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ICTR-98-44-T
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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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: 18 February 2009

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

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**DECISION ON JOSEPH NZIRORERA'S 13TH, 14TH, AND 15TH NOTICES OF RULE
68 VIOLATION AND MOTIONS FOR REMEDIAL AND PUNITIVE MEASURES:
ZF, MICHEL BAKUZAKUNDI, AND THARCISSE RENZAHO**

Rule 68(A) of the Rules of Procedure and Evidence

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INTRODUCTION

1. Joseph Nzirorera has filed three additional notices of alleged disclosure violations by the Prosecution, and motions for remedial and punitive measures, concerning the testimony of Prosecution Witnesses ZF,¹ and concerning the testimony of other Prosecution witnesses related to Michel Bakuzakundi,² and Tharcisse Renzaho.³ Nzirorera requests that the Chamber: (1) make an explicit finding that the Prosecution violated its disclosure obligations under Rule 68 of the Rules of Procedure and Evidence for each witness; (2) impose such remedial and punitive measures as are warranted under the circumstances, taking into account the extent and pattern of the Prosecution's disclosure violations to date; (3) institute a stay of the proceedings; and (4) appoint a special master to oversee the remaining Rule 68 disclosures in the case. The Prosecution opposes all three motions in their entirety.⁴

DELIBERATIONS

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

2. 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.⁵

3. The determination of which materials are subject to disclosure under this provision is a fact-based inquiry made by the Prosecution.⁶ If an accused wishes to show that the

¹ Joseph Nzirorera's 13th Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures: Witness ZF, filed on 5 January 2009, ("ZF Motion"); Reply Brief: Joseph Nzirorera's 13th Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures: Witness ZF, filed on 19 January 2009, ("ZF Reply").

² Joseph Nzirorera's 14th Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures: Michel Bakuzakundi, filed on 12 January 2009, ("Bakuzakundi Motion"); Reply Brief: Joseph Nzirorera's 14th Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures: Michel Bakuzakundi, filed on 21 January 2009, ("Bakuzakundi Reply").

³ Joseph Nzirorera's 15th Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures: Tharcisse Renzaho, filed on 19 January 2009, ("Renzaho Motion"); Reply Brief: Joseph Nzirorera's 15th Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures: Tharcisse Renzaho, filed on 26 January 2009, ("Renzaho Reply").

⁴ Prosecutor's Response to Joseph Nzirorera's 13th Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures: Witness ZF, filed on 12 January 2009, ("ZF Response"); Prosecutor's Response to Joseph Nzirorera's 14th Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures: Michel Bakuzakundi, filed on 19 January 2009 ("Bakuzakundi Response"); Prosecutor's Response to Joseph Nzirorera's 15th Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures: Tharcisse Renzaho, filed on 23 January 2009, ("Renzaho Response").

⁵ *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse 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.

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

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.⁷ 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.⁸

4. Joseph Nzirorera has specifically identified the material sought,⁹ and the Prosecution does not dispute that the material is in its custody or under its control.¹⁰ Therefore, the Chamber finds that the first and third prongs of the test for determining whether the Prosecution has breached its disclosure obligations for all three witnesses under Rule 68(A) have been met. The Chamber will now determine whether the second prong of the test has been met for each witness, whether a disclosure violation occurred regarding each witness, and whether remedial and punitive measures are warranted.

Whether the Information Concerning ZF is Exculpatory

5. On 19 May 2006, Witness ZF testified that Colonel Théoneste Bagosora and Alphonse Higaniro were members of a secret network known variously as the Abakozi, Friends of the Alliance, Dragons, or *réseau zéro*.¹¹ However, in October 2008, the Prosecution disclosed to Joseph Nzirorera a statement from Bagosora in which he said that he was not a member or *réseau zéro*, and was not aware of its existence in Rwanda; and a statement from Higaniro in which he stated that he was not a member of *réseau zéro*. Nzirorera contends that these statements are exculpatory, and should have been disclosed to him by the Prosecution under Rule 68(A), because they directly contradict ZF's testimony on these issues, and therefore affect his credibility.

6. The Prosecution claims that, while contradictory, the material is not exculpatory because the Chamber has already ruled that the evidence concerning membership in *réseau zéro* should be excluded because it is not pleaded in the Indictment.¹² In support of this proposition, the Prosecution relies on the Chamber's Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions Against the Prosecution and for Exclusion of Evidence Outside the Scope of the Indictment of 19 October 2006.¹³

⁷ *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.

⁸ *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.

⁹ ZF Motion, paras. 3,5 ; Bakuzakundi Motion, paras. 4,6 ; Renzaho Motion, paras. 4-8.

¹⁰ ZF Response, para. 2 ; Bakuzakundi Response, paras. 5-6 ; Renzaho Response, para. 5.

¹¹ T. 19 May 2006, p. 19.

¹² ZF Response, para. 3.

¹³ *Karemera et al.*, Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions Against the Prosecution and for Exclusion of Evidence Outside the Scope of the Indictment (TC), 19 October 2006.

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7. However, the Chamber recalls that it did not find that the evidence on *réseau zéro* was categorically inadmissible. Instead, it clearly stated ZF's evidence on *réseau zéro* was inadmissible to prove the material fact that the accused participated in this network because they were not put on notice of this allegation, but admissible to the extent that it was related to the existence of the *Akazu*,¹⁴ as pleaded in the Indictment.¹⁵

8. Nevertheless, even if the Chamber had found that any evidence on *réseau zéro* was categorically inadmissible, this does not alter the fact that the two statements at issue in the ZF Motion contradict portions of ZF's testimony, and are therefore exculpatory and subject to disclosure under Rule 68(A) because they affect ZF's credibility. The Chamber reminds the Prosecution that material, which affects the credibility of a witness adverse to the Defence, is considered exculpatory and subject to disclosure under Rule 68(A).¹⁶

9. The Prosecution further argues that its disclosure obligations under Rule 68(A) do not extend to pursuing every possible avenue of investigation into a witness' credibility on behalf of the Defence.¹⁷ The Chamber reminds the Prosecution that this is not the letter of the jurisprudence surrounding Rule 68(A). The Appeals Chamber has simply stated that, under Rule 68(A), the Prosecution must disclose any exculpatory material to the defence, and that whether material is exculpatory depends on an evaluation of whether there is any possibility, in light of the submissions of the parties, that the information could be relevant to the defence of the accused.¹⁸

10. Finally, the Prosecution argues that there is no express contradiction in Théoneste Bagosora's statement that he is not a member of *réseau zéro* because that statement is dated 31 October 1992, and therefore only covers a small part of the existence of *réseau zéro*. The Chamber disagrees and finds that, regardless of the date of Bagosora's statement, it still contradicts ZF's testimony enough to render it exculpatory and subject to disclosure under Rule 68(A). Accordingly, the Chamber finds that the Prosecution has violated its disclosure obligations under Rule 68(A) concerning the statements related to ZF.

Whether the Information Concerning Michel Bakuzakundi is Exculpatory

11. On 8 June 2006, Witness BTH testified that, after an RPF attack in February 1993, a meeting was held at the Mukingo communal office at which the formation of the *Amahindure*

¹⁴ The Akazu was a group affiliated with the alleged "Hutu Power" movement. See *Prosecutor v. Édouard Karemera, Mathieu Ndirumapatse and Joseph Nzirorera*, Case No. ICTR-98-44-T, ("*Karemera et al.*"), Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions Against the Prosecution, and for Exclusion of Evidence Outside the Scope of the Indictment (TC), 19 October 2006, para. 27.

¹⁵ *Karemera et al.*, Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions Against the Prosecution, and for Exclusion of Evidence Outside the Scope of the Indictment (TC), 19 October 2006, para. 28.

¹⁶ *Karemera et al.*, Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings (TC), 11 September 2008, para. 11.

¹⁷ ZF Response, para. 4.

¹⁸ *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.

or Virunga Force was announced.¹⁹ He also testified that Michel Bakuzakundi was one of the organizers of the meeting, and that he had attended the meeting.²⁰

12. On 5 December 2006, Witness GBU testified that Michel Bakuzakundi attended the swearing-in ceremony of Juvenal Kajelijeli in June 1994 at which Joseph Nzirorera had congratulated the *Interahamwe* for killing the Tutsi of Mukingo *commune*.²¹

13. However, in September 2008, the Prosecution disclosed to Joseph Nzirorera a statement from Michel Bakuzakundi from 1996, in which he stated that: (1) he was continually on mission for work outside Rwanda from September 1990 to January 1994; and (2) that his family was evacuated to Nairobi, Kenya, by the United Nations on 17 April 1994.²² Nzirorera contends that these statements are exculpatory, and should have been disclosed to him by the Prosecution under Rule 68(A), because they affect the credibility of BTH and GBU's testimony by casting doubt on Bakuzakundi's ability to: (1) organize and be present at the meeting where the formation of the Amahindure was announced (since it occurred soon after the February 1993 RPF attack, at a time when he claims to have been frequently out of the country); and (2) be present at Kajelijeli's swearing-in ceremony (since it occurred in June 1994, and his family was evacuated to Nairobi in April 1994).²³

14. The Prosecution contends that the information at issue concerning Michel Bakuzakundi is not exculpatory, and therefore not subject to disclosure under Rule 68(A), because it does not definitively state that Bakuzakundi was not in Rwanda at the exact time that the *Amahindure* meeting took place, nor that he never returned to Rwanda after his family was evacuated to Nairobi. While Bakundakuzi's statements lack the precision raised by the Prosecution, the Chamber nonetheless finds that they are exculpatory and subject to disclosure under Rule 68(A) because they affect the credibility of two Prosecution witnesses by raising the possibility that Bakundakuzi could have been outside the country at the time the events at issue took place. Accordingly, the Chamber finds that the Prosecution has violated its disclosure obligations under Rule 68(A) concerning the statements related to Bakundakuzi.

Whether the Information Concerning Tharcisse Renzaho is Exculpatory

15. On 6 March 2006, Witness UB testified that *préfet* Tharcisse Renzaho never tried to stop the killings in April 1994,²⁴ and that he attended the meetings of *conseillers* and "security council" of Kigali *préfecture* in the days after the death of President Habyarimana, and that nobody at the meeting called for the killings to stop.²⁵ On 27 October 2006, Witness

¹⁹ T. 8 Jun. 2006, p. 45.

²⁰ T. 8 Jun. 2006, p. 46.

²¹ T. 5 Dec. 2006, p. 24.

²² Bakuzakundi Motion, paras 4-7.

²³ Bakuzakundi Motion, paras. 5-6, 9-11.

²⁴ T. 6 Mar. 2006, p. 26.

²⁵ T. 27 Feb. 2006, p. 41.

ALG testified that none of the authorities in Kigali stated that the killings should stop,²⁶ and that he only heard *préfet* Renzaho call for the killings to stop on one occasion, at a security meeting at the *préfecture* in May 1994, but that he did not mean it with his heart.²⁷ Renzaho is listed as one of Joseph Nzirorera's co-conspirators, and a member of the alleged joint criminal enterprise to which Nzirorera belonged.²⁸

16. However, in September 2008, the Prosecution disclosed to Joseph Nzirorera a statement from Tharcisse Renzaho from 1997 in which he said that: (1) the Kigali *préfecture* security council adopted several measures to try to stop the killing; (2) meetings with the *bourgmestres* and *conseillers* were held at least once a week to follow up measures taken and restore calm; and (3) he tried to stop the killings.²⁹ Nzirorera contends that Renzaho's statement is exculpatory, and should have been disclosed to him by the Prosecution under Rule 68(A), because it directly contradict UB and ALG's testimony on these issues, and therefore affects their credibility.

17. Noting that the Prosecution does not dispute that Tharcisse Renzaho's statement is exculpatory, the Chamber indeed finds that it is exculpatory because it directly contradicts UB and ALG's testimony concerning the measures taken by Renzaho and other authorities to maintain order in Kigali during the beginning of the genocide in Rwanda. Accordingly, the Chamber finds that the Prosecution has violated its disclosure obligations under Rule 68(A) concerning the statements related to Renzaho.

Whether Remedial and Punitive Measures are Warranted

18. 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.³⁰ The accused must demonstrate that he has suffered material prejudice as a result of the late disclosure in order for remedial and/or punitive measures to be warranted.³¹

Witness ZF

19. Joseph Nzirorera claims that he was prejudiced by the Prosecution's disclosure violation related to ZF because he was unable to use the materials at issue in his cross-examination of ZF in 2006.³²

20. The Prosecution contends that Joseph Nzirorera has not suffered prejudice because: (1) the Chamber excluded all evidence related to *réseau zéro* in its 19 October 2006 Decision; (2) Colonel Bagosora testified in open session on 1 November 2005 that he was not a member of *réseau zero*, which Nzirorera could have researched and discovered on his own;

²⁶ T. 27 Oct. 2006, p. 12.

²⁷ T. 27 Oct. 2006, p. 9.

²⁸ Indictment, para. 6(i).

²⁹ Renzaho Motion, paras. 5-7.

³⁰ *Prosecutor v. Juvenal Kajelijeli*, Case No. ICTR-98-44A-A, Judgement (AC), 23 May 2005, para. 262

³¹ *Ibid.*

³² ZF Motion, para. 11.

and (3) Nzirorera could have simply looked for the ZF statements at issue on the Electronic Disclosure Suite ("EDS") database.³³

21. The Chamber finds that its 19 October 2006 Decision has no bearing on whether Joseph Nzirorera was prejudiced by the Prosecution's ZF disclosure violation because the relevant issue is not the extent to which the *réseau zero* information was admissible at trial. Instead, the issue is whether Colonel Bagosora and Alphonse Higaniro's statements affect ZF's credibility. Furthermore, the Chamber disagrees with, and finds absolutely lacking in merit, the Prosecution's contention that it does not have to abide by established Rule 68(A) disclosure obligations when it feels that an accused might be able to find the information on his own.

22. Accordingly, the Chamber finds that Nzirorera was prejudiced to some extent by the Prosecution's Rule 68(A) disclosure violations concerning ZF because he was not able to fully cross-examine ZF with Colonel Bagosora and Alphonse Higaniro's statements.

Michel Bakuzakundi

23. Joseph Nzirorera claims that he was prejudiced by the Prosecution's disclosure violation related to Michel Bakuzakundi because he was unable to use the materials at issue in his cross-examination of BTH and GBU in 2006.³⁴

24. The Prosecution attempts to justify its specific disclosure violation concerning Michel Bakuzakundi's statements by stating that it otherwise does a good job of disclosing many documents under Rule 68, and that it has actually disclosed many documents relating to GBU to Joseph Nzirorera.³⁵ While the Chamber acknowledges and appreciates the Prosecution's efforts in this regard, it does not find that it excuses the specific disclosure violations raised in the Bakuzakundi Motion.

25. The Prosecution also claims that Joseph Nzirorera has not suffered prejudice because he has been able to challenge GBU's credibility using more compelling documents, which it disclosed to Nzirorera, than those at issue in the Bakuzakundi Motion.³⁶ The Chamber recalls that Rule 68(A) refers to "any material"; thus, the Prosecution's disclosure obligations necessarily extend beyond those documents, which the Prosecution considers to be the most compelling for an accused's cross-examination.

26. Accordingly, the Chamber finds that Nzirorera was prejudiced to some extent by the Prosecution's Rule 68(A) disclosure violations concerning Michel Bakuzakundi because he was not able to fully cross-examine BTH and GBU with Bakuzakundi's statements.

Tharcisse Renzaho

³³ ZF Response, paras. 6-8.

³⁴ Bakuzakundi Motion, para. 13.

³⁵ Bakuzakundi Response, para. 9.

³⁶ Bakuzakundi Response, para. 11.