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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Dennis C. M. Byron, Presiding  
Gberdao Gustave Kam  
Vagn Joensen

**Registrar:** Adama Dieng

**Date:** 3 July 2009

**THE PROSECUTION**

v.

Édouard KAREMERA  
Matthieu NGIRUMPATSE  
Joseph NZIRORERA  
*Case No. ICTR-98-44-T*

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**DECISION ON JOSEPH NZIRORERA'S 16<sup>TH</sup> NOTICE OF RULE 68 VIOLATION:  
TESTIMONY OF RPF INSIDERS**

*Rule 68 of the Rules of Procedure and Evidence*

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## INTRODUCTION

1. Joseph Nzirorera has brought a motion alleging that the Prosecution violated Rule 68 of the Rules of Procedure and Evidence by failing to disclose the closed-session testimony of two witnesses in the *Ndindiliyimana* trial.<sup>1</sup> While Nzirorera originally brought his Motion based solely on information he had received concerning the exculpatory nature of the testimony,<sup>2</sup> in Reply he states that he has now obtained the transcripts of the closed-session testimony which confirms that it is exculpatory.<sup>3</sup> The closed-session testimony is attached as a confidential annex to Nzirorera's Reply.<sup>4</sup>

2. In response, the Prosecution states that it has reviewed the closed-session testimony in question and deemed it not to fall within the ambit of Rule 68.<sup>5</sup> Consequently, the Prosecution requests that the Motion be dismissed in its entirety.<sup>6</sup>

## DELIBERATIONS

### *Preliminary Issues*

3. The Prosecution seeks leave to file a sur-reply in order to respond to the issues raised in Joseph Nzirorera's Reply.<sup>7</sup> The Prosecution also requests that the Chamber refuse to consider the arguments made by Nzirorera for the first time in reply, on the basis that this practice is procedurally improper, and in particular because the Chamber recently warned the parties that it would disregard arguments made in this manner.<sup>8</sup>

<sup>1</sup> Joseph Nzirorera's 16<sup>th</sup> Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures: Testimony of RPF Insiders, filed 30 March 2009 ("Motion"); Reply Brief: Joseph Nzirorera's 16<sup>th</sup> Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures: Testimony of RPF Insiders, filed 14 April 2009 ("Reply").

<sup>2</sup> Motion, para. 5.

<sup>3</sup> Reply, para. 4.

<sup>4</sup> Confidential Annexes to Reply Brief: Joseph Nzirorera's 16<sup>th</sup> Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures: Testimony of RPF Insiders, filed 14 April 2009.

<sup>5</sup> Prosecutor's Response to Joseph Nzirorera's 16<sup>th</sup> Notice of Rule 68 Violation: RPF Insiders – Closed Session Mil II Testimony, filed 6 April 2009 ("Prosecution Response"), paras. 5-6.

<sup>6</sup> Prosecution Response, para. 6.

<sup>7</sup> Sur-Reply to Joseph Nzirorera's Reply Brief: 16<sup>th</sup> Notice of Violation of Rule 68 and Motion for Remedial and Punitive Measures: Testimony of RPF Insiders, filed 20 April 2009 ("Prosecution Sur-Reply"), para. 2.

<sup>8</sup> Prosecution Sur-Reply, para. 3, citing *The Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse, and Joseph Nzirorera*, Case No. ICTR-98-44-T ("*Karemera et al.*"), Decision on Joseph Nzirorera's 23<sup>rd</sup> Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Witness ALG, 30 March 2009.

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4. Joseph Nzirorera's Motion was initially brought on the unsubstantiated belief that the material in question was exculpatory.<sup>9</sup> The Chamber notes that Nzirorera has previously been warned not to bring motions without a sound basis for the relief requested.<sup>10</sup> Having later obtained the testimony in question from the Prosecution, it is plain that there was no need to file the Motion without first requesting the material and that this would have at least alleviated the need for multiple filings.

5. However, given that Joseph Nzirorera has now obtained the transcripts, and continues to assert that the Prosecution violated Rule 68 by failing to disclose them in a timely manner, the Chamber finds that it would not serve judicial economy nor the interests of justice to refuse to consider the matter on its merits. Consequently, the Chamber also finds it appropriate to admit and consider the Prosecution Sur-Reply.

6. With respect to Joseph Nzirorera's failure to identify the remedial and punitive measures he seeks in his Motion, in favour of waiting to do so in his Reply,<sup>11</sup> the Chamber reiterates its disapproval of this practice but notes that its warning to the parties to refrain from raising new arguments in reply was issued the same day the Motion was filed. In such circumstances, it would not be appropriate to refuse to consider arguments raised for the first time in Nzirorera's Reply.

#### Rule 68

7. 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.<sup>12</sup>

8. The Chamber notes that Joseph Nzirorera has specifically identified the material sought and that it is admittedly in the custody of the Prosecution. Consequently, the first and third

<sup>9</sup> Motion, paras. 4 and 5.

<sup>10</sup> *Karemera et al.*, Decision on Joseph Nzirorera's 22<sup>nd</sup> Notice of Rule 66 Violation and Motion for Remedial Measures: Paul Bisengimana, 13 February 2009, para. 5.

<sup>11</sup> Motion, para. 14.

<sup>12</sup> *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.

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criteria have been met and the only matter for consideration is the exculpatory nature of the testimony.

*Witness ALPHA-1*

9. ALPHA-1, a former member of the RPF, testified in the *Ndindiliyimana* trial that RPF soldiers known as "technicians" were sent to Kigali to disrupt the security situation.<sup>13</sup> They did so by placing bombs in public places and assassinating opponents of the RPF; crimes which were blamed on President Habyarimana's soldiers and the *Interahamwe*.<sup>14</sup> Soldiers who resembled President Habyarimana's soldiers were chosen to join the "technicians", and they wore uniforms identical to those worn by President Habyarimana's soldiers, so that they could go to the roadblocks and not be identified.<sup>15</sup> ALPHA-1 also identified two individuals, Gatumba and Gatabazi, who were allegedly killed by the "technicians".<sup>16</sup> After the death of President Habyarimana, when the city was engulfed in fighting, the "technicians" could no longer be operational.<sup>17</sup>

10. Joseph Nzirorera argues that this testimony is exculpatory because information of systemic infiltration by the RPF into the *Interahamwe*, as well as information concerning RPF crimes which were blamed on the Habyarimana regime and the *Interahamwe*, contradict Prosecution evidence that the accused ordered crimes by the *Interahamwe* and sought to undermine the Arusha Accords.<sup>18</sup> The Prosecution counters that the testimony is too remote and is of marginal contextual value to have any exculpatory worth.<sup>19</sup> Further, the Prosecution points out that the Chamber has already ruled, with respect to the alleged assassination of Gatabazi in particular, that evidence regarding RPF assassinations is not exculpatory if the accused is not charged in relation to those acts.<sup>20</sup>

11. The Chamber notes that Joseph Nzirorera appears to concede that Witness ALPHA-1's testimony concerning the alleged RPF assassinations of Gatumba and Gatabazi is not itself exculpatory, in light of the Chamber's earlier decision on this very issue.<sup>21</sup>

<sup>13</sup> *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56 ("*Ndindiliyimana et al.*"), T. 1 July 2008, p. 74; 2 July 2008 pp. 16-17 [closed-session].

<sup>14</sup> *Ndindiliyimana et al.*, T. 1 July 2008, p. 74 [closed-session].

<sup>15</sup> *Ndindiliyimana et al.*, T. 1 July 2008, p. 74 [closed-session].

<sup>16</sup> *Ndindiliyimana et al.*, T. 1 July 2008, p. 75; T. 2 July 2008, p. 93 [closed-session].

<sup>17</sup> *Ndindiliyimana et al.*, T. 2 July 2008 p. 17 [closed-session].

<sup>18</sup> Motion, para. 11.

<sup>19</sup> Prosecution Sur-Reply, para. 8.

<sup>20</sup> Prosecution Sur-Reply, paras. 5-7.

<sup>21</sup> Motion, para. 11; See *Karempera et al.*, Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings, 11 September 2008, para. 14.

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12. With respect to the remainder of Witness ALPHA-1's evidence, the Chamber notes that Joseph Nzirorera relies heavily on jurisprudence of this Tribunal to assert that evidence regarding RPF infiltration activities is exculpatory.<sup>22</sup> The Chamber notes that this jurisprudence has consistently held that while information concerning RPF activities may be exculpatory, such a determination must be individualized as it depends on the nature of the charges and evidence heard against the accused.<sup>23</sup>

13. This jurisprudence has also distinguished between evidence of RPF infiltration that is germane to the crimes alleged against the accused, or is simply of a more general or remote nature, which is not exculpatory.<sup>24</sup> Indeed, while the assessment of whether evidence is exculpatory depends on an evaluation of whether there is any possibility that the information could be relevant to the defence of the accused,<sup>25</sup> within the meaning of Rule 68, relevance is determined by whether the material may tend to disprove a material fact against the accused, undermine the credibility of evidence intended to prove those material facts, or even serve to sustain a valid excuse or justification for the alleged criminal conduct.<sup>26</sup>

<sup>22</sup> Motion, paras. 1-3, 9-10.

<sup>23</sup> *Karemera et al.*, Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution, 19 October 2006, para. 8.

<sup>24</sup> See, for instance, *Ndindiliyimana et al.*, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008, para. 27, where the Chamber held that the role of RPF "technicians" in the killings of specific persons was exculpatory because the Prosecution alleged that the accused was responsible for those killings; *Karemera et al.* Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings, 11 September 2008, paras. 10-11, where the Chamber found that evidence concerning RPF control over specific leaders of the *Interahamwe* was exculpatory because the Indictment alleged that the Accused conspired with, and exercised control over, these persons, and therefore the evidence could cast doubt on the allegation of the accused's effective control over them. Further, evidence that a Prosecution witness worked for the RPF was exculpatory because it could affect his credibility. However, *cf. The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T ("*Bagosora et al.*"), Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68(A), 8 March 2006, para. 7 where the Chamber held that evidence concerning "crimes committed by RPF forces against civilians in geographic areas physically distant from combat between the opposing armed forces in 1994 would not suggest the innocence or mitigate the guilt of the accused. The impact of such events on the criminal conduct with which the accused are charged is too remote and indirect. The Defence submissions have not demonstrated that such information would assist in disproving any element of the offences with which the Accused are charged, or how it could sustain a valid excuse or justification for their alleged conduct."; *Bagosora et al.*, Decision on Ntabakuze Motion for Disclosure of Prosecution Files, 6 October 2006, para. 5, where the Trial Chamber held that information concerning the responsibility of any particular person for the shooting down of President Habyarimana's plane was not exculpatory given that the accused was not alleged to be responsible for his death. The Chamber also noted at para. 5 "evidence of RPF operations at times or places unrelated to the crimes alleged against the Accused is not exculpatory."

<sup>25</sup> *Karemera et al.*, Decision on 'Joseph Nzirorera's Appeal From Decision on Tenth Rule 68 Motion' (AC), 14 May 2008, para. 12.

<sup>26</sup> *Karemera et al.*, Decision on Prosecutor's Rule 68(D) Application and Joseph Nzirorera's 12<sup>th</sup> Notice of Rule 68 Violation, 26 March 2009, para. 19; *cf. The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Decision on Kanyabashi's Motion for Disclosure Pursuant to Rule 68, 25 February 2009, para. 27; *Bagosora et al.*, Decision on Ntabakuze Motion for Disclosure of Prosecution Files, 6 October 2006, para. 4; *Bagosora et al.*, Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68(A), 8 March 2006, para. 7; *The Prosecutor v. Léonidas Nshogoza*, Case no. ICTR-2007-91-PT, Decision on Defence

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14. Upon review of the testimony of ALPHA-1, the Chamber does not find it to be exculpatory. ALPHA-1 provided evidence that RPF "technicians" planted bombs in taxis and bus stations, and that these crimes were ascribed to the *Interahamwe*. No further details, however, are given. There is no indication of when these crimes were perpetrated, where in Kigali they took place, or who may have been the victims of these crimes. As such, this testimony is not concrete enough to be relevant to the crimes alleged against the Accused. Although the Chamber notes that the Indictment alleges that the Accused participated in a joint criminal enterprise with, *inter alia*, leaders of the *Interahamwe*, and that the Accused exercised effective control over the *Interahamwe*, the vague information provided by ALPHA-1 does not assist in disproving these allegations, nor any element of the offences with which the Accused are charged. Further, Joseph Nzirorera has not demonstrated how the information may serve to undermine the credibility of Prosecution evidence. In light of the foregoing, the Chamber finds that Nzirorera has failed to make a *prima facie* demonstration of this material's exculpatory nature.

*Witness SABS*

15. SABS is a former member of the RPF who gave evidence that testimony is fabricated at the Tribunal. He stated that there are individuals within the Office of the Prosecutor in Kigali who are agents for the RPF and who manipulate and brief witnesses regarding what to say to investigators. He also testified that he was never personally involved in manipulating witnesses, nor was he personally aware of any person who had been asked to fabricate evidence in the *Ndindiliyimana* proceedings.<sup>27</sup>

16. The Chamber notes that SABS' allegations are general in nature, and are not based on personal involvement in witness tampering or fabrication of evidence. When questioned by the Presiding Judge about specific cases in which he alleged that evidence had been fabricated, Witness SABS did not mention the present proceedings. Consequently, the Chamber does not find his evidence to be capable of undermining Prosecution evidence intended to prove material facts against the Accused. Moreover, the Chamber does not agree that it serves to corroborate the testimony of Prosecution Witness BTH, who made much more specific allegations regarding the generation of false testimony in Ruhengeri prison,

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Motions for Disclosure Under Rules 66 and 68 of the Rules of Procedure and Evidence, 22 December 2008, para. 31; *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-1 ("*Bizimungu et al.*"), Decision on Justin Mugenzi's Request for Disclosure Order, 23 July 2008, para. 7; *Bizimungu et al.*, Decision on Bicomupaka's Urgent Motion for Disclosure of Exculpatory Material, 4 February 2009, para. 5.

<sup>27</sup> *Ndindiliyimana et al.*, T. 12 November 2008, pp. 28-31 and 37 [closed-session].

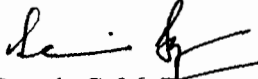
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rather than Kigali. Consequently, Joseph Nzirorera has failed to demonstrate the *prima facie* exculpatory nature of this material.

**FOR THE ABOVE NOTED REASONS, THE CHAMBER**

**DENIES** Joseph Nzirorera's Motion in its entirety.

Arusha, 3 July 2009, done in English.

  
Dennis C. M. Byron  
Presiding Judge

  
Gberdao Gustave Kam  
Judge

  
Vagn Joensen  
Judge

