



UNITED NATIONS
NATIONS UNIES

ICTR-98-44-T
26-02-2004
(9806 - 9803)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER III

Before Judges: Andrésia Vaz, Presiding
Flavia Lattanzi
Florence Rita Arrey

Registrar: Adama Dieng

Date: 26 February 2004

THE PROSECUTOR

v.

Édouard KAREMERA,
Mathieu NGIRUMPATSE,
Joseph NZIRORERA and
André RWAMAKUBA

Case No. ICTR-98-44-T

INDICIALE TRIBUNAL PENAL
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**DECISION ON THE DEFENCE REQUEST FOR CERTIFICATION TO APPEAL
THE DECISION ON ACCUSED NZIRORERA'S MOTION FOR INSPECTION OF
MATERIALS**

Rules 66, 68, 73 B) of the Rules of Procedure and Evidence

Defence Counsel:

Peter Robinson

Defence Counsel of the Co-Accused:

Dior Diagne
Charles Roach and Frédéric Weyl
David Hooper and Andreas O'Shea

Office of the Prosecutor:

Don Webster
Ifeoma Ojemeni
Dior Fall
Simone Monasebian
Holo Makwaia
Tamara Cummings-John
Ayo Fadugba
Sunkarie Ballah-Conteh

[Signature]

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“Tribunal”),

SITTING as Trial Chamber III, composed of Judges Andréia Vaz, Presiding, Flavia Lattanzi and Florence Rita Arrey (“Chamber”);

BEING SEIZED of the “Request for Certification to Appeal Decision on Accused Nzirorera’s Motion for Inspection of Materials”, filed on 6 February 2004 (“Request”);

CONSIDERING the Chamber’s “Decision on Accused Nzirorera’s Motion for Inspection of Materials” rendered on 5 February 2004 (“Decision”);

NOTING that the Prosecution did not file a reply to the Request within the time frame stipulated in Rule 73(E) of the Rules of Procedure and Evidence (“Rules”), and that he did not request an extension of time thereto;

CONSIDERING the Statute of the Tribunal (“Statute”) and the Rules, and specifically Rule 73(B) which reads:

Decisions rendered on such motions are without interlocutory appeal save with certification of the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

NOW DECIDES the request solely on the basis of the written brief filed by the Defence, pursuant to Rule 73(A) of the Rules.

I. Defence’s submissions

1. The Defence appeals paragraphs 8 (d), 8 (e), 11, 14 and 15 of the Decision. It contends that paragraphs 8 (d), 8 (e), 11 and 15 significantly affect the fair conduct of the proceedings and the outcome of the trial. In particular, the Defence submits as follows:

(i) The original Defence request for an order compelling disclosure of UNAMIR reports and correspondence has been as narrow and specific as possible. The Chamber’s ruling on this issue is legally erroneous for contradicting pertinent ICTY jurisprudence defining the required degree of specificity of requests¹ and, furthermore, unreasonable. The denial of access to the requested UNAMIR materials is obstructing the preparation of the Defence and thus adversely affecting the fairness and the outcome of the trial.

(ii) The items pertaining to the assassination of President Habyarimana are, according to the standards established by ICTY jurisprudence², material to the Defence for the following reasons: the assassination is inextricably intertwined with the alleged execution of the pre-planned human rights violations that it is said to have prompted; its circumstances are decisive for the question whether the conflict in Rwanda in 1994

¹ *Prosecutor v. Kordic & Cerkez*, No. IT-95-14/2-AR 108 bis (9 September 1999).

² *Prosecutor v. Delalic*, No. IT-96-21-PT (26 September 1996).

was internal; the non-involvement of the Accused in the assassination is a mitigating circumstance. Again, the denial of access to items that are material to the Defence is obstructing the preparation of its case and thus affecting the fairness and the outcome of the trial.

2. The Defence submits that a decision by the Appeals Chamber prevents the necessity of a new trial which would otherwise become inevitable once the Chamber is shown, after judgment, to have erred in denying the original motion for inspection of materials. Moreover, an early resolution of the issue before the conclusion of the trial facilitates an expeditious preparation of the Defence case. Hence, a decision by the Appeals Chamber will materially advance the proceedings.

3. The Defence points to the circumstance that, according to the Rules, the trial can continue while the appeal is pending, so that the Chamber's certification would not cause any delay in the trial.

4. The Defence submits that the Chamber has so far been acting in a partial manner in granting a request for certification to appeal submitted by Prosecution whereas dismissing all of the Defence requests to the same purpose.

II. Deliberations

5. The reasoning of the Defence in support of its Request refers only to UNAMIR reports and correspondence and to the materials pertaining to President Habyarimana's assassination. The Defence does not contest that its original request for an order compelling disclosure of all written or tape recorded communiqués issued by the MRND party at the national level between 6 April 1994 and 17 July 1994 (cf. par. 14 of the Decision) is too broad. The Chamber therefore construes the motion as a request for certification to appeal paragraphs 8 (d), 8 (e), 11 and 15 of its Decision.

6. Rule 73(B) provides that decisions on motions brought under Rule 73(A) are, on a regular basis, without interlocutory appeal. Only in exceptional cases, i.e. if the prerequisites detailed in Rule 73(B) are met, the Trial Chamber may grant certification to appeal. The certification is not granted automatically but on the basis of each particular motion's merit. As far as the Defence considers the dismissal of several of its previous motions requesting the certification to appeal as unfair it misconceives the structure and meaning of Rule 73(B).

7. The Chamber recalls that its denial of an order compelling disclosure of UNAMIR reports and correspondence was not based on a lack of pertinence of the requested items but rather on the lack of specificity in the Defence's original request. As long as the Defence has not specified the requested items with sufficient precision the Chamber can not determine their materiality to the case. The Chamber is thus not satisfied that, with regard to the UNAMIR reports and correspondence, its Decision involves an issue that affects the fair and expeditious conduct of the proceedings or the outcome of the trial.

8. Whereas the Defence has not specified the requested items with sufficient precision the Chamber notes that the Prosecutor can and, in view of the right of the Accused to a fair trial, ought to assist the Defence in its exact identification of the requested items.

9. As far as the materials on President Habyarimana's assassination are concerned, the Defence has not shown that the Decision involves an issue that could significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

(i) The Defence has not demonstrated a possible link between President Habyarimana's assassination and the charges against the Accused in this trial. The two issues are clearly distinguishable and, from a legal point of view, anything but "inextricably intertwined".

(ii) The personal responsibility for President Habyarimana's assassination has no potential bearing on the characterization of the subsequent events in Rwanda in 1994 as an internal conflict and on the applicability of Article 3 Common to the Geneva Conventions and of Additional Protocol II to these events. The internal nature of the conflict is uncontroversial in view of the Security Council Resolution 955 (1994) which implements "Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II" as Article 4 into the Statute of the Tribunal.

(iii) The Chamber notes that Article 6 par. 4, the Statute's only explicit provision on mitigating circumstances, is not applicable. Moreover, the Defence has not demonstrated that the non-participation of the Accused in additional crimes which are not covered by the current indictment has any bearing on the present case. Therefore the Chamber finds that the materials on President Habyarimana's assassination are not relevant for the determination of possibly mitigating circumstances.

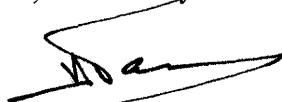
FOR THE ABOVE REASONS,

THE CHAMBER

I. DISMISSES THE MOTION

II. ORDERS the Prosecutor to provide Defence with an index of all UNAMIR reports and correspondence in his possession by 26 March 2004.

Arusha, 26 February 2004



Andréia Vaz
Presiding Judge



Flavia Lattanzi



Florence Rita Arrey
Judge