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:	29 May 2008

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THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

DECISION ON APPEALS CHAMBER REMAND ON THE INTERPRETATION OF RULE 68 (A) OF THE RULES OF PROCEDURE AND EVIDENCE IN RELATION TO MIXED DOCUMENTS

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INTRODUCTION

1.   On 21 November 2007, Joseph Nzirorera filed his Tenth Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures.[1] In his motion, Joseph Nzirorera alleged that the Prosecution failed to disclose exculpatory documents from the United States National Security Archives, and requested that the Chamber impose appropriate remedial and punitive measures.

2.   On 5 February 2008, the Chamber denied Joseph Nzirorera's motion, and stated that the Prosecution did not commit a disclosure violation under Rule 68(A) of the Rules of Procedure and Evidence ("Rules") when it did not disclose a report dated 21 August 1992 from the United States' embassy in Kigali, which cited a statement by the leader of the CDR party that contradicted the testimony of Prosecution Witnesses UB and GOB.[2] The Chamber held that the report, when read in its entirety, was not exculpatory because it also contained inculpatory information, which contradicted the statement of the CDR leader.

3.   On 14 May 2008, the Appeals Chamber reversed the Chamber's decision, and remanded the matter to the Chamber "to determine whether the Appellant is prejudiced by the Prosecution's violation of Rule 68(A) of the Rules and the appropriate remedy, if any."[3]

Discussion

4.   The fact that material relevant for the Defence has not been disclosed in a timely manner does not always create prejudice to the accused.[4] It is for Joseph Nzirorera to demonstrate that he has suffered material prejudice as a result of the late disclosure.[5]

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[1]   Joseph Nzirorera's Tenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures, filed on 21 November 2007. *See also*: Prosecutor's Response to Joseph Nzirorera's Tenth Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures, filed on 26 November 2007; and Reply Brief: Joseph Nzirorera's Tenth Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures, filed on 3 December 2007; Supplemental Memorandum in Support of Joseph Nzirorera's Tenth Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures, filed on 17 December 2007; Prosecutor's Response to Nzirorera's Supplemental filing of 17 December 2007 – 10th Rule 68 Violation, filed on 24 December 2007.
[2]   *The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera*, ("*Karemera, et al.*") Case No. ICTR-98-44-, Decision on Joseph Nzirorera's Tenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures, (TC) ("Impugned Decision"), 5 February 2008.
[3]   *Karemera et al.*, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion" (AC), 14 May 2008, para. 14.
[4]   *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."
[5]   *Ibid.*

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5.   In his original motion, Joseph Nzirorera asserts that he was prejudiced by the Prosecution's late disclosure of the report at issue. Specifically, he claims in his reply brief that the report directly contradicts the Prosecution's case against him, and the testimony of such witnesses as UB and GOB that the CDR was established and controlled by the MRND. He contends that the late disclosure precluded him from using the document to contradict Prosecution witnesses; and, moreover, that he was categorically prejudiced by the late disclosure of a document that tends to prove his innocence.

6.   The Chamber finds that Joseph Nzirorera has not shown that he suffered material prejudice as a result of the late disclosure. He is a former member of the executive committee of the MRND, and has not shown that he was unable to testify personally about everything relevant to the relationship between the MRND and CDR parties. Furthermore, he has not shown that his inability to confront Prosecution Witnesses UB and GOB with a quote of the CDR leader's statement in the report could *materially* have affected the credibility of the testimony of UB and GOB. The Chamber notes that the Prosecutor, during re-direct, would have confronted the Witnesses with incriminatory information in the same report contradicting the CDR leader's statement. Finally, the mere assertion that he was categorically prejudiced by the late disclosure of the report because it tends to prove his innocence does not suffice.

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7.   For the abovementioned reasons, the Chamber does not find that Joseph Nzirorera was materially prejudiced by the Prosecution's violation of Rule 68(A), and accordingly does not consider a remedy to be appropriate.
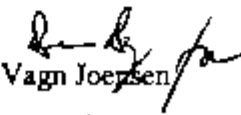
FOR THESE REASONS, THE CHAMBER

I.   **FINDS** that no material prejudice was suffered by Joseph Nzirorera as a result of the Prosecution's violation of Rule 68(A); and

II.   **DENIES** Joseph Nzirorera any remedy

Arusha, 29 May 2008, done in English.

Dennis C. M. Byron

Presiding Judge

Gberdao Gustave Kam

Judge
(Absent during signature)

Vagn Joensen

Judge
(Absent during signature)

[Seal of the Tribunal]