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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:** 19 March 2008

**THE PROSECUTOR**

v.

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

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**DECISION ON JOSEPH NZIRORERA'S MOTION FOR MISTRIAL**

*Article 20 of the Statute; Rules 66 and 68 of the Rules of Procedure and Evidence*

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**INTRODUCTION**

1. A first trial in this case commenced in November 2003. Pursuant to a decision by the Appeals Chamber that the trial had to start *de novo*, the presentation of the evidence for the Prosecution started afresh on 19 September 2005. On 4 December 2007, at the end of the sixth trial session, the Prosecution closed its case.

2. On 7 January 2008, Joseph Nzirorera moved the Chamber to declare a mistrial "because the epidemic of incurable disclosure violations by the Prosecution has deprived him of a fair trial", listing a number of complaints that he has made throughout the 1<sup>st</sup> to 6<sup>th</sup> sessions of this trial as well as, "for background and context", the complaints he made during the trial which had started in November 2003 ("Motion").<sup>1</sup> He contends that, from the very beginning of this case the Prosecution has consistently violated its disclosure obligations pursuant to Rules 66 (A) (ii), 66 (B), and 68 (A) of the Rules of Procedure and Evidence ("Rules"), which has impeded his cross-examination of virtually every Prosecution witness called, and substantially disrupted the investigations and preparation of his defence.

3. The Prosecution opposes the motion. It asserts that the trial has not been unfair to the Defence thus far, and points out that the Chamber has delivered decisions on all of Joseph Nzirorera's complaints, with relevant remedies where appropriate.<sup>2</sup>

**DELIBERATION**

*Disclosure issues concerning the first through fourth trial sessions*

4. The Chamber recalls that at the end of the fourth trial session when Judge Short withdrew from the case due to health reasons, Joseph Nzirorera contended in his "Submissions to Remaining Judges in Support of a New Trial" that the trial had been rendered unfair due to a number of causes, including the alleged "continuous violations by the Prosecutor of his disclosure obligations under Rules 66 (A) (ii), 66 (B) and 68."<sup>3</sup>

5. When addressing this submission, the remaining Judges of the Chamber stated:

<sup>1</sup> Joseph Nzirorera's Motion for Mistrial at the Close of the Prosecution's Case, filed on 7 January 2008; and Reply Brief, filed 16 January 2008.

<sup>2</sup> Prosecutor's Response to Joseph Nzirorera's Motion for Mistrial at the Close of the Prosecution's Case, filed on 14 January 2008.

<sup>3</sup> Joseph Nzirorera's Submission to Remaining Judges in Support of a New Trial, filed on 31 January 2007.

22. [...] the disclosure issues raised by Joseph Nzirorera have already been adjudicated upon. Over a period of two years, more than 50 decisions were delivered on disclosure issues only, including reconsideration of prior decisions and certification to appeal.
23. It is not relevant for the remaining Judges to reiterate the prior reasoning and findings which are disputed in the current Joseph Nzirorera's submissions. It is, however, necessary to emphasize that in each relevant instance, the rights of the Accused persons were duly taken into consideration. As a result, the Trial Chamber found that either there was no prejudice caused to the Accused persons or, if there was any, it ordered an appropriate remedy considering the circumstances of the case. [...]
24. It must also be noted that in other circumstances where no prejudice to the rights of the Accused was found, the Trial Chamber, nonetheless, made further arrangements to ensure that the fairness of the trial be preserved.<sup>4</sup>
6. After having considered all the prior decisions, the remaining Judges concluded:
- In light of these circumstances, the remaining Judges are satisfied that the rights of the Accused to a fair trial, including their rights to cross-examine the witnesses against them and to have adequate time and facilities to prepare their defence, were duly guaranteed despite disclosure issues. Where necessary, appropriate remedies and actions have been taken by the Trial Chamber to ensure a fair trial. The Judges do not find any circumstances or fact newly adduced by Joseph Nzirorera in the current submissions that would support another conclusion.<sup>5</sup>
7. The Chamber notes that apart from two decisions delivered after that Decision on the Continuation of the Proceedings, Joseph Nzirorera's arguments for moving the Chamber to declare a mistrial are exactly the same as those previously submitted to the remaining Judges. The Chamber, now fully composed, confirms the prior decisions, and rationale regarding the disclosure issues raised by Nzirorera in the present Motion, and finds no ground to revisit the complaints concerning the first to fourth trial sessions.
8. Likewise, the Chamber considers that it is not relevant to reiterate the prior reasoning and findings of its decisions which were delivered after the Decision on the Continuation of

<sup>4</sup> *Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera*, Case No. ICTR-98-44 ("Karemera et al."), Decision on Continuation of the Proceedings (TC), 6 March 2007 ("Decision on Continuation of the Proceedings") (Footnotes omitted).

<sup>5</sup> Decision on Continuation of the Proceedings, para. 28.

the Proceedings and were therefore not addressed therein,<sup>6</sup> and that Joseph Nzirorera now disputes in his current Motion. The Chamber recalls that in each instance, the rights of each Accused person were duly taken into consideration. As a result, the Chamber found that either the Prosecution did not fail to comply with its disclosure obligation, or no prejudice was caused to the Accused persons in light of the circumstances of the case.

*Disclosure issues concerning the fifth and sixth trial sessions*

9. Joseph Nzirorera's complaints concern Prosecution Witnesses ANU, AMM, Jean-Bosco Twahirwa, AWE, FH, Fidèle Uwizeye, AMN, BDX, AWD, AXA, AJY and BDW. He contends that 1) all the incidents he refers to relate to the Prosecution's disclosure obligations under Rules 66 (A)(ii), 66 (B) or 68(A) 2) that the Prosecution is liable for *violations* of these Rules and 3) that he has suffered material prejudice which has not caused the Chamber to order appropriate remedial or punitive measures.

10. The Chamber notes once again that it has already ruled on the exact arguments submitted in the current Motion. Since the Decision on the continuation of the proceedings, more than 30 decisions were delivered on disclosure issues only, including reconsideration of prior decisions and certification to appeal.<sup>7</sup> In most of the instances, Joseph Nzirorera's arguments in his current Motion amount to an allegation that the Chamber erred in law in the exercise of its discretion. The Chamber, however, finds no ground to revisit its prior decisions.

11. It must be recalled that in each decision, the Chamber has duly taken into account the rights of each Accused. As a result, the Chamber found that there was no violation of the

<sup>6</sup> *Karemera et al.*, Decision on Nzirorera's Motion to Strike Paragraph 25.2 of the Amended Indictment and Evidence of MRND Meeting in Gisenyi (TC), 11 July 2007; Decision on Joseph Nzirorera's Notices of Rule 68 Violations and Motions for Remedial and Punitive Measures (TC), 25 October 2007.

<sup>7</sup> See the Decisions referred hereinafter; see also Decision on Defence Motion for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK (TC), 4 April 2007; Decision on Prosecution Cross-Motion for Enforcement of Reciprocal Disclosure (TC), 21 September 2007; Decision on Prosecutor's Application for Certification to Appeal the Chamber's Decision on Joseph Nzirorera's Motion for Inspection of Statement of Pierre Celestin Mbonankira and Decision on Prosecution on Cross-Motion for Enforcement of Reciprocal Disclosure (TC), 2 October 2007; Decision on Defence Motion for Cooperation of Rwanda to Obtain Statements of Witnesses ALG, GK and UB (TC), 2 October 2007; Decision on Joseph Nzirorera's Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK (TC), 9 October 2007; Decision on Joseph Nzirorera's Motion to Exclude the Testimony of Prosecution Witness Upendra Baghel (TC), 30 October 2007; Decision on Joseph Nzirorera's Tenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures (TC), 5 February 2008; Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on Tenth Rule 68 Motion (TC), 4 March 2008.

Prosecution's obligation,<sup>8</sup> or no prejudice caused to the Accused<sup>9</sup> or, if there was any prejudice caused to the Accused, it decided on the appropriate remedy considering the circumstances of the case.<sup>10</sup>

12. Although the Chamber does not find it necessary to reiterate its prior reasoning on each issue raised by the Defence, it considers that two Defence arguments merit particular attention and need to be specifically addressed again.

13. Joseph Nzirorera submits that the Prosecution has violated the Chamber's orders that it uses its best efforts to provide prior statements made to Rwandan authorities as well as the Rwandan judicial records of its witnesses ("Rwandan material"). The Chamber has indeed in relation to *some* of the incidents referred to by Joseph Nzirorera, criticized the Prosecution for not using sufficient diligence to locate the material sought and/or to provide it in a timely manner; however, as to *most* of the incidents in question the Chamber was not satisfied that it should disregard the Prosecution's assertion that it could not have provided the material sought earlier, if at all, as urged by the Defence. The Chamber has taken additional steps to ensure that the Defence be provided with the material sought.<sup>11</sup> At this stage, the Chamber does not find that delay in obtaining the Rwandan material for some Prosecution witnesses has been such that it resulted in unfairness to the Accused. The Chamber further recalls that, although the Prosecution has been ordered to deploy its best efforts in obtaining Rwandan material, it falls upon the Defence to make reasonable efforts to provide it as part of its own

<sup>8</sup> *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Exclude the Testimony of Witness AXA (TC), 11 July 2007; 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 (TC), 11 July 2007; Decision on Joseph Nzirorera's Fifth Notice of Rule 68 Violations and Motions for Remedial and Punitive Measures (TC), 13 November 2007; Decision on Joseph Nzirorera's Sixth, Seventh and Eight Notices of Disclosure Violations and Motions for Remedial, Punitive Measures and Other Measures (TC), 29 November 2007 (concerning the Seventh and Eight Notices).

<sup>9</sup> *Karemera et al.*, Decision on Defence Motions to Exclude the Testimony of Witness QBG (TC), 11 July 2007; Decision on Defence Motion to Exclude the Testimony of Witness GAY, 16 July 2007.

<sup>10</sup> *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Exclude the Testimony of Witness AMM (TC), 15 June 2007; Decision on Joseph Nzirorera's Motions to Vacate the Decision on Defence Motion for Subpoenas to Prosecution Witnesses, to Exclude the Testimony of Witnesses AMB, ANU, AWD, AWE, FH, AND KVG, and to Postpone the Testimony of Witness ANU (TC), 14 June 2007; Decision on Joseph Nzirorera's Motion to Postpone Commencement of Sixth Trial Session (TC), 27 September 2007; Decision on Joseph Nzirorera's Seventeenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures (TC), 20 February 2008.

<sup>11</sup> See for e.g.: Decision on Defence Motion for Request for Cooperation of Government of Rwanda: Statements of Witness BDW (TC), 25 July 2007; Decision on Defence Motion for Cooperation of Rwanda to Obtain Statements of Witnesses ALG, GK and UB (TC), 2 October 2007; Decision on Joseph Nzirorera's Motion for Cooperation of Rwanda to Obtain Statements of Prosecution Witnesses AWD and AJY (TC), 1 November 2007; Decision on Joseph Nzirorera's Motion for Reconsideration of Decision on his Motion for Cooperation of Rwanda to Obtain Statements of Prosecution Witnesses ALG and GK (TC), 21 November 2007.

investigations.<sup>12</sup> The Chamber also notes that in some instances, despite the inability of the Prosecution to provide the material sought, the Defence did indeed find those documents.<sup>13</sup> Where appropriate, the Chamber has permitted the recall of the witness so that the Defence may further cross-examine the witness.<sup>14</sup>

14. Regarding material under Rules 66 (A)(ii), 66 (B) and 68 (A), Joseph Nzirorera represents that the Chamber would have asserted that the Prosecution has violated his disclosure obligations on a number of occasions. However, where material should have been disclosed by the Prosecution pursuant to the Rules, the Chamber has not applied the term *violation*, which would have implied that the Prosecution had acted in bad faith.<sup>15</sup> Thus, the Chamber has stated in the past, where appropriate, that the Prosecution's management of its disclosure obligations and/or the filing of material provided by OTP investigators has been insufficient.<sup>16</sup> Further, where the issue concerned whether particular material would be exculpatory, the Chamber has consistently recalled that the initial determination thereof, which is primarily a fact-based judgement, rests with the Prosecution, and where the Chamber has rejected the Prosecution's judgement, the Chamber has not indicated that the Prosecution's judgement had been made in bad faith.<sup>17</sup>

15. Joseph Nzirorera submits that the cumulative effect of the Prosecution's multiple failures to comply with its disclosure obligations has disrupted his defence, and forced him to re-evaluate his approach to Prosecution witnesses and replace his comprehensive pre-trial defence strategy.

16. The Chamber has continuously considered the issue of cumulative effect when it has found a lack of diligence on the part of the Prosecution in disclosing some statements or a

<sup>12</sup> See: *Karemera et al.*, Decision on Motion For Further Order to Obtain Documents in Possession of Government of Rwanda (TC), 27 November 2006, para. 8.

<sup>13</sup> See recently concerning Witness AXA, Decision on Joseph Nzirorera's Second Motion to Exclude Testimony of Witness AXA and Edouard Karemera's Motion to Recall the Witness (TC), 4 March 2008.

<sup>14</sup> Decision on Joseph Nzirorera's Second Motion to Exclude Testimony of Witness AXA and Edouard Karemera's Motion to Recall the Witness (TC), 4 March 2008; Decision on Joseph Nzirorera's Motion to Recall Prosecution Witness BTH (TC), 12 March 2008.

<sup>15</sup> See for e.g.: Decision on Joseph Nzirorera's Motion to Exclude the Testimony of Witness AMM (TC), 15 June 2007; Decision on Joseph Nzirorera's Motion for Inspection of Report on Interahamwe (TC), 28 June 2007; Decision on Defence Motions to Exclude the Testimony of Witness QBG (TC), 11 July 2007; Decision on Joseph Nzirorera's Motion for Inspection of Statement of Pierre Celestin Mbarankira (TC), 20 September 2007.

<sup>16</sup> See for instance: *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Exclude the Testimony of Witness AMM (TC), 15 June 2007; Decision on Defence Motion to Exclude the Testimony of Witness GAY, 16 July 2007; Decision on Joseph Nzirorera's Motion to Exclude the Testimony of Prosecution Witness Upendra Baghel (TC), 30 October 2007.

<sup>17</sup> See for e.g.: Decision on Joseph Nzirorera's Notices of Rule 68 Violations and Motions for Remedial and Punitive Measures (TC), 25 October 2007; Decision on Joseph Nzirorera's Tenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures (TC), 5 February 2008.

failure to comply with its obligations to disclose exculpatory material. The Chamber remains satisfied that the rights of the Accused to a fair trial, including their rights to cross-examine the witnesses against them and to have adequate time and facilities to prepare their defence, were duly guaranteed despite disclosure issues. Contrary to the Defence's assertion, the Chamber recalls that a failure to disclose material was not established in every case and where necessary, appropriate remedies and actions have been taken by the Chamber to ensure a fair trial.


17. Joseph Nzirorera disputes that recalling a witness may cure the Prosecution's failures to disclose material. The Chamber, however, notes that so far the Defence has sought to recall only two witnesses. It cannot be concluded that this remedy is not appropriate at this stage.

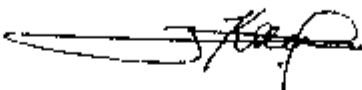
18. Having considered all the circumstance of the case, the Chamber considers that the disclosure issues in this trial, where established, have not substantially handicapped the preparation of the defence, nor hampered the effective cross-examination of Prosecution witnesses. In light of all these circumstances, the Chamber does not find any circumstance or fact newly adduced by Joseph Nzirorera in the current submissions that could support another conclusion.


#### FOR THOSE REASONS

**DENIES** Joseph Motion for Mistrial in its entirety.

Arusha, 19 March 2008, done in English.

  
Dennis C. M. Byron  
Presiding Judge

  
Gberdao Gustave Kam  
Judge

  
Vigen Joensen  
Judge

