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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 25 October 2007

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THE PROSECUTOR

v.

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

**DECISION ON JOSEPH NZIRORERA'S NOTICES OF RULE 68 VIOLATIONS
AND MOTIONS FOR REMEDIAL AND PUNITIVE MEASURES**

Rule 68 of the Rules of Procedure and Evidence

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INTRODUCTION

1. On 24 May 2007 and on 26 September 2007, the Defence for Nzirorera filed motions asserting that the Prosecutor had violated Rule 68 of the Rules of Procedure and Evidence ("Rules") by late disclosures of interviews conducted by the Office of the Prosecutor ("OTP") investigators on 28 January 2004 with Jean Damascène Habyarimana ("2004 interview") and on 13 May 2003 with Pierre Célestin Mbonankira ("2003/1 interview").¹ It contends that these interviews should have been disclosed pursuant to Rule 68 (A) as soon as practicable since the statements therein contradict the testimony of some Prosecution witnesses and furthermore, as to the 2004 interview, the allegations in Paragraph 68.2 of the Indictment.² The Defence for Nzirorera therefore moves the Chamber to order remedial and punitive measures against the Prosecutor and any other measures that the Chamber deems appropriate.³

2. On 22 October 2007, during the continuation of the presentation of the Prosecution case, the Defence for Nzirorera made an additional notice of violation of Rule 68.⁴ It explained that it sought to obtain from the Prosecutor, pursuant to Rules 66 (D) (inspection of material) and 68 (disclosure of exculpatory material), any OTP statements from six individuals, including Mathias Nyagasaga, that Prosecution Witness BDX mentioned in his testimony about his activities in Kigali from 6 April 1994.⁵ The Prosecutor, having previously stated that BDX's detailed account of his activities in Kigali from 6 April 1994 was first made known to the Prosecutor at the proofing session on the eve of his examination-in-chief, responded that as a result of the further Defence's request, the OTP had searched its database and disclosed two transcripts from radio broadcasts and two statements.⁶ Further, one interview conducted on 5 August 2003 by OTP investigators with Mathias Nyagasaga ("2003/2 interview"), concerning his activities in Kigali from 6 April 1994, was found. He

¹ Joseph Nzirorera's Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures, filed 24 May 2007 ("Nzirorera's First Motion").

² Paragraph 62.8 of the Indictment reads as follows: "Joseph NZIRORERA participated in decisions taken at a meeting at his mother's Busogo secteur residence on the evening of 6 April 1994 or the morning of 7 April 1994 or both. Other participants at one or the other of those meetings were Casimir BIZIMUNGU, Augustin BIZIMUNGU, and Juvenal KAJELIJELI. During the meeting that took place on or about the early morning of 7 April 1994 Joseph NZIRORERA agreed with the other participants and ordered that Interahamwe militias and locally recruited armed civilians should attack and kill the Tutsi population in Mukingo and Nkuli communes."

³ Joseph Nzirorera's Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures, filed 24 May 2007 ("Nzirorera's First Motion").

⁴ T. 22 October 2007, p. 3.

⁵ T. 22 October 2007, p. 4.

⁶ T. 22 October 2007, p. 4.

further noted that the Prosecution "as a matter of principle" did not disclose witness statements made to OTP investigators pursuant to Rule 66 (B), as in its opinion such statements are confidential and outside the ambit of Rule 66 (B), and recalled that the matter was still pending in the Appeals Chamber. As it was questionable whether the interview fell under Rule 68 the Prosecutor, however, offered to hand over the statement to the Chamber in order to make a finding as to whether it should be disclosed as exculpatory material under Rule 68. The Chamber declined the offer but, in view of the Prosecutor's acknowledgement that the statement of Mathias Nyagasagais related to BDX's testimony as to his whereabouts from 7 April 1994, ordered, pursuant to Rule 66 (B), that the document be disclosed forthwith to the Defence.⁷

3. After reading the interview, the Defence for Nzirorera submitted that Mathias Nyagasaga's statement was Rule 68 material and, joined by the Defence for Karemera and the Defence for Ngirumpatse, requested the Chamber to remedy this additional violation and impose sanctions upon the Prosecution.⁸

4. The Prosecutor disputes that any of the interviews fall under Rule 68 and opposes the motion for remedial and punitive or other measures.⁹

DELIBERATIONS

Do the interviews fall under Rule 68?

5. Under Rule 68 (A), the Prosecutor has a positive and continuous obligation to disclose, as soon as practicable, 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 the Prosecution evidence.¹⁰ The initial determination of what material is exculpatory, which is

⁷ T. 22 October 2007, p. 5

⁸ T. 22 October 2007, pp. 9-12.

⁹ Prosecutor's Response to Nzirorera's Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures, filed 29 May 2007 ("Prosecutor's First Response"), Prosecutor's Response to Nzirorera's (sic) Notice of Rule 68 Violation and Request for Remedial and Punitive Measures – Statement of Mbonankira, filed 1 October 2007 ("Prosecutor's Second Response").

¹⁰ *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-R, Decision on the Prosecutor's Motion to Move for Decision on Niyitegeka's Requests for Review Pursuant to Rules 120 and 121 and the Defence Extremely Urgent Motion Pursuant to (i) Rule 116 for Extension of Time Limit, (ii) Rule 68 (A), (B) and (E) for Disclosure of Exculpatory Evidence Both of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda and (iii) Response to Prosecutor's Motion of 15 August 2005 seeking a Decision, in the Absence of Any Legal Submissions from the Applicant (AC), 28 September 2005, p. 7 ("*Niyitegeka Appeals Chamber Decision*").

primarily a facts-based judgement, rests with the Prosecutor.¹¹ The expression "actual knowledge" has been consistently interpreted as requiring that the material be in the possession of the Office of the Prosecutor.¹² Hence, if the Defence claims that the obligation to disclose exculpatory material has been violated it must: (i) define the material with reasonable specificity; (ii) establish that it is in the custody and control of the Prosecutor; and (iii) present a *prima facie* case which would make probable the exculpatory nature of the materials sought.¹³ The Prosecutor is generally presumed to discharge its obligations under Rule 68 in good faith.¹⁴

6. The Appeals Chamber has held that the Prosecutor's obligation under Rule 68 shall be interpreted broadly considering that it is essential to a fair trial.¹⁵ Furthermore, in the *Bagosora* case, the Trial Chamber has held that Rule 68 is applicable where there is any possibility, in light of the submissions of the Parties, that the material could be relevant to the defence of the accused.¹⁶

7. In the 2004 interview, Jean Damascène Habyarimana stated "[r]egarding a meeting in the house of Nzirorera's mother" that "[p]ersons who claim there was a meeting in the night of the death of President Habyarimana, lie." (emphasis added)

8. The Prosecutor contends that the 2004 interview does not affect the credibility of Prosecution Witnesses BTH and GDU since they testified to a meeting which allegedly took place in Nzirorera's mother's house "during the early morning hours of 7 April", and not on the night of 6 April 1994 as alleged by Habyarimana in his 2004 statement.¹⁷ It submits that the 2004 interview, seen as a whole, does not suggest the innocence or mitigate the guilt of

¹¹ *Karemura et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 16.

¹² *Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-A, Judgement (AC), 23 May 2005, para. 262 ("Defence must first establish that the evidence was in the possession of the Prosecution; *Karemura et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 16.

¹³ *Nyirtegeka* Appeals Chamber Decision, p. 7; *Karemura et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 13; *Bagosora et al.*, Decision on the Ntabakuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68 (TC), 6 October 2006, para. 2; *Bagosora et al.*, Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses (TC), 27 September 2005, para. 3 ("a request for production of documents has to be sufficiently specific as to the nature of the evidence sought and its being in the possession of the addressee of the request").

¹⁴ *Kordic and Cerkez*, Case No. IT-95-14/2-A, Judgement (AC), 17 December 2004, para. 183 ("the general practice of the International Tribunal is to respect the Prosecution's function in the administration of justice, and the Prosecution execution of that function in good faith"); *Karemura et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 17 ("the Trial Chamber is entitled to assume that the Prosecution is acting in good faith").

¹⁵ *Karemura et al.*, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations (AC), 30 June 2006, para. 9.

¹⁶ *Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Ntabakuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68 (TC), 6 October 2006, para. 5.

¹⁷ Prosecutor's First Response.

Nzirorera or affect the credibility of the Prosecutor's evidence because the remaining part of Habyarimana's statement, in relation to other charges in the Indictment, corroborates the Prosecutor's evidence and contradicts Joseph Nzirorera's alibi defence.

9. The Chamber does not accept the Prosecutor's contention and finds it evident that it is at least possible that Habyarimana's statement refers to the same alleged meeting in Nzirorera's mother's house as the testimony of BTH and GBU and Paragraph 68.2 of the Indictment. Therefore Habyarimana's statement may suggest the innocence of Nzirorera in relation to Paragraph 68.2 of the Indictment and may affect the credibility of the Prosecution evidence. Whether in the light of the remaining parts of Habyarimana's statement it would be in Joseph Nzirorera's interest, or not, to rely on Habyarimana as a witness for his defence is not a consideration for the Prosecutor to make in the exercise of his disclosure obligations.

10. In the 2003/1 interview, Pierre Célestin Mbonankira stated that "on 7 April 1994, at about 07:00 hours, I left my house in Busogo Cell of Busogo Sector with the intention of visiting Byangabo Trading Center, which is also in Busogo Sector. I did not remain at the trading centre but proceeded to a drinking bar that was on a side road that runs alongside the ISAE in Busogo Sector. Later that day, between 11:00 – 11:30 hours, I saw a white pick-up vehicle (which may have been a Landrover or a Toyota) pull on the ISAE side-road directly opposite the bar."

11. The Prosecutor submits that this statement does not affect the credibility of Prosecution Witnesses BTH and GBU.¹⁸ According to the Prosecutor, BTH testified that between 8:00 and 9:00 a.m. that morning, he met Mbonankira among a group of men who perpetrated the killings and rapes, without specifying where they met and without expanding on Mbonankira's possible participation in the criminal acts. The Prosecutor also notes that GBU testified that Mbonankira participated in the rape of a woman, Joyce, on 7 April 1994 without specifying the time of day, but that other evidence suggests that the rape took place in the afternoon. The Prosecutor further contends that both the killings in the morning and the rape took place less than one kilometre from the bar in question.

12. The Chamber notes that in his testimony BTH, when replying to the question "Now, when you rejoined the killers and started going up towards Samvura's house, can you tell us who it was that you rejoined?", mentioned a number of persons, including "Célestin Mbonankira".

¹⁸ Prosecutor's Second Response.

13. The Chamber disagrees with the Prosecutor's contention and is satisfied that there is a *prima facie* case that the 2003/1 interview may affect the credibility of Prosecution evidence.

14. Concerning the statement of Mathias Nyagasaga in the 2003/2 interview, the Chamber is also of the view that this material falls within the ambit of Rule 68 disclosure. Witness BDX testified that from 6 April 1994 until 2 days after the death of President Habyarimana he stayed with Janvier Bugusi, Nyagasaga's son, in his home in Nyamirambo and left the house twice in the company of Busugi.¹⁹ Mathias Nyagasaga, however, stated that from 7-12 April 1994, together with his son, who lived in Nyamirambo, he moved from place to place and stayed in different hotels. Although Nyagasaga did not mention in his statement the name of his son, it appears that he only has one son.²⁰ The Chamber is therefore of the view that Nyagasaga's statement may affect the credibility of Witness BDX.

15. For these reasons, the Chamber finds that all three interviews fall under Rule 68. It is not in dispute that the material has been in the possession of the Prosecutor's Office since the interviews were recorded in 2003 and 2004. Furthermore, the Chamber recalls that Trial Chamber III has previously stated that the Office of the Prosecutor, in relation to the exercise of its disclosure obligations, must be seen as a whole. Therefore it is irrelevant whether the Prosecutor in charge of the case may not have had actual knowledge of the material.²¹

16. The 2004 interview and the 2003/1 interview should therefore have been disclosed within the time limits prescribed in Rule 68 (A). As to the 2003/2 interview, the Chamber has no reason not to accept the Prosecutor's assertion that he did not become aware of Witness BDX's detailed account of his activities from 6 April 1994 involving Mathias Nyagasaga until the witness proofing session shortly before the examination-in-chief. Therefore the Chamber is satisfied that it was not *practicable* to disclose the 2003/2 interview prior to the examination-in-chief of Witness BDX.

¹⁹ T. 9 October 2007.

²⁰ See identifying information on the witness' statement.

²¹ *Karemera et al.*, Oral Decision on Stay of Proceedings. T. 16 February 2006, pp. 5 and seq.

Are remedial or punitive measures warranted?

17. The fact that material under Rule 68 has not been timely disclosed does not always create a prejudice to the Accused.²² It is for the Defence to demonstrate that the Accused has suffered material prejudice as a result of the late disclosure.²³

18. The Defence for Nzirorera submits in relation to the 2004 and 2003/1 interviews that it has suffered a prejudice because during the cross-examination of the Prosecution witnesses, it was not able to put to them the contradicting statements made by Habyarimana and Mbonankira. It therefore requests as a remedial and punitive measure that Paragraph 62.8 of the Indictment be stricken and the testimony of Prosecution Witnesses BTH and GBU be excluded.

19. The Chamber is not satisfied that the Defence has suffered *materiel* prejudice because of the late disclosure of the 2004 and 2003/1 interviews. The Chamber notes that some disclosures were made with respect to the Prosecution Witnesses so that the Defence for Joseph Nzirorera could conduct investigations and prepare the cross-examination of the witnesses. In relation to the 2004 interview, the Chamber further notes that the Defence, in its reply brief, has not commented upon the contention in the Prosecutor's response that the Defence would have known that Habyarimana, being Nzirorera's cousin, living in Nzirorera's mother's house at the time in question and keeping the key to the house, would be able to testify as to whether the meeting in question had taken place or not, and that the Defence indeed would have interviewed Habyarimana before the cross-examination of BTH and GBU.

20. In relation to the 2003/1 interview, the Chamber notes that the statement of Célestin Mbonankira does not concern the alleged acts and conduct of Nzirorera. Further, the fact that Mbonankira told the OTP interviewer that he was in a place other than the crime scenes at the time of the criminal acts, had it been put to the concerned Prosecution witnesses, is unlikely to have affected their testimonies significantly.

21. Concerning the 2003/2 interview, the Chamber recalls that it granted the request of the Defence for postponement of the cross-examination of Witness BDX due to the lack of

²² *Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-A, Judgement (AC), 23 May 2005, para. 262 ("If the Defence satisfies the Tribunal that the Prosecution has failed to comply with its Rule 68 obligations, then the Tribunal must examine whether the Defence has been prejudiced by that failure before considering whether a remedy is appropriate."); *Niyitegeka Appeals Chamber Decision*, p. 7.

²³ *Niyitegeka Appeals Chamber Decision*, p. 7.

notice concerning the witness' detailed account of his activities from 6 April 1994 involving, among others, Mathias Nyagasaga. The fact that the 2003/2 interview was disclosed about one week after it became practicable has clearly not materially added prejudice to the defence/Defence.

22. Furthermore, the Chamber recalls that the exclusion of evidence and/or a part of the Indictment would be an extreme remedy and finds that the Defence has not shown that it has suffered such a prejudice from the late disclosure of the interviews as would justify such a remedy.

Are disciplinary measures against the Prosecutor warranted?

23. In addition to moving the Chamber to remedy to the Prosecutor's repetitive late disclosure of Rule 68 material, the Defence for Nzirorera moves the Chamber to impose some penalty upon the Prosecutor therefore. It notes that in April 2004, during the first trial in this case, in response to its request for disclosure of OTP interviews with witnesses from Mukungu or other information concerning an alleged meeting in Nzirorera's mother's house on the morning of 7 April 1994 that would affect the credibility of Prosecution evidence, the Prosecutor stated that it was not aware of any such evidence. The Defence further recalls that during the instant trial, on 6 February 2006, it reiterated its request for disclosure of OTP interviews and specified seven Prosecution witnesses, including Jean Damascène Habyarimana and Pierre Célestin Mbonankira, who would refute the allegation that the meeting in question had taken place.

24. In its additional oral submissions to the Chamber, the Defence for Nzirorera suggested that since the Senior Trial Attorney is mainly responsible for the late disclosures, he should be removed the responsibility to determine what is to be considered Rule 68 material and should be denied audience before the Chamber.²⁴

25. Under Rule 46 (A) of the Rules, a Chamber may, after a warning, impose sanctions against a counsel, if, in its opinion, his conduct obstructs the proceedings, or is otherwise contrary to the interests of justice.

26. In the *Krstic* case, the Appeals Chamber did not impose a disciplinary sanction for the Prosecutor's late disclosure of Rule 68 material on the grounds that no material prejudice had been shown and that it could not establish whether the Prosecutor had deliberately breached

²⁴ T. 22 October 2007.

his obligations.²⁵ The Chamber is, however, of the view that disciplinary sanctions, where appropriate, can be applied even if no material prejudice and/or deliberate breach of the Prosecutor's obligations have been established if the case demonstrates a pattern of continuous lack of diligence in the exercise of the Prosecutor's disclosure obligations, which will amount to obstructing the proceedings or be contrary to the interests of justice.

27. In the present case, Trial Chamber III has, on a number of occasions, criticised the Prosecutor for his lack of diligence in the exercise of his disclosure obligations. Since then, warnings were issued against the Prosecutor, pursuant to Rule 46 (A), for his failure to comply with his disclosure obligations and a sanction was even imposed upon the Prosecution by formally drawing the attention of the Prosecutor himself, as the disciplinary body, to its misconduct.²⁶

28. Furthermore, while Trial Chamber III in February 2006 denied the Defence motion for disclosure of material, being satisfied by the Prosecutor's assertions that "[t]here [was] nothing in what [the Lead Prosecution Counsel] looked at that would bring it within Rule 68,"²⁷ it considered it necessary "to point out that the administration of justice depends on the integrity of the Prosecution to the extent that, if it is subsequently established that the declarations made in this session were inaccurate, the Chamber will revisit the issue to consider whether there has been misconduct on behalf of the Prosecution."²⁸

29. In the present case, the Chamber cannot directly sanction the Prosecutor's handling of the request made by the Defence in 2004 during the previous trial, but the Chamber finds that the history of the disclosure issue ought to have motivated the Prosecutor to show more diligence when the Defence filed another motion in 2006 further detailing the material sought.

30. The Chamber, however, finds no basis not to accept the Prosecutor's assertion that research of the OTP database was conducted without the 2004 interview being found. The Chamber further notes that some improvements seem to have been made to the OTP's search for Rule 66 (B) and Rule 68 material as shown by the disclosures made pursuant to examination-in-chief of Witness BDX.

²⁵ *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Judgement (AC), 19 April 2004, paras. 153 and 214.

²⁶ See: *Karemera et al.*, Oral Decision on Stay of Proceedings, T. 16 February 2006, pp. 5 and seq.; Oral Decision on Late Disclosure of Witness T's Statement and Imposing a Warning pursuant to Rule 46(A) to the Prosecution, T. 24 May 2006; Decision on Defence Motion for Disclosure of RPF Material and for Sanctions against the Prosecution (TC), 19 October 2006.

²⁷ T. 16 February 2006.

²⁸ T. 16 February 2006.

31. As to the 2003 interviews, the Chamber is satisfied that the late disclosures were based on an interpretation of the ambit of Rule 68. As the initial determination of what material is exculpatory, which is primarily a facts-based judgement, rests with the Prosecutor, a decision by the Prosecutor not to disclose material can only be sanctioned if it be demonstrated that his determination pursuant to Rule 68 has clearly not been made in good faith. Taking into account the limited jurisprudence in existence on the standards to be followed under Rule 68, the Chamber finds that it has not been demonstrated that the Prosecutor, when determining that the 2003 interviews did not fall under Rule 68, clearly did not act in good faith.

FOR THESE REASONS, THE CHAMBER

I. GRANTS Nzirorera's Motions in part, finding that the material in question has not been timely disclosed pursuant to Rule 68 (A);

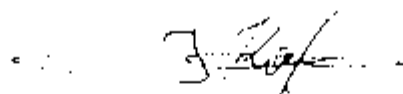
II. DENIES Nzirorera's requests for remedial, punitive or other measures.

Arusha, 25 October 2007, done in English.



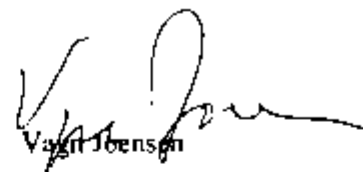
Dennis C. M. Byron

Presiding Judge



Gberdao Gustave Kam

Judge



Vaglit Jørgensen

Judge

