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TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 26 March 2009

THE PROSECUTION

v.

Édouard KAREMERA
Matthieu NGIRUMPATSE
Joseph NZIRORERA
Case No. ICTR-98-44-T

JUDICIAL RECORDS ARCHIVE
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**DECISION ON PROSECUTOR'S RULE 68(D) APPLICATION AND JOSEPH
NZIRORERA'S 12TH NOTICE OF RULE 68 VIOLATION**

Rule 68 of the Rules of Procedure and Evidence

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INTRODUCTION

1. In October 2008, the Prosecution disclosed to the Defence a number of statements made in 2001 and 2002 by witnesses concerning RPF activities in Rwanda pursuant to Rule 66(B) of the Rules of Procedure and Evidence. With respect to eleven of those statements, which were disclosed in redacted form ("Redacted Statements"), the Prosecution then filed an *ex parte* application pursuant to Rule 68(D) seeking to be relieved of its obligation to disclose the identifying information of the witnesses.¹ Pursuant to an Order of the Chamber,² the Prosecution filed written submissions in support of the Rule 68(D) Application on 10 February 2009.³
2. On 18 February 2009, the Chamber refused Joseph Nzirorera's request for disclosure of the Rule 68(D) Application, but permitted Nzirorera, in the interests of justice, to file submissions regarding the Rule 68(D) Application,⁴ which he did on 19 February 2009.⁵
3. Joseph Nzirorera has also filed a motion with respect to four of the Redacted Statements ("Disputed Statements"), claiming that the Prosecution violated Rule 68(A) by failing to disclose them in a timely manner and also seeking their disclosure in un-redacted form.⁶ Nzirorera seeks various sanctions and remedial measures. The Prosecution asks that the Rule 68 Motion be dismissed in its entirety.⁷

DELIBERATIONS

Rule 68(D) Application

4. Rule 68(D) offers the Prosecution a mechanism to be relieved of its obligation to disclose exculpatory material, an obligation which is fundamental to the fairness of

¹ *Ex Parte* Application to withhold identifying information from disclosure, filed 20 October 2008 ("Rule 68(D) Application").

² *The Prosecutor v. Édouard Karemera, Matthieu Ndirumpate and Joseph Nzirorera*, Case No. ICTR-98-44-T ("*Karemera et al.*"), Order for the Prosecution to File Written Submissions, 3 February 2009.

³ Prosecution's *Ex Parte* Written Submissions Pursuant to Order of 3 February 2009, filed 10 February 2009 ("Prosecution Written Submissions").

⁴ *Karemera et al.*, Decision on Joseph Nzirorera's Motion for Disclosure of *Ex Parte* Filings, 18 February 2009.

⁵ Supplemental Submission: Joseph Nzirorera's 12th Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures: Evidence of RPF Infiltration and Crimes, filed 19 February 2009.

⁶ Joseph Nzirorera's 12th Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures: Evidence of RPF Infiltration and Crimes, filed 11 November 2008 ("Rule 68 Motion"); Reply Brief: Joseph Nzirorera's 12th Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures: Evidence of RPF Infiltration and Crimes, filed 24 November 2008 ("Rule 68 Reply Brief").

⁷ Prosecutor's Response to Joseph Nzirorera's 12th Notice of Rule 68 Violation: Evidence of RPF Infiltration and Crimes, filed 17 November 2008 ("Prosecution Response").

proceedings.⁸ An exemption may be granted if disclosure of the material would 1) prejudice further or ongoing investigations; 2) be contrary to the public interest; or 3) affect the security interests of any state.

5. The Prosecution argues that it should be relieved of its obligation to disclose identifying information concerning the witnesses who made the Redacted Statements because they are fearful for their personal safety and that of their family members.⁹ The witnesses gave the Redacted Statements on the condition that their identifying information would not be disclosed until such time as they are granted full protection by either the Tribunal or courts in other jurisdictions.¹⁰

6. The Prosecution further argues that as the Redacted Statements contain relevant but merely contextual evidence, the right to life of the witness outweighs the benefit of full disclosure to the Defence, particularly when the substance of the Redacted Statements have been provided to the Defence.¹¹ The Chamber must cautiously balance the right of an accused to a fair trial and to prepare his defence with revealing the identities of a witness in circumstances that may lead to his or her death.¹²

7. As this Chamber has previously held, concern for the safety of witnesses is not a reason falling within the ambit of the exception provided by Rule 68(D).¹³ Permitting the Prosecution to withhold exculpatory information on un-enumerated grounds undermines the scope of Rule 68(A) and would be contrary to the interests of justice, given the importance of exculpatory information to trial fairness.¹⁴ In the absence of any submissions demonstrating that the conditions of Rule 68(D) are satisfied, the Chamber finds that the Prosecution cannot be exempted from full disclosure of the Redacted Statements.

8. However, the Chamber accepts the Prosecution's concern regarding the safety of the witnesses and notes its submission that the witnesses' identities would not be revealed until they were provided with protection by the Tribunal. The Chamber therefore, *proprio motu*, orders that the Defence and the Accused should not disseminate to the public and media any of the witnesses' identifying information. Further, should the witnesses agree to an interview

⁸ *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T ("*Bagosora et al.*"), Decision on Disclosure of Identity of Prosecution Informant, 24 May 2006, para 8.

⁹ Prosecution Written Submissions, para. 8.

¹⁰ Prosecution Written Submissions, paras. 8-9.

¹¹ Prosecution Written Submissions, paras. 12, 15.

¹² Prosecution Written Submissions, paras. 11-12.

¹³ *Karemera et al.*, Decision on Prosecution's Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and his Family, 21 June 2006, para. 7.

¹⁴ *Bagosora et al.*, Decision on Disclosure of Identity of Prosecution Informant, paras. 8-10.

with the Defence, after notifying the Prosecution, the Witness and Victims Support Section of the Tribunal ("WVSS") shall take all necessary arrangements to facilitate the interview.

Rule 68 Motion

9. 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. The initial determination of whether material is exculpatory, a fact-based judgement, rests with the Prosecution. To that end, the Prosecution is expected to actively review the material in its possession for exculpatory content. The duty to disclose exculpatory material is of a positive and continuing nature, notwithstanding the public or confidential character of that material.¹⁵

10. 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.¹⁶

11. The Disputed Statements are attached as confidential annexes to the Rule 68 Motion.¹⁷ They concern, in general, infiltration and crimes committed by the RPF in the area controlled by the Rwandan government. It is common between the parties that Joseph Nzirorera has specifically identified the material sought and that the material is in the possession of the Prosecution.¹⁸ The Chamber therefore finds that the first and third criteria for demonstrating a violation of Rule 68(A) have been met. The primary controversy between the parties is whether the Disputed Statements are exculpatory.

12. Joseph Nzirorera argues, in general, that the Disputed Statements are exculpatory by reference to decisions by this Chamber as well as other Chambers which have held that information concerning infiltration of the *Interahamwe* by the RPF, the activities of RPF "technicians", and the efforts of the RPF to undermine the Arusha Accords by committing

¹⁵ *The Prosecutor v. Nindiliyimana*, Case No. ICTR-00-56 ("*Ndindiliyimana et al.*"), Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008, paras. 9-12; *Bagosora et al.*, Decision on Ntabakuze Motion for Disclosure of Prosecution Files, 6 October 2006, para. 2.

¹⁶ *Karemera et al.*, Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings, 11 September 2008, paras. 5-6.

¹⁷ Confidential Annexes to: Joseph Nzirorera's 12th Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures: Evidence of RPF Infiltration and Crimes, filed 11 November 2008.

¹⁸ Rule 68 Motion, para. 5; Prosecution Response, paras. 4-5.

crimes is subject to disclosure under Rule 68.¹⁹ The Chamber recalls that it must undertake an individualized assessment of each statement since the exculpatory character of material depends on the nature of the charges and the evidence heard against the accused.²⁰ The Chamber also recalls that 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.²¹

i. Annexes A, B & C

13. With respect to Annex A,²² the witness states that the "technicians" began operating in Kigali as of February 1994. He further states that the "technicians" were responsible for several assassinations, including of an individual named Bucyana, which was attributed to the MRND. The objective of the "technicians" was to create tension in Kigali; to provoke a confrontation between the MDR, the CDR, the PSD and the *Interahamwe* because the coalition against the RPF was growing; as well as to protect active members of the RPF who infiltrated Kigali.

14. In Annex B,²³ the witness provides a general description of the mission of the 600 "technicians" in Kigali before the war, namely, protecting certain Tutsi individuals, liquidating enemies of the RPF, creating a climate of total insecurity; anything that would trigger the war. The "technicians" infiltrated *Interahamwe* militias and even killed Tutsi. The witness provides names of some of the "technicians" whom he can remember. The witness does not, as Joseph Nzirorera claims, state that the "technicians" committed crimes were which blamed on the MRND.²⁴

15. In Annex C,²⁵ the witness discusses the Intelligence Staff of the RPF. One of their roles was to find information concerning the FAR in the "Zone Tampon", but the most important role was to destabilize the regime in that zone, by killing civilians. They then circulated

¹⁹ Rule 68 Motion, paras. 5-7; Rule 68 Reply Brief, para. 11; citing *Karemera et al.*, Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings, 11 September 2008, para. 10; *Ndindiliyimana et al.*, Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008, para. 27; *Bagosora et al.*, Decision on Disclosure of Defence Witness Statements in the Possession of the Prosecution Pursuant to Rule 68(A), 8 March 2006, para. 6.

²⁰ *Karemera et al.*, Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution, 19 October 2006 ("19 October 2006 Decision"), para. 7.

²¹ *Karemera et al.*, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion" (AC), 14 May 2008, para. 12.

²² R000-0223-R000-0236.

²³ R000-0204-R000-0212.

²⁴ Rule 68 Motion, para. 2(B).

²⁵ R000-0269-R000-0279.

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rumours that the government was unable to protect the civilian population. The witness also states that, two weeks before the death of President Habyarimana, he participated in a military mission in Bwisege, Byumba *préfecture*, in the Zone Tampon in which they killed civilians. He knows that other soldiers participated in the same kind of mission in other zones. He later heard on Radio Muhabura that the FAR killed people in Bwisege and that the Habyarimana regime violated the Arusha Accords.

16. The Chamber accepts Joseph Nzirorera's assertion that these three statements have marginal exculpatory value.²⁶ The Indictment alleges that Nzirorera exercised effective control over the *Interahamwe* and participated in a joint criminal enterprise with political authorities and leaders of the *Interahamwe*, among others. Given that Annexes A, B and C allege that some crimes which were blamed on the MRND, *Interahamwe* or the Habyarimana regime were in fact committed by the RPF, including the killing of Tutsi, the Chamber finds that despite being exceedingly general, the statements pass the threshold and are exculpatory.

ii. *Annex D*

17. In Annex D,²⁷ the witness states that the "technicians" were formed during 1993, as a 600 man force was moving to Kigali. He states that they were soldiers who were chosen, trained and deployed for killing specific targets and lists three people killed by the "technicians". He also provides names of the "technicians" that he can remember. The statement does not, as Joseph Nzirorera suggests, state that the "technicians" were sent to Kigali to infiltrate the population and commit murders to be blamed on the MRND.²⁸

18. The Chamber finds that this statement does not suggest the innocence or mitigate the guilt of Joseph Nzirorera or relate to the credibility of Prosecution evidence. The Chamber recalls that evidence regarding RPF assassinations is not exculpatory if the accused is not charged in relation to these acts and that evidence of RPF activities which have only a remote connection to the crimes alleged against the accused are not exculpatory.²⁹ Nzirorera is not charged with the deaths of the individuals mentioned in Annex D and the Chamber finds that the information provided is simply too general and too remote to have any connection to the criminal conduct alleged against Nzirorera and therefore to have any exculpatory value.

²⁶ Rule 68 Motion, para. 7; Rule 68 Reply Brief, para. 8.

²⁷ R000-0217-R000-0222.

²⁸ Rule 68 Motion, para. 2(D); Prosecution Response, para. 7(D).

²⁹ *Karemera et al.*, Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings, 11 September 2008, para. 14; *Bagosora et al.*, Decision on Ntabakuze Motion for Disclosure of Prosecution Files, 6 October 2006, para. 5.

19. Although Nzirorera argues, in general, that the Disputed Statements would have allowed him to interview RFP insiders and to get more specific information about who the infiltrators were and what crimes they committed,³⁰ the Chamber does not find that this possible use of the Disputed Statements, and Annex D in particular, makes the material exculpatory. In the context of Rule 68, material which is "relevant to the defence of the accused",³¹ should be understood to be material which may tend to disprove a material fact against the accused, undermine the credibility of evidence intended to prove those material facts, or even serve to sustain a valid excuse or justification for the alleged criminal conduct.³² Information which may or may not prove useful to the preparation of the defence case is better treated under Rule 66 of the Rules.

iii. Remedial Measures & Sanctions

20. It is undisputed that the Disputed Statements have been in the possession of the Prosecution since 2001 and 2002, but not disclosed to the Defence until October 2008.³³ The Chamber finds that such a delay in disclosure cannot, by any stretch, comply with the timeliness requirement of Rule 68. Consequently, the Chamber finds that the Prosecution violated Rule 68 by failing to disclose Annexes A, B and C as soon as practicable.

21. The Chamber recalls that the fact that material has not been disclosed in a timely manner does not *per se* prejudice the accused. 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.³⁴

22. Joseph Nzirorera argues that he has been prejudiced by the Prosecution's breach of Rule 68 because he has been prevented from learning the identity of potential witnesses and because he has been unable to confront Prosecution witnesses with the information contained

³⁰ Rule 68 Reply Brief, para. 10.

³¹ *Karemera et al.*, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion" (AC), 14 May 2008, para. 12.

³² See *The Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, Decision on Kanyabashi's Motion for Disclosure Pursuant to Rule 68, 25 February 2009, para. 27; *Bagosora et al.*, Decision on Ntabakuze Motion for Disclosure of Prosecution Files, 6 October 2006, para. 4; *Bagosora et al.*, Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68(A), 8 March 2006, para. 7; *The Prosecutor v. Nshogoza*, Case no. ICTR-2007-91-PT, Decision on Defence Motions for Disclosure Under Rules 66 and 68 of the Rules of Procedure and Evidence, 22 December 2008, para. 31; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-I ("*Bizimungu et al.*"), Decision on Justin Mugenzi's Request for Disclosure Order, 23 July 2008, para. 7; *Bizimungu et al.*, Decision on Bicamumpaka's Urgent Motion for Disclosure of Exculpatory Material, 4 February 2009, para. 5.

³³ Rule 68 Reply Brief, para. 3; Prosecution Response, para. 14.

³⁴ *Karemera et al.*, Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings, 11 September 2008, para. 21; *Ndindilyumana*, Defence on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008, para. 14.

in Annexes A, B and C.³⁵ Accordingly, Nzirorera requests a stay of proceedings and the appointment of a special master to certify that all exculpatory material has been disclosed, as well as sanctions against the Prosecution for its violation of Rule 68.³⁶

23. The Chamber finds that Joseph Nzirorera has been marginally prejudiced by the late receipt of Annexes A, B and C in October 2008, in light of the general nature of the information provided. Although he has now had them in his possession for several months, the Chamber notes that because they have been redacted, Nzirorera has likely not been able to conduct further investigations on the basis of those statements. Therefore, should Nzirorera require more time to conduct such investigations, or wish to recall the seven Prosecution witnesses he submits he could have cross-examined more fully with this information,³⁷ the Chamber finds that he is entitled to file submissions demonstrating good cause for such relief.

24. With respect to the Prosecution's conduct, the Prosecution seeks to explain its failure to disclose Annexes A, B and C earlier by reference to the structure of the Office of the Prosecutor. Until 25 September 2008, Annexes A, B and C were in the possession of the Special Investigations Unit ("SIU"), managed exclusively by a specially appointed Senior Trial Attorney and not accessible to the *Karemera* prosecution team.³⁸ Once the SIU made Annexes A, B and C available to the *Karemera* prosecution team, they were reviewed and disclosed to the Defence.³⁹

25. The Prosecution acknowledges this Chamber's repeated admonitions that the Prosecution is expected to function as a unitary office in meeting its obligations,⁴⁰ but suggests that this legal standard must be tempered by certain practical considerations. The Prosecution also asks the Chamber to consider whether it is consistent with the principles of natural justice to hold a particular trial team responsible for disclosing materials which it has no access to.⁴¹

26. The Chamber has no reason to doubt the Senior Trial Attorney's representation that, once he received Annexes A, B and C, he disclosed them to the Defence as soon as

³⁵ Rule 68 Motion, paras. 20-21.

³⁶ Rule 68 Motion, paras. 22 and 24; Rule 68 Reply Brief, para. 12.

³⁷ Rule 68 Motion, para. 21.

³⁸ Prosecution Response, paras. 2-4.

³⁹ Prosecution Response, para. 4.

⁴⁰ See *Karemera et al.*, Decision on Joseph Nzirorera's 19th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Jean-Marie Vianney Mudahinyuka, 9 February 2009, para. 17; *Karemera et al.*, 19 October 2006 Decision, para. 11; See also *Bagosora et al.*, Case No. ICTR-98-41-AR73 & ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders (AC), 6 October 2005, para. 43.

⁴¹ Prosecution Response, paras. 2 and 6.

practicable. Absent a finding of misconduct or negligence, the Chamber does not find it appropriate to sanction the *Karemera* Prosecution team. However, no reasons have been offered to explain the failure of the SIU to review Annexes A, B and C earlier and provide them to the *Karemera* Prosecution team in a timely manner. Although the primary obligation with respect to disclosure lies with the prosecution team assigned to the case, it should go without saying that if the Office of the Prosecutor chooses to structure itself in such a way that potentially relevant and exculpatory material is available only to the SIU, then the SIU shares the burden of meeting the Prosecution's disclosure obligations under the Rules.

27. The Chamber has repeatedly issued warnings to the Prosecution in this case regarding its dilatory disclosure practices, which apparently have not reached the SIU. Given the marginal prejudice in this instance, the Chamber does not find that a stay of proceedings or the appointment of a special master is called for. Nonetheless, it remains gravely concerned at the ongoing failure of the Prosecution to meet its fundamental duty to provide disclosure.⁴² Further, the Chamber finds the SIU's unexplained failure to comply with its disclosure obligations deeply troubling and therefore issues a warning pursuant to Rule 46 to the Senior Trial Attorney in the SIU, Bill Egbe. The Chamber also finds that a copy of this decision should be served on the Prosecutor personally.

28. Joseph Nzirorera also argues that the Prosecution's representation in 2006 that it was not aware of any other information concerning RPF infiltration and crimes that should be disclosed pursuant to Rule 66 or 68 was a serious misrepresentation to the Chamber in light of the disclosure of Annexes A, B and C.⁴³ However, the Chamber notes that this statement undoubtedly sprung from the ignorance of the *Karemera* Prosecution team that such information was in the possession of the SIU. As such, the Chamber finds that there is no need to address this issue beyond what is stated above.

29. Joseph Nzirorera further complains that the Prosecution disclosed Annexes A, B and C in redacted form, despite an admonition from this Chamber in another decision regarding the Prosecution's failure to disclose similar statements in un-redacted form.⁴⁴ As Nzirorera is no doubt aware, however, the sanction imposed by the Chamber in the 19 October 2006 Decision arose directly from the failure of the Prosecution to comply with a direction in an

⁴² *Prosecutor v. Kordic et al.*, Case No. IT-95-14/2-A, Decision on Motions to Extend Time for Filing Appellant's Brief (AC), 11 May 2001, para. 14.

⁴³ Rule 68 Motion, paras. 9-12 and 19; See Prosecutor's Response to Nzirorera's Motion to Compel Disclosure of RPF Material and for Sanctions, filed 29 September 2006, para. 9.

⁴⁴ Rule 68 Motion, paras. 15-17; See *Karemera et al.*, 19 October 2006 Decision, para. 17.

earlier decision dated 4 July 2006 to disclose the specific statements at issue in un-redacted form.⁴⁵ There was no general finding, as Nzirorera seeks to imply, that the Prosecution must always disclose RPF material, or any other information, in un-redacted form. Rule 68(D) specifically permits the Prosecution to be relieved of its obligation to disclose information in its possession if it meets the criteria outlined therein. Since the Prosecution sought to avail itself of Rule 68(D) when disclosing Annexes A, B and C in redacted form, the Chamber finds no basis to hold that the Prosecution was engaged in any misconduct.

30. With respect to Joseph Nzirorera's request for Annexes A, B and C in un-redacted form, in light of the disposition concerning the Rule 68(D) Application above, the Chamber finds that this request is moot.

FOR THE ABOVE MENTIONED REASONS, THE CHAMBER

- I. DENIES** the Prosecution's Rule 68(D) Application;
- II. ORDERS** that the Prosecution's Rule 68(D) Application be reclassified as an *inter partes* document, but remain confidential;
- III. ORDERS** that the Defence for each accused and the accused persons shall not share, reveal or discuss, directly or indirectly, any documents or any information contained in any documents, or any other information which could reveal or lead to the identification of any person whose statements shall be disclosed pursuant to this decision, to any person or entity other than the accused, assigned Counsel or other persons working on the Defence teams;
- IV. ORDERS** that the Defence for each accused shall notify the Prosecution in writing, with reasonable notice, and WVSS if it wishes to contact any person who submitted a statement disclosed pursuant to this decision. Should the person concerned agree to the interview, WVSS shall immediately undertake all necessary arrangements to facilitate the interview;
- V. GRANTS** Joseph Nzirorera's Rule 68 Motion in part, finding that Annexes A, B and C were not disclosed in a timely manner pursuant to Rule 68(A);

⁴⁵ *Karemera et al.*, Decision on Prosecutor's Application pursuant to Rules 39, 68 and 75 of the Rules of Procedure and Evidence for an Order for conditional Disclosure of Witness Statements and Other Documents Pursuant to Rule 68(A), 4 July 2006, para. 8.