



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: 9 February 2009

THE PROSECUTION

v.

**Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-T

**DECISION ON JOSEPH NZIRORERA'S 19TH NOTICE OF VIOLATION OF RULE
66 AND MOTION FOR REMEDIAL AND PUNITIVE MEASURES: JEAN-MARIE
VIANNEY MUDAHINYUKA**

Rules 66(B) and 68 of the Rules of Procedure and Evidence

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INTRODUCTION

1. On 22 August 2008, the Chamber ordered the Prosecution to provide inspection pursuant to Rule 66(B) of the Rules of Procedure and Evidence ("Rules") of all statements made by persons listed as potential witnesses in Joseph Nzirorera's third Rule 73^{ter} filing, which included Jean-Marie Vianney Mudahinyuka.¹ Although the Prosecution has met with Mudahinyuka on three occasions, it has not disclosed any material emanating from those meetings.

2. On 6 October 2008, Joseph Nzirorera filed a motion claiming that the Prosecution violated Rule 66(B) and possibly Rule 68 because it did not disclose information obtained from Jean-Marie Vianney Mudahinyuka.² He moves for immediate disclosure of that information and for remedial and punitive measures. The Prosecution opposes the motion in its entirety.³

DELIBERATIONS

Preliminary Matters

3. In response to the Nzirorera Motion, the Prosecution sought an extension of time until 20 October 2008 to file its response, stating that it needed additional time to investigate the issues raised by Joseph Nzirorera.⁴ The Chamber considers that, given the short delay and because Nzirorera does not oppose the extension,⁵ it is in the interests of justice to grant the Prosecution an extension of time in order to clarify the issues raised in the Nzirorera Motion.

4. The Prosecution also seeks leave to file a sur-reply in order to address new matters raised in Joseph Nzirorera's reply brief.⁶ The Chamber finds that Nzirorera's Reply raises

¹ Decision on Joseph Nzirorera's Fourth Motion for Inspection of Defence Witness Information, 22 August 2008 ("Inspection Decision"); See Joseph Nzirorera's Third Rule 73 Ter Filing (*ex parte* and confidential), filed 2 June 2008 ("Third Rule 73^{ter} Filing"). In the Order to Joseph Nzirorera on the Presentation of his Defence Evidence, 30 July 2008, the Chamber ordered the disclosure of Nzirorera's Third Rule 73^{ter} Filing to the parties.

² Joseph Nzirorera's 19th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Jean-Marie Vianney Mudahinyuka, filed 6 October 2008 ("Nzirorera Motion"); Reply-Brief: Joseph Nzirorera's 19th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Jean-Marie Vianney Mudahinyuka, filed 21 October 2008 ("Nzirorera Reply").

³ Prosecution's Response to Joseph Nzirorera's Motion for Remedial and Punitive Measures – Rule 66(B) – Mudahinyuka, filed 20 October 2008 ("Prosecution Response"); Prosecutor's Sur-Reply to Joseph Nzirorera's Motion for Remedial and Punitive Measures – Rule 66(B) – Mudahinyuka, filed 27 October 2008 ("Prosecution Sur-Reply").

⁴ Prosecutor's Motion for Extension of Time to Respond to Joseph Nzirorera's 19th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Jean-Marie Vianney Mudahinyuka, filed 13 October 2008, para. 2.

⁵ Joseph Nzirorera's Response to Prosecution motion for Extension of Time, filed 14 October 2008.

⁶ Prosecution Sur-Reply, para. 1.

new issues, namely the Prosecution's violation of an order of this Chamber, and therefore grants the Prosecution's request.

Rules 66(B) and 68 of the Rules

5. Rule 66(B) imposes an obligation upon the Prosecution, after receiving a request from the Defence, to allow the Defence to inspect any books, documents, photographs, and tangible objects in its custody or control, which: (1) are material to the preparation of the defence; or (2) are intended for use by the Prosecution as evidence at trial; or (3) were obtained from or belonged to the accused.

6. Rule 68(A) imposes an obligation on the Prosecution to disclose to the defence, as soon as practicable, any material which, in the actual knowledge of the Prosecution, may suggest the innocence or mitigate the guilt of an accused, or affect the credibility of the evidence led by the Prosecution in that particular case. If an accused wishes to show that the Prosecution is in breach of its disclosure obligation, he or she must: (1) identify specifically the material sought; (2) present a *prima facie* showing of its probable exculpatory nature; and (3) prove that the material requested is in the custody or under the control of the Prosecution.⁷

7. Although Joseph Nzirorera is unable to precisely identify the material he seeks to be disclosed under Rules 66(B) and 68(A), he asks the Chamber to accept that the Prosecution possesses such material based on Jean-Marie Vianney Mudahinyuka's belief, conveyed to Nzirorera's counsel, that the Prosecution recorded some of its meetings with him.⁸ Nzirorera supports Mudahinyuka's statement by pointing to a mission report prepared by Jacques Baillargeon of The Office of the Prosecutor,⁹ which contains a list of topics discussed by the Prosecution at one of its meetings with Mudahinyuka. Nzirorera appears to argue that since the list of topics contained in the Mission Report corresponds closely to the account of the meetings given by Mudahinyuka, his recollection of the meetings should be accepted by the Chamber.¹⁰

8. The Prosecution submits that its meetings with Jean-Marie Vianney Mudahinyuka were exploratory; the first was preliminary in nature, lasted only fifteen minutes, and was never

⁷ *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera*, Case No. ICTR-98-44-T ("Karemera et al."), Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings, 11 September 2008, paras. 5-6.

⁸ Nzirorera Motion, paras. 9 and 14; Nzirorera Reply, para. 20.

⁹ See Annex D to the Prosecution Response ("Mission Report").

¹⁰ Nzirorera Reply, paras. 20-21.

documented.¹¹ With respect to the second meeting in July 2006, conducted by investigators Jacques Baillargeon and Rejean Tremblay, the Prosecution annexed the Mission Report filed by the investigators which listed the topics discussed. The Prosecution categorically denies that any information was provided and states that “Mudahinyuka avoided substantive comments in response to [the Prosecution’s] inquiries and simply indicated whether or not he would be able to provide information about the matters that interested the Prosecution.”¹² Although the Prosecution intended to obtain a detailed statement from Mudahinyuka at its third meeting, that meeting was abandoned when it became clear that Mudahinyuka was not serious about providing information to the Prosecution.¹³

9. The Senior Trial Attorney asserts that the Prosecution has no statements or notes from its discussions with Jean-Marie Vianney Mudahinyuka subject to disclosure pursuant to Rule 66(B).¹⁴ Joseph Nzirorera invites the Chamber to infer that there were records of the meetings from the fact that the meetings occurred and from the information provided by Mudahinyuka. The Chamber finds that Mudahinyuka’s belief, two years later, that some of his interviews were recorded is not sufficient to doubt the Prosecution’s representation.¹⁵

10. To the extent that Joseph Nzirorera argues that the Mission Report should have been disclosed by the Prosecution, the Chamber finds that it cannot be said to be material to the preparation of the defence, as required by Rule 66(B). The materiality of the documents sought to be inspected may be determined by assessing the relevance of the document sought to the preparation of the defence case, and preparation is a broad concept.¹⁶ The Chamber cannot find that an enumeration of topics discussed with Jean-Marie Vianney Mudahinyuka meets this standard, and indeed Nzirorera does not advance any argument in support of the proposition. In any event, the Chamber also finds that the Mission Report is protected from disclosure under Rule 70(A), as a report prepared in connection with the investigation of a

¹¹ Prosecution Sur-Reply, para. 5; Prosecution Response, para. 8.

¹² Prosecution Response, para. 6.

¹³ Prosecution Response, para. 6.

¹⁴ Prosecution Response, paras. 4, 6 and 8; Prosecution Sur-Reply, paras. 4 and 14.

¹⁵ *Karemera et al.*, Decision on Joseph Nzirorera’s Interlocutory Appeal (AC), 28 April 2006 (“Decision on Interlocutory Appeal”), paras. 16-17.

¹⁶ *Karemera et al.*, Decision on Prosecution Submission on Entering into Evidence Exhibits Arising from the Prosecution Cross-Examination of Karemera Defence Witnesses KBL, LSP, and TXL and Joseph Nzirorera’s Eighteenth Motion for Remedial and Punitive Measures for Violation of Rule 66, 10 November 2008, para. 15.

case.¹⁷ Consequently, the Chamber finds that Nzirorera has failed to demonstrate that the Prosecution has violated Rule 66(B).

11. With respect to Rule 68, the Chamber notes that the determination of which materials are subject to disclosure under Rule 68 is a fact-based enquiry made by the Prosecution.¹⁸ The Senior Trial Attorney has specifically denied having obtained any exculpatory information from Jean-Marie Vianney Mudahinyuka at any of the meetings.¹⁹

12. Again, Joseph Nzirorera has shown no reason to doubt the Prosecution's representations.²⁰ Nzirorera's reliance on Jean-Marie Vianney Mudahinyuka's recollection of his meetings with the Prosecution is insufficient to demonstrate that the Prosecution possesses exculpatory information in its custody or control;²¹ something which is not in the possession of or accessible to the Prosecution cannot be subject to disclosure.²² As such, the Chamber finds that Nzirorera has not demonstrated that the Prosecution is in breach of Rule 68.

13. Finally, Joseph Nzirorera argues that the Prosecution deliberately destroyed evidence of its meetings with Jean-Marie Vianney Mudahinyuka because Jacques Baillargeon states in a letter attached to the Prosecution Response that notes taken during his July 2006 meeting with Mudahinyuka were destroyed.²³

14. The Chamber finds that the evidence does not support an inference that the Prosecution destroyed evidence. Jacques Baillargeon categorically stated in a letter attached to the Prosecution Response that he did not make a record of Jean-Marie Vianney Mudahinyuka's answers to his inquiries.²⁴ Baillargeon went on to state that the only notes taken were a reference for completing the Mission Report.²⁵ The Chamber finds that there is nothing to

¹⁷ *Karemera et al.*, Decision on Defence Motion for Disclosure of Information Obtained from Juvénal Uwilingiyamana, 27 April 2006, para. 16.

¹⁸ *Karemera et al.*, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion" (AC), 14 May 2008, para. 9.

¹⁹ Prosecution Response, paras. 4-5

²⁰ *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004 ("Niyitegeka Judgement"), para. 37.

²¹ *Karemera et al.*, Decision on Interlocutory Appeal, paras. 16-17; *Karemera et al.*, Decision on Joseph Nzirorera's 20th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Colonel Felicien Muberuka, 4 December 2008, para. 8.

²² Niyitegeka Judgement, para. 35; *Karemera et al.*, Decision on Joseph Nzirorera's Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive and Other Measures, 28 November 2007, para. 19.

²³ Nzirorera Reply, paras. 18 and 22; See Prosecution Response, Annex B2.

²⁴ Prosecution Sur-Reply, para. 4; Annex B2 to Prosecution Response.

²⁵ Annex B2 to Prosecution Response.

indicate that those notes contained evidence from Mudahinyuka and were therefore subject to disclosure under the Rules.

16 February 2006 Order

15. On 26 January 2006, Joseph Nzirorera brought an *ex parte* motion seeking a subpoena to interview Jean-Marie Vianney Mudahinyuka.²⁶ Because Nzirorera's *Ex Parte* Motion was inadvertently distributed to the Prosecution,²⁷ the Chamber ordered the Prosecution to destroy copies of Nzirorera's *Ex Parte* Motion and ordered the Prosecution to refrain from contacting Mudahinyuka or his legal representative until it decided the merits of Nzirorera's *Ex Parte* Motion.²⁸ On 12 July 2006, the Chamber denied Nzirorera's *Ex Parte* Motion.²⁹

16. Joseph Nzirorera first submits that the Prosecution violated the 16 February 2006 Order by meeting with Jean-Marie Vianney Mudahinyuka from 10-13 July 2006, before the Decision on Nzirorera's *Ex Parte* Motion was issued.³⁰ Nzirorera also argues that the Prosecution should have informed the Chamber of its meetings with Mudahinyuka which suggests that Mudahinyuka was willing to provide information and therefore available to be subpoenaed.³¹

17. The Prosecution concedes that it met with Jean-Marie Vianney Mudahinyuka when such contact had been prohibited³² and therefore the Chamber finds that the Prosecution violated the 16 February 2006 Order. While the Chamber accepts that it was not the *Karempera* prosecution team who initiated the meeting with Mudahinyuka, nor did it obtain any information from that meeting,³³ the Prosecution is well aware of jurisprudence which has consistently held that the Prosecution is expected to function as a unitary office in meeting its obligations.³⁴ The Prosecution has not advanced any compelling reason to depart from that jurisprudence in this case.

²⁶ Joseph Nzirorera's *Ex Parte* Motion for Order for Interview of Defence Witness NZI, filed 26 January 2006 ("Nzirorera's *Ex Parte* Motion").

²⁷ See Prosecutor's Response to Nzirorera's *Ex Parte* Motion for Order for Interview of Witness NZI, filed 27 January 2006.

²⁸ T. 16 February 2006, p. 11 ("16 February 2006 Order").

²⁹ Decision on Nzirorera's *Ex Parte* Motion for Order for Interview of Defence Witnesses NZ1, NZ2, and NZ3, 12 July 2006 ("Decision on Nzirorera's *Ex Parte* Motion").

³⁰ Nzirorera Reply, para. 6.

³¹ Nzirorera Reply, paras. 25-26.

³² Prosecution Sur-Reply, para. 9.

³³ Prosecution Sur-Reply, para. 10.

³⁴ *Karempera et al.*, Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution, 19 October 2006, para. 11; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73 & ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005, para. 43: "Nowhere in the Statute or Rules is it stated that the Prosecutor's obligations may be

18. However, the Chamber accepts that members of the Prosecution met with Jean-Marie Vianney Mudahinyuka just two days prior to the Decision on Nzirorera's *Ex Parte* Motion³⁵ and therefore finds that the Prosecution could not be said to have influenced Mudahinyuka's refusal to cooperate with Joseph Nzirorera. Although the Chamber is gravely concerned about the Prosecution's flagrant breach of the 16 February Order, it cannot find that Nzirorera was prejudiced by that breach. Consequently, the Chamber does not find that any remedial orders are required.

19. The Chamber is reminded that there has been a history of Prosecution violations during this case. It also notes that the Prosecution has admitted this violation, apologised for it and explained that it occurred because of deficiencies in communication within The Office of the Prosecutor as the officers involved were not part of the *Karemera* team.³⁶ The Chamber will therefore limit itself to making a formal declaration of the violation of the 16 February Order and issue a warning under Rule 46. The Prosecution is enjoined, once again, to take steps to ensure that similar orders of the Tribunal are respected in the future.

20. Joseph Nzirorera further argues that the Prosecution's failure to disclose its July 2006 meeting with Jean-Marie Vianney Mudahinyuka constituted misconduct which obstructed the proceedings. He appears to argue that the fact that the Prosecution met with Mudahinyuka suggests that the Chamber's denial of the application for a subpoena was based on a false factual premise which could have been corrected by disclosure of the meeting.

21. First, the Chambers notes that the Decision on Nzirorera's *Ex Parte* Motion was based partly on representations made by the Registry concerning Jean-Marie Vianney Mudahinyuka's willingness to testify in the present case.³⁷ While the Registry stated the Mudahinyuka was unwilling to cooperate with the Tribunal, in fact counsel for Mudahinyuka indicated that he was unwilling to testify or cooperate in the *Karemera* matter.³⁸ Second, Joseph Nzirorera misrepresents the Chamber's findings in its Decision on Nzirorera's *Ex Parte* Motion. Contrary to Nzirorera's assertions,³⁹ the Chamber was *not* convinced that

limited to specific teams within the Office of the Prosecutor, which in the practice of the Tribunal, are sometimes referred to as the "Prosecution" in an individual case. The ordinary meaning and context of the text of the Rules suggest that the obligations of the Prosecutor rest on him or her alone as an individual who is then able to authorize the Office of the Prosecutor as a whole, undivided unit, in fulfilling those obligations."

³⁵ Prosecution Sur-Reply para. 9.

³⁶ Prosecution Sur-Reply, paras. 9-11.

³⁷ Decision on Nzirorera's *Ex Parte* Motion, para. 12.

³⁸ Registrar's Submission under Rule 33(B) of the Rules on Chamber's Interim Order on Defence Motion for Subpoena to Meet with Defence Witness NZ1, filed 23 June 2006.

³⁹ Nzirorera Reply, paras. 11 and 12.

information possessed by Mudahinyuka was necessary for the conduct and fairness of the trial.⁴⁰

22. Consequently, the Chamber does not agree that the Prosecution ought to have considered that the basis for its Decision on Nzirorera's *Ex Parte* Motion would have been impacted by the knowledge that other members of The Office of the Prosecution met with Jean-Marie Vianney Mudahinyuka. As such, the Chamber finds that Joseph Nzirorera has not demonstrated that the Prosecution's failure to inform the Chamber of its meeting constituted a breach of any duty to the Chamber, caused prejudice to him or that the proceedings were obstructed by this omission. Consequently, there is no basis to impose remedial measures with respect to this matter.

FOR THESE REASONS, THE CHAMBER

- I. **GRANTS** the Prosecution's motion for an extension of time;
- II. **DENIES** Joseph Nzirorera's motion in its entirety.

Arusha, 9 February 2009, done in English.

Dennis C. M. Byron
Presiding Judge

Gberdao Gustave Kam
Judge

Vagn Joensen
Judge

[Seal of the Tribunal]

⁴⁰ The Chamber stated at para. 12: "The Chamber is not convinced that the information that [Mudahinyuka] could provide according to Joseph Nzirorera could not be obtained through other means and is therefore necessary for the conduct and fairness of this trial. In addition, in light of the Registrar's submissions that the witness is firmly unwilling to cooperate with the Tribunal, it is unlikely that a subpoena will produce the necessary degree of cooperation needed for the Defence Counsel for Nzirorera to interview this witness. There is therefore no ground for issuing a subpoena with respect to [Mudahinyuka]." (Emphasis added).