

ICTR-98-44-T  
20-02-2008  
(34004-33996)

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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:** 20 February 2008

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**THE PROSECUTOR**

v.

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

**DECISION ON JOSEPH NZIRORERA'S SEVENTEENTH NOTICE OF  
DISCLOSURE VIOLATIONS AND MOTION FOR REMEDIAL AND PUNITIVE  
MEASURES**

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

**Office of the Prosecutor:**  
Don Webster  
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## INTRODUCTION

1. During the current proceedings, Joseph Nzirorera has requested on different occasions the Prosecutor to disclose any information on interviews with Prosecution Witnesses AXA and BDW by investigators from the Office of the Prosecutor ("OTP").<sup>1</sup> The Prosecutor responded that such information could not be found.<sup>2</sup> However, on 4 December 2007, after Witness BDW had already testified in-chief before the Chamber, the Prosecutor disclosed an investigator's note from a previous interview with this witness ("BDW Interview Note").<sup>3</sup> The Chamber decided to postpone the cross-examination of BDW until the commencement of next session, scheduled on 10 March 2008. On 7 December 2007, while Prosecution Witness AXA had already testified, the Prosecutor filed a Confidential Notice under Rule 67 (D) of the Rules of Procedure and Evidence ("Rules") disclosing an investigator note from a previous interview with AXA ("AXA Interview Note").<sup>4</sup>

2. On 10 December 2007, Joseph Nzirorera filed his seventeenth notice of disclosure violations<sup>5</sup> moving the Chamber: 1) to find that the Prosecutor has violated Rules 66 (A)(ii) and 68 of the Rules by the late disclosure of the two interview notes,<sup>6</sup> and 2) as remedial and punitive measures, to exclude the testimony of the two witnesses, to sanction the Prosecutor pursuant to Rule 46 (A) for misrepresentations to the Chamber and to order the Prosecutor to have all present and former investigators search their records.<sup>7</sup>

3. In his Response, filed confidentially, the Prosecutor<sup>8</sup> opposes the request for exclusion of evidence and for sanctions.

4. In his reply, Joseph Nzirorera moves the Chamber to require the Prosecutor's Response to be filed publicly.<sup>9</sup>

<sup>1</sup> Joseph Nzirorera asked Trial Attorneys Iain Morley and Don Webster to produce information: at the meeting on 10 October 2007, in court on 22 November 2007 (see Transcripts of 22 November 2007, p. 18), at the status conference on 5 December 2007.

<sup>2</sup> T. 22 November 2007, p. 16-17.

<sup>3</sup> T. 4 December 2007, p. 22.

<sup>4</sup> Confidential Rule 67(D) Notice and Disclosure of Unsigned Memoranda concerning AXA, filed on 7 December 2007.

<sup>5</sup> Seventeenth Notice of Rule 66(A)(ii) Violation and Motion for Remedial and Punitive Measures – Witnesses AXA and BDW, filed on 10 December 2007 ("Joseph Nzirorera's Motion").

<sup>6</sup> Joseph Nzirorera's Motion, paras. 17, 24 and 35.

<sup>7</sup> Joseph Nzirorera's Motion, para. 36.

<sup>8</sup> Confidential Prosecutor's Response to Joseph Nzirorera's 17<sup>th</sup> Notice of Rule 66(A)(ii) Violations – AXA and BDW, filed on 18 December 2007.

<sup>9</sup> Reply Brief: Seventeenth Notice of Rule 66(A)(ii) Violation and Motion for Remedial and Punitive Measures – Witnesses AXA and BDW, filed on 20 December 2007 ("Joseph Nzirorera's Reply Brief"), paras. 1-3.

## DELIBERATIONS

### Preliminary issues

5. In a separate motion, the Prosecutor requested an additional day to respond to Nzirorera's Motion.<sup>10</sup> He explained that he needed to conduct further searches in order to be able to confirm information in his response and that he was challenged by dysfunctional computers in accessing this information.<sup>11</sup>

6. The Chamber considers that, in light of the issues raised by Joseph Nzirorera and to allow the Prosecutor to clarify his position as to the information requested, it is in the interests of justice to allow the Prosecutor an extension of time. The Chamber further finds that one additional day granted to the Prosecutor cannot prejudice the Accused in the present instance, considering moreover that Joseph Nzirorera did not oppose the motion. The Chamber will therefore consider the Prosecutor's Response.

7. As to the issue of confidentiality, the Chamber considers that, contrary to what is argued by Joseph Nzirorera,<sup>12</sup> the Prosecutor's Response reveals the identity of a protected Prosecution Witness.<sup>13</sup> Filing the Prosecutor's Response as a public document would be contrary to the protective measures ordered by the Chamber and may affect the security and safety of the witness. Joseph Nzirorera's request in that respect therefore falls to be rejected.<sup>14</sup>

### Disclosure obligations

8. Rule 66 (A)(ii) provides that the Prosecutor 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

<sup>10</sup> Prosecution Request for Additional Time to Respond – Nzirorera's 17<sup>th</sup> Notice of Violation of Rule 66(A)(ii), filed on 17 December 2007.

<sup>11</sup> *Ibid.*, para.3.

<sup>12</sup> Joseph Nzirorera's Reply Brief, para. 3.

<sup>13</sup> See Prosecutor's Response, paras. 13, 26, 48.

<sup>14</sup> *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Confidential Decision on the Prosecution's Motion to be Relieved of the obligation to Disclose the Identities of certain Witnesses (TC), 2 November 2007, para. 11; *Prosecutor v. Pauline Nyiramasuhuko and Arsene Shalom Ntahobali*, Case No. ICTR-98-42-T, Decision on the Prosecutor's Extremely Confidential Motion – under seal – in Response to the Motion of Arsene Shalom Ntahobali on the Disclosure of the Identity and Will say Statements of Witnesses (TC), 23 August 2005, para. 11; *Prosecutor v. Simeon Nchamihigo*, Case No. ICTR-2001-63-T, Decision on Defence motion on Contempt of Court and Reconsideration of Protective Measures for Defence Witnesses (TC), 10 August 2007, para. 5.

Prosecution intends to call to testify at trial",<sup>15</sup> whereas Rule 68 (A) provides that "[t]he Prosecutor shall, as soon as practicable, disclose 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 the Prosecution evidence".<sup>16</sup>

9. The Prosecutor concedes that the interview notes contain witness statements pursuant to Rule 66 (A)(ii).<sup>17</sup> While asserting that the Prosecution team on the case had not been able to locate the notes which were privately held by the investigator and thus never filed in the OTP database, the Prosecutor does concede that because the prevailing jurisprudence treats the OTP as indivisible, the Prosecution has therefore breached its obligation under Rule 66 (A)(ii) to disclose the two interview notes.<sup>18</sup>

10. Accordingly, the Chamber finds that the Prosecution has breached its disclosure obligations under Rule 66 (A)(ii) in relation to the two interview notes.

11. Joseph Nzirorera submits that the Chamber should also find that the late disclosure of the two interview notes amounts to a violation of Rule 68 (A), as there are several inconsistencies between the AXA Interview Note as well as the BDW Interview Note and the trial testimony of the two Witnesses.<sup>19</sup>

12. Having found that the interview notes should have already been disclosed pursuant to Rule 66 (A)(ii) sixty (60) days prior to the commencement of the trial, the Chamber finds Joseph Nzirorera's submission concerning Rule 68 (A) moot and will deal with possible

<sup>15</sup> *Prosecutor v. Kayishema*, 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., para. 38; *Karemera 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) ("*Niyitegeka Appeals Judgment*"), 9 July 2004, para. 35; *Niyitegeka Appeals Judgment* para. 35.35; 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, 11 July 2006 para. 6.

<sup>16</sup> *Prosecutor v. Eliezer 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*"); *Karemera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 16; *Prosecutor v. Naser Oric*, Case No. IT-03-68-T, Decision on ongoing complaints about prosecutorial non-compliance with rule 68 of the rules, 13 December 2005, para. 20.

<sup>17</sup> Prosecutor's Response, para. 31.

<sup>18</sup> *Ibid.*, para. 42.

<sup>19</sup> Joseph Nzirorera's Motion, paras. 17, 24, 35.

inconsistencies between the interview notes and the Witnesses' trial testimony in connection with the issue on whether Joseph Nzirorera has suffered material prejudice as a result of the late disclosures.

#### Are remedial measures warranted?

13. Articles 20 and 21 of the Statute provide that the Chamber must ensure the fair and expeditious conduct of the trial which includes the right of an accused to have sufficient time prior to the testimony of a prosecution witness to be able to adequately prepare for cross examination of that witness.<sup>20</sup>

14. However, the fact that material relevant for the Defence has not been disclosed in a timely manner does not always create prejudice to the accused.<sup>21</sup> It is for Joseph Nzirorera to demonstrate that he has suffered material prejudice as a result of the late disclosure.<sup>22</sup>

15. Joseph Nzirorera argues that he has indeed suffered material prejudice due to the late disclosure of the interview notes because he has been impeded in his preparation for the cross-examination of AXA.<sup>23</sup> He submits that he has been prevented from confronting the witness with inconsistencies between the interview note and what the witness testified about when he was examined-in-chief including key aspects of his testimony not contained in the note and from exploring matters addressed in the interview note, but not addressed during his examination in court.<sup>24</sup> He further points out that BDW, according to the note of his interview, (1) stated that he did not know anything about Édouard Karemera's activities in 1994, which totally contradicts his testimony and (2) referred to AXA, which implies a connection between the two Witnesses.<sup>25</sup>

16. Therefore, Joseph Nzirorera submits that the testimony of AXA and BDW should be excluded in order to remedy the prejudice he has suffered and – in light of the Prosecution's repeated lack of diligence in its exercise of its disclosure obligations and its misrepresentations to the Chamber that the interview notes did not exist – in order to deter

<sup>20</sup> *Prosecutor v. Popovic et al.*, Case No. IT-05-88-T, Decision on Nikolic's Motion for Disclosure pursuant to Rules 65ter and 66 (TC), 30 January 2007 p. 3.

<sup>21</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>22</sup> *Niyitegeka Appeals Chamber Decision*, p. 7.

<sup>23</sup> Joseph Nzirorera's Motion, para. 17.

<sup>24</sup> *Ibid.*

<sup>25</sup> Joseph Nzirorera's Motion, para. 24.

future violations.<sup>26</sup> Joseph Nzirorera moreover submits that, to ensure that all the material with regard to all witnesses is submitted to the Defence, the OTP should contact all present and former investigators to search records of all the witnesses that testified in the case and produce potential notes that would not have been disclosed yet.<sup>27</sup> The Prosecutor agreed to undertake such a review.<sup>28</sup>

17. The Prosecutor disputes that Joseph Nzirorera has suffered material prejudice as AXA's statement according to the interview note does not differ from his later signed statement that was timely disclosed.<sup>29</sup> Further, the Prosecutor asserts, as detailed below, that the OTP, at the request of Joseph Nzirorera, did make diligent searches without finding the material.<sup>30</sup> Therefore, the Chamber is of the view that the Prosecutor's representations to it were made in good faith.

18. As to the AXA Interview Note, the Chamber observes that the Prosecution did disclose in a timely manner the witness' signed statement, dated 14 March 2005, and that there appear to be no discrepancies of any material relevance between the signed statement and the previous interview note. Thus the late disclosure of the AXA Interview Note could not have affected Joseph Nzirorera's ability to conduct relevant research for AXA's cross-examination. Joseph Nzirorera has therefore not demonstrated that he has suffered material prejudice because of the late disclosure of the AXA Interview Note.

19. As regards the BDW Interview Note, the Chamber observes that the fact that BDW did not have any information on Édouard Karemera's activities in 1994 could not have given Joseph Nzirorera a basis for further investigations. Conversely, knowing that BDW had referred to AXA would likely have prompted Joseph Nzirorera to investigate the possible connection between the two Witnesses and to put questions to them on this issue during cross-examination. Therefore, Joseph Nzirorera has suffered some prejudice in relation to both Witnesses due to the late disclosure of the BDW Interview Note.

20. However, the Chamber recalls that the exclusion of evidence is an extreme remedy, which should not be considered but in rare cases, where other reasonable remedies are not

<sup>26</sup> Joseph Nzirorera's Motion, para. 29.

<sup>27</sup> Joseph Nzirorera's Motion, para. 30.

<sup>28</sup> Prosecutor's Reponse, para. 43.

<sup>29</sup> Prosecutor's Response, para. 34.

<sup>30</sup> Prosecutor's Response, para. 37.

applicable.<sup>31</sup> The Chamber recalls in relation to AXA that the Defence, upon showing good cause, may request that he be recalled for further cross-examination and that his Interview Note be admitted into evidence. The Chamber also recalls in relation to BDW that the Chamber has already postponed his cross-examination, thus granting the Defence more than three months to investigate the possible connections between the two Witnesses and prepare the cross-examination of BDW. The Chamber therefore, despite the regrettable conduct of the Prosecution in this context, does not find it justified to exclude the testimony of the two Witnesses. As such, Joseph Nzirorera's request falls to be rejected.

**Are disciplinary measures against the Prosecutor warranted?**

21. Under Rule 46 (A), 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.

22. 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>32</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, as long as the case demonstrates a pattern of continuous lack of diligence in the exercise of the Prosecution's disclosure obligations which amounts to obstructing the proceedings or is contrary to the interests of justice.<sup>33</sup>

23. Joseph Nzirorera moves the Chamber to sanction Trial Attorneys Iain Morley and Don Webster for their misrepresentations to the Chamber that the material sought despite alleged diligent searches could not be found.<sup>34</sup>

<sup>31</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>32</sup> *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Judgement (AC), 19 April 2004, paras. 153 and 214.

<sup>33</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.

<sup>34</sup> Joseph Nzirorera's Motion, para. 32; Joseph Nzirorera's Reply Brief, paras. 13-27.

24. The Prosecutor opposes the request asserting that upon the request from Joseph Nzirorera for the material sought it did search the OTP database without any result.<sup>35</sup> Moreover, upon Joseph Nzirorera's further request, he did contact the OTP investigators in Kigali for any material that might not have been filed, but was informed that the Kigali log on the first contact with AXA and BDW indicated only that the witnesses would be interviewed at a later time, but that there was nothing of substance.<sup>36</sup> Moreover, when requested to detail its searches, the Prosecution contacted the relevant investigator, who had left his service, and revealed that the investigator kept the interview notes in question in his personal records without having filed them.<sup>37</sup>

25. The Chamber finds that in the present instance the Prosecutor did take action on Joseph Nzirorera's request for further searches of material. The Chamber has no reason to believe that the Prosecutor has deliberately violated his disclosure obligations. The fact that the first searches did not produce the material sought reveals a flaw in the organisation of the OTP and its filing system, which cannot be attributed to Trial Attorneys Iain Morley and Don Webster in particular. The Chamber, therefore, does not find sufficient grounds to take disciplinary measures. However, the Chamber expresses its disapproval of the organisation of the Prosecutor and strongly recommends that the Prosecutor improves its management of disclosure in this case.

#### **FOR THESE REASONS, THE CHAMBER**

I. **GRANTS** Joseph Nzirorera's Motion in part, finding that the material in question was not disclosed in a timely manner pursuant to Rules 66 (A)(ii);

II. **ORDERS** the Prosecution to contact all its present and former investigators who have been in contact with the 28 witnesses who have testified in this case, to request them to provide all material concerning those witnesses which has not previously been disclosed, and for the Prosecutor to in turn immediately disclosure this all such material to the defence;

<sup>35</sup> Prosecutor's Response, para. 9.

<sup>36</sup> Prosecutor's Response, para. 23.

<sup>37</sup> Prosecutor's Response, para. 28.




III. **ORDERS** the Prosecutor to submit a detailed report on its research to the Chamber and the Parties as soon as possible no later than 10 March 2008; and,

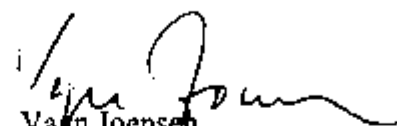
IV. **DENIES** Joseph Nzirorera's Motion in all other respects.

Arusha, 20 February 2008, done in English.



Dennis C. M. Byron  
Presiding Judge

  
With the consent and on  
behalf of  
Gberdao Gustave Kam  
Judge  
(absent at the time of the  
signature)

  
Vagn Joensen  
Judge