



UNITED NATIONS  
NATIONS UNIES

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26-03-2009  
(1006 - 998)

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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Khalida Rachid Khan, presiding  
Lee Gacuiga Muthoga  
Aydin Sefa Akay

**Registrar:** Mr. Adama Dieng

**Date:** 26 March 2009

**THE PROSECUTOR**  
v.  
**DOMINIQUE NTAWUKULILYAYO**

**Case No. ICTR-05-82-PT**

JUDICIAL RECORDS/ARCHIVED  
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**DECISION ON DEFENCE MOTION ALLEGING BREACH OF PROSECUTION'S  
DISCLOSURE OBLIGATIONS; CHAMBER'S WARNING TO PROSECUTION  
COUNSEL; AND SCHEDULING ORDER CONCERNING  
COMMENCEMENT OF TRIAL**

*Article 20 of the Statute of the Tribunal and  
Rules 54 and 66 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**  
Charles Adeogun-Phillips  
Ibukunolu Alao Babajide  
Thembile Segoete

**Counsel for the Defence:**  
Maroufa Diabira  
Dorothee Le Fraper du Hellen

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## INTRODUCTION

1. On 11 March 2009, the Defence filed a Motion alleging, among other things, breach of the Prosecution's disclosure obligations under Rule 66 (A) (ii) of the Rules of Procedure and Evidence ("Rules") and requesting that the Chamber order that the evidence of those witnesses, whose statements were disclosed after 6 March 2009, be excluded.<sup>1</sup> The Prosecution responded to the Motion on 17 March 2009.<sup>2</sup>
2. On 18 March 2009, the Chamber issued an Interim Order.<sup>3</sup> The Chamber considered that in light of the large amount of material disclosed by the Prosecution after the 60 day time limit prescribed by Rule 66 (A) (ii), further information was required from the Parties in order to determine whether the Accused's right to adequate time to prepare his defence had been adversely affected by the Prosecution's late disclosures, and if necessary, to determine the appropriate remedy.<sup>4</sup>
3. On 23 March 2009, the Parties filed separate tables setting out the information on disclosure requested by the Chamber.<sup>5</sup>

## BACKGROUND

4. On 16 December 2008, the Chamber held a status conference with the Parties in order to ascertain trial readiness and the trial was scheduled to commence on 30 March 2009.<sup>6</sup> The Parties were officially informed approximately three and a half months in advance of the date scheduled for trial.

<sup>1</sup> *Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-PT, "Requete en Urgence de la Defense en Rejet des Nouvelles Declarations Produites ou Annoncees et non Encore Produites par le Procureur en Dehors des Delais Prevus par l'Article 66 (A) (ii) de Reglement de Procedure et de Preuve", 11 March 2009 ("Motion").

<sup>2</sup> *Ntawukulilyayo*, Prosecution's Response to 'Requete en Urgence de la Defense en Rejet des Nouvelles Declarations Produites ou Annoncees et non Encore Produites par le Procureur en Dehors des Delais Prevus par l'Article 66 (A) (ii) de Reglement de Procedure et de Preuve', 17 March 2009 ("Prosecution Response").

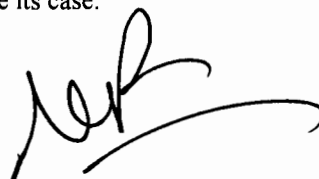
<sup>3</sup> *Ntawukulilyayo*, Interim Order to the Parties Regarding Disclosure, 18 March 2009 ("Interim Order").

<sup>4</sup> The Interim Order requested that the Parties immediately collaborate and no later than 9.30 a.m. on 23 March 2009, provide the Chamber with a joint table which:

- (i) lists the Prosecution witnesses, with pseudonyms where relevant;
- (ii) identifies the Rule 66 (A) (ii) material disclosed in respect of each witness, with the dates on which those disclosures were made; and
- (iii) states whether the Parties agree on the dates of the disclosures, and whether they agree that the disclosed material falls within Rule 66 (A) (ii).

<sup>5</sup> *Ntawukulilyayo*, Prosecutor's Compliance with the Interim Order to the Parties Regarding Disclosure, 23 March 2009 ("Prosecution Disclosure Table"), and Defence "*Réponse à la demande d'informations émise par la Chambre dans sa décision du 18 mars 2009*", 23 March 2009 ("Defence Disclosure Table"). In addition to a table with the aforementioned information, the Defence filed a response to the Chamber's Interim Order repeating its complaints regarding the Prosecution's disclosure and requesting that the Chamber either exclude evidence of witnesses whose statements were disclosed after 29 January 2009 (60 days before trial), or grant additional time before trial to enable the Defence to effectively prepare its case.

<sup>6</sup> *Ntawukulilyayo*, T. 16 December 2008.



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5. On 30 January 2009, the Prosecution filed disclosures pursuant to Rule 66 (A) of the Rules,<sup>7</sup> and an additional statement was disclosed by the Prosecution on 24 February 2009.<sup>8</sup>

6. On 20 February 2009, the Defence filed a motion alleging violations of the Prosecution's disclosure obligations under Rule 66.<sup>9</sup> The Defence requested that, due to these violations, the Chamber order the exclusion of certain evidence, and an adjournment of the trial.

7. On 27 February 2009, the Chamber issued a Decision on the First Defence Motion, in which the Chamber found the Prosecution in violation of its disclosure obligation under Rule 66 (A) (ii) and ordered that the Prosecution:

- (i) conduct a thorough and diligent review of the materials in its possession with a view to ensuring full compliance with its disclosure obligations under Rule 66 (A) (ii); and
- (ii) certify, in writing, that such a search has been conducted, and that all disclosures have been made, in accordance with Rule 66 (A) (ii) of the Rules no later than 9:30 a.m. 6 March 2009.<sup>10</sup>

8. On 6 March 2009, the Prosecution provided certification in relation to Rule 66 (A) (i) instead of sub-Rule (A) (ii).<sup>11</sup> The Chamber therefore issued a further order for the Prosecution to comply with its Order of 27 February 2009 by 11 March 2009.<sup>12</sup> The Prosecution filed the required certification on 12 March 2009.<sup>13</sup>

9. In addition, on 4 and 6 March 2009, the Prosecution filed a large number of disclosures indicating that the disclosures were made pursuant to Rules 66 (A) and (B).

10. Further, on 19 March 2009, new Lead Counsel for the Accused, Mr. Maroufa Diabira, was assigned following the withdrawal of previous Lead Counsel, Mr. Francois Roux.<sup>14</sup>

<sup>7</sup> Rule 66 (A) (i) provides for disclosure by the Prosecutor within 30 days of the accused's initial appearance, of copies of the supporting material which accompanied the indictment when confirmation was sought, as well as prior statements obtained by the Prosecutor from the accused. For sub-Rule (A) (ii), *see* para. 11 of this Decision.

<sup>8</sup> *Ntawukulilyayo*, Confidential Disclosure of 24 February 2009.

<sup>9</sup> *Ntawukulilyayo*, "Requete en Urgence de La Defense Concernant les Manquements du Procureur a Ses Obligations de Communiquer les Pieces et Ses Effets sur le Calendrier du Proces", 20 February 2009 ("First Defence Motion").

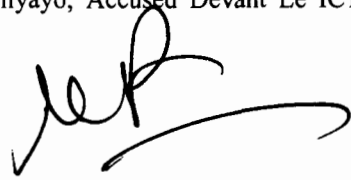
<sup>10</sup> *Ntawukulilyayo*, Decision on Defence 'Requete en Urgence de La Defense Concernant les Manquements du Procureur a Ses Obligations de Communiquer les Pieces et Ses Effets sur le Calendrier du Proces' ("Order of 27 February 2009")

<sup>11</sup> *Ntawukulilyayo*, Prosecutor's Certification in Respect of Rule 66 Disclosure, 6 March 2009, paras. 3 and 5.

<sup>12</sup> *Ntawukulilyayo*, Order for the Prosecutor to Comply with the Chamber's Order of 27 February 2009, 9 March 2009.

<sup>13</sup> *Ntawukulilyayo*, Prosecutor's Certification in Respect of Rule 66 Disclosure, though dated 11 March 2009, filed on 12 March 2009.

<sup>14</sup> *Ntawukulilyayo*, (Correspondence) Commission D'Office De Me Maroufa Diabira a Titre De Conseil Principal Pour la Defense des Interests DE M. Dominique Ntawukulilyayo, Accused Devant Le ICTR, 19 March 2009.



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## DISCUSSION

### *Law on Disclosure under Rule 66 (A) (ii)*

11. Pursuant to Rule 66 (A) (ii), the Prosecution is required to disclose, no later than 60 days before the date set for trial, copies of the statements of all witnesses whom they intend to call to testify at trial.

12. A witness statement under Rule 66 (A) (ii) has been interpreted as an account of a person's knowledge of a crime which has been recorded in the course of an investigation into that crime. It can include statements taken by entities other than the Prosecutor, which then result in the persons who gave the original statements becoming witnesses in proceedings before the Tribunal.<sup>15</sup> The Prosecutor must disclose previous statements of all Prosecution witnesses, in whatever form, to the Defence.<sup>16</sup> Further, the transcript of the testimony of a witness constitutes a statement within the meaning of Rule 66 (A) (ii) if the witness is to testify on the same subject matter as his previous testimony.<sup>17</sup>

13. The obligation to disclose witness statements to the Defence extends to all witness statements in the custody or control of the Prosecution, or to which it has access. However, the Prosecution is not obligated to disclose documents which are not in its possession, or which are not accessible to it.<sup>18</sup> In addition, the Prosecution is presumed to discharge its obligations under Rule 66 (A) (ii) in good faith.<sup>19</sup>

14. With regard to the 60 day time limit for disclosure prescribed by sub-Rule (A) (ii), it is noted that early disclosure of redacted witness statements is encouraged.<sup>20</sup> The obligation of disclosure is an ongoing one, and the deadline under Rule 66 (A) (ii) is to be interpreted as a final date for disclosure, with the expectation that the Prosecution will make disclosure prior to this date if possible.<sup>21</sup>

15. The fact that material has not been disclosed in a timely manner does not *per se* result in prejudice to an accused. Rather, an accused must demonstrate that he has suffered material

<sup>15</sup> *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66 (A) (ii), 29 September 2006, para. 14 (citing the Appeals Chamber in *Prosecutor v. Blaskić*, Case No. IT-95-14-A, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 15.).

<sup>16</sup> *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion to Require Strict Compliance with Rule 66 (A) (ii) ("Strict Compliance Decision"), para. 7 (citing *Prosecutor v. Tihomir Blaskić*, Case No. IT-95-14-PT, Decision on the Production of Discovery Materials, 27 January 1997, para. 38).

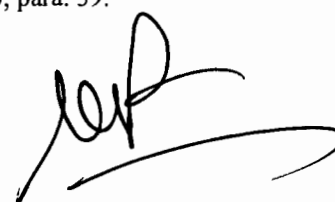
<sup>17</sup> *Bizimungu et al.*, Strict Compliance Decision, para. 8; *Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-2007-91-PT, Decision on Defence Motions for Disclosure under Rules 66 and 68 of the Rules of Procedure and Evidence, 22 December 2008 ("Nshogoza Decision"), para. 22.

<sup>18</sup> *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Josph Nzirorera's Motion of Notice of Violation of Rule 66 (A) (ii) for Witness ALZ and AMC, and for Remedial and Punitive Measures, 11 July 2007, para. 6; and *Nshogoza Decision*, para. 23.

<sup>19</sup> *Karemera et al.*, Decision on Josph Nzirorera's Motion of Notice of Violation of Rule 66 (A) (ii) for Witness ALZ and AMC, and for Remedial and Punitive Measures, 11 July 2007, para. 8.

<sup>20</sup> *Prosecutor v. Bisengimana*, Case No. ICTR-2000-60-I, Decision on Bisengimana's Motion for Disclosure of Materials (Rule 66 (A) (i)), 28 March 2003 ("*Bisengimana Decision*"), para. 9; *Prosecutor v. Nyiramasuhuko, Decision on Defence Motion for Disclosure of Evidence*, 1 November 2000, para. 39.

<sup>21</sup> *Bisengimana Decision*, para. 9.



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prejudice as a result of the late disclosure.<sup>22</sup> Rule 66 (A) (ii) must be read in light of the accused's right to have adequate time and facilities for the preparation of his defence in accordance with Article 20 (4) (b) of the Statute.

16. Exclusion of evidence is a remedy which is at the extreme end of a scale of measures available to the Chamber in addressing the prejudice caused to an accused in the preparation of his defence.<sup>23</sup> An accused must demonstrate that he has suffered a degree of prejudice that would justify the extreme remedy of excluding a Prosecution witnesses' testimony.<sup>24</sup>

*Late Disclosure of Rule 66 (A) (ii) Material*

17. The Chamber notes that on 30 January 2009, one day after the 60 day time limit, the Prosecution disclosed a CD containing statements and indicated that such disclosure was made pursuant to Rule 66 (A).<sup>25</sup> The disclosure tables provided by the Parties shows that 29 statements were disclosed on 30 January 2009. The Chamber notes the Prosecution submission that some of these statements were disclosed to the Defence on 10 June 2008, as part of the Rule 66 (A) (i) material supporting the Indictment.<sup>26</sup>

18. On 24 February 2009, however, the Prosecution made an additional late disclosure of a Rule 66 (A) (ii) statement.<sup>27</sup> Furthermore, following the Order of 27 February 2009, the Prosecution filed further Rule 66 (A) (ii) material, which consists of over 700 pages.<sup>28</sup>

<sup>22</sup> *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."; *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-R, Decision on the Prosecutor's Motion to Move for Decision on Niyitegeka's Requests for Review Pursuant to Rules 120 and 121 and the Defence Extremely Urgent Motion Pursuant to (i) Rule 116 for Extension of Time Limit, (ii) Rule 68 (A), (B) and (E) for Disclosure of Exculpatory Evidence Both of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda and (iii) Response to Prosecutor's Motion of 15 August 2005 seeking a Decision, in the Absence of Any Legal Submissions from the Applicant (AC), 28 September 2005, p. 7. See also *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Sixth, Seventh and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive and Other Measures, 29 November 2007, para. 30.

<sup>23</sup> *Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR 98-42-T, Decision on Alphonse Nteziryayo's Motion for Exclusion of Evidence, 25 February 2009, para. 26; *Karemera et al.*, Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor Andre Guichaoua; Defence Motion to Exclude the Witness's Testimony; Decision on Defence Motions to Exclude Testimony of Professor Andre Guichaoua, 20 April 2006, para. 8. *Karemera et al.*, Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guichaoua; Defence Motion to Exclude the Witness' Testimony; and Trial Chamber's Order to Show Cause (TC), 1 February 2006, para. 11; *Karemera et al.*, Decision on Defence Motions to Exclude Testimony of Professor André Guichaoua (TC), 20 April 2006, para. 8; *Karemera et al.*, Decision on the Defence Oral Motions for Exclusion of XBM's Testimony, for Sanctions against the Prosecution and Exclusion of Evidence outside the Scope of the Indictment (TC), 19 October 2006, para. 6.

<sup>24</sup> *Karemera et al.*, Decision on Joseph Nzirorera's Second Motion to Exclude the Testimony of Witness AXA and Edouard Karemera's Motion to Recall the Witness, 4 March 2008, para. 19.

<sup>25</sup> The Prosecution did not specify whether the disclosures were made pursuant to sub-Rule (A) (i) or (ii).

<sup>26</sup> Prosecution Response, para. 2. Rule 66 (A) (i) provides that the Prosecution shall disclose to the Defence, within 30 days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused.

<sup>27</sup> *Ntawukulilyayo*, Confidential Disclosure, 24 February 2009.

<sup>28</sup> *Ntawukulilyayo*, Confidential Disclosures Parts 1 to 4 made on 4 March 2009, and Confidential Disclosures Parts 1 to 2 made on 6 March 2009.



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19. The disclosure tables provided by the Parties show that 29 statements, different to those disclosed on 30 January 2009, were disclosed on 6 March 2009, just 24 days before the scheduled date for commencement of trial. The Chamber further notes the Defence submission that transcripts of oral testimony from other cases in relation to at least eight Prosecution witnesses, three of whom are scheduled to testify during the first week of trial, were not provided to the Defence until 26 February 2009, and French translations of these transcripts, not until 9 March 2009, just 21 days before the scheduled date for commencement of trial.<sup>29</sup> In this regard, the Chamber notes the Accused's right, deriving from Article 20 (4) (a) of the Statute, to receive Rule 66 (A) (ii) material in a language which he understands.<sup>30</sup>

20. The Chamber considers that in view of the above, the Prosecution is in flagrant breach of its disclosure obligations under Rule 66 (A) (ii).

#### *Prejudice to the Accused*

21. The Defence submits that as a result of the various late disclosures made by the Prosecution, the Accused suffers prejudice as he does not have adequate time to prepare his defence.

22. The Chamber recalls that the fact that material has not been disclosed in a timely manner does not *per se* result in prejudice to an accused. Rather, an accused must demonstrate that he has suffered material prejudice as a result of the late disclosure.<sup>31</sup>

23. The Chamber considers that the Prosecution's disclosure violations in this case are not minor. Rather, a substantial amount of Rule 66 (A) (ii) material has been disclosed between 21 and 24 days before the scheduled date for commencement of trial, including the transcripts of oral testimony in other cases for three of the witnesses scheduled to testify during the first week of trial. The Chamber considers that the Defence would suffer material prejudice if the

<sup>29</sup> Prosecution Witnesses BAP, BAZ, AYD, AZI, AZN, AYK, AYQ, and BAU. See Prosecution Disclosure Table and Defence Disclosure Table. Prosecution Witnesses AZN, AYQ and AYK are scheduled to testify during the first week of the trial.

<sup>30</sup> Article 20 (4) (a) provides that the accused is entitled to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her. See also *Ntawukulilyayo*, Decision on "Requete en Urgence de la Defense aux Fins de Suspension des Delais de la Procedure Traduction des Documents de l'Accusation et des Actes de Procedure en Francais, Langue de l'Accused et de son Conseil", 13 March 2009, para. 8; *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-I, Decision on Defence Request for Translation, 20 June 2008, para. 2; *Kanyarukiga*, Decision on the Defence Request for Kinyarwanda Translations of all Documents, 8 November 2004, paras. 2-4; *Prosecutor v. Muhimana*, Case No. ICTR-95-I-B-I, Decision on the Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel, 6 November 2001 ("*Muhimana* Decision"), paras. 22, 23, 26, 29; *Prosecutor v. Delalic et. al.*, Case No. IT-96-21-T, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, para. 14.

<sup>31</sup> *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."); *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-R, Decision on the Prosecutor's Motion to Move for Decision on Niyitegeka's Requests for Review Pursuant to Rules 120 and 121 and the Defence Extremely Urgent Motion Pursuant to (i) Rule 116 for Extension of Time Limit, (ii) Rule 68 (A), (B) and (E) for Disclosure of Exculpatory Evidence Both of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda and (iii) Response to Prosecutor's Motion of 15 August 2005 seeking a Decision, in the Absence of Any Legal Submissions from the Applicant (AC), 28 September 2005, p. 7. See also *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Sixth, Seventh and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive and Other Measures, 29 November 2007, para. 30.



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trial proceeded as scheduled on 30 March 2009, since the Defence would not have been afforded adequate time to consider the material, and prepare its case accordingly.

#### *Appropriate Remedy*

24. In considering an appropriate remedy, the Chamber recalls its obligation under Articles 19 and 20 of the Statute to ensure a fair and expeditious trial and to ensure that the accused's rights are respected. The Chamber further recalls that it must consider Rule 66 (A) (ii) in light of the accused's right to adequate time to prepare his defence under Article 20 (4) (b) of the Statute.<sup>32</sup> In addition, under Rule 54, the Chamber has discretionary powers to take any necessary measures for the preparation or conduct of the trial.

25. The Defence request is for an order to exclude the evidence of witnesses whose statements were disclosed after 6 March 2009, the deadline set by the Chamber for the Prosecution to provide certification pursuant to the Order of 27 February 2009.<sup>33</sup> The Chamber recalls that exclusion of evidence is a remedy at the extreme end of the scale which should only be considered where other remedies are not appropriate.<sup>34</sup>

26. The Chamber notes that 29 statements were in fact disclosed on 6 March 2009. Accordingly, the exclusion of evidence of only those witnesses whose statements were disclosed after 6 March 2009, would not remedy the prejudice which the Accused would suffer were the trial to proceed as scheduled. In any event, the Chamber does not consider that exclusion of evidence is the only appropriate remedy in this case. In this regard, the Chamber notes that trial is due to commence on 30 March 2009 for only one week and to resume on 4 May 2009. The Chamber considers that adjournment of the commencement of trial to 4 May 2009 would allow the Defence adequate time to prepare its defence and would result in an overall delay in the proceedings of only one week. Accordingly, pursuant to the Chamber's obligations under Articles 19 and 20 of the Statute to ensure a fair and expeditious trial and to ensure that the rights of the Accused are respected, as well as its discretionary power to make such orders it deems necessary for the conduct of trial under Rule 54, the Chamber considers it in the interests of justice to adjourn the commencement of the trial until 4 May 2009.

27. The Chamber is further mindful of the recent assignment of a new Lead Counsel to act on behalf of the Accused.

#### *Warning to the Prosecution under Rule 46*

28. The Chamber considers that the Prosecution's conduct in this case has so far shown a disregard for the Chamber's orders, as well as the Prosecution's obligations stipulated in Rule

<sup>32</sup> See *supra*, para. 15.

<sup>33</sup> The Chamber however notes that the disclosures of 4 and 6 March 2009 were not circulated by the Court Management Section until 9 and 12 March 2009 due to technical problems with the Tribunal's server.

<sup>34</sup> *Karemera et al.*, Decision on Defence Motion for Exclusion of Witness Gk's Testimony or for Request for Cooperation from Government of Rwanda - Articles 20 and 28 of the Statute; Rules 66 and 98 of the Rules of Procedure and Evidence, 27 November 2006, para. 3; *Karemera et al.*, Decision on Defence Oral Motions for Exclusion of XBM's Testimony, for Sanctions Against the Prosecution and Exclusion of Evidence Outside the Scope of the Indictment (TC), 19 October 2006; *Karemera et al.*, Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guichaoua; Defence Motion to Exclude the Witness' Testimony; and Trial Chamber's Order to Show Cause (TC), 1 February 2006, para. 11; *Karemera et al.*, Decision on Defence Motions to Exclude Testimony of Professor André Guichaoua (TC), 20 April 2006, para. 8.



66 (A) (ii). In this regard, the Chamber notes that the Prosecution has, on more than one occasion, failed to comply with its orders.

29. The first instance of non-compliance is in relation to the Chamber's order to the Prosecution during the status conference on 16 December 2008. The Chamber ordered the Prosecution to immediately file with the Registry, hard copies of its Rule 66 (A) (i) material in support of the indictment, and that the Registry transmit the material to the Defence as soon as practicable, and no later than two weeks from 16 December 2009 ("Chamber's Order of 16 December 2008").<sup>35</sup>

30. Following the Chamber's Order of 16 December 2008, on the same date, the Prosecution informed the Court Management Section ("CMS"), the Chamber, and the Defence, that it had filed a CD of the Rule 66 (A) (i) material with the Registry on 10 June 2008.<sup>36</sup> On 17 December 2008, the Defence replied that it had not received any official communication of the disclosure, nor hard copies of the material.<sup>37</sup> In response to these communications, the Chamber advised the Parties that it would not revisit the Order of 16 December 2008, which required the Prosecution to immediately file hard copies of the supporting material.<sup>38</sup> The Prosecution failed to comply with the Chamber's Order.

31. In addition, the Chamber recalls that on 27 February 2009, the Prosecution was found in breach of its disclosure obligations under Rule 66 (A) (ii). Following an order from the Chamber, the Prosecution was required to provide certification with regard to its compliance with the aforementioned sub-Rule. The Chamber notes that the Prosecution failed to comply with the Chamber's Order of 27 February 2009 and was again ordered to comply.<sup>39</sup> The Prosecution filed the requisite certification one day after the second deadline set by the Chamber.<sup>40</sup>

32. The Chamber further considers that the disclosure of hundreds of pages of Rule 66 (A) (ii) material, following the Chamber's Order of 27 February 2009, demonstrates that the Prosecution had not conducted a thorough search with a view to discharging its obligation within the 60 day time limit prescribed by the Rules. Further, the disclosure of such a large

<sup>35</sup> Ntawukulilyayo, T. 16 December 2009, p. 10.

<sup>36</sup> Email from Prosecution Counsel Charles Adeogun-Phillips to Mr. Constant Hometowu of CMS attaching an internal memorandum from the Prosecution to Mr. Nouhou Diallo, CMS Coordinator for Trial Chamber 1, dated 10 June 2008 ("Memo"), which states that the Prosecutor provides CMS with a copy of the CD containing copies of supporting statements which accompanied the indictment when confirmation was sought, in redacted form, pursuant to Rule 66 (A) (i). The Memo does not state that hard copies of the material have been provided, but only that the same CD, given to the Defence, is filed with CMS.

<sup>37</sup> Email from Mr. Francois Roux, Counsel for the Defence, to Mr. Constant Hometowu of CMS, dated 17 December 2008, stating "*Je note toutefois que lors de cette communication officielle à CMS le Bureau du Procureur n'a transmis aucun récépissé de sa communication à la Défense, et que ni le Bureau du Procureur, ni CMS n'ont transmis à la défense copie de la communication à CMS du 10 Juin 2008 de sorte que la Défense découvre aujourd'hui ce document. Si la Défense avait eu connaissance auparavant de ce document elle n'aurait pas manqué d'indiquer, comme elle l'a fait hier à l'audience et le confirme aujourd'hui, qu'en ce qui la concerne, ni elle ni l'accusé n'ont reçu de communication officielle (disclosure) sous bordereau, et en copie papier, des pièces jointes à l'acte d'accusation.*"

<sup>38</sup> Email from Clair Duffy, Legal Officer, to Counsel dated 17 December 2008: "The Chamber will not revisit its Order. Without a finding of any fault on the part of the Prosecution, or on the part of CMS - the Chamber maintains its position that the Prosecution file - with CMS - all R. 66 (A) (i) supporting materials forthwith; and that the CMS officially transmit this material to the Defence, as soon as practicable, and no later than two weeks from 16 December 2008."

<sup>39</sup> See *supra*, para. 8.

<sup>40</sup> *Ibid.*





volume of Rule 66 (A) (ii) material, less than one month before commencement of trial, is unacceptable, particularly in view of the fact that the scheduling of the trial was finalised following a status conference with the Parties.<sup>41</sup>

33. In view of the above, the Chamber considers that the Prosecution's conduct in this case demonstrates a pattern of lack of diligence in the exercise of its disclosure obligations, and a disregard for the Chamber's orders. Such conduct is offensive, obstructs the proceedings, and is not in the interests of justice. While the Prosecution's conduct in this case may warrant a sanction, the Chamber notes that pursuant to Rule 46 (A), a warning is a precondition for the imposition of sanctions.<sup>42</sup>

34. The Chamber therefore warns the Prosecution that if its conduct remains offensive, obstructive of the proceedings or otherwise contrary to the interests of justice, the Chamber may sanction the Prosecution.

**FOR THE ABOVE REASONS, THE CHAMBER**

**GRANTS** the Defence Motion in part with respect to the request to order that the Prosecution is in violation of its disclosure obligations under Rule 66 (A) (ii);

**WARNS** the Prosecution that if its conduct remains offensive, obstructive to the proceedings or otherwise contrary to the interests of justice, the Chamber may impose sanctions pursuant to Rule 46 of the Rules;

**ORDERS** that the date for commencement of trial is postponed until 9 a.m. on 4 May 2009; and

**ORDERS** the Registry to notify all concerned persons of the new date for commencement of trial.

Arusha, 26 March 2009



Khalida Rachid Khan  
Presiding Judge



With the consent, and  
on behalf of  
Lee Gacuiga Muthoga  
Judge



Aydin Sefa Akay  
Judge



<sup>41</sup> See *supra*, para. 4.

<sup>42</sup> Pursuant to Rule 46 (A) of the Rules, a Chamber may, after a warning, impose sanctions against a Counsel if, in its opinion, his conduct remains offensive or abusive or obstructs the proceedings, or is otherwise contrary to the interests of justice.