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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: 15 February 2006

THE PROSECUTOR

v.

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

2006 FEB 15 14:56
ICTR-98-44-T
2006

**DECISION ON DEFENCE MOTION TO REPORT GOVERNMENT OF A CERTAIN
STATE TO UNITED NATIONS SECURITY COUNCIL AND ON PROSECUTION
MOTIONS UNDER RULE 66(C) OF THE RULES**

Article 28 of the Statute of the Tribunal and Rule 66(C) of the Rules of Procedure and Evidence

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INTRODUCTION

1. The first trial session in this case was held from 19 September to 28 October 2005, with the Prosecution calling Witnesses G and GFJ. Prosecution Witness T was initially scheduled to be called during that first trial session but was not actually heard.

2. On 23 February 2005, the Chamber requested a State¹ 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:²

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

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

3. In early September 2005, the Prosecutor made an independent request for the above-mentioned documents under his power to seek assistance of State authorities in the collection of evidence.³ Having obtained these documents, the Prosecution made two applications, one filed *inter partes* and the other one filed *ex parte*, moving the Chamber to allow partial disclosure of the documents under Rule 66(C) of the Rules of Procedure and Evidence ("Rules").⁴ Both the Defence for Nzirorera and Ngirumpatse opposed the applications and requested immediate disclosure of all the material received from the State.⁵

4. On 12 October 2005, as a result of an additional communication made by the authorities of the State, the Prosecution requested the Chamber to permit redacted disclosure of a statement of Witness T taken on 29 September 2005, but served in edited form on the Defence on 7 October 2005.⁶ The Defence for each Accused opposed the Motion and requested to obtain an un-redacted version of that statement.⁷

5. In a separate Motion, the Defence for Nzirorera moved the Chamber, pursuant to Rule 7bis of the Rules, to request the President of the Tribunal to report the failure of the State to cooperate with the Tribunal following the Decision of 23 February 2005 to the United Nations Security Council.⁸ The Prosecution responded that this Motion was moot

¹ In accordance with specific protective measures applicable in the instant case, the name of the State is specified in the Confidential Annex to the present Decision placed under seal.

² *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse 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.

³ Prosecution Motions 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, filed *inter partes* and *ex parte* on 26 September 2005.

⁴ *Ibidem*.

⁵ The Defence for Joseph Nzirorera filed a Preliminary Response on 30 September 2005 and a Supplemental Response on 20 October 2005, the Defence for Mathieu Ngirumpatse filed a Response on 3 October 2005, and the Prosecution filed Replies to these Responses on 6 and 10 October 2005.

⁶ Prosecution Motion to Permit the Redacted Disclosure of the Statement of Witness T taken by the authorities of a State on 29 September 2005, and served in edited form on the Defence on 7 October 2005, filed *ex parte* on 12 October 2005.

⁷ The issue has been first raised in open court by the Defence for Nzirorera, see T. 10 October 2005, p. 7.

⁸ Motion to Report Government of a certain State to United Nations Security Council, filed on 20 September 2005.

since the requested file was disclosed by the State to the Prosecution and an application was made for disclosure in part under Rule 66(C) of the Rules.⁹

6. On 14 October 2005, the Chamber considered that the Prosecution Motions under Rule 66(C) of the Rules concerned the authorities of the State and that these authorities may also be able to provide important assistance to the Chamber.¹⁰ These authorities were therefore invited to make submissions on the Prosecution Motions under Rule 66(C)¹¹ and on the Defence application to report the State to the Security Council.¹² These submissions were filed on 3 December 2005.

7. The Chamber is now in a position to deal with the Defence Motion to report to the United Nations Security Council, and the submissions regarding disclosure in part of documents related to Witness T.

DELIBERATIONS

Request to Report the State to the United Nations Security Council

8. In its Motion, the Defence for Nzirorera claims that the State has failed to comply with the Decision of 23 February 2005 requesting its cooperation to provide certain documents relating to Witness T to the parties in this case. It is submitted that the authorities provided the requested material to the Prosecution but not to the Defence which the Prosecution now applies to be only partially disclosed pursuant to Rule 66(C). Accordingly, the Defence requests the President of the Tribunal to report this failure to the United Nations Security Council.

9. The Prosecution explains that, during the course of a mission in Europe, it found out that the authorities of the State had serious concerns regarding the disclosure of the material sought, including the fact that Witness T's Counsel strongly objected to any disclosure in a letter dated 15 September 2005. Consequently, the Prosecution offered the authorities of the State the opportunity to deliver Witness T's judicial record in its entirety to the Chamber and to request the Chamber to make a fair determination regarding its disclosure pursuant to Rule 66(C) of the Rules. The Prosecution was of the view that such action would expedite the proceedings and address concerns expressed by the State regarding public disclosure of the material.

10. In their submissions, the authorities of the State emphasize its obligation and willingness to cooperate with the Tribunal. The State, however, explained that full disclosure of Witness T's judicial records would be contrary to the applicable domestic law and would also infringe on Witness T's right to a fair trial as he is currently in judicial proceeding before the State. Full disclosure of the material to the Defence could prejudice the security of certain witnesses specifically identified in the documents. The authorities of the State express the view that the suggestion made by the Prosecution in its applications under Rule 66(C) for

⁹ The Prosecution files a Response on 26 September 2005 and the Defence replied thereto on 30 September 2005.

¹⁰ *Karemera et al.*, Decision on Defence Motion for Disclosure of Prosecution Ex Parte Motion under Rule 66(C) and Request for Cooperation of a Certain State (TC), 14 October 2005; and *Karemera et al.*, *Ordonnance portant extension de délai pour le dépôt de soumissions* (TC), 11 November 2005.

¹¹ Prosecution Motions 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, filed *inter partes* and *ex parte* on 26 September 2005; and Prosecution Motion to Permit the Redacted Disclosure of the Statement of Witness T taken by the authorities of a State on 29 September 2005, and served in edited form on the Defence on 7 October 2005, filed *ex parte* on 12 October 2005.

¹² Motion to Report Government of a certain State to United Nations Security Council filed on 20 September 2005.

partial disclosure of Witness T's judicial records will satisfy both its obligation to cooperate with the Tribunal and to protect its own security interests. They conclude that due to, among other things, security reasons, the documents contained in Witness T's judicial record can only be partially disclosed to the Defence.

11. Rule 7bis of the Rules provides that "where a Trial Chamber or a Judge is satisfied that a State has failed to comply with an obligation under Article 28 of the Statute relating to any proceedings before that Chamber or Judge, the Chamber or Judge may request the President to report the matter to the Security Council". A State is, however, permitted to rely on exceptional circumstances, including security interests, to be relieved of its obligation to cooperate with the Tribunal.¹³

12. In the present case, it is clear that the authorities of the State had difficulties, including security reasons, to comply with the Decision of 23 February 2005 and was of the view that their position could be represented to the Chamber via another organ of the Tribunal, the Prosecutor's Office. The Chamber also finds that, in its applications, the Prosecution fairly represented the State's concerns and did not intend to frustrate the disclosure of the material. This procedure is not the most appropriate one to comply with an Order to cooperate with the Tribunal. However, the Chamber is of the view that, in these particular circumstances, the authorities have not failed to comply with their obligations under Article 28 of the Statute. The Defence Motion to report the State to the United Nations Security Council falls therefore to be rejected.

13. The Chamber has now to determine whether the disclosure in part, as proposed by the Prosecution and supported by the State, can be granted.

Request for Partial Disclosure

14. The Prosecution has divided the material into three sets of CDs: 1) (CD 1) Material that can be disclosed and was effectively disclosed in redacted form to the Defence on 26 September 2005, containing contents of statements of Witness T to judicial police officers of the State; 2) (CD 2) Material to be reviewed under Rule 66(C); and 3) (CD 3) Internal legal correspondence and bills for the investigation. The Prosecution moves the Chamber to order that the material contained in CD2, which is divided into 4 sub-sets of CDs (CD2A, 2B, 2C and 2D), is not subject to disclosure until the trial of Witness T is completed. It is submitted that full disclosure of the material contained in CD2 could violate Witness T's right to fair trial. The Prosecution contends that the material contained in CD3 is classified as internal documents falling within the ambit of Rule 70 of the Rules, and is not subject to disclosure.

15. In a third Motion, the Prosecution moves the Chamber to permit redacted disclosure of Witness T's statement taken by the authorities of the State on 29 September 2005, and served in edited form on the Defence on 7 October 2005. It claims that un-redacted disclosure of this statement may prejudice the fair trial of Witness T.

16. The Defence for Nzirorera argues that all the material in the Prosecution's possession should be disclosed forthwith to allow it to complete its investigation before Witness T testifies. Should the Chamber determine the need for an *in camera* inspection, the Defence submits that the Chamber could nevertheless order the disclosure of exculpatory material under Rule 68(A) of the Rules. Alternatively, if the Chamber concludes that any of the material should be withheld until after the trial of Witness T is completed, the Defence

¹³ *Karemera et al., Décision relative à la requête de la Défense aux fins de faire injonction au Département des opérations de maintien de la paix des Nations Unies de produire certains documents* (TC), 9 March 2004, para. 18.

requests that the testimony of Witness T be delayed until his trial in the State is concluded and the objection to disclosure has become moot.

17. The Defence for Ngirumpatse claims that the Prosecution abusively intercepted the documents and has withheld them, prejudicing its ability to cross-examine Prosecution witnesses. It requests that the Chamber deny the Motion, order the Prosecution to disclose all of the documents and adjourn the hearing of the Prosecution witnesses for 60 days, allowing the Defence to examine the documents. In the alternative, the Defence requests the Chamber to postpone the testimony of Witness T and of other Prosecution witnesses, in particular Witnesses G, ALG, UB and GFJ until after the trial of Witness T and complete disclosure by the Prosecution, or exclude their testimony altogether.

18. Rules 66(C) and 68(D) of the Rules provide for an exception to the Prosecution disclosure obligations under Sub-Rules 66(A), (B) and 68(A) if the disclosure "may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interests or affect the security interests of any State". Rule 70(B) of the Rules provides that "if the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused".

19. After reviewing the documents sought for non-disclosure, the Chamber is particularly concerned that Witness T receives a fair trial. The Chamber is persuaded that it must balance the rights of the Accused with those of Witness T to receive fair trials in their respective criminal proceedings.

20. The Chamber finds that there is likelihood that some of the documents contained in CD2 A, B, C and D if disclosed to the Defence before Witness T's trial, may violate that right and therefore be contrary to the public interests. In the present case, the Accused has already received substantial disclosure regarding Witness T's testimony and has access to other relief with regard to the documents contained in CD2 at a later stage in these proceedings. The Chamber is therefore of the view that the documents contained in CD2 should not be subject to disclosure at this stage.

21. The Chamber however adopts the Prosecution's suggestion, agreed to by the authorities of the State that some statements made by Witness T contained in CD2B may be disclosed now in a redacted form and will not affect the public interests. Under these circumstances, disclosure of these statements, in a redacted form, should be made.

22. In addition, the Chamber needs further information before deciding whether disclosure of Witness T's immigration files contained in CD2D could be ordered. In that regard, the Chamber has already requested the cooperation of the State in a separate Order and will reserve its ruling on that matter.¹⁴

23. The Chamber notes that all of the documents contained in CD3, except for one report, concern Witness T's criminal proceedings in the State. The report is also contained in CD2A, which may be disclosed at a later stage. The other documents in CD3 were provided to the Prosecution by the authorities of the State on a confidential basis and therefore should not be disclosed without the consent of the State in accordance with Rule 70(B) of the Rules. It must be further noted that these documents are not likely relevant to the preparation of the Defence in this case.

¹⁴ *Karemera et al., Ordonnance visant au dépôt des soumissions d'un Etat* (TC), 13 February 2006.

24. In order to preserve the right of Witness T to a fair trial and the public interests, the Chamber is also of the view that the Prosecution is permitted to maintain the redaction of Witness T's statement taken on 29 September 2005, served on the Defence on 7 October 2005.

Delay or Exclusion of Witness Testimony

25. The Chamber notes that following the latest information provided by the Prosecution,¹⁵ Witness T will not be called to testify during the second trial session which started on 13 February 2006 as originally planned. The testimony has not yet been rescheduled. In light of these particular circumstances, neither the exclusion nor the postponement of Witness T's testimony is warranted. The Chamber extends this reason to the request to exclude the testimony of certain Prosecution witnesses, in particular Witnesses G, ALG, UB and GFJ. Exclusion of evidence is at the extreme end of a scale of measures available to the Chamber in addressing any prejudice to the rights of the Accused. The Defence has not shown, at this stage, the existence of any prejudice that would justify such an extreme remedy.

26. In response to Ngirumpatse's request to postpone the testimony of certain witnesses, the Chamber reminds the Defence that it has already denied the postponement of Witness G and Witness GFJ's testimony who were heard during the first trial session in September 2005. The Chamber is of the view that the right of the Defence to cross-examine the Prosecution witnesses will not be impaired if material is withheld from the Defence pursuant to this Decision. In addition, the Chamber has already specified that, if the need arises, witnesses could be recalled to testify on significant matters that arise in the course of the proceedings. At this stage, the interests of the justice would not be served by an order delaying the testimonies of some Prosecution witnesses.

27. Finally, it must be noted that in their submissions of 3 December 2005, the authorities of the State note that Witness T's Counsel agreed that his letter dated 15 September 2005 explaining his opposition to the full disclosure of Witness T's judicial records, could be disclosed to the parties in the instant case.

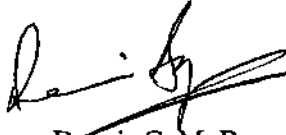
FOR THE ABOVE REASONS, THE CHAMBER

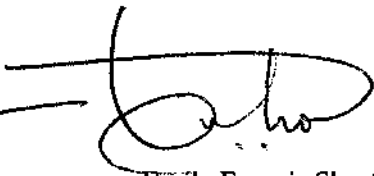
- I. **DENIES** Joseph Nzirorera's Motion to Report the Government of a certain State to the United Nations Security Council;
- II. **DENIES** the Defence requests for exclusion or postponement of the testimony of Witness T or of any other Prosecution witnesses;
- III. **GRANTS** in part the Prosecution Motions;
- IV. **ORDERS** that the documents pertaining to Witness T, contained in CD 2 annexed to the Second Prosecution Motion, should not be disclosed at this stage;
- V. **ORDERS** that the documents pertaining to Witness T's judicial records, contained in CD 3, should not be disclosed without the consent of the State, except the report, which is also contained in CD2A, which could be disclosed after Witness T's trial;

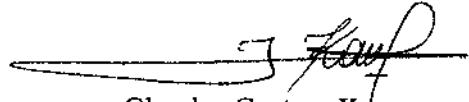
¹⁵ Order of appearance of witnesses for the trial session starting on 13 February 2006, filed on 15 December 2005.

- VI. RESERVES** its ruling with respect to the Witness T's immigration files;
- VII. AUTHORIZES** the Prosecution to maintain the redaction of Witness T's statement taken on 29 September 2005, served in edited form on the Defence on 7 October 2005;
- VIII. REQUESTS** the Registry to disclose to the Defence the letter dated 15 September 2005 written by Counsel for Witness T,¹⁶ annexed to 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, filed *ex parte* on 26 September 2005.¹⁷

Arusha, 15 February 2006, done in English.


Dennis C. M. Byron


Emile Francis Short


Gberdao Gustave Kam

Presiding Judge

Judge

Judge

[Seal of the Tribunal]



¹⁶ The name of the Counsel is specified in the confidential Annex to the present Decision placed under seal.

¹⁷ The name of the State is specified in the confidential Annex to the present Decision placed under seal.

