1354/H

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-98-44-AR73.6
28 April 2006
(1354/H– 1347/H)

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Adama Dieng

Decision of: 28 April 2006

ICTR Appeals Chamber
Date: 28 April 2006
Action: A.J.
Copied To: See Proof of Service

PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-AR73.6

Decision on Joseph Nzirorera's Interlocutory Appeal

Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James Stewart
Mr. Don Webster
Mr. Alfred Orono Orono

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: KOFI KUMELIO A AFANDE
SIGNATURE: DATE: 28 April 2006

Counsel for the Defence:

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Ms. Chantal Hounkpatin and Mr. Frédéric Weyl for Mathieu Ngirumpatse
Mr. Peter Robinson and Mr. Patrick Nimy Mayidika Ngimbi for Joseph Nzirorera

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 Serious Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized with an interlocutory appeal filed by Joseph Nzirorera[1] against the Trial Chamber's oral decision of 16 February 2006.[2] This appeal raises issues of whether the Trial Chamber provided Mr. Nzirorera with adequate time to prepare for cross-examination of a witness following the Prosecution's late disclosure of potentially exculpatory material that was relevant to that cross-examination as well as whether it applied the correct standard and followed proper procedures in declining to order additional disclosure.

BACKGROUND

2. The trial in which this appeal arises is in the initial stages of the Prosecution case. The trial originally commenced on 27 November 2003 before a section of Trial Chamber III.[3] The Defence successfully challenged the composition of the Bench, and the Appeals Chamber ordered the trial to commence *de novo*.[4] The trial restarted on 19 September 2005,[5] and the Trial Chamber heard two witnesses during the first session, which lasted until 28 October 2005.

3. On 6 February 2006, before the commencement of the second trial session, Mr. Nzirorera requested the immediate disclosure of material relevant to the testimony of each of the witnesses scheduled to be heard during the upcoming session.[6] He claimed that the Prosecution had failed to provide these materials in violation of its obligations under Rules 66(A)(ii) and 68 of the Rules of Procedure and Evidence of the Tribunal ("Rules").[7] As a remedy, he sought a sixty day stay of proceedings.[8]

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[1] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44AR73.6, Joseph Nzirorera's Interlocutory Appeal from Decision Denying Motion for Stay of Proceedings and Request for Stay Pending Appeal, filed 7 March 2006 ("Nzirorera Appeal"). Mathieu Ngirumpatse filed a brief in support of the Nzirorera Appeal. *See The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44AR73.6, *Mémoire de M. Ngirumpatse au soutien du* Nzirorera's Interlocutory Appeal from Decision Denying Motion for Stay of Proceedings and Request for Stay Pending Appeal, filed 10 March 2006 ("Ngirumpatse Submissions"). The Prosecution responded in *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44AR73.6, Prosecutor's Response to "Joseph Nzirorera's Interlocutory Appeal from Decision Denying Motion for Stay of Proceedings and Request for Stay Pending Appeal", filed 17 March 2006 ("Prosecution Response"). Mr. Nzirorera filed a reply on 21 March 2006.

[2] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Oral Decision, T. 16 February 2006 pp. 2-10 ("Impugned Decision").

[3] Impugned Decision, p. 8.

[4] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44AR15*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.

[5] Impugned Decision, p. 8.

[6] Impugned Decision, p. 2; Nzirorera Appeal, para. 1.

[7] Impugned Decision, p. 2; Nzirorera Appeal, para. 1.

[8] Impugned Decision, p. 2; Nzirorera Appeal, para. 1.

4. In the Impugned Decision, the Trial Chamber agreed that the Prosecution had failed to comply with its disclosure obligations in respect of some of the material sought by Mr. Nzirorera.[9] However, it declined to stay the proceedings.[10] In addition, the Trial Chamber refused to order the production of other material, based on the Prosecution's undertaking that it either did not possess the documents or that they were not exculpatory.[11] Over Mr. Nzirorera's objection, the Trial Chamber commenced the testimony of Witness UB.[12] The testimony of Witness UB covered the entire second trial session, running from 16 February until 15 March 2006. The third trial session is scheduled to commence on 15 May 2006.

DISCUSSION

A. Ground 1: Allegation that the Trial Chamber Erred in Failing to Provide a Remedy for Rule 66 and Rule 68 Violations It Found to Have Been Established

5. Under his first ground of appeal, Mr. Nzirorera focuses his submission on Rule 68 violations bearing on the testimony of Witness UB,[13] the only witness ultimately heard during the second trial session. These violations include the late disclosure of a judgement of a Rwandan court implicating Witness UB in killings[14] as well as statements of two individuals further incriminating the witness.[15] Mr. Nzirorera argues that, having found serious violations of the Prosecution's disclosure obligations, the Trial Chamber erred as a matter of law by failing to provide him with adequate time and facilities to prepare his defence in violation of his rights under Article 20(4)(b) of the Statute.[16]

6. The Trial Chamber determined that, in the circumstances of the case, no prejudice resulted from the late disclosures because Mr. Nzirorera had some knowledge of the material, and the Prosecution provided the documents at the outset of the witness's testimony.[17] Mr. Nzirorera disagrees with this assessment and submits that he suffered prejudice because, in order to properly challenge Witness UB's credibility based on the material, he needed time to "digest" the material

[9] Impugned Decision, pp. 3, 4, 6-8. The Trial Chamber found disclosure violations in respect of Witnesses UB, GFA, GBU, AWB, ALG, HH, Omar Serushago, and Ahmed Mbonyunkiza. Impugned Decision pp. 3, 4, 6-8.
[10] Impugned Decision, pp. 8-10. The Appeals Chamber observes that, given the trial schedule, Mr. Nzirorera received the sixty day delay that he sought with respect to all witnesses other than Witnesses Mbonynkiza and UB, who have already testified.
[11] Impugned Decision, pp. 5-7.
[12] Impugned Decision, pp. 8, 9.
[13] Nzirorera Appeal, paras. 73-92.
[14] Nzirorera Appeal, para. 77. The Prosecution disclosed this judgement in Kinyarwanda on 13 February 2006. It was translated informally for the parties into French and English on 16 February 2006 on an expedited basis at the request of the Trial Chamber. The judgement contains allegations of fourteen individuals implicating Witness UB in various killings. *See* Nzirorera Appeal, para. 78; Impugned Decision, p. 9. The Appeals Chamber observes that the Prosecution obtained the Rwandan judgement on 10 February 2006. T. 13 February 2006 pp. 12, 13.
[15] Nzirorera Appeal, para. 80.
[16] Nzirorera Appeal, paras. 75-82.
[17] Impugned Decision, p. 8.

and to interview the individuals whose allegations underlie it.[18] In response, the Prosecution argues that Mr. Nzirorera had no right to a stay of proceedings in the circumstances of the case.[19]

7. The Prosecution's obligation to disclose potentially exculpatory material is essential to a fair trial.[20] However, not every violation of this important obligation implicates a violation of an accused's fair trial rights, warranting a remedy.[21] If a Rule 68 disclosure is extensive, parties are entitled to request an adjournment in order to properly prepare themselves.[22] The authority best placed to determine what time is sufficient for an accused to prepare his defence is the Trial Chamber conducting the case.[23]

8. Mr. Nzirorera raised the issue of his need for investigations arising from the late disclosure before the Trial Chamber.[24] In the Impugned Decision, the Trial Chamber expressly considered the impact of the late disclosure on Mr. Nzirorera's ability to prepare for Witness UB's testimony and determined that the late disclosure would not interfere with an effective cross-examination.[25] Furthermore, the Trial Chamber noted that it would provide appropriate additional relief on a case-by-case basis and indicated that it might be appropriate to recall the witness if further investigations warranted additional cross-examination.[26] In the present circumstances, the Appeals Chamber cannot say that the Trial Chamber abused its discretion in declining to stay the proceedings. The Appeals Chamber considers that in long and complicated cases, it is necessary for a Trial Chamber to exercise its discretion to control the progress of the proceedings as appropriate, provided that it does not encroach on fair trial rights.[27]

[18] Nzirorera Appeal, paras. 75-82.
[19] Prosecution Response, paras. 3-28.
[20] *The Prosecutor v. Théoneste Bagosora et al.*, ICTR Case Nos. 98-41-AR73, 98-41-AR73(B), Decision on Interlocutory Appeals on Witness Protection Orders, 6 October 2005, para. 44; *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, paras. 183, 242 ("*Kordić and Čerkez* Appeal Judgement"); *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 20 July 2004, para. 264 ("*Blaškić* Appeal Judgement"); *The Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004, para. 180 ("*Krstić* Appeal Judgement"); *The Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004, p. 3 ("*Brđanin* Decision").
[21] *Kordić and Čerkez* Appeal Judgement, para. 179 ("Once the Defence has satisfied a Chamber that the Prosecution has failed to comply with Rule 68, the Chamber, in addressing what is the appropriate remedy (if any) must examine whether or not the Defence has been prejudiced by a breach of Rule 68 [...].")(emphasis added). *See also The Prosecutor v. Juvénal Kajelijeli*, ICTR Case No. 98-44A-A, Judgement, 23 May 2005, para. 262 (*Kajelijeli* Appeal Judgement"); *Blaškić* Appeal Judgement, paras. 295, 303; *Krstić* Appeal Judgement, para. 153.
[22] *Krstić* Appeal Judgement, para. 206.
[23] *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004, para. 18.
[24] T. 13 February 2006 p. 16.
[25] Impugned Decision, p. 8.
[26] Impugned Decision, pp. 3, 8, 10.
[27] *See Kordić and Čerkez* Appeal Judgement, para. 196.

9. Mr. Nzirorera contends that the Trial Chamber rejected his request for a stay of proceedings solely based on an erroneous reading of an oral decision in the *Karera* case.[28] Mr. Nzirorera notes that, in the *Karera* case, the Trial Chamber postponed the cross-examination of Witness UB, who also appeared in that trial, based on late disclosure.[29] However, he submits that in the Impugned Decision, the Trial Chamber erroneously described the holding in *Karera* as providing for the recall of the witness.[30] The Appeals Chamber does not accept Mr. Nzirorera's contention that the Trial Chamber reached the Impugned Decision on the basis of such a reading of the *Karera* decision. In refusing to stay the proceedings, the Trial Chamber engaged in a case-specific analysis of the impact of the late disclosure on Mr. Nzirorera's ability to cross-examine Witness UB.[31] The Trial Chamber also noted that it had a range of other possible remedies at its disposal, including postponing or excluding the witness's testimony.[32] Only then, did the Trial Chamber proceed to make its observations about the *Karera* decision.[33]

10. Mr. Nzirorera also contends that recall, as an exceptional measure, is an insufficient remedy.[34] The Appeals Chamber notes, however, that the adequacy of this remedy in this instance has not been tested given that Mr. Nzirorera has not yet sought to recall the witness. In addition, at this stage, it is also entirely unclear what evidentiary value, if any, the Trial Chamber will place on Witness UB's testimony in light of the existing cross-examination or further evidence and submissions provided during the proceedings.

11. Accordingly, this ground of appeal is dismissed.

B. Ground II: Allegation that the Trial Chamber Erred in Setting an Unreasonable Threshold for Proof of Rule 68 Violations It Did Not Find Had Been Established

12. Under his second ground of appeal, Mr. Nzirorera submits that the Trial Chamber erred in refusing to order the disclosure of additional material in the Prosecution's possession pertaining to Witnesses Mbonyunkiza, UB, GFA, and GBU.[35] He claims that members of his Defence team interviewed a number of individuals who acknowledged providing statements to the Prosecution which, in the Defence's view, contradicted the anticipated testimony of Prosecution witnesses about

[28] Nzirorera Appeal, paras. 83-86, referring to *The Prosecutor v. François Karera*, ICTR Case No. 01-74-T, Oral Decision, T. 18 January 2006 p. 86.
[29] Nzirorera Appeal, paras. 85, 86.
[30] Nzirorera Appeal, para. 84.
[31] *See* Impugned Decision, pp. 8, 9.
[32] *See* Impugned Decision, p. 4.
[33] *See* Impugned Decision, pp. 9, 10.
[34] Nzirorera Appeal, paras. 87, 88.
[35] Nzirorera Appeal, paras. 93-102.

specific events.[36] In refusing to order disclosure of this material, Mr. Nzirorera argues that the Trial Chamber set an unreasonably high threshold for proof of a Rule 68 violation by requiring the Defence to have actual knowledge of the contents of the material in question before ordering disclosure.[37]

13. To establish a violation of the Rule 68 disclosure obligation, the Defence must (i) establish that additional material exists in the possession of the Prosecution; and (ii) present a *prima facie* case that the material is exculpatory.[38]

14. The Prosecution admitted taking statements from some of the individuals, as alleged by the Defence, but did not consider the material to be exculpatory.[39] The Trial Chamber accepted a representation to this effect from the Prosecution, noting that the Defence did not refute it.[40]

15. Mr. Nzirorera claims that, in accepting this representation, the Trial Chamber failed to consider the history of the Prosecution's Rule 68 violations in this case, the Prosecution's "misguided view" of its Rule 68 obligations, as well as the likelihood that a witness to an important event who was not being called by the Prosecution would possess information which affected the credibility of its witness, describing the same event.[41] The Prosecution responds that it was open to the Trial Chamber to accept its representations.[42]

16. The Appeals Chamber can identify no error on the part of the Trial Chamber in declining to order the disclosure of the material in question. The responsibility for disclosing exculpatory material rests on the Prosecution, and the determination of what material meets Rule 68 disclosure requirements is primarily a facts-based judgement, falling within the Prosecution's responsibility.[43]

17. The Appeals Chamber cannot fault the Trial Chamber for requesting Mr. Nzirorera to provide an "evidentiary basis" for his claims that the material fell within the scope of Rule 68, contrary to the assertions of the Prosecution.[44] The Trial Chamber is entitled to assume that the Prosecution is acting in good faith.[45] The Appeals Chamber observes that Mr. Nzirorera supported his assertion that the Prosecution possessed exculpatory material based on the representations of his

[36] Nzirorera Appeal, paras. 96-98; T. 13 February 2006 pp. 4, 6, 7, 30.
[37] Nzirorera Appeal, para. 93.
[38] *Kajelijeli* Appeal Judgement, para. 262; *Kordić and Čerkez* Appeal Judgement, para. 179; *Brdanin* Decision, p. 3.
[39] Impugned Decision, pp. 6, 7.
[40] Impugned Decision, pp. 6, 7.
[41] Nzirorera Appeal, para. 99.
[42] Prosecution's Response, para. 29.
[43] *Kordić and Čerkez* Appeal Judgement, para. 183; *Brdanin* Decision, p. 3. *See also Kajelijeli* Appeal Judgement, para. 262.
[44] *See* Impugned Decision, pp. 7, 8; T. 13 February 2006 p. 6 ("If you're saying the Prosecutor has not honoured a commitment and you're asking us to provide a remedy for doing so, we would need some evidence that would enable us to say that.").
[45] *Kordić and Čerkez* Appeal Judgement, para. 183; *Brdanin* Decision, p. 3.

counsel recounting interviews with individuals who claimed that they provided the Prosecution with contradictory accounts of certain events.[46] Although the Trial Chamber would have been within its discretion to order the Prosecution to disclose the material in question on the basis of such representations, the Appeals Chamber cannot conclude that it abused its discretion in declining to do so.

18. The Appeals Chamber also does not agree that, in reaching its decision, the Trial Chamber failed to adequately consider the history of disclosure violations in this case.[47] The Trial Chamber expressly stated that it had been requested to draw various inferences from prior disclosure disputes, which Mr. Nzirorera raised during oral argument.[48] Moreover, in accepting the Prosecution's representations, the Trial Chamber emphasized that the administration of justice depended on the integrity of the Prosecution and indicated its willingness to consider sanctions if the Prosecution declarations were inaccurate.[49]

19. Accordingly, this ground of appeal is dismissed.

C. Ground III: Allegations that the Trial Chamber Erred in Refusing to Inspect the Disputed Material *In Camera*

20. Finally, under his third ground of appeal, Mr. Nzirorera submits that the Trial Chamber erred by refusing to inspect the disputed material *in camera*.[50] The Appeals Chamber observes, however, that Rule 68 (D) requires inspection *in camera* of materials only where the Prosecution seeks to be relieved of its disclosure obligation as a result of possible prejudice to ongoing investigations, or because disclosure may be contrary to the public interest or the security interests of a state. Given that the Prosecution has the primary responsibility to make disclosure determinations under Rule 68,[51] the Appeals Chamber does not find any error on the Trial Chamber's part in declining to inspect the documents *in camera*.

21. Accordingly, this ground of appeal is dismissed.

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[46] *See, e.g.*, Nzirorera Appeal, paras. 96-98; T. 13 February 2006 pp. 4, 6, 7, 30.
[47] Mr. Nzirorera and Mr. Ngirumpatse outline the Prosecution's disclosure practices throughout the case in detail. Nzirorera Appeal, paras. 12-64, 94. *See also* Ngirumpatse Submissions, paras. 10-13. The Prosecution notes that past problems have been cured and that the Trial Chamber has never found that the Prosecution acted in bad faith. Prosecution Response, para. 17.
[48] Impugned Decision, p. 5.
[49] Impugned Decision, pp. 6, 8, 9.
[50] Nzirorera Appeal, paras. 103-106.
[51] *Kordić and Čerkez* Appeal Judgement, para. 183.

DISPOSITION

22. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Nzirorera Appeal in all respects and **DISMISSES** his motion for a stay of proceedings pending the disposition of the appeal as moot.

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

Done this 28th day of April 2006,
At The Hague,
The Netherlands.

Judge Liu Daqun
Presiding

[Seal of the Tribunal]

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	Case No / *no. de l'affaire*: ***ICTR-98-44-AR73.6***	

To: / *A:*

OTP, Trial Attorney in charge of case ☐ In The Hague ✖ **In Arusha** ☐ In Kigali

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