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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

37641
Jury
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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: 11 September 2008

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THE PROSECUTOR

v.

**Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-T

**DECISION ON JOSEPH NZIRORERA'S ELEVENTH NOTICE OF RULE 68
VIOLATION AND MOTION FOR STAY OF PROCEEDINGS**

Rule 68 of the Rules of Procedure and Evidence

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37640

INTRODUCTION

1. In November 2006, Witness ALL-42, a former RPF official, testified in closed session in the *Bagosora et al.* trial. During his testimony, ALL-42 stated that: (1) the RPF had infiltrated the Interahamwe; (2) the National President of the Interahamwe, Robert Kajuga, was working for the RPF, which financed his election; (3) the Vice President of the Interahamwe, Pheneas Ruhumuliza, was working for the RPF; (4) Prosecution Witness G was working for the RPF; (5) a close relative of Mathieu Ndirumutse was working for the RPF, and arranged for RPF operative Jean-Pierre Turatsinze to work for the MRND as coordinator of the Interahamwe; and (6) the RPF was responsible for the assassination of Félicien Gatabazi in February 1994, and sought to blame it on the regime of President Habyarimana.¹

2. In April 2006, Witness BRA-1, a former RPF soldier, testified in closed session in the *Bagosora et al.* trial. During his testimony, BRA-1 testified that the RPF assassinated Félicien Gatabazi and Emmanuel Gapyisi, and sought to blame it on the regime of President Habyarimana.² BRA-1 also testified that the RPF assassinated President Habyarimana on the orders of President Kagame.³

3. Joseph Nzirorera believes that the testimony of ALL-42 and BRA-1 is exculpatory, and that the Prosecution failed to disclose it to him as required by Rule 68 of the Rules of Procedure and Evidence. Accordingly, he filed an eleventh notice of violation of Rule 68 of the Rules of Procedure and Evidence, and motion for stay of the proceedings.⁴ The Prosecution opposes the motion in its entirety.⁵

DELIBERATIONS

4. In its response, the Prosecution stated that it disclosed the exculpatory material from the testimony of BRA-1 to Joseph Nzirorera on 21 February 2007. In his reply, Nzirorera acknowledged that the Prosecution disclosed the exculpatory portion of BRA-1's testimony, and withdrew his motion as to that witness.⁶ Accordingly, Nzirorera's motion is moot regarding the testimony of BRA-1, and the Chamber's decision will only relate to the claims related to Witness ALL-42.

¹ T. 8 Nov. 2006, pp. 38-40; T. 9 Nov. 2006, pp. 1-5.

² T. 9 Apr. 2006, pp. 20-23.

³ T. 5 Apr. 2006, pp. 67-74.

⁴ Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of the Proceedings, filed on 21 July 2008 ("Nzirorera's Motion"); Reply Brief: Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings, filed on 28 July 2008 ("Nzirorera's Reply").

⁵ Prosecutor's Response to Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of the Proceedings, filed on 24 July 2008 ("Prosecution Response").

⁶ Nzirorera's Reply.

287

37639

Standard for Determining Whether a Breach of Disclosure Obligations Exists Under Rule 68(A)

5. 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. As a rule of disclosure rather than of admissibility of evidence, Rule 68 imposes a categorical obligation to disclose any document or witness statement that contains exculpatory material.⁷

6. The determination of which materials are subject to disclosure under this provision is a fact-based inquiry made by the Prosecution.⁸ 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.⁹ Information is considered exculpatory under Rule 68(A) if there is any possibility, in light of the submissions of the parties, that the information could be relevant to the defence of the accused.¹⁰

7. Joseph Nzirorera has specifically identified the material sought,¹¹ and the Prosecution does not dispute that the material is in its custody or under its control.¹² Therefore, the Chamber finds that the first and third prongs of the test for determining whether the Prosecution has breached its disclosure obligation under Rule 68(A) have been met.

8. Regarding the second prong of the test, the Chamber notes that the Prosecution only disputes whether ALL-42's statements concerning the RPF's responsibility for the assassination of Félicien Gatabazi are exculpatory. The Prosecution does not dispute that ALL-42's testimony regarding the RPF's control over leaders of the Interahamwe and

⁷ *The Prosecutor v. Édouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-AR73.13, ("*Karemera et al.*"), Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion"(AC), 14 May 2008, para. 12.

⁸ *Karemera et al.*, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 16.

⁹ *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence (AC), 8 December 2006, para. 34.

¹⁰ *Karemera et al.*, Case No. ICTR-98-44-AR73.13, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion" (AC), 14 May 2008, para. 12.

¹¹ Nzirorera's Motion, para. 2.

¹² Prosecution Response, para. 9.

37638

witness G is exculpatory. Concerning this latter category of evidence, the Prosecution merely states that it disclosed the material as soon as practicable, as required by Rule 68(A).

9. Nonetheless, the Chamber must still determine for itself whether Joseph Nzirorera has presented a *prima facie* showing of the probable exculpatory nature of all of the evidence at issue before it can assess whether the Prosecution violated its disclosure obligation under Rule 68(A).

Whether the Material is Exculpatory

10. Joseph Nzirorera contends that ALL-42's statements concerning the RPF's control over Robert Kajuga, Pheneas Ruhumuliza, and Jean-Pierre Turatsinze are exculpatory because the Indictment charges that Nzirorera conspired with and exercised control over these persons. The Chamber agrees that the Indictment specifically alleges that Nzirorera conspired with, and exercised control over Robert Kajuga, Pheneas Ruhumuliza, and other leaders of the Interahamwe.¹³ Therefore, ALL-42's testimony may cast doubt on whether Nzirorera maintained effective control over these persons because it suggests, at a minimum, that they also received orders from the RPF. It also follows that ALL-42's testimony may cast doubt on whether the actions of the Interahamwe were the result of Nzirorera's actions, or those of the RPF. Consequently, the Chamber finds that ALL-42's statements in this regard are exculpatory.

11. Joseph Nzirorera further argues that ALL-42's testimony that Prosecution Witness G worked for the RPF is exculpatory because it is clearly a matter that would affect his credibility. If Prosecution witness G worked for the RPF, then it is clear that his testimony may have been tainted. Therefore, the Chamber agrees that ALL-42's testimony in this regard is exculpatory.

12. Joseph Nzirorera also claims that ALL-42's statement that the RPF was responsible for the assassination of Felicien Gatabazi is exculpatory because it contradicts Prosecution evidence, which suggests that the MRND was responsible for Gatabazi's assassination. In support of this argument, Nzirorera quotes a decision in the *Bagosora et al.* case, which states that: (1) descriptions of infiltration into areas of government control by RPF soldiers disguised as civilians could provide context or background information that may be useful to the Chamber when it assesses Prosecution evidence; and (2) information concerning the

¹³ Indictment, paras. 6(iv), 18(ii), 23.

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37637

assassination of President Habyarimana may also assist the Chamber in understanding the background to the events in April 1994.¹⁴

13. The Chamber finds that the *Bagosora et al.* decision is inapposite here because it only refers to President Habyarimana by name and, in any event, only concerns whether evidence of RPF infiltration or involvement with the assassination of President Habyarimana can serve as background or context information for the Chamber. It does not state that evidence of the RPF's responsibility for the assassination of a political figure is exculpatory under Rule 68(A).

14. Moreover, this Chamber has already stated that records or documents concerning the assassination of President Habyarimana are not exculpatory under Rule 68(A) if the accused was not charged with taking part in that assassination.¹⁵ The Chamber finds that the same holds true if the records or documents concern the assassination of any prominent political figure in 1994 in Rwanda, such as Félicien Gatabazi, and the accused is not charged with taking part in the assassination. Accordingly, the Chamber concludes that ALL-42's testimony regarding RPF responsibility for Gatabazi's assassination is not exculpatory under Rule 68(A).

Whether the Prosecution Violated its Disclosure Obligations under Rule 68(A)

15. The Prosecution contends that it did not violate its disclosure obligations under Rule 68(A) because it actually disclosed the materials at issue to Joseph Nzirorera in July 2008. The Prosecution therefore argues that Nzirorera's only valid argument concerning these materials is that there was a delay in the disclosure.

16. In support of this proposition, the Prosecution refers to language from the *Krstic* Appeals Chamber Judgment, which recognizes that there may be an increased burden on the Prosecution, both in terms of the volume of material to be disclosed, and in terms of the effort expended in determining whether material is exculpatory under Rule 68(A). Relying on this language, the Prosecution asserts that a two-year delay in disclosing the materials at issue is acceptable.

17. The Chamber disagrees with the Prosecution in the strongest terms possible. The Prosecution only disclosed the materials at issue after Joseph Nzirorera made a specific

¹⁴ Nzirorera's motion, para. 11.

¹⁵ *Karemera et al.*, Decision on the Defence Motion for Disclosure of Exculpatory Evidence (TC), 7 October 2003, para. 15.

request for them on 17 June 2008.¹⁶ Disclosure violations under Rule 68(A) occur when the Prosecution does not disclose exculpatory material to the Defence as soon as practicable. It strains credulity to claim that a disclosure of exculpatory material was made as soon as practicable when that disclosure occurred *two years* after the material became available, and only after it was specifically requested by the Defence.

18. Moreover, the Prosecution has misinterpreted paragraph 180 of the *Krstic* judgement. That paragraph actually states:

The disclosure of exculpatory material is fundamental to the fairness of proceedings before the Tribunal, and considerations of fairness are the overriding factor in any determination of whether the governing Rule has been breached. The Appeals Chamber is conscious that a broader interpretation of the obligation to disclose evidence may well increase the burden on the Prosecution, both in terms of the volume of material to be disclosed, and in terms of the effort expended in determining whether material is exculpatory. *Given the fundamental importance of disclosing exculpatory evidence, however, it would be against the interests of a fair trial to limit the Rule's scope for application in the manner suggested by the Prosecution.* (Emphasis added.)

19. Although the Appeals Chamber recognized that sifting through voluminous material in order to determine whether that material is exculpatory may create an increased burden for the Prosecution, it expressly stated that this does not justify a relaxation of the Prosecution's categorical obligation to disclose exculpatory material to the defence under Rule 68(A). Thus, the Prosecution's reliance on the *Krstic* Judgement is misplaced.

20. Accordingly, the Chamber concludes that the Prosecution violated its disclosure obligations under Rule 68(A) regarding ALL-42's statements about: (1) the RPF's control over Robert Kajuga, Pheneas Ruhumuliza, and Jean-Pierre Turatsinze; and (2) Prosecution Witness G's employment with the RPF because that material is exculpatory, and was not disclosed to the Defence as soon as practicable. The Chamber does not find that the Prosecution violated its disclosure obligations under Rule 68(A) concerning ALL-42's testimony that the RPF was responsible for Félicien Gatabazi's assassination because that material was not exculpatory.

Whether Remedial and/or Punitive Measures are Warranted

21. The Chamber recalls that the fact that material has not been disclosed in a timely manner does not *per se* create a prejudice to the accused.¹⁷ The accused must demonstrate

¹⁶ Annex "B" to Nzirorera's Motion; Nzirorera's Motion, para. 4.

¹⁷ *Prosecutor v. Juvenal Kajelijeli*, Case No. ICTR-98-44A-A, Judgement (AC), 23 May 2005, para. 262

37635

that he has suffered material prejudice as a result of the late disclosure in order for remedial and/or punitive measures to be warranted.¹⁸

22. The Prosecution only responded to one of Joseph Nzirorera's claims that he had suffered prejudice as a result of the non-disclosure; namely, the argument that the preparation of his defence will be disrupted because he must now divert resources to investigate new material, which he should have received in 2006. The Prosecution argues that Nzirorera, on his own admission, was already investigating Witness ALL-42 to determine whether to call him as a witness. Therefore, the Prosecution asserts that Nzirorera has not had to divert any resources.

23. The Chamber considers that preliminary investigations for determining whether to call someone as a witness require significantly less resources than the comprehensive review of newly disclosed documents. Because Joseph Nzirorera must now engage in a comprehensive review of newly disclosed testimony, the Chamber finds that he has to divert additional resources to this task, and that he has suffered some prejudice as a result.

24. Even so, the Chamber considers that Joseph Nzirorera's second claim of prejudice, which the Prosecution did not address, is much stronger. In this claim, Nzirorera argues that he was prejudiced by the non-disclosure because he was precluded from using the information in his cross-examination of several witnesses who testified to statements and activities of Robert Kajuga and Jean Pierre Turatsinze. The Chamber considers that Nzirorera has definitely suffered prejudice in this regard.

25. Under Rule 46 (A) of the Rules, a Chamber may, after a warning, impose sanctions against a counsel, if, in its opinion, his conduct obstructs the proceedings, or is otherwise contrary to the interests of justice.

26. In the present case, the Chamber has, on a number of occasions, criticised the Prosecution for its lack of diligence in the exercise of its disclosure obligations. Since then, warnings were issued against the Prosecutor, pursuant to Rule 46 (A), for his failure to comply with his disclosure obligations, and a sanction was even imposed upon the Prosecution by formally drawing the attention of the Prosecutor himself, as the disciplinary body, to its misconduct.¹⁹ The Chamber notes with great concern that this is the thirteenth disclosure violation committed by the Prosecution.

¹⁸ *Ibid.*

¹⁹ *Karemera et al.*, Oral Decision on Stay of Proceedings, T. 16 February 2006, pp. 5 and seq.; Oral Decision on Late Disclosure of Witness T's Statement and Imposing a Warning pursuant to Rule 46(A) to the

27. Joseph Nzirorera proposes the following remedial and punitive measures as sanctions for this violation: (1) an express finding that the Prosecution violated Rule 68 by failing to disclose the closed session testimony of Witness ALL-42; (2) a stay of the proceedings until all Rule 68 material has been disclosed to Mr. Nzirorera; (3) a finding that the Prosecution can no longer be relied upon to discharge its Rule 68 obligations in this case; (4) the appointment of a special master to supervise a comprehensive review of the material in the possession of the Prosecution for exculpatory material; (5) a resumption of the trial only after the special master has certified that all exculpatory material in the possession of the Prosecution has been disclosed; and (6) the imposition of such other remedial and punitive measures as the Trial Chamber deems necessary.

28. Despite the increasingly egregious level of disclosure violations committed by the Prosecution, the Chamber does not find that a stay of the proceedings until all Rule 68 material is disclosed is an appropriate remedy. The Prosecution has a continuous obligation to disclose exculpatory material under Rule 68(A) because it is understood that such material may appear in a continuing manner.²⁰ It would be impractical to impose an indefinite stay of the proceedings until all Rule 68 material is disclosed.

29. However, the Chamber notes that the proceedings have already been stayed until 20 October 2008, for medical reasons related to Mathieu Ngirumpatse. Accordingly, it orders the Prosecution to take advantage of this hiatus in the trial to endeavour to disclose all remaining Rule 68 material, of which it is aware, to the Defence.

30. 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.

Prosecution, T. 24 May 2006; Decision on Defence Motion for Disclosure of RPF Material and for Sanctions against the Prosecution (TC), 19 October 2006;

²⁰ *Karemera et al.*, Decision on Joseph Nzirorera's Tenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures (TC), filed on 5 February 2008, para. 4.

31. The Chamber does not find that the appointment of a special master is necessary at this stage in the proceedings. The Chamber is willing to trust that the Prosecution will strive to abide by its disclosure obligations from this point forward.

32. Finally, the Chamber finds that, upon a showing of good cause, Joseph Nzirorera is entitled to recall the Prosecution witnesses, which he was not able to cross-examine fully due to the missing exculpatory evidence from ALL-42.

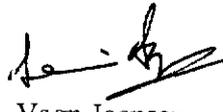
FOR THESE REASONS, THE CHAMBER

- I. **GRANTS** Joseph Nzirorera's Motion in part;
- II. **GRANTS** Joseph Nzirorera's request to withdraw his application concerning Witness BRA-1;
- III. **FINDS** that the Prosecution has violated its disclosure obligations under Rule 68(A) with regard to Witness ALL-42's statements about: (1) the RPF's control over Robert Kajuga, Pheneas Ruhumuliza, and Jean-Pierre Turatsinze; and (2) Prosecution witness G's employment with the RPF;
- IV. **DENIES** Joseph Nzirorera's request for a stay of the proceedings, and for the appointment of a special master;
- V. **ORDERS** the Prosecution to disclose all remaining Rule 68 material, of which it is aware, to the Defence as soon as possible; and
- VI. **WARNS** the Prosecution that it will strictly sanction future disclosure violations.

Arusha, 11 September 2008, done in English.


 Dennis C. M. Byron
 Presiding Judge


 Gberdao Gustave Kam
 Judge


 Vagn Joensen
 Judge
 (absent during signature)

[Seal of the Tribunal]





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)

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II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

CMS SHALL take necessary action regarding translation.

Filing Party hereby submits only the original, and **will not submit** any translated version.

Reference material is provided in annex to facilitate translation.

Target Language(s):

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CMS SHALL NOT take any action regarding translation.

Filing Party hereby submits **BOTH the original and the translated version** for filing, as follows:

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Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda

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