



UNITED NATIONS
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ICTR-98-44-T
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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: 6 May 2009

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THE PROSECUTION

v.

**Édouard KAREMERA
Matthieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-T

**DECISION ON JOSEPH NZIRORERA'S 24TH NOTICE OF RULE 66 VIOLATION
AND MOTION FOR REMEDIAL AND PUNITIVE MEASURES**

Rules 41, 66, 67, 68, and 70 of the Rules of Procedure and Evidence

Office of the Prosecution:

Don Webster
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. On 9 February 2009, Joseph Nzirorera filed a motion claiming that the Prosecution is in violation of Rules 66 and 68 of the Rules of Procedure and Evidence ("Rules") for failing to honour Nzirorera's 8 December 2008 request for inspection of documents related to Colonel Felicién Muberuka.¹ Nzirorera prays that the Chamber take appropriate remedial and punitive measures, renewing his previous request for an order that the Prosecution is under an affirmative obligation to record any information it receives, particularly that which may be exculpatory.²

2. The Prosecution acknowledges that it was obligated to allow inspection of all documents relevant to Felicién Muberuka under Rule 66(B) pursuant to Joseph Nzirorera's 8 December 2008 request,³ but claims to have already disclosed everything in its possession related to Muberuka.⁴ Additionally, the Prosecution has requested reciprocal disclosure of any statements recorded by Counsel for Joseph Nzirorera in his interview with Felicién Muberuka, as well as any other undisclosed witness statements that Nzirorera may possess.⁵

DELIBERATIONS

3. Joseph Nzirorera states that in an October 2008 interview, Colonel Felicién Muberuka told Lead Counsel for Nzirorera that he had been interviewed twice by the Office of the Prosecutor ("OTP") of the Tribunal, first in 1997 or 1998, and again in 2004 or 2005. Muberuka told him that he was interviewed by Luc Coté on the first occasion, and by two

¹ Joseph Nzirorera's 24th Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Colonel Felicién Muberuka, filed on 9 February 2009, ("Nzirorera's Motion").

² Reply Brief: Joseph Nzirorera's 24th Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Colonel Felicién Muberuka, filed on 16 February 2009, ("Nzirorera's Reply"), paras. 18,21.

³ See Nzirorera's 8 December 2008 disclosure request, attached to Nzirorera's Motion as Annex 1.

⁴ Prosecutor's Response to: Joseph Nzirorera's 24th Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Colonel Felicién Muberuka, filed on 13 February 2009, ("Prosecution Response"), para. 3.

⁵ Prosecution Response, paras. 9-10.

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unnamed individuals on the second occasion, and that on both occasions he had made statements that the army and authorities had tried to stop the killings but were unable to do so, and that there was no plan or intention to exterminate the Tutsis.⁶ Due to the failure to disclose statements made by Muberuka on those dates, Nzirorera claims that the Prosecution is in violation of Rules 66(B) and 68.

4. On 17 December 2008, the Prosecution disclosed numerous documents related to Felicien Muberuka in compliance with Joseph Nzirorera's 8 December 2008 request pursuant to Rule 66(B).⁷ The Prosecution states that it is not in possession of any other documents related to Muberuka, and it has identified the reasons for its inability to locate any of the documents referenced by Nzirorera in his motion.⁸ The Prosecution explains that the specific OTP employee identified as having taken the 1997 or 1998 statement, Luc Coté, has not been employed by the OTP in almost ten years. The Prosecution claims that it has searched the IESS database, and found no documentation of any conversations Luc Coté may have had with Muberuka. Further, the Prosecution confirms that an investigator and Trial Attorney working on the *Bagosora et al.* case met with Muberuka in 2004, but says that no information was recorded because it was inconclusive.

5. In his Reply, Joseph Nzirorera accepts the Prosecution's representation that no written statements were taken from Felicien Muberuka in the meetings in question and adopts an argument which is contradictory to his initial position, asserting that the Prosecution is in violation of Rules 66 and 68(A) because it did not record the statements that he claims Muberuka made. Nzirorera requests that the Chamber find that the Prosecution henceforward has an affirmative duty to record all information it receives, especially that which is exculpatory.⁹

⁶ Nzirorera's Motion, paras. 4-5.

⁷ See Prosecution disclosure of 17 December 2008.

⁸ Prosecution Response, para. 7.

⁹ Nzirorera's Reply, para. 5.

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The Prosecution's Alleged Failure to Record Exculpatory Information

6. The Chamber recalls that it has previously ruled on an argument by Joseph Nzirorera that the Prosecution violated Rules 66(B) and 68 by failing to record information obtained in its investigations, particularly anything that could be exculpatory.¹⁰ The Chamber found in its Decision on Nzirorera's Fifth Rule 68 Motion that "the Rules do not explicitly impose upon the Prosecutor an obligation to record information obtained in the course of investigations. While it may be argued that such an obligation would follow from Rule 41 (A), as read in conjunction with Rules 66 (B) and 68, the Chamber does not have a sufficient basis in the present case to make a ruling in this respect."¹¹ In that decision, the Chamber found that "it appears from the Prosecutor's e-mails to Joseph Nzirorera that the OTP investigators 'did not take any notes because they did not find Rwabukamba's information of much use...' and that 'Rwabukamba was evasive and was supposed to come back for further conversation the next day and never showed up.'"¹² An assessment of Nzirorera's argument in the context of the present situation leads to the same conclusion.

7. Joseph Nzirorera claims that Felicién Muberuka told counsel for Nzirorera that he had made certain statements to the Prosecution at interviews that took place in 1997 or 1998 and in 2004 or 2005, and that the Prosecution intentionally failed to record this exculpatory information.¹³ However, Muberuka's claim that he made such statements is not sufficient proof to refute the Prosecution's claims. There is therefore no basis for the Chamber to find that the Prosecution has violated Rules 66(B) or 68.

8. With relation to its failure to record the 2004 statement of Felicién Muberuka, the Prosecution claims that Muberuka seemed 'deliberately evasive' and takes the position that it

¹⁰ See *Karemera et al.*, Decision on Joseph Nzirorera's Fifth Notice of Rule 68 Violations and Motion for Remedial and Punitive Measures (TC), 13 November 2007 ("Decision on Nzirorera's Fifth Rule 68 Motion").

¹¹ *Karemera et al.*, Decision on Nzirorera's Fifth Rule 68 Motion, para. 4.

¹² *Karemera et al.*, Decision on Nzirorera's Fifth Rule 68 Motion, para. 4.

¹³ Nzirorera's Motion, para. 4-5; Nzirorera's Reply, para. 2.

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is not its practice to record statements from people it interviews who seem intentionally evasive. This is the same position taken by the Prosecution in response to Nzirorera's Fifth Rule 68 Motion, and the Chamber again reaches the same conclusion with respect to the argument of applying Rule 41 (A) in this context.

Reciprocal Defence Disclosure

9. Rule 67 (C) requires that the Defence disclose documents related to evidence that it intends to use at trial. Rule 70 (A) excludes reports, memoranda, and other internal documents prepared by a party, its assistants, or other representatives from being subject to such disclosure.

10. The Prosecution has requested reciprocal disclosure of any statements recorded by Counsel for Joseph Nzirorera in his interview with Felicién Muberuka, as well as any other undisclosed witness statements that Nzirorera may possess.¹⁴ Nzirorera claims that he has already disclosed the only statement in his possession from Muberuka, as well as any other witness statements in his possession pursuant to Rule 92 *bis*. Nzirorera further states that the only undisclosed materials in his possession with relation to the witnesses he intends to call *viva voce* are confidential notes and reports to Nzirorera.¹⁵

11. The Prosecution understands and accepts that the Defence is not subject to the same disclosure obligations as it is.¹⁶ However, the Prosecution asserts that the Chamber's previous order to the Karemera Defence team to disclose all prior recorded statements from Defence witnesses should also apply to Joseph Nzirorera, and accordingly he should be required to disclose all witness statements in his possession.¹⁷

¹⁴ Prosecution Response, paras. 9-10.

¹⁵ Nzirorera's Reply, paras. 19-20.

¹⁶ Prosecution Response, para. 10.

¹⁷ Prosecution Response, paras. 9-10, referring to *Prosecutor v. Édouard Karemera, Matthieu Ndirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("*Karemera et al.*"), Decision on Édouard Karemera's Motion for Postponement of the Commencement of his Case as well as on the Prosecutor's Cross-Motion for Enforcement of Rule 73 *ter* and Remedial and Punitive Measures and the Prosecutor's Request for

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12. The 27 February 2008 Decision referred to by the Prosecution merely ordered that the Defence disclose all statements in its possession. It rejected the Prosecution's request that the Karemera Defence team be ordered to ask the witnesses about prior statements they had made that it was not in possession of. Therefore, the Defence should be ordered to disclose witness statements in its possession that it intends to use as evidence at trial, but not notes taken during interviews.¹⁸

13. The Prosecution asserts that it is clear from Joseph Nzirorera's Rule 92bis filing that he routinely records information provided by his prospective witnesses.¹⁹ However, whether or not Nzirorera is in possession of notes taken during interviews is not the question to be decided. What the Chamber must determine is whether Nzirorera is in possession of any witness statements which he intends to use as evidence at trial, since any such statements would be subject to disclosure under Rule 67 (C). The Chamber has already determined what constitutes a "statement" which must be disclosed and "internal documents" which are not subject to disclosure in the context of Prosecution disclosure obligations.²⁰ Accordingly, where any of the Accused is in possession of witness statements as defined by the jurisprudence which they intend to use as evidence at trial, such statements should be disclosed.

14. The argument presented by the Prosecution does not persuade the Chamber that Joseph Nzirorera is in possession of witness statements that he intends to use as evidence at trial that have not already been disclosed. Therefore, the Prosecution request for reciprocal Defence disclosure in this instance must be denied.

Temporary Transfer of Witness AXA Pursuant to Rule 90 bis (TC), 27 February 2008, ("27 February 2008 Decision") paras. 26-28.

¹⁸ *Karemera et al.*, 27 February 2008 Decision, para. 28.

¹⁹ Prosecution Response, para. 9.

²⁰ *Karemera et al.*, Decision on the Motion for Disclosure of Witness Reconfirmation Statements (TC), 23 February 2005, paras. 5-7 (citing *The Prosecutor v. Eliezer Niyitegeka*, Case No. ICTR-96-14-T, Judgement (AC), para. 34).

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FOR THESE REASONS, THE CHAMBER

DENIES Joseph Nzirorera's motion in its entirety.

Arusha, 6 May 2009, done in English.

[Signature]
Dennis C. M. Byron
Presiding Judge
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Gberdao Gustave Kam
Judge
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Vagn Joensen
Judge



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