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UNITED NATIONS
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**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: 14 October 2005

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THE PROSECUTOR

v.

**Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA
Case No. ICTR-98-44-T**

**DECISION ON DEFENCE MOTION FOR DISCLOSURE OF PROSECUTION EX
PARTE MOTION UNDER RULE 66(C) AND REQUEST FOR COOPERATION OF A
CERTAIN STATE**

Article 28 of the Statute, Rules 54 and 66(C) of the Rules of Procedure and Evidence

Office of the Prosecutor:
Don Webster
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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

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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”);

NOTING the Motion to Report Government of a certain State to United Nations Security Council filed by the Defence for the Accused Joseph Nzirorera (“First Defence Motion”) on 20 September 2005;¹

NOTING the Prosecution’s Response thereto filed on 26 September 2005 and the Defence’s Reply thereto filed on 30 September 2005;

NOTING the Prosecution Motions under Rule 66 C for material within the Dossier of a certain State² to be reviewed in camera by the Trial Chamber and ruled not disclosable, filed *inter partes* and *ex parte* on 26 September 2005 (respectively, “First and Second Prosecution Motions”);

CONSIDERING “Joseph Nzirorera’s Motion for Disclosure of Prosecution *Ex Parte* Motion under Rule 66(C)” (“Second Defence Motion”), filed by the Defence for the Accused Joseph Nzirorera (“Defence”) on 30 September 2005;

CONSIDERING the Prosecution Response thereto, filed on 5 October 2005;

CONSIDERING the Prosecution Motion to Permit the Redacted Disclosure of the Statement of Witness T taken by the authorities of a State³ on 29 September 2005, and served in edited form on the Defence on 7 October 2005 (“Third Prosecution Motion”), filed *ex parte* on 12 October 2005;

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

INTRODUCTION

1. The Prosecution case in the instant proceedings started on 19 September 2005. Prosecution Witness T is scheduled to testify during the next trial session in January 2006. On 23 February 2005, the Chamber requested a State to provide its assistance so that all the parties in the current proceedings could be served, as soon as possible, with the following documents pertaining to Witness T (“Decision of 23 February 2005”):⁴

- i) copies of all documents on the investigation and prosecution of this Witness which contain a description of the charges being investigated or lodged against this Witness or any facts upon which those charges are based ; and

¹ The name of the State is specified in the confidential Annex to the present Decision placed under seal.

² *Ibidem*.

³ *Ibidem*.

⁴ *Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-PT (“*Karemera et al.*”), *Décision relative à la requête de Joseph Nzirorera aux fins d’obtenir la coopération du gouvernement d’un certain Etat* (TC), 23 February 2005 (the name of the State is specified in the confidential Annex to the present Decision placed under seal).

ii) copies of any statement made by this Witness before the judicial or law enforcement authorities of the said State.

2. In its First Motion, the Defence moves the Chamber, pursuant to Rule 7bis of the Rules, requesting the President of the Tribunal to report to the United Nations Security Council the failure of the said State to cooperate with the Tribunal in compliance with the above-mentioned Decision. The Prosecution responds that the Motion is moot since the Prosecution has obtained a copy of the full dossier by making a request pursuant to its power to seek assistance of said State authorities in the collection of evidence. It submits that, on 26 September 2005, some of this material was disclosed, in redacted form, to the Defence for each Accused in this case. Furthermore, the Prosecution refers the Chamber to two other Motions, one filed *inter partes* and the other filed *ex parte*, in which the Prosecution, relying upon Rule 66 (C) of the Rules, moves the Chamber to order that some of the material in question is not subject to disclosure until the trial of Witness T is completed and that some of the material is not subject to disclosure at any time.

3. The Defence for both Nzirorera and Ngirumpatse oppose the First and Second Prosecution Motions and request immediate disclosure of all the material received from the said State. In addition, the Defence for Nzirorera requests immediate disclosure of the Second Prosecution Motion and its annexes filed *ex parte*. It further seeks the opportunity to file a response within five days of the disclosure.

DELIBERATIONS

4. The Chamber recalls that, as a general rule, 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 the fact of 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”.⁵ This Chamber has also held that the principle of *audi alteram partem* requires that filings be disclosed to the opposing party, absent a compelling reason not to do so.⁶

5. In its Response to the Second Defence Motion, the Prosecution opposes the disclosure of its *ex parte* Motion. In its view, a submission made under Rule 66(C) of the Rules, and the materials to which that application relates, may be filed *ex parte*.

6. The Chamber notes that Rule 66(C) of the Rules provides an exception to the Prosecution disclosure obligations under Rules 66(A) and (B). Furthermore, this Rule prescribes that “[w]hen making such an application the Prosecutor shall provide the Trial Chamber, and only the Trial Chamber, with the information or materials that are sought to be kept confidential.” (emphasis added)

7. The Chamber notes that the Second Prosecution Motion, which was filed *ex parte*, includes information which is not contained in the First Prosecution Motion, namely: information concerning the content of the material in the Prosecution’s possession; information relating to the arguments in support of both Prosecution Motions under Rule

⁵ *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; *Karemera et al.*, Decision on Joseph Nzirorera’s Motion to Compel Inspection and Disclosure (TC), 5 July 2005, par. 5.

⁶ *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 and 13.

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66(C); a letter from Witness T's lawyer, annexed to the Motion; and a complete set of CD-Roms containing all of the documents provided by the said State.

8. There is no doubt that the complete set of documents which the Prosecution seeks to be kept confidential under Rule 66(C) should not be disclosed to the Defence at this stage. It is an issue on which the Chamber will rule at a later stage. Likewise, the wide description of the content of this material provided in the Second Prosecution Motion could reveal the content of the documents which the Prosecution seeks to keep confidential. It is therefore appropriate that the Defence should not have access to that information at the moment.

9. With respect to the letter from the lawyer of Witness T, the Chamber is of the view that its disclosure to the Defence would be likely to unfairly prejudice some person involved in or related to that document since it may contain sensitive information. It is therefore appropriate to ascertain, with the assistance of the authorities of the said State, whether the lawyer has any reservations in disclosing the letter.

10. Conversely, the Chamber is not persuaded that the additional legal arguments developed by the Prosecution at paragraphs 13, 14 and 15 of its Second Motion contain any information, the disclosure of which would likely be prejudicial to anyone or which should be kept confidential under Rule 66(C) of the Rules. In addition, the argument of the Prosecution in the Second Motion may assist the Chamber in its decision making. The Chamber therefore finds that, in the interests of justice and in the light of the *audi alteram partem* principle, disclosure of paragraphs 13, 14 and 15 of the Second Prosecution Motion to the Defence is necessary.

11. The Chamber notes that the Third Prosecution Motion, also filed *ex parte*, relies on the Second Prosecution Motion and develops the same arguments. For the same reasons, it should be disclosed to the Defence. The Annexes consisting of the un-redacted statement of Witness T and the Second Prosecution Motion should nevertheless not be revealed to the Defence for the moment since those are material to be reviewed by the Chamber under Rule 66(C).

12. Finally, the Chamber considers that the Prosecution Motions under Rule 66(C) of the Rules concern the authorities of the said State and that the said authorities may also be able to provide important assistance to the Chamber. Therefore, before the Chamber rules on the matter, it is appropriate, pursuant to Article 28 of the Statute of the Tribunal and Rule 54 of the Rules, for the Chamber to invite the said State to make submissions on the First, Second and Third Prosecution Motions as well as on the Defence Motion to Report Government of a certain State to the United Nations Security Council.

FOR THE ABOVE REASONS, THE CHAMBER

I. GRANTS in part Joseph Nzirorera's Motion for Disclosure of Prosecution *Ex Parte* Motion under Rule 66(C); and accordingly

II. ORDERS the immediate and confidential disclosure to all Defence in the instant proceedings of paragraphs 13, 14 and 15 of the Prosecution Motion under Rule 66 C for material within the Dossier of a certain State to be reviewed in camera by the Trial Chamber and ruled not disclosable,⁷ filed *ex parte* on 26 September 2005; but

III. ORDERS that the *ex parte* status of the remaining Prosecution Motion and Annexes be maintained temporarily;

⁷ The exact title of this Motion is specified in the confidential Annex to the present Decision placed under seal.

IV. AUTHORIZES the Defence for each Accused to file any supplementary response to the above-mentioned Prosecution Motion no later than 19 October 2005;

V. ORDERS the immediate and confidential disclosure to all Defence in the instant proceedings of the Prosecution Motion to Permit the Redacted Disclosure of the Statement of Witness T taken by the authorities of a State⁸ on 29 September 2005, and served in edited form on the Defence on 7 October 2005, filed on 12 October 2005, the Annexes to this Motion being temporarily excepted;

VI. AUTHORIZES the Defence for each Accused to file any response to the above-mentioned Prosecution Motion no later than 19 October 2005;

VII. REQUESTS the authorities of a State, the name of which is specified in the confidential Annex to the present Decision and placed under seal, to provide their assistance to contact a certain lawyer whose name is specified in the same confidential Annex to the present Decision, and to obtain his consent to disclose the letter, or parts of it, which is annexed to the Second Prosecution Motion;

VIII. INVITES the authorities of the same State, the name of which is specified in the confidential Annex to the present Decision, to make submissions with respect to the following documents no later than 3 November 2005:

- i. Prosecution Motions under Rule 66 C for material within the Dossier of a Certain State⁹ to be reviewed in camera by the Trial Chamber and ruled not disclosable, filed on 26 September 2005;
- ii. the Defence Responses thereto, filed respectively on 30 September 2005 and 3 October 2005; and
- iii. the Defence Motion to Report Government of a certain State¹⁰ to United Nations Security Council.

Arusha, 14 October 2005, done in English.



Dennis C. M. Byron

Presiding Judge



Emile Francis Short

Judge



Gberdao Gustave Kam

Judge



⁸ The exact title of this Motion is specified in the confidential Annex to the present Decision placed under seal.

⁹ *Ibidem*.

¹⁰ *Ibidem*.