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UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

Original: English

**TRIAL CHAMBER III**

**Before:** Judge Lloyd G. Williams, Q.C., Presiding  
Judge Andréia Vaz  
Judge Khalida Rachid Khan

**Registrar:** Adama Dieng

**Date:** 7 October 2003

**THE PROSECUTOR**

v.

**JOSEPH NZIRORERA *et al.***

*Case No. ICTR-98-44-I*

2003 OCT - 7 A 11:30  
ICTR  
GENERAL SECRETARIAT  
KAMPALA

**DECISION ON THE DEFENCE MOTION FOR DISCLOSURE OF  
EXCULPATORY EVIDENCE**

*Rule 68 of the Rules of Procedure and Evidence*

**Counsel for the Defence:**  
Peter Robinson

**Counsel for the Co-Accused:**  
Didier Skornicki and John Traversi  
David Hooper and Andreas O'Shea  
Charles Roach and Frédéric Weyl

**Office of the Prosecutor:**  
Don Webster  
Tamara Cummings-John

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

**SITTING** as Trial Chamber III, composed of Judges Lloyd G. Williams, Q.C., Presiding, Andréia Vaz and Khalida Rachid Khan (“Chamber”);

**BEING SEIZED** of the Defence “Motion for Disclosure of Exculpatory Evidence,” filed on 4 December 2002 by the Defence for Accused Joseph Nzirorera (“Motion”);

**CONSIDERING** the Prosecution Response to the Motion filed on 27 February 2003 and the Defence Reply to the Prosecution Response, filed on 3 March 2003;

**CONSIDERING FURTHER**, in their relevant parts, the “Prosecutor’s Consolidated Supplemental Response to (i) the Defense Motion for Inspection of Items ‘Material to the Preparation of the Defence’; (ii) The Defense Motion for Disclosure of Exculpatory Material; (iii) The Defense Motion for Requests for Cooperation to the Governments of United States, Belgium, France and Germany” filed on 18 August 2003 (“Prosecutor’s Consolidated Response”) and the Defence “Reply to Prosecutor’s Consolidated Supplemental Response: Assassination of President Habyarimana”, filed on 20 August 2003 (“Reply to Prosecutor’s Consolidated Response”);

**CONSIDERING** the Statute of the Tribunal (“Statute”) and the Rules, particularly Rule 68 of the Rules;

**NOW REVIEWS** the Motion, pursuant to Rule 73(A) of the Rules, solely on the basis of the written briefs filed by the parties.

**Submissions of the Parties**

*Defence Motion*

1. The Defence seeks disclosure of all exculpatory evidence in the Prosecutor’s possession, pursuant to Rule 68 of the Rules.

2. The Defence further requests disclosure of specific categories of evidence, which it deems to be exculpatory, or potentially exculpatory, within the meaning of Rule 68, as follows:

(i) Any information tending to show that the Accused, or other persons affiliated with the MRND, the *Interahamwe*, or the Interim Government, attempted to stop the killings. The Defence refers to Witness X, a prosecution witness in the *Media Case (Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T)*, whose pseudonym is ‘G’ in the Prosecution Pre-Trial Brief filed on 15 March 2003. The Defence argues that Witness X testified in the *Media Case* that, at one point in time during the period referred-to in the Indictment, the Accused asked him to convince people in Kigali to stop the killings. The Defence emphasises that this information came to its notice through its own inquiry, and was not disclosed by the Prosecutor. The Defence argues that “nothing could be more exculpatory than evidence that a person accused of a crime actually tried to prevent it,” and thus seeks disclosure of the information from Witness G concerning these events, and any other information about efforts to stop the killing.

(ii) All documents regarding the assassination of President Habyarimana on 6 April 1994. According to the Defence, whether Mr. Nzirorera was involved in the assassination of

President Habyarimana would have a major impact on the determination of his guilt or innocence, his sentence, and the process of truth and reconciliation.

(iii) Any records of benefits afforded or promises made by the Office of the Prosecutor or any branch of the United Nations to prosecution witnesses or their families, specifically Witnesses Omar Serushago, Georges Ruggiu, Jean Kambanda and "Jean Pierre," a prosecution informant who is believed to be now deceased and whose statements will be offered into evidence as hearsay statements. The Defence emphasises that such evidence is universally considered to be relevant to the credibility of witnesses.

(iv) All information about the commission of crimes by any prosecution witness and criminal records pertaining to any prosecution witness, including "Jean-Pierre". The Defence emphasises that such information or documents are exculpatory, within the meaning of Rule 68, since it affects the credibility of the witnesses and the reliability of their evidence.

(v) Any information which contradicts or calls into doubt the evidence to be given by any prosecution witness, including "Jean-Pierre", or any information which affects their credibility.

(vi) The identities of the prosecution Investigators who interviewed Witness ACM, who testified in the *Kajelijeli* Case (*Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T), and who denied during her testimony in that Case having ever made specific pronouncements about the Accused, which appeared in her prior statement as taken by the Investigators. The Defence emphasises that the credibility of the evidence from other witnesses interviewed by these Investigators may be affected by similar fabrication.

#### *Prosecution Response*

3. The Prosecutor states that he is aware of his obligations under Rule 68, and addresses each of the specific requests, as follows:

(i) The information regarding efforts to stop the killing relates only to Witness G, a witness currently protected by special measures. The related requests should therefore be denied under Rule 66(C) and Rule 69 of the Rules.

(ii) Responsibility for the assassination of President Habyarimana is not material to the case.

(iii) The Prosecutor agrees to supply information on benefits and promises to Witnesses relating to Omar Serushago and Georges Ruggiu, but argues that information pertaining to Jean Kambanda is privileged and thus non-disclosable under Rule 66(C). The Prosecutor does not address the request for information of this nature regarding other witnesses than Serushago, Ruggiu and Kambanda.

(iv) The Prosecutor is aware of his obligations with respect to the criminal activity and records of witnesses, contradictory information, and material regarding "Jean Pierre"; he has disclosed all that he is able to at this stage.

(v) Disclosure of the identity of the prosecution Investigators who interviewed Witness ACM is not appropriate, particularly since no decision has yet been made as to the credibility of any of the witnesses at issue.

#### *Defence Reply*

4. The Defence argues that information regarding the assassination of President Habyarimana must be disclosed under Rule 68, because evidence that the Rwandan Patriotic

Front ("RPF"), rather than the Accused and his associates, were responsible for the plane crash would mitigate the guilt of the Accused, should such guilt be established.

5. The Defence objects to the Prosecutor's claim that Rule 66(C) and Rule 69 protections render the requested materials non-disclosable. According to the Defence, Rule 66(C) only applies to the Prosecutor's obligations under Sub-Rules 66(A) and (B), and an exemption of disclosure in such a case must be granted by the Trial Chamber based on a specific factual showing, which has not been made in this case. The Defence submits that Rule 69 applies only to the identity of a witness, not to the substance of exculpatory information the concerned witness brings.

6. The Defence further objects to the Prosecutor's claim that he is aware of his obligations and that he has disclosed to the Defence all that he is able to at this stage regarding criminal activity and records of witnesses, information contradicting anticipated prosecution evidence and material related to "Jean Pierre". The Defence submits that nothing has been disclosed under these categories, despite the Rule 68 requirement that disclosure be carried out as soon as practicable.

### Deliberations

#### *The Prosecutor's Disclosure Obligations under Rule 68 of the Rules*

7. Rule 68 of the Rules, which is entitled "Disclosure of Exculpatory Evidence", reads as follows:

"The Prosecutor shall, as soon as practicable, disclose to the Defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused, or may affect the credibility of prosecution evidence."

8. In the view of the Chamber, Rule 68 entails, not merely the Prosecution's obligation to disclose to the Defence the existence of exculpatory evidence, also the Prosecution's obligation to disclose any such evidence in its control or custody. As emphasised by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY" and "ICTY Appeals Chamber"), these obligations are of a continuous nature.<sup>1</sup>

9. The categories of evidence which qualify as exculpatory pursuant to Rule 68 are:

- (i) Evidence which in any way tends to suggest the innocence of the accused; or
- (ii) Evidence which in any way tends to mitigate his guilt; or
- (iii) Evidence which may affect the credibility of prosecution evidence.

10. The Prosecutor is responsible for making the initial determination of the exculpatory or potentially exculpatory nature of evidence in his custody or control, or of evidence whose existence comes to his notice, which the Prosecutor is to disclose as soon as practicable.

11. The Defence may believe that items of an exculpatory nature other than those disclosed are in the Prosecutor's custody or control. It may in that case seize the Trial Chamber of a

<sup>1</sup> See in this respect *Prosecutor v. Blaskic*, IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings (AC), 26 September 2000, para. 32.

request for an order compelling disclosure pursuant to Rule 68. In doing so, the Defence is expected:

- (i) First, to identify the materials sought;
- (ii) Second, if disputed, to satisfy the Chamber on a *prima facie* basis of the Prosecutor's custody or control of the materials requested;
- (iii) Third, if disputed, to satisfy the Chamber on a *prima facie* basis of the exculpatory or potentially exculpatory character of the materials requested.

*Requests Deemed to be Lacking in Specificity*

12. Considering the first criteria above, the following requests for an order compelling disclosure pursuant to Rule 68 cannot be entertained for lack of specificity:

- (i) Request for disclosure of any information which contradicts or calls into doubt the information provided by any prosecution witness, or which affects their credibility;
- (ii) Request for any information tending to show that the Accused, or other persons affiliated with the MRND, the *Interahamwe*, or the Interim Government, attempted to stop the killings.

13. The Chamber however emphasises that such information would fall under Rule 68, and notes that the Prosecutor stated that he is aware of his obligations under this Rule.

14. The Chamber further notes that the Prosecution does not clarify whether it has any information, other than the relevant Transcripts in the *Media* Trial, in respect of Witness X's statement that the Accused asked him, in the Defence words, "to convince people to stop the killings". Any such information, if in the Prosecutor's knowledge, should be disclosed pursuant to Rule 68 of the Rules, notwithstanding the applicable protective measures in regard to Witness X, if necessary under the seal of confidentiality and subject to specific conditions to be determined by the Chamber. The Chamber recalls in this regard that exceptions to the Prosecutor's disclosure obligations under the Rules are subject to the Trial Chamber's leave not to disclose. See Rule 66(C).

*Reports and Documents Regarding the Assassination of President Habyarimana*

15. The Chamber considers that the Defence has not shown how such materials, if they exist, could suggest the innocence of the Accused, who is not charged with taking part in the assassination, or how such materials could tend to mitigate the Accused's personal guilt or affect the credibility of the prosecution evidence. The request summarized in paragraph 2(ii) above therefore fails under Rule 68 of the Rules.

*Information and Records on Benefits and Promises to Prosecution Witnesses*

16. Information and records relating to benefits or promises made to Prosecution witnesses or their families would fall under Rule 68 of the Rules in that they may affect the credibility of prosecution evidence.

17. The Chamber notes that the Prosecutor has agreed to supply such information regarding Omar Serushago and Georges Ruggiu.



18. The Chamber does not accept the Prosecutor's response that information and records relating to benefits or promises made to former Prime Minister Jean Kambanda is privileged under Rule 66(C) of the Rules. Again, the Chamber notes that Rule 66(C) only exempts material from disclosure subject to a Trial Chamber's leave thereto. The Prosecutor has not requested the Chamber to be relieved from his obligation to disclose all or part of any information or records relating to benefits or promises made to Jean Kambanda, if such information or records exist. If the Prosecutor intends to call Jean Kambanda as a witness in the present case, he is to disclose the information or records in question.

*Information on Prior Criminal Activity, Criminal Records of Prosecution Witnesses*

19. Information on prosecution witnesses' prior criminal activity, and criminal records of prosecution witnesses, similarly fall under Rule 68 of the Rules in that they may affect the credibility of prosecution evidence. As the ICTY Appeals Chamber has noted, "The material to be disclosed [under Rule 68] is not restricted to material which is in a form which would be admissible in evidence. It includes all information which in any way tends to suggest the innocence or mitigate the guilt of [the Accused] or may affect the credibility of prosecution evidence, as well as material which may put [the Accused] on notice that such material exists."<sup>2</sup> Should the existence of such material come to its notice, the Prosecution should notify the Defence thereof as soon as practicable. Should such materials come to be in the Prosecution's custody or control, the Prosecution should as soon as practicable disclose it to the Defence.

*Identities of the Prosecution Investigators who Interviewed Witness ACM*

20. The Chamber is satisfied that the names of the Prosecution Investigator(s) who collected Witness ACM's prior statement(s) qualify as exculpatory material within the meaning of Rule 68, in the sense that this information may affect the credibility of prosecution evidence.

*Fees and Costs Associated with the Motion*

21. The Chamber rendered its Decision on the Defence Motion for Disclosure of Items Deemed Material to the Defence of the Accused on 29 September 2003. This Decision dealt with a "Motion for Inspection of Items 'Material to the Preparation of the Defence'" filed on 4 December 2002 by the Defence for the Accused on the basis of Rule 66(B) of the Rules ("Rule 66(B) Motion"). The Chamber notes that some of the requests made in the present Motion are similar to requests made in the Rule 66(B) Motion. Besides, all of the issues raised in the present Motion and those raised in the Rule 66(B) Motion should have been dealt with in one motion filed pursuant to both Rule 66(B) and Rule 68. The Chamber accordingly finds that the Registrar should deny payment to the Defence of half of the costs and fees associated with the present Motion, pursuant to Rule 73(F) of the Rules.

<sup>2</sup> *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, Decision on Motion by Dario Kordic for Access to Unredacted Portions of October 2002 Interviews with Witness "AT" (ICTY AC), 23 May 2003, para. 24. Rule 68 of the ICTY Rules of Procedure and Evidence is identical to Rule 68 of this Tribunal's Rules.



**FOR THE ABOVE REASONS,**

**THE TRIBUNAL,**

**I. ORDERS** the Prosecutor, pursuant to Rule 68 of the Rules, to disclose to the Defence, as soon as possible:

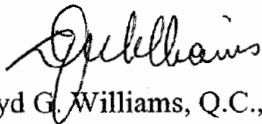
A) The names of the Prosecution Investigator(s) who collected Witness ACM's prior statement(s);

B) The information and records relating to benefits or promises made to former Prime Minister Jean Kambanda, subject to the Prosecutor's intention to call Jean Kambanda as a witness in the present Case;

**II. DENIES** the Motion in all other respects.

**III. DIRECTS** the Registrar, pursuant to Rule 73(F) of the Rules, to deny payment to the Defence of half of the fees and costs associated with the Motion, for the reasons stated in para. 21 above.

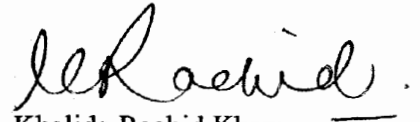
Arusha, 7 October 2003



Lloyd G. Williams, Q.C.,  
Presiding Judge



Andrézia Vaz  
Judge



Khalida Rachid Khan  
Judge

