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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of an interlocutory appeal filed by the Office of the Prosecutor ("Prosecution") on 16 October 2007¹ against two decisions rendered by Trial Chamber III on 20 and 21 September 2007, concerning reciprocal disclosure obligations of the parties under Rules 66(B) and 67(C) of the Rules of Procedure and Evidence of the Tribunal ("Rules").² Mr. Nzirorera responded on 18 October 2007,³ and the Prosecution replied on 22 October 2007.⁴

A. Background

2. On 31 May 2007, Mr. Nzirorera requested that the Prosecution allow him to inspect all statements made by Witness BWN in its possession. The Prosecution declined the request and, on 11 June 2007, Mr. Nzirorera filed a motion requesting the Trial Chamber to order the Prosecution to allow such inspection pursuant to Rule 66(B).⁵

3. On 14 June 2007,⁶ the Prosecution requested that Mr. Nzirorera provide reciprocal disclosure of memoranda regarding his interviews with Abdulmohamed Bandali and Prosecution Witness ANU. Mr. Nzirorera declined the request on the ground that he did not intend to introduce the material sought as evidence.⁷ Nonetheless, a memorandum of Mr. Nzirorera's interview of Witness

¹ On 9 October 2007, the Prosecution filed confidentially the Prosecutor's Interlocutory Appeal Pursuant to Rule 73(C), Respecting the Decisions of Trial Chamber III on Joseph Nzirorera's Motion for Inspection and on Prosecution Cross-Motion for Enforcement of Reciprocal Disclosure [Rule 66(B), Rule 67(C), and Rule 73(C)]. Following the filing, on 11 October 2007, of Joseph Nzirorera's Motion for Access to Confidential Decision, for Extension of Time to File Response, and for Filing of Prosecution Appeal as Public Document ("Motion for Extension of Time"), in which Mr. Nzirorera, *inter alia*, requested the Appeals Chamber to direct the Prosecution to file a public version of the appeal, the Prosecution filed a public redacted version of its appeal on 16 October 2007 ("Appeal").

² *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Inspection of Statement of [Redacted] – Rule 66(B) of the Rules of Procedure and Evidence, 20 September 2007; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecution Cross-Motion for Enforcement of Reciprocal Disclosure – Rule 67 of the Rules of Procedure and Evidence, 21 September 2007 (respectively "Decision on Motion for Inspection" and "Decision on Cross-Motion for Reciprocal Disclosure"; collectively, "Impugned Decisions").

³ Joseph Nzirorera's Response Brief to Prosecutor's Interlocutory Appeal on Rule 66(B) and 67(C) Issues, 18 October 2007 ("Response"). The Appeals Chamber notes that in the same filing, Mr. Nzirorera indicated that he was withdrawing his Motion for Extension of Time (*see* Response, footnote 1).

⁴ Prosecutor's Reply to Joseph Nzirorera's Response Brief to Prosecutor's Interlocutory Appeal on Rule 66(B) and 67(C) Issues, 22 October 2007 ("Reply").

⁵ *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Joseph Nzirorera's Motion for Inspection of Statement of [Redacted], filed on 11 June 2007 ("Motion for Inspection").

⁶ Although it is dated 13 June 2007, the Prosecution's request for reciprocal disclosure was filed on 14 June 2007.

⁷ *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Prosecutor's Response to Nzirorera's Motion for Inspection and Prosecutor's Cross-Motion for Enforcement of Reciprocal Disclosure Pursuant to Rule 67, filed on 18 June 2007 ("Cross-Motion for Reciprocal Disclosure"), Annexure 5, E-mail of 14 June 2007 – Nzirorera Defense Team to STA Don Webster.

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ANU was disclosed to the Prosecution on the same day⁸ and was admitted into evidence as Exhibit D. NZ300 during Witness ANU's cross-examination.⁹

4. In its response to the Motion for Inspection, the Prosecution moved the Trial Chamber to order reciprocal disclosure under Rule 67(C).¹⁰

5. The Trial Chamber granted Mr. Nzirorera's Motion for Inspection and denied the Prosecution's Cross-Motion for Reciprocal Disclosure on 20 and 21 September 2007, respectively.¹¹

6. The Prosecution sought certification to appeal the Impugned Decisions, which the Trial Chamber granted on 2 October 2007.¹²

B. Standard of Review

7. In the present decision, the Appeals Chamber must determine whether the Trial Chamber erred in granting Mr. Nzirorera's request for disclosure under Rule 66(B) and in denying the Prosecution's request for reciprocal disclosure pursuant to Rule 67(C). As the Impugned Decisions relate to the general conduct of trial proceedings, they are discretionary decisions to which the Appeals Chamber must accord deference.¹³ The Trial Chamber's exercise of discretion will be reversed only if it is demonstrated that the Trial Chamber made a discernible error in the Impugned Decisions because they were based on an incorrect interpretation of governing law, on a patently incorrect conclusion of fact, or because they were so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.¹⁴

C. Alleged Error in Granting the Motion for Inspection

8. In the Decision on Motion for Inspection, the Trial Chamber concluded that Witness BWN's statements fell within the purview of Rule 66(B).¹⁵ The Prosecution requests that the Appeals

⁸ T. 14 June 2007, pp. 2-3.

⁹ T. 18 June 2007, pp. 12-13.

¹⁰ Cross-Motion for Reciprocal Disclosure.

¹¹ See Decision on Motion for Inspection, p. 6; Decision on Cross-Motion for Reciprocal Disclosure, p. 8.

¹² See *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecutor's Application for Certification to Appeal the Chamber's Decision on Joseph Nzirorera's Motion for Inspection of Statement of [Redacted] and on Decision on Prosecution on [sic] Cross-Motion for Enforcement of Reciprocal Disclosure, 2 October 2007.

¹³ See *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.10, Decision on Nzirorera's Interlocutory Appeal Concerning his Right to be Present at Trial, 5 October 2007, para. 7 ("*Karemera et al.* Decision of 5 October 2007"); *The Prosecutor v. Élie Ndayambaje et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeals against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List, 21 August 2007 ("*Ndayambaje et al.* Decision of 21 August 2007").

¹⁴ See *Karemera et al.* Decision of 5 October 2007, para. 7; *Ndayambaje et al.* Decision of 21 August 2007, para. 10.

¹⁵ See Decision on Motion for Inspection, paras. 9, 14 and p. 6.

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Chamber reverse this Decision and clarify the materiality threshold outlined in Rule 66(B).¹⁶ It contends that the Trial Chamber abused its discretion in misapplying governing law and jurisprudence and in failing to assess properly the requisite *prima facie* showing that the statements sought were material to the preparation of the defence.¹⁷ It argues that the Trial Chamber "content[ed] itself with a simple assertion from the Defence that the information that might be contained in [...] a witness statement *might be* material to their preparation", while Mr. Nzirorera should have satisfied the Prosecution and the Trial Chamber that the documents sought were concretely material to the preparation of his defence.¹⁸ The Prosecution claims that, in the present case, Mr. Nzirorera "did not consider [Witness] BWN as his witness and it was not established that he had any intention whatsoever to use the witness' evidence at trial at the time of the request" for disclosure made pursuant to Rule 66(B).¹⁹ Thus, in the view of the Prosecution, the Trial Chamber "unduly expanded the parameters of the defence's right to inspect documents".²⁰

9. The Prosecution also asserts that the right of inspection pursuant to Rule 66(B) does not apply to witness statements, or should apply to them only in exceptional circumstances on a case-by-case basis, since (1) the Prosecution's obligation to disclose witness statements in its possession is fully encompassed in Rules 66(A)(ii) and 68;²¹ and (2) an unduly broad disclosure obligation could unnecessarily jeopardize the security of potential Prosecution witnesses, undermine ongoing investigations, or violate witness protection orders from other cases.²²

10. Mr. Nzirorera responds that the Trial Chamber did not abuse its discretion when it granted the Motion for Inspection, ordering disclosure of Witness BWN's statements.²³ He argues that, according to the plain meaning of the rule, witness statements fall within the scope of Rule 66(B),²⁴ as acknowledged by the Tribunal.²⁵ Mr. Nzirorera also challenges the Prosecution's submission that the Trial Chamber erred in ordering disclosure before he was required to file a final witness list on

¹⁶ See Appeal, paras. 45-46.

¹⁷ See Appeal, paras. 4, 25.

¹⁸ See Appeal, para. 27 (emphasis in the original). See also Appeal, paras. 26, 28.

¹⁹ See Appeal, para. 32. See also Appeal, paras. 29-33.

²⁰ See Appeal, para. 34.

²¹ See Appeal, paras. 36-37, relying on *Georges Rutaganda v. the Prosecutor*, Case No. ICTR-96-3-A, Declaration of President Jorda and Judge Shahabuddeen Appended to the Decision ("Prosecution's Urgent Request for Clarification in Relation to the Applicability of Rule 66(B) to Appellate Proceedings and Request for Extension of the Page Limit Applicable to Motions"), 28 June 2002 ("Declaration of President Jorda and Judge Shahabuddeen").

²² See Appeal, para. 38 (where the Prosecution stresses that Witness BWN is a protected witness in another case).

²³ See Response, para. 31.

²⁴ See Response, para. 35.

²⁵ See Response, paras. 36-38, referring to *Ferdinand Nahimana et al. v. the Prosecutor*, Case No. ICTR-99-52-A, [Public Redacted] Decision on Prosecution's Motion for Leave to Call Rebuttal Material, 13 December 2006 ("*Nahimana et al.* Decision of 13 December 2006") and to Trial Chamber decisions in the *Zigiranyirazo* (Case No. ICTR-2001-73-T), *Kamuhanda* (Case No. ICTR-99-54A-T), *Nyiramasuhuko et al.* (Case No. ICTR-97-21-I), *Ndayambaje* (Case No. ICTR-96-3-T), *Ntagerura et al.* (Case No. ICTR-98-46-T) and *Kajelijeli* (Case No. ICTR-98-44A-T) cases as well as in the present case. Mr. Nzirorera also refers to decisions of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and of the Special Court for Sierra Leone.

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the ground, *inter alia*, that the very purpose of Rule 66(B) is to enable an accused to decide whether to call a certain witness before he files his final witness list, in order to manage the trial in an orderly way.²⁶

11. The Prosecution replies that Mr. Nzirorera failed to make a sufficiently specific request and to establish that the documents sought were material to the preparation of the defence.²⁷ It adds that Mr. Nzirorera already has access to the Prosecution's databases, through the Electronic Disclosure System, and that he could thus conduct his own searches.²⁸ It also disputes having contended that the Trial Chamber erred in ordering inspection – which would trigger reciprocal disclosure – before Mr. Nzirorera was required to file his witness list. Instead, the Prosecution maintains that it merely asserted that it was impossible for it to establish a *prima facie* case as to what the Defence would use as evidence at trial for the purpose of obtaining reciprocal disclosure.²⁹

12. Rule 66(B) provides for the inspection of certain items which “are material to the preparation of the defence case”, “are intended for use by the Prosecution as evidence at trial”, or “were obtained from or belonged to the accused”. The material sought by Mr. Nzirorera potentially falls under the first category. The Appeals Chamber has previously held that “written statements by the witnesses should be considered as being included within the scope of documents to be disclosed by the Prosecutor to the Defence as provided for under Rule 66(B).”³⁰ The Appeals Chamber also recalls that, for a Trial Chamber to order inspection of documents considered material to the preparation of the defence case, the defence must (1) demonstrate that the material sought is in the custody or control of the Prosecution; (2) establish *prima facie* the materiality of the document sought to the preparation of the defence case; and (3) specifically identify the requested material.³¹

13. In the present case, it is not disputed that Witness BWN's statements were in the Prosecution's possession at the time of the request for inspection and that the requested material was specifically identified. The issue to be resolved by the Appeals Chamber is thus whether the Trial Chamber

²⁶ See Response, paras. 48-52.

²⁷ See Reply, para. 6. See also Reply, para. 7.

²⁸ See Reply, para. 5.

²⁹ See Reply, para. 9.

³⁰ *The Prosecutor v. Georges Rutaganda*, Case No. ICTR-96-3-A, T. 4 July 2002 p. 18. See also *Nahimana et al.* Decision of 13 December 2006, para. 14. Additionally, in another case, the Trial Chamber ordered the Prosecution to permit the Defence to inspect witness statements, pursuant to Rule 66(B). See *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-44A-T, Decision on Kamuhanda's Motion for Disclosure of Witness Statements and Sanction of the Prosecutor, 29 August 2002 (“*Kamuhanda* Decision of 29 August 2002”), para. 27.

³¹ See *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-96-7-T, Decision on the Motion by the Defence Counsel for Disclosure, 27 November 1997 (“*Bagosora et al.* Decision of 27 November 1997”), p. 5. See also *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66(B) of the Rules, 25 September 2006 (“*Bagosora et al.* Decision of 25 September 2006”), paras. 10-11.

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erred in finding that Mr. Nzirorera's request established the materiality of the documents sought to the preparation of the defence case.

14. The Trial Chamber held that it was satisfied that the requested witness statements are material to the preparation of Mr. Nzirorera's defence since their inspection may assist him in assessing the credibility of Witness BWN before deciding to add him to the witness list.³² The Appeals Chamber finds no error in this conclusion. It reiterates that, within the framework of Rule 66(B), the test for materiality is the relevance of the documents sought to the preparation of the defence case and that "[p]reparation is a broad concept".³³ It also notes that, in the present case, when Mr. Nzirorera made his request pursuant to Rule 66(B), he indicated that his Defence team had interviewed Witness BWN and was considering including him on his witness list.³⁴

15. Further, the Appeals Chamber cannot accept the Prosecution's submission that Mr. Nzirorera could undertake his own investigations. As the Trial Chamber recalled,³⁵ "[a] request under Rule 66(B) is one of the methods available to the Defence for carrying out investigations" and the fact or possibility of other investigations does not prevent the use of inspection under this provision.³⁶

16. Therefore, the Appeals Chamber finds that the Trial Chamber did not abuse its discretion when it granted the Defence Motion for Inspection, finding that the requested materials, namely Witness BWN's statements, were material to the preparation of Mr. Nzirorera's case.

D. Alleged Error in Denying the Cross-Motion for Reciprocal Disclosure

17. In the Decision on Cross-Motion for Reciprocal Disclosure, the Trial Chamber denied the Prosecution's motion to inspect notes taken by Mr. Nzirorera's Defence team, holding that the Prosecution failed to make a *prima facie* showing that the Defence intends to use these interview notes as evidence at trial.³⁷ The Prosecution submits that the Trial Chamber abused its discretion by requiring the Prosecution to establish *prima facie* that the Defence intends to use these materials as evidence at trial.³⁸ Accordingly, it requests that the Appeals Chamber reverse this Decision and clarify the notion of "intent" in Rule 67(C).³⁹

³² See Decision on Motion for Inspection, paras. 12, 14. See also Decision on Motion for Inspection, paras. 10-11, relying on the *Bagosora et al.* Decision of 25 September 2006, para. 9.

³³ See *Bagosora et al.* Decision of 25 September 2006, para. 9.

³⁴ See Motion for Inspection, para. 7.

³⁵ See Decision on Motion for Inspection, para. 15.

³⁶ *Bagosora et al.* Decision of 25 September 2006, para. 11.

³⁷ See Decision on Cross-Motion for Reciprocal Disclosure, para. 9, p. 8.

³⁸ See Appeal, paras. 4, 14.

³⁹ See Appeal, paras. 45-46.

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18. The Prosecution concedes that its disclosure obligations under Rule 66(B) are broader than the reciprocal disclosure obligation imposed on the Defence, pursuant to Rule 67(C).⁴⁰ It contends, however, that the requirement to make a *prima facie* showing of the Defence's intention to use as evidence at trial material sought to be inspected is a restriction that is incompatible with the reciprocity principle enshrined in Rule 67(C) which is aimed at ensuring equality of arms.⁴¹ In this respect, the Prosecution argues that its right to reciprocal disclosure is triggered, automatically, from the moment the Defence requests inspection under Rule 66(B).⁴² It adds that "if it is accepted that witness statements may fall within the ambit of documents envisaged for inspection, then both parties should be equally entitled to inspect such material."⁴³ The Prosecution submits that requiring a *prima facie* showing of the Defence's intentions unacceptably subjects the Prosecution's right to reciprocal disclosure to the "willingness of the Defence to express or confirm its intention to use [...] a document as evidence at trial" at a late stage in the proceedings and that, in practice, it thus imposes an unfair burden on the Prosecution.⁴⁴

19. The Prosecution states that the Defence's intention can be established only circumstantially and provisionally, and argues that, in the present case, the Trial Chamber failed to draw the only reasonable inference, namely that, at the time of the request to inspect, Mr. Nzirorera did intend to use the interview notes as evidence at trial.⁴⁵ It recalls that, although Mr. Nzirorera initially claimed that he would not use his notes of Witness ANU's interview, he subsequently tendered them into evidence, thus showing that he clearly considered using the document all along.⁴⁶

20. Mr. Nzirorera responds that Rules 66(B) and 67(C) do not impose identical disclosure requirements on the Prosecution and on the Defence.⁴⁷ He claims that the Prosecution's argument that reciprocal disclosure is an indispensable ingredient of fair trial is misplaced in light of the abolition of the reciprocal disclosure obligation in the Rules of Procedure and Evidence of the ICTY ("ICTY Rules").⁴⁸ He adds that the *prima facie* showing disputed by the Prosecution is the same showing required of the Defence when seeking disclosure from the Prosecution under Rules 66 and 68.⁴⁹ Mr. Nzirorera also stresses that the Trial Chamber made no ruling as to the disclosure of Witness ANU's interview notes since these notes were disclosed on the very day when they were

⁴⁰ See Appeal, para. 15.

⁴¹ See Appeal, paras. 15, 42.

⁴² See Appeal, para. 16.

⁴³ Appeal, para. 17.

⁴⁴ Appeal, paras. 18-19, 24.

⁴⁵ See Appeal, paras. 20-23.

⁴⁶ See Appeal, para. 22.

⁴⁷ See Response, para. 21.

⁴⁸ See Response, para. 23.

⁴⁹ See Response, para. 22.

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requested.⁵⁰ Moreover, with respect to the interview notes of Abdulmohamed Bandali, Mr. Nzirorera states that he did not intend to use them as evidence, that he indeed did not use them and that, consequently, the Trial Chamber could not have abused its discretion in finding that the Prosecution did not establish his intent to use these materials as evidence at trial.⁵¹

21. The Prosecution replies that the fact that the reciprocal disclosure obligation does not appear in the ICTY Rules does not imply that the Prosecution's right should not be implemented at the ICTR.⁵² It dismisses Mr. Nzirorera's assertion that the entire Prosecution argument is premised on seeking identical disclosure obligations.⁵³ It also argues that the very fact that Mr. Nzirorera asked questions about the content of Witness ANU's interview notes is evidence of the use of these notes at trial.⁵⁴

22. Rule 67(C) provides that "[i]f the Defence makes a request pursuant to Rule 66(B), the Prosecutor shall in turn be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the Defence and which it intends to use as evidence at the trial" (emphasis added). A plain reading of this provision shows that the exercise by the Defence of the inspection provision of Rule 66(B) triggers an entitlement on the part of the Prosecution to inspect certain materials that the Defence intends to use as evidence. This interpretation was confirmed by the Appeals and Trial Chambers of this Tribunal.⁵⁵ The Trial Chamber was therefore correct to consider whether in making its request for inspection pursuant to Rule 67(C), the Prosecution showed that the Defence intends to use the requested materials as evidence at trial.

23. The final question before the Appeals Chamber is whether the Trial Chamber correctly exercised its discretion when it found that the Prosecution failed to make a *prima facie* showing that Mr. Nzirorera intends to use Abdulmohamed Bandali's interview notes as evidence at trial.

⁵⁰ See Response, paras. 14, 19.

⁵¹ See Response, paras. 19-20.

⁵² See Reply, para. 10.

⁵³ See Reply, para. 10.

⁵⁴ See Reply, para. 11.

⁵⁵ See *Bagosora et al.* Decision of 25 September 2006, para. 10; *Kamuhanda* Decision of 29 August 2002, para. 28. Furthermore, ICTY jurisprudence supports this application of Rule 67(C) whilst it was still in force. For instance, it has been held that if the Defence refuses to subject itself to reciprocal disclosure under Rule 67(C), it is deemed to have waived use of Rule 66(B). See *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Decision on the Defence Motion for Sanctions for the Prosecutor's Failure to Comply with Sub-Rule 66(A) of the Rules and the Decision of 27 January 1997 Compelling the Production of All Statements of the Accused, 15 July 1998, p. 4. See also *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-PT, Decision on the Production of Discovery Materials, 27 January 1997, pp. 20-21. A Trial Chamber of the ICTY also held that "[a] request by the Defence pursuant to Sub-rule 66(B) triggers Sub-rule (C) of Rule 67"; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21, Decision on Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 September 1996, para. 3.

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24. The Prosecution does not dispute that Abdulmohamed Bandali had not been listed as a witness when it submitted its request for inspection pursuant to Rule 67(C), and it has not demonstrated on appeal that it brought any other information before the Trial Chamber showing that Mr. Nzirorera intended to use the requested materials as evidence at trial. Indeed, the Prosecution concedes that at the time it made its request for inspection, Mr. Nzirorera's Defence responded that it did not intend to introduce the requested material as evidence at trial.⁵⁶ However, in its Cross-Motion for Reciprocal Disclosure, the Prosecution explained that such disclosure would "broaden the basis for weighing the reliability of potential evidence in deciding which witnesses should be called to testify at trial."⁵⁷ The Trial Chamber found that, at the time the request was made pursuant to Rule 67(C), the Prosecution had failed to make a *prima facie* showing that the Defence intended to use Abdulmohamed Bandali's interview notes as evidence at trial on the ground that "[t]he Prosecution's desire to use the statements to assess credibility of its witnesses is not an interest which triggers any obligation under Rule 67(C)."⁵⁸ The Appeals Chamber fully agrees with this statement and finds that the Trial Chamber applied the correct standard prescribed in Rule 67(C).

25. Accordingly, the Appeals Chamber finds that the Prosecution has not demonstrated that the Trial Chamber abused its discretion by denying the Prosecution's request for inspection of the interview notes of Abdulmohamed Bandali at the time the request was introduced.

D. Disposition

26. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Appeal in all respects.

Done in English and French, the English version being authoritative.

Dated this 23rd day of January 2008,
at The Hague, The Netherlands.



Fausto Pocar
Presiding Judge

[Seal of the Tribunal]

⁵⁶ See Appeal, para. 21.

⁵⁷ Cross-Motion for Reciprocal Disclosure, para. 28.

⁵⁸ Decision on Cross-Motion for Reciprocal Disclosure, para. 9.