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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Dennis C. M. Byron, Presiding  
Emile Francis Short  
Gberdao Gustave Kam

**Registrar:** Adama Dieng

**Date:** 27 April 2006

**THE PROSECUTOR**

v.

Édouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA

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

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**DECISION ON DEFENCE MOTIONS FOR DISCLOSURE OF INFORMATION  
OBTAINED FROM JUVÉNAL UWILINGIYIMANA**

***RULES 66(B) AND 68(A) OF THE RULES OF PROCEDURE AND EVIDENCE***

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## INTRODUCTION

1. Referring to the Prosecution's disclosure obligations under Rules 66 (B) and 68 (A) of the Rules, the Defence for Nzirorera<sup>1</sup> seeks an order obligating the Prosecution to disclose "information obtained from Juvénal Uwilingiyimana", including any statements taken from him, any reports of interviews conducted with him, and any investigator's notes containing information about him. Nzirorera contends that the information is material to the preparation of his defence under Rule 66 (B), in particular for the preparation of his cross-examination of Prosecution Witness Omar Serushago. Nzirorera also claims that the material constitutes exculpatory material which affects the credibility of Prosecution evidence under Rule 68 (A), in particular the proposed testimony of Serushago. The Defence for Ngirumpatse moves the Chamber for the same relief as Nzirorera.<sup>2</sup> The Prosecution opposes the Defence Motions, but proposes to offer Uwilingiyimana's statement *in camera* for review by the Chamber and for it to determine whether or not it ought to be disclosed,<sup>3</sup> an alternative supported by the Defence.

2. Omar Serushago may testify during the next trial session in this case, which is scheduled to begin on 15 May 2006, and to run until 14 July 2006. The Defence for Nzirorera expects, on the basis of material already disclosed to it,<sup>4</sup> that part of Serushago's testimony will relate to the allegation that former Rwandan Government Minister Juvénal Uwilingiyimana, and the Accused Joseph Nzirorera, jointly participated in the planning and execution of genocide in Rwanda in 1994.<sup>5</sup>

<sup>1</sup> "Joseph Nzirorera's Motion for Disclosure of Information Obtained from Juvénal Uwilingiyimana," filed on 27 January 2006, by the Defence for Nzirorera.

<sup>2</sup> "Requête aux fins de communication de tous documents relatifs aux entretiens intervenus entre le Procureur et Juvénal Uwilingiyimana," filed by the Defence for Ngirumpatse on 7 February 2006.

<sup>3</sup> See "Prosecutor's Response to Nzirorera's Request of 27 January 2006 for Disclosure of the Statements of the Deceased Juvénal Uwilingiyimana," filed on 1 February 2006, as well as "Réponse du Procureur à la Requête de Mathieu Ngirumpatse aux fins de communication de tous documents relatifs aux entretiens intervenus entre le Procureur et Juvénal Uwilingiyimana," filed on 9 February 2006.

<sup>4</sup> Nzirorera makes specific reference to specific allegations contained in Omar Serushago's Statements of 16 February 2005, 3 February 1998 and 12 February 1998, taken by the OTP, and his testimony in the *Nahimana* trial.

<sup>5</sup> The allegations contained in the statements, quoted by Nzirorera, are as follows:

- (a) In 1993, at an MRND meeting in Gisenyi stadium, Juvénal Uwilingiyimana took the floor and said that it was important to know that the Inyenzi were the enemies (OTP statement of 16 February 2005, p. 322).
- (b) In December 1993, Nzirorera and Uwilingiyimana led a meeting of the *Interahamwe* at the Meridien Hotel in Gisenyi at which Major Anatole Nsengiyumva was introduced as the new Army commander in Gisenyi. They promised the *Interahamwe* that arms would be distributed to them (OTP statement of 16 February 2005, p. 322).
- (c) In April 1994, Nzirorera and Uwilingiyimana harbored Serushago and Thomas Mugiraneza in their rooms at the Meridien Hotel after Serushago killed the sister of Colonel Ngungize. They later intervened with Ngungize so that the army and the *Interahamwe* could continue to work together to kill Tutsis (OTP statements of 3 February 1998; 12 February 1998, p. 562).
- (d) In April 1994, Uwilingiyimana called Serushago and instructed him to kill the wife of football coach Longin Rudasinga. Serushago arrived at the residence where she was staying, took her and showed her to Nzirorera and Colonel Nsengiyumva, and then took her to the cemetery to be killed (OTP statements of 3 February 1998; 12 February 1998, p. 569).
- (e) In June 1994, Uwilingiyimana and Nzirorera attended a meeting for raising funds to purchase arms to be used to kill Tutsis (Testimony in *Nahimana* trial, 16 November 2001, p. 41; statement of 16 February 2005, p. 322).

3. Uwilingiyimana, who is now deceased, was indicted by this Tribunal in June 2005.<sup>6</sup> The Defence for Nzirorera claims that it interviewed Uwilingiyimana on two occasions, during which interviews Uwilingiyimana provided information which directly contradicts the evidence to be given by Serushago. Nzirorera claims that Uwilingiyimana must have provided information to the Prosecution consistent with that which he provided to the Defence. As Uwilingiyimana is now deceased, the Defence is unable to obtain a written statement from him, or to call him to testify. Therefore, one of the reasons for which the Defence seeks disclosure of the material is to decide whether to have any statement made by the deceased admitted under Rule 92 *bis* of the Rules.<sup>7</sup>

4. Whilst the Prosecution acknowledges its possession of at least one witness statement from Uwilingiyimana, which it offers for *in camera* review by the Chamber, it has rejected all previous written requests by the Defence to obtain any material concerning Uwilingiyimana.<sup>8</sup>

## DISCUSSION

### In Camera Inspection

5. As a preliminary matter in the determination of the Defence Motions, the Chamber has considered whether to accept the Prosecution's offer to review a statement taken from Uwilingiyimana, *in camera*, for the purposes of determining whether or not it ought to be disclosed under Rule 68 of the Rules. The Chamber notes that this course of action is supported by the Defence in the absence of a determination by the Chamber that the material ought to have been disclosed, though Nzirorera seeks to widen the category of material to be inspected by the Trial Chamber to include "all information obtained from Mr. Uwilingiyimana not limited to formal statements taken from him".

6. Rules 66 and 68 impose an obligation upon the Prosecution to disclose materials falling within the ambit of those provisions. As the jurisprudence of this Tribunal indicates, the Prosecutor is responsible for making an initial determination about whether or not material ought to be disclosed under those provisions,<sup>9</sup> yet that determination can be

<sup>6</sup> *Prosecutor v. Juvénal Uwilingiyimana*, Case No. ICTR-2005-83-I, Indictment (Confidential), 10 June 2005, confirmed on 13 June 2005, see *Prosecutor v. Juvénal Uwilingiyimana*, Case No. ICTR-2005-83-I, Confirmation of Indictment and other Related Orders, 13 June 2005; Confidential Status of Indictment lifted by *Prosecutor v. Juvénal Uwilingiyimana*, Case No. ICTR-2005-83-I, Decision on Prosecutor's Motion to Unseal the Indictment and Warrant of Arrest, 29 November 2005.

<sup>7</sup> Rule 92 *bis*, entitled "Proof of Facts Other Than by Oral Evidence" provides for circumstances under which a Trial Chamber may admit the evidence of a witness in the form of a written statement in lieu of oral testimony.

<sup>8</sup> By letter dated 23 December 2005, Nzirorera requested disclosure of "all reports, statements, or recordings of all interviews" with Juvénal Uwilingiyimana to the OTP. Nzirorera stated in his letter that he had "reason to believe that the material is exculpatory, relevant and necessary for the preparation of the defence... In addition, Mr. Nzirorera's defence team had interviewed Mr. Uwilingiyimana in the past and considered him a potential defence witness. Disclosure of the statements made to OTP is necessary to determine whether to seek to admit his evidence pursuant to Rule 92*bis*." This request was rejected by the Prosecutor by letter dated 25 January 2006. The Prosecutor said, "Based on those conversations [with the Prosecutor's colleagues], and in light of my familiarity with the indictment against your client and the lines of defence that you have articulated, I have made the determination that the Prosecutor is not in possession of information from this witness that is exculpatory, relevant or necessary for the preparation of the defence... since his file does not contain exculpatory material, the Prosecutor will decline to disclose any portion of his file at this time."

<sup>9</sup> See, for example, *Prosecutor v. Bagosora et al*, ICTR Case No. 98-41-T, Decision on Defence Request for Additional Disclosure of Investigative Reports and Statements, 25 August 2004, para. 6, concerning Rule 68.

interfered with by a Chamber if it is found that the Prosecution has erred in making such a determination. Once the Prosecution has made a determination that it is not under an obligation to disclose the material, and has communicated this view to the Defence, it is then for the Defence to demonstrate, by satisfying the criteria outlined in the jurisprudence, that the Prosecution has made an erroneous determination under either, or both, of the aforementioned provisions.

7. In the particular circumstances of this case, the Chamber considers it inappropriate to review the material *in camera*. The Chamber prefers to consider whether or not the Defence has demonstrated that the Prosecution has made an erroneous determination with respect to the material in question, through the satisfaction of the criteria outlined in the relevant jurisprudence. To that end, the Chamber must consider the merits of the application, based solely on the briefs of the Parties, as governed by Rule 73 of the Rules.

Whether Disclosure should be ordered under Rule 68 of the Rules

8. Rule 68 of the Rules sets out the Prosecution's disclosure obligations in relation to exculpatory and other relevant material. Sub-Rule (A) places a duty upon the Prosecutor to disclose to the Defence any material which, in his actual knowledge, may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence. The timeframe stipulated is "as soon as practicable."

9. In order for the Defence to establish that the Prosecution has breached its disclosure obligations under Rule 68, and invoke an order from the Chamber that the material be disclosed, the Defence must: firstly, identify the material sought with the requisite specificity;<sup>10</sup> secondly, make a *prima facie* showing of the exculpatory or potentially exculpatory character of the materials requested;<sup>11</sup> and, thirdly, make a *prima facie* showing of the Prosecution's custody or control of the materials requested.<sup>12</sup> It has been held that information which contradicts that provided by a Prosecution witness is exculpatory within the meaning of Rule 68.<sup>13</sup>

10. The Chamber considers that the Defence has failed to satisfy the criteria invoking an interference with the Prosecution's determination under Rule 68 (A). In particular, the Chamber is not convinced that the Defence has presented *prima facie* evidence that the material sought is exculpatory within the meaning of the Rule. Nzirorera claims that Uwilingiyimana told him that the allegations of Omar Serushago were untrue. Other than his own assertions, Nzirorera relies upon a letter, purportedly from Juvénal Uwilingiyimana to

<sup>10</sup> *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-I, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, para. 11 ("the purpose of Rule 68 is not to facilitate the conduct of a fishing expedition."); *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-PT, Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure, 5 July 2005, para. 14; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion for Disclosure Under Rule 68, 1 March 2004, para. 5; *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI, 14 September 2001, para. 11.

<sup>11</sup> *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Decision on Kajelijeli's Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials Pursuant to Rule 66 (B) and Rule 68 of the Rules of Procedure and Evidence, 5 July 2001, paras. 13-14.

<sup>12</sup> *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-I, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, para. 11.

<sup>13</sup> *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, paras. 12-13; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motion for Disclosure Under Rule 68, 1 March 2004, fn. 5;

the Prosecutor, the provenance of which has not been established, containing general allegations about misconduct of Prosecution investigators. It also contains an allegation, purportedly by Uwilingiyimana, that the testimony to be given by Omar Serushago is "rote". The Chamber is of the view that an allegation, purportedly by Uwilingiyimana, that Serushago's testimony before this Tribunal is "rote" is not sufficient to establish that the Prosecution has material which contradicts the testimony to be given by Serushago.

11. Nzirorera also claims that information from Uwilingiyimana is material to his cross-examination of Witnesses ADE and T and will raise issues concerning their credibility, though he does not provide any basis for such an assertion other than claiming that the material sought will expose Prosecution misconduct.<sup>14</sup> The Chamber is, therefore, presently unprepared to go behind the Prosecutor's assertion that his review of the material "presently suggests it is not exculpatory or undermining of other witnesses within the meaning of Rule 68."<sup>15</sup>

Whether Disclosure should be ordered under Rule 66 of the Rules

12. Rule 66 of the Rules places an obligation upon the Prosecution to disclose certain materials falling within the ambit of that provision. Rule 66 (B) places an obligation upon the Prosecution, after receiving a request from the Defence,<sup>16</sup> to permit the Defence to "inspect any books, documents, photographs and tangible objects in his custody or control," which:

- (1) are material to the preparation of the defence; or
- (2) are intended for use by the Prosecutor as evidence at trial; or
- (3) were obtained from or belonged to the accused.

13. The Defence submits that the "information provided by Mr. Uwilingiyimana" is material to the preparation of Nzirorera's defence. The Prosecution submits that sub-Rule (B) does not apply to material concerning a witness whom the Prosecution does not intend to call. In support of its position, the Prosecution submits that, as sub-Rule (A) refers to disclosure of witness statements of intended prosecution witnesses, Rule 66 (B) ought to be read in that context. Since the Prosecution has no intention of calling Juvénal Uwilingiyimana (as he is deceased), Rule 66 (B) does not apply to the material in question. The Defence argues that this is an incorrect interpretation of Rule 66 (B) and cites a number of decisions of the Tribunal wherein the Prosecution has been ordered to allow inspection of material under sub-Rule (B) which related to witnesses whom the Prosecution did not intend to call to testify.<sup>17</sup>

<sup>14</sup> With respect to Witness ADE, Nzirorera asserts that he was used as a 'tool' to encourage Uwilingiyimana to co-operate with the prosecution. No further basis or material is advanced to support this assertion. In relation to Witness T, Nzirorera asserts that Uwilingiyimana's information will expose the "Gestapo" tactics of the Prosecution in encouraging witnesses to turn against Nzirorera. Again no further basis or material is advanced to support this assertion.

<sup>15</sup> See letter from Prosecutor to Peter Robinson, dated 25 January 2006 (appearing as Annexure C to Nzirorera's Motion), as well as Prosecutor's Response, dated 1 February 2006, para. 5. See also "Prosecution Response to Nzirorera's Supplemental Motion for Stay of 13 February 2006 (Confidential), filed on 14 February 2006, para. 5.

<sup>16</sup> See fn 9, above, concerning the satisfaction of this element by the Defence.

<sup>17</sup> *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-21-I, Decision on Defence Motion for Disclosure of Evidence, 1 November 2000, para. 47; *Prosecutor v. Ndayambaje*, Case No. ICTR-96-8-T, Decision on Defence Motion for Disclosure, 25 September 2001, para. 12; *Prosecutor v. Ntagerura et al.*, Case No. ICTR-98-46-T, Decision on Bagambiki's Motion for the Disclosure of the Guilty Pleas of Detained Witnesses and the Statements of Jean Kambanda, 1 December 2000, para. 18; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-

14. A simple reading of Rule 66 as a whole, as well as sub-Rule (B) in isolation, indicates that the Defence argument is the correct interpretation of sub-Rule (B). Rule 66 is entitled “Disclosure of Materials by the Prosecutor”.<sup>18</sup> The Chamber considers that sub-Rules (A) and (B) are intended to cover separate categories of material; sub-Rule (A) referring to *disclosure* of statements of the accused and statements of witnesses, and sub-Rule (B) referring to *inspection* of other material not falling within the ambit of sub-Rule (A).

15. In order for the Defence to establish that the Prosecution has breached its disclosure obligations under Rule 66 and invoke an order from the Chamber that the material be made available for inspection, the Defence must, firstly, identify the material sought with the requisite specificity, and secondly, make a *prima facie* showing of the material’s “materiality for the preparation of the Defence.”<sup>19</sup> The materiality of the documents sought to be inspected may be determined by assessing whether they are necessary for the preparation of the cross-examination of a witness,<sup>20</sup> or by reference to the Indictment.<sup>21</sup> Furthermore, Rule 66 must be read in the context of Rule 70 which outlines materials exempt from Rule 66 disclosure. Pursuant to Rule 70(A), reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of a case are not subject to disclosure under Rule 66.

16. In this case, the Chamber is of the view that the investigator’s reports and/or notes sought by the Defence constitute “matters not subject to disclosure” pursuant to Rule 70 (A). Secondly, with respect to the specificity of the materials sought, the Chamber has noted, and has accepted, the Prosecution’s assertion in open court that it is not in possession of any tape recordings and/or transcripts of interviews conducted between Uwilingiyimana and Prosecution investigators.<sup>22</sup> The Chamber is of the view that Nzirorera’s references, throughout his Motion, to any or all “information obtained from Uwilingiyimana” lacks the specificity required under Rule 66. However, Nzirorera also seeks inspection of any statements taken from Uwilingiyimana, which request does have the requisite specificity. The Chamber notes that the Prosecution has admitted that it has in its possession at least one statement from Uwilingiyimana. The Chamber will therefore consider whether that statement is material to the preparation of the Defence.

17. In terms of materiality, Nzirorera submits that his inspection of the material is necessary for the preparation of his cross-examination of Serushago. The Prosecution does not actually respond to the merits of the Defence’s application under Rule 66(B) since the Prosecution says that, as a matter of law, Rule 66(B) only applies to statements from witnesses whom it intends to call at trial. The Prosecution does, however, submit that

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44-PT, Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records, 14 September 2005, para. 15.

<sup>18</sup> Emphasis added.

<sup>19</sup> *Prosecutor v. Zejnil Delalic*, Case No. IT-96-21-T, Decision on the Motion by the Accused Zanjil Delalic for the Disclosure of Evidence, 26 September 1996, para. 10; *Prosecutor v. Ndayambaje*, Case No. ICTR-96-8-T, Decision on the Defence Motion for Disclosure, 25 September 2001, para. 11; *Prosecutor v. Rwamakuba et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Disclosure, 15 January 2004, para. 11.

<sup>20</sup> *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-T, Decision on Motion to Disclose to the Defence all the Facts and Authorities that Led to the Arrest, Detention and Provisional Release of Prosecution Witnesses TBG, TBH, TBI, TBJ and TBK, 1 August 2003.

<sup>21</sup> *Prosecutor v. Ndayambaje*, Case No. ICTR-96-8-T, Decision on the Defence Motion for Disclosure, 25 September 2001, para. 11.

<sup>22</sup> T. 22 February 2006, p. 48.

Uwilingiyimana's statement is not material to any issue that the Defence has indicated that it wishes to put forth affirmatively, and that Nzirorera is "fishing" for material.

18. Whilst the Indictment against the Accused in this case does not specifically refer to Juvénal Uwilingiyimana as being part of the joint criminal enterprise of which the co-Accused were allegedly part, it states that the co-Accused were participants in the joint criminal enterprise with the following individuals and classes of persons:

... (ii) political authorities at the national and regional level, including... (iii) influential businessmen, Akazu, and political party leaders affiliated with 'Hutu Power', including... (iv) leaders of the *Interahamwe* and *Impuzampagambi* political party 'youth wing' militias and the 'civil defense' program, including... The Prosecutor is unable to specifically identify each and every participant in the joint criminal enterprise."<sup>23</sup>

The allegations in the Indictment against Juvénal Uwilingiyimana put him within the aforementioned classes of persons. The Chamber also notes that the Indictment against Juvénal Uwilingiyimana specifically alleges that all three co-Accused in this case were the co-conspirators of Uwilingiyimana.<sup>24</sup>

19. The Chamber is of the view that Nzirorera has succeeded in establishing the *prima facie* materiality of the statement in the possession of the Prosecution from Uwilingiyimana. It is apparent from the passages in Serushago's statements, relied upon by the Defence for Nzirorera in its Motion, that Serushago will testify to specific allegations concerning Uwilingiyimana and Nzirorera which are relevant to specific paragraphs and counts in the Indictment against the co-Accused in this case.

20. The Chamber finds, therefore, that the criteria under Rule 66(B) have been met by the Defence with respect to Uwilingiyimana's statement. The Chamber also considers that any other material in the Prosecution's possession concerning Uwilingiyimana which does not fall within the ambit of the Rule 70 exception, and which relates to any allegations against the Accused linked with any paragraph or count in the Indictment, is material to the preparation of the Defence and should be disclosed.

## FOR THOSE REASONS

### THE CHAMBER

- I. **GRANTS** the Defence Motions for disclosure of information obtained from Juvénal Uwilingiyimana, in part; and
- II. **ORDERS** that, pursuant to Rule 66(B), the statement of Juvénal Uwilingiyimana be made available for inspection by the Defence of each of the Accused in this case; and

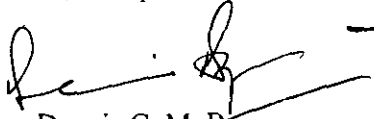
<sup>23</sup> *Prosecutor v. Karemera et al*, Case No. ICTR-98-44-I, Amended Indictment of 24 August 2006, para. 6.


<sup>24</sup> The relevant passages of the Indictment against Uwilingiyimana are attached as an Annexure to this Note.

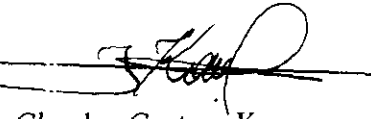
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**III. ORDERS** that, pursuant to Rule 66(B), the Prosecution make available for inspection by the Defence of each of the Accused in this case any other material in its possession from Juvénal Uwilingiyimana which does not fall within the ambit of Rule 70 (A) of the Rules and which relates to any allegations against the Accused linked with any paragraph or count in the Indictment against them.

Arusha, 27 April 2006, done in English.

  
Dennis C. M. Byron  
Presiding

  
Emile Francis Short  
Judge

  
Gherdao Gustave Kam  
Judge

