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UNITED NATIONS
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**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: 19 October 2006

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THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA
Case No. ICTR-98-44-T

**DECISION ON DEFENCE MOTION FOR DISCLOSURE OF RPF MATERIAL AND
FOR SANCTIONS AGAINST THE PROSECUTION**

Rule 68 of the Rules of Procedure and Evidence

Office of the Prosecutor:
Don Webster
Alayne Frankson-Wallace
Iain Morley
Saidou N'Dow
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

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INTRODUCTION

1. The proceedings in the instance case commenced on 19 September 2005. In a motion filed on 5 April 2006, the Prosecution indicated its willingness to disclose RPF materials as requested by the Defence for Nzirorera but moved the Chamber to "be relieved of its obligation to disclose the identities of the individuals who made the statements."¹ On 4 July 2006, the Chamber granted in part this application ruling that the identity of the individuals who gave statements regarding the *Revolutionary Patriotic Front* ("RPF") material should be disclosed to the Defence, but also ordered protective measures in view to protect their security.²

2. Subsequently, the Prosecution disclosed, in redacted form, to the Defence for each Accused four witness' statements, including those of Witnesses DM46 and DM80, and a copy of a report pertaining to RPF activities.³

3. In the meantime, the Defence for Nzirorera filed a Motion moving the Chamber to order the Prosecution to disclose documents and witness statements relating to RPF acts of violence and infiltration in Rwanda between 1990 and 1994. It also requests the Chamber to sanction the Prosecution for its failure to comply with the Chamber's Decision of 4 July 2006.⁴ The Prosecution opposes the Motion.⁵

DELIBERATIONS

(1) Defence Request for Disclosure of Exculpatory Material

4. The Defence argues that documents and witness statements relating to RPF acts of violence and infiltration in Rwanda between 1990 and 1994 are exculpatory material falling within the ambit of Rule 68 of the Rules of Procedure and Evidence. In the Defence's view, the material sought is sufficiently identified and its disclosure is vital for its case as such evidence provides justification for the road blocks, civil defence system and tends to prove that the acts of the Accused were legitimate responses to actual infiltration and acts of

¹ Prosecutor's Application pursuant to Rules 39, 68 and 75 of the Rules of Procedure and Evidence for an Order for Conditional Disclosure of Witnesses Statements and other documents pursuant to Rule 68(A).

² *Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera* ("Karemera et al."), Case No. ICTR-98-44-T, Decision on the Prosecutor's Application pursuant to Rules 39, 68 and 75 of the Rules of Procedure and Evidence for an Order for Conditional Disclosure of Witnesses Statements and other documents pursuant to Rule 68(A) (TC), 4 July 2006 ("Decision of 4 July 2006").

³ See disclosures made on 1 August 2006 and 29 September 2006.

⁴ Joseph Nzirorera's Motion to Compel Disclosure of RPF Material and For Sanctions, filed on 25 September 2006.

⁵ Prosecutor's Response, filed 29 September 2006.

violence by the RPF. It submits that the exculpatory character of the material has already been accepted by the Trial Chamber in *Bagosora* case and is equally applicable here.⁶ It also claims that the Prosecution has acknowledged possession of other witness statements besides those which it has disclosed. The Defence concludes that the requirements set forth by this Chamber's prior decisions for ordering the disclosure of the material under Rule 68 are therefore met in the present case. The Prosecution responds that its trial team periodically reviews its database for RPF material using the criteria offered by the Defence but denies having found other material that should be disclosed.

5. Rule 68 (A) of the Rules provides that the Prosecution has an obligation to disclose, as soon as practicable, to the Defence "any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence." The determination as to whether material has to be disclosed under Rule 68 "is primarily a facts-based judgement, falling within the responsibility of the Prosecution,"⁷ which is presumed to discharge its obligation in good faith.⁸

6. According to the established jurisprudence of this Tribunal, if the Defence claims that the obligation to disclose material under Rule 68 has been violated, it must: (i) identify the material sought with reasonable specificity; (ii) establish that the material is in the custody or control of the Prosecution; and (iii) make a *prima facie* showing of the exculpatory or potentially exculpatory character of the materials requested.⁹ Information will be exculpatory if it tends to disprove a material fact alleged against the accused, or if it undermines the credibility of evidence intended to prove to material facts.¹⁰

7. As the Trial Chamber I in the *Bagosora et al.* noted, the exculpatory character of the material sought "depends on the nature of the charges and evidence heard against the

⁶ The Defence refers to *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Disclosure of Defence Witness Statements in the Possession of the Prosecution Pursuant to Rule 68(A) (TC), 8 March 2006.

⁷ *Karemera et al.*, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 16; *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-A, Judgement (AC), 29 July 2004, para. 264.

⁸ *Karemera et al.*, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 17; *Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-A, Judgement (AC), para. 183.

⁹ *Karemera et al.*, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 13; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on the Ntabakuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68 (TC), 6 October 2006, para. 2.

¹⁰ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Ntabakuze Motion for Disclosure of Prosecution Files (TC), 6 October 2006, para. 4 ("*Bagosora* Decision of 6 October 2006").

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accused".¹¹ It concluded that some specific information on RPF activities could be exculpatory in the light of the charges against the accused in that specific case. It also held that "evidence of RPF activities which have only a remote connection to the crimes alleged against the Accused is not exculpatory", and found that "evidence of RPF operations at times or places unrelated to the crimes alleged against this Accused is not exculpatory."¹² The Trial Chamber I's rulings were based on a case-by-case basis and did not contain any general statement on the exculpatory character of RPF materials. That same Chamber further held that

Although some of the material within the category defined by the Defence may be exculpatory, this does not justify an order for disclosure of the entire category. [...] Disclosure of an entire category of documents will only be ordered under Rule 68 where the category is accurately tailored to the exculpatory content.¹³

8. In the present case, it cannot be excluded that some information concerning RPF activities may be exculpatory to the extent that it is relevant to the crimes alleged against the Accused or to the evidence adduced during the Prosecution's case. This information may, for instance, assist the Chamber in understanding some of conduct and acts about which testimony was heard. The Defence's request, however, lacks specificity as to the material desired. It generally refers to all evidence in the hands of the Office of the Prosecutor concerning "RPF acts of violence and infiltration in Rwanda between 1990 and 1994." Such a request is too vague and could encompass evidence of RPF activities which have only remote connection or even no connection at all to the crimes alleged against the Accused and which therefore would have no exculpatory character. The Defence's request is not sufficiently tailored to the exculpatory content of the material sought. The Rule cannot be used freely as a means to obtain information from the Prosecution and then subsequently to determine whether it can be used or not.¹⁴ The Defence's motion for disclosure of exculpatory material falls therefore to be rejected.

(2) Defence Request for Disclosure of Statement in Un-Redacted Form and for Sanctions Against the Prosecution

9. The Defence for Nzirorera requests disclosure of statements in un-redacted form arguing that, in order to use the exculpatory information, it needs to know the identity of the

¹¹ *Ibidem*.

¹² *Ibid.*, para. 5.

¹³ *Ibid.*, para. 6.

¹⁴ *Ibid.*, para. 6 quoting *Delalic et al.*, Decision on the Request of the Accused Hazim Delic Pursuant to Rule 68 for Exculpatory Information (TC), 24 June, para. 15.

persons making the statements.¹⁵ It shares with the Prosecution concerns about the perils faced by the witnesses with information concerning the RPF's crimes who are likely to want to cooperate with the Defence and thus undertakes not to take any action that could jeopardize their security; it has no objection to contacting these witnesses under the auspices of the Witnesses and Victims Support Section.¹⁶ The Defence further requests the Chamber to impose sanctions, pursuant to Rule 46(A), for violating the Chamber's Decision of 4 July 2006. It claims that sanctions are the only measures which can put an end to the impunity with which the Prosecution has violated its disclosure obligations in this case which are delaying and obstructing the trial on a continuous, ongoing basis.¹⁷

10. The Prosecution submits that "its trial team" has determined the existence of two additional witness statements but has disclosed them to the Defence in redacted form in order to avoid any prejudice to ongoing investigations and protect the security of its informants.¹⁸

11. As this Chamber and the Appeals Chamber clearly stated, the Prosecution's obligation to disclose exculpatory material is essential to a fair trial.¹⁹ One of the purposes of the Prosecution's investigative function is "to assist the Tribunal to arrive at the truth and to do justice for the international community, victims and the accused."²⁰ The Appeals Chamber has also explained the unity of the Office of the Prosecutor in discharging disclosure obligations considering that the Prosecution teams are all representatives in the same Office of the Prosecutor.²¹

¹⁵ Defence's Reply, filed on 2 October 2006.

¹⁶ *Ibidem*.

¹⁷ Defence's Motion.

¹⁸ Prosecution's Response.

¹⁹ Oral Decision on Stay of Proceedings, T. 16 February 2006, pp. 5 and seq.; *Karemera et al.*, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations (AC), 30 June 2006, para. 9.

²⁰ *Karemera et al.*, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations (AC), 30 June 2006, para. 9; *Bagosora et al.*, Case No. ICTR-98-41-AR73 & ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), para. 44.

²¹ *Bagosora et al.*, Case No. ICTR-98-41-AR73 & ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005, para. 43:

Nowhere in the Statute or Rules is it stated that the Prosecutor's obligations may be limited to specific teams within the Office of the Prosecutor, which in the practice of the Tribunal, are sometimes referred to as the "Prosecution" in an individual case. The ordinary meaning and context of the text of the Rules suggest that the obligations of the Prosecutor rest on him or her alone as an individual who is then able to authorize the Office of the Prosecutor as a whole, undivided unit, in fulfilling those obligations.

See also: *Karemera et al.*, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations (AC), 30 June 2006, footnote 33.

12. In the light of these principles, the Prosecution's contentions that "[its] trial team is not aware of any other materials that should be disclosed pursuant to Rules 66 (B) and 68 (A)" and that "the review did not identify [the two above-mentioned] statements since they were deemed to be *sub judice* in the *Bagosora et al.* trial" are unsatisfactory.²² The Prosecution must actively review the material in the possession of the Office of the Prosecutor, and not only the documents in possession of this trial team, and, at the very least, inform the accused of the existence of exculpatory material.²³

13. In its Decision of 4 July 2006, the Chamber also considered that "since the identity of the individuals who gave statements regarding the RPF material and the individuals who gave the Credibility Statements are indeed related to the content of the statements, they should be disclosed to the Defence."²⁴ The Prosecution acknowledges this prior order but claims that the disclosure of these witnesses' identities would expose them to grave danger and that it must use its power under Rule 39 which allows the Prosecution to take special measures to protect the safety of potential witnesses and informants. It invites the Chamber to balance the Defence's request with the Prosecutor's interest to preserve the integrity of his ongoing investigation.

14. As stated in prior decisions, Rule 39 of the Rules could not constitute, as such, an impediment to disclosure of identifying information with respect to Prosecution witnesses.²⁵ However, when the Prosecution fears that potential witnesses or informants may be in danger or at risk or that disclosure of material may prejudice further or ongoing investigations, it may apply to the Chamber for specific measures in accordance with the Statute and the Rules.²⁶ Specifically, Rule 68(D) of the Rules provides for an exception to the Prosecution disclosure obligations of exculpatory material if the disclosure "may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interests or affect the security interests of any State." When applying for such exemption, the Prosecution is expected to provide the Chamber with the information or materials sought to be kept

²² Prosecution's Reply, para. 9 (emphasis added).

²³ *Karemera et al.*, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations (AC), 30 June 2006, para. 10.

²⁴ Decision of 4 July 2006, quoting *Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68 (TC), 10 December 2003, para. 21.

²⁵ Decision of 4 July 2006, para. 8; see also: *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure (TC), 5 July 2005, para. 18; *Karemera et al.*, Scheduling Order (TC), 30 March 2006, para. 6.

²⁶ See Statute, Article 21; Rules of Procedure and Evidence, Rules 69, 75, 66(C) and 68(D).

confidential.²⁷ The Chamber will grant such kind of request only on a case-by-case basis after consideration of the Prosecutor's submissions in each case.

15. In the Prosecution's response, no information or material has been given to the Chamber, nor has any specific argument been made for the Chamber to make an order under the exception provided by Rule 68(D). In its Decision of 4 July 2006, the Chamber has already issued measures to protect the security of the individuals who gave the statements.²⁸ If the Prosecution seeks further measures, it must apply forthwith to the Chamber. Apart from the statements of Witnesses DM80 and DM46,²⁹ disclosure of exculpatory material in redacted form is therefore not permitted at this stage, as acknowledged by the Prosecution.

16. Rule 46(A) of the Rules provides that

a Chamber may, after a warning, impose sanctions against a counsel if, in its opinion, his conduct remains offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice. This provision is applicable *mutatis mutandis* to Counsel for Prosecution.

17. In its oral Decision of 24 May 2006, the Chamber found a lack of diligence in the Prosecution's compliance with its disclosure obligations.³⁰ It concluded that this obstructed the proceedings and was contrary to the interests of justice and imposed a warning against the Prosecution. In the situation at hand, the Chamber finds, and the Prosecution does not even dispute, that the Prosecution's conduct in disclosing statements in redacted form is in breach of the prior Chamber's Decision of 4 July 2006. Such misconduct is unacceptable; it remains offensive, obstructs the proceedings and is contrary to the interests of justice. The Chamber therefore finds that a sanction should be imposed against the Prosecution, by formally drawing the attention of the Prosecutor himself, as the disciplinary body, to this misconduct.³¹

²⁷ Decision of 4 July 2006, para. 7.

²⁸ Decision of 4 July 2006:

[...] the Defence for each Accused and the Accused persons shall not share, reveal or discuss, directly or indirectly, any documents or any information contained in any documents, or any other information which could reveal or lead to the identification of any person whose statement shall be disclosed pursuant to this decision, to any person or entity other than the Accused, assigned Counsel or other persons working on the Defence team;

[...] the Defence for each Accused shall notify the Prosecution in writing, on reasonable notice, and the Witnesses and Victims Support Section of the Tribunal (WVSS) if it wishes to contact any person who submitted a statement to the Prosecution related to the RPF material or a Credibility Statement, who are not subject to a Trial Chamber's protective orders. Should the person concerned agree to the interview, WVSS shall immediately undertake all necessary arrangements to facilitate the interview.

²⁹ Decision of 4 July 2006.

³⁰ T 24 May 2006, pp. 35-36.

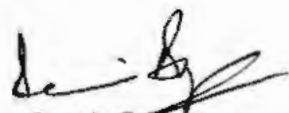
³¹ Compare with Rule 46(B) which provides that the misconduct of counsel may be communicated "to the professional body regulating the conduct of counsel in his State of admission."

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FOR THE ABOVE REASONS, THE CHAMBER

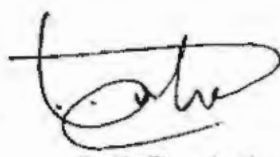
- I. DENIES the Defence's application for disclosure of exculpatory material and for sanctions against the Prosecution;
- II. GRANTS the Defence's application for disclosure of the statements previously disclosed on 29 September 2006 in un-redacted form;
- III. IMPOSES, pursuant to Rule 46(A) of the Rules, a sanction against the Prosecution and accordingly
- IV. REQUESTS the Registry to serve the present Decision on the Prosecutor in person

Arusha, 19 October 2006, done in English.



Dennis C. M. Byron

Presiding Judge



Emile Francis Short

Judge



Gberdao Gustave Kam

Judge

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