

ICTR-98-44-T  
30-03-2009  
(45480-45476)

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THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR RWANDA

CASE No. ICTR-98-44-T

IN TRIAL CHAMBER No. 3

Before: Judge Dennis C.M. Byron, Presiding  
Judge G. Gustave Kam  
Judge Vagn Joensen

Registrar: Mr. Adama Dieng

Date Filed: 30 March 2009

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JUDICIAL RECORDS/ARCHIVES  
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JOSEPH NZIRORERA'S 16<sup>th</sup> NOTICE OF RULE 68 VIOLATION  
AND MOTION FOR REMEDIAL AND PUNITIVE MEASURES:  
TESTIMONY OF RPF INSIDERS

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The Office of the Prosecutor:

Mr. Don Webster  
Mr. Iain Morley  
Ms. Gerda Visser  
Mr. Saidou N'Dow

Defence Counsel:

Mr. Peter Robinson  
Mr. Patrick Nimy Mayidika Ngimbi

Counsel for Co-Accused:

Ms. Dior Diagne Mbaye and Mr. Felix Sow for Edouard Karemera  
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ngirumpatse

1. On 19 October 2006, the Trial Chamber found that the prosecution had violated Rule 68 by failing to disclose the unredacted statements of RPF insiders. In its Decision, the Trial Chamber also held that the prosecution's conduct in disclosing the statements of RPF infiltration in redacted form was in breach of the prior Chamber's Decision of 4 July 2006. The Chamber went on to say:

“Such misconduct is unacceptable; it remains offensive, obstructs the proceedings and is contrary to the interests of justice. The Chamber therefore finds that a sanction should be imposed against the Prosecution, by formally drawing the attention of the Prosecutor himself, as the disciplinary body, to this misconduct.”<sup>1</sup>

2. On 11 September 2008, the Trial Chamber found that the prosecution had once again violated Rule 68 by failing to disclose closed session testimony of RPF insiders. The Trial Chamber, in its decision on that motion, after finding that the prosecution had violated Rule 68 for the thirteenth time, said that:

“Although the Chamber is not prepared to state that the Prosecution can no longer be relied upon to discharge its Rule 68 obligations in this case, it notes that the Prosecution's compliance with the rules of disclosure has been less than adequate thus far. In fact, the Chamber finds that the increasing number of disclosure violations by the Prosecution is quickly approaching the threshold for sanctions of a more serious nature than mere disclosure of the misconduct to an internal disciplinary body. The Chamber hereby warns the Prosecution that future disclosure violations will not be met with the same lenience that has been displayed to date.”<sup>2</sup>

3. On 26 March 2009, the Trial Chamber once again found the prosecution had violated Rule 68 by failing to disclose the unredacted statements of additional RPF insiders. It issued a warning to Senior Trial Attorney William Egbe.<sup>3</sup>

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<sup>1</sup> *Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution* (19 October 2006) at para. 17

<sup>2</sup> *Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (11 September 2008) at para. 30

4. Mr. Nzirorera now believes that he has uncovered two additional violations of Rule 68 by the prosecution with respect to RPF insiders.

5. Mr. Nzirorera has received information that two former RPF insiders testified in 2008 in closed session as defence witnesses in the *Ndindiliyimana* trial that the RPF “technicians” committed assassinations and other crimes in Kigali between January and April 1994 which they blamed on the Habyarimana regime and Interahamwe, and that the RPF intelligence services recruited persons to fabricate evidence against the accused at the ICTR.<sup>4</sup>

6. Despite the exculpatory nature of this closed session testimony, it has never been disclosed by the prosecution.

7. Rule 68(A) provides:

“The Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.”

8. A party alleging a violation of Rule 68 must: (1) identify specifically the material sought; (2) present a *prima facie* showing of its probably exculpatory nature; and (3) prove that the material requested is in the custody or under the control of the prosecution.<sup>5</sup>

9. Mr. Nzirorera has specifically identified the testimony in question, and has established that the material was in the custody and control of the prosecution, which is a party to the *Ndindiliyimana* trial. With regard to its exculpatory nature, this Trial Chamber has already held that testimony concerning infiltration of the Interahamwe by

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<sup>3</sup> *Decision on Joseph Nzirorera's 12<sup>th</sup> Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures* (26 March 2009)

<sup>4</sup> Mr. Nzirorera is informed that this testimony took place on 1-2 July 2008 and 12 November 2008,

<sup>5</sup> *Decision on Joseph Nzirorera's Appeal from Decision on 10<sup>th</sup> Rule 68 Motion* (14 May 2008) at para. 9

the RPF was required to be disclosed pursuant to Rule 68.<sup>6</sup> And virtually identical evidence dealing with information about the activities by the “technicians” has been held by the Trial Chamber in *Ndindiliyimana* to be exculpatory within the meaning of Rule 68.<sup>7</sup>

10. In the *Bagosora* case, the Trial Chamber held that such material was required to be disclosed pursuant to Rule 68, saying that:

“Descriptions of infiltration into areas of government control by RPF soldiers disguised as civilians could provide context or background information which may assist the Chamber in understanding some of the conduct about which the Chamber has heard testimony during the Prosecution case.”<sup>8</sup>

11. While the Trial Chamber has held that information of the RPF’s commission of specific crimes, such as the assassination of Felicien Gatabazi and President Habyarimana is not of an exculpatory nature<sup>9</sup>, the information of the systematic infiltration by the RPF into the Interahamwe and the efforts of the RPF to undermine the Arusha Accords by committing crimes while claiming it was the MRND which was violating the Accords, contradicts the prosecution’s evidence that the accused ordered crimes by Interahamwe and sought to undermine the Arusha Accords.

12. Evidence of a systematic effort by the RPF to fabricate testimony against the accused in Arusha is also exculpatory, and would corroborate the testimony of Witness BTH in April 2008 that he and others were recruited to lie against Mr. Nzirorera by the Rwandan authorities.

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<sup>6</sup> *Decision on Joseph Nzirorera’s Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (11 September 2008) at para. 10

<sup>7</sup> *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Defence Motions Alleging Violation of the Prosecutor’s Disclosure Obligations Pursuant to Rule 68* (22 September 2008) at para. 27

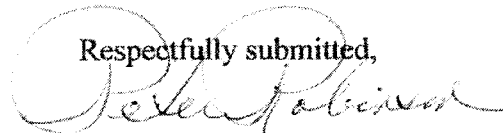
<sup>8</sup> *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Disclosure of Defence Witness Statements in the Possession of the Prosecution Pursuant to Rule 68(A)* (8 March 2006) at para. 6

<sup>9</sup> *Decision on Joseph Nzirorera’s Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (11 September 2008) at para. 14. Mr. Nzirorera disagrees with this part of the decision.

13. Therefore, the transcripts of the closed session testimony are of an exculpatory nature and the failure to disclose them constitutes yet another violation of Rule 68 by the prosecution.

14. Mr. Nzirorera requests that the Trial Chamber order the immediate disclosure of the transcripts of the testimony that is the subject of this motion, and make an explicit finding that the prosecution has violated Rule 68 as to each transcript. He will comment on the appropriate remedial and punitive measures to be taken after the prosecution's explanation for what appears to be a flagrant violation of Rule 68 is received.

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera



## TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

**COURT MANAGEMENT SECTION**  
(Art. 27 of the Directive for the Registry)

### I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

<b>To:</b>	<input type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input checked="" type="checkbox"/> Trial Chamber III C. K. Hometowu	<input type="checkbox"/> Trial Chamber III A. N'Gum
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<b>From:</b>	<input type="checkbox"/> Chamber (names)	<input checked="" type="checkbox"/> Defence <b>Peter Robinson</b> (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
<b>Case Name:</b>	The Prosecutor vs. <b>Joseph Nzirorera</b>		<b>Case Number:</b> ICTR-98-44-T	
<b>Dates:</b>	Transmitted: <b>30 March 2009</b>		Document's date: <b>30 March 2009</b>	
<b>No. of Pages:</b>	<b>5</b>	<b>Original Language:</b>	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
<b>Title of Document:</b>	<b>JOSEPH NZIRORERA'S 16th NOTICE OF RULE 68 VIOLATION AND MOTION FOR REMEDIAL AND PUNITIVE MEASURES: TESTIMONY OF RPF INSIDERS</b>			
<b>Classification Level:</b>		<b>TRIM Document Type:</b>		
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<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: