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ICTR-98-44-T  
29-11-2007  
(32870-32860)

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

32870

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OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Dennis C. M. Byron, Presiding  
Gherdao Gustave Kam  
Vagn Joensen  
**Registrar:** Adama Dieng  
**Date:** 29 November 2007

**THE PROSECUTION**

v.

Édouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA

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

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**DECISION ON JOSEPH NZIRORERA'S SIXTH, SEVENTH AND EIGHTH  
NOTICES OF DISCLOSURE VIOLATIONS AND MOTIONS FOR REMEDIAL,  
PUNITIVE AND OTHER MEASURES**

*Rules 66 (A), 66 (B) and 68 of the Rules of Procedure and Evidence*

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## INTRODUCTION

1. On 2 November 2007, Joseph Nzirorera filed a Motion asserting that the Prosecution had violated Rule 68 of the Rules of Procedure and Evidence ("Rules") by its non disclosure of an interview conducted by Office of the Prosecution ("OTP") investigators on 24 and 26 April 2007 with Charles Karorero ("Karorero interview")<sup>1</sup> who contradicted the testimony of Prosecution Witness ANU ("Sixth Notice").<sup>2</sup>
2. On 8 November 2007, during the cross-examination of Prosecution Witness AWD, Joseph Nzirorera made an oral Motion asserting that the Prosecution had violated Rules 66 (A) (ii) and 66 (B) in relation to material concerning AWD ("Seventh Notice").<sup>3</sup>
3. On 12 November 2007, Joseph Nzirorera filed yet another Motion asserting that the Prosecution had violated Rule 68 by the non-disclosure of interviews with at least four residents of Bwakira commune, which allegedly contradict the testimony of Prosecution Witness AXA ("Eighth Notice").<sup>4</sup>
4. Joseph Nzirorera moves the Chamber to order remedial and punitive measures against the Prosecution as well as any other sanctions it finds appropriate, including the exclusion of the testimony of ANU, AWD and AXA, and denying audience to the Lead Counsel for the Prosecution on the case. In his Motions, he makes an alternative request for the postponement of the cross-examination of AXA. This alternative request will be dealt with separately. The Prosecution opposes the Motions, asserting that there have been no disclosure violations.<sup>5</sup>
5. This Decision will address the Sixth Notice and the Eighth Notice first; and then, the Seventh Notice.

<sup>1</sup> The Karorero interview was disclosed on 7 November 2007.

<sup>2</sup> Joseph Nzirorera's Sixth Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures, filed 2 November 2007.

<sup>3</sup> *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("Karemera et al."), T. 8 November 2007, pp. 12 to 15.

<sup>4</sup> Joseph Nzirorera's Eighth Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures (Witness AXA), filed on 12 November 2007.

<sup>5</sup> *Prosecutor's Response to Joseph Nzirorera's Sixth Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures*, filed 7 November 2007; *Karemera et al.*, T. 8 November 2007 at p. 17; *Prosecutor's Response to Joseph Nzirorera's Eighth Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures (Witness AXA)*, filed 14 November 2007.



## DELIBERATIONS

### *The Sixth and Eight Notices (Rule 68 (A))*

#### **Applicable Law**

6. Under Rule 68 (A), the Prosecution has a positive and continuous obligation to disclose, as soon as practicable, to the Defence any material, which in its actual knowledge may suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecution evidence.<sup>6</sup> The initial determination of what material is exculpatory, which is primarily a facts-based judgement, rests with the Prosecution.<sup>7</sup>

7. The disclosure to the Defence of evidence which in any way tends to suggest the innocence or mitigate the guilt of the accused is one of the most onerous responsibilities of the Prosecution,<sup>8</sup> and shall be interpreted broadly since it is essential to a fair trial.<sup>9</sup> The Appeals Chamber has held that the Prosecution shall be presumed to act *bona fide* while discharging its obligations under Rule 68.<sup>10</sup>

8. The expression "actual knowledge" has been consistently interpreted as requiring that the material be in the possession of the Prosecution,<sup>11</sup> which must be understood as the OTP

<sup>6</sup> *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").

<sup>7</sup> *Karemera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 16.

<sup>8</sup> *Prosecutor v. Brđanin*, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, Case No. IT-99-36-A, App. Ch., 7 December 2004, p. 3; *Prosecutor v. Brđanin and Talić*, Decision on "Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed pursuant to Rule 68 bis and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved", Case No. IT-99-36-T, T. Ch. II, 30 October 2002, para. 23.

<sup>9</sup> *Karemera 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. See also *The Prosecutor v. Théoneste Bagosora et al.*, Case Nos. ICTR-98-41-AR73, ICTR-98-41-AR73(B), Decision on Interlocutory Appeals on Witness Protection Orders, 6 October 2005, para. 44 ("Bagosora Appeal Decision"); *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, paras. 183, 242 ("Kordić and Čerkez Appeal Judgement"); *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 20 July 2004, para. 264 ("Blaškić Appeal Judgement"); *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004, para. 180 ("Krstić Appeal Judgement"); *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004, p. 3 ("Brđanin Appeal Decision").

<sup>10</sup> *Kordić and Čerkez*, 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"); *Karemera 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").

<sup>11</sup> *Prosecutor v. Juvenal 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"); *Karemera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 16.

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as a whole. It is the duty of the Prosecution to disclose exculpatory material arising from related cases and this duty is a continuous obligation without distinction as to the public or confidential character of the evidence concerned.<sup>12</sup> It is, therefore, irrelevant whether the Prosecutor in charge of the case had actual knowledge of the material.

9. When bringing a motion pursuant to Rule 68, in which the accused intends to show that the Prosecution is in breach of its obligations, the accused is expected (i) to identify the materials sought; (ii) if disputed, to satisfy the Chamber on a *prima facie* basis of the Prosecution's custody or control of the materials requested; and (iii) if disputed, to satisfy the Chamber on a *prima facie* basis of the exculpatory or potentially exculpatory character of the materials sought.<sup>13</sup>

#### On the merits of the Sixth Notice

10. On 18 June 2007, Prosecution Witness ANU, during his examination-in-chief, testified that all training of the Amahindure in Mukingo commune took place before 6 April 1994.<sup>14</sup> In the Karorero interview, however, Karorero states that he started training the Amahindure as of June 1994.

11. The Prosecution admits that the Karorero interview may affect the credibility of its evidence, but submits that disclosure of the interview was made "as soon as practicable". It asserts that on 14 October 2007, when Joseph Nzirorera requested the inspection or disclosure of any statements from Karorero and others, OTP made diligent searches of its database without any material being found. Upon Joseph Nzirorera's suggestion, additional searches were carried out in OTP mission reports in Kigali, and it was discovered that the investigators in the case of Ephrem Setako had made handwritten notes of the Karorero interview, which had not been processed at that time. These notes were retyped and communicated to the Lead Counsel of the present case on 2 November 2007, who disclosed

<sup>12</sup> Prosecutor v. Brđanin, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, Case No. IT-99-36-A, App. Ch., 7 December 2004, p. 4; Prosecutor v. Blaškić, Judgement, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 267.

<sup>13</sup> Karemera et al., Oral Decision on Stay of Proceedings (TC), 16 February 2006, p. 6. Karemera et al., Decision on Joseph Nzirorera's Notice of Violation of Rule 68 and Motion for Remedial Measures (TC), 12 July 2006, p. 2; Nyutegeka Appeals Chamber Decision, p. 7; Karemera 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").

<sup>14</sup> Karemera et al., T. of 13 June 2007, p. 20.

them in their entirety to Joseph Nzirorera on 7 November 2007, after having reviewed and assessed the material under Rules 66 (C) and 68 (D). Thus, claims the Prosecution, the notes were disclosed as soon as practicable, after they came to the actual knowledge of the Lead Counsel of the present case.

12. The Chamber does not accept the Prosecution's contention that the material was disclosed as soon as practicable, since the notes had been in the possession of OTP and were, therefore – in relation to Rule 68 – in the actual knowledge of the Prosecution since the time they were produced. The Chamber further notes that the searches for the notes conducted by the OTP were not diligent enough, as the searches in the mission reports in Kigali were only made after Joseph Nzirorera suggested it. In those circumstances, the Chamber is of view that the Prosecution has breached its obligations under Rule 68.

#### **On the merits of the Eighth Notice**

13. Prosecution Witness AXA, during his examination-in-chief, testified that Édouard Karemera brought firearms to the Bwakira commune office for use by the Interahamwe. The Witness testified that a total of 20 firearms were brought by the end of 1993 for the Interahamwe's training,<sup>15</sup> and 200 firearms were brought six days after the President's death for the killing of the Tutsi.<sup>16</sup>

14. Joseph Nzirorera asserts in his Motion that at least four people who were residents of Bwakira commune at the time told OTP investigators that the weapons for the training for the Interahamwe and for the attacks on the Tutsi were brought by a colonel called Rumende. Nzirorera further submits that the non-disclosure of this evidence violates Rule 68.

15. In response to the Motion, the Prosecution disclosed eight witness statements to the Defence "as a courtesy, or alternatively, under Rule 66 (B)".<sup>17</sup> The Prosecution submits that there has been no violation of Rule 68, because there is no contradiction between AXA's testimony that Édouard Karemera brought firearms for the Interahamwe and the statements of other witnesses declaring that Rumende did the same.

16. In his reply, Joseph Nzirorera relies on two of the disclosed witness statements, according to which one witness states that "[i]t was the general belief in the Commune that

<sup>15</sup> Karemera et al., T. 11 October 2007, pp. 14-18

<sup>16</sup> Karemera et al., T. 11 October 2007 pp. 20-21

<sup>17</sup> Prosecutor's Response to Joseph Nzirorera's Eighth Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures (Witness AXA) filed on 14 November 2007, para. 11

Colonel Rumende brought the rifles that were distributed to the civilian population," and the other witness states that "it was generally said in the Commune" that Colonel Rumende in his helicopter brought the arms for the training of the Interahamwe.<sup>18</sup>

17. The Chamber notes that Joseph Nzirorera relies on statements from witnesses who have neither witnessed themselves the events in question nor explained the source of their assumptions apart from a reference to "general belief" and what "was generally said".

18. The Chamber considers that the material provided by Joseph Nzirorera is insufficient to make a *prima facie* case showing that the witness statements may affect the credibility of Prosecution evidence.

### ***The Seventh Notice (Rules 66 (A) (ii) and 66 (B))***

#### **Applicable Law**

19. The obligation of the Prosecutor to disclose prior witness statements, as required by Rule 66 (A), is general and permanent.<sup>19</sup> Rule 66 (A) (ii) provides that the Prosecution shall disclose to the Defence, "[n]o later than 60 days before the date set for trial, copies of statements of all witnesses whom the Prosecution intends to call to testify at trial." This obligation entails the witness statements that are in its possession or which the Prosecution has access to.<sup>20</sup> The Appeals Chamber held that "something which is not in the possession of or accessible to the Prosecution cannot be subject to disclosure: *nemo tenetur ad impossibile* (no one is bound to an impossibility)".<sup>21</sup> Therefore, a document which is not in the possession or accessible to the Prosecution cannot be subject to disclosure.<sup>22</sup>

20. The usual meaning of a witness statement in trial proceedings is an account of a person's knowledge of a crime, which is recorded through due procedure in the course of an

<sup>18</sup> Reply Brief, Joseph Nzirorera's Eighth Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures (Witness AXA) filed on 14 November 2007, filed on 15 November 2007.

<sup>19</sup> *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Decision on Prosecutor's Request for Authorization to Delay Disclosure of Rule 70 Information (TC), 6 May 1998, para. 7.

<sup>20</sup> *Prosecutor v. Kaviyama*, Case No. ICTR-95-I-T, Decision on preliminary motion filed by Defence (TC), 6 November 1996, *ICTR Report 1995-1997*, pp. 298-300; *Prosecutor v. Semanza*, Case No. ICTR-97-20-I, Decision on Semanza's Motion for Subpoenas, Depositions and Disclosure (TC), 20 October 2000, *ICTR Report 2000*, p. 2364 and seq., par. 38 (emphasis added); *Karemura et al.*, Decision on the Defence Notification of Failure to Comply with Trial Chamber Order and Motion for Remedial Measures (TC), 20 October 2003, paras. 5 and 9; *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, Judgment (AC), 9 July 2004, para. 35.

<sup>21</sup> *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, Judgment (AC), 9 July 2004, para. 35.

<sup>22</sup> *Karemura et al.*, Decision on Joseph Nzirorera's Motion on Notice of Violation of Rule 66(A)(ii) For Witnesses ALZ And AMC, and for Remedial and Punitive Measures - Rules 66 (A)(ii) and 73 of the Rules of Procedure and Evidence, 11 July 2007, para. 6; *Karemura et al.*, Decision on Disclosure of Witness Reconfirmation Statements (TC), 23 February 2005, paras. 6 and 7.

investigation into the crime.<sup>23</sup> The Appeals Chamber has added that any statement or declaration made by a witness in relation to an event he or she witnessed and recorded in any form by an official in the course of investigation, falls within the meaning of a "witness statement" under Rule 66.<sup>24</sup>

21. Furthermore, pursuant to Rule 66 (B), "[a]t the request of the Defence, the Prosecution shall [...] permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence [...]." Rule 66 (B) imposes on the Prosecution the responsibility of making the initial determination of materiality of evidence within its possession and if disputed, requires the Defence to specifically identify evidence material to the preparation of the Defence that is being withheld by the Prosecutor.<sup>25</sup>

#### On the merits

22. The Seventh Notice concerns 3 items in relation to Joseph Nzirorera's cross-examination of Prosecution Witness AWD on 8 and 9 November 2007.

#### Item 1

23. When being questioned about why he had refused to meet with Counsel for Nzirorera, AWD testified that he had been approached in a way he found inappropriate by an investigator he believed was sent by Counsel for Nzirorera, who produced an authorisation form/request for a meeting with him and an attached questionnaire ("Item 1") in the name of Mathieu Ndirumputse.<sup>26</sup> He further testified that he believed that Counsel for Nzirorera was

<sup>23</sup> *Prosecutor v. Blaskić*, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, Case No. IT-95-14-A, App. Ch., 26 September 2000, para. 15.

<sup>24</sup> *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-I, Decision on Prosper Mugiraneza's Motion to Require Strict Compliance with Rule 66 (A) (ii), 5 May 2004, para. 7; *Prosecutor v. Nyiraguhweze*, Appeal Judgement, Case No. ICTR-96-14-A, 9 July 2004, par 35; *Prosecutor v. Brima et al.*, Decision on Joint Defence Motion on Disclosure of all Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68, Case No. SCSL-04-16-T, T. Ch. II, 4 May 2005, para. 16; *The Prosecutor v. Tihomir Blaskić*, Case No. IT-95-14-PT, "Decision on the Production of Discovery Materials", 27 January 1997, para. 38; *Prosecutor v. Norman et al.*, Decision on Disclosure of Witness Statements and Cross-Examination, Case No. SCSL-04-14-PT, T. Ch. I, 16 July 2004, para. 10; *Prosecutor v. Norman et al.*, Decision on Disclosure of Witness Statements and Cross-Examination, Case No. SCSL-04-14-PT, T. Ch. I, 16 July 2004, par 14.

<sup>25</sup> *Prosecutor v. Delalić et al. (Celebici)*, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, Case No. IT-96-21-T, T. Ch., 26 September 1996, par 11; *Prosecutor v. Sesay et al.*, Sesay – Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, Case No. SCSL-04-15-T, T. Ch. I, 9 July 2004.

<sup>26</sup> Item 1 was tendered in evidence under seal as DNZ-360.

the Lead Counsel for all the Accused in this case and that he had shown Item 1 to the Prosecution team who had made a photocopy.<sup>27</sup>

24. Joseph Nzirorera, joined by Mathieu Ndirumpatse, submits that the Prosecution, by the non-disclosure of Item 1 to the Defence, has violated Rule 66 (B) and Rule 68.<sup>28</sup> Mathieu Ndirumpatse further submits that the Prosecution anticipated that AWD would produce Item 1 during cross-examination and that the non-disclosure thus amounts to an ambush on the Defence.<sup>29</sup>

25. In the present case, the Prosecution asserts that no photocopy was taken by the Prosecution team since it did not attach any importance to Item 1.<sup>30</sup> In view of this circumstance, the Chamber, considering that the Prosecution is presumed to discharge its obligations in good faith,<sup>31</sup> finds no reason to assume that the Prosecution was in possession of Item 1. In addition, the Chamber notes that the Prosecution during the examination-in-chief did not put any questions to AWD concerning the issue; and that the Defence has not made any request under Rule 66 (B) for material concerning this issue. The Chamber therefore finds that the Defence has made no showing that the Prosecution has violated Rule 66 (B) or Rule 68, with regard to Item 1.

## Item 2

26. After the issues regarding Item 1 arose, the Prosecution disclosed an e-mail from an OTP investigator, dated 15 February 2006, concerning AWD's complaints against the Defence team for Nzirorera for improper conduct.<sup>32</sup> Joseph Nzirorera submits that the Prosecution's late disclosure of the e-mail ("Item 2") constitutes a violation of Rule 66 (A) (ii), since the e-mail recounts what AWD had told the investigator, but does not amount to a violation of Rule 68 (A).<sup>33</sup>

27. The Chamber notes that in the e-mail, the OTP investigator merely reports about his meeting with the Witness and the manner in which the Witness was allegedly approached by the Defence team for Joseph Nzirorera. The Chamber finds that the e-mail deals with the interaction between Joseph Nzirorera's Defence team and the Witness and not with an issue

<sup>27</sup> T. 8 November 2007, p. 6.

<sup>28</sup> *Karimera et al.*, T. 8 November 2007 at p. 12 to 15.

<sup>29</sup> *Mémoire pour M Ndirumpatse sur la Prosecution's consolidated Response to Nzirorera's Oral Motion concerning Rule 66 B and 68 violations - Witness AWD*, filed on 14 November 2007.

<sup>30</sup> *Karimera et al.*, T. 8 November 2007 at p. 17; see also *Prosecution's consolidated Response to Nzirorera's Oral Motion concerning Rule 66 B and 68 violations - Witness AWD*, filed on 12 November 2007, para. 9.

<sup>31</sup> *Prosecutor v. Niyitegeka*, Case No ICTR-96-14-A, Judgement (AC), 9 July 2004, par. 37.

<sup>32</sup> See e-mail from Don Webster to the Defense Teams dated 11 November 2007 at 18:28 pm.

<sup>33</sup> *Karimera et al.*, T. 12 November 2007, pp. 1 - 2.



relevant to the charges against the Accused. Therefore, the e-mail cannot be considered a witness statement which had to be disclosed pursuant to Rule 66 (A) (ii).

### Item 3

28. During cross-examination by Mathieu Ndirumpatse, Witness AWD responded to a question by referring to an alleged incriminating statement made by Mathieu Ndirumpatse in connection with an MRND rally in Kigali on 28 January 1993 ("Item 3"). During cross-examination by Joseph Nzirorera, AWD testified that he had provided information to OTP investigators concerning the statement in question.<sup>34</sup>

29. Joseph Nzirorera, supported by Mathieu Ndirumpatse, submits that the Prosecution's non-disclosure of this information is a violation of Rule 66 (B), as since 2002 Joseph Nzirorera has requested information concerning statements made by the Accused at MRND rallies.<sup>35</sup>

30. The Chamber finds that there has been no showing that the Prosecution – should it be in possession of such statements by AWD – has violated Rule 66 (B). Thus, a request by Joseph Nzirorera for information concerning statements made at MRND rallies could not reasonably be understood as referring to information given in the course of a *private* conversation.

### *The Motions for remedial, punitive or other measures*

#### **Applicable Law**

The Chamber recalls that the fact that material has not been timely disclosed does not *per se* create a prejudice to the accused.<sup>36</sup> The accused must demonstrate that he has suffered material prejudice as a result of the late disclosure.<sup>37</sup> The Chamber further recalls that

<sup>34</sup> *Karemera et al.*, T. 9 November 2007, pp. 6 - 7.

<sup>35</sup> *Karemera et al.*, T. 9 November 2007, pp. 16 - 17.

<sup>36</sup> *Prosecutor v. Juvenal 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.

<sup>37</sup> *Prosecutor v. Juvenal 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.

exclusion of evidence is at the extreme end of the scale of measures available to the Chamber in addressing violations of Rule 68.<sup>38</sup>

31. In the *Krstic* case, the Appeals Chamber did not impose a disciplinary sanction for the Prosecution'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 Prosecution had deliberately breached his obligations.<sup>39</sup> However, the Chamber has previously stated that disciplinary sanctions, where appropriate, can be applied even if no material prejudice and/or deliberate breach of the Prosecution's obligations have been established if the case demonstrates a pattern of continuous lack of diligence in the exercise of the Prosecution's disclosure obligations, which will amount to obstructing the proceedings or be contrary to the interests of justice.<sup>40</sup>

#### On the merits

32. As Joseph Nzirorera has made no showing that the Prosecution has violated its disclosure obligations in relation to the Seventh Notice or the Eighth Notice, the Motion for remedial, punitive and other measures is moot in relation to these Motions.

33. In relation to the Sixth Notice, Joseph Nzirorera submits that he has suffered material prejudice because he was prevented from confronting Prosecution Witness ANU with the Karorero interview, as he could have done had it been timely disclosed to him pursuant to Rule 68. The Chamber is not satisfied that the prejudice shown by Joseph Nzirorera would justify such an extreme remedy as the exclusion of the testimony of ANU.

34. Regarding Joseph Nzirorera's request for other measures the Chamber recalls that under Rule 46 (A), a Chamber may, after a warning, impose sanctions against a counsel, if, in its opinion, his or her conduct obstructs the proceedings, or is otherwise contrary to the interests of justice.

<sup>38</sup> *Karemera et al.*, Decision on Defence Motion for Exclusion of Witness Gk's Testimony or for Request for Cooperation from Government of Rwanda - Articles 20 and 28 of the Statute; Rules 66 and 98 of the Rules of Procedure and Evidence, 27 November 2006, para. 3; *Karemera et al.*, Decision on Defence Oral Motions for Exclusion of XBM's Testimony, for Sanctions Against the Prosecution and Exclusion of Evidence Outside the Scope of the Indictment (TC), 19 October 2006; *Karemera et al.*, Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guichaoua: Defence Motion to Exclude the Witness' Testimony; and Trial Chamber's Order to Show Cause (TC), 1 February 2006, para. 11; *Karemera et al.*, Decision on Defence Motions to Exclude Testimony of Professor André Guichaoua (TC), 20 April 2006, para. 8.

<sup>39</sup> *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Judgement (AC), 19 April 2004, paras. 153 and 214.

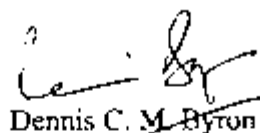
<sup>40</sup> *Karemera et al.*, Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution - Rule 68 of the Rules of Procedure and Evidence; 19 October 2006, paras. 16 - 17.

35. The Chamber notes that in the present case the Prosecution did take action on Joseph Nzirorera's request concerning the Sixth Notice. The Chamber has no reason to believe that the Prosecution has deliberately violated its disclosure obligation. Furthermore, the fact that the first searches conducted in relation to the Sixth Motion did not produce the material sought seems to reveal a general weakness in OTP's filing system, which cannot be attributed to the Lead Counsel of this case in particular. The Chamber, therefore, does not find sufficient grounds to take disciplinary measures against the Prosecution.

**FOR THESE REASONS, THE CHAMBER**

- I. **GRANTS** Joseph Nzirorera's Sixth Motion in part, finding that the material in question was not timely disclosed pursuant to Rule 68 (A), and;
- II. **DENIES** Joseph Nzirorera's Seventh and Eighth Motions, as well as all the requests for remedial, punitive or other measures.

Arusha, 29 November 2007, done in English.

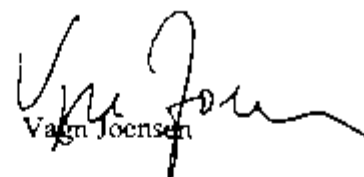
  
Dennis C. M. Byron

Presiding Judge



Gberdao Gustave Kam

Judge

  
Vagn Joensen

Judge

[Seal of the Tribunal]

