

ICTR - 98-44 - T
(45429 - 45426)

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UNITED NATIONS
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**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: 24 March 2009

THE PROSECUTOR

v.

**Édouard KAREMERA
Matthieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-T

JUDICIAL RECORDS/ARCHIVES
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**DECISION ON JOSEPH NZIRORERA'S 25TH NOTICE OF VIOLATION OF RULE
66 AND MOTION FOR REMEDIAL AND PUNITIVE MEASURES: WITNESS T**

Rule 66 of the Rules of Procedure and Evidence

Office of the Prosecution:

Don Webster
Iain Morley
Saidou N'Dow
Sunkarie Ballah-Conteh
Takeh Sendze

Defence Counsel for Édouard Karemera
Dior Diagne Mbaye and Félix Sow

Defence Counsel for Matthieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl

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

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INTRODUCTION

1. Joseph Nzirorera alleges that the Prosecution violated Rule 66(A)(ii) of the Rules of Procedure and Evidence by disclosing, in February 2009, an interview dated 16 July 1998 with Witness T, more than two years after he testified in these proceedings.¹ Nzirorera asserts that he is prejudiced by the late disclosure and seeks remedial and punitive measures.² In response, the Prosecution acknowledges that it disclosed the interview after the testimony of Witness T, but submits that Joseph Nzirorera was not prejudiced as a result.³

DELIBERATIONS

2. Rule 66(A)(ii) requires the Prosecution to disclose to the defence copies of the statements of all witnesses whom the Prosecution intends to call to testify at trial, no later than 60 days before the date set for trial.⁴ It is evident that the Prosecution violated this requirement by disclosing the interview with Witness T in February 2009.

3. The Chamber recalls that the fact that material has not been disclosed in a timely manner does not *per se* prejudice the accused. The accused must demonstrate that he has suffered material prejudice as a result of the late disclosure in order for remedial and/or punitive measures to be warranted.⁵

4. In his interview with the Prosecution, Witness T provides information concerning public funds that were distributed during the genocide and after the defeat of the Interim Government in 1994. Witness T alleges that Joseph Nzirorera engaged in fraud and bribery. Nzirorera argues that he was prejudiced by not being able to use these false allegations to impeach the credibility of Witness T during his cross-examination, specifically to demonstrate that Witness T was motivated to falsely implicate Nzirorera in criminal activities.⁶

¹ Joseph Nzirorera's 25th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Witness T, filed 3 March 2009 ("Motion"); Confidential Annex "A": Joseph Nzirorera's 25th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Witness T, filed 3 March 2009; Reply Brief: Joseph Nzirorera's 25th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Witness T, filed 11 March 2009 ("Reply Brief").

² Motion, paras. 5-6; Reply Brief, para. 6.

³ Prosecutor's Response to Joseph Nzirorera's 25th Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Witness T, filed 9 March 2009 ("Prosecution Response").

⁴ *The Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse, and Joseph Nzirorera*, Case No. ICTR-98-44-T ("*Karemera et al.*"), Decision on Joseph Nzirorera's Sixth, Seventh and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive and other Measures, 29 November 2007, paras. 19-20.

⁵ *Karemera et al.*, Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings, 11 September 2008, para. 21.

⁶ Motion, paras. 4-5.

5. The Prosecution argues that Joseph Nzirorera was not prejudiced by its failure to disclose the interview in a timely manner because the allegations made by Witness T were not charged in the Indictment and figure only peripherally in the trial; the Prosecution provided voluminous disclosure with respect to Witness T in these proceedings; and because it would be counter-intuitive for Nzirorera to seek to elicit damaging information to impeach Witness T's credibility.⁷

6. The Chamber finds the prejudice caused to Joseph Nzirorera to be marginal, in light of the nature of the evidence provided by Witness T in the interview. Nevertheless, Nzirorera was entitled to this evidence prior to the testimony of Witness T. The Chamber recalls that it has already granted Nzirorera the entitlement, upon a showing of good cause, to recall Witness T for further cross-examination on the basis of a different disclosure violation by the Prosecution.⁸ Accordingly, should Nzirorera demonstrate such good cause, the Chamber finds that Nzirorera may also confront him with the information contained in the interview.

7. With respect to sanctions, Joseph Nzirorera points out that the Prosecution has been warned previously about disclosure violations with respect to Witness T.⁹ Consequently, Nzirorera requests that Prosecutors Don Webster and Iain Morely be reported to their respective bar associations for misconduct. In the alternative, should the Chamber refuse to order such a sanction, Nzirorera requests that the Chamber reconsider its previous decision to report counsel for Nzirorera to his state bar, since this would be an intolerable double standard.¹⁰

8. The Chamber agrees with Joseph Nzirorera that the Prosecution's continued failure to provide complete disclosure with respect to Witness T in particular is egregious in light of the warning already issued. However, the Chamber notes that the Prosecution provided a large amount of disclosure with respect to Witness T and it appears that the failure to disclose the interview was inadvertent.¹¹ Further, the Prosecution has acknowledged the disclosure violation, offered its apologies to the accused and to the Chamber, and has reiterated its

⁷ Prosecution Response, paras. 6-8.

⁸ *Karemera et al.*, Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings, 11 September 2008, para. 32; See also *Karemera et al.*, Decision on Joseph Nzirorera's Motions for Request for Cooperation to a State: Interviews of Witness Colonel Frank Claeys and Witness T (Confidential), 25 November 2008, para. 8; *Karemera et al.*, Décision sur les questions proposées par Joseph Nzirorera pour être posées aux témoins Frank Claeys et T (Confidential), 4 February 2009.

⁹ Motion, para. 7, referring to T. 24 May 2006, p. 36.

¹⁰ Reply Brief, paras. 4-5.

¹¹ Annex, Prosecution Response.

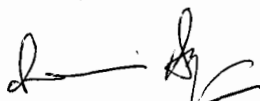
undertaking to review and enhance the organization of its disclosure records.¹² Consequently, in light of the Chamber's finding with respect to prejudice, it does not find that sanctions are appropriate in this case.

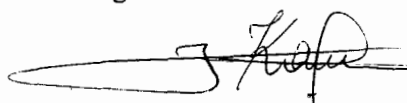
9. Finally, the Chamber notes the imposition of sanctions against counsel stand on their own facts and bear no relation whatsoever to whether or not sanctions are justified against another party in the proceedings. There is therefore no basis to reconsider, in the context of this decision, sanctions already imposed on counsel for Joseph Nzirorera.


FOR THESE REASONS, THE CHAMBER

- I. **GRANTS** Joseph Nzirorera's Motion in part; and
- II. **FINDS** that the Prosecution has violated its disclosure obligations under Rule 66(A)(ii) with respect to Witness T's 16 July 1998 interview; and
- III. **PERMITS** Joseph Nzirorera, upon a showing of good cause, to recall Witness T for further cross-examination with respect to the 16 July 1998 interview.

Arusha, 24 March 2009, done in English.


Dennis C. M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge


Vagn Joensen
Judge



¹² Prosecution Response, para. 11.