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ICTR-98-44-T
4-7-2006
(27061 - 27057)

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Duf

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: 4 July 2006

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

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ICTR
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**DECISION ON THE PROSECUTOR'S APPLICATION PURSUANT TO RULES 39,
68 AND 75 OF THE RULES OF PROCEDURE AND EVIDENCE FOR AN ORDER
FOR CONDITIONAL DISCLOSURE OF WITNESS STATEMENTS AND OTHER
DOCUMENTS PURSUANT TO RULE 68(A)**

Rules 68(A) and 75 of the Rules of Procedure and Evidence

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INTRODUCTION

1. The trial in the instant proceedings started on 19 September 2005. The Prosecution makes this motion, following several requests by the Defence, for conditional disclosure of 1) documents and witness statements relating to RPF acts of violence and "infiltration" in Rwanda between 1990 and 1994 ("RPF material"), and 2) other independent witness statements which may affect the credibility of Prosecution witnesses or be exculpatory pursuant to Rule 68(A) of the Rules of Procedure and Evidence ("Credibility Statements").¹ The Prosecution's condition for disclosing the RPF material is that the disclosure is done in a redacted format by not revealing the identities of the individuals who gave the statements, and for the Credibility Statements that the individuals who gave the statements and who are not presently the beneficiaries of any order for protective measures by a Trial Chamber, be given protective measures by this Chamber.

DISCUSSION

Confidential Character of the Prosecution Motion

2. In his Response, Joseph Nzirorera moves first for an Order that the Prosecutor's Motion be filed publicly.² The Chamber notes that submissions from the Parties are to be filed publicly unless the content warrants confidential filing.³ The Chamber has reviewed the content of the Motion and finds that it does not contain any protected information nor does the Prosecutor submit any argument in support of its confidential filing.⁴ The Chamber is therefore of the view that this application is to be filed as public.

Application for Conditional Disclosure

3. The Prosecutor is willing to disclose certain RPF materials if it can be relieved of its obligation to disclose the identities of the individuals who made the statements pursuant to Rules 66(C) and 68(D) of the Rules as their disclosure may undermine Prosecution investigations that are still underway. Except for the statements of Witnesses DM80 and DM46 who are covered by an order for protective measures from the *Bagosora* case⁵, the Prosecutor states that the witnesses who provided these materials are not subject to protective measures by any Trial Chamber of the Tribunal, even though he claims they are protected through Rule 39 of the Rules. Further, the Prosecutor requests that the Defence should not attempt to investigate the identities of the witnesses or share any of the information in the statements with anyone outside of the Defence team, except for the Accused himself. He also requests that the Chamber maintain the order for protective measures for Witnesses DM80 and DM46.

¹ Prosecutor's Application pursuant to Rules 39, 68 and 75 of the Rules of Procedure and Evidence for an Order for Conditional Disclosure of Witnesses Statements and other documents pursuant to Rule 68(A), filed on 5 April 2006.

² Filed on 10 April 2006

³ See for example, *Prosecutor v. Slobodan Milosovic*, Case No. IT-02-54-T, Order on Defence Application for Re-Admission of Witness Henning Hensch (TC), 9 May 2005.

⁴ In his Reply to Joseph Nzirorera's Response, the Prosecutor does not address the issue of the confidentiality of his application.

⁵ *The Prosecutor v. Théoneste Bagosora et al.*, Case No ICTR-98-41-T ("Bagosora et al."), Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution Pursuant to Rule 68 (A) (TC), 8 March 2006; these statements will be disclosed automatically pursuant to Rule 75(F).

4. As for the Credibility Statements, although the Prosecutor only wishes to disclose them in a redacted format, if the Chamber orders their full disclosure, he requests that the Chamber protect the identities of the individuals who provided the information by extending its prior orders for protective measures from 10 December 2004 and in the Scheduling Order of 30 March 2006⁶, to these witnesses. In particular, the Prosecutor asks that the Defence notify the Prosecutor in writing and on reasonable notice if it wishes to contact one of these witnesses and such contact, if agreed to by the witness, should be facilitated through WVSS.

5. In support of the requests in this Motion, the Prosecutor relies on this Chamber's Scheduling Order of 30 March 2006 where the Chamber ordered the Rule 68(A) witness statement material concerning Witness ADE to be disclosed in an unredacted format but ordered the Defence and the Accused not to disseminate any of the included identifying information so as to protect the security of the witnesses. In his Reply⁷, the Prosecutor further relies on the recent decision in the *Zigiranyirazo* case where the Trial Chamber extended its orders of protective measures to witnesses who were not expected to testify at trial but who made statements to the Prosecutor which may contradict one of the Prosecutor's witnesses, based on the interests of protecting the witnesses in question and in the interests of justice as a whole⁸. The Prosecutor also submitted as Annexes to this Motion, a declaration of one of his investigators from May 2005 detailing the security situation in Rwanda, which remains highly precarious and unpredictable, and an affirmation from another investigator dated March 2006 that the details in the first declaration remain current.

6. Joseph Nzirorera opposes the Motion only to the extent that he believes that the Prosecutor's Rule 68(A) obligations require the provision of completely unredacted witness statements to the Defence. He also opposes the requirement that he notify the Prosecutor if he wishes to interview any of these witnesses and that WVSS facilitate the interview because as this Chamber has already ruled, they are not property of either party and have not been designated as Prosecution witnesses.⁹

7. Concerning the Prosecutor's request to be relieved of its obligation to disclose the identities of the individuals who provided the RPF material pursuant to Rules 66(C) and 68(D) of the Rules, the Chamber notes that these rules provide an exception to the Prosecutor's obligation to disclose information which may affect the credibility of Prosecution witnesses, be exculpatory, or material to the preparation of the Defence when it is might prejudice further or ongoing Prosecution investigations, be contrary to the public interest or affect the security interests of any State. Furthermore, these rules prescribe that when making such an application the Prosecutor shall provide the Trial Chamber with the information or materials sought to be kept confidential. The Chamber is of the view that an exception to the Prosecutor's obligation to disclose information should only be given on a case-by-case basis after consideration of the Prosecutor's submissions in each case. In the instant case, no information or material has been given to the Chamber, nor has any specific argument been made for the Chamber to make this order.

⁶ *The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera* ("Karemera et al."), Case No. ICTR-98-44-R75 Order on Protective Measures For Prosecution Witnesses (TC), 10 December 2004 ("Order of 10 December 2004"); *Karemera et al.*, Case No. ICTR-98-44-T, Scheduling Order (TC), 30 March 2006. The Prosecutor attached two affidavits to support the allegation of risks faced by the witnesses, and argues that the protective measures order could be extended to persons who were interviewed by him.

⁷ Filed on 3 May 2006.

⁸ *Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on Prosecution Motion for Conditional Disclosure of Witness Statements (TC), 7 April 2006, para. 6.

⁹ *Karemera et al.*, Decision on Defence Motion for Issuance of Subpoena to Witness T (TC), 8 February 2006, para. 3.

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8. The Chamber has already decided that Rule 68(A) mandates the disclosure of identifying information with respect to Prosecution witnesses,¹⁰ when their identity is inextricably connected with the substance of the statements.¹¹ The Chamber acknowledges that Rule 39 of the Rules allows the Prosecution to take special measures to provide for the safety of potential witnesses and informants including requesting an order from a Trial Chamber or a Judge. As stated in prior Decisions, the application of this Rule could not constitute, as such, an impediment to disclosure of identifying information with respect to Prosecution witnesses".¹² Accordingly, since the identity of the individuals who gave statements regarding the RPF material and the individuals who gave the Credibility Statements are indeed related to the content of the statements, they should be disclosed to the Defence.¹³

9. The Chamber however agrees that the Credibility Statements and the statements concerning the RPF Material may contain sensitive information, which could affect the security of the individuals who gave the statements. To adequately protect those individuals, the Chamber is of the view that the Defence and the Accused should be requested not to disseminate to the public and media any of their identifying information and that should the individuals agree to an interview with the Defence, after notifying the Prosecution, the Witnesses and Victims Support Section of the Tribunal (WVSS) shall take all necessary arrangements to facilitate the interview.

10. Following the established jurisprudence, Rule 75(F) of the Rules provides a mechanism for routine disclosure and obviates the need for individualized applications to the Chambers.¹⁴ It also provides that Defence to whom the disclosure is being made must be informed of the nature of the protective measures ordered in the first proceedings. In the present case, there is therefore no need for the Chamber to order the maintenance of protective measures already ordered for Witnesses DM80 and DM46.

FOR THE ABOVE MENTIONED REASONS, THE CHAMBER

- I. **ORDERS** that the Prosecutor's Application pursuant to Rules 39, 68 and 75 of the Rules of Procedure and Evidence for an Order for Conditional Disclosure of Witnesses Statements and other documents pursuant to Rule 68(A) be reclassified as a public document;
- II. **GRANTS** the Prosecutor's Motion in part; and accordingly,

¹⁰ *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure (TC), 5 July 2005, para. 18; *Karemera et al.*, Scheduling Order (TC), 30 March 2006, para. 6.

¹¹ *Bagosora et al.*, Decision on Disclosure of Identity of Prosecution Informant, 24 May 2006, para. 5; *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure (TC), 5 July 2005, para. 18; *Karemera et al.*, Scheduling Order (TC), 30 March 2006, para. 20.

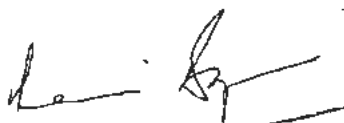
¹² *Karemera et al.*, Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure (TC), 5 July 2005, para. 18; *Karemera et al.*, Scheduling Order (TC), 30 March 2006, para. 6.

¹³ See *Bizimungu et al.*, Decision on Prosper Mugiraneza's Motion to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68 (TC), 10 December 2003, para. 21.

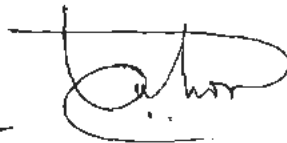
¹⁴ *The Prosecutor v. Pauline Nyiramasuhuko, et al.*, Joint Case No. ICTR-98-42-T, Decision on the Prosecutor's Ex Parte and Extremely Urgent Motion for Leave to Access Closed Session Transcripts in Case No. ICTR-96-3-A for Disclosure in Case No. ICTR-98-42-T (TC), 23 September 2004. *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Joint Case No. ICTR-98-42-T, Decision on the Prosecutor's Motion for an Order of Disclosure of Closed Session Transcripts and Sealed Prosecution Exhibits Pursuant to Rules 69 and 75 (TC), 16 December 2004; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on the Prosecutor's Request for an Order of Disclosure of Closed Session Transcripts and Sealed Prosecution Exhibits Pursuant to Rules 69 and 75 of the Rules of Procedure and Evidence (TC), 2 February 2005.

- III. **ORDERS** that the Defence for each Accused and the Accused persons shall not share, reveal or discuss, directly or indirectly, any documents or any information contained in any documents, or any other information which could reveal or lead to the identification of any person whose statement shall be disclosed pursuant to this decision, to any person or entity other than the Accused, assigned Counsel or other persons working on the Defence team;
- IV. **ORDERS** that the Defence for each Accused shall notify the Prosecution in writing, on reasonable notice, and the Witnesses and Victims Support Section of the Tribunal (WVSS) if it wishes to contact any person who submitted a statement to the Prosecution related to the RPF material or a Credibility Statement, who are not subject to a Trial Chamber's protective orders. Should the person concerned agree to the interview, WVSS shall immediately undertake all necessary arrangements to facilitate the interview;
- V. **DENIES** the remainder of the Prosecutor's Motion.

Arusha, 4 July 2006, done in English.



Dennis C. M. Byron
Presiding



Emile Francis Short
Judge



Gberdao Gustave Kam
Judge

[Seal of the Tribunal]

