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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: 3 September 2010

THE PROSECUTOR

v.

**Édouard KAREMERA
Matthieu NGIRUMPATSE**

Case No. ICTR-98-44-T

2010 SEP 3 10:11
OFFICIAL RECORDS ARCHIVES
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**DECISION ON JOSEPH NZIRORERA'S MOTION FOR
RECONSIDERATION: STATEMENT OF PROSECUTION WITNESS ALG**

Rules 66 (B) and 67 (D) of the Rules of Procedure and Evidence

Office of the Prosecution:

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INTRODUCTION

1. The proceedings against Joseph Nzirorera were terminated on 12 August 2010 by virtue of his death.¹ 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 a possible disclosure violation by the Prosecution and may have an impact on the case.
2. By Decision of 30 May 2009 the Chamber rejected Joseph Nzirorera's *23th Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Witness ALG* on the grounds that the Prosecution, in the Chamber's opinion, did not have an ongoing obligation to offer for inspection documents that had come into its possession after the defence had made a request for inspection.
3. On 17 May 2010, the Appeals Chamber issued its Decision on Joseph Nzirorera's Appeal from another Decision on Alleged Rule 66 Violation ("Appeal Decision").² This Decision impresses an obligation upon the Prosecution to permit inspection of any documents which fall within the scope of a sufficiently specific inspection request submitted by Defence Counsel, also with respect to documents that came into the possession of the Prosecution after the submission of the inspection request.³
4. Joseph Nzirorera moved the Chamber to reconsider its 30 May 2009 Decision, find that the Prosecution violated Rule 66 (B) by not making the 2008 Statement of Witness ALG available for inspection⁴, and order remedial and punitive measures.
5. The Prosecution opposes the motion in its entirety and requests that the Chamber deny reconsideration of the impugned Decision.⁵ Additionally, the Prosecution requests that the Chamber reject any remedial or punitive measures proposed by Joseph Nzirorera.⁶

¹ *The Prosecutor v Édouard Karemera, Matthieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44 ("*Karemera et al.*"), Decision Relating to Registrar's Submission Notifying the Demise of Accused Joseph Nzirorera (TC), 12 August 2010.

² *Karemera et al.*, Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66 Violation (AC), 17 May 2010 ("Appeal Decision").

³ Appeal Decision, para. 24.

⁴ *Ibid.*, para. 7.

⁵ Prosecutor's Consolidated Response to Joseph Nzirorera's Motion for Reconsideration: MRND Ruhengeri Documents and Statement of Prosecution Witness ALG, filed on 31 May 2010, para. 20.

⁶ *Ibid.*, paras. 24-26.

DELIBERATIONS

Reconsideration

6. Well established jurisprudence grants an inherent power to the Trial Chamber to reconsider its own decisions if (i) a new fact is discovered that was not known to the Trial Chamber at the time, (ii) if there is a material change in the circumstances, (iii) or where there is reason to believe that a previous decision was erroneous or constituted an abuse of power on the part of the chamber, resulting in an injustice.⁷ The Chamber recalls that it is for the party seeking reconsideration to demonstrate special circumstances warranting such reconsideration.⁸

7. Joseph Nzirorera demonstrates that by juxtaposing the Appeal Decision and the Chamber's 30 May 2009 Decision, the Chamber's Decision, in holding that there is no continuing obligation to allow inspection if the Prosecution later comes into possession of a document which fits a sufficiently specific request, is in direct contravention to the Appeal Decision. As a result, the Chamber's Decision is erroneous in law.⁹

8. Therefore, in view of the Appeals Chamber determination, the Chamber finds it appropriate to exercise the exceptional remedy of reconsideration specifically on the issue of whether the Prosecution was in violation of Rule 66 (B) by failing to meet its continuous obligation to permit inspection of properly requested materials.

Violation of Rule 66

9. In order for the Chamber to determine if the Prosecution was in violation of Rule 66 (B): (i) Joseph Nzirorera must have filed an inspection request pursuant to Rule 66 (B); (ii) the Trial Chamber must determine that the Prosecution was in possession of the 2008 Statement of Witness ALG; (iii) the request must meet the requirements of specificity; and

⁷ *Karemera et al.*, Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses (TC), 29 August 2005, para. 8; *Karemera et al.*, Decision on Defence Motion for Modification of Protective Order: Timing of Disclosure (TC), 31 October 2005, para. 3; *Karemera et al.*, Decision on Motion for Reconsideration or Certification to Appeal Decision on Motion for Order Allowing Meeting with Defence Witness (TC), 11 October 2005, para. 8 (note also the authorities cited in footnotes contained within that paragraph).

⁸ See *Karemera et al.*, Decision on the Defence Motion for Reconsideration of Sanctions Imposed on the Defence Request for Leave to Interview Potential Prosecution Witnesses Jean Kambanda, Georges Ruggiu and Omar Serushago (TC), 10 October 2003, para. 6.

⁹ Appeal Decision, para. 24; *Karemera et al.*, Decision on Joseph Nzirorera's 23rd Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Witness ALG (TC), 30 March 2009 ("Original Decision").

(iv) the 2008 Statement of Witness ALG must be within the scope of the appropriately specific request. It is not disputed that Nzirorera has met the conditions under prongs (i) – (iii).

10. With respect to the scope of Nzirorera's 2004 Inspection Request, the Prosecution submits that the Request does not qualify as a request for inspection under Rule 66 (B). Instead, the Prosecution claims that the request was simply a way for the Joseph Nzirorera to ensure that all Rule 66 (A) (ii) disclosures would be made in a timely basis wherefore it falls outside of the scope of the Appeal Decision.¹⁰ The Prosecution argues that its disclosure obligations are determined by the ICTY Appeals Chamber decision in *Blaškić* which held that the Prosecution is not under an obligation under Rule 66(A) to disclose witness statements that are recorded after the witness has testified at trial.¹¹

11. The Chamber notes that Rule 66 (A) does not require the Defence to submit a request to the Prosecution. Moreover, it is unclear what jurisprudence the Prosecution is relying upon to determine which rule the 2004 Inspection Request falls under. As such the Chamber finds that no showing has been made by the Prosecution that the 2004 Inspection Request is a request pursuant to Rule 66 (A). Therefore, the Chamber finds the inspection request to fall under Rule 66 (B).

12. The Chamber finds in light of the recent Appeals Chamber jurisprudence, that Nzirorera's 2004 Inspection Request impressed upon the Prosecution a continued obligation to allow inspection of all witness statements of Witness ALG pursuant to Rules 66 (B) and 67 (D). Consequently, the Chamber holds that the Prosecution violated that obligation when it failed to permit inspection of the 2008 Statement of Witness ALG.

Remedial and Punitive Measures

13. As a remedial measure, Nzirorera requested that the Chamber order that Witness ALG submit to an interview with Nzirorera's counsel in the presence of the Prosecution to determine whether matters arising from the new statement might justify an application to recall ALG.¹² Further, as a punitive measure Nzirorera requested that the Chamber order the Prosecution to undertake a search of its collections, disclose all material which came into its

¹⁰ Prosecutor's Consolidated Response to Joseph Nzirorera's Motion for Reconsideration: MRND Ruhengeri Documents and Statement of Prosecution Witness ALG, filed on 31 May 2010, para. 23.

¹¹ *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, 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, paras. 14-17.

¹² *Ibid.*, para. 8.

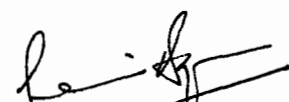
possession after any and all of the Rule 66 (B) requests in this case, and certify that all such material has been disclosed.¹³

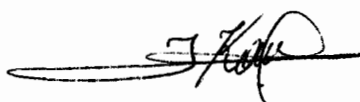
14. The Chamber dismisses Joseph Nzirorera's requests on the following grounds: There is no indication that Nzirorera suffered any material prejudice. Furthermore, the requested remedies are specifically related to Nzirora's defence and, thus, moot as the proceedings against him have been closed by virtue of his death. Finally, in any event, there would have been no basis for punitive measures as the Prosecution acted in accordance with an understanding of the relevant Rules that was, at the time, shared by the Chamber.


FOR THESE REASONS, THE CHAMBER:

- I. **RECONSIDERS** its Decision of 30 March 2010 and finds that the Prosecution violated its obligation under Rule 66 (B) when it failed to disclose the 2008 Statement of Witness ALG; and
- II. **DISMISSES** Joseph Nzirorera's motion in all other respects.

Arusha, 3 September 2010, done in English.


Dennis C. M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge


Vagn Joensen
Judge



¹³ *Ibid.*, para. 10.