

ICTR-98-44-T
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(44710-44706)

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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: 6 February 2009

JUDICIAL RECORDS/ARCHIVES
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THE PROSECUTION

v.

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

**DECISION ON JOSEPH NZIRORERA'S MOTION FOR RECONSIDERATION OF
MUBERUKA DECISION**

Rules 66(B) and 73ter of the Rules of Procedure and Evidence

Office of the Prosecution:
Don Webster
Iain Morley
Saidou N'Dow
Gerda Visser
Sunkarie Ballah-Conteh
Takeh Sendze

Defence Counsel for Édouard Karemera
Dior Diagne Mbaye and Félix Sow

Defence Counsel for Mathieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl

Defence Counsel for Joseph Nzirorera
Peter Robinson and Patrick Nimy Mayidika Ngimbi

INTRODUCTION

1. Joseph Nzirorera claims that this Chamber has erred in failing to rule on the merits in its *Decision on Joseph Nzirorera's 20th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Colonel Félicien Muberuka*.¹ Nzirorera prays that the Chamber reconsider its decision and rule on the merits about whether the Prosecution is in violation of Rule 66(B), as well as reconsider the sanctions imposed upon counsel for Mr. Nzirorera.²
2. The Prosecution opposes the motion.³

DELIBERATIONS

3. The Chamber has the inherent power to reconsider its decisions when: (i) a new fact has been discovered that was not known to the Chamber at the time it made its original Decision; (ii) there has been a material change in circumstances since it made its original Decision; or (iii) there is reason to believe that its original Decision was erroneous or constituted an abuse of power on the part of the Chamber, resulting in an injustice thereby warranting the exceptional remedy of reconsideration.⁴
4. Joseph Nzirorera alleges four errors that he claims merit reconsideration of the Muberuka Decision. The claimed errors are as follows:

¹ Joseph Nzirorera's Motion for Reconsideration of Muberuka Decision, filed on 9 Dec 2008, ("Nzirorera's Motion"); Reply Brief: Joseph Nzirorera's Motion for Reconsideration of Muberuka Decision, filed on 17 December 2008, ("Nzirorera's Reply")

² Nzirorera's Motion, para. 15.

³ Prosecutor's Response To: Nzirorera's Motion for Reconsideration of Muberuka Decision, filed on 9 December 2008, ("Prosecution Response") paras. 5,12.

⁴ *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Reconsider the Warning Issued to Co-Counsel (TC), 8 September 2008, para. 4; See also: *The Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-AR72, Decision (Motion for Review or Reconsideration) (AC), 12 September 2000; *Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva ("Bagosora et al.") v. The Prosecutor*, Case No. ICTR-98-41-A, Appeals Chamber, Interlocutory Appeal from refusal to Reconsider Decisions relating to Protective Measures and Application for a Declaration of "Lack of Jurisdiction" (AC), 2 May 2002, para. 10; See also *The Prosecutor v. Zdravko Mucić, Hazim Delić, Esad Landžo ("Mucić et al.")*, Case No. IT-96-21-A, Decision on Hazim Delić's Emergency Motion to Reconsider Denial of Request of Provisional Release (AC), 1 June 1999, para. 4.

- 1) The Chamber erroneously held that Nzirorera relied upon his third Rule 73ter filing as opposed to his fifth Rule 73ter filing when he filed his 20th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Colonel Felicien Muberuka;⁵
 - 2) The Chamber erred in assuming that the Prosecution's obligation to comply with Rule 66(B) was limited to those witnesses listed in the third Rule 73ter filing;⁶
 - 3) The Chamber erred in concluding that Nzirorera was required to make yet another request for inspection of Colonel Muberuka's information;⁷
 - 4) The Chamber erred in allowing Prosecution as much time as necessary to disclose Rule 66(B) materials.⁸
5. Pursuant to this Chamber's decision of 22 August 2008, the Prosecution was required to provide Rule 66(B) disclosures for all witnesses presented in Joseph Nzirorera's third Rule 73ter filing. Nzirorera's statement that the 22 August 2008 Order required the prosecution to allow inspection of documents related to all persons on his witness list, including Colonel Muberuka,⁹ implied that Muberuka was part of the third Rule 73ter filing. It is now undisputed that Muberuka was not on the witness list in this filing.¹⁰ Accordingly, the Chamber finds that it did not err in its conclusion that Nzirorera misstated the content of his third Rule 73ter filing.
6. Next, Joseph Nzirorera contends that the Chamber erred in assuming that the Prosecution was only required to provide Rule 66(B) disclosures for those witnesses listed in his third Rule 73ter filings. This decision was not based upon an assumption. The rule was correctly applied based upon the filings at that date, since the 22 August 2008 Order required Rule 66(B) disclosures only for the witnesses on the third Rule 73ter filing.

⁵ Nzirorera's Motion, paras. 4,- 6.

⁶ Nzirorera's Motion, para. 8.

⁷ Nzirorera's Motion, para. 10.

⁸ Nzirorera's Motion, para. 13.

⁹ Joseph Nzirorera's Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Colonel Félicien Muberuka, filed on 30 October 2008, para. 4.

¹⁰ Nzirorera's Motion, paras. 6 - 7.

7. Nzirorera further alleges that the Chamber erred in requiring fresh requests for information related to witnesses added after the third Rule 73^{ter} filing, including Colonel Muberuka. He claims that by adding Muberuka to his witness list on 8 September 2008, the Prosecution was automatically required to provide Rule 66(B) disclosures for Colonel Muberuka, since Nzirorera claims that the obligations under Rule 66(B) are ongoing as additions are made to the witness list.¹¹ This is a proposition for which Nzirorera cites no jurisprudence. As his reasoning, Nzirorera puts forth the idea that the Prosecution has acknowledged it has an ongoing Rule 66(B) responsibility, saying that the Prosecution acquiesced to the idea that additions to Rule 73^{ter} filings fulfil the requirements of making requests for Rule 66(B) disclosures.¹² However, in its Response, the Prosecution asserts that it actually asked the Defence to *reduce* its witness list to be presented in the fifth Rule 73^{ter} filing so that its Rule 66(B) obligations could be lessened. The Prosecution never agreed to provide omnibus Rule 66(B) disclosures for additional witnesses added in the fifth Rule 73^{ter} filing.¹³

8. The Chamber has been unable to locate any decisions where Rule 66(B) obligations have been extended to fresh witnesses added after previous Rule 66(B) requests were made. It is, however, well established that Rule 66(B) disclosure obligations must be triggered by specific Defence requests.¹⁴ Therefore, it was proper to hold that after Nzirorera changed his witness list for the fifth time he was required to make a new request for Rule 66(B) disclosures encompassing the new witnesses for whom Rule 66(B) disclosures had not already been ordered.

¹¹ Nzirorera's Motion, para. 8.

¹² Nzirorera's Reply, para. 3.

¹³ Prosecution's Response, para. 10.

¹⁴ *Bagosora et al.*, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence, 25 September 2006, para. 10; *Prosecutor v. Zigiranyirazo*, Case No. ICTR-01-73-T, Decision on Defence Motion for Disclosure under Rule 66 (B) of the Rules, 21 February 2007, para. 5. *Prosecutor v. Augustin Ndindiliyimana et al.*, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008 para. 13 (citations omitted); *Bizimungu et al.*, Decision on Justin Mugenzi's Request for Disclosure Order, 23 July 2008, para. 7 (citations omitted); *Karemera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para. 13.

9. In any event, this argument is moot, since Joseph Nzirorera has accepted that the proper procedure for triggering a Rule 66(B) disclosure is to make fresh requests to the Prosecution by making such requests on 8 December 2008.¹⁵

10. Further, the Prosecution continues to state that it does not oppose offering inspections under Rule 66(B), and it continues to actively pursue relevant searches for inspection concerning Colonel Muberuka.¹⁶

11. The final point, that the Chamber has erred in allowing the Prosecution as much time as necessary to provide disclosures is also moot, since a request for disclosures related to Colonel Muberuka was only properly made on 8 December 2008, one day before the filing of this Motion for Reconsideration and on the same day of the filing of his current (sixth) Rule 73ter filing.

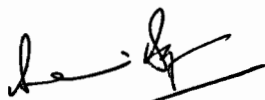
12. The information presented does not evidence reversible error on the part of the Chamber. To the contrary, the filing of this motion for reconsideration further reiterates that Joseph Nzirorera's original motion was both frivolous and premature.

FOR THESE REASONS, THE CHAMBER

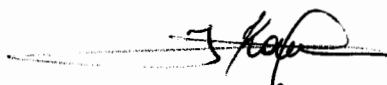
I. DENIES Joseph Nzirorera's motion in its entirety.

II. DIRECTS the Registrar to deny counsel for Joseph Nzirorera all fees related to the filing of this motion.

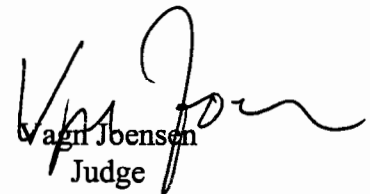
Arusha, 6 February 2009, done in English.



Dennis C. M. Byron
Presiding Judge



Gberdao Gustave Kam
Judge



Vagn Joensen
Judge

[Seal of the Tribunal]



¹⁵ Prosecution's Response, para. 8.

¹⁶ Prosecution Response, paras. 9, 11.