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**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

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ICTR-98-44-T
24-7-2008
(36797-36792)

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IN TRIAL CHAMBER III

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

Registrar: Mr. Adama Dieng

Date Filed: 24 July 2008

The PROSECUTOR

v.

**Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA**

Case No. ICTR-98-44-T

1 2008 JUL 24 P 11:19
JUDICIAL RECORDS/ARCHIVES

**Prosecutor's Response to Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and
Motion for Stay of Proceedings**

For the Prosecutor:

Mr. Don Webster
Ms. Alayne Frankson-Wallace
Mr. Iain Morley
Mr. Saidou N'Dow
Ms. Gerda Visser
Ms. Sunkarie Ballah-Conteh
Mr. Takeh Sendze

For the Accused:

Ms. Dior Diagne and Mr. Moussa Félix Sow for Édouard Karemera
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ngirumpatse
Mr. Peter Robinson and Patrick Nimy Mayidika Ngimbi for Joseph Nzirorera

1. This is the Prosecutor's Response to *Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings*, filed on 21 July 2008.

The Parameters of Rule 68

2. The Trial Chamber will recall that Rule 68 requires the Prosecutor, as soon as practicable, to disclose exculpatory material to the defence. The initial decision as to whether evidence is exculpatory has to be made by the Prosecutor.¹ The Prosecutor is presumed to discharge this obligation in good faith.² In the absence of proof that there has been an abuse of discretion the Chamber should not be inclined to intervene in the manner being proposed by Nzirorera.³

Whether Rule 68 Violated

3. Nzirorera has complained that the prosecution is in violation of Rule 68 in respect of witness BRA-1 and witness ALL-42, both of whom testified in the *Bagosora* case. By his own statement the testimonies of both these witnesses were transmitted to Nzirorera in July 2008. It is therefore misleading to submit to the Trial Chamber that there is a breach of Rule 68 in circumstances where Nzirorera has got the material from the prosecution in satisfaction of its disclosure obligations. The material has been transmitted to Nzirorera, and he is in possession of it.

4. In the instant case the Trial Chamber previously cited dicta from *Bagosora* where it was said that 'some specific information on RPF activities could be exculpatory in light of the charges against the accused in that specific case'. It further referred to the statement from the *Bagosora* Chamber where it said that 'evidence of RPF activities which have only a remote connection to the crimes alleged against the accused is not exculpatory'.⁴ The instant Trial Chamber then found that information concerning the RPF may be exculpatory to the extent that it is relevant to crimes alleged against the accused or to the evidence adduced during the prosecution case.⁵

¹ *Prosecutor v Blaskic*, Decision on the Appellant's Motions for the Production of Materials, 26 September 2000, para 39

² *Kordic and Cerkez*, Case No. IT-95-14/2-A, Judgement (AC), 17 December 2004, para. 183 ("the general practice of the International Tribunal is to respect the Prosecution's function in the administration of justice, and the Prosecution execution of that function in good faith"); *Karemera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 17 ("the Trial Chamber is entitled to assume that the Prosecution is acting in good faith").

³ *Prosecutor v Kordic*, Decision on Motion by Dario Kordic for Access to Unredacted Portions of October 2002 Interviews with Witness AT, 23 May 2003, para 24

⁴ *Karemera et al.*, Decision on Defence Motion for Disclosure of RPF Materials and for Sanctions Against the Prosecution, 19 October 2006, para 7

⁵ *Ibid*, para 8

5. The prosecution submits that no accused in this case has been charged with the murder of Gapyisi, President Habyarimana or Gatabazi. The Chamber may therefore agree that evidence from witnesses BRA-1 and ALL-42 on these matters has only a remote connection to the crimes charged, is not exculpatory and does not fall within the category of material to be disclosed under Rule 68. Nzirorera has cited dicta from the *Bagosora* case concerning the nature of such information as background and context. It may be thought that material which constitutes background and context is not information for purposes of Rule 68 and the prosecution is therefore under no obligation to disclose it.

BRA-1

6. Nzirorera is also misleading the Trial Chamber when he alleges that he did not previously receive any disclosure in respect of witness BRA-1. The records of the prosecution show that exculpatory material from the testimony of BRA-1 given on 6 April 2006 was disclosed to Nzirorera by CD on 21 February 2007 in anticipation of the evidence of witness XXQ.

7. In respect of testimony from BRA-1 on 5 April 2006 no disclosure was made as the Prosecutor, in the exercise of his discretion, did not deem testimony of the shooting down of President Habyarimana's aeroplane exculpatory. This point of view is consistent with the earlier determinations in this case where it was said that records and documents concerning the assassination of President Habyarimana need not be disclosed pursuant to Rule 68 where the accused is not charged with taking part in the assassination.⁶ Later attempts by the defence to obtain inspection of information concerning the assassination of President Habyarimana were also met with the criterion of materiality.⁷

ALL-42

8. In deliberating on the issues raised in relation to witness ALL-42 the prosecution invites the Trial Chamber to recall that even as it determined that it is in the interests of justice not to limit the scope of Rule 68 the Appeals Chamber nonetheless recognized that there may be a resultant unreasonable burden placed on the prosecution in discharging its disclosure obligations. The Appeals Chamber identified that the burden would attach both to the volume of material to be disclosed and the effort to be expended in determining whether material is exculpatory.⁸

⁶ *Prosecutor v Karemera et al*, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, para 15

⁷ *Prosecutor v Karemera et al*, Decision on Accused Nzirorera's Motion for Inspection of Materials, 5 February 2004, para 11; Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure, 5 July 2005, para 12

⁸ *Prosecutor v Kirstic*, Appeals Chamber Judgment, para 180

9. It is in the context of the volume of material to be searched and disclosed that the timing of the disclosure of the testimony of this witness was not made as soon as the testimony was given. The disclosure in respect of this witness was made in July 2008. Therefore, there is currently no existing breach warranting remedial measures by this Chamber. Indeed, the only valid argument would be that given that the witness testified in November 2006 there was a delay in making the disclosure. The only default would therefore be that the material was not disclosed 'as soon as practicable.' Late disclosure should fairly be treated differently to non-disclosure.

Issue of Prejudice

10. The prosecution submits that in his usual and inimitable way, Nzirorera has grossly exaggerated the breaches of Rule 68 by the prosecution by lumping instances where the Trial Chamber has found a breach with instances where it has not. By so doing the impression is conveyed that there have in fact been breaches on such a scale as to warrant the order for a stay of the proceedings which is being sought.

11. The allegation by Nzirorera that he has been prejudiced in the preparation of his case is unconvincing. His defence case is certainly not underway. On his own admission he was investigating witness BRA-1 and ALL-42 with a view to deciding whether to call them as his witnesses. He is therefore not required to divert any resources to investigate new material as he claims. It is the same material he claims he was investigating and it is still open to him to adduce evidence from both these persons.

12. Furthermore, the reliance on the *Lubango* case at the ICC is wholly misguided, wholly misplaced and is calculated to mislead this court into adopting the view that the issues raised there are of any relevance or application in the instant case. The *Lubango* case is remarkable if only for the novelty of the circumstances presented by the methodology employed by the prosecution in acquiring information, which resulted in its inability and consequent failure to meet its disclosure obligations.

13. In brief, the Prosecutor at the ICC, apparently used Article 54, a provision which should be extraordinarily relied upon to get leads for further investigations and evidence gathering, as the principal method by which it obtained evidence. As a consequence, the bulk of the prosecution evidence was subject to confidentiality agreements with the United Nations, non-governmental organizations and other entities. In the result, the prosecution had material which was substantive

evidence, but which it was not at liberty to disclose, even to the Trial Chamber.⁹ In that extreme case the Trial Chamber may be thought to have acted reasonably when it concluded that the fair trial rights of the accused were jeopardized. It therefore stretches the imagination for Nzirorera to submit that his circumstances are far more compelling than in the *Lubango* case.

14. It may well be that in no other trial in the history of international criminal justice has there been so many **applications** made for orders finding violations of Rule 68. However, Nzirorera has very helpfully shown that his numerous applications are wholly disproportionate, and bear no relationship to the number of times that the Trial Chamber has actually found violations. In order to cast the relatively small number of Rule 68 violations into a more negative light Nzirorera has supplemented his list with Rule 66 and Rule 67 violations.¹⁰

15. The Trial Chamber may wish to consider whether it is appropriate for Nzirorera to scandalize the Chamber by stating that this Chamber has been or is engaged in 'covering up for prosecutorial misconduct,' or is being 'guided by expediency' at the expense of fairness.¹¹

16. In an effort to unseat reason, Nzirorera resorts to impassioned pleas and thinly veiled chastisement of the Chamber. He has applied for a number of orders in paragraph 33 of his Motion, inviting the Chamber to employ courage as its instrument. There is no haemorrhaging which needs to be cauterized, as Nzirorera dramatically suggests.¹² The prosecution is confident that the Trial Chamber will remain grounded in reason, dispassionately and judiciously applying relevant legal principles.

17. In this regard the prosecution asks the Trial Chamber to find that there is no legal basis upon which it could state that the prosecution can no longer be relied upon to discharge its Rule 68 obligations. Furthermore, that there is no provision in the rules or the jurisprudence of this tribunal that authorizes the granting of any order for a special master to review all exculpatory material in the possession of the Prosecutor.

18. Additionally if the Chamber were to grant the stay of proceedings until the special master certifies that all exculpatory material in the possession of the prosecution has been disclosed, as prayed by Nzirorera, the trial would likely never resume. It is well established that the Prosecutor's

⁹ *Prosecutor v Lubango*, Case No. ICC-01/04-01/06, Decision on the Consequences of Non-Disclosure of exculpatory Materials Covered by Article 54(3)(e) agreements and the Application to Stay the Prosecution of the Accused, together with Certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, paras 62-76; and Decision on the Release of Thomas Lubango Dyilo, 2 July 2008.

¹⁰ Motion paras 23 and 24

¹¹ Motion para 32

¹² Motion para 36

duty to disclose is a continuous one. Therefore, there is no point in time when it could be certified that all exculpatory material in the possession of the Prosecutor has been disclosed.

19. The Prosecutor further submits that the Chamber may hold the view that an invitation to trample on Article 15 and impose its presence into the Office of the Prosecutor is ill conceived.

20. The Prosecutor urges the Trial Chamber to find:

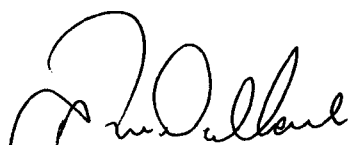
- That there has been no disclosure violation in relation to witness BRA-1 as disclosure of exculpatory material from his testimony was made from February 2007, and not July 2008 as Nzirorera submits;
- There has been disclosure of the testimony of witness ALL-42, albeit not 'as soon as practicable';
- That orders for a stay of proceedings and an appointment of a special master are unwarranted; and
- That there is no need for remedial and /or punitive measures.

WHEREFORE, the prosecution prays that the Trial Chamber will dismiss the Motion.

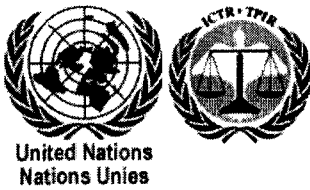
Respectfully submitted in Arusha, this 24th day of July 2008

For the Prosecutor:

Don Webster
Senior Trial Attorney



Alayne Frankson-Wallace
Trial Attorney



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

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

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Case Name:	The Prosecutor vs. Karemera.		Case Number: ICTR-98-44-T	
Dates:	Transmitted: 24-07-08		Document's date: 24-07-08	
No. of Pages:	6 pages	Original Language:	<input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda	
Title of Document:	Prosecutor's Response to Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings			
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