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7.10.2003
(3231 — 3227)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 7 October 2003

The PROSECUTOR
v.
Juvenal KAJELIJELI

Case No. ICTR-99-44A-T

**DECISION ON JOSEPH NZIRORERA'S MOTION FOR DISCLOSURE OF
CLOSED SESSION TESTIMONY AND EXHIBITS RECEIVED UNDER SEAL**

Office of the Prosecutor
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Counsel for the Defence of Nzirorera
Peter Robinson

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OFFICE OF THE PROSECUTOR

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"), **3230**

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Winston C. Matanzima Maqutu and Arlette Ramaroson (the "Chamber");

BEING SEIZED of "Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal," filed on 19 May 2003 (the "Motion");

HAVING RECEIVED AND CONSIDERED the "Prosecutor's Response to Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal," filed on 21 May 2003 (the "Prosecutor's Response"); **AND** The "Reply to Prosecutor's Response to Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal," filed on 23 May 2003 (the "Reply");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rules 54, 75, 66(A) and 81(B) of the Rules;

NOW DECIDES the Motion solely on the basis of the written briefs filed by the Parties pursuant to Rule 73(A) of the Rules.

SUBMISSIONS OF THE PARTIES

Defence Submissions

1. The Defence Counsel for the Accused Joseph Nzirorera ("Nzirorera") requests, pursuant to Rules 54 and 81(B) for the disclosure of closed session testimony and exhibits under seal relating to Prosecution Witnesses GAP and GBG, as well as all the defence witnesses who testified in the instant case. Counsel for Nzirorera submits that the materials it seeks are under the same rationale that lies behind Rule 66(A)(ii), which requires the Prosecution to disclose all prior statements of its witnesses. The Defence argues that the only difference here is that the said prior statements are under the control of the Trial Chamber rather than the Prosecutor.
2. Counsel for Nzirorera also draws the attention of the Chamber to 75(F) and (G) of the ICTY Rules submitting that the Tribunal has no specific provision for the situation where an accused in one case seeks access to transcripts or exhibits from a closed session of another trial.
3. Counsel for Nzirorera submits that in the Prosecution Pre-Trial Brief of 15 March 2002, he was notified that the Prosecution intended to call Witness GAP and GBG as witnesses at Nzirorera's trial. Counsel for Nzirorera submits that the material he requests will materially assist the case of Nzirorera because these same witnesses who testified at the trial of Kajelijeli will testify at the trial of Nzirorera. Regarding the request for the disclosure of closed session testimony and exhibits under seal relating to the Defence witnesses called in the instant case, Counsel for Nzirorera submits that he may wish to call as his own witnesses some of Kajelijeli Defence witnesses in order to refute the evidence presented by the Prosecution.
4. Counsel for Nzirorera submits that he and his team agree to be bound by the same protective orders as the ones made in the instant case. He submits that Defence Counsel for Kajelijeli has no objection to the disclosures sought in the Motion.

Prosecutor's Response

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5. The Prosecution opposes the Motion because it is irregular. The Prosecution submits that Nzirorera is not a party to the proceedings before the Chamber but rather Nzirorera is before Trial Chamber I. Due to this irregularity, the Prosecution advises that Trial Chamber I request for the assistance of Trial Chamber II in reviewing the Motion in a manner it deems most appropriate and advise Trial Chamber I if the Motion would be granted and under which conditions in terms of confidentiality and protective measures, if necessary.

6. In the alternative the Prosecution submits that if the Chamber is going to consider the Motion at this stage, the Prosecution reminds it of its on-going duty to protect witnesses and therefore the Prosecution submits that the consent of GBG and GAP should be sought to have redacted transcripts of their closed-session testimony released to Nzirorera.

7. For its submissions, the Prosecution makes reference to the jurisprudence of the ICTY.¹

Defence Reply

8. Counsel for Nzirorera responds to the Prosecution with regard to the irregularity of the Motion submitting that he filed his Motion both to the Trial Chamber seized of the Nzirorera case and to the Trial Chamber seized of the Kajelijeli case. The Counsel notes that there is no settled practice at the Tribunal on the issue raised in his Motion. The Defence draws its arguments from the ICTY jurisprudence which has consistently held that such Motions must be made before the Trial Chamber that granted the protective measures under which the witness testified.

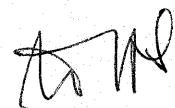
9. As regards consent of the witness, Counsel for Nzirorera relies on Rule 66(a)(ii) which obliges the Prosecution to disclose transcripts of testimony of all witnesses she intends to call at Nzirorera's trial. This argument, Counsel for Nzirorera submits, is backed up by the ICTY case of *Kupreskic*.² Counsel for Nzirorera submits that the ICTY case of *Kordic and Cerkez* held that the transcripts and exhibits of those witnesses to be called in the *Kordic* trial should be released. With regard to those witnesses who were not to be called, the Trial Chamber directed the Registrar to release the transcript of those witnesses who consented to the release of their non-public testimony.

HAVING DELIBERATED

10. The Chamber notes that it must first decide whether it can properly be seized of the Motion, particularly as Nzirorera's case is not before it. On this issue, the Chamber notes, as submitted by Counsel for Nzirorera, there has never been such a request at the Tribunal. The Chamber nonetheless, notes that such requests were made at the ICTY. The Chamber recalls

¹ In particular the "Further Order on Motion for Access to Non-Public Materials in the Lasva Valley and Related Cases," of 16 February 1999 in *Prosecutor v. Kordic and Cerkez* (the "*Kordic and Erkez* Decision of 16 February 1999) ; "Decision on the Motion of the Accused for Access to Non-Public Materials in the Lasva Valley and Related Cases," of 12 November 1998 in *Prosecutor v. Kordic and Cerkez* (the "*Kordic and Erkez* Decision of 12 November 1998)

² See the "Decision on the Prosecutor's Request to Release Testimony Pursuant to Rule 66 of the Rules of Procedure and Evidence Given in Closed Session under Rule 79 of the Rules," of 29 July 1998 in *Prosecutor v. Kupreskic* (the *Kupreskic* Decision)



the ICTY Trial Chamber considerations in the *Kordic and Erkez* case that it, “[h]as no jurisdiction to rule on measures adopted by another Trial Chamber so long as that Trial Chamber is still seized of a case.”³ The Appeals Chamber sitting on an appeal originating from the ICTY in *Aleksovski* overruled the Trial Chamber finding that the protective order made by another Trial Chamber could not be altered. In this case, the Appeals Chamber found that, “[t]here was nothing to prevent the Prosecution from applying to the Chamber trying the *Blaskic* case for a waiver or amendment of the protective measures in relation to the witness to enable the witness’ evidence to be disclosed in the *Aleksovski* trial. This is the practice in the Tribunal, and could have been followed in the instant case.”⁴

11. In the instant case, the Chamber notes that Counsel for Nzirorera requests the Chamber to grant it access to confidential testimony and exhibits of witnesses in the Kajelijeli case. Drawing from the practice of the ICTY, the Chamber considers itself as being the proper Chamber to which a request such as the one in the Motion can be made because the Kajelijeli case is before it and the measures for the protection of witnesses that appeared in that case were made by it.

12. With regard to the specific request for access to confidential testimony and exhibits of witnesses in the Kajelijeli case, the Chamber notes that the Defence for Nzirorera makes this request in two ways. First Counsel for Nzirorera makes the request for two identified witnesses who were called in the Kajelijeli case and who will be called in its case, i.e., GBG and GAP.

13. The Chamber recalls the provisions of Rule 66(A)(ii) that the Prosecutor is obliged to disclose to the Defence, “[n]o later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; upon good cause shown a Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the defence within a prescribed time.” The Chamber also recalls the ICTY Trial Chamber opinion in *Kupreskic* that, “[i]t cannot be contested that the transcript of the testimony of a witness constitutes a statement within the meaning of Sub-Rule 66(A)(ii) of the Rule; that it is therefore appropriate to permit its disclosure to Defence Counsel.”⁵

14. Given the fact the Prosecution has indicated in its Pre-trial brief that it intends to call witnesses GBG and GAP in the case of Nzirorera, it is the Chamber’s opinion that the transcripts of the testimony of the two identified witnesses do indeed fall within the provisions of Rule 66(A)(ii).

15. Bearing in mind its Decision for the protection of Prosecution Witnesses of 6 July 2000 in the case of Kajelijeli, the Chamber grants the request of Counsel for Nzirorera instructing said Counsel and his team that they are under strict orders to comply with the orders made in the Chamber’s above-mentioned Decision. The Chamber therefore orders the Prosecution to disclose to the Defence of Nzirorera the closed session testimony and exhibits under seal relating to Prosecution Witnesses GAP and GBG but that the Defence should preserve the confidentiality of the said closed session testimony and exhibits under all

³ See “Decision on the Motion of the Accused for Access to Non-public materials in the Lasva Valley and Related Cases,” of 12 November 1998 in *Prosecutor v. Kordic et al.*

⁴ See “Decision on Prosecutor’s Appeal on Admissibility of Evidence,” of 16 February 1999 in *Prosecutor v. Aleksovski* at para. 26.

⁵ See the *Kupreskic* Decision at page 2.

circumstances and in compliance with the protective measures made in the Chamber's Decision of 6 July 2000.

16. The Chamber further recalls its "Decision on Disclosure of Evidence," of 1 November 2000 in the case of *Prosecutor v. Nyiramasuhuko* where by it was of the opinion at para. 32 that, "As regards Rule 66 (A) (ii) of the Rules, we consider that each of the Accused in the same proceedings must receive disclosure of the statements of all the witnesses whom the Prosecutor intends to call at their joint trial, so that the Defence of each of the Accused may be in a position to prepare their Defence and in particular to fully cross-examine the witnesses of its choice, in the course of the hearing." The Chamber agrees with this reasoning and thus extends the order at para. 15 herein to the Defence of the co-Accused of Nzirorera.

17. The Chamber now looks at the second request by Counsel for Nzirorera that the Prosecution disclose to it the closed session testimony and exhibits under seal relating to Defence witnesses who were called in the Kajelijeli case because he may wish to call said witnesses to rebut the evidence of GBG and GAP. In this instance, the Chamber finds there is no basis for this request because neither have the Defence of Nzirorera nor the Prosecution given a definite indication that said Defence Witnesses of Kajelijeli will be called in the case of Nzirorera. The Chamber thus denies the Defence request for closed session testimony and exhibits under seal relating to Defence witnesses who were called in the Kajelijeli case.

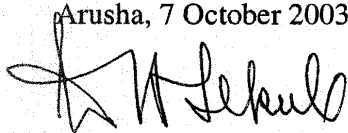
FOR THE ABOVE REASONS, THE TRIBUNAL

GRANTS the request of Counsel for Nzirorera instructing the Counsel for Nzirorera as well as the counsel for the Co-Accused and their teams that they are under strict orders to comply with the Chamber's Decision on protective measures for Prosecution Witnesses of 6 July 2000; and

ORDERS the Prosecution to disclose to the Defence Team of Nzirorera and the Defence Teams of his co-Accused the closed session testimony and exhibits under seal relating to Prosecution Witnesses GAP and GBG but that these Defence teams should preserve the confidentiality of the said closed session testimony and exhibits under all circumstances and in compliance with the protective measures made in the Chamber's Decision of 6 July 2000; and

DENIES the request of the Defence of Nzirorera for closed session testimony and exhibits under seal relating to Defence witnesses who were called in the Kajelijeli case.

Arusha, 7 October 2003



William H. Sekule
Presiding Judge



Winston C. Matanzima Maqutu
Judge



Arlette Ramaroson
Judge

