

ICTR-98-44-T  
23-08-2010  
(51831-51828)

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UNITED NATIONS  
NATIONS UNIES

**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:** 23 August 2010

**THE PROSECUTOR**

v.

**Édouard KAREMERA  
Matthieu NGIRUMPATSE**

*Case No. ICTR-98-44-T*

ICTR  
JUDICIAL RECORDS/ARCHIVES  
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**DECISION ON REMAND FOLLOWING THE APPEALS CHAMBER DECISION OF  
17 MAY 2010**

*Rules 66(B) of the Rules of Procedure and Evidence*

**Office of the Prosecution:**  
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*dsy*

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## INTRODUCTION

1. A letter written by Aloys Karekezi (“the Karekezi letter”) was disclosed to the Parties on 19 November 2009, immediately before the Prosecution began cross-examination of Joseph Nzirorera’s witness Jean Damascène Niyoyita.<sup>1</sup> Joseph Nzirorera objected to the use of the Karekezi letter, arguing that the Prosecution had violated Rule 66(B) of the Rules of Procedure and Evidence.<sup>2</sup> On 24 November 2009, the Trial Chamber held that the Prosecutor had not violated its disclosure obligations under Rule 66(B).<sup>3</sup> Nzirorera appealed the Trial Chamber’s decision on 15 February 2010.<sup>4</sup> On 17 May 2010, the Appeals Chamber found that the Prosecution violated Rule 66(B) by failing to make the letter Karekezi letter available for inspection, pursuant to a prior request by the Defence and remanded the matter to the Trial Chamber for a determination of an appropriate remedy for this violation.<sup>5</sup> Nzirorera filed submissions asking that testimony of witnesses Jean Damascène Niyoyita and Juvénal Kajelijeli which referenced the Karekezi letter be disregarded by the Trial Chamber, that the Karekezi letter not be used by the Prosecution in the future, and the Prosecution be ordered to disclose all material which came into its possession after any and all Rule 66(B) requests.<sup>6</sup> The Prosecution asks that Nzirorera’s submission be dismissed in its entirety.<sup>7</sup>

2. Joseph Nzirorera was terminated from these proceedings on 12 August 2010 by virtue of his death.<sup>8</sup> Based on the Chamber’s oral decision on 23 August 2010, the Chamber deems it in the interests of justice to render this Decision as it deals with the body of evidence upon which the Chamber will ultimately deliberate.

## DELIBERATIONS

3. Joseph Nzirorera states that he is requesting the relief sought because the Karekezi letter has not been admitted into evidence, and therefore, excluding the letter would not be an

<sup>1</sup> T. 19 November 2009, p. 22.

<sup>2</sup> *Id.*

<sup>3</sup> T. 25 November 2009, p. 2.

<sup>4</sup> Joseph Nzirorera’s Appeal from 27<sup>th</sup> Rule 66 Violation, filed on 15 February 2009.

<sup>5</sup> *Id.*

<sup>6</sup> Joseph Nzirorera’s Submission on Remedy for Disclosure Violation: Karekezi Letter (“Nzirorera’s Submission”), filed on 21 May 2010, paras. 5-8.

<sup>7</sup> Prosecutor’s Response to Joseph Nzirorera’s Submission on Remedy for Disclosure Violation: Karekezi Letter, filed on 26 May 2010.

<sup>8</sup> *The Prosecutor v Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera (“Karemera et al.”)*, Decision Relating to Registrar’s Submission Notifying the Demise of Accused Joseph Nzirorera, filed 12 August 2010.

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appropriate remedy.<sup>9</sup> He therefore asks that the questions and answers regarding the Karekezi letter be disregarded by the Trial Chamber, and not be considered for any purpose in this case.<sup>10</sup> The Chamber notes that there are a number of remedies available for such a disclosure violation, and agrees with the Prosecution that the exclusion of the Karekezi letter would be considered to be at the extreme end of the scale of the available measures in addressing delay in disclosure and violation of the rights of a party.<sup>11</sup> To justify this remedy, the Defence must show material prejudice as a result the late disclosure of the Karekezi letter.<sup>12</sup>

4. In Joseph Nzirorera's submissions he fails to claim any prejudice from the Prosecution's violation of Rule 66, and in doing so the Defence has failed to demonstrate that remedy is justified in these circumstances, let alone the severe remedy of exclusion of evidence.<sup>13</sup> Turning to the testimony of Jean Damascène Niyoyita, the Chamber finds that Niyoyita's testimony did not change as a result of the Karekezi letter. Niyoyita claimed before and after being read the letter that there was no misbehaviour by the *Interahamwe* in Mukingo *commune*.<sup>14</sup> Because Nzirorera has not claimed material prejudice as a result of the Karekezi letter in regards to Niyoyita's testimony, there is no reason for the Chamber to provide a remedy in these circumstances. The Chamber recalls that by the time Juvénal Kajelijeli gave his testimony the Defence teams had been in possession of the Karekezi letter for about six months. Because of Nzirorera's knowledge of the existence of the letter, material prejudice cannot be shown regarding the testimony of Kajelijeli in reference to the "Karekezi letter."<sup>15</sup>

5. Furthermore, now that Nzirorera and his co-accused are aware of the existence of this letter and can adequately prepare witnesses accordingly, future prejudice cannot be claimed. Therefore pre-emptive exclusion of the Karekezi letter is not warranted. The Chamber will re-address whether the letter's use is appropriate if the situation arises at some future point.

<sup>9</sup> Nzirorera's Submission, paras. 3, 4.

<sup>10</sup> *Id.*

<sup>11</sup> *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, para. 6.

<sup>12</sup> *Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A, Appeal Judgment (AC), para.262; *Karemera et al.*, Decision on Joseph Nzirorera's Sixth, Seventh and Eighth Notice of Disclosure Violations and Motion for Remedial, Punitive and Other Measures (TC), 29 November 2007.

<sup>13</sup> *Karemera et al.*, No. ICTR-98-44-T, Decision on Joseph Nzirorera's 21st Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Theophile Urikumwenimana (TC), 22 April 2009, para. 9.

<sup>14</sup> T. 25 November 2009, p. 29.

<sup>15</sup> *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings (TC), 26 September 2000, para 38.


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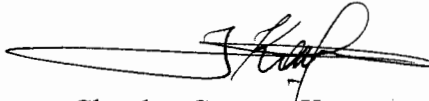
6. Joseph Nzirorera has requested punitive measures against the Prosecution, namely that the Chamber order that the Prosecution undertake a search of its collections, disclose all material which came into its possession after any and all of the Rule 66(B) requests in this case, and certify that all such material has been disclosed.<sup>16</sup> As there has been no showing of material prejudice by Nzirorera, there is no basis for awarding punitive measures. However, the Chamber does take this opportunity to remind the Prosecution of its disclosure obligations, and requests that the Prosecution search through its collections to ensure that all material has been disclosed to the Defence, pursuant to any Rule 66(B) requests made.

**FOR THESE REASONS, THE CHAMBER**

**ORDERS** no remedy for the Prosecution's Violation of Rule 66(B) at this time.

Arusha, 23 August 2010, done in English.

  
Dennis C. M. Byron  
Presiding Judge

  
Gberdao Gustave Kam  
Judge

  
Vagn Joensen  
Judge



<sup>16</sup> Nzirorera's Submission, para. 8.