

ICTR-98-44-T
25-10-2006
(27923 - 27918)

27923
vbm



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: 25 October 2006

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

JUDICIAL RECORDS/ARCHIVES
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DECISION ON MOTIONS TO DISCLOSE A PROSECUTION WITNESS
STATEMENT AND TO UNSEAL CONFIDENTIAL DOCUMENTS

Rule 66(C) of the Rules of Procedure and Evidence

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Peter Robinson and Patrick Nimy Mayidika Ngimbi

INTRODUCTION

1. The trial in this case started on 19 September 2005. During the third trial session, the Defence for each Accused requested the disclosure of a statement of Prosecution Witness HH taken by the authorities of a certain State.¹ The Prosecution acknowledged that this statement should be disclosed, as a prior statement of a witness intended to be called during the fourth trial session, and in accordance with Rule 66 of the Rules of Procedure and Evidence.² The Chamber, however, noted that the document was part of the investigatory file of Witness T communicated by the State and for which it had already been ruled that it could not be disclosed to the Defence due to the public interest.³ It therefore decided to make a further request of the authorities of the State to file submissions on the specific issue and to inform the Chamber as to whether the statement could be disclosed, in a whole or in part, to the Defence in the present case.⁴

2. On 5 October 2006, the Registrar informed the Chamber that the State had filed a submission in accordance with the Chamber's Decision of 7 June 2006.⁵ This submission was filed under seal, confidentially, and exclusively with the Chamber. In a separate Motion, the Defence for Nzirorera requests that this document be unsealed forthwith.⁶ The Chamber will begin by addressing this issue and then turn to the application for disclosure of the witness' statement.

DELIBERATIONS

Motion to Unseal Confidential Annexes

3. In the Chamber's view, the State's correspondence attached to the Registrar's submissions filed on 5 October 2006 does not contain information the disclosure of which to the Parties in the case would cause any prejudice or be contrary to the interests of justice. The Chamber further notes that the Parties were already served with the State's submission made

¹ T. 2 June 2006. Due to 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 T. 2 June 2006.
³ T. 6 June 2006, p. 18. See also, *Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("*Karemera et al.*"), 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 (TC), 15 February 2006.
⁴ T. 6 June 2006, p. 18; see also *Karemera et al.*, *Ordonnance complémentaire visant au dépôt de submissions d'un Etat* (TC), 7 June 2006.
⁵ Registrar's Submissions, 5 October 2006.
⁶ Joseph Nzirorera's Motion to Unseal Attachment to Registrar's Submission of 5 October 2006, filed on 9 October 2006.

in December 2005, which is reproduced in the current correspondence. This document, however, contains information concerning a protected witness that should not be disseminated to the public.⁷ The Chamber is therefore of the view that the attachment to the Registrar's submission can be disclosed to the Defence but must remain confidential to the public.

4. In addition to requesting to unseal the annex to the Registrar's submission of 5 October 2006, the Defence for Nzirorera claims that the Chamber has yet to rule on its Oral Motion to unseal the confidential annex to the Chamber's Decision of 7 June 2006, requesting the further cooperation of the State.⁸

5. Contrary to the Defence's assertion, the Chamber has already ruled on this application and decided that "the confidentiality was a necessary incident of consistency with [its] previous orders."⁹ This annex was attached to facilitate the State's cooperation: it contains the name of the State, the physical description (including the exact title and reference) of the document sought for disclosure, and the Chamber's request to be informed on whether the document can be disclosed in whole or in part in the present case. There is therefore no fair trial issue at stake, and unsealing the document to the Defence should not be entertained since it contains information which is part of the State investigative file which is subject to non-disclosure at this stage.¹⁰

Motion for Disclosure of Witness HH's statement

6. Rule 66(C) of the Rules provide for an exception to the Prosecution obligation to disclose prior statements of a witness it intends to call at trial under Sub-Rules 66(B)(ii) 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".

7. In the present case, the State expresses the view that the requested statement cannot be disclosed, at this stage, to the Defence for the Accused persons. It reiterates its prior position expressed in its submission dated 2 December 2005, which was communicated to the

⁷ See: *Karemera et al.*, Order on Protective Measures for Prosecution Witnesses (TC), 10 December 2004.

⁸ T. 14 June 2006, p. 1.

⁹ T. 14 June 2006, p. 2.

¹⁰ *Karemera et al.*, 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 (TC), 15 February 2006.

Chamber as a result of a request for cooperation concerning the same material.¹¹ In that prior submission, the State relied upon, among other things, security reasons, and 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 the witness is currently in judicial proceeding before the State. It also submitted that full disclosure of the material to the Defence could also prejudice the security of certain witnesses specifically identified in the documents.

8. As already stated in its Decision of 15 February 2006, the Chamber is concerned that Witness T receives a fair trial and must balance the rights of the Accused with those of Witness T to receive fair trials in their respective criminal proceedings.¹²

9. The Chamber finds that there is likelihood that the document requested, if disclosed to the Defence before Witness T's trial, may violate his right to a fair trial and therefore be contrary to the public interest. It must be also noted that the document sought for disclosure is only composed of six pages of questions and answers and that the Accused have already received substantial disclosure regarding Witness HH and his anticipated testimony, which provides them with adequate facilities for the preparation of their defence and the cross-examination of the witness.

FOR THE ABOVE REASONS, THE CHAMBER

- I. **DECIDES**, pursuant to Rule 66(C) of the Rules, that the statement of Witness HH taken by the authorities of a certain State should not be disclosed at this stage;
- II. **GRANTS** in part the Defence Motion to Unseal the Attachment to the Registrar's Submission of 5 October 2006,¹³ and accordingly

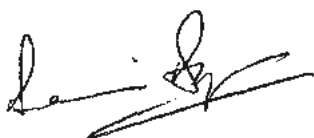
¹¹ See: Order for submissions *Kareméra et al.*, Decision on Defence Motion to Report Government of a Certain State to United Nations Security Council and on Prosecution Motions under Rule 66(C) of the Rules (TC), 15 February 2006.

¹² *Ibid.*, para. 19.

¹³ Entitled: "The Registrar's Submissions Regarding the Trial Chamber's Decision on Request for Subpoena Dated 7 June 2006".

III. REQUESTS the Registry to reclassify this Attachment confidential to the public and to disclose it only to the parties in the instant case.

Arusha, 25 October 2006, done in English.



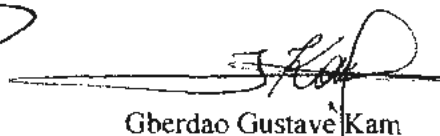
Dennis C. M. Byron

Presiding Judge



Emile Francis Short

Judge



Gberdao Gustave Kam

Judge

[Seal of the Tribunal]

