. According to Nzirorera, all items describing the existence, acts, and conduct of *Interahamwe* throughout the country are material to his defence.[66] He submits that in limiting the request to documents obtained from the Government of Rwanda and to acts in four out of eleven prefectures, his request was sufficiently specific.[67] Further, he avers that descriptions of categories of documents are permissible under Rule 66(B) of the Rules.[68]

39. The Prosecution responds that as the *Interahamwe* were predominant in Kigali, Gisenyi, and Ruhengeri, most documents relating to the *Interahamwe* would originate from or mention these regions. It avers that thousands of documents could thus fall into the parameters set out in the October 2009 Inspection Request, including any document that mentions the word "*Interahamwe*", making a targeted search impossible.[69] It further submits that Nzirorera's argument that the Karekezi Letter is material to the preparation of his defence is overstated as the Indictment does not charge Nzirorera with Karekezi's murder.[70]

40. Nzirorera replies that the limitation of the October 2009 Inspection Request to a "discrete group of individuals" and "documents obtained from the [G]overnment of Rwanda" considerably reduced the scope of the material requested in his October 2009 Inspection Request.[71] He further posits that the Karekezi Letter was material to his defence given the link between him, the persons alleged to be *Interahamwe* in his own family and commune, and the fact that the author of the letter is listed in the Indictment as one of the victims of Nzirorera's crimes.[72]

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[63] Appeal, para. 46. *See also* paras. 33-45.
[64] Appeal, para. 35.
[65] The Indictment alleges that Nzirorera, *inter alia*, planned and prepared attacks against the Tutsi population in Ruhengeri prefecture, Kigali-ville prefecture and in other regions of Rwanda. *See* Indictment, paras. 62, 63.
[66] Appeal, paras. 36-38.
[67] Appeal, paras. 38, 44.
[68] Appeal, paras. 42, 43.
[69] Response, para. 43.
[70] Response, para. 48. According to the Prosecution, Karekezi is simply listed as a victim of killings perpetrated by *Interahamwe*. *See also* Indictment, para. 63.2.
[71] Reply, paras. 19-21.
[72] Reply, para. 24.

41. The Appeals Chamber finds that Nzirorera has established *prima facie* the materiality of the Karekezi Letter to the preparation of his defence as it reports that Nzirorera had a militia which committed a number of crimes in Mukingo commune, Ruhengeri prefecture, in November 1993.[73]

42. Paragraph 2 of the October 2009 Inspection Request solicited material on "Nzirorera's knowledge, notice or responsibility for the acts of the Interahamwe".[74] The Appeals Chamber finds that this sub-request delineated a category of documents linking Nzirorera with *Interahamwe* regarding their specific activities. It considers that, again mindful of the broad nature of the charges against Nzirorera,[75] paragraph 2 of the October 2009 Inspection Request defines the request parameters with sufficient detail. Further, the Appeals Chamber reiterates that although the Karekezi Letter does not explicitly mention the term "*Interahamwe*", it would have been readily identifiable as material concerning Nzirorera's knowledge, notice, or responsibility for militia activities.[76]

43. Consequently, the Appeals Chamber finds that the Trial Chamber erred and acted outside the confines of its discretion when it found that the October 2009 Inspection Request was impermissibly broad. This ground of appeal is therefore granted.

E. Conclusion

44. The Appeals Chamber finds that Nzirorera has failed to show any discernible error in the Trial Chamber's finding that the Karekezi Letter was unavailable at the time of the June 2002 Inspection Request. However, the Appeals Chamber finds that the Trial Chamber erred in holding that there is no continuing duty upon the Prosecution to grant inspection of materials pursuant to Rules 66(B) and 67(D) of the Rules based upon a prior inspection request. Lastly, the Appeals Chamber finds that the Trial Chamber erred in concluding that the October 2009 Inspection Request lacked the required degree of specificity in the circumstances of the case. The Prosecution's failure to permit inspection of the Karekezi Letter in a timely manner amounted to a violation of Rule 66(B) of the Rules.

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[73] The test for materiality pursuant to Rule 66(B) of the Rules is the relevance of the requested material to the preparation of the defence case. *See* First *Karemera* Decision, para. 14. The Appeals Chamber notes that Nzirorera stands accused of crimes *inter alia* committed by *Interahamwe* in the prefectures enunciated in the October 2009 Inspection Request. *See* Indictment, paras. 25, 50, 59, 62, 63 (mentioning Karekezi's killing by *Interahamwe* with Nzirorera's assistance), 66.

[74] Appeal, Annex "C".

[75] *See supra*, para. 33.

[76] *See supra*, para. 34. The Appeals Chamber further notes that at the time of the October 2009 Inspection Request, the Prosecution was not only in possession of the Karekezi Letter for a number of years, but was also aware of its existence and content as it indicated its intention to use the Karekezi Letter at trial less than a month after receiving the October 2009 Inspection Request. *See The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, T. 19 November 2009 p. 22.

F. Disposition

45. For the foregoing reasons, the Appeals Chamber

FINDS that the Trial Chamber erred in holding that the Prosecution does not have an ongoing obligation to produce relevant material subject to a sufficiently specific request for inspection pursuant to Rule 66(B) of the Rules;

FINDS that the Trial Chamber erred in concluding that the October 2009 Inspection Request was impermissibly broad;

REVERSES the Impugned Decision in respect of the above;

FINDS that the Prosecution's failure to permit inspection of the Karekezi Letter upon its receipt in October 2002 pursuant to the June 2002 Inspection Request as well as its failure to permit inspection of the Karekezi Letter pursuant to the October 2009 Inspection Request violated Rule 66(B) of the Rules;

REMANDS this matter to the Trial Chamber for determination of an appropriate remedy; and

DENIES Nzirorera's Appeal in all other respects.

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

Done this 17th day of May 2010
At The Hague,
The Netherlands.

Judge Patrick Robinson
Presiding

[Seal of the Tribunal]

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Date: **18/05/2010**	Case Name / *affaire:*	**-Edouard KAREMERA** **-Matthieu NGIRUMPATSE** **- Joseph NZIRORERA**
	Case No / *no. de l'affaire*:	**ICTR-98-44-A**

To: *A:*	**Appeals Chamber Support Unit, The Hague:** - **Mr. Koffi Afande** - **Ms. Rosette Muzigo-Morrison** - **Mr. Ramadhani T. Juma**	☒ **Judge / Juge, Patrick Robinson, Presiding** ☒ **Judge / Juge Fausto Pocar** ☒ **Judge / Juge Liu Daqun** ☒ **Judge / Juge Theodor Meron** ☒ **Judge / Juge Carmel Agius**

ACCUSED / DEFENSE
☒ Accused / *Accusé* **KAREMERA, NGIRUMPATSE, NZIRORERA...** see / *voir* " CMS4
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☐ Co-Counsel / *Conseil Adjoint*:
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☐ The Hague / *La Haye* ☐ Arusha (see / *voir* CMS3) ☐ Kigali

From: *De:*
☐ JP. Fomété (Chief, CMS) ☐ (Chief, JPU) ☒ **C. Hometowu (TC III)** ☐ F. A. Talon (Team IV)
☐ A. N'gum (TC3) ☐ Other

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