



UNITED NATIONS  
NATIONS UNIES

ICTR-98-44-PT  
18-8-2005  
(23492 - 23489)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

23492  
2005

OR: ENG

**TRIAL CHAMBER III**

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

**Registrar:** Adama Dieng

**Date:** 18 August 2005

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ICTR

**THE PROSECUTOR**

v.

**Édouard KAREMERA**  
**Mathieu NGIRUMPATSE**  
**Joseph NZIRORERA**

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

**DECISION ON THE DEFENCE MOTION TO PERMIT INVESTIGATORS  
TO ATTEND CLOSED SESSIONS**

*Rule 73 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**  
Don Webster  
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Sunkarie Ballah-Conteh  
Takeh Sendze

**Defence Counsel for Édouard Karemera**  
Dior Diagne Mbaye and Félix Sow

**Defence Counsel for Mathieu Ngirumpatse**  
Chantal Hounkpatin and Frédéric Weyl

**Defence Counsel for Joseph Nzirorera**  
Peter Robinson

**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 Permit Investigators to Attend Closed Sessions, filed on 13 July 2005 (“Motion”); and Mathieu Ndirumpatse’s Joinder filed on 8 August 2005 (“Joinder”); and **RECALLING** that the Defence for Mathieu Ndirumpatse raised a similar issue at the status conference of 17 November 2004;<sup>1</sup> (“Defence”)

**RECALLING** the Order for the Registrar to file his submissions on the Motion<sup>2</sup> and **CONSIDERING** the representations made by the Registrar on 8 August 2005 (“Registrar’s Submissions”);

**CONSIDERING ALSO** the Prosecution’s Response filed on 27 July 2005 (“Response”) and Joseph Nzirorera’s Reply to the Registrar’s submission filed on 10 August 2005 (“Reply”);

**TAKING INTO ACCOUNT** the practice and jurisprudence before the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL);

**RECALLING** the Chamber’s Order on Protective Measures for Prosecution Witnesses of 10 December 2004;

**DECIDES** as follows pursuant to Rule 73(A) of the Rules of Procedure and Evidence (“Rules”):

**INTRODUCTION**

1. Defendant Nzirorera submits that two of his investigators are native Kinyarwanda speakers and have interviewed many people in the course of the preparation for trial. The Defence asserts that the presence of its investigators during closed sessions would benefit them by providing immediate assistance for cross-examination and information for further investigation.

2. The Prosecution concedes that the presence of Defence investigators in closed session may be allowed but is not requisite and would serve to intimidate their witnesses.

3. The Registrar states that special circumstances would be required from the Defence in order for its investigators to attend court sessions and to be eligible for reimbursement of costs, pursuant to its management policies and principles that govern the availability of financial means under the Legal Aid program.

4. Furthermore, the Registrar states that the Tribunal does not have any provision in its Rules that expressly excludes the attendance of the parties’ investigators from trial sessions. Nonetheless, the Registrar submits that his general policy is to limit the presence of Defence investigators in Arusha to the time when the Defence is presenting its case. He finally suggests that decisions on the presence of Defence investigators in Arusha should be made on a case-by-case basis, since parts of the present multi-accused trial might not necessitate the attendance of the investigators of a particular team at all times.

<sup>1</sup> *The Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera* (“Karemera et al”), Case No. ICTR-98-44, T. 17 November 2004, pp.25, 26, 27.

<sup>2</sup> *Karemera et. al*, Order for the Registrar to Make Submissions on Joseph Nzirorera’s Motion for Allowing Defence Investigators in Closed Sessions (TC), 1 August 2005.



5. The Defence replies that it does not seek authorization for any funding, which is a separate issue, and affirms that the Motion is solely directed at allowing its investigators to attend closed sessions.

**DISCUSSIONS**

6. This Tribunal has not yet decided on the issue of investigators attending closed sessions, even if it has been raised orally during some trial sessions before this Chamber and Trial Chamber II.<sup>3</sup> However, it has been the practice before the ICTY to allow the investigators of the parties to be present during the proceedings,<sup>4</sup> and the SCSL recently granted a similar motion where it allowed the presence of Defence investigators during closed session hearings when certain conditions were met.<sup>5</sup>

7. Article 20 of the Statute of the Tribunal ("Statute") guarantees the accused the right to a fair and public hearing. According to Rule 79 of the Rules, which is to be read in conjunction with Rule 75 and balanced with the rights of the accused, the press and public may be excluded from all or part of the proceedings during closed sessions for reasons of public order or morality, the protection of the interests of justice and, in most occasions, for ensuring the safety, security or non-disclosure of the identity of a victim or witness. The Chamber accordingly notes that a closed session has a clear objective: to prevent disclosure to the public.

8. Defence Investigators are not members of the public but part of the Defence team. They are responsible for obtaining the factual information relevant for the Defence to defend the accusations against them. They spend a considerable amount of time in the field and therefore usually possess first-hand-experience of the locations in question and of the facts adduced at trial. They have interviewed witnesses who will appear during the proceedings. The contribution of the Investigators is therefore an integral part of the work of the Defence.

9. The Chamber observes that neither the Rules nor the Statute explicitly prohibit investigators from attending open and closed court sessions. The Chamber also observes that being part of the Defence team, they are, in principle, allowed to attend closed sessions, and consequently, they are bound by any order made by the Chamber. The Chamber recalls that Lead Counsel is responsible for the management of the Defence team.

10. The Chamber notes the Registrar's policy as outlined in his submissions regarding the management of the Legal Aid Fund, in accordance with the functions assigned to him by the Statute and the Rules. The Chamber also notes that the Registrar based his submissions largely on considerations regarding the administration of funds and not the legal substance argued by the Defence.

11. The Chamber recalls the rights of the Accused as set out by Article 20(4)(b) of the Statute to be provided with adequate facilities in preparing and presenting his defence, and observes that whenever the presence of an investigator in Arusha during court sessions is

<sup>3</sup> See *Prosecutor v. Kajelijeli*, Case No ICTR-98-44A-T, T. 30 September 2002 pp 3-6; T. 19 September 2002 pp.98-99, T. 23 September 2002 pp.4-5; and *Karemera et al.*, T. 17 November 2004 p. 25, 26, 27.

<sup>4</sup> *Prosecutor v. Kordic and Cerkez*, Case No. IT-94-14/2, Order permitting Investigators to follow Proceedings (TC), 19 April 1999; *Prosecutor v. Naletilic and Martinovic*, Case No. IT-38-34, Decision on Prosecutor's Motion to Permit Investigators to Follow the Proceedings (TC), 31 August 2001; *Prosecutor v. Mrksic, et al.*, IT-95-13A, Order Permitting Investigators to Follow Proceedings (TC), 23 April 1998.

<sup>5</sup> *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T, Decision on Joint Motion by Sam Hinga Norman, Moinina Fofana, and Allieu Kondiwa Seeking Permission for Defence Investigators to Sit in Court During Closed Sessions, 28 February 2005.

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considered to be necessary, the Defence could seize the Registrar with this matter by providing justification in order to support a request for adequate funding.

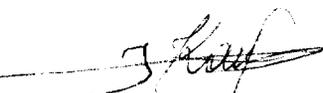
12. The Chamber, moreover, recalls Rule 90(D) of the Rules which, as the general rule, does not allow a witness, other than an expert witness, who has not yet testified to be present in court during the testimony of another witness, although this fact alone will not disqualify the future witness testimony. The Chamber also recalls that Articles 20(2) and (4)(e) of the Statute make it imperative to treat the Prosecution and the Defence equally with regard to the examination of witnesses. The Chamber therefore observes that it could lead to potentially different treatment if the Prosecution's investigators are allowed to be present in court and subsequently testify, whereas the Defence's investigators are not granted the same right. Consequently, the Chamber holds that the Defence investigators will not be disqualified from testifying simply by attending court sessions prior to their own testimony.

**FOR THE ABOVE MENTIONED REASONS, THE CHAMBER  
GRANTS the Motion.**

Arusha, 18 August 2005, done in English.

  
Dennis C. M. Byron  
Presiding

  
Emile Francis Short  
Judge

  
Gberdao Gustave Kam  
Judge

