



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 30 May 2006

THE PROSECUTOR

v.

Edouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

**ORAL DECISION ON DISCLOSURE OF MATERIAL FROM JOSEPH
SERUGENDO**

Office of the Prosecutor:

Don Webster
Alayne Frankson-Wallace
Iain Morley
Gilles Lahaie
Sunkarie Ballah-Conteh
Takeh Sendze

Defence Counsel for Édouard Karemera

Dior Diagne Mbaye and Félix Sow

Defence Counsel for Mathieu Ngirumpatse

Chantal Hounkpatin and Frédéric Weyl

Defence Counsel for Joseph Nzirorera

Peter Robinson and Patrick Nimy Mayidika
Ngimbi

See transcripts E: pp. 62-64 (original language)

MR. PRESIDENT:

The first decision is a draft oral decision on oral motion pursuant to Rules 66(B) and 68(A) for disclosure of information from Joseph Serugendo.

The Chamber is now going to rule on Nzirorera's oral application of 22nd May 2006 for the disclosure of information from Joseph Serugendo. The Defence for Nzirorera submits that the information sought is both exculpatory under Rules 68(A) of the Rules of Procedure and Evidence and is material to the preparation of his defence, pursuant to Rule 66(B) of the rules. The Defence commits that the information is necessary for the purposes of its cross-examination of Witness T, in particular because both Serugendo and Witness T were members of the same national committee and were amongst the founders of RTLM. The Defence further submits that Serugendo was present on 10th April 1994 when it is alleged that Nzirorera directed the *Interahamwe* committee to stop killings, an event in relation to which Witness T also testifies. The Defence submits that if it does not have access to the Serugendo material now, Witness T may need to be recalled.

The Prosecution opposed the Defence motion, submitting that it is not in possession of any information from Serugendo which falls within the scope of either Rules 66 or 68. The Prosecution submits that it has nothing in its possession to disclose since it has not, as yet, taken a "formalised" statement from Serugendo. It further submits that it intends to take a statement from him, at which point it will be disclosed to the Defence under Rule 66(A) of the rules. The Prosecution today advised the Chamber that it does intend to make an application to vary its witness list by adding Joseph Serugendo to it.

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.

According to the jurisprudence of this Tribunal, for the Defence to establish that the Prosecution has breached its disclosure obligations under Rule 68(A), the Defence must:

- a. firstly, identify the material sought with the requisite specificity;
- b. secondly, make a *prima facie* showing of the Prosecution's custody or control of the materials requested; and
- c. thirdly, make a *prima facie* showing of the exculpatory or potential exculpatory nature of the materials requested.

Information which contradicts that provided by a Prosecution witness is exculpatory within the meaning of Rule 68.

With regard to the first and second criteria concerning the Prosecution's possession of material which is identified with sufficient specificity, the Chamber is of the view that whilst the Prosecution's submissions on this issue have been ambiguous, the criteria have been satisfied. It can be established from the Prosecution's submissions that there is material in his office's possession, which has been reviewed by him, and which he has determined not to be exculpatory. A combination of the Prosecution's submissions, as well as its indication that it intends to add Serugendo to its witness list, makes it clear to the Chamber that the Prosecution is in possession of information concerning this individual.

The Chamber notes its concern that the Prosecution would consider the Defence's intention to call an individual as a witness -- expressed during the early stages of the Prosecution's case -- as in some way relieving it of its obligations to disclose materials under Rule 66 and/or 68. Rules 66 and 68 outline the Prosecution's obligations to disclose material falling within the ambit of those rules. Such obligations can in no way be limited by an expression of intention, by the Defence, to call an individual as a witness.

Turning to the third criterion requiring the Defence to make a *prima facie* showing of the exculpatory or potential exculpatory character of the materials requested, the Chamber is also of the view that this criterion has been satisfied. Serugendo's alleged presence on 10th April 1994 when Nzirorera claims to have directed the *Interahamwe* committee to stop killings, is potentially exculpatory in that Serugendo may support this Defence assertion. As Witness T also testifies to this event, the Chamber considers it important for Nzirorera to have access to all information concerning this event in the Prosecution's possession, for the purpose of properly conducting his cross-examination of Witness T. Furthermore, the Chamber considers that exculpatory or potentially exculpatory material should be disclosed irrespective of whether it is contained in a statement -- in statement form or not.

The Chamber is therefore of the view that the Defence's application for disclosure of information from Serugendo should be granted in part, and hereby orders, pursuant to Rule 68(A), that the Prosecution disclose, prior to the completion of Mr. Robinson's cross-examination of Witness T, to the Defence of all of the Accused any information it may have from Serugendo concerning the allegation that Nzirorera directed the *Interahamwe* committee to stop killings on 10th April 1994, since such information is important for the Defence's cross-examination of Witness T.

The Chamber notes, however, that if the provision of material pursuant to this Order does not allow Mr. Robinson an adequate opportunity to review it prior to the close of his cross-examination, the Chamber will afford him a further opportunity to question the witness upon the subject matter of the material disclosed pursuant to this order.

Finally, the Chamber notes that any application to add Serugendo to the Prosecution witness list should be made forthwith, and any statements taken from Serugendo should be disclosed under Rule 66(A) as soon as possible.