



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: 16 April 2008

THE PROSECUTOR

v.

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

**DECISION ON MOTION FOR PARTIAL RECONSIDERATION OF THE
DECISION ON JOSEPH NZIRORERA'S TENTH NOTICE OF RULE 68
VIOLATION**

Rules 68 (A) of the Rules of Procedure and Evidence

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INTRODUCTION

1. On 5 February 2008, the Chamber issued a decision on Joseph Nzirorera's tenth notice of disclosure violations concerning seven documents originating from the United States National Security Archive,¹ in which it accepted the Prosecution's representation that it was not in possession of one of the documents ("Document 1"), and found that the Prosecution did not violate Rule 68 of the Rules of Procedure and Evidence ("Rules") when it did not disclose the other documents. However, Joseph Nzirorera subsequently inspected a DVD with documents that the Prosecution had received from the United States Security Archive, and found Document 1 on it.
2. Joseph Nzirorera now moves for partial reconsideration of the decision of 5 February 2008 with a finding that the Prosecution has violated Rule 68 as to Document 1.² He also requests that the Chamber impose remedial and punitive measures.
3. The Prosecution disputes that Rule 68 applies to Document 1, and opposes the request for remedial and punitive measures.

DELIBERATIONS

Reconsideration of the tenth notice decision

5. In its discretion, a Chamber has the inherent power to reconsider its decisions when: (1) a new fact has been discovered that was not known to the Chamber at the time it made its original decision; (2) there has been a material change in circumstances since it made its original decision; and (3) there is reason to believe that its original decision was erroneous, or constituted an abuse of power that resulted in an injustice.³ The Chamber recalls that the burden is on the party seeking reconsideration to demonstrate that these special circumstances exist.

¹ *The Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("Karemera et al."), Decision on Joseph Nzirorera's Tenth Notice of Disclosure Violations and motion for Remedial and Punitive Measures (TC), 5 February 2008.

² Motion for Partial Reconsideration: Decision on Joseph Nzirorera's Tenth Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures, filed on 11 March 2008; Prosecutor's Response to Nzirorera's Motion for Partial Reconsideration: Decision on Joseph Nzirorera's Tenth Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures, filed on 17 March 2008; Reply Brief: Motion for Partial Reconsideration: Decision on Joseph Nzirorera's Tenth Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures, filed on 19 March 2008.

³ *Karemera et al.*, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses (TC), 29 August 2005, para. 8.

6. The Prosecution does not dispute that, despite its representations to the contrary, it actually possessed Document 1 when the Chamber issued the decision in question. Therefore, the Chamber finds that a reconsideration of the decision in question is warranted.

Does Rule 68 (A) apply to Document 1?

4. Document 1 purports to be an “AF Press Guidance” dated 14 June 1994, originating from the U.S. State Department, in which the United States Government indicates that it had no evidence to confirm reports that the genocide had been planned.

5. Under Rule 68 (A), the Prosecution has a continuous obligation to actively review all material in its possession to identify material that “may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence” and to disclose such material to the Defence “as soon as practicable.”

6. When an accused moves under Rule 68 (A) to show that the Prosecution is in breach of its disclosure obligations, he is expected to: (1) identify the materials sought; (2) satisfy the Chamber on a *prima facie* basis of the Prosecution’s custody or control of the materials requested; and (3) satisfy the Chamber on a *prima facie* basis of the exculpatory or potentially exculpatory character of the materials sought.⁴

7. It is undisputed that Joseph Nzirorera has satisfied the requirements of the first and second prongs.

8. The Prosecution contends that the document is not exculpatory because the mere fact that the United States Government had no evidence to confirm reports of a planned genocide cannot mean that such evidence does not exist. Further, the Prosecution relies on a previous decision where the Chamber stated that “*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” could not affect the credibility of Prosecution evidence.*”⁵

9. The Chamber recalls that the disclosure to the Defence of evidence which in any way tends to suggest the innocence or mitigate the guilt of the accused or affect the credibility of

⁴ *Karemera et al.*, Decision on Joseph Nzirorera’s Fifth Notice of Rule 68 Violations and Motions for Remedial and Punitive Measures, 13 November 2007, para. 6.

⁵ *Karemera et al.*, Decision on Joseph Nzirorera’s Tenth Notice of Disclosure Violations and motion for Remedial and Punitive Measures (TC), 5 February 2008.

Prosecution evidence is one of the most onerous responsibilities of the Prosecution,⁶ and shall be interpreted broadly since it is essential to a fair trial.⁷ Furthermore, the weight to be attributed to a particular piece of evidence is for the Trial Chamber to decide and cannot be decided before the end of the trial in light of all the evidence presented by the Parties. The determination must therefore be made on a *prima facie* basis.

10. The Chamber finds that Document 1 tends to suggest the innocence of the Accused and therefore falls under Rule 68 (A). Thus, a public statement by the U.S. State Department on the situation in Rwanda can be assumed to be based on information received from the United States Embassy in Rwanda which, as has been established by other disclosures in this case, conducted active intelligence gathering from many sources in Rwanda at the time, and reported its findings to the State Department. The statement is therefore clearly distinguishable from the statements from ordinary witnesses dealt with in the Chamber's previous decision.

Are remedial and punitive measures warranted?

11. The Chamber recalls that the fact that material has not been disclosed in a timely manner does not *per se* create a prejudice to the accused.⁸ The accused must demonstrate that he has suffered material prejudice as a result of the late disclosure.⁹

12. In the present case, Joseph Nzirorera submits that he has suffered prejudice because of the Prosecution's misrepresentation that it was not in possession of Document 1 with the result that his Original Motion was denied in relation to that document. However, that is clearly not a prejudice which is relevant to Nzirorera's preparation of his defence, as it

⁶ *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, (AC), 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, (TC), 30 October 2002, para. 23.

⁷ *Karempera 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 Kordic and Mario Čerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, paras. 183, 242 ("*Kordic 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").

⁸ *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.")

⁹ *Ibid.*

appears that he was already in possession of Document 1 when he filed that motion. He may have been prejudiced because Document 1, which had been in the Prosecution's possession since May 2006, was not disclosed to him "as soon as practicable", but he has made no submissions to that effect. Nor has he indicated how the prejudice, if any, could be remedied. Therefore the Chamber finds no basis to order remedial and punitive measures to rectify a possible evidentiary disadvantage suffered by Nzirorera.

13. As to possible disciplinary measures, the Chamber recalls that 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 its obligations.¹⁰ 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.¹¹

14. In the present case, it appears that Document 1 was in the DVD collection with more than 4,700 documents which the Prosecution in May 2006 received from the United States National Archive. The Prosecution submits that the documents were printed out, manually stamped with ERN numbers and then scanned into its Zyfind evidentiary database and from there transferred to the Electronic Data Suite, which thereby made them available to all the defence. However, the Prosecution contends that due to a human error in the process, Document 1 was not transferred to the Zyfind database. From the Prosecution's original representation that it was not in possession of Document 1, the Chamber infers that no assessment of the potentially exculpatory nature of Document 1 was made by the Prosecution. Therefore, whether the Prosecution would have made a wrongful determination warranting disciplinary measures is a hypothetical issue, which the Chamber will not address.

15. The Prosecution asserts that it did search its Zyfind database for the document sought before representing to the Chamber that it was not in possession of the document and thus acted in good faith. The Chamber recalls that the Prosecution is presumed to be acting in

¹⁰ *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Judgement (AC), 19 April 2004, paras. 153 and 214.

¹¹ *Karemera et al.*, Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution (TC), 19 October 2006, paras. 16-17.

good faith when exercising its disclosure obligations and making representations to the Chamber, and notes that it subsequently did give Joseph Nzirorera access to inspect the original DVD collection. Therefore, the Chamber accepts the Prosecution's assertion that Nzirorera's Original Motion prompted it to search its Zyfind database for Document 1 and that, when representing to the Chamber that it was not in possession of that document, the Prosecution believed this to be true.

16. However, the Chamber also notes that the Prosecution did not exercise sufficient diligence neither when transferring the documents from the original DVD collection to the databases, nor when making its representation to the Chamber without searching the original DVD, despite the insistence by Joseph Nzirorera who appeared to have inside knowledge of the fact that the document was to be found on the DVDs.

17. Although the Chamber notes with concern that as it must again remind the Prosecution to exercise more diligence in the administration of its disclosure obligations and now in addition when making representations to the Chamber, it finds that the circumstances of the present case do not warrant that disciplinary measures be taken against particular members of the Prosecution team. Joseph Nzirorera's request therefore falls to be rejected.

FOR THESE REASONS, THE CHAMBER

- I. GRANTS** Joseph Nzirorera's motion for reconsideration;
- II. FINDS** that the Prosecution has not complied with Rule 68 (A); and
- III. DENIES** Joseph Nzirorera's request for remedial and punitive measures.

Arusha, 16 April 2008, done in English.

Dennis C. M. Byron
Presiding Judge

Gberdao Gustave Kam
Judge

Vagn Joensen
Judge

[Seal of the Tribunal]