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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: 30 March 2009

THE PROSECUTION

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 23rd NOTICE OF RULE 66 VIOLATION
AND MOTION FOR REMEDIAL AND PUNITIVE MEASURES: WITNESS ALG**

Rules 66, 67(D), and 68 of the Rules of Procedure and Evidence

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INTRODUCTION

1. On 2 February 2009, Joseph Nzirorera filed his 23rd Notice of Violation of Rule 66 of the Rules of Procedure and Evidence ("Rules") whereby he claims that the Prosecution is in violation of Rules 66 and 68 of the Rules because it failed to disclose a statement taken in November 2008 from former Prosecution Witness ALG.¹ Nzirorera prays that the Chamber take appropriate remedial and punitive measures, renewing his calls for a stay of proceedings and appointment of a special master.²

2. The Prosecution submits that it is not in violation of Rule 66 or Rule 68 with respect to witness ALG since it disclosed the statement after it was requested on 2 February 2009 and takes the position that it is not exculpatory. The Prosecution further argues that there has been no prejudice that could justify the imposition of any remedial and punitive measures.³ The Prosecution does, however, request clarification from the Trial Chamber of the scope of its Rule 66 (A) (ii) obligations in relation to Rule 67(D).⁴

DELIBERATIONS

Preliminary Matter

3. The Prosecution prays that the Chamber find that it is abusive of the process for Joseph Nzirorera to wait until his Reply to identify the remedial and punitive measures he

¹ Joseph Nzirorera's 23rd Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Witness ALG, filed on 2 February 2009 ("Nzirorera's Motion"); Reply Brief: Joseph Nzirorera's 23rd Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Witness ALG, filed on 9 February 2009 ("Nzirorera's Reply").

² Nzirorera's Reply, para. 18.

³ Prosecutor's Response To: Joseph Nzirorera's 23rd Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Witness ALG, filed on 5 February 2009, ("Prosecution Response"), paras. 15-16.

⁴ Prosecutor's Sur-Reply To "Reply Brief: Joseph Nzirorera's 23rd Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Witness ALG," filed on 11 February 2009 ("Prosecution Sur-Reply"), para. 3.

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seeks, since to do so does not follow the standard practice of the Tribunal and prejudices the Prosecution by limiting its ability to address the relief sought in its response.⁵

4. The Chamber notes that the purpose of a reply brief is to answer matters raised by the opposing party in its response.⁶ It is procedurally improper to raise new issues that could have been addressed in the initial brief for the first time in the reply brief as, at the very least, it is prejudicial to the responding party as it does not have a meaningful opportunity to respond.⁷ The Chamber warns the parties to make all submissions in support of the relief sought, including any remedial or punitive measures, in the initial brief, as the Chamber will not consider arguments raised for the first time in Reply.

Rules 66 and 67(D) of the Rules

5. Rule 66 (A) (ii) provides that the Prosecution shall disclose to the Defence, “[n]o later than 60 days before the date set for trial, copies of statements of all witnesses whom the Prosecution intends to call to testify at trial.” In the *Blaškić* case, the Appeals Chamber held that “[Rule 66 (A) (ii)] should be given its plain meaning that, once a witness has given evidence in court, the Prosecution can no longer *intend* to call that witness to testify, and that there is therefore no obligation to make available any subsequent statements from the witness, unless the witness will be recalled as an additional Prosecution witness in the sense of the sub-Rule.”⁸

6. Joseph Nzirorera contends that, despite the decision of the Appeals Chamber in the *Blaškić* case, Rule 67(D) imposes Rule 66(A) (ii) obligations after a witness has testified and

⁵ Prosecution Response, para. 12.

⁶ *Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T (“*Karemera et al.*”), Decision on Joseph Nzirorera’s Second Motion to Exclude Testimony of Witness AXA and Édouard Karemera’s Motion to Recall the Witness (TC), 4 March 2008, para. 10.

⁷ *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Jérôme-Clément Bicamumpaka’s Urgent Motion for Disclosure of Exculpatory Material (TC), 9 February 2009, para. 7.

⁸ *Prosecutor v. Blaškić*, Case No. IT-95-14, Decision on Appellant’s Motions for Production of Material, Suspension or Extension of the Briefing Rule, and Additional Filings (AC), 26 September 2000 (“*Blaškić Decision*”), para. 16 (*emphasis original*).

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where there has been no indication that the Prosecution intends to recall the witness.⁹ In support of this contention, Nzirorera states that Rules of this Tribunal and the International Criminal Tribunal for the former Yugoslavia ("ICTY") have been amended to include Rule 67(D)¹⁰ since the *Blaškić* Decision.

7. The Chamber notes that Rule 67(D) has been a part of the Rules since 1995 and that the only amendment to Rule 67(D), the addition of the word "information" so that the Rule now reads "additional evidence or information or materials," occurred prior to the *Blaškić* Decision.¹¹ The Chamber further points out that Joseph Nzirorera has failed to cite any jurisprudence in support of his position and his argument is without merit. Therefore, the *Blaškić* Decision remains valid, and the Chamber finds that the Prosecution has not violated Rule 66(A) (ii).

8. With respect to Rule 66(B) of the Rules, Joseph Nzirorera claims that his 2004 request for inspection relative to Witness ALG created an ongoing obligation to disclose all information that came into the Prosecution's custody or control related to ALG and that the Prosecution has violated Rule 66(B) by not disclosing ALG's November 2008 Statement pursuant to the 2004 request.¹² In support of this, Nzirorera points to an Appeals Chamber decision from the *Bagosora* case¹³ claiming it holds that Rule 66(B) obligations continue during the Defence case.¹⁴

⁹ Nzirorera's Reply, para. 4.

¹⁰ See Rule 67(D), ICTR Rules of Procedure and Evidence, entered into force 29 June 1995, available at <http://www.ictt.org/ENGLISH/rules/290695/290695e.pdf>; Rule 67(D), ICTY Rules of Procedure and Evidence, as amended 3 May 1995, available at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev4_en.pdf.

¹¹ Rule 67(D) of the ICTR Rules of Procedure and Evidence reads: "If either party discovers additional evidence or *information* or materials which should have been produced earlier pursuant to the Rules, that party shall promptly notify the other party and the Trial Chamber of the existence of the additional evidence or *information* or materials." (emphasis added)

¹² Nzirorera's Reply, para. 7-8.

¹³ See *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 ("the Bagosora Decision"), para. 10.

¹⁴ Nzirorera's Reply, para. 7-8.

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9. Contrary to Joseph Nzirorera's interpretation, the *Bagosora* Decision defines what may be material to the defence case and therefore must be disclosed under Rule 66(B), not whether the Prosecution is under a continued obligation to disclose materials that come into its possession after a request is made under Rule 66(B).¹⁵

10. The Chamber recalls that it is well established that Rule 66(B) inspection obligations must be triggered by specific Defence requests for materials within the custody or control of the Prosecution.¹⁶ In the *Niyitegeka* case, the Appeals Chamber held that "something which is not in the possession of or accessible to the Prosecution cannot be subject to disclosure [under Rule 66(A)]: *nemo tenetur ad impossibile* (no one is bound to an impossibility)".¹⁷ In the same way as it applies to Rule 66(A), the principle of *nemo tenetur ad impossibile* also logically applies to requests under Rule 66(B), such that a document which is not in the custody or control of the Prosecution when the request is made cannot be subject to inspection.¹⁸

11. Accordingly, the Chamber considers that the Prosecution fulfilled its Rule 66(B) obligations pursuant to the 2004 request by providing all documents in its custody or control at the time the request was made. Consequently, the Prosecution was never obligated to allow

¹⁵ The *Bagosora* Decision emphasizes that a plain reading of Rule 66(B) is appropriate, and thereby interprets the definition of "material to the defence" to include evidence that could assist in determination of whether to call a person as a defence witness or not. It is in that way only that it holds that Rule 66(B) obligations also apply during the Defence case. The decision also emphasizes that sufficiently specific requests are required to trigger Rule 66(B), in that case the request was made for documents admittedly in the possession of the Prosecution at the time the request was made.

¹⁶ *Karemera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para. 13; *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 Ndingiyimana 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).

¹⁷ *Niyitegeka*, Judgement (AC), 9 July 2004, para. 35; See also *Karemera et al.*, Decision on Joseph Nzirorera's Motion on Notice of Violation of Rule 66(A)(ii) For Witnesses ALZ And AMC, and for Remedial and Punitive Measures - Rules 66 (A)(ii) and 73 of the Rules of Procedure and Evidence, 11 July 2007, para. 6; *Karemera et al.*, Decision on Disclosure of Witness Reconfirmation Statements (TC), 23 February 2005, paras. 6 and 7.

¹⁸ Rule 66(B) is sufficiently clear in stating that the Prosecutor shall, at the request of the Defence, permit inspection of ... "objects within his custody or control" and accordingly, the Prosecutor cannot be expected to disclose a document that is not in his custody or control when the request is made.

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for inspection of the November 2008 Statement of Witness ALG pursuant to the 2004 request since the statement was not in its custody or control when the request was made.

12. The Chamber notes that Joseph Nzirorera did not renew his request for disclosure of ALG's 2008 Statement after it was in the possession of the Prosecutor. Since the statement was disclosed by the Prosecution when Nzirorera made it known that he sought inspection of the statement by filing his 23rd Notice of Rule 66 Violation, the Chamber finds that the Prosecution is not in violation of Rule 66(B) in relation to the November 2008 Statement of ALG.

Rule 68 of the Rules

13. 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.¹⁹

14. In order to determine whether the Prosecution has acted in breach of Rule 68, the Chamber must analyse whether the Accused: (1) specifically identifies the material sought; (2) presents a *prima facie* showing of its probable exculpatory nature; and (3) proves that the material is in the custody of the Prosecution.²⁰

15. Joseph Nzirorera alleges that the Prosecution is in violation of Rule 68(A) for not disclosing the exculpatory November 2008 Statement made by witness ALG as soon as practicable.²¹ There is no question that Joseph Nzirorera has specifically identified the material sought, or proven that it was in the custody of the Prosecution. As to the probable exculpatory nature, Nzirorera contends that the November 2008 Statement made by Witness

¹⁹ *Karemera et al.*, Decision on Joseph Nzirorera's 19th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Jean-Marie Vianney Mudahinyuka (TC), 9 February 2009, para. 6.

²⁰ *Karemera et al.*, Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings (TC), 11 September 2008, paras. 5-6.

²¹ Nzirorera's Reply, para. 11.

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ALG affects the credibility of the witness.²² In support of this, Nzirorera says that the November 2008 Statement affects ALG's credibility because he makes fresh accusations against Nzirorera and his failure to raise these in his many prior statements and testimony demonstrates that he continues to invent false accusations against Nzirorera, thereby affecting his credibility.²³

16. In considering whether a witness statement contains exculpatory material, the Appeals Chamber has held that the determination "must depend on an evaluation of whether there is any possibility, in light of the submissions of the parties, that the information could be relevant to the defence of the accused."²⁴ Additionally, in the *Niyitegeka* and *Rutaganda* cases, the Appeals Chamber has held that omitting to again make previous allegations subsequent to trial testimony does not necessarily undermine the credibility of the witness and therefore make the statement exculpatory.²⁵

17. The Chamber finds that it does not automatically follow that simply because a witness omits a detail or allegation from his previous evidence that he is lying or otherwise unworthy of belief. As stated by the Appeals Chamber "to suggest that if something were true a witness would have included it in a statement...is obviously speculative."²⁶ The Chamber further believes that Nzirorera fails to take into account that ALG was not allowed to testify unabated when he was called as a witness in this trial, but was restricted to concise and specific answers to questions asked by the parties. It follows, therefore, that his testimony may not have exhaustively detailed all of his knowledge concerning relevant events or allegations.

²² Nzirorera's Motion, para. 3.

²³ Nzirorera's Reply, para 16.

²⁴ *Karemera et al.*, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion" (AC), 14 May 2008, para 12.

²⁵ See *Eliezer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R, Decision on Request for Review (AC), 30 June 2006, para. 70; *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-03-R, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification (AC), 8 December 2006, para. 15.

²⁶ *Rutaganda*, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification (AC), 8 December 2006, para 13.

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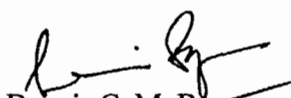
18. The Chamber also notes that, upon review of ALG's testimony in these proceedings with his November 2008 Statement, there is no apparent inconsistency. On this basis as well, no credibility issues are raised.

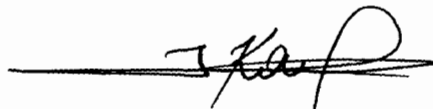
19. Thus Joseph Nzirorera has failed to make a *prima facie* showing that the November 2008 Statement made by Witness ALG is exculpatory, and consequently the Chamber finds the Prosecution has not violated Rule 68(A).

FOR THESE REASONS, THE CHAMBER

DENIES Joseph Nzirorera's motion in its entirety.

Arusha, 30 March 2009, done in English.


Dennis C. M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge


Vagn Joensen
Judge

