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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:** 5 July 2005

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**THE PROSECUTOR**

v.

**Edouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA**

**Case No. ICTR-98-44-PT**

**DECISION ON JOSEPH NZIRORERA'S MOTION TO COMPEL  
INSPECTION AND DISCLOSURE**

*Rules 54, 66 (B) and 68 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**  
Don Webster  
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**Defence Counsel for Mathieu Ngirumpatse**  
Chantal Hounkpatin and Frédéric Weyl

**Defence Counsel for Joseph Nzirorera**  
Peter Robinson

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

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

**BEING SEIZED** of "Joseph Nzirorera's Motion to Compel Inspection and Disclosure", filed by the Defence of the Accused ("Defence") on 4 April 2005;

**CONSIDERING** the Prosecution's Response thereto filed on 11 April 2005, and the Defence' Reply thereto filed on 13 April 2005;

**CONSIDERING** the "Prosecutor's Submission in Compliance with Order for Filing Documents of 11 May 2005", filed on 13 May 2005, and the Defence's Reply thereto filed on 17 May 2005;

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

#### INTRODUCTION

1. The commencement of the trial in the instant proceedings is scheduled on 6 September 2005. On 4 April 2005, the Defence filed a Motion seeking disclosure and inspection of three categories of documents and material:

- A. Under Rule 54 of the Rules, disclosure of two documents filed *ex parte* and confidential by the Prosecution:
  1. Statement of Witness T attached as Annex to "Prosecutor's Supplemental Response to Nzirorera's Ex Parte Motion to interview Witness T" (5 October 2004);
  2. Supporting Affidavit of Christian Baudesson filed with "Prosecutor's Motion for Special Protective Measures for Witnesses G and T" (23 September 2003).
- B. Under Rule 66(B) of the Rules, inspection of:
  1. Items seized from former Prime Minister Jean Kambanda as described in Annex "A" of the Motion;
  2. E-mails and correspondence between Prosecution and any Prosecution witness;
  3. Material relating to the assassination of President Habyarimana.
- C. Under Rule 68, disclosure of
  1. Statements of any witness which contradict Prosecution witnesses and therefore affects their credibility;
  2. Exculpatory Witness Statements for the Accused or any member of the joint criminal enterprise;
  3. The identifying information for thirteen witnesses to crimes committed by Witness T whose redacted statements were previously disclosed to the Defence under Rule 68.

2. In its Response, the Prosecution consents to inspection of items seized from former Prime Minister Jean Kambanda. It furthermore notes that some of these documents have been already disclosed to the parties and that the Electronic Disclosure Suite ("EDS") contains or will contain these materials. The Defence acknowledges the Prosecution's

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undertaking but reserves its right to bring this matter again to the attention of the Chamber where necessary.

3. The Chamber now addresses contentious Defence requests.

#### DISCUSSION

##### *A. On the Disclosure of Documents Filed Ex Parte and Confidential by the Prosecution*

4. The Defence submits that, in light of Articles 20(1) and 21 of the Statute of the Tribunal ("Statute"), the Trial Chamber must balance the rights of the Accused against the need for protection of victims. Since the identities of Witnesses G and T have now been disclosed, the Defence contends that the justification for confidential filings no longer exists. It also alleges that the requested documents were submitted in support of Prosecution submissions and should therefore be disclosed in accordance with the principle *audi alteram partem* already applied by the Presiding Judge in this case. Finally, it submits that the information sought is necessary for the preparation of cross-examination and is also relevant to show the bias and motives of the Witnesses to testify.

5. As a general rule, the Chamber finds that applications must be filed *inter partes*. *Ex parte* and confidential applications can be warranted when they are in the interests of justice "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>1</sup> This requires consideration on a case-by-case basis and in light of the provisions of the Statute and the Rules. Pursuant to Article 19 of the Statute and as acknowledged by the Defence, the Chamber has to ensure a fair trial with full respect of the rights of the Accused but must also have due regard for the protection of victims and witnesses.

6. The Chamber observes that the Order granting special protective measures to Witnesses G and T was indeed based on the confidential information provided in the Supporting Affidavit of Christian Baudesson.<sup>2</sup> This document contains information whereby disclosure could jeopardize the protection of these Witnesses, and the Prosecution's ongoing investigations, and therefore cause them both an unfair prejudice. After reviewing the content of this document, the Chamber does not consider that its non-disclosure will affect the Defence's cross-examination. In the interests of justice, the said Affidavit must be kept *ex parte* and confidential.

7. The Statement of Witness T sought by the Defence contains identifying information related to his whereabouts, which in accordance with the Chamber's Order of 10 December 2004, cannot be disclosed to the Accused, the Defence or the public.<sup>3</sup> The disclosure of the requested Statement of Witness T could cause unfair prejudice to the Witness and impair his protection. The complete statement must be kept *ex parte* and

<sup>1</sup> See *Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-R66 (*Karemera et al.*), Decision on Motion to Unseal *Ex Parte* Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment (TC), 3 May 2005, par. 11.

<sup>2</sup> *Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44-R75, Order on Protective Measures for Prosecution Witnesses (TC), 10 December 2004.

<sup>3</sup> *Ibidem*.

confidential. However, the Chamber is of the view that the substance of the said statement does not contain any protected information and can be disclosed to the Defence. This substantive statement is therefore quoted in an Annex to this Decision.

*B. On the Inspection of E-mails and Correspondence between Prosecution and any Prosecutor Witness and of Material Relating to the Assassination of President Habyarimana*

8. The Defence submits that the e-mails and correspondence between Prosecution and any Prosecution Witness are material for the preparation of its case and should be made available for inspection since they do not fall within any exception. The Prosecution opposes the requested disclosure since it would considerably compromise its relationship with the potential Witnesses. It however undertakes to disclose to the Defence any e-mail or correspondence matching the criteria of the *Niyitegeka* Appeals Chamber Judgement.

9. Following Decisions of both *ad hoc* Tribunals, when requesting inspection of documents under Rule 66(B) of the Rules, the Defence must clearly and sufficiently identify specific material that the Prosecution has within its custody and control and for which inspection is requested.<sup>4</sup> It may not rely on general description of the information. In addition, the Defence must make a *prima facie* showing that the documents for which inspection is sought are material for its preparation.<sup>5</sup>

10. In the present case, the Defence request concerns a general access to the said documents and lacks specific identification. In addition, the Defence has not shown their materiality for its preparation. In such circumstances, the Defence request cannot be granted.

11. The Defence also seeks the inspection under Rule 66(B) of the Rules of the reports relating to the assassination of President Habyarimana, alleging that they are material to its preparation and in the possession of the Prosecution.

12. The Chamber had already delivered a Decision denying Defence Motion seeking State cooperation for obtaining the report of Judge Bruguière on President Habyarimana's assassination.<sup>6</sup> In that Decision, the Chamber ruled that the potential involvement of the RPF in the said assassination cannot relieve a person who is alleged to have committed international crimes in 1994 in Rwanda of his/her own criminal responsibility. It was furthermore noted that the charges against the Accused are not based on any alleged responsibility of the Accused in the assassination of President Habyarimana. In addition, the Defence no longer shows that there is any defence which could be supported by the requested document. Therefore, the second request under Rule 66(B) also fails.

*C. On the Disclosure of Documents Pursuant to Rule 68*

13. The Defence contends that the Prosecution is not complying with its obligations under Rule 68 of the Rules and requests disclosure of all the Witness statements which

<sup>4</sup> See *Ndayambaje et al.*, Decision on the Defence Motion for Disclosure (TC), 25 September 2001, par. 10; *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Decision on the Motion by the Accused Zejnil Delalic for the Disclosure of Evidence, 26 September 1996.

<sup>5</sup> *Ibidem*.

<sup>6</sup> *Karemera et al.*, *Décision relative à la requête de Joseph Nzirorera aux fins d'obtenir la coopération du Gouvernement français*, 23 février 2005 (TC), par. 11-12; see also *Karemera et al.*, Decision on Joseph Nzirorera's Application for Certification to Appeal the Decision Denying his Request for Cooperation to Government of France (TC), 31 March 2005.

contradict Prosecution Witnesses or are exculpatory of the Accused or of any member of the joint criminal enterprise. The Prosecution states that the introduction of Witness statements into an Electronic Disclosure System ("EDS") would sort out the issue of disclosure of exculpatory material pursuant to Rule 68 of the Rules. The Defence acknowledges the existence of the EDS but requests that the Chamber set a deadline of 5 July 2005 for completion of the Rule 68 disclosure since it is unknown when the Witness statements will be available on EDS.

14. Following the jurisprudence, when the Defence seeks to challenge the Prosecution disclosure material under Rule 68(A), it is expected to identify specifically the material sought and to show the exculpatory or potentially exculpatory character of the materials requested.<sup>7</sup>

15. The alleged materials sought by the Defence in the present case are not specifically identified. It does not indicate how the materials are exculpatory or potentially exculpatory. Such a request cannot therefore be granted. The Chamber furthermore recalls that the Prosecution has a continuous obligation under Rule 68(A) of the Rules.<sup>8</sup> By the expression "as soon as practicable", the Rule does not give a time limit by when the Prosecution should disclose the material sought. In these circumstances, setting a deadline for such a disclosure would not be appropriate. The Chamber appreciates the willingness of the Prosecution to disclose all Witness statements through EDS. However, EDS is not operational yet and the Chamber does not know about its worldwide access and reliability. EDS does not relieve the Prosecution from complying with its obligations under Rule 68(A) of the Rules as soon as practicable.<sup>9</sup>

16. In addition, the Defence seeks disclosure of identifying information for the thirteen witnesses who provided statements regarding Witness T to allow it to investigate the allegations and to confront him with these matters. The Prosecution opposes such a disclosure since all thirteen Witnesses are subject to Tribunal's Protective Orders.<sup>10</sup> It submits that in accordance with Rule 39 of the Rules, assurances were given to Witnesses of the confidentiality of the information they provided. The Prosecution would be unable to carry out its investigations without making such assurances. In any case, it opposes any application by the Defence to approach the said Witnesses for further questioning. A representative of the Prosecution or of the Witness and Victims Support Unit ("WVSS") must ascertain whether a particular Witness consents to meet the Defence.

17. The Defence acknowledges the existence of protective measures that apply to the thirteen Witnesses. However, it contends that since eleven of these Witnesses were not called

<sup>7</sup> *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Decision on Motion for Disclosure under Rule 68 (TC), 1 March 2004, par. 5; *Prosecutor v. Casimir Bizimungu and al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI (TC), 14 September 2004, par. 11; *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, Judgement (AC), 23 May 2005, par. 262.

<sup>8</sup> *The Prosecutor v. Casimir Bizimungu and al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI, 14 September 2004, par. 8.

<sup>9</sup> See Rule 68(B) of the Rules: "Where possible, and with the agreement of the Defence, and without prejudice to paragraph (A), the Prosecutor shall make available to the Defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the Defence can search such collections electronically." (emphasis added).

<sup>10</sup> Prosecutor's Submission in Compliance with Order for Filing Documents of 11 May 2005 filed on 13 May 2005.

by the Prosecution in the other cases and one other Witness was dropped from the *Karemera et al.* Case, only Witness HAF is covered by protective measures. The Defence agrees to be bound by such measures, but notes that Rule 75(F) of the Rules does not impede the Prosecution from disclosing the identity of the Witness. It relies on Decisions delivered in *Bagosora* and *Bizimungu* Cases where the identity of persons possessing exculpatory evidence was ordered to be disclosed.<sup>11</sup>

18. While Rule 39 of the Rules allows the Prosecution to take the necessary measures to provide for the safety of potential witnesses, the Chamber only has the authority to order protective measures in accordance with Articles 19 and 20 of the Statute and Rules 69 and 75 of the Rules. The application of Rule 39 of the Rules by the Prosecution could not constitute, as such, an impediment to disclosure of identifying information with respect to Prosecution witnesses. In addition, while Rule 75(F) of the Rules prescribes that protective measures ordered in respect of a Witness in any proceedings before the Tribunal continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal, it also prohibits the Prosecution from using a protective Order in a prior case as an excuse for failing to comply with its disclosure obligations. The same Rule requires the Prosecution to notify the Defence of the nature of the protective measures in the first proceedings.<sup>12</sup>

19. In the present case, the Chamber finds that the above-mentioned material sought by the Defence has the required precision. There is no doubt that the Prosecution has knowledge of, and is in possession of, the unredacted version of the requested statements. It does not dispute that these statements contain evidence that may be characterized as exculpatory. The requirements set out by Rule 68 of the Rules are met.

20. The Chamber is of the view that the identity of the thirteen Witnesses is inextricably connected with the substance of the statements. Their identifying information should therefore be disclosed to the Defence in accordance with Prosecution's obligation under Rule 68 of the Rules.

21. The Chamber nevertheless recalls that protective Orders were delivered by the Tribunal regarding the thirteen Witnesses and are binding for both Defence and Prosecution.<sup>13</sup> These measures continue to apply since these Orders explicitly provide that they apply to all "potential" Prosecution Witness. Nothing in the Protective Orders implies

<sup>11</sup> *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, *Decision on Motion for Disclosure Under Rule 68* (TC), 1 March 2004; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence* (TC), 25 May 2004.

<sup>12</sup> See *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-T, *Decision on Disclosure of Transcripts and Exhibits of Witness X* (TC), 3 June 2004, par. 4.


<sup>13</sup> See *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44-R75, *Order on Protective Measures for Prosecution Witnesses* (TC), 10 December 2004; *Prosecutor v. Kabiligi and Ntabakuze*, Case No. ICTR-97-34-I, *Decision on Motion by the Office of the Prosecutor for Orders for Protective Measures for Victims and Witnesses* (TC), 19 May 2000; *Prosecutor v. Bagosora*, Case No. ICTR-96-7-1, *Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses* (TC), 31 October 1997; see also *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, *Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001* (TC), 18 July 2003; *Prosecutor v. Nindiliyimana et al.*, *Order for Protective Measures for Witnesses* (TC), 12 July 2001 as amended by *Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials* (TC), 3 November 2004; *Prosecutor v. Seromba*, Case No. ICTR-2001-66-I, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses* (TC), 30 June 2003.


that their application cease upon the Witness' removal from the Prosecution Witness list. In addition, the Chamber reminds the Defence that, following the said protective Orders, it must notify the Prosecution of its intent to contact a protected Witness or to make such a written request to this Chamber.

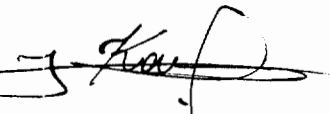
**FOR THE ABOVE MENTIONED REASONS, THE CHAMBER**


- I. **GRANTS** the Motion in part and **ORDERS** disclosure of the identifying information of the thirteen Witnesses whose redacted statements were previously disclosed to the Defence;
- II. **DENIES** the remainder of the Motion.

Arusha, 5 July 2005, done in English.

  
 Dennis C. M. Byron  
 Presiding Judge

  
 Emile Francis Short  
 Judge

  
 Gberdao Gustave Kam  
 Judge

  
 [Seal of the Tribunal]

**ANNEX:****Extract of Statement of Witness T attached as Annex to "Prosecutor's Supplemental Response to Nzirorera's *Ex Parte* Motion to interview Witness T" (5 October 2004)**

« Vous m'informez que par commission rogatoire internationale, le TPIR à Arusha souhaite savoir si je suis d'accord de rencontrer Mr. Robinson, avocat de la défense dans le dossier GOUVERNEMENT 1, représentant l'accusé Joseph NZIRORERA.

Je ne souhaite pas rencontrer l'avocat de Joseph NZIRORERA, en la personne de Mr. ROBINSON. Par le passé, Maître ROBINSON a eu par trois fois l'occasion de me rencontrer.

Je n'ai rien d'autre à déclarer ».

