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UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Dennis C. M. Byron, Presiding  
Emile Francis Short  
Gberdao Gustave Kam

**Registrar:** Adama Dieng

**Date:** 3 May 2005

JUDICIAL RECORDS/ARCHIVES  
ICTR  
2005 MAY -3 A 10: 121  
C.A. Nyirorera

**THE PROSECUTOR**

v.

**Edouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA**

Case No. ICTR-98-44-R66

**DECISION ON MOTION TO UNSEAL EX PARTE SUBMISSIONS AND TO  
STRIKE PARAGRAPHS 32.4 AND 49 FROM THE AMENDED INDICTMENT**

*Rule 66(A)(i) of the Rules of Procedure and Evidence*

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Peter Robinson

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

**SITTING** as Trial Chamber III, composed of Judge Dennis C. M. Byron, Presiding Judge, Judge Emile Francis Short and Judge Gberdao Gustave Kam ("Chamber");

**BEING SEIZED** of a "Motion to Unseal *Ex Parte* Submission and to Strike Paragraphs 32.4 and 49 from the Amended Indictment" ("Motion"), filed by the Defence for Nzirorera ("Defence") on 29 March 2005;

**CONSIDERING** the Prosecution's Response filed on 4 April 2005 and the Defence Reply thereto filed on 11 April 2005;

**HEREBY DECIDES** the Motion, pursuant to Rule 73 of the Rules of Procedure and Evidence ("Rules").

**ARGUMENTS OF THE PARTIES**

*Defence Motion*

1. The Defence complains that, on 16 February 2005, in addition to the further supporting material filed following the Chamber's Decision of 14 February 2005 with respect to Paragraphs 32.4 and 49 of the proposed Amended Indictment,<sup>1</sup> the Prosecution filed *ex parte* a Memorandum containing submission in response to the cited Decision. That document would have been the basis of the Chamber's Decision of 18 February 2005 that a *prima facie* case for the mentioned Paragraphs of the Amended Indictment was established.<sup>2</sup> The Defence observes that, on 23 February 2005, the Prosecution filed additional supporting material as well as a second *ex parte* Memorandum for the attention of the Chamber. The Defence raises queries about that subsequent filing of supporting material, while the Decision granting leave to amend the Indictment was already delivered. It also claims that the Prosecution refused to disclose both *ex parte* Memoranda of 16 and 23 February 2005 ("Memoranda") and requests their disclosure since it would enable it to address preliminary motions, challenge the Amended Indictment and facilitate the understanding of the Chamber's Decision of 18 February 2005, making the proceedings more fair and transparent. It contends that its application for disclosure is supported by two decisions delivered in cases before the International Tribunal for Former Yugoslavia ("ICTY")<sup>3</sup> and an oral ruling in the instant case.<sup>4</sup>

2. Finally, the Defence submits that the dismissal of Paragraphs 32.4 and 49 of the Amended Indictment is warranted because the additional supporting material filed by the

<sup>1</sup> *Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44-PT, Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment (TC), 14 February 2005.

<sup>2</sup> *Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-PT (Karemera et al.), Decision on Prosecution Motion for Leave to File Amended Indictment and Filing of Further Supporting Material (TC), 18 February 2005.

<sup>3</sup> *Prosecutor v. Milutinovic et al.*, Case No. IT-99-37-I, Decision on Application by Dragoljub Ojdanic for Disclosure of *Ex Parte* Submissions, 8 November 2002 (*Milutinovic* Decision); *Prosecutor v. Dusko Sikirica and Others*, Case No. IT-95-8-PT, Order Granting in Part Prosecutor's Motion to Vacate Order of Non-Disclosure Issued on 30 August 1999 (TC), 20 July 2000.

<sup>4</sup> See Transcripts of 26 November 2004, p. 2.

Prosecution on 16 February 2005 fails to establish a *prima facie* case against the Accused, unless there is further support in the *ex parte* Memoranda not disclosed to the Defence.

*Prosecution's Response*

3. The Prosecution alleges that neither the Statute of the Tribunal ("Statute") nor the Rules prescribe that Memoranda transmitted by the Prosecution to the Chamber in the course of providing supporting material should be disclosed. The phrase "supporting material" under Rule 66(A)(i) would apply solely to the material upon which the charges are based and not to Internal Memoranda.<sup>5</sup> The Prosecution recognizes that a Judge could order disclosure of documents in the interest of justice, but concludes that it would not be applicable in the instant case since the Defence has no justifiable purpose in obtaining the requested documents. The Prosecution submits indeed that, contrary to the Defence's contention, a Preliminary Motion under Rule 72 of the Rules would not be a vehicle to challenge the Chamber's determination that a *prima facie* case exists against the Accused.<sup>6</sup> The Prosecution also alleges that the oral Decision regarding disclosure of an email from a protected witness, quoted in the Defence Motion, is distinguishable since, contrary to the present request, the said email was disclosed in open court which waived any expectation that it would remain confidential.

4. Finally, the Prosecution recalls Judge Hunt's Decision in *Ojdanic* case<sup>7</sup> that disclosure of *ex parte* filings should only be entertained where it is necessary in the interests of justice to "everyone" concerned. It alleges that since the *ex parte* Memoranda were written in a manner that did not anticipate disclosure, it would unfairly prejudice the Prosecution if the Motion was granted.

*Defence Reply*

5. In the Defence's view, principles of fairness and transparency require that the Accused be allowed to understand the basis of the Chamber's Decision of 18 February 2005 which would not be apparent from the disclosure of supporting material made by the Prosecution. *Ex parte* communications between the Prosecution and the Chamber, such as the requested Memoranda, would destroy any trust the Accused and the public have in the fairness of the proceedings before the Tribunal. The Defence reiterates that the principle stated by the Presiding Judge in the current case about the disclosure of an email from protected witness should apply to the present request. In the Defence's view, disclosure would be a matter to be decided by the Chamber, not a party. The Prosecution's argument that it did not anticipate disclosure of the said Memoranda should be rejected. The Defence submits that, contrary to the Prosecution's contention, it is entitled to challenge the Chamber's finding that a *prima facie* case exists against the Accused. In its Decision of 14

<sup>5</sup> The Prosecution refers to *Prosecutor v. Ojdanic and Sainovic*, Case No. IT-99-37-PT, Decision on Defence Motion to Require Full Compliance with Rule 66(a)(i) and for Unsealing of *Ex Parte* Materials (TC), 18 October 2002 (*Ojdanic and Sainovic* Decision).

<sup>6</sup> The Prosecution refers to *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-21-I, Decision on the Preliminary Motion by Defence Counsel on Defects in the Form of the Indictment (TC), 4 September 1998, par. 19-20; *Prosecutor v. Bagambiki et al.*, Case No. ICTR-97-36-(I), Decision on the Defence Motion on Defects in the Form of the Indictment (TC), 24 September 1998, par. 5; *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment (TC), 24 February 1999, par. 20.

<sup>7</sup> *Milutinovic* Decision.

February 2005,<sup>8</sup> the Chamber would have indicated that the Defence would have an opportunity to challenge the supporting material, by way of preliminary motions, after leave to amend the Indictment was granted.

### DELIBERATIONS

#### *On the Request to Unseal Ex Parte Submissions*

6. Pursuant to Rule 66(A)(i) of the Rules, the Prosecution shall disclose to the Defence:

“i) Within 30 days of the initial appearance of the accused copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused”

7. The Chamber concludes, following the jurisprudence, that the supporting material includes “the material upon which the charges are based and *does not include other material that may be submitted [...], such as a brief of argument or statement of facts*”.<sup>9</sup> Documents filed with the goal of assisting the Chamber when adjudicating on a Motion for leave to amend the Indictment under Rule 50 of the Rules do not fall within the category of supporting material to be disclosed under Rule 66(A)(i) of the Rules.<sup>10</sup>

8. In the present case, the Chamber finds that the requested documents are briefs of arguments or statements of facts. The first one, dated 16 February 2005, indexes the further supporting material provided for Paragraph 49 of the Amended Indictment which involved two witness statements that have been disclosed to the Defence since then, suggests an amendment of Paragraph 32.4 and, as support to these last allegations, invites the Chamber to rely on material previously disclosed to the parties.<sup>11</sup> The second Memorandum, dated 23 February 2005, provides explanations on how the Prosecution complied with the Chamber’s Decision of 14 February 2005. None of these documents can be qualified as “supporting material” within the meaning of Rule 66(A)(i) of the Rules. The material upon which the charges against the Accused are based has been disclosed to the parties. The non-disclosure of the requested documents did not amount in any deficiency or late filing of supporting material.

9. The fact that neither the Statute nor the Rules obliges explicitly the Prosecution to disclose the requested documents does not imply that these documents are not subject to disclosure. Access to material from the Prosecution can be granted where it appears necessary in the interest of justice.<sup>12</sup>

10. The Chamber notes that the requested Memoranda were filed with the notation “not for distribution for the parties”. That notation and the subsequent submissions of the Prosecution indicate that these documents were intended to be *ex parte* filings so that the Defence could not have access to them.

<sup>8</sup> *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44-PT, Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment (TC), 14 February 2005.

<sup>9</sup> *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-I, Order on Motion to Compel Compliance by the Prosecutor with Rules 66 (A) and 68 (TC), 26 February 1999, p. 2 (*Kordic and Cerkez* Decision); *Ojdanic and Sainovic* Decision.

<sup>10</sup> See, by analogy, *Kordic and Cerkez* Decision; *Ojdanic and Sainovic* Decision.

<sup>11</sup> Namely, the Diary of Pauline Nyiramasuhuko, the Expert Report of André Guichaoua entitled “Butare: The Rebellious Prefecture” and statements of GBU and ANP witnesses.

<sup>12</sup> *Milutinovic* Decision, par. 18.

11. As a general rule, applications must be filed *inter partes*. Such a rule finds its expression in the general principle of *audi alteram partem*. *Ex parte* applications are nevertheless appropriate, and even required, in certain circumstances.<sup>13</sup> They are not necessarily contrary to the fairness of the proceedings. The fundamental principle is that “*ex parte* proceedings should be entertained only where it is thought to be necessary in the interests of justice to do so – that is, justice to *everyone* concerned – in the circumstances already stated: where the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact the application itself, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application.”<sup>14</sup>

12. In view of the previous elements, the Chamber concludes that when filing the requested Memoranda *ex parte*, the Prosecution did not intend to take advantage of the Defence nor try to misrepresent the facts to the Chamber.

13. The Chamber however is of the view that the interest of justice and the *audi alteram partem* principle require disclosure of the said documents. Even if the Memorandum of 16 February 2005 does not add, as such, any information not already in possession of the Defence, it assisted the Chamber in its Decision granting leave to maintain Paragraphs 32.4 and 49 of the proposed Amended Indictment.<sup>15</sup> The second Memorandum explains how the Prosecution provided further details concerning certain charges as requested by the Chamber’s Decision of 14 February 2005.<sup>16</sup> This explanation could avoid further requests seeking additional details about these charges. The suggestion that the Prosecution may suffer unfair prejudice because it did not anticipate the documents to be disclosed is not persuasive. Disclosure of the requested documents is therefore warranted.

14. Finally, the Chamber considers that there is no basis for the Defence queries about the filing of additional statements made by the Prosecution and attached to the second Memorandum, while the Decision granting leave to amend the Indictment was already delivered. The Chamber notes that additional material was provided to allow the Prosecution to comply with the Chamber’s order to include supplementary details in the Amended Indictment filed. The supplementary filing did not affect the Chamber’s Decision granting leave to amend the Indictment. The rights of the Accused were enhanced due to the details and material added, allowing him to know better the charges against him.

*On the Request to Strike Paragraphs 32.4 and 49 from the Amended Indictment*

15. The Chamber recalls that Motions filed under Rule 72(A) of the Rules consist solely in (i) challenging jurisdiction of the Tribunal, or (ii) alleging defects in the form of the Indictment, or (iii) seeking severance of counts or separate trials, or (iv) raising objection based on the refusal of a request for assignment of Counsel. Through a Preliminary Motion alleging defects in the form of the Indictment, the Accused can challenge a lack of sufficient

<sup>13</sup> For instance, Prosecution’s application to submit an Indictment for review and confirmation, under Article 18 of the Statute; submissions pursuant to Rule 66(C) of the Rules or seeking protective orders under Rule 69 of the Rules, see *Prosecutor v. Simic et al.*, Case No. IT-95-9, Decision on (1) Application by Stevan Todorovic to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material (TC), 28 February 2000, par. 40 (*Simic et al.* Decision).

<sup>14</sup> *Simic et al.* Decision, par. 41; *Prosecutor v. Brdanin and Talic*, Case No. IT-99-36/1, Decision on Second Motion by Prosecution for Protective Measures (TC), 27 October 2000, par. 11; *Milutinovic* Decision, par. 23.

<sup>15</sup> *Karemera et al.*, Decision on Prosecution Motion for Leave to File Amended Indictment and Filing of Further Supporting Material (TC), 18 February 2005.

<sup>16</sup> *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44-PT, Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment (TC), 14 February 2005.

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notice of the charges against him, but not the veracity of the allegations contained in the Indictment. The purpose of reviewing supporting material provided to obtain leave to amend the Indictment is to ensure that the Prosecution has shown sufficient grounds to indict the Accused with the charges as amended, without going into any specific evaluation of the culpability of the Accused. The Chamber's statement that a *prima facie* case exists against the Accused cannot therefore be challenged by filing Preliminary Motions under Rule 72(A) of the Rules. In its Decision of 14 February 2005, the Chamber has not decided otherwise.<sup>17</sup>

16. The allegations contained at Paragraph 32.4 are supported by the Diary of Pauline Niyiramasuhuko and Statements of Witnesses GBU and ANP. These materials were previously disclosed to the Defence and explicitly pinpointed in the *Index of Documents contained in Binders*, annexed to the Prosecution Motion of 17 December 2004.<sup>18</sup>

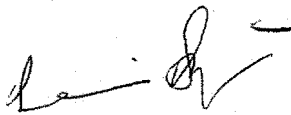
17. The Witness statement that "Minister Mugenzi told the new prefect that his mission as prefect of Gisenyi was to kill all the Tutsis" supports fully the allegation that "Justin Mugenzi ordered or instigated attacks against the Tutsi population, emphasizing the new *préfet's* mission as the elimination of the Tutsis", whether the meeting took place in Kibungo prefecture or in Gisenyi.<sup>19</sup> Nothing in the wording of the second sentence allows the supposition that it applies only to a speech held in Kibungo prefecture.

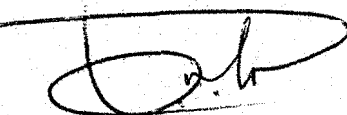

18. Contrary to the Defence's contention, a *prima facie* case has been sufficiently established concerning Paragraphs 32.4 and 49 of the Amended Indictment. The second Defence's contention falls therefore to be rejected.

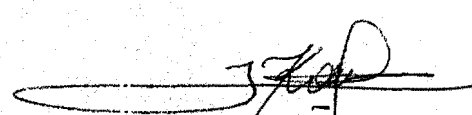
**FOR THE ABOVE MENTIONED REASONS, THE CHAMBER**

- I. **GRANTS** in part the Motion.
- II. **ORDERS** the Prosecution to disclose immediately to all parties in the present case the Memoranda of 16 February 2005 and 23 February 2005, respectively entitled "Further Supporting Material in Compliance with Decision of 14 February 2005" and "Amended Indictment of 23 February 2005/Further Supporting Material".
- III. **DISMISSES** the remainder of the Motion.

Arusha, 3 May 2005, done in English.

  
 Dennis C. M. Byron  
 Presiding Judge

  
 Judge Francis Short  
 Judge  
  
 [Seal of the Tribunal]

  
 Gberdao Gustave Kam  
 Judge

<sup>17</sup> *Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44-PT, Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment (TC), 14 February 2005, par. 36.

<sup>18</sup> Prosecution Motion that Index has been disclosed to the Defence a second time on 24 March 2005.

<sup>19</sup> Second sentence of Paragraph 49 of the Amended Indictment.